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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE SOUTH CAROLINA COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY COURT
Court of Common Pleas
The Honorable Bentley Price, Circuit Court Judge

Magistrate Case No. 2022-CV-10-11000100
Trial Court Case No. 2022-CP-10-04780
Appellate Case No. 2023-001414

Family Dollar Stores of South Carolina, LLC
successor by merger of Family Dollar Stores of South Carolina, Inc.,

Appellant,

vs.

1260 E Butler Road Self Storage, LLC and 3575 Maybank, LLC,

Respondents.

RESPONDENTS' INITIAL BRIEF

Brendan P. Langendorfer (SC Bar No. 71971)
Langendorfer Law Firm, LLC
P.O. Box 68
Mount Pleasant, SC. 29465
(843) 501-0469
brendan@langendorferlaw.com
Attorney for Respondents

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STATEMENT OF ISSUES ON APPEAL

1. Did the Court of Common Pleas properly affirm the Magistrate's Order Granting Respondents' Motion for Summary Judgment which held that Appellant did not demonstrate a material fact was in dispute regarding Appellant's breach of the lease for fire code violations and its failure to timely cure?

2. Did the Court of Common Pleas properly affirm the Magistrate's Order which found that the Kiriakides factors weighed in favor of the Respondents?

STATEMENT OF THE CASE

This case concerns a commercial lease dispute between 1260 E Butler Road Self Storage, LLC and 3575 Maybank, LLC ("Respondents"), as landlords, and Family Dollar Stores of South Carolina, LLC, successor by merger of Family Dollar Stores of South Carolina, Inc. ("Appellant"), as tenant. On June 23, 2022, Respondents filed an Application for Ejectment with the Charleston County Magistrate's Court asserting that Appellant committed several non-monetary defaults and failed to cure within the contractual deadline. In particular, Respondents asserted that Appellant failed to maintain the leased premises in a safe manner by, among other things, violating the fire codes of the City of Charleston by blocking access to the pump and riser room.

Respondents filed a Motion for Summary Judgment on August 23, 2022. Appellant filed a Cross-Motion for Summary Judgment on September 16, 2022. The Hon. Laura C. Waring, Charleston County Magistrate, conducted a hearing on September 27, 2022. By Order dated October 11, 2022, the Charleston County Magistrate's Court granted Respondents' Motion for Summary Judgment and issued a Writ of Ejectment. On October 13, 2022, Appellant filed and served a Notice of Appeal, which was thereafter amended on November 11, 2022.

On May 31, 2023, the Hon. Bentley Price conducted a hearing regarding Appellant's Appeal. The Court of Common Pleas affirmed the Magistrate's Order Granting Summary Judgment by Orders dated August 7 and 15, 2023. On September 6, 2023, Appellant filed a Notice

of Appeal of Judge Price's Orders. Appellant posted a bond which stayed enforcement of the Writ of Ejectment.

STANDARD OF REVIEW

A. Appeal of an Ejectment Order

When reviewing a circuit court's adjudication of an appeal of an ejectment action in magistrate's court, the appellate court reviews the order under a limited standard of review in which "(1) findings of fact are to be upheld if there is any supporting evidence and (2) absent an error of law, the circuit court's holding is to be affirmed." Skydive Myrtle Beach, Inc. v. Horry Cnty., 424 S.C. 298, 302-313, 818 S.E.2d 224, 226-227 (S.C. App. 2018); citing McNair v. United Energy Distribs., 390 S.C. 44, 49, 699 S.E.2d 723, 726 (Ct. App. 2010).

B. Summary Judgment

An appellate court applies the same standard applied by the trial court when reviewing the trial court's decision to grant summary judgment. Rawlinson Rd. Homeowners Ass'n Inc. v. Jackson, 395 S.C. 25, 32, 716 S.E.2d 337, 341 (Ct. App. 2011). When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise, must set forth specific facts showing that there is a genuine issue for trial. If he does not, summary judgment, if appropriate, shall be entered against him. Id. See also, David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006) ("summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner").

"Summary judgment should be granted when plain, palpable, and undisputable facts exist on which reasonable minds cannot differ." NationsBank v. Scott Farm, 320 S.C. 299, 302-03, 465

S.E.2d 98, 100 (S.C. App. 1995). "When a party makes no factual showing in opposition to a motion for summary judgment, the trial 'court must grant summary judgment to the moving party if, under the facts presented, the latter is entitled to summary judgment as matter of law.'" Coker v. Cummings, 381 S.C. 45, 55, 671 S.E.2d 383, 388 (Ct. App. 2008) (quoting S.C. Elec. & Gas Co. v. Combustion Eng'g, Inc., 283 S.C. 182, 189, 322 S.E.2d 453, 457 (Ct. App. 1984). "[T]o resist a motion for summary judgment, the nonmoving party must come forward with specific facts showing genuine issues necessitating trial." NationsBank, 320 S.C. at 303, 465 S.E.2d at 100; see also Rule 56(e), SCRCP ("When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.").

ARGUMENT

A. Background

Respondents are small local businesses located in Charleston and own the shopping center found at 3575 Maybank Highway, Johns Island (the "Property"). The Property contains multiple lessees in addition to Appellant. Under section 12 of the subject Lease, as amended, Appellant is required to maintain the interior of the demised premises in a clean and safe condition. (Mag. Return, p. 16). Pursuant to section 18 of the Lease, Appellant has 30 days from its receipt of notice of default to cure (or be in the process of curing) a non-monetary default. (Mag. Return, p. 20) and Affidavit of Tracy Watson in Support of Motion for Summary Judgment ("Watson Aff.) at ¶ 5 (Mag. Return p. 65).

The Charleston Fire Marshal Division enforces the 2021 International Fire Code, National Fire Protection Association (NFPA) codes and standards referenced in the IFC or as adopted by the State of South Carolina, and various City ordinances. Code of the City of Charleston, South Carolina, Sec. 13-76.

Section 901.4.6 of the 2021 International Fire Code provides –

> 901.4.6 Pump and riser room size.
>
> Where provided, fire pump rooms and automatic sprinkler system riser rooms shall be designed with adequate space for all equipment necessary for the installation, as defined by the manufacturer, with sufficient working space around the stationary equipment. Clearances around equipment to elements of permanent construction, including other installed equipment and appliances, shall be sufficient to allow inspection, service, repair or replacement without removing such elements of permanent construction or disabling the function of a required fire-resistance-rated assembly. Fire pump and automatic sprinkler system riser rooms shall be provided with doors and unobstructed passageways large enough to allow removal of the largest piece of equipment.

1. Appellant's Breach of the Lease

On March 1, 2022, Respondents sent notice of Lease defaults to Appellant. Watson Aff. at ¶¶ 6-7 and Exhibit E annexed thereto (Mag. Return, pp. 65 and 106-110). Among other things, Respondents sent written notice to Appellant of its violation of the Charleston Fire Code by obstructing the riser room. Watson Aff. at ¶ 7 and Exhibit E annexed thereto (Mag. Return, pp. 65 and 106-110). According to the proof of delivery, Appellant received the notice of default on March 7, 2022. Affidavit of Shannon Lhotsky ("Lhotsky Aff.) at ¶ 6 and Exhibit A annexed thereto. (Mag. Return pp. 141 and 145). To cure the fire hazard, Appellant needed to clear the blocked riser room by moving boxes and other items that were preventing proper access to the riser room no later than April 6, 2022, or be in the process of doing so by April 6. Lhotsky Aff. at ¶ 7. (Mag. Return p. 141).

2. Appellant's Failure to Cure

Appellant failed to cure the default within 30 days of its receipt of the written notice of default. Watson Aff. at ¶ 8 and Lhotsky Aff. at ¶ 7-8. (Mag. Return pp. 65 and 141). On April 21, 2022, Respondents inspected the leased premises. The passageway to the riser room remained blocked. Lhotsky Aff. at ¶ 8 (Mag. Return p. 141) and Watson Aff. at ¶ 9 (Mag. Return p. 65). By letter dated April 28, 2022, Respondents again provided notice that the riser room, which should have been cleared by April 6, 2022, remained blocked. Watson Aff. at ¶ 10 (Mag. Return p. 66) and Lhotsky Aff. at ¶ 9 and Exhibit F annexed thereto. (Mag. Return pp. 142, 161-165).

On May 16, 2022, Respondents inspected the premises. Lhotsky Aff. at ¶ 13 (Mag. Return p. 142). Once again, the riser room remained blocked. Lhotsky Aff. at ¶ 13 (Mag. Return p. 142). This obstruction was originally raised in the March 1 notice received by Appellant on March 7, 2022. Lhotsky Aff. at ¶ 13. (Mag. Return p. 142). On May 19, 2022, Respondents sent another notice of default to Appellant. Lhotsky Aff. at ¶ 14 and Exhibit G annexed thereto (Mag. Return pp. 143, 166-172).

The Charleston Fire Department ordered the store closed for 30 days on June 2, 2022, because of numerous fire code violations. Watson Aff. at ¶ 12 (Mag. Return p. 66), together with Exhibit D annexed thereto (Mag. Return p. 103) and Lhotsky Aff. at ¶ 10 (Mag. Return p. 142). Appellant willfully disregarded the Fire Department's order closing the premises and unlawfully re-opened on June 27, 2022. Watson Aff. at ¶ 14 (Mag. Return p. 66). On July 1, 2022, Respondents inspected the Property yet again. The riser room remained blocked. Lhotsky Aff. at ¶ 15 (Mag. Return p. 143).

On July 5, 2022, the fire department conducted a re-inspection and issued another violation notice and closed the store a second time. Watson Aff. at ¶ 17 and Exhibit J annexed thereto (Mag.

Return p. 67, 126). On July 6, 2022, Appellant was issued a summons by the City of Charleston for re-opening a retail location without the required reinspection.[1] Watson Aff. at ¶ 16 and Exhibit I annexed thereto (Mag. Return pp. 67, 125).

B. The Court of Common Pleas properly affirmed the Magistrate's Court Order granting summary judgment because Appellant failed to demonstrate a material fact in dispute by providing competent evidence that Appellant cured or was in the process of curing the lease defaults within 30-days of receipt of the notice.

As set forth in the affidavits of Respondents' agents, the notices of default, the accompanying photographs and other documents, Appellant had notice of default concerning the blocked riser room as early as March 7, 2022. The failure to maintain the premises in a safe manner by obeying fire codes is a material breach of the Lease. Appellant did not cure or take any action to cure the fire hazard by April 6 – the contractual deadline to do so. Although the March 1 notice of default and corresponding failure to cure was sufficient for ejectment as of April 6, Respondents sent further notices of default regarding the blocked riser room. Despite receiving additional notices of default (which were not required) and multiple opportunities to cure, Appellant failed to timely do so.

In connection with the summary judgment motions, Appellant submitted the Affidavit of Chris Anton ("Anton Aff."). (Mag. Return pp. 218-221). Mr. Anton attended the hearing on the summary judgment motion. Mr. Anton began his position as district manager with Family Dollar on June 6, 2022. Anton Aff. at ¶ 7. (Mag. Return p. 219). Appellant did not produce any evidence that it took steps to timely cure the blocked riser room by April 6, 2022. In fact, Mr. Anton stated in the Reply Affidavit of Chris Anton ("Anton Reply Aff."), that Appellant did not attempt to cure

[1] Appellant pled guilty to the fire code violations on December 16, 2022 (Summons Nos. U49010 and U49005).

the blocked riser room until the store was closed by the Charleston Fire Department on June 2, 2022. Specifically, Mr. Anton states:

- Soon after the Fire Marshall closed the store in June, I escalated the matter and began taking steps to cure the alleged defaults asserted by Respondents. Anton Reply Aff. at ¶ 4. (Mag. Return p. 132).

- After the initial closure in June, my team and I worked to make sure the fire marshal's concerns were addressed. We resolved the major concerns, including ensuring appropriate ingress and egress points were not blocked and that access to the riser room was clear. Anton Reply Aff. at ¶ 9. (Mag. Return p. 132).

In order to successfully assert a material fact in dispute, Appellant had to demonstrate through competent evidence that it cured the blocked riser room default by April 6, 2022, or was in the process of doing so by such date. At the summary judgment hearing, the Court took the unusual step of permitting the Appellant to make a proffer, identify any facts, or witnesses refuting Respondents' affidavit testimony that notice of the blocked riser room was received on March 7, 2002, and the blockage was not (i) corrected or (ii) in the process of being corrected within the 30-day limit. The Appellant was unable to do so. Magistrates' Return and Order Granting Plaintiffs' Motion for Summary Judgment ("Summary Judgment Order") at ¶¶ 13-14 (Mag. Return pp. 2 and 239-240). Respondents' Affidavits, multiple default letters and photographs attached thereto, demonstrate – overwhelmingly and uncontestably – that Appellant did not cure or attempt to cure within the 30-day cure period.

None of the testimony contained in Appellant's affidavits filed prior to the summary judgment hearing assert that Appellant cured (or attempted to cure) the fire hazard by April 6, 2022. (Mag. Return p. 2). Nearly two weeks after the hearing, Appellant served the Supplemental Affidavit of Star Quinn ("Quinn Aff."). (Mag. Return p. 232-233). The Magistrates' Court did not issue an order authorizing the parties to supplement the record. Respondents objected to the

Court's consideration of the Quinn Aff. because the Quinn Aff. was not timely filed and served. Moreover, Ms. Quinn was not disclosed as a witness in Appellant's Pre-Trial Report. Notwithstanding the foregoing, the Quinn Aff. does not establish a material fact in dispute.

The March 1 notice of default cites the International Fire Code regarding the blocked riser room. Appellant received this notice on March 7, 2022. Lhotsky Aff. at ¶ 6 (Mag. Return p. 141) and Exhibit A annexed thereto. (Mag. Return p. 145). Ms. Starr testifies that at some unknown point in time prior to June 2, she cleared the riser room and attaches a photograph from September 27, 2022, in support of that statement. Quinn Aff. at ¶¶ 3, 7. (Mag. Return pp. 232-233). Appellant still did not produce any evidence that the riser room was cleared or was in the process of being cleared by April 6.

Appellant alleges that the Magistrate's decision rests on a misstatement of fact. Namely, the Magistrate incorrectly relied on the Fire Marshall's report of June 2, 2022. However, the Summary Judgment Order does not rely on the Fire Marshall's report. Rather, the Summary Judgment Order is clear – Appellant failed to provide a scintilla of evidence that the blocked riser room fire hazard was corrected (or in the process of being corrected) by April 6, 2022. The Court relied upon Respondent's affidavits and the attached exhibits. Respondents' testimony and evidence was not disputed by affidavit testimony, a proposed proffer or other evidence of the Appellant. See Summary Judgment Order at ¶¶ 5, 7, 13, 14 and 15. (Mag. Return pp. 238-240).

Appellant alleges that the notices of default were defective because the letters provided a 10-day cure period instead of the 30-day period. Appellant's argument is of no avail. Appellant is a sophisticated commercial enterprise and knows the terms of its lease and that it had 30-days to cure nonmonetary defaults. Nevertheless, Respondents gave multiple notices of default – none of which were required. Appellant was not prejudiced in any manner concerning the discrepancy

regarding the appropriate cure period because Appellant waited more than 30 days to commence the ejectment process.

C. The Kiriakides factors favor Respondents.

In determining whether a failure to render or to offer performance under a commercial lease is material, the following circumstances are significant:

> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
>
> (b) the extent to which the injured party can be adequately compensated [by damages] for the part of that benefit of which he will be deprived;
>
> (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
>
> (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
>
> (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 276, 440 S.E.2d 364, 366-67 (S.C. 1993).

As to first factor, Appellant's refusal to timely cure the fire hazard jeopardizes the safety of the shopping center, its customers, vendors, employees, and Respondents. The requirement to maintain a safe condition is not a technical term buried in the boiler plate of a lease. Rather it is a primary concern for the Respondents as failure to abide by simple safety rules places both people and the structure itself in danger and potentially exposes Respondents to legal liability. Similarly, Respondents cannot be adequately compensated by monetary damages because of the danger of personal injury to numerous parties.

It cannot be said that Appellant would suffer a forfeiture. Obviously affirming the Order would result in the Appellant's disposition from the leased premises, but that does not constitute a

forfeiture. Appellant failed to conform with the health and safety provisions of the Lease and the City Code. Despite repeated written notices to cure, Appellant failed to do so. Dollar Tree, Inc., Appellant's parent company, is ranked 137 on the Fortune 500 list and operates more than 16,000 stores across the 48 contiguous states and five Canadian provinces with more than 200,000 associates. Watson Aff. at ¶ 4. (Mag. Return p. 65). Appellant has sufficient resources and was given ample opportunity to comply with basic fire code safety. The decision to obey fire code provisions was in the total control of the Appellant. Appellant was not dependent on third parties to perform the work nor did the Appellant require goods or machinery to complete the task which may have been unavailable. Appellant simply chose not to cure timely. Any purported forfeiture is simply the foreseeable consequences of the Appellant's business decision to consciously disregard the safety of the premises.

The remaining two factors also favor of the Respondents. Appellant received multiple notices from the Respondents. Appellant had the opportunity to correct the hazardous condition. Appellant did not take corrective action until the store was closed by the Charleston Fire Department. Anton Reply Aff. at ¶ 9. (Mag. Return p. 132). Appellant did not respond to the notices of default sent by Respondents or dispute the validity of the allegations. Lhotsky Aff. at ¶ 18. (Mag. Return p. 143). Appellant's continued disregard of the safety of the leased premises does not evidence good faith.

This case is distinguishable from the Appellants in Kiriakides. In Kiriakides, the Appellant acted in good faith and attempted to promptly comply by paying the landlord. The landlord rejected those payments. Here, Appellant did not make any attempt to cure until it had no other option.

The Magistrate's Court properly applied the Kiriakides factors and ruled the blockage of the riser room was a material default under the Lease and ejectment was proper.

CONCLUSION

Appellant has not submitted any evidence that it cured or attempted to cure the breach of the lease within 30 days of its receipt of notice of default period. Because there was an absence of material facts in dispute, the Magistrate's Court properly granted Respondents' motion for summary judgment which was properly affirmed by the Court of Common Pleas. Respondents request that the Court deny the appeal, affirm the orders issued by lower courts, and grant such other and further relief as is just and necessary.

/s/ Brendan P. Langendorfer
Brendan P. Langendorfer (SC Bar No.: 71971)
Langendorfer Law Firm, LLC
P.O. Box 68
Mount Pleasant, SC 29465
(843) 501-0469
brendan@langendorferlaw.com
Counsel for the Respondents

Dated: February 9, 2024

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Family Dollar Stores of South Carolina, LLC
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vs.

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Respondents.

CERTIFICATION OF SERVICE

The undersigned hereby certifies that on the date indicated below, he caused a true and correct copy of Respondent's Initial Brief to be filed with the Court of Appeals and served upon the parties identified below by e-mail and first-class mail, proper postage affixed, addressed as follows:

Kevin McCarrell, Esq.
Fox Rothschild
2 W. Washington Street, Suite 1100
Greenville, SC 29601
kmccarrell@foxrothschild.com

/s/ Brendan P. Langendorfer

Brendan P. Langendorfer (SC Bar No.: 71971)
Langendorfer Law Firm, LLC
Post Office Box 68
Mount Pleasant, South Carolina 29465
Telephone: (843) 501-0469
brendan@langendorferlaw.com
Counsel to Respondents

Dated: February 9, 2024

Langendorfer Law Firm, LLC

Brendan@Langendorferlaw.com

P. 843-501-0469

* Also admitted in New York and New Jersey

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VIA U.S. AND EMAIL

The Hon. Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201
ctappfilings@sccourts.org

Re: Family Dollar Stores of South Carolina, LLC v. 1260 E Butler Road et al.
Appellate Case No.: 2023-001414

Dear Ms. Kitchings:

I represent both Respondents in the above-referenced appeal. Enclosed for filing are Respondents' initial brief and certification of service. The originals are included with the hard copy of this letter.

Sincerely,

Brendan P. Langendorfer (SC Bar No. 71971)

Enclosures

cc: Kevin McCarrell, Esq.
(Via e-mail and regular mail)

Mail

P.O. Box 68

Mount Pleasant, SC 29465