THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Wade H. Logan, III, Special Master

Appellate Case No. 219-001322
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.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the Special Master committed legal error by failing to enforce the plain language of the Lease and instead concluding: "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."

STATEMENT OF THE CASE

Chicora Life Center, LC ("Landlord") was organized for the purpose of owning and managing a multistory commercial real estate building located at 3600 Rivers Avenue, North Charleston, South Carolina. In May 2015, Landlord entered into a commercial Lease with Fetter Health Care Network, Inc. ("Tenant") for occupancy of space located at the property.

On May 6, 2016, Landlord filed its Complaint alleging breach of contract, breach of duty of good faith and fair dealing, negligent misrepresentation and seeking a declaratory judgment to determine the rights and obligations of the parties. Tenant's Answer contained a general denial, affirmative defenses, and asserted a counterclaim for breach of the lease.

On April 23 and 24, 2018, a non-jury trial before Wade H. Logan, III as Special Master-in-Equity was conducted in Mount Pleasant, South Carolina at the law offices of Buist, Byars & Taylor, LLC. On April 3, 2019, the Special Master issued an Order (1) dismissing Plaintiff/Landlord's Complaint; (2) granting Defendant/Tenant's Counterclaim; and (3) ordering Plaintiff/Landlord to refund Defendant/Tenant's initial deposit of $17,000.00 together with interest and requiring Plaintiff/Landlord to pay Defendant/Tenant's attorney's fees and costs effectively terminating or canceling the written Lease Agreement.

FACTS

1. On August 4, 2014, Tenant signed and fully executed a lease to rent space from Landlord for property located at 3600 Rivers Avenue, North Charleston, South Carolina. (R. pp. 512-541).

2. As originally executed the Lease consisted of 8,722 rentable square feet from the property that consisted of a 10-story former naval hospital building with a total of 365,717 total rentable square feet. (R. p. 517, § 1).

3. A Third Addendum to the Lease was executed on November 23, 2015, that adjusted the space leased to Tenant to 9,108 square feet. (R. p. 555).

4. Pursuant to the Lease, certain Tenant Improvements ("TI") were to be accomplished. (R. p. 517, § 2).

5. As modified by the Third Addendum, the Lease specified that Landlord would be responsible for $56,626.00 for the cost of the TI and that Tenant was responsible to pay for TI in excess of the "Budget Cap" of $56,626.00. (R. p. 555).

6. The Lease as modified by the Third Addendum also provides: "Term Commencement of the Lease shall occur upon completion of the Tenant Improvements and issuance of a certificate of occupancy for the Premises, which shall occur on or before ninety (90) days from the date a Contract is executed between Contractor and Tenant, but no later than February 15, 2016." (R. p. 555).

7. On November 24, 2015, Tenant executed a "Tenant Estoppel Certificate" signed by its CEO that was directed to Landlord's lender confirming lease terms and specifically stating:

> (6) Neither Tenant nor Landlord is in default under the Lease; Tenant has no offset; defense, deduction or claim against Landlord.

* * *

(l l) in the event of a default by Landlord, Lender agrees it will not disturb the tenancy of Tenant, as long as Tenant is not in default of any of the terms or conditions of the aforementioned Lease. (See Exhibit B, Lender Acknowledgement).

(R. p. 558).

8. It is undisputed that both Landlord and Tenant are sophisticated business parties who were represented by professionals, including attorneys, during the negotiation, drafting, and execution of the Lease documents.

9. Based on and in accordance with all of the contract provisions, especially those noted above, Landlord and lender proceeded to construct and pay for all agreed TI for Tenant.

10. The City of North Charleston issued a temporary certificate of occupancy for the leased premises on December 21, 2015, indicating that it was "Ok to move office furniture in." (R. p. 570; R. p. 365, lines 11-22).

11. A final and unqualified Certificate of Occupancy was issued on January 21, 2016, by the City of North Charleston. (R. p. 578; R. p. 367, lines 2-24).

12. In a letter dated January 1, 2016, Landlord effectively delivered the leased premises to Tenant by notifying Tenant, in accordance with the Lease, that (a) TI were complete and in place and ready for Tenant to take occupancy and (b) a certificate of occupancy had been issued. The letter also requested certain payments and was accompanied by an invoice dated January 4, 2016, for TI in excess of the Budget Cap owed by Tenant totaling $254,998.00, as well as an invoice for the first month's rent totaling, $14,801.00. (R. pp. 574-576).

13. It is undisputed that despite the plain language of the Lease, addenda, and Estoppel Certificate as well as the certificates of occupancy being issued, Tenant refused to:

a. pay for the TI amounts in excess of the Budget Cap,

b. pay its rental obligations, and

c. occupy the space designated in the Lease.

14. The Lease specifically provides: "In the event Tenant does not occupy the space designated herein, all [including the amounts paid for by Landlord as part of the Budget Cap as well as all Tenant amounts exceeding the Budget Cap] interior finishing costs [TI] become due and payable upon billing by Landlord[.]" (R. p. 517, § 3).

15. Pursuant to § 19 of the Lease, Tenant's refusal to pay for the costs in excess of the Budget Cap constituted Tenant's serious, material and substantial breach under the terms of the Lease. (R. p. 527, § 19).

16. It is undisputed that Tenant has not paid for its TI in any amount.

17. Pursuant to § 10 of the Lease: "Unless Tenant notifies Landlord in writing at the time of delivery stated in paragraph 2[1] and 11 hereunder, Tenant accepts the Premises as being in the condition in which Landlord is obligated to deliver the Premises." (R. p. 522, § 10).

18. Also pursuant to § 10 of the Lease, Tenant specifically and expressly waived all rights "to vacate the Premises as provided by law." *Id.*

19. Pursuant to § 4 of the Lease: "Upon completion of the Tenant Improvements *as* provided herein and the issuance of a certificate of occupancy the term of this Lease shall commence (the 'Term Commencement')[.]" (R. p. 518, § 4).

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[1] Section 2 of the Lease states:

> Tenant takes the Premises "AS IS" except as described in Exhibit B, with Tenant to receive delivery of the Premises after satisfactory completion of the Tenant Improvements by Landlord. 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*."

(emphasis added). (R. p. 517, § 2). Section 11 of the Contract deals with damage or destruction during the term of the Lease and is not applicable to the issues before the Court. (R. pp. 522-523, § 11).

20. Pursuant to the terms of the Lease as well as other documents referenced above, Tenant was obligated to pay monthly rent totaling $14,800.50 ($19.50 x 9,109 rentable square feet) per month with annual adjustments for a term of not less than five years. (R. p. 558; R. p. 551).

21. It is undisputed that Tenant has not paid any amount for its monthly rental.

22. Despite its refusal to pay for the costs of TI in excess of the Budget Cap or its monthly rental, clearly breaching the terms of the Lease, Tenant sent Landlord a letter dated April 26, 2016, declaring Landlord had breached the Lease and that Tenant "will immediately begin its search for another location." (R. pp. 584-585).

23. There is no language in the Lease that permits Tenant to terminate, cancel, or otherwise repudiate the Lease prematurely. (R. pp. 512-541).

24. Section 10 of the Lease specifically states that Tenant waives "all rights . . .to vacate the Premises as provided by law[.]" (R. p. 522, § 10).

25. Sections 19, 20, 21, 22, 23, and 24 of the Lease are provisions relating to default. These sections provide:

> § 19 Events of Default: The occurrence of any one or more of the following events ("Events of Default") shall constitute a breach of this Lease by Tenant: (a) if Tenant shall fail to pay any rental or other sum when and as the same becomes due and payable and such failure shall continue for more than 10 days after written notice of such failure is received by Tenant from Landlord; or (b) if Tenant shall fail to perform or observe any other term hereof[.]
>
> § 20 Termination Upon Default: Upon such termination Landlord may recover from Tenant: (a) the unpaid rental which had been earned at the time of termination and future rental as it becomes due, without acceleration, less any rental received by Landlord for reletting the Premises; (b) and any other amount necessary to compensate Landlord for all the actual damages proximately caused by Tenant's failure to perform its obligations under this Lease excluding any punitive, exemplary, or consequential dames.

§ 21 Continuation After Default: Even though Tenant has breached this Lease and abandoned the Premises, this Lease shall continue in effect, provided that Landlord has neither taken possession nor relet the Premises, and as long as Landlord does not terminate Tenant's right to possession, and Landlord may enforce all of its rights and remedies under this Lease, including the right to recover the rental as it becomes due under this Lease.

§ 22 Other Relief: 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.

§ 23 Landlord's Right to Cure Defaults: Except as expressly stated in this Lease, all agreements and provisions to be performed by Tenant under any of the terms of this Lease shall be at its sole cost and expense and without any abatement of rental. If Tenant shall fail to pay any sum of money, other than rental, required to be paid by it hereunder or shall fail to perform any other act on its part to be performed hereunder and such failure shall continue for 30 days after written notice thereof by Landlord, Landlord may, but shall not be obligated to do so, and without waiving or releasing Tenant from any obligations of Tenant, make any such payment or perform any such other act on Tenant's part to be made or Performed as provided in this Lease. All sums reasonably paid by Landlord and all necessary incidental costs shall be deemed additional rent hereunder and shall be payable to Landlord within ten (10) days of written demand, and Landlord shall have (in addition to any other right or remedy of Landlord) the same rights and remedies in the event of the nonpayment thereof by Tenant as in the case of default by Tenant in the payment of rental.

§ 24 Attorney's Fees: Should any party hereto employ an attorney for the purpose of enforcing, constructing, or declaring rights under this Lease, . . . the prevailing party shall be entitled to receive from the other party or parties thereto reimbursement for all reasonable attorneys' fees and all costs[.] . . . The "prevailing party" means the party determined by the court to most nearly prevail.

§ 38 Guarantee of Lease: 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 any other provisions set forth herein.

(R. pp. 527-529; R. p. 532).

26. The Order of the Special Master concludes: "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 [Tenant]." (R. p. 20).

27. The Order of the Special Master is premised on his finding "that the preponderance of the evidence supports the finding that the Tenant Improvements had not been completed." (R. p. 16).

28. The Order, however, fails to consider or address (1) a certificate of occupancy was issued by the City of North Charleston independently confirming that TI were completed in accordance with the submitted plans and permit; (2) Landlord's alleged breach was preceded in time and entirely caused by Tenant's refusal to pay for the cost of TI in excess of the Budget Cap, and/or Tenant's refusal to pay rent; (3) even if Tenant had paid for its TI and rent, and Landlord still failed to complete the TI, the Lease terms did not allow Tenant to prematurely terminate the Lease or release itself from any and all other legal obligations and simply unilaterally repudiate and free itself from its contract obligations and "immediately begin its search for another location[;]" and (4) Tenants only remedy for the alleged breach was damages, if any, as the ultimate responsibility for TI was on the Tenant.

STANDARD OF REVIEW

A lease agreement is a contract (which is law between the parties), 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 (2010). "The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language. When a contract's language is clear and unambiguous, the language alone determines the force and effect of the contract." *Mason v. Mason*, 412 S.C. 28, 56, 770 S.E.2d 405, 420 (Ct. App. 2015) (internal citations omitted). Whether the language of a contract is ambiguous is also a question of law. *Id.* "The construction

of a clear and unambiguous contract presents a question of law for the court." *Id.* On appeal, questions of law may be decided with no particular deference to the trial court. *Doe ex rel. Legal Guardian v. Barnwell School Dist. 45*, 369 S.C. 659, 662, 633 S.E.2d 518, 519 (Ct. App. 2006) citing *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000); *U.S. Bank Trust Nat. Ass'n v. Bell*, 385 S.C. 364, 373, 684 S.E.2d 199, 204 (2009).

ARGUMENT

I. THE ORDER OF THE SPECIAL MASTER FAILED TO ENFORCE THE PLAIN LANGUAGE OF THE LEASE FINDING A TERMINATION CLAUSE AND OTHER PROVISIONS WHERE NONE EXISTED AND, THEREFORE, REPRESENTS LEGAL ERROR.

Landlord asserts that the terms of the Lease are clear and unambiguous. Accordingly, the proper construction of the Lease is a question of law that owes no deference to the interpretation of the Special Master. *Id.*

As noted in ¶ 27 of Landlord's Statement of Facts, the Order of the Special Master is premised on his finding "that the preponderance of the evidence supports the finding that the Tenant Improvements had not been completed." (R. p. 16). Based upon this factual finding, the Special Master concluded that Landlord did not meet its obligations as a landlord and that Tenant's failure to take occupancy and pay rent was not a breach of the lease by Tenant. (R. p. 20). The error in this approach is that the Special Master may have read the Lease improperly or limited his focus on an incomplete set of particular Lease provisions and failed to properly evaluate all the legal obligations owed under the Lease and the respective consequences on the outcome of the case. In short, the Special Master failed to properly construe the Lease, enforce the plain language of the Lease, and give effect to the parties' intentions. *See South Carolina Dept. of Transp. v. M & T Enterprises of Mt. Pleasant, LLC*, 379 S.C. 645, 665, 667 S.E. 2d 7, 13 (2008). As a result of the Special Master's failure to properly interpret and apply the Lease

as a whole, it was legal error to (1) not recognize that there is no provision for Lease termination; (2) not to recognize Tenant breached the Lease prior to any claimed breach by Landlord; (3) find that Landlord was in breach of the Lease; (4) to allow Tenant to terminate the Lease and effectively vacate the premises in direct contravention of the Lease's plain language; and (5) apply the default provisions which do not allow for termination by Tenant, even if there were a Landlord default.

The primary concern of the court when interpreting a contract is to give effect to the intent of the parties. *Lee v. Univ. of S.C.*, 407 S.C. 512, 757 S.E. 2d 394, 397 (2014). The best evidence of the parties' intent is the contract's plain language. *Id.* The question of whether a contract is ambiguous is a question of law. *Id.* A contract is ambiguous when it is capable of more than one meaning or when its meaning is unclear. *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 594 S.E.2d 485, 493 (Ct. App. 2004). If a contract's language is unambiguous, the plain language will determine the contract's force and effect. *Lee*, 757 S.E.2d at 397. A contract must be read as a whole document so that one party may not create ambiguity by pointing out a single sentence or clause. *S. Atl. Fin. Servs., Inc. v. Middleton*, 356 S.C. 444,590 S.E.2d 27, 29 (2003). "Interpretation of a contract is governed by the objective manifestation of the parties' assent at the time the contract was made, rather than the subjective, after-the-fact meaning one party assigns to it." *Laser Supply & Servs., Inc. v. Orchard Park Assoc.*, 382 S.C. 326, 676 S.E.2d 139, 143-44 (Ct. App. 2009); *N. Am. Rescue Products, Inc. v. Richardson*, 411 S.C. 371, 768 S.E. 2d 237, 240-41 (2015).

To be clear, although Landlord affirmatively asserts that it met and exceeded its Lease obligations regarding TI, and adamantly disagrees with the finding that the TI were not completed per the Lease, as evidenced by the objective third party issuance of a Certificate of

Occupancy, it is not necessary to explore further that factual finding on appeal. Rather, Landlord asserts that proper construction of the Lease as a whole, recognizes that such a finding was not relevant to the resolution of the dispute between the parties since the default paragraphs of the Lease would apply. Assuming arguendo, that the 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. (R. p. 513-541; R. p. 539). ("Tenant Improvements requested by the Tenant which exceed the Budget Cap shall be the sole responsibility of and paid for by the Tenant."). If Tenant actually believed that Landlord had defaulted in its obligation to complete the TI, the common practice is to give notice to the Landlord and provide a reasonable time to cure the asserted breach which was not done by Tenant. Regardless, the Lease provisions are clear and unambiguous that Tenant did not have the right under the Lease to unilaterally vacate and terminate the Lease. There is simply no provision for such a remedy in the Lease or in the contemplation of the parties to the Lease as evidenced by the Lease's plain language.

Nowhere in any of the written Lease documents, binding and creating law between the parties, is there a provision that would allow a unilateral termination by the Tenant. There is not even an arguably ambiguous section, sentence, or clause in the Lease contract that could be interpreted as providing for the remedy of a unilateral termination. This is especially true and confirmed as the intention of the parties given that Tenant expressly waived in writing the right to vacate or terminate the Lease pursuant to § 10 of the Lease and pursuant to § 38 of the Lease wherein Tenant guaranteed it would occupy the premises after completion of the TI and delivery of a certificate of occupancy and expressly agreed that failure to occupy the premises did not relieve Tenant from the obligation to pay rent. No other interpretation may be gleaned from the plain language of the Lease.

The Special Master's conclusions and Order are nothing short of a judicial creation of Lease terms where none exists, done in hindsight and after the fact which is contrary to all legal precedence of contract law.

A. THE ORDER OF THE SPECIAL MASTER REPRESENTS LEGAL ERROR SINCE IT FAILED TO CONSIDER OR RECOGNIZE THAT TENANT BREACHED THE LEASE PRIOR TO ANY CLAIMED OR ASSERTED BREACH BY LANDLORD.

1. Tenant Breached the Lease by Failing to Pay for Tenant Improvements in Excess of the Budget Cap.

Proper interpretation of the Lease regarding TI payment obligations requires both acknowledgment and consideration of (1) Exhibit B (TI) contained in the Lease; (2) § 2 of the Lease (Terms, Completion of Improvements); (3) § 3 of the Lease (Non-Occupancy of Improved Space), and (4) ¶ C of the Third Addendum to the Lease.

Exhibit B contained in the Lease states:

> The expectation and agreement of the Parties is that current or existing improvements at the Premises may be utilized to the fullest extent possible so as to reduce the costs of Tenant Improvements. *Any Tenant Improvements requested by Tenant which exceed the Budget Cap shall be the sole responsibility of and paid for by the Tenant.*

(R. p. 539 (italics added)). When Landlord notified Tenant by letter dated January 1, 2016, that TI had been completed and that a certificate of occupancy had been issued by the City of North Charleston, it is undisputed that TI improvement exceeded the Budget Cap by more than a quarter-million dollars.[2] (R. p. 576).

Section 2 of the Lease states: "All Tenant Improvements contemplated prior

[2] The invoice for TI sent to Tenant in Landlord's January 1, 2016, letter detailed that TI totaled $311,624.00. With the credit for the agreed upon Budget Cap $56,626.00 (contained in the Third Addendum), Tenant owed $254,998 for the costs of TI in excess of the Budget Cap. (R. p. 576).

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." (R. p. 517; R. p. 539).

In addition, § 3 of the Lease specifically provides: "In the event Tenant does not occupy the space designated herein, all interior finishing costs become due and payable upon billing by Landlord[.]" (R. p. 517, § 3). There is no dispute that Tenant never occupied the space designated in the Lease. There is no dispute that Landlord billed Tenant for $254,998.00, representing the amount owing in excess of the Budget Cap. Neither is there any dispute that Tenant refused to pay and has not paid for the TI in excess of the Budget Cap or any amount.

The Third Addendum to the Lease provides in like manner:

> C. Landlord shall immediately provide to Tenant a detailed accounting for the work performed and the costs incurred on Tenant's upfit, providing a full credit for the Budget Cap which was referenced in the original Lease and thereafter modified to include what monies, if any, are owed in excess of the Budget Cap of $56,626. Tenant will timely make payment to Landlord for the agreed upon amount in excess of the Budget Cap[.]
>
> D. Term Commencement of the Lease shall occur upon completion of the Tenant Improvements and issuance of a certificate of occupancy for the Premises, which shall occur on or before ninety (90) days from the date a Contract is executed between Contractor and Tenant, but no later than February 15, 2016.

(R. p. 555).

Based upon the plain language of these Lease provisions and reading the Lease as a whole, there can be no doubt that irrespective of whether all TI were completed, Tenant committed to "making timely payment" for TI that exceeded the Budget Cap. When Tenant received the invoice for amounts owing in excess of the Budget Cap and refused, and continues to refuse, to make timely payment, it was then and still is in breach. Because Tenant's breach of the Lease occurred prior to any supposed breach by Landlord, it was legal error for the Special

Master to not even consider or at least recognize that Tenant's failure to pay for TI in fact and law, represented both a material breach of Lease and the breach that occurred first in time. Because Tenant's breach preceded any claimed or asserted breach by the Landlord, it was likewise legal error for the Special Master to conclude that Tenant was somehow not required under the Lease to meet its obligations as a tenant to pay TI and rent.

Accordingly, Landlord urges this Court to reverse the Order and Judgment of the Special Master with instructions to enter Judgment in favor of Landlord and remand for proceedings to calculate the appropriate award of damages due to Landlord, that include, at a minimum, reimbursement for TI and rent due pursuant to the plain language of the Lease.

2. Tenant Breached the Lease by Failing to Pay Rent.

Three Lease provisions are relevant and determinative of Tenant's obligation to pay rent.

As previously noted, ¶ D of the Third Addendum states:

> D. Term Commencement of the Lease shall occur upon completion of the Tenant Improvements and issuance of a certificate of occupancy for the Premises, which shall occur on or before ninety (90) days from the date a Contract is executed between Contractor and Tenant, but no later than February 15, 2016.

(R. p. 555).

Section 4 of the Lease states: "Upon completion of the Tenant Improvements as provided herein and the issuance of a certificate of occupancy the term of this Lease shall commence (the 'Term Commencement')." (R. p. 518, § 4).

Section 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[3] hereunder, Tenant accepts the Premises as being in the condition in which Landlord is obligated to deliver the Premises.

[3] Section 11 of Lease, not relevant here, sets out provisions relating to "Destruction or Damage."

> Section 2 of the Lease states "Tenant takes the Premises 'AS IS' subject to the completion of TI subject to the completion of TI as detailed in Exhibit B and subject to the Budget Cap.

(R. p. 522, § 10; R. p. 517, § 2.).

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.

However, even if Tenant had delivered an objection relating to the TI at the time of Landlord's delivery of the Premises, it would not have been effective to delay the commencement of the Lease term or delay Tenant's obligation to begin paying rent under the Lease. This is due to several sections of the Lease including: (1) § 2 (Terms, Completion of Improvements) of the Lease plainly states: "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*." (R. p. 517, § 2 (emphasis added)). Since the Budget Cap had already been exceeded by more than a quarter-million dollars, "sole responsibility" and payment for TI was the responsibility of Tenant pursuant to the controlling Lease terms. (2) Section 4 (Rental) of the Lease states: "Upon completion of the Tenant Improvements as provided herein and the issuance of a certificate of occupancy the term of this Lease shall commence[.]" (R. p. 518, § 4) (3) Section 50 (Tenant Improvements) states:

> The Landlord shall deliver the Premises AS IS after the improvements contemplated on Exhibit *B* are completed and a certificate of occupancy is delivered to the Tenant[.] . . . Landlord will use all reasonable diligence to complete such improvements and obtain a certificate of occupancy at which time the Lease Term shall commence.

(R. p. 535, § 50).

(4) Exhibit B of the Lease provides:

> Tenant shall contract with the Landlord or an approved General Contractor to make any and all Tenant Improvements in accordance with applicable building codes and craftsmanship standards to the satisfaction of Tenant, Landlord, and City of North Charleston such that a Certificate of Occupancy will be issued in a timely fashion.
>
> * * *
>
> Any Tenant Improvements requested by Tenant which exceed the Budget Cap shall be the sole responsibility of and paid for by the Tenant.

(R. p. 539).

Because Landlord complied with, and in fact exceeded, all its legal obligations to deliver the Premises to Tenant (by advancing TI costs in excess of the Budget Cap; obtaining a certificate of occupancy and delivering the Premises), Tenant's obligation to begin paying rent in accordance with § 4 of the Lease was triggered. There is no dispute that Tenant has refused and continues to refuse to pay rent. Accordingly, Tenant's failure to deliver rent payments to Landlord pursuant to the plain language of the Lease constituted then and continues today as a material breach of the Lease. Irrespective of whether TI improvement were complete, the Special Master's conclusion that Tenant's duties were never triggered is completely contrary to the plan language of the Lease and represents legal error.

Because the Order of the Special Master failed to properly construe the pertinent and relevant Lease terms, and then recognize Tenant's legal obligations to pay rent as well as TI were triggered, this Court should reverse the Order and Judgment of the Special Master with instructions to enter Judgment in favor of Landlord and remand for proceedings to calculate the

appropriate award of damages due to Landlord that include, at a minimum, reimbursement for TI and rent due pursuant to the plain language of the Lease.

B. THE ORDER OF THE SPECIAL MASTER REPRESENTS LEGAL ERROR SINCE IT IGNORED BOTH SPECIFIC AND CONTROLLING LEASE PROVISIONS AND CONTROLLING CASE PRECEDENT IN ORDER TO FIND THAT LANDLORD BREACHED THE LEASE.

The Order of the Special Master concluding that "[Landlord] failed to meet its obligations as a landlord and that [Tenant] was not called upon to meet its obligations as a tenant" creates new contract terms, imposes un-agreed to language into the Lease, and is in direct conflict with specific and controlling Lease provisions, and in addition ignores controlling case precedent. These failures represent legal error.

1. Specific and Controlling Lease Provisions Demonstrate Tenant Breached and Landlord Did Not Breach the Lease.

As noted, in ¶ 15 of Landlord's Statement of Facts, § 3 of the Lease explicitly states:

> 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.*

(R. p. 517, § 3 (emphasis added)).

In short, when the parties entered into the Lease agreement, they specifically contemplated and expressly provided the remedy they intended would govern if TI were not completed. While Landlord continues to disagree with the Special Master's finding that Landlord did not complete TI, the inescapable point is that even if such a finding were correct, the failure to deliver satisfactorily completed TI, does not constitute legitimate grounds to conclude that Landlord breached the Lease or that termination could be a remedy but rather the

payment for such TI costs could only be excused or waived. The parties specifically contemplated the possibility that such a circumstance might arise and expressly provided that the sole and exclusive remedy would be a waiver of Tenant's obligation to pay for TI or "interior finishing costs." Having contemplated the possibility of incomplete TI and expressly providing a remedy for such a contingency in the plain language of the Lease conclusively demonstrates that the failure to complete TI cannot legally constitute a breach of the Lease by Landlord.

Because the Special Master failed to enforce this governing Lease Provision, his Order represents legal error. To conclude that Landlord breached the Lease by failing to complete TI demonstrates a failure to properly construe the Lease as a whole, give effect to the intentions of the parties, and enforce the plain language of the Lease. This is particularly true in light of § 10 of the Lease in which Tenant expressly waived "all rights to . . . vacate the Premises as provided by law, statute or ordinance now or hereafter in effect" and, in addition acknowledged:

> Landlord has no obligation and has made no promise to alter, remodel, improve, repair, decorate or paint the Premises or any part thereof, except as may be specified in Exhibit B. No representations respecting the condition of the Premises or the Building have been made by Landlord to Tenant, except as specifically herein set forth.

(R. p. 522, § 10). Furthermore, bearing in mind that the Budget Cap had been exceeded, § 8 (Alterations) expressly provides: "Any alterations, additions or improvements (except the initial improvements covered by Exhibit B) to the Premises consented to by Landlord *shall be made by Tenant at Tenant's sole cost and expense*." (R. p. 521, § 8 (emphasis added)).

2. <u>Case Precedent Demonstrates Landlord Did Not Breach the Lease.</u>

A valid lease is not subject to termination on claims of technical breach as such would equate to an unequitable forfeiture, especially where damages would be an adequate remedy. *See Kiriakides v. United Artists*, 440 S.E.2d 364, 366 (S.C. 1994) (holding that termination of a

commercial lease is not justified by a trivial or immaterial breach, and that the "decision to permit termination must be tempered by notions of equity and common sense."). In *Kiriakides* the Supreme Court of South Carolina further explained:

> A majority of courts have concluded that a lease may not be forfeited for a trivial or technical breach . . . . These courts note the sophistication and complexity of most business interactions and are concerned that the possibilities for breach of a modern commercial lease are virtually limitless. In their view, the parties to the lease did not intend that every minor or technical failure to adhere to complicated lease provisions could cause forfeiture. Therefore, the majority of courts hold that to justify forfeiture, the breach must be material, serious, or substantial.

Id. (citing *Foundation Dev. Corp. v. Loehmann's, Inc.*, 788 P.2d 1189, 1196 (Ariz. 1990)).

In this case, Landlord's purported breach is the failure to complete TI notwithstanding the issuance of a certificate of occupancy. Even if true, such a breach should not be considered "material, serious, or substantial" as contemplated by *Kiriakides.* In this case, there is no dispute that both temporary and final certificates of occupancy had been issued by the proper inspection authority attesting satisfactory completion of the Premises. Also Tenant requested and received several formal amendments relating to TI and participated weekly or as often as they desired in the build out process, even directing the contractors and selecting the sub-contractors. Subjective, one-sided, trivial, minor, and feigned dissatisfaction in an attempt to escape liability or otherwise cancel a lease is exactly what the *Kiriakides* court instructed against and refused to allow. There is no evidence of record to suggest that satisfactory completion of TI could not have been completed if required, even in spite of Tenant's refusal to pay for TI in excess of the Budget Cap. Moreover, and perhaps most importantly, the parties anticipated the possibility of incomplete TI but did not include this possibility in defining the events that constituted default. *Compare* R. p. 517, §3 (Non-Occupancy of Improved Space) and R. p. 527, §19 (Events of Default) of the Lease.

The Order of the Special Master is premised upon Landlord's supposed breach of the Lease based upon a failure to deliver satisfactorily completed TI. Such a conclusion is contrary to precedent requiring a breach to be "material, serious, or substantial." Since the Landlord's supposed breach is not "material, serious, or substantial," but is based on a subjective after-the-fact breach, and in support of Tenant's feelings and contrived litigation position, the Order of the Special Master is legally flawed and not in harmony with binding legal precedent. It should, therefore, be reversed.

C. THE ORDER OF THE SPECIAL MASTER REPRESENTS LEGAL ERROR SINCE IT ALLOWED TENANT TO TERMINATE THE LEASE IN DIRECT CONTRAVENTION OF SPECIFIC AND CONTROLLING LEASE PROVISIONS.

As discussed *supra*, and highlighted in ¶¶ 23-25 of Appellant's Statement of Facts and discussing the default provisions contained in §§ 19-24 of the Lease, there is absolutely no language in the Lease that permitted Tenant to terminate the Lease prematurely. In fact, the plain language of Lease specifically dictates that such a contingency was expressly and deliberately ruled out and rejected by the parties. Pursuant to § 10 of the Lease, Tenant specifically waived any right to vacate or terminate the Lease and, in addition, pursuant to § 38 of the Lease, Tenant *guaranteed* that it would occupy the premises and specifically confirmed that a failure to occupy the premises would not relieve Tenant of its obligation to pay rent. (R. pp. 521-522). Any and all other Lease provisions relating to default discuss Landlord's rights and remedies in the event of Tenant default. The Order of the Special Master creating and inserting a Tenant right to terminate the Lease when such a right directly contravenes specific and controlling Lease terms represents legal error as such was never bargained for by either party as part of the Lease terms.

As detailed in § 3 of the Lease:

> 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.*

(R. p. 517, § 3 (emphasis added)). It cannot be overemphasized that the parties contemplated the possibility that TI would not be completed and/or that Landlord would not perform an obligation under the Lease terms and then specifically provided for an agreed upon remedy for such a situation, namely, that Tenant's obligation to pay interior finishing costs or TI would be excused or waived. This is what the parties bargained for, expected, and agreed to, not a forfeiture of the Lease.

Nowhere in the Lease and specifically in the Lease sections describing remedies in the event of default (§§ 19-24) is there a right for the Tenant to unilaterally vacate the Premises or terminate the Lease. The Special Master's Order creating and inserting such a right directly contravenes specific and controlling Lease terms which were bargained for and agreed to as law between the parties.

Again, the terms of this Lease provision are clear and unambiguous. Even if it were conceded that (1) Tenant did not first breach the Lease by not paying for TI in excess of the Budget Cap; (2) Tenant did not first breach the Lease by not paying rent; and (3) all TI were not completed, Tenant's sole and exclusive remedy pursuant to the Lease terms was to have costs for TI excused or waived. While Tenant may have wished in hindsight that it had contracted differently, it did not do so. Moreover, Landlord would not have been willing to enter into such a one-sided and illusionary obligation. Accordingly, the Lease should be enforced as written. On the other hand, if there were a finding that TI were not completed by Landlord, an offset exceeding a quarter-million dollars (the costs in excess of the Budget Cap) is not an insignificant

amount for which to have bargained. Regardless, Landlord emphasizes that the South Carolina Supreme Court has provided clear and direct guidance for matters such as this:

> 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. We 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. at 665.

Because the language of the Lease clearly and unambiguously does not provide Tenant the right to terminate the Lease for any reason let alone a "punch list" of minor items which could never form the basis of lease cancellation or forfeiture, it was legal error for the Special Master to create and insert such a right into the Lease and then find a cancellation.

Accordingly, Landlord again urges this Court to reverse and remand the Order and Judgment of the Special Master with directions to enter Judgment in favor of Landlord and calculate the appropriate damage award in favor of Landlord that include, at a minimum, reimbursement for TI and rent due pursuant to the plain language of the Lease.

CONCLUSION

The Order of the Special Master failed to enforce the plain language of the Lease and, therefore, represents legal error. Although the terms of the Lease are unambiguous, the Special Master improperly focused his attention on a desire to re-write the Lease contract or alternatively, limited his focus on a narrow and incomplete set of Lease provisions and failed to consider and discuss controlling and pertinent Lease provisions that demonstrate Tenant breached the Lease prior to Landlord's supposed breach for incomplete TI. Properly construing the Lease as a whole, giving effect to the parties' intentions, and abiding by the plain language of

the Lease demonstrates Tenant breached the lease based on its failure to pay for TI in excess of the Budget Cap and to pay rent upon delivery of the Premises. Furthermore, the Order of the Special Master ignores controlling lease provisions and relevant precedent demonstrating that Landlord did not breach the Lease, and improperly allowed for termination of the Lease by Tenant despite the fact that Lease expressly excluded such a remedy or result. Accordingly, the Special Master's conclusion "Since [Landlord] failed to meet its obligations as a landlord, [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 [Tenant]" represents legal error. Landlord urges this Court to reverse the Order and Judgment of the Special Master with instructions to enter Judgment in favor of Landlord and remand for proceedings to calculate the appropriate award of damages due to Landlord, that includes at a minimum, reimbursement for TI, rent due pursuant to the plain language of the Lease, as well as other damages as provided in the Lease, including attorney fees and costs to the Landlord/Appellant.

DATED this 28th day of February, 2020.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Wade H. Logan, III, Special Judge

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, ... Defendants,

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

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that Appellant's Final Brief complies with Rule 211(b), SCACR.

February 28, 2020

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