

STATE OF SOUTH CAROLINA  
COUNTY OF BEAUFORT

BOKF REAL ESTATE HOLDING,  
LLC,

Plaintiff,

vs.

T&S MANAGEMENT, INC. and  
TURAN STRANGE,

Defendants.

IN THE COURT OF COMMON PLEAS  
FOURTEENTH JUDICIAL DISTRICT

CASE NO.: 2020-CP-07-00977

ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT

RECEIVED

Oct 10 2023

SC Court of Appeals

This matter come before the Court by motion of Plaintiff BOKF Real Estate Holding, LLC for summary judgment against Defendants T&S Management, Inc. and Turan Strange. The matter was argued by counsel, on March 28, 2023, at a hearing held via WEBEX remote video conference pursuant to and by consent of the parties and counsel. Present at the hearing were Edward M. Kubec, Esquire, CoffeyKubec, LLP, attorney for the Plaintiff, and Michael Mogil, Esquire, Mogil Law Firm, attorney for the Defendants.

Having considered the positions of the parties as argued by their respective counsel together with the pleadings and exhibits filed of record, motions, affidavits, and exhibits including the depositions of the parties with exhibits, as well as applicable statutory and case law, the Court hereby **GRANTS** the Plaintiff's Motion for Summary Judgment.

#### **FINDINGS OF FACT**

1. On April 11, 2016, Defendant T&S Management, LLC ("T&S"), as tenant, and WD-I Associates, LLC ("WD-I"), as landlord, entered into a written Lease Agreement ("Lease") for commercial property located at Suite 301 of the Sea Turtle Marketplace Shopping Center ("Shopping Center") at 430 Fording Island Rd., Hilton Head Island, South Carolina ("Premises") pursuant to which T&S was to operate a restaurant known as Another Broken Egg Cafe.
2. In order to further secure payment under the Lease, on or about April 11, 2016, the Defendant Turan Strange ("Strange") executed a written unconditional Guaranty

(“Guaranty”), whereby he guaranteed the payment of all rents and other sums and the performance of the terms, covenants and conditions by the tenant under the Lease.

3. The Lease includes the following terms relevant herein:
  - a. T&S agreed to lease the Premises for a period of ten (10) years with an option to renew for three terms of five years each, and to pay the landlord the Minimum Rent at the monthly and yearly rates set forth in Lease. (§1(g)).
  - b. T&S agreed to pay the landlord Additional Rent which included a share of the real property taxes, insurance and other operating expenses incurred by the landlord to operate, maintain and manage the Shopping Center. The Minimum Rent and the Additional Rent are collectively referred to herein as the “Rent”. (§6 and §7).
  - c. Equipment and fixtures that are an integral part of the operation of the Premises or that are permanently installed in the Premises (such as built-in cabinets) shall not be considered trade fixtures. (§11).
  - d. T&S agreed that any additions or improvements installed in the Premises immediately became property of the landlord and shall not be removed without landlord approval. (§17).
  - e. Landlord shall undertake commercially reasonable efforts to re-let the premises and mitigate any damages suffered by landlord as a result of the tenant’s default, however tenant’s liability under the Lease shall not be affected by or diminished in any way whatsoever, for landlord’s failure to re-let the Premises, or if the Premises are re-let, for landlord’s failure to collect the rentals under such re-letting. (§25(b)).
  - f. In the event of a tenant default, the landlord may re-let all or part of the Premises accepting any rents then obtainable, for a term or terms that may be greater or less than the balance of the term of the Lease, and landlord may grant concessions or free rent without in any way affecting tenant’s liability for the Rent payable under this Lease. (§25(b)).
  - g. In the event of a tenant default, the tenant is liable for the following damages:
    - i. All Rent and damages that may be due or sustained by landlord up to the time the Lease terminates, the Premises are relet, or landlord takes possession of the Premises, whichever occurs later, and the performance of all other obligations of tenant accruing under this Lease through such date,

- (collectively “Accrued Damages”) which Accrued Damages shall bear interest at the Default Rate until paid; and
- ii. All reasonable costs, fees and expenses (including without limitation attorney's fees and expenses, brokerage commissions and fees) incurred by landlord in pursuit of its remedies under the Lease and in renting the Premises to others including, but not limited to Re-letting Preparations (all such Accrued Damages, costs, rents and expenses being referred to collectively as the “Default Damages”); and
  - iii. Future Damages, which, is the amount (the “Deficiency”) by which (i) the Rent under the Lease until the expiration date or the Term exceeds (ii) the amount of rent, if any, that landlord receives during the same period from others to whom the Premises may be rented, and the Deficiency shall bear interest at the Default Rate until paid. (§25(c)).
  - h. The Default Rate of interest is 12% per annum. (§6(e)).
  - i. T&S agreed to pay all collection costs incurred by the landlord on account of a T&S’ default, including collection costs, court costs and reasonable attorneys’ fees. (§25(c)).
4. T&S took possession of the Premises and, on or about November 5, 2018, the Defendants opened Another Broken Egg Café for business to the public from the Premises.
5. T&S failed to pay Rent and other charges required by the terms of the Lease since September 1, 2019.
6. T&S shut down operations of Another Broken Egg Café and abandoned possession of the Premises on or about January 14, 2020.
7. In a Chapter 11 bankruptcy case in which WD-1 was the debtor, the United States Bankruptcy Court of South Carolina entered an Order on January 30, 2020 whereby the Court authorized WD-I’s assumption and assignment of leases, including the subject Lease, and approved WD-I’s sale of the Shopping Center to Plaintiff’s affiliated company (the “Bankruptcy Order”).
8. Pursuant to and consistent with the Bankruptcy Order, on February 28, 2020, Plaintiff and WD-I entered into an Assignment and Assumption of Leases by which WD-I assigned and transferred all of its right, title and interest in and to the Lease and Guaranty,

including any Rent payment and other charges due under the Lease, to Plaintiff. The Assignment and Assumption of Leases contains terms indicating that Plaintiff would seek to collect rents due WD-I prior to the assignment.

9. Strange, who is the owner of T&S, admitted that Rent was not paid solely because T&S could no longer afford to pay it and Defendants decided to close the Another Broken Egg Café located in the Hilton Head Island and abandon the Premises so Defendants could continue to operate a second Another Broken Egg Café owned by Defendants in Pooler, Georgia.

10. On March 17, 2020, furniture, trade fixtures and equipment (FF&E) were removed from the Premises by third parties who were provided access to the Premises by Defendants. Plaintiff was unaware of the removal of the FF&E until after the fact and it did not authorize removal of the FF&E. The items left by Defendants at the Premises, including a range hood, walk-in cooler, sink and cabinetry, are improvements and not trade fixtures, and are therefore Plaintiff's property.

11. After T&S abandoned the Premises, Plaintiff undertook diligent efforts to procure another tenant for the Premises, which included its retaining a local commercial real estate broker to actively list and market the Premises for lease.

12. On or about February 12, 2021, Plaintiff entered into a lease for the Premises with a third-party commercial tenant, Gusto Restaurant, which began paying minimum rent and additional rent (common area maintenance charges) for the Premises to Plaintiff on July 1, 2021.

13. Plaintiff paid brokerage commissions of \$16,707.13 to procure this new tenant for the Premises.

14. T&S failed to make payments for Rent and other charges due under the Lease and Plaintiff has demanded that Defendant Strange make those payments pursuant to the Guaranty.

15. Strange has failed to make the payments due to Plaintiff under the Guaranty.

16. Plaintiff has incurred damages of 312,425.73 (which includes an \$8,875 offset for a security deposit paid by T&S to WD-I).

17. The Guaranty provides at Section 9 that Plaintiff is entitled to recover costs of collection, reasonable attorneys' fees and costs of suit incurred by Plaintiff on account of Strange's default.

### **STANDARD OF REVIEW/LAW**

Summary judgment is proper 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 the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP.

"In determining whether a genuine issue of material fact exists, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." *Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P.*, 385 S.C. 452, 456 (2009). The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder. *George v. Fabri*, 345 S.C. 440, 452 (2001). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial. *Regions Bank v. Schmauch*, 354 S.C. 648, 660 (Ct. App. 2003). *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)(Once the moving party has established a prima facie case for summary judgment, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts.")

### **CONCLUSIONS OF LAW**

#### **1. Breach of the Lease by Defendant T&S Management**

There is no genuine issue of material fact at issue on this cause of action.

To recover for a breach of contract, the plaintiff must prove: (1) a binding contract entered into by the parties; (2) a breach or unjustifiable failure to perform the contract; and (3) damage suffered by the plaintiff as a direct and proximate result of the breach. *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 124 S.E.2d 602 (1962).

T&S and WD-I entered into a binding Lease and the Lease and all rights therein were properly assigned to Plaintiff. There is no dispute that T&S failed to perform as the Lease required. T&S breached the Lease, without any justification, by failing to pay Rent and other sums as they become due and by its vacating and abandoning the Premises. Indeed, Strange, the owner of T&S, admitted that T&S failed to pay rent because it could no longer afford to pay it due to the financial burden of operating two restaurants.

Defendants contend that Plaintiff or its predecessor in interest, WD-1, breached the Lease before T&S defaulted claiming that the shopping center failed to produce foot traffic, failed to implement anticipated marketing and merchant promotions, and failed to create a commercially acceptable appearance. However, no evidence was presented to support this position. In addition, the Lease does not require the landlord to perform any of these conditions. Moreover, the Lease contains an integration clause which precludes the Court from considering extrinsic evidence that is to be used to contradict the terms of the Lease. *Davis v. Kb Home of South Carolina Inc.*, 394 S.C. 116, 127 (S.C. Ct. App. 2011). (“The parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary, or explain the written instrument.”); *U.S. Leasing Corp. v. Janicare, Inc.*, 294 S.C. 312, 318 (S.C. Ct. App. 1988).

Evidence introduced by Plaintiff supports its claim that Plaintiff incurred damages of \$321,300.73. Defendants contend that Plaintiff failed to mitigate its damages and that Plaintiff should be entitled to a set off for the value of fixtures and equipment installed by Tenant which remained in the Premises after Tenant vacated. I find to the contrary, the undisputed evidence shows that Plaintiff immediately engaged a commercial broker to market the Premises after it was vacated by T&S in March 2000 – at the outset of the Covid 2019 outbreak – and Plaintiff procured a replacement tenant within a reasonable period, notwithstanding the difficulties of doing such in the Covid environment. Moreover, Defendants specifically agreed in the Lease that in the event of a default their “liability under the Lease shall not be affected by or diminished in any way whatsoever, for Landlord’s failure to re-let the Premises, or if the Premises are re-let, for Landlord’s failure to collect the rentals under such re-letting.” Defendants’ lack of mitigation defense is without merit. I also decline to attribute value to the fixtures and equipment left in the premises because I find that that the lease allocates that property to the Landlord.

Accordingly, the Court awards damages of \$312,425.73 for Plaintiff against T&S (which includes an \$8,875 offset for a security deposit paid by T&S to WD-I).

2. **Breach of Guaranty by Defendant Turan Strange.**

There is no genuine issue of material fact at issue on this cause of action.

As described herein, T&S owes the Plaintiff Rent, other charges and expenses pursuant to the Lease. Plaintiff demanded that Strange pay those monies pursuant to the Guaranty, but Defendant Strange has failed to make the required payment. As such, it is undisputed that Strange failed to perform his obligations under the Guaranty and has therefore breached the Guaranty.

Accordingly, the Court awards damages of \$312,425.73 for Plaintiff against Strange.<sup>1</sup>

3. **Attorneys' Fees, Costs and Pre-Judgment Interest.**

Finally, Plaintiff as the prevailing party in this matter is entitled to its reasonable attorneys' fees and costs as provided in Section 25(c) of the Lease and Section 9 of the Guaranty, and therefore it is entitled to an award of its reasonable attorneys' fees and costs against Defendants T&S and Strange.

Plaintiff is further entitled to an award of pre-judgment interest on the damage award of \$312,425.73. *Smith-Hunter Constr. Co. v. Hopson*, 365 S.C. 125, 128, 616 S.E.2d 419, 421 (2005)(the law has long allowed prejudgment interest on obligations to pay money from the time when, either by agreement of the parties or operation of law, the payment is demandable, if the sum is certain or capable of being reduced to certainty); *Butler Contracting v. Court Street*, 369 S.C. 121, 133 (S.C. 2006)( "The fact that the amount due is disputed by the opposing party does not render the claim unliquidated for the purposes of an award of prejudgment interest. The proper test for determining whether prejudgment interest may be awarded is whether the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose.").

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<sup>1</sup> Plaintiff abandoned its remaining claims in the Complaint, the Third (Conversion), Fourth (Declaratory Relief) and Fifth (Injunctive Relief) Causes of Action, based on this grant of summary judgment.

Plaintiff shall within ten days of this Order file an affidavit of attorneys' fees and costs and a calculation of prejudgment interest through the date of this Order.

**IT IS SO ORDERED.**



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The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**  
**E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.**

\_\_\_\_\_  
**Circuit Court Judge**

\_\_\_\_\_  
**Judge Code**

\_\_\_\_\_  
**Date**

**For Clerk of Court Office Use Only**

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ and a copy mailed first class or placed in the appropriate attorney's box on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ to attorneys of record or to parties (when appearing pro se) as follows:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**ATTORNEY(S) FOR THE PLAINTIFF(S)**

\_\_\_\_\_  
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**ATTORNEY(S) FOR THE DEFENDANT(S)**

\_\_\_\_\_  
**CLERK OF COURT**

**Court Reporter:**

**E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRPC.**

**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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Beaufort Common Pleas

**Case Caption:** Bokf Real Estate Holding Llc VS T&S Management Inc , defendant,  
et al  
**Case Number:** 2020CP0700977  
**Type:** Order/Summary Judgment

So Ordered:

s/Marvin H. Dukes III #3069