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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley Price, Circuit Court Judge

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

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Fairfield 132 Smith Street, LLC, Respondent,

v.

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

Of whom Haley Surface, Jill Surface and Hannah Glickman are the Appellants.

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# FINAL BRIEF OF APPELLANTS

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## STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR BY GRANTING SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENT-LANDLORD AND DENYING THE APPELLANTS' MOTIONS FOR RECONSIDERATION WHEN, IN VIEWING THE EVIDENCE AND ALL INFERENCES WHICH CAN BE REASONABLY DRAWN THEREFROM IN THE LIGHT MOST FAVORABLE TO THE APPELLANTS, THERE WAS AT LEAST A SCINTILLA OF EVIDENCE THAT GENUINE ISSUES OF MATERIAL FACT EXIST AS TO:

   a. WHETHER APPELLANTS BREACHED THE LEASE AGREEMENT AS PLED BY THE LANDLORD OR IF THE RESPONDENT-LANDLORD IS DEEMED TO HAVE TERMINATED THE LEASE PURSUANT TO ITS EXPRESS TERMS;

   b. WHETHER CERTAIN NAMED DEFENDANTS ARE ACTUALLY JOINTLY AND SEVERALLY LIABLE FOR ANY DAMAGES AS CO-SIGNERS UNDER THE TERMS OF THE LEASE;

   c. WHETHER THE RESPONDENT-LANDLORD'S ALLEGED DAMAGES ARE PROPERLY ACCOUNTED FOR AND RECONCILED, WERE ADEQUATELY MITIGATED, AND WHETHER THE RESPONDENT-LANDLORD ACTED IN GOOD FAITH OR CONTRIBUTED TO ITS OWN ALLEGED DAMAGES.

## STATEMENT OF THE CASE

This case arises from a residential landlord-tenant dispute involving two young, former College of Charleston students, a downtown-Charleston property owned by the Landlord which caters to college students, and two mothers who "co-signed" a lease to the property so their daughters had a place to live while going to school. Plaintiff Fairfield 132 Smith Street, LLC ("Landlord") brought suit against the Appellants on December 10, 2019, alleging causes of action for breach of a lease agreement and for damages. (R.pp. 13-34).

On January 6, 2020, Appellant Hannah Glickman and her mother, Diane Glickman, jointly answered the complaint *pro se*, generally denying the allegations and raising affirmative defenses. (R.pp. 35-42). Although Landlord filed a Motion for Entry of Default as to the Glickmans on January 16, 2020, the Motion was never heard as an answer had been filed. Appellant Jill Surface

was served on December 21, 2019, via hand-delivery to her husband at their home in Lexington, South Carolina. (R.p. 43). On January 24, 2020, Landlord filed a Motion for Entry of Default as to Jill Surface. On December 10, 2020, the undersigned counsel filed a Notice of Appearance on behalf of Defendant Hannah Glickman.

On January 11, 2021, almost one year after Landlord filed its Motion for Entry of Default as to Jill Surface, the Court granted the Motion. (R.pp. 44-46). On March 27, 2021, Appellant Jill Surface was served with Notice of the Damages Hearing requested by the Landlord. Although she had never been served, Appellant Haley Surface filed her answer, pro se, on April 9, 2021. (R.pp. 47-58). On April 12, 2021, Jill Surface filed and served her answer, pro se. (R.pp. 59-60).

On April 22, 2021, the Honorable Jennifer B. McCoy held a hearing on Landlord's motion for damages and ruled as follows:

> Plaintiff's Motion for Damages as to Defendants Jill and Haley Surface was set for April 22, 2021 at 9:30 a.m. Attorney Kelly appeared on behalf of Plaintiff, and both Jill and Haley Surface appeared, as well as other parties to the case. The hearing was CONTINUED due to the Surfaces receiving the Plaintiff's damages packet the night before and not being prepared to respond. The hearing will be continued until June or the next available term of court. The hearing will not be rescheduled again absent exigent circumstances.
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> (R.pp. 61-63).

On July 14, 2021, attorney Sean Trundy noticed appearance on behalf of Appellants Jill Surface and Haley Surface, and further filed a Motion for Relief from Entry of Default. (R.pp. 64-68). On October 1, 2021, the Honorable Jennifer B. McCoy granted Jill Surface's Motion for Relief from Entry of Default in toto. (R.pp. 69-71). On October 1, 2021, attorney Trundy filed an Amended Answer for Appellant Jill Surface. (R.pp. 72-73).

On January 25, 2022, Landlord filed a Motion for Summary Judgment pursuant to Rule 56, SCRCP. (R.pp. 74-75). A hearing on Landlord's Motion for Summary Judgment was held April 19,

2022, before the Honorable Bentley D. Price, whereat the court received memoranda of law, the affidavit of Appellant Haley Surface, and heard the arguments of counsel. (R.pp. 86-208; R.pp. 76-85). A Form 4 Order was entered on April 22, 2022, granting Landlord's Motion for Summary Judgment. (R.pp. 1-3). The Form 4 Order did not contain an amount for damages or contain findings of fact or conclusions of law.

Appellants filed Motions to Alter, Amend and Reconsider on April 29, 2022 and May 2, 2022, respectively. (R.pp 214-222). By e-mail to Judge Price's law clerk dated May 3, 2022, Landlord's counsel inquired as to whether the court would prefer a draft order to review and edit in lieu of the Form 4 based upon the issues raised by Appellants' Motions. (R.pp 211-213). On June 2, 2022, Judge Price's law clerk replied to Landlord's counsel requesting submission of a formal order and informing counsel that Judge Price would be issuing a formal order denying Appellants' Motions to Alter, Amend and Reconsider. (*Id*.)

On June 6, 2022, Judge Price entered the Order denying the Appellants' Motions to Alter, Amend and Reconsider. (R.pp. 4-6). On June 13, 2022, Landlord's counsel e-filed the proposed formal order denying Appellants' Motions. On August 17, 2022, the court entered the formal order granting summary judgment. (R.pp. 7-12). Counsel for Appellants Jill Surface and Haley Surface served and filed the Notice of Appeal from the Order on September 15, 2022, and the undersigned counsel for Hannah Glickman served and filed the Notice of Appeal from the Order on September 17, 2022.

Following the initiation of this appeal, attorney Sean Trundy fell ill. Attorney Trundy subsequently passed away on January 15, 2023. Appellants Jill Surface and Haley Surface have since retained undersigned counsel who now represents all of the Appellants in this matter.

## STANDARD OF REVIEW

"[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 673 S.E.2d 801, 803 (2009). Summary judgment is appropriate only "when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. In determining whether any triable issue of fact exists, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. If triable issues exist, those issues must go to the jury." Worsley Companies, Inc. v. Town of Mount Pleasant, 339 S.C. 51, 528 S.E.2d 657, 659-660 (2000) (citations omitted).

> Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. . . . All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the movant.
>
> The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. For summary judgment to be granted, it must be perfectly clear no issue of fact is involved. Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues.
>
> Moriarty v. Garden Sanctuary Church of God, 334 S.C. 150, 511 S.E.2d 699, 702 (Ct. App. 1999), aff'd, 341 S.C. 320, 534 S.E.2d 672 (2000) (citations omitted).

The Appellants here submitted far more than a mere scintilla of evidence supporting their defenses to the Landlord's causes of action, and the contents and discrepancies within the Landlord's own evidence rise to the level of triable issues of fact when all inferences reasonably drawn therefrom are viewed in the light most favorable to the Appellants as the nonmoving party. The

circuit court erred in granting summary judgment to Landlord.

## ARGUMENT

### I. Summary judgment was improper as there exists more than a scintilla of evidence that there are genuine issues of material fact as to whether a breach of contract occurred under the terms of the lease that entitled Landlord to the full extent of damages sought, whether all named Defendants are jointly and severally liable under the terms of the lease, and whether Landlord is entitled to the extent of damages so awarded, whether in whole or in part.

It is undisputed that the lease agreement at issue in this case constituted a contract. Landlord's cause of action accrues from an alleged breach of the contract by the Appellants. "The elements for a breach of contract are the existence of a contract, its breach, and damages caused by such breach." S. Glass & Plastics Co. v. Kemper, 399 S.C. 483, 491–92, 732 S.E.2d 205, 209 (Ct. App. 2012). "The general rule is that for a breach of contract the [breaching party] is liable for whatever damages follow as a natural consequence and a proximate result of such breach." Id. at 492, 732 S.E.2d at 209 (quoting Fuller v. E. Fire & Cas. Ins. Co., 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962)). However, one who seeks to recover damages for breach of a contract must demonstrate that he has performed his part of the contract, "or at least that he was, at the appropriate time, able, ready, and willing to perform it." Swinton Creek Nursery v. Edisto Farm Credit, ACA, 334 S.C. 469, 487, 514 S.E.2d 126, 135 (1999) (quoting Parks v. Lyons, 219 S.C. 40, 48, 64 S.E.2d 123, 126 (1951)).

#### A. A genuine issue of material fact exists as to whether the Appellants breached the lease agreement in the manner or to the extent claimed by the Landlord, or if the lease must be deemed terminated by the Landlord by virtue of the Landlord's acts or omissions.

In this case, when viewed in tandem with the Landlord's own evidentiary submissions, the

lease agreement in and of itself creates a genuine and triable issue of material fact as to whether or not a breach occurred that entitled Landlord to the full extent of damages and remedies sought, or whether the lease must be deemed terminated by the Landlord and thus subject to limitations on recovery. Pursuant to Paragraph 20 of the lease agreement, "If the Landlord fails to use reasonable efforts to rent the dwelling unit at a fair rental or if the Landlord accepts the abandonment as a surrender, the rental agreement is considered to be terminated by the Landlord as of the date the Landlord has notice of the abandonment." (R.pp. 21)(Emphasis added).

The Landlord's own documents that were submitted in support of its claims for damages clearly indicate that the Landlord was aware as early as May of 2019 that neither Haley Surface nor Hannah Glickman would be occupying the premises, and that the Landlord actually became aware that neither were occupying the premises as of mid-August of 2019. (R.pp. 190-210; Haley Surface Affidavit R.pp 76-85). The Landlord's own documentary evidence includes e-mails from cleaning service providers dated November 20, 2019—three months after Landlord possessed actual knowledge that neither Haley Surface nor Hannah Glickman were in the premises—indicating that the Plaintiff had not even started efforts to clean, let alone re-let the apartment. (R.p. 123). In fact, the Landlord's own ledger indicates that the Landlord did not incur any costs or engage in cleaning efforts or begin any releasing efforts until the end of November 2019, more than 100 days after Landlord's actual knowledge the premises were not occupied. (R.pp. 98, 127). Additionally, the Landlord did not even advertise the premises for rent until after Landlord had completed total renovations to the entire apartment which exceeded routine repair of wear and tear and other alleged damages claimed by Landlord. (R.p. 79).

As argued by the Appellants in opposition to the Landlord's Motion for Summary Judgment and in the Appellants' Motions to Alter, Amend and Reconsider, all of these factors constitute a scintilla of evidence as to genuine issues of material fact of whether the Landlord used reasonable efforts to relet

the premises. By the express terms of the lease, if the landlord did not use reasonable efforts to rent the dwelling unit, then the rental agreement is to be considered terminated by the Landlord as of the date the Landlord has notice of the abandonment. While such a termination may arise from an actual breach of the lease, it nonetheless calls into question the extent of damages the Landlord can claim, Landlord's calculation of the same, and any limitations thereto. By the very terms of the lease, and based upon the evidence as to Landlord's actual knowledge coupled with the timing of Landlord's acts and omissions as to cleaning, repair, and marketing, there is a genuine issue of material fact—or at least a dispute as to the conclusions to be drawn—as to whether Landlord used reasonable efforts that would preclude Appellants from the contractual and mitigating defenses afforded by Paragraph 20 of the lease agreement. "[E]ven where there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should not be granted." Hill v. York County Sheriff's Dep't, 313 S.C. 303, 305, 437 S.E.2d 179, 180 (Ct. App. 1993).

### B. There exists a genuine issue of material fact as to whether the Defendants who are identified as "co-signers" to the lease are also jointly and severally liable for damages.

When filing suit, Landlord named both Jill Surface and Diane Glickman as Defendants, alleging that each of them were jointly and severally liable on the basis they each co-signed for their daughters on the lease. Although Jill Surface and Diane Glickman executed Page 7 of the lease and provided the last four digits of their social security number, they are only identified thereon as co-signers and not as tenants. (R.pp. 24, 180). Importantly, and not addressed by the trial court when granting summary judgment for the Landlord or in denying Appellants' Motions to Alter, Amend and Reconsider, the term "co-signer" is not defined anywhere in the lease, nor is there any reference to a co-signer sharing any form of liability for a breach or default of the lease. Rather, Pursuant to Paragraphs 6 and 7 of the lease, only the tenants are obligated to pay rent, and only the tenants are

allowed to occupy the premises. (R.pp. 174). All terms of the lease regarding rights, obligations, duties, and liabilities speak solely to the tenants. The only persons expressly identified as tenants are Appellants Hannah Glickman and Haley Surface. Appellants' research has not revealed any definition of "co-signer" under South Carolina law other than within the Consumer Protection Code contained in Title 37 of the South Carolina Code of Laws, which is inapplicable to the residential lease in this case. Both the lease and the South Carolina Landlord Tenant Act are devoid of any definition of a co-signer.

At best for the Landlord, the lease is internally inconsistent about the rights and responsibilities of co-signers, rendering summary judgment inappropriate. For instance, Paragraph 30 of the lease provides: "The provisions of this Rental Agreement shall be binding upon and inure to the benefit of the Landlord and the Tenant, and their respective successors, legal representatives, and assigns." (R.p. 178). The Landlord could have included the term "co-signer" in this Paragraph but did not do so. Similarly, Paragraph 35 of the lease provides: "If this Rental Agreement is executed by more than one (1) Tenant, the responsibility and liabilities herein imposed shall be considered and construed to be joint and several, and the use of the singular shall include the plural." (R.p. 179). The Landlord also could have included the term "co-signer" in this Paragraph but did not do so. However, Paragraph 43 of the lease titled "LEASE TERMINATION" contains this sentence: "All signatures and co-signatures listed below are bound to this Lease in its entirety, including all current and future addendums." (R.p. 180). Yet this Paragraph 43 expressly calls for the initials of only the tenants, and not the persons identified as co-signers on Page 7 of the lease.

"In determining whether any triable issue of fact exists, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. If triable issues exist, those issues must go to the jury." Worsley Companies, Inc. v. Town of

Mount Pleasant, 339 S.C. 51, 528 S.E.2d 657, 659-660 (2000). The internal inconsistencies of the lease make summary judgment inappropriate as to any determination of joint and several liability or the obligations of Jill Surface and Diane Glickman, if any, under the lease.

**C. There exist genuine issues of material fact as to whether the Landlord is entitled to the damages so claimed, whether the Landlord properly mitigated its damages, and whether the Landlord acted in good faith.**

A landlord has the duty to minimize its damages by finding a new tenant. U.S. Rubber Co. v. White Tire Co., 231 S.C. 84, 97 S.E.2d 403, 409 (1956). In addition, Paragraph 20 the lease itself imposes a duty of mitigation and a standard of reasonableness upon the Landlord in its efforts to relet. (R.p. 170). In granting summary judgment as to the Landlord's alleged damages, the trial court has overlooked the genuine issues of material fact as the Landlord's acts and omissions that render summary judgment inappropriate.

"The reasonableness of actions to mitigate damages is ordinarily a question for the jury." McClary v. Massey Ferguson, Inc., 291 S.C. 506, 354 S.E.2d 405 (Ct. App. 1987) ("it is inferable that the jury considered mitigation and declined to award the $17,000 sought for losses occurring after 1984."). "Since the evidence of value was in conflict, it was for the jury, not the court, to decide the question of failure to mitigate. . . .The evidence provided no basis for the court to hold, as a matter of law, that the Bannons unreasonably failed to mitigate damages. That question was properly submitted to the jury." Bannon v. Knauss, 282 S.C. 589, 320 S.E.2d 470 (Ct. App. 1984).

The evidence presented to the trial court by the Appellants in this case (as well as the evidence contained within the Landlord's own evidentiary submissions) provides more than a mere scintilla of evidence giving rise to genuine issues of fact that should be submitted to the trier of fact. The uncontroverted evidence before the trial court is that new tenants were allegedly not found by the Landlord until February of 2020. (R.pp. 79, 96). In their arguments to the trial court and by their

Motions to Alter, Amend and Reconsider, Appellants fully and properly raised additional issues and questions of fact that render summary judgment inappropriate when taken in light most favorable to the Appellants, to wit:

(i) Why did the Landlord do nothing between July 30, 2019 and October 18, 2019, when the refrigerator was replaced? (R.p. 125).

(ii) Why were the repairman (Luigi) and the professional cleaner not called until a month later, in November 2019? (R.pp. 97, 98-123).

(iii) The unnamed document in Landlord's damages packet lists "Total Clean Up and Abandonment Costs," yet when did the abandonment occur? (R.p. 96).

(iv) Haley Surface's affidavit establishes that the Landlord relieved her of any responsibility for finding a new tenant on August 27, 2019. (R.p. 79).

(v) The Landlord's e-mails show that it was prepared to list the unit back on January 9, 2019. Why then did it take so long to get a new tenant in? The Landlord's own statements claim that in the student housing market, demand exceeds supply. (R.pp. 39, 42, 77, 82-84).

(vi) Why was the Landlord attempting to collect damages from the Appellants for long-standing and pre-existing conditions already affecting the property prior to the Appellants moving in, and to what extent are the Landlord's alleged damages the result of Landlord's sorely needed renovations beyond the scope of basic clean out and repairing reasonable wear and tear of the tenants? (R.pp. 76-81, 96, 98, 125).

In granting summary judgment and awarding Landlord full extent of its alleged damages, the trial court has concluded that it was reasonable for the Landlord to not re-let the premises between August 1, 2019 and mid-February, 2020—a Landlord which used the alleged high-demand for

student housing to coerce and pressure Appellants Hannah Glickman and Haley Surface into extending their lease by a year. (R.pp. 82-84). In granting summary judgment, the trial court has further concluded that the Landlord's failure to mitigate its damages was reasonable, even though it did not even clean the apartment until approximately 100 days after the Tenants left and did not procure new tenants until six months later.

The award of summary judgment and the blanket approval of the Landlord's alleged damages further overlooks the genuine issues of material fact as to whether the Landlord acted in good faith. "There exists in every contract an implied covenant of good faith and fair dealing." Tharpe v. GE Moore Co., 254 S.C. 196, 174 S.E.2d 397 (1970), citing Commercial Credit Corp. v. Nelson Motors, Inc., 247 S.C. 360, 147 S.E.2d 481 (1966). While every contractual dispute involves the implied duty of good faith and fair dealing, residential landlord tenant disputes involve a statutorily mandated duty. "Every duty under this chapter and every act which must be performed as a condition precedent to the exercise of a right or remedy under this chapter imposes an obligation of good faith in its performances or enforcement." S.C. Code § 27-40-220.

"Factual inquiries, such as whether the defendants acted in good faith . . . are generally left in the hands of the jury to determine . . ." Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. 469, 514 S.E.2d 126, 134 (1999). Haley Surface's affidavit, and the Landlord's own statements and records, raise genuine issues of fact as to whether the Landlord exerted undue influence on two young students to commit to another full year lease some six months before the expiration of their existing lease citing high demand, or otherwise acted in bad faith by leaving the property sitting empty for months on end then subsequently attempting to seek damages from the Appellants for the total period and the Landlord's self-imposed costs and expenses to renovate its investment far beyond the necessary clean up and mitigation of standard tenant wear and tear in an apartment that

was already in need of renovations before the Appellants ever moved in. It will be for the jury to decide if the Landlord's pressure campaign constitutes good faith; if it did not, then the lease actually ended exactly when the Defendants vacated. Likewise, it will be for the jury to decide if the Landlord's statement of damages is in good faith. Given that every interaction between the Landlord and the Appellants was required by statute to be governed by good faith, summary judgment is inappropriate based upon the evidence, of which the Appellants have put forth more than a mere scintilla.

## CONCLUSION

For the reasons stated, this Court should reverse the judgment of the Circuit Court.

Respectfully submitted,

January 22, 2024

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