

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Skydive Myrtle Beach, Inc.,

Appellant,

vs.

Horry County

Respondent.

FOR THE FIFTEENTH JUDICIAL CIRCUIT
IN THE COURT OF COMMON PLEAS
CASE NO.: 2014-CP-26-4965

ORDER DISMISSING

MAGISTRATE'S APPEAL

RECEIVED
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Horry County
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AUG 24 2015
SC Court of Appeals

The above captioned matter came before the court on the appeal of Skydive Myrtle Beach, Inc., (Appellant) from the Order of Eviction of the Honorable Christopher J. Arakas, Magistrate Judge. Judge Arakas evicted Appellant from Horry County's (Respondent) airplane hangar, Hangar 7, on the grounds that Appellant's tenancy had ended. Appellant raises two grounds on appeal. The first ground is substantive and raises the question of what document controlled the tenancy right of Appellant to occupy Hangar 7. The second ground is procedural and raises the question of whether Judge Arakas abused his discretion by conducting a non-jury bench trial on the eviction proceeding.

A hearing on the appeal was held before this Court on May 6, 2015, in the Horry County Courthouse. Present at the hearing were the Appellant and his attorneys, Robert G. Eastman and Robert B. Varnardo. Also, present were Respondent and its attorney, Michael W. Battle. After considering the Magistrate's Return, the briefs of the parties and oral arguments, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Respondent Horry County is the landlord and owner of Hangar 7 at Grand Strand Airport CRE.
2. On May 10, 2012, Appellant Skydive Myrtle Beach, Inc. entered an agreement (jump agreement) with Grand Strand Aviation to provide tandem parachute jumps for Appellant from the Grand Strand Airport.
3. Paragraph 5 of the jump agreement provides: "There will be no packing fees charged to SkyDive MB. SkyDive shall be provided with a **minimum of 2,500 square feet during daylight hours** without fee seven days a week, including holidays, 365 days a year."
(emphasis added).
4. Paragraph 18 of the jump agreement provides the agreement will remain in effect through Grand Strand Aviation's lease with Horry County Department of Airports through July 2020.
5. Grand Strand Aviation's lease with Horry County Department of Airports was terminated by agreement in 2013.
6. On September 13, 2013, Respondent Horry County through its Department of Airports entered a new commercial agreement with Appellant permitting Appellant to use the approximately 6800 square feet of space in Hangar 7 twenty four hours a day seven days a week until January 31, 2014. The fee for the use of the space in Hangar 7 was monthly payments of One Thousand Two Hundred & 00/100 (\$1200.00) dollars per month. Respondent reserved the right to adjust the amount of the fee for use of the space upon thirty days' notice to Appellant.
7. Paragraph 14 of the Hangar 7 permit agreement provided: "This permit constitutes the entire agreement of the parties with respect to the subject matter hereof and supersedes all

previous agreements, representations and understandings concerning the same, whether written or oral. The provisions of the Permit may be modified, amended or waived only by written instrument executed by the County (Respondent) and Company (Appellant).”
(Parenthesis added).

8. The Hangar 7 agreement was duly signed by Respondent and Appellant.
9. The Hangar 7 permit expired by its own terms on January 31, 2014.
10. Appellant is now occupying Hangar 7 without permission or authority from Respondent.
11. On or about June 5, 2014, Respondent duly served and filed in Magistrate’s Court an Ejectment Proceeding/Rule to Vacate. On June 13, 2014, Appellant responded by filing a Motion to Remove pursuant to S.C. Code Ann. §22-3-30 contesting the Court’s jurisdiction.
12. On July 2, 2014, Judge Christopher Arakas denied the Motion to Remove and set an original trial date for Respondent’s Rule to Vacate for July 23, 2014.
13. Appellant did not file a second responsive pleading within 15 days of the denial of its Motion to Remove on by Judge Arakas on July 2, 2014.
14. On July 21, 2014, the Magistrate’s office received a letter dated July 18, 2014, requesting that the Magistrate reconsider his order of July 2, 2014, or in the alternative grant Appellant a jury trial and permission to file a counterclaim. On July 23, 2014, Judge Arakas denied Appellant’s request to reconsider his Motion to Remove and his request for a jury trial plus 30 days to file a counter claim. Judge Arakas denied both requests on the grounds that the requests were untimely. Judge Arakas tried the Respondent’s Ejectment Action/Rule to Vacate in a nonjury trial and ruled in favor of the Respondent granting the eviction of the Appellant.

15. Judge Arakas found that the lease agreement between Respondent and Appellant had expired. Respondent is the rightful Landlord and did present Appellant with a new agreement/lease. Appellant did not agree with it and refused to sign the new agreement/lease. Therefore, Appellant had no legal right to be on the property or in the building.

CONCLUSIONS OF LAW

(Substantive Issues)

1. This Court has jurisdiction of the above captioned appeal. *SC R MAG CT Rule 18*.
2. The standard of review to be applied by a Circuit Court in an appeal of a magistrate's judgment is prescribed by *S.C. Code Ann. § 18-7-170 (1976)*: Upon hearing the appeal the appellate court shall give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits. In giving judgment the court may affirm or reverse the judgment of the court below, in whole or in part, as to any or all the parties and for errors of law or fact. *Hadfield v. Gilchrist, 343 S.C. 88, 92, 538 S.E.2d 268, 270 (Cr. App. 2000)*.
3. Under the doctrine of merger, the Hangar 7 permit supersedes and replaces any other agreement entered between Respondent and Appellant or its predecessors in connection with the use of Hangar 7. *Davis v. KB Home of S. Carolina, Inc., 394 S.C. 116, 127, 713 S.E.2d 799, 804 (Cr. App. 2011) aff'd in part, vacated in part, No. 2011-199587, 2014 WL 2535489 (S.C. Jan. 29, 2014) (employment application were superseded and rendered invalid by the presence of a merger clause in his subsequent employment agreement)*.

4. Under S.C. Code Ann. §27-35-110, “[w]hen there is an express agreement, either oral or written, as to the term of the tenancy of a tenant for a term or for years such tenancy shall end without notice upon the last day of the agreed term.”
5. Appellant’s tenancy ended on January 31, 2014. Appellant’s right to occupy Hangar 7 expired on January 31, 2014, and Appellant had no legal right to occupy Hangar 7. *SC Code Ann. §27-35-110.*

(Procedural Issues)

6. Magistrate Court rules of civil procedure shall govern all civil suits in the magistrates’ court. If no procedure is provided by those rules, the court shall proceed in a manner consistent with the statutory law applicable to magistrates and with circuit court practice in similar situations but not inconsistent with these rules. *SC R MAG CT Rule 2; Rule 81 SCRCF.*
7. The defendant may reply to the plaintiff’s complaint by filing a written statement in a form approved by the magistrate or by personally appearing and making an oral statement. This reply shall be called an “answer.” A defendant shall file an answer and any appropriate counterclaims with the court within thirty (30) days from the first day after the date of service. *SC R MAG CT Rule 7.* “Answer” means the paper filed by the party responding to the complaint. *SC R MAG CT Rule 1.*
8. A defendant shall file an answer and any appropriate counterclaims with the court within thirty (30) days from the first day after the date of service. *SC R MAG CT Rule 7.*
9. Appellant waived its right to file a counterclaim by failing to file a counterclaim within thirty (30) days from the first day after the date of service. *SC R MAG CT Rule 7.* Any different ruling would be inconsistent with the mandates of *SC R MAG CT Rule 7.*

10. Even if the Court were to accept Appellant's claim that Appellant's Motion to Remove was a Rule 12 motion under the South Carolina Rules of Civil Procedure, Appellant would have been in default by July 21, 2014, when his request a jury trial and the right to file a counterclaim was filed in Magistrate's Court. The service of a motion permitted under Rule 12 SCRCF only alters the time to answer as follows, unless a different time is fixed by order of the Court: (1) if the Court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 15 days after notice of the Court's action. *SCRCF 12*.
11. If either party wanted a jury trial, it must have been requested in writing at least five (5) working days prior to the original date set for trial. *SC R MAG CT Rule 13*.
12. Appellant waived its right to have a jury trial by failing to request one at least 5 working days prior to the original date set for trial. . *SC R MAG CT Rule 13*. Also see *Rule 38(d), SCRCF* (stating a party's failure to demand a jury trial as required by the rule constitutes a waiver of the right to a jury trial); *C & S Real Estate Servs. v. Massengale*, 290 S.C. 299, 300, 350 S.E.2d 191, 192 (1986); Also see *Cohen v. Creech*, No. 2013-UP-091, 2013 WL 8482385, (S.C. Ct. App. Feb. 27, 2013). Any different ruling would be inconsistent with the mandates of *SC R MAG CT Rule 13*.
13. The decision to grant or deny a continuance is a matter within the lower court's discretion. *Graybar Elec. Co. v. Rice*, 287 S.C. 518, 520, 339 S.E.2d 883, 884 (Ct.App.1986). Absent an abuse of discretion, the court's decision to deny a continuance will not be disturbed on appeal. *Hamm v. South Carolina Pub. Serv. Comm'n*, 312 S.C. 238, 241, 439 S.E.2d 852, 853 (1994); *A & I, Inc. v. Gore*, 366 S.C. 233, 243-44, 621 S.E.2d 383, 388 (Ct. App. 2005).

14. Judge Arakas did not abuse his discretion by proceeding with a nonjury trial on July 23, 2014 which had been scheduled and set for trial on July 2, 2014, and duly noticed to the parties on July 2, 2014. *Id.*

15. Judge Arakas correctly decided that Appellant has no legal right to occupy Hangar 7.

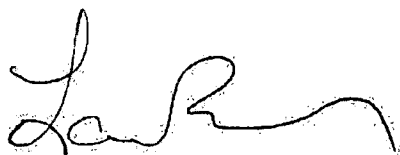
DISCUSSION

The Court has carefully reviewed the record, memorandums of authorities and arguments of counsel. The Court finds that the fact that the Hangar 7 agreement by which Appellant occupied the property expired in January of 2014 has not been refuted by Appellant. The jump agreement dated May 10, 2012, introduced at the hearing of the appeal was not a valid eight year lease agreement to occupy Hangar 7. The express terms of the jump agreement provided that Appellant would be permitted the use of a minimum of 2500 square feet in "Byrd Hangar" for use during daylight hours without paying a fee. Appellant entered a new agreement with Respondent that permitted it to use 6800 square feet without limitation of the use to daylight hours. In addition, Appellant agreed to pay Respondent \$1200 per month for the use of 6800 square feet without limitation of the use to daylight hours. The new agreement expressly provided that the permit constituted the entire agreement of the parties with respect to the use of Hangar 7 and superseded all previous agreements, representations and understandings concerning the same, whether written or oral. When a contract is unambiguous, clear and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary and popular sense. *Warner v. Weader*, 280 S.C. 81, 83, 311 S.E.2d 78, 79 (1983). The Hangar 7 permit expired in January of 2014. Judge Arakas was correct in ruling Appellant had no right to occupy Hangar 7 and should be evicted.

Appellant claims it was denied procedural due process of law because Judge Arakas denied its attorneys' request to file a counterclaim and seek a jury trial. Under the Rules of Procedure for Magistrate's Court both requests were untimely. Appropriate counterclaims must be filed with the court within thirty (30) days from the first day after the date of service. *SC R MAG CT Rule 7*. Jury trials must be requested in writing at least five (5) working days prior to the original date set for trial. *SC R MAG CT Rule 13(c)*. Appellant did not file a counterclaim within thirty days of the original date of service and Appellant's request for a jury trial was not made five (5) working days prior to the original date set for trial. Judge Arakas did not abuse his discretion by denying Appellant attorney's requests and proceeding to trial on the original date set for trial. *SC R MAG CT Rule 7 & Rule 13 (c)*; also see *A & I, Inc. v. Gore*, 366 S.C. 233, 243-44, 621 S.E.2d 383, 388 (Ct. App. 2005).

This Court is charged with giving judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits. *S.C. Code Ann. § 18-7-170 (1976)*. The merits of the present case are clear and this Court has ruled that the controlling Hangar 7 agreement by which the Appellant was allowed to occupy Hangar 7 expired in January 2014. Appellant has no legal right to occupy Hangar 7 and that conclusion and/or fact has not been refuted by the Appellant.

THEREFORE, IT IS HEREBY ORDERED, the appeal of Skydive Myrtle Beach, Inc., is hereby dismissed.



The Honorable Larry B. Hyman, Jr.
Judge Of The Fifteenth Judicial Circuit

5-27, 2015