

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2020-CP-07-00155

SOUTH CAROLINA CVS PHARMACY, L.L.C.,
Plaintiff,
vs.
KPP HILTON HEAD, LLC,
Defendant.

**ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

RECEIVED

Oct 29 2020

SC Court of Appeals

THIS MATTER CAME BEFORE THE COURT for a hearing via WebEx on August 13, 2020, on the parties' cross motions for summary judgment filed pursuant to Rule 56, SCRCP. Walt H. Cartin, Esq. with PARKER POE ADAMS & BERNSTEIN, LLP appeared on behalf of Plaintiff, SOUTH CAROLINA CVS PHARMACY, L.L.C. ("Tenant"), and Thomas A. Pendarvis, Esq., with PENDARVIS LAW OFFICES, P.C. and P. Benjamin Zuckerman, Esq., with BERGER SINGERMAN, LLP, appeared on behalf of Defendant, KPP HILTON HEAD, LLC ("Landlord"). Landlord and Tenant agreed that there were no disputed material facts and that the Court could rule on the record before it. Based on the undisputed facts and as a matter of law, and as stated below, the Court GRANTS Landlord's motion for summary judgment and DENIES Tenant's motion for summary judgment.

Introduction

This dispute involves the Tenant's 20-year old lease ("the Lease") of the CVS store on Pope Avenue on Hilton Head Island (the "Hilton Head Store") from Landlord. The issue before the Court is whether Tenant's attempt to exercise the first renewal option in the Lease was timely. As the record and undisputed facts before the Court make clear, it was not. Tenant did not exercise

its option to renew during the life of the option.

FINDINGS OF FACT

The following are undisputed facts in the record before the Court:

1. In May of 1998, Landlord's predecessor in interest and Tenant's predecessor in interest entered into the Lease. On or about July 23, 1998, Landlord's predecessor and Tenant's predecessor entered into the First Lease Amendment. The initial Lease had a 20-year term, which was to expire January 31, 2020. The Lease provides for four successive, five-year renewal options.

2. The Lease specifies that a renewal option must be exercised not later than 90 days before the expiration of the then current term. See (Lease Part I, Article 13 ("Required Advance Notice of Exercise of Renewal Option: 90 days prior to the expiration of the then-current term. (See Article 3 of Part II)"), and Lease Part II, Article 3 ("by giving Landlord notice of such election not later than the Required Advance Notice of Renewal Option (as defined in Section 13 of Part I).").

3. The Parties agree that the Lease required Tenant to give Landlord the Tenant's notice that it was exercising the option to renew the Lease "not later than" Sunday, November 3, 2019, and in conformity with the Lease terms.

4. On October 9, 2019, Landlord's property manager sent an email to Tenant asking whether Tenant intended to renew two CVS stores it managed for Landlord and Landlord's affiliate, both of which had identical January 31, 2020 renewal deadlines -- the Hilton Head Store at issue and the CVS Port Royal store. Tenant's Lease Administrator responded the next day that Tenant was renewing the CVS Port Royal store lease, but he was awaiting further instructions regarding the Hilton Head Store.

5. On October 10, 2019, Tenant posted its Registered Mail, Return Receipt Requested

renewal notice for the CVS Port Royal store. It was received (signed for) by the Landlord's agent on October 21, 2019, eleven days after posting, and an executed copy was forwarded to Tenant the next day.

6. Landlord's business hours as part of its ordinary course of business is Monday through Friday, except holidays. Tenant's own expert was of the opinion "that the ordinary course of business in the commercial real estate industry is that property owners/managers(or their designated agents), including those acting on behalf of landlords, check their mail, including post office boxes, on all non-holiday business days (generally Monday through Friday)." Landlord's property manager has no regular employees. It operates with a single independent contractor, Stefan Cap, who works on a part time basis. Neither Landlord, nor its property manager, receive mail in an office. Both use a Post Office Box for their mail. Mr. Cap's duties include checking Landlord's Post Office Box on weekdays for correspondence.

7. On Tuesday, October 29, 2019, Tenant executed its Notice of Renewal Letter ("the Renewal") for the Hilton Head Store, and the next day, Wednesday, October 30, 2019, Tenant mailed the Renewal, Registered Mail (Return Receipt Requested), to the proper address for the Landlord.

8. Tenant's Registered Mail, Return Receipt Requested Renewal arrived at the Hilton Head Post Office by 9:45 am on Saturday, November 2, 2019.

9. Landlord did not sign for and, therefore, did not receive the Renewal until Wednesday, November 6, 2019. Landlord thereafter notified Tenant it rejected the Renewal for the Hilton Head Store as being untimely.

10. There is no evidence (or allegation) that Landlord ignored any Return Receipt ticket that may have been in its Post Office Box after Tenant's Renewal arrived at the Hilton Head Post

Office on Saturday, November 2, 2019.

11. The Notice provision in the Lease provides,

Whenever, pursuant to this Lease, notice or demand shall or may be given to either of the parties by the other, and whenever either of the parties shall desire to give to the other any notice or demand with respect to this Lease or the Premises, each such notice or demand shall be in writing, and any Laws to the contrary notwithstanding, shall not be effective for any purpose unless the same shall be given or served as follows: by mailing the same to the other party by registered or certified mail, return receipt requested, or by overnight courier service provided a receipt is required, at its Notice Address set forth in Part I hereof, or at such other address as either party may from time to time designate by notice given to the other. The date of receipt of the notice or demand shall be deemed the date of the service thereof (unless the notice or demand is not received or accepted in the ordinary course of business, in which case the date of mailing shall be deemed the date of service thereof).

See (Lease Part II, Article 27.)

CONCLUSIONS OF LAW

I. Standard of Review.

“The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder.” Prince v. Liberty Life Ins. Co., 390 S.C. 166, 169, 700 S.E.2d 280, 281 (Ct. App. 2010). “Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law.” Carolina Chloride, Inc. v. S.C. Dep't of Transp., 391 S.C. 429, 434, 706 S.E.2d 501, 504 (2011). “In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party.” Id. at 203, 743 S.E.2d at 852–53. “However, it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine.” McMaster v. Dewitt, 411 S.C. 138, 143, 767 S.E.2d 451, 453–54 (Ct. App. 2014) (quoting Town of Hollywood v. Floyd, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013)). “Summary judgment is a drastic remedy that should be cautiously invoked in order not to improperly deprive a litigant of a trial of the disputed factual issues.” HK New Plan Exch. Prop.

Owner I, LLC v. Coker, 375 S.C. 18, 22, 649 S.E.2d 181, 183 (Ct. App. 2007).

II. Law Governing the Claims in this Dispute.

South Carolina law is clear that “[b]ecause of its unilateral nature, an option to renew a lease is strictly construed against the party claiming the option.” 33 Flavor Stores of Virginia, Inc. v. Hoffman’s Candies, Inc., 296 S.C. 37, 370 S.E.2d 293, 295 (Ct. App. 1988), citing Southern Silica Mining and Manufacturing Company v. Hoefer, 215 S.C. 480, 56 S.E. 2d 321, 328 (1949).

The 33 Flavor Stores court went on to say:

Where, as in this case, notice of the exercise of the option is required in a certain manner, time is of the essence and exact compliance will be required. Pope v. Goethe, 175 S.C. 394, 179 S.E. 319 (1935). Where a lessee has a right to renew upon giving notice to the lessor at or before a specified time, in the absence of a waiver, the giving of notice is a condition precedent which must be complied with within the stipulated time; and, absent special circumstances warranting relief from a court of equity, the right of renewal is lost if notice is not given in accordance with the provisions of the lease.

III. Legal Analysis and Application of the Law to the Facts in this Case.

As is the custom and practice in most leases, the Lease at issue has specific and unambiguous receipt requirements: “return receipt” is required if using certified or registered mail, and “a receipt” is required if using a courier. The “date of receipt” is deemed the “date of service.” The Lease contains a limited exception to the receipt requirement. Tenant argues that the limited exception in the parenthetical contained in the last sentence of Lease Part II, Article 27, which reads “(unless the notice...is not received or accepted in the ordinary course of business...)” applies here so as to deem the date of mailing as the date of service. The Court disagrees with Tenant’s interpretation of the exception.

In the ordinary course of business, Tenant (and other businesses) keep regular weekday (Monday through Friday) hours, except holidays, and Tenant (and other businesses) accept mail during those hours and do not to refuse or reject mail or notices. It is this refusal, rejection, or

failure to abide by the normal method of mail or courier receipt that the parenthetical in the Lease addresses, not the fortuitous receipt of mail on a non-ordinary course of business day. Tenant seeks to expand this and relies on an interpretation that presumes that because the Renewal arrived at the Post Office on a weekend, that the Renewal was not received or accepted in the “ordinary course of business.” The Court does not agree. Moreover, such a reading would not amount to the strict construction “against the party claiming the [renewal] option” mandated by 33 Flavor Stores of Virginia, Inc. v. Hoffman, *supra*.

Here, the Lease expressly provides that all notices, including the Renewal at issue, be signed for by the notified party. See Lease Part II, Article 27 (a notice “shall not be effective for any purpose unless the same shall be given or served as follows: by mailing the same to the other party by registered or certified mail, *return receipt requested*, or by overnight courier provided a *receipt is required . . .*” (Emphasis added)). Regardless of the method selected to send any notice, the Lease unambiguously requires a signed receipt for that notice. No “special circumstances warranting relief from a court of equity” exist or are alleged regarding this signed receipt requirement. See 33 Flavor Stores of Virginia, Inc. v. Hoffman’s Candies, Inc., *supra*.

The Lease also unambiguously specifies that “[t]he date of receipt of the notice . . . shall be deemed the date of service thereof.” See (Lease Part II, Article 27). No “special circumstances warranting relief from a court of equity” exist or are alleged regarding the “deemed . . . date of service” as unambiguously expressed in the Lease. Id.

Although it is undisputed that the Renewal was received by the Hilton Head Post Office on Saturday, November 2, 2019, it is also undisputed that Landlord’s agent did not go to the Post Office that weekend day and did not actually receive the Renewal that day; it was not in the ordinary course of Landlord’s business to collect its mail on weekends, and the Renewal was not

signed for and received until the following week, Wednesday, November 6, 2019. As set forth in the Lease, November 6, 2019, therefore, was “deemed the date of service” of the notice. This was three (3) days after the deadline, and not “at least 90 days before expiration of the term” as required by the unambiguous and clear terms of the Lease for a notice of renewal. Had Landlord’s agent gone to the Post Office, signed for and received the Renewal on Monday, November 4, 2019, the Renewal would still have been untimely, that is, less than 90 days before the expiration of the lease term.

CONCLUSION

The undisputed factual record before the Court establishes Tenant did not timely exercise the right to renew the Lease as its required notice was not given in accordance with the provisions of the Lease. As stated in this Order, the Court GRANTS Landlord’s motion for summary judgment and DENIES Tenant’s motion for summary judgment.

AND IT IS SO ORDERED.

Master-in-Equity for Beaufort County

Beaufort, South Carolina

August 27, 2020



Beaufort Common Pleas

Case Caption: South Carolina Cvs Pharmacy Llc VS Kpp Hilton Head Llc

Case Number: 2020CP0700155

Type: Order/Summary Judgment

So Ordered:

s/Marvin H. Dukes III #3069