

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Wade H. Logan, III, Special Referee

Appellate Case No. 2022-001685
Unpublished Opinion No. 2022-UP-354 (S.C. Ct. App. Filed September 14, 2022)

Chicora Life Center, LC, Petitioner,

v.

Fetter Health Care Network Inc.;
NBSC Corporation, and John and Jane Does 1-100, Defendants,

Of which Fetter Health Care Network Inc. is the Respondent.

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Petitioner's Writ of Certiorari asserts legal error in the Order of the Special Referee and the opinion of The Court of Appeals since both failed to enforce the plain language of the Lease, finding a termination clause and other provisions where none existed. Specifically, the Writ of Certiorari outlines, *inter alia*, that both the order of the Special Referee and the opinion of The Court of Appeals 1) ignored both specific and controlling Lease provisions and controlling case precedent to find that the Landlord breached the Lease, and 2) allowed the Tenant to terminate the Lease in direct contravention of specific and controlling Lease provisions. Respondent's Return to the Petition for Certiorari limits its argument to asserting: "The decision of the Special Judge got it right, and the Court of Appeals affirmed unanimously." Return to Petition at 4. Based upon this bald and incorrect assertion, Respondent concludes that there is no basis for this Court to grant the Petition for Certiorari. *Id.* Contrary to Respondent's assertions, neither the Special Referee nor The Court of Appeals got it right since their decisions ignored and are in direct conflict with controlling precedent from this Court. *See* S.C. Appellate Court Rule 242(b)(3).

ARGUMENT

I. THE ORDER OF THE SPECIAL REFEREE AND THE OPINION OF THE COURT OF APPEALS CONFLICT WITH CONTROLLING PRECEDENT FROM THIS COURT.

The order of the Special Referee specifically concluded: "Since Chicora failed to meet its obligations as a Landlord [by failing to complete Tenant Improvements¹], Fetter 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 Fetter." Order, R. p. 20. In its per curiam decision, The Court of

¹ Order, R. pp. 8, 12, 16.

Appeals concluded: “Having decided the contract obligated Chicora to provide satisfactory Tenant Improvements before the Lease term commenced and Fetter's duty to perform arose, we consider whether the Special Referee's factual findings that Chicora breached its obligation are supported by the evidence. We conclude they are amply supported, and therefore, we affirm the well-reasoned ruling of the Special Referee.” *Chicora Life Center LLC v. Fetter Health Care Network, Inc.*, No. 2019-001322, slip op. at 5 (Ct. App. 2022). The order of the Special Referee and the opinion of The Court of Appeals, however, are contrary to precedent established by this Court.

This Court has provided clear and explicit guidance for interpreting and enforcing contracts:

Where an agreement is clear and capable of legal construction, the court's only function is to interpret its lawful meaning and the intention of the parties as found within the agreement and give effect to it. We are without authority to alter an unambiguous contract by construction or to make new contracts for the parties. 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 Dept. of Transp. v. M & T Enterprises of Mt. Pleasant, LLC, 379 S.C. 645, 665 (2008).

This fundamental rule of contract interpretation and enforcement was confirmed and reinforced by this Court stating: “The primary concern of the court when interpreting a contract is to give effect to the intent of the parties.” *Lee v. Univ. of S.C.*, 407 S.C. 512, 757 S.E. 2d 394, 397 (2014). The best evidence of the parties' intent is the contract's plain language. *Id.*

In this case, § 3 of the Lease contained the following relevant provision:

In the event Tenant does not occupy the space designated herein, all interior finishing costs become due and payable upon billing by Landlord; provided, however, that *if 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 pursuant to this Section 3 shall be excused or waived.*

(Italics added).

It cannot be overemphasized that the Lease contemplated the possibility that Tenant Improvements would not be completed and/or that Landlord would not perform an obligation under the Lease terms and then specifically provided for an agreed upon remedy for such a situation, namely, that Tenant's obligation to pay interior finishing costs or Tenant Improvements would be excused or waived. This is what the parties bargained for, expected, and agreed to, not a forfeiture of the Lease.

Nowhere in the Lease and specifically in the Lease sections describing remedies in the event of default (Lease, R. pp. 527-529) is there a right for the Tenant to unilaterally vacate the Premises and/or terminate the Lease. Moreover, nowhere in the Lease is there any language to support the conclusion that the Landlord's failure to complete Tenant Improvements constitutes a default or a breach of the Lease by the Landlord.

When the parties entered into the Lease agreement, they specifically contemplated and expressly provided the remedy they intended would govern if Tenant Improvements were not completed. Even if it were conceded that the Landlord did not complete Tenant Improvements, the conclusion is inescapable that failure to deliver satisfactorily completed Tenant Improvements cannot constitute legitimate grounds to conclude that 1) the Landlord breached the Lease or 2) termination could be a remedy for the Tenant. Instead, the parties specifically contemplated the possibility that such a circumstance might arise and expressly provided that the sole and exclusive remedy would be a waiver of the Tenant's obligation to pay for Tenant

Improvements or "interior finishing costs." Having contemplated the possibility of incomplete Tenant Improvements and expressly providing a remedy for such a contingency in the plain language of the Lease conclusively demonstrates that the failure to complete Tenant Improvements can neither 1) legally constitute a breach of the Lease by the Landlord, nor 2) provide the Tenant with the right to terminate the Lease.

The order of the Special Referee and the opinion of the Court of Appeals creating and inserting such rights directly contravene specific and controlling Lease terms which were bargained for and agreed to as law between the parties. By concluding that the Landlord breached the Lease based upon an asserted failure to complete Tenant Improvements and by permitting the Tenant to terminate the Lease based upon a failure to complete Tenant Improvements, both the Special Referee and the Court of Appeals altered the contract and contravened the intent of the parties as demonstrated in the clearly expressed plain language of the Lease.

In doing so, the Special Referee and the Court of Appeals created a substantial conflict with a prior decision of this Court which has declared: "We are without authority to alter an unambiguous contract by construction or to make new contracts for the parties." *South Carolina Dept. of Transp.*, 379 S.C. at 665. This clear error warrants granting Petitioner's Writ of Certiorari.

CONCLUSION

The order of the Special Referee and the opinion of The Court of Appeals is in conflict with precedent from this Court that expressly prohibits a court from altering clearly expressed contract terms or creating a new contract for the parties. Accordingly, this Court should grant Petitioner's Writ of Certiorari.

Respectfully submitted,

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