THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Master-in-Equity

Opinion No. 6005 (S.C. Ct. App. filed July 26, 2023)

Case No. 2023-001468

SOUTH CAROLINA CVS PHARMACY, LLC, ... Appellant,

vs.

KPP HILTON HEAD, LLC, ... Respondent.

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

Respondent, KPP HILTON HEAD, LLC ("Landlord") files this Reply to SOUTH CAROLINA CVS PHARMACY, LLC'S ("Tenant") Return to Petition for Writ of Certiorari ("Tenant's Return") pursuant to Rule 242(g), SCACR. For the reasons set out below, Tenant's Return completely misses the mark: it seeks to have the Court focus on two words in the parenthetical contained in Part II, Article 27 of the Lease, totally disregard the actual language of the entire Article and ignores the necessity of "exact compliance" with option provisions; and it completely fails to recognize the impact the Court of Appeals decision will have on the numerous circumstances where (i) Registered Mail, Return Receipt Requested notice provisions are applicable, or (ii) ambiguous terms exist in lease (or other) option provisions.

I. *THE LEASE REQUIRES RECEIPT AND A SIGNATURE, NOT SIMPLE DELIVERY.*

Tenant attempts to limit the Court's focus on two words contained in the parenthetical in Part II, Article 27 -- "received or accepted" -- and then seeks to have the Court impute that the Lease, therefore, "expressly contemplated that a party's constructive receipt would be sufficient for purposes of determining when a party 'received' a notice or demand under the Lease." *Tenant's Return at 10*. Tenant contends the language 'accepted' would otherwise be 'meaningless. *Id.*

This completely ignores the entirety of Article 27, which reads as follows:

> Whenever, pursuant to this Lease, notice or demand shall or may be given to either of the parties by the other, and whenever either of the parties shall desire to give the other any notice or demand with respect to this Lease or the Premises, each such notice or demand shall be in writing, and any Law to the contrary notwithstanding, ***shall not be effective for any purpose unless*** the same is 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,*** at its Notice Address set forth in Part I hereof, or at such other address as either party may from time it time designate by notice to the other. ***The date of receipt*** of the notice or demand shall be deemed the date of service thereof (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. (Emphasis added).

Firstly, the parenthetical was not what the Court of Appeals relied upon. The Court of Appeals found that the Renewal Notice was timely because "Notice of [Tenant's] intent to renew the lease arrived at its final destination and ***was available for pick up*** the day before the deadline." Opinion at *3 (emphasis added).[1] Article 27, however, requires not only that the Notice of Renewal be "available for pick up," but that there be a "return receipt" if "given or

[1] As stated in the Writ of Certiorari, the Court of Appeals statement is clear error as the Renewal Notice had not "arrived at its final destination"; the return receipt ticket for the letter had been placed in Landlord's post office box, but the Renewal Notice itself still needed to be picked up at the post office window.

served … by mailing the same to the other party by registered or certified mail, ***return receipt requested***, or [if given or served] by overnight courier [then] ***a receipt is required***." Per this clear and unambiguous language, constructive receipt is not contemplated; actual receipt, indeed proof of actual receipt is what is expressly required.

Secondly, Tenant's reference to the Restatement's explanation of when a writing is received has no bearing here as the Restatement's explanation does not deal with a writing which is made pursuant to "a registered or certified letter, return receipt requested," as the Lease requires and particularly when, as is expressed in the Lease, a notice "shall not be effective ***for any purpose*** unless the same is given or served" in one of the precise manners specified in the Lease. The Lease does not require a simple letter; it requires "a registered or certified letter, ***return receipt requested***." (Emphasis added).

Thirdly, the Opinion effective neuters 33 Flavor Stores of Virginia, Inc. v. Hoffman's Candies, Inc., 296 S.C. 37, 370 S.E.2d 293, 295 (Ct. App. 1988), which quite clearly provides that:

> Where … notice of the exercise of the option is required in a certain manner, time is of the essence and **exact compliance will be required.** … 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).

Exact compliance does not encompass a notice being "available for pick up" being substituted for a signed receipt. The Court of Appeals Opinion effectively undermines the continued efficacy of the exact compliance principal expressed in 33 Flavor Stores.

Fourthly, the parenthetical is itself ambiguous at best. It does not clearly mean that any notice or demand arriving on a non-business day – which is some 29% of the time (5 of 7 days in

normal weeks, plus holidays) – should be deemed received when sent, as Tenant apparently claims. Rather, it more likely means that the failure of the recipient to actually receive or accept the notice or demand in "the ordinary course of business," which Tenant's own expert acknowledged was Monday through Friday, is when the deemed receipt applies. Landlord did not receive even the tear off ticket to the registered Renewal Notice letter on an ordinary course of business day (Monday through Friday) before the renewal deadline. The parenthetical does not adequately explain what the impact of this failure is. The clear requirement that options be construed against the option holder, *see* 33 Flavor Stores of Virginia, 370 S.E.2d at 295, necessitates that any ambiguity in the parenthetical be construed against Tenant here.[2]

II. THE FAILURE TO GIVE MEANING TO A REGISTERED MAIL, RETURN RECEIPT REQUESTED REQUIREMENT WILL CAUSE HAVOC.

Innumerable contracts and leases provide that notice must be made by registered or certified mail, return receipt requested. The lawyers who draft and litigate over these provisions and their clients who agree to such provisions rely upon those provisions meaning that there must be an actual signed return receipt. Absent the "special circumstances warranting relief from a court of equity" 33 Flavor Stores referenced or the "equitable estoppel" principals the EEOC cases the Court of Appeals referenced and allowed to impact otherwise clear deadlines, this Court should not allow the Court of Appeals decision to interfere with the certainty lawyers and their clients give to such requirements. That certainty is important, if not essential.

III. THE EQUITIES DO NOT FAVOR TENANT.

Tenant's contention that the equities favor it is so far off the mark as to impact the

[2] This is not inconsistent with Tenant's contention that the Lease expressly provides that "the language of this Lease shall be construed according to its plain meaning, and not strictly for or against Landlord or Tenant," for, as Tenant acknowledges the notice/demand provisions apply equally to both parties.

remainder of its Return. The only evidence in this case is that Landlord sent an email to Tenant on October 9, 2019, some 65 days before the renewal deadline, asking whether Tenant wished to renew the Lease at issue here (for the Hilton Head Store) and another (for the Port Royal Store), both of which were managed by Landlord's management company and had identical renewal deadlines. See (R. 5, Order granting summary judgment, p. 2, ¶ 4). Tenant's Lease Administrator responded the next day via email that Tenant was renewing the Port Royal Store, but he was awaiting further instructions regarding the Hilton Head Store. Id.

Tenant then posted its Registered Mail, Return Receipt Requested renewal notice for the Port Royal Store on October 10, 2019. It was signed for by Landlord's agent on October 21, 2019, ***eleven days after posting,*** and an executed copy was forwarded to Tenant the next day. See (R. 5, Order granting summary judgment, pp. 2-3, ¶ 5); (R. 149, King Aff. p. 3, ¶9). Tenant attempted to exercise the first renewal option for the Hilton Head Store more than a week after receiving Landlord's receipt of the Port Royal Store renewal: Tenant signed its renewal notice letter (the "Renewal Notice") on Tuesday, October 29, 2019, but did not post it to Landlord via Registered Mail, Return Receipt Requested until the next day (Wednesday, October 30, 2019), and its Registered Mail, Return Receipt Requested Renewal Notice reached the Hilton Head Post Office three days later, on Saturday, November 2, 2019, at 9:45 am. See (R. 132, TRO Motion, p. 3, ¶¶14-17); (R. 78, Affidavit of Peter J. Perry, dated Jan. 23, 2020, ¶¶12-15, and Exhibits C and D thereto).

Tenant not only dawdled after receiving Landlord's inquiry regarding the renewal of the Hilton Head Store – it waited 20 days -- but once it decided to renew, it did not even post the renewal letter for a full day after so deciding. See (R. 6, Order granting summary judgment, p. 3, ¶7). It is Tenant, not Landlord, who failed to timely act. As Tenant's own expert stated, "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*). Landlord cannot be found wanting for not going to the post office on Saturday morning between 9:45 and noon to see if there was any mail, particularly as there is no evidence that Tenant ever advised Landlord or Landlord's management company after receiving Landlord's October 9, 2019 inquiry that it did wish to renew the Lease. No equitable estoppel is available.

FOR THE FOREGOING REASONS, Landlord respectfully prays that the Court grant its Petition and issue a writ of certiorari to hear this matter and grant such other relief as is just and proper.

Respectfully submitted,

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