THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Wade H. Logan, III, Special Master

RECEIVED
JAN 13 2020
SC Court of Appeals

Appellate Case No. 2019-001322
Common Pleas Case No. 2016-CP-10-2380

Chicora Life Center, LC, ...Appellant,

v.

Fetter Health Care Network Inc.;
NBSC Corporation, and John and Jane Does 1-100,...Respondent,

Of which Fetter Health Care Network Inc. is the Respondent.

REPLY BRIEF OF APPELLANT

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SUMMARY OF THE ARGUMENT

In Appellant's ("Landlord") Initial Brief, its first and primary argument is that Respondent ("Tenant") breached the Lease at issue in this appeal when it failed to pay for Tenant Improvements ("TI") in excess of the Budget Cap and by failing to pay rent. Specifically, Landlord asserted that once it expended funds in excess of the Budget Cap, TI became the "sole responsibility" of Tenant. Accordingly, with Landlord having expended over a quarter-million dollars in excess of the Budget Cap, Tenant became solely responsible for any remaining TI it desired. As a result, the failure of Tenant to be "satisfied" with TI was entirely the fault of Tenant and not grounds for asserting a breach of the Lease by Landlord.

Tenant's brief fails to mention, comment, or rebut Landlord's first and primary argument. Relevant case law and persuasive authority suggest that such a blatant omission should be treated as a concession by the Tenant that Landlord's position is correct. If this Court treats Tenant's failure to address Landlord's primary argument that it was Tenant's sole responsibility to complete the TI to its satisfaction once the Landlord advanced funds in excess of the Budget Cap, that decision alone is sufficient to resolve this appeal. However, even if this Court were to overlook Tenant's failure to address Landlord's first and primary argument, an examination and application of the unambiguous Lease terms produces the same conclusion, namely, that Landlord, having completed TI in excess of the Budget Cap, did not breach the Lease and that Tenant's failure to pay for TI in excess of the Budget Cap, pay its rental obligations, and occupy the Premises, constituted the first and only material breach of the Lease. Because of Tenant's initial breach of the Lease, any argument or claim that Landlord subsequently breached the Lease is immaterial and irrelevant since Landlord was excused from any remaining Lease obligations after Tenant's initial breach.

Tenant also fails to mention, comment, or rebut Landlord's argument that Tenant accepted the Premises as being in the condition in which Landlord was obligated to deliver them, when Tenant failed to proffer any objection when the Premises were delivered. Again, whether the Court treats Tenant's failure to address this argument as a concession that Landlord's position is correct, or examines and applies the unambiguous Lease terms, the conclusion is the same: it was Tenant and not Landlord who breached the Lease.

Tenant also mistakenly argues that Landlord's asserted breach of the Lease prevented the possession of the Premises and was, therefore, a material breach. This notion distorts the actual facts and is erroneous. After completing TI subject to the Budget Cap and obtaining a Certificate of Occupancy, Landlord, in fact, delivered the Premises to Tenant. Tenant, on the other hand, refused to pay for TI in excess of the Budget Cap; complete the TI on its own, as it was obligated to do under controlling Lease provisions; pay rent; and occupy the Premises. It was Tenant who actually prevented the transfer of possession of the Premises, and who, therefore, breached the Lease.

Finally, Tenant's argument that § 22 of the Lease preserved Tenant's common law remedy to unilaterally terminate the Lease relies on an analysis that conveniently omits specific and controlling Lease terms in which (1) Tenant guaranteed that it would take possession of the Premises, (2) expressly waived "all rights . . . to vacate the Premises as provided by law, statute or ordinance now or hereafter in effect[,]" and (3) specifically agreed to the exclusive remedy recited in the Lease if TI were not completed by Landlord. Accordingly, there is no basis to assert that unwritten terms, not agreed to by the parties, relieved Tenant of its duties and obligations under the Lease and permitted Tenant to unilaterally waive or cancel specific and controlling Lease provisions.

ARGUMENT

I. THE COURT SHOULD ENFORCE THE CLEAR AND UNAMBIGUOUS TERMS OF THE LEASE AND IS WITHOUT AUTHORITY TO ALTER UNAMBIGUOUS LEASE TERMS, INSERT NEW LEASE TERMS, OR MAKE A NEW CONTRACT FOR THE PARTIES.

The Lease agreement at issue in this appeal is a contract. The contract represents the mutually agreed upon law between the parties. The parties agree that the Court must enforce unambiguous contracts according to the terms the parties have used, understood in their plain sense, and that once the contract terms are settled, the parties are entitled to performance of their contract. *See* Respondent's Brief ("Resp. Br.") at 10; *see also* Appellant's Brief ("App. Br.") at 7-8, 9. The South Carolina Supreme Court has emphasized:

> Where an agreement is clear and capable of legal construction, the court's only function is to interpret its lawful meaning and the intention of the parties as found within the agreement and give effect to it. [Courts] are without authority to alter an unambiguous contract by construction or to make new contracts for the parties. A court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully.

South Carolina Dept. of Transp., 379 S.C. 645, 665, 667 S.E. 2d 7 (2008).

II. TENANT'S FAILURE TO MENTION, RESPOND, ADDRESS, OR ATTEMPT TO REBUT ARGUMENTS IN LANDLORD'S INITIAL BRIEF SHOULD BE TREATED AS TENANT'S CONCESSION THAT LANDLORD'S POSITION IS CORRECT.

In this case, it is undisputed that Respondent Tenant, Fetter Health Care Network, Inc., signed and fully executed a Lease to rent space from Appellant Landlord for a term of not less than five years. PLF Trial Exhibits IL and 1I (First Amended Exhibit C and Tenant Estoppel Certificate). While both parties appeal to this Court to enforce the terms of the contract, each party asserts that the other breached the contract. Tenant argues that Landlord breached the contract based on Tenant's failure to receive delivery of the Premises after "satisfactory"

completion of the TI by Landlord. In fact, Tenant devotes the vast majority of its brief arguing that it was excused from its Lease obligations based upon Landlord's failure to complete the TI to Tenant's "satisfaction." *See* Resp. Br. at 10-20. Landlord, on the other hand, asserts that its obligation to complete TI is controlled by the contract's express terms that limited TI to an amount not exceeding the agreed-upon Budget Cap of $56,626. After expending sums to complete TI in excess of the budget cap, the contract dictated that the responsibility for completing TI became the sole responsibility of Tenant. Accordingly, Landlord asserts that it complied with, and in fact exceeded, all its legal obligations to deliver the Premises to Tenant by advancing TI costs well in excess of the Budget Cap, obtaining a certificate of occupancy, and delivering the Premises to Tenant. In turn, Tenant's failure to (1) pay for the TI amounts in excess of the Budget Cap, (2) pay its rental obligations, and (3) occupy the space designated in the Lease constituted Tenant's material breach of the Lease that occurred prior to any claimed or asserted breach by Landlord. This argument is presented in Landlord's Initial Brief as its first and primary argument. App. Br. at 11-16.

Tenant's brief fails to mention, respond, address, or attempt to rebut this argument. Having failed to address Landlord's argument, this Court should treat Tenant's position as a concession that Landlord's position is correct. *Turner v. South Carolina Dept. of Health and Environmental Control*, 377 S.C. 540, 547, 661 S.E. 2d 118, 121 (2008) citing *First Union Nat'l Bank v. FCVS Communications,* 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct.App.1996) (if respondent fails to respond to an issue in his brief, the appellate court may treat the failure to respond as a confession that the appellant's position is correct), *reversed on other grounds,* 328 S.C. 290, 494 S.E.2d 429 (1997); *see also* 5 Am.Jur.2d *Appellate Review* § 555, at 254 (1995) ("[i]f an appellee fails to

respond to an issue in its brief, the [appellate] court may treat the failure to respond as a confession that the appellant's position is correct").

If this Court treats Tenant's failure to address Landlord's primary argument that it was Tenant's sole responsibility to complete the TI once the Landlord advanced funds in excess of the Budget Cap, that is all that is required to resolve this appeal. Having met its obligation to complete TI *subject to the Budget Cap*, there is no remaining basis to assert any breach by the Landlord. Conversely, Tenant's continuing refusal to: (1) pay for TI in excess of the Budget Cap, (2) pay its rental obligations, and (3) occupy the space designated in the Lease, constitute the Tenant's material and substantial breach of the contract, thus, entitling Landlord to Judgment in its favor and a remand of proceedings to calculate the appropriate award of damages for Landlord.

Even if this Court were to overlook Tenant's failure to address Landlord's first and primary argument, an examination and application of the unambiguous Lease terms produces the same conclusion that Landlord, having completed TI in excess of the Budget Cap, did not breach the Lease and that Tenant's failure to pay for TI in excess of the Budget Cap, pay its rental obligations, and occupy the space designated in the Lease, constituted Tenant's material and substantial breach of the Lease.

Assuming arguendo, that TI were not complete, the plain language of the Lease required Tenant to complete the TI at its own expense since the Budget Cap had already been exceeded. Section 2 ("Terms, Completion of Improvements") of the Lease states:

> Tenant takes the Premises 'AS IS' except as described in Exhibit B . . . . . All Tenant Improvements contemplated prior to Tenant's occupancy are to be done by and at the expense of the Landlord as described in Exhibit B and *subject to the Budget Cap*. See Exhibit B for further details regarding Tenant Improvements, if any.

PLF Trial Exhibit IF (emphasis added). In turn, Exhibit B to the contract specifically and unambiguously provides: "*Any Tenant Improvements requested by Tenant which exceed the Budget Cap shall be the sole responsibility of and paid for by the Tenant.*" PFL Trial Exhibit IF at Exhibit B (italics added).

In short, once Landlord completed TI that exceeded the Budget Cap, pursuant to the plain and unambiguous terms of the Lease, it became Tenant's "sole responsibility" to complete and pay for any remaining TI. The Budget Cap was $56,626.00. PLF Trial Exhibit lK, ¶ C. Landlord expended $254,998.00 in excess of the Budget Cap. PLF Trial Exhibit IP. Based upon the foregoing, no reasonable argument can be sustained that Landlord breached his duties regarding TI. Tenant's contention that it did not receive TI completed to its "satisfaction" after Tenant became solely responsible for any remaining TI it desired, is simply untenable and contrary to the proper enforcement of the plain language of the Lease. Likewise, the Order of the Special Master represents legal error based upon his failure to properly construe and enforce the Lease provisions. Accordingly, the Special Master committed legal error when he concluded: "Since Chicora [Landlord] failed to meet its obligations as a landlord, Fetter [Tenant] was not called upon to meet its obligations as a tenant, and therefore, its failure to take occupancy and pay rent was not a breach of the lease by Fetter." This Court should reverse the Judgment of the Special Master, order that Judgment be entered in favor of Landlord, and remand these proceedings for a proper calculation of damages.

Landlord's Initial Brief also observed that § 10 of the Lease explicitly and unambiguously provides: "Unless Tenant notifies Landlord in writing at the time of delivery stated in paragraph 2 and 11 hereunder, Tenant accepts the Premises as being in the condition in

which Landlord is obligated to deliver the Premises." App. Br. at 14. Landlord's Initial Brief continues:

> There is no dispute that when Landlord delivered the Premises to Tenant pursuant to the Lease terms, Tenant did not 'at the time of delivery' notify Landlord in writing that it did not accept the Premises as being in the condition in which Landlord was obligated to deliver them. Accordingly, it was legal error for the Special Master to not enforce the plain language of these Lease provisions and improperly create new and unwritten terms, not agreed to by the parties, that relieved Tenant of its duties and obligations under the Lease and manufactured a judicially conjured escape clause allowing Tenant to unilaterally waive or cancel specific and controlling Lease provisions.

Id.

Tenant's brief also fails to mention, respond, address, or attempt to rebut Landlord's argument that it was legal error for the Special Master not to enforce the plain language of this Lease provision. Accordingly, this Court should again treat Tenant's position as a confession that Landlord's position is correct. *Turner,* 377 S.C. at 547, 661 S.E. 2d at 121. Again, even if this Court were to overlook Tenant's failure to address Landlord's argument regarding Tenant's failure to object "at the time of delivery" to the condition of the property, an examination and application of the unambiguous Lease terms produces the same conclusion: namely, since Tenant did not "at the time of delivery" notify Landlord in writing, that it did not accept the Premises as being in the condition in which Landlord was obligated to deliver them, it was error for the Special Master to create new and unwritten terms, not agreed to by the parties that relieved Tenant of its duties and obligations under the Lease and waive or cancel specific and controlling Lease provisions. In short, the Special Master conclusions are legally backwards: it was Tenant who failed to meet its obligations under the Lease; therefore, Landlord was not called upon to meet its remaining obligations (if any) under the Lease.

III. <u>BECAUSE TENANT'S ACTIONS, AND NOT LANDLORD'S, PREVENTED THE TRANSFER OF POSSESSION OF THE PREMISES, IT WAS TENANT WHO MATERIALLY BREACHED THE LEASE.</u>

In its brief, Tenant cites *Brazell v. Windsor*, 384 S.C. 512, 518, 682 S.E.2d 824, 827 (2009) for the proposition that "when a breach of a real estate contract prevents the transfer of the possession of the real estate, the breach is a material one which ends the contract and relieves the other party from further performance." Resp. Br. at 21. Tenant's reliance on this proposition, however, undercuts its position and strengthens Landlord's.

Tenant complains that the purpose of the Lease was frustrated because TI were not completed to its "satisfaction." As detailed above, however, it was the "sole responsibility" of Tenant to complete any, and all, TI exceeding the Budget Cap. In other words, if Tenant was not "satisfied" with TI, the legal burden was on Tenant to complete the TI to the point of its satisfaction. It was no longer Landlord's legal obligation once the Budget Cap had been reached. In point of fact, Landlord delivered the Premises to Tenant. PLF Trial Exhibit IP; *see also* App. Br. at 3, ¶ 12. Accordingly, it was Tenant who prevented the transfer of the property because it refused to honor the Lease terms requiring it to take "sole responsibility" for completion of TI and pay for the TI in excess of the Budget Cap. PLF Trial Exhibit IF, Exhibit B to the Lease. The truth is that Tenant came to the Premises on the coattails of Charleston County, as the anchor tenant, who had signed a 25-year lease. When Charleston County breached its lease, Tenant had a change of heart and elected to breach as well. While Charleston County settled the action against it by buying Landlord's property, Tenant in this case has refused to accept its responsibility for its breach of the Lease by paying damages. Nothing, however, in the Lease between Landlord and Tenant addressed or required Charleston to remain as the anchor tenant. While it is possible that Tenant may have a claim against Charleston County, such issues are not

relevant to the present appeal and the determination that Tenant's refusal to take possession of the property constituted a material breach of the Lease.

Rather than asserting a breach of the Lease by Landlord, Tenant should have complied with its Lease obligations to complete the TI, to its satisfaction, on its own. On the other hand, Tenant's refusal to pay for TI in excess of the Budget Cap, pay rent, and take possession of the Premises, constitutes a material breach in accordance with *Brazell* since it prevented the transfer of the property and frustrated the purpose of the Lease.

IV. TENANT EXPRESSLY WAIVED ITS COMMON LAW REMEDY TO UNILATERALLY TERMINATE THE LEASE.

Tenant's brief argues that nothing in the Lease waives the common law remedies that were expressly preserved by § 22 of the Lease. This assertion is simply mistaken and legally unsustainable. The assertion is the result of a selective and distorted reading of the controlling Lease terms out of context. While it is true that § 22 (Other Relief) of the Lease states: "The rights and remedies provided for Landlord and Tenant in this Lease are in addition to any other remedies available at law or in equity by statute or otherwise, *except as expressly limited or waived under the provisions of this Lease*." PLF Trial Exhibit IF,§ 22 (italics added). Tenant overlooks relevant Lease provisions in which it expressly guaranteed that it would take possession of the Premises, expressly waived any right to vacate the Premises, and agreed to an exclusive remedy if Landlord failed to complete TI.

Section of 38 of the Lease provides:

> *Tenant guarantees*, that upon completion of the improvements, and the delivery of a Certificate of Occupancy, that it will occupy the Premises as specified herein. Except as otherwise provided herein, any failure to occupy the Premises does not release the Tenant from the obligation of paying rent or other provisions set forth herein.

Trial Exhibit 1F, § 38 (italics added). As previously noted and discussed, there is no dispute that Landlord completed its obligation to complete TI up to, and even far in excess, of the Budget Cap and that a Certificate of Occupancy was delivered. PLF Trial Exhibit IP and 1Q; Trial Transcript 314:2-24. As a result, despite any remedy otherwise available at law or in equity by statute or otherwise, Tenant expressly guaranteed that it would occupy the Premises, per the written terms of the contract or the law between the parties.

As previously noted, pursuant to § 10 of the Lease, Tenant accepted the Premises as being in the condition in which Landlord was obligated to deliver the Premises when Tenant did not notify Landlord in writing at the time of delivery of any objections to the Premises. PLF Trial Exhibit IF, §10. In addition, however, after accepting the Premises and guaranteeing its occupancy, Tenant also expressly waived any right to "vacate the Premises as provided by law, statute or ordinance now or hereafter in effect." *Id.*

Furthermore, as detailed in Landlord's Initial Brief and § 3 of the Lease, the parties specifically contemplated and expressly provided for an exclusive and agreed upon remedy in the event TI were not completed by Landlord.

> In the event Tenant does not occupy the space designated herein, all interior finishing costs become due and payable upon billing by Landlord; provided, however, that if Tenant's failure to occupy the Premises is due to Landlord's failure to complete improvements or to perform any other obligation set forth herein, then Tenant's obligation to pay interior finishing costs pursuant to this Section 3 shall be excused or waived.

Id. at § 3 (emphasis added).

Accordingly, Tenant's assertion that nothing in the Lease waives the common law remedies asserted to have been preserved by § 22 of the Lease is simply erroneous. Rather, even assuming (but not conceding), that Landlord failed to complete TI to Tenant's satisfaction, Tenant voluntarily and expressly waived any common law right to either vacate or not occupy

the premises pursuant to specific and controlling Lease provisions and, in addition, agreed to the specific and controlling remedy to which Tenant was entitled in the event TI were not completed by Landlord.

Tenant's common law rights were a catch all for any non-specifically written contract terms or omissions by the parties. The specific terms of the Lease, however, control the rights of the parties. Only if something was unaddressed, did the common law rights fill in. In this case, however, there was no omission for the common law to fill in.

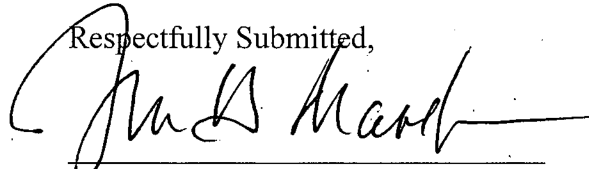
CONCLUSION

Specific and controlling Lease terms, agreed upon by the parties, govern the resolution of the issues on appeal. Landlord urges the Court to enforce the controlling Lease terms as written and agreed upon by the parties. An examination and application of the relevant Lease terms establish that (1) in the absence of any objection by Tenant at the time of delivery, Tenant accepted the Premises as being in the condition in which Landlord was obligated to deliver the Premises, (2) TI which exceeded the Budget Cap were the "sole responsibility" of Tenant, (3) Tenant materially breached the Lease when it prevented the transfer of possession of the Premises, and (4) Tenant expressly waived any common law remedy to unilaterally terminate the Lease when it guaranteed that it would take possession of the Premises; waived its right "to vacate the Premises as provided by law, statute or ordinance now or hereafter in effect[;]" and agreed to an exclusive remedy in the event that Landlord failed to complete TI. All this leads to the inescapable conclusion that the Special Master turned the agreement between the Landlord and the Tenant on its head when he concluded that Landlord breached the Lease and Tenant was excused from any further obligations under the Lease.

Tenant's brief fails to mention, respond, address or attempt to rebut Landlord's arguments that (1) in the absence of a timely objection, Tenant accepted the Premises as being in the condition Landlord was obligated to deliver them and (2) TI in excess of the Budget Cap were the "sole responsibility" of Tenant. Having failed to address these arguments, this Court should treat Tenant's position as a confession that Landlord's positions are correct. However, even if the Court excuses Tenant's failure to address Landlord's arguments, an examination and application of the governing Lease terms, leads to the same conclusion: the Order of the Special Master contains legal error based upon his failure to properly construe and apply the Lease terms and that Landlord is entitled to Judgment in its favor and a remand for further proceedings for a determination of damages to which Landlord is entitled.

DATED this 9th day of January, 2020.

Respectfully Submitted,



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v.

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Of which Fetter Health Care Network Inc. is the Respondent.

PROOF OF SERVICE

I certify that I have served the **Initial Reply Brief of Appellant** on Fetter Health Care Network Inc. by depositing a copy of the same in the United States Mail, postage prepaid, on January 9, 2020, addressed to its attorneys of record as follows:

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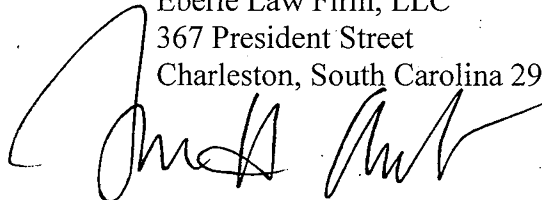

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The Honorable Jenny Abbott Kitchings
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RE: Chicora Life Center, LC v. Fetter Health Care Network, Inc.
Appellate Case No.: 2019-001322
Our File No.: 990-4

Dear Ms. Kitchings:

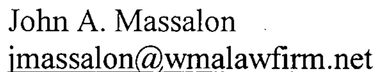
Enclosed please find the original and one (1) copy of the Initial Reply Brief of Appellant and Proof of Service in regard to the above-referenced matter. Please file the original, file-stamp the copy, and return the file-stamped copy to me in the self-addressed, stamped envelope provided.

By copy of this correspondence, I am serving the same upon counsel for Respondent, Fetter Health Care Network, Inc. If you have any questions, please do not hesitate to contact me.

With kind regards, I am

Sincerely,

WILLS MASSALON & ALLEN LLC



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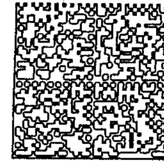

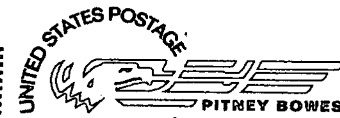

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