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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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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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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