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Jan 30 2025

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 PETITION FOR REHEARING

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Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Appellant respectfully submits this Petition for Rehearing and accompanying Memorandum in Support of Petition for Rehearing regarding the Court's January 15, 2025 decision (Opinion No. 2025-UO-015) affirming the circuit court's affirmance of the magistrate court's grant of summary judgment to Respondents.

Respectfully submitted,

s/ M. Kevin McCarrell

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Dated: January 30, 2025

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**MEMORANDUM IN SUPPORT OF
PETITION FOR REHEARING**

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ARGUMENT

Appellant (“Family Dollar”) respectfully submits this Memorandum in Support of its Petition for Rehearing. Family Dollar expressly preserves all arguments made in its briefings to this Court and the lower courts for any writ of certiorari.

This appeal arises out of an eviction action instituted by Respondents (collectively, and in the singular, “Landlord”) seeking to eject Family Dollar as a tenant from its commercial property located at 3575 Maybank Highway, Johns Island, SC. The parties filed cross-motions for summary judgment and the magistrate court entered summary judgment in favor of Landlord on the sole ground that an alleged “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.” (R. p. 4). In its appeal, Family Dollar argued that the magistrate court’s entire conclusion was based on a significant misstatement of fact because there is no evidence that the Fire Marshal closed the Family Dollar due to obstructions to the riser room; rather, the Fire Marshal’s June report discusses a separate and distinct obstruction to the exit path. (Appellant’s Final Brief, p. 5).

This Court affirmed the magistrate court’s ruling in its decision issued on January 15, 2025 (the “Opinion”). Opinion No. 2025-UO-015. In the Opinion, this Court acknowledged that it was “unclear whether the violation noted on CFD’s report requiring, ‘[e]xit path unobstructed’ is the same as Landlord noted in its previous notices of default, obstruction to the riser room” but concluded that because Family Dollar was continuously noticed regarding “obstructions” between March and June 2022, it suffered no prejudice from the misstatement by the magistrate. (Opinion p. 4). However, this Court, like the magistrate court, has failed to consider the importance of distinguishing between the alleged obstructions.

There are two distinct alleged obstructions: (1) obstruction to the riser room; and (2) obstruction to the exit path. The obstruction to the riser room was an issue raised by Landlord in its March 1, 2022 notice letter as an alleged breach of the Lease agreement. (R. pp. 48-49). The March notice letter initiated the 30-day period for Family Dollar to cure or be in the process of curing¹ the violation, and Family Dollar submitted evidence that it had taken steps towards curing the violation within the 30 days. (R. pp. 184-185). Viewing the evidence in the light most favorable to Family Dollar, as required under the applicable standard of review, Family Dollar met its obligation to cure or begin the process of curing the violation within the 30-day period prescribed by the Lease. Landlord then raised the riser room issue in April and May, initiating a new 30-day period to cure the violation. (R. pp. 53-60). Again, Family Dollar submitted evidence that it took steps to cure the alleged obstruction within 30-days of receiving the notices, satisfying its obligations under the Lease. (R. pp. 171, ¶ 11).

The obstruction of the exit path, on the other hand, was an issue that Landlord never raised in any default notice. It was raised only by the Fire Department in June 2022. (R. p. 105). While the exit path obstruction theoretically could have been a separate default under the Lease, it was never noticed by Landlord, and thus cannot be a basis for Landlord to terminate the Lease. Equally important, this obstruction was indisputably cured within 30 days as required by the Lease. (R. pp. 45-47). The magistrate court's entire ruling rests on its incorrect assumption that the Fire Department closed the Family Dollar in June because of obstructions to the riser room. That assumption is simply incorrect. Had the magistrate court properly distinguished between the

¹ Notably, one section of the Opinion states that “[t]he lease requires Tenant to cure defaults within thirty days.” (Opinion p. 4). This is incorrect, as the language cited in a prior portion of the Opinion states that a default “must be cured *or in the process of being cured* . . . within thirty (30) days of receipt of written notice[.]” (Opinion p. 2)(emphasis added).

obstruction to the riser room and the obstruction to the exit path, it would have concluded that Family Dollar properly cured the obstructions to the exit path within 30 days of receiving notice from the Fire Department and that there was a genuine issue of material fact regarding whether Family Dollar met its Lease obligation with respect to the riser room obstructions within 30 days.

CONCLUSION

For the reasons set forth above, Appellant Family Dollar respectfully request that this Court grant its Petition for Rehearing.

s/ M. Kevin McCarrell

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SC Court of Appeals

PROOF OF SERVICE

This is to certify that I have, this 30th day of January, 2025, served a true and correct copy of **APPELLANT'S PETITION FOR REHEARING** in the above-captioned action by U.S. mail and e-mail to:

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January 30, 2025

Via Email (ctappfilings@sccourts.org) & US MAIL

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

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 is Appellant's Petition for Rehearing with Proof of Service along with Memorandum in Support of Petition for Rehearing. These same documents are being mailed to the Clerk's office along with the \$50.00 filing fee. 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

A handwritten signature in blue ink that reads "M. Kevin McCarrell".

M. Kevin McCarrell

MKM/ela
Enclosures

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

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California Colorado Delaware District of Columbia Florida Georgia Illinois Massachusetts Minnesota Missouri
Nevada New Jersey New York North Carolina Oklahoma Pennsylvania **South Carolina** Texas Washington