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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Willard D. Hanna, Jr., Special Referee

SOUTH CAROLINA COURT OF APPEALS
UNPUBLISHED OPINION NO. 2013-UP-078
Filed on February 20, 2013

Leon P. Butler, Jr. — Respondent,

v.

William L. Wilson a/k/a Billy Wilson — Petitioner.

RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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INDEX

TABLE OF AUTHORITIES

Cases:

Rules:

Miscellaneous:

I. COUNTER STATEMENT OF THE CASE

This action arose by way of a Complaint filed by Leon P. Butler, Jr., (hereinafter sometimes referred to as "Respondent Butler" or "Butler") against William L. Wilson a/k/a Billy Wilson (hereinafter sometimes referred to as "Petitioner Wilson" or "Wilson") on May 13, 2005 in the Court of Common Pleas for Horry County. (R. pp. 70-77) A consent Order for Change of Venue transferred venue for the proceeding to Georgetown County. (R. pp. 6-7) Butler's Complaint alleges an action at law against Wilson for the recovery of money damages for breach of Wilson's obligations under a Ground Lease Agreement. The Complaint alleges that the parties entered into a written Ground Lease Agreement dated May 15, 1998 pursuant to which Wilson leased from Butler certain commercial real property located in Horry County (hereinafter sometimes referred to as the "Leased Premises"). A copy of the written Ground Lease Agreement is attached to Butler's Complaint, designated as Exhibit "A". The initial term of the Ground Lease Agreement was one year, commencing May 15, 1998 and ending May 14, 1999. The Ground Lease Agreement provides for automatic annual renewals at Wilson's option as the Ground Lease Agreement granted him the right to "opt out" of the annual renewals by furnishing written notice to Butler, at least ninety (90) days prior to the expiration of the then current term, of his intention not to extend the term of the Ground Lease Agreement for another year. Butler's Complaint alleges that Ground Lease Agreement automatically renewed for the term commencing May 15, 2002 and ending May 14, 2003 as Wilson did not furnish written notice to Butler at least ninety (90) days prior to May 14, 2002 of his intention not to extend the term of the Ground Lease Agreement. Butler's Complaint further alleges that Wilson breached his obligations under the Ground Lease Agreement

by failing to pay rent in the amount of $50,000.00 on May 15, 2002, by failing to pay real property taxes assessed against the Leased Premises, and by abandoning debris upon the Leased Premises in violation of his maintenance covenant. Butler's Complaint further alleges that Butler is entitled to judgment against Wilson for unpaid rent in the amount of $50,000.00 that was due and payable on May 15, 2002, for real property taxes assessed against the Leased Premises, for reasonable costs for removal of debris, for pre-judgment interest at the legal contract rate, and for the collection costs incurred by Butler, including a reasonable attorney's fee.

Wilson's Answer and Counterclaim admits that he entered into the Ground Lease Agreement attached to Butler's Complaint, that the initial term of the Ground Lease Agreement was one year, commencing May 15, 1998 and ending May 14, 1999, that the Ground Lease Agreement automatically renewed on an annual basis through May 14, 2002, and that he occupied the Leased Premises from May 15, 1998 until the fall of 2002. (R. p. 78) Wilson's Answer and Counterclaim denies that the Ground Lease Agreement automatically renewed for the term commencing May 15, 2002 and ending May 14, 2003, denies the existence of a landlord and tenant relationship between Butler and Wilson during the period commencing May 15, 2002 and ending May 14, 2003, and denies that Butler is entitled to any recovery against him. Wilson's Answer and Counterclaim also alleges several affirmative defenses to Butler's Complaint, including: (1) failure to mitigate damages; (2) accord and satisfaction; (3) waiver; (4) laches; (5) failure to state a cause of action; (6) set off; and (7) novation. (R. pp. 78-82). Wilson's Answer and Counterclaim did not plead as an affirmative defense the unenforceability of the Ground

Lease provision which specifically excuses Butler from any obligation to mitigate his damages upon a default by Wilson. Furthermore, Wilson's Answer and Counterclaim did not plead a termination of the Ground Lease Agreement by Butler or a termination of Wilson's right to possession of the Leased Premises by Butler.

The matter was referred to Willard D. Hanna, Jr., as Special Referee with authority to enter a final judgment in the matter by virtue of a Consent Order of Reference issued pursuant to Rule 53 SCRCP (R. pp. 8-9). In accordance with the Consent Order of Reference, the Special Referee conducted a bench trial in the matter on October 26, 2007.

Counsel for Wilson submitted a Trial Brief at the commencement of the hearing (R. pp. 103-105). At the conclusion of Butler's case, Wilson presented an oral Motion for Involuntary Dismissal of Butler's case pursuant to SCRCP 41(b) based upon his contentions: (1) that Butler had demonstrated no right to relief as a result of his failure to mitigate his damages; (2) that Butler was not entitled to pre-judgment interest; and (3) that there had been a verbal modification of the Ground Lease Agreement that permitted him to give oral notice that he was opting out of the automatic renewal of the Ground Lease Agreement and that he, in fact, gave oral notice to Butler's real estate agent, Charley Ray, of his election to "opt out" of the automatic renewal of the Ground Lease Agreement so that he was not obligated to perform the Lessee's obligations under the Ground Lease Agreement during the period commencing May 15, 2002 and ending May 14, 2003. Wilson also presented an oral Motion for Directed Verdict based upon contentions: (1) that Butler failed to mitigate damages; and (2) that Butler was not entitled to pre-judgment interest. The Special Referee denied Wilson's Motions for Involuntary Dismissal and Directed Verdict,

noting that Wilson's defense based upon Butler's alleged breach of a duty to mitigate his damages is an affirmative defense upon which Wilson bears not only the burden of establishing Butler's breach of a legal duty to mitigate his damages but also the burden of establishing the amount of damages that Butler could have avoided by reasonable efforts to mitigate his damages. The Special Referee indicated that he would revisit Wilson's Motion for a Directed Verdict based upon Butler's alleged breach of a duty to mitigate his damages at the close of Wilson's evidence. (R. p. 189, line 17-p. 192, line 10).

At the conclusion of the trial testimony, the Special Referee afforded counsel for Butler and Wilson an opportunity to submit written post-trial motions and briefs. Butler submitted a written Motion for Directed Verdict, a Trial Brief, and a Reply to Wilson's Reply Brief. (R. pp. 429-442; R. pp. 443-460; R. pp. 474-494) Wilson submitted a written Motion for Directed Verdict and a Reply Brief to Butler's Trial Brief. (R. pp. 461-467; R. pp. 468-473) Wilson's written Motion for Directed Verdict set forth four separate grounds for his Motion for Directed Verdict: (1) that Butler failed to prove a breach of the Ground Lease Agreement by Wilson by failing to prove that the Ground Lease Agreement automatically renewed for the period commencing May 15, 2002 and ending May 14, 2003; (2) that Butler failed to mitigate his damages; (3) that Butler failed to provide competent evidence concerning the cost of removal of debris; and, (4) that Butler is not entitled to pre-judgment interest as a matter of law. Wilson did not present evidence to the Special Referee and did not submit arguments to the Special Referee concerning the remaining affirmative defenses set forth in his Answer, including (1) accord and satisfaction; (2) waiver; (3) laches; (4) failure to state a cause of action; (5) set off; and (6) novation.

The Special Referee considered the parties' post-trial motions, the briefs of counsel, Butler's Affidavit of Attorney Fees, and a proposed Final Order submitted by counsel for Butler, which was rejected by the Special Referee. (R. pp. 523-572) Thereafter, on March 27, 2009, the Special Referee issued a Final Order Ending Action that awarded Butler a judgment against Wilson for money damages in the amount of $133,887.75, which included an award of attorney fees in the amount of $39,145.00. The Final Order Ending Action was filed in the Office of the Clerk of Court for Georgetown County on April 1, 2009. (R. pp. 10-54)

On April 7, 2009, Wilson filed a written Motion for Reconsideration. (R. pp. 574-577) Wilson's Motion for Reconsideration set forth six (6) alleged errors by the Special Referee in the Final Order Ending Action:

1. That the evidence and testimony showed that Butler had received adequate notice that Wilson did not intend to re-let the premises.

2. That the Special Referee erred in asserting that Butler did not have the duty to mitigate his damages due to the contract provision in the Ground Lease Agreement.

3. That the Special Referee erred in not considering the evidence offered by Wilson on the issue of mitigation.

4. That the Special Referee erred in awarding Butler damages for removal of trash abandoned by Wilson as Butler did not present competent evidence of the damages as to the cleanup of the property.

5. That the Special Referee erred in awarding Butler pre-judgment interest as Butler was not entitled to pre-judgment interest.

6. That the attorney's fees awarded to Butler by the Special Referee were excessive and unreasonable.

Wilson's Motion for Reconsideration did not contain any arguments concerning the remaining affirmative defenses set forth in his Answer, including (1) accord and satisfaction; (2) waiver; (3) laches; (4) failure to state a cause of action; (5) set off; and (6) novation.

On April 9, 2009, Butler filed a written Notice of Motion and Motion for Reconsideration pursuant to Rules 52(b), 59(e) and 60(a) SCRCP. Butler's Motion for Reconsideration requested that the Special Referee reconsider and alter or amend the Final Order Ending Action to correct certain deficiencies, including the following:

1. That the Final Order Ending Action be altered or amended pursuant to Rule 60(a) SCRCP to correctly identify the Petitioner Wilson as William L. Wilson a/k/a Billy Wilson.

2. To correct the Special Referee's error in failing to include a Finding of Fact that Wilson did not present evidence concerning the amount of damages that Butler could have avoided by efforts to mitigate the damages that he suffered, which evidence was necessary to satisfy Wilson's burden of proof with respect to his affirmative defense that Butler failed to mitigate his damages.

3. To correct the Special Referee's error in failing to include a Conclusion of Law that Wilson failed to satisfy his burden of proof with respect to the amount of damages

that Butler could have avoided by efforts to mitigate the damages that he suffered. (R. pp. 495-497)

On June 2, 2009 the Special Referee conducted a hearing to consider the parties' motions for reconsideration and heard the arguments of counsel. Thereafter, on September 18, 2009, Wilson filed a Motion for Deposit in Court pursuant to Rule 67 SCRCP, which sought an Order allowing Wilson to deposit the amount of the Judgment with the Clerk of Court for Georgetown County. Butler did not oppose Wilson's motion. On August 15, 2011, the Special Referee issued an Order granting Butler's Motion to identify the Petitioner Wilson as William L. Wilson A/K/A Billy Wilson. The Order issued by the Special Referee denied the remaining requests for reconsideration set forth in Butler's Motion for Reconsideration and Wilson's Motion for Reconsideration. The Order issued by the Special Referee granted, with conditions, Wilson's Motion to Deposit the amount of the Judgment with the Clerk of Court for Georgetown County. Wilson failed to deposit the amount of the Judgment with the Clerk of Court for Georgetown County. The Order issued by the Special Referee on August 15, 2011 was filed in the Office of the Clerk of Court for Georgetown County on August 23, 2011 and written notice of entry of the Order was received by counsel for Wilson on August 23, 2011. (R. pp. 55-69) Thereafter, on September 15, 2011, Wilson filed his Notice of Appeal of the Orders of the Special Referee filed on April 1, 2009 and August 23, 2011. Wilson's appeal did not include an appeal of the Special Referee's award of litigation costs and attorney fees to Butler. As the award of costs and attorney fees was not appealed by Wilson, it is a final award that may not be disturbed.

Wilson's Amended Final Brief raised the following issues for consideration by the Court of Appeals:

A. Whether the Special Referee erred in finding and concluding that Wilson failed to give Butler notice of his intent not to renew the Ground Lease Agreement?

B. Whether the Special Referee erred in finding and concluding that Butler had no duty to mitigate his damages?

C. Whether the Special Referee erred by failing to conclude that the Ground Lease provision which excuses Butler from a duty to mitigate his damages is an unenforceable penalty clause that permitted Butler to accelerate rental payments?

D. Whether the Special Referee erred by failing to consider evidence offered by Wilson on the issue of mitigation?

E. Whether the Special Referee erred by finding that Butler is entitled to an award of pre-judgment interest?

Following oral argument on January 9, 2013, the Court of Appeals issued *per curiam* Opinion Number 2013-UP-078 on February 20, 2013 which affirmed the Final Order of the Special Referee. Wilson filed his Petition for Rehearing by the Court of Appeals on March 7, 2013 and the Court of Appeals denied his Petition for Rehearing on March 20, 2013.

Wilson petitions this Honorable Court for a Writ of Certiorari to review only those portions of the Opinion of the Court of Appeals which deal with Wilson's sole remaining affirmative defense of mitigation of damages. Wilson has thus abandoned his challenge to the conclusion of law set forth in the Special Referee's Final Order that Wilson failed to give Butler notice, at least ninety (90) days prior to the expiration of the lease term ending May 14, 2002, of his intention not to exercise his option to extend the term of the Ground Lease Agreement for an additional year. As Wilson failed to give Butler notice of his

intention not to renew the Ground Lease Agreement, the Ground Lease Agreement automatically renewed for a one (1) year term commencing May 15, 2002 and ending May 14, 2003 and Wilson is legally obligated to perform all obligations of the Lessee under the terms of the Ground Lease Agreement, including the obligation to pay rent in the amount of $50,000.00, in advance, on May 15, 2002 as set forth in the Ground Lease Agreement. The Petitioner Wilson has also abandoned his challenge to the Special Referee's determination that Butler is entitled to an award of pre-judgment interest.

II. COUNTER STATEMENT OF FACTS

The real property that is the subject of this action is a tract of unimproved land in Little River, South Carolina that contains approximately five (5) acres. (R. p. 116, lines 6-15; R. pp. 263-266). On May 24, 1996, Butler, acting on behalf of his mother, Hazel W. Butler, entered into an "Exclusive Authorization and Right to Lease" with Ray Realty, Inc., and its broker in charge, Charley Ray, to lease the property for a term of twenty (20) years at a net annual rental of $50,000.00 for the first five years, with annual adjustments thereafter. (R. p. 114, line 16-p. 115, line 7; R. pp. 261-262). Despite Charley Ray's efforts to secure a suitable lessee for the property, there were no significant lease offers tendered for the property until Wilson submitted a "Letter of Intent" to lease the property on or about February 25, 1998, and the property was not actually under lease until Wilson executed the final draft of the Ground Lease Agreement on May 23, 1998 following extensive lease negotiations. (R. p. 155, line 13-p. 156, line 17; R. p. 157, line 21-p. 161, line 2; R. p. 115, line 21-p. 123, line 9; R. p. 123, line 19-p. 124, line 25; Plaintiff's Trial Exhibits 1, 2, 3, 5, 7, 8, 9, 11, and 12 R. 263-271; R. 275-362). The period of time that

elapsed from May 24, 1996, the date that Butler engaged Ray Realty, Inc., to market the property, until the property was actually leased to Wilson was just one day short of two years.

At the time that Wilson commenced negotiations to lease Butler's property in February of 1998, he was a sophisticated businessman. (R. p. 192, line 23-p. 193, line 3; R. p. 209, line 10-p. 211, line 18) (See also Finding of Fact #4, Final Order Ending Action, R. pp. 21-22). Wilson was interested in leasing Butler's property as a location for a mobile home dealership to sell mobile homes in connection with his sale of mobile home lots in Horry County. (R. p. 211, line 19-p. 212, line 4). Wilson saw the Ray Realty, Inc., sign upon Butler's land and contacted Charley Ray to begin lease negotiations for Butler's land. (R. p. 212, lines 5-16).

Wilson's initial lease proposal was presented to Butler in the form of a written "Letter of Intent" for his execution. (R. p. 212, line 17-p. 214, line 13; Plaintiff's Trial Exhibit 3 R. pp. 269-271). Following Wilson's initial "Letter of Intent" dated on or about February 25, 1998, there were extensive lease negotiations over the course of three months that culminated in the written Ground Lease Agreement dated on or about May 15, 1998. (R. p. 212, line 17-p. 218, line 13; R. p. 155, line 13-p. 156, line 17; R. p. 157, line 21-p. 161, line 2; R. p. 115, line 21-p. 123, line 9; R. p. 123, line 19-p. 124, line 25; Plaintiff's Trial Exhibits 1, 2, 3, 5, 7, 8, 9, 11, 12 and Court's Exhibit #2 R. 263-271; R. 275-362). (See also Findings of Fact #6 and #7, Final Order Ending Action, R. p. 22). All of the parties' lease negotiation proposals were reduced to writing and set forth in either "Letters of Intent" or formal lease proposals that were drafted by the parties' respective

attorneys. (R. p. 115, line 21-p. 116, line 5; R. p. 124, lines 1-25; R. p. 157, lines 8-11; R. p. 160, lines 7-24; R. p. 212, line 17-p. 218, line 13) As Wilson conceded on cross examination, everything was reduced to writing; it was not done on a handshake. (R. p. 217, lines 19-23) Butler and Wilson were represented by separate independent legal counsel of their choice during the lease negotiations. (R. p. 215, line 17-p. 216, line 2) Legal counsel for the parties prepared and reviewed drafts of the Ground Lease Agreement and made changes to the Ground Lease Agreement prior to the execution of the final draft of the Ground Lease Agreement. (R. p. 124, lines 6-16; Plaintiff's Trial Exhibits 7, 8, 9, 10, 11, 12, 13, and 14 R. pp. 280-364) (See also Finding of Fact #8, Final Order Ending Action, R. p. 22). Butler and Wilson made various requests and proposals during the lease negotiations that were set forth in a series of written amendments to Wilson's original "Letter of Intent". (Plaintiff's Trial Exhibits 1 through 12 and Court's Exhibit 2, R. pp. 263-362) Compromises and concessions were made by both parties during the course of the lease negotiations. (Plaintiff's Trial Exhibits 1 through 12 and Court's Exhibit 2, R. pp. 263-362) (See also Finding of Fact #9, Final Order Ending Action, R. p. 22). Butler and Wilson were in essentially equal bargaining positions during the Ground Lease Agreement negotiations. (See Finding of Fact #10, Final Order Ending Action, R. p. 23).

The executed Ground Lease Agreement contains the following automatic renewal provision which is set forth in Paragraph 29 of the Ground Lease Agreement:

> "...Unless the LESSEE furnishes written notice to the LESSOR, at least ninety (90) days prior to the expiration of the original lease term or at least ninety (90) days prior to the expiration of the then current option period, of his intention not to exercise his option to extend the term of this Lease Agreement for an additional one (1) year option period, the LESSEE's option to extend the lease term for an additional one (1) year option period shall be deemed to be exercised automatically..."

The testimony of the witnesses and the documentary evidence pertaining to the lease negotiations reveals that the automatic renewal provision was inserted into the Ground Lease Agreement at the request of Wilson during the lease negotiations. (R. p. 121, line 13-p. 123, line 9; R. p. 216, line 3-p. 217, line 6; Plaintiff's Trial Exhibits 8, 9, 10, and 11 R. pp. 282-324).

It is undisputed that Wilson entered into the Ground Lease Agreement with Butler and took possession of the Leased Premises on or about May 15, 1998. It is also undisputed that the initial term of the Ground Lease Agreement was one (1) year, commencing on May 15, 1998 and terminating on May 14, 1999, and that the Ground Lease Agreement automatically renewed at the expiration of the original lease term on May 14, 1999, and at the expiration of the annual renewal periods ending May 14, 2000 and May 14, 2001, as Wilson did not furnish written notice to Butler, at least ninety (90) days prior to the expiration of the then current lease period, of his intention not to exercise his option to extend the term of the Ground Lease Agreement for an additional one (1) year lease period. (See Butler's Complaint and Wilson's Answer R. pp. 70-82)

Wilson acknowledges that he did not furnish written notice to Butler at least ninety (90) days prior to May 14, 2002 of his intention not to exercise his option to extend the term of the Ground Lease Agreement for an additional one (1) year term commencing on May 15, 2002, and ending on May 14, 2003. (See Finding of Fact #18, Final Order Ending Action, R. p. 24). Wilson further acknowledges that he occupied the Leased Premises from May 15, 1998 until the fall of 2002. (See Paragraph 10 of Butler's Complaint R. p. 73 and Paragraph 4 of Wilson's Answer and Counterclaim R. p. 78) (See

also Finding of Fact #13, Final Order Ending Action, R. p. 23, Findings of Fact #23 and #24, Final Order Ending Action, R. p. 25, and Findings of Fact #32 and #33, Final Order Ending Action, R. p. 27).

On April 16, 2002, Butler's real estate agent, Charley Ray, sent an invoice to Wilson's place of business for the $50,000.00 rent due and payable in advance on May 15, 2002 for the lease term commencing May 15, 2002 and ending May 14, 2003. Wilson did not respond to the invoice. (R. p. 128, line 7-p. 129, line 2; Plaintiff's Exhibit 21 R. p. 393). On June 3, 2002 Charlie Ray sent a certified letter to Wilson that notified him that the rent due on May 15, 2002 had not been received and that phone calls to Wilson's Little River office had not been returned. The letter requested advice from Wilson concerning his intentions with respect to the Leased Premises. Wilson did not respond to Mr. Ray's certified letter. (R. p. 129, line 3-p. 130, line 5; R. p. 164, line 15-p. 165, line 23; Plaintiff's Exhibit 22 R. pp. 396-397). (See also Finding of Fact #27, Final Order Ending Action, R. p. 26). While ignoring requests for information concerning his intentions with respect to the Leased Premises and ignoring demands for payment of rent that was due and payable on May 15, 2002, Wilson continued to hold possession of the Leased Premises and continued to conduct his mobile home sales business operations on the Leased Premises. (R. p. 202, lines 8-12; R. p. 165, line 24-p. 166, line 14). (See also Finding of Fact #23, Final Order Ending Action, R. p. 25). In July of 2002 Wilson continued to collect and retain lease income from billboards located upon the Leased Premises. (R. p. 167, line 19-p. 168, line 14; Plaintiff's Exhibit 20 R. p. 395) (See also Finding of Fact #24, Final Order Ending Action, R. p. 25). Pursuant to the provisions of

Paragraph 31 of the Ground Lease Agreement Wilson was entitled to collect and receive lease income from billboards located upon the Leased Premises only if Wilson was in lawful possession of the Leased Premises at that time. (Court's Exhibit # 2 R. p. 359). Wilson has not paid the rent and the real property taxes payable with respect to the May 15, 2002 though May 14, 2003 lease year.

Butler drove by the Leased Premises in the late summer or early fall of 2002 and observed that Wilson's mobile home inventory had been removed from the Leased Premises. Butler does not know the date upon which Wilson abandoned the Leased Premises. Wilson did not call Butler or correspond with Butler to inform Butler that he was vacating the Leased Premises (R. p. 172, line 9-16). When Butler drove by the Leased Premises and observed that Wilson's mobile home inventory had been removed from the Leased Premises, he noted that Wilson's mailbox and the freestanding business signs advertising Wilson's business and telephone number remained upon the Leased Premises. Butler further observed that a partially burned mobile home, a truck, and an illuminated sign were also present on the Leased Premises. (R. p. 169, line 9-p. 173, line 10; Plaintiff's Trial Exhibits 26, 27, 28 and 29 R. pp. 415, 417)

On October 26, 2002 Butler's legal counsel forwarded to Wilson formal written notice of Wilson's default in performance of his obligation to pay rent pursuant to the Ground Lease Agreement and further notified Wilson of his right to cure his default. (Plaintiff's Exhibit #24 R. pp. 409-411) Butler did not: (1) terminate the Ground Lease Agreement; (2) terminate Wilson's right to possession of the Leased Premises; (3) accept a surrender of the Leased Premises from Wilson; or (4) act in a manner inconsistent with

Wilson's right to possession of the Leased Premises. (See Findings of Fact #35, #36, and #37, Final Order Ending Action, R. p. 27). Butler entered and took possession of the Leased Premises upon the expiration of Wilson's lease term on May 15, 2003. (See Finding of Fact #38, Final Order Ending Action, R. p. 27). Butler's real estate agent, Charley Ray attempted to lease the subject property after the expiration of the lease term on May 15, 2003. Despite his efforts to lease the subject property, the property was not leased again until May 14, 2005. (Defendant's Exhibit 7 R. pp. 425-428). (See also Findings of Fact #44 and #45, Final Order Ending Action, R. p. 28).

With respect to Wilson's affirmative defense that Butler failed to mitigate his damages, Wilson failed to present any evidence which would enable the Special Referee to reasonably estimate how much Butler's damages could have been mitigated. Wilson did not present **any** evidence that he offered Butler a substitute tenant for the Leased Premises or that he exercised his right to assign his leasehold interest or sublease the Leased Premises. Likewise, Wilson did not present **any** evidence that the Leased Premises were readily rentable for the portion of the lease year remaining after Wilson abandoned the Leased Premises and left significant amounts of trash to be removed from the Leased Premises. Indeed, the only reasonable conclusions that may be drawn from the evidence in the record are that the property is difficult to rent because of its size, that it was leased by the Respondent Butler on only two occasions, and on each occasion it was on the market for approximately two (2) years prior to being leased. (R. p. 155, line 13-p. 156, line 17; R. p. 157, line 21-p. 161, line 2; R. p. 115, line 21-p. 123, line 9; R. p. 123, line 19-p. 124, line 25; Defendant's Exhibit 7, R. pp. 425-428).

III. STANDARD OF REVIEW

A proceeding to recover money damages for breach of obligations under a lease agreement is an action at law. In an action at law tried without a jury, the appellate court will not disturb the trial court's findings of fact unless there is no evidence to reasonably support them. Crossman Communities of North Carolina, Inc. v. Harleysville Mut. Ins. Co., 395 S.C. 40, 717 S.E.2d 589 (2011). The judging of the credibility of witnesses and the weighing of evidence in a law case are uniquely functions of the trial court, not the appellate court. Bivens v Watkins, 313 S.C. 228, 437 S.E.2d 132 (Ct. App. 1993).

IV. COUNTER STATEMENT OF QUESTIONS PRESENTED/ARGUMENT

A. THE COURT OF APPEALS CORRECTLY AFFIRMED THE SPECIAL REFEREE'S RULING THAT THE RESPONDENT BUTLER WAS NOT UNDER A LEGAL DUTY TO MITIGATE HIS DAMAGES.

Wilson has asserted as an affirmative defense the proposition that Butler failed to mitigate his damages. The Special Referee concluded as a matter of law, and the Court of Appeals affirmed, that Butler was not under a legal obligation under South Carolina law to mitigate his damages. Wilson argues that the holdings of the Special Referee and the Court of Appeals directly contradict the following South Carolina precedents which Wilson offers as controlling precedent on the issue of whether Butler is obligated to mitigate his damages under the facts of this case: Burkhalter v. Townsend, 139 S.C. 324, 138 S.E. 34 (1927); United States Rubber Company v. White Tire Company, Inc., et al., 231 S.C. 84, 97 S.E.2d 403 (1956); and Gentry v. Recreation, Inc., 192 S.C. 429, 7 S.E.2d 63 (1940). The factual context of each authority relied upon by the Petitioner Wilson is clearly distinguishable from the facts of this case and Wilson's reliance thereon is

misplaced. In Burkhalter v. Townsend, supra, the plaintiff lessor, following the lessee's abandonment of leased farmland, rented the farmland to other tenants and collected rent from the other tenants. The landlord/tenant relationship between the plaintiff lessor and the original lessee who abandoned the leased farmland was terminated by the plaintiff lessor's leases to the new tenants and the plaintiff lessor had a mere contract claim against the original lessee. In United States Rubber Company v. White Tire Company, Inc., et al., supra, the landlord re-entered the leased premises following abandonment of the leased premises by the tenant and re-let the premises to a third party. The Court held that the landlord's re-entry and re-letting of the leased premises following the original tenant's abandonment of the leased premises terminated the lease and the original tenant's obligation for payment of future rent; the tenant's liability to the landlord was for contract damages only. Gentry v. Recreation, Inc., supra, involved a distraint action for unearned future rent. In Gentry v. Recreation, Inc., the tenant locked the doors of the leased premises and delivered the keys to the leased premises to his attorneys, who, in turn, delivered the keys to the landlord's attorneys. The Court in Gentry v. Recreation, Inc., held that the landlord who had accepted the tenant's surrender of the premises could not claim that it was entitled to the full amount of future rent for the remainder of the lease term and possession of the premises. It is obvious that the authorities relied upon by Wilson are inapposite as each case relied upon by Wilson materially differs from the instant case in two distinguishing respects: (1) Butler did not (a) terminate the Ground Lease Agreement; (b) terminate Wilson's right to possession of the Leased Premises; (c) accept a surrender of the Leased Premises from Wilson; or (d) act in a manner

inconsistent with Wilson's right to possession of the Leased Premises (See Findings of Fact #35, #36, and #37, Final Order Ending Action, R. p. 27); and (2) Butler's claim is not for future rent, but rather for rent that was earned and payable in advance at the beginning of the term. Contrary to Wilson's argument, this case does not involve an acceleration of payment of future rent.

The Special Referee correctly held that when a tenant abandons leased premises the landlord is under no legal duty to attempt to re-let the premises for the balance of the term of the lease to mitigate the tenant's liability under the lease, including the tenant's liability for rent, if the landlord does not terminate the lease agreement, does not accept the tenant's surrender of the leased premises, does not act inconsistent with the tenant's right to possession of the leased premises during the leasehold term, and does not re-enter and re-take possession of the leased premises. Restatement (Second) of Property, Land. & Ten. § 12.1; Sancourt Realty Corporation v. Dowling, 220 A.D. 660, 222 N.Y.S. 288 (1st Dept. 1927); Atkinson v. Rosenthal, 33 Mass. App. Ct. 219, 598 N.E.2d 666 (Mass. App. Ct. 1992); Miller v. Gammon & Sons, Inc., 67 S.W.3d 613 (Mo. Ct. App. W.D. 2001); Sandusky Mall Co. v. Pet Corner, Inc., 117 Ohio App. 3d 198, 690 N.E.2d 78 (7th Dist. Mahoning County 1997), cause dismissed 79 Ohio St. 3d 1411, 679 N.E.2d 727 (1997).

The black letter law is set forth in the Restatement (Second) of Property: Landlord & Tenant

> "§ 12.1 Tenant's Obligation To Pay Rent
>
> (1) Except to the extent the tenant is legally excused from doing so, there is a breach of the tenant's obligation if he fails to pay the rent reserved in the lease on or before the date the rent is due.

(2) Except to the extent the parties to a lease validly agree otherwise, if there is a breach of the tenant's obligation to pay the rent reserved in the lease, the landlord may:

(a) recover from the tenant the amount of the rent that is due; and

(b) terminate the lease if the rent that is due is not paid promptly after a demand on the tenant for the rent, unless equitable considerations justify extending the time for payment.

(3) Except to the extent the parties to the lease validly agree otherwise, if the tenant abandons the leased property, the landlord is under no duty to attempt to relet the leased property for the balance of the term of the lease to mitigate the tenant's liability under the lease, including his liability for rent, but the landlord may: **(emphasis supplied)**

(a) accept the tenant's offer of surrender of the leased property, which offer is inherent in the abandonment, and thereby terminate the lease, leaving the tenant liable only for rent accrued before the acceptance and damage caused by the abandonment; or
(b) notify the tenant that he will undertake to relet the leased property for the tenant's account, thereby relieving the tenant of future liabilities under the lease, including liability for future rent, to the extent the same are performed as a result of a reletting on terms that are reasonable.

Comment *i* to Restatement § 12.1 explains the rationale for the rule:

"If the tenant has abandoned the leased property and the landlord stands by and does nothing, the lease is not terminated. A tenant who abandons leased property is not entitled to insist on action by the landlord to mitigate the damages, absent an agreement otherwise. Abandonment of property is an invitation to vandalism, and the law should not encourage such conduct by putting a duty of mitigation of damages on the landlord.

Prior to any action being taken by the landlord that amounts to an acceptance of the tenant's offer to surrender the leased property, and prior to any reletting of the premises for the benefit of the tenant's account, the tenant may retake possession of the leased property and cancel his abandonment. An assignment or sublease of the leased property by the tenant to another who enters the leased property is a cancellation of the abandonment, if done at a time when the tenant himself could still reenter. If the lease contains a promise against an assignment or a sublease without the consent of the landlord and the landlord unreasonably refuses to give his consent, the tenant may be entitled to assign or sublease.

An abandonment of the leased property by the tenant occurs when he vacates the leased property without justification and without any present intention of returning and he defaults in the payment of the rent..."

B. THE COURT OF APPEALS CORRECTLY AFFIRMED THE SPECIAL REFEREE'S RULING THAT ANY DUTY OF THE RESPONDENT BUTLER TO MITIGATE HIS DAMAGES WAS EXCUSED BY A CLEAR, UNAMBIGUOUS, AND EXPLICIT LEASE PROVISION WHICH SPECIFICALLY ANNULLED ANY DUTY OF THE RESPONDENT BUTLER TO MITIGATE HIS DAMAGES.

When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary, and popular sense. C.A.N. Enters., Inc. v. South Carolina Health & Human Servs. Finance Comm'n, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988). A court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully. South Carolina Department of Transportation v. M & T Enterprises of Mt Pleasant, LLC, 379 S.C. 645, 667 S.E. 2d 7 (Ct. App. 2008) When a sophisticated party enters into a contract that contains a provision which excuses another party to the contract from the duty to mitigate damages, South Carolina appellate precedent permits enforcement of the contract provision which excuses the duty to mitigate damages. Cisson Construction, Inc., v. Reynolds & Assocs., Inc., 311 S.C. 499, 429 S.E.2d 847 (Ct. App. 1993)

Applying that precedent to the facts of the instant case, it is apparent that Butler and Wilson, sophisticated businessmen of equal bargaining power entered into extensive negotiations that resulted in a lease provision which specifically annuls any duty of Butler to mitigate damages: (Court's Exhibit #2, R. p. 354):

> "There shall be no obligation on the part of the LESSOR to re-let nor any liability on his part for failure to re-let, and the LESSEE'S liability shall not be diminished or affected by the LESSOR's failure to re-let."

The lease provision is clear and unambiguous. The Special Referee properly concluded that Butler was not under a duty to mitigate damages as Butler and Wilson bargained away any obligation on the part of Butler to mitigate his damages during their extensive arms-length negotiations. Similarly, other jurisdictions have specifically held that a landlord's obligation to mitigate damages can be effectively negated by a lease provision that annuls any duty to mitigate. Sylva Shops Limited Partnership v Hibbard, 175 N.C.App. 423, 623 S.E. 2d 785 (N.C. App. 2006); New Towne Ltd. P'shp v. Pier 1 Imports (U.S.), Inc., 113 Ohio App.3d 104, 109, 680 N.E.2d 644, 647 (Ohio App. 6 Dist. 1996); Weingarten/Arkansas, Inc., v. ABC Interstate Theatres, Inc., 306 Ark. 64, 811 S.W.2d 295 (1991)

C. THE COURT OF APPEALS CORRECTLY RULED THAT THE SPECIAL REFEREE DID NOT ERR BY FAILING TO CONCLUDE THAT THE GROUND LEASE PROVISION WHICH EXCUSES ANY DUTY OF THE RESPONDENT BUTLER TO MITIGATE HIS DAMAGES IS AN UNENFORCEABLE PENALTY CLAUSE WHICH PERMITS ACCELERATION OF UNEARNED RENT.

Wilson argues that the provision of the Ground Lease Agreement which specifically excuses any duty of Butler to mitigate his damages is an unenforceable penalty clause which permits acceleration of unearned rent. Wilson's argument is without merit. As noted above in Argument IV B., South Carolina appellate precedent recognizes that a sophisticated party to a contract may bargain away any obligation of another party to mitigate damages. Cisson Construction, Inc., v. Reynolds & Assocs., Inc., 311 S.C. 499, 429 S.E.2d 847 (Ct. App. 1993). Furthermore, as noted above in

Argument IV A., Butler's claim is not a claim for accelerated future rent. Under the facts of this case, Butler agreed to grant to Wilson a leasehold estate in the subject real property for a period of one year in exchange for a single rent payment of $50,000.00 that was earned and payable in advance at the beginning of the term of the Lease Agreement on May 15, 2002. In exchange for the required rent payment of $50,000.00, in advance, Wilson was entitled to quiet enjoyment of the Leased Premises for one year and if he chose to abandon the Leased Premises or assign his leasehold estate to a third party that was of no concern to Butler. As this case does not involve acceleration of payment of future unearned rent, Wilson's contention that the Ground Lease provision which excuses any duty of Butler to mitigate his damages must be construed as an unenforceable penalty is completely without merit. Moreover, the Court of Appeals correctly noted that Wilson waived the defense of unenforceability of the lease provision by failing to specifically plead that affirmative defense. D&D Leasing Co., of S.C., Inc., v. David Lipson, Ph.D., P.A. 305 S.C. 540, 409 S.E.2d 794 (Ct. App. 1991); Rim Associates v. Blackwell, 359 S.C. 170, 597 S.E.2d 152 (2005)

D. THE COURT OF APPEALS CORRECTLY RULED THAT THE SPECIAL REFEREE DID NOT ERR BY FAILING TO CONSIDER EVIDENCE PERTAINING TO THE PETITIONER'S AFFIRMATIVE DEFENSE OF FAILURE TO MITIGATE DAMAGES. THE RESPONDENT BUTLER HAD NO DUTY TO MITIGATE HIS DAMAGES AND EVIDENCE CONCERNING MITIGATION OF DAMAGES WAS UNNECESSARY.

Please see Arguments IV A. and IV B. hereinabove. As the Respondent Butler had no legal duty to mitigate his damages, the Special Referee did not commit error by failing to consider evidence offered by Wilson on the issue of mitigation of damages.

E. THE SPECIAL REFEREE'S FINAL ORDER ENDING ACTION SHOULD BE AFFIRMED UPON THE ADDITIONAL SUSTAINING GROUND

THAT THE PETITIONER WILSON FAILED TO SATISFY HIS BURDEN OF PROOF WITH RESPECT TO THE AMOUNT OF DAMAGES THAT THE RESPONDENT BUTLER COULD HAVE AVOIDED OR REDUCED BY EFFORTS TO MITIGATE HIS DAMAGES.

Even if this Court concludes that the Special Referee should have considered Wilson's evidence on the issue of mitigation of damages, Wilson nevertheless failed to present sufficient evidence to satisfy his burden of proof with respect to the amount of damages that Butler could have avoided by efforts to mitigate his damages. See, Brendle's Stores, Inc., v. OTR, et al., 978 F.2d 150 (C.A. 4 [SC] 1992) (holding under South Carolina law, that the burden of showing failure to mitigate damages falls on the party asserting that claim). The proposition that a party who claims that damages should have been minimized has the burden of proving that they could reasonably have been avoided or reduced is set forth in Tri-Continental Leasing Corp. v. Stevens, Stevens & Thomas, P.A., 287 S.C. 338, 342, 338 S.E.2d 343, 346 (Ct. App. 1985). In that opinion, the South Carolina Court of Appeals held that the party who claims damages should have been minimized has the burden of showing that the course of action to minimize damages was feasible, what the cost of minimization of damages would be, and whether actions to minimize would, in fact, reduce the damages caused by the Defendant's breach. Id., 287 S.C. 342-43, 338 S.E.2d at 346-47. The Georgia Court of Appeals, in Branon v. Ellbee Pictures Corporation, which was cited and followed by the South Carolina Court of Appeals in Tri-Continental Leasing Corp., stated:

> "Where the Lessor in such a contract brings an action for damages against the lessee for a breach of the contract, and alleges that his damages were the total of the fixed amounts to be paid under the contract...and proves upon the trial the execution of the contract and a breach thereof by the lessee, a prima facie case in favor of the plaintiff for the full amount sued for is made out, and the burden is then upon the defendant to prove that

> the plaintiff could have lessened its damages, and such proof should include sufficient data to allow the jury to reasonably estimate how much the damages could have been mitigated."

Branon v. Ellbee Pictures Corp., 42 Ga. App. 293, 155 S.E. 923 (Ga. App. 1930) (citing Vitagraph v. Liberty Theatres, 197 Cal. 694, 242 P. 709 (Cal. 1925) and Branch v. Johnson, 9 Ga. App. 699, 71 S.E. 1123 (Ga. App. 1911).

Wilson failed to offer any proof which would enable the Special Referee to reasonably estimate the amount of damages that could have been mitigated. See Branon, supra. Wilson did not present any evidence that he offered Butler a substitute tenant or exercised his right to assign his leasehold interest or sublease the Leased Premises. Wilson also failed to offer evidence that the Leased Premises were readily rentable for the portion of the lease year remaining after Wilson abandoned the Leased Premises and left significant amounts of trash to be removed from the Leased Premises. The only reasonable conclusions that may be drawn from the evidence in the record are that the property is difficult to rent because of its size, that it was leased by Butler on only two occasions, and on each occasion it was on the market for approximately two (2) years prior to being leased. Wilson offered no proof that if the Respondent Butler had acted prior to the expiration of the lease term (May 14, 2003) the damages caused by the Petitioner Wilson's breach would have been reduced. See, Tri-Continental Leasing Corp., supra.

The Special Referee did not limit in any manner Wilson's ability to offer testimonial and/or documentary evidence in support of his affirmative defense of failure to mitigate damages. The trial transcript reveals that the Special Referee did not reject

any offer of evidence concerning mitigation. Wilson, as the party who has the burden of showing that a course of action to minimize damages was feasible, what the cost of minimization of damages would be, and whether such actions would, in fact, reduce the damages caused by his breach of the Ground Lease Agreement, simply failed to produce such evidence. Where no proffer of testimony is made, the Court is unable to determine whether the Petitioner was prejudiced by the trial judge's refusal to admit the testimony into evidence. State v. Anderson, 304 S.C. 551, 406 S.E.2d 152 (1991); Greenville Memorial Auditorium v. Martin, 301 S.C. 242, 391 S.E.2d 546 (1990)("An alleged erroneous exclusion of evidence is not a basis for establishing prejudice on appeal in the absence of an adequate proffer of evidence in the court below.")

V. CONCLUSION

For the reasons set forth herein, the just and correct decision rendered by the Court of Appeals in this case must not be disturbed. In closing, it is appropriate to note that the instant case does not involve any of the special and important reasons outlined in SCACR 242(b) as considerations for granting a writ of certiorari to review a final decision of the Court of Appeals. This Honorable Court must therefore deny the Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,

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This 20th day of May, 2013

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Willard D. Hanna, Jr., Special Referee

SOUTH CAROLINA COURT OF APPEALS
UNPUBLISHED OPINION NO. 2013-UP-078
Filed on February 20, 2013

Leon P. Butler, Jr. — Respondent,

v.

William L. Wilson a/k/a Billy Wilson — Petitioner.

PROOF OF SERVICE

I certify that I have served the **Respondent's Return to Petition for Writ of Certiorari** on the Petitioner William L. Wilson a/k/a Billy Wilson by depositing a true and correct copy thereof in the United States Mail, postage prepaid, on May 20, 2013, addressed to the office of his attorneys of record, Howell V. Bellamy, Jr., Esq., and George W. Redman, III, Esq., Bellamy, Rutenberg, Copeland, Epps, Gravely & Bowers, P.A., Post Office Box 357, Myrtle Beach, SC 29578-0357.

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