Case No. 2019-1322

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

On appeal from the Court of Common Pleas

Charleston County

Wade H. Logan, III, Special Master

CHICORA LIFE CENTER, LLC,

Appellant,

v.

Fetter Health Care Network Inc.,

NBSC Corp., and John and Jane Does 1-100,

of which

FETTER HEALTH CARE NETWORK INC. is the

Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUE

Landlord (Chicora Life Center, LLC) agreed to satisfactorily build out its premises for Tenant's (Fetter Health Care Network LLC's) medical clinic as a prerequisite to Tenant's tenancy. After hearing many witnesses' testimony during the lengthy trial, the Special Master ruled that Landlord's work was "far from completed," a ruling which Landlord has conceded on appeal. Did the Special Master correctly rule that Landlord's breach terminated the contract and that Tenant had no obligation to begin paying rent on the unfinished premises that Tenant could not use for a medical clinic?

SUMMARY OF ARGUMENT

The parties contracted for Landlord to provide premises to use as a community medical clinic. Since the clinic's federal grants were time-sensitive, Tenant had to make other plans when Landlord had not completed the improvements to the space by the February 2016 deadline.

Landlord's failure to complete the improvements defeated the very purpose of the contract: the transfer to Tenant of premises suitable for a medical clinic. The lease conditioned the start of the tenancy on obtaining a certificate of occupancy (CO) from the City of North Charleston and completing the Tenant Improvements to Tenant's satisfaction. While Landlord did obtain the CO (which certified only that Landlord's incomplete work did not violate the building code), Landlord did

not complete the Tenant Improvements and certainly not to Tenant's satisfaction, either subjective or objective.

Tenant had the right to be satisfied with the improvements. The Special Master ruled not only that Tenant was not satisfied with the work, but also that Landlord's work was "far from completed" and "unready for [Tenant]'s use as a healthcare facility." Indeed, Landlord's shortcomings—almost 150 defects remained—would have violated federal regulations for using the space as a medical clinic. The Special Master found:

> It appears that the premises were not ready for any use, but as a healthcare facility, treating patients and having to comply with numerous state and federal regulations, the premises were certainly unready and the Tenant Improvements were by no means completed.

The lease, written by Landlord, expressly preserved all of Tenant's common law rights upon Landlord's breach. Contrary to Landlord's view, the lease did not limit Tenant's remedy to being excused from reimbursing Landlord for the faulty work while still having to pay rent for the unusable space. Rather, as the Special Master ruled, Tenant was entitled to terminate the lease with no obligation to pay on-going rent for the still incomplete premises.

STATEMENT OF THE CASE

Landlord promised Tenant to build out a medical clinic to Tenant's satisfaction by February 2016. When Landlord failed to do so, Tenant cancelled its plans for the new location.

On May 5, 2016, Landlord sued Tenant for breach of contract, breach of duty of good faith and fair dealing, negligent misrepresentation, and a declaratory judgment. (R. 461-71.) Tenant answered and counterclaimed for breach of the lease on September 7, 2016. (R. 474-79.)

The case was tried before Special Master Wade Logan in April 2018. He determined that "the preponderance of the evidence supports the finding that he Tenant Improvements had not been completed." (R. 16 (para. 38).) Because Landlord's breach prevented the tenancy from starting, the Special Master concluded that Tenant did not have to take possession or begin paying rent: "Since [Landlord] failed to meet its obligations as a landlord, [Tenant] was not called upon to meet its obligations as a tenant, and therefore, its failure to take occupancy and pay rent was not a breach of the lease by [Tenant]." (R. 20.)

The Special Master dismissed Landlord's complaint, granted Tenant's counterclaim, and ordered a refund by Landlord of Tenant's $17,000 deposit. (R. 3-20.) The Special Master also awarded legal fees and costs to Tenant as provided by the lease. (R. 20.)

After a post-trial motion was denied, Landlord appealed on August 6, 2019. (R. 1.)

STATEMENT OF FACTS

Tenant operates community healthcare clinics for uninsured and low-income patients. (R. 303.) Tenant wanted to add a new clinic at Landlord's refurbished Naval Hospital where a social services hub was planned (R. 166, 304) and signed a five-year lease for part of the building (R. 512-41). Both parties knew the space was for a medical clinic and said so: "The premises may be used by Tenant for the provision of health care services and related uses." (R. 520 (§ 6).)

Before the space could be used as a medical clinic, "Tenant Improvements" would be made such as installing sinks and toilets in many of the examination rooms. (R. 539.) The lease provided that the "satisfactory completion" of the improvements was a prerequisite to the start of the tenancy:

> Tenant takes the Premises 'AS IS' except as described in Exhibit B [concerning Tenant Improvements], with Tenant to receive delivery of the Premises after *satisfactory completion* of the Tenant Improvements by Landlord.

(R. 517 (§ 2) (emphasis added).)

The lease was written by Landlord (R. 14, 34) and included many terms that balanced Landlord's and Tenant's interests. For example, Tenant would *normally* have had to reimburse Landlord for the cost of rehabbing the premises whether or not Tenant took possession *but* only upon both "completion of the Tenant Improvements as provided herein *and* the issuance of a certificate of occupancy . . . ." (R. 518 (§ 4) (emphasis added); 320.)

The phrase "as provided herein" referred to a satisfaction clause. Either party might have made the Tenant Improvements (R. 40), so a satisfaction term requiring *each* party's satisfaction protected both Landlord (if Tenant did the work) and Tenant (if Landlord did the work). The Tenant Improvements would also have to be satisfactory to the City of North Charleston, but the lease tied the City's satisfaction to the issuance of a certificate of occupancy (CO); the City would otherwise not have any reason to be satisfied or not. (R. 42.) The lease referred to all three satisfactions, not just one:

> Tenant shall contract with the Landlord or an approved General Contractor to make any and all Tenant Improvements in accordance with applicable building codes and craftsmanship standards to the satisfaction of [1] Tenant, [2] Landlord, and [3] City of North Charleston such that a Certificate of Occupancy will be issued in a timely fashion.

(R. 539 (Ex. B).)

Tenant's new clinic was financed with a federal grant with a deadline (R. 167, 305), and the parties agreed that "[t]ime [was] of the essence of this Lease and each and all of its provisions" (R. 532 (§ 39)). Still, the parties mutually agreed to modify the lease, expanding the footprint of the clinic and pushing the deadline for Landlord to complete the Tenant Improvements to February 15, 2016. (R. 63, 67, 555.)

Tenant had every intention of moving into the building. (R. 330-31, 413.) Tenant bought equipment for its expected clinic (R. 236, 306, 356-57) and showed

the space to candidates who were interviewing to be Tenant's CEO. (R. 329.) Tenant was prepared to honor the contract if Landlord had completed it. (R. 357, 413.) Contrary to Landlord's statement that Tenant never paid (App.'s Initial Br. 11), Landlord never completed the work (the trigger to Tenant's repayment obligations) and never sent any interim invoices. Further proving that Tenant would have gone forward with the lease, the parties had a side-deal for storage space for Tenant's records; Tenant paid rent for a year until water intrusion damaged its records and Landlord refused to make repairs. (R. 404-05.)

Landlord obtained a *temporary* CO from the City of North Charleston on December 22, 2015, but it was limited to allowing Tenant to "set up office furniture." (R. 570.) Landlord never contacted Tenant to see if the work had been completed satisfactorily. (R. 313.) On January 1, 2016, Landlord sent a letter claiming that the premises were "complete with the agreed upon Tenant Improvements in place and ready for [Tenant] to take occupancy. The City of North Charleston has also issued a certificate of occupancy (issued December 21, 2015) as required by the Lease." (R. 574.) Landlord did not have a final CO yet and did not receive one until three weeks later. (R. 367, 578.)

As with the temporary CO, Landlord never told Tenant that Landlord was asking for a final CO. (R. 8, 212.) Thus, the building inspector never had any reason to even speculate about whether the work was satisfactory to Tenant, much

less whether it was satisfactory for the specific purpose of operating a medical clinic; the building inspector had no interest in the project other than knowing it met the building codes. (R. 42.)

On January 21, 2016, the City of North Charleston issued a final CO which certified only that "at the time of issuance this structure was in compliance with the various ordinances of North Charleston regulating building construction or use." (R. 578.) A final CO means the building department "inspect[ed] and that all code compliance has met the requirement for life safety and that the facility is—or the area is safe to move in." (R. 365.) The inspector would not have reviewed any improvements that were not part of "life safety." (R. 370-71.) The City's building inspector, who did not inspect the building himself, did not even know if the plans had been on site during the walk-throughs. (R. 369-70.)

After learning that Landlord had sought a final CO and claimed the project was complete, John Hinson, who was the chairman of Tenant's facilities committee, took an expert, Adrian Williams, with him to the premises and saw that earlier defects (R. 123-24, 167-68, 185) had still not been finished by February 2016 (R. 170-71). The space was still unusable. (R. 177, 180-81.) In fact, Mr. Hinson was surprised the CO had been issued: "I thought after I had seen the place there was some sort of a cruel joke." (R. 185.)

Tenant's CEO testified that the property was never delivered. (R. 310.) None of the things that would have kept Tenant from operating in the space resulted from a change order. (R. 317, 325.) Doors, locks, sinks, toilets, and even an exit were missing. (R. 327, 332-33.) The space smelled of mold and mildew and had inoperable elevators. (R. 403.) The CEO said about "50 percent of the – what we felt of the work had been completed." (R. 339; *see also* 401-02.) During another tour of the facilities in February 2018 and even by the trial of this case, the conditions had *still* not improved. (R. 405-06.)

Tenant's licensed civil engineer identified 148 defects including thirteen rooms without sinks, doors that could not be closed or locked, three missing toilets, walls that needed to be moved or repaired, floors that required finishing, a missing reception desk, ceilings that needed to be repaired, and many other defects which would keep the premises from being used as a healthcare facility. (R. 374-77, 580-82.) The space was simply not ready to be occupied, and Tenant could not have used the space. (R. 378, 389.) Not only were the items unsatisfactory to Tenant, the Special Master even noted that federal regulations were not met, so the space could not have been used as a medical clinic regardless. (R. 10.)

Landlord's evidence acknowledged that the improvements were not finished. (R. 145, 620.) The construction manager agreed that the items on Tenant's list of

defects (R. 580-82) were problems with the original scope of work and not change orders (R. 216-17).

Tenant's CEO tried to speak with the building inspector about the on-going defects, but no one would talk to her. (R. 411.) She realized that the building inspector had not been concerned with whether the contractual improvements had been made: ". . . I realized that it wasn't about tenant improvements or cosmetics or being able to provide services. [The inspection] was simply about life and safety. So when they do the COs[,] they didn't care if doors were up against the wall or if the toilets were rusty. They didn't care about that. They just wanted to make sure no one would die in the building." (R. 412.)

Landlord declared that rent and reimbursement were due immediately. (R. 119.) When Tenant refused to pay for the still unusable space and incomplete "improvements" (R. 584), Landlord sued Tenant (R. 461-71).

STANDARD OF REVIEW

The Special Master made findings both about the proper understanding of the lease and about the parties' performance and non-performance of their obligations. The rulings about the interpretation of the lease are legal rulings that are reviewed de novo. *Middleton v. Eubank*, 388 S.C. 8, 14, 694 S.E.2d 31, 34 (Ct. App. 2010); *Hunt v. S.C. Forestry Comm'n*, 358 S.C. 564, 569, 595 S.E.2d 846, 849-50 (Ct. App. 2004). Findings about the parties' performance or non-

performance are factual and must be affirmed unless "found to be without evidence which reasonably supports the judge's findings." *Wigfall v. Fobbs*, 295 S.C. 59, 60-61, 367 S.E.2d 156, 157 (1988).

ARGUMENT

I. The Special Master correctly ruled that Tenant was excused from paying rent to Landlord when Landlord materially breached its contractual duty to deliver satisfactory premises for a medical clinic.

The Court must enforce unambiguous contracts according to the terms the parties have used, understood in their plain sense. *C.A.N. Enters., Inc. v. S.C. Health & Human Servs. Fin. Comm'n*, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988). *Even if* the Court decides that the contract *is* ambiguous, the Court may not consider what the parties, in retrospect, wish they had agreed on to decide the contract's meaning. *Ellis v. Taylor*, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994).

Once the requirements of a contracts are settled, parties are entitled to performance of their contracts, and when a breach is material, the contract terminates. *Vaughn Coltrane & Assocs., Inc. v. LaM Distribution, LLC*, No. 2004-UP-309, 2004 WL 6330901, at *2 (S.C. Ct. App. May 7, 2004) ("[T]he legal consequences of one party's material breach is to relieve the other contracting party of its performance obligation . . . ."). The right to terminate a contract in response to a material breach exists by operation of law, whether recited in a contract or not. *Bannon v. Knauss*, 282 S.C. 589, 320 S.E.2d 470 (Ct. App. 1984).

A. Because the lease gave Tenant the right to be satisfied with the improvements for its medical clinic, Landlord breached the lease when it failed to even complete its work, much less satisfactorily.

The court's only function is to give effect to the terms the parties themselves have settled on. *Ebert v. Ebert*, 320 S.C. 331, 338, 465 S.E.2d 121, 125 (Ct. App. 1995). One such term that courts must enforce is a satisfaction clause; such terms do not result in unenforceable rights since the obligation of good faith and fair dealing in all contracts checks the withholding of consent. *Tharpe v. G.E. Moore Co.*, 254 S.C. 196, 174 S.E.2d 397 (1970).

In just one of many examples of satisfaction clauses that have been upheld in South Carolina, in *Palmetto Dunes Resort v. Brown*, 287 S.C. 1, 2, 336 S.E.2d 15, 16 (Ct. App. 1985), the developer of a subdivision included a covenant in deeds for the lots giving the developer the power to reject proposed plans for any buildings. A buyer wanted to build a house on one of the subdivision's lots, but the developer was not satisfied that the plans met with the "quality we are striving for." *Id.* at 3, 336 S.E.2d at 17. When subsequent tweaks of the owner's plans still did not win over the developer (acting through its design review board), the owner sued, claiming that the covenant was unenforceable. *Id.* at 4-5, 336 S.E.2d at 17.

This Court affirmed the trial court's injunction against the construction of an unapproved house. Although the covenant did not include detailed explanations of what would be acceptable, the mission of the developer itself provided enough

meaning to enforce the term. *Id.* at 4-6, 336 S.E.2d at 17-19. This Court approved a very broad, but not boundless, understanding of the necessary satisfaction: The developer could correctly withhold its satisfaction for many purely aesthetic reasons just so long as it did so in good faith. *Id.* at 7, 336 S.E.2d at 19 ("The plain and obvious purpose of the covenant is to vest this discretion in Palmetto Dunes, which is constrained only to exercise its judgment reasonably and in good faith.").

The short answer to Landlord's appeal is that Tenant's duty to start paying rent for the premises was triggered only *after* Tenant was satisfied with the *completed* improvements, and Tenant was not.

> . . . Tenant [is] to receive delivery of the Premises after *satisfactory completion* of the Tenant Improvements by Landlord.

(R. 517 (§ 2) (emphasis added).) In fact, as the Special Master included in his findings of fact, the work was never completed, much less to Tenant's satisfaction: "Based on the testimony and the Court's own review of the items on [the expert's list of 148 shortcomings], **I FIND** that the Tenant Improvements were far from completed." (R. 11.)

During the trial, Landlord's owner explained that he did not read the contract as requiring Tenant's satisfaction since, he thought, that would mean that satisfaction could then be withheld artificially. (R. 121-22.) That understanding is legally wrong since, as this Court ruled in *Palmetto Dunes Resort*, Tenant would always be required to decide its satisfaction in good faith.

Good reason certainly existed for not being satisfied with the premises. Landlord never even completed the improvements at all. (R. 123-24.) Just before the deadline, the chairman of Tenant's facilities committee visited the site and "was shocked. I was hoping to find a facility that we could move into. Instead, I found a place that I consider a wreck. It was a mess." (R. 167.)

What work *had* been done was in terrible condition, and Tenant could not have used the space for a medical clinic. (R. 168 ("Q: Do you think it was in a condition where [Tenant] could have moved in and operated its business at that time that you inspected the property? A: No it wasn't in that sort of condition. You couldn't provide health services there."), 177, 180-81, 185, 378, 389.) In fact, Tenant's licensed civil engineer identified 148 defects including thirteen rooms without sinks, doors that could not be closed or locked, three missing toilets, walls that needed to be moved or repaired, floors that required finishing, a missing reception desk, ceilings that needed to be repaired, and many other defects which would keep the premises from being used as a healthcare facility. (R. 374-77, 393, 580-82.) During her inspection, Tenant's CEO observed many problems, both cosmetic and structural, and assessed that perhaps half the work had been performed. (R. 332-33, 339, 401-02.) The problems she testified about were not resolved even when she returned two years later (R. 406), and she summarized that "it was just not space we [were] interested in" (R. 405).

Landlord and its own contractor agreed that the improvements were not completed (R. 145, 620), and the Special Master made a factual finding that the work was undone too: "Based on the testimony and the Court's own review of the items in Exhibit R [listing the 148 defects], **I FIND** that the Tenant Improvements were far from completed" (R. 11 (para. 17)). Landlord has not appealed from the Special Master's ruling, and such finding is a factual matter. (*See* App. Initial Brief at 8, 10.) Regardless, there was *no evidence* showing either that Landlord had completed the improvements *or* that the improvements should have been satisfactory to a reasonable tenant *or* that Tenant was subjectively satisfied.

In short, the Special Master correctly ruled that Landlord breached the lease when it failed to tender satisfactory premises to Tenant.

B. Landlord incorrectly interprets its lease as requiring *only* the City of North Charleston to be satisfied enough to issue a CO and that Tenant had no choice but to accept any work—useful to Tenant or not—that met the local building code.

Contract interpretation "is governed by the objective manifestation of the parties' assent at the time the contract was made," rather than "the subjective, after the fact meaning one party assigns to it." *Bannon v. Knauss*, 282 S.C. 589, 593, 320 S.E.2d 470, 472 (Ct. App. 1984). Ambiguity can be resolved with reference to the words themselves and standard rules of grammar, including the placement of modifiers, especially when a contract would otherwise be absurd. *See Lewis v. Carnaggio*, 257 S.C. 54, 56, 183 S.E.2d 899, 899 (1971). Moreover, any ambiguity

is resolved against the party that drafted the agreement. *Davis v. KB Home of S.C., Inc.*, 394 S.C. 116, 129 n.4, 713 S.E.2d 799, 805 n.4 (Ct. App. 2011).

In *Lewis v. Carnaggio*, 257 S.C. 54, 56, 183 S.E.2d 899, 899 (1971), a contractor and owner disagreed about a term in their construction contract, and the dispute was resolved using only rules of English, not what the parties later claimed to have intended. *Id.* at 56, 183 S.E.3d at 899. Their contract included a cap on the cost of a house and a 10% mark-up: "'[T]he owners shall not be required . . . to pay to the contractor any amount in excess of [$34,500] which is the estimated cost of construction, plus the fee provided for herein.'" *Id.* at 56, 183 S.E.2d at 900. According to the owner, the cap was $34,500 in total, which was the estimated cost of the construction with the 10% profit they had agreed upon *already included*. *Id.* at 56-57, 183 S.E.2d at 900. The contractor, on the other hand, read the same language as capping the cost of construction at $34,500 but then *also* allowing a separate 10% mark-up on the work. *Id.* at 57, 183 S.E.2d at 900.

The South Carolina Supreme Court resolved the dispute with no special rules other than basic English grammar. The Court noted that the comma in the disputed term meant that the $34,500 had been described only using the phrase "which is the estimated cost of the construction" and that what followed the comma was a separate item and not part of the description of the $34,500. *Id.* at 58, 183 S.E.2d at 900. The Court reversed the trial court and ruled that the language

provided for a 10% profit in addition to the capped construction costs of $34,500. *Id.* at 58, 183 S.E.2d at 901.

One convention of standard English—that a phrase modifies only the last item in a preceding series—is so well known that the rule has been given its own name in the canons of construction: the Rule of the Last Antecedent. *See Lockhart v. United States*, 136 S. Ct. 958, 962-63 (2016); *see also Black's Law Dictionary* 1532-33 (10th ed. 2014) ("[Q]ualifying words or phrases modify the words or phrases immediately preceding them and not words or phrases more remote, unless the extension is necessary from the context or the spirit of the entire writing"); Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 144 (2012). Justice Sotomayor recently explained the sense behind such a rule and provided an easy to understand example:

> The rule reflects the basic intuition that when a modifier appears at the end of a list, it is easier to apply that modifier only to the item directly before it. That is particularly true where it takes more than a little mental energy to process the individual entries in the list, making it a heavy lift to carry the modifier across them all. For example, imagine you are the general manager of the Yankees and you are rounding out your 2016 roster. You tell your scouts to find a defensive catcher, a quick-footed shortstop, or a pitcher from last year's World Champion Kansas City Royals. It would be natural for your scouts to confine their search for a pitcher to last year's championship team, but to look more broadly for catchers and shortstops.

Lockhart, 136 S. Ct. at 963. Courts have used that presumption about English composition to interpret ambiguous contracts as well as statutes. *See, e.g.*,

Barnhart v. Thomas, 124 S. Ct. 376, 380 (2003) ("Consistent with this principle, the courts ordinarily assume that 'a limiting clause or phrase . . . modif[ies] only the noun or phrase that it immediately follows'"); *Goldberg v. Companion Life Ins. Co.*, 910 F. Supp. 2d 1350, 1352 (M.D. Fla. 2012) ("'There is no rule about the placement of modifying phrases except perhaps the very general one that they should be as close as possible to the things they modify.'" (citation omitted)).

In addition to interpreting language consistently with standard modes of writing, courts will strive to avoid interpretations that would cause unusual or extraordinary outcomes and will instead use another interpretation, equally consistent with the language employed, that would make it reasonable, fair, and just. *Farr v. Duke Power Co.*, 265 S.C. 356, 362, 218 S.E.2d 431, 434 (1975). For instance, in *Farr v. Duke Power Co.*, a utility company agreed to pay a developer a connection fee for each water connection that was installed in a new subdivision. When problems prevented the developer from building more than just six houses, the developer demanded that the utility make water connections to the still-empty lots. *Id.* at 360, 218 S.E.2d at 432-33. Doing so would therefore entitle the developer to enough connection fees to pay off its cost for the system. *Id.* at 360-61, 218 S.E.2d at 433. But having the connections would increase the value of the lots to the developer but would not benefit the utility unless the connections were put into actual operation by new houses. *Id.* at 361, 218 S.E.2d at 433.

On appeal, the South Carolina Supreme Court reversed the lower court's interpretation of the agreement as producing unreasonable results. *Id.* at 364, 218 S.E.2d at 363. Although the language of the contract could conceivably have been read as the developer argued, such an understanding would have made no sense. The developer might have requested all the water connections on the first day of the contract, thereby recouping all its cost for a water system that benefitted the developer with no benefit to the utility. Because the utility's interpretation was "more reasonable and probable," the Court chose to enforce it instead of "an interpretation leading to an absurd result." *Id.* at 362, 218 S.E.2d at 434.

In the current case, the lease has a very clear meaning that requires Tenant's satisfaction with the improvements that were being done at Tenant's request.

> . . . Tenant [is] to receive delivery of the Premises after satisfactory completion of the Tenant Improvements by Landlord.

(R. 517 (§ 2) (emphasis added).) Landlord has pointed to *another* term in the lease which adds two *other* satisfactions which are also required:

> Tenant shall contract with the Landlord or an approved General Contractor to make any and all Tenant Improvements in accordance with applicable building codes and craftsmanship standards to the satisfaction of [1] Tenant, [2] Landlord, and [3] City of North Charleston such that a Certificate of Occupancy will be issued in a timely fashion.

(R. 539.) According to Landlord, the concluding modifier "such that a Certificate of Occupancy will be issued in a timely fashion" applies to all three satisfactions and not just the satisfaction of the City of North Charleston.

The interpretation sought by Landlord is both at odds with traditional canons of construction *and* would produce an absurd outcome. The canons of construction require the Court to apply the limitation ("such that a Certificate of Occupancy will be issued in a timely fashion") only to the final entry in the list ("City of North Charleston")—and not Tenant's and Landlord's satisfactions too. That is, the lease provides for simple subjective satisfaction with the work by both Landlord and Tenant without special restrictions on how to gauge that satisfaction. In contrast, the City of North Charleston (which otherwise has no reason to be satisfied or not with the work) was given a measuring stick for its satisfaction ("such that a Certificate of Occupancy will be issued in a timely fashion"). There is nothing about a CO which relates to the satisfaction of anyone other than the building inspector or even that a construction contract had been met at all (R. 13); the Special Master specifically noted, "I FIND that the issuance of a Certificate of Occupancy does not establish that the separate requirement of completion of Tenant Improvements had been completed." (R. 12.)

Any other interpretation would be absurd since the term would unambiguously require satisfaction of Tenant but would simultaneously exclude

Tenant from the satisfaction process. In fact, using its own strained interpretation of the language, Landlord sought the final CO without ever even notifying Tenant that it had submitted a request to the City of North Charleston at all. (R. 212.) Since the North Charleston building inspector would not even know what the premises would be used for and was looking only for building code violations, North Charleston would be satisfied so long as the building did not endanger its occupants. If Landlord's interpretation were correct, Landlord would be free to simply build a toolshed instead of a medical clinic; after all, as long as the toolshed did not violate the building code, Tenant would be forced to accept it and pay rent for five years according to Landlord! No reasonable party could have understood the avoidance of death or physical injury to be the standard to be satisfied.

Even if a person could conceivably have meant to name an uninformed third party as a proxy for satisfaction, the language chosen by Landlord did not clearly do that. As the party who authored the lease (R. 34), the Court must interpret any possible ambiguous meaning against Landlord and in favor of Tenant.

Even apart from the clear language of the lease requiring Tenant's subjective (albeit reasonable) satisfaction with the improvements, rules of construction require the Court to resolve any ambiguity against Landlord and look for Tenant's satisfaction.

C. Tenant was excused from performance upon the material breach of Landlord's duty to provide satisfactory premises for a clinic.

The law existing at the time and place of the making of a contract is a part of the contract. *Ayres v. Crowley*, 205 S.C. 51, 30 S.E.2d 785 (1944); 4 Samuel Williston, *The Law of Contracts*, § 615 at 597 (3d ed. 1961). Courts have no power to alter an unambiguous contract by construction or to make new contracts for the parties. *C.A.N. Enters., Inc.*, 296 S.C. at 378, 373 S.E.2d at 587.

1. Because the point of the contract was to receive space that could be used as a medical clinic, Landlord's failure to deliver that was a *material* breach of the contract.

Only when the breach is relatively minor are parties left to pursue monetary relief while still having to adhere to the contract. *Ackerman v. McMillan*, 314 S.C. 268, 271, 442 S.E.2d 618, 620 (Ct. App. 1994) ("Where the breach is not so material as to defeat the purpose of the contract, the nonbreaching party is compensated by damages.").

When a breach of a real estate contract merely shortchanges one of the parties by some cash payment, that financial breach is not normally a material breach and may be corrected through a monetary award. *Kiriakides v. United Artists*, 312 S.C. 271, 440 S.E.2d 364 (1994). But, when a breach of a real estate contract prevents the transfer of the possession of the real estate, the breach is a material one which ends the contract and relieves the other party from further performance. *Brazell v. Windsor*, 384 S.C. 512, 518, 682 S.E.2d 824, 827 (2009).

In *Kiriakides v. United Artists*, the South Carolina Supreme Court used a set of Restatement factors to judge materiality. The Kiriakides realized that United Artists had not started paying a $365 per month increase in the rent for a movie theater. *Kiriakides*, 312 S.C. at 273, 440 S.E.2d at 365. More than a year later, when the Kiriakides notified United Artists of the missed payments, United Artists immediately sent the past due amount. *Id.* at 273, 440 S.E.2d at 365. The Kiriakides argued that the breach by United Artists had terminated the lease, but the trial court ruled that United Artists could resume the lease upon making up for the missed payments. *Id.* at 273, 440 S.E.2d at 365.

On appeal to the South Carolina Supreme Court, the Court agreed that the right to terminate a commercial lease would not be triggered by a "trivial or immaterial breach," *id.* at 276, 440 S.E.2d at 366. The Court then proceeded to offer guidance on how to determine the materiality of a breach and endorsed the factors listed in the Restatement (Second) of Contracts:

> In determining whether a failure to render or to offer performance is material, the following circumstances are significant:
>
> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
>
> (b) the extent to which the injured party can be adequately compensated [by damages] for the part of that benefit of which he will be deprived;
>
> (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;

(d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;

(e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Id. at 276, 440 S.E2d at 366-67 (quoting Restatement (Second) of Contracts § 241 (1981)). The breach by United Artists did not interfere with the transfer of the property—United Artists was already in possession—and resulted only in the Kiriakides' getting less money than they were entitled to. That shortchanging—which could be corrected with a monetary award—was not a material breach and did not allow the Kiriakides to end the lease. *Id.* at 277, 366 S.E.2d at 367.

More recently, the South Carolina Supreme Court has ruled that *true* purpose of a real estate contract is to affect the transfer of property; a breach that interferes with that purpose can be a material breach justifying termination of the deal. *Brazell v. Windsor*, 384 S.C. 512, 518, 682 S.E.2d 824, 827 (2009). In *Brazell*, the owners of a house had agreed to sell it to a buyer for $550,000. *Id.* at 514, 682 S.E.2d at 825. At the last moment, the buyer told the owners about a defect with the water filtration system and withheld $2000 in breach of the contract. *Id.* at 514, 682 S.E.2d at 825.

That breach caused the sale to grind to a halt, and the title was not recorded. *Id.* at 519, 682 S.E.2d at 828. The owners sued for breach and sought *not* monetary

damages ($2000), but to terminate the contract based on the buyer's material breach. The lower courts decided that the $2000 could not be a material breach as a matter of law and dismissed the complaint seeking to end the contract.

On appeal, the Supreme Court reversed. The Supreme Court found that the lower court had incorrectly focused on the small *monetary* size of the breach (the buyer withheld only 0.04% of the contracted price) and instead noted that "real estate contracts are unique and courts should evaluate the purpose of the real estate contract and the materiality of a breach in light of these differences." *Id.* at 518, 682 S.E.2d at 827. The *actual* purpose of a real estate contract is to transfer the real estate from one party to the other. *Id.* at 518, 682 S.E.2d at 827 ("[T]he overriding purpose of the contract was not merely to receive proceeds from the sale of a home, but rather to finalize a real estate transaction and transfer title . . . .").

The breach by the buyer did not just deny $2000 to the owners. Rather, the breach by the buyer frustrated the overarching goal of the contract—transferring the title to the house. The Court therefore reinstated the owners' lawsuit seeking to terminate the contract because of the buyer's material breach.

The South Carolina Code's definition of substantial performance (that is, the opposite of material breach) very clearly requires at least enough work so that the property can be used an intended. S.C. Code Ann. § 15-3-630 (2005) ("'[S]ubstantial completion' shall mean that degree of completion of a project,

improvement, or a specified area or portion thereof (in accordance with the contract documents, as modified by any change orders agreed to by the parties) upon attainment of which the owner can use the same for the purpose for which it was intended.").

In the present case, both parties agree that Landlord breached its contract by failing to complete the improvements. (App. Initial Brief at 8.) Indeed, Landlord has agreed that it will consider that matter settled on appeal: "[I]t is not necessary to explore further that factual finding on appeal." (App. Initial Brief at 10.)

Landlord's breach was material, not trivial. As the Special Master noted, the premises could not be used for their intended purpose—a purpose of which Landlord was perfectly well aware. Landlord has not cited any evidence that the breach was trivial. (App. Initial Brief at 18-19.)

Landlord's failure to provide satisfactory premises not only frustrated Tenant's plans to operate a medical clinic but frustrated the very purpose of the contract: the transfer of an interest in the premises. The purpose of the contract was fundamentally to transfer a leasehold interest to Tenant from Landlord, but that transfer hinged on the completion of satisfactory repairs and upfitting.

Even disregarding the real purpose of the contract, the *Kiriakides* factors also weigh in favor of finding that Landlord's breach was material. Obviously, the breach by Landlord prevented Tenant from getting the benefit it had bargained

for—suitable space for a medical clinic. (R. 168, 177, 180-81, 185, 374-78, 389, 393, 405, 580-82.) Tenant could not push forward with its finances to open its medical clinic without Landlord's having finished the work on the clinic because of federal deadlines. (R. 167, 305.) Any damages would be impossible to measure since, as a community health clinic, Tenant would not have the normal profits. If the lease the ended, Landlord will not suffer a forfeiture. Unlike a contractor who might lose the value of his work at a client's house before the contractor's breach, Landlord will still own all its work on its own premises. There is certainly no reason to believe that Landlord will ever finish the work if Tenant were forced to continue the relationship; the CEO of Tenant testified that even more than two years after the deadline, the premises were still not complete. (R. 405-06.) But, more importantly, Landlord has not cited any evidence showing that any of the *Kiriakides* factors tilts in its favor at all.

Landlord's breach stood in the way of that transfer and was exactly the sort of breach that the Supreme Court ruled was material in *Brazell*. Since even the balance of *Kiriakides* factors weighs in favor of materiality, the Court should agree that the breach was a material failure that justified setting aside Landlord's duties.

2. Landlord's material breach triggered the termination of the lease as a Tenant remedy by operation of law.

A party is not entitled to expect compliance from the other party when he is himself in breach. *Parks v. Lyons*, 219 S.C. 40, 48, 64 S.E.2d 123, 126 (1951);

Willms Trucking Co. v. JW Constr. Co., 314 S.C. 170, 178, 442 S.E.2d 197, 201 (Ct. App.1994); *see also Ellis v. Taylor*, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994). Moreover, the right to terminate a contract upon a material breach exists whether it is recited in the contract or not since such an outcome "is required out of a sense of fairness rather than as a result of the agreement of the parties." Restatement (Second) of Contracts § 237 cmt. a (1981) (emphasis added).

In *Bannon v. Knauss*, 282 S.C. 589, 320 S.E.2d 470 (Ct. App. 1984) (Bell, J.), for example, the parties agreed to the sale of a lot in Hilton Head. The purchaser paid a $1500 deposit but backed out before the deal closed. When the sellers ultimately sold the lot for significantly less than the purchaser's offer, the sellers sued and received a judgment for $17,300.

On appeal, the purchaser argued that the sellers' remedies were limited by a specific term about the purchaser's deposit: "If Purchaser fails to fully perform his obligation hereunder, he shall forfeit the earnest money deposit . . . ." From the *inclusion* of that term in the contract, the purchaser argued that the sellers were not entitled to any *other* relief. *Id.* at 592, 320 S.E.2d at 472 ("In Knauss's view, this clause provided the sole remedy for a purchaser's breach of the contract.").

Judge Bell, however, quickly dismissed that notion: "In the absence of clear language in the contract to the contrary, a nonbreaching party may normally elect either to pursue a remedy specified in the contract *or to sue for any other remedy*

available for the breach." *Id.* at 592, 320 S.E.2d at 472 (emphasis added). The inclusion of a liquidated damages term did not limit the nonbreaching sellers to *only* that relief. There was nothing in the contract that referred to any limitation on other remedies, so the court sided with the sellers and affirmed the judgment for both the retention of the earnest money *and* the consequential damages.

Landlord correctly quotes section 10 (App. Initial Br. 4, 5), but then—*with no basis whatsoever*—falsely represents that "Tenant specifically waived any right to vacate *or terminate* the Lease." (App. Initial Br. 19 (emphasis added).) That is simply not true. Landlord did *not* waive its common law right to terminate the contract upon Landlord's material breach. Quite to the contrary, the lease included a term which clearly preserved Tenant's common law rights:

> The rights and remedies provided for Landlord and Tenant in this Lease are *in addition to any other remedies available at law* or in equity by statute or otherwise, except as expressly limited or waived under the provisions of this Lease.

(R. 528 (§ 22) (emphasis added).

Because Tenant never waived—and certainly not "expressly"—its common law right to terminate the lease upon Landlord's material breach, the Court must find that Tenant's duty to begin paying rent for the incomplete space never began and then permanently ended when Landlord failed to even complete—much less satisfactorily—the improvements to the premises.

3. Nothing in the Lease waives the common law remedies that were expressly preserved by section 22 of the Lease.

Landlord never discusses section 22's express reservation of all common law remedies at all. Instead, Landlord relies on a very limited term that does not apply to the parties' situation.

If Landlord had ever completed the premises and Tenant still refused to accept them, Landlord would have been entitled to the cost of the Tenant Improvements. However, the Lease very specifically cancelled Landlord's right to reimbursement for the improvements if Landlord's failure to complete the improvements prevented Tenant from occupying the premises:

> [I]f Tenant's failure to occupy the Premises is due to Landlord's failure to complete improvements or to perform any other obligation set forth herein, then Tenant's obligation to pay interior finishing costs . . . shall be excused or waived.

(R. 517 (§ 3).) That waiver was expressly not a limit on Tenant. As discussed above, the lease specifically safeguarded all of Tenant's remedies, including the common law right to terminate the lease upon Landlord's material breach.

Section 3 includes absolutely no language even implying a waiver of Tenant's rights, and the Court should reject Landlord's argument that it was a waiver of the same rights expressly preserved by section 22.

CONCLUSION

For all these reasons, the Court should affirm the decision of Special Master Wade Logan.

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Case No. 2019-1322

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

On appeal from the Court of Common Pleas

Charleston County

Wade H. Logan, III, Special Master

CHICORA LIFE CENTER, LLC,

Appellant,

v.

Fetter Health Care Network Inc., NBSC Corp., and John and Jane Doe 1-100,

of which

FETTER HEALTH CARE NETWORK INC. is the Respondent.

CERTIFICATE OF COMPLIANCE

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The undersigned certifies that Respondent's Brief complies with Rule 211.

Feb. 25, 2020

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