Order Affirming the Magistrate Court

Dated August 20, 2018

Adams Outdoor Advertising Limited Partnership
v.
LNJ, LLC
Civil Action No. 2018-CP-0975
Civil Action No. 2017-CP-10-6412
In Charleston County Court of Common Pleas

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
Adams Outdoor Advertising Limited Partnership,	)	Civil Action No. 2018-CP-10-975
	)	Civil Action No. 2017-CP-10-6412
Appellant,	)	**ORDER AFFIRMING THE MAGISTRATE COURT**
vs.	)	
LNJ, LLC,	)	
Respondent.	)	

This matter comes before the Court on Adams Outdoor Advertising's ("Adams") civil appeals from orders of the Magistrate Court granting a petition for ejectment filed by LNJ, LLC (the "Ejectment Order") and setting an appeal bond in the amount of $300,000 (the "Bond Order" and, jointly with the Ejectment Order, the "Orders").[1] The Ejectment Order, filed January 31, 2018, directed Adams to remove an advertisement billboard Adams erected pursuant to a ground lease with LNJ's predecessor in title at 289 Huger Street in Charleston.

The Court held a hearing on the appeals on July 12, 2018, at which Adams and LNJ were represented by counsel. Having heard the arguments of counsel and reviewed their briefs filed with the Court, along with the Magistrate's return and the record from the proceedings below, the Court agrees with the Magistrate's findings of fact and conclusions of law contained in the Ejectment Order and finds the Magistrate did not abuse his discretion in setting the appeal bond. For the reasons set forth therein and below, the Orders are affirmed.

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[1] Adams filed an initial appeal (Case No. 2017-CP-10-6412) before the Magistrate entered the Ejectment Order because the Magistrate announced his ruling from the bench immediately following a bench trial held on November 17, 2017 and S.C. Code Ann. § 27-37-120 requires notice of any appeal to be filed within 30 days of the date the Magistrate announces a ruling at trial. After the Magistrate subsequently issued the written Ejectment Order, Adams filed a second appeal (Case No. 2018-CP-10-975) on substantially the same grounds. The parties agreed to consolidate the appeals before this Court.

FACTUAL & PROCEDURAL BACKGROUND

Until September of 2015, Walter and Thomas Brooks (the "Brooks") were the owners, directly or through entities they controlled, of approximately 3 acres of real estate located at 287 Huger Street (the "Brooks Tract"), including the .5-acre parcel currently owned by LNJ and known as 289 Huger Street.

Adams' predecessor-in-interest, Infinity Outdoor Advertising, Inc. ("Infinity") approached the Brooks in 2000 about entering into a ground lease pursuant to which Infinity would place an advertising billboard on the Brooks Tract. During negotiations with Infinity over the terms of the ground lease, the Brooks insisted they be permitted to terminate the lease on 90 days' notice in the event the Brooks, or their assignees, decided to sell or lease the Brooks Tract or improve it by erecting a permanent structure on the property.

The Brooks and Infinity subsequently executed a Ground Lease, effective November 12, 2000 (the "Ground Lease" or the "Lease"). The first page of the Ground Lease is a standard form contract prepared by Infinity, which provides for a 10-year term and contains no right to terminate early due to a sale, lease or improvement of the property. An Addendum A to the Ground Lease, however, states the lessor may terminate upon 90 days' written notice, in the event the property is sold or leased or a bona fide residential or commercial structure is erected on the property. (*Id.*) Specifically, Addendum A provides as follows:

> In the event that the Property, occupied by Infinity Outdoor, Inc. structure (s) is to be leased, sold OR improved by erecting a bona fide permanent private commercial or residential building, LESSOR may terminate this Lease upon: i) giving Infinity Outdoor, Inc. ninety (90) days' written notice of termination; ii) LESSOR'S refunding to the rent previously paid for the unexpired portion of this Lease beyond the termination date. Infinity Outdoor, Inc. agrees to remove its advertising structures within the ninety (90) day period. Any right of termination stated herein in favor of the LESSOR or its successors and assigns shall not exist and cannot be exercised: I) if the Property shall be condemned or taken by power of eminent domain, ii) if the Property is conveyed to an entity having or delegated the power of eminent domain, iii) if the LESSOR's principal purpose in erecting an improvement is to terminate this Lease

under this provision; or iv) if the purpose of the termination is to erect another outdoor advertising structure.

After the Ground Lease was executed, Infinity erected a billboard (the "Billboard") on the Brooks Tract. The Billboard stands immediately adjacent to and extends above a building located on the western edge of the Brooks Tract that has been occupied since the 1990s by Palmetto Brewery, (the "Brewery") which leased the building from the Brooks.

On September 1, 2015, LNJ's immediate predecessor-in-interest, Huger Street Holdings, LLC ("HSH"), acquired the Brooks Tract and received an assignment of the Ground Lease for the Billboard and the lease for the Brewery. HSH is a special purpose entity created by its members for the sole purpose of acquiring the Brooks Tract and developing residential apartment units on the property. After HSH acquired the Brooks Tract, it obtained the necessary approvals and permits to erect a building containing 198 apartment units, along with various amenities, on the Brooks Tract. As of the date of trial, HSH had already begun constructing the apartment complex on the Brooks Tract.

In January of 2017, HSH approached the owner of the lessor of the Brewery, Larry Lipov ("Lipov"), about selling him the .5 acre portion of Brooks Tract on which the Brewery was located. The parties subsequently entered into a purchase and sale agreement the following month.

Via letter dated January 18, 2017, and delivered via Federal Express and electronic mail, HSH's counsel notified Adams in writing that it was terminating the Ground Lease, pursuant to Addendum A, effective 90 days after the date of the notice. HSH directed Adams to remove the Billboard within the 90-day period as required by Addendum A. Adams received the notice, and, on January 25, 2017, representatives of Adams and HSH exchanged email correspondence regarding the termination in which HSH indicated it was willing to allow the Billboard to remain

until construction on the apartment building began, and Adams assured HSH that Adams could remove the Billboard within 30 days once HSH instructed Adams to remove it.

Meanwhile, Lipov and his wife formed LNJ for the purpose of acquiring from HSH the .5-acre portion of the Brooks Tract on which the Brewery is located. The .5-acre parcel was subdivided from the Brooks Tract and became known as 289 Huger Street ("289 Huger Street").[2]

On April 20, 2017, as HSH and LNJ were preparing to close on the sale of 289 Huger Street, HSH sent Adams a proposed estoppel certificate, which would have required Adams to confirm that HSH validly terminated the Ground Lease. On April 26, Adams responded to HSH that the lessor's right to terminate the Ground Lease is triggered only upon erection of a permanent structure on the specific portion of the Brooks Tract where the Billboard is located and that, unless HSH intended to erect a structure on that specific area where the Billboard arises out of the ground, HSH had no right to terminate the Ground Lease. HGH responded and made additional demands for Adams to remove the Billboard via letters dated April 26, 2017 and May 17, 2017.

On April 28, 2017, HSH and LNJ closed on the sale of 289 Huger Street to LNJ. Because Adams had not removed the Billboard from 289 Huger Street by the date of closing, LNJ took an assignment of the Ground Lease. After Adams continued to refuse to remove the Billboard, LNJ commenced this action for ejectment.

The Magistrate held a bench trial on November 17, 2017, after which the Court granted LNJ's Application for Ejectment from the bench. The Magistrate subsequently entered the written Ejectment Order Granting LNJ's Application for Ejectment on January 31, 2018. The Magistrate ruled HSH had the right to terminate the Ground Lease upon 90 written notice to Adams in the event of development or sale of any portion of the Brooks Tract, that HSH validly terminated the

[2] The remaining approximately 2.5 acres of the Brooks Tract owned by HSH is known as 287 Huger Street.

Ground Lease, and that LNJ was entitled to ejectment on that basis. On the same day he issued the Ejectment Order, the Magistrate held an evidentiary hearing regarding the amount of the appeal bond, and, at the conclusion of the hearing, the Magistrate set the bond at $300,000. These appeals followed.

STANDARD OF REVIEW

The Circuit Court sitting in an appellate capacity applies a *de novo* standard of review to findings of fact and conclusion of law by the Magistrate. *Burns v. Wannamaker*, 281 S.C. 352, 357, 315 S.E.2d 179, 182 (Ct. App. 1984). The amount of the appeal bond, however, is reviewed for abuse of discretion. *United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc.*, 307 S.C. 102, 108, 413 S.E.2d 866, 870 (Ct. App. 1992).

FINDINGS OF FACT & CONCLUSIONS OF LAW

Adams's various grounds for appeal of the Ejectment Order can be reduced to the following basic arguments: 1) the Magistrate erred in finding HSH had the right to terminate the Ground Lease; 2) the Magistrate erred in finding HSH substantially complied with the termination procedure specified in the Lease; and 3) the Magistrate erred in failing to find LNJ's conduct resulted in ratification of the Lease or that LNJ is barred by the doctrines of waiver and estoppel from pursuing ejectment. The Court addresses each of these arguments below.

I. The Magistrate Correctly Ruled HSH had the Right to Terminate the Ground Lease.

A. The Ground Lease permitted HSH to terminate based upon HSH's development plans for the Brooks Tract.

The Magistrate ruled HSH had the right to terminate based upon its plans to erect an 198-unit apartment complex on the Brooks Tract. Adams argues HSH had no right to terminate because

the apartment building will stand merely adjacent to the Billboard, rather than directly over the specific area where the Billboard arises from the ground. The Court disagrees with Adams.

The plain language of the Ground Lease supports LNJ's reading. *North American Rescue Products, Inc. v. Richardson*, 411 S.C. 371, 378, 769 S.E.2d 237, 240 (2015) (holding the plain language of an unambiguous contract determines its force and effect). Addendum A states the right to terminate arises when "the Property, occupied by Infinity Outdoor, Inc. structure (s) is to be leased, sold OR improved by erecting a bona fide permanent private commercial or residential building." In the landlord-tenant context, "occupy" carries a particular meaning. S.C. Code Ann. § 27-33-10 defines a "tenant" as "[a] person other than the owner using or *occupying* real estate. . . ." In this context, "occupy" means "to dwell in." *Webster's New World College Dictionary* (4th ed. 1999). Thus, a tenant "occupies" property during the lease term without being physically present on every inch of the property at all times. By the same token, for purposes of Addendum A, the property "occupied" by the Billboard refers to the entire Brooks Tract, despite the fact that the sign does not cover the entire square footage of the property.

This reading best effectuates the intention of the termination clause, evident from Addendum A itself, to allow the lessor to terminate in order to prevent the Billboard from interfering with development of the Brooks Tract. Plainly, the Billboard may interfere with development, regardless of whether the development plans contemplate erection of a structure over the specific location of the Billboard pole. In fact, LNJ introduced evidence at trial from a representative of HSH, Hobie Orton, who testified the Billboard substantially interferes with HSH's development of the apartment complex. (Trial Tr. 63-90.) Specifically, Orton testified the Billboard will obstruct the view from the apartments on the western side of the complex and that, if the Billboard is not removed, the value of those apartments will be lower than they would be

without the Billboard. (*Id.*) Thus, the Court concludes that Addendum A allows the lessor to terminate when any portion of the Property is improved, not merely when the improvements call for erection of a structure over the specific area where the Billboard post arises from the ground. HSH therefore had the right to terminate the Ground Lease on that basis.

As previously noted, LNJ introduced extensive evidence into the record regarding HSH's development plans for the Property via the testimony of Hobie Orton, architectural plans, and photographs showing the status of construction. Indeed, Adams does not dispute that HSH is erecting a "bona fide permanent residential or commercial structure" on the Property. Thus, the Magistrate's ruling that HSH was entitled to terminate the Lease on this ground was supported by substantial evidence, and this Court will affirm.

B. The Ground Lease permitted HSH to terminate based upon the sale to LNJ.

The Magistrate ruled HSH also had the right to terminate the Ground Lease on the basis of HSH's sale to LNJ of the specific portion of the Brooks Tract where the Billboard is located. Adams argues, however, that the lessor's right to terminate under Addendum A arises upon a sale only if the lessor also intends to erect a permanent structure on the property. More specifically, Adams contends that the phrase "by erecting a bona fide permanent private commercial or residential building" modifies each of the words "leased," "sold" and "improved," rather than only the word "improved." Thus, Adams contends a lease or sale, standing alone, is insufficient to trigger the right to terminate. Instead, according to Adams, the lessor must *also* erect a structure on the property before the right to terminate will arise in connection with a lease or sale.

Adams' interpretation is contrary to the plain terms of Addendum A and settled rules of contract construction. "The general rule of contract construction requires that language used in a contract must be interpreted in its natural and ordinary sense... [and, therefore] a contract should

receive [a] sensible and reasonable construction and not such [a] construction as will lead to absurd consequences." *Twenty Ninth Avenue Corp. v. Great Atlantic & Pacific Tea Co., Inc.*, 311 S.C. 275, 277, 428 S.E.2d 734, 735 (Ct. App. 1993). The only sensible reading of Addendum A is that the phrase "by erecting a bona fide permanent private commercial or residential building" modifies *only* the word "improved" and does not also modify "leased" and "sold." A property can be "improved" by erecting a structure upon it. Plainly, property cannot be "sold" or "leased" by erecting a structure upon it. Adams' interpretation makes no sense.

Even Adams' corporate designee agreed at trial that Adams' interpretation of the termination clause makes no sense. Randall Romig, a former Infinity and Adams executive who executed the Ground Lease on behalf of Infinity, readily acknowledged that reading the phrase "by erecting a bona fide permanent private commercial or residential building" as modifying "leased" and "sold," as well as "improved," renders the clause nonsensical:

Q: But you can't actually sell a property by erecting a building on it, right?
A: No.
Q: And you can't lease a building by erecting a building on it, can you?
A: Lease it to be constructed.
Q: But you can't actually lease property by building on it.
A: Of course not.
(Tr. 35)

Q: But you agree with me you can improve property by erecting a structure on it, right?
A: Yes.
Q: That makes perfect sense, right?
A: Yes.
Q: And so you told me it makes no sense to say you can lease property by erecting a structure on it?
A: I said it's poorly phrased, yeah.
Q: But it makes no sense, correct?
A: Yes.
Q: It makes no sense to say you can sell a property by erecting a structure on it, correct?
A: You can sell it with the proviso that it's being (inaudible).
Q: But you can't—you can't sell it by erecting a structure on it, right? That makes no sense?
A: Right.

(Trial Tr. 37.) Thus, Adams' own witness at trial—the only witness Adams offered regarding the meaning of Addendum A—acknowledged that Adams' interpretation of the termination clause makes no sense.

Moreover, Adams' interpretation violates the grammatical "rule of the last antecedent," which provides that "a limiting clause or phrase ... should ordinarily be read as modifying only the noun or phrase that it immediately follows." *See Barnhart v. Thomas*, 540 U.S. 20, 26 (2003); see also *Black's Law Dictionary* 1532–1533 (10th ed. 2014) ("[Q]ualifying words or phrases modify the words or phrases immediately preceding them and not words or phrases more remote, unless the extension is necessary from the context or the spirit of the entire writing"). In this case, the rule means that the qualifying phrase—"by erecting a bona fide permanent private commercial or residential building"—modifies ***only*** the last antecedent—"improved"—and does not also modify the remote words in the series—"leased" and "sold."

Furthermore, Adams' interpretation would render the words "leased" and "sold" superfluous. The South Carolina Supreme Court has held that "[a]n interpretation that gives meaning to all parts of [a] contract is preferable to one which renders provisions in [a] contract meaningless or superfluous." *Stevens Aviation, Inc. v. DynCorp Intern*, LLC, 407 S.C. 407, 417 756 S.E.2d 148, 153 (2014). In this case, if the phrase "by erecting a bona fide permanent private commercial or residential building" is read as modifying "leased" and "sold," as well as "improved" then the terms "leased" and "sold" are superfluous because termination would require improvement of the property by erection of a structure, regardless of whether the property is being sold, leased or held.

The Court finds the relevant provisions of Addendum A discussed above are unambiguous. The only natural, sensible, and reasonable construction of Addendum A is that a sale of the

property, a lease of the property, or improvement of any portion of the Property by erection of a bona fide commercial or residential structure are each *independently* sufficient to trigger the right to terminate. Thus, the Magistrate correctly determined HSH had the right to terminate the Lease based upon its sale of a portion of the Brooks Tract to LNJ.[3]

C. Extrinsic evidence also supports the Magistrate's interpretation of the Ground Lease.

Adams also argued at trial that extrinsic evidence supports its reading of the Lease. But extrinsic evidence may be used to vary the terms of a written instrument only where the instrument is ambiguous. *Iseman v. Hobbs*, 290 S.C. 482, 351 S.E.2d 351, 352 (Ct. App. 1986); *Hansen v. DHL Laboratories*, 316 S.C. 505, 508, 450 S.E.2d 624, 626 (Ct. App. 1994), *affirmed*, 459 S.E.2d 850 (1995). In this case, the Magistrate expressly found the Ground Lease was *unambiguous* and that it unambiguously permitted HSH's termination of the Lease in this situation. This Court agrees. Thus, extrinsic evidence cannot be used to contradict the terms of the Lease.

The Magistrate nevertheless permitted the introduction of extrinsic evidence and also found, in the alternative, that the evidence clearly supported LNJ's interpretation of the Lease based on the testimony of Walter Brooks ("Brooks"), one of the brothers who owned the Brooks Tract when the Ground Lease was executed. Brooks was the only witness at trial who actually participated in the negotiations over the Ground Lease. He testified he was directly involved in

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[3] Adams also argues that there was no evidence that Adams actually sought to terminate on the basis of the sale to LNJ. However, a letter dated April 26, 2017, from HSH's attorneys to Adams, admitted into evidence without objection by Adams, clearly states HSH sought to terminate based on *both* the sale of the Property and the improvement of the Property:

> Two of those circumstances [under which termination is permitted]—the sale of the Property and the improvement of the Property by erecting a bona fide permanent residential building—are now applicable and justify the termination of the Ground Lease.

(Pls. Ex. 14, 4/26/2017 Letter from Chris Atkinson to Derek Arsenault.) In any event, the failure to identify the sale as a basis for termination would not prevent HSH from terminating on that basis. Addendum A does not require the notice to specify the basis for termination.

the negotiations and that he and his brother proposed the termination provisions contained in Addendum A. Brooks testified his intention in insisting upon Addendum A was that "if we sold the property, leased the property, or in any way that that structure was going to interfere with the plans of ours or anybody that we sold it to or leased it to, we could have (sic) 90 days' notice to have the sign taken down." (Trial Tr. 59-60.) Brooks agreed that HSH's plans for the Brooks Tract are precisely the circumstances in which the Brooks intended the right to terminate would apply.

The only evidence Adams introduced regarding the intention of the parties with respect to Addendum A was the testimony of Romig, the former Infinity and Adams executive who executed the Ground Lease on behalf of Infinity. Romig testified Infinity's intention was that the termination right would arise only upon erection of a structure on the portion of the property where the Billboard is located. But Romig had *no personal knowledge* of the negotiations. He admitted he was not involved in the negotiation or drafting of Addendum A, that he does not know who drafted the addendum, that he did not communicate with the Brooks regarding the termination right, and that the Brooks would know more than Romig regarding the intention of the parties with respect to Addendum A. Indeed Romig had nothing to do with the Lease, other than the fact that he ultimately signed it for Infinity:

Q: Mr. Romig, you didn't draft this lease, did you?
A: No, I did not.
Q: And you didn't actually communicate with Mr. Brooks regarding the negotiation of the lease, did you?
A: No.
Q: So you don't know what the drafter had in mind when he drafted Addendum A, correct?
A: I don't know, no.
Q: And you don't know what the intention of Mr. Brooks was with respect to Addendum A, do you?
A: I don't.

(Trial Tr. 34.)

THE COURT: You already testified you were not involved in the negotiation or preparation of this contract.
THE WITNESS: Correct.

(Trial Tr. 44.)

Q: Okay. So who would be in a better position between you and Mr. Brooks to testify regarding the intention of Addendum A?
A: Well, I imagine the person that negotiated with Mr. Brooks.
Q: Or Mr. Brooks, correct?
A: Well, representing himself, but I'm talking about the lessee (sic), and that would be someone negotiating on behalf of the lessee.
Q: The lessee would know more – the person who negotiated on behalf of the lessee would know more than you do about the intent.
A: That's certainly true, yes.
Q: Would it also be the case that Mr. Brooks would know more than you do about the intention of Addendum A?
A: From his perspective, yes.

(Trial Tr. 48-49.)

Thus, even if the Court were to find Addendum A ambiguous (the Court does not), LNJ's interpretation of the addendum is consistent with the only competent evidence in the record regarding intention of the parties—that of Mr. Brooks, who testified the intention was that a sale of the property, a lease of the property, or improvement of any portion of the Property by erection of a bona fide commercial or residential structure are each independently sufficient to trigger the right to terminate.

Moreover, Mr. Romig's testimony regarding industry custom and provisions Infinity or Adams typically sought to include in their leases is irrelevant. Romig acknowledged that Addendum A did not appear to be a document created by Adams, and Mr. Brooks testified he and his brother were the parties who insisted on the termination right in this instance. Thus, Romig's testimony that a termination clause like the one in Addendum A was atypical for Infinity has no bearing upon the interpretation of the termination clause in this case because this Lease was not a standard Adams lease and the termination clause was specifically negotiated at the Brooks'

instance. The evidence in the record demonstrates that, in this particular instance, Infinity agreed to a termination clause that perhaps it would not typically have agreed to because the Brooks insisted upon it and Infinity's alternative to not agreeing was to lose the ability to erect a billboard on the Brooks' property. For these reasons, the Court agrees with the Magistrate that the extrinsic evidence overwhelmingly shows LNJ's position is consistent with the intention of the original parties to the Lease and that Adams' position is not.

In light the above, the Magistrate correctly determined HSH had the right to terminate the Ground Lease. Two events occurred which each independently triggered HSH's right to terminate: 1) HSH was pursuing plans to erect a multi-family residential structure—a "bona fide permanent private residential building"—on the Brooks Tract and 2) HSH sold the specific portion of the Brooks Tract on which the Billboard is located, to LNJ.

II. The Magistrate Correctly Ruled that HSH Effectively Exercised its Right to Terminate the Ground Lease.

Adams argued to the Magistrate that HSH's notice of termination was deficient in several respects. The Magistrate correctly rejected these arguments as explained below.

A. HSH was not required to tender a refund of unearned rent with the notice of termination.

Adams first argues the notice of termination was ineffective because HSH did not tender a refund of unearned rent with the notice. The Court disagrees. Addendum A requires the lessor to refund any prepaid rent for the period beyond the date of termination. Because Adams prepaid rent for 2017, Adams would be entitled to a refund of any portion of the rent it prepaid for the period beyond the termination date. There is no dispute HSH offered to refund Adams the applicable prorated portion of the prepaid rent as soon as it removed the Billboard. Adams argues, however, that HSH was required to tender the refund *with the notice of termination.*

Addendum A required Adams to remove the Billboard within the 90-day notice period. The amount of the refund to which Adams was entitled remains unknown until Adams *actually removes the Billboard*, which Adams has refused to do. HSH informed Adams in writing that it was ready and willing to refund the applicable prorated portion as soon as Adams removed the Billboard, but Adams informed HSH it would not remove the Billboard because Adams believed HSH had no right to terminate. Thus, HSH's failure to tender a refund with the initial notice of termination does not render the notice ineffective.

B. Delivery of the notice of termination via Federal Express did not render the notice ineffective.

Next, Adams argues the Ground Lease required the termination notice to be sent via certified mail. Because HSH sent the notice of termination via Federal Express and email, Adams argues, the notice was ineffective. Addendum A requires only "written notice of termination." However, the first page of the Ground Lease states "[a]ll notices sent under this lease shall be by certified mail, return receipt requested." Because Adams did not send the notice of termination via certified mail, it did not strictly comply with this provision.

Nevertheless, the Court concludes HSH's failure to send the notice via certified mail did not render it ineffective because HSH substantially complied with the notice provision by sending it via Federal Express. Delivery via Federal Express sufficiently served the purpose of the notice provision because Federal Express is the functional equivalent of certified mail.

In addition, there is no dispute Adams received actual notice of termination. Indeed, Adams acknowledged receipt of the notice in email correspondence with HSH of January 25, 2017. Under South Carolina law, strict compliance with a prescribed manner of notice is not required if the other party receives actual notice. *Hammond v. Tilghman Lakes, Inc.*, 295 S.C. 152, 154, 367 S.E.2d 446, 447 (Ct. App. 1988) ("[n]otice in a prescribed manner is not required where a party

has actual notice and has not suffered prejudice by the other's failure strictly to follow the contract.") Adams has identified no prejudice, and the Court finds Adams was not prejudiced because it received the notice in a timely manner. Thus, HSH's failure to deliver the notice via certified mail was immaterial. *Hammond*, at 154, 367 S.E.2d at 447.

C. Failure to identify the specific basis for termination with the notice did not render the notice ineffective.

Finally, Adams argues the notice was ineffective because HSH failed to identify which of the termination "triggers" in Addendum A it was relying upon to terminate the Ground Lease. But Addendum A does not require the notice to specify the basis for termination. In any event, email correspondence dated January 25, 2017, between representatives of Adams and HSH reveal Adams understood HSH was terminating based upon its development of the property. (Pls. Ex. 11.) And a letter dated April 26, 2017, from HSH's attorneys to Adams, admitted into evidence without objection by Adams, clearly states HSH sought to terminate based on both the sale of the Property and the improvement of the Property:

> Two of those circumstances [under which termination is permitted]—the sale of the Property and the improvement of the Property by erecting a bona fide permanent residential building—are now applicable and justify the termination of the Ground Lease.

(Pls. Ex. 14, 4/26/2017 Letter from Chris Atkinson to Derek Arsenault.) Thus, HSH's failure to identify the specific basis for termination in the January 18, 2017 notice does not render the notice ineffective.

D. Strict compliance with the notice procedure was not required.

Furthermore, to the extent HSH failed to strictly comply with any termination notice requirements, the Court finds South Carolina law required only substantial compliance and that HSH substantially complied with the notice requirements in the Lease. *Clardy v. Bodolosky*, 383

S.C. 418, 427, 679 S.E.2d 527, 531 (Ct. App. 2009) (holding that unless the terms of a contract make strict compliance essential, substantial compliance is sufficient)

At trial, Adams relied upon *Litchfield Co. of South Carolina, Inc. v. Kiriakides*, 290 S.C. 220, 226, 349 S.E.2d 344, 347 (Ct. App. 1986) for the proposition that strict compliance with the termination procedure contained in Addendum A was required because termination resulted in forfeiture to Adams. In *Kiriakides*, the Court of Appeals held that termination of a commercial lease following tenant's failure to timely pay two month's rent would work a forfeiture of more than $1,500,000 in improvements made by the lessee to the property and loss of a lease that did not expire for another 30 years. The Court stated that forfeiture provisions of a lease are strictly construed and "when a forfeiture depends upon giving a written notice of default, it must appear that the notice was given in strict compliance with the contract both as to time and content." *Id.* The Court concluded that, because the lessor failed to prove it mailed a notice of termination before the lessee tendered the past-due rent, the lessor was precluded from terminating the lease. *Id.* at 226, 349 S.E.2d at 348.

The Magistrate correctly ruled that *Kiriakides* is distinguishable from the instant case. First, the Magistrate correctly found that, unlike the default provision at issue in *Kiriakides*, Addendum A is not a forfeiture provision. A "forfeiture" is a the "loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty." *Black's Law Dictionary* 661 (7th ed. 1999). The lessor's right to terminate the Ground Lease under Addendum A, however, is not dependent upon a breach or default on the part of the lessee. Rather, the parties to the Ground Lease specifically agreed the lessor had the right to terminate upon occurrence of any of the events specified in Addendum A, none of which relate to any breach or failure to perform by the lessee. Because Addendum A is not a forfeiture provision, *Kiriakides* does not apply.

Moreover, unlike the lessee in *Kiriakedes*, Adams presented no evidence that removal of the Billboard would result in forfeiture. In *Kiriakedes*, the lessee stood to lose $1,500,000 in improvements to the property and a lease with 30 years remaining on the term. In this case, by contrast, the Billboard has stood on the Brooks Tract for 17 years and the current term expires in 2020. Furthermore, Adams presented no evidence at trial that it would lose any investment as a result of early termination of the Ground Lease. And Adams plainly would not lose the benefit of prepaid rent because Addendum A expressly requires a refund to the lessee of any pre-paid rent for the period beyond the termination date. Thus, the Magistrate did not err in finding termination did not result in forfeiture to Adams.

III. LNJ Did Not Reinstate the Ground Lease or Waive Its Right to Eject Adams by Conduct.

Adams next argues that LNJ reinstated the Ground Lease by accepting assignment of the Lease from HSH or, in the alternative, that LNJ should be barred by waiver or estoppel from pursuing eviction based upon LNJ's assumption of the Lease. These arguments are not preserved for review by this Court because Adams did not raise them to the Magistrate. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); *Indigo Assocs. v. Ryan Inv. Co.*, 314 S.C. 519, 522, 431 S.E.2d 271, 273 (Ct. App. 1993) ("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.").

In any event, the record does not support Adams' arguments for reinstatement, waiver or estoppel. Adams left LNJ no choice but to assume the Ground Lease because Adams refused to remove the Billboard despite receiving notice of termination by HSH. The record shows LNJ assumed the Lease so that it could step into HSH's shoes for purposes of pursuing this ejectment

proceeding. After the closing, LNJ promptly pursued ejectment. There is no evidence in the record that LNJ did anything to reinstate the Lease or waive its right to seek ejectment.

Nor does Lipov's testimony at trial regarding his understanding of the status of the Lease support Adams' arguments. Lipov testified that, when LNJ purchased the Property, he understood that HSH had already provided notice of termination to Adams and that Adams would be removing the Billboard as a result. (Trial Tr. 103-104.) As a non-lawyer, Lipov testified he simply was unaware of the legal status of the termination at the time of the closing:

Q: And so—so when you received the deed, did you understand that you were taking subject to certain interests of other parties?

A: What I understood when I bought the property as a contingency in my contract with [HSH] was that I was going to buy the property and not have any leases, so it was [HSH's]—obligation under the contract to terminate the lease with . . . [Adams], and bought the property with the understanding that was going to be done . . . .

(Trial Tr. 101-102.)

Q: But did you have any understanding of whether or not [the Lease] had been terminated at the time that property was conveyed to you?

A: I know that the—I know that those letters were sent to Adams to terminate. Now, whether they were completely terminated, I was—I was under the understanding in talking to the legal people that I was taking to that it was in process.

(Trial Tr. 103-104.) Thus, Lipov testified that, as of the closing, he understood the termination notice had been delivered, but, as layman, he did not necessarily understand the status of the termination, given that Adams had not yet removed the Billboard. Lipov did not testify that LNJ reinstated the Lease or that he believed HSH's notice was somehow ineffective.

In any event, even if Lipov *had* testified he understood the Lease was still effective when LNJ closed on the Property (which he did not), that testimony would not somehow render HSH's termination ineffective or reinstate the Lease. Not surprisingly, Adams cites no authority for its

argument that Lipov's alleged testimony "nullified" the termination or reinstated the Lease. That is because Lipov's testimony regarding his personal *understanding* of the legal effect of the termination notice has no bearing upon whether or not HSH's notice was effective, as a legal matter, to terminate the Lease. There is no evidence Lipov took any action to reinstate the Lease at any time after HSH provided notice of termination—to the contrary, he has persistently sought to evict Adams on the basis that the termination was valid. Thus, Lipov's testimony regarding his understanding of the status of the termination at closing is not grounds for reversal of the Magistrate's ruling. Therefore, even if these arguments were preserved for appellate review (which they are not), the Court would not reverse the Magistrate on this basis.

IV. The Magistrate Did Not Improperly Ignore Approvals Allegedly Required to Remove the Billboard.

Adams also argued for the first time in its brief to this Court that the Magistrate "ignored or failed to give proper weight to the requirements of third-party and governmental approvals necessary to remove the Billboard." (App. Br. 18.) Again, Adams did not raise this argument to the Magistrate, and therefore this argument is not preserved for appellate review. *Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733; *Indigo Assocs.*, 314 S.C. at 522, 431 S.E.2d at 273.

In any event, Adams presented no evidence at trial or otherwise regarding any permits or approvals required for Adams to remove the Billboard. Adams does not even identify in its appellate brief what approvals are allegedly required, other than to vaguely state permits are necessary because the Billboard is near the interstate highway. There is no evidence in the record on which the Magistrate could have made findings regarding this argument even if Adams had raised it below (which it did not), and consequently there are no grounds for this Court to reverse the Magistrate on this basis.

Furthermore, the fact that regulatory approvals may be required provides no defense to this ejectment proceeding as a matter of law. The Ground Lease permits termination upon occurrence of the events stated in Addendum A, and it does not make exception for situations in which regulatory approval is required. If approvals are indeed required—and there is no evidence that they are—that fact cannot constitute a basis to prevent ejectment.

V. The Court Affirms the Magistrate on the Additional Sustaining Ground that the Record Shows LNJ Plans to Erect a Bona Fide Commercial Structure on the Specific Area Where the Billboard is Located.

In addition to the grounds on which the Magistrate ordered ejectment, LNJ presented evidence at trial of LNJ's plans to renovate the Brewery. As part of the renovation, LNJ plans to erect a raised catwalk over the specific area where the Billboard arises from the ground. (Trial Tr. 82-111.) Lipov presented architectural drawings showing LNJ's renovation plans for the property and testified that the catwalk over the area where the Billboard is located is necessary for the safety of patrons at the renovated Brewery tasting room. (Trial Tr. 86-93; Pls. Ex. 21, 22.) Thus, LNJ is also entitled to terminate the Ground Lease based upon its own plans for improvements at the specific location where the Billboard arises from the ground. The Court finds this additional sustaining ground supports the Magistrate's ejectment order.[4] *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) (holding the prevailing party may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court).

[4] The Magistrate declined to order ejectment on this ground because he concluded LNJ was required to issue a separate notice of termination in order to terminate based upon its own development plans for the Brewery, as opposed to the grounds on which *HSH* terminated. The Court disagrees that LNJ was required to deliver a separate notice of termination. Again, Addendum A does not require the notice to state the particular ground for termination. Thus, because the Court concludes HSH properly notified Adams the Lease was terminated, LNJ is entitled to rely upon any ground appearing in the record, including its own development plans for the Brewery, that would support termination.

VI. The Appeal Bond is Not Excessive and Was Within the Magistrate's Discretion.

Adams argues the Magistrate abused his discretion by setting the appeal bond at an excessive amount. The Court finds there is evidence in the record to support the amount of the bond and the Magistrate did not abuse his discretion under S.C. Code Ann. § 27-37-130.

S.C. Code Ann. § 27-37-130 provides that "[a]n appeal in an ejectment case will not stay ejectment unless at the time of appealing the tenant shall give an appeal bond as in other civil cases for an amount to be fixed by the magistrate and conditioned for the payment of all costs and damages which the landlord may sustain thereby." This language makes clear that the Magistrate has discretion to determine the bond amount based on the costs and damages the landlord *may* sustain due to the delay in eviction.

At the January 31, 2018 bond hearing the Magistrate received evidence, including the testimony of Larry Lipov, regarding damages LNJ may incur during Adams' appeal of the Ejectment Order. Lipov testified that LNJ leases the Brewery to Catawba Brewing Company ("Catawba"). (Hr'g. Tr. 12-17.) He further testified that the existence of the Billboard impedes access to the Brewery tasting room and loading dock area, which affects delivery of goods and operation of the tasting room. Lipov also testified that LNJ and Catawba reached an understanding upon executing their lease agreement that the Billboard would be removed and LNJ would move forward with the planned renovations to the Brewery, including erection of a raised catwalk over the area where the Billboard currently arises out of the ground. He also testified that, if the Billboard is not removed, Catawba could refuse to pay rent or hold LNJ responsible for any losses to Catawba's business operations. Based on this evidence, counsel for LNJ requested the appeal bond be set at $500,000 (based on the approximate value of 2 years' worth of the value of the lease with Catawba, $227,000 per year). Adams offered no testimony or evidence in rebuttal.

After considering the evidence and arguments of counsel, the Magistrate found that "a reasonable bond in these circumstances would be $300,000." (*Id.* at 35:1-2.) Because the Magistrate relied upon the evidence introduced at the bond hearing, and the evidence reasonably supports the bond amount, the Court finds no abuse of discretion.

CONCLUSION

For all of the above reasons, the Magistrate's rulings contained in the Orders are AFFIRMED.

Diane Schafer Goodstein
Circuit Court Judge

3-14, 2018