THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

RECEIVED
FEB 23 2017
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.

RESPONDENT'S RETURN TO APPELLANT'S MOTION TO FILE AND SERVE THE FINAL BRIEF OF APPELLANT OUT OF TIME

Respondent Julie Smith hereby responds to Appellant's motion to file and serve his final brief outside of filing deadlines in accordance with Rule 240(e).

The time proscribed by the South Carolina Appellate Court Rules for performing an act, other than the time for serving notice of appeal under Rules 203 and 243, may be extended by the court. *See* Rule 263(b), SCACR. It has been the standard in this state that a motion to enlarge the time for doing an act should be made prior to the expiration of the deadline. *See J.L. Mott Iron Works v. Clark*, 84 S.C. 493, 66 S.E. 680-81, 680 (1910) ("While the court is inclined to be liberal in its construction of the statutes and of the rules of court, to the end that appeals, taken in good faith, shall be heard on the merits, nevertheless we wish to impress upon counsel the importance of complying with those

statutes and rules which are intended to provide for the orderly disposition of appeals, and to sound a warning that the court will not allow its liberality to be presumed upon to the detriment of parties who invoke the statutes or rules in such cases."). When the time has expired and a party seeks an enlargement of that time, the decision is within the discretion of this Court. In exercising its discretion in this case, as it does in considering motions to reinstate dismissed appeals, the Court should expect a showing that the failure of the Appellant to timely perform the required act was the result of "excusable neglect". *See Lamb v. Padgett*, 45 S.C. 534, 23 S.E. 628 (1896).

This standard most frequently is applied in the context of setting aside defaults at the trial court level. In moving to set aside a default, it is not sufficient for a party to merely show neglect. Instead, a showing must be accompanied by a proper excuse for the neglect. *See Hedgepath v. State Highway Dep't*, 263 S.C. 98, 207 S.E.2d 820 (1974) (deciding that a lower court erred in not making a determination related to excusable neglect where the state's attorney asserted that an inexperienced stenographer had placed the suit papers in a location where they were not discovered until after the deadline for responding had expired). In *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 246 S.E.2d 880 (1978), the affidavit filed in support of a motion to set aside a default explained that house counsel had not given prompt attention to the suit because of his "extensive traveling" around that time. *See id.* at 239-40, 246 S.E.2d at 881. The Supreme Court agreed with the lower court that such neglect was not excusable. *See id.*; *see also Lee v. Peek*, 240 S.C. 203, 214, 125 S.E.2d 353, 358 (1962) (Lewis, J., concurring in result) ("However, the mistake, inadvertence or neglect of counsel has been held insufficient

grounds for relief where default results from inaction of counsel on behalf of the client or failure to exercise due diligence in the protection of the client's interest.").

After the Appellant missed the deadline for filing the Record on Appeal under Rule 210(a), SCACR, resulting in a similar motion by the Appellant, the Court granted his motion on January 23, 2017 and directed that all final briefs be served and filed by January 26, 2017. (Ex. A). Appellant missed this Court's deadline, prompting the Clerk of Court to send a letter dated February 7, 2017, requiring Appellant to file and serve his motion to file out of time and final brief within ten (10) days, or February 17, 2017. (Ex. B). Appellant's motion, served on February 16, 2017, provides no explanation for his indifference toward this Court's deadline. (Ex. C). In fact, Appellant's final brief was twenty-one (21) days overdue by February 16, 2017. There is a showing of neglect and Appellant has provided no grounds upon which this Court can determine that his neglect was excusable.

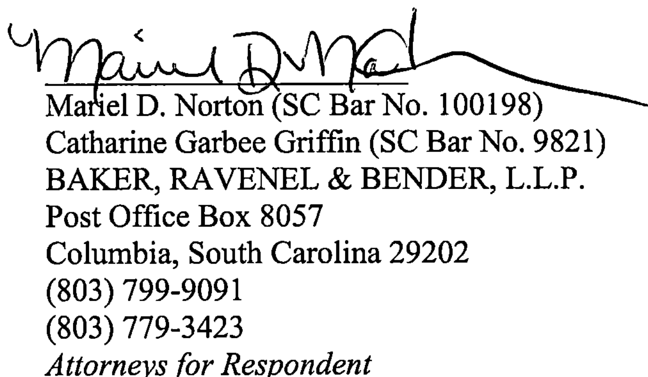
Moreover, Appellant's Motion should be denied and this appeal dismissed because Appellant's Final Brief does not meet the requirements of Rule 211(b), SCACR. For the Court's convenience, copies of Appellant's Initial Brief and Final Brief are attached. (Ex. D and Ex. E). Although Appellant included a Certificate of Counsel with his Final Brief, stating that his brief complies with Rule 211(b), SCACR, the Certificate is obviously incorrect. As can be seen through a comparison of Appellant's Initial and Final Briefs, Appellant has included in his Final Brief numerous references which are not "revised references" to the Record on Appeal, but are instead added references to material which was not included in his Initial Brief. This is a plain violation of Rule 211(b), and Respondent submits that there is no justification for the Appellant's failure to

comply with the Rule. Rule 211's prohibition against additions to a party's initial brief, when conforming initial references in a brief to a Record on Appeal, must be complied with to ensure fairness between the parties. Appellant's inclusion of new references in his Final Brief violates Rule 211(b), SCACR, and directly conflicts with the purpose of the Rule. Respondent therefore asks that Appellant's motion be denied and this appeal be dismissed.

CONCLUSION

Appellant's motion for relief is insufficient. Based on his motion, no proper excuse has been advanced to lead to a conclusion that his neglect in failing to file his final brief when previously ordered by this Court was excusable. Instead, Respondent has been prejudiced by another extended delay caused by Appellant's failure to comply with the Rules, including Rule 211(b), SCACR. For the reasons stated herein, Appellant's motion should be denied and his appeal dismissed.

Alternatively, should Appellant's appeal not be dismissed for the reasons set forth herein, Respondent requests that the portions of Appellant's Final Brief which were not included in his Initial Brief be stricken for failing to comply with the Rules.



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Attorneys for Respondent

February 23, 2017

Other Counsel of Record:

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The South Carolina Court of Appeals

Tracy Fulmore, Appellant,

v.

Julie Smith, Respondent.

Appellate Case No. 2016-000505

The Honorable Thomas A. Russo
Richland County
Trial Court Case No. 2014CP4005976

ORDER

Counsel for appellant filed a motion to serve and file the record on appeal out of time. No return was filed. The motion is Granted. The Court is in receipt of the record on appeal and it is accepted as filed. All final briefs are due to be served and filed by January 26, 2017.

FOR THE COURT

BY [signature]
CLERK

FILED
January 23, 2017

Columbia, South Carolina

cc:
Charles Thomas Brooks, III, Esquire
Mariel Denise Norton, Esquire
Catharine H. Garbee Griffin, Esquire

Exhibit A

RECEIVED
FEB 09 2017
BY:

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

February 07, 2017

Mr. Charles Thomas Brooks, III, Esquire
309 Broad St.
Sumter SC 29150

Re: Tracy Fulmore v. Julie Smith
Appellate Case No. 2016-000505

Dear Counsel:

Our records reflect that the time for serving and filing the appellant's final brief has expired. Within ten (10) days of the date of this letter you must serve and file your appellant's final brief as required by Rule 211(a)(1), SCACR, and a motion requesting permission to file outside of the filing deadlines, or your appeal will be dismissed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Mariel Denise Norton, Esquire
Catharine H. Garbee Griffin, Esquire

Exhibit B

RECEIVED

BY:

The Brooks Law Office, LLC

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Email: cbrooks@ctbrooks.com

February 16, 2017

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

RE: Fulmore vs. Smith
Appellate Case No.: 2016-000505

Dear Ms. Kitchings:

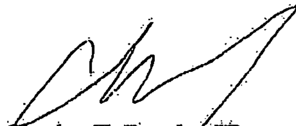
Please find enclosed herewith the original and six (6) copies of the Motion to File and Serve the Final Brief of Appellant Out of Time along with the original and fifteen (15) bound copies of the Record on Appeal with reference to the above matter, which I hereby sumbit for filing at this time. In addition, I have enclosed the required fee for the filing of this Motion with the Courts.

Please return any unused copies to my attention in the provided self-addressed stamped envelope.

If there are any questions, please feel free to give me a call.

With kind regards,

Sincerely,



Charles T. Brooks, III
CTB,III/jlm
cc: Baker Ravenel Bender
ATTN: Mariel D. Norton, Esq.
Post Office Box 8057
Columbia, South Carolina 29202

Exhibit
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

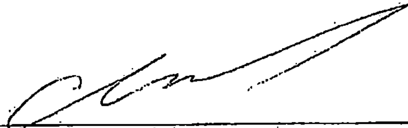
APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Honorable Thomas A. Russo, Circuit Court Judge

Case No: 2016-000505

Tracy Fulmore..............................Appellant
v.
Julie Smith ....Respondent

MOTION TO FILE AND SERVE THE FINAL BRIEF OF APPELLANT OUT OF TIME

Appellant, Fulmore, makes motion to file and serve the Appellant's Final Brief out of time. The Court's acceptance of this Brief will not prejudice the Respondent in this matter.



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Sumter, SC
February 15, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Honorable Thomas A. Russo, Circuit Court Judge

Case No: 2016-000505

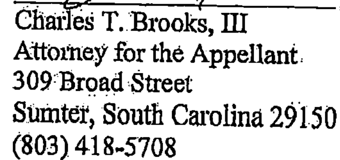
Tracy Fulmore..............................Appellant
v.
Julie Smith ....Respondent

PROOF OF SERVICE

I, the undersigned, do hereby certify that on this February 16, 2017, I served the foregoing **Motion to File and Serve the Final Brief of Appellant Out of Time and the Final Brief of Appellant** as well as **Proof of Service** in this matter by depositing a true copy of it in the United States Mail, postage prepaid, on February 16, 2017, addressed to the following as indicated below:

Baker Ravenel Bender
ATTN: Mariel D. Norton, Esq.
Post Office Box 8057
Columbia, South Carolina 29202

Dated: February 16, 2017



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
JUN 17 2016
SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Honorable Thomas A. Russo

Appellate Case No: 2016-000505

Tracy Fulmore .... Appellant,

v.

Julie Smith ....Respondent.

INITIAL BRIEF

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June 10, 2016

Exhibit D

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STATEMENT OF ISSUE ON APPEAL

DID THE TRIAL COURT ERR BY DENYIG THE APPELLANT'S REQUEST FOR APPEAL AND AFFIRMING THE MAGISTRATE COURT RULING THAT APPELLANT BREACHED A CONTRACT FOR LEASE AND THEREFORE WAS RESPONSIBLE FOR DAMAGES PURSUANT TO THE LEASE, EVEN THOUGH APPELLANT CANCELED THE LEASE PRIOR TO THE EFFECTIVE DATE AND WAS NOT IN POSSESSION OF THE PROPERTY?

STATEMENT OF THE CASE

This matter came before the Circuit Court as a civil appeal from a Magistrate's Court judgment, Case Number 2014-CV-40-10900510, in which the Appellant was ordered to pay the Respondent for breach of contract pursuant to a lease agreement. The Appellant filed an action in Magistrate Court seeking to recover $2,200.00 (two thousand two hundred dollars) plus filing fees when he sought to cancel his lease agreement with the Respondent. The Respondent counter-claimed and sought $7,500.00 (seven thousand five hundred dollars) for cost associated with an alleged breach of the lease agreement. The Magistrate Court ruled in favor of the Respondent. The ruling was appealed to the Circuit Court.

The Respondent filed a Motion to Dismiss the Appeal. The Appellant filed a Return to Respondent's Motion, as well as a Reply to the Return and a Supplemental Reply to the Return of Appeal.

The Circuit Court heard this matter on July 7, 2015. The Appellant was represented by the undersigned attorney. The Respondent appeared Pro Se. The record was left open for the Court to consider the Transcript from the Magistrate Court hearing.

After considering the arguments in this matter and all the documents, the Circuit Court made the following findings:

> "1. The transcript from the Magistrate Court proceeding clearly indicates that the 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;
> 2. Based upon a transcript of the lower court proceeding, the Magistrate was well within the law in granting the Respondent, Julie Smith, a judgment against the Appellant, Tracy Fulmore, for breaching the lease that was effective per the written details of the lease document; and
> 3. The Appellant's request for Appeal in this matter should be denied and the findings and judgment of the Magistrate be upheld." Circuit Court Order.

This appeal follows.

ARGUMENT

THE TRIAL COURT ERRED BY DENYING THE APPELLANT'S REQUEST FOR APPEAL AND AFFIRMING THE MAGISTRATE COURT RULING THAT APPELLANT BREACHED A CONTRACT FOR LEASE AND THEREFORE WAS RESPONSIBLE FOR DAMAGES PURSUANT TO THE LEASE, EVEN THOUGH APPELLANT CANCELED THE LEASE PRIOR TO THE EFFECTIVE DATE AND WAS NOT IN POSSESSION OF THE PROPERTY.

""A lease agreement is a contract, and an action to construe a contract is an action at law." *Middleton v. Eubank*, 388 S.C. 8, 14, 694 S.E.2d 31, 34 (Ct. App. 2010) (citations omitted). "An action for breach of contract seeking money damages is an action at law." *Sapp v. Wheeler*, 402 S.C. 502, 507, 741 S.E.2d 565, 568 (Ct. App. 2013) (citing *Silver v. Aabstract Pools & Spas, Inc.*, 376 S.C. 585, 590, 658 S.E.2d 539, 541-42 (Ct. App. 2008). When reviewing a master-in-equity's judgment made in an action at law, "the appellate court will not disturb the master's findings of fact unless the findings are found to be without evidence reasonably supporting them." *Silver*, 376 S.C. at 590, 658 S.E.2d at 542. Nevertheless, the "reviewing court is free to decide questions of

law with no particular deference to the [master]." *Id.* (quoting *Hunt v. S.C. Forestry Comm'n*, 358 S.C. 564, 569, 595 S.E.2d 846, 848-40 (Ct. App. 2004) (internal quotation marks omitted).""
Relied on in *Bluffton Towne Ctr., LLC v. Gilleland-Prince* (S.C. App., 2015).

""In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's finding.....The judge's findings are equivalent to a jury's findings in a law action." *Townes Assocs. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773 (1976); accord *Cohens v. Atkins*, 333 S.C. 345, 347, 509 S.Ed.2d 286, 288 (Ct. App. 1998); *Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 461, 494 S.E.2d 835, 841 (Ct. App. 1997)."" Relied on in *Ellie, Inc. v. Miccichi*, 594 S.E. 2d 485, 358 S.C. 78 (S.C. App., 2004).

The Appellant, Tracy Fulmore, entered into a lease agreement with the Respondent, Julie Smith, to rent commercial space to be used as a barber shop. The parties met and signed the lease agreement on May 9, 2014. The lease was to begin on June 1, 2014. On May 9, 2014, when the parties met to sign the lease agreement, the Appellant rendered two checks to the Respondent for the deposit of $1,200.00 (one thousand two hundred dollars) and the first month rent for $1,000.00 (one thousand dollars). On May 9, 2014, at the signing of the lease, the Appellant was not given the keys to the leased premises or a copy of the lease agreement. At some point later on May 9, 2014, the Respondent scanned and emailed the Appellant a copy of the lease agreement. However, the Respondent never released keys to the leased premises to the Appellant.

On May 14, 2014, the Appellant notified the Respondent through a telephone conversation that he did not want to lease the premises. On May 22, 2014, the Appellant's attorney sent a letter to the Respondent informing her that the Appellant did not wish to rent the property and was requesting a refund of the monies paid at that time. In the letter to the Respondent, it was noted

that the Appellant "did not take possession of the premises and had not been provided access" to the property.

The Appellant filed an action in the Magistrate Court against the Respondent for failure of the Respondent to allow Appellant's occupancy of the leased premises. The Appellant sought damages in the amount of $2,200.00 (two thousand two hundred dollars) for the deposit and first month rent. The Respondent counterclaimed for breach of contract and sought damages in the amount of $7,500.00 (seven thousand five hundred dollars) and court costs. The Magistrate Court ruled in favor of the Respondent and granted judgment for the $7,500.00 (seven thousand five hundred dollars) minus the $2,200.00 (two thousand two hundred dollars) already received from the Appellant, plus court costs. The Circuit Court affirmed the Magistrate Court's ruling. This appeal follows.

On appeal, the Magistrate Court's ruling on the facts will not be disturbed unless found not to be supported by the evidence. The evidence in this case does not support a ruling for breach of contract of the lease agreement. The Circuit Court's affirmation of the Magistrate Court ruling was in error. The central issue is whether the Appellant canceled the lease agreement prior to the effective date of the lease agreement. In addition, the facts are undisputed that the Appellant was never is possession of the leased premises.

The effective date of the lease agreement was June 1, 2014. The evidence in this case supports the facts that the parties met and executed the lease agreement on May 9, 2014. On May 14, 2014, according to the testimony of the Appellant, the parties engaged in a 12-minute conversation in which the Appellant described that he felt uneasy with what the Respondent was telling him and he informed her he wanted his money returned and he did not want to lease the property. On May 22, 2014, the Appellant's attorney sent the Respondent a letter informing her

that the Appellant did not wish to rent the property. All of these actions occurred before the effective date of the lease. In addition, the evidence is undisputed that the Appellant never took possession of the leased premises because the Appellant was never given keys to the property. The Magistrate Court's ruling that "the Court could not find sufficient justification for Mr. Fulmore to not honor the agreement" is not legally or factually based.

The 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. The Magistrate Court's focus on whether the Appellant should have honored the lease agreement was misguided and in error. However, the Appellant did testify that the Respondent said one thing and did another and he did not feel comfortable with her actions even before the lease began. The Circuit Court's affirmation of the Magistrate Court ruling was in error as well.

In addition, the record is not undisputed about the Respondent offering the Appellant keys to the property. The Appellant did not receive possession of the leased premises when he signed the lease agreement on May 9, 2014. The Appellant did not have possession of the leased premises when he discussed that matter on the phone with the Respondent on May 14, 2014. Thereafter, a letter was sent by the Appellant's attorney on May 22, 2014, informing the Respondent that the Appellant was canceling the lease agreement and requested a refund of the monies paid to the Respondent. The record is undisputed that the Appellant never had possession of the leased premises. While the Respondent testified that she offered keys to the Appellant, it appears the offer was after the Appellant canceled the lease agreement. Offering the keys to the Appellant after he canceled the lease agreement was not a remedy, nor did it create a liability for the Appellant because he was not in possession of the leased premises. If anything, the Respondent's offer of

the keys after the Appellant's cancellation is proof that the Appellant never had possession of the leased premises. In any event, the Appellant was never in possession of the leased premises, and the Appellant canceled the lease prior to the effective date of June 1, 2014.

A lease is not effective until the lessee takes possession of the property. In *Willcox v. Bostick*, 57 S.C. 151, 35 S.E. 496, (S.C. 1900), the court ruled that "the lessee must enter into possession in order to acquire an estate in the land." *Id.* at 497. See also *Simon v. Kirkpatrick*, (No. 11280), (S.C. 1927). Therefore, if a party leasing property is not given possession to the property, the lease is not effective as creating an estate in the land. The Magistrate Court erred in its ruling concluding that there was not a sufficient reason for the Appellant not to continue in the lease. The Appellant clearly canceled the lease prior to the effective date of June 1, 2014. In addition, there is no factual evidence in the record, specifically in the Magistrate Court hearing transcript in which the facts have been established as to the Appellant receiving keys and possession to the leased premises. In fact, the record is clear that the Appellant never received keys to the leased premises.

In addition, the present situation is distinguishable from situations in which the lease becomes effective and the lessee then attempts to cancel after the effective date of the lease. After the commencement of the lease and the effective date, an attempt at cancellation may give rise to damages. Here, the cancellation was clearly prior to the effective date of the lease, specifically prior to June 1, 2014.

The plain language of the lease agreement allows for cancellation prior to the effective date of the lease. In Paragraph "6" of the lease agreement, entitled "DELAY OF POSSESSION", the agreement specifically states

> "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 NA (hand-written), 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." Page 3 of Lease Agreement.

The Appellant canceled the lease agreement prior to the effective date of June 1, 2014. In addition, the Appellant provided written notice of the cancellation by the May 22, 2014, letter sent by the Appellant's attorney to the Respondent. The Magistrate Court trial transcript does not contain any factual information from the Respondent as to when she received the May 22, 2014, letter canceling the lease agreement. The record does not clearly establish facts that support the position that the Respondent received the notice of cancellation after the effective date of the lease. The record establishes the contrary in that the notice of cancellation was made prior to the effective date of the lease and that the Appellant was not in possession of the leased premises. Therefore, the Magistrate Court erred by ruling that the Respondent was not contacted until June about the cancellation. The facts in the record do not support this finding. Equally, the Circuit Court erred in affirming the Magistrate Court ruling.

""The law in this state regarding the construction and interpretation of contracts is well settled." *Conner v. Alvarez*, 285 S.C. 97, 101, 328 S.E.2d 334, 336 (1985). When the language of a contract is clear, explicit, and unambiguous, the language of the contract alone determines the contract's force and effect. *Ellie, Inc., Miccichi*, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004). In addition, "[w]here an agreement is clear and capable of legal interpretation, the court's only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it." *Id.* (citing *Heins v. Heins*, 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct. App. 2001)."" Relied on in

Highlands Prop. Owners Ass'n, Inc. v. Schumaker Land, LLC, 397 S.C. 432, 724 S.E.2d 685 (S.C. App. 2012).

In the present case, the lease agreement clearly allows for cancellation of the lease, especially if the tenant is not in possession of the leased premises. Here, the Appellant was not in possession of the leased premises. Further, the Appellant notified the Respondent orally and in writing of his desire to cancel the lease prior to the effective date of the lease. The Magistrate Court's ruling in not in accord with the facts or the law, and therefore, is in error regarding the judgment rendered in favor of the Respondent and should be reversed. Equally therefore, the Circuit Court ruling affirming the Magistrate Court judgment is also in error and should be reversed.

CONCLUSION

Based on the argument set out above, the Magistrate Court erred in its ruling determining that the Appellant breached the lease agreement when the Appellant was not in possession of the leased premises and gave proper notice regarding cancellation prior to the effective date of the lease. Consequentially, the Circuit Court erred in its ruling in affirming the decision of the Magistrate Court. The Circuit Court ruling should be reversed.

(REMAINDER OF PAGE INTENTIONALLY LEFT BLANK)

RESPECTFULLY SUBMITTED,

Charles T. Brooks, III

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June 10, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
JUN 17 2016
SC Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas
Honorable Thomas A. Russo

Appellate Case No: 2016-000505

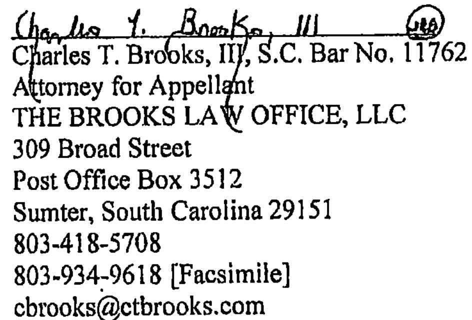
Tracy Fulmore .... Appellant,

v.

Julie Smith ....Respondent.

CERTIFICATE OF COUNSEL

The undersigned certified that this Initial Brief and Designation complies with Rule 208 and Rule 228, SCRAP.



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June 10, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Honorable Thomas A. Russo

Appellate Case No: 2016-000505

Tracy Fulmore .... Appellant,

v.

Julie Smith ....Respondent.

FINAL BRIEF OF APPELLANT

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February 14, 2017

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STATEMENT OF ISSUE ON APPEAL

DID THE TRIAL COURT ERR BY DENYIG THE APPELLANT'S REQUEST FOR APPEAL AND AFFIRMING THE MAGISTRATE COURT RULING THAT APPELLANT BREACHED A CONTRACT FOR LEASE AND THEREFORE WAS RESPONSIBLE FOR DAMAGES PURSUANT TO THE LEASE, EVEN THOUGH APPELLANT CANCELED THE LEASE PRIOR TO THE EFFECTIVE DATE AND WAS NOT IN POSSESSION OF THE PROPERTY?

STATEMENT OF THE CASE

This matter came before the Circuit Court as a civil appeal from a Magistrate's Court judgment, Case Number 2014-CV-40-10900510 (R pp 52-55), in which the Appellant was ordered to pay the Respondent for breach of contract pursuant to a lease agreement. The Appellant filed an action in Magistrate Court seeking to recover $2,200.00 (two thousand two hundred dollars) plus filing fees when he sought to cancel his lease agreement with the Respondent (R. pp 5-21). The Respondent counter-claimed and sought $7,500.00 (seven thousand five hundred dollars) for cost associated with an alleged breach of the lease agreement (R. pp 41-44). The Magistrate Court ruled in favor of the Respondent (R. p 4). The ruling was appealed to the Circuit Court.

The Respondent filed a Motion to Dismiss the Appeal. (R. p. 59) The Appellant filed a Return to Respondent's Motion (R. p 60), as well as a Reply (R. p. 62-73) to the Return and a Supplemental Reply to the Return of Appeal. (R. pp 74-75)

The Circuit Court heard this matter on July 7, 2015. The Appellant was represented by the undersigned attorney. The Respondent appeared Pro Se. The record was left open for the Court to consider the Transcript from the Magistrate Court hearing. (R pp. 78-108)

After considering the arguments in this matter and all the documents, the Circuit Court

made the following findings:

> "1. The transcript from the Magistrate Court proceeding clearly indicates that the 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;
> 2. Based upon a transcript of the lower court proceeding, the Magistrate was well within the law in granting the Respondent, Julie Smith, a judgment against the Appellant, Tracy Fulmore, for breaching the lease that was effective per the written details of the lease document; and
> 3. The Appellant's request for Appeal in this matter should be denied and the findings and judgment of the Magistrate be upheld." Circuit Court Order.

This appeal follows.

ARGUMENT

THE TRIAL COURT ERRED BY DENYING THE APPELLANT'S REQUEST FOR APPEAL AND AFFIRMING THE MAGISTRATE COURT RULING THAT APPELLANT BREACHED A CONTRACT FOR LEASE AND THEREFORE WAS RESPONSIBLE FOR DAMAGES PURSUANT TO THE LEASE, EVEN THOUGH APPELLANT CANCELED THE LEASE PRIOR TO THE EFFECTIVE DATE AND WAS NOT IN POSSESSION OF THE PROPERTY.

""'A lease agreement is a contract, and an action to construe a contract is an action at law." *Middleton v. Eubank*, 388 S.C. 8, 14, 694 S.E.2d 31, 34 (Ct. App. 2010) (citations omitted). "An action for breach of contract seeking money damages is an action at law." *Sapp v. Wheeler*, 402 S.C. 502, 507, 741 S.E.2d 565, 568 (Ct. App. 2013) (citing *Silver v. Aabstract Pools & Spas, Inc.*, 376 S.C. 585, 590, 658 S.E.2d 539, 541-42 (Ct. App. 2008). When reviewing a master-in-equity's judgment made in an action at law, "the appellate court will not disturb the master's findings of fact unless the findings are found to be without evidence reasonably supporting them." *Silver*, 376 S.C. at 590, 658 S.E.2d at 542. Nevertheless, the

"reviewing court is free to decide questions of law with no particular deference to the [master]." *Id.* (quoting *Hunt v. S.C. Forestry Comm'n*, 358 S.C. 564, 569, 595 S.E.2d 846, 848-40 (Ct. App. 2004) (internal quotation marks omitted)."" Relied on in *Bluffton Towne Ctr., LLC v. Gilleland-Prince* (S.C. App., 2015).

""In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's finding.....The judge's findings are equivalent to a jury's findings in a law action." *Townes Assocs. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773 (1976); accord *Cohens v. Atkins*, 333 S.C. 345, 347, 509 S.Ed.2d 286, 288 (Ct. App. 1998); *Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 461, 494 S.E.2d 835, 841 (Ct. App. 1997)."" Relied on in *Ellie, Inc. v. Miccichi*, 594 S.E. 2d 485, 358 S.C. 78 (S.C. App., 2004).

The Appellant, Tracy Fulmore, entered into a lease agreement with the Respondent, Julie Smith (R. pp 123-132), to rent commercial space to be used as a barber shop. The parties met and signed the lease agreement on May 9, 2014. The lease was to begin on June 1, 2014. On May 9, 2014, when the parties met to sign the lease agreement, the Appellant rendered two checks to the Respondent for the deposit of $1,200.00 (one thousand two hundred dollars) and the first month rent for $1,000.00 (one thousand dollars). (R. p 47) On May 9, 2014, at the signing of the lease, the Appellant was not given the keys to the leased premises or a copy of the lease agreement. At some point later on May 9, 2014, the Respondent scanned and emailed the Appellant a copy of the lease agreement. However, the Respondent never released keys to the leased premises to the Appellant.

On May 14, 2014, the Appellant notified the Respondent through a telephone conversation that he did not want to lease the premises. On May 22, 2014, the Appellant's

attorney sent a letter to the Respondent informing her that the Appellant did not wish to rent the property and was requesting a refund of the monies paid at that time. (R. p 133) In the letter to the Respondent, it was noted that the Appellant "did not take possession of the premises and had not been provided access" to the property.

The Appellant filed an action in the Magistrate Court against the Respondent for failure of the Respondent to allow Appellant's occupancy of the leased premises. (R. p. 5-21) The Appellant sought damages in the amount of $2,200.00 (two thousand two hundred dollars) for the deposit and first month rent. The Respondent counterclaimed (R. pp 41-44) for breach of contract and sought damages in the amount of $7,500.00 (seven thousand five hundred dollars) and court costs. The Magistrate Court ruled in favor of the Respondent and granted judgment for the $7,500.00 (seven thousand five hundred dollars) minus the $2,200.00 (two thousand two hundred dollars) already received from the Appellant, plus court costs. (R. p 4) The Circuit Court affirmed the Magistrate Court's ruling. (R. pp 1-3) This appeal follows.

On appeal, the Magistrate Court's ruling on the facts will not be disturbed unless found not to be supported by the evidence. The evidence in this case does not support a ruling for breach of contract of the lease agreement. The Circuit Court's affirmation of the Magistrate Court ruling was in error. The central issue is whether the Appellant canceled the lease agreement prior to the effective date of the lease agreement. In addition, the facts are undisputed that the Appellant was never is possession of the leased premises.

The effective date of the lease agreement was June 1, 2014. (R. pp 123-132). The evidence in this case supports the facts that the parties met and executed the lease agreement on May 9, 2014. On May 14, 2014, according to the testimony of the Appellant, the parties engaged in a 12-minute conversation in which the Appellant described that he felt uneasy with what the

Respondent was telling him and he informed her he wanted his money returned and he did not want to lease the property. On May 22, 2014, the Appellant's attorney sent the Respondent a letter informing her that the Appellant did not wish to rent the property. All of these actions occurred before the effective date of the lease. In addition, the evidence is undisputed that the Appellant never took possession of the leased premises because the Appellant was never given keys to the property. The Magistrate Court's ruling that "the Court could not find sufficient justification for Mr. Fulmore to not honor the agreement" (R. p 58) is not legally or factually based.

The 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. The Magistrate Court's focus on whether the Appellant should have honored the lease agreement was misguided and in error. However, the Appellant did testify that the Respondent said one thing and did another and he did not feel comfortable with her actions even before the lease began. (R. p 57) The Circuit Court's affirmation of the Magistrate Court ruling was in error as well.

In addition, the record is not undisputed about the Respondent offering the Appellant keys to the property. The Appellant did not receive possession of the leased premises when he signed the lease agreement on May 9, 2014. The Appellant did not have possession of the leased premises when he discussed that matter on the phone with the Respondent on May 14, 2014. Thereafter, a letter was sent by the Appellant's attorney on May 22, 2014, (R p. 133) informing the Respondent that the Appellant was canceling the lease agreement and requested a refund of the monies paid to the Respondent. The record is undisputed that the Appellant never had possession of the leased premises. While the Respondent testified that she offered keys to the

Appellant, it appears the offer was after the Appellant canceled the lease agreement. Offering the keys to the Appellant after he canceled the lease agreement was not a remedy, nor did it create a liability for the Appellant because he was not in possession of the leased premises. If anything, the Respondent's offer of the keys after the Appellant's cancellation is proof that the Appellant never had possession of the leased premises. In any event, the Appellant was never in possession of the leased premises, and the Appellant canceled the lease prior to the effective date of June 1, 2014.

A lease is not effective until the lessee takes possession of the property. In *Willcox v. Bostick*, 57 S.C. 151, 35 S.E. 496, (S.C. 1900), the court ruled that "the lessee must enter into possession in order to acquire an estate in the land." *Id.* at 497. See also *Simon v. Kirkpatrick*, (No. 11280), (S.C. 1927). Therefore, if a party leasing property is not given possession to the property, the lease is not effective as creating an estate in the land. The Magistrate Court erred in its ruling concluding that there was not a sufficient reason for the Appellant not to continue in the lease. The Appellant clearly canceled the lease prior to the effective date of June 1, 2014. In addition, there is no factual evidence in the record, specifically in the Magistrate Court hearing transcript in which the facts have been established as to the Appellant receiving keys and possession to the leased premises. In fact, the record is clear that the Appellant never received keys to the leased premises.

In addition, the present situation is distinguishable from situations in which the lease becomes effective and the lessee then attempts to cancel after the effective date of the lease. After the commencement of the lease and the effective date, an attempt at cancellation may give rise to damages. Here, the cancellation was clearly prior to the effective date of the lease, specifically prior to June 1, 2014.

The plain language of the lease agreement allows for cancellation prior to the effective date of the lease. In Paragraph "6" of the lease agreement (R. p 125), entitled "DELAY OF POSSESSION", the agreement specifically states

> "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 NA (hand-written), 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." Page 3 of Lease Agreement.

The Appellant canceled the lease agreement prior to the effective date of June 1, 2014. In addition, the Appellant provided written notice of the cancellation by the May 22, 2014, letter sent by the Appellant's attorney to the Respondent. The Magistrate Court trial transcript does not contain any factual information from the Respondent as to when she received the May 22, 2014, letter canceling the lease agreement. The record does not clearly establish facts that support the position that the Respondent received the notice of cancellation after the effective date of the lease. The record establishes the contrary in that the notice of cancellation was made prior to the effective date of the lease and that the Appellant was not in possession of the leased premises. Therefore, the Magistrate Court erred by ruling that the Respondent was not contacted until June about the cancellation. The facts in the record do not support this finding. Equally, the Circuit Court erred in affirming the Magistrate Court ruling.

""The law in this state regarding the construction and interpretation of contracts is well settled." *Conner v. Alvarez*, 285 S.C. 97, 101, 328 S.E.2d 334, 336 (1985). When the language of a contract is clear, explicit, and unambiguous, the language of the contract alone determines the contract's force and effect. *Ellie, Inc., Miccichi*, 358 S.C.

78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004). In addition, "[w]here an agreement is clear and capable of legal interpretation, the court's only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it." *Id.* (citing *Heins v. Heins*, 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct. App. 2001)."" Relied on in *Highlands Prop. Owners Ass'n, Inc. v. Schumaker Land, LLC*, 397 S.C. 432, 724 S.E.2d 685 (S.C. App. 2012).

In the present case, the lease agreement clearly allows for cancellation of the lease, especially if the tenant is not in possession of the leased premises. Here, the Appellant was not in possession of the leased premises. Further, the Appellant notified the Respondent orally and in writing of his desire to cancel the lease prior to the effective date of the lease. (R. p 133) The Magistrate Court's ruling in not in accord with the facts or the law, and therefore, is in error regarding the judgment rendered in favor of the Respondent and should be reversed. Equally therefore, the Circuit Court ruling affirming the Magistrate Court judgment is also in error and should be reversed.

CONCLUSION

Based on the argument set out above, the Magistrate Court erred in its ruling determining that the Appellant breached the lease agreement when the Appellant was not in possession of the leased premises and gave proper notice regarding cancellation prior to the effective date of the lease. Consequentially, the Circuit Court erred in its ruling in affirming the decision of the Magistrate Court. The Circuit Court ruling should be reversed.

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RESPECTFULLY SUBMITTED,

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February 14, 2017

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

Honorable Thomas A. Russo

Appellate Case No: 2016-000505

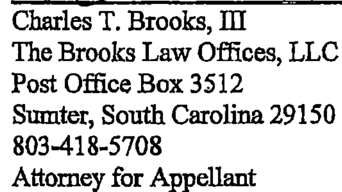
Tracy Fulmore .... Appellant,

v.

Julie Smith ....Respondent.

CERTIFICATE OF COUNSEL

I hereby certify that the Final Brief of Appellant complies with Rule 211(b), SCACR and the August 17, 2007 Supreme Court Order regarding personal identifiers.



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

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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.

PROOF OF SERVICE

I, Suzanne Rodriguez, Legal Assistant to Mariel D. Norton and Catharine G. Griffin, employees of Baker, Ravenel & Bender, L.L.P., Attorneys for Julie Smith, Respondent, hereby certify that, on this 23rd day of February 2017, I have served the following with the foregoing Respondent's Return to Appellant's Motion to File and Serve the Final Brief of Appellant Out of Time and Proof of Service by mailing copies of same by United States Mail, postage prepaid, to counsel of record at the addresses shown below:

Charles T. Brooks, III, Esquire
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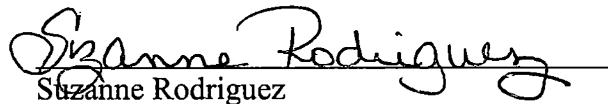

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February 23, 2017

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RECEIVED
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SC Court of Appeals

Re: Tracy Fulmore v. Julie Smith
Appellate Case No. 2016-000505
Final Brief

Dear Ms. Kitchings:

Enclosed herein for filing in the above-referenced matter are the original and six (6) copies of Respondent's Return to Appellant's Motion to File and Serve the Final Brief of Appellant Out of Time and Proof of Service. I have enclosed an extra copy of each, which I would appreciate your clocking in and returning to me via courier delivering same.

By copy hereof, I am serving same on counsel for Appellant.

Thank you very much.

Sincerely yours,

Mariel D. Norton
MDN:sr
Enclosures

cc: w/enclosure: Charles T. Brooks, III, Esquire