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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2021-001400

IOS, LLC.,.....Appellant-Respondent,

v.

Lander University, ...Respondent-Appellant.

INITIAL RESPONSE BRIEF OF APPELLANT-RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

Appellant-Respondent believes the issues in the cross appeal can be restated as follows:

I. Whether the circuit court erred in denying Lander's request for summary judgment on the assertion that IOS lacked standing to sue for breach of the lease because of an assignment and foreclosure when,

1) Lander's position is now moot because the foreclosure judgment has expired,

2) the foreclosure itself is damages to IOS because it was Lander's actions that so damaged IOS that it forced them into foreclosure,

3) the assignment was not exclusive so as to allow IOS to protect its property and to seek damages to satisfy their obligations to any lienholder, and

4) IOS as a matter of law has standing.

STATEMENT OF THE CASE

On May 29, 2012, IOS, LLC ("IOS") filed their Complaint against Lander University and The Lander Foundation ("Lander") alleging causes of action for 1) breach of oral contract for the sale of real property, 2) breach of contract and specific performance, 3) promissory estoppel, 4) negligent misrepresentation, 5) negligence and 6) Breach of Lease Agreement. On August 7, 2012, Lander filed their Answer admitting that it had entered into a lease agreement with IOS to use and occupy their hotel as a college dormitory. The remainder of the answer denies most of the substantive allegations in the Complaint and raises affirmative defenses of 1) Statute of Frauds, 2) Standing, 3) Failure to state a cause of action, 4) integration/merger, 5) failure of essential elements of a contract, 6) statute of limitations and 7) frivolous civil proceedings.

On December 28, 2017, IOS stipulated to the dismissal of the Lander Foundation. At the hearing before Judge Frank R. Addy on Lander's Motion for Summary Judgment, IOS conceded to the dismissal of breach of contract of an oral agreement for the purchase of property and specific performance of an oral contract to purchase. On March 7, 2019, Judge Addy issued a form 4 order granting partial Summary Judgment in favor of the Lander dismissing IOS' causes of action for breach of contract, breach of oral promise to purchase real estate, promissory estoppel, negligent misrepresentation, and negligence but denying summary judgement as to IOS' cause of action for breach of lease agreement. On November 2, 2021, Judge Addy signed the formal order granting partial summary judgement. On November 12, 2021, IOS filed a Motion to Reconsider pursuant to S.C.R. Civ. P. 59(e), asserting that the order failed to provide the necessary findings of fact and conclusions of law sufficient to support the decision and allow for proper appellate review. The Motion further asserted inconsistencies and that there exists as to causes of action for breach of

contract, breach of oral promise to purchase real estate, promissory estoppel, negligent misrepresentation, and negligence, genuine issues of material fact and law that would make the granting of summary judgment inappropriate. Judge Addy issued a form 4 order denying IOS' Motion to Reconsider on December 2, 2021. IOS filed notice of this appeal on December 3, 2021, and Lander cross-appealed December 7, 2021.

STANDARD OF REVIEW

An appellate court evaluates summary judgment under the same standard as the trial court. Grinnell Corp. v. Wood, 389 S.C. 350, 355, 698 S.E.2d 796, 798 (2010). Summary Judgment is proper only when it is clear there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. S.C.R. Civ. P 56(c). In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the non- moving party. Koester v. Carolina Renral Center, Inc., 313 S.C. 490, 443 S.E.2d 392 (1994). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. *Id*.

FACTS

IOS is a South Carolina limited liability company that owned the Inn on the Square ("Hotel" or "property"), a hotel / restaurant / bar operating in downtown Greenwood, South Carolina from 2005 to 2011. During that time-period, Vietnam Combat Veteran John Huffman was the person responsible for the operation of the Hotel. Appellant-Respondent's Brief in Opposition to Summary Judgment Ex. 1, Huffman deposition, pp.9-15. Mr.

Huffman had years of experience rehabilitating similar projects and had worked on twenty-two prior buildings before becoming involved with IOS. *Id* IOS agreed to purchase the Hotel in order to rehabilitate it into a profitable, going concern. *Id* On behalf of IOS, Mr. Huffman negotiated a debt reduction on the mortgage on the Hotel, obtained financing through various lenders to renovate and improve the structure and the furniture, fixtures, and equipment ("FFE") in 2007 (spent approximately $670,000.00 in upfitting), secured a franchise agreement with Clarion hotels, and achieved three-star status as a hotel operation. Appellant-Respondent's Brief in Opposition to Summary Judgment Ex. 1, pp.14-15.

IOS was a profitable venture as a hotel, restaurant, and bar. Appellant-Respondent's Brief in Opposition to Summary Judgment Ex. 1, pp.20-24. As a result of the economic downturn in 2008 the hotel portion of the operation began to struggle. *Id* Leading up to the summer of 2009, IOS intended to close the rooms on the top two floors and only operate the restaurant and bar, its most profitable operations, both for the public and for private events. *Id* Then, around July 2009, IOS made the decision to market the property for sale. Appellant-Respondent's Brief in Opposition to Summary Judgment Ex. 1, pp.23-24. The property was never listed for sale; however, through local channels Lander University came to learn that IOS might be interested in selling the building and set up a meeting with Mr. Huffman in July 2009. Appellant-Respondent's Brief in Opposition to Summary Judgment Ex. 1, pp.25-26. During that meeting, Diane Newton, a representative and housing acquisition executive of Lander University toured the property and expressed an interest in leasing the rooms for student housing. Appellant-Respondent's Brief in Opposition to Summary Judgment Ex. 1, pp.26-27. Mr. Huffman informed them IOS was not interested in leasing the property.

Id A few days later, Mr. Huffman alleges Ms. Newton met with him and indicated Lander would be willing to purchase the Inn for $2.3 million but that it would require federal funding. Appellant-Respondent's Brief in Opposition to Summary Judgment Ex. 1, pp.28-29. She informed him that funding would take time and, because Lander needed beds within a month, inquired as to whether IOS would just rent the second and third floors (not the bar/ restaurant/ event hosting first floor) until they could work out a contract for the purchase of the property. *Id* IOS agreed to look at such an arrangement. IOS then negotiated with Lander, through Ms. Newton, to rent the top two floors and their forty-eight rooms for a ten-month lease at a monthly rent of $48,000.00. Appellant-Respondent's Brief in Opposition to Summary Judgment Ex. 1, pp. 28-30. This oral agreement was made with the understanding that the lease would give Lander time to obtain financing to purchase the property for $2.3 million in April 2010 and that Lander would draw up an offer to purchase reflecting that term. *Id* Based on that understanding, Mr. Huffman obtained a verbal agreement from IOS as well as the mortgagor to enter such a deal. *Id* IOS has consistently maintained that without Lander's promise to purchase the property it never would have agreed to lease its recently renovated, three-star hotel for student housing. Appellant-Respondent's Brief in Opposition to Summary Judgment Ex. 1, pp.30-31; Ex.2, Louis Smith deposition, pp.103-104.

Following this meeting, with the understanding that a lease and offer to purchase were forthcoming, Mr. Huffman was contacted by Ms. Newton who was upset and concerned that her housing need deadline and that no lease had been executed because the South Carolina Budget and Control Board ("BCB") had to approve it. Appellant-Respondent's Brief in

Opposition to Summary Judgment Ex. 1, pp.35-36. Mr. Huffman was then faxed a copy of the lease the BCB drafted which materially altered the terms he had negotiated with Ms. Newton, including the rent ($48,000.00 to $31,000.00), ad valorem tax treatment, the scope of the lease (entire property as opposed to 2d and 3d floors necessitating the close / cancellation of events, bar, and restaurant), and maintenance responsibility. *Id,* pp.36-48. The BCB lease also required IOS to obtain forbearance agreements from the various lenders recognizing and consenting to the lease. Mr. Huffman refused to agree to this proposed lease. *Id* In response, Ms. Newton offered an oral "side" lease agreement to IOS which they took to Lander's attorney office to have drafted. *Id* The terms of the oral "side" lease were that (1) even though the BCB lease made IOS responsible for maintenance, Lander agreed they would be responsible and reimburse IOS for maintenance expenses; (2) the additional rents ($17,000.00 per month) would be deferred and paid later, on the "back end", and incorporated into the sales price for the property; and (3) the property taxes would be owed and paid, but in the same manner as the deferred rent. *Id,* pp.36-48, 261-264; Ex. 3, July 11, 2011, letter. Based on the oral "side" lease agreement, IOS agreed to obtain the forbearance agreements and execute the BCB lease that had been presented. Appellant-Respondent's Brief in Opposition to Summary Judgment Ex. 1, pp.44-45; Ex. 4 - Lease.

Once IOS executed the written BCB lease agreement for a ten-month term, Lander took possession of the building and students began moving in. Over the next few months, IOS and its attorney regularly reached out to Ms. Newton and Lander's attorney inquiring as to the status of the promised offer to purchase. Appellant-Respondent's Brief in Opposition to Summary Judgment Ex. 5 - 9/2/09 email; Ex. 6 - 11/17/09 emails. Upon inquiry into the

status of the promised purchase offer, IOS was regularly put off and assured that Lander was still working toward that goal (offering to buy) but that it would require BCB approval following environmental assessment, appraisal, and other inspections which, they were told, would likely happen in March 2010. *Id.,* Ex. 1, pp.73-74, 80.

During this same time-period, Lander treated the property as if they owned it. Of note, Lander unilaterally, and without the written approval required by the lease (Appellant-Respondent's Brief in Opposition to Summary Judgment Ex. 4, paragraph 10) filled in the swimming pool with concrete, tore down the fence surrounding the pool, nailed the windows shut (voiding the warranty), and sold and moved furniture. Appellant-Respondent's Brief in Opposition to Summary Judgment Ex. 1, pp.61- 64, 171-172. When IOS confronted Lander about this conduct their response was essentially that they owned it all because they were going to purchase the building. Appellant-Respondent's Brief in Opposition to Summary Judgment Ex.1, pp.63, 75-76; Ex. 3.

As time passed, IOS learned that Ms. Newton was leaving Lander for a post at another university around December 2009. Appellant-Respondent's Brief in Opposition to Summary Judgment Ex. 7 - 12/16/09 emails. During that time, IOS was informed that Phase I of the BCB's purchase approval process had occurred (essentially, they got funding to conduct the due diligence). *Id.* IOS was informed that their contact with Lander going forward would be Tom Covar who informed IOS that they were still working towards an offer to purchase the property. Appellant-Respondent's Brief in Opposition to Summary Judgment Ex. 8 - 1/12/10 emails. As it became clear the due diligence would not be completed prior

to the prior represented target of April 2010, Lander confirmed that they would be exercising their option to renew the lease. Appellant-Respondent's Brief in Opposition to Summary Judgment Ex. 9 - 2/22/10 email. Even during the renewal process it was still Lander's stated intent to purchase the subject property. Appellant-Respondent's Brief in Opposition to Summary Judgment Ex. 10 - 3/3/10 email. After the renewal of the lease, a similar pattern continued. IOS would inquire as to the status of the offer of purchase and would be informed that they were still working on it. The parties even worked on setting up an alternative arrangement including a long-term lease while Lander worked through the purchase due diligence period. Appellant-Respondent's Brief in Opposition to Summary Judgment Ex. 11 - 4/23/10 email.

Then, in February 2011, Lander abruptly informed IOS they would not be renewing the lease when it expired in June 2011. Appellant-Respondent's Brief in Opposition to Summary Judgment Ex. 12 - 2/24/11 letter. IOS requested a joint walk-through of the premises in advance of IOS re-taking possession. Appellant-Respondent's Brief in Opposition to Summary Judgment Ex. 13 - 3/7/11 letter. After an initial walkthrough in May 2011, IOS planned a joint walkthrough with a number of inspectors for the parties to attend. Appellant-Respondent's Brief in Opposition to Summary Judgment Ex. 14 - 6/15/11 email. **Lander did not show and when IOS arrived the power had been shutoff, the doors were unlocked, and the entire property was in disrepair with substantial damage. *Id.*, Ex. 3. Some of the damage was as follows: pool filled in with concrete and pool fence torn down without being repaired, bar equipment / fixtures missing including ice machine, other furniture missing including TVs, computers, servers,**

telecommunications switchboard, windows crudely nailed shut, industrial laundry equipment had been taken out, textiles and other soft goods had been removed, water damage to ceiling tiles, bar / kitchen sink and plumbing ripped out or exposed, and mold damage throughout the restaurant. Appellant-Respondent's Brief in Opposition to Summary Judgment Ex. 1, pp.155- 58, 171-72, 181-86; Ex. 3; Ex. 15 - damage photos. Lander essentially abandoned the property and failed to make amends or repairs in anyway following IOS demand that they do so. This was in violation of the lease which required Lander to return the property in the condition it was delivered. Appellant-Respondent's Brief in Opposition to Summary Judgment – Ex. 4 Lease.

Without the capital to fix the extensive damage Lander caused and replace the missing items Lander took or lost, IOS was unable to re-open the property as a hotel and, thus, was unable to service its debt and the property was foreclosed upon in July 2011. **IOS was foreclosed on because of the damage caused by Lander. Lander turned IOS's hotel into a college dorm and failed to "surrender the Demised Premises to [IOS] in good order and condition…" Appellant-Respondent's Brief in Opposition to Summary Judgment Ex. 4, Lease Article 17.** The property was sold at auction to the first priority lien holder shortly thereafter. In addition, judgments were entered against IOS by a number of different creditors including Clarion / Choice hotels due to IOS' breach of the franchise agreement following their failure to re-open as a hotel following the end of Lander's lease. Appellant-Respondent's Brief in Opposition to Summary Judgment Ex. 2, pp.76-77.

ARGUMENT

The trial court correctly held in its Form 4 Order dated March 7, 2019, that "an issue of fact exists

as to whether Plaintiff may recover for any alleged damage to the Inn after Lander vacated the property and prior to the lender's foreclosure of any interest which the Plaintiff may have had in the property." The trial court also noted that the bank's foreclosure also resulted in a deficiency judgment against the Appellant-Respondent.

I. THE TRIAL COURT'S DECISION TO DENY RESPONDENT-APPELLANT'S MOTION FOR SUMMARY JUDGMENT BASED UPON THE ASSIGNMENT AND FORECLOSURE SHOULD BE AFFIRMED BECAUSE RESPONDENT-APPELLANT'S POSITION IS NOW MOOT.

It was Respondent-Appellant who raised the specter of mootness in their Return to Petition for Emergency Writ of Supersedeas and Petition to Lift the Emergency Stay Granted by Order Dated December 3, 2021, asserting,

> "…Respondent-Appellant would argue that enforcing the Emergency Stay which was ordered in this matter while this case is on Appeal would work to deprive it of a substantial right, as after the foreclosure judgment expires on May 2, 2022, the issue of whether the Assignment of Leases and Rents precludes IOS, LLC from standing to sue, which is subject of Lander University's Cross Appeal, is arguably moot."

Appellant-Respondent will not challenge Respondent-Appellant on its assertion of mootness and further, Respondent-Appellant is now judicially estopped from asserting otherwise.

The mortgage, forbearance agreements, assignments and resulting foreclosure including a deficiency judgment against the Plaintiff is the source of Respondent-Appellant's position on standing. That very foreclosure and deficiency judgment expired May 2, 2022, and as a result they have no force or effect under the law. The bank, who the foreclosure and deficiency judgment were rendered in favor of, now has no cause or ability under the law to enforce that judgment. Certainly then, Respondent-Appellant who was not a party to that action would have even less of an ability to assert expired rights which were never provided for their benefit.

Notwithstanding any assertion of mootness, the lower court should be affirmed in its ruling

because the foreclosure was caused by Appellant-Respondent's breach of the lease agreement.

II. THE TRIAL COURT'S DECISION TO DENY RESPONDENT-APPELLANT'S MOTION FOR SUMMARY JUDGMENT SHOULD BE AFFIRMED BECAUSE IT WAS RESPONDENT-APPELLANT'S ACTIONS THAT SO DAMAGED APPELLANT-RESPONDENT AND FORCED IT INTO FORECLOSURE.

The foreclosure itself is damage suffered by Appellant-Respondent at the hands of Respondent-Appellant. Respondent-Appellant took possession of Appellant-Respondent's property pursuant to the Lease and turned the building from a hotel to a dormitory. Before Respondent-Appellant could return or surrender the property back to Appellant-Respondent the Lease required Respondent-Appellant to return the Inn in good order and condition. This would require Respondent-Appellant to restore unauthorized alterations to the Inn as well as repair all damages beyond normal wear and tear. Respondent-Appellant simply abandoned the property with massive damages that made it impossible for Appellant-Respondent to open leaving no option for Appellant-Respondent but foreclosure.

When Appellant-Respondent and Respondent-Appellant agreed to meet at the property to do a joint assessment of the condition of the property, Respondent-Appellant was a no-show. Upon arrival Appellant-Respondent found that the power had been shutoff, the doors were unlocked, and the entire property was in disrepair with substantial damage. Appellant-Respondent's Brief in Opposition to Summary Judgment Ex. 3 and 14. Some of the damage was as follows: pool filled in with concrete and pool fence torn down without being repaired, bar equipment / fixtures missing including ice machine, other furniture missing including TVs, computers, servers, telecommunications switchboard, windows crudely nailed shut, industrial laundry equipment had been taken out, textiles and other soft goods had been removed, water damage to ceiling tiles, bar / kitchen sink and plumbing ripped out or exposed,

and mold damage throughout the restaurant. Appellant-Respondent's Brief in Opposition to Summary Judgment Ex. 1, pp.155- 58, 171-72, 181-86; Ex. 3; Ex. 15 - damage photos. Respondent-Appellant essentially abandoned the property and failed to make amends or repairs in anyway. This was in violation of the lease which required Respondent-Appellant to return the property in the condition it was delivered. Appellant-Respondent's Brief in Opposition to Summary Judgment – Ex. 4 Lease. The lower court noting that Appellant-Respondent suffered a deficiency judgment as a result of the foreclosure action, the court correctly held that "an issue of fact exists as to whether Plaintiff may recover for any alleged damage to the Inn after Lander vacated the property and prior to the lender's foreclosure of any interest which the Plaintiff may have had in the property." If Respondent-Appellant had not breached the Lease agreement by failing to return the property in good condition, Appellant-Respondent could have reopened as a hotel and avoided any foreclosure.

III. THE TRIAL COURT'S DECISION TO DENY REPONDENT-APPELLANT'S MOTION FOR SUMMARY JUDGMENT SHOULD BE AFFIRMIED BECAUSE THE ASSIGNMENT DID NOT PRECLUDE APPELLANT-RESPONDENT FROM TAKING ACTION TO PROTECT THEIR INTEREST IN THE PROPERTY.

Assignment of rents to the bank mortgagor does not divest Appellant-Respondent of standing to sue Respondent-Appellant for damages it has done to the property. For its position, Respondent-Appellant relies solely on one case asserting, "[w]hen an assignor retains no rights to assigned property, an assignor lacks standing to enforce any agreements regarding that property." Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 493 S.E. 2d 826 (1997). Respondent-Appellant both misapprehends the holding of this case and further misapplies this case to the facts herein. In Crestwood, the South Carolina Supreme Court found that the assignment did not deny the parties therein the right and duty bring the lawsuit. The Court held that Appellants' argument regarding

standing or real part in interest lacks merit, because the language in the assignment did not preclude the Sellers from bringing the claims. The assignment in this case did not assign the Bank "all of the rights, title and interest of the Appellant-Respondent in the property. Indeed, the assignment was limited to rents and proceeds from the Lease. Nothing of the assignment released Appellant-Respondent from the duty to pay the mortgage and further, nothing in the assignment provided for an exclusive assignment of causes of action or claims arising from a breach of the lease. Nothing in the assignment language prohibits, Appellant-Respondent from enforcing terms of the lease.

Respondent-Appellant sites language in the subordination agreement providing the Appellant-Respondent's lender is "entitled, but not obligated, to exercise the claims, rights … and remedies of the landlord under the Lease…" Nothing in the language asserts that right to be exclusive to the Lender and precluding any action brought by Appellant-Respondent. Notwithstanding the previous arguments, Appellant-Respondent at the outset of this action had standing to bring claims against Respondent-Appellant for breach of the lease agreement.

IV. THE TRIAL COURT'S DECISION TO DENY REPONDENT-APPELLANT'S MOTION FOR SUMMARY JUDGMENT SHOULD BE AFFIRMIED BECAUSE APPELLANT-RESPONDENT HAS STANDING TO BRING THE BREACH OF LEASE CAUSE OF ACTION.

Justiciability of a dispute is a matter of law. "A plaintiff must have standing to institute an action. To have standing, one must have a personal stake in the subject matter of the lawsuit." Sloan v. Greenville County, 356 S.C. 531, 547 (Ct. App. 2003). In addition, justiciability requires "a real and substantial controversy appropriate for judicial determination, as opposed to a dispute or difference of a contingent, hypothetical or abstract character." *Id.* at 546. Appellant-Respondent was a party to the alleged oral contract for sale, the oral lease "side" agreement, and the written lease agreement. Appellant-Respondent has

alleged pecuniary loss as a result of Respondent-Appellant's alleged conduct in breach of those agreements, this includes the cited damages to the property. Indeed, Appellant-Respondent alleges the very foreclosure itself is damages that it would not have suffered but for Respondent-Appellant's breach of the lease agreement by not returning the property in good condition and undamaged. Just because the objects forming the basis of the parties' contracts may no longer be owned by Appellant-Respondent does not divest Appellant-Respondent, a party to a contract, the right to pursue contractual remedies under those agreements. The loss of ownership itself is a measure of the damages suffered by Appellant-Respondent. As a party to those agreements Appellant-Respondent has a direct, personal stake in this matter.

CONCLUSION

For the foregoing reasons this Court should affirm the trial court's denial of summary judgment consistent with the arguments herein and remand.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below he served counsel for Respondent-Appellant, Lena Y. Meredith, Esq., with a copy of the Initial Response Brief of Appellant-Respondent and Designation of Matter to be included in the Record on Appeal and Certification by email and first-class US mail to the below addresses:

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May 22, 2022

Via Email CtAppFilings@sccourts.org

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Clerk, South Carolina Court of Appeals
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RE: IOS, LLC v. Lander University
Appellate Case No. 2021-001400

Dear Madam Clerk:

I am attaching by email the Initial Response Brief of Appellant-Respondent, Designation of Matter Designation of Matter and Certification with Proof of Service in the above-referenced matter.

By copy of this letter to Respondent-Appellant's counsel, I am hereby serving her with a copy of the same.

Thank you for your assistance.

With kind regards, I remain

Very truly yours,

James E. Smith, Jr.

JES
Enclosure as referenced
cc: Lena Y. Meredith, Esq., - *Via Email* Lena@nicholsonmeredith.com