



STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF CHARLESTON )  
 )  
 )  
 Quality Fresca I, LLC, )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 Kenneth R. Davenport II, Personal )  
 Representative of the Estate of Kenneth R. )  
 Davenport )  
 )  
 Respondent. )  
 )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
 FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2020-CP-1004936

ORDER

**RECEIVED**  
**Apr 29 2021**  
 SC Court of Appeals

Before this Court is an appeal taken from the Magistrate Court’s order of ejectment in this matter. This Court considered the record below, the notice of appeal, the Magistrate’s return, the appellate briefs, and the oral arguments presented by the parties at the appeal hearing which was held via WebEx Virtual Courtroom. For the reasons set forth herein, this Court affirms the Magistrate Court’s order of ejectment on the merits and agrees with and adopts the findings of fact and conclusions of law in that order as its own. Procedurally, as independent, alternative grounds to deny and dismiss the appeal, this Court finds that the appeal was not perfected, as a jurisdictional matter, and that the issues raised in the appeal were not preserved for review.

**FINDINGS OF FACT**

Based upon its own review, this Court agrees with and adopts the Magistrate Court’s findings of fact, as summarized and restated below.

Before the Magistrate Court, and now before this Court on appeal, is an Application for Ejectment filed by Respondent, the landlord, Kenneth R. Davenport II, Personal Representative of the Estate of Kenneth R. Davenport, against Appellant, the tenant, Quality Fresca I, LLC. A bench

trial was conducted on October 27, 2020. The parties expressly waived any right to a jury trial. Respondent, Mr. Davenport, and Mr. Daniel Ravenel, property manager for Respondent, testified as witnesses. Appellant called its Vice President of Operations, Mr. Chris Grooms, as its sole witness. The parties stipulated to the authenticity of the documentary evidence in the record and each party was afforded the opportunity to testify at the hearing.

The commercial lease at issue in this case is comprised of three documents, including that certain “Retail Lease,” entered into as of September 25, 2013; that certain “Assignment, Assumption and Amendment of Lease,” entered into as of October 16, 2018; and that certain “Assignment, Assumption and Amendment to Lease Agreement,” entered into as of May 8, 2020. Collectively, these three lease documents are referred to hereinafter as the “Lease.”

Under the Lease, Respondent is the landlord and Appellant is the tenant. Appellant became the tenant on May 8, 2020, through a lease assignment.

The leased premises is located on the corner of King Street and Calhoun Street in downtown Charleston, commonly known as 381 King Street, Suite #1.

Appellant, and its predecessors in interest, have operated a restaurant known as “Moe’s” for the duration of the Lease. A representative of Appellant testified at trial that it owns approximately 60 Moe’s restaurants, of which the leased premises is but one.

In pertinent part in this matter, the Lease provided the following terms.

Regarding the end of the Lease:

Tenant agrees to rent the Leased Premises from Landlord for a term of Seven (7) years, beginning on the 1<sup>st</sup> day of October, 2013, and ending on the 30<sup>th</sup> day of September, 2020 (hereinafter the “Lease Term”).

Retail Lease, p. 5 (Section B.1).

Regarding the option to extend the Lease:

Tenant shall have the option to extend this Lease for two (2) additional five (5) year periods with all terms and conditions of the Lease remaining the same with the exception of rent. The base lease rate shall increase on each anniversary date of the Lease and any extensions by (i) 2.5%, or (ii) 7% of the ten Gross Sales (hereinafter defined), whichever is greater.

Retail Lease, p. 5 (Section B.2).

Regarding a security deposit required by the Lease:

On [May 8, 2020], Assignee shall deposit with Landlord a security deposit in the amount of \$30,496.00, which equals four (4) months' base rent (the "Security Deposit"), which, except as provided herein, shall be governed by Section 6 of the Lease.

Assignment, Assumption and Amendment to Lease Agreement, p. 2 (Section 4.c).

The facts at issue relating to these terms of the Lease are not in dispute.

The e-mail chain attached to the Application of Ejectment and supplemented by the additional e-mails introduced at trial by stipulation of the parties without objection, includes numerous e-mails from the months of July and August, 2020, generally between Mr. Davenport and Appellant's Vice President of Real Estate, Bob Hartmann. These emails, together with the added testimony of Mr. Davenport, show that Appellant made representations to Respondent that it was financially unable to pay the full rent amount, that it would not exercise its option to extend the Lease, and that Respondent should seek a new tenant. Appellant did not call Mr. Hartmann to testify at trial, nor was he present at trial. Appellant's sole witness, Mr. Grooms, did not and could not refute Mr. Davenport's testimony and the plain language of the e-mail correspondence.

For example, in e-mails exchanged between Respondent and Appellant on August 6, 2020,

Respondent wrote:

Thank you for your email. These are definitely unprecedented times. We appreciate your attempts at seeking solutions to your lack of business. If we are unwilling to accept these terms or terms similar to what you are proposing and the lease terms would remain

as they currently are, does that mean you are not going to exercise the option and would be vacating the property?

To which Appellant responded:

Unfortunately it does. It doesn't make sense to sign up for a situation where you know you are going to take losses with the hope that, at some point in the unknown future, you will start to turn a profit. That is why we offered a short term situation with mutual termination rights, so if you could find someone to pay the freight, you can make the deal and until then, we both ride the wave and take what is available.

Respondent testified that immediately after Appellant's August 6 e-mail and in reliance on Appellant's representations that it would not be exercising its option to extend the Lease, Respondent engaged a real estate brokerage firm who assisted him in negotiating the terms of a new lease with a new tenant and ultimately reaching an agreement to re-let the leased premises to that new tenant. During redirect examination, Respondent further testified that, having hired a broker, if the leased premises were not made available to the new tenant, Respondent would suffer financial damages as a result of Appellant's failure to vacate the leased premises.

After Appellant's August 6 and August 24<sup>1</sup> emails made clear to Respondent that Appellant was not going to exercise its option and was planning to vacate the leased premises, Appellant made alternative, extra-contractual offers to lease the premises at reduced rent either month-to-month or for a year. The e-mails and Mr. Davenport's testimony show that Respondent rejected

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<sup>1</sup> On August 24, Appellant wrote to Respondent:

I hope this email finds you well. We are a little over a month away from the lease termination date. I need to let our facilities team know if we are leaving so they can put together their closing and de-branding plan. Please let me know if you are interested in us staying on a month-to-month basis at the reduced terms or if we should put our closing plan together.

these alternative, extra-contractual offers. Then, contrary to its prior representations, by e-mail dated September 3, 2020, Appellant stated it would “try and make this location work...[and]...will be exercising our option to stay....” By letter dated September 3, 2020, Appellant purported to provide notice to Respondent that it would, in fact, exercise its option to extend the Lease.

Respondent sent a notice of default and waiver of option on September 4, 2020. That notice clearly stated that Appellant should timely vacate the leased premises by September 30, 2020. It further stated that Respondent had not received the security deposit payment, due May 8, 2020.

In response to that notice, Appellant remained in possession of the premises past September 30, 2020, and apparently intends to stay indefinitely. Also, on the eve of the end of the Lease, nearly five months late and beyond the time to cure, on September 29, 2020, Appellant belatedly attempted to pay the security deposit that was due on May 8, 2020, in the amount of \$30,496.00. Respondent rejected that attempted payment because it was untimely and it was an inappropriate response to the notice to vacate the premises by September 30, 2020, which was based on Appellant’s prior representations.

Thereafter, this litigation commenced and proceeded as follows:

Respondent filed its Application for Ejectment on October 1, 2020;

The Magistrate Court held a bench trial on October 27, 2020;

The Magistrate Court issued its order of ejectment on November 4, 2020;

Appellant did not file a motion to reconsider or amend with the Magistrate Court;

Appellant filed its notice of appeal on November 9, 2020;

Appellant did not file to pay a bond within five days of its notice of appeal;

The Magistrate Court, *sua sponte*, on November 18, 2020, scheduled a bond hearing, held on November 25, 2020, and thereafter accepted a bond from Appellant;

The parties submitted their appeal briefs on March 12, 2021; and

This Court held the appeal oral arguments on March 15, 2021.

### **CONCLUSIONS OF LAW**

The Magistrate Court correctly and equitably granted an order of ejectment in this matter. As detailed above, the record supports that Appellant represented to Respondent, in writing, that it was financially unable to pay the full rent amount, that it was not going to exercise the option to extend the lease at issue, and that Respondent should seek a new tenant to occupy the premises. Respondent relied on those representations, engaged the services of a broker, and entered an agreement to lease the premises to a new tenant. Appellant later claimed that its representations were fairly typical of lease negotiations, attempting to compel Respondent to reduce the rent. Courts in this State do not condone the bad faith negotiating tactic of intentionally making false representations. In a 9-page order, with detailed findings of fact and conclusions of law, the Magistrate Court accordingly ordered Appellant to vacate the premises within two weeks.

Appellant failed to vacate the premises, as ordered by the Magistrate Court. Appellant then procedurally failed to perfect its right to appeal and preserve the four issues it has attempted to raise in its notice of appeal. Specifically, Appellant failed to timely file a bond within five days of filing its notice of appeal, which requires dismissal of the appeal, as a jurisdictional matter, by statute, according to our Supreme Court. Appellant also failed to file a motion to alter or amend, which would have been required to preserve the four issues it now attempts to raise in its notice of appeal, and other issues it attempted to raise in its appeal brief and at the appeal hearing.

These conclusions of law are more particularly set forth below.

### **PERFECTING THE APPEAL**

The statute at issue, entitled “Ejectment of Tenants,” S.C. Code Ann. §§ 27-37-10 *et seq.*

expressly provides, pursuant to subsection S.C. Code Ann. § 27-37-130, that an appeal of an ejectment shall be dismissed if the tenant fails to file a bond within five days after serving its notice of appeal, as follows:

An appeal in an ejectment case will not stay ejectment unless at the time of appealing the tenant shall give an appeal bond as in other civil cases for an amount to be fixed by the magistrate and conditioned for the payment of all costs and damages which the landlord may sustain thereby. In the event the tenant shall fail to file the bond herein required within five days after service of the notice of appeal such appeal shall be dismissed by the trial magistrate.

S.C. Code Ann. § 27-37-130.

Our Supreme Court has held that this statutory provision, requiring the tenant to file a bond within five days after serving its notice of appeal, is a “jurisdictional,” “condition precedent” to the “right of appeal by a tenant from an order of ejectment.” *Wheeler v. Hyler*, 228 S.C. 584, 91 S.E. 2d 265 (1956). In *Wheeler*, the Supreme Court further explained that, “[b]ecause of appellants’ non-compliance with this mandatory provision of the statute, the appeal is not properly before us[,]” and that “the conclusion that this appeal is not properly pending before this court exhausts our jurisdiction and precludes consideration of it.” *Id.*; see also *In re Arrieta*, 612 B.R. 342 (Bankr. D.S.C. 2020) (citing *Wheeler* for its holding that the “appeals court lacked jurisdiction to hear an appeal of an order of ejectment when the tenant failed to pay the statutorily-required bond”); *Skydive Myrtle Beach, Inc. v. Horry Cnty.*, 424 S.C. 298, 818 S.E. 2d 224 (Ct. App. 2018) (appeal of magistrate’s ejectment order dismissed as moot in absence of supersedeas staying the magistrate’s ruling on the issue of right of possession of the premises).

Here, Appellant filed its notice of appeal on November 9, 2020. Appellant thereafter made no attempt to give or file an appeal bond within five days. That was a dispositive failure. Nine days after the jurisdictional, condition precedent deadline passed, the Magistrate Court, *sua sponte*,

on November 18, 2020, scheduled a bond hearing, held on November 25, 2020, and thereafter accepted a bond from Appellant. But the Magistrate Court's gracious leniency toward Appellant could not and did not revive this unperfected appeal, which must be denied and dismissed on jurisdictional grounds.

Appellant, notably, did not address this point at any time during the appeal before this Court, either by brief or oral argument.

### **PRESERVING ISSUES FOR APPEAL**

In *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000), our Supreme Court explained the rule of issue preservation on appeal in connection with the requirement to make a motion to amend or alter a judgment before the lower court, as follows:

The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments. *E.g.*, *Smith v. Phillips*, 318 S.C. 453, 458 S.E.2d 427 (1995) (appellate court generally will not address an issue unless the issue was raised to and ruled upon by the trial court); *State v. Williams*, 303 S.C. 410, 401 S.E.2d 168 (1991) (same); *Sumter Building & Loan Ass'n v. Winn*, 45 S.C. 381, 23 S.E. 29 (1895) (same).

If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review. *E.g.*, *Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton*, 311 S.C. 56, 427 S.E.2d 673 (1993); *Hoffman v. Powell*, 298 S.C. 338, 380 S.E.2d 821 (1989); *see also* Rules 52(b) and 59(e), SCRPC.

Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. *See Roche v. South Carolina Alcoholic Beverage Control Comm'n*, 263 S.C. 451, 211 S.E.2d 243 (1975) (purpose of an appeal is to determine whether the trial judge erroneously acted or failed to act and when appellant's contentions

are not presented or passed on by the trial judge, such contentions will not be considered on appeal). The requirement also serves as a keen incentive for a party to prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case. *See Brown v. Singletary*, 226 S.C. 482, 85 S.E.2d 738 (1955) (party may not neglect or ignore vices in the trial, then expect to assert those vices on appeal in case of disappointment at trial); *State v. Warren*, 207 S.C. 126, 134, 35 S.E.2d 38, 41 (1945) (same).

*I’On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000).

To be sure, this rule of issue preservation on appeal in connection with the requirement to make a motion to amend or alter a judgment before the lower court applies equally in appeals from the Magistrate Court to the Circuit Court.

Rule 19(d) of the Magistrate Court’s Rules is essentially the same as Rule 59(e), SCRCF.

*Compare* Rule 19(d) of the Magistrate Court’s Rules:

A motion to alter or amend the judgment shall be filed no later than ten (10) days after notice of the judgment, except that in cases involving landlords and tenants under Chapters 37 and 40, Title 27 of the South Carolina Code, the motion shall be filed no later than five (5) days after notice of the judgment. The court shall notify all opposing parties that the motion has been filed and shall provide those parties a copy of the motion in a manner provided for in Rule 8.

*with* Rule 59(e), SCRCF:

A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order.

Further, the statute for Ejectment of Tenants, pursuant to S.C. Code Ann. § 27-37-120, expressly provides, that this “appeal shall be heard and determined as other appeals in civil cases from the magistrate’s court.” And the South Carolina Rules of Civil Procedure, pursuant to Rule 81, SCRCF, provides that its rules “apply insofar as practicable in magistrates courts . . . to the extent they are not inconsistent with the statutes and rules governing those courts.” *See Walton v.*

*Mazda of Rock Hill*, 376 S.C. 301, 657 S.E.2d 67 (Ct. App. 2007) (“Therefore, we find Rule 56, SCRCP, applies to magistrates as members of the South Carolina court system.”); *see also State v. Tanner*, Opinion No. 2010-UP-267 (S.C. App. 5/4/2010) (Ct. App. 2010) (holding on the issue of “[w]hether the circuit court erred in considering information not included in the magistrate court’s return” was unpreserved under Rule 59(e), SCRCP).

Here, the Appellant did not first file a motion to alter or amend with the Magistrate’s Court, or otherwise “try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred,” as our Supreme Court instructed in *I’On*. Appellant accordingly has not preserved any issues for appeal, including the four issues it attempts to raise in its notice of appeal.

#### **MERITS OF THE APPEAL**

In an appeal from the Magistrate Court, it is incumbent upon the appellant to raise grounds with particularity in the notice of appeal, so that the respondent can fairly respond to, and this Court can fairly review, the grounds so raised. By statute, the appellant “shall serve a notice of appeal, stating the grounds upon which the appeal is founded.” S.C. Code Ann. § 18-7-20. “In the notice of appeal the appellant shall state in what particular or particulars he claims the judgment should have been more favorable to him.” S.C. Code Ann. § 18-7-30.

This Court then reviews the parties’ respective arguments with respect to the grounds raised with particularity in the notice of appeal *de novo*. S.C. Code Ann. § 18-7-170. “However, this broad scope of review does not require an appellate court to disregard the findings below or ignore the fact that the trial judge is in the better position to assess the credibility of the witnesses.” *Pinckney v. Warren*, 344 S.C. 382, 387-88, 544 S.E.2d 620 (2001) (citing *Dorchester County Dep’t of Soc. Servs. v. Miller*, 324 S.C. 445, 477 S.E.2d 476 (Ct. App. 1996)). “Moreover, the appellant

is not relieved of his burden of convincing the appellate court the trial judge committed error in his findings.” *Id.*; see also Jean Hoefler Toal, *et al.*, APPELLATE PRACTICE IN SOUTH CAROLINA (3d ed. 2016) at 224 (discussing *de novo* review, and explaining that, “[i]n most cases, despite the appellate court’s ability to find facts in accordance with its view of the preponderance of the evidence, the appellate court will not disregard the findings below or ignore the fact that the trial judge is in the better position to assess the credibility of the witnesses.”).

The legal grounds for the ejectment of a tenant are provided by statute, S.C. Code Ann. § 27-37-10(A), which states as follows: “The 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, (2) the term of tenancy or occupancy has ended, or (3) the terms or conditions of the lease have been violated.”

As construed by our Supreme Court, this statute must be applied with “equity and common sense.” *Kiriakides v. United Artists Communications, Inc.*, 312 S.C. 271, 276, 440 S.E. 2d 364, 366 (1993). In applying equity and common sense, a court must assess whether a breach is “material.” *Id.* In determining materiality, the following factors should be considered: “(a) the extent to which the injured party will be deprived of the benefit which he reasonably expected; (b) the extent to which the injured party can be adequately compensated [by damages] for the part of that benefit of which he will be deprived; (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.” *Id.*

Further, in the context of considering a lease option, our Supreme Court has adopted a

“fact-specific rule.” *Ingram v. Kasey*, 340 S.C. 98, 110, 531 S.E.2d 287 (2000). One seeking specific performance to exercise an option must have (1) “the ability to perform” and (2) “do equity.” *Id.*, 340 S.C. at 106-7, 531 S.E.2d 287. Equity is not available to one who “misled . . . by promising he would not exercise his option,” with an “improper ulterior motive.” *Id.* Further, “[t]he doctrines of unclean hands and equitable estoppel can be used to preclude [a party] from recovering in equity.” *Id.*, 340 S.C. at 107 n.2, 531 S.E.2d 287. “Unclean hands precludes a Respondent from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the Appellant.” *Id.* “Elements of equitable estoppel as to the party estopped are: (1) conduct by the party estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the true facts.” *Id.* “As to the party claiming the estoppel, the elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; and (2) reliance upon the conduct of the party estopped.” *Id.*

Discussing the Supreme Court’s holding in *Ingram*, The Honorable Roger M. Young, Sr., Circuit Court Judge for the Ninth Circuit, and Stephen Spitz, Professor of Law, then at the University of South Carolina School of Law, wrote as follows in a jointly authored essay published by the South Carolina Law Review:

H. She Who Seeks Equity Must Do Equity [] This is a broad principle and is used in a variety of situations. The premise is that a court may impose equitable obligations on a party as a condition of granting relief. In another fairly recent case, *Ingram v. Kasey’s Associates*, Ingram leased property with an option to purchase and told the optionee he had no plans to exercise the option. Relying on this representation, the optionee entered into a new lease with another tenant and spent \$135,000 to purchase adjacent land so the optionee could expand the leasehold estate. Ingram then notified the optionee that he did, in fact, intent to exercise his option and sued for specific performance, an equitable remedy. The South Carolina Supreme Court, also citing the unclean hands doctrine discussed

next, said that Ingram's misrepresentation regarding his plans not to exercise the option precluded him from invoking equitable remedies. Of course, under our SUEM analysis, Ingram's actions were bad, and bad guys often do not win in equity.

Roger Young & Stephen Spitz, *SUEM-Spitz Ultimate Equitable Maxim: In Equity, Good Guys Should Win and Bad Guys Should Lose*, 55 S.C. L.Rev., 175, 186 (2003).

Appellant's representations in this matter are analogous to those in *Ingram*, as highlighted above by Judge Young and Professor Spitz. Appellant cannot maintain any legal or equitable right to remain in the leased premises after representing that it would not extend the Lease and that it did not have the financial ability to pay full rent, but would "try and make this location work."<sup>2</sup> Applying the analytical framework of *Ingram*, Appellant admitted that it did not have (1) "the ability to perform" the option, and Appellant certainly did not (2) "do equity." 340 S.C. at 106-7, 531 S.E.2d 287. Instead, like *Ingram*, Appellant "misled . . . by promising he would not exercise his option," acting with an "improper ulterior motive." *Id.*

It is clear that the emails from Mr. Hartmann to Mr. Davenport stating that Appellant "couldn't afford" the rent, would not exercise the option, would be vacating the property at the expiration of the term, and would be putting "together the closing and de-branding plan" were all false representations and a concealment of material facts, that Mr. Hartmann intended Respondent to act upon, either by renegotiating the Lease terms with Appellant to provide reduced rent, a shorter lease term, or both. Further, it is clear that Hartmann had knowledge of the true facts, that Appellant had not yet "decided fully the option." Mr. Davenport testified at trial that he accepted Mr. Hartmann's representations as true, and that in reliance thereon he engaged a real estate broker and negotiated for and obtained a new tenant. Davenport further testified that Respondent would suffer financial damages if the new tenant did not take occupancy of the premises. The doctrine of unclean hands therefore applies because Appellant's representation that it would not extend the

Lease was unfair, at best. *Ingram*, 340 S.C. at 106-7, 531 S.E.2d 287. The doctrine of equitable estoppel also applies because Appellant concedes to the falsity of its representation that it would not extend the Lease, as well as its intent to influence Respondent by causing Respondent to be concerned about finding a new tenant. *Id.* Respondent relied on Appellant's misrepresentations, as wrongfully intended, by expending his time and resources to attempt to find a new tenant, which Appellant knew would be a difficult endeavor, and Respondent would now suffer additional financial damages if the new tenant that Respondent labored to find does not take occupancy of the premises.

The application of each of the five factors reflecting equity and common sense identified in *Kirikades* likewise turns on Appellant's representations that it would not extend the lease, and that it did not have the financial ability to pay full rent. Beginning with (e), Appellant's own "behavior" undermines its position. 312 S.C. 271, 440 S.E. 2d 364. The other factors similarly weigh against Appellant for the same fundamental reason. Appellant created this situation with its own representations and cannot claim to be the "injured party" referred to in (a) and (b) or one who will suffer "forfeiture" in (c). *Id.* Rather, the only injured party is Respondent (and by extension its new tenant and brokerage firm) and Appellant can suffer no forfeiture by being bound to its own representations. Appellant also cannot now claim a "likelihood" under (d) of being able to cure by paying full rent when it already represented just the opposite; and, furthermore, Respondent already reached an agreement with a new tenant, which of course cannot be undone by Appellant. *Id.* Lastly, Appellant's failure to timely pay the security deposit, a significant sum of \$30,496.00, is an additional breach that plainly supports this Application for Ejectment.

Appellant attempts to defeat the above legal analysis by raising four unpreserved issues in its notice of appeal, which are each without merit, as set forth below.

*First, Appellant argues: “There was insufficient evidence presented at trial to support a finding that the Appellant / Tenant did not validly exercise its option for an addition term as provided in the written lease.”*

This argument ignores all the evidence discussed above, namely, the critical e-mails and other documents admitted into evidence by stipulation and without objection, as well as the uncontroverted testimony of witnesses called by Respondent, and Appellant’s own choice not to call the witness who made the false representation.

This is not a case with a scant record, as Appellant’s notice of appeal suggests. This important matter, involving two sophisticated parties represented by counsel and valuable commercial property, was given due attention and fully briefed and tried before the Magistrate Court. The testimony taken and documentary evidence admitted is extensive.

*Second, Appellant argues: “There was insufficient evidence presented at trial to support a finding that the Appellant / Tenant was equitably estopped from exercising its option.”*

The answer to this second argument is the same as the first one.

*Third, Appellant argues: “The Magistrate erred in considering facts not entered into evidence at the hearing.”*

It is unclear what facts Appellant is referring to here. This argument completely lacks particularity, as required by statute. S.C. Code Ann. § 18-7-30 (“In the notice of appeal the appellant shall state in what particular or particulars he claims the judgment should have been more favorable to him.”). In any respect, everything the Magistrate Court refers to in its order was entered into evidence at the hearing.

*Fourth, Appellant argues: “There was insufficient evidence presented at trial to support a finding that Appellant / Tenant did not pay a security deposit, even though Respondent refused*

*Appellant's attempts to pay all amounts due. Further, the Magistrate Court's finding ignored the plain language of the lease which required notice of default and right to cure, neither of which were given by Respondent."*

The record, as discussed above, supports that Respondent sent a notice of default and waiver of option on September 4, 2020. That notice clearly stated that Appellant should timely vacate the leased premises by September 30, 2020. It further stated that Respondent had not received the security deposit payment, due May 8, 2020.

In response to that notice, Appellant remained in possession of the premises past September 30, 2020 and apparently intends to stay indefinitely. Also, on the eve of the end of the Lease, nearly five months late and beyond the 20-day time to cure as measured from the notice of default, on September 29, 2020, Appellant belatedly attempted to pay the security deposit that was due on May 8, 2020, in the amount of \$30,496.00. Respondent rejected that attempted payment because it was untimely and it was an inappropriate response to the notice to vacate the premises by September 30, 2020, which was based on Appellant's prior representations.

To the extent Appellant expounded upon these four unpreserved issues in its appeal brief and during the appeal hearing, such further arguments were equally unpreserved and without merit.<sup>3</sup> Appellant has not shown that any error was made by the Magistrate Court, let alone any

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<sup>3</sup> Appellant's primary argument in its appeal brief and during the appeal hearing – after failing to raise the same argument to the Magistrate Court in a motion to alter or amend, or to state the same argument with particularity in its notice of appeal – was that Respondent did not introduce sufficient evidence at trial of its reliance on Appellant's false representations. This argument is misguided. Respondent indeed presented uncontroverted testimony at trial that it relied on Appellant's false representations, specifically, by engaging the services of a broker, and entering into an agreement to lease the premises to a new tenant. That uncontroverted testimony was sufficient. Respondent was not required to introduce any superfluous documents providing ancillary details about such acts of reliance to further support its uncontroverted testimony. *See Wilburn v. Wilburn*, 743 S.E.2d 734, 742, 403 S.C. 372 (S.C. 2013) (“Wife presented testimony that the funds in each of the three disputed accounts were nonmarital property because they were

error that would warrant reversal. After consideration of the record in this case, including the Magistrate Court Return, and the arguments of the parties which were also well-briefed in submissions filed, this Court finds that the decision and judgment of the Magistrate Court is not affected by any material error of law or of fact and that the justice of the case dictates that the decision and JUDGMENT of the Magistrate Court should be and IS therefore AFFIRMED in accordance with S.C. Code Ann. § 18-7-170.<sup>4</sup>

March 26<sup>th</sup>, 2021

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Debra R. McCaslin  
Circuit Court Judge

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inherited, gifted, or acquired before the marriage. Husband adduced no evidence to contradict this testimony. Instead, Husband argues her testimony was insufficient because she failed to present any documentary evidence. However, Wife’s testimony, absent any evidence to the contrary, is sufficient to establish the source of the funds in these accounts.”) (citation omitted).

<sup>4</sup> The Court further notes that Appellant made no attempt to give or file an appeal bond within five days of the filing of its Notice of Appeal pursuant to S.C. Code Ann. § 27-37-130. The Magistrate Court’s gracious leniency toward Appellant and *sua sponte* bond hearing could not and does not revive this unperfected appeal, which, notwithstanding this Court’s affirming the decision and judgment of the Magistrate’s Court, may alternatively be dismissed and denied on jurisdictional grounds.



Charleston Common Pleas

**Case Caption:** Quality Fresca I Llc VS Kenneth R Davenport II , defendant, et al

**Case Number:** 2020CP1004936

**Type:** Order/Other

So Ordered

Debra R. McCaslin