THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LANCASTER COUNTY
In The Circuit Court

Brian Gibbons, Circuit Court Judge

Appellate Case No. 2019-001243

Katkams Ventures, LLC
and Suprema, LLC,
as successors in interest to 521, LLC, Respondents,

v.

No Limit, LLC, d/b/a No Limit Financial, LLC
and Estate of Erich Simpson, Appellants.

PETITION FOR WRIT OF *CERTIORARI*

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STATEMENT OF THE CASE

In June, 2016, NO LIMIT, LLC, doing business as No Limit Financial, LLC leased commercial space from 521, LLC, the assignor of the Respondents KATKAMS VENTURES, LLC and SUPREMA, LLC. ERICH SIMPSON, now deceased, executed a guaranty for the lease Under the lease, base monthly rent was set as follows:

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the first two months:	No rent
3rd through the 12th months:	$ 2,296.00
12th through the 24th months:	$ 2,364.88
25th through the 36th months:	$ 2,435.67
37th through the 48th months:	$ 2,508.38
49th through the 60th months:	$ 2,583.96
Total:	$59,081.42

Under the lease, NO LIMIT, LLC was also to pay a proportion of other upkeep or "CAM" fees in the amount of $406.58 per month, as well as late charges and brokerage fees in the event of default.

In July, 2017, NO LIMIT, LLC vacated the premises and requested the lease be terminated. In December, 2017, the Respondents re-rented the premises for a term beginning in February, 2018 at a lesser rent. Under the term of the re-rental, base monthly rent was set as follows:

months 1-2:	rent free period
months 3-14:	$ 2,296.00
months 15-26:	$ 2,364.88
months 27-38:	$ 2,435.67

The new lease maintained the "CAM" fees in the same amount. ERICH SIMPSON, now deceased, became ill and the rental property was abandoned. [APPENDIX, p.91-92.]

Suit was filed March 12th, 2018 against NO LIMIT and on his guaranty against SIMPSON. The Respondents moved for summary judgment; by Memorandum to that Motion, they sought:

a.	Unpaid Rent from July 1, 2017 to January 30, 2018:	$6,209.76
b.	Late Fees at five percent (5%) of the monthly rent from July 1, 2017 to January 30, 201 8:	$ 952.79
c.	Past Due CAM fees:	$ 2,846.06
d.	Calculated Loss from Difference in Rent:	$28,862.32
e.	Broker Commission to re-let property:	$ 3,406.36
f.	Attorney's fees and costs:	$11,584.24

Total: $63,825.531[1]

By their Memorandum in support of summary judgment and in argument, the Respondents sought the full difference between the old lease amounts and the lesser, new rent payments. [APPENDIX, p.101-103; 120-126.] That is, the "Calculated Loss from Difference in Rent", or the "Total Rent Difference" referenced above; that amount is a calculation of the rental difference from breach by the Appellant through the end of the new lease, 38 months after November 1st, 2017, that is through December, 2020. In short, the item alleged by Respondent and awarded by the Circuit Court is for future damages.

At the Motion for summary judgment before the Circuit Court, counsel for Appellants argued for a reduction in the awarded amount based on present value, as calculated as of the date of judgment. However, by Order filed February 8, 2019, the Circuit Court awarded the full amount of $ 63,825.53 recited in the Respondents' Memorandum.

At hearing on the Motion to Reconsider, the Appellants submitted evidence of present value of the damages sought. The Motion to Reconsider was denied. This Appeal followed.

STANDARD OF REVIEW

The matter in question is an error of law.

ARGUMENT

The Plaintiffs also claim what they describe as a "Calculated loss from Difference in rent" in the amount of $33,556.00. This figure represents a claim for the difference between the amounts due under the Defendants' Lease and Guaranty and that to be obtained from the new tenant. This is, in short, a claim for future rent.

The commentators of American Jurisprudence 2d state the rule:

> Under the common form of lease, the obligation to pay rent is a contingent one, to be made absolute by the use and enjoyment of the property or the opportunity for such use and enjoyment, and a covenant to pay rent periodically during the term creates no debt until the time

1 The true total is $63,861.53; the amount recited above is the Respondent's stated total, which was adopted by the Circuit Court.

for payment arrives [Ftn.65, citing *Calechman v. Great Atlantic & Pacific Tea Co.,* 120 Conn. 265, 180 A. 450, 100 A.L.R. 302 1935).]

Thus, unaccrued rent is not a debt or present obligation, [Ftn.66, citing *Ambrozich v. City of Eveleth,* 200 Minn. 473, 274 N.W. 635, 112 A.L.R. 269 (1937); *Lindsay Park Houses* v. *Greer,* 128 Misc.2d 775, 490 N.Y.S.2d 953 (1985) (criticized on other grounds by *Davern Realty Corp.* v. *Vaughn* (Sup.App.T.) 161 Misc.2d 550, 616 N.Y.S.2d 683 (1994)) as the obligation to pay rent is not certain to become due. [Ftn.67, citing *Lindsay Park Houses*, *supra*.]

As a general rule, rent will not be accelerated and future rent is demandable only in the amounts and at the time specified in the lease. [Ftn.68, citing *National Advertising Co. v. Main Street Shopping Center,* 539 So.2d 594, 14 F.L.W. 661 (F1a.App. D2 1989).[2]
[49 AM.JUR.2D *Landlord and Tenant §* 677 (2002); paragraphing added.]

The rule as stated above has been followed by South Carolina Courts. The Supreme Court dealt with this rule as it related to an acceleration clause and distraint for rent in *Gentry v. Recreation, Inc.,* 192 S.C. 743, 7 S.E.2d 63, 128 A.L.R. 743 (1940). That decision stated:

There is, however, quite an obvious difference between the acceleration of an ordinary debt and the acceleration of rent. In the case of an ordinary debt the debtor has already received the entire consideration, either in money or in property, while in the case of rent an acceleration would require him to pay for that which he has not yet received.
[*Id.*, 192 S.C. at __, 7 S.E.2d at 65.]

Even should the above reasoning be, for some reason, inapplicable, the Court is still bound by the general rule that an allowance for future damages must be reduced to its present worth.

The damages as awarded included the "Calculated Loss from Difference in Rent", or the "Total Rent Difference" referenced above; in other words, future damages were a) assumed to exist and b) were not reduced to the present value of that item as of the date of judgment.

The general rule is that an allowance for future damages must be reduced to its present worth. 22 AM.JUR.2D *Damages §* 678 (09/2002). The commentators of AMERICAN JURISPRUDENCE 2D state:

2 There is no acceleration language in the parties' lease.

> Therefore, the amount awarded for damage to be suffered in the future is such sum as, being put at interest, will amount (at the dates the damage will be suffered) to the sum the jury finds the plaintiff will lose in the future by reason of the alleged tort or breach of contract.
>
> [*Id.*, citing *Hollwedel v. Duffy-Mott Co.*, 263 N.Y. 95, 188 N.E. 266 (N.Y. 1933); *Gallaspy v. Warner,* 324 P.2d 848, *reh. denied* (Okla. 1958); and *Look v. Werlin,* 590 S.W.2d 526 (Tex.Civ.App. Houston (1st Dist) (1979); the last case cited dealing with future rent payments on a commercial lease.]

The same rule has been applied by other Courts dealing with damages under a lease. See *720 Lex Acquisition LLC v. Guess? Retail, Inc.* 09-cv-7199 (AJN) (S.D.N.Y. 08/17/2015); *IN RE United American Financial Corp.,* 55 B.R. 117 (Bankr. E.D.Tenn. 1985); *Consumers United Ins. Co. v. Smith,* 644 A.2d 1328 (D.C. 1994).

The rule reducing future damages to present value has been followed in many South Carolina cases. *See, e.g., Hamilton v. Martin,* 270 S.C. 223, 241 S.E.2d 569 (1978); *E & S Investment Corp. v. Richland Bowl, Inc.,* 264 S.C. 582, 216 S.E.2d 522 (1975); *Frampton v. S.C. Dep't of Transp.,* 406 S.C. 377, 752 S.E.2d 269 (Ct.App. 2014). In these cases, our Appellate Courts recognized the propriety of reducing future damages to a present value. All the above cited cases involved the present value of future rentals, as in this case.

The Respondents produced no evidence as to present value of the claimed future rent other than the rental amount under the new lease. [APPENDIX, p. 85-116.] Even taking that as given, the Appellants are entitled to credit for the difference between the two rental amounts, as reduced to present value as of the date of judgment, as recognized by the cited precedent of our Supreme Court.

The Appellants cited, and supplied to the Circuit Court, the opinion of a Certified Public Accountant as to such value, which was calculated at $ 7,976.65, far beneath the $ 28,862.32 awarded as a portion of the Order granting summary judgment. [APPENDIX, p.154-167.] That is the figure to which that item in the awarded damages should be reduced.

Finally, the Appellant notes that the decision of the Court of Appeals relies upon the language of Section 20 of the parties' Lease setting the amount of damages to deny the relief sought. [APPENDIX, Opinion of May 18, 2022, 2022-UP-205, p.2-3] That section of the Lease provides, in relevant part:

> Landlord may relet the premise or a portion of the premises for any reasonable use, and Landlord shall be entitled to recover from Tenant an amount equal to the amount of all rents reserved under this Lease, less the net rent, if any, collected by the Landlord on reletting the Demised Premises.

> Net rent collected on reletting by the Landlord shall be computed by deducting from the gross rent collected all expenses incurred by the Landlord in connection with the reletting of the premises, including broker's commissions and the cost of repairing, renovating or remodeling said premises.
> [APPENDIX, p.59]

Relying on the language above, the Circuit Court awarded future rent without reduction and this was confirmed by the Court of Appeals.[APPENDIX, Opinion of May 18, 2022, 2022-UP-205, p.3]

The problem with that reasoning is that the quoted language allows, as is usual with rental damages, the "net rent collected by the Landlord on reletting". *Id.* A Court called to award damages before the end of the rental term can have no knowledge of what that future "net rent collected" is at the time an Order awarding future damages is entered.

Thus that Court, in calculating future damages has two choices: it can a) wait until the end of the original lease term and require the Landlord to prove its actual damages after credit for the actual "net rent" received, or b) it can apply the legal requirements cited above for an award of future damages, which will reflect the reduction of damages to their present value as of the date of judgment. It cannot, either in law or mathematics, ignore the requirements of evidence of future damages.

CONCLUSION

The Appellants are entitled to a judgment reducing that portion of the awarded damages to its present value, based upon the sole evidence presented. The present decision of this Court should be amended accordingly.

August 31, 2022

Respectfully submitted,

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CERTIFICATION BY COUNSEL

Pursuant to Rule 242(d)(1), counsel for Petitioners certifies that a petition for rehearing was made and finally ruled on in this case by the Court of Appeals.

August 31, 2022

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CERTIFICATE OF SERVICE

The undersigned, counsel for Appellants in the civil appeal above, hereby certifies that, on the date written below, he served copies of the following pleadings or documents in the above-captioned and numbered civil action:

Petition for Writ of *Certiorari*;
Appendix; and
this Certificate of Service,

by depositing the same with the United States mail, with sufficient first class postage attached, properly addressed to the clerk of the Court, and with a copy also directed to the respective last known address(es) of those attorney(s) and/or persons set out below; or

by service to the opposing lawyer's primary e-mail address listed in the Attorney Information System (AIS), as authorized by Section d(1) of the Order of the Supreme Court dealing with Electronic Filing and Service issued May 6, 2022.

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