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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Bentley D. Price, Circuit Court Judge

Magistrate Case No. 2022-CV-1011000100
Trial Court Case No. 2022-CP-1004780
Appellate Case No. 2023-001414

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

Respondents,

v.

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

Appellant.

APPELLANT'S REPLY BRIEF

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ARGUMENT

1. The Magistrate Court improperly relied on the Fire Marshal's report as evidence that the riser room remained blocked until June 2, 2022.

Landlord claims that the Magistrate Court did not rely on the Fire Marshal's report in its Summary Judgment Order. (Resp. Initial Brief, p. 8). However, the Magistrate's Return states "The obstruction of the riser room created a fire hazard, which apparently remained in that state from Landlord's notice March 1, 2022, until the Charleston Fire Department closed the store June 2, 2022." (Mag. Return p. 3). The Magistrate's Return, therefore, suggests that the reason for the closure was because of a blocked riser room. However, neither the June 2, 2022 nor the July 5, 2022 Fire Marshal report mention blockage of the riser room as an enumerated fire code violation. (Mag. Return pp. 104-106, 127-129). Any alleged blockage was not a basis for the closure of the store and the Fire Marshal's reports are not evidence that the riser room remained blocked until June 2, 2022.

2. The Magistrate Court did not apply the *Kiriakides* factors, and, if it had, the factors weigh in favor of Family Dollar.

Landlord cites to *Kiriakides v. United Artists Communications* to argue that Family Dollar's alleged breach of the lease was material. As an initial matter, Landlord claims that the Magistrate Court "properly applied the *Kiriakides* factors." (Resp. Initial Brief, p. 11). To the contrary, the Magistrate Court neither cited to nor applied the *Kiriakides* factors in its Return. (See Mag. Return p. 3).

If the Magistrate Court had applied the *Kiriakides* factors, they would not support its finding that the blockage of the riser room was a material default under the Lease. Forfeitures are not favored in law or equity. *South Carolina Tax Commission v. Metropolitan Life Insurance Co.*, 266 S.C. 34, 221 S.E.2d 522 (1975). Most courts hold that to justify forfeiture, the breach must

be material, serious, or substantial. *Kiriakides v. United Artists Communications, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994). As held in *Kiriakides*, "the landlord's right to terminate is not unlimited and the court's decision to permit termination must be tempered by notions of equity and common sense." *Id*. at 276, 440 S.E.2d at 366. "Forfeiture for a trivial or immaterial breach of a commercial lease should not be enforced." *Id*. In order to determine if a breach of a commercial lease is material, the court considers the following factors:

> 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.

With regard to the first factor, the primary benefit that Landlord could reasonably expect to receive under the lease agreement is the payment of rent. *Id.* at 277, 440 S.E.2d at 367. ("As to subsections (a) and (b), we find that the only benefit Landlord reasonably could have expected was the past due rent which could be adequately compensated by damages."). There is no question that Family Dollar timely made all rent payments due under the lease and Landlord does not dispute that. Therefore, Landlord has not been deprived of the primary benefit which it reasonably expected to receive under the lease. Even if a landlord may anticipate a benefit from a tenant maintaining the condition of the store, in this case, Family Dollar had been maintaining the store

since 1992. A momentary lapse in store maintenance, which has since been corrected, is not a significant factor in favor of Landlord.

With respect to the second factor, Landlord has incurred no damages. All rent has been paid, and Landlord suffered no adverse consequences to the non-material defaults, which have all been cured.

As for the third factor, contrary to Landlord's assertion, Family Dollar will suffer forfeiture. Forfeiture is defined as "the loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty." Black's Law Dictionary 765 (10th ed. 2014). There is no question that eviction of Family Dollar is a complete forfeiture of the premises. Moreover, Family Dollar has operated its business out of the property for over 30 years and has an established customer base in the John's Island community. Should it be forced to move its operations to a different location – assuming relocation is even possible – or close the store altogether, it will lose the customer base it has spent over three decades building, with no guarantee that those customers will be able to continue their business at its new location.

As to the fourth factor, all alleged violations and defaults have been cured by Family Dollar and the store has continued to operate without issue since the initiation of this action.

Finally, with regard to the fifth factor, at all relevant times, Family Dollar acted in good faith towards Landlord. From the receipt of Landlord's initial demand letter in March 2022, Family Dollar immediately began addressing Landlord's concerns as whole. Between March and July 2022, Landlord continued to raise additional complaints, all of which Family Dollar has addressed. Mag Return, Ex. 2, Aff. of Anton (pp. 169-171). Moreover, Family Dollar has, on multiple occasions, made a good faith attempt to communicate or negotiate a resolution of this matter with Landlord, but all its efforts have been ignored by Landlord.

In sum, the *Kiriakides* factors weigh in favor of Family Dollar. Family Dollar is a staple in the John's Island community, providing an accessible, low-cost shopping venue for its customers for nearly three decades. All of Landlord's complaints have been addressed and all defaults have been cured. Forfeiture here would be an unduly harsh and unjust result for both Family Dollar, and the community it serves.

CONCLUSION

For the reasons set forth above, Family Dollar respectfully requests this Court reverse the trial court's affirmation of summary judgment and remand to the magistrate court for a trial.

Respectfully submitted,

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PROOF OF SERVICE

This is to certify that I have, this 20th day of February, 2024, served a true and correct copy of **APPELLANT'S REPLY BRIEF** in the above-captioned action by U.S. mail and e-mail to:

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RE: Appellate Case No. 2023-001414
1260 E Butler Road Self Storage, LLC and 3575 Maybank, LLC, Respondent v. Family Dollar Stores of South Carolina, LLC, Appellant

Dear Ms. Kitchings:

Enclosed for filing is Appellant's Reply Brief in the above case along with the following:

(1) Proof of service of Appellant's Reply Brief on the Respondents.

These same documents are being mailed to the Clerk's office. By copy of this letter, copies of the same are being served upon counsel for Respondents.

Thank you for your assistance in this matter.

Sincerely,

Fox Rothschild LLP

M. Kevin McCarrell

MKM/ela
Enclosures

cc: Via U.S. Mail & e-mail: Brendan P. Langendorfer, Esquire, *Attorneys for Respondents*