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STATE OF SOUTH CAROLINA
 COUNTY OF ANDERSON
 LAKESIDE CENTER STATION, LLC

IN THE COURT OF COMMON PLEAS
 ELEVENTH JUDICIAL CIRCUIT

C/A #: 09- CP-04-1138

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OCT 29 2014

SC Court of Appeals

**OPINION AND
 JUDGMENT**

FILED-CLERK'S OFFICE
 ANDERSON SC
 10AM SEP 12 P 3:16
 COMMON PLEAS AND
 GENERAL SESSIONS

Plaintiff,
 vs.

KAVE ENTERPRISES, LLC, d/b/a
 JACKSON HEWITT TAX SERVICE
 Defendants.

BACKGROUND

This Breach of Contract action, which came before the Court for a non-jury trial on July 24, 2014, arises from a Commercial Lease Agreement entered into in Anderson County, South Carolina. Plaintiff, Lakeside Center Station, LLC ("Lakeside"), represented by Jonathan M. Milling, alleged that the Defendant, Kave Enterprises, LLC d/b/a Jackson Hewitt Tax Service ("Kave") breached the terms of their Lease Agreement by failing to pay rent when due, and by vacating the premises prior to the expiration of the term of the lease. Kave, represented by Scott D. Robinson, in response admitted the existence of the Lease Agreement, the accuracy of copy attached to the Complaint, the term of the Lease Agreement, the Rent due under the Lease Agreement, and that interest would accrue on any unpaid amounts at the rate of one and one-half percent (1 ½ %) per month. The remaining allegations of the Complaint were denied, and Kave also raised affirmative defenses of estoppel and constructive eviction.¹

¹ Kave also initially raised several Counterclaims against Lakeside, but those Counterclaims were dismissed prior to the trial in this matter as they alleged claims arising under the South Carolina Residential

At the trial of this case, Lakeside presented the testimony of Christine Agee, Regional Property Manager for Phillips Edison & Co. ("PECO"), which serves as the property management group for Lakeside. Ms. Agee properly authenticated documents on behalf of Lakeside, including the Lease Agreement dated December 28, 2005, several default notices, an accounting of the amount due and owing, together with accrued interest at the rate specified in the Lease Agreement, as well as other correspondence between the parties subsequent to Kave vacating the premises. Ms. Agee was also asked about a series of letters from the Defendant which were addressed to the Plaintiff, but revealed an address of 3575 Paysphere Circle, Chicago, IL 60674. These letters from the Defendant raise complaints consistent with those presented during the trial, notably a leak in the roof, blocked signage, and trash behind the building. Ms. Agee testified that she had not seen the letters prior to the initiation of the instant lawsuit and that they were not found in the files maintained for this property. She also indicated that the address noted on these letters containing complaints was not the Notice Address of 11690 Grooms Road, Cincinnati, Ohio 45242, which is where any tenant complaints were to have been sent, pursuant to the terms of the Lease Agreement. Ms. Agee testified that the Paysphere address was a bank drop box, where rental payments were sent and that bank employees received and deposited the checks. Finally, Ms. Agee outlined that the first time she became aware of any issues, the roof leaking or otherwise, was in early April 2008, and that she contacted Greenville Maintenance Services, Inc. to repair the leak, which was accomplished on April 8, 2008. An email and invoice were presented as evidence to confirm the date and completion of service.

Landlord Tenant Act, S.C. Code Ann. § 27-40-10 *et seq.*, and the instant lease is Commercial and therefore outside of the purview of the Residential Landlord Tenant Act.

In response to Lakeside's case, Kave presented the testimony of David Patterson and Scott Patterson. Both David Patterson and Scott Patterson testified that the leased premises experienced leaking from the roof whenever it rained. Both also testified regarding a PECO leasing sign blocking their roadside Jackson Hewitt signage from certain vantage points, but not their storefront signage. They both also testified as to problems with debris and trash behind the leased premises. David Patterson also testified that he sent several letters to Lakeside raising these same issues, but acknowledged that the correspondence was sent to the Paysphere address noted above, not the Grooms Road address identified for notice purposes.² David Patterson also complained of the subject shopping center losing tenants, notably Bi Lo, but Lakeside presented evidence of Bi Lo's Bankruptcy filing, and lease rejection as a part of that proceeding. Kave argues that these problems with the leased premises required them to vacate, and thus they were constructively evicted. Kave also argues that representations by Lakeside concerning the development of the space and marketing of the premises should preclude Lakeside's recovery. Finally, Kave argues they were denied the "Quiet Enjoyment" of the leased premises.

Having received the evidence in this case, documentary and testimonial, I make the following findings of fact, and conclusions of law.

FINDINGS OF FACT and CONCLUSIONS OF LAW

Lakeside and Kave entered into binding Commercial Lease Agreement on or about December 28, 2005. Both the Landlord and Tenant are sophisticated businesses, one being in the business of leasing property, the other in the business of preparing and

² David Patterson testified that he read and understood the Lease Agreement, and all terms thereof. The Notice Address is plainly specified in the Lease Agreement.

filing income tax returns.³ Pursuant to the terms of this Lease Agreement, Kave was to lease Unit 15 of Lakeside Center Shopping Center in Anderson, South Carolina for an initial term of Three (3) years and Four (4) months, or until April 20, 2009. Kave promised to pay monthly rent to Lakeside during this term in the amount of Eight Hundred and no/100 (\$800.00) Dollars per month, and to continuously occupy the leased premises until April 30, 2009.

Under the lease, if Kave vacated the premises prematurely, such was considered an event of default. Similarly, a failure by Kave to pay the monthly rent was an event of default. The Lease Agreement further outlines that any past due amounts owing to Lakeside accrue interest at the one and one-half percent (1 ½%) per month. In the event of default, Lakeside has the right to accelerate the balance due under the lease, to term, and also has the right to recover legal fees and collection costs associated with collection efforts.

Kave has failed to pay rent under the Lease Agreement since April 2008. The balance owing for rent is Nine Thousand Eight Hundred Fifty Two and 47/100 (\$9,852.47) Dollars. Interest has accrued on this amount at the rate of one and one-half percent (1 ½%) such that, interest now due on the account is Sixteen Thousand Nine Hundred Ninety Four and 19/100 (\$16,994.19) Dollars. Thus the principal and interest due on this account is Twenty Six Thousand Eight Hundred Forty Six and 66/100 (\$26,846.66) Dollars. Lakeside has retained the services of counsel in an attempt to collect on this account, and has incurred legal fees and collection costs associated with

³ David Patterson, the President of Kave who executed the Lease Agreement on behalf of Kave and as noted testified at the trial, has a Masters Degree, has been in the accounting business since the early 1970s, has entered into franchise agreements with Jackson Hewitt, and actually been a landlord for other properties as well.

these efforts. Lakeside's utilization of counsel is authorized under the terms of the Lease Agreement, as is their ability to recover legal fees and costs.

Kave has disputed their responsibility for these amounts.⁴ Initially, Kave asserts that Lakeside made certain representations to Kave regarding improvements to the premises, as well as the retention and expansion of tenants, which should preclude their recovery. Essentially, Kave relies upon the legal theory of equitable estoppel.

Elements of equitable estoppel as to the party estopped are: (1) conduct by the party estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the true facts. *Ingram v. Kasey's Assocs.*, 531 S.E.2d 287 n. 2 (S.C. 2000). Essential elements of estoppel as related to the party claiming the estoppel are: (1) lack of knowledge and of means of knowledge of truth as to facts in question; (2) reliance upon conduct of the party estopped; and (3) prejudicial change in position. *Mayes v. Paxton*, 437 S.E.2d 66 (S.C. 1993). "Estoppel cannot exist if the knowledge of both parties is equal and nothing is done by one to mislead the other." *Evins v. Richland County Historic Pres. Comm'n*, 532 S.E.2d 876, 878 (S.C. 2000).

Zabinski v. Bright Acres Associates, 553 S.E.2d 110, 114 (S.C. 2001)

Here, there is nothing to suggest that Lakeside mislead Kave. As previously outlined, both are sophisticated businesses with experience leasing properties. Additionally, the Lease Agreement contains a merger clause at Paragraph 14.10 confirming that the Lease Agreement contains the entire agreement of the parties. This clause would preclude Kave's suggestion that he relied upon any representations not included in the Lease Agreement. Furthermore, Kave did not vacate, nor discontinue rental payments, until April 2008, almost two and a half years after entry into the Lease

⁴ Kave did not challenge the calculations, but rather only challenged their responsibility for any amounts owing.

Agreement. Finally, as demonstrated by the evidence presented by Lakeside, Bi Lo, the anchor tenant for the space, filed Bankruptcy, and through that proceeding rejected the lease. There is nothing Lakeside could have done to prevent this action by Bi Lo, and nothing in the record suggests that Bi Lo anticipated bankruptcy at the time of execution of the Lease Agreement, or that Lakeside had any reason to believe Bi Lo, or any other tenant for that matter, would vacate the premises. Ms. Agee also testified as to efforts by PECO to lease the spaces, including the posting of signage. Notably, Kave also complains of the location of the advertising sign. Kave has failed to meet their burden of proving the affirmative defense of equitable estoppel, and therefore it must be denied.

Kave also alleges that the conditions on the premises, as outlined herein, effectively and constructively evicted them, and required their relocation. "A tenant asserting constructive eviction must show: (1) some intentional act or omission of the landlord deprived the tenant of possession or substantially interfered with the tenant's beneficial use or enjoyment of the leased premises and (2) as a result of the act or omission by the landlord, the tenant abandoned the premises." *Pleasantburg Warehouse Co. v. Global Distribution, Inc.*, 339 S.E.2d 135, 136 (S.C. Ct. App. 1985). "There is no 'constructive eviction' if the tenant continues in possession of the premises however much he may be disturbed in the beneficial enjoyment." 49 Am.Jur.2d *Landlord & Tenant* § 598 (2006)(cited in *Silver Bay Seafood Restaurants, Inc. v. Mann*, No. 2008-UP-431, 2008 WL 9844660 (S.C. Ct. App. July 31, 2008)).

In the instant situation, there is no evidence that Lakeside acted intentionally. Rather, Kave complains of Lakeside's failures. While Kave points to the letters in evidence to demonstrate their continuing problems, Kave failed to send these letters to

the Notice Address plainly specified in the Lease Agreement. David Patterson testified that he read and understood the terms of the Lease Agreement and cannot now claim he did not understand where these notices were to have been sent. The Lease Agreement outlines in Paragraph 14.9 that “all notices given or required to be given hereunder must be delivered by a nationally-recognized overnight courier or by registered or certified mail – return receipt requested, postage prepaid (or equivalent), to the Notice Address.” Not only did Kave fail to provide the required notice to the correct address, but Kave also failed to send the notices in the proper manner, by recognized carrier or registered or certified mail. No evidence was presented that Lakeside received the correspondence upon which Kave relies, or otherwise had notice of any problems with the premises. Kave’s defense of constructive eviction, therefore, must also be denied.⁵

The same holds true with Kave’s claims that Lakeside breached the covenant of Quiet Enjoyment, as nothing in the record reveals that Lakeside actually received notice of any problems until a complaint was received concerning a roof leak until early April 2008. That leak was promptly repaired on April 8, 2008. Kave vacated the premises subsequent to these repairs. Lakeside did not breach the covenant of Quiet Enjoyment.

Kave has also alleged a failure to mitigate, but Lakeside presented testimony that the space was advertised. The burden is on Kave, as the defendant, to establish Lakeside's lack of due diligence in mitigating damages. *See Sloan Const. Co., Inc. v.*

⁵ Kave contends that the roof leak was Lakeside’s responsibility, while Lakeside points to Exhibit D of the lease to demonstrate that HVAC maintenance was Kave’s responsibility. I need not determine which party was responsible for the repairs, as Section 6.2 of the Lease Agreement entitled “Landlord’s Maintenance” requires notice to the landlord, which as noted herein, Kave did not provide. Thus, even if the repairs were Lakeside’s responsibility (which I need not determine), Kave failed to provide the required notice to require action from Lakeside.

Southco Grassing, Inc., 717 S.E.2d 603, 608 (S.C. 2011)(citing *Adams v. Orr*, 194 S.E.2d 232, 235 (1973)). Kave failed to meet this burden.

Based upon the foregoing, I find that Lakeside is entitled to damages for outstanding rental payments in the amount of Nine Thousand Eight Hundred Fifty Two and 47/100 (\$9,852.47) Dollars, plus Sixteen Thousand Nine Hundred Ninety Four and 19/100 (\$16,994.19) Dollars in accrued interest pursuant to the terms of the Lease Agreement. I also find that Lakeside was required to employ the services of an attorney to pursue collection efforts in this matter. The Lease Agreement clearly contemplates and authorizes the recovery of attorneys fees and collection costs, and I find that such are just and proper as outlined below.

ATTORNEYS FEES

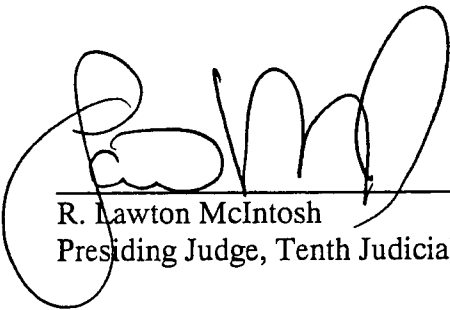
In order to pursue their claim for recovery of the aforementioned amounts, Lakeside employed the services of attorney Jonathan M. Milling, who submitted an Affidavit of Attorneys Fees in this case outlining justification for his fees the factors for consideration outlined by our Supreme Court in *Dede v. Strickland*, 414 S.E.2d 134 (S.C. 1992). These factors include nature, extent, and difficulty of the legal services rendered, the time and labor necessarily devoted to the case, the professional standing of counsel, the contingency of compensation, the customary fees charged in the locality for similar services, and the beneficial result obtained.

Counsel for Kave was provided a copy of Mr. Milling's Affidavit of Attorneys Fees, and an opportunity to object to the amount claimed, or cross examine Mr. Milling. He declined to do so. As such, and following an independent review of the justification provided by Mr. Milling, I find that the fees and costs claimed are reasonable.

31/100 (\$11,338.31) Dollars. The total amount of the Judgment shall be Thirty Eight Thousand One Hundred Eighty Four and 97/100 (\$38,184.97) Dollars.

THEREFORE, IT IS HEREBY ORDERED THAT Judgment shall be entered in this matter in favor of Lakeside Center Station, LLC, and against Kave Enterprises, LLC d/b/a Jackson Hewitt Tax Service, in the total amount of Thirty Eight Thousand One Hundred Eighty Four and 97/100 (\$38,184.97) Dollars. Interest shall accrue on this amount at the legal rate of 8 ¾% upon the entry of this Judgment.

IT IS SO ORDERED!



R. Lawton McIntosh
Presiding Judge, Tenth Judicial Circuit

9-11, 2014
Anderson, South Carolina

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COMMON PLEAS AND
GENERAL SESSIONS