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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Marvin H. Dukes, III, Master-in-Equity

Appellate Case No. 2020-001446

Trial Court Case No. 2020-CP-07-00155

SOUTH CAROLINA CVS PHARMACY, LLC,Appellant,

vs.

KPP HILTON HEAD, LLC,Respondent.

PETITION FOR REHEARING

Respondent, KPP HILTON HEAD, LLC (“Respondent”) files this Petition for Rehearing pursuant to Rule 221(a), SCACR, seeking a rehearing of the oral arguments leading to this Court’s Opinion reversing the trial court’s Order granting summary judgment in favor of Respondent and against, Appellant, SOUTH CAROLINA CVS PHARMACY, LLC (“Appellant”), and states as follows:

1. The issue in this case is whether Appellant, as Tenant, timely exercised the lease renewal option contained in its May 1998 Lease of Respondent’s property on Hilton Head Island (the “Lease”).

UNDISPUTED MATERIAL FACTS

2. The material facts are not disputed:

(a) The Lease requires written notice to Respondent by Appellant of the exercise of Appellant’s renewal option (“Renewal Notice”). *See* (Lease, Renewal Options Part II, Art. 3, “Tenant may extend the Term of this Lease ... by giving Landlord notice of each such election not later than the Required Advance Notice of Exercise of Renewal Options (as defined in Section 13 of Part I).”; R. 34-35); (Lease, Notices Part II, Art. 27, “[E]ach such notice or demand shall be in writing[.]”; R. 47).

(b) The Lease implicitly provides that all notices, including the Renewal Notice at issue, ***be signed for*** by the notified party, not merely received.¹ Specifically, the Lease expressly provides that “***any Laws to the contrary notwithstanding,***” notice “***shall not be effective for any purpose*** unless the same shall be given or served as follows: by mailing the same to the other party by registered or certified mail, ***return receipt requested,*** or by overnight courier ***provided a receipt is required*** . . .” (Emphasis added) (Lease Part II, Article 27; R. 47).

(c) The required Renewal Notice was to be received (and, therefore, signed for) by Respondent “***no later than***” Sunday, November 3, 2019. *See* (Compl. ¶ 17; R. 22, ¶ 17); (Motion for Temporary Restraining Order, ¶ 17; R. 132, ¶ 17); (King Aff. ¶¶ 8, 10, and 14; R. 148-150, ¶¶ 8, 10, and 14).

(d) The Lease unambiguously provides that “[~~t~~]***he date of receipt of the notice*** . . . shall be deemed the date of service thereof (unless the notice or demand is not received or

¹ Respondent has numerous obligations and Appellant has numerous rights to require things from Respondent pursuant to the Lease by making demand or giving notice. *See, e.g.,* Lease Part II Article 9(d) (Repairs & maintenance) (R. 39), Article 15(a) (Assignment & Subletting) (R. 43), Article 16 (Alterations) (R. 43), Article 33(c) (Maintaining Parking and Exterior Areas) (R. 49), Article 36 (Tenant Audit Rights) (R. 53), Article §47 (Landlord’s Indemnity) (R. 58), and Article 24 provides a required Notice of Default (R. 46). All required notices and demands regarding these matters, as well of the exercise of option to renew, are subject to the Notice provision requirements of Article 27 (R. 47).

accepted in the ordinary course of business, in which case the date of mailing shall be deemed the date of service thereof.” *See* (Lease Part II, Article 27; R. 47).²

(e) Appellant signed its Renewal Notice letter on Tuesday, October 29, 2019, posted it to Respondent via Registered Mail, Return Receipt Requested the next day (Wednesday, October 30, 2019), and its Registered Mail, Return Receipt Requested Renewal Notice reached the Hilton Head Post Office on Saturday, November 2, 2019, at 9:45 am. *See* (Motion for Temporary Restraining Order, ¶¶14-17, R. 132); (January 23, 2020 Affidavit of Peter J. Perry (“Perry Aff.”) ¶¶12-15, R. 78-79 and Exhibits C and D thereto, R. 120-23).³

(f) The Renewal Notice itself was not placed in Respondent’s Post Office Box on November 2, 2019. Rather, and at most,⁴ the tear-off Return Receipt ticket notifying Respondent that a Registered letter from Appellant could be received at the Post Office window was placed in Respondent’s Post Office Box that day.⁵ As such and contrary to the Opinion, the

² The exception contained in Article 27 of the Lease “(unless the notice or demand is not received or accepted in the ordinary course of business, in which case the date of mailing shall be deemed the date of service thereof)” was not the basis of the Court’s Opinion; rather, and as explained below, the Opinion found that because “Notice of [Appellant’s] intent to renew the lease arrived at its final destination and was available for pick up the day before the deadline,” the Renewal Notice was timely. *S.C. CVS Pharmacy, LLC v. KPP Hilton Head, LLC*, No. 2020-001446, 2023 WL 4751778, at *3 (S.C. Ct. App. July 26, 2023).

There was no finding or allegation that Respondent did not receive or accept the Notice; the issue was when it was received, and the Opinion found delivery to Respondent’s Post Office (not to Respondent’s Post Office *Box*) was sufficient.

³ The Opinion refuses to allow Appellant’s own delay in the face of its knowledge of the time it would take for a Renewal Notice to get to Respondent be used against it. Inasmuch as even the “flexible approach” mandated by the EEOC cases relied upon by the Opinion requires an equitable analysis, as explained below and in Note 10, Respondent contends not considering Appellants’ own seeming disregard for the ensuing renewal deadline is misguided.

⁴ There was no finding that the Return Receipt ticket was placed in Respondent’s Post Office box that morning; the parties have merely assumed it was.

⁵ See Note 1. Knowing that a Registered letter could be obtained would not allow Respondent to know it was a Renewal Notice, particularly as Appellant had never responded to Respondent’s property manager’s October 9, 2019, email asking whether Appellant did wish to

Renewal Notice itself had not “arrived at its final destination,” it had not been placed in Respondent’s Post Office Box or been picked up by Respondent at the Post Office window.

(g) Consistent with the practice of those in the commercial real estate industry,⁶ in the normal course of their business, Respondent and its property manager retrieve their mail from their Post Office Box during the customary (Monday – Friday) work week, not on weekends or holidays. *See* (King Aff. ¶12; R. 149).

(h) Respondent did not go the Post Office on Saturday, November 2, 2019, and did not learn that a Registered Letter of some sort from CVS was available for pick-up at the Post Office window after 9:45 am and before it closed at noon. *See* (King Aff. ¶¶11-12; R. 149).

(i) The Master-in-Equity found that “[t]here is no evidence (or allegation) that [Respondent] ignored any Return Receipt ticket that may have been in its Post Office Box after [Appellant’s] Renewal arrived at the Hilton Head Post Office on Saturday, November 2, 2019.” (Order, ¶10; R. 6-7).

(j) As the Master-in-Equity also found and is not disputed, Appellant’s “renewal letter arrived in the Post Office on Saturday, which is not a business day. The next business day, which was Monday, was [itself] beyond the renewal period.” (Order denying Motion to Reconsider; R. 1).

renew, to which Appellant responded that it was “still waiting on instructions,” and then never further responded. *See* (King Aff. ¶ 8; R. 148).

⁶ *See* (Order at p. 3, “[Appellant]’s own expert was of the opinion ‘that the ordinary course of business in the commercial real estate industry is that property owners/managers (or their designated agents), including those acting on behalf of landlords, check their mail, including post office boxes, on all non-holiday business days (**generally, Monday through Friday.**’)” (Emphasis added); R. 6).

(k) Respondent signed for the Renewal Letter at the Hilton Head Post Office on Wednesday, November 6, 2019, and the Post Office recorded it “Delivered” that day.⁷ *See* (King Aff. ¶11, R. 149) and (Exhibit D to Perry Affidavit, the United States Postal Service Tracking History; R. 122-23).

(l) Respondent thereafter notified Appellant it had rejected the Renewal Notice for the Hilton Head Store as being untimely. *See* (Complaint ¶25, R. 23, and Exhibits F and G thereto, R. 124-26 and R. 127-29); (Motion for Temporary Restraining Order, ¶21, R. 133).

3. Based upon these undisputed facts, the Master-in-Equity found that Appellant “did not timely exercise the right to renew the Lease as its required notice was not given in accordance with the provisions of the Lease.” *See* (Order at p. 7; R. 10). No “Return Receipt” to Appellant’s Registered Mail Renewal Notice had been signed for by the Respondent.

THE OPINION

4. On July 26, 2023, this Court entered its Opinion reversing the Beaufort County Master-in-Equity’s decision and finding that “Notice of [Appellant’s] intent to renew the lease arrived at its final destination and was available for pick up the day before the deadline,” which the Court found sufficient receipt of notice. S.C. CVS Pharmacy, LLC, No. 2020-001446, 2023 WL 4751778, at *3.⁸

5. The Opinion relied upon Fourth Circuit Court of Appeals EEOC Title VII cases that, for purposes of starting the 90 limitations period in Title VII EEOC matters, actual receipt of

⁷ The receipt on Wednesday rather than Monday is irrelevant for, as the Master-in-Equity found, Monday “was [itself] beyond the renewal period.” *See* (Order denying Motion to Reconsider; R. 1).

⁸ Inasmuch as it was at most the Return Receipt ticket and not the Renewal Notice itself that had been placed into Respondent’s Post Office Box and had not been picked up by Respondent at the Post Office window, Respondent submits that the Renewal Notice itself had not “arrived at its final destination.”

notice to a party of his/her right to sue was not required, that delivery of that notice was *sometimes* sufficient.⁹ See S.C. CVS Pharmacy, LLC, No. 2020-001446, 2023 WL 4751778, at *2 and cases cited therein.

6. Respondent submits this is error for a number of reasons.

7. Unlike the split of authority regarding whether actual receipt is required to start the limitations period in an EEOC Title VII matter acknowledged by the Fourth Circuit Court of Appeals in Harvey v. City of New Bern Police Dep't, 812 F. 2d 652, 653-54 (4th Cir., 1987), a split which Harvey then resolved in favor of a “flexible rule ... [requiring] a thorough examination of the facts to determine if reasonable grounds exist for an equitable tolling of the filing period,”¹⁰ long-term and consistently applied South Carolina precedent expressly provides that “[b]ecause of its unilateral nature, an option to renew a lease *is strictly construed against the party claiming the option.*” 33 Flavor Stores of Virginia, Inc. v. Hoffman’s Candies, Inc., 296 S.C. 37, 370 S.E.2d 293, 295 (Ct. App. 1988) (emphasis added), *citing* Southern Silica Mining and Manufacturing Company v. Hoefler, 215 S.C. 480, 56 S.E. 2d 321, 328 (1949).¹¹

⁹ The Opinion disregards the fact that the EEOC cases only stand for the proposition that delivery of notice rather than actual receipt is *sometimes* sufficient, not always sufficient. They stand for the proposition that there may be equitable reasons to so provide, that equitable tolling may extend the deadline for commencing an EEOC Title VII lawsuit, and the examples recited in the cases reflect that equitable reasons are the exception, not the rule.

¹⁰As the Court explained in Harvey at 653-54, “The circuits differ as to when the filing period should begin to run. The Seventh Circuit ... adopted an ‘actual receipt’ rule.... The Seventh Circuit refused to read any theory of constructive receipt into Title VII The Fifth and Eleventh Circuits have rejected the actual receipt rule in favor of a flexible rule which requires a case-by-case examination to determine if an equitable tolling of the filing period is appropriate.... Congressional desire for expedition and the requirements of justice can best be served by the flexible rule ... [and] courts should conduct a thorough examination of the facts to determine if reasonable grounds exist for an equitable tolling of the filing period.”

¹¹ Notably, courts finding that delivery of the EEOC notice is constructive receipt are construing the right to sue against the party holding that option. The “flexible approach” allows the party otherwise precluded to provide equitable reasons for not having timely acted. That

8. The 33 Flavor Stores court is quite adamant:

“Where, as in this case, notice of the exercise of the option is required in a certain manner, time is of the essence and ***exact compliance will be required.*** Pope v. Goethe, 175 S.C. 394, 179 S.E. 319 (1935). Where a lessee has a right to renew upon giving notice to the lessor at or before a specified time, in the absence of a waiver, the giving of notice is a condition precedent which must be complied with within the stipulated time; and, absent special circumstances warranting relief from a court of equity, ***the right of renewal is lost if notice is not given in accordance with the provisions of the lease.***” (Emphasis added).

9. “Exact compliance” does not allow for the failure of the actual Renewal Notice to reach the Respondent and simply be “available for pick-up”; notice in Respondent’s Post Office Box at 9:45 am that a Registered letter of some sort would be available at the window between 9:45 and noon that same day, if Respondent happened to go to its Post Office Box on a weekend, is not ‘exact compliance’ or strictly construing the option provisions against the option holder.

10. The Opinion essentially neuters 33 Flavor Stores and will undoubtedly provide many South Carolina litigants with precedent to justify asking the court in their case to disregard the requirement of strict construction of lease options against the option holder.

11. The Opinion conflates the fact that the Registered letter Appellant sent was “available for pick up” with its actual delivery to Respondent, disregards the signed receipt required by the Lease, and seemingly obligated Respondent, a party to commercial lease transaction, to pick up its mail more often than is the custom of the industry, which Appellant’s own expert indicated was limited to weekdays.

party must still then carry the burden to establish why the 90-day period should not be measured by when the EEOC notice is delivered and not actually received.

12. The Opinion totally abrogates the meaning and purpose of a Registered Mail, Return Receipt Requested letter; the Court gives absolutely no meaning to the Return Receipt requirement.

13. The Opinion will provide precedent for litigants who wish to avoid Registered Mail, Return Receipt or Certified Mail notice requirements in other contracts where there is no equitable basis for doing so.

14. The Opinion's reference to and reliance upon the Restatement is similarly misplaced: the Restatement is *not* restating the law of lease renewal options in South Carolina or elsewhere; does not in any way refute the strict construction against the lease option holder South Carolina law mandates; does not say or intimate that a Registered Mail, Return Receipt letter does not actually require a signed Return Receipt despite its express terms; and it does not purport to abrogate specific language contained in agreements, and particularly agreement language regarding options to lease which is to be strictly construed against the option holder.

15. The Opinion will provide South Carolina litigants with precedent that the express language in leases need not be given their unambiguous meaning.¹²

16. To the extent the “flexible approach” and “equitable estoppel” principals Harvey v. City of New Bern Police Dep't, *supra*, calls for may impact the analysis, here there is no allegation that Respondent did anything to interfere with Appellant's ability to timely exercise its option or in any way lead Appellant to believe it did not have to meet the renewal deadline; here, there is no extraneous event – weather, mail failure, death-in-the-family, etc., which caused the Renewal

¹² The Opinion's comments regarding the fact that the Lease provides that “notice shall be ‘given or served’ and ... when notice is not ‘received or served’” adds nothing to the necessary analysis, as the disjunctives do not identify inconsistent circumstances justifying the disregard for the clearly articulated requirement for a written receipt whether given, served, received, or served.

Notice to be delayed. Indeed, the only evidence is that Respondent sent an email to Appellant on October 9, 2019, some 65 days before the renewal deadline asking whether Appellant wished to renew, (Order at p. 2; R. 5), and Appellant not only doddled, but once it decided to renew did not even post the renewal letter for a full day after so deciding. (Order at p. 3; R. 6). It is Appellant, not Respondent, who failed to timely act. No equitable estoppel is available.

17. Finally, the Opinion also disregards paragraph 21 of CVS's Complaint, which admits that "a notice received on a Saturday is 'not received or accepted in the ordinary course of business,' as contemplated by Part II, Paragraph 27 of the Lease." *See* (Complaint, ¶21; R. 22-23).

FOR THE FOREGOING REASONS, Respondent respectfully prays that the Court rehear this matter and grant such other relief as is just and proper.

Respectfully submitted,

Respondent, KPP HILTON HEAD, LLC

By its Attorneys

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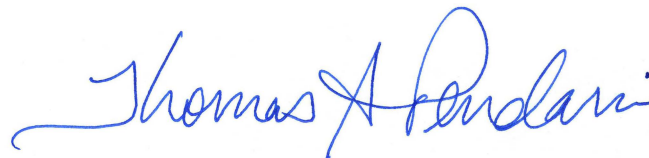
PROOF OF SERVICE

The undersigned hereby certifies that on August 9, 2023, a copy of the Petition for Rehearing filed on behalf of Respondent, KPP Hilton Head, LLC, was served on all counsel of record via electronic mail containing the above-referenced document to each counsel's individual AIS email addresses as follows:

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Beaufort, South Carolina

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Via E-Mail and US Mail

The Honorable Jenny Abbott Kitchings
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RE: SOUTH CAROLINA CVS PHARMACY, L.L.C. vs. KPP HILTON HEAD, LLC
Trial Court Case No.: 2020-CP-07-00155; Appellate Case No.: 2020-001446

Dear Mrs. Kitchings:

Included with the email transmitting this letter please Respondent's Petition for Rehearing and Proof of Service for filing in the above action. Enclosed with the hard copy of this letter please find a check made payable to the Court of Appeals in the amount of \$50 for the filing fee for the Petition for Rehearing.

Please let us know if anything else is necessary for filing Respondent's Petition for Rehearing. Thank you very much for your time and attention to this matter.

With kind regards, I remain

Sincerely,

PENDARVIS LAW OFFICES, P.C.

A handwritten signature in blue ink that reads "Thomas A. Pendarvis". The signature is fluid and cursive.

Thomas A. Pendarvis

TAP/tll

Enclosure(s)

Ec (w/ attachments):

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