

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LANCASTER COUNTY
In The Circuit Court

Brian Gibbons, Circuit Court Judge

Appellate Case No. 2019-001243

KATKAMS VENTURES, LLC
and SUPREMA, LLC,
as successors in interest to 521, LLC,

RECEIVED
Aug 07 2020
SC Court of Appeals

Respondents,

v.

NO LIMIT, LLC, d/b/a No Limit Financial, LLC
and Erich Simpson,

Appellants.

BRIEF OF APPELLANTS

John Martin Foster
Post Office Box 106
Rock Hill, South Carolina 29731
(803) 324-8100
Attorneys for Appellants

TABLE OF CONTENTS

Table of Authorities	2
Statement of Issues on Appeal	4
Statement of the Case	4
Standard of Review.....	5
Argument	6
Conclusion	7

TABLE OF AUTHORITIES

CASES: SOUTH CAROLINA

SUPREME COURT

E & S Investment Corp. v. Richland Bowl, Inc., 264 S.C. 582, 216 S.E.2d 522 (1975) 7
Hamilton v. Martin, 270 S.C. 223, 241 S.E.2d 569 (1978) 7
Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000) 6
Okatie River, L.L.C. v. Southeastern Site Prep, L.L.C., 353 S.C. 327, 577 S.E.2d 468 (2003) 6
Rickborn v. Liberty Life Ins. Co., 321 S.C. 291, 468 S.E.2d 292 (1996) 6

COURT OF APPEALS

Frampton v. S.C. Dep't of Transp., 406 S.C. 377, 752 S.E.2d 269 (Ct.App. 2014) 7
Hunt v. Forestry Comm, 358 S.C. 564, 595 S.E.2d 846 (Ct.App. 2004) 6
State Farm Mut. Auto. Ins. Co. v. Moorner, 330 S.C. 46, 496 S.E.2d 875 (Ct.App. 1998) 6

CASES: U.S. BANKRUPTCY COURT

IN RE United American Financial Corp., 55 B.R. 117 (Bankr. E.D.Tenn. 1985) 7

CASES: DISTRICT OF COLUMBIA

Consumers United Ins. Co. v. Smith, 644 A.2d 1328 (D.C. 1994) 7

CASES: NEW YORK

720 Lex Acquisition LLC v. Guess? Retail, Inc. 09-cv-7199 (AJN) (S.D.N.Y. 08/17/2015) 7
Hollwedel v. Duffy-Mott Co., 263 N.Y. 95, 188 N.E. 266 (N.Y. 1933) 6

CASES: OKLAHOMA

Gallaspy v. Warner, 324 P.2d 848, *reh. denied* (Okla. 1958) 6

CASES: TEXAS

Look v. Werlin, 590 S.W.2d 526 (Tex.Civ.App. Houston (1st Dist) (1979) 6

OTHER AUTHORITIES

22 AM.JUR.2D *Damages* § 678 (09/2002) 6

STATEMENT OF THE ISSUES ON APPEAL

- I. ARE THE APPELLANTS ENTITLED TO HAVE THE FUTURE RENTAL DAMAGES AWARDED REDUCED TO PRESENT VALUE?

STATEMENT OF THE CASE

In June, 2016, NO LIMIT, LLC, doing business as No Limit Financial, LLC leased commercial space in Indian Land, Lancaster County from 521, LLC, the assignor of the Respondents KATKAMS VENTURES, LLC and SUPREMA, LLC. ERICH SIMPSON, now deceased, executed a guaranty for the lease

Under the lease, base monthly rent was set as follows:

the first two months:	No rent
3 rd through the 12 th months:	\$ 2,296.00
12 th through the 24 th months:	\$ 2,364.88
25 th through the 36 th months:	\$ 2,435.67
37 th through the 48 th months:	\$ 2,508.38
49 th through the 60 th months:	\$ 2,583.96
Total:	\$59,081.42

Under the lease, NO LIMIT, LLC was also to pay a proportion of other upkeep or “CAM” fees in the amount of \$406.58 per month, as well as late charges and brokerage fees in the event of default.

In July, 2017, NO LIMIT, LLC vacated the premises and requested the lease be terminated.

In December, 2017, the Respondents re-rented the premises for a term beginning in February, 2018 at a lesser rent. Under the term of the re-rental, base monthly rent was set as follows:

months 1-2:	rent free period
months 3-14:	\$ 2,296.00
months 15-26:	\$ 2,364.88
months 27-38:	\$ 2,435.67

The new lease maintained the “CAM” fees in the same amount. ERICH SIMPSON, now deceased, became ill and the rental property was abandoned. [RECORD ON APPEAL, p.5; Para.14 of Complaint, p. 15.]

Suit was filed March 12th, 2018 for breach of the lease against NO LIMIT, breach of the guaranty against SIMPSON, and breach of good faith by both Appellants. The Respondents moved for summary judgment by Motion filed November 12th, 2018. By Memorandum to that Motion, they sought:

a. Unpaid Rent from July 1, 2017 to January 30, 2018:	\$16,209.76
b. Late Fees at five percent (5%) of the monthly rent from July 1, 2017 to January 30, 2018:	\$ 952.79
c. Past Due CAM fees:	\$ 2,846.06
d. Calculated Loss from Difference in Rent:	\$28,862.32
e. Broker Commission to re-let property:	\$ 3,406.36
f. <u>Attorney’s fees and costs:</u>	<u>\$11,584.24</u>
Total:	\$63,825.53 ¹

By their Memorandum in support of summary judgment and in argument, the Respondents sought the full difference between the old lease amounts and the lesser, new rent payments. [RECORD ON APPEAL, p.55 – 86.]

The Motion for summary judgment was heard January 28, 2019. Counsel for the Appellants argued for a reduction based on present value. By Order filed February 8, 2019, the Circuit Court awarded the full amount of \$ 63,825.53 recited in the Respondents’ Memorandum.

Appellants’ Rule 59 Motion was filed February 18, 2019 and heard on June 24, 2019. At hearing the Appellants submitted evidence of present value of the damages sought. The Motion to Reconsider was denied by Form 4 Order on June 25, 2019. Appeal was filed and served on July 25, 2019.

1 The true total is \$ 63,861.53; the amount recited above is the Respondent’s stated total, which was adopted by the Circuit Court.

STANDARD OF REVIEW

This Court has held, in *Hunt v. Forestry Comm*, 358 S.C. 564, 595 S.E.2d 846 (Ct.App. 2004) as follows:

While a trial court's findings of fact in a nonjury action at law should not be disturbed on appeal unless they are without evidentiary support, a reviewing court is free to decide questions of law with no particular deference to the trial court. *See Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 296, 468 S.E.2d 292, 295 (1996); *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000); *see Okatie River, L.L.C. v. Southeastern Site Prep, L.L.C.*, 353 S.C. 327, 334, 577 S.E.2d 468, 479 (2003) ("In an action at law, tried without a jury, the appellate court standard of review extends only to the correction of errors of law."); *State Farm Mut. Auto. Ins. Co. v. Moorner*, 330 S.C. 46, 51, 496 S.E.2d 875, 878 (Ct.App. 1998) ("In legal actions, our scope of review extends only to the correction of errors of law.").

[*Hunt v. Forestry Comm*, 358 S.C. at 569, 595 S.E.2d at ____.]

The matter in question is an error of law.

ARGUMENT

The general rule is that an allowance for future damages must be reduced to its present worth. 22 AM.JUR.2D *Damages* § 678 (09/2002). The commentators of AMERICAN JURISPRUDENCE 2D state:

Therefore, the amount awarded for damage to be suffered in the future is such sum as, being put at interest, will amount (at the dates the damage will be suffered) to the sum the jury finds the plaintiff will lose in the future by reason of the alleged tort or breach of contract.

[*Id.*, citing *Hollwedel v. Duffy-Mott Co.*, 263 N.Y. 95, 188 N.E. 266 (N.Y. 1933); *Gallaspy v. Warner*, 324 P.2d 848, *reh. denied* (Okla. 1958); and *Look v. Werlin*, 590 S.W.2d 526 (Tex.Civ.App. Houston (1st Dist) (1979); *the last case cited dealing with future rent payments on a commercial lease.*]

The same rule has been applied by other Courts dealing with damages under a lease. See *720 Lex Acquisition LLC v. Guess? Retail, Inc.* 09-cv-7199 (AJN) (S.D.N.Y. 08/17/2015); *IN RE United American Financial Corp.*, 55 B.R. 117 (Bankr. E.D.Tenn. 1985); *Consumers United Ins. Co. v. Smith*, 644 A.2d 1328 (D.C. 1994)

The rule reducing future rental damages to present value has been followed in many South Carolina cases. See, e.g., *Hamilton v. Martin*, 270 S.C. 223, 241 S.E.2d 569 (1978); *E & S Investment Corp. v. Richland Bowl, Inc.*, 264 S.C. 582, 216 S.E.2d 522 (1975); *Frampton v. S.C. Dep't of Transp.*, 406 S.C. 377, 752 S.E.2d 269 (Ct.App. 2014).

The Respondents produced no evidence as to present value of the claimed future rent other than the new rental amount. [RECORD ON APPEAL, p.55 -86; p.90 – 121; p.139 – 145; Transcripts of Hearings, p.146 – 160.] Taking that as given, the Respondents are entitled to the difference between the two rental amounts, reduced to present value as of the date of judgment.

The Appellants cited, and supplied to the Circuit Court, within the period allowed by that Court, the opinion of a Certified Public Accountant as to such value, which value was calculated at \$ 7,976.65, far beneath the \$ 28,862.32 awarded as a portion of the Order granting summary judgment. [RECORD ON APPEAL, p.124 – 137.]

CONCLUSION

The Appellants are entitled to judgment reducing that portion of the awarded damages to its present value, based upon the sole evidence presented.

August 7, 2020

Respectfully submitted,



John Martin Foster
S.C. Bar No. 2086
Post Office Box 106
Rock Hill, SC 29731-6106
803 324-8100
Attorney for Appellants

CERTIFICATE OF COUNSEL

The undersigned certifies that the final Brief of Appellants complies with Rule 211(b), S.C.A.C.R.

May 11, 2018



John Martin Foster
Post Office Box 106
Rock Hill, South Carolina 29731-6106
(803) 324-8100
Attorney for Appellants

RECEIVED
Aug 07 2020
SC Court of Appeals