THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appellate Case No. 2023-001147

APPEAL FROM BEAUFORT COUNTY
Master In Equity

Marvin H. Dukes, III, Master in
Equity and Special Circuit Court Judge
Case No. 2020-CP-07-00977

BOKF Real Estate Holding, LLC,

Respondent,

v.

T & S Management, Inc. and
Turan Strange,

Appellants.

INITIAL BRIEF OF RESPONDENT

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1. Did the trial court abuse its discretion in denying the Appellants' Motion for Reconsideration pursuant to Rule 59, SCRCP?

STATEMENT OF THE CASE

This case involves a tenant's breach of a commercial lease and the related breach by the guarantor of the tenant's obligations under the lease.

Appellant T&S Management, LLC ("T&S") was the tenant under a written lease agreement for commercial property located in Hilton Head Island, South Carolina wherein it operated a restaurant known as *Another Broken Egg Cafe*. Respondent BOKF Real Estate Holding, LLC was, at all times relevant to this action, the assignee of the lease and the landlord for the subject property. Appellant Turan Strange is the owner of T&S and a guarantor of T&S' obligations under the lease.

After T&S failed to make rent payments and abandoned the property, and Strange refused to make good on his guaranty, BOKF initiated this action on April 30, 2020 by filing a Complaint alleging causes of action for breach of the lease against T&S, breach of the guaranty against Strange, conversion, declaratory relief and injunctive relief. (Complaint, ROA ____).

On February 23, 2023, BOKF filed a Motion for Partial Summary Judgment against T&S and Strange and hearings on the motion took place before the Honorable Marvin H. Dukes, III, Master in Equity for Beaufort County ("Master"), on March 28, 2023 (via Webex) and April 17, 2023 (via teleconference). (BOKF's Notice of Motion and Motion for Partial Summary Judgment, ROA ____).

On May 8, 2023, the Master entered an Order granting summary judgment in favor of BOKF. The Master found that T&S breached the lease agreement and that Strange breached the

guaranty and awarded damages against both Appellants for $312,425,73.[1] The Master further found that BOKF was the prevailing party in the action and ruled that BOKF was entitled to an award of its reasonable attorneys' fees and costs pursuant to the terms of the lease and guaranty. (Order Granting BOKF's Motion for Summary Judgment, ROA _____). Judgment was entered against Appellants on May 8, 2023. (Form 4, Judgment in a Civil Case, ROA _____).

On May 18, 2023, the Appellants filed a Motion to Alter, Amend and Reconsider the Order granting Summary Judgment pursuant to Rules 59 and 60, SCRCP ("Motion for Reconsideration"). The Motion for Reconsideration was denied by the Master in an Order entered on June 9, 2023. (Appellants' Motion for Reconsideration and Master's Order denying the Motion for Reconsideration, ROA ___).

On July 6, 2023, Appellants served on Respondent's counsel a Notice of Appeal which states:

> T & S Management, Inc. and Turan Strange appeal the Order denying Defendants Motion to Alter, Amend and Reconsider the Court's Order granting Summary Judgment entered by the Honorable Marvin H. Dukes III on June 9, 2023. Appellants received written notice of entry of this order on June 9, 2023.

The Notice of Appeal was received by the Court of Appeals on July 14, 2023. (Notice of Appeal, ROA _____).

On August 31, 2023, the Clerk for the Court of Appeals notified Appellants' counsel that the time for Appellants to order the transcript had expired. The Clerk further warned Appellants' counsel that the appeal would be dismissed if Appellants failed to advise the Court of the status of the transcript order within ten (10) days. (Clerk of Court letter dated August 31, 2023, ROA ____).

[1] BOKF abandoned its claims for conversion, declaratory relief and injunctive relief in light of the grant of summary judgment on the breach of contract and breach of guaranty claims.

Appellants did not respond within the ten-day period and, on October 2, 2023, the Court of Appeals dismissed the Appeal due to Appellants, failure to comply with Rule 207, SCACR. (Court of Appeals Order filed October 2, 2023).

On October 10, 2023, Appellants served and filed a Motion to Reinstate the Appeal and a concurrent Motion to Amend the Notice of Appeal attempting to appeal the underlying Summary Judgment Order. (Appellants' Moton to Reinstate Appeal and Motion to Amend the Notice of Appeal, ROA ____). On November 16, 2023, the Court of Appeals issued an Order granting the Appellants' Motion to Reinstate the Appeal and thereby reinstated the appeal. However, in that same Order, the Court of Appeals also denied Appellants' Motion to Amend the Notice of Appeal and held that the only order properly before the Court for review is the Master's June 9, 2023 order denying reconsideration. (Court of Appeals Order filed November 16, 2023, ROA ___).

STATEMENT OF FACTS

On April 11, 2016, Appellant T&S Management, LLC ("T&S"), as tenant, and WD-I Associates, LLC ("WD-I"), as landlord, entered into a written Lease Agreement ("Lease") for commercial property located at Suite 301 of the Sea Turtle Marketplace Shopping Center ("Shopping Center") at 430 Fording Island Rd., Hilton Head Island, South Carolina ("Premises"). Pursuant to the Lease, T&S was to operate a restaurant known as *Another Broken Egg Café* at the Premises. (5-8-2023 Master Order at ¶, pg. 1; Affidavit of Warren E. Hill ("Hill Aff."), ¶4 and Ex. A, ROA _____).

In order to further secure payment under the Lease, on or about April 11, 2016, Appellant Turan Strange ("Strange"), the owner of T&S, executed a written unconditional Guaranty ("Guaranty") whereby he guaranteed the payment of all rents and other sums and the performance

of the terms, covenants and conditions by the tenant under the Lease. (5-8-2023 Master Order at ¶2, pg. 1; Hill Aff., ¶5 and Ex. B, ROA _____).

The Lease includes the following terms:

a. Term. T&S agreed to lease the Premises for a period of ten (10) years with an option exercisable by T&S to renew for three terms of five years each. (Lease, §1(g), ROA ___).

b. Rent. T&S agreed to pay the landlord a minimum base rent at the monthly and yearly rates set forth in Lease (Lease, §1(g), ROA ___) and additional rent which included a share of the real property taxes, insurance and other operating expenses incurred by the landlord to operate, maintain and manage the Shopping Center. (Lease, §6 and §7, ROA ____).

c. Fixtures and Improvements. Equipment and fixtures that are an integral part of the operation of the Premises or that are permanently installed in the Premises (such as built-in cabinets) shall not be considered trade fixtures. (Lease, §11, ROA ___). Any additions or improvements installed in the Premises immediately became property of the landlord and shall not be removed without landlord approval. (Lease, §17, ROA _____).

e. Tenant Default. A tenant default includes tenant's failure to pay minimum rent, failure to pay additional rent and/or the tenant's act of vacating, abandoning or closing the business to the public. (Lease, §25(a), ROA ____).

f. Mitigation and Reletting. In the event of a tenant default, the landlord is required to undertake commercially reasonable efforts to re-let the premises and mitigate any damages, however, tenant's liability under the Lease shall not be affected by or diminished in any way whatsoever, for landlord's failure to re-let the Premises, of if the Premises are re-let, for landlord's failure to collect the rentals under such re-letting. (Lease, §25(b), ROA ____). The landlord may re-let all or part of the Premises accepting any rents then obtainable, for a term or terms that may

be greater or less than the balance of the term of the Lease, and landlord may grant concessions or free rent without in any way affecting tenant's liability for the rent payable under this Lease. (Lease, §25(b), ROA _____).

h. Damages in the Event of a Tenant Default. The tenant is liable for the following damages:

i. All rent and damages that may be due or sustained by landlord up to the time the Lease terminates, the Premises are relet, or landlord takes possession of the Premises, whichever occurs later, and the performance of all other obligations of tenant accruing under this Lease through such date, which damages shall bear interest at the default rate of 12% until paid; and

ii. All reasonable costs, fees and expenses (including without limitation attorney's fees and expenses, brokerage commissions and fees) incurred by landlord in pursuit of its remedies under the Lease and in renting the Premises to others including, but not limited to Re-letting preparations; and

iii. The amount (the "Deficiency") by which (i) the rent under the Lease until the expiration date or the Term exceeds (ii) the amount of rent, if any, that landlord receives during the same period from others to whom the Premises may be rented, and the Deficiency shall bear interest at the default rate of 12% until paid. (Lease, §25(c), ROA ____).

h. Late Charges and Interest. T&S agreed to pay a late charge of 5% of the minimum and additional rent on each monthly installment and interest at 12% per annum on each unpaid installment of minimum and additional rent. (Lease, §6(e), ROA _____).

i. Collection Costs. T&S agreed to pay all collection costs incurred by the landlord on account of a T&S' default, including court costs and reasonable attorneys' fees. (Lease, §25(c), ROA ____).[2]

The Lease was amended by T&S and WD-I three times, on January 6, 2017, October 11, 2017 and January 29, 2018, each time extending the opening date for the restaurant and deferring the commencement of rent payments. (Hill Aff., ¶4, ROA___).

T&S took possession of the Premises and, on or about November 5, 2018, *Another Broken Egg Café* was opened to the public for business. (5-8-2023 Master Order at ¶4, pg. 3; Hill Aff., ¶8, ROA ____). Ten months later, starting on September 1, 2019, T&S stopped paying rent and other charges required by the terms of the Lease. (5-8-2023 Master Order at ¶5, pg. 3; Hill Aff., ¶8, ROA ____). T&S then shut down the restaurant's operations and ultimately it abandoned possession of the Premises on or about January 14, 2020. (5-8-2023 Master Order at ¶6, pg. 3; Hill Aff., ¶9, ROA ____).

Strange admits that T&S stopped paying rent solely because it could no longer afford to pay it. T&S owned and operated a second *Another Broken Egg Café* in Pooler, Georgia at the same time and, believing that he could not keep both restaurants open due to financial reasons, Strange simply chose to close the Hilton Head Island restaurant and keep the Pooler, Georgia location open. (5-8-2023 Master Order at ¶9, pg. 4; Affidavit of Edward M. Kubec, ¶3 and Ex. E (Deposition Transcript of Turan Strange ("Strange Depo"), pgs. 34-38), ROA ____).

On or about February 28, 2020, WD-I and BOKF entered into an Assignment and Assumption of Leases whereby WD-I assigned and transferred all of its right, title and interest in

[2] The Guaranty provides for the recovery of costs of collection, reasonable attorneys' fees and costs of suit incurred by BOKF on account of Strange's default. (Guaranty §9, ROA ____).

and to the Lease and the Guaranty to BOKF. The Assignment and Assumption of Leases contains terms indicating that BOKF would seek to collect rents that became due to WD-I prior to the assignment. (5-8-2023 Master Order at ¶8, pgs. 3-4; Supplemental Affidavit of Warren Hill ("Hill Supp. Aff."). Ex. F (Assignment and Assumption of Leases §2 and §5), ROA ____).

On March 17, 2020, Appellants allowed a third-party to access the Premises for the purpose of removing all furniture, trade fixtures and equipment ("FF&E") from the property. BOKF did not authorize removal of the FF&E and it first became aware of the FF&E removal well-after the fact. Appellants did leave some improvements belonging to BOKF on the Premises, including a range hood, walk-in cooler, sink and cabinetry. (5-8-2023 Master Order at ¶10, pg. 4; Hill Aff., ¶11, ROA ____).

After T&S abandoned the Premises – which coincided in time with the outbreak of the COVID epidemic - BOKF immediately hired a local commercial real estate broker to actively list and market the Premises for lease. (5-8-2023 Master Order at ¶11, pg. 4; Hill Aff., ¶12, ROA ____). After several months, the broker was able to procure a replacement tenant and, on or about February 12, 2021, BOKF entered into a lease for the Premises with a third-party commercial tenant, Gusto Restaurant. BOKF paid the broker a commission of $16,707.13 to procure the new tenant. (5-8-2023 Master Order at ¶¶12-13, pg. 4; Hill Aff., ¶12 and Ex. C, ROA ____). The new tenant started paying minimum rent and additional rent (common area maintenance charges) for the Premises to BOKF on July 1, 2021. (5-8-2023 Master Order at ¶12; pg.4; Hill Aff., ¶12, ROA ____). However, the rent amount paid by new tenant was less than the rent that T&S was required to pay under the Lease. (Hill Supp. Aff., ¶8 and Ex. G, ROA ____).

The Premises was sold by BOKF to a third-party on October 11, 2022. (Hill Supp. Aff,"), ¶5, ROA ____). Though the date of its sale of the Premises, BOKF incurred damages of

312,425.73 arising from T&S' breach of the Lease and Strange's breach of the Guaranty. This amount includes an $8,875 offset for a security deposit paid by T&S to WD-I. (5-8-2023 Master Order at ¶16, pg. 4; Hill Supp. Aff., ¶¶7-8, ROA ___). The damages amount includes rent (base and additional), late fees, interest charges and broker commissions of $263,941.48 for the period prior to BOKF's reletting the Premises and the rent differential and interest of $57,359.24 for the period after BOKF relet the Premises. (Hill Supp. Aff., ¶¶7-9 and Ex. G, ROA ___). However, the damage amount does not include any items for the period after BOKF sold the Premises. (Hill Supp. Aff., ¶6 and Ex. G, ROA ____).

STANDARD OF REVIEW

The abuse of discretion standard is utilized in reviewing a district court's ruling on a motion under SCRCP Rule 59(e). *Pollard v. Cnty. of Florence*, 314 S.C. 397, 402, 444 S.E.2d 534, 536 (Ct. App. 1994). "An abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support." *BB&T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 503 (2006).

ARGUMENT

A. THE MASTER-IN-EQUITY PROPERLY EXERCISED HIS DISCRETION IN DENYING THE APPELLANTS' MOTION FOR RECONSIDERATION

In their Motion for Reconsideration, the Appellants maintained that the Master's grant of summary judgment in favor of BOKF was erroneous for six different reasons. In their Initial Brief, it appears that Appellants have limited their appeal to three issues decided by the Master: (1) the Master's consideration of evidence concerning the value of improvements and fixtures to the Premises, (2) the Master's consideration of Affidavits by Warren Hill, the Senior Vice President and Manager of REO Special Assets/Facilities for BOKF and (3) the calculation of BOKF's

damages and whether the damages include amounts that accrued both prior to BOKF's acquiring the Premises and after BOKF sold the Premises. (Appellants' Initial Brief at pgs. 8-9). Those three issues are discussed in sections 2, 4 and 5 below. Accordingly, it appears that Appellants have abandoned the other three issues raised in the Motion for Consideration. Nevertheless, because it is less than crystal clear to BOKF exactly what Appellants are contesting on appeal, BOKF other issues raised by Appellants in their Motion for Reconsideration, but seemingly not addressed in this appeal, in sections 1, 3 and 6 below.

1. <u>The Delayed Opening of the Restaurant Did Not Excuse Appellants' Obligations</u>

Appellants argued in the Motion for Reconsideration that the Master erred by not finding that the acts or omissions of the prior landlord for the subject property, WD-I, amounted to a breach of the Lease and that WD-I's purported breach either excused T&S' performance under the Lease or caused T&S to breach the Lease. Specifically, Appellants posit that WD-I's actions or inactions somehow delayed T&S from opening the restaurant for more than one year and that WD-I otherwise failed to provide required foot traffic and certain aesthetics for the Shopping Center.[3]

The Master appropriately considered and rejected these arguments in both the underlying summary judgment motion and Motion for Reconsideration. With regard to the delayed opening, the evidence shows that Appellants and WD-I entered into three amendments to the original Lease, each time extending the opening date for the restaurant and deferring the commencement of rent payments. (Hill Aff., ¶4, ROA ____). Thus, the Master correctly ruled that Appellants effectively waived any right to claim the former landlord's delay was a breach of the Lease or excused

[3] Appellants seem to have conceded this issue in their Initial Brief. But, in an abundance of caution, BOFK addresses the issue herein.

Appellants' performance in any manner. Likewise, the Master found that the delays were caused in large part by hurricanes that impacted Hilton Head Island during the relevant time period.

As for the Appellants contention that the former landlord breached the Lease due to a lack of foot traffic or poor aesthetics in the Shopping Center, the Master correctly ruled that Appellants presented no evidence to support this position. (5-8-2023 Master Order at pg. 6). The Master additionally found that the Lease does not require the landlord to maintain any level of foot traffic or to achieve a certain level of aesthetics for the Shopping Center. (5-8-2023 Master Order at pg. 6). A finding that is supported by Strange's own admission that the Lease does not contain such terms. (Strange Depo. at pg. 59, ROA ___).

Moreover, the Lease contains the following integration clause:

> This lease represents the final understanding and agreement between landlord and tenant and incorporates all negotiations between the parties. Tenant hereby acknowledges and agrees that tenant has not relied on any representations, warranties, agreements and/or understandings, oral or written, except those that are set forth in this lease in entering into this lease. And tenant agrees that any and all negotiations, statements and representations made by landlord, agent or other party on behalf of the landlord have been merged into and are superceded by this lease

(Lease, ¶34, ROA _____).

The Master further correctly held that the integration clause precluded Appellants from presenting, and the Master from considering, extrinsic evidence to contradict the terms of the Lease. *See Davis v. KB Home of S.C., Inc*., 394 S.C. 116, 128, 713 S.E.2d 799, 805 (Ct. App. 2011), aff'd in part, vacated in part, 429 S.C. 634, 842 S.E.2d 653 (2014) ("The parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary, or explain the written instrument."). (5-8-2023 Master Order at pg. 6). The parol evidence rule is particularly applicable where the writing in question has an integration clause that

expresses the intention of the parties to treat the writing as a complete integration of their agreement. *U.S. Leasing Corp. v. Janicare, Inc*, 294 S.C. 312, 318, 364 S.E.2d 202, 205 (S.C. Ct. App. 1988) (when the writing on its face appears to express the whole agreement, parol evidence cannot be admitted to add another term to the agreement, even when the writing is silent as to the particular term sought to be established).

Accordingly, it was not an abuse of discretion for the Master to find that the prior landlord, WD-I, did not breach the Lease and that WD-I's actions did not excuse T&S' performance under the Lease or cause T&S to breach the Lease.

2. **Appellants Are Not Entitled to an Offset Against Damages for the Value of Improvements or Fixtures**

Appellants seek a credit against their damages for the value of fixtures and improvements to the Premises that remained in the building even after the Appellants permitted a third-party to gut the restaurant of all FF&E.

The Master found that the items at issue - a stove hood, walk-in cooler, sink and built-in cabinets - were an integral part of the operation of the Premises and that the items were permanently installed in the Premises. Therefore, the Master concluded that the items were not trade fixtures, but instead were improvements to the Premises. (5-8-2023 Master Order at ¶10, pg. 4; Lease, §11; ROA ____). Accordingly, the Master correctly determined that the improvements were property owned by the landlord, BOKF. (5-8-2023 Master Order at ¶10, pg. 4 and pg. 6; Lease §17, ROA ____).

Appellants, in effect, are seeking a reduction of damages for the purported value of improvements that they never owned and that were solely owned by BOKF. The Master properly denied this illogical claim by Appellants.

Nevertheless, Appellants contend on appeal that the Master abused his discretion with regard to evidence relating to the value of the improvements by denying the introduction of an amended affidavit by Appellant Strange and by not taking appropriate consideration of Strange's unsupported opinion on the value of the improvements in his filed affidavit. Again, Appellants argument completely misses the mark as any valuation proffered by Strange is meaningless since the improvements were BOKF's property and their value simply cannot be used as an offset against BOKF's damages.

The Master did not abuse his discretion by denying the introduction of an amended affidavit by Appellant Strange or by not reducing BOKF's damage award by value of the improvements opined on by Appellant Strange.

3. <u>Respondent BOKF Mitigated its Damages</u>

In the Motion for Consideration, the Appellants contested the Master's interpretation of the Lease terms pertaining to T&S' liability in the event T&S defaulted under the Lease and the Master's findings concerning BOKF's efforts to mitigate its damages. Appellants seem to have conceded this issue in their Initial Brief. But, in an abundance of caution, BOFK addresses the issues as follows.

As an initial matter, the Master properly found that T&S specifically agreed in the Lease that in the event that T&S defaulted its "liability under the Lease shall not be affected by or diminished in any way whatsoever, for Landlord's failure to re-let the Premises, or if the Premises are re-let, for Landlord's failure to collect the rentals under such re-letting." (5-8-2023 Master Order at ¶3(e), pg. 2 and pg. 6; Lease, §____, ROA ____). Accordingly, the Master correctly held that Appellants would have been liable for post-default rent during the period were there was no replacement tenant regardless of any failure by BOKF to procure a replacement tenant.

Putting that rationale aside, the Appellants argument is completely misplaced in that it overlooks the fact the Master also specifically found that the undisputed evidence shows that BOKF immediately engaged a commercial broker to market the Premises after it was vacated by T&S Management in March 2000 – at the outset of the Covid 2019 outbreak – and that BOKF procured a replacement tenant within a reasonable period, notwithstanding the difficulties of doing such in the Covid environment. (5-8-2023 Master Order at ¶11, pg. 4 and pg. 6; ROA ____).

The Master clearly did not abuse his discretion in finding that BOKF exercised reasonable efforts to mitigate damages and in locating a new tenant.

4. <u>The Master Properly Considered the Hill Affidavit</u>

Appellants argue that the Master improperly considered evidence of BOKF's damages presented through the affidavit of Warren E. Hill ("Hill"), the Senior Vice President and Manager of REO Special Assets/Facilities for BOKF. Hill attested that his duties and responsibilities for BOKF included the oversight of company-owned commercial real estate and activities relating to the collection of delinquent tenant accounts. As such, he was very familiar with the circumstances surrounding this litigation and BOKF's business relationship with the Appellants. (Hill Aff., ¶4, ROA ____). Appellants failed to present any admissible evidence at either the summary judgment or reconsideration motions challenging Hill's qualifications as a percipient witness. Accordingly, it was not an abuse of discretion for the Master to consider evidence presented by Hill's affidavit. *See Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 434, 673 S.E.2d 448, 457 (2009) ("The admission of evidence is a matter left to the discretion of the [master] and will not be disturbed on appeal absent an abuse of discretion.")

Furthermore, Appellants fail to identify any specific findings from the Master that were solely based on the Master's assessment of Hill's credibility or reliability as a witness. This lack of specificity, in itself, completely nullifies Appellants challenge to the admissibility of evidence

presented through Hill's affidavit. *See State v. NV Sumatra Tobacco Trading, Co.*, 379 S.C. 81, 87, 666 S.E.2d 218, 221 (2008) (argument challenging admissibility of affidavit is "deemed abandoned" for failure to point to any particular statement within the affidavit that would not be admissible in evidence.)

5. <u>Respondent BOKF's Damages Are Based on the Proper Time Period</u>

Appellants maintain, as they did both in the summary judgment and reconsideration motions, that BOKF is not entitled to recover damages that occurred prior to the date when BOKF obtained ownership of the Premises. The Master, however, specifically found that pursuant to and consistent with a Bankruptcy Court order, on February 28, 2020, BOKF and WD-I entered into an Assignment and Assumption of Leases by which WD-I assigned and transferred "***all of its right, title and interest in and to the Lease and Guaranty, including any rent payment and other charges due under the Lease.***" (5-8-2023 Master Order at ¶¶7-8, pgs. 3-4; Assignment and Assumption of Leases, §2, (Emphasis added); ROA ____). The Master further correctly found that the Assignment and Assumption of Leases contains terms indicating that BOKF would seek or agreed to collect rents due WD-I prior to the assignment. (5-8-2023 Master Order at ¶8, pgs. 3-4; Assignment and Assumption of Leases, §5; ROA ____). Therefore, the Master did not abuse his discretion in finding that BOKF was entitled to recover as a component of its damages rent and other charges due under the Lease that accrued before BOKF acquired the Premises.

Appellants further posit that the Master incorrectly included rent differential, late fees and penalties in the damage award that accrued after BOKF sold the Premises in October 2022. This position is just flatly erroneous since BOKF did not seek to recover damages for any period of time after it sold the Premises and the Master did not award any such damages. (Hill Supp. Aff., ¶6 and ¶8 and Ex. G, ROA ____).

6. Respondent BOKF'S Damages Include Items Allowed by the Lease

In the Motion for Reconsideration, Appellants argued that BOKF's damages should not include two components (i) late fees and (ii) the rent differential between the lower amount paid by the replacement tenant and the higher amount that T&S paid pursuant to the Lease. The Master properly found that BOKF could recover both items as part of its damages. Again, Appellants seem to have conceded this issue in their Initial Brief. But, in an abundance of caution, BOFK addresses the issue herein.

The Lease allows the landlord to charge late fees if the tenant fails to pay rent in a timely manner. (Lease, §6(e), ROA ___). As noted above, BOKF acquired all of the landlord's "right, title and interest in and to the Lease and Guaranty, including any rent payment ***and other charges*** due under the Lease." The Master properly determined that late fees were encompassed within "other charges" and properly held that BOKF was entitled to recover accrued late fees as part of its damages.

The Lease further provides that in the event of a tenant default, the landlord is entitled to recover as damages the deficiency in the amount of rent under the Lease and the amount of rent, if any, that the landlord receives from others to whom the Premises may be rented, and the deficiency bears interest at the rate of 12% until paid. (Lease, §25(c), ROA ____).

Accordingly, the Master correctly found that Lease specifically entitles BOKF to recover as "future damages" the differential between the lower amount paid by the new tenant, Gusto Restaurant, and the amount paid by T&S, with interest on the deficiency (Lease, §25, ROA _____). As such, the Master did not abuse his discretion by including the rent rate differential and accrued interest thereon in the damage award.

CONCLUSION

For the reasons set forth above, this Court should affirm the Master's order denying the Appellants' Motion for Reconsideration.

Respectfully submitted,

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