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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

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

Appellant,

v.

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

Respondents.

APPELLANT'S FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. Did the magistrate court err in finding that there was no genuine issue of material fact regarding whether Family Dollar had timely commenced the process to cure any alleged default?

II. Did the magistrate court err in finding that the defaults alleged by Landlord were significantly material to warrant ejectment?

III. Did the magistrate court err in finding that Landlord's default notices were sufficient, despite failing to provide sufficient time to cure?

STATEMENT OF FACTS

This matter involves the shopping center located at 3575 Maybank Highway, Johns Island, SC 29455 (the "Property") owned by Respondents, 1260 E Butler Road Self Storage, LLC and 3575 Maybank, LLC (collectively, in the singular, "Landlord"). Since 1992, Appellant, Family Dollar Stores of South Carolina, LLC ("Family Dollar"), has rented a portion of the Property ("the Store") under the terms of a lease, as amended (the "Lease"). (R. pp. 12-44). Family Dollar is a general discount retail store providing a low-cost shopping venue for the communities it serves. (R. p. 170-171, ¶ 3). During the COVID-19 pandemic, Family Dollar employees were generally considered essential workers. (R. p. 171, ¶ 4).

The Lease provides that, after notice of an alleged default from Landlord, Tenant has thirty (30) days (i) to cure, (ii) be in the process of curing, or (iii) have a bona fide dispute. (R. p. 22). Family Dollar paid – and Respondents acknowledge – every penny of rent required under the terms of the Lease. However, more than three decades into its tenancy, Landlord sent three letters to Tenant couched as notices of default, dated March 1, 2022, April 28, 2022, and May 19, 2022, respectively (the "Default Notices"). (R. pp. 48-64). None of the Default Notices suggested that Tenant had failed to timely pay all rent due. Instead, the Default Notices each set forth a myriad of alleged defaults – most of which are not significantly material – and do not appear to rank the

items in order of importance. Additionally, each of the Default Notices make reference to the riser room being "blocked," among other issues, including broken ceiling tiles, cracked floor tiles, faded paint on the walls, dirty windows, an improperly placed ice machine, sale items on the sidewalk, an HVAC unit leak, and minor parking lot damage. Family Dollar submitted evidence that, sometime in April or May 2022, after verbal instruction from Landlord, an employee of Tenant immediately ensured that access to the riser room was clear. (R. pp. 184-185).

Thereafter, on June 2, 2022, the Charleston Fire Department directed the Store to close due to various fire code concerns. Importantly, blocked access to the riser room was *not* one of the items of concern listed by the fire marshal. (R. pp. 45-47). District Manager Chris Anton personally took steps after learning of the June 2 notice to try to make sure any concerns of the Fire Department were resolved. (R. pp. 171-172, ¶ 12). He believed the concerns to be cured. *Id*. Unfortunately, upon its second inspection on or around July 2, 2022, the Fire Department still had concerns, and directed Family Dollar to close the Store until another inspection could be completed. (R. p. 172, ¶ 13). On July 27, 2022, the Fire Marshal conducted a third inspection finding no fire code violations and indicating that the Store was clear to continue normal operations. (R. p. 172, ¶ 14).

Through its upfits of the Leased Premises and the investments in advertising and goodwill, Tenant has made a substantial investment in its position within the Leased Premises in reliance on its rights, including quiet enjoyment, pursuant to the Lease. (R. p. 38). The Store had experienced significant turnover at the store manager level, including significant gaps during the March 2022 to July 2022 timeframe of which Landlord complains during which there was no store manager. (R. p. 171, ¶¶ 8-9). However, since July 2022, all of the minor issues raised by Landlord have

been corrected, and upon additional inspections, the Fire Marshal has found no further violations. (R. pp. 170-172).

Landlord filed this eviction action on June 22, 2022 seeking to eject Family Dollar from the commercial retail shopping center located at 3575 Maybank Highway, Johns Island, SC. The magistrate court held a hearing on September 27, 2022 on the parties' cross-motions for summary judgment. Family Dollar submitted evidence to the magistrate court that it cured, was in the process of curing, or had a bona fide dispute over the items set forth in Respondents' Default Notices. However, the magistrate court entered summary judgment in favor of the Landlord.

Pursuant to Mag. Rule 18, Appellant appealed the magistrate's order to the circuit court on October 13, 2022, and oral argument was heard before the Honorable Bentley Price on May 31, 2023. The circuit court affirmed the magistrate court's order by way of Form 4 dated August 7, 2023, and corresponding written Order on August 14, 2023. Appellant filed its Notice of Appeal with this Court on September 6, 2023.

STANDARD OF REVIEW

Summary judgment is a "drastic remedy which should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues. *Schmidt v. Courtney*, 357 S.C. 310, 318 (S.C. Ct. App. 2003)(internal citations omitted). In reviewing a motion for summary judgment, the appellate court applies the same standard of review as the trial court. *Companion Property & Casualty Insurance v. Airborne Express, Inc.*, 369 S.C. 388, 390 (S.C. Ct. App. 2006). Summary judgment should be granted if "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 that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP; *see also Legette v. Piggly Wiggly, Inc.*, 368 S.C. 576, 579, 629 S.E.2d 375, 376 (Ct. App. 2006). When examining a motion for summary judgment, the "evidence and all

inferences reasonably drawn therefrom must be viewed in the light most favorable to the non-moving party." *Strother v. Lexington Cnty Recreation Comm'n*, 332 S.C. 54, 61, 504 S.E.2d 117, 121 (1998) (citing *Hamiter v. Retirement Div. of SC*, 326 S.C. 93, 484 S.E.2d 586 (1997)). When evidence is susceptible to more than one reasonable inference, the issue should be submitted to the jury. *Vaughan v. Town of Lyman*, 370 S.C. 436, 448, 635 S.E.2d 631, 638 (2006).

ARGUMENT

Family Dollar is a valuable asset to the John's Island / Wadmalaw community, providing a low-cost shopping venue for those in the community who need it most, including throughout the COVID-19 pandemic, in which its workers were deemed essential workers[1] due to providing food products and other items determined to be critical to the community's infrastructure. Local residents would undoubtedly be worse off if Family Dollar is forcibly ejected from its location at the shopping center at the corner of Maybank Highway and Bohicket Road. That would especially be so if Family Dollar were forcibly ejected without a trial on the merits after it has submitted evidence showing it acted to cure the alleged defaults within the time permitted under the Lease.

The relevant portion of the Lease, Section 18, is captioned "Forfeiture for Failure to Pay Rent." (R. p. 82). Read as part of the Lease, the caption suggests that Family Dollar would only be subject to forfeiture for failure to pay rent, not other types of defaults. Section 18 of the Lease provides:

> If the Tenant defaults in the performance of any covenant or condition of this lease which is not cured ***or in the process of being cured***, ***unless in the case of a bona-fide dispute***, within thirty (30) days after receipt of written notice by Tenant . . . then and in such case it shall and may be lawful for the said Landlord, at its option, to declare the said term ended and enter into said premises or any part thereof, either with or without process of law, and expel the said Tenant, or any person or persons occupying, in or upon said premises, using such force as may be necessary to do so, and so to

[1] *See e.g.*, https://www.cdc.gov/vaccines/covid-19/categories-essential-workers.html

> repossess and enjoy the said premises as in the landlord's former estate."[2] (emphasis added).

Based on the language of the forfeiture provision and applicable case law, there is a genuine issue of material fact sufficient to warrant reversal.

1. <u>The magistrate court's decision rests on a significant misstatement of fact.</u>

As set forth above, Family Dollar timely paid all rent due. However, Landlord asserts that a few minor operational concerns constitute a sufficient default to merit eviction and forfeiture of Family Dollar's significant investment in the premises. The magistrate court acknowledged that most of Landlord's alleged defaults contained issues of material fact due to Family Dollar's factual disputes of the alleged defaults. Ultimately, the magistrate court relied on only one alleged default in granting summary judgment: an alleged obstruction of the riser room creating an alleged fire hazard. Importantly, the magistrate court held that the alleged obstruction remained in place from the first notice of default dated March 1, 2022 to the Fire Marshal closing the Store on June 2, 2022, and that there was no evidence that Family Dollar had timely commenced efforts to resolve the issue. (R. p. 3). However, this conclusion is based on an incorrect statement of fact because the June 2, 2022 Fire Marshall Notice did <u>not</u> include obstruction of the riser room as a concern. Therefore, the circuit court's conclusion that the decision and judgment of the magistrate court "was not affected by any material error of fact" is simply incorrect. (R. p. 213, ¶ 1).

2. <u>The evidence presented by Family Dollar to the magistrate court created a genuine issue of material fact regarding whether it timely commenced the process to cure any alleged defaults.</u>

The terms of the Lease expressly provide Family Dollar an opportunity to cure any defaults; within thirty days of the Landlord serving notice of an alleged default, Family Dollar

[2] Despite such language in the Lease, South Carolina has never recognized a right to self-help repossession in this state, and Family Dollar asserts that Landlord would be liable for wrongful ejectment if it attempted to do so.

need only be *in the process of* curing the alleged default to remain in compliance with the Lease. (R. p. 22).

The magistrate court incorrectly held that there was no material dispute of fact regarding whether Family Dollar timely began its attempts to cure Landlord's alleged default with respect to an alleged blockage of the riser room. (R. p. 3). As discussed above, Landlord's first Notice of Default dated March 1, 2022 does, in fact, reference an alleged obstruction to the riser room. (R. pp. 48-49). However, while the Fire Department Violation Notice listed several minor violations, blocking access to the riser room was not one of them. (R. pp. 45-47). Thus, the magistrate court's entire holding hinges on an incorrect factual assertion that blocked access to the riser room was an enumerated violation listed by the Fire Marshal in June 2022, which is clearly refuted by the documented evidence.

Moreover, Family Dollar submitted a Supplemental Affidavit of Star Quinn, an employee of Family Dollar. (R. pp. 184-185). Ms. Quinn averred that she was working at the Store in April and May 2022. (R. p. 184, ¶ 2). At an unknown date, a representative of Landlord inspected the Store and directed her to clear out the back storage area to ensure unobstructed access to the riser room, which Ms. Quinn accomplished the same day. (R. p. 184, ¶¶ 3-5). Ms. Quinn further noted that the Fire Marshal's June 2, 2022 Notice did not find any violation based on blocked access to the riser room. (R. p. 184, ¶ 6). Ms. Quinn's testimony, at a minimum, creates an issue of material fact sufficient to survive summary judgment because Ms. Quinn may have cleared the storage area as early as the first week of April, which would have been within thirty (30) days of Family Dollar's receipt of the original Default Notice.

Finally, the timeline set forth by Landlord suggests that Family Dollar was attempting to cure Landlord's alleged defaults as a whole within the 30 days prescribed by the Lease. Landlord's

initial demand letter dated March 1, 2022 contains a litany of minor complaints to be addressed by Family Dollar, and the evidence is clear that Family Dollar immediately began addressing them. Specifically, Landlord complained of (i) chipped floor tiles, faded paint, and ceiling tiles in need of replacement, (ii) an ice machine and other sale items on the shopping center sidewalk, (iii) an obstruction to the riser room, and (iv) alleged parking lot damage. (R. pp. 48-49). Addressing each in turn:

(i) Landlord's aesthetic concerns over paint and tiles were timely addressed. As evidenced by Landlord's demand letter dated May 19, 2022, the paint and tiles were no longer outstanding issues. (R. p. 58). In order to have maintenance work done, Family Dollar would have been required to place work orders and line up the vendors to accomplish the tasks. Therefore, it is evident that Family Dollar began the process within 30 days of the date of Landlord's demand letter.

(ii) Landlord acknowledged that the ice machine was removed from the sidewalk (although this led to further demands to pressure wash the store window front). (R. p. 53).

(iii) Landlord's final demand letter no longer considered sale items on the sidewalk to be a concern. (R. pp. 58-60).

(iv) After working with the marshal through two inspections, the fire marshal cleared the Store to continue its operations. (R. p. 172, ¶ 14).

(v) Family Dollar has a bona fide dispute with respect to the alleged parking lot damage. The alleged damage appears to be normal wear and tear on the parking lot. (R. p. 172 ¶, 15(g)).

Landlord's final demand letter adds additional complaints regarding (i) an HVAC leak, (ii) a dirty window, and (iii) closure of the Store due to the HVAC leak. As with the items above, the issues have been addressed: the HVAC has been repaired, the window has been cleaned, and the Store continues to operate. (R. p. 172, ¶ 15).

Read as a whole, the Notices of Default reveal a relentless Landlord bent on evicting Family Dollar, perhaps because Landlord thinks Family Dollar is too low-brow for its shopping center. As seen from month-to-month, Family Dollar was left playing a game of whack-a-mole where, after it addressed one issue, Landlord would find additional issues to complain about. Therefore, the court should consider when Family Dollar commenced efforts to resolve the entire list of Landlord's concerns, rather than considering only one alleged default in isolation. The evidence is clear that Family Dollar began working to resolve Landlord's laundry list of items well before the required April 6, 2022 date, which is thirty (30) days after receipt of the initial notice.

Therefore, because (i) the magistrate's ruling rests on an incorrect factual holding about the Fire Marshal's violations, (ii) Family Dollar submitted evidence that it timely commenced efforts to cure any alleged blockage of the riser room, and (iii) when considered as a whole, it is clear that Family Dollar was addressing the entire list of Landlord's concerns within the time prescribed by the Lease, the magistrate court erred in finding that there were no disputes of material fact.

3. **The defaults alleged by Landlord were not sufficiently material to warrant ejectment.**

South Carolina recognizes the equitable maxim that equity abhors forfeiture. *Litchfield Co. of S.C. v. Kiriakides*, 290 S.C. 220, 226, 349 S.E.2d 344, 348 (Ct. App. 1986)("while the tenant has breached some of the lease provisions, none were so substantial or fundamental as to constitute a material breach justifying the forfeiture urged by the Defendant.")

Landlord relies on minor operational concerns, which have been cured, to demand eviction of Family Dollar. As in *Kiriakides* above, such alleged lease violations are not so substantial or fundamental as to constitute a material breach justifying Landlord's demanded forfeiture. Running a store is a complex task, and managers are constantly required to address various matters as they arise. At all relevant times, Family Dollar was in the process of resolving, or had resolved, Landlord's concerns, including replacing ceiling tiles, moving an ice machine, and the like. However, Landlord continuously sought to nitpick any minor issue in its quest to oust Family Dollar from the premises. Although Landlord's motives have been obscured through its refusal to communicate or negotiate a resolution of this matter, it seems likely that Landlord believes it can now obtain a higher rental rate than its predecessor negotiated in the last amendment dated July 2011 due to rising property values in the area. Contrary to Landlord's inflammatory reference to the Store as a "pig stye" (sic), (R. p. 70, ¶ 21), Family Dollar has resolved all of the concerns of the Fire Marshal and the Landlord and continues to serve the community. Family Dollar has a substantial investment in the leased premises in reliance on its right to continue operating through expiration on December 31, 2027. Therefore, equity demands that it not be required to forfeit its leasehold interest.

4. <u>Landlord's default notices were deficient.</u>

As set forth in Section 18 of the Lease, Family Dollar was entitled to thirty (30) days to cure, or be in the process of curing, any alleged defaults, after receipt of written notice. Each of the demand letters upon which Landlord relies insisted that Family Dollar cure the alleged defaults "within ten (10) days from the date hereof to avoid further legal action," rather than being in the process of curing within 30 days, as required by the Lease. (R. pp. 48-64). Moreover, by calculating its threats from the date of the letter, rather than the date that Family Dollar received written notice, Landlord further deviated from the terms of the Lease. Because Landlord's demand

letters were defective, and no proper notice was given or received under Section 18 of the Lease, Landlord should not be entitled to eviction of Family Dollar from the premises.

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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April 8, 2024

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In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
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The Honorable Bentley D. Price, Circuit Court Judge

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

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

Respondents.

CERTIFICATE OF COUNSEL

The undersigned certified that Appellants' Final Briefs comply with Rule 211(b), SCACR.

April 9, 2024

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PROOF OF SERVICE

This is to certify that I have, this 8th day of April, 2024, served a true and correct copy of **APPELLANT'S FINAL BRIEF** in the above-captioned action by U.S. mail and e-mail to:

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April 9, 2024

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

Dear Ms. Kitchings:

Enclosed for filing are the following:

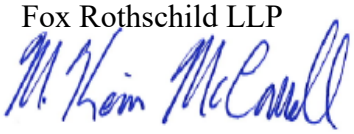
(1) One original, unbound copy and one bound copy of Appellant's Final Brief;
(2) One original, unbound copy and one bound copy of Appellant's Final Reply Brief;
(3) Certificate of Counsel; and
(4) Proof of services.

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



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