THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
May 13 2021
SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
DEBRA R. MCCASLIN, CIRCUIT COURT JUDGE
Case No.: 2020-CP-10-04936

Quality Fresca I, LLC, ...Appellant,

vs.

Kenneth R. Davenport II, Personal Representative of the Estate of Kenneth R. Davenport, ... Respondent,

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PETITION FOR WRIT OF SUPERSEDEAS

Appellant Quality Fresca I, LLC d/b/a Moe's Southwest Grill (hereafter referred to as "Tenant") moves this Honorable Court, pursuant to Rule 241(c), SCACR, for an order of supersedeas permitting Tenant to remain in possession of certain commercial property which it occupies by virtue of an Amendment, Assumption and Amendment of Lease[1] (hereafter "Covid-19 Amendment") executed by and between Tenant and Respondent Kenneth R. Davenport II, P.R. of the Estate of Kenneth R. Davenport (hereafter "Landlord"), with such supersedeas to remain in effect until final decision of this Court. Tenant assumed responsibility for the existing lease, for commercial restaurant space on King Street in Downtown Charleston, from a prior commercial tenant with agreement of the Landlord during the time all restaurants in Charleston were closed by government mandate related to the onset of the Covid-19 pandemic.

[1] **Exhibit 1** to this pleading is a copy of the Amendment, Assumption and Amendment of Lease dated May 8, 2020.

Alternatively, Tenant seeks an order of this Court continuing in effect an appeal bond issued by the magistrate court in this case, under which bond Tenant has been performing in good faith and occupying the subject premises during the appeal of this matter from the magistrate's court through the conclusion of an appeal to the circuit court. Attached hereto as **Exhibit 2** is an appeal bond issued by the Magistrate' Court during the term of the appeal to the circuit court, the terms of which have been fully complied with by Tenant since the appeal bond was issued.

Pursuant to the terms of that appeal bond, Tenant has been paying rent in accordance with the lease. The appeal bond permits Landlord to increase rental or other financial obligations due from Tenant pursuant to terms of lease as a condition of the appeal bond.

Attached hereto as **Exhibit 3** is the affidavit of Timothy Baynes, who is an Account Manager for TKT Certified Public Accounts and who maintains the accounts payable for Tenant, which details all funds due in connection with the execution of the Covid-19 Amendment were paid to and accepted by Landlord. The affidavit also confirms that rent due and paid during the appeal before circuit court, as well as rent paid pursuant to the Appeal Bond dated November 25, 2020, has been timely and fully paid by Tenant and accepted by Landlord. The affidavit also verifies that Tenant is current on all financial obligations to Landlord as of the filing of this Petition, including a monthly rental payment made (and accepted by Landlord) after this appeal was filed.

In support of the relief requested herein, Tenant would show as follows:

1. On April 8, 2021, Tenant timely filed a motion for reconsideration of the final order of the circuit court that affirmed the magistrate's court order of eviction.

2. At the same time, Tenant filed a Motion to Extend Bond, requesting the circuit court continue the magistrate's appeal bond to remain in place for a period of thirty (30) days to permit Tenant to file this appeal in the event relief was not granted by the circuit court. **Exhibit 4.**

3. The circuit court declined to address the relief requested regarding extension of the appeal bond. **Exhibit 5**. Landlord did not object to, or file a response to, the motion to extend the appeal bond.

4. Upon instructions of the circuit court, the parties fully briefed the issues raised in the motion to reconsider on April 22, 2021.

5. By Form 4 order filed April 27, 2021, the circuit court denied Tenant's motion for reconsideration. **Exhibit 6.**[2]

6. Tenant timely filed and served its Notice of Appeal with this Court on April 29, 2021. A copy of the Notice of Appeal is attached hereto as **Exhibit 7** as required by Rule 241(d)(3).

GROUNDS FOR SUPERSEDEAS

Pursuant to Rule 241(b)(10, SCACR, there is no automatic supersedeas in an appeal from an order of ejectment. As a result, Tenant affirmatively requests issuance of a supersedeas by this Honorable Court to maintain the status quo, *i.e.,* Tenant occupation of the commercial space pursuant to the terms of the Covid-19 Amendment, with Landlord receiving full compensation for commercial rental of the space from Tenant. Landlord is being fully compensated for Tenant's

[2] Exhibit 6 attached hereto is not a certified copy as required by Rule 241(d)(3), although this attachment was obtained directly from the Charleston County Clerk of Court's website, and the undersigned certifies that Exhibit F as attached hereto is a true and correct copy of the April 27, 2021 order denying reconsideration that is on file with the Charleston County Clerk of Court.

use of the space pursuant to the Covid-19 Amendment and Tenant's election of right to exercise renewal for a five-year term, which option was exercised prior to the expiration of the Covid-19 Amendment and original lease. (See Exhibit 3).

Alternatively, Tenant requests this Court to issue an order continuing the terms of the Magistrate's Appeal bond during the pendency of this appeal and for a period of thirty (30) days after any final order of this Court on the merits of the appeal currently pending.

Pursuant to Rule 241(d)(2), Tenant has sought relief from the trial court to extend the terms of the appeal bond prior to requesting supersedeas from this Court, in that Tenant filed a motion with the circuit court to extend bond. (See Exhibit 4). The circuit court did not rule on the motion, which remains outstanding. On information and belief, further request for a stay pending appeal to the Court would be unavailing. Further, Tenant will sustain irreversible damages if a supersedeas is not granted, and Tenant's significant likelihood of success on the merit will be rendered moot if the status quo is not maintained.

Landlord has been, and is continuing to be, fully paid for Tenant's occupancy of the commercial premises at issue.

FACTUAL BACKGROUND

In May 2020, Tenant assumed a lease originally executed by and between Landlord and a third-party for commercial restaurant space on King Street in Charleston. At the time of execution of that Covid-19 Amendment, the country was in the early days of the Covid-19 pandemic, and restaurants in South Carolina were operating at a severely restricted manner, if at all, pursuant to Section 1 of Executive Order 2020-05008 issued by Governor Henry McMaster and effective Monday, May 11, 2020. That Executive Order permitted "limited indoor, on-premises customer

dining" for restaurants in the state and "issued by, or any other state or federal public official." (McMaster Executive Order 2020-05-08). Nonetheless, Tenant persisted in its operations, and prior to the expiration of the lease which Tenant assumed, Tenant exercised its option under those terms to renew the lease for a five-year period, an option which had been specifically incorporated into the Covid-19 Amendment executed in May 2020. (See Exhibit 1).

After Tenant exercised that option to renew the lease for a five-year period, Landlord brought this action seeking to eject Tenant, claiming that it was not fair for Tenant to exercise the option when Landlord had exerted some minimal effort to locate a new tenant because of the potential that the option would not be exercised. The writ of ejectment was granted, and an appeal bond issued by the Magistrate, the terms of which have allowed for Tenant to remain in place and Landlord to be fully compensated for such use of the premises during these proceedings, including the appeal before the circuit court.

The factual and legal errors during the proceedings below are fully explored in Tenant's Memorandum in Support of its Motion to Reconsider, a copy of which is attached hereto as **Exhibit 8.**

Tenant's request for supersedeas seeks an order of this Court maintaining the *status quo*, *i.e.,* Tenant continuing to occupy and use the space for commercial purposes while paying Landlord pursuant to the terms of the appeal bond issued by the Magistrate's Court. The most recent payment to Landlord by Tenant was made the day the Notice of Appeal in this matter was filed and served. (See Exhibit C). The payment was accepted, and Tenant remains in good standing on all financial obligations to Landlord.

RELIEF REQUESTED

I. THE PURPOSES OF SUPERSEDEAS ARE EVIDENT AND WOULD BE EQUITABLE IN THIS MATTER.

Tenant seeks an order of this court granting a supersedeas, *i.e.,* to maintain the *status quo.* "The purpose of a supersedeas is to stay proceedings in the trial court to preserve the *status quo* pending the determination of the appeal… and to preserve to appellant the fruits of a meritorious appeal where they might otherwise be lost to him." *Graham v. Graham*, 301 S.C. 128, 390 S.E.2d 469 (Ct.App. 1990) (citations omitted).

In balancing the equities between the parties on this Petition, it should be noted that at the time Tenant assumed the amended lease, much uncertainty existed regarding the Covid-19 pandemic, particularly for restaurants in South Carolina who were operating at a severely reduced level, if at all, pursuant to state executive order.[3] Tenant nevertheless survived, despite Covid-19 and despite efforts of Landlord to evict it from its commercial space.

However, Tenant is informed and believes that the absence of a supersedeas would create an immediately enforceable writ of ejectment, allowing Landlord to evict Tenant and thereby cause an immediate, complete closure of Tenant's business, with attendant immediate and permanent loss of income. Alternatively, grant of the supersedeas would allow Tenant to remain in the premises pending appeal without any harm to Landlord, as Landlord will continue to receive full rental for the premises, with provisions existent whereby Landlord is able to adjust rental or other costs as necessary.

[3] The South Carolina Restaurant Association guidelines were most recently amended on March 8, 2021. https://cdn.ymaws.com/www.scrla.org/resource/resmgr/coronavirus/SC_Restaurant_Guidelines_3.8.pdf

II. SIGNIFICANT LEGAL ISSUES EXIST IN THIS MERITORIOUS APPEAL THAT WARRANT SUPERSEDEAS.

In the absence of an order of supersedeas staying the magistrate's court order of ejectment, "the fruits of a meritorious appeal where they might otherwise be lost" to Tenant. *Graham v. Graham, supra.* Tenant is informed and believes there are significant issues of law raised in this appeal that make it meritorious.

The record establishes that Landlord might have had an intended successor tenant for the premises at the time of the hearing before the magistrate's court, but insufficient evidence was introduced to identify that potential tenant. In contrast, the record is clear that the prospective tenant, who had been located after mere making of a few phone calls, was free to walk away if Tenant remained in the commercial space. And the record is clear that the prospective tenant was allowed to walk away from any proposed lease agreement being offered or considered, without consequence, thus Landlord has not suffered any financial loss whatsoever.[4] Instead, Landlord has maintained an income-producing asset in the form of Tenant's honoring of the terms of the lease, its renewal, and continued occupancy.

CONCLUSION

Tenant respectfully asserts that a supersedeas is appropriate here, in that there is significant upside for both parties by allowing the terms of the Magistrate's court appeal bond to remain in effect during the pendency of this appeal. Tenant will sustain irreversible damages if a supersedeas is not granted, and Tenant is further informed and believes it appeal has significant likelihood of success on the merits.

[4] The Covid-19 Amendment, under which Tenant assumed responsibility for the existing lease, provided for deferred rental for three months in 2020, and all deferred rent has since been paid back, so Landlord is financially whole vis-à-vis Tenant.

Wherefore, Tenant respectfully moves for an order of this Court granting a supersedeas pending appeal, and allowing the terms of the Magistrate's court appeal bond Exhibit C to remain in effect during the pendency of this appeal.

Tenant's counsel received the trial court transcript today and has so notified this Court by separate mailing this date, so the timeline for Tenant' initial brief has begun. Rule 208(a)(1), SCACR.

Respectfully submitted,

s/ Desa Ballard
Desa Ballard
Harvey M. Watson III

BALLARD & WATSON
226 State Street
West Columbia, SC 29169
Telephone 803.796.9299
Facsimile 803.796.1066
desab@desaballard.com
harvey@desaballard.com

Theodore Huge
HARRIS & HUGE LLC
180 Spring Street
Charleston, SC 29403
Telephone 843.805.8031
Facsimile 843.636.3375
ted@harrisnadhuge.com

ATTORNEYS FOR APPELLANT

May 13, 2021



ASSIGNMENT, ASSUMPTION AND AMENDMENT TO LEASE AGREEMENT

THIS ASSIGNMENT, ASSUMPTION AND AMENDMENT TO LEASE AGREEMENT (this "Amendment") is entered as of May 08, 2020 (the "Effective Date") by and among **THE ESTATE OF KENNETH R. DAVENPORT, BY KENNETH R. DAVENPORT II, PERSONAL REPRESENTATIVE**, with a mailing address of 101 Old Trolley Road, Summerville, South Carolina 29485 ("Landlord"), **MSG KING STREET, LLC**, a Florida limited liability company, with a mailing address of 450-106 State Road 13 North #213, St. Johns, Florida 32259 ("Assignor"), and **QUALITY FRESCA I, LLC**, a Delaware limited liability company, with an address at 4700 Falls of Neuse Road, Suite 400, Raleigh, North Carolina 27609 ("Assignee").

WITNESSETH:

WHEREAS, Landlord and Assignor are parties to that certain lease dated as of September 25, 2013, together with any and all assignments, amendments, modifications, letter amendments, letter agreements, supplements and/or extensions thereto, as set forth on Exhibit A attached hereto (the "Lease"), pursuant to which Assignor leases from Landlord certain real property owned by Landlord located at 381 King Street, Charleston, South Carolina 29401 (the "Premises");

WHEREAS, Assignor and Assignee are parties to that certain Asset Purchase Agreement, dated as of November 22, 2019 (as amended, restated, supplemented and modified from time to time, the "Purchase Agreement"), by and among Assignor, as seller, Assignee, as purchaser, and the other parties thereto;

WHEREAS, pursuant to the Purchase Agreement and this Amendment, Assignor intends to assign, effective as of the closing of the transactions contemplated by the Purchase Agreement, which occurred on March 9, 2020 (the "Closing Date"), all of Assignor's right, title and interest in and to the Lease to Assignee, and Assignee desires to accept such assignment of the Lease from Assignor and to assume Assignor's obligations under the Lease accruing on and after the Closing Date;

WHEREAS, Assignor and Assignee desire Landlord's consent to such assignment, and subject to the terms and conditions set forth in this Amendment, Landlord is willing to consent to such assignment; and

WHEREAS, the parties desire also to amend the Lease as set forth herein.

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and with the intent to be legally bound, the parties agree as follows:

1. Assignment and Assumption of Lease. Subject to the terms and conditions of the Purchase Agreement (including, without limitation, Section 2.5 of the Purchase Agreement), effective as of the Closing Date, Assignor hereby assigns, transfers, and conveys unto Assignee all right, title and interest of Assignor in, to and under the Lease, and Assignee hereby accepts the

2" = "2" "SGR/22670244.1" "" SGR/22670244.1

assignment of the Lease from Assignor and assumes all of the obligations imposed upon the lessee under the Lease which accrue from and after the Closing Date.

2. Consent to Assignment; Release. Landlord hereby consents to the assignment of the Lease to Assignee and of the assignment to Assignee of Assignor's right, title and interest as tenant under the Lease. Landlord hereby releases Assignor, Assignor's predecessors-in-interest under the Lease (to the extent applicable), and any and all guarantors under the Lease, including without limitation Welcome to Moe's, Inc., a Florida corporation, from any and all claims and obligations arising and accruing from and after the Closing Date. The foregoing release hereby given shall not be deemed a waiver of any rights Landlord may have against Assignor by reason of any breach by Assignor prior to the Closing Date nor as an estoppel of the assertion of any such rights by Landlord against Assignor.

3. Rights of Assignor. Landlord acknowledges and agrees that from and after the Closing Date, Assignee shall be entitled to exercise any of Assignor's options or rights afforded to Assignor, as tenant under the Lease, pursuant to the terms and conditions provided therein, including, but not limited to, tenant's option to extend the term of the Lease for two (2) additional five (5) year periods as set forth in Section B.2 of the Lease.

4. Rent and Security Deposits.

a. Landlord hereby agrees to reduce the monthly base rent due under the Lease by fifty percent (50%) for the months of April 2020, May 2020 and June 2020 (collectively, the "Deferral Period") to $3,812.00, which Assignee shall pay to Landlord on the date the monthly base rent is due for such months under the Lease (provided that such payment of April 2020 and May 2020 rent may be made within two (2) business days of the Effective Date hereof); provided, however, notwithstanding the foregoing, during the Deferral Period Assignee shall still remain responsible for the timely payment of 100% of CAM and any additional rent that Assignee is obligated to pay to Landlord pursuant to the terms of the Lease. Within two (2) business days of the Effective Date hereof, Assignee shall pay to Landlord the sum of $11,182.56, which shall constitute the fifty percent (50%) payment of monthly base rent for April 2020, the fifty percent (50%) payment of monthly base rent for May 2020, all CAM for April 2020, all CAM for May 2020 and applicable sales tax.

b. Commencing on July 1, 2020 and continuing on the first day of each calendar month thereafter up through and including December 1, 2020, Assignee shall pay Landlord, in addition to the regular monthly base rent, CAM, and other additional rental payments due on such dates as provided in the Lease, an additional monthly amount of $1,906.00, which equals 1/6th of the aggregate base rent amounts that were deferred and unpaid during the Deferral Period.

c. On the Effective Date, 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. Provided that Assignee is not then in default under the Lease (subject to any

applicable notice and cure rights), fifty percent (50%) of the Security Deposit (or the balance of any remaining Security Deposit if applied to any shortfall of amounts to be paid by Assignee under the Lease) shall be returned to Assignee (or Assignor's designee) no later than January 31, 2022 and the remaining fifty percent (50%) of the Security Deposit (or the balance of any remaining Security Deposit if applied to any shortfall of amounts to be paid by Assignee under the Lease) shall be returned to Assignee at the end of the lease term, as may be extended. Landlord shall not be required to pay Assignee any interest on the Security Deposit.

5. Consent to Re-Assignment. Landlord hereby consents to any assignment of the Lease from Assignee to Assignor (whether by voluntary assignment or collateral assignment). For the avoidance of doubt, Assignor shall have no obligation to accept any assignment of the Lease or assume any obligations of Assignee under the Lease, and any election to do so shall be in Assignor's sole and absolute discretion.

6. Governing Law. This Amendment, and all claims, disputes and actions relating hereto, will be governed by and construed and enforced in accordance with the laws of the State of South Carolina without regard to principles of conflicts of laws.

7. Amendment. This Amendment may be amended or modified only by means of a written instrument executed by all of the parties.

8. Successors and Assigns. This Amendment will bind and inure to the benefit of Landlord, Assignor, and Assignee and their respective successors and permitted assigns.

9. Execution and Counterparts. This Amendment may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same agreement. Signatures of the parties transmitted by facsimile or in portable document format (.pdf) will be deemed to be their original signatures for all purposes.

10. Effect of Amendment. Except as modified herein, the Lease shall be and remain in full force and effect. In the event of any conflict between the terms and provisions of the Lease and this Amendment, the terms and provisions of this Amendment shall prevail.

[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF, the parties have caused this Amendment to be duly executed on the Effective Date.

LANDLORD:

By: _____
Name: **ESTATE OF KENNETH R. DAVENPORT BY KENNETH R. DAVENPORT II, PERSONAL REPRESENTATIVE**

ASSIGNOR:

MSG KING STREET, LLC, a Florida limited liability company

By: _____
Name: Brad Chasteen
Title: Manager

ASSIGNEE:

QUALITY FRESCA I, LLC.
a Delaware limited liability company

By: _____
Name: Matthew Alley
Title: Authorized Person

Exhibit A

List of Lease Documents

1. Retail Lease, dated September 25, 2013
2. Lease Termination Agreement, dated September 25, 2013
3. Assignment, Assumption and Amendment of Lease, dated October 16, 2018, by and among Ochlocknee Ventures, LLC, MSG King Street, LLC, Kenneth R. Davenport and Cary Chastain
4. Lease Guaranty, dated September 25, 2013, from Cary Chastain
5. Lease Guaranty, dated October 16, 2018, from Welcome to Moe's, Inc.

Exhibit D
Tenant Correspondence

Gmail **Kenneth Davenport <kenneth@jacksondavenport.com>**

RE: Moes 381 King St

1 message

Bob Hartmann <bob.hartmann@qrgllc.com> Mon, Aug 24, 2020 at 11:46 AM
To: "kenneth@jacksondavenport.com" <kenneth@jacksondavenport.com>
Cc: Steven Milonas <steven@danielravenel.com>, Daniel Ravenel <daniel@danielravenel.com>

Kenneth,

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.

Best regards,

Bob Hartmann

bob.hartmann@qrgllc.com

214-577-6627

QRG
QUALITY RESTAURANT GROUP LLC

From: Bob Hartmann
Sent: Thursday, 6 August, 2020 4:31 PM
To: kenneth@jacksondavenport.com
Subject: RE: Moes 381 King St

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.

Best regards,

Bob Hartmann

bob.hartmann@qrgllc.com

214-577-6627

QUALITY RESTAURANT GROUP LLC

From: kenneth@jacksondavenport.com <kenneth@jacksondavenport.com>
Sent: Thursday, 6 August, 2020 4:13 PM
To: Bob Hartmann <bob.hartmann@QRGLLC.COM>
Subject: RE: Moes 381 King St

Bob,

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?

Kindest regards,

Kenneth Davenport

From: Bob Hartmann <bob.hartmann@QRGLLC.COM>
Sent: Monday, July 27, 2020 3:36 PM
To: Steven Milonas <steven@danielravenel.com>; Daniel Ravenel <daniel@danielravenel.com>; Kenneth Davenport <kenneth@jacksondavenport.com>
Subject: RE: Moes 381 King St

Thanks Steven. I apologize for the delay in getting this proposal sent over.

As I mentioned to Steven, our sales here are pretty rough. We are down 64% since we opened back up and year-to-date we are down 45%. Thus, we have been taking losses at this unit since covid started back in March. Prior to Covid the unit performed fine (below average sales, but still made some money). With sales the way they are now, the only thing that makes sense for us is to pay you a percentage of sales until we hit a minimum threshold to support the unit. Thus, our proposal is as such:

- Tenant will pay a gross occupancy (Rent + all expenses) of 5% of gross revenues (gross sales minus

normal discounts), paid within 10 days after the end of each fiscal month
- When sales for any fiscal quarter (trailing 3-month period) exceed $165,000, Tenant will pay 8% of gross revenues, paid within 10 days after the end of each fiscal month after the quarter in which sales exceed $165,000
- When sales for any fiscal quarter (trailing 3-month period) exceed $200,000, Tenant will pay 10% of gross revenues, paid within 10 days after the end of each fiscal month after the quarter in which sales exceed $200,000
- When sales for any fiscal quarter (trailing 3-month period) exceed $280,000, Tenant will pay a fixed occupancy of $9,333.33 per month
- Term will be month-to-month until Tenant starts paying fixed occupancy rent
- The month-to-month lease term will end once Tenant exceeds $280,000 in a fiscal quarter and the new termination date will be 60 months from the last day of the quarter in which Tenant's sales hit the threshold
- Occupancy costs will increase 2.0% per year for the 5-year term

We will need to get an attorney to draft the language for these terms in amendment form to the existing lease. If you have any questions or if I haven't made anything clear, please feel free to call to discuss.

The good news is that the restaurant performed well in January and February with sales of $118, 097 (up 24% from 2019) and $115,248 (up 21%), respectively. The bad news is that is it running very slow right now with limited foot traffic downtown. Thru 6 days last week, we did $5,978 vs $16,337 (down 63% from 2019) and for the first 13 days of this period, we did $11,975 vs $35,899 (down 66%). Thus, we are taking losses right now and can't afford any more than we are offering. We see the month-to-month term as a mutually beneficial situation. If we can't turn this into a profitable unit, we will call it a day. If our sales don't move up fast enough and you have another tenant that will take the space, you can let us know.

Best regards,

Bob Hartmann

bob.hartmann@qrgllc.com

214-577-6627

QRG

QUALITY RESTAURANT GROUP LLC

From: Steven Milonas <steven@danielravenel.com>
Sent: Wednesday, 22 July, 2020 3:53 PM
To: Daniel Ravenel <daniel@danielravenel.com>; Kenneth Davenport <kenneth@jacksondavenport.com>; Bob Hartmann <bob.hartmann@QRGLLC.COM>
Subject: Moes 381 King St

Good afternoon,

Bob Hartmann here is the new VP of Quality Fresca. He has reached out to me to solidify the upcoming lease

for the restaurant. As we all know we are in interesting times right now for hospitality. Bob please let us know your proposal for the lease renewal.

Thank you,

--

Steven Milonas
Property Manager
Daniel Ravenel Real Estate
530 Savannah Highway Unit A
Charleston, SC 29407
www.danielravenelrentals.com
(o) 843-723-2763 (f) 843-637-3329

Exhibit E
Default Letter

HELLMAN YATES & TISDALE

ATTORNEYS AND COUNSELORS AT LAW

BRIAN A. HELLMAN
DIRECT VOICE 843 414-9753
BH@HELLMANYATES.COM

HELLMAN YATES & TISDALE, PA
105 BROAD STREET, THIRD FLOOR
CHARLESTON, SOUTH CAROLINA 29401
V 843 266-9099
F 843 266-9188

September 4, 2020

Via Email and Certified Mail, Return Receipt Requested

Mr. Matt Ailey
Quality Fresca I, LLC
4700 Falls of Nuese Road, Suite 400
Raleigh, NC 27609

Re: Default of and waiver of option under that certain Retail Lease dated September 25, 2013, by and between Quality Fresca I, LLC as assignee of MSG King Street, LLC, as assignee of Ochlocknee Ventures, LLC, as Tenant, and Kenneth R. Davenport, as Landlord (the "Lease").

Dear Mr. Ailey:

This firm represents the Estate of Kenneth R. Davenport ("Landlord") in regards to the above Lease. Landlord has requested that we provide this Notice of Default waiver of option under the terms of the Lease.

Pursuant to Paragraph 5 of the Lease, Tenant is required to maintain normal business hours of 10:00 a.m. to 6:00 p.m., six (6) days a week. Landlord brought this issue to Tenant's attention, and Tenant claimed that Covid-19 excuses this performance. Landlord directs Tenant to that certain Assignment, Assumption and Amendment to Lease Agreement (the "Assignment") entered into as of May 8, 2020, wherein, if not void due to failure of consideration, the parties agree that the Lease is in full force and effect. As of May 8, many restaurants were operating in the City of Charleston. Currently, it appears that all of the other Moe's franchises are currently operating in the City of Charleston. Given the obligation of Tenant to pay Percentage Rent, Tenant's refusal to operate as required by the Lease works a fundamental unfairness on Landlord. In addition, Tenant did not comply with the terms of Section 4.c. of the Assignment, never depositing the Security Deposit with Landlord, nor has Tenant tendered the proper amounts of CAM, Taxes, and Insurance as required by the Assignment.

Furthermore, Landlord is in receipt of Tenant's emails dated July 27, August 6, and August 24, 2020, whereby Bob Hartmann advised Landlord that Tenant was suffering financial difficulties, suggested that Landlord seek another tenant that could pay the rent, and clearly stated that Tenant would be vacating the Premises at the expiration of the then-current term, September 30.

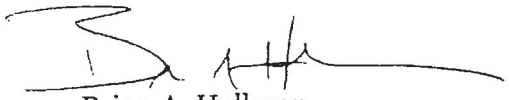
As Tenant is aware, Landlord accepted Tenant's notice, pursuant to the above emails that it would be vacating the Premises and not exercising the option to extend the Lease due to Tenant's inability to comply with the financial requirements of the Lease. It is well settled South Carolina law that a Tenant, having given Landlord assurances it will not exercise an option, is thereafter estopped from doing so. As such, given the foregoing assurances and the fact that

Tenant has failed to pay the anticipated and full amount of rent and the Security Deposit as required by the Assignment, Tenant has no right to exercise an option to extend the Lease.

In reliance on Tenant's representations and suggestion to obtain another tenant, Landlord did, in fact, seek another tenant for the Premises and found a tenant. As such, Landlord does not accept Tenant's notice to exercise an option to extend the Lease as Tenant waived said option. Landlord intends to seek damages from Tenant for the resulting damage to Landlord if Tenant fails to timely vacate the Premises by the end of September.

With kindest regards, I am

Very truly yours,



Brian A. Hellman

From: Steven Milonas <steven@danielravenel.com>
Sent: Wednesday, 22 July, 2020 3:53 PM
To: Daniel Ravenel <daniel@danielravenel.com>; Kenneth Davenport <kenneth@jacksondavenport.com>; Bob Hartmann <bob.hartmann@QRGLLC.COM>
Subject: Moes 381 King St

Good afternoon,

Bob Hartmann here is the new VP of Quality Fresca. He has reached out to me to solidify the upcoming lease for the restaurant. As we all know we are in interesting times right now for hospitality. Bob please let us know your proposal for the lease renewal.

Thank you,

--
Steven Milonas
Property Manager
Daniel Ravenel Real Estate
530 Savannah Highway Unit A
Charleston, SC 29407
www.danielravenelrentals.com
(o) 843-723-2763 (f) 843-637-3329

QF 1

From: Bob Hartmann <bob.hartmann@QRGLLC.COM>
Sent: Monday, July 27, 2020 3:36 PM
To: Steven Milonas <steven@danielravenel.com>; Daniel Ravenel <daniel@danielravenel.com>; Kenneth Davenport <kenneth@jacksondavenport.com>
Subject: RE: Moes 381 King St

Thanks Steven. I apologize for the delay in getting this proposal sent over.

As I mentioned to Steven, our sales here are pretty rough. We are down 64% since we opened back up and year-to-date we are down 45%. Thus, we have been taking losses at this unit since covid started back in March. Prior to Covid the unit performed fine (below average sales, but still made some money). With sales the way they are now, the only thing that makes sense for us is to pay you a percentage of sales until we hit a minimum threshold to support the unit. Thus, our proposal is as such:

- Tenant will pay a gross occupancy (Rent + all expenses) of 5% of gross revenues (gross sales minus normal discounts), paid within 10 days after the end of each fiscal month
- When sales for any fiscal quarter (trailing 3-month period) exceed $165,000, Tenant will pay 8% of gross revenues, paid within 10 days after the end of each fiscal month after the quarter in which sales exceed $165,000
- When sales for any fiscal quarter (trailing 3-month period) exceed $200,000, Tenant will pay 10% of gross revenues, paid within 10 days after the end of each fiscal month after the quarter in which sales exceed $200,000
- When sales for any fiscal quarter (trailing 3-month period) exceed $280,000, Tenant will pay a fixed occupancy of $9,333.33 per month
- Term will be month-to-month until Tenant starts paying fixed occupancy rent
- The month-to-month lease term will end once Tenant exceeds $280,000 in a fiscal quarter and the new termination date will be 60 months from the last day of the quarter in which Tenant's sales hit the threshold
- Occupancy costs will increase 2.0% per year for the 5-year term

We will need to get an attorney to draft the language for these terms in amendment form to the existing lease. If you have any questions or if I haven't made anything clear, please feel free to call to discuss.

The good news is that the restaurant performed well in January and February with sales of $118, 097 (up 24% from 2019) and $115,248 (up 21%), respectively. The bad news is that is it running very slow right now with limited foot traffic downtown. Thru 6 days last week, we did $5,978 vs $16,337 (down 63% from 2019) and for the first 13 days of this period, we did $11,975 vs $35,899 (down 66%). Thus, we are taking losses right now and can't afford any more than we are offering. We see the month-to-month term as a mutually beneficial situation. If we can't turn this into a profitable unit, we will call it a day. If our sales don't move up fast enough and you have another tenant that will take the space, you can let us know.

Best regards,

Bob Hartmann
bob.hartmann@qrgllc.com
214-577-6627

QF 2

From: kenneth@jacksondavenport.com <kenneth@jacksondavenport.com>
Sent: Thursday, 6 August, 2020 4:13 PM
To: Bob Hartmann <bob.hartmann@QRGLLC.COM>
Subject: RE: Moes 381 King St

Bob,

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?

Kindest regards,

Kenneth Davenport

QF 3

From: Bob Hartmann
Sent: Thursday, 6 August, 2020 4:31 PM
To: kenneth@jacksondavenport.com
Subject: RE: Moes 381 King St

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.

Best regards,

Bob Hartmann
bob.hartmann@qrgllc.com
214-577-6627
QRG
QUALITY RESTAURANT GROUP, LLC

From: Bob Hartmann <bob.hartmann@QRGLLC.COM>
Sent: Monday, August 24, 2020 11:47 AM
To: kenneth@jacksondavenport.com
Cc: Steven Milonas <steven@danielravenel.com>; Daniel Ravenel <daniel@danielravenel.com>
Subject: RE: Moes 381 King St

Kenneth,

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.

Best regards,

Bob Hartmann
bob.hartmann@qrgllc.com
214-577-6627
QRG
QUALITY RESTAURANT GROUP, LLC

From: kenneth@jacksondavenport.com <kenneth@jacksondavenport.com>
Sent: Tuesday, 25 August, 2020 7:31 AM
To: Bob Hartmann <bob.hartmann@QRGLLC.COM>
Cc: 'Steven Milonas' <steven@danielravenel.com>; 'Daniel Ravenel' <daniel@danielravenel.com>
Subject: RE: Moes 381 King St

Bob,

At this current time we are not in a position to accept your proposal regarding the lease. I understand this means Quality Fresca has elected to not exercise their option regarding the lease extension. I expect you will be engaging your facilities group to de-brand and remove all Moes owned property from the location prior to September 30th.

Regards,
Kenneth

From: Bob Hartmann <bob.hartmann@QRGLLC.COM>
Sent: Tuesday, August 25, 2020 6:14 PM
To: kenneth@jacksondavenport.com
Cc: 'Steven Milonas' <steven@danielravenel.com>; 'Daniel Ravenel' <daniel@danielravenel.com>
Subject: RE: Moes 381 King St

I will speak with our CEO, but to be clear, the guys have not decided fully the option. We just need some relief in order for it to make sense to stay. Is there a willingness on the Landlord's to provide temporary relief so that we don't have to take losses until the community starts coming back downtown?

Best regards,

Bob Hartmann
bob.hartmann@qrgllc.com
214-577-6627
QRG
QUALITY RESTAURANT GROUP, LLC

Sent: Wednesday, 26 August, 2020 4:52 PM
To: Bob Hartmann <bob.hartmann@QRGLLC.COM>
Cc: 'Steven Milonas' <steven@danielravenel.com>; 'Daniel Ravenel' <daniel@danielravenel.com>
Subject: RE: Moes 381 King St

Bob,

Thank you for your email. At this time we have some issues with Moe's not honoring its lease. First, Section 5 requires the store to be open 6 days a week with regular business hours. This is the only store not fully open in all of the local Moe's operations. If you do not operate, there is no chance we will see any of the percentage rent required by the lease. Second, there is an ongoing trash issue. According to a neighbor, the City of Charleston Livability Department has received complaints about flies and grease on the sidewalk due to the trash cans not being cleaned and stored properly. As you recall, we have raised this issue many, many times. Lastly, the lease calls for a yearly rent increase that we will certainly apply.

Given these issues we are not inclined to extend any further lease concessions for the Moe's.

Regards,
Kenneth

From: Bob Hartmann <bob.hartmann@QRGLLC.COM>
Sent: Thursday, August 27, 2020 2:56 PM
To: kenneth@jacksondavenport.com
Cc: 'Steven Milonas' <steven@danielravenel.com>; 'Daniel Ravenel' <daniel@danielravenel.com>
Subject: RE: Moes 381 King St

What about a short extension, say for 1 year?

Best regards,

Bob Hartmann
bob.hartmann@qrgllc.com
214-577-6627
QRG
QUALITY RESTAURANT GROUP, LLC

From: kenneth@jacksondavenport.com <kenneth@jacksondavenport.com>
Sent: Friday, 28 August, 2020 11:05 AM
To: Bob Hartmann <bob.hartmann@QRGLLC.COM>
Cc: 'Steven Milonas' <steven@danielravenel.com>; 'Daniel Ravenel' <daniel@danielravenel.com>
Subject: RE: Moes 381 King St

Thanks for the alternate option. At this time we are not agreeable to your proposal. Also, you did not respond to the issues I raised. Will Moe's be immediately reopening 6 days a week as the lease requires? Will Moe's be addressing the trash issue before the end of the day today?

Regards,
Kenneth

QF 10

From: Bob Hartmann
Sent: Thursday, 3 September, 2020 4:40 PM
To: kenneth@jacksondavenport.com
Cc: 'Steven Milonas' ; 'Daniel Ravenel'
Subject: RE: Moes 381 King St

Kenneth,

The team has discussed this internally and have decided to try and make this location work, even with the increased rent in the option period.
We will be exercising our option to stay and will mail and email you a letter to that effect tomorrow. We have also looked into the trash issue and were unable to find any evidence of an issue whatsoever there, but would be glad to revisit if the landlord has specific concerns we can address.

With regard to the 6 day per week operating covenant, please refer to paragraph 5 of the lease Hours of Operation where it states "unless caused by an Act of God, equipment failures, governmental regulations or other casualty conditions beyond the reasonable control of Tenant". We believe the Covid-19 pandemic, governmental restrictions and conditions beyond our control have been the cause for our inability to effectively operate during the required days and thus, we are not in default on that issue.

If you would like to discuss further, please feel free to reach out and my number below. I will email you the letter tomorrow exercising our option to extend.

Best regards,

Bob Hartmann
bob.hartmann@qrgllc.com
214-577-6627
QRG
QUALITY RESTAURANT GROUP, LLC

From: Bob Hartmann
Sent: Friday, 4 September, 2020 10:04 AM
To: kenneth@jacksondavenport.com
Cc: 'Steven Milonas' ; 'Daniel Ravenel'
Subject: RE: Moes 381 King St

Kenneth,

Per my email yesterday, please find attached our notice of exercise of the renewal option. We look forward to hopefully improvements in the downtown market over the next year.

Best regards,

Bob Hartmann
bob.hartmann@qrgllc.com
214-577-6627
QRG
QUALITY RESTAURANT GROUP, LLC

QUALITY RESTAURANT GROUP, LLC

QUALITY FRESCA, LLC

September 3, 2020

Mr. Kenneth R. Davenport II
101 Old Trolley Road
Summerville, South Carolina 29485
Via email: kenneth@jacksondavenport.com

RE: Lease dated September 25, 2013 (the "**Lease**") between THE ESTATE OF KENNETH R. DAVENPORT, BY KENNETH R. DAVENPORT II, PERSONAL REPRESENTATIVE ("**Landlord**") and QUALITY FRESCA I, LLC ("Tenant") for the premises commonly known as 381 King Street, Charleston, SC 29401.

Dear Mr. Davenport,

Pursuant to the terms and conditions of the lease between referenced above, this letter serves as notice of exercise of the first of our two, five (5) year options. We understand that the rent will be increasing annually starting October 1, 2020 by the greater of 2.5% or 7% of sales. Further, per the agreement 50% of the balance of the $30,496 security deposit will be returned to the Tenant by 1/31/2021 and the remainder of the security deposit will be returned at the end of the term.

If you have any questions, should you have any questions do not hesitate to contact Bob Hartmann at (214) 577-6627.

Respectfully,

Matt Ailey
Quality Fresca I, LLC

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE MAGISTRATE COURT

CASE NO: 2020CV1010700554

KENNETH DAVENPORT, PR FOR ESTATE
PLAINTIFF

VS

QUALITY FRESCA, MOE'S
DEFENDANT

RULE TO SHOW CAUSE

EVICTION

THE ABOVE CASE CAME BEFORE THE COURT ON: OCTOBER 27, 2020 AT 9:30 AM

_X_ APPEARED FOR THE PLAINTIFF: BRIAN HELLMAN, ESQUIRE

_X APPEARED FOR THE DEFENDANT: TED HUGE, ESQUIRE

THE COURT RULES:

___✓___	WRIT OF EJECTMENT ISSUED	31	Settled
_____	EJECTMENT DENIED	32	Find for Plaintiff
_____	PICK-UP/ DISPOSSESSION GRANTED	33	Find for Defendant
_____	JUDGMENT GRANTED	34	Judicial Dismissal
_____	CLAIM & DELIVERY DENIED	41	Dismissed W/Prejudice
_____	PUBLIC SALE (GRANTED) (DENIED)	42	Dismissed W/O Prejudice
_____	DISMISSED	40	Transfer to Another Court
_____	RESTRAINING ORDER (GRANTED) (DENIED)		
_____	OTHER_____		

NOTES OR CONDITIONS: SEE THE ATTACHED ORDER

IT IS SO ORDERED,
JUDGE

DATE: 11/4/20

STATE OF SOUTH CAROLINA	)	**IN THE MAGISTRATE'S COURT**
	)	
COUNTY OF CHARLESTON	)	2020-CV-10-10700554
	)	
Kenneth R. Davenport II, Personal Representative of the Estate of Kenneth R. Davenport c/o Hellman Yates & Tisdale, PA 105 Broad Street, Third Floor Charleston, SC 29401	)	**ORDER OF EJECTMENT**
Plaintiff,	)	
v.	)	
Quality Fresca I, LLC d/b/a Moe's Southwest Grill 381 King Street Charleston, SC 29401,	)	
Defendant.	)	

Before the Court is an Application for Ejectment filed by Plaintiff, the landlord, Kenneth R. Davenport II, Personal Representative of the Estate of Kenneth R. Davenport, against Defendant, 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. Plaintiff, Mr. Davenport, and Mr. Daniel Ravenel, property manager for Plaintiff, testified as witnesses. Defendant 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. Based on the findings of fact and conclusions of law set forth below, the Court GRANTS Plaintiff's application for ejectment.

FINDINGS OF FACT

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, Plaintiff is the landlord and Defendant is the tenant. Defendant became the tenant through a series of lease assignments.

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.

Defendant, and its predecessors in interest, have operated a restaurant known as "Moe's" for the duration of the Lease. A representative of Defendant 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 1st day of October, 2013, and ending on the 30th 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 Defendant's Vice President of Real Estate, Bob Hartmann. These emails, together with the added testimony of Mr. Davenport, show that Defendant made representations to Plaintiff that it was financially unable to pay the full rent amount, that it would not exercise its option to extend the Lease, and that Plaintiff should seek a new tenant. Defendant did not call Mr. Hartmann to testify at trial, nor was he present at trial. Defendant'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 Plaintiff and Defendant on August 6, 2020, Plaintiff 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 Defendant 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.

Plaintiff testified that immediately after Defendant's August 6 e-mail and in reliance on Defendant's representations that it would not be exercising its option to extend the Lease, Plaintiff 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, Plaintiff further testified that, having hired a broker, if the leased premises were not made available to the new tenant, Plaintiff would suffer financial damages as a result of Defendant's failure to vacate the leased premises.

After Defendant's August 6 and August 24 emails made clear to Plaintiff that Defendant was not going to exercise its option and was planning to vacate the leased premises, Defendant made alternative, extra-contractual offers to lease the leased premises at reduced rent either month-to-month or for a year. The e-mails and Mr. Davenport's testimony show that Plaintiff rejected these alternative, extra-contractual offers. Then, contrary to its prior representations, by email dated September 3, 2020, Defendant stated it would "try and make this location work…[and]…will be exercising our option to stay…." By letter dated September 3, 2020, Defendant purported to provide notice to Plaintiff that it would, in fact, exercise its option to extend the Lease. (Later, by letter dated September 25, 2020, Defendant attempted to justify its prior contrary representations as being "fairly typical negotiations regarding terms.").

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

In response to that notice, Defendant has remained in possession of the premises into the present month of October 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,

Defendant belatedly attempted to pay the security deposit that was due on May 8, 2020, in the amount of $30,496.00. Plaintiff 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 Defendant's prior representations.

Plaintiff filed the instant Application for Ejectment on October 1, 2020.

LEGAL STANDARDS

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 the Supreme Court of South Carolina, 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, the Supreme Court of South Carolina

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 plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant." *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 South Carolina 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).

CONCLUSIONS OF LAW

Defendant's representations in this matter are analogous to those in *Ingram*, as highlighted above by Judge Young and Professor Spitz. Defendant 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".[1] In other words, applying the analytical framework of *Ingram*, Defendant admitted that it did not have (1) "the ability to perform" the option, and Defendant certainly did not (2) "do equity." 340 S.C. at 106-7, 531 S.E.2d 287. Instead, like *Ingram*, Defendant "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 Defendant "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 Plaintiff to act upon, either by renegotiating the Lease terms with Defendant to provide reduced rent, a shorter

[1] As noted above, Defendant's Vice President of Real Estate, Bob Hartmann, author of the emails was notably not present at trial, and Defendant's agent, Mr. Grooms, testified at trial that he was in "operations" and could not testify as to Defendant's ability to afford the rent. See *Matthews v. National Fidelity Insurance Company* 228 S.C. 124, 89 S.E.2d 95 (1955) ("The important point here was the fact that the appellant's agent was present and heard the testimony but was not placed upon the stand to deny the testimony of both the beneficiary and the respondent as to the agreement with him. This fact 'raises the inference that had his testimony been presented it would have been unfavorable to appellant', citing *Robinson v. Duke Power Co.*").

lease term, or both. Further, it is clear that Hartmann had knowledge of the true facts, that Defendant 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 Plaintiff would suffer financial damages if the new tenant did not take occupancy of the premises. The doctrine of unclean hands therefore applies because Defendant'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 Defendant concedes the falsity of its representation that it would not extend the Lease, as well its intent to influence Plaintiff by causing Plaintiff to be concerned about finding a new tenant. *Id.* Plaintiff indeed relied on Defendant's misrepresentations, as wrongfully intended, by expending his time and resources to attempt to find a new tenant, which Defendant knew would be a difficult endeavor, and Plaintiff would now suffer additional financial damages if the new tenant that Plaintiff 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 Defendant'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), Defendant's own "behavior" undermines its position. 312 S.C. 271, 440 S.E. 2d 364. The other factors all similarly weigh against Defendant for the same fundamental reason. Defendant 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 Plaintiff (and by extension its new tenant and brokerage firm) and Defendant can suffer no forfeiture by being bound to its own representations. Defendant 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, Plaintiff

already reached an agreement with a new tenant, which of course cannot be undone by Defendant. *Id.*

Lastly, Defendant'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, with no further analysis required.

For these reasons, the Application for Ejectment is granted. Defendant is to vacate the premises on or before November 18, 2020. Pro rata rental payments are due for the time until they have completely vacated the premises.

IT IS SO ORDERED.

The Honorable T.R. Spann-Wilder
Judge, City of Charleston, Magistrate Court

November 4, 2020

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
)
)

2020CV1010700544
CIVIL CASE NUMBER
MAGISTRATE'S COURT

BOND TO STAY EXECUTION ON APPEAL

Kenneth R. Davenport II, PR of the
Estate of Kenneth R. Davenport
c/o Hellman Yates & Tisdale, PA
105 Broad Street, Third Floor
Charleston, SC 29401

LANDLORD

Vs

Quality Fresca I, LLC dba Moe's Southwest Grill
381 King Street
Charleston, SC 29401

TENANT(S)

TO: Circuit Court

Now comes the Tenant(s) in the above entitled action and respectfully shows the Court that a Judgment of Execution was issued against the Tenant(s) and for the L agistrate. On **November 9, 2020**, the Tenant timely appealed the Jud

Pursuant to the findings of the Magistrate f **$7,814.60** base rent per month, Common Area Maintenance (CA ime as it is adjusted by the landlord as a result of the parties lease ag $1,906.00 per month for the agreed upon deferral payment until the D **499.88** due on the 1st day of each month beginning with the Decembe January 1, 2021 shall be in the amount of $9,593.88 as the deferral rent deferral rental amount of $1,906.00 for November 2020 and shall t additional grace period).

Bond to Stay Appeal

Tenant(s) hereby undertakes to pay the pe findings of the Court and moves the Circuit Court to stay execution on the ppeal and decided by the Circuit Court.

Dated on November 25, 2020:

Brian Hellman, Esq., Attorney/Tenant Ke

Upon execution of the above bond, execution on the Judgment of Ejectment is hereby stayed until the action is heard on appeal and decided by the Circuit Court. If Tenant(s) fails to make any regular monthly rental payment within five days of the due date, upon application of the Landlord, the stay of execution shall dissolve, the appeal by the Tenant(s) to the Circuit Court on issues dealing with possession must be dismissed and the Sheriff may dispossess the Tenant(s).

Dated on November 25, 2020

JUDGE, T.R. SPANN-WILDER

Charleston City Magistrate
995 Morrison Drive
P.O. Box 941
Charleston, SC 29403
Phone: (843) 724-6719
Fax: (843) 720-7133

MV125

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
)
)

2020CV1010700544
CIVIL CASE NUMBER
MAGISTRATE'S COURT

BOND TO STAY EXECUTION ON APPEAL

Kenneth R. Davenport II, PR of the
Estate of Kenneth R. Davenport
c/o Hellman Yates & Tisdale, PA
105 Broad Street, Third Floor
Charleston, SC 29401

LANDLORD

Vs

Quality Fresca I, LLC dba Moe's Southwest Grill
381 King Street
Charleston, SC 29401

TENANT(S)

TO: Circuit Court

Now comes the Tenant(s) in the above entitled action and respectfully shows the Court that a Judgment of Execution was issued against the Tenant(s) and for the Landlord on **November 4, 2020**, by the undersigned Magistrate. On **November 9, 2020**, the Tenant timely appealed the Judgment to the Circuit Court.

Pursuant to the findings of the Magistrate, the Tenant(s) is obligated to pay rent in the amount of **$7,814.60** base rent per month, Common Area Maintenance (CAM) in the amount of $ **1.779.28** per month until such time as it is adjusted by the landlord as a result of the parties lease agreement and the Charleston County tax provisions and $1,906.00 per month for the agreed upon deferral payment until the December 2020 rental payment for a grand total of **$11,499.88** due on the 1st day of each month beginning with the December 1st rental payment. Subsequent rental payments from January 1, 2021 shall be in the amount of $9,593.88 as the deferral rent would have ended. Additionally, Tenant has a past due deferral rental amount of $1,906.00 for November 2020 and shall pay the same on or before November 30, 2020 (without additional grace period).

Tenant(s) hereby undertakes to pay the periodic rent hereinafter due according to the aforesaid findings of the Court and moves the Circuit Court to stay execution on the Judgment for Ejectment until this matter is heard on appeal and decided by the Circuit Court.

Dated on November 25, 2020:

Brian Hellman, Esq., Attorney/Tenant Kenneth Davenport

Upon execution of the above bond, execution on the Judgment of Ejectment is hereby stayed until the action is heard on appeal and decided by the Circuit Court. If Tenant(s) fails to make any regular monthly rental payment within five days of the due date, upon application of the Landlord, the stay of execution shall dissolve, the appeal by the Tenant(s) to the Circuit Court on issues dealing with possession must be dismissed and the Sheriff may dispossess the Tenant(s).

Dated on November 25, 2020

JUDGE, T.R. SPANN-WILDER

Charleston City Magistrate
995 Morrison Drive
P.O. Box 941
Charleston, SC 29403
Phone: (843) 724-6719
Fax: (843) 720-7133

MV125

STATE OF SOUTH CAROLINA) **)** **COUNTY OF CHARLESTON)**	**IN THE COURT OF COMMON PLEAS** **NINTH JUDICIAL CIRCUIT**
Quality Fresca I, LLC Appellant, v. Kenneth R. Davenport, II, Personal Representative of the Estate of Kenneth R. Davenport, Respondent.	Appeal from Charleston Magistrate Court (Case 2020CV101070554) **NOTICE OF APPEAL**

Appellant Quality Fresca I, LLC ("Appellant" or "Tenant") hereby gives notice of appeal to Charleston County Circuit Court from the order of ejectment issued November 4, 2020 by the Charleston Magistrate Court. Appellant's exceptions to the order are as follows:

1. 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.
2. There was insufficient evidence presented at trial to support a finding that the Appellant / Tenant was equitably estopped from exercising its option.
3. The Magistrate erred in considering facts not entered into evidence at the hearing.
4. There was insufficient evidence presented at trial to support a finding that Appelllant / Tenant did not pay a security deposit, even though Respondent refused Appellant's attempts to pay all amounts due. Further, the Magistrate

CITY MAGISTRATE COURT
NOV 16 2020
CHARLESTON COUNTY

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.

Respectfully submitted,

s/theodore huge
Theodore Huge, Esq. (S.C. Bar 16546)
Harris & Huge LLC
180 Spring Street
Charleston, SC 29403
Tel 843.805.8031
Fax 843.636,3375
ted@harrisandhuge.com
Attorney for Appellant

Certificate of Service

The undersigned certifies that on November 9, 2020, a true and correct copy of this *Notice of Appeal* was mailed via U.S. first class mail to the following:

The Honorable Tiffany R. Spann-Wilder Charleston County Magistrate Court 995 Morrison Drive Charleston, SC 29403	Brian Hellman, Esq. Hellman, Yates & Tisdale, PA 105 Broad Street Charleston, SC 29401

s/theodore huge

HARRIS & HUGE, LLC
ATTORNEYS AT LAW
180 Spring Street, Charleston, South Carolina 29403

CHARLESTON SC 294
10 NOV 2020 PM 3 L



The Honorable Tiffany Spann-Wilder
City of Charleston Magistrate Court
995 Morrison Drive
Charleston, SC 29403

CITY MAGISTRATE COURT
NOV 16 2020
FILED IN CHARLESTON COUNTY

29403-425750

Tiffany Spann-Wilder
Charleston County Magistrate

CHARLESTON COUNTY
SOUTH CAROLINA

CITY MAGISTRATE'S COURT

843.724-6719
Fax: 843.720-7133
City District Summary Court
995 Morrison Drive
Post Office Box 941
Charleston, SC 29402

February 16, 2021

The Honorable Julie Armstrong
Clerk of Court
100 Broad Street, Ste. 106
Charleston, SC 29401

CASE NO: 2020-CP-1004936
RE: Kenneth R. Davenport, II PR of the Estate of Kenneth R. Davenport v Quality Fresca, LLC d/b/a Moe's Southwestern Grill
Civil Case Number 2020-CV-10107-00554

Dear Mrs. Armstrong,

Please find enclosed the original Return Answer to Defendant's Appeal for the above referenced case. I have enclosed the original return and the supporting documents. If you could please return a clocked copy of the top page marked "COPY" to our office. I have enclosed a return addressed envelope for your convenience. If I can be of any further assistance, feel free to contact this office.

Sincerely,

Michelle Harding
Summary Court Clerk
City Magistrate
995 Morrison Drive
Charleston, SC 29403

Enclosure: Magistrate's Return and supporting documents

Tiffany Spann-Wilder
Charleston County Magistrate

CHARLESTON COUNTY
SOUTH CAROLINA

CITY MAGISTRATE'S COURT

843.724-6719
Fax: 843.720-7133
City District Summary Court
995 Morrison Drive
Post Office Box 941
Charleston, SC 29402

2021 FEB 23 AM 10:17
FILED
CLERK OF COURT

February 16, 2021

The Honorable Julie Armstrong
Clerk of Court
100 Broad Street, Ste. 106
Charleston, SC 29401
Civil Appeal Return

CASE NO: 2020-CP-1004936
RE: Kenneth R. Davenport, II PR of the Estate of Kenneth R. Davenport v Quality Fresca, LLC d/b/a Moe's Southwestern Grill
Civil Case Number 2020-CV-10107-00554

Dear Mrs. Armstrong,

Please find enclosed an attachment that goes with the Return that was sent to your office on February 16, 2021. I failed to attach the "Witness Summation" to the original Return that was sent to your office on February 16, 2021

Sincerely,

M. Harding

Michelle Harding
Summary Court Clerk
City Magistrate
995 Morrison Drive
Charleston, SC 29403

Enclosure: Magistrate's Return and supporting documents

2020-CP-1004936

Kenneth Davenport v. Quality Fresca d/b/a Moe's Southwest Grill

WITNESS SUMMATION

Plaintiff Witnesses:

Kenneth Davenport – His father originally owed the building. His father is deceased and he is the PR for the Estate and has been in charge of transacting the rental interest. Due to COVID-19 the new tenant asked for concessions on rent. The original lease had been assigned on May 8, 2020 to MSG KING STREET, LLC and QUALITY FRESCA I, LLC – the Moe's Southwest Grill was still the tenant but operating under other business entity names. The rent they could not pay at that time was deferred to the back of the lease. The original lease term that was assigned ended September 30, 2020. He was in negotiations with Moe's about renewing the lease and was being told they didn't know if they could make the rent as currently stated. On August 6, 2020 he was advised that they could not do the terms so he sought another option to lease out the building. He used Palmetto Commercial Properties to secure another tenant. He has found a new tenant and entered into an initial agreement on August 7, 2020. He could incur cost with the broker who made the deal to the new tenants and does not want to have a financial consequence.

He got an email from Quality Fresca in September 3, 2020 saying they would try to make the terms work. Plaintiff advised that he had relied on the prior emails that they had to vacate on September 30, 2020.

Daniel Ravenel – Testified that he is the property manager for Daniel Ravenel Property Management Company and that he oversees the rental property in question at 381 King Street, Charleston, SC 29401. He

testified that he had regular complaints about trash and grease disposal from other tenants at the property about Moe's. He testified that on October 1, 2020 the security deposit payment from the Defendant was rejected. It was I the amount of $30,496.00 and had been due May 8, 2020. On October 13, 2020 the payment was again rejected by the accountant and returned to Defendant.

Defendant Witnesses:

Chris Grooms – Mr. Grooms testified that he is the VP of Operations for the Defendant and works out of Parish, FL and oversees 67 Moe's establishments. He testified that the revenue at the store in question was slow and began to pick up around June 1 and they slowly began to expand operations so his response to Davenport were legitimate that they could not afford the terms when they were being asked to exercise the option. On Cross examination he testified that he was not sure of the current balance sheet for the store to advise when things changed.



STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
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2020CV1010700544
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Kenneth R. Davenport II, PR of the
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c/o Hellman Yates & Tisdale, PA
105 Broad Street, Third Floor
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LANDLORD

Vs

Quality Fresca I, LLC dba Moe's Southwest Grill
381 King Street
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TENANT(S)

TO: Circuit Court

Now comes the Tenant(s) in the above entitled action and respectfully shows the Court that a Judgment of Execution was issued against the Tenant(s) and for the Landlord on **November 4, 2020**, by the undersigned Magistrate. On **November 9, 2020**, the Tenant timely appealed the Judgment to the Circuit Court.

Pursuant to the findings of the Magistrate, the Tenant(s) is obligated to pay rent in the amount of **$7,814.60** base rent per month, Common Area Maintenance (CAM) in the amount of $ **1.779.28** per month until such time as it is adjusted by the landlord as a result of the parties lease agreement and the Charleston County tax provisions and $1,906.00 per month for the agreed upon deferral payment until the December 2020 rental payment for a grand total of **$11,499.88** due on the 1st day of each month beginning with the December 1st rental payment. Subsequent rental payments from January 1, 2021 shall be in the amount of $9,593.88 as the deferral rent would have ended. Additionally, Tenant has a past due deferral rental amount of $1,906.00 for November 2020 and shall pay the same on or before November 30, 2020 (without additional grace period).

Tenant(s) hereby undertakes to pay the periodic rent hereinafter due according to the aforesaid findings of the Court and moves the Circuit Court to stay execution on the Judgment for Ejectment until this matter is heard on appeal and decided by the Circuit Court.

Dated on November 25, 2020:

Brian Hellman, Esq., Attorney/Tenant Kenneth Davenport

Upon execution of the above bond, execution on the Judgment of Ejectment is hereby stayed until the action is heard on appeal and decided by the Circuit Court. If Tenant(s) fails to make any regular monthly rental payment within five days of the due date, upon application of the Landlord, the stay of execution shall dissolve, the appeal by the Tenant(s) to the Circuit Court on issues dealing with possession must be dismissed and the Sheriff may dispossess the Tenant(s).

Dated on November 25, 2020

JUDGE, T.R. SPANN-WILDER

Charleston City Magistrate
995 Morrison Drive
P.O. Box 941
Charleston, SC 29403
Phone: (843) 724-6719
Fax: (843) 720-7133

MV125



THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
DEBRA R. MCCASLIN, CIRCUIT COURT JUDGE
Case No.: 2020-CP-10-04936

Kenneth R. Davenport II, Personal Representative of the Estate of Kenneth R. Davenport,.....Respondent,

vs.

Quality Fresca I, LLC d/b/a Moe's Southwest Grill, ... Appellant,

---

AFFIDAVIT OF TIMOTHY BAYNES

Personally appeared before me, Timothy Baynes, CPA, who being duly sworn, deposes and says that:

1. I am over the age of eighteen (18) years and I have personal knowledge of the matters set forth herein, except as to those matters set forth on information and belief, and as to those matters, I have a good faith basis for believing them to be true.
2. Since 2019, I have been employed by TJT Accounting Services, Inc. ("TJT") as an Account Manager. Quality Fresca I, LLC engages TJT to provide account, administrative, and cash management services, including but not limited to accounts payable for restaurant operations of Quality Fresca I, LLC.
3. TJT maintains the accounts payable records for Quality Fresca I, LLC and is considered its primary custodian for those records, which are maintained in the ordinary course of business for those accounts payable.

4. In connection with an Assignment, Assumption, and Amendment to Lease Agreement between Quality Fresca I, LLC and Kenneth R. Davenport II, Personal Representative of the Estate of Kenneth R. Davenport (hereafter "Landlord") executed on May 8, 2020, Quality Fresca I LLC made the following payments reflected on the chart attached hereto as Exhibit A using Wire or ACH electronic transfer to Landlord.[1]

5. Following its exercise of option to renew the lease with Landlord in early September 2020, Quality Fresca I LLC attempted three times to make the following payments for rent and a four-month security deposit using Wire or ACH electronic transfer to Landlord:

   a. September 28, 2020: $9,593.88 (October rent)

   b. September 28, 2020: $ 1,906.00 (Payment 4 of 6 deferred rent)

   c. September 28, 2020: $20,496.00 (Four-month deposit for renewal of lease

6. As reflected in Exhibit A, Landlord rejected and returned each payment attempt of the amounts reflected in Paragraph 5 above on September 25, 2020, September 28, 2020, and again on October 2, 2020.

7. During the term of the eviction proceedings, including the appeal, Quality Fresca I LLC continued to pay rent and other expenses due to Landlord as reflected in Exhibit beginning on November 2, 2020 and continuing through April 29, 2021. The Landlord finally accepted the amounts attempted to be paid in September 2020 on November 16, 2020.

[1] Quality Freca was asked to make ACH deposits directly to Landlord's agent Daniel Ravenel Real Estate

8. On information and belief, Quality Fresca I LLC is current on all financial obligations to Landlord under the terms of the option to renew exercised in September, 2020 and the appeal bond issued November 25, 2020.

9. None of the funds paid to Landlord since November 2, 2020 have been rejected or returned.

FURTHER DEPONENT SAYETH NOT.

Timothy Baynes, CPA

Sworn to before me this
12 day of May 2021.

Notary public for Wake County
My commission expires: 8.28.21

Danielle C Saponaro
NOTARY PUBLIC
Wake County
North Carolina
My Commission Expires 8-28-21

Exhibit A

Date Pymt Initiated	Date Returned	Amount	Description of Pymt
7/1/2020		14,103.35	50% June rent, 100% July rent
8/1/2020		9,402.23	100% August Rent
9/1/2020		9,402.23	100% Aseptember Rent
9/8/2020		17,793.87	April rent (5591.28), May rent (5591.28), June rent correction (890.16), deferred pymt 1,2, & 3
9/25/2020	9/25/2020	41,995.88	4 mo sec dep, October rent, deferred pymt 4
9/28/2020	9/28/2021	41,995.88	4 mo sec dep, October rent, deferred pymt 4
9/29/2020	10/2/2020	41,995.88	4 mo sec dep, October rent, deferred pymt 4
11/2/2020		9,593.88	November Rent
11/16/2020		41,995.88	4 mo sec dep, October rent, deferred pymt 4
11/25/2020		1,906.00	deferred pymt 5
11/30/2020		11,499.88	December Rent, deferred pymt 6
12/30/2020		9,593.88	January Rent
1/29/2021	2/3/2021	9,402.23	February Rent (paid incorrect amount in error)
2/8/2021		9,593.88	February Rent
2/26/2021		9,593.88	March Rent
3/31/2021		9,593.88	April Rent
4/29/2021		9,593.88	May Rent



ELECTRONICALLY FILED - 2021 Apr 08 2:52 PM - CHARLESTON - COMMON PLEAS - CASE#2020CP1004936

STATE OF SOUTH CAROLINA)) COUNTY OF CHARLESTON)) Quality Fresca I, LLC,)) Appellant,) vs.)) Kenneth R. Davenport II, Personal Representative of the Estate of Kenneth R. Davenport,)) Respondent.)	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT Case No. 2020-CP-10-04936 **MOTION TO EXTEND APPEAL BOND**

Appellant Quality Fresca I, LLC, moves to extend the appeal bond issued by the Magistrate's Court by order dated November 25, 2020, which set forth Tenant's rental obligations during the term of the appeal to the circuit court, and by which tenant has been in full compliance. **Exhibit A.** The filing of Tenant's Motion to Reconsider this date renders the decision of the circuit court still pending and there is not, at present, a final decision at the circuit court. Appellant is informed and believes that with Appellant's full compliance with the terms of the appeal bond Respondent landlord will sustain no prejudice because it will be fully compensated for occupancy of the premises in question pursuant to the terms of the appeal bond.

The motion to reconsider raises substantial issues which support the amendment or vacating the order of the circuit court dated March 29, 2020 and a remand for judgment in favor of Appellant Tenant.

Appellant is informed and believes that the filing of this motion establishes the lack of finality of the existing circuit court order, but seeks an order extending the stay for the purposes set forth herein. A proposed order is submitted contemporaneously with the filing of this motion.

Appellant also moves for the appeal bond to remain effective for thirty (30) days after the final order to be issued after consideration of Appellant's Motion to Reconsider. Appellate court

rules provide thirty (30) days to appeal from the final order of the circuit court. *See* Rule 203(b)(1), SCACR. Should the existing order not be vacated or amended, Appellant intends to seek relief from the South Carolina Court of Appeals.

RULE 11 CERTIFICATION

Pursuant to Rule 11, SCRCP, undersigned counsel has attempted to reach opposing counsel Brian Hellman (via telephone and email) to seek his consent to the relief sought in this motion, but at the time of filing, she has been unable to reach him and is therefore unable to provide the Court with his position on the relief requested herein.

Respectfully submitted,

s/ Desa Ballard
Desa Ballard
Harvey M. Watson III
BALLARD & WATSON
226 State Street
West Columbia, SC 29169
Telephone 803.796.9299
Facsimile 803.796.1066
desab@desaballard.com
harvey@desaballard.com

Theodore Huge
HARRIS & HUGE LLC
180 Spring Street
Charleston, SC 29403
Telephone 843.805.8031
Facsimile 843.636.3375
ted@harrisnadhuge.com

ATTORNEYS FOR APPELLANT

April 8, 2021

ELECTRONICALLY FILED - 2021 Apr 08 2:52 PM - CHARLESTON - COMMON PLEAS - CASE#2020CP1004936



ELECTRONICALLY FILED - 2021 Apr 08 2:52 PM - CHARLESTON - COMMON PLEAS - CASE#2020CP1004936

STATE OF SOUTH CAROLINA)
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COUNTY OF CHARLESTON)
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2020CV1010700544
CIVIL CASE NUMBER
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Vs

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Dated on November 25, 2020:

Brian Hellman, Esq., Attorney/Tenant Kenneth Davenport

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Dated on November 25, 2020

JUDGE, T.R. SPANN-WILDER

Charleston City Magistrate
995 Morrison Drive
P.O. Box 941
Charleston, SC 29403
Phone: (843) 724-6719
Fax: (843) 720-7133

MV125



From: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>
Sent: Tuesday, April 13, 2021 3:18 PM
To: Desa Ballard <desab@desaballard.com>; Ted Huge <ted@harrisandhuge.com>; 'Murnane, Matthew T.' <MTMurnane@Venable.com>; 'Brian Hellman' <bh@hellmanyates.com>; 'Jason Smith' <js@hellmanyates.com>
Cc: McCaslin, Debra <dmccaslinj@sccourts.org>; Beth Cogan <Beth@desaballard.com>
Subject: RE: Motion "MOTAPP-Motion/Appeal" for Case "2020CP1004936- Quality Fresca I Llc VS Kenneth R Davenport II , defendant, et al" was added to a Motions Roster for 3/15/2021 at 9:30 AM

Good Afternoon, All,

The Appellant's Motion to Reconsider was timely filed within 10 days of Judge McCaslin's Order Affirming the Magistrate. Judge McCaslin has taken the Appellant's motion under advisement and will permit both parties to submit any supporting memoranda within 10 days from today's date before issuing a ruling on the motion to reconsider. Please submit any memoranda by 5:00 PM on Thursday, April 23rd.

Based upon this, Judge McCaslin is declining to sign the Proposed Orders submitted by the Appellant. Please contact me if you have any questions or concerns.

Best,

Bruce H. Norton II
Law Clerk to the
Honorable Debra R. McCaslin
Circuit Court Judge
Eleventh Judicial Circuit
(803) 785-2375
dmccaslinlc@sccourts.org

-----Original Message-----
From: Desa Ballard <desab@desaballard.com>
Sent: Tuesday, April 13, 2021 11:59 AM
To: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>; Ted Huge <ted@harrisandhuge.com>; 'Murnane, Matthew T.' <MTMurnane@Venable.com>; 'Brian Hellman' <bh@hellmanyates.com>; 'Jason Smith' <js@hellmanyates.com>
Cc: McCaslin, Debra <dmccaslinj@sccourts.org>; Beth Cogan <Beth@desaballard.com>
Subject: RE: Motion "MOTAPP-Motion/Appeal" for Case "2020CP1004936- Quality Fresca I Llc VS Kenneth R Davenport II , defendant, et al" was added to a Motions Roster for 3/15/2021 at 9:30 AM

*** EXTERNAL EMAIL: This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. ***

I received the transcript moments ago. May I have 10 days?

The authorities cited by opposing counsel address situations where the motion to reconsider was NOT filed within 10 days. The rules do not prohibit an extension to amend or supplement after a timely filing of a motion to reconsider.

Thank you.

db

-----Original Message-----
From: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>
Sent: Monday, April 12, 2021 11:45 AM
To: Ted Huge <ted@harrisandhuge.com>; 'Murnane, Matthew T.' <MTMurnane@Venable.com>; 'Brian Hellman' <bh@hellmanyates.com>; 'Jason Smith' <js@hellmanyates.com>; Desa Ballard <desab@desaballard.com>
Cc: McCaslin, Debra <dmccaslinj@sccourts.org>
Subject: RE: Motion "MOTAPP-Motion/Appeal" for Case "2020CP1004936- Quality Fresca I Llc VS Kenneth R Davenport II , defendant, et al" was added to a Motions Roster for 3/15/2021 at 9:30 AM

Good Morning, All,

Judge McCaslin is in receipt of the Appellant's Motion to Reconsider and Appellant's Proposed Orders granting additional time to supplement said motion and extending the appeal bond.

Before ruling on these matters, Judge McCaslin would like the parties to coordinate with the Court Reporter to determine how quickly the transcript sought by the Appellant could be produced, such that a limiting date could be placed in any order issued by the Court. Please provide the Court with an update once a tentative date has been established.

Best,

Bruce H. Norton II
Law Clerk to the
Honorable Debra R. McCaslin
Circuit Court Judge
Eleventh Judicial Circuit
(803) 785-2375
dmccaslinlc@sccourts.org

-----Original Message-----
From: Ted Huge <ted@harrisandhuge.com>
Sent: Friday, March 19, 2021 9:14 AM
To: McCaslin, Debra Law Clerk (Bruce Norton) <dmccaslinlc@sccourts.org>
Cc: 'Murnane, Matthew T.' <MTMurnane@Venable.com>; 'Brian Hellman' <bh@hellmanyates.com>; 'Jason Smith' <js@hellmanyates.com>
Subject: Motion "MOTAPP-Motion/Appeal" for Case "2020CP1004936- Quality Fresca I Llc VS Kenneth R Davenport II , defendant, et al" was added to a Motions Roster for 3/15/2021 at 9:30 AM

*** EXTERNAL EMAIL: This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. ***

Dear Judge McCaslin and Mr. Norton,

Per Judge McCaslin's request, attached is Appellant’s proposed order in this case. Please let me know if you need anything else from us on this matter.

Sincerely,

Ted Huge

Harris & Huge LLC
Attorneys at Law
180 Spring Street
Charleston, SC 29403
tel 843.805.8031
fax 843.636.3375
Confidential & Privileged
Unless otherwise indicated or obvious from its nature, the information contained in this communication is attorney-client privileged and confidential information/work product. This communication is intended for the use of the individual or entity named above. If the reader of this communication is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error or are not sure whether it is privileged, please immediately notify us by return e-mail and destroy any copies--electronic, paper or otherwise--which you may have of this communication.

~~~ CONFIDENTIALITY NOTICE ~~~ This message is intended only for the addressee and may contain information that is confidential. If you are not the intended recipient, do not read, copy, retain, or disseminate this message or any attachment. If you have received this message in error, please contact the sender immediately and delete all copies of the message and any attachments.
~~~



ELECTRONICALLY FILED - 2021 Apr 27 1:13 PM - CHARLESTON - COMMON PLEAS - CASE#2020CP1004936

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Charleston
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL

CASE NO. 2020CP1004936

Quality Fresca I Llc
PLAINTIFF(S)

Kenneth R Davenport, II et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☑ Statement of Judgment by the Court:

This matter comes before the Court by way of Appellant Quality Fresca's Motion to Reconsider this Court's Order filed March 26, 2021, which affirmed the Magistrate Court's issuance of an Order of Ejectment against Appellant. Appellant now moves this Court to reconsider its prior Order based upon Rule 59(e), SCRCP.

Upon careful consideration of the arguments and memoranda of counsel, and the record before the Court, this Court finds no controlling errors or law or fact, nor does the Court find any other grounds to alter, amend, or vacate the Order dismissing this appeal.

THEREFORE, the Appellant's Motion to Reconsider is hereby DENIED.

ORDER INFORMATION

This order ☑ ends ☐ does not end the case. ☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 04/27/2021 .

Jason S. Smith for Kenneth R Davenport, II,Kenneth R Davenport Estate,Kenneth R Davenport,Kenneth R Davenport Ii Personal Representative
Brian A Hellman for Kenneth R Davenport, II,Kenneth R Davenport Estate,Kenneth R Davenport,Kenneth R Davenport Ii Personal Representative
Case Party Info Protected
Theodore Harry Huge for Quality Fresca I Llc
Desa Ballard for Quality Fresca I Llc

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

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Charleston Common Pleas

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

Case Number: 2020CP1004936

Type: Order/Electronic Form 4

So Ordered

Debra R. McCaslin

EXHIBIT
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Apr 29 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
DEBRA R. MCCASLIN, CIRCUIT COURT JUDGE
Case No.: 2020-CP-10-04936

Kenneth R. Davenport II, Personal Representative of the Estate of Kenneth R. Davenport,.....Respondent,

vs.

Quality Fresca I, LLC d/b/a Moe's Southwest Grill, ... Appellant,

---

NOTICE OF APPEAL

Appellant Quality Fresca I, LLC d/b/a Moe's Southwest Grill appeals from the orders of the Honorable Debra R. McCaslin, dated March 26, 2021 and April 27, 2021, received by counsel for Appellant via proper service by the Clerk of Court on March 29, 2021 and April 27, 2021, respectively. Copies of the orders on appeal are attached hereto by reference as **Exhibits A and B**.

Respectfully submitted,

s/ Desa Ballard
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April 29, 2021

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STATE OF SOUTH CAROLINA)	**IN THE COURT OF COMMON PLEAS**
)	
COUNTY OF CHARLESTON)	**FOR THE NINTH JUDICIAL CIRCUIT**
)	
)	
Quality Fresca I, LLC,)	Case No. 2020-CP-1004936
)	
Appellant,)	**ORDER**
)	
v.)	
)	
Kenneth R. Davenport II, Personal Representative of the Estate of Kenneth R. Davenport)	
)	
Respondent.)	

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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

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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 1st day of October, 2013, and ending on the 30th day of September, 2020 (hereinafter the "Lease Term").

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

Regarding the option to extend the Lease:

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> 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

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> 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[1] 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

[1] 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.

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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;

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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*.

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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*,

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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), SCRCP.
>
> 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

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> 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 essentiality the same as Rule 59(e), SCRCP. *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), SCRCP:

> 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, SCRCP, 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.*

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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

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is not relieved of his burden of convincing the appellate court the trial judge committed error in his findings." *Id.*; *see also* Jean Hoefer 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

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"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

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> 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."2 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

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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.

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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

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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.[3] Appellant has not shown that any error was made by the Magistrate Court, let alone any

[3] 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

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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.[4]

March 26th, 2021

_____
Debra R. McCaslin
Circuit Court Judge

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).

[4] 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.

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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



FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Charleston
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2020CP1004936

Quality Fresca I Llc
PLAINTIFF(S)

Kenneth R Davenport, II et al
DEFENDANT(S)

RECEIVED
Apr 29 2021
SC Court of Appeals

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☑ Statement of Judgment by the Court:

This matter comes before the Court by way of Appellant Quality Fresca's Motion to Reconsider this Court's Order filed March 26, 2021, which affirmed the Magistrate Court's issuance of an Order of Ejectment against Appellant. Appellant now moves this Court to reconsider its prior Order based upon Rule 59(e), SCRCP.

Upon careful consideration of the arguments and memoranda of counsel, and the record before the Court, this Court finds no controlling errors or law or fact, nor does the Court find any other grounds to alter, amend, or vacate the Order dismissing this appeal.

THEREFORE, the Appellant's Motion to Reconsider is hereby DENIED.

ORDER INFORMATION

This order ☑ ends ☐ does not end the case. ☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 04/27/2021 .

Jason S. Smith for Kenneth R Davenport, II,Kenneth R Davenport Estate,Kenneth R Davenport,Kenneth R Davenport Ii Personal Representative
Brian A Hellman for Kenneth R Davenport, II,Kenneth R Davenport Estate,Kenneth R Davenport,Kenneth R Davenport Ii Personal Representative
Case Party Info Protected
Theodore Harry Huge for Quality Fresca I Llc
Desa Ballard for Quality Fresca I Llc

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

Charleston Common Pleas

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

Case Number: 2020CP1004936

Type: Order/Electronic Form 4

So Ordered

Debra R. McCaslin



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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON Quality Fresca I, LLC, Appellant, vs. Kenneth R. Davenport II, Personal Representative of the Estate of Kenneth R. Davenport, Respondent.	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT Case No. 2020-CP-10-04936 **MEMORANDUM IN SUPPORT: MOTION TO RECONSIDER RULE 59(E), SCRCP**

Pursuant to Rule 59(e), SCRCP, Appellant Quality Fresca I, LLC (hereafter "Tenant") timely filed a motion seeking reconsideration by this Court of its order affirming the Judgment of the Magistrate Court, which order was filed on March 29, 2021. This Memorandum is filed in response to the Court's directive to fully brief all issues prior to April 22, 2021 (Email dated April 13, 2021).

Tenant requests the circuit court to vacate the order of the magistrate's court[1] and remand the matter to the magistrate with instructions to enter judgment in favor of Tenant.

Pursuant to Rule 10(c), SCRCP, Tenant incorporates by reference the discussion of the magistrate court proceedings, which is set forth in its Motion to Reconsider dated April 8, 2021 as fully as if repeated herein verbatim. Attached hereto and incorporated by reference is the transcript of the bond hearing held on November 25, 2020, as identified in more detail in Footnote 5, which is cited herein as "Bond Tr.". Other citations are to the trial transcript as "Tr."

The inclusion of the transcript of the bond hearing became necessary because of that portion of the circuit court's order which addressed the timeliness of the request for appeal bond.

[1] Magistrates have concurrent jurisdiction with the circuit court to address "all matters between landlord and tenant . . .as provided in Chapters 33 through 41 of Title 27." S.C. Code §22-3-10(10). This action was brought pursuant to Section 10 of Chapter 37 of Title 37. S.C. Code §27-37-10.

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Although Landlord did not appeal the order setting bond to the circuit court, Landlord argued this issue before the circuit court as an additional sustaining ground, which makes the issue relevant in this appeal.[2] However, the issue was not properly before the circuit court because Landlord did not appeal it.[3]

While discussed in more detail below, the South Carolina Supreme Court has expressly held that any delay in or failure to post bond pending appeal from a municipal court does not deprive the court of jurisdiction. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E.2d 278 (2011). In *Town of Mt. Pleasant*, the Supreme Court made clear that the only jurisdictional inquiry is whether the notice of appeal is timely filed. "Having met this procedural requirement [timely filing her notice of appeal], the circuit court was vested with appellate jurisdiction to determine [the] appeal." Only the notice of appeal affects jurisdiction, and there is no doubt Tenant timely filed the notice of appeal.

PROCEEDINGS ON APPEAL BOND[4]

Magistrate Tiffany R. Spann-Wilder (hereafter "the magistrate")[5] held a hearing on

[2] "It is within the appellate court's discretion whether to address any additional sustaining grounds." *Kosiusco v. Parham*, 428 S.C. 481, 510, 836 S.E.2d 362 (Ct.App. 2019), citing *Futch v. McAllister Towing of Georgetown*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999).

[3] The Supreme Court and Court of Appeals point out that a "Respondent may raise an additional sustaining ground that was not even presented to the lower court, but the appellate court is likely to ignore it." *I'on, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 421, 526 S.E.2 716, 724 (2000), as cited in *State v. Boston*, Op. No. 5808 (Court of Appeals March 10, 2021), footnote 3.

[4] Magistrate Spann-Wilder noted there had been delays in scheduling because she was in quarantine for a few days as a result of possible exposure to Covid-19 by her children while they were at school. (Bond Tr. p. 4, line 1-8).

[5] The reference to "the magistrate" is also to prevent confusion in proceedings before the magistrate's court and proceedings before the circuit court.

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Tenant's application for appeal bond on November 25, 2020.[6] At the commencement of the hearing, Judge Spann-Wilder ruled that Tenant was:

> . . . [E]ntitled to a hearing to the bond on the appeal, and that's kind of procedurally how it's done in Magistrate Court. . . Because he timely filed the appeal, that stayed everything, and thus we're here with this opportunity to figure out what the [amount of the monthly appeal bond] is going to be.

(Bond Tr. p. 3, lines14-22).

The magistrate noted Landlord sent a letter and a $10.00 check to the magistrate "to execute the eviction that was based on the original order. . ." (Bond Tr. p. 3, lines 10-14). The magistrate denied Landlord's request and returned counsel's check for $10.00 to counsel for Landlord since the Landlord's request was denied.[7] (Bond Tr. p. 3, line 16 – 24; p. 15, lines 7-8).

The magistrate and counsel discussed whether Tenant would pay Landlord directly for funds due during the term of the appeal bond, or whether the magistrate's office would hold the funds being paid by Tenant in trust during the term of the appeal. (Bond Tr. p. 4, lines 17-21). The magistrate made it clear she was going to order payments during appeal as part of the terms of the appeal bond. (Bond Tr. p. 4, line 17 – p. 5, line 7). Landlord's counsel did not take exception to this ruling, nor did Landlord appeal from the written order or the order of appeal bond.

Landlord's counsel asked that "my November 20 letter . . . [be] incorporate[d] into the record" and that request was granted. As noted in the prior footnote, since Landlord did not appeal

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[6] All citations are to the transcript of proceedings on November 25, 2020, prepared by Tenant's employment of Clark & Associates Inc., transcribed by Carol T. Lucic, RPR, RMR on April 13, 2021. The magistrate's staff provided an audio to Tenant's counsel, who had the proceedings professionally transcribed on an expedited basis. The parties jointly shared the expense to produce the expedited transcript for the court's use.

[7] The Magistrate's Return to Tenant's appeal does not include any correspondence from Landlord's counsel which addresses the relief the Landlord was requesting. (Magistrate's Return Vol. 1 & 2). Therefore, the relief requested by Landlord was not addressed in the magistrate's written order. Landlord filed no appeal from the magistrate's orders (the order of ejectment or the order of appeal bond) and no documentation related to any relief requested by Landlord was a part of the record on appeal before the circuit court. The magistrate's return forms the record on appeal before the circuit court. Rule 8(b), South Carolina Rules of Magistrate's Courts.

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any the grant of the appeal bond to the circuit court, the appropriateness of the appeal bond is the "law of the case." *State v. Rearick*, 417 S.C. 391, 790 S.E.2d 192 (2016). *See also Sloan v. Department of Transportation*, 365 S.C. 299, 618 S.E.2d 876 (2005) (The failure to appeal an alternate ground of the judgment below will result in affirmance, citing *Town of Mt. Pleasant v. Jones*, 335 S.C. 295, 516 S.E.2d 468 (Ct.App. 1999)).

Landlord abandoned any right to raise the issue regarding the appeal bond by failing to appeal the magistrate's ruling. S.C. Code Ann. §27-37-100. Once the bond was issued and the tenant paid the amount ordered, the issue became moot. An issue is moot, precluding review, when "a judgment rendered by the Court will have no practical legal effect upon an existing controversy. . ." *Wachesaw Plantation v. Alexander*, 414 S.C. 355, 778 S.E.2d 898 (2015).

Since Landlord did not appeal the denial of its request or the setting of the appeal bond, nor did Landlord ask the magistrate's court for reconsideration, the issue was not preserved for consideration by the circuit court. "When a trial court does not explicitly rule on an argument raised, and the appellant[8] makes no Rule 59(e) SCRCP motion to obtain a ruling, the appellate court may not address the issue. *Smith v. Ncci Inc.*, 369 S.C 236, 631 S.E.2d 268 (Ct.App. 2005). Since an order of the circuit court on the appeal bond can have no effect on the rights of the parties, the circuit court should not address an issue that is moot.

During the hearing on the appeal bond, the magistrate was surprised to learn that Tenant had been paying rent[9] at all times since the Covid-19 Amendment had been executed, and had paid

[8] The rule also requires a cross appeal by a respondent in order to raise an issue on later appeal. *In the Matter of Estate Galen Rider*, 394 S.C. 84, 713 S.E.2d 642 (Ct.App. 2011). In order to preserve this issue for consideration by the circuit court, Landlord should have filed a cross-appeal. The circuit court has the option to abstain from addressing an issue that is raised solely as an additional sustaining ground. *See* Footnote 2.

[9] Tenant was paying rent pursuant to the terms of the Covid-19 Amendment. (Assignment dated May 8, 2020). Section 4 of the Covid-19 Amendment detailed the period of deferred rent (April – June 2020), the period of rent

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the "rejected October rent, the October Deferral payment and the past due or unpaid security deposit $30,000.00. . . and the November rent" during the ejectment proceedings. (Bond Tr. p. 6, lines 1-7; p. 10, line 10-24). Tenant assumed the lease during the deferral period, and timely paid the full rent for October and November, 2020 at the time of the hearing on the appeal bond.[10] (Bond Tr. p. 7, lines 1 – p. 8 line 9).[11]

ISSUES ONE, TWO, SIX, SEVEN, NINE AND TEN[12]

The magistrate court and the circuit court erred in failing to adjudicate the action as a matter of law, *i.e.,* in failing to address the legal issues before applying any equitable doctrines. Landlord structured his pleadings to misdirect the magistrate's court and the appellate circuit court away from the contractual documents which controlled the parties' rights and to instead address the matter solely as one in equity.

The petition for ejectment appears to have been crafted carefully to assert actions by Tenant that occurred prior to the expiration of the lease as grounds for seeking eviction. This caused the magistrate's court to fail to apply the terms of the contract between the parties. The rationale was

following deferral, and a requirement for an "additional monthly amount of $1,906.00 which equals 1/6th of the aggregate base rent amounts that were deferred and unpaid during the Deferral Period." *Id.* p. 2.

[10] The magistrate insured that the amount of the appeal bond fully compensated Landlord for the use by Tenant of the premises during the term of the appeal. (Bond Tr. p. 6, line 1 – p. 9, line 23). There was even discussion that Tenant would continue to pay by ACH to the management company. (Bond Tr. p. 14, line 22 – p. 15, line 6). This is important in that the circuit court is separately being asked to continue the bond in place during appeal to the Court of Appeals, if the magistrate's order is upheld by the circuit court. There is absolutely NO prejudice to Landlord to allow the appeal bond to continue, since Landlord is being paid in full every month.

[11] Based on the discussions at the hearing, the parties and the court agreed that the deferral repayment of $1,906.00 for December, 2020 still needed to be paid. (Bond Tr. p. 10, lines 8-24). Landlord's lawyer stated "in summary, we have an ongoing rent of $9,593.88). (Bond Tr. p. 11, lines 18-21). The majority of the hearing was spent calculating the amount that would have to be paid monthly during the period of the stay to fully compensate Landlord. (Bond Tr. p. 12, line 5- p.14, line 11). That detail included an agreement by both parties to allow the existing monthly payments to continue to be paid to the management company during the period of the appeal. (Bond Tr. p. 14, lines 23 – p. 15, line 1; p. 16, lines 6-13).

[12] The numbers forth in this memorandum correspond to the numbers for each ground set forth by Tenant in the Motion to Reconsider.

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obvious for Landlord: Since Tenant timely and properly exercised the option to renew prior to the expiration of the lease, Landlord had to argue that Tenant had done something wrong during the lease period in order to obtain the relief he sought, *i.e.,* equitable relief of ejectment.

Landlord used the official form for Magistrate's court (SCCCA/733A) for a rule to vacate or show cause, and selected two of the three options for seeking relief: (1) "The terms of your tenancy or occupancy have ended; and (2) You have violated the terms of conditions of your lease by." Neither option stated a factual basis for the petition for relief. Instead, the form merely said "see packet" which was attached to the petition. (Magistrate's Return Vol. 1, p. 6).

The packet included an affidavit of Landlord which stated relief was being sought because:

> Exhibit D[13] shows that on August 6, 2020, Tenant informed Landlord that it would not be financially able to pay full rent and would not exercise its option to extend the Lease beyond expiration of the current term.. . In reliance thereon, Landlord entered into an agreement to relet the Leased Premises. Nearly a month later, Tenant then demanded to extend the lease and refused to vacate the Leased Premises at the expiration of the term, contrary to its prior representation.

(Magistrate's Return Vol. 1 pp. 7-8).

As demonstrated herein, Landlord had no right to assume Tenant was going to vacate, or to take any action to re-let the premises during the term of the lease, because the lease did not require notice of intent to exercise the option prior to expiration of the lease. To the extent the emails from the summer of 2020 have any effect at all, Landlord tried to claim the emails constituted notice Tenant was not going to exercise the option, but Tenant expressly said the decision on the option had not been made. (Magistrate's Return Vol. 2, pp. 19-20).

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[13] Exhibit D in the Magistrate's Return was a carefully selected portion of the full email communications exchanged between Landlord and Tenant during the summer of 2020, long before the lease expired on September 30, 2020. Tenant introduced the entirety of the email communications between the parties as an exhibit (which was not numbered or otherwise identified, but listed as Plaintiff's (*sic)* Exhibit (No. 7) on page 4 of the Magistrate's Return Vol. 1). The actual full exchange of correspondence between the parties appears in the Magistrate's Return Vol. 2 at pp. 14-26, labeled QF 1 through QF 13.

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Among the documents attached to Landlord's petition was the Assignment, Assumption and Amendment to Lease Agreement dated May 8, 2020 (referred to in the Motion to Reconsider and here as "the Covid-19 Amendment"). (*Id.* p. 50 – Magistrate's Return Vol. 1, pp. 1-5).

The issue presented to the magistrate was construction of the contract between the parties. *Rogers v. Nation*, 284 S.C. 330, 326 S.E.2d 182 (Ct.App. 1985) (an action for ejectment is an action at law). Instead of even attempting to litigate the legal issues, however, Landlord presented evidence and testimony solely related to the request for equitable relief, bypassing entirely the necessary determination of whether Tenant (or Landlord) had breached the lease.

As a result, the magistrate was misled into believing that the pleadings presented only an issue related to equitable relief, and she decided the action solely on the basis of equitable doctrines.

The magistrate's order set forth the "legal standards" applicable for breach of contract, and stated "the facts at issue relating to the terms of the Lease are not in dispute." Nothing could be further from the truth. Landlord had to prove the terms of the contract between the parties and demonstrate a violation of those terms (an issue of law) before being entitled to any relief in equity. Instead, the magistrate made no analysis of the legal rights of the parties based on the contract, but relied only upon equitable doctrines in granting relief. (Magistrate's Return Vol. 2, pp. 28-36).

Specifically, on page 5 of her order,[14] the magistrate said that the issue before her had to be determined "applying equity and common sense" and discussed solely an equitable analysis. The magistrate's order also cited to the law of specific performance, stating "[o]ne seeking specific performance to exercise an option must have. . ." *Id.* p. 6, Magistrate's Return Vol. 2 p. 33.

[14] Page 5 of the Magistrate's Order appears at Magistrate's Return Vol. 2, p. 32.

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This was an action at law in which the Landlord claimed the Tenant violated the terms of the lease. Landlord completely ignored its obligation to establish the terms of the lease and some violation of the terms of the lease by Tenant, causing the magistrate to conclude incorrectly that no analysis of the terms of the lease was necessary. *Id.* Magistrate's Return Vol. 2, pp. 32-33.

However, testimony presented by Landlord made clear that Tenant did not violate the lease, as Landlord expressly stated Tenant was not required to exercise the option to renew "till the very last day of the lease." (Tr. p. 41, lines 17-21). It is undisputed Tenant exercised the option on September 3, 2020, nearly a month before the lease expired. (Magistrate's Return Vol. 2, pp. 25-26; Tr. p. 24, line 12 – p. 25, line 10). All funds necessary to exercise the option were tendered to Landlord. Landlord is the one who violated the lease, by refusing to accept the option to renew and sending back the funds tendered by Tenant before expiration of the lease.[15]

The proper inquiry before both courts was whether the Landlord had a right to refuse to accept the timely and fully-paid option. Landlord did not have that right, because Tenant did not breach the Covid-19 Amendment. The magistrate's verdict should have been to deny the relief requested by Landlord. *Skull Creek Club Ltd. Partnership v. Cook and Book Inc*, 313 S.C. 283, 438 S.E.2d 163 (Ct.App. 1993), *cert. granted* August 11, 1994, *cert dismissed as improvidently granted*, 318 S.C. 515, 458 S.E.2d 549 (1995) (application for ejectment and construction of contract are matters of law).

In *Skull Creek*, the landlord sought ejectment of the tenant alleging tenant had breached the lease. The Court of Appeals applied rules of contract construction to determine the tenant's

[15] As pointed out in Footnote 6 of the Motion to Reconsider, Landlord cleverly did not reveal during its case whether it (or its agent, the management company) deposited the tendered option renewal payment and then refunded it, or whether the checks were held and then returned. Since Landlord failed to show how Tenant's funds were handled, it must be assumed the funds were accepted and deposited, then affirmatively rejected by a refund. *See* Footnote 6, Motion to Reconsider.

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obligations under the lease and whether a breach by tenant had occurred. In *Skull Creek,* the Court of Appeals elaborated on rules applicable to construction of a commercial lease. "A lease is to be construed more strongly against the [Landlord] and in favor of the [Tenant], particularly where the lease was prepared by the [Landlord]. Thus, where the lease admits of two constructions, either of which is reasonable, the one more favorable to the [Tenant] must be adopted." *Id*. 437 S.E.2d at 165.

As applicable here, the Court of Appeals decision in *Skull Creek* is instructive as to the characterization by the parties of whether the relief sought is legal or equitable. "It is well settled that parties are judicially bound by their pleadings. . . and a party cannot subsequently take a position contradictory of. . . his pleadings. . . " *Id.* at 166, citing *Elrod v. All*, 243 S.C. 425, 134 S.E.2d 410 (1964).

These issues were properly raised by Tenant on appeal to the circuit court. (Notice of Appeal filed November 9, 2020). The order of the circuit court should be vacated, the magistrate's ruling reversed, and the case remanded to the magistrate to enter judgment in favor of Tenant.

ISSUES 4, 5 AND 12: <u>BURDEN OF PROOF AND SCOPE OF REVIEW</u>

Since an order seeking ejectment is an action at law, Landlord had the burden to establish facts in support of its claim for relief by a preponderance of the evidence. *Rogers v. Nation*, 284 S.C. 330, 326 S.E.2d 182 (Ct.App. 1985). Landlord did not do so, and therefore failed to establish a case for relief of any kind. Landlord made no effort to discuss the language of the contract/lease at all, but focused solely on the emails exchanged well before the lease expired. This had the effect of putting the cart before the horse; equity would step in only if there had been a breach of contract/lease by the tenant. Instead, Tenant timely complied with the option to renew the lease.

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The Landlord ignored its burden to prove the rights of the parties under the applicable documents and therefore failed to prove a right to relief.

The circuit court sitting in an appellate capacity has the ability to make a determination in the same manner as a circuit court in trials without a jury. S.C. Code Ann. §18-7-140; *Vacation Time of Hilton Head Island Inc. v. Kiwi Corp*., 280 S.C. 232, 312 S.E.2d 20 (Ct.App. 1984). This is true even though "the Circuit Court may not have the opportunity to observe the demeanor of the witnesses." *Id*.

The magistrate's order did not identify the burden of proof to which Landlord was held in attempting to establish the facts upon which it relied in support of its request to relief. (Magistrate's Return Vol. 2, pp. 28-36). While the magistrate's order addressed one paragraph of the order as "findings of fact," there were no findings of fact construing the contract/lease. Additionally, there was no discussion as to the burden of proof to which Landlord was held.[16] The magistrate was required to find whether there was a breach by Tenant based on the parties' rights from construction of the documents, *i.e.,* the contract/lease documents. Only then did other facts become relevant. Since Landlord failed to establish a breach by Tenant, that was the end of the analysis.

In civil proceedings in South Carolina, the required burden of proof is "preponderance of the evidence" except as those matters which require "clear and convincing" evidence. *Gorecki v. Gorecki*, 387 S.C. 626, 693 S.E.2d 419 (Ct.App. 2010) (defining "preponderance of the evidence"). *Satcher v. Satcher,* 351 S.C. 477, 570 S.E.2d 535 (Ct.App. 2002) (defining "clear and convincing evidence"). The magistrate did not address either the burden of proof nor did she make any analysis of the parties' obligations under the contract.

[16] This may be because of the backward way the Landlord sought relief, *i.e.,* trying to posture the case as one in equity, instead of attempting to prove a legal ground for the relief sought.

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Landlord postured the case as one in equity[17] and the emails were included in the original filing so as to enable Landlord to posture his theory of "detrimental reliance" without requiring the court to first determine what the terms of the contract/lease required. Landlord essentially prevented a consideration of the contract based solely on its terms, since the emails were relied upon in seeking relief from the magistrate court.

It is unclear from the circuit court order what standard of review was applied to the facts by the circuit court in considering the appeal. The order states that the circuit court "agrees with and adopts the findings of fact and conclusions of law." (March 29, 2021 Order, p. 1).

Neither the magistrate's court nor the circuit court articulated the standard of proof to which Landlord's evidence was judged. As stated above, the magistrate erroneously stated there was no dispute as to the contract, when in fact, the entire matter was based on the contract documents. Tenant's Issue One on the Notice of Appeal presented this issue to the circuit court for determination on appeal.

Only after determining the legal issues, *i.e.,* what the rights of the parties were pursuant to the contract/lease, only then did any evidence of intent or anything else was admissible. Since an analysis of the contract/lease would have established no breach of contract by Tenant, the inquiry before the magistrate court and the circuit court should have ended there. On appeal, the circuit court also evaluated the action based solely on equitable principles, without regard to the necessary determination of whether Tenant breached the lease.

[17] The creative use of the official form for seeking ejectment was accomplished by not filling out the form as required, and instead using the reference "see packet" to set forth the grounds for the relief it was seeking. (Magistrate's Return Vol. 1, p. 6). Landlord's posture, as the magistrate's return erroneously stated, was that "the terms of the tenancy had ended," which was incorrect. The order then began a discussion of the emails, completely ignoring the contract documents and the issue of law presented, both of which were prerequisites to consideration of equitable issues. *Id.* p. 1.

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To the extent the emails add to the story, when considered as required in favor of the Tenant, Landlord was not entitled to rely in any way on the content of the emails. Tenant made clear in the email of August 25, 2020 that Tenant had not yet decided whether to exercise the option to renew the lease. The emails do not tell the story, and cannot be used to decide the issues, until the contract is construed and only then, if the terms of the contract are ambiguous. *Landry v. Landry*, 430 S.C. 153, 843 S.E.2d 491 (2020); *McCord v. Laurens County Health Care System*, 429 S.C. 286, 838 S.E.2d 220 (Ct.App. 2020). Neither court construed the matter as one at law, neither court considered the burden of proof to which the Landlord was held and neither court analyzed the rights of the parties under the contract/lease.

The circuit court is requested to find the magistrate's ruling on the contract documents was error, vacate the circuit court order, vacate the magistrate's order and remand the matter to the magistrate's court for entry of judgment in favor of Tenant. It was Landlord's obligation to establish that Tenant breached the lease. Landlord failed. Landlord does not get a second chance to prove its case when it failed to do so the first time. *Erickson v. Jones St. Publishers*, LLC, 368 S.C. 444, 476, 629 S.E.2d 653, 670 (2006) (holding that a party may not complain of an error his own conduct has induced); *Porter v. S.C. Pub. Serv. Comm'n*, 333 S.C. 12, 32, 507 S.E.2d 328, 338 (1998) (noting that an "administrative agency may not consider additional evidence upon remand unless [this] Court allows it because that affords a party two bites at the apple," *citing Parker v. S.C. Pub. Serv. Comm'n*, 288 S.C. 304, 342 S.E.2d 403 (1986).

ISSUE THREE

The magistrate's court erroneously ruled ". . . [Tenant'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, with no further analysis required." Magistrate's Return Vol. 2, p. 36.

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That certainly explains why, at the time of hearing evidence to set the amount of the appeal bond, the magistrate was surprised to learn not only that Tenant had been paying rent all along, but that the "security deposit" had been timely sent, possibly accepted, and then sent back. (Bond Tr. p. 6, lines 1- 7; p. 10, line 10-24).

Landlord intentionally failed to establish what it did with the funds that Tenant tendered in September and October, 2020 (whether deposited to Landlord's account or to the account of the management company). If deposited, the tender (and receipt) of the funds constituted an acceptance of the funds and consummated the renewal of the option. Landlord's witnesses were vague on this, perhaps to mislead the court, and did mislead the court, since the magistrate ruled the "security deposit" had not been paid when it had been.

The Supreme Court has analyzed whether tender of payment is sufficient for exercising an option to renew a lease, concluding that option contracts "have been decided on a factual basis, recognizing the difference between a free-standing option contract to purchase real estate and an option provision embedded in a lease." *Ingram v. Kasey's Associates*, 340 S.C. 98, 111, 531 S.E.2d 287 (S.C. 2000). Interestingly, the Supreme Court concluded that ". . . there is simply no way to equate a requirement to pay money with the giving of notice." *Id.*

Here, Tenant did both and did so timely. The magistrate's ruling to the contrary is error. Similarly, the circuit court construed the facts with the same error as the magistrate. The circuit court found that Tenant "belatedly attempted to pay" the security deposit. We now know Tenant did, in fact, pay the security deposit and Landlord avoided this issue, confusing both courts.

The attempted rejection of the funds by Landlord is one of the many things Landlord did in violation of the lease. The Landlord had no right to reject the funds that were timely tendered before the expiration of the lease.

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Both courts erred in erroneously concluding that Tenant had not tendered the funds, when in fact, Tenant tendered them three times, the first time before the expiration of the lease, and Landlord inappropriately rejected the payment. Landlord cleverly avoided introducing facts as to when Landlord finally accepted the tendered funds.

To the extent the circuit court affirmed the magistrate court in erroneously stating that Tenant had not timely tendered the security deposit, and since the record clearly reveals that Landlord did finally accept the security deposit, both orders should be vacated or amended to correct this significant error.

ISSUE EIGHT

As noted in the Motion to Reconsider, pp. 3-4, Landlord established no damages of any kind. The shadowy "new" tenant was not required to do anything if the current Tenant stayed in the property, and was free to walk away from an "agreement" that was not defined or produced by Landlord during its case in chief. (Tr. p. 36, lines 6-15; p. 42, lines 17-25). The "few phone calls" to which Landlord testified did not establish that a management company or realtor was engaged, nor did it show it spent a dime or lost a dime as a result of Tenant timely exercising its option to extend the lease. Landlord conveniently did not bring an agreement with the shadowy tenant to the hearing. (Tr. p. 32, line 11- p. 33, line 2). There was no testimony that Landlord expended any funds for any purpose in reliance on the summer 2020 email.

Both orders should be vacated, in that Landlord failed to establish any damages. *See* discussion, Motion to Reconsider, pp. 3-5.

ISSUE ELEVEN

This issue is not briefed separately because it is subsumed by other arguments already set forth above.

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ISSUES THIRTEEN AND FOURTEEN

The circuit court's ruling that it lacked jurisdiction to review the appeal was error. The South Carolina Supreme Court has expressly held that any delay in or failure to post bond pending appeal from a municipal court does not deprive the reviewing court of jurisdiction. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E.2d 278 (2011). In *Town of Mt. Pleasant*, the Supreme Court made clear that the only jurisdictional inquiry is whether the notice of appeal is timely filed.

Additionally, the issue of whether jurisdiction existed to issue the appeal bond became moot when Landlord failed to appeal from the order granting appeal bond. An issue is moot, precluding review, when "a judgment rendered by the Court will have no practical legal effect upon an existing controversy. . ." *Wachesaw Plantation v. Alexander*, 414 S.C. 355, 778 S.E.2d 898 (2015). Tenant has been paying rent pursuant to the appeal bond during the entirety of this appeal.

"Appellate courts will not pass on moot and academic questions or make an adjudication where there remains no actual controversy." *Linda Co. Ins. V. Shore*, 390 S.C. 432, 558, 703 S.E.2d 499, 506 (2010).

While it is true that questions of subject matter jurisdiction may be raised at any time, the rule will not be applied when the answer to the question will provide no actual relief to the parties. *Linda Co. Ins., supra.*

Here, the circuit court addressed the issue of jurisdiction gratuitously, as Landlord did not appeal the grant of appeal bond, nor was it was necessary to a determination of the issue before the circuit court. As pointed out above in Footnote 2, an appellate court need not decide an additional sustaining ground raised by a respondent on appeal. *Kosiusco v. Parham*, 428 S.C. 481,

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510, 836 S.E.2d 362 (Ct.App. 2019), citing *Futch v. McAllister Towing of Georgetown*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999).

While Landlord argued the magistrate's court lacked jurisdiction to issue the appeal bond, and the circuit court agreed, the fact remains that the magistrate's court did issue an appeal bond. Both parties, Landlord and Tenant, have had the benefit of the appeal bond during the appeal to the circuit court. *Jones v. Dillon-Marion Human Resources Dev. Comm'n*, 277 S.C.2d 533, 291 S.E.2d 195 (1982). *See also Knight Pub. Co. v. University of South Carolina*, 295 S.C. 31, 367 S.E.2d 20 (S.C. 1988).

By way of substance, the magistrate's court ruling and the circuit court's ruling that the failure to post an appeal bond deprived the magistrate's court of jurisdiction to hear the matter, the issue is not one of jurisdiction at all.

A court's subject matter jurisdiction is determined by whether it has the authority to hear the type of case in question." *Allison v. W.L. Gore & Assocs.*, 394 S.C. 185, 188, 714 S.E.2d 547, 549 (2011). There can be no question that the magistrate's court had subject matter jurisdiction to issue the appeal bond. S.C. Code §22-3-310(10).

"The question of subject matter jurisdiction is a question of law for the court." *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009) (citation omitted). *See also Baddourah v. McMaster*, Op. No. 28013 (March 20, 2021) (South Carolina Supreme Court).

The circuit court's reliance on *Wheeler v. Hyler*, 228 S.C. 584, 91 S.E.2d 265 (1956) is misplaced because its holdings were abrogated by the South Carolina Rules of Civil Procedure. [18]

[18] The circuit court relied upon *Wheeler v. Hyler*, 228 S.C. 584, 91 S.E.2d 265 (1956), which incorrectly equated a condition precedent to an appeal to a jurisdictional question.

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The Supreme Court has made clear there is a distinction between jurisdiction to hear a matter versus power or authority to hear a matter. *Baddourah v. McMaster*, Op.No. 28013 (S.Ct. March 10, 2021). *See also First Citizens Bank & Trust Co. v. Taylor*, 431 S.C. 149, 847 S.E.2d 249 (Ct.App. 2020). No existing precedent[19] has construed the applicability of S.C. Code Ann. Section 27-37-130 as it relates to jurisdiction, and an appeal to circuit court is not an appropriate forum in which to address a novel issue, especially one not raised by the parties and instead addressed *sua sponte* by the appellate court.

Lastly, Landlord's argument regarding jurisdiction fails on the merits. While S.C. Code Ann. §27-37-120 discusses the requirement for bond for appeal, the amount of the bond has to be set by the magistrate, which is exactly what happened here. ". . . [T]he 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." *Id.*

Tenant could not possibly know how much bond to post without the magistrate having a hearing to determine what the amount of the bond was. The record does not reflect when the request for bond was made, but at the commencement of the hearing on the bond, the magistrate court stated Landlord had "appealed that decision, and so this hearing was set as a bond to stay execution on appeal." (Bond Tr. p. 3, lines 7-10). The magistrate said she wanted to hear the bond issue "probably last week," but she ended up having to quarantine. (Bond Tr. p. 4, lines 1-8).

Landlord did not object to proceeding nor did he raise any omission by Tenant in timely seeking an appeal bond. To the contrary, the magistrate clearly stated the hearing was delayed by her own issues.

[19] The predecessor to the statute was construed in a 1948 action which was again decided prior to the enactment of the South Carolina Rules of Civil procedure. *Horn v. Blackwell*, 212 S.C. 480, 48 S.E.2d 322 (1948).

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Lastly, as noted in the Motion to Reconsider, the courts have been unclear in precedent in carelessly referring to "jurisdiction" for many years, and The Supreme Court has only recently provided helpful guidance on the subject. *Baddourah v. McMaster*, Op.No. 28013 (S.Ct. March 10, 2021). *See also First Citizens Bank & Trust Co. v. Taylor*, 431 S.C. 149, 847 S.E.2d 249 (Ct.App. 2020).

The magistrate court is statutorily empowered to issue an appeal bond. S.C. Code Ann. §18-7-10 (no time period within which appeal bond must be posted). The Summary Court Bench Book, provided to the magistrate's courts by the Supreme Court of South Carolina, specifically provides that the magistrate is to determine the amount of the appeal bond. https://www.sccourts.org/summaryCourtBenchBook/, Section N(3)(f). Clearly the magistrate cannot determine the amount of appeal bond until the notice of appeal is filed. As here, the court schedules a hearing for appeal bond at the earliest available time.

CONCLUSION

It is respectfully asserted that the circuit court's affirmance of the order of the magistrate's court was error. The magistrate court erred in failing to decide the legal issues presented by the petition for ejectment before considering how equitable issues factored into any relief being sought by Landlord (or Tenant). The magistrate court also erred in determining that Landlord failed to sustain his burden of proof that Tenant had breached the contract/lease. The magistrate's order should have been reversed, and the case remanded to the magistrate for entry of an order in favor of Tenant, denying relief to Landlord.

A proposed order is submitted herewith by separate filing.

[signature next page]

Respectfully submitted,

s/ Desa Ballard

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