THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley Price, Circuit Court Judge

RECEIVED
Sep 18 2023
SC Court of Appeals

Case No. 19-CP-10-06387
Appellate Case No. 2022-001303

Haley Surface, Hannah Glickman, Jill Surface, and Diane Glickman ………………. Defendants,

versus

Fairfield 132 Smith Street, LLC …………………………………………………….. Respondent.

REPLY BRIEF FOR RESPONDENT

s/Matthew Z. Kelly
Matthew Z. Kelly
Oyster Road Law Firm, LLC
751 Johnnie Dodds Blvd Suite 100
Mt. Pleasant SC 29464
Phone: (843) 804-6538
mkelly@oysterrd.com

Attorney for Respondent

TABLE OF CONTENTS

TABLE OF CONTENTS ………………………………………………………………… ii

TABLE OF AUTHORITIES ……………………………………………………….……… iii

STATEMENT OF ISSUES ON APPEAL …………………………………………………….. 1

STATEMENT OF THE CASE ……………………………………………………………1

STANDARD OF REVIEW ……………………………………………………………… 4

ARGUMENT ……………………………………………………………………………… 5

I. THE TRIAL COURT WAS CORRECT IN GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, AS NO GENUINE DISPUTE AS TO ANY MATERIAL FACT EXISTED DURING THE COURT'S PROPER ANALYSIS OF THE DEFENDANTS' FAULT IN BREACHING THE LEASE, THE PARTIES TO BE HELD LIABLE AS TENANTS AND COSIGNERS UPON BREACH, AND THE SUBSEQUENT DAMAGES FLOWING FROM SUCH WRONGFUL ACTS AS INCURRED BY PLAINTIFF-LANDLORD ……………………………………..… 5

A. The trial court properly concluded the Defendants were at fault in breaching a lease agreement on or about August 1, 2019, whereupon their failure to tender rental payments was construed as a default under the rental guidelines ………… 7

B. The trial court was correct in finding and upholding joint and several liability obligations bestowed unto Defendant-cosigners, Jill Surface and Diane Glickman, for all damages and other costs upon breach of the lease, pursuant to the contract……………………………………………………………………….. 10

C. The trial court correctly determined the amount of damages awarded to Plaintiff-Respondent, considering such amounts as provided under the rental agreement, along with Plaintiff's consequential damages suffered during reasonable mitigation efforts ……………………………………………………………….. 13

CONCLUSION ………………………………………………………………….…. 18

TABLE OF AUTHORITIES

Cases

Bluffton Towne Ctr., LLC v. Gilleland-Prince,
412 S.C. 554, 772 S.E.2d 882 (Ct. App. 2015) …………………………………………… 11

Bowers v. Thomas,
373 S.C. 240, 644 S.E.2d 751 (Ct. App. 2007) ……………………………………… 7, 8, 9

Brendle's Stores, Inc. v. OTR,
978 F.2d 150 (4th Cir.1992) ……………………………………………………….… 14

First-Citizens Bank & Tr. Co. v. Conway Nat. Bank,
282 S.C. 303, 317 S.E.2d 776, (Ct. App. 1984) ……………………………………………. 4

Genovese v. Bergeron,
327 S.C. 567, 490 S.E.2d 608 (Ct. App. 1997) ………………………………… 13, 14, 15

Gulf Oil Corp. v. S.C. Tax Comm'n,
248 S.C. 267, 149 S.E.2d 642, (1966) ……………………………………………………. 10

Hendricks v. Clemson Univ.,
353 S.C. 449, 578 S.E.2d 711 (2003) ……………………………………………………… 5

Laser Supply & Servs., Inc. v. Orchard Park Assocs.,
382 S.C. 326, 676 S.E.2d 139 (Ct. App. 2009) …………………………………………… 10

Lee v. Thermal Eng'g Corp.,
352 S.C. 81, 572 S.E.2d 298 (Ct. App. 2002) …………………………………………….. 10

Mathesoya Mgmt. Corp. v. Taylor,
No. 2008-UP-315, 2008 WL 9843963, (S.C. Ct. App. June 25, 2008) …………….. 13, 15

Moore v. Moore,
360 S.C. 241, 599 S.E.2d 467, (Ct.App.2004) …………………………………………… 13

Regions Bank v. Schmauch,
354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003) ………………………………….. 5, 11, 12

Simon v. Kirkpatrick,
141 S.C. 251, 139 S.E. 614 (1927) …………………………………………………….. 13

Stanley v. Atlantic Title Ins. Co.,
377 S.C. 405, 661 S.E.2d 62, (2008) …………………………………………………... 11

State v. Dickinson,
339 S.C. 194, 528 S.E.2d 675 (Ct.App.2000) ……………………………….………… 10

Swinton Creek Nursery v. Edisto Farm Credit, ACA,
334 S.C. 469, 514 S.E.2d 126 (1999) …………………………………………………... 6

United Dominion Realty Tr., Inc. v. Wal-Mart Stores, Inc.,
307 S.C. 102, 413 S.E.2d 866 (Ct. App. 1992) ……………………………………..... 10

Willms Trucking Co. v. JW Const. Co. Inc.,
314 S.C. 170, 442 S.E.2d 197 (Ct. App. 1994) ………………………………………. 6

Dictionaries

Black's Law Dictionary (6th ed. 2021) ……………………………………………………… 12

Marriam Webster Dictionary, (Jul. 2023) …………………………………………………… 12

Statutes

S.C. Code Ann. § 27-40-710 ………………………………………………………………….. 7, 8

STATEMENT OF THE ISSUES ON APPEAL

I. The Trial Court correctly granted Plaintiff's Motion for Summary Judgment, as there lacked any dispute as to a material fact of the court's analysis, including the assessment of fault properly levied upon Defendants in their unilateral breach of the lease, the upholding of joint and several liability to the known cosigners, and the determination of appropriate damages levied unto all Defendants which flowed from such wrongful acts and continued through Plaintiff's completed remediation.

   A. The Trial Court, in analyzing the information and evidentiary support surrounding this matter, properly concluded and held the Defendants responsible for breaching the lease agreement, as shown through the facts surrounding their impermissible failure to tender rental payments and subsequent abandonment in August 2019.

   B. The Trial Court, construing the rental agreement in its entirety, properly found Defendant-cosigners jointly and severally liable for damages upon breach, as is pursuant to the common understanding and ordinary use of the word "cosigner" in contractual customs.

   C. The Trial Court correctly ascertained the amount of damages sustained by Plaintiff, doing so in accordance with the applicable provisions under the rental agreement and factoring Plaintiff-landlord's consequential damages absorbed during reasonable repair and mitigation efforts.

STATEMENT OF THE CASE

This case arises from the breach of a residential lease agreement committed by Defendants Haley Surface and Hannah Glickman, the tenants. The case also involves Defendants Jill Surface and Diane Glickman, whom, as co-signers to the agreement, were jointly and severally liable for all terms, conditions, and rent payments. The Defendant-Appellants breached a lease agreement for 132 Smith Street, Unit 5 Charleston, S.C. 29413, owned by Plaintiff-Respondent, on or about August 1, 2019 whereby tenants and/or co-signers failed to tender rent owed. Upon information and belief, Appellants abandoned the leased premises in late July, or early August of 2019, after failing to obtain a replacement tenant for their lease. Appellants were in continuous breach of the rental agreement in subsequent months, absconding from Respondent's property without paying rent amounts for September, October, November, and December, 2019.

Plaintiff-Respondent filed suit against the named Defendants on December 10, 2019 for breach of the rental agreement and damages. (Summons and Complaint R.pp.____). Defendants Hannah and Diane Glickman filed their answer to the complaint *pro se* on January 6, 2020. (Answer Glickman R.pp. ___). Respondent filed a Motion for Entry of Default Judgment against Hannah and Diane Glickman on January 16, 2020, yet the Motion remained unheard following the Glickman's *pro se* January 6 answer. (Glickman Motion - Default R.pp. ___). On January 24, 2020, Plaintiff-Respondent filed a Motion for Entry of Default Judgment against Jill Surface upon failure to appear in the action. (Surface Motion - Default R.pp.___). On January 11, 2021, the Court granted Plaintiff-Respondent's Motion for Entry of Default Judgment against Jill Surface. (Order - Default Jdgmt R.pp. ___).

Defendant-Appellant Haley Surface did not file her answer until April 9, 2021, whereby she did so *pro se.* (H. Surface Answer R.pp. ___). Then, on April 12, 2021, Jill Surface filed her answer *pro se*. (J. Surface Answer R.pp. ___). On April 22, 2021, undersigned counsel motioned the Court for Damages against Defendants Jill and Haley Surface, whereby the Honorable Jennifir B. McCoy continued the hearing. On July 14, 2021, attorney for Defendants Jill and Haley Surface filed a Motion for Relief from Entry of Default. (Motion for Relief from Default R.pp. ____). On October 1, 2021, attorney Sean Trundy, on behalf of Jill Surface, filed an Amended Answer. (Surface Amended Answer R.pp. ____). Also on October 1, 2021, the Honorable Jennifer B. McCoy granted the Motion for Relief from Entry of Default, filed on behalf of Jill Surface. (Order Granting Relief R.pp. ___).

On January 25, 2022, Plaintiff, through undersigned counsel filed a Motion for Summary Judgment as to the existence of a breach of contractual duties on part of all Defendants. (Plaintiff Motion for SJ R.pp. ____). Subsequently, on April 22, 2022, Plaintiff's Motion for Summary

Judgment, as heard on April 19, was granted by the Honorable Bentley D. Price. (Order Granting SJ for Plaintiff R.pp. ___). In response, on April 29, 2022, attorney Trundy for Defendants Jill and Haley Surface filed a Motion for Reconsideration and Rehearing on behalf of Plaintiff' Motion for Summary Judgment. (Surface Motion to Reconsider R.pp. ___). On May 2, 2022, attorney Andrew Shepherd, on behalf of Defendant Hannah Glickman, filed a Motion to Alter, Amend or Reconsider the Order Granting Summary Judgment. (Glickman Motion to Alter, Amend R.pp. ___). Both of Defendant-Appellants' Motions were denied, respectively, on June 6, 2022 whereupon the Honorable Judge Price entered the Order Denying Defendants' Motion to Reconsider. (Order Denying Motion to Reconsider R.pp. ___). Following Plaintiff's filing of a Proposed Order for Summary Judgment on June 13, 2022, the Honorable Judge Price granted Plaintiff's Motion on August 13, 2022. (Order Granting SJ R.pp. ___). In the Order, the Court found:

1. Plaintiff and Defendants entered into a binding contract in the form of a residential lease agreement on January 23, 2019.
2. Under said residential lease agreement, Defendants jointly and severally liable for annual rent in the amount of Thirty-Nine Thousand Three Hundred and NO/100 ($39,300.00) Dollars.
3. Under said residential lease agreement, rent was to be paid monthly by Defendants Hannah Glickman and Haley Surface in the amount of Three Thousand Two Hundred Seventy-Five and NO/100 ($3,275.00) Dollars.
4. Under said residential lease agreement, the performance of Defendants Hannah Glickman and Haley Surface was guaranteed by Defendants Jill Surface and Diane Glickman, who each were co-signers to the lease.

5. Defendants breached the residential lease agreement on August 1, 2019, Tenants failed to tender rent in the amount of Three Thousand Two Hundred Seventy-Five and NO/100 ($3,275.00) Dollars.
6. Defendants further breached the residential lease agreement when they abandoned the leased Premises and failed to secure new tenants.
7. Despite being provided notice by Plaintiff, Defendants failed to cure their breaches.
8. Defendants' breaches of the residential lease agreement caused Plaintiff to suffer damages totaling Forty-Six Thousand Eighty Five and 87/100 ($46,085.87) Dollars in the form of lost rents, late fees, cleaning fees, repairs, management fees, utilities, and legal costs.

Upon information and belief, Attorney Trundy served and filed a Notice of Appeal on behalf of Defendants Jill and Haley Surface on or about September 15, 2022. On September 17, 2022, Attorney Shepherd filed a Notice of Appeal on behalf of Defendant Hannah Glickman. (Notice of Appeal R.pp. ___). Mr. Sean Trundy unfortunately passed away in mid-January, 2023. Attorney Shepherd since retained both Jill Surface and Haley Surface, making him the current representative of all Appellants.

STANDARD OF REVIEW

"Where a motion for summary judgment presents a question as to the construction of a written contract, the question is one of law if the language employed by the agreement is plain and unambiguous." First-Citizens Bank & Tr. Co. v. Conway Nat. Bank, 282 S.C. 303, 305, 317 S.E.2d 776, 777 (Ct. App. 1984). Thus, in such an instance, "summary judgment is proper and a trial unnecessary where the intention of the parties as to the legal effect of the contract may be gathered from the four corners of the instrument itself." Id.

A trial court should grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; Regions Bank v. Schmauch, 354 S.C. 648, 659, 582 S.E.2d 432, 438 (Ct. App. 2003). Upon the movant's showing of the initial burden, namely "an absence of evidentiary support for the opponent's case," it remains true that the nonmoving party "cannot simply rest on mere allegations or denials contained in the pleadings." Id. at 660. "Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial." Id.

ARGUMENT

I. The Trial Court was correct in granting Plaintiff's motion for Summary Judgment, as no genuine dispute as to any material fact existed during the court's proper analysis of the Defendants' fault in breaching the lease, the parties to be held liable as tenants and cosigners upon breach, and the subsequent damages flowing from such wrongful acts as incurred by Plaintiff-landlord.

A breach of contract is, quite simply put, the failure to perform a duty owed to another at a time when performance is due. In South Carolina, to assert a claim for breach of contract, one must point to an identifiable promise to an agreement that the opposing party failed to honor. Hendricks v. Clemson Univ., 353 S.C. 449, 578 S.E.2d 711 (2003). This principle is no different in a residential lease agreement. As the Defendants stipulated, the underlying rental agreement between the parties was a valid, enforceable contract. Within the lease is a provision for the payment of rent by the tenant(s), which appears conspicuously in the signed agreement, using unambiguous language. (Lease Agreement R.pp. ___). The Defense seemingly acknowledges the occurrence of a breach yet has chosen instead to litigate the issue of the party responsible for the broken agreement. However, "where a contract is not performed, the party who is guilty of the first breach

is generally the one upon whom all liability for the nonperformance rests." Willms Trucking Co. v. JW Const. Co. Inc., 314 S.C. 170, 178, 442 S.E.2d 197, 201 (Ct. App. 1994).

The trial court found the Appellant-tenants breached the lease upon failure to tender payment on or about August 5, 2019, the last day to do so under the lease provisions. Per paragraph six (6) of the rental agreement, rent amounts were to be paid on or before the first day of each month. (Lease Agreement R.pp. ___). In a provision beneath the rent paragraph, the language provides: "If tenant does not pay rent within five days of the due date, landlord can start to have tenant evicted and may terminate the rental agreement, as this constitutes written notice in conspicuous language in this written agreement of landlord's intention to terminate and proceed with eviction." (Lease Agreement R.pp. ___). As set forth in the lower court proceedings, Defendants failed to tender rental amounts for the month of August, 2019, a direct violation of their lease with Plaintiff-landlord.

The Appellants have not disputed these facts. Rather, Defense counsel has elected to invoke the presence of case law such as Swinton Creek Nursery v. Edisto Farm Credit, ACA, 334 S.C. 469, 514 S.E.2d 126 (1999). The mention of Swinton Creek Nursery in Appellants' brief is confounding, as none of its discussion pertains to an issue before the court in this case. In fact, the main issue heard by the Court was whether a party had any available redress for breach of contract against another, when they, themselves, are in default. The Court in *Swinton Creek Nursery* ruled that a like-individual did *not* have grounds for such an action. In sum, a party bringing suit for breach of contract must demonstrate completed performance on their part, or the ability, willingness, or readiness to do so. Id. at 487.

At no point prior to the material breach committed by the Appellants did Respondent-Landlord repudiate or otherwise fail to perform any duty or obligation tied to the contract. Any

inference on the part of Appellants regarding a breach committed by Respondent is contrary to the record and all stipulations by the parties to date. The first, only, and final, material breach of the lease agreement was on the part of the Defendants, as was concluded by the trial court.

Upon complete review of Appellants' initial brief, any mention of relevant, substantive case law on-point with this type of landlord-tenant dispute is curiously omitted. Yet, South Carolina case law is ripe with discussion and decisions in direct association to this scenario, making Appellants' approach increasingly unusual. An action to recover unpaid rent and costs of repairs is far from a novel issue in this State's courts. Instead, it seems the Defendant-Appellants have elected to pursue a different route on appeal, one that narrowly focuses on the language of the lease, in a vacuum, without mention of the facts the parties and court have before them.

A. The trial court properly concluded that the Defendants were at fault in a breach of the lease agreement on or about August 1, 2019, whereupon their failure to tender rental payments was construed as a default under the rental guidelines.

Upon the refusal or inability to pay rental amounts when due or demanded, "the landlord may terminate the rental agreement provided the landlord has given the tenant written notice of nonpayment and his intention to terminate the rental agreement if the rent is not paid within that period." S.C. Code Ann. § 27-40-710. The notice requirement of this provision may be satisfied through language in the initial lease or via subsequent correspondence. In fact, compliance with such landlord notice duties can be obtained if the lease agreement informs the lessee of the consequences for late rental payment and the lessor's right to eviction. Bowers v. Thomas, 373 S.C. 240, 246, 644 S.E.2d 751, 753 (Ct. App. 2007). The presence of such a "provision in the rental agreement fully satisfies the 'written notice' requirement under this subsection" and thus, alleviates any additional notice disputes. Id.

In Bowers v. Thomas, the Court of Appeals reviewed a defendant-tenant's contention that the lower court erred in finding "legally sufficient notice to justify termination of his lease." Id. at

245. Thomas, the tenant, who failed to tender timely rent amounts for the month of June 2005, again defaulted by failing to pay July rent on time. Id. at 243. Bowers, the plaintiff-landlord, gave Thomas written notice of nonpayment and provided his intention to terminate the lease if not paid within ten days. The July 15 notice read:

> If you do not pay your rent on time this is your notice. If you do not pay your rent within 10 days of the due date, the landlord can start to have you evicted. You will get no other notice as long as you live in this rental unit. Id. at 243

When Thomas failed to comply, Bowers obtained a magistrate's judgment ordering the tenant's eviction. Upon review, the Court of Appeals confirmed the defendant was at fault for termination of the lease, quickly tossing aside challenges of the notice issue, stating there was "sufficient notice under section 27–40–710(B) from the July 2005 letter of the consequences if he failed to pay his rent in a timely manner." Id. at 246.

Here, any discussion regarding the breach of the lease agreement and which party – or parties – is at fault shall be limited. This should come without surprise, as no conceivable argument, notion, or explanation on Appellants' behalf can justify their unequivocal breach of contract. This is not a new assertion, nor an unsubstantiated allegation. There are swaths of evidence to support this conclusion, including email correspondence, photographic documentation, and affidavits. However, Appellants' brief fails to address the undisputed factual elements within the record pertaining to the underlying breach. Instead, the latest argument takes the approach of re-stating various provisions within the lease, subsequently analyzing them without reference to judicial, statutory, or any other authority.

As set forth in S.C. Code Ann. § 27-40-710 and Bowers v. Thomas, 373 S.C. 240, 246, 644 S.E.2d 751, 753 (Ct. App. 2007), upon compliance with the notice requirement, a lessor is entitled

to hold a defaulting tenant liable for breaching a lease agreement. Further, the notice provision in the rental agreement, as supplied by Respondent-landlord to Appellants provided strikingly comparable language as that highlighted in Bowers, reading:

> NOTICE TO TENANT: IF TENANT DOES NOT PAY RENT WITHIN FIVE DAYS OF THE DUE DATE, LANDLORD CAN START TO HAVE TENANT EVICTED AND MAY TERMINATE THE RENTAL AGREEMENT, AS THIS CONSTITUTES WRITTEN NOTICE IN CONSPICUOUS LANGUAGE IN THIS WRITTEN AGREEMENT OF LANDLORD'S INTENTION TO TERMINATE AND PROCEED WITH EVICTION. TENANT WILL RECEIVE NO OTHER WRITTEN NOTICE AS LONG AS TENANT REMAINS IN THIS RENTAL UNIT. **(Lease Agreement R.pp ___)**

The facts of this case leave no further discussion as to the responsible, breaching party. The Defendant-Appellants were unquestionably at fault. The lease agreement required Appellants to tender rent payments on or before the first of each month during the rental term. Failure to do so within five (5) days of the due date permitted the Plaintiff-Respondent to initiate eviction proceedings and terminate the lease. (Lease Agreement R.pp. ___). Appellants do not dispute that the tenant-Defendants, Hannah Glickman and Haley Surface, failed to pay their rent to Plaintiff on or before August 1, 2019. Likewise, facts of the continued noncompliance of the tenants while in default, which carried past the fifth day of the month, has remained unchallenged. The Appellants' unexcused failure to comply with the terms of the lease constitutes an unequivocal, material breach of contract. Despite efforts of Appellants to blatantly exclude discussion of these substantiated claims in their brief – choosing to include unrelated snippets from the lease, instead – the level of fault on the Defendants behalf shines through.

B. The trial court was correct in finding and upholding joint and several liability obligations bestowed unto Defendant-cosigners, Jill Surface and Diane Glickman, for all damages and other costs upon breach of the lease, pursuant to the contract.

In South Carolina, the "cardinal rule" of contractual interpretation amidst disagreement is "to ascertain and give effect to the intention of the parties." United Dominion Realty Tr., Inc. v. Wal-Mart Stores, Inc., 307 S.C. 102, 105, 413 S.E.2d 866, 868 (Ct. App. 1992). The intention of the parties to a contract may be revealed through the plain language assented to, "rather than the subjective, after-the-fact meaning one party assigns to it." Laser Supply & Servs., Inc. v. Orchard Park Assocs., 382 S.C. 326, 334, 676 S.E.2d 139, 144 (Ct. App. 2009). Further, a contract is said to be unambiguous – capable of only one meaning – "when viewed objectively by a reasonably intelligent person who (1) has examined the context of the entire integrated agreement; and (2) is cognizant of the customs, practices, usages, and terminology as generally understood in the particular trade or business." Id. Thus, when posing questions of construction in a written agreement, if the contract's language is "clear and unambiguous, the question is not one of fact but one of law." United Dominion Realty Tr., Inc. v. Wal-Mart Stores, Inc., 307 S.C. 102, 105, 413 S.E.2d 866, 868 (Ct. App. 1992).

In South Carolina, where a word is not expressly defined by statute, State courts, including those at the Appellate level, have looked to the usual dictionary denotation to supply its meaning. Lee v. Thermal Eng'g Corp., 352 S.C. 81, 91–92, 572 S.E.2d 298, 303 (Ct. App. 2002). State courts have turned to both Webster's New International Dictionary and Black's Law Dictionary for definitions in similar instances. See e.g. Gulf Oil Corp. v. S.C. Tax Comm'n, 248 S.C. 267, 270, 149 S.E.2d 642, 643 (1966); State v. Dickinson, 339 S.C. 194, 528 S.E.2d 675, (Ct.App.2000).

In Bluffton Towne Ctr., LLC v. Gilleland-Prince, 412 S.C. 554, 772 S.E.2d 882 (Ct. App. 2015), a defaulting tenant appealed the awarded amount in a lower court judgment, arguing the

lease's undefined "damages" term was given improper meaning and effect. Relying on South Carolina jurisprudence, the Court remarked that contractual terminology is to be viewed and applied "in their plain, ordinary, and popular sense." Id. at 569 (citing Stanley v. Atlantic Title Ins. Co., 377 S.C. 405, 414, 661 S.E.2d 62, 67 (2008)). Addressing the omission of "damages" from the list of defined terms, the lower court looked to the "four corners of the subject lease," reading it as a whole to "determine the meaning and effect" intended. Id. at 570. Further, as the Court of Appeals agreed, "Not only did the lease reserve BTC's right to recover damages upon termination, but it also provided a specific damages formula in the default provision stating Tenant must pay all costs, damages, and expenses BTC suffers by reason of Tenant's default. Id. Lastly, regarding Appellant's attempt to escape future rent liabilities, the Court concluded:

> The "costs, *damages,* and expenses... suffered by [BTC] by reason of Tenant's defaults" undoubtedly includes the rent BTC was unable to recover during the remainder of the subject lease term due to Tenant's default. We find no other construction would provide full meaning to all of the terms in the lease. Id.

In 2003, a situation of professed ignorance of contractual liability obligations played out in the landmark case, Regions Bank v. Schmauch, 354 S.C. 648, S.E.2d 432, (Ct. App. 2003). Here, while pleading fraud as an affirmative defense in a loan collection suit, Appellant claimed Respondents withheld information regarding the extent of her "unlimited" liability as guarantor to two bank loans. Id. Appellant, as guarantor to her son's loans, put up a personal certificate of deposit (CD) as collateral, and further guaranteed payment in the event of his default. When the son's payments ceased, Regions Bank turned to Appellant, who also refused to pay, claiming "that while her signature may be on the Guarantee Agreement, she never intended to enter into an agreement for unlimited liability." Id. at 439. However, the court vehemently disagreed with this

contention, noting, "Appellant could easily have determined for herself the extent of her liability by reading the [guaranty.] It clearly enunciated that she was guaranteeing all debts, present and future, and that her liability was unlimited. Appellant now cannot complain because the extent of her liability was not explained to her by Respondents." Id. at 446.

Here, the Appellants have elected to take issue with the omission of the term "co-signer" from the list of definitions. Seemingly, they claim the absence of such clarity in the contract creates "internal inconsistencies," effectively relieving Defendant-cosigners, Jill Surface and Diane Glickman of liability for damages. Such a position blatantly ignores established South Carolina law in contractual interpretation and the exclusion of a defined term. As noted, State courts turn to dictionary interpretation in like instances. According to Black's Law Dictionary, the term "cosign" means "to sign a document along with another person, [usually] to assume obligations and to supply credit to the principal obligor." *Cosign*, Black's Law Dictionary (6th ed. 2021). Similarly, Marriam Webster's Dictionary denotes the word "cosigner" as "a joint signer of a promissory note." *Cosigner*, Marriam Webster Dictionary, (Jul. 2023).

The notion that the absence of one word from a list of defined terms somehow relieves co-defendants from liability is not one grounded in fact. As noted, State courts have no difficulty interpreting and effecting the meaning of common words that often appear in binding contracts, but due to clerical error or unilateral mistake, are omitted. In fact, this discussion is exceptionally similar to the challenge presented in Regions Bank v. Schmauch, where the Court noted the ease in which the appellant could have discerned her level of liability. Here, despite the absence of the term's definition, Appellant-co-signers were either aware, should have been aware, or should have inquired further regarding the extent of their financial liability under the lease. To say that the term "cosigner" is one of common usage would be an understatement. There is little challenge to the

task of assigning meaning to the word, as it appears in nearly every modern contract of this type. Lastly Appellant-cosigners do not dispute their knowledge of the phrase's definition or any other obligations conferred upon them at signing. Rather, this assertion is brought only as a means to further muddle the waters of a validly adjudicated dispute.

C. The Trial Court correctly determined the amount of damages awarded to Plaintiff-Respondent, considering such amounts as provided under the rental agreement, along with Plaintiff's consequential damages suffered during reasonable mitigation efforts.

In an action for breach of contract, "the measure of damages is the difference between the rent fixed in the lease and the rental value of the premises for the entire term, at the time of the breach, together with such special damages as plaintiff may plead and prove to have resulted from the breach." Simon v. Kirkpatrick, 141 S.C. 251, 139 S.E. 614, 617 (1927). In South Carolina, the law is clear: "the party who claims damages should have been minimized has the burden of proving they could reasonably have been avoided or reduced." Moore v. Moore, 360 S.C. 241, 262, 599 S.E.2d 467, 478 (Ct.App.2004). Furthermore, to meet this burden of proof in a breach of lease dispute, a tenant must "present affirmative evidence showing how a landlord's damages could reasonably have been avoided, or how the landlord's efforts were unreasonable under the circumstances." Mathesoya Mgmt. Corp. v. Taylor, No. 2008-UP-315, 2008 WL 9843963, at *3 (S.C. Ct. App. June 25, 2008).

In Genovese v. Bergeron, 327 S.C. 567, 490 S.E.2d 608 (Ct. App. 1997), a tenant appealed a directed verdict in favor of her landlord, contending a failure to "reasonably mitigate" damages in an unpaid rent action. Here, the defendant-tenant abandoned the premises before lease expiration. The plaintiff-landlord subsequently brought suit, successfully recovering the remaining rental period amounts owed. On appeal, the Court began discussion of the issue by noting that any injured party must mitigate their damages in accordance with a "person of ordinary prudence" in

similar circumstances. Id. at 573. "However, the law does not require unreasonable exertion or substantial expense for this to be accomplished." Id. The tenant's primary argument was that the landlord, in failing to "adequately" re-advertise the property upon abandonment, caused a greater extent of damages. The Court was not swayed, concluding the "tenant failed to meet her burden" of proof regarding reduction or avoidance of damages. Id. Notably, "the tenant failed to present any evidence showing what types of advertising would have been reasonable, how much sooner the landlords could have rented or sold the property through other methods, or that the landlords' actions to rent the property were inadequate or improper." Id.

While rejecting the appellant's argument, the Court also addressed reasonable mitigation efforts during instances when lessor repairs are necessary before reletting efforts may commence. In doing so, the Genovese Court referenced a Fourth Circuit opinion concerning a parallel issue, Brendle's Stores, Inc. v. OTR, 978 F.2d 150 (4th Cir.1992). Here, following the tenant's breach of a lease agreement, OTR, the landlord, was "obligated to 'use its best efforts to relet the demised premises at a reasonable rental value.'" Id. at 158. However, prior to OTR's initiation of the re-leasing process, extensive repairs had to be completed after the tenant neglected to do so. Undergoing a similar review of advertisement, repair, and mitigation efforts, the OTR Court applied South Carolina law, finding that, "although [the landlord] did not expedite repairs of the building, [the plaintiff] failed to present evidence showing that this inaction discouraged any prospective tenants." Id.

Expounding upon the discussion in Genovese v. Bergeron, the Court in Mathesoya Mgmt. Corp. v. Taylor, No. 2008-UP-315, 2008 WL 9843963 (S.C. Ct. App. June 25, 2008), echoed analogous sentiments regarding tenants challenging a lessor's "reasonable efforts" in reletting processes. Here, after abandoning the premises, Taylor, the defendant-tenant, took issue with the

plaintiff-landlord's delay in acquiring new tenants for reletting. Taylor argued the "efforts to re-lease the premises were insufficient to mitigate its damages." Id. at *3. The Court declined to entertain this notion, concluding, "Taylor failed to present any affirmative evidence of steps Mathesoya should have taken or that Mathesoya's efforts were unreasonable under the circumstances." Id. In fact, the Court found sufficient evidence showing the landlord *had* effectively mitigated his damages. Notably, the plaintiff testified to "multiple steps to re-lease the premises, including cleaning the premises, replacing the air conditioning units, advertising, replacing carpet, repairing a damaged wall, and repainting." Id.

The similarities between abovementioned South Carolina landlord-tenant decisions and the case at bar are stark. Here, Appellants state, without justification or evidentiary support, that Respondent did not properly mitigate their damages. The Appellants further claim, blindly, that Plaintiff did not adequately advance the pursuit of new tenants in a timely manner, and that the repairs to the abandoned unit were unnecessary. Their brief repeatedly mentions "discrepancies" in factual assertions and unreasonable methods taken by the landlord. Yet, there has been no offering of any affirmative evidence or supplemental information as to what those inconsistencies may be. Instead, Appellants conveniently glossed over the detailed ledger of necessary repair work conducted on the unit prior to reletting upon the Defendants' breach. This information and evidence was provided to Appellants during discovery. Appellants also chose to ignore the blatantly damaged condition in which the unit was abandoned, undoubtedly unfit for human habitation in the immediacy. In sum, Appellants are asking this court to view these events in a vacuum – omitting all situational and contextual analysis. Yet, there is no shortage of evidence documenting the willful abandonment of the unit, including; photographic evidence of the damaged premises; the subsequent mitigation steps taken by Plaintiff-landlord; and the final invoices from completed

repairs. Respondent acted as a landlord of ordinary prudence under similar circumstances, taking the appropriate steps to assess, review, and subsequently coordinate repairs and replacement items upon Appellants' breach.

Appellants also raised the question of when the moment of abandonment took place, noting an August 27, 2019 email from Respondent's manager, Jennifer Veyera, to Defendants alleviated the tenants' responsibility to find replacement lessees. Indeed, the referenced email did remove Defendants from the replacement process. Yet, the decision by Plaintiff to assume control of the new tenant search process was made to avoid continuing issues with the unreliable Defendant-tenants, and nothing more. Appellants had, on multiple occasions, attempted to identify new tenants to assume their lease, each time without success. After roughly 26 days in default, Plaintiff sought to mitigate the frustrations that would undoubtedly persist if Defendants were permitted to find their own replacement. This email did nothing to alleviate the responsibilities of rent and other outstanding costs owed by Defendants in accordance with their breach. In fact, the Respondent's agent conveyed this exact message to Defendants, noting, "This does not relieve you or your consigners from the responsibility of the lease." (Abandonment Email R.pp. ___).

Next, in another unsubstantiated assertion, Appellants offhandedly imply that Plaintiff "coerced" the Defendants into a lease renewal, using the student housing demand as leverage. Firstly, given the demand for downtown spaces exceeds the usual supply, a landlord similarly situated to the Respondent would have no need to "coerce" any would-be tenant. Yet, the downtown student housing situation is one that may assist in explaining Appellants' questioning of Plaintiff's time taken to relet the premises. After all, with the overwhelming majority of Charleston college students – whether from College of Charleston, the Citadel, or Medical University of South Carolina – reporting to school in mid-August every year, the likelihood of

finding a replacement student tenant during the fall semester is extremely less likely. This quantifiable barrier, coupled with the need for Respondent's extensive repairs to the unit, should assist in Appellants' understanding of the reletting timeline.

In closing, it is important to briefly address the nonsensical discussion included in the latter half of Appellants' first subsection of their initial brief. Here, Appellants contend the May 22 correspondence, wherein Hannah Glickman attempted to escape lease obligations some 15 months before expiration, applied "notice" of future abandonment to the Plaintiff-landlord. (Glickman May Correspondence R.pp. ___). Appellants' brief states "the landlord was aware as early as May of 2019 that neither [Defendants] would be occupying the premises." Be that as it may, the email exchange did nothing to attenuate or dissolve the tenants' responsibility under the lease. The Defendants' request for early release from the agreement bestowed no obligation unto the Plaintiff, and, pursuant to the contractual language, the landlord rightfully refused to oblige. Yet, Respondent continuously illuminated other options for the tenants, none of which were taken by Defendants. (Glickman May Correspondence R.pp. ___). Yet, Appellants' mention of the May 22, 2019 email exchange should not be completely disregarded. In fact, it illustrates the beginning of Defendants' plot to breach their lease at any cost, discarding the other equitable methods provided, all while quietly packing their things, disabling essential utilities in the mid-summer Charleston heat, and plotting escape from responsibility under the rental agreement.

CONCLUSION

For the reasons stated herein, the Court of Appeals should uphold the correct rulings of the lower court in granting summary judgment in favor of the Plaintiff.

Respectfully Submitted,

s/Matthew Kelly

Matthew Z. Kelly
Oyster Road Law Firm, LLC
751 Johnnie Dodds Blvd Suite 100
Mt. Pleasant SC 29464
Phone: (843) 804-6538
mkelly@oysterrd.com

Attorney for Respondent

Mt. Pleasant, South Carolina
Dated: Monday, September 18, 2022