

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

SC Court of Appeals

The Honorable Perry H. Gravely, Circuit Court Judge

Appellant Case No. 2020-00904

Mary Earle,.....Respondent,

v.

Boulder LP,.....Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT PROPERLY REMAND THE MATTER TO MAGISTRATE'S COURT?
2. DID THE TRIAL COURT PROPERLY RULE ON APPELLANT'S MOTION TO MODIFY THE TERMS OF THE APPEAL BOND?

STATEMENT OF THE CASE

This case involves a landlord-tenant dispute between tenant Mary Earle, a 60 year-old unemployed mother of four, who complied with the terms of the lease, reported interim changes, provided information for purposes of recertification, continually sought clarification regarding additional information requested and Boulder LP, a domestic limited partnership which dissolved in March 2019; which receives federal subsidies for providing housing to qualified low-income persons in Greenville, South Carolina; which is subject to federal regulations governing subsidized housing regulations promulgated by the United States Department of Housing and Urban Development (HUD) as codified in the Code of Federal Regulations Title 24, Subtitle A, Part 5 and included in the *HUD Handbook 4350.3, Rev-1* (Handbook) and must comply with all federal regulations that relate to HUD; who repeatedly failed to respond to Mary Earle's requests for clarification and assistance; who, in bad faith, made application to evict Mary Earle.

STANDARD OF REVIEW

An appeal from the Magistrate's court shall be to the circuit court, which shall give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits. In giving judgment the court may affirm or reverse the judgment of the court below, in whole or in part, as to any or all the parties and for errors of law or fact. *See S.C. Code Ann. §18-7-10, 170.*

This statute gives the circuit court authority to reverse a magistrate's findings of fact and correct errors of law. *Burns v. Wannamaker*, 281 S.C. 352, 315 S.E.2d 179 (S.C. Ct. App. 1984). It is the equivalent of a circuit court in a trial without a jury because they may reverse the magistrate's judgment for errors of fact even though the circuit court judge may not have had the opportunity to observe the demeanor of the witnesses. *Vacation Time of Hilton Head Island, Inc. v. Kiwi Corp.*, 280 S.C. 232, 234; 312 S.E. 2d 20, 21 (S.C. Ct. App.1984).

The court has jurisdiction to find facts in accordance with its view of the preponderance of the evidence. *See* S.C. Code Ann. § 18-7-170; *Townes Assocs., Ltd v. Greenville*, 266 S.C. 81, 86; 221 S.E. 2d 773, 775 (S.C. 1976).

FACTUAL AND PROCEDURAL HISTORY

Lease

Mary Earle, a 60 year-old unemployed mother of four, and Boulder LP, a domestic limited partnership which dissolved in March 2019, which receives federal subsidies for providing housing to qualified low-income persons in Greenville, South Carolina entered into a lease agreement on or about December 7, 2018 as set forth in the Model Lease For Subsidized Programs. See Lease. The lease, along with the attachments, set forth some of the federal regulations for federally subsidized housing, rules, obligations and responsibilities of the parties. See Lease. The attachments set forth Mary Earle's total assistance payment (TAP) and total tenant payment (TTP), which includes a utility allowance that Mary Earle was to receive each month. See Lease, Owner's Certification of Compliance with HUD Tenant Eligibility and Rent Procedures. It also outlines the two times during the term of a tenancy that owner's calculate rent: (1) An Interim Recertification (IR)-when there is a change in the tenant's income,

household composition, or other event; (2) An Annual Recertification (AR)-prior to the expiration of a lease term. See Lease 3, 4, 16, 17; HUD Handbook, pp. 5-65 through 5-70. Because Boulder receives monies from HUD, they are required to comply with all federal regulations that relate to HUD as codified in the Code of Federal Regulations Title 24, Subtitle A, Part 5 and included in the Handbook. The lease sets forth the duties, obligations, responsibilities of the parties. The lease, specifically designed for federally subsidized housing, sets forth the purpose for federal subsidized housing, rent, how rent is computed, and all other federal rules and regulations which must be followed by a landlord in order to continue to receive monies from the federal government and the tenant in order to live in federally subsidized housing.

Interim Recertification

The purpose of the interim re-certification is to make any necessary adjustments to the tenant's rent based on changes in a tenant's income, household composition or other event. See Lease paragraphs 3-4, 16.

Mary Earle timely reported to Boulder that she lost jobs in May and another in July 2019. See Self-Affidavit of Mary Earle. Boulder failed to calculate Mary Earle's rent in May, June, or July. They appeared to begin the IR, but never verified the information, never completed it, never made the appropriate rent reduction, and never provided Mary Earle written notice of any rent due for June, July, or August as required. See Tenant File Notes; Lease paragraph 16.

Annual Recertification.

In August, Appellate began Mary Earle's annual re-certification which was not due to begin on that date. See Notice dated August 1, 2019. Mary Earle completed this recertification

on August 21, 2019, by providing all necessary employment and unemployment information required and signing all required documents. Boulder did not verify Mary Earle's income as required but notified Mary Earle that she needed to provide additional information. Mary Earle questioned Boulder about additional information, as she was unclear about what she failed to provide. On or about September 30, 2019, Mary Earle received a Notice to Vacate due to Failure to Recertify. See Notice to Vacate. She then enlisted the assistance of her counsel who spoke with Boulder's agent on October 2, 2019 seeking clarification of any additional information needed for Mary Earle to complete recertification. Boulder's agent offered no response. In fact, Counsel repeatedly requested Boulder to inform her of any information needed, but never received a response from Boulder. In November, counsel provided Mary Earle's employment information that she believed Boulder needed. See lease, letters to Boulder, fax coversheets, and Mary Earle earnings information. Boulder never responded to counsel.

Boulder did not file an action for eviction based upon Mary Earle's failure to recertify and did not provide Mary Earle with notice of any alleged rent owed as required. See Application for Ejectment, Lease paragraph 16, Tenant File provided by Boulder.

Application for Ejectment.

Boulder filed an eviction action against Mary Earle on December 31, 2019 for non-payment (of rent). The application was defective as it does not forth the directions to the property and the lease is not attached as required. See Application for Ejectment. The demand for payment attached to the application is defective in that it does not clearly set forth the date and the months that rent was allegedly not paid. See Demand for Payment.

Show Cause Hearing

The purpose of a show cause hearing is for the tenant to inform the court why he or she should not be evicted from the dwelling unit. See Rule to Vacate, SC Code Ann. 27-37-60. The tenant may request a jury trial to be set at a later date. SC Code Ann. 27-37-80. Additionally, at this hearing, the magistrate is required to preliminarily determine the amount of monthly rent to be paid pending the jury trial, if the amount of rent is in controversy. See SC Code Ann. 27-40-790.

At her show cause hearing, Mary Earle's counsel requested a jury trial and requested to be heard regarding the amount of rent to be paid as Mary Earle disputed Boulder's alleged rent calculations. See S.C. Code Ann. §27-40-790. Not only was Mary Earle denied an opportunity to present any evidence regarding rent, the magistrate gave Boulder an opportunity to provide evidence of alleged rent owed in addition to the amount sought in the Demand for Payment attached to the Application for Ejectment. Thus, the magistrate refused to "preliminarily" determine the matter of disputed rent or any alleged back rent. See Magistrate Hearing Transcript pp. 6-9.

The magistrate set the alleged back rent to be paid at \$1000 and Mary Earle's monthly tenant payment (rent) at \$282. The magistrate acknowledged that the effect of his ruling would be to cause Mary Earle to be homeless. See Magistrate Hearing Transcript pp. 9-10.

Neither party presented any evidence as to the Fair Market Value of the dwelling unit, and as state, no procedural due process hearing was held to address the matter.

Mary Earle filed a notice of appeal and thereafter, the magistrate's court set an appeal/bond hearing pursuant to S.C. Code Ann. § 27-40-800.

Appeal/Bond Hearing

At this hearing the magistrate set the bond at the rate of \$282 per month. This was based on Mary Earle's belief that she would be able to obtain employment to be able to pay rent.

Motion to Alter/Amend

Mary Earle filed a Motion to Alter or Amend the bond hearing amount set by the magistrate. See Motion.

Appeal (Circuit Court) Hearing

The Honorable Perry Gravely held the appeal conference by telephone. Counsel for the parties, but not the parties were on the telephone conference. At this hearing, Counsel for Mary Earle properly laid out her argument that the magistrate erred by not preliminarily determining the amount of disputed rent and alleged back rent as required by 27-40-790. Boulder tried to argue that Mary Earle did not recertify; however, they failed to state the actual facts and that Boulder can only evict on grounds of non-payment (of rent) as set forth in their notice and application for ejectment.

Judge Gravely remanded the case to magistrate's court held Mary Earle's motion as moot, and Boulder appealed. See Appeal Hearing Transcript, Order.

ARGUMENTS

- I. THE TRIAL COURT PROPERLY REMANDED THE MATTER TO MAGISTRATE'S COURT.
 - A. **This landlord tenant dispute is controlled by federal laws as set forth in 24 C.F.R., the HUD Handbook 4350.3, the parties' lease, and the South Carolina Landlord Tenant Act.**

Federally subsidized housing is governed by HUD federal law. It is defined in 24 C.F.R., Subtitle A, Part 5. Landlords that provide such housing for qualified tenants must abide by HUD Regulations, HUD Handbook, the parties' lease. (24 C.F.R.). The model lease and its attachments are standard and contained in HUD Regulations and HUD Handbook. See Model Lease, 24 C.F.R. The initial (and subsequent) lease and its attachments sets forth the rent, which includes the tenant payment and tenant assistance payment. See Lease. The lease sets forth the agreement between landlord and tenant that amount of rent tenant pays during lease term may change if certain events occur. See Lease, Paragraph 4. Thus, rent set forth in the lease is subject to change. See Lease, Paragraph 3.

In subsidized housing, a tenant's income must be determined before rent can be calculated. *HUD Handbook-4350.3*, Chapter 5; Model HUD Lease. Rent is set for a 12-month term but can be changed during this term due to changes in a tenant's income, household composition, or other circumstance. See *HUD Handbook-4350.3*, Chapter 7; Lease, Paragraph 4. It is not sufficient for a landlord to state that a tenant's rent is the same each month, where the lease provides for changes to a tenant's rent based upon the composition of tenant's household or tenant's income changing during a lease term. See *HUD Handbook-4350.3*, Chapter 7; Lease.

A tenant may be evicted for non-payment of rent. See 24 C.F.R. 247; Lease, Paragraph 23. The lease also sets forth the conditions under which a tenant may be evicted. See Lease. The parties to the lease must abide by all provisions before a landlord may evict a tenant and any eviction must be upon terms as set forth by HUD Regulations. See *HUD Handbook-4350.3*.

The South Carolina Landlord Tenant Act (SCLTA) is applicable in this case because the subject property is located in South Carolina. See S.C. Code Ann. §27-40-110. The purpose of

the landlord tenant act must be construed liberally and applied to promote its underlying purposes and policies which are to simplify, clarify, modernize and revise landlords and tenants. See S.C. Code Ann. §27-40-20. Additionally, unless displaced by the provisions of this chapter, the principles of law and equity including the law relating to capacity to contract mutuality of obligations, principal and agent, real property, public health, safety and fire prevention, estoppel, fraud, misrepresentation, duress, coercion, mistake bankruptcy, or other validating or invalidating cause shall supplement the provisions of this chapter. See S.C. Code Ann. §27-40-30. The SCLTA sets forth the obligation of good faith in that every duty under this chapter and every act which must be performed as a condition precedent to the exercise of a right or remedy under this chapter imposes an obligation of good faith in its performances or enforcement. See S.C. Code Ann. § 27-40-220. A tenant may be ejected upon application of the landlord or his agent when (1) the tenant fails or refuses to pay the rent when due or when demanded See S.C. Code Ann. §27-37-10.

The SCLTA does not differentiate between “regular” housing and subsidized housing, but it does address and define rent and rental agreements between landlords and tenants. See S.C. Code Ann. §27-40-210(12). The rental agreement between these parties does distinguish between regular and subsidized housing. See Lease. In fact, the lease between these parties is specifically designated for “federally subsidized housing,” sets forth the purpose for federal subsidized housing, rent, how rent is computed, and all other federal rules and regulations which must be followed by a landlord in order to continue receive monies from the federal government and the tenant in order to live in federally subsidized housing. In fact, rent is defined as “the consideration payable for use of the premises including late charges whether payable in lump sum or periodic payments, excluding security deposits or other charges,” under S.C. Code Ann.

§27-40-210(11), and a rental agreement is defined as “all agreements, written or oral, and valid rules and regulations adopted under 27-40-540 embodying the terms and conditions concerning the use and occupancy of a dwelling unit and premises.” See S.C. Code Ann. § 27-40-210(12). So, the lease controls the duties, obligations, responsibilities of the parties.

South Carolina law provides that a tenant may be ejected upon application of landlord when tenant fails to pay rent when due. See S.C. Code Ann. §27-37-20.

B. The magistrate erred in its order as he refused to preliminarily determine the matter of disputed rent as required by 27-40-790(a).

In any action where the landlord sues for possession and the tenant raises defenses or counterclaims pursuant to this chapter or the rental agreement:

(a) the tenant is required to pay the landlord all rent which becomes due after the issuance of a written rule requiring the tenant to vacate or show cause as rent becomes due.

If the landlord and tenant disagree as to the amount of rent or the time of payments thereof, the court shall hold a hearing as soon as feasible after the issues have been joined, and preliminarily determine the matter.

S.C. Code Ann. § 27-40-790(a).

Webster’s Dictionary defines preliminary as ‘coming before and usually forming a necessary prelude to something else.’ (“preliminary.” Merriam-Webster.com. 2011. <https://www.merriam-webster.com> (29 October 2020)). The magistrate did not preliminarily determine issue of rent to be paid pending jury trial and did not determine the amount of rent based upon the lease. At the time of the show cause hearing, Mary Earle disputed rent alleged by the landlord and requested a jury trial. Mary Earle raised the defense and counterclaim that she did not owe rent complained of by Appellant citing the fact that the rent changes during a lease term due to certain events and could not pay rent, thus the amount of rent owed was in

controversy, and the magistrate was required to hold a hearing to preliminarily determine the matter. See S.C. Code Ann. §27-40-790. The magistrate refused to allow Appellant to present *any* evidence regarding the amount of monthly rent to be paid, if any, and instead accepted Respondent's testimony as to the alleged amount of back rent owed. Respondent never made a showing that Respondent is entitled to the rent alleged in the Demand for Rent. Thus, the magistrate was required to determine the matter preliminarily. See S.C. Code Ann. §27-40-790.

At a minimum, the magistrate was required to review the lease paragraphs 3, 4, 15, 16, 23 which governs rent and any changes thereto. See Lease.

C. The magistrate failed to use the proper standard to determine the matter of alleged back rent.

(b) The tenant is required to pay the landlord all rent allegedly owed prior to the issuance of the rule, provided; however, that in lieu of the payment the tenant may be allowed to submit to the court a receipt and cancelled check, or both, indicating that payment has been made to the landlord.

In the event that the amount of rent is in controversy, the court shall determine the amount of rent to be paid to the landlord in the same manner as in subsection (a) or (b) of this section.

S.C. Code Ann. § 27-40-790(b).

Instead of preliminary hearing, the magistrate only accepted the word of the landlord as to the amount of disputed rent. According to 27-40-790(b) there must be a hearing, if the amount of rent is in controversy. If there is a hearing, the parties must be allowed to present canceled checks to show proof of rent paid. See S.C. Code Ann. § 27-40-790(b) above.

The magistrate's court, without an actual preliminary hearing to address the amount of back rent alleged by Boulder and disputed by Mary Earle, ordered an unreasonable lump sum payment amount of \$1,000 for back rent that the statute does not contemplate and that an unemployed Mary Earle, living in subsidized housing, could never pay. The magistrate stated

that if the effect of his ruling was to cause Mary Earle to be homeless, then so be it. See Magistrate Hearing Transcript.

All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute. *Bohlen v. Allen*, 228 S.C. 135, 89 S.E.2d 99 (1955). However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention. *Stackhouse v. Rowland*, 86 S.C. 419, 68 S.E. 561 (1910). If possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect. *Kiriakides v. United Artists Com.*, 440 S.E.2d 364 (1994).

D. The trial court did not err in not ruling on the issue of Fair Market Value of the dwelling unit.

... In the event that the basis for the disagreement of the amount of rent due is the landlord's alleged violation of the rental agreement or the provisions of this chapter, the rent to be paid must be the fair-market rental value of the premises at the time of the hearing.

S.C. Code Ann. § 27-40-790.

There were no statements made or evidence presented as to the Fair Market Value of the dwelling unit and there was no evidence presented regarding the termination of Mary Earle's tenant assistance payment. See Magistrate's Hearing Transcript. Raising a tenant's rent to the Fair Market Value is tied to the tenant's assistance and whether or not tenant complied with paragraphs 4 and 17 of the lease. See Lease. While the SCLTA allows for rent to be paid as Fair Market Value, requiring Mary Earle to pay Fair Market Value can only be accomplished

pursuant to paragraphs 4 and 17 and may be accomplished pursuant to paragraphs 15 or 16 and only after a due process hearing. The landlord cannot terminate a tenant's tenant assistance payment without due process. Thus, the landlord tenant act can only be applied when there is a hearing. See Lease. Additionally, the provisions of the SCLTA can only require Fair Market Value if Boulder has complied with paragraphs 4 and 17. See Lease, 24 C.F.R., and *HUD Handbook-4350.3*.

Procedural due process protections are required in cases where a person's property interests such as termination of government subsidized housing is at issue. See *Goldberg v. Kelly*, 397 U.S. 254 (1970). The court held that certain elements are needed to ensure the Appellant is afforded procedural due process protections and include (1) timely notice stating the basis for the proposed termination of the benefit; (2) an opportunity by the beneficiary to confront and cross-examine each witness relied upon for the termination; (3) the right of the beneficiary to be represented by counsel; (4) a decision based solely on evidence adduced at the hearing, in which the reasons for the decision are set forth; and (5) an impartial decision-maker. Further, HUD policies and regulations require due process protections that were not afforded Appellant. Appellant was not given an opportunity to present any evidence regarding rent. See Magistrate's Hearing Transcript, pp. 8-9; Magistrate's Return.

Joy v. Daniels, 479 F.2d 1236 (4th Cir. 1973), applying the holding in *Goldberg* and *Caulder v. Durham Housing Authority*, 433 F.2d 998 (4th Cir. 1970), found it undisputed that public housing tenants hold property interest in their leases and their continued occupancy. A tenant's property interest in the renewal of a lease and continued rental assistance subsidy entitles her to the procedural due process protections recognized in *Goldberg*. See also *DiVetro v. Hous. Auth. of Myrtle Beach*, Civil Action No.: 4:13-cv-01878-RBH (D.S.C. Jul. 10, 2014).

The court in *Goldberg* recognized that welfare benefits provided to qualified recipients may be their only means to obtain essential food, clothing, housing and medical care. That the termination of aid might deprive an eligible recipient of the very means by which to live. These benefits cannot be terminated without safeguards that protect recipients due process rights. The court held that persons facing loss of government benefits must be given a time and adequate notice detailing the reasons for the termination, the opportunity to appear and testify, and the opportunity to confront and cross examine adverse witnesses. The purpose of the notice is to inform persons of the allegations against them so that they can prepare a defense.

Finally, the court in *Edgecomb v. Housing Auth. of Town of Vernon*, 824 F. Supp. 312 (D. Conn. 1993), upholding the standards established in *Goldberg* and applying them to a termination of subsidized housing lease, stated, the notice must be sufficient specific to enable tenant to prepare rebuttal evidence. The notice must alert the tenant of the accusations against him. *Id.* at 314. The termination of housing by the magistrate without adherence to the protections identified in the above cases violated appellant's due process rights.

E. The magistrate did not properly hear the matter of Mary Earle's assertion that Boulder did not bring their eviction action in good faith.

Every act which must be performed as a condition precedent to the exercise of a right or remedy under this chapter imposes an obligation of good faith in its performances or enforcement.

S.C. Code Ann. §27-40-220.

Good faith is defined as honesty in fact in the conduct of the transaction concerned.

S.C. Code Ann. §27-40-210(5).

There is common law which is case law, precedent law or judge-made law (rules of law developed by the courts through its decisions). There is statutory law and legislative law.

Equity is doing justice after a harsh law judgment (to alleviate the harshness and inflexibility of the law or relief that cannot be found in common law and is based on judicial evaluation of fairness, reason, good faith and justice.

The purpose of the Landlord Tenant Act must be construed liberally and applied to promote its underlying purposes and policies. See S.C. Code Ann. §27-40-20.

Unless displaced by the provisions of this chapter, the principles of law and equity, including the law relating to capacity to contract, safety and fire prevention, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement the provisions of this chapter. See S.C. Code Ann. 27-40-30.

II. THE TRIAL COURT PROPERLY HELD THAT THE ISSUE OF APPELLANT’S MOTION TO MODIFY THE TERMS OF THE RENT WAS MOOT BASED ON THE RULING TO REMAND ON OTHER GROUNDS.

The trial court properly held that the issue of Appellant’s Motion to Modify was moot based upon its ruling to remand the matter on other grounds. The court declined to address remaining issues where the disposition of prior issues was dispositive. See *Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 248, 715 S.E.2d 348, 352 (Ct. App. 2011) citing *Futch v. McAllister Towing of Georgetown, Inc.*, 355 S.C. 598, 613, 518 S.E.2d 591, 598 (1999).

CONCLUSION

The magistrate was required to protect Mary Earle’s right to due process by following federal and state law. He disregarded the provisions of 24 C.F.R., Subtitle A, Part 5 and the

South Carolina Landlord Tenant Act section 27-40-790. The record does not support the magistrate's decision and the proper remedy should be that the matter is remanded and heard consistent with federal and state law.

Respectfully Submitted,

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PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondent & Respondent’s Designation of Matter on counsels for the Appellant electronically, by E-mail to the address indicated below, on November 4, 2020.

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