

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

SC Court of Appeals

The Honorable Thomas A. Russo, Circuit Court Judge

Case No.: 2014-CP-40-5976
Appellate Case No.: 2016-000505

Tracy Fulmore.....Appellant,

v.

Julie Smith.....Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE CIRCUIT COURT ERR IN CONCLUDING THAT IT HAD JURISDICTION OVER APPELLANT'S APPEAL, THE NOTICE OF APPEAL HAVING BEEN UNTIMELY FILED BY APPELLANT?
- II. DID APPELLANT PROPERLY PRESERVE HIS ARGUMENT THAT HE COULD CANCEL THE LEASE PRIOR TO THE EFFECTIVE DATE AND PRIOR TO HIS POSSESSION OF THE PROPERTY BASED ON PROVISION SIX (6) OF THE LEASE?
- III. DID THE CIRCUIT COURT ERR IN FINDING THAT EVIDENCE SUBMITTED TO THE LOWER COURT CLEARLY INDICATED THAT APPELLANT WAS OFFERED ACCESS TO THE COMMERCIAL RENTAL SPACE ON SEVERAL OCCASIONS PRIOR TO THE START DATE OF THE COMMERCIAL LEASE?
- IV. DID THE CIRCUIT COURT ERR IN FINDING THAT THE LOWER COURT PROPERLY DETERMINED THAT THE APPELLANT BREACHED THE COMMERCIAL LEASE PURSUANT TO THE TERMS OF THE LEASE DOCUMENT AND THEREFORE OWED RESPONDENT DAMAGES?

STATEMENT OF THE CASE

Appellant filed an action in magistrate's court on July 3, 2014, alleging that Respondent failed to allow occupancy and access to a commercial lease space which was the subject of a two year commercial lease signed by Appellant as tenant and Respondent as landlord. (R. pp. 6-7; R. pp. 123-132). Appellant sought \$2,280.00 in damages, which included \$2,200.00 paid as a security deposit and first month's rent along with court filing costs. (R. pp. 6-7). Respondent filed an answer on July 15, 2014, denying the Appellant's allegations. (R. pp. 22-25). Respondent also filed a counterclaim the same day, alleging breach of contract and seeking \$7,500.00 in damages. (R. pp. 42-43). Appellant filed his answer to Respondent's counterclaim on July 28, 2014. (R. pp. 45-46).

The non-jury trial took place before Magistrate Judge Andy Surles on August 27, 2014. (R. p. 57). Following the trial, Judge Surles rendered a judgment in favor of Respondent, finding that Appellant breached the subject commercial lease and awarding Respondent \$7,500.00 minus the \$2,200.00 received from Appellant in conjunction with the lease, plus court costs. (R. p. 105, lines 2-13; R. p. 106, lines 4-8; R. p. 4; R. p. 58). Appellant did not file a motion for a new trial and filed a Notice of Civil Appeal on September 29, 2014. (R. pp. 54-55). On appeal, Respondent filed an Answer to Appeal/Motion to Dismiss, and Appellant filed a Return in response. (R. p. 59; R. pp. 60-61). Appellant also filed a Reply to Return of Appeal and a Supplemental Reply to Return to Appeal to which Respondent filed a Reply. (R. pp. 62-64; R. pp. 74-75; R. pp. 76-77). The Circuit Court denied the appeal and affirmed the magistrate court's ruling on February 18, 2016. (R. pp. 1-3).

STATEMENT OF FACTS

Appellant and Respondent entered in to a commercial lease on May 9, 2014. (R. pp. 131-132; R. p. 86, lines 13-17; R. p. 92, lines 13-14). Before signing the lease, Appellant and Respondent talked several times by phone regarding the premises, beginning in late October or November 2013. (R. p. 100, line 24-p. 101, line 20). The lease period was to begin June 1, 2014 and end on May 30, 2016. (R. p. 123). After the lease was signed and on the same day, Respondent scanned and emailed the Appellant a copy of the executed lease. (R. p. 86, lines 19-20; R. p. 94, lines 13-14). At the time the lease was signed, Appellant paid Respondent a security deposit of \$1,200.00 along with one month's rent in an amount of \$1,000.00. (R. p. 80, lines 9-13).

Appellant sought to lease the premises to open a barbershop. (R. p. 83, line 17). Appellant knew that, although the space was available, there were items that needed to be

removed prior to June 1, 2014. (R. p. 84, lines 11-17; R. p. 89, lines 14-19; R. p. 92, lines 18-25; R. p. 94, lines 10-12). Respondent agreed, upon Appellant's request, that Appellant would be allowed occupancy prior to June 1, 2014, at no charge and once the space had been cleared, in order for him to obtain measurements of the space and begin plans for his barbershop. (R. p. 92, line 25 – p. 93, line 7). Appellant thereafter called Respondent on May 14, 2014 to request a key to the leased property. (R. p. 85, lines 1-4; R. p. 93, lines 8-10).

According to Appellant, their conversation on May 14, 2014 lasted twelve (12) minutes and made him feel as if he “was being pulled back and forth” by the Respondent. (R. p. 85, line 4 – p. 86, line 3). According to the Appellant's testimony, Respondent allegedly expressed concern about “demolition” to the property, and also wanted him to pay for the cost of electricity from the point at which he started occupancy, rather than June 1, 2014. (R. p. 85, lines 9-15; R. p. 87, line 19 – p. 88, line 15; R. p. 91, lines 19-21; R. p. 102, lines 15-17). Appellant believed that he should have received keys to the premises immediately upon signing the lease. (R. p. 83, lines 21-25). He further believed that he had done “[e]verything that [Respondent] requested that [he] do leading up to the lease” and perceived Respondent's requests during their conversation to be “additional demands.” (R. p. 85, lines 18-20; R. p. 7). Appellant alleged that he ended the conversation by requesting that his two checks be returned. (R. p. 85, line 23 – p. 86, line 2).

Appellant testified that Respondent continued to correspond with him via emails and text messages after the May 14, 2014 conversation. (R. p. 86, lines 3-12; R. pp. 6-10; R. pp. 134-136). However, Appellant ceased communication with Respondent. (R. p. 86, lines 2-5). He told the magistrate that he perceived the Respondent to be “very

disingenuous. She's saying one thing, but she often does another." (R. p. 90, lines 7-8). He believed, based on their interactions, that there would be "a lot of issues with [Respondent]" in the future. (R. p. 86, lines 9-10). Appellant testified that he had his attorney send a letter, which was dated May 22, 2014, requesting that the agreement be cancelled and his checks returned. (R. p. 133; R. p. 92, lines 1-6).

In defense of the case against her as well as in support of her counterclaim for breach of contract, Respondent testified before the magistrate that, after signing the lease, Appellant still needed to produce several items, including sketches of proposed alterations to the space and proof of liability insurance. (R. pp. 23-27; R. pp. 42-44; R. p. 93, lines 8-15). Respondent specifically requested proof of insurance and sketches of proposed changes from Appellant by email on May 9, 2014. (R. p. 26). Respondent again requested proof of insurance during her telephone conversation with Appellant on May 14, 2014. (R. p. 93, lines 10-12). Respondent stated that she planned to contact Appellant and allow him occupancy once the premises was "cleared out and cleaned up and ready for him," and that "[a]s far as agreeing to give [Appellant] a key, there was no way [she] could have given him a key on the day that [they] signed the lease, and he knew that." (R. p. 93, lines 5-7; R. p. 94, lines 10-12). Respondent further stated that during the May 14, 2014 conversation she "asked [Appellant] why he didn't want to put the power in his name since [she] was going to give him possession early, and he just didn't want it on." (R. p. 93, lines 17-20). Respondent emailed the Appellant the following day, informing him that she had turned the power off as requested, and she inquired again about proof of insurance and offered to provide him with a key. (R. p. 93, lines 20-24; R. pp. 134-136).

In all, Respondent emailed the Appellant three times after the May 14, 2014 conversation, inquiring twice about the needed insurance information and each time

offering him a key to the premises. (R. p. 117, lines 14-24; R. pp. 134-136). Respondent testified that Appellant “did not ask for the checks back” during the telephone conversation on May 14, 2014. (R. p. 94, lines 1-2). Respondent also testified that her first notice of his request to have his checks returned was when she received a letter from Appellant’s attorney, dated May 22, 2014, postmarked May, 28, 2014, and received by Respondent on June 4, 2014. (R. p. 133; R. p. 94, lines 2-4; R. p. 117, lines 6-9; R. pp. 22-40). At the time of the magistrate court trial, Respondent had not yet been able to rent the premises to another tenant. (R. p. 95, lines 3-4).

After a finding by the magistrate that the Appellant had breached the lease, Appellant appealed and argued for the first time, through counsel, that provision six (6) of the lease allowed him to cancel the lease agreement prior to his possession of the property. (R. p. 104, line 2 – p. 105, line 13; R. p. 4; R. p. 58; R. pp. 62-63; R. pp. 74-75; R. p. 111, lines 1-6; R. p. 125). He also argued for the first time that the “N/A” portion of provision six (6) of the lease meant that an entire portion of the provision was not applicable and seemingly deleted. (R. p. 116, line 14 – p. 117, line 1). In denying Appellant’s appeal, Judge Russo upheld the lower court’s decision, failing to rule specifically on provision six (6) of the commercial lease. (R. pp. 1-3). This appeal followed.

ARGUMENT

I. DID THE CIRCUIT COURT ERR IN CONCLUDING THAT IT HAD JURISDICTION OVER APPELLANT’S APPEAL, THE NOTICE OF APPEAL HAVING BEEN UNTIMELY FILED BY APPELLANT?

Circuit judges may hear appeals from magistrates’ courts and municipal courts in the Court of General Sessions and the Court of Common Pleas, upon notice as required by law being given for the hearing of such appeals. S.C. Code Ann. § 14-5-340 (1976).

S.C. Code Ann. § 18-7-20 dictates the requirements for when and how a notice of appeal to circuit court must be taken:

The appellant, within thirty days after written notice of judgment has been given him or his attorney by the magistrate, recorder, or judge of the municipal court, **except when the judgment is announced at the trial in the presence of the appellant or his attorney then no written notice is necessary**, shall serve a notice of appeal, stating the grounds upon which the appeal is founded.

S.C. Code Ann. § 18-7-20 (2014) (emphasis added). Rule 18 of the South Carolina Magistrates Court Rules similarly dictates:

All appeals of judgments rendered by the magistrates court shall be to the circuit court of the county where the judgment was rendered. Within thirty (30) days after delivery of written notice of judgment to the parties or their attorneys, a party wishing to appeal shall serve on the respondent and file a notice of appeal containing a statement of the grounds for appeal with the magistrate rendering the judgment and with the Circuit Court of the County where the judgment was rendered. **If the judgment is announced at the trial in the presence of the parties or their attorneys, the notice of appeal shall be served and filed within thirty (30) days of the date the judgment is announced.**

SC R MAG CT Rule 18(a) (emphasis added). As previously set forth in Respondent's Motion to Dismiss the Appeal filed August 16, 2016 and Respondent's Reply to Appellant's Return filed October 3, 2016, the magistrate judge announced his ruling at the trial of this action on August 27, 2014 in the presence of both parties. (R. p. 103, line 7 – p. 107, line 6). Pursuant to the aforementioned statute and court rule, the Appellant had thirty (30) days from that day to file the Notice of Appeal. Upon a review of a 2014 calendar for August and September, a count of each day after August 27, 2014 reveals that the thirty (30) day period for the Appellant to appeal this action ran on Friday, September 26, 2014. Appellant's Notice of Civil Appeal was filed with the Richland County Clerk of Court on Monday, September 29, 2014. (R. pp. 54-55). As a result, Appellant's Notice of Civil Appeal from the magistrate court's judgment was untimely.

Moreover, Appellant did not serve the Notice of Civil Appeal on Respondent until October 2, 2014. (R. p. 56). Pursuant to Rule 18 of the South Carolina Magistrates Court Rules, Appellant was required to both serve and file his notice of appeal within thirty days of Judge Surles' announcement of his judgment on August 27, 2014, or by September 26, 2014.

In South Carolina, "as a general rule if an inferior court or tribunal has no jurisdiction of a cause an appeal from its decision confers no jurisdiction on the appellate court" *Senn v. Spartanburg Cty.*, 192 S.C. 489, 7 S.E.2d 454, 456 (1940); *see also* 15 S.C. Jur. Appeal and Error § 72 (2016) ("If the circuit court did not have jurisdiction over the appeal, the Supreme Court did not have jurisdiction over the appeal from the circuit court."). Since the requirement of service of the notice of appeal is jurisdictional, the appellate court lacks jurisdiction to consider this appeal. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 14–15, 602 S.E.2d 772, 775 (2004); *see also State v. Brown*, 358 S.C. 382, 387, 596 S.E.2d 39, 41 (2004) ("[T]his Court has held the failure to comply with procedural requirements for an appeal divests a court of appellate jurisdiction"); *Great Games, Inc. v. S.C. Dep't of Revenue*, 339 S.C. 79, 82 n. 5, 529 S.E.2d 6, 7 n. 5 (2000) ("The failure of a party to comply with the procedural requirements for perfecting an appeal may deprive the court of 'appellate' jurisdiction over the case"). Since Appellant failed to both timely serve and file his Notice of Civil Appeal from the magistrate court's judgment, the circuit court did not obtain appellate jurisdiction over the case. As a result, Appellant's subsequent Notice of Appeal from the circuit court's decision failed to confer appellate jurisdiction to this Court. This Court therefore lacks appellate jurisdiction over this appeal, and any consideration of the merits of the appeal would be improper.

II. DID APPELLANT PROPERLY PRESERVE HIS ARGUMENT THAT HE COULD CANCEL THE LEASE PRIOR TO THE EFFECTIVE DATE AND PRIOR TO HIS POSSESSION OF THE PROPERTY BASED ON PROVISION SIX (6) OF THE LEASE?

The South Carolina Supreme Court has made clear “that the purpose of appeal under our procedure is ‘to determine if the lower court did something that it should not have done, or omitted doing something it should have done.’ Accordingly, a trial judge will not be reversed for failing to act on a matter that was not submitted to him.” *Roche v. S.C. Alcoholic Beverage Control Comm’n*, 263 S.C. 451, 455, 211 S.E.2d 243, 244 (1975), *superseded by statute as recognized in Schudel v. S.C. Alcoholic Beverage Control Comm’n*, 276 S.C. 138, 276 S.E.2d 308 (1981); *see also Brown v. Singletary*, 226 S.C. 482, 484, 85 S.E.2d 738, 738 (1955) (stating that a party cannot ignore vices in trial and then expect to assert those vices on appeal after disappointment on the trial level); *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (quoting *Queen’s Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006)) (“Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.”). This Court has also made clear that arguments must be preserved before the magistrate judge for purposes of subsequent appeals:

As the circuit court noted in its order, the circuit court, pursuant to S.C.CODE ANN. § 18-7-170 (1985), in appeals from the magistrate court, “may affirm or reverse the judgment of the [magistrate], in whole or in part, as to any or all the parties or for errors in law or fact.” Nonetheless, the circuit court is restricted regarding which issues it may entertain in determining whether a judgment should be affirmed or reversed, either in whole or in part. The circuit court, acting as an appellate court in a case heard by the magistrate, cannot consider questions that have not been presented to the magistrate. Also, the parties to an appeal from the magistrate court are restricted to the theory on which the case was tried in the magistrate court.

Indigo Associates v. Ryan Inv. Co., 314 S.C. 519, 523, 431 S.E.2d 271, 273–74 (Ct. App. 1993) (internal citations omitted).

Based on the record in this case, Appellant clearly did not present to the magistrate judge for his determination the issue of the Appellant's alleged ability to cancel the lease prior to possession of the property based on provision six (6) of the lease. This argument was not raised nor ruled upon by the magistrate court during the trial. Appellant instead argued that he was not allowed occupancy and that he got a bad feeling from communications with the Respondent after the lease was executed and prior to the start date. (R. pp. 6-7; R. p. 85, lines 7-9; R. p. 86, lines 5-12). Furthermore, although he raised this argument for the first time on appeal to the circuit court, Judge Russo appropriately did not rule on the novel argument. (R. pp. 1-3).

Notably, Appellant has based his entire Initial Brief on this unpreserved argument and novel legal theory. According to Appellant, "[t]he central issue is whether the Appellant canceled the lease agreement prior to the effective date of the lease agreement." (Appellant's Initial Brief p. 4). He then goes on to state that "[t]he focus of the Magistrate Court should have been on the ability of the Appellant to cancel the lease according to the plain terms of the lease agreement since all of the Appellant's actions occurred prior to the effective date of the lease." (Appellant's Initial Brief p. 5). Appellant then asserts that "[t]he Magistrate Court's focus on whether the Appellant should have honored the lease agreement was misguided and in error." (Appellant's Initial Brief p. 5). As previously stated and clearly seen in the magistrate court record, the Appellant never argued before the magistrate judge that he could cancel the contract prior to an effective date based on the terms of the lease agreement. The magistrate court, at the trial level, cannot "focus" on an argument and legal theory that was not raised at trial.

In fact, the magistrate judge properly focused, and ultimately ruled on, whether the Appellant should have honored his contractual arrangement with the Respondent based on the arguments presented at trial.

In light of the aforesaid rules of issue preservation and the trial record, Appellant failed to properly preserve his aforesaid argument at the magistrate level and again has improperly raised this novel argument on appeal before this Court. As South Carolina case law clearly dictates, Appellant cannot assert new theories on appeal following disappointment at a trial level, and this is exactly what the Appellant is attempting to do. The aforesaid cancellation argument, and crux of Appellant's initial brief, was not properly presented or ruled upon by the magistrate judge and therefore has not been properly preserved for this Court's consideration.

III. DID THE CIRCUIT COURT ERR IN FINDING THAT EVIDENCE SUBMITTED TO THE LOWER COURT CLEARLY INDICATED THAT APPELLANT WAS OFFERED ACCESS TO THE COMMERCIAL RENTAL SPACE ON SEVERAL OCCASIONS PRIOR TO THE START DATE OF THE COMMERCIAL LEASE?

As set forth above in Parts I and II, this Court does not have jurisdiction to address the merits of this appeal, and Appellant's argument based on provision six (6) of the lease agreement was not properly preserved. In the interest of thoroughness and having addressed the issue of timeliness of the appeal as well as preservation concerns, Respondent nevertheless addresses the arguments of Appellant.

Appellant's stated cause of action in magistrate's court was for Respondent's alleged "failure to allow occupancy" or alternately for Respondent's failure to "allow [him] access to the lease space." (R. p. 6). After conducting a hearing between the parties, Judge Surles' view of the evidence was that:

The lease did not start for a month and [Respondent's] daughter still had items in the building that needed to be removed and [Appellant] still needed to provide documents for liability insurance and switch the power into his name. Several weeks before June [Respondent] tried to arrange a meeting to give [Appellant] a key.

(R. p. 57). The magistrate further stated that “[b]oth parties knew there were items in the building that needed to be removed and actual availability would not take place immediately.” (R. p. 58). On these facts, Judge Surles did not find that Appellant was denied access under the terms of the lease. (R. pp. 57-58). In seeking an appeal of the magistrate’s decision, Appellant again took the position that he “was not granted possession of the property.” (R. p. 62). Judge Russo, after a hearing and after reviewing the transcript from the magistrate’s court, found that “Appellant was offered keys and access to the building, which is the subject of the lease, on several occasions prior to the start date of the lease.” (R. p. 2).

In South Carolina, “[t]he standard of review to be applied by a Circuit Court in an appeal of a magistrate’s judgment is prescribed by Section 18-7-170 of the South Carolina Code of Laws.” *Burns v. Wannamaker*, 281 S.C. 352, 357, 315 S.E.2d 179, 182 (Ct. App. 1984) *aff’d as modified by Burns v. Wannamaker*, 288 S.C. 398, 343 S.E.2d 27 (1986). S.C. Code Ann. § 18-7-170 reads as follows:

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.

S.C. Code Ann. § 18-7-170 (2014). When deciding whether a Circuit Court properly reviewed and affirmed a magistrate’s judgment, “the Court of Appeals will presume that an affirmance by a Circuit Court of a magistrate’s judgment was made upon the merits where the testimony is sufficient to sustain the judgment of the magistrate and there are

no facts that show the affirmance was influenced by an error of law.” *Burns v. Wannamaker*, 281 S.C. at 357, 315 S.E.2d at 182 (citations omitted). The Court of Appeals “will not grant that presumption where ... it clearly appears that the Circuit Court applied an erroneous standard of review and failed to accord the contested facts the scrutiny which Section 18-7-170 contemplates.” *Id.*

The testimony and evidence before the Circuit Court judge was sufficient to sustain the magistrate’s judgment. It was indisputably shown that Respondent sent multiple communications to Appellant regarding the exchange of keys to the leased premises prior to the start date of the lease. (R. pp. 134-136; R. p. 93, lines 21-24; R. p. 117, lines 14-24). In fact, Respondent offered to provide Appellant a key on May 15, 2014, May 18, 2014, and May 28, 2014, which was clearly established in the exhibits to the pleadings on the magistrate level. (R. pp. 6-21; R. pp. 22-40; R. pp. 134-136). Remarkably, Appellant has asserted in his Initial Brief that “the record is not undisputed about the Respondent offering the Appellant keys to the property”, emphasizing Appellant’s lack of possession. (Appellant’s Initial Brief p. 5). After alleging that Appellant cancelled the lease via a May 22, 2014 letter sent by his attorney, the Appellant states, “While the Respondent testified that she offered keys to the Appellant, it appears the offer was after the Appellant canceled the lease agreement.” (Appellant’s Initial Brief p. 5). Based on the aforesaid dates of communication clearly established in the lower court record, Appellant’s statement is entirely inaccurate. Moreover, as will be more thoroughly addressed in Part IV, Appellant’s alleged “cancellation date” is irrelevant and inapplicable based on the facts established before the magistrate and the subject lease agreement at issue. Instead, the record below clearly established that Respondent offered Appellant access to the premises on multiple occasions prior to the lease term’s start date,

even though this was not required by the terms of the lease. Appellant had several opportunities to claim the keys and take possession.

Thus, the Circuit Court did not err in finding that Respondent offered access to the leased premises, and the Circuit Court's and the Magistrate Court's rulings should be sustained.

IV. DID THE CIRCUIT COURT ERR IN FINDING THAT THE LOWER COURT PROPERLY DETERMINED THAT THE APPELLANT BREACHED THE COMMERCIAL LEASE PURSUANT TO THE TERMS OF THE LEASE DOCUMENT AND THEREFORE OWED RESPONDENT DAMAGES?

Under South Carolina law, a lease is treated as a type of contract. *See Middleton v. Eubank*, 388 S.C. 8, 14, 694 S.E.2d 31, 34 (Ct. App. 2010) (citing *Duncan v. Little*, 384 S.C. 420, 424, 682 S.E.2d 788, 790 (2009)); *Piedmont Interstate Fair Ass'n v. City of Spartanburg*, 274 S.C. 462, 464, 264 S.E.2d 926, 927 (1980)). A lease is a valid and enforceable contract where there was "a meeting of the minds between the parties with regard to *all* essential and material terms of the agreement." *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989). "The *essential terms and conditions of a lease agreement include a definite agreement as to the extent and boundary of the property to be leased, the term of the lease, the rental as well as the time and manner of payment.*" *Id.* at 105, 382 S.E.2d at 893-94. A violation of the terms of a valid lease, like a violation of the terms of any valid contract, gives rise to an action for breach of contract. *See e.g., U.S. Rubber Co. v. White Tire Co.*, 231 S.C. 84, 95, 97 S.E.2d 403, 409 (1956); *Bluffton Towne Center, LLC v. Gilleland-Prince*, 412 S.C. 554, 772 S.E.2d 882 (Ct. App. 2015).

A dispute as to the meaning of the language or terms of a lease should be resolved according to ordinary, well-established canons of contract interpretation. *Middleton v. Eubank*, 388 S.C. 8, 14, 694 S.E.2d 31, 34 (Ct. App. 2010) ("A lease agreement is a

contract, and an action to construe a contract is an action at law”). “Courts are without authority to alter a contract by construction or to make new contracts for the parties. Their duty is limited to the interpretation of the contract made by the parties themselves ‘...regardless of its wisdom or folly, apparent unreasonableness, or failure to guard their rights carefully.’” *Gilstrap v. Culpepper*, 283 S.C. 83, 86, 320 S.E.2d 445, 447 (1984) (quoting *Blakeley v. Rabon*, 266 S.C. 68, 73, 221 S.E.2d 767, 769 (1976)). “Where a contract is unambiguous, clear and explicit, it must be construed according to the terms which 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). “A contract must be read as a whole document so that one party may not create ambiguity by pointing out a single sentence or clause.” *North American Rescue Products, Inc. v. Richardson*, 411 S.C. 371, 378, 769 S.E.2d 237, 240-41 (2015) (citation omitted).

The lease agreement at issue here, when read in full and according to its plain meaning, negates Appellant’s argument that he had a right to cancel the agreement prior to the effective date and prior to taking possession of the premises. At the hearing before the Circuit Court and now on appeal, Appellant has pointed to provision six (6) of the lease, entitled “DELAY OF POSSESSION”, as the basis for his right to cancel the lease prior to entering possession (R. p. 111, lines 1-6; R. p. 116, line 14 – p. 117, line 1). As set forth in Part II, this argument was not properly preserved. Nevertheless, this argument is not supported by the plain language of the lease. As filled out on the day the agreement was signed, provision six (6) of the lease reads in full:

If Landlord is unable to deliver possession of Premises on the effective date of this lease, by reason of the holding over of a prior Tenant or for any other reason, this lease shall not be affected or impaired in any way and landlord shall not be liable to Tenant for any loss or damage resulting therefrom. The effective date of this lease however, shall not begin until

the delivery of possession. If Landlord, however, is unable to deliver possession of the Premises to Tenant by N/A (in handwriting), and if Tenant in fact shall not have accepted possession of the Premises, and if Tenant shall not be in default, Tenant shall have the right to cancel this lease upon written notice delivered to Landlord and upon such cancellation Landlord and Tenant shall each be released and discharged from all liability under this lease. In such case any deposit or prepaid rent shall be promptly returned to Tenant.

(R. p. 125). Similar to his argument before the Circuit Court, Appellant failed to quote provision six (6) in its entirety in his Initial Brief. (Appellant's Initial Brief p. 6-7). When provision six (6) is taken in its entirety, its effect is the opposite of what Appellant claims. The first sentence of the provision establishes that the lease will remain in effect even if the landlord fails to deliver possession on the effective date of the lease. The second sentence provides that the effective date of the lease will automatically be modified to reflect the date on which actual delivery of possession occurs. Finally, the third sentence of provision six (6), upon which Appellant relies, affords the tenant a right of cancellation in the event that the landlord fails to deliver possession of the premises by an agreed-upon date when two other requirements are met.

The cancellation provision in the third sentence of provision six (6) operates by leaving a blank space for the parties to enter a date. A date entered by the parties would create a deadline for delivery of possession of the premises other than the effective date of the contract. After that date, the tenant would be entitled to cancel the lease under certain conditions. However, Appellant and Respondent opted not to create such a deadline for delivery of possession. The blank space in the third sentence was marked "N/A", or "Not Applicable". Both parties placed their initials at the bottom of the page containing provision six (6), indicating that each had read that page. (R. p. 125; R. p. 92, lines 15-18). As previously set forth, the magistrate court record clearly shows that there

were no impediments to the delivery of possession of the rental space to the Appellant, besides removal of some other property from inside, supporting the parties' decision to mark the deadline for delivery of possession as not applicable. (R. p. 84, lines 7-17; R. p. 89, lines 14-19; R. p. 92, lines 18-25; R. p. 94, lines 10-12). Moreover, the record clearly shows that the Respondent attempted to deliver possession of the property several times, prior to the start date of June 1, 2014, which was not required by the terms of the lease. (R. pp. 123-132; R. p. 92, line 25 – p. 93, line 7; R. p. 93, lines 20-24; R. p. 104, lines 3-8; R. p. 105, lines 6-12; R. p. 113, lines 6-9; R. p. 113, lines 18-19; R. p. 117, line 14 – p. 118, line 4).

Respondent also points out that the effective date of the lease and lease term are clearly defined in the lease agreement and are contrary to the dates argued by Appellant in his Initial Brief. Appellant argues throughout his Brief that the “effective date” of the subject lease was June 1, 2014, claiming that a lack of possession prior to this date allows for cancellation per provision six (6). In fact, per the lease, the term of the lease period was to begin June 1, 2014. (R. p. 123). As established by the record below, the lease was signed on May 9, 2014, which constitutes the effective date of the lease under provision twenty-three (23). (R. p. 128). Neither provision six (6) nor any other provision in the lease required that Respondent provide possession prior to the date upon which the lease term was to begin. (R. pp. 123-132; R. p. 104, lines 5-9; R. p. 105, lines 6-12; R. p. 113, lines 6-19; R. p. 116, lines 7-8). The offers made repeatedly by Respondent for Appellant to pick up a key prior to June 1, 2014 were done out of courtesy and cannot be deemed a breach of the lease agreement when Appellant failed to respond to the offers. (R. p. 92, line 25 – p. 93, line 4; R. p. 105, lines 6-12; R. p. 113, lines 6-19; R. p. 116, lines 7-8). Moreover, this proper and complete reading of the lease agreement renders Appellant's

argument that his counsel's letter, dated May 22, 2014, canceled the lease agreement prior to the effective date for purposes of the alleged cancellation provision. Not only did testimony below establish that this letter was dated May 22, 2014 and post marked May 28, 2014, but Respondent also asserted that she did not receive the letter until June 4, 2014. (R. p. 133; R. p. 117, lines 6-9). Based on the terms of the subject lease, whether this "cancellation" letter was received June 4, 2014 or May 22, 2014, it was not received prior to the "effective date" as asserted by Appellant. In this way, even if provision six (6) in some way could be read to allow for tenant cancellation in this case, which is expressly and vehemently denied, Appellant's alleged cancellation was not received when the lease agreement was effective on May 9, 2014.

Based on South Carolina law, the above-cited rules of contract construction should control in this case. Provision six (6) plainly and unambiguously allows a tenant to cancel the lease only where the landlord fails to deliver possession by a stated date. Appellant and Respondent did not set a deadline for delivery of possession because no issues related to delivery were anticipated. Furthermore, the record below clearly shows that Respondent offered to deliver possession several times prior to the actual start date of the lease, negating any argument that she was unable to deliver possession to the Appellant for purposes of triggering provision six (6). In this way, Judge Russo correctly pointed out that provision six (6) must be viewed in its entirety and fails to support Appellant's argument for cancellation. (R. p. 112, line 12 – p. 113, line 15). No other language in the lease purports to give the Appellant the right to cancel the agreement prior to taking possession before the actual lease term. (R. pp. 123-132). Appellant therefore had no right under the terms of the agreement to cancel the lease.

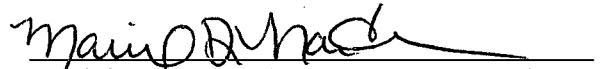
In addition to claiming that there was a contractual basis for cancellation, Appellant also argues that South Carolina common law allows for cancellation prior to exchange of possession. Appellant cites to *Willcox v. Bostick*, 57 S.C. 151, 35 S.E. 496 (1900) and *Simon v. Kirkpatrick*, 141 S.C. 251, 139 S.E. 614 (1927) for the proposition that “[a] lease is not effective until the lessee takes possession of the property.” (Appellant’s Initial Brief, p. 6). *Willcox v. Bostick* is quoted for the statement that “the lessee must enter into possession in order to acquire an estate in the land.” *Id.* at 497. Because an estate interest is not created until a lessee has been put in possession, the Appellant reasons that the lessee is allowed to cancel the lease agreement prior to possession without repercussions. The present issue, however, is not whether an estate in land was created, but whether the parties were required to honor the lease agreement signed on May 9, 2014. The court in *Willcox v. Bostick* explicitly noted that “other remedies for a mere breach of contract” are available prior to the exchange of possession and creation of an estate interest. *Id.* Likewise, *Simon v. Kirkpatrick* clearly illustrates that a valid lease agreement is binding on the parties prior to the lessee’s entry into possession under the lease. In that case, the lessee “refused to take possession of the lot, which he was under an obligation to do by the terms of the lease.” *Id.* at 617. Lessor/plaintiff had “tendered the premises to the defendant, and ... performed all the conditions of the lease on his part.” *Id.* at 615. Under those circumstances, the lessee’s refusal to take possession constituted a breach of the agreement and gave rise to an action for damages. *Id.* at 617. Similarly, the Respondent performed all her requirements under the lease and attempted to tender possession of the premises to the Appellant for his use, prior to the lease term’s start date as a courtesy. The Appellant’s refusal to take possession and request for a return of his deposits constituted a breach and warranted an

award of damages to the Respondent, as found by the magistrate judge and affirmed by the circuit court. Thus, contrary to Appellant's argument, South Carolina case law holds that a lease agreement is effective prior to a lessee taking possession of the property. Similar to the case of *Simon v. Kirkpatrick* cited by the Appellant, Respondent was properly awarded damages for Appellant's breach of the lease.

CONCLUSION

Based on the foregoing discussion and analysis, Respondent Julie Smith respectfully requests that this Court affirm the decisions of the Circuit Court and the Magistrate Court and find in favor of the Respondent in the amount of Five Thousand Three Hundred Ten and No/00 (\$5,310.00) Dollars.

RESPECTFULLY SUBMITTED,



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January 24, 2017

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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JAN 25 2017

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

SC Court of Appeals

The Honorable Thomas A. Russo, Circuit Court Judge

Case No.: 2014-CP-40-5976
Appellate Case No.: 2016-000505

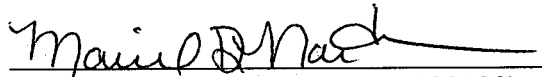
Tracy Fulmore.....Appellant,

v.

Julie Smith.....Respondent.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief of Respondent complies with Rule
211(b), SCACR.



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January 24, 2016