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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Red Lobster Hospitality, LLC, and
ARCP RL Portfolio, IV, LLC,
Plaintiffs Below, Petitioners

vs.) No. 21-0288 (Cabell County 17-C-576)

The City of Huntington and Huntington
Municipal Development Authority,
Defendants Below, Respondents

AND

The City of Huntington and Huntington
Municipal Development Authority,
Plaintiffs Below, Respondents

vs.)

Red Lobster Hospitality, LLC, and
ARCP RL Portfolio, IV, LLC,
Defendants Below, Petitioners

MEMORANDUM DECISION

Petitioners Red Lobster Hospitality, LLC, and ARCP RL Portfolio, IV, LLC, by counsel Tim J. Yianne and Tonya P. Shuler, appeal the Circuit Court of Cabell County's March 12, 2021, denying, in part, petitioners' motion for summary judgment.[1] Respondents the City of Huntington and Huntington Municipal Development Authority, by counsel Scott A. Damron, filed a response in support of the circuit court's order. Petitioners filed a reply.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons,

[1]The underlying cases involving the parties, Cabell County Circuit Court case numbers 17-C-576 and 17-C-646, were consolidated below and are considered by this Court together.

a memorandum decision affirming the circuit court's order is appropriate under Rule 21 of the Rules of Appellate Procedure.

On May 1, 1984, an agreement (hereinafter referred to as "the agreement") was signed by the then-mayor of Huntington, J. Roger Smith, and representatives of Petitioner Red Lobster Hospitality, LLC's ("Red Lobster") (all predecessors in interest of petitioners). The preamble of the agreement includes the following provisions:

> a. WHEREAS, in order for the RED LOBSTER to develop the PREMISES for a restaurant, RED LOBSTER must have ample parking for its intended USE;
>
> b. WHEREAS the CITY is willing to provide ingress and egress and parking for the general use of the public who may be customers of RED LOBSTER, provided RED LOBSTER, acquires tittle to the PREMISES.

Further, the agreement contained seven numbered paragraphs, which state in relevant part:

> Paragraph 1. The property shown on Exhibit "A" attached hereto in green shall be restricted to a public parking lot or parking garage and shall contain no less than one hundred twelve (112) parking spaces.
>
> Paragraph 2. The CITY warrants to RED LOBSTER that the property outlined in green on Exhibit "A" shall remain public parking except as provided in paragraph 3. [Paragraph 3 of the document relates to the possibility of a parking garage being built on the property, but no garage was ever built.]
>
> Paragraph 6. This Agreement shall be binding upon heirs, successors and assigns of both PARTIES hereto.
>
> Paragraph 7. If for any reason Red Lobster should go into receivership the provisions of this Agreement shall be terminated.

The current dispute between the parties relates to a parking lot (identified in the agreement at Exhibit A) that is now owned by Respondent Huntington Municipal Development Authority ("HMDA") and leased to the Huntington Municipal Parking Board ("the parking board").[2] Since "at least 1982," portions of this lot have been used for reserved monthly parking, with spaces available for rent on a monthly basis to members of the public. Since 1982, a "number of different businesses and individuals have rented spaces in the lot." Twenty-two spaces in the lot are available for daily or hourly rental either via parking meter, parking lot attendant, or parking lot

[2] The property upon which the Huntington location of the Red Lobster restaurant is situated is owned by ARCP RL Portfolio IV, LLC.

machine; the remainder of the spaces were "available for monthly parking, but many are generally not rented."

On April 23, 1984, the Huntington City Council granted a resolution authorizing the Mayor of Huntington to execute the parties' agreement on behalf of the city. The minutes from the April 23, 1984, Huntington City Council meeting state that the council noted its understanding that the parties' agreement "would not interfere with the way the parking lot was managed by the Parking Board." Affidavits from three then-Huntington City Council members note that it was the intent of the city in approving the agreement, the existing use of the lot for both daily/hourly parking and monthly parking would not to be affected.

Petitioners contend that over the years, its representatives engaged in communications with respondents about the subject parking lot, related primarily to the condition of the lot. However, it was not until the summer months of 2017, that there arose a substantive issue between the parties concerning the parking lot. During this time, the board rented several spaces in the lot to the Pullman Plaza Hotel. Without the consent of the city, the hotel erected signs on its rented spaces indicating that unauthorized vehicles would be towed, and it engaged in the towing of a vehicle on one occasion. Upon being advised of the occurrence, the city "quickly informed" the hotel that it was prohibited from towing vehicles on the lot.

Thereafter, in October of 2017, petitioners filed their "Complaint for Declaratory Relief and Specific Performance" against respondents alleging that petitioners held a property right to spaces in the subject parking lot by "non-exclusive easement" (conveyed via Petitioner Red Lobster's 1984 executed agreement with the City of Huntington) and seeking a declaration that the HMDA and Board be prohibited from renting out any of the parking spaces on a reserved monthly basis. Specifically, petitioners sought (1) a declaration that the May 1, 1984, agreement between the parties is a valid and enforceable easement; (2) a declaration that respondents breached the agreement by failing to ensure that at least 112 spaces in the designated parking lot are restricted to public parking; and (3) an order requiring respondents to specially comply with the obligations set forth in the agreement and, thus, make all parking spaces in the subject lot public parking.

One month later, on November 17, 2017, respondents filed a declaratory judgment action against petitioners seeking a declaration that the parties' agreement was invalid. Thereafter, respondents' declaratory judgment action was consolidated with petitioners' declaratory judgment action and discovery between the parties began. Following discovery, the parties filed cross-motions for summary judgment. In its motion, petitioners sought a ruling that a valid enforceable contract existed between the parties granting a "non-exclusive easement providing access to and use of 112 parking spaces in the lot." Petitioners argued that complaints regarding the limited availability of parking and reports of petitioners' restaurant patrons being towed from the lot has resulted in decreased patronage and overall damages to Petitioner Red Lobster's reputation.

In its March 12, 2021, order, the circuit court found that a valid and enforceable agreement existed between the parties but determined that petitioners did not have an easement of any sort to

the parking lot at issue via its agreement with the City of Huntington or otherwise.[3] Further, the court found that the term "public parking" within the parties' agreement was undefined within the terms of the agreement and ambiguous. As to the drafter of the agreement, the circuit court found that there was uncontroverted evidence that the parties' agreement was prepared by petitioners' then counsel and that, therefore, any ambiguity within the agreement must be resolved against petitioners. Because the uncontroverted historical evidence supports the city's position (use of lot historically included both daily/hourly fee parking and monthly reserved parking – both before and after the agreement), the circuit court interpreted the agreement as meaning that monthly reserved parking is permitted under the terms of the parties' agreement. The court found that the term "public parking," as used in the parties' agreement, does not limit the use of the parking lot to any particular type of parking, so long as the parking lot is available for public use and determined that the continued rental of parking spaces on a monthly reserved basis "comports with the terms of the" parties' agreement.

Accordingly, the court granted, in part, petitioner's motion for summary judgment in that it found that the agreement between the parties was valid and enforceable. The court denied, in part, petitioner's motion for summary judgment in that the agreement does not limit the use of the subject parking lot to daily/hourly parking but permits the use of the parking lot for monthly reserved parking as well. As to respondents' motion for summary judgment the court granted the same, in part, as it found that the agreement permits respondents to use the subject parking lot for both daily/hourly meter parking and for monthly reserved parking. The court denied, in part, respondents' motion for summary judgment in that it did not hold the agreement invalid.

It is from the March 12, 2021, order that petitioners now appeal. On appeal, petitioners raise three assignments of error. We have long held that "[a] circuit court's entry of summary judgment is reviewed *de novo*." Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

In their first assignment of error, petitioners contend that the circuit court erred in finding that petitioners do not have a "non-exclusive easement" with respect to the subject parking lot. Petitioners contend that by its plain and unambiguous terms, the agreement between the parties "was intended to provide 112 publicly accessible parking spaces for use by Red Lobster customers." As a result, a valid and enforceable easement on behalf of Red Lobster was created.

We long ago held in *Beckley Development Corp. v. Hutzler*, 159 W. Va. 844, 229 S,E,2d 732 (1976)(*overruled on other grounds*, *O'Dell v. Stegall*, 226 W. Va. 590, 703 S.E.2d 561 (2010), that the party advocating for an easement must prove the existence of the easement by clear and convincing evidence. Here, the circuit court reasoned that petitioners' sole claim is to existence of an express easement arising out of the execution of the agreement and that the petitioners did not meet their burden of proof in establishing the existence of the easement. We agree and find that nothing in the parties' agreement conveyed any interest in the property (the subject parking

[3] As to the existence of an easement, the court recognized that there are several different types of easements, but petitioners' "sole claim is the existence of an express easement arising out of the" agreement; that petitioner "never asserted that the easement arises out of implied actions of the parties, by way of necessity, or other ways that an easement may come into existence."

lot) to petitioners. Thus, we find no error. Such ruling is supported by the record and the uncontroverted historical evidence which shows that the lot at issue was used for both daily/hourly fee parking and monthly reserved parking, both before and after the petitioners' agreement.

In their second assignment of error, petitioners contend that the circuit court erred in finding that the term "public parking" as referenced in the parties' agreement is ambiguous and subject to judicial construction and interpretation. We have consistently held that a court's determination on whether a contract is ambiguous is reviewable by this Court de novo. *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995). The parties dispute the meaning of the term "public parking" within the context of their agreement, which reads, in pertinent part, that the lot "shall be restricted to a public parking lot or parking garage" and "shall remain public parking." Petitioners contend that the term means that respondents can only permit daily or hourly parking, or possibly monthly parking without any designation as to the spaces to be used, whereas respondents believe that "public parking" has a broader meaning. In the context of the parties' agreement, respondents assert that "public parking" means that respondents cannot build a structure on the lot and the lot must remain a parking lot.

The circuit court found, and we concur, that there was "no context in the [agreement] that could provide direction as to a determination of a reasonable application of the term." Given these opposing positions, the circuit court found that it "must determine" that "public parking" is ambiguous in the context of the agreement. We agree and we find no error.

In their final assignment of error, petitioners argue that the circuit court erred in resolving an issue of fact with respect to the drafter of the parties' written agreement. Petitioners contend that there was no dispute as to the identity of the drafter of the parties' agreement, as the document contained a stamped notation expressly indicating that the document was prepared by Assistant City Attorney, Lee Booten, and that in accepting evidence otherwise the court violated the parol evidence rule.

However, it is undisputed that during discovery in the underlying case, respondents presented the affidavit of Attorney Booten who averred that he did not prepare the parties' agreement and that the same was prepared by counsel for petitioner. Such affidavit was unrefuted by petitioners below except to the extent that petitioners made reference to the appearance of Attorney Booten's stamp on the agreement. In considering all the evidence before it, the circuit court found that because petitioners offered no evidence to dispute the evidence in the affidavit of Attorney Booten, the identity of the author of the parties' agreement was uncontroverted. We agree and find no error.

As to petitioner's contention that the circuit court's act in hearing evidence from respondents regarding the author of the parties' agreement was the improper consideration of parol evidence, we note that this Court has long held that

> where the meaning [of a writing] is uncertain and ambiguous, parol evidence is admissible to show the situation of the parties, the surrounding circumstances when the writing was made, and the practical construction given to the contract by the parties themselves either

> contemporaneously or subsequently....' Syl. Point 4, *Watson v. Buckhannon River Coal Co.*, 95 W. Va. 164, 120 S.E. 390 (1923).

Syl. Pt. 1, in part, *Buckhannon Sales Co., Inc. v. Appalantic Corp.*, 175 W. Va. 742, 338 S.E.2d 222 (1985). Here, respondents offered evidence as to the true author of the parties' agreement, evidence which was unrefuted by petitioners except to the extent that petitioners made reference to the appearance of Attorney Booten's stamp on the agreement. Under the limited facts and circumstances of this case, we find no error with the circuit court's consideration of evidence presented by respondents regarding the author of the parties' agreement, as such evidence showed the situation of the parties and the circumstances surrounding when the writing was made.

For the foregoing reasons, we affirm the March 12, 2021, order denying, in part, petitioners' motion for summary judgment

Affirmed.

ISSUED: May 26, 2022

CONCURRED IN BY:

Chief Justice John A. Hutchison
Justice Elizabeth D. Walker
Justice Tim Armstead
Justice William R. Wooton

NOT PARTICIPATING:

Justice C. Haley Bunn