

**THE STATE OF SOUTH CAROLINA  
In the Court of Appeals**

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**May 11 2021**

**SC Court of Appeals**

**APPEAL FROM BEAUFORT COUNTY  
Marvin H. Dukes, III, Master-in-Equity**

**Appellate Case No. 2020-001446**

**Trial Court Case No. 2020-CP-07-00155**

**SOUTH CAROLINA CVS PHARMACY, LLC, ..... Appellant,**

**vs.**

**KPP HILTON HEAD, LLC, ..... Respondent.**

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**BRIEF OF RESPONDENT**

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## **STATEMENT OF ISSUES ON APPEAL**

1. Did the Master-In-Equity correctly find the Tenant failed to exercise its option to renew a 20-year lease before the option had expired when the undisputed evidence shows the Landlord did not sign a receipt of the Registered Mail, Return Receipt Requested letter which contained the renewal notice before the expiration date.
2. Did the Master-In-Equity correctly find the Tenant failed to exercise its option to renew a 20-year lease before the option had expired when the first business day the Landlord could have signed a receipt of the Tenant's Registered Mail, Return Receipt Requested renewal notice in the ordinary course of business was after the option had expired.
3. Did the Master-In-Equity correctly find the Tenant failed to exercise an option to renew a 20-year lease before the option had expired when the Tenant's delay in posting its Registered Mail, Return Receipt Requested notice of its election to exercise its option resulted in the Registered Mail, Return Receipt Requested renewal notice arriving in the Landlord's post office and a notice that the Registered Mail, Return Receipt Requested letter could be obtained at the post office counter was placed in Landlord's post office box on a weekend during non-ordinary course of business hours.

## **STATEMENT OF THE CASE**

This appeal involves a dispute regarding a more than 20-year-old lease (the "Lease") of the CVS store on Pope Avenue on Hilton Head Island (the "Hilton Head Store") between KPP Hilton Head LLC ("KPP" or "Landlord") and South Carolina CVS Pharmacy LLC ("CVS" or "Tenant"). The dispute is whether CVS' attempt to exercise the first renewal option contained in the Lease was timely. In late 2019, KPP rejected CVS's thirteenth-hour attempt to exercise its option to renew the Lease as being untimely, rendering CVS a holdover tenant.

CVS sued, seeking a declaratory judgment it had timely exercised its Renewal Option and, although no effort or threat had been made to remove CVS from the premises, also seeking an injunction “barring Landlord from taking any action to remove Tenant . . . during the pendency of [the] action.” After limited discovery and on cross-motions for summary judgment, the Master agreed with KPP’s position and found that CVS’ attempt to exercise its Renewal Option was untimely. The Master, therefore, granted KPP’s Motion for Summary Judgment and entered judgment for KPP. (R. 4-11). This appeal followed.

The Master’s decision was correct. CVS did not exercise its option to renew the Lease during the almost 20-year life of the option. The Renewal Option expired on November 3, 2019, and the Lease Term expired on January 31, 2020. CVS is a holdover tenant.<sup>1</sup>

The parties agree there are no disputed material facts; indeed, both sought summary judgment. The issue is whether, given the undisputed facts, CVS exercised its renewal option before its option expired. The parties agree that the required renewal notice was due “*no later than*” Sunday, November 3, 2019. The parties further agree that CVS’ Registered Mail, Return Receipt Requested letter notifying KPP that CVS was exercising its renewal option arrived at the Hilton Head Post Office by 9:45 am on Saturday, November 2, 2019, but the letter was not signed for by and, therefore, was not “Delivered” to Landlord until after the November 3, 2019 deadline had passed. There is no evidence (or allegation) that Landlord ignored the Return Receipt ticket (the “Registered Mail Ticket”) that was apparently placed in its Post Office Box after the Registered Mail, Return Receipt notice of renewal letter arrived at the Hilton Head Post Office

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<sup>1</sup> KPP has never threatened to have CVS removed from the premises. Rather, the issue is primarily whether CVS should have paid and should be paying holdover rent to KPP. *See* Lease Part II, Article 26. (R. 47 ¶26).

that November 2, 2019 Saturday morning in the 2 hours and 15 minutes remaining before the Post Office counter closed for the weekend that day at noon.<sup>2</sup>

KPP contends and the Master agreed that the contractually required deadline for CVS to exercise its Lease Renewal Option was simply not met: the precise terms the Lease required for CVS to exercise the renewal option had not been complied with.

[O]ptions because unilateral, are strictly construed against the party claiming the option.

*Cotter v. James L. Tapp Co.*, 267 S.C. 647, 653, 230 S.E.2d 715, 717 (1976).

Where notice of the exercise of the option is required in a certain manner, time is of the essence and exact compliance will be required.

*33 Flavors Stores of Virginia, Inc. v. Hoffman's Candies, Inc.*, 296 S.C. 37, 40, 370 S.E.2d 293, 295 (1988) (internal citations omitted).

### **MATERIAL FACTS**

1. In May of 1998, KPP's predecessor in interest and CVS's predecessor in interest entered into the Lease. *CVS' Complaint* ("Compl.") ¶ 4 and *Exhibit A thereto* (R. 20, ¶ 4; R. 28-64); *Affidavit of Julie H. King* ("King Aff.") ¶ 3 and *Exhibit 1 thereto* (R. 147; R. 152-187).

2. On or about July 23, 1998, KPP's predecessor and CVS' predecessor entered into the First Lease Amendment. *Complaint* ¶5 and *Exhibit B thereto* (R. 20 ¶ 5; R. 65 - 70); *King Aff. ¶ 4 and Exhibit 2 thereto* (R. 147, ¶ 4; R. 189-192).

3. The Lease had a 20-year term, which was to expire January 31, 2020. *Complaint* ¶ 8 (R. 20); *CVS Motion for Temporary Restraining Order* ("Injunction Motion") ¶ 6, (R. 131, ¶ 6); *King Aff. ¶ 5* (R. 148, ¶ 5).

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<sup>2</sup> The U.S. Post Office hours for the Hilton Head Island office are shown at <https://www.postallocations.com/sc/hilton-head-island/hilton-head-island> and are not disputed.

4. The Lease provides for four, five-year renewal options. *Complaint* ¶ 12 (R. 21, ¶ 12); *Injunction Motion* ¶ 7 (R. 131, ¶ 7); *King Aff.* ¶ 5 (R. 148, ¶ 5).

5. The Lease specifies that a renewal option must be exercised -- and Landlord must be provided notice of its exercise -- **not later than** 90 days **before** the expiration of the then current term. *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)”) (R. 30, ¶ 13) (emphasis added), 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)”) (emphasis added) (R. 34-35, ¶ 3).<sup>3</sup>

6. The renewal notice deadline for the Hilton Head Store Lease was, therefore, **not later than** November 3, 2019, a Sunday. See *Compl.* ¶ 17 (R. 22, ¶ 17); *Injunction Motion* ¶ 17 (R. 132, ¶ 17); *King Aff.* ¶¶ 8, 10, and 14 (R. 148-150, ¶¶ 8, 10, and 14); *CVS’ Initial Brief at 1*.<sup>4</sup>

7. The Lease expressly provides that “Tenant may extend the Term of this Lease for each of the Renewal Options . . . **by giving Landlord notice** of each such election not later than the Required Advance Notice of Exercise of Renewal Options (as defined in Section 13 of Part I).” (Emphasis added.) (R. 34-35, ¶ 3).

8. The Lease also expressly provides that any notices pursuant to the Lease, including the notice of renewal at issue, **be signed for** by the notified party. Specifically, the Lease provides that 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**

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<sup>3</sup> There is no restriction in the Lease as to how far in advance of the expiration of the Term a Renewal Option may be exercised.

<sup>4</sup> CVS could have exercised its option at any time between May of 1998 when the Lease was first signed and November 3, 2019 when it expired.

*requested*, or by overnight courier *provided a receipt is required . . .*” (Emphasis added). *See Lease Part II, Article 27* (R. 47, ¶ 27).

9. The Lease then unambiguously provides that “[*t*]he *date of receipt* of the notice . . . shall be deemed the date of service thereof.” *See Lease Part II, Article 27* (R. 47, ¶ 27).

10. On October 9, 2019, KPP’s property manager sent an email to CVS asking whether CVS intended to renew the leases of two CVS stores it managed for KPP’s owner, both of which had identical November 3, 2019 lease renewal deadlines -- the Hilton Head Store at issue here, and CVS’ Port Royal Store. CVS’ Lease Administrator responded the next day (October 10, 2019) that CVS was renewing the Port Royal Store lease, but he was awaiting further instructions regarding whether CVS intended to renew the Hilton Head Store Lease. *King Aff. ¶ 8* (R. 148, ¶ 8).

11. CVS posted its Registered Mail, Return Receipt Requested renewal notice letter for the Port Royal Store on October 10, 2019. The landlord signed for the Registered renewal notice letter on October 21, 2019, *eleven days after CVS had posted it*, and an executed copy was emailed to CVS the next day (October 22, 2019). *King Aff. ¶ 9* (R. 149, ¶ 9).

12. CVS attempted to exercise the first lease renewal option for the Hilton Head Store at issue here a full week after it had received KPP’s receipt of CVS’s renewal for the Port Royal Store: CVS signed its Lease Renewal Option notice letter for the Hilton Head Store (the “Renewal Notice”) on October 29, 2019, but waited to post its Renewal Notice to KPP via Registered Mail, Return Receipt Requested to KPP at its Post Office Box address until the next day (Wednesday, October 30, 2019),<sup>5</sup> and its Registered Mail, Return Receipt Requested Renewal Notice did not

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<sup>5</sup> The USPS Tracking History Report, Exhibit D to the Perry Affidavit, shows that the Registered Letter did not arrive at the USPS Regional Facility in Providence, Rhode Island, where it was posted, until 11:13 PM on October 30, 2019. (R. 123).

reach the Hilton Head Post Office where KPP maintained its Post Office Box until Saturday, November 2, 2019, at 9:45 am. *Injunction Motion* ¶¶ 14-17 (R. 132, ¶¶ 14-17); *January 23, 2020 Affidavit of Peter J. Perry* (“*Perry Aff.*”) ¶¶ 12-15 (R. 78-79, ¶¶ 12-15) and *Exhibits C and D thereto*; (R. 120-121; R. 122-123).

13. Neither KPP, nor its property manager receive mail in an office. Both use a Post Office Box for their mail. Neither KPP, nor its property manager generally conduct business on weekends or holidays. In the ordinary course of their business, KPP and its property manager retrieve their mail from their Post Office Box during the customary (Monday – Friday) work week based upon the schedule and availability of the property manager’s agent, Mr. Stefen Cap. *King Aff.* ¶ 12 (R. 149, ¶ 12).

14. The only evidence presented – and it was presented by CVS -- is that, in the ordinary course of business, other real estate property owners and managers also check for their mail on non-holiday weekdays, not on weekends. *CVS’ Answers to Defendant’s Interrogatories No. 5*, “*Mr. Kibler [Plaintiff’s Expert] is expected to testify . . . 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.)*” (*Emphasis added*). (R. 278, line 8 and lines 17-20).

15. When CVS posted its Registered Mail, Return Receipt Requested Notice of Renewal Letter to KPP, there were less than 3 full “ordinary course of business” days before the renewal deadline: Wednesday, October 30, 2019 (the day the Renewal Notice Letter was posted at 11:13 PM in Providence, Rhode Island); Thursday, October 31, 2019; and Friday, November 1, 2019. *Second Perry Aff., Ex. A* (R. 311).

16. CVS' Registered Mail, Return Receipt Requested Renewal Letter was not delivered to KPP before the Renewal Option deadline expired. As of the time the deadline expired, KPP had not even been made aware "that CVS wished to renew the Hilton Head Store Lease" despite the fact that KPP had asked on October 9, 2019, and CVS' Lease Administer clearly knew of the property manager's email address, having communicated with him via email just 3 weeks earlier regarding CVS' Port Royal Store lease renewal and CVS' Hilton Head Store Lease renewal. *King Aff.* ¶ 10 (R. 149, ¶ 10); *see also King Aff.* ¶¶ 8 and 13. (R. 148-149, ¶¶ 8 and 13).

17. KPP signed for the Renewal Notice Letter at the Hilton Head Post Office on Wednesday, November 6, 2019, and the Post Office recorded it "Delivered" to KPP that day (November 6, 2019). *King Aff.* ¶ 11 (R. 149, ¶ 11); *Exhibit D to Perry Aff., the United States Postal Service Tracking History* (R. 123).

18. KPP thereafter notified CVS it rejected the Renewal Notice for the Hilton Head Store as being untimely. *Complaint ¶25 and Exhibits F and G thereto* (R. 23, ¶ 25; R. 124-126; R. 127-129); *Injunction Motion* ¶ 21 (R. 133, ¶ 21).

19. CVS has held over as a tenant but has not paid holdover rent. *King Aff.* ¶ 16 (R. 150, ¶ 16).

### **STANDARD OF REVIEW**

An appellate court uses the same standard as the trial court when reviewing a summary judgment. *Sloan v. Department of Transportation*, 379 S.C. 160, 167, 666 S.E.2d 236, 239 (2008). "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)).<sup>6</sup>

## ARGUMENTS

### I. CVS DID NOT TIMELY EXERCISE ITS OPTION TO RENEW THE LEASE.

The Master correctly found that CVS did not timely exercise its option to renew the Lease.

#### A. The Renewal Option is to be Strictly Construed Against CVS.

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, 40, 370 S.E.2d 293, 295 (Ct. App. 1988) (emphasis added) (citing *Southern Silica Mining and Manufacturing Company v. Hoefer*, 215 S.C. 480, 56 S.E.2d 321, 328 (1949)).<sup>7</sup> 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.*** 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

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<sup>6</sup> Moreover, there is no evidence either party contends need be presented beyond the record before the Master.

<sup>7</sup> As early as 1925, the Supreme Court of South Carolina recognized that extensions of less-than fee rights to real property “conferring a privilege and unilateral in its obligation, partakes of the nature of an option, in which time is ordinarily of the essence, and the accepted doctrine applicable to such contracts is that ***they should be strictly construed in favor of the grantor or optionor.***” *A.C. Tuxbury Lumber Co. v. Byrd*, 131 S.C. 32, 127 S.E. 267, 269 (1925) (emphasis added). This principle has been continuously followed. *See, e.g., Dargan v. Page*, 222 S.C. 520, 526-27, 73 S.E.2d 705 (1952); *Edwards v. Rouse*, 290 S.C. 449, 451, 351 S.E.2d 174, 176 (1986).

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.***

296 S.C. at 40, 56 S.E.2d at 295 (Emphasis added) (internal citations omitted).

Here, 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)”)* (emphasis added) (R. 30, ¶ 13), and *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)”)* (emphasis added) (R. 34-35, ¶ 3). CVS had 20 years to exercise its option. No “special circumstances warranting relief from a court of equity” exist or were even alleged regarding this deadline.

The renewal notice deadline for the Hilton Head Store Lease was, therefore, ***not later than*** Sunday, November 3, 2019. *See Complaint* ¶ 17, (R. 22, ¶ 17); *Injunction Motion* ¶ 17, (R. 132, ¶ 17); *King Aff.* ¶¶ 8, 10, and 14, (R. 148-150, ¶¶ 8, 10, and 14). CVS admits this deadline. *See CVS’ Initial Brief at p. 1.*

#### **B. No Receipt of a Timely Renewal Notice Exists.**

The Lease unambiguously requires that the Landlord actually receive notice of the Tenant’s exercise of its unilateral option to renew the Lease.

Tenant may extend the Term of this Lease for each of the Renewal Options described in Section 12 of Part I hereof . . . ***by giving Landlord notice*** of each such election not later than the Required Advance Notice of Exercise of Renewal Options (as defined in Section 13 of Part I). (Emphasis added)<sup>8</sup>

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<sup>8</sup> Section 13 of Part I provides “Required Advance Notice of Exercise of Renewal Options: 90 days prior to the expiration of the then-current term. (See Article 3 of Part II).” (R. 30, ¶ 13).

Lease Section 3 of Part II, (R. 34-35). This is then augmented by Section 27, Part II of the Lease -- the Notice provision -- which requires a receipt and makes the date of the receipt of notice the date the notice is deemed served:

#### NOTICES-

27. 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 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 and 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 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).***” (Emphasis added)

(R. 47, ¶ 27).

It is indisputable that no receipt from KPP was obtained “not later than the Required Advance Notice of Exercise of Renewal Options (as defined in Section 13 of Part I).” (R. 30, ¶ 13). That CVS’s Registered Mail, Return Receipt Requested Renewal Notice arrived at the Hilton Head Post Office on Saturday November 2, 2019 and that a Registered Mail Ticket was placed in KPP’s Post Office Box some time thereafter<sup>9</sup> does not equate to when “receipt of the notice” was obtained from KPP, and it is undisputed that the signed receipt obtained from KPP was not signed before the expiration of the renewal deadline.

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<sup>9</sup> There was no evidence offered of when the Registered Mail Ticket was actually placed in KPP Hilton Head’s Post Office Box, but KPP Hilton Head submits that is not a material issue of fact as CVS does not contend that the Registered Mail Ticket is the required Renewal Notice itself.

**C. The Landlord’s Signature was Required.**

The Lease also expressly provides that all notices, including the notice of 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). (R. 47, ¶ 27).* The Lease also unambiguously specifies that “[t]he date of receipt of the notice . . . **shall** be deemed the date of 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).” (Emphasis added). *See Lease Part II, Article 27, (R. 47, ¶ 27).*<sup>10</sup>

So, unless the parenthetical exception in Article 27 applies – i.e., “(unless the notice or demand is not received or accepted in the ordinary course of business . . .)” -- KPP itself had to actually **receive** the renewal notice timely for the Renewal Option to be effectively exercised. For KPP **to receive** the Registered Letter, Return Receipt Requested, KPP, as would any addressee, it had to present the Registered Mail Ticket the Post Office had placed in its Post Office Box and sign for the letter itself at the Post Office counter. What any addressee gets before signing for a Registered Letter is the Registered Mail Ticket in its Post Office Box or mailbox saying there is a letter for the addressee to receive by signing for it at the Post Office counter. Delivery of a Registered Mail, Return Receipt Requested letter only occurs after it has signed for the letter.<sup>11</sup>

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<sup>10</sup> 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.

<sup>11</sup> The Postal Service Tracking Report History attached as Exhibit D to the Perry Affidavit reports that the Renewal Notice was “Delivered” to KPP on November 6, 2019. (R. 123).

CVS contends that its Renewal Notice should be considered delivered to KPP on the date it was delivered to the Post Office where KPP maintained its Post Office Box and received its mail, citing two cases: *Watts-Means v. Prince George's Family Crisis Center*, 7 F.3d 40, 42 (4<sup>th</sup> Cir. 1993); and *Workman v. Bill M.*, 2017WL4863055 (D.S.C. August 26, 2017). Both are inapposite.

Neither case CVS relies upon involved Registered Mail, Return Receipt Requested letters sent to a Post Office Box address. In *Watts-Means*, “[t]he Postal Service attempted to deliver the [EEOC’s right to sue] letter” at issue timely to the addressee *at her home*; in *Workman*, the EEOC sent the right to sue letter timely *to the addressee’s home*. The *Workman* opinion makes it clear that “delivery of the notice” at issue is the key element, and delivery of notice by a Registered Mail, Return Receipt Requested letter addressed to a Post Office Box does not occur when the Registered Mail Ticket is put into the addressee’s Post Office Box, delivery of that notice occurs only after the Registered Mail Ticket is presented by the addressee at the Post Office counter. KPP acknowledges that the Registered Mail Ticket may have been delivered to its Post Office Box before the renewal deadline expired, but it is indisputable that the Renewal Notice Letter itself had not. CVS improperly conflates delivery of the Registered Mail Ticket with delivery of the Registered letter itself.

Neither case CVS relies upon involved the exercise of a lease renewal option, which South Carolina caselaw unambiguously requires be construed strictly against the option holder. 33 *Flavors Stores, supra*; *Cotter v. James L. Tapp Co., supra*. Both *Watts-Means* and *Workman* dealt with the amount of time a person allegedly discriminated against had to file suit in federal court after receiving notice from the EEOC of their right to do so. In both instances, the addressee had already declared their intention to obtain redress for the claims they wished to assert by filing

claims with the EEOC. The important rights of the optionor of real property were not at stake in either case.

**D. The Weekend Arrival Did Not Mean that the Letter Was “Not Received or Accepted in the Ordinary Course of Business.”**

KPP does not receive its mail on weekends. As expressed in the Affidavit of Julie King, KPP’s principal, “Principal Developers [the property manager] and KPP do not generally conduct business on weekends or holidays or obtain their mail on weekends or holidays. It is Principal Developers and KPP’s normal course of business to receive their mail once or twice per week during the customary work week (Monday through Friday).” Thus, in KPP’s “ordinary course of business,” a letter arriving at the Post Office on a weekend or holiday would be received by KPP no earlier than the next business day. CVS has acknowledged that in the ordinary course of business in the commercial real estate business generally, mail is received Monday through Friday, not on weekends or holidays. *See CVS’ Answers to Defendant’s Interrogatories No. 5*, “Mr. Kibler [Plaintiff’s Expert] is expected to testify . . .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.*” (Emphasis added). (R. 278, line 8 and lines 17-20). Thus, what is in the ordinary course of business for KPP is entirely consistent with what is in the ordinary course of business within its industry.

CVS does not contend that KPP refused to receive or accept the Renewal Notice in the ordinary course of KPP’s business. Instead, it contends that a letter arriving on a non-ordinary course of business day is to be “deemed” served the day it had been sent. There are several problems with this late-taken position.

First, CVS' contention would necessarily mean that a Renewal Notice which was never received, although allegedly posted to the Notice Address at any time before the expiration of the time for renewal, would be an effective Notice. This would be so even regarding a registered letter sent the very day it was due but was not delivered or, worse, was delivered several weekend days or several weekends later.<sup>12</sup> This is neither a "strict construction" of the Renewal Option required by *33 Flavors*, nor a reasonable construction of the parenthetical language.

Second, CVS's contention completely disregards what the provision is clearly intending to overcome: the actions of the landlord precluding the receipt of a timely Registered Mail, Return Receipt Requested notice by delaying the signing of the required receipt or accepting the notice (signing the courier's receipt) in the ordinary course of the landlord's business and thereby being able to claim the Notice was untimely. Had the Option Renewal Letter arrived on Friday, November 1, 2019, and had KPP not gone to the Post Office to retrieve its mail that day, the retrieval of the letter after the expiration of the deadline would not make the Notice untimely – the parenthetical exception would apply. Similarly, had the Option Renewal deadline been Monday, November 4, 2019, and had KPP not gone to the Post Office that day to obtain the Registered Mail Ticket and then gone to the Post Office counter to have the Renewal Notice delivered to it, CVS's position might have merit, but the Option Renewal Letter did not arrive on Friday, November 1, 2019, and the Renewal Option had already expired by Monday, November 4, 2019.

Third, CVS' contention requires that the Court totally disregard the holding of *33 Flavors of Virginia, Inc. v. Hoffman's Candies, Inc., supra*.

Because of its unilateral nature, an option to renew a lease ***is strictly construed against the party claiming the option***. Where, as in this case, notice of the exercise

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<sup>12</sup> Had CVS posted its Option Renewal Notice Letter on Saturday, November 2, 2019, and it been delivered the following Saturday, November 9, 2019, CVS' contention would make this a timely exercise, which would not be a strict construction and an exact compliance with the renewal option.

of the option is required in a certain manner, time is of the essence and *exact compliance will be required*. 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*.

296 S.C. at 40, 56 S.E.2d at 295 (Emphasis added) (internal citations omitted).

Here, there are no “special circumstances warranting relief” alleged or extant. KPP did not cause CVS’ failure to act timely, and its failure to go to the Post Office on Monday, November 4, 2019 – the first “ordinary course of business” business day following receipt of the Renewal Notice letter by the Post Office – did not cause CVS to miss the renewal deadline as Monday, November 4, 2019 was itself **not later than** 90 days **before** the expiration of the then current term. Monday, November 4, 2019 was beyond the Renewal Option deadline.

Failing to timely renew is solely on CVS: it had 20 years to exercise the Renewal Option; it had almost a full month’s advance notice that the Renewal Option deadline was approaching (the October 9, 2019 inquiry); it delayed in deciding whether to exercise its option to renew the Hilton Head Store Lease, and even after having recently experienced the significant time (11 days) it took to obtain a receipt from the same source as to the renewal of its Port Royal Store lease, it then further delayed both in obtaining internal sign-offs for the Lease renewal of the Hilton Head Store and then, knowing of the significant time it took to obtain a receipt from the same source as to the renewal of its Port Royal Store lease, after finally getting the Renewal Notice letter signed by the right person at CVS with only 3 “ordinary course of business” days remaining before its option expired, it waited until late the next day to actually post the Registered Mail, Return Receipt

Requested letter to KPP's Post Office Box address.<sup>13</sup> Now CVS seeks to contort the language of the Notice provisions of the Lease to avoid the required finding it simply missed the Renewal Option deadline and, therefore, lost its right to renew the Lease.

CVS' Renewal Notice letter for the Hilton Head Store was not timely; it was not signed for "not later than 90 days prior to the expiration of" the Lease Term as required by the Lease, and the failure has nothing to do with KPP acting or failing to act inconsistently with its "ordinary course of business," which did not differ from the "ordinary course of business" of others in the real estate business. As the *33 Flavor Stores* court made clear, when examining whether an option to renew a lease has been properly exercised,

***exact compliance will be required.*** . . . 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.***

296 S.C. at 40, 56 S.E.2d at 295 (Emphasis added) (internal citations omitted).

There is no "special circumstance [here] warranting relief" from the precise requirements of the Lease. There is no allegation that KPP somehow lulled CVS into missing the option deadline. There is no other allegation that KPP did ***anything***, let alone anything untoward, to cause CVS to miss the Lease Renewal Option deadline. KPP cannot reasonably be accused of bad faith actions because it did not have its agent go to the Post Office in the 2 ¼ hours between 9:45 am and noon on Saturday, November 2, 2019, a "non-ordinary course of business" day, to see if a

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<sup>13</sup> CVS seeks to somehow use the fact that KPP Hilton Head only had a Post Office Box address to excuse its failure to meet the option renewal deadline. The fact that KPP used a Post Office Box address was not new or unknown, *see King Aff. ¶ 13 and Exhibits 4, 5, and 6 thereto*, (R. 149-150, ¶ 13; R. 195-197; R. 198-200; R. 201-202); and CVS had itself not only used the same Post Office Box address to provide Notice of Renewal for its Port Royal Store, but had experienced the time that required for the Notice to be received.

Registered letter from CVS – a letter KPP had never been advised to expect<sup>14</sup> -- had come that morning. So, too, there is no other circumstance – no unusual weather or postal disruption or Post Office closure or the like -- which impeded delivery of CVS' Renewal Letter. Rather, the meager time -- less than 3 ordinary course of business days -- CVS allowed for delivery (October 30 – November 1) was simply inadequate.<sup>15</sup>

### CONCLUSION

The simple fact is, CVS missed the requisite Renewal Option deadline, and it has no one to blame for missing that deadline but itself. CVS had 20 years to exercise its option. KPP asked CVS in early October 2019 whether it intended to renew. CVS exercised its renewal of the Port Royal Store on October 10, 2019 and experienced that it took *11 days* for that renewal to be signed for by the same management entity that managed the Hilton Head Store, yet CVS still dithered regarding the Hilton Head Store. When CVS finally and belatedly decided to renew the Hilton Head Store Lease, it did absolutely nothing to make sure its required notice would be timely: the October 29, 2019 Registered Mail, Return Receipt Renewal Letter was not even posted until late *the next day*; the overnight courier option expressly authorized by Part II, Article 27 was not used, even knowing it had taken 11 days for the Port Royal Store renewal to be signed for;<sup>16</sup> and no other actions were taken to assure a timely renewal. CVS just acted as if it did not have to strictly comply with the option deadline clearly and unambiguously contained in the Lease. *33 Flavor Stores of*

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<sup>14</sup> CVS claims to have sent KPP an email copy of the Registered Letter, *see* Compl. ¶ 24 (R. 23, ¶ 24), but the addressee (Anita Fullam) had not been an employee of KPP or its property manager for more than 4 years, and the only evidence is that the email – which was not an effective service method per the Lease in any event -- was never received. King Aff. ¶ 13 (R. 149-150, ¶ 13).

<sup>15</sup> The fact that CVS actually waited a day to post the October 29, 2019 Renewal Letter under the time circumstances was either negligence or unfounded hubris.

<sup>16</sup> CVS did not even reach out to seek to obtain a physical address to have a courier go to or to have KPP agree to accept the Renewal via email.

*Virginia, Inc. v. Hoffman's Candies, Inc., supra*, mandates the result: CVS's right of renewal regarding the Hilton Head Store was lost as its required notice was "not given in accordance with the provisions of the lease."

The Court should affirm the judgment.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY  
Marvin H. Dukes, III, Master-in-Equity

Appellate Case No. 2020-001446

Trial Court Case No. 2020-CP-07-00155

SOUTH CAROLINA CVS PHARMACY, LLC, ..... Appellant,

vs.

KPP HILTON HEAD, LLC, ..... Respondent.

**CERTIFICATE OF COUNSEL**

The undersigned hereby certify that Final Brief of Respondent in the above-referenced matter complies with Rule 211(b), SCACR.

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