

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appellate Case No. 2021-000460

RECEIVED

May 21 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.

v.

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

APPENDIX TO MOTION TO DISMISS APPEAL

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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 Appellant / Tenant did not pay a security deposit, even though Respondent refused Appellant’s attempts to pay all amounts due. Further, the Magistrate

Court's finding ignored the plain language of the lease which required notice of default and right to cure, neither of which were given by Respondent.

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

COUNTY OF [CHARLESTON]

2020-CF-10-4936

IN THE COURT OF COMMON PLEAS

Davenport c/o Hellman Yates & Tisdale, PA
105 Broad Street, Third Floor, Charleston, SC 29401

Plaintiff

RETURN OF THE CIVIL APPEAL

Vs.

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

381 King Street Charleston, SC 29401

Defendant(s))

This matter is on appeal from the Magistrate Court of Charleston County, South Carolina,

the Honorable T.R. Spann-Wilder Presiding Judge.

The Plaintiff filed a (an) Application for Ejectment (Eviction) on October 1, 2020

against the Defendant(s) alleging the following: That the terms of the tenancy had ended and that on 8/6/20

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, which ended on September 30, 2020. In reliance thereon, Landlord accordingly 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 representations. Landlord must make the leased premise available to the replacement tenant. Furthermore, Tenant never made the \$30,496.00 security deposit as required in the Assignment, Assumption and Amendment of Lease that was dated May 8, 2020.

served the Defendant on October 12, 2020

at Moe's Southwest Grill, 381 King Street, Charleston, SC 29401

by delivery to the store manager, Ashley . The Defendant answered on October 15, 2020

stating: No formal answer was filed. A call was made asking for a hearing on the matter within the requisite 10 days of service.

The matter was heard on October 27, 2020. The Plaintiff submitted a brief in support of his position at the hearing and the Defendants were allowed to submit a brief in opposition which was provided on October 29, 2020.

The ruling was issued in favor of Plaintiff Kenneth R. Davenport, II, PR

on the claim the Court awarded the following: Granted the application of ejectment for the Plaintiff as Defendant's response that they could not meet the new lease terms sufficed to decline it's option to renew and Plaintiff was within it's right to seek new tenants and hold the expectation that Defendant would be leaving.

The Court ruled for the N/A on the counterclaim, the Court awarded the following

The proceedings were (Check Appropriate Box)

- ☒ Recorded electronically.
- ☐ Recorded by a court reporter.
- ☐ Recorded in writing by the judge.

The Notice of Appeal was served upon the Court by N/A on N/A * court does not have proof of the filed appeal from Circuit Court being served here. A plain copy was mailed in and clocked 11/16/20. This response is based on inquires of the parties for a return from the court.

The jury list was prepared pursuant to S.C. Code Ann. (Check Appropriate Box)(Answer if Applicable): N/A

- ☐ § 22-2-80. Selection of jury list for a single trial.
- ☐ § 22-2-90. Selection of jury list for scheduled terms of jury trials.

and the Plaintiff and Defendant(s) were given an opportunity to exercise challenges on

The Plaintiff called the following witnesses, and a summary of their testimony is attached.

1. Kenneth R. Davenport, II, Plaintiff
2. Daniel Ravenel, Property Manager

- | | |
|----------|-----------|
| 3. _____ | 4. _____ |
| 5. _____ | 6. _____ |
| 7. _____ | 8. _____ |
| 9. _____ | 10. _____ |

The Defendant called the following witnesses and a summary of their testimony is attached.

- | | |
|---------------------------------------|-----------|
| 1. <u>Chris Grooms, VP Operations</u> | 2. _____ |
| 3. _____ | 4. _____ |
| 5. _____ | 6. _____ |
| 7. _____ | 8. _____ |
| 9. _____ | 10. _____ |

The Plaintiff made the following motions. A summary of the Plaintiff's and Defendant's position on each motion and the Court's ruling is attached.

- | | |
|---------------|-----------|
| 1. <u>N/A</u> | 2. _____ |
| 3. _____ | 4. _____ |
| 5. _____ | 6. _____ |
| 7. _____ | 8. _____ |
| 9. _____ | 10. _____ |

The Defendant made the following motions. A summary of the Plaintiff's and Defendant's position on each motion and the Court's ruling is attached.

- | | |
|---------------|-----------|
| 1. <u>N/A</u> | 2. _____ |
| 3. _____ | 4. _____ |
| 5. _____ | 6. _____ |
| 7. _____ | 8. _____ |
| 9. _____ | 10. _____ |

The Plaintiff offered the following items into evidence.

- | | |
|---|--|
| 1. <u>Exh A –Retail Lease –dated 9/25/2013 & Site Plan</u> | 2. <u>Exh B – CAM, Tax & Insurance Schedule</u> |
| 3. <u>Exh B cont'd-Assignment, Assumption & Amendment of lease dated 10/16/2018</u> | 4. <u>Exh C - Assignment, Assumption & Amendment of lease dated 05/08/2020</u> |

5. Exh D – Tenant Correspondence to Landlord – date 8/24/20; 8/6/20;7/27/20 & 7/22/20

6. Exh E – Default Letter dates 9/4/2020

7. Documents Stamped QF 1-13 (presented at trial – all others pre-filed with Application of Ejectment)

8.

9.

10.

The Defendant raised the following objections to the items that the Plaintiff sought to introduce into evidence:

1. N/A

2.

3.

4.

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9.

10.

A summary of the Defendant's and Plaintiff's position and the Court's ruling on the objection is attached.

The Defendant offered the following items into evidence:

1.

2.

3.

4.

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6.

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8.

9.

10.

The Plaintiff raised the following objections to the items that the Defendant sought to introduce into evidence:

1. N/A

2.

3.

4.

5.

6.

7.

8.

9.

10.

A summary of the Plaintiff's and Defendant's position and the Court's ruling on the objection is attached.

The Court issued the following Judgment N/A

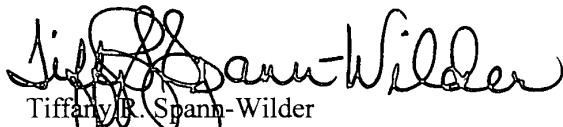
Both parties presented a summation of their position. The Plaintiff argued the equitable remedies of Unclean Hands and Equitable Estoppel. They argued that this was a David and Goliath situation where the Defendants continued to assert that they did not have the ability to pay but "found money" when they learned they had to vacate and Plaintiff had found another tenant. There was no good faith and fair dealing in how Moe's handled Davenport. When they said they could not meet his terms in the early August 2020 email then Davenport was free to find a new tenant and mitigate his damages. That email estopped Moe's from exercising the option to renew this agreement.

Defendants argued that they were shut down due to the Coronavirus and financially impacted. The Plaintiff knew this as there was a new assignment in May after the virus hit. The emails between Hartman (Moe's) and Davenport should be considered ongoing negotiations and as such the September 3, 2020 email renewed the option and Moe's ability to remain where they are. Further, the two rejected payments sent by the Defendant in late September 2020 show their good faith to close the deal.

Attached are copies of the items which are checked.

- ☐ Summons and Complaint ☒ Other: Bond to Stay Appeal
- ☐ Summons and Claim and Delivery
- ☒ Landlord-Tenant Rule to Show Cause
- ☐ Answer
- ☐ Counterclaim
- ☐ Judgment
- ☐ Writ of Ejectment
- ☒ Order
- ☐ Jury List
- ☒ List of witnesses and a summary of their testimony.
- ☐ List of motions, a summary of the parties positions and this court's ruling.
- ☒ List of items offered into evidence, a summary of objections, and court's ruling.
- ☒ Documents and exhibits put into the record.
- ☒ Notice of Appeal.

Respectfully submitted,


Tiffany R. Spann-Wilder
Magistrate, Charleston County
City Magistrate Court

Dated: February 16, 2021

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

)
)
)
)

2020CV1010700554

CIVIL CASE NUMBER

MAGISTRATE'S COURT

RULE TO VACATE OR SHOW CAUSE (EVICTION)

**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**

Phone:

PLAINTIFF(S)

Vs

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

**Serve Manager or Assistant Manager
on duty.**

Phone:

DEFENDANT(S)

TO Quality Fresca I, LLC dba Moe's Southwest Grill : Kenneth R. Davenport II, Personal Rep of the Estate of
Kenne is asking this Court to evict you from the property listed above because they claim that:

☐ You have failed to pay rent when due or demanded in the amount of \$.

☒ The terms of your tenancy or occupancy have ended. **SEE PACKET**

☒ You have violated the terms or conditions of your lease by: **SEE PACKET**

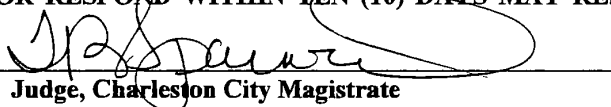
You the defendant(s) or lessee(s) of the premises located at the address listed above, **and all others**, are ordered to vacate the premises immediately pursuant to S.C. Code Ann. §27-37-10 **OR** contact the:

**Charleston City Magistrate
995 Morrison Drive
P. O. Box 941
Charleston, SC 29403
(843) 724-6719**

within ten (10) days of receiving this notice, for the purpose of scheduling a hearing to show why you should not be evicted from these premises.

**FAILURE TO VACATE THE PREMISES OR RESPOND WITHIN TEN (10) DAYS MAY RESULT IN THE
ISSUANCE OF A WRIT OF EJECTMENT.**

10/01/2020


Judge, Charleston City Magistrate

Personally appeared before me, the undersigned deponent, being duly sworn, , says s/he is a person over 18 years of age, not a party or attorney in this action and s/he to serve the Rule to Vacate or Show Cause on Quality Fresca I, LLC dba Moes Southwest Grill on the following dates/times:

DATE TIME INITIALS DATE OF SERVICE TIME OF SERVICE

1. **SETTLED/DATE VACANT/DATE**

2. **PERSON SERVED & RELATIONSHIP IF NOT DEFENDANT**

3. _____

Sworn to and subscribed before me

This _____ day of _____, 20____.

NOTARY PUBLIC OR JUDGE

SIGNATURE OF SERVER

ON _____ I DEPOSITED IN THE UNITED STATES MAIL IN AN ENVELOPE ADDRESSED TO THE DEFENDANT(S) ABOVE WITH FIRST CLASS POSTAGE AFFIXED THERETO, A COPY OF THIS DOCUMENT.

MV220

SCCA/733A (Amended 11/2019)

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

CIVIL CASE NUMBER
IN THE MAGISTRATE'S COURT

2020CV10107-
00554

PLAINTIFF(S))

VS.)

APPLICATION FOR
EJECTMENT
(Eviction)

)
)
Quality Fresca I, LLC)
d/b/a Moe's Southwest Grill)
381 King Street)
Charleston, SC 29401)

DEFENDANT(S))

I, Kenneth R. Davenport II, Personal Representative of the Estate of Kenneth R. Davenport, plaintiff in this action, state that I am the landlord-lessor of premises within the jurisdiction of Magistrate T.R. Spann-Wilder which is described as: (address and description of premises – apartment, house, etc.)

381 King Street, Ground Floor
Charleston, South Carolina 29401 ("Moe's Southwest Grill")

I further state that, with regard to the above described premises, a landlord-tenant relationship exists between myself and the defendant Quality Fresca I, LLC, the tenant-lessee, as evidenced by the following: (Attach lease papers or other written proof.)

See attached: (Exhibit A) Lease; (Exhibit B) Assignment, Assumption and Amendment of Lease dated October 16, 2018; (Exhibit C) Assignment, Assumption and Amendment of Lease dated May 8, 2020.

Grounds for this ejectment are one or more of the following:

☐ The tenant fails or refuses to pay the rent when due or when demanded; or

☒ The term of tenancy or occupancy has ended; or

☒ The terms or conditions of the lease have been violated as follows: Exhibit D 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, which ended on September 30, 2020. In reliance thereon, Landlord accordingly entered into an agreement to relet the Leased Premises. Nearly a month later, Tenant then demanded to

554

extend the Lease and refused to vacate the Leased Premises at the expiration of the term, contrary to its prior representations. Landlord must make the Leased Premises available to the replacement tenant.

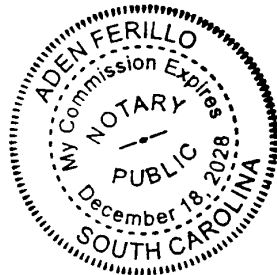
Furthermore, Tenant never made the \$30,496.00 Security Deposit as required by Paragraph 4.c. of the Assignment, Assumption and Amendment of Lease dated May 8, 2020 (Exhibit C). Landlord provided notice of this default to Tenant on September 4, 2020 (Exhibit E).

Sworn to before me
this 1st day of October, 2020.

Aden Ferillo
Magistrate or Notary Public for South Carolina

My Commission expires 12/18/2028

)
)
) [Signature]
) PLAINTIFF (or his attorney)
)
)



#554

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE MATTER OF
KENNETH RICHARD DAVENPORT
(Decedent)

IN THE PROBATE COURT

CERTIFICATE OF APPOINTMENT

CASE NUMBER: 2019ES1001966

This is to certify that

KENNETH RICHARD DAVENPORT, II

is/are the duly qualified

- ☒ PERSONAL REPRESENTATIVE
☐ SUCCESSOR PERSONAL REPRESENTATIVE
☐ SPECIAL ADMINISTRATOR

In the above matter and that this appointment, having been executed on the 15th
day of November, 2019 is now in full force and effect.

RESTRICTIONS:

NONE

CITY MAGISTRATE COURT

OCT 08 2020

FILED IN CHARLESTON COUNTY

Executed this 15th day of November, 2019



IRVIN G. CONDON, JUDGE OF PROBATE
BY ESTATE CLERK

**Do not accept a copy of this certificate without
the raised seal of the Probate Court.**

STATE OF SOUTH CAROLINA

COUNTY OF Charleston

Kenneth R. Davenport II, Personal
Representative of the Estate of Kenneth
R. Davenport PLAINTIFF(S)

VS.

Quality Fresca I, LLC

DEFENDANT(S)

CIVIL CASE NUMBER: 554

IN THE MAGISTRATE'S COURT

CERTIFICATION OF COMPLIANCE
WITH THE CORONAVIRUS AID, RELIEF,
AND ECONOMIC SECURITY ACT

(Evictions)

My name is: Kenneth R. Davenport II

First

Middle

Last

I am (check one) ☒ the Plaintiff or ☐ an authorized agent of the Plaintiff in the eviction case described at the top of this page. I am capable of making this certification. The facts stated in the certification are within my personal knowledge and are true and correct.

1. Verification:

Plaintiff is seeking to recover possession of the following property:

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

Name of Apartment Complex (if any)

381 King Street (Ground Floor), City and County of Charleston, SC 29401

Street Address & Unit No. (if any) City County State ZIP

I verify that this property is not a "covered dwelling" as defined by Section 4024(a)(1) of the Coronavirus Aid, Relief, and Economic Security Act. The facts on which I base my conclusion are as follows:

(Please identify which data base or the other information you have used to determine that the property does not have a federally backed mortgage loan or federally backed multifamily mortgage loan.)

The subject property is commercial and not a "covered dwelling" as defined by the Act. The property is not subject to a federally backed mortgage loan of any kind.

Is the property a Low Income Housing Tax Credit (LIHTC) property? (check one)

☐ Yes ☒ No

Is the property federally subsidized under any HUD program? (check one)

☐ Yes ☒ No

Is the property rented to persons with Section 8 vouchers? (*check one*)

☐ Yes ☒ No

2. Declaration:

I certify that the foregoing statements made by me are true and correct. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment by contempt.

My name is: Kenneth R. Davenport II
First Middle Last

My address is: c/o Hellman Yates & Tisdale, PA, 105 Broad Street, Charleston, SC 29401
Street Address & Unit No. (if any) City State ZIP

Signed on: 10 / 1 / 2020 in Dorchester County, South Carolina.
Month Day Year

Kenneth R. Davenport II
Signature

Exhibit A
Lease

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON) **RETAIL LEASE**

THIS **RETAIL LEASE** is made and entered into as of this 25th day of September, 2013 (the "**Lease**"), by and between **KENNETH R. DAVENPORT** (hereinafter referred to as "**Landlord**") and **OCHLOCKNEE VENTURES, LLC**, a South Carolina limited liability company (hereinafter referred to as "**Tenant**").

WITNESSETH:

WHEREAS, Landlord and Tenant entered into that certain Retail Lease dated as of October 1, 2001 (the "**Prior Lease**"), by which Landlord leased the Leased Premises (hereinafter defined) to Tenant from October 1, 2011 until the date first above written (the "**Prior Term**");

WHEREAS, while Landlord and Tenant have terminated the Prior Lease (subject to the terms of that certain Lease Agreement of even date herewith), the parties desire to ensure the continuity of certain provisions of the Prior Lease and are therefore agreeing herein that such certain provisions are and have been valid during the Prior Term and will continue through the Lease Term (hereinafter defined).

WHEREAS, through mere inadvertence, the name of Tenant included in the Prior Lease was "Moe's Southwestern Grille," which is the trade/ business name of Tenant; however, Tenant's legal name is Ochlocknee Ventures, LLC; and

WHEREAS, the parties agree, acknowledge and confirm that Ochlocknee Ventures, LLC has been, for all times, the Tenant under the Prior Lease, notwithstanding the fact that Tenant's trade/ business name was utilized for purposes of executing the Prior Lease.

NOW, THEREFORE, for and in consideration of the mutual covenants, conditions, and agreements of the respective parties herein contained, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto, for themselves, their heirs, distributees, executors, administrators, legal representatives, successors and/or assigns, do hereby agree as follows:

A. INCORPORATION OF RECITALS; LEASED PREMISES

1. The above recitals are true and correct and are incorporated herein by reference.
2. Landlord agrees to lease to Tenant, and Tenant agrees to rent from Landlord for the term and upon the rental, covenants, conditions, and agreements hereinafter set forth those certain premises located in the City of Charleston, County of Charleston, State of South Carolina, to wit: 381 King Street containing approximately two thousand fifty-four (2,054) square feet (hereinafter referred to as the "**Leased Premises**"), as more particularly described as Suite #1 on that

certain first floor *Site Plan*, a copy of which is attached hereto as Exhibit A, and incorporated herein by this reference.

Nothing herein contained shall be construed as a grant or rental by Landlord of the roof, common areas or exterior walls of the building in which the Leased Premises is located. The Leased Premises prorations shall be as per attached Exhibit B.

B. TERM AND DELIVERY OF LEASED PREMISES

1. 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").
2. **Options:** 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 then Gross Sales (hereinafter defined), whichever is greater.

C. COVENANTS AND CONDITIONS OF LEASE

This Lease is made on the following covenants and conditions which are expressly agreed to and accepted by Tenant:

1. **Payments.** All payments of any nature due under the Lease from Tenant shall be deemed Rent as set forth below, including, but not limited to, any CAM (as hereinafter defined, see Exhibit B) percentage rent (as hereinafter defined) or additional rent of whatever kind or nature, for whatever intent or purposes as set forth in this Lease, all of which shall be referred to and deemed, jointly and severally, as "Rent". In the event of non-payment of any Rent, Landlord shall have all rights and remedies provided for herein, at law or in equity, in accordance with the laws of the State of South Carolina.
2. **Rent.**
 - a. Base Rent. Tenant agrees to pay Landlord an annual sum of Eighty Thousand Eight Hundred Fifty and 84/100 (\$80,850.84) Dollars (the "Base Rent"), in lawful money of the United States, payable in equal monthly installments of Six Thousand Seven Hundred Thirty-Seven and 57/100 (\$6,737.57) Dollars or any amount equal to seven percent (7%) of Gross Sales as defined herein, whichever amount is greater, plus any Annual Rent Adjustment (hereinafter defined), CAM (hereinafter defined) and additional rent (hereinafter defined) (hereinafter referred to, jointly and severally, as the "Monthly Rent"). The Monthly Rent shall be due and payable in advance, for receipt by Landlord on the first (1st) day of each and every month, but no later than the tenth (10th) of each month made payable to the agent designated by Landlord. In the event Tenant fails to pay any Rent when

due, and/or fails to pay the Monthly Rent or any additional Rent, a late charge equal to five percent (5%) of the Monthly Rent then in effect, or One Hundred Fifty and No/100 (\$150.00) Dollars, whichever is greater, shall become immediately due and owing, compounded monthly, which Late Charge(s) shall be in addition to the Monthly Rent(s) then due and shall be treated as additional Rent; provided, however, that said Late Charge is not to exceed the maximum amount allowed by law.

- b. Annual Rent Adjustment. The Base Rent shall be subject to an annual rent adjustment of two and one-half percent (2.5%) per annum (the "Annual Rent Adjustment"); provided, however, that *the Base Rent shall be fixed for the first two years of the Lease Term at \$80,850.84*. After the 2nd year, such Annual Rent Adjustment shall be applied and due on the anniversary date of this Lease (the "Rent Adjustment Date"). Landlord is deemed to have given notice to Tenant of the Annual Rent Adjustment with the following schedule.

10/1/13-9/30/14	\$6,737.57 per month	\$80,850.84 per year
10/1/14-9/30/15	\$6,737.57 per month	\$80,850.84 per year
10/1/15-9/30/16	\$6,906.00 per month	\$82,872.00 per year
10/1/16-9/30/17	\$7,079.00 per month	\$84,948.00 per year
10/1/17-9/30/18	\$7,256.00 per month	\$87,072.00 per year
10/1/18-9/30/19	\$7,438.00 per month	\$89,256.00 per year
10/1/19-9/30/20	\$7,624.00 per month	\$91,488.00 per year

- c. Percentage Rent. Tenant shall pay Base Rent or Percentage Rent, not both, whichever is greater. "Percentage Rent" shall be calculated by multiplying the annual Gross Sales by seven percent (7%). In the event 7% of Gross Sales is greater than the Base Rent paid, Tenant will pay Landlord the difference within fifteen (15) days of the anniversary date of the Lease.
- d. Common Area Maintenance. Tenant shall pay on the first (1st) day of each month, in advance as additional rent, a fee equal to the Tenant's prorata share of the cost of maintaining common areas (the "CAM"). Said CAM shall be adjusted at the end of each Lease year to reflect any increase or decrease in cost during said year. The CAM shall include property management fees related to the retail shops, insurance, property taxes, pest control, if paid by Landlord and not provided by Tenant, for common area if necessary, supplies, garbage collection and user fees, if paid by Landlord and not provided by Tenant, trash removal cost, if paid by Landlord and not provided by Tenant, water and sewer charges, if paid by Landlord and not provided by Tenant, solid waste disposal fees, if paid by

Landlord and not paid by Tenant, and streetscape assessments, if paid by Landlord and not paid by Tenant, and any other items identified on attached **Exhibit B**.

3. **Gross Sales.** "**Gross Sales**" shall mean the dollar aggregate of the sales price of all food and drink, goods, wares and merchandise sold and the charges for all services performed by Tenant from all business conducted at or from the Leased Premises, by check, credit or otherwise, without reserve or deduction for inability or failure to collect for the same, including, but not limited to, such sales and services where the orders originate from and, are produced in or are serviced by Tenant in the Leased Premises, even if delivery or performance thereof is made from or to any other place; any and all orders, by whatever nature or means, acquired or delivered, received or billed from the Leased Premises; sales from mechanical, electrical, computerized or other vending devices; which Tenant in the normal and customary course of its operations would credit or attribute to its business; and any and all items of value, tangible or intangible, sold by Tenant which are neither included in, nor excluded from, Gross Sales by the other provisions of this paragraph. Each and every transaction, whether delivered immediately or over a period of time, shall be treated as a sale for the full price in the month during which such transaction is made and the food or beverage service is delivered, irrespective of whether or not such item associated with said transaction is discounted, placed on credit. Gross Sales are all sales net of any discounts to the customer or to credit card facilitators. All sales facilitated through and produced on the leased premises shall be included in the computation of Gross Sales; however, any sales produced outside of Leased Premises by Tenant shall be considered as outside sales and excluded from the calculation of Gross Sales. Such sales shall be itemized as "Outside Sales" on the Statement of Operations of the Tenant whether or not the order is accepted by phone or in person on the Leased Premises. In the case of sales paid by credit card, gross sales shall be determined by the amount of the sale after any discount or fee paid to the credit card company. Any individual write-offs from sales in excess of \$1,000.00 per incident may be deducted from Gross Sales in the month in which the write-off occurs. For the purpose of outside, catered affairs, facilitated and produced by Tenant within the Leased Premises, Gross Sales shall be the total cost of the sales less any expense amounts in addition to normal food and staffing costs that are specifically created in order to facilitate such activities. Such deductions to be included but not limited to are, table, chairs, transportation and equipment rentals, and other direct expenses that are in addition to costs that would be incurred if such an affair were to be held on the premises leased herein. Customer reimbursements of rental equipment for all catered or private affairs or other costs charged to the customer at less than a 20% gross profit margin shall be considered as reimbursements and not included in Gross Sales.
4. **Records and Reports.** Tenant shall deliver to Landlord on or before the twentieth (20th) day of each month during the term hereof, a report which shall include a copy of Tenant's Sales Tax Return for the State of South Carolina that has been forwarded to the State of South Carolina showing the amount of Gross Sales during the preceding month (the "**Report**"). Failure to forward this Report by the twentieth (20th) day of each month shall be a default under this Lease; however, Landlord will agree to up to a ten (10) day

grace period upon notice of a reasonable delay. Tenant shall pay a fee of One Hundred and No/100 (\$100.00) Dollars per day, as additional rent for each late day.

During the term of this Lease, Tenant shall maintain, keep and preserve, at the Leased Premises, full complete and accurate original books and records, including cash register tapes or computer software program for restaurant management and financial reporting and charge vouchers or daily computer reports which shall disclose separately for each business day, all information required to determine Gross Sales and Tenant acknowledges that it is of essential and material importance to Landlord that Tenant must maintain or use a cash register or computer software program for restaurant management and financial reporting approved in advance by Landlord which keeps a cumulative total of all transactions and is un-resettable. Checkbooks and records and all supporting records, including federal and state income tax returns of Tenant shall at all reasonable times be open to inspection and audit by Landlord, or its duly authorized agents. If such audit shall disclose a liability for payment of greater rent, Tenant shall promptly pay such deficiency, and if such audit shows Gross Sales to be understated by five percent (5%) or more, Tenant shall pay the cost of such audit. Tenant shall keep and preserve said records for not less than thirty-six (36) months after the close of each Lease year. Tenant covenants that at no later than fifteen (15) days after the close of the Lease year or the termination of this Lease, Tenant will deliver to Landlord a certificate of a certified public accountant, certifying to the amount of the Gross Sales, as defined herein, for the preceding year or portion thereof. Any such certified statements shall be accompanied by any deficiency due under the computations hereof from Tenant to Landlord. Any excess claimed, if agreed upon by Landlord, shall be credited to Tenant's next monthly rental obligation or, if upon termination of this Lease, shall be paid within thirty (30) days by Tenant. All reports, including the monthly sales Report, shall be certified by Tenant to be true and correct. The acceptance by Landlord of Percentage Rent or reports shall be without prejudice and shall in no way constitute a waiver of Landlord's right to examine or audit Tenant's books and records. The delivery by Tenant of a report which contains an understatement of Gross Sales by more than five percent (5%) or presentation of any statement or books and records that are grossly inaccurate shall constitute a default, without cure, under this Lease, except in the case of any computer software "glitch" unknown to Tenant, provided that upon learning of such malfunction, Tenant has taken immediate steps to rectify any discrepancy and accrue for immediate payment any additional rent that may be due to Landlord. Tenant shall be given a reasonable amount of time to have such problem rectified, once identified.

5. **Hours of Operation.** Tenant shall operate its business in a diligent and business like manner fully utilizing all of the Leased Premises. Tenant shall remain open for normal business at a minimum from 10:00 a.m. to 6:00 p.m. (EST) six days a week, provided those hours represent the hours that are normal and customary in the trade. However, Tenant may open or close its business earlier or later, at its sole discretion. In the event Tenant shall cease operation of its business for a period of more than fourteen (14) consecutive days, unless caused by an Act of God, equipment failures, governmental regulations or other casualty conditions beyond the reasonable control of Tenant or fail to observe the hours of operation set forth in this Lease, then Tenant shall be deemed to be

in default under the terms and conditions of this Lease, and Landlord or Landlord's agent shall be entitled to proceed under all remedies available by law and available in this Lease.

6. **Security Deposit.** The Security Deposit required by Landlord and paid by Tenant shall be retained as a security deposit for the faithful performance by Tenant of all terms, covenants and conditions contained herein. Landlord, at its sole discretion, may apply the Security Deposit, or any portion thereof, to any default made by Tenant under the performance of this Lease. In the event all or any portion of the Security Deposit is used, Tenant shall immediately or upon demand by Landlord, deposit an amount equal to the sum used to cure said default so that the full amount paid as the Security Deposit at the inception of this Lease remains in Landlord's possession at all times during the Lease Term. Upon the expiration of this Lease and all extensions thereof, Tenant shall surrender possession of the Leased Premises as required herein, and Landlord, at its sole discretion, may deduct the costs of any cleaning, repairs, or other maintenance from the Security Deposit upon such surrender, provided Landlord notifies Tenant of the necessary cleaning and repairs, and provided said repairs are not the result of usual and normal wear and tear. The Security Deposit may not be used as a portion of the last month's Rent. The Security Deposit, or any remaining portion thereof, shall be returned within thirty (30) days after termination of this Lease. In the event the Security Deposit, or the remaining portion thereof, is not an amount sufficient to cover payment of any and all outstanding expenses at the surrender, termination or expiration of this Lease, then Tenant shall be required to pay any excess amount due within ten (10) days after receiving written notice thereof from Landlord. Landlord and Tenant agree that, for purposes of this Lease, Landlord has retained the Security Deposit delivered by Tenant to Landlord at the commencement of the Prior Term.

7. **Taxes, Insurance, and CAM.**

- a. **Taxes and Insurance.** Tenant shall pay, as part of the CAM, Tenant's prorata share of any and all real estate taxes, building, fire, casualty and flood insurance, governmental assessments, or other charges billed or levied against the real property of which the Leased Premises is a part, including, but not limited to, any and all special governmental assessments imposed upon the Leased Premises or upon the real property of which the Leased Premises, or upon the real property of which the Leased Premises is a part, for whatever nature or purpose, during the Lease Term, including, but not limited to, any and all extensions, modifications, or renewals thereof. In the event any documentary, local, state, or federal tax or other fee is required to be paid at the execution of this Lease, the payment thereof shall be the responsibility of Tenant.
- b. **Use and CAM.** The Leased Premises, and any and all facilities owned by Landlord outside of the boundaries of the Leased Premises, shall be subject to the exclusive control and management of Landlord. Subject to Tenant's right as stated herein, Tenant shall have no other right, title or interest in the common areas, facilities or boundaries outside the Leased Premises whatsoever except the

right of reasonable access. Tenant's customers shall have the right to use the common areas. Landlord may withdraw the designation of property as common areas at any time, may change area, location and arrangement of the common areas and may lease, convey or encumber any space formerly designated as common areas, so long as such action does not interfere with Tenant's or Tenant's customers access to and use of the Leased Premises. In such event, Tenant shall not be entitled to compensation or diminution of Rent but may be entitled to diminution of CAM charges. Landlord may close the common areas to the general public at such times and for such periods as may be necessary to maintain the private rights of Landlord but shall not interfere with access to the Leased Premises by Tenant or Tenant's customers.

8. **Authorized Use.** The Leased Premises shall be used by Tenant for a restaurant and related services, which is the specific use and purpose on the Leased Premises. Tenant shall not use the common passageways, entrances, janitorial closets, restrooms or other open areas for any purpose whatsoever without the specific written consent of Landlord. Tenant shall not keep pets, animals or birds on or near the Leased Premises or common areas or use the Leased Premises as sleeping quarters or the like, engage in or permit games of chance or any form of gambling or immoral conduct in or about the Leased Premises. Tenant shall keep the Leased Premises in a clean, safe and sanitary condition, and in compliance with all laws and ordinances, and rules and regulations of any governing body of the Leased Premises. Tenant shall not allow nuisance or misuse of the Leased Premises and shall not be allowed to use any sound system, equipment or any other similar device that interferes with the quiet enjoyment of the other tenants in the building. Tenant may however, use a sound system such as MUZAK for background music in the Leased Premises so long as such system does not interfere with the quiet enjoyment of the other tenants in the building.

Tenant shall comply with all statutes, ordinances, rules, orders, regulations and requirements of any federal or state governing body and of any of the departments of such entity pursuant to the terms and conditions contained in this Lease for the correction, prevention and abatement of nuisances or other grievances, in, upon, or connected with the Leased Premises, during the Lease Term at Tenant's own cost and expense.

9. **Tenant Alterations and Maintenance.** Tenant shall not make, or suffer to be made, any alterations, modifications or improvements of the Leased Premises, or any part thereof, without the express written consent of Landlord, which consent will not be unreasonably withheld. Any such alterations, modifications and/or improvements shall be at Tenant's sole expense and shall become the exclusive real property of Landlord, in its sole discretion, i.e. permanent partitions, wall to wall carpet, lighting, attached shelving, etc. Tenant may install, at its expense and without Landlord's consent, trade fixtures, movable partitions, furniture and equipment and other personal property; provided, however, Tenant shall provide Landlord written notice of its intention to do so along with an itemized list. Tenant shall not install or maintain any equipment, partitions, furniture, or apparatus, the weight or operation of which would tend to injure or be detrimental to the

Leased Premises or that would unreasonably annoy or disturb other tenants. Tenant shall keep the Leased Premises free and clear of any lien or encumbrance of any kind or nature created by Tenant's act or by its omission thereof.

Tenant shall not suffer or commit any waste and shall keep and do whatever is necessary to maintain the Leased Premises in good condition and repair, normal wear and tear excepted. Tenant shall repaint and decorate the Leased Premises at such times and from time to time as reasonably necessary and reasonably demanded by Landlord to maintain a professional and high-quality appearance. Tenant shall make repairs and improvements of the Leased Premises as provided by written notice to Tenant by Landlord from time to time. A refusal by Tenant to make any such repairs or improvements within thirty (30) days after receipt of notice shall be deemed a default under this Lease.

Tenant shall replace all broken glass in the Leased Premises and shall repair any and all damage, willful or otherwise, to the Leased Premises, the common areas, caused by it, its agents, employees or invitees. In the event Tenant fails to make said repairs, Landlord may, at its sole discretion, make such repairs on behalf of and for the account of Tenant, as additional Rent or otherwise, the full cost of which shall be borne by Tenant and paid for as provided by the provisions contained in this Lease. Landlord shall be responsible for exterior structural repairs. All other repairs shall be performed by Tenant at its sole cost and expense, unless expressly agreed to by the parties hereto in writing.

Trash and Grease Disposal: Tenant acknowledges that the Leased Premises is part of a mixed use complex and agrees that all trash, food, grease, etc. will be disposed of in a proper manner and that the premises will be kept clean at all times. Tenant agrees that any grease or other stains on sidewalks or parking area caused as a result of the tenant's operation will be steam-cleaned on an as-needed basis. Tenant hereby acknowledges that Landlord, at the commencement of the Prior Term, delivered the Leased Premises to Tenant in a broom-clean condition.

10. **Utilities and Services.** Tenant shall be responsible for the payment of all electricity and other utilities, including, but not limited to, janitorial and other services, necessary to conduct its business and maintain the Leased Premises in a professional and high-quality manner.
11. **Waiver of Claims due to Adjoining Tenants.** Tenant specifically takes its tenancy subject to any noise, disturbance or commercial competition from other tenants of the Landlord.
12. **Subordination of Lease.** It is agreed that this Lease and the rights of Tenant hereunder shall be and remain subordinate to the right and lien of any bona fide mortgage and related financing documents placed upon the Leased Premises, or any portion thereof, by Landlord before or during the Lease Term. Tenant agrees to execute any and all subordination, non-disturbance and attornment agreements as required by Landlord during the Lease Term.

13. **Entry by Landlord.** Landlord shall have the right, at its sole discretion, to enter upon the Leased Premises at reasonable times for the purpose of inspection, posting notices, pest control or supervising any necessary repairs and maintenance to be performed, or other like purposes. Sixty (60) days prior to expiration of the final option period under this Lease, Landlord, at its option, may post suitable notice on the Leased Premises that same are for rent and may show the Leased Premises to prospective tenants at reasonable times.
14. **Assignment and Subletting.** Tenant shall not be entitled directly or indirectly to assign, sell or transfer the Leased Premises or any interest herein, or sublet all or any portion thereof without the written consent of Landlord. If Tenant desires to assign or sublet the Leased Premises or any portion thereof, it shall so notify Landlord in writing and such request shall include: (i) a financial statement of the proposed assignee, (ii) a description of the proposed assignee's food service business which it proposed to conduct at the Premises, (iii) a description of the proposed assignee's experience in the restaurant business, including resumes of the person or persons charged with the day-to-day management of the proposed business, and (iv) delivery of a deposit as set forth below and the agreement on the part of the Tenant to reimburse Landlord for all reasonable out-of-pocket expenses actually incurred by Landlord in its review of the information provided as to the proposed assignee. In evaluating a proposed assignee or sub-lessee, Landlord shall be entitled to take into consideration the factors listed in (i) through (iv) above, and shall further be entitled to take into consideration the financial strength of any proposed guarantors of the assigned Lease. Utilizing all of this information, Landlord may approve or disapprove any proposed assignment of the Lease or sublease of all or any portion thereof. Any attempted transfer without such written consent of the Landlord or any subletting shall be null and void ab initio and shall constitute a default under this Lease. As used in this paragraph a "transfer" shall mean and include, but shall not be limited to, the taking of a partner or association of a business associate having more than a thirty-three and one-third (33 1/3%) percent interest in the business profits or cash flow of Tenant, any transfer of more than thirty-three and one-third (33 1/3%) percent of the stock of a corporate tenant or any merger or consolidation, any transfer of more than thirty-three and one-third (33 1/3%) percent of the partnership interest of a partnership tenant, and any transfer of more than thirty-three and one-third (33 1/3%) percent of the beneficial interest of any Trust tenant. If Tenant, nonetheless, requests that Landlord consent to the assignment or sublease of the Leased Premises, Landlord, at its option, may require the tender of a deposit of an amount equal to two (2) months rent by Tenant to reimburse Landlord for its out-of-pocket expenses, including legal fees, incurred in evaluating, negotiating, and implementing an assignment or sublease. If the amount of the deposit is not adequate to cover reasonable out-of-pocket expenses, Landlord shall forward a written notice to Tenant itemizing the amounts due along with copies of the supporting bills and invoices and Tenant shall pay the difference to Landlord prior to the execution of the consent to the assignment or sublease by Landlord. Notwithstanding the above, no fees or deposits shall be payable by Tenant if the Lease is assigned to another Landlord-approved Moe's Franchisee.
15. **Substitution of Premises.** RESERVED.

16. **Injuries and Property Damage.** Tenant agrees to indemnify and hold Landlord harmless from any and all claims, of any kind or nature, arising from Tenant's use of the property of which the Leased Premises are a part. Tenant hereby waives all claims against Landlord for damages to goods, wares or merchandise, or for injuries to any person in and upon the entire property from any cause whatsoever, except such as might result from the intentional acts of Landlord or Landlord's representatives, or from failure of Landlord to perform its obligations in good faith within a reasonable time after written notice by Tenant informing Landlord that an unsafe condition exists. Tenant shall at all times during the term of this Lease, keep in effect through insurance companies with an A.M. Best Financial Rating of a "A", or better, liability insurance in the names of and for the benefit of Landlord and Tenant with bodily injury and property damage of not less than CSL One Million and No/100 (\$1,000,000.00) Dollars. Tenant shall also keep in effect through insurance companies with an A.M. Best Financial Rating of "A", or better, fire, legal liability coverage sufficient to return Tenant's Leased Premises to Landlord to the condition that the Leased Premises was in prior to Tenant doing any leasehold improvements.

All such policies shall list Landlord as an "Additional Named Insured" and may be carried by Tenant's general blanket coverage. An original policy, or a certified copy thereof shall be provided to Landlord on each anniversary date of this Lease of the Leased Premises. Failure to provide such policy or certified copy thereof shall be a default under this Lease. Tenant shall have the right to settle all claims with the insuring companies, without subjecting Landlord to any liability or obligation. Any insurance procured by Tenant shall contain endorsements that such insurance may not be canceled or amended with respect to Landlord until notice of such cancellation or amendment is forwarded to Landlord, and Tenant shall be solely responsible for payment of premiums and Landlord shall be named as an "Additional Insured" under all such policies.

Tenant shall not stock, use or sell any article or provide any service in or about the Leased Premises which may be prohibited by Landlord's insurance policies or any endorsements or forms attached thereto or which may increase any insurance rates or premiums on the property or the building of which they are a part. Upon request, Landlord shall furnish copies of its insurance policies to Tenant. Tenant shall pay on demand any increase in premiums for Landlord's insurance that may be charged by such insurance companies resulting from Tenant's violation of the use and occupancy of the Leased Premises, whether or not Landlord has consented to such use or occupancy. Should any insurance carried by Landlord or Tenant be canceled due to the failure to occupy or abandonment of the Leased Premises by Tenant, then in any such event, Tenant shall indemnify and hold Landlord harmless and shall pay any increased cost of such insurance, as well as any reinstatement fees. Tenant shall also pay any increased premium on any insurance carried by Landlord for its protection against loss through fire or casualty or rent increase. Landlord shall provide Tenant with copies of all bills showing increased premiums along with a statement explaining the amounts owed by Tenant.

Notwithstanding anything herein, Tenant shall indemnify and hold Landlord harmless from all suits, actions, damages, liability or expenses in connection with loss of life, bodily or personal injury, or property damage arising from or out of any occurrence in, upon or from the Leased Premises or the occupancy or use by Tenant of said Leased Premises or any part thereof, if such claim results wholly or in part by any act or omission of Tenant, its agents, contractors, employees, servants, invitees, licensees or concessionaires. Tenant shall store its property in and shall occupy the Leased Premises at its own risk, and release Landlord, to the full extent permitted by law, from all claims of every kind arising from loss of life, personal or bodily injury, or property damage. Landlord shall not be responsible or liable at any time for any loss or damage to Tenant's merchandise, equipment, fixtures or other personal property of Tenant that may be occasioned by or through the acts or omissions of persons occupying adjacent, connecting or adjoining premises. Landlord shall not be responsible or liable for any defect, latent or otherwise, for the building constituting the premises or any of the equipment, machinery, utilities, appliances or apparatus therein, nor shall it be responsible or liable for any injury, loss or property damage to any person or to any property of Tenant caused by or resulting from bursting, breakage, leakage, overflowing, running, backing up, seepage or overflow of water or sewerage in any part of said Leased Premises or for any injury or damage caused by or resulting from acts of God or for any injury damage caused by or resulting from any defect or negligence by the Tenant in the occupancy, construction, operation or use of any of the Leased Premises. Tenant shall give prompt notice to Landlord in case of fire or accidents in the Leased Premises or in the building of which the Leased Premises are a part, or any defects therein in any fixtures or equipment. Tenant shall also pay all costs, expenses and reasonable attorneys' fees that may be incurred or paid by Landlord in enforcing the terms of this Lease or defending any suit by Tenant in which Landlord prevails. Landlord shall indemnify and hold Tenant harmless from all suits, actions, damages, liability or expense in connection with loss of life, bodily or personal injury, or property damage arising from or out of any occurrence in, upon, or from the common area around the Leased Premises or any part thereof, to the extent such claim results wholly or in part by any act or omission of Landlord, its agents, contractors, employees, servants, invitees, licensees or concessionaires.

The parties agree and acknowledge that the obligations, covenants, indemnifications and waivers of the parties contained within this paragraph arose upon the commencement of the Prior Term and shall continue, uninterrupted, from the commencement of the Prior Term until the expiration or earlier termination of this Lease (and, if applicable, shall survive until the expiration of any survivability period). Further, the parties agree and acknowledge that Landlord's limitations of liability contained within this paragraph relate to and are effective for all times during the Prior Term and the Lease Term (and, if applicable, shall survive until the expiration of any survivability period).

17. **Fire or Other Casualty.** If the Leased Premises shall be partially damaged by fire or other casualty and Landlord shall elect to repair the damages, then until such repairs shall be made Rent shall be apportioned according to the untenable portion of the Leased Premises. If such damage is caused by Tenant, or its agents, employees or invitees,

Tenant shall not have the right to terminate this Lease due to untenantability, and if the Lease is not terminated by Landlord, there shall be no abatement of Rent.

In the event the Leased Premises are damaged by fire or other casualty so as to be rendered untenantable, and Landlord is unable to put the Leased Premises in tenantable condition within one hundred twenty (120) days from the time Tenant gives Landlord full and complete possession of the Leased Premises for the purpose of making repairs, either Landlord or Tenant shall have the option of terminating this Lease by ten (10) days written notice to the other, in which case Rent shall be due from Tenant to Landlord up to and including the date of the fire or other casualty to the end of the one hundred twenty (120) day period. Should the damage be repaired and the Leased Premises made tenantable within the one hundred twenty (120) day period provided herein, there shall be no right by either party to terminate this Lease, but the Rent shall abate for the period during which the Leased Premises was untenantable and unused by Tenant.

In the event the Leased Premises shall be partially damaged by fire or other casualty, Landlord will promptly repair the Leased Premises and the building. In the event such fire or other casualty has been occasioned by Tenant's negligence, the building shall be repaired by Landlord at Tenant's expense. Landlord agrees that it will carry fire and extended casualty insurance on the building but not on Tenant's improvements.

If loss or damage is caused by fire or other hazards ordinarily covered by fire and extended coverage insurance policies, Tenant waives all rights of recovery for such loss or damage. Willful misconduct lawfully attributable to Landlord, whether in whole or in part a contributing cause of the casualty giving rise to the loss or damage, shall not be excused under the foregoing release and waiver.

Tenant hereby releases Landlord from liability for loss or damage occurring on or to the Leased Premises or the property of which it is a part, or to the contents of either. The foregoing release arose upon the commencement of the Prior Term and shall continue, uninterrupted, from the commencement of the Prior Term until the expiration or earlier termination of this Lease (and, if applicable, shall survive until the expiration of any survivability period).

18. **Condemnation.** If the property, or any part thereof, wherein the Leased Premises are located shall be taken by public or quasi-public authority under any power of eminent domain, Tenant shall have no claim or interest in or to any award of damages for such taking, and, at the election of the Landlord, this Lease shall terminate. Landlord shall notify Tenant upon its receipt of notice of the exercise of any powers of eminent domain against the Leased Premises by any public or quasi-public authority.
19. **Assignment of Chattels.** It is understood and agreed that any merchandise, fixtures, furniture or equipment left in the Leased Premises when Tenant vacates shall be deemed to have been abandoned by Tenant and by such abandonment Tenant relinquishes any right, title or interest therein to Landlord and Landlord shall be authorized to sell, dispose, or destroy same.

20. **No Waivers.** No failure by Landlord to insist upon the strict performance of any term or condition of this Lease or to exercise any right or remedy available on a breach thereof, and no acceptance of full or partial Rent during the continuance of any such breach shall constitute a waiver of any such breach or of any such term or condition. No term or condition of this Lease required to be performed by Tenant shall be waived, altered, or modified except by a written instrument executed by Landlord. No waiver of any breach shall affect or alter any term or condition in this Lease, and each such term or condition shall continue in full force and effect with respect to any other then existing or subsequent breach.

21. **Default.**

- a. **Events of Default.** The occurrence of any of the following shall constitute an event of default:
- i. Delinquency in the due and punctual payment of any Rent, CAM charge, or additional rent payable under this Lease when such rent shall become payable;
 - ii. Delinquency by Tenant in the performance of or compliance with any of the conditions contained in this Lease;
 - iii. Filing by Tenant, or any individual guarantor on this Lease, in any court pursuant to any statute, either of the United States or any state, of a petition of bankruptcy or insolvency, or for reorganization, or for the appointment of a receiver or trustee of all, or a portion of Tenant's property, or an assignment by Tenant for the benefit of creditors;
 - iv. Filing against Tenant, or any individual guarantor in this Lease, in any court pursuant to any statute, either of the United States or of any state, of a petition in bankruptcy or insolvency, or for reorganization, or for appointment of a receiver or trustee of all, or a portion of Tenant's property, if within ninety (90) days after the commencement of any such proceeding against Tenant such petition shall not have been dismissed.
- b. **Termination of Lease by Default.** Upon the occurrence of any event of default, Landlord may give written notice to Tenant specifying such event of default and stating that this Lease shall expire on the date specified in such notice, which shall be twenty (20) days after the giving of such notice, unless such event of default is cured within the twenty (20) days specified in the written notice. Upon the date specified in such notice, this Lease and all rights of Tenant hereunder shall terminate. Except for the cure rights set forth above, Tenant acknowledges that Tenant has no right to reinstate this Lease after the occurrence of an event of default and that the setting by Landlord of a termination date is provided for the convenience of Tenant in leaving the Leased Premises.

- c. *Surrender.* Upon the termination of this Lease pursuant to the default provisions of this Lease, Tenant shall peacefully surrender the Leased Premises to Landlord, and Landlord, upon or at any time after any such expiration, may, without further notice, reenter the Leased Premises and repossess it by force, summary proceedings, ejectment, or otherwise, and may dispossess Tenant and remove Tenant and all persons and personal property from the Leased Premises and may have, hold, and enjoy the Leased Premises.
- d. *Reletting the Leased Premises.* At any time after any such retaking of the Leased Premises, Landlord may relet the Leased Premises, or any part thereof, in the name of Landlord or otherwise, for such term (which may be greater or less than the period which would otherwise have constituted the balance of the term of this Lease) and on such conditions (which may include concessions or free rent) as Landlord, in its uncontrolled discretion, may determine, and may collect and receive Rent therefor. Landlord shall in no way be responsible or liable for any failure to relet the Leased Premises, or any part thereof, or for any failure to collect any Rent due upon any such reletting.
- e. *Tenant's Liabilities and Obligations.* No such expiration of this Lease shall relieve Tenant of its liability and obligations under this Lease, and such liability and obligations shall survive any such expiration. In the event of any such expiration, whether or not the Leased Premises or any part thereof shall have been relet, Tenant shall pay to Landlord the Rent and additional rent required to be paid by Tenant up to the time of such expiration, and thereafter Tenant, until the end of what would have been the term of this Lease in the absence of such expiration, shall be liable to Landlord for, and shall pay to Landlord, as and for liquidated and agreed current damages for Tenant's default:
- i. the equivalent of the amount of Rent, additional rent, and late charges which would be payable under this Lease by Tenant if this Lease were still in effect, less;
 - ii. the net proceeds (but not in excess of the Rent due from Tenant) of any reletting effected pursuant to the provisions of this Lease, after deducting all the Landlord's expenses in connection with such reletting, including, without limitation, all repossession costs, new tenant upfitting, brokerage commissions, legal expenses, expenses of advertising, reasonable attorneys' fees, alteration costs, and expenses of preparation for such reletting.
- f. *Re-Entry.* Tenant hereby expressly waives, so far as permitted by law, the service of any notice of intention to reenter. Tenant, for and on behalf of itself and all persons claiming through or under Tenant, waives any right of redemption or reentry, repossession, or to restore the operation of this Lease in case Tenant shall be dispossessed by a judgment or by warrant of any court or judge or in case of

reentry or repossession by Landlord. In case of any expiration of this Lease, Landlord and Tenant, so far as permitted by law, waive trial by jury in any action, proceeding, or counterclaim brought by either of the parties hereto against the other on any matter arising out of or in any way connected with this Lease, the relationship of Landlord and Tenant, Tenant's use or occupancy of the Leased Premises, or any claim of injury or damage. The terms "enter," "reenter," "entry," or "reentry" as used in this Lease are not restricted to their technical legal meaning.

22. **Legal Proceedings.** Tenant shall pay, indemnify and hold Landlord harmless from and against all legal costs and charges, including attorneys' fees lawfully and reasonably incurred, in obtaining possession of the Leased Premises after a default of the Tenant or after Tenant's default in surrendering possession upon the expiration or earlier termination of the term of this Lease, or enforcing any covenant of Tenant herein contained, including, without limitation, the covenants to pay Rent or additional rent, or in defending any suit by Tenant in which Landlord prevails.
23. **Surrender.** Tenant agrees to surrender to Landlord, at the end of the term of this Lease and/or upon any cancellation of this Lease, said Leased Premises broom clean and in as good a condition as said Leased Premises were at the beginning of the Prior Term, ordinary wear and tear, and damage by fire and windstorm or other acts of God excepted, and this covenant shall be a condition precedent. Tenant agrees that, if Tenant does not surrender the Leased Premises to Landlord at the end of the term of this Lease, or upon any cancellation of the term of this Lease, then Tenant will pay to Landlord all damages that Landlord may suffer on account of Tenant's failure to surrender to Landlord possession of said Leased Premises, and will indemnify and hold Landlord harmless from and against any and all claims made by any succeeding tenant of said Leased Premises against Landlord on account of delay of Landlord in delivering possession of said Leased Premises to said succeeding tenant so far as such delay is occasioned by failure of Tenant to surrender said Leased Premises. Landlord may have previously consented to certain Tenant improvements. All damage to the Leased Premises caused by removal of any such improvements shall be paid by Tenant. All property, including equipment and/or fixtures, not specified as property of Tenant shall become the property of Landlord upon termination of this Lease. Tenant may update Tenant's ownership list from time to time by giving Landlord written notice of additional Tenant property, and such new list shall be binding upon Tenant if such notice is duly executed by Landlord's duly authorized agent.
24. **Holding Over.** In case of Tenant holdover after the end of the term of this Lease, if Landlord accepts Rent from Tenant, such tenancy shall be from month-to-month only, and shall not constitute a renewal hereof; subject, however, to all other items, agreements, covenants and conditions of this Lease. The monthly Rent during such holdover period shall be fifty percent (50%) greater than the Rent for the last month of this Lease.

25. **Liens.** Tenant further agrees that Tenant will pay and obtain the immediate discharge of all liens of contractors, subcontractors, mechanics, laborers, material men, and other items of like character, and will indemnify and hold Landlord harmless from and against any and all legal costs and charges, bond premiums for release of liens, including reasonable attorneys' fees and against the defense of any suit in discharging the said Leased Premises, or any part thereof, from any liens, judgments, or encumbrances caused or suffered by Tenant. It is understood and agreed to between the parties hereto that the costs and charges referred to herein above shall be deemed Rent and shall be included in any lien for Rent. Further, Tenant shall not have any authority to create any liens for labor or material on Landlord's interest in the Leased Premises or upon the property of which the Leased Premises are a part, and all persons contracting with the Tenant for the destruction or removal of any portion of the building or for the erection, installation, alteration, or repair of the building or the improvements on the property, and all material men, contractors, mechanics and laborers are hereby charged with notice that they must look to Tenant and to Tenant's interests only in the above described property to secure the payment of any bill for work done or material furnished during the term of this Lease, and any extensions, modifications or renewals hereof.
26. **Quiet Enjoyment.** Landlord agrees that Tenant, keeping and performing the covenants herein contained on the part of Tenant to be kept and performed, shall at all times during the term of this Lease peaceably and quietly have, hold and enjoy the Leased Premises.
27. **Notices.** Any notice, demand or other instrument or written communication required or permitted to be given, served, made or delivered hereunder may be given, served, made or delivered by mailing the same by certified mail in a sealed envelope, postage prepaid:

If to Tenant:

Ochlocknee Ventures, LLC
Attn: Cary Chastain
381 King Street
Charleston, South Carolina 29401
Fax: _____

If to Landlord:

Kenneth R. Davenport

Fax: _____

With a copy to:

David C. Humphreys III, Esq.
Haynsworth Sinkler Boyd, PA
134 Meeting Street, Third Floor

Charleston, South Carolina 29401
Fax: 843.720.4530

Any such notice, demand or other instrument, or written communication mailed as provided in this paragraph shall be deemed to have been given, served, made or delivered at the time that it was placed in the mail with sufficient postage attached thereto. Additionally, notice may be given by hand delivery or by facsimile transmission.

28. **Rules and Regulations.** Landlord reserves the right at any time to make such rules and regulations as, in Landlord's sole discretion, may from time to time be necessary for the safety, care, appearance, and cleanliness of the Leased Premises and the preservation of good order therein, and such other rules and regulations shall be binding upon the parties hereto with the same force and effect as if having been contained herein at the time of execution hereof. Any such rules and regulations shall not materially interfere with the operation of the Tenant's businesses.
29. **Signs.** While it is expressly understood by Landlord that Tenant will need to erect signage for the purpose of letting potential customers know the location and nature of its businesses, no awnings, signs, notices, pictures or advertising matter or the like shall be attached to, or erected on the exterior of the Leased Premises without the prior written consent of Landlord, which consent shall not be unreasonably withheld. Any damage caused to the Leased Premises by Tenant's erection and/or removal of any awning, sign, notice, picture, or advertising matter or the like shall be promptly repaired or paid for by Tenant.
30. **Examination of Premises and Contingency.** RESERVED.
31. **Estoppel Certificates and Attornment.** Tenant agrees that it will, from time to time, within ten (10) business days following written notice by Landlord, execute, acknowledge and deliver to Landlord a written statement certifying that this Lease is unmodified and in full force and effect (or if there have been modifications, that the same is in full force and effect as modified and stating the modifications), and the dates to which Rent and other payments due hereunder from Tenant have been paid in advance, if any, and stating whether or not, to the best of the Tenant's knowledge, Landlord is or is not in default in performance of any covenant, agreement or condition contained in this Lease, and, if so, specifying each such default of which Tenant may have knowledge. The failure of Tenant to execute, acknowledge and deliver to the Landlord a statement in accordance with this paragraph shall constitute an acknowledgment by Tenant that this Lease is unmodified and in full force and effect and that all Rent has been paid to the respective due date immediately proceeding the date of such notice and shall constitute a waiver of any defaults by Landlord which may have existed prior to the date of such notice. Tenant shall, in the event of the sale or assignment of Landlord's interest (or any part thereof) in the building and land of which the Leased Premises form a part, or in the event of any proceedings brought for the foreclosure of said land and building, or in the event of exercise of the power of sale under any mortgage made by Landlord, or its predecessors in interest, covering said land and building, attorn to the purchaser and recognize such purchaser as Landlord under this Lease.

32. **Lease Effective.** This Lease shall become effective as a binding agreement only upon the execution and delivery thereof by both Landlord and Tenant. If this Lease is signed by one party only and submitted to the other party, then it shall constitute an offer to lease which is subject to revocation at any time prior to execution by the other party.
33. **Waiver of Liability.** Tenant shall look solely to the estate and property of Landlord in the land and buildings of which the Leased Premises are a part, and subject to prior rights of any mortgagees of the real property of which the Leased Premises are a part, for the collection of any judgment (or other judicial process) requiring the payment of monies by Landlord in the event of any default or breach of Landlord with respect to any of the terms, covenants and conditions of this Lease to be observed and/or performed by Landlord, and no other assets of Landlord shall be subject to levy, execution or other procedures for the satisfaction of Tenant's remedies. In the event Landlord transfers this Lease, except as collateral security for a loan, upon such transfer, Landlord will be released from all liability and obligations hereunder.
34. **Keys.** Landlord has heretofore provide one key per lock, and Tenant is responsible for accounting for all keys provided or duplicated. Tenant shall return all keys to the Leased Premises to Landlord upon termination of this Lease and/or Tenant's vacating said Leased Premises. Landlord shall have the right, at the Landlord's reasonable discretion, to require Tenant, at Tenant's expense, to replace any lock and to supply Landlord with one key to the new lock. Landlord may retain a master key, or passkey, to the Leased Premises and enter only in case of an emergency.
35. **Definitions.** The words, "Landlord" and "Tenant," wherever used herein shall be construed to mean "Landlords" and "Tenants" in all cases where there is more than one Landlord or one Tenant; and necessary grammatical changes required to make the provisions hereof apply either to all forms of partnerships, limited liability companies, corporations, companies, or individuals shall in all cases be assumed as though fully expressed.
36. **Heirs and Assigns.** This Lease, and all provisions, covenants and conditions thereof, shall be binding upon and inure to the benefit of the heirs, legal representatives, successors and assigns of the parties hereto, excepted that no person, firm, corporation, or court officer holding under or through Tenant in violation of any right, interest or equity in or to this Lease, the terms of this Lease, or the Leased Premises covered by this Lease. In the event of the sale of Landlord's property or building in which the Leased Premises are a part or the assignment of this Lease, or in the event of the leasing of the property or building by Landlord, Landlord shall be released and relieved of all obligations hereunder.
37. **Severability.** If any term or provision of this Lease shall, to any extent, be invalid or unenforceable, the remaining provisions of this Lease shall not be affected thereby and shall remain in full force and effect and this Lease shall be valid and enforceable to the fullest extent provided for hereunder or as permitted by law.

38. **Memorandum of Lease.** This Lease shall not be recorded. Landlord and Tenant shall, at the option of either Landlord or Tenant, execute and deliver a "memorandum of lease" in proper form for the purpose of recording, the contents of which shall be approved by Landlord, but said memorandum of lease shall not, under any circumstances, be deemed to modify or change any of the provisions of this Lease, the provisions of which shall in all instances prevail.
39. **Gender.** All pronouns, and any variation thereof, shall be deemed to refer to the masculine, feminine, or neuter, singular or plural, as the identity of the person or persons may require.
40. **Time is of the Essence.** Subject to the *force majeure* provisions herein, it is understood and agreed to by the parties that time is of the essence of all the terms, conditions, and provisions of this Lease.
41. **Brokerage.** There are no brokerage fees or commissions due in connection with this Lease.
42. **Entire Agreement.** This Lease contains the entire agreement between the parties and all previous negotiations leading thereto, and may be modified only by a written agreement signed and sealed by Landlord and Tenant. No surrender of the Leased Premises or of the remainder of the term of this Lease shall be valid unless agreed to and accepted by Landlord in writing.
43. **Governing Law.** The laws of the State of South Carolina shall govern this Lease.
44. **Guarantor(s).** The undersigned Guarantor hereby unconditionally guarantees the payment of all sums required to be paid hereunder and the performances of all terms, covenants and conditions herein undertaken by Tenant, as provided in the Guaranty attached as Exhibit C. In the event that Tenant assigns the Lease or subleases all or a portion of the Leased Premises pursuant to the terms of this Lease, the Lease Guaranty shall survive; provided, however, that Guarantor may request in writing that a substitute guarantor be accepted and take the place of Guarantor. Landlord, in its sole discretion, will determine whether or not to grant such request.
45. **Right of First Offer.** Provided Tenant is not then in default beyond any applicable grace period, Tenant shall have a right of first offer (the "Right of First Offer") to lease the portion of the building (in which the Leased Premises is located) known as Suite 3 and shown and designated as "Suite #3" on Exhibit A ("Suite 3"). If and when Suite 3 first becomes available for rental during the term of this Lease, Tenant shall have the Right of First Offer, subject to the following:
- a. Landlord shall notify Tenant when Suite 3 first becomes available for rental, and Tenant shall have seven (7) days following receipt of such notice within which to notify Landlord in writing that Tenant is interested in negotiating terms for leasing

Suite 3. If Tenant notifies Landlord within such time period that Tenant is so interested, then Landlord and Tenant shall have thirty (30) days following Landlord's receipt of such notice from Tenant within which to negotiate mutually satisfactory terms for the leasing of Suite 3 by Tenant and to execute an amendment to this lease incorporating such terms or a new lease for Suite 3.

- b. If Tenant does not notify Landlord within such seven (7) days of its interest in leasing Suite 3, or if Tenant does not execute such amendment or lease within such thirty (30) days, if applicable, then this Right of First Offer to lease Suite 3 will lapse and be of no further force or effect, and Landlord shall have the right to lease all or part of Suite 3 to any other party at any time on any terms and conditions acceptable to Landlord.
- c. This Right of First Offer to lease Suite 3 is a one-time right, if and when Suite 3 first becomes available, is personal to Tenant and is non-transferable to any assignee or sublessee (regardless of whether any such assignment or sublease was made with or without Landlord's consent) or other party.

*****Remainder of this page intentionally left blank*****
[Signatures on the following pages]

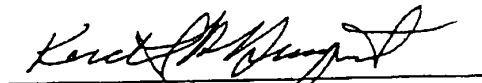
IN WITNESS WHEREOF, the parties hereto, being duly authorized, have executed this Lease on the day and year first above written

WITNESSES:

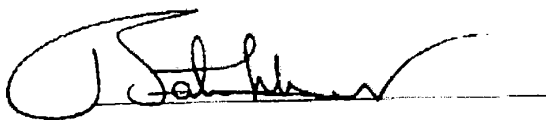
AS TO LANDLORD:



Deborah K. Zulcher

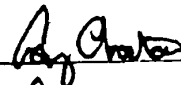

KENNETH R. DAVENPORT

AS TO TENANT:



Deborah K. Zulcher

OCHLOCKNEE VENTURES, L.L.C.,
a South Carolina limited liability company

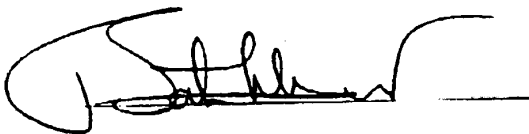
By: 

Name: Cary Chastain

Its: managing member

ACKNOWLEDGED AND AGREED TO BY:

GUARANTOR:



Deborah K. Zulcher

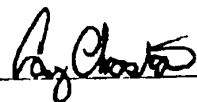
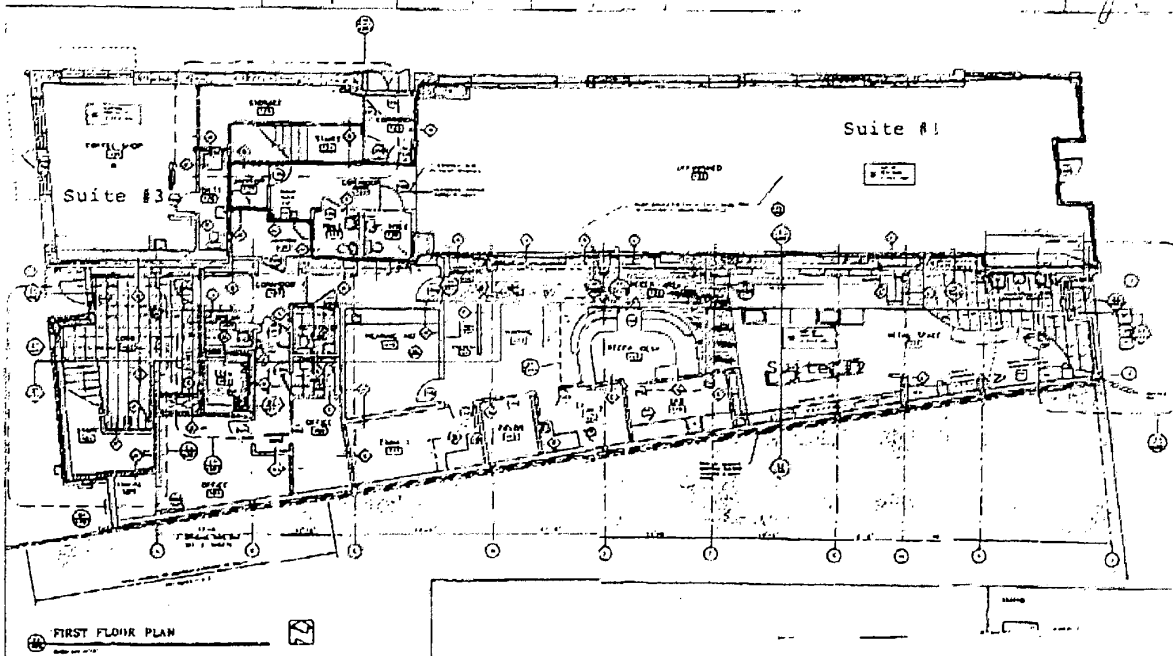


EXHIBIT A – Site Plan

(see attachment)



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Exhibit 'A'

EXHIBIT B – CAM , Tax & Insurance Schedule

(see attachment)

EXHIBIT C – Lease Guaranty

In order to induce Kenneth R. Davenport ("Landlord") to enter into that certain Retail Lease dated Sept 25, 2013 (the "Lease") between Landlord and Ochlocknee Ventures, LLC, a South Carolina limited liability company ("Tenant"), and in consideration of the benefits inuring to the undersigned (the "Guarantor") under said Lease, the receipt and sufficiency of which is represented by the Guarantor to Landlord to be sufficient and adequate, the Guarantor hereby unconditionally guarantees the performance of all of Tenant's obligations under the Lease, including, without limitation, the payment of rental as provided therein. This Guaranty shall remain in full force throughout the original lease term and any renewals thereof. This Guaranty shall be binding upon Guarantor and Guarantor's heirs, legal representatives, successors and assigns, and shall inure to the benefit of Landlord and its successors and assigns. If there is more than one Guarantor, the liability of each Guarantor shall be joint and several.

This Guaranty is a guaranty of payment and performance and not of collection. Guarantor hereby waives notice of acceptance of this Guaranty agreement and all other notices in connection herewith or in connection with the liabilities, obligations, and duties guaranteed hereby, including notices to it of default by Tenant under the Lease, and hereby waives diligence, presentment, protest and suit on the part of Landlord in the enforcement of any liability, obligation or duty guaranteed hereby. Guarantor further agrees Landlord shall not be first or concurrently required to enforce against Tenant or any other person, any liability, obligation or duty guaranteed hereby before seeking enforcement thereof against Guarantor. The liability of Guarantor shall not be affected by any indulgence, compromise, settlement or variation of terms which may be extended to Tenant by Landlord, or agree upon by Landlord or Tenant, and shall not be affected by any assignment or sublease by Tenant of its interest in the Lease, nor shall the liability of the Guarantor be affected by the insolvency, bankruptcy (voluntary or involuntary), or reorganization of Tenant, nor by the voluntary or involuntary liquidation, sale, or other disposition of all or substantially all of the assets of Tenant, or by the release of any other guarantor. Landlord and Tenant, without notice to or consent by Guarantor, may at any time or times enter into such modifications, extensions, amendments or other covenants respecting the Lease as they may deem appropriate, and Guarantor shall not be released thereby but shall continue to be fully liable for the performance of all obligations and duties of Tenant under the Lease as so modified, extended or amended.

Guarantor further agrees (1) to indemnify and hold harmless Landlord from and against any claims, damages, expenses, or losses, including to the extent permitted by law, the reasonable fees of any attorney, resulting from or arising out of any breach of the Lease by Tenant or by reason of Tenant's failure to perform any of its obligations thereunder, and (2) to the extent permitted by law, to pay no costs or expenses, including the reasonable fees of an attorney, incurred by Landlord in enforcing this Guaranty.

All existing and future advances by Guarantor to Tenant and all existing and future debts of Tenant to any Guarantor shall be subordinated to all obligations owed to Landlord under the Lease and this Guaranty. Guarantor assumes the responsibility to remain informed of the financial condition of Tenant and of all other circumstances bearing upon the risk of Tenant's default, which reasonable inquiry would reveal, and agrees that Landlord shall have no duty to

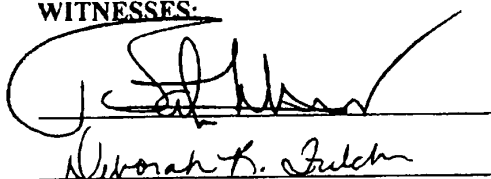
advise Guarantor of information known to it regarding such condition or any such circumstance. Landlord shall not be required to inquire into the powers of Tenant or the officers, employees, partners or agents acting or purporting to act on its behalf, and any indebtedness made or created in reliance upon the professed exercise of such powers shall be guaranteed under the Guaranty. Each Guarantor hereby represents and warrants to Landlord that such Guarantor has received a copy of the Lease, has read or had the opportunity to read the Lease, and understands the terms of the Lease. The provisions in the Lease relating to the execution of additional documents, legal proceedings by Landlord against Tenant, severability of the provisions of the Lease, interpretation of the Lease, notices, waivers, the applicable laws which govern the interpretation of the Lease and the authority of Tenant to execute the Lease are incorporated herein in their entirety by this reference and made a part thereof. Any reference in those provisions to "Tenant" shall mean each Guarantor and any reference in those provisions to the "Lease" shall mean this Guaranty.

If any one or more of the provisions of this Guaranty shall be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision of this Guaranty, and this Guaranty shall be construed as if such invalid, illegal or unenforceable provision had never been contained herein. This Guaranty shall be construed according to the law of the state of South Carolina (the "State"). By execution hereof, the undersigned specifically consent to this choice of law designation and consent that all actions or proceedings arising directly, indirectly or otherwise in connection with, out of, related to, or from this Guaranty or the Lease shall be litigated only in the courts located in the State, and the undersigned (i) consent and submit to the in personam jurisdiction of any state or federal court located within the State, (ii) waive any right to transfer or change the venue of litigation brought against the undersigned, and (iii) agree to service of process, to the extent permitted by law, by mail.

TO THE EXTENT PERMITTED BY APPLICABLE LAW, AND ACKNOWLEDGING THE CONSEQUENCES OF SAID WAIVER ARE FULLY UNDERSTOOD, THE UNDERSIGNED HEREBY EXPRESSLY WAIVE THE RIGHT TO TRIAL BY JURY, THE RIGHT TO INTERPOSE ANY DEFENSE BASED UPON ANY STATUTE OF LIMITATIONS, ANY CLAIM OF LACHES AND ANY SET-OFF OR COUNTERCLAIM OF ANY NATURE OR DESCRIPTION IN ANY ACTION OR PROCEEDING INSTITUTED AGAINST THE UNDERSIGNED OR ANY OTHER PERSON LIABLE ON THE LEASE.

IN WITNESS WHEREOF, Guarantor has caused this instrument to be executed the 25th day of September, 2013.

WITNESSES:


Deborah K. Zulcher

GUARANTOR:

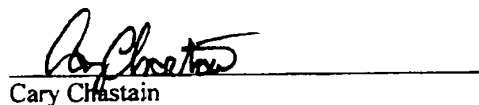

Cary Chastain

Exhibit B

Assignment, Assumption and Amendment of Lease dated October 16, 2018

ASSIGNMENT, ASSUMPTION AND AMENDMENT OF LEASE

This Assignment, Assumption and Amendment of Lease (this "Assignment") is entered into as of the 16th day of October, 2018 (the "Effective Date"), by and among **OCHLOCKNEE VENTURES, LLC**, a South Carolina limited liability company ("Assignor"), **MSG KING STREET, LLC**, a Florida limited liability company ("Assignee"), **KENNETH R. DAVENPORT**, an individual ("Landlord"), and **CARY CHASTAIN**, an individual ("Guarantor").

WITNESSETH

WHEREAS, Assignor and Landlord are party to that certain Retail Lease (the "Lease") dated September 25, 2013, pursuant to which Assignor leases from Landlord those certain premises containing approximately 2,054 square feet and located at 381 King Street, Suite #1, Charleston, South Carolina (the "Premises"), as more particularly described in the Lease; and

WHEREAS, Assignor desires to assign to Assignee, and Assignee desires to assume from Assignor, all of Assignor's rights, obligations and interest as Tenant under the Lease, subject, however, to Landlord's agreement to modify certain terms and conditions of the Lease;

WHEREAS, Landlord has agreed to amend the terms of the Lease so as to enable Assignee to complete the assumption of the Lease;

WHEREAS, Guarantor is the guarantor of the Lease under that certain Guaranty executed by Guarantor as of September 25, 2013 (the "Lease Guaranty"), and Guarantor agrees to the terms of this Assignment, ratifies the Lease Guaranty, and represents that the Lease Guaranty is now and will continue after the Effective Date to be in full force and effect.

NOW, THEREFORE, in consideration of the foregoing recitals and the covenants and conditions contained herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Assignor and Assignee agree as follows:

1. **Definitions; Recitals.** Capitalized terms used in this Assignment and not otherwise defined herein shall have the meanings given to such terms in the Lease. The foregoing recitals are incorporated herein by reference as if fully set forth below.

2. **Assignment and Assumption; Release.**

(a) **Assignment.** Assignor hereby assigns, transfers and sets over unto Assignee all of Assignor's right, title and interest in, under and to the Lease. Assignor shall deliver exclusive possession of the Premises to Assignee on the Effective Date. Assignor shall indemnify, defend and hold Assignee harmless from and against any liability related to or arising out of the Lease or Assignor's actions or omissions thereunder occurring or arising on or before the Effective Date.

(b) **Assumption.** Assignee hereby accepts the foregoing assignment and agrees to perform all of the terms and conditions of the Lease to be performed on the part of Assignor and assumes all of the liabilities and obligations of Assignor under the Lease arising or accruing after

the Effective Date, subject to the terms and conditions of this Assignment, including, without limitation, liability for the payment of rent and for the due performance of all the terms, covenants and conditions of the Tenant pursuant to the Lease as affected hereby.

(c) **Release**. As of the Effective Date, Landlord hereby releases Assignor from the Lease and all obligations accruing thereunder arising or accruing after the Effective Date.

3. **Amendment of Lease**. The following amendments to the Lease are hereby incorporated into the Lease, effective as of the Effective Date:

(a) **Tenant's Notice Addresses (Section 27)**. The following addresses shall replace the address for "Tenant" under the Lease as of the Effective Date:

MSG King Street, LLC
450-106 SR 13 North #213
Jacksonville, Florida 32259
Attention: Darryl Nagao

With a copy to:
Arnall Golden Gregory LLP
Attention: Jonathan L. Neville, Esq.
171 17th Street, Suite 2100
Atlanta, Georgia 30363

4. **Ratification of Lease**. Landlord and Assignee acknowledge and agree that, notwithstanding anything set forth in the Lease to the contrary or in conflict, the transactions contemplated by this Assignment, including, without limitation, the assignment of the Lease to Assignee, shall have no impact upon the negotiated rights and privileges of the named "Tenant" under the Lease (as amended hereby), regardless of whether the Lease expressly or implicitly limits the application of such rights and privileges to the original named "Tenant" under the Lease.

5. **Estoppel**. Landlord and Assignor acknowledge and agree that, to each party's actual knowledge, neither Landlord nor Assignor (as "Tenant") is in default under the Lease, nor has any event occurred which with the passage of time (beyond expiration of any applicable notice and cure period) would constitute an event of default under the Lease.

6. **Miscellaneous**.

(a) **Incorporation**. The Lease, including all exhibits and schedules attached thereto, is incorporated into this Assignment by reference.

(b) **Conflict**. In the event of a conflict or discrepancy between the Lease and this Assignment, the provisions of this Assignment shall control.

(c) **Successors and Assigns**. This Assignment shall inure to the benefit of and be binding upon Assignor and Assignee and their respective successors and assigns.

(d) No Modification. Except as expressly amended hereby, the Lease remains unmodified and in full force and effect.

(e) Counterparts; Authority; Facsimile Signatures. This Assignment may be executed in counterparts and by facsimile, each of which shall be deemed an original, but all of which, together, shall constitute one and the same document.

(f) Governing Law. This Assignment shall be governed by and construed in accordance with the laws of the State of South Carolina, without giving effect to choice of law or conflicts of laws provisions thereof.

[Signatures begin on following page]

IN WITNESS WHEREOF, the parties hereto have executed this Assignment as of the date first above written.

ASSIGNOR:

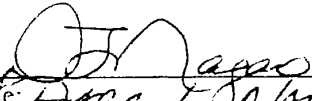
Ochlocknee Ventures, LLC,
a South Carolina limited liability company

By: Cary Chute
Name: Cary Chute
Title: member

Signatures continued on following page

ASSIGNEE:

MSG King Street, LLC,
a Florida limited liability company

By: 
Name: Grant Nelson
Title: Authorized Signatory

Signatures continued on following page

LANDLORD:

By: Kenneth R. Davenport
Kenneth R. Davenport, his Attorney-in-Fact
Kenneth R. Davenport, an individual

Signatures continued on following page

GUARANTOR:

By: Cary Chastain
Cary Chastain, an individual

Assignment – King Street – Store 115

Lease Guaranty

In order to induce Kenneth R. Davenport ("Landlord") to enter into that certain Assignment, Assumption and Amendment of Lease dated October 16, 2018, between Ochlocknee Ventures, LLC ("Assignor"), MSG King Street, LLC, as assignee ("Tenant"), and Landlord (the "Assignment") for the assignment and amendment of that certain Retail Lease dated September 25, 2013, between Landlord and Assignor, as the tenant, and in consideration of the benefits inuring to the undersigned (the "Guarantor") under said Lease, the receipt and sufficiency of which is represented by the Guarantor to Landlord to be sufficient and adequate, the Guarantor hereby unconditionally guarantees the performance of all of Tenant's obligations under the Lease, including, without limitation, the payment of rental as provided therein. This Guaranty shall remain in full force throughout the original lease term and any renewals thereof. This Guaranty shall be binding upon Guarantor and Guarantor's heirs, legal representatives, successors and assigns, and shall inure to the benefit of Landlord and its successors and assigns. If there is more than one Guarantor, the liability of each Guarantor shall be joint and several.

This Guaranty is a guaranty of payment and performance and not of collection. Guarantor hereby waives notice of acceptance of this Guaranty agreement and all other notices in connection herewith or in connection with the liabilities, obligations, and duties guaranteed hereby, including notices to it of default by Tenant under the Lease, and hereby waives diligence, presentment, protest and suit on the part of Landlord in the enforcement of any liability, obligation or duty guaranteed hereby. Guarantor further agrees Landlord shall not be first or concurrently required to enforce against Tenant or any other person, any liability, obligation or duty guaranteed hereby before seeking enforcement thereof against Guarantor. The liability of Guarantor shall not be affected by any indulgence, compromise, settlement or variation of terms which may be extended to Tenant by Landlord, or agree upon by Landlord or Tenant, and shall not be affected by any assignment or sublease by Tenant of its interest in the Lease, nor shall the liability of the Guarantor be affected by the insolvency, bankruptcy (voluntary or involuntary), or reorganization of Tenant, nor by the voluntary or involuntary liquidation, sale, or other disposition of all or substantially all of the assets of Tenant, or by the release of any other guarantor. Landlord and Tenant, without notice to or consent by Guarantor, may at any time or times enter into such modifications, extensions, amendments or other covenants respecting the Lease as they may deem appropriate, and Guarantor shall not be released thereby but shall continue to be fully liable for the performance of all obligations and duties of Tenant under the Lease as so modified, extended or amended.

Guarantor further agrees (1) to indemnify and hold harmless Landlord from and against any claims, damages, expenses, or losses, including to the extent permitted by law, the reasonable fees of any attorney, resulting from or arising out of any breach of the Lease by Tenant or by reason of Tenant's failure to perform any of its obligations thereunder, and (2) to the extent permitted by law, to pay no costs or expenses, including the reasonable fees of an attorney, incurred by Landlord in enforcing this Guaranty.

All existing and future advances by Guarantor to Tenant and all existing and future debts of Tenant to any Guarantor shall be subordinated to all obligations owed to Landlord under the Lease and this Guaranty. Guarantor assumes the responsibility to remain informed of the financial condition of Tenant and of all other circumstances bearing upon the risk of Tenant's default, which reasonable inquiry would reveal, and agrees that Landlord shall have no duty to

advise Guarantor of information known to it regarding such condition or any such circumstance. Landlord shall not be required to inquire into the powers of Tenant or the officers, employees, partners or agents acting or purporting to act on its behalf, and any indebtedness made or created in reliance upon the professed exercise of such powers shall be guaranteed under the Guaranty. Each Guarantor hereby represents and warrants to Landlord that such Guarantor has received a copy of the Lease, has read or had the opportunity to read the Lease, and understands the terms of the Lease. The provisions in the Lease relating to the execution of additional documents, legal proceedings by Landlord against Tenant, severability of the provisions of the Lease, interpretation of the Lease, notices, waivers, the applicable laws which govern the interpretation of the Lease and the authority of Tenant to execute the Lease are incorporated herein in their entirety by this reference and made a part thereof. Any reference in those provisions to "Tenant" shall mean each Guarantor and any reference in those provisions to the "Lease" shall mean this Guaranty.

If any one or more of the provisions of this Guaranty shall be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision of this Guaranty, and this Guaranty shall be construed as if such invalid, illegal or unenforceable provision had never been contained herein. This Guaranty shall be construed according to the law of the state of South Carolina (the "State"). By execution hereof, the undersigned specifically consent to this choice of law designation and consent that all actions or proceedings arising directly, indirectly or otherwise in connection with, out of, related to, or from this Guaranty or the Lease shall be litigated only in the courts located in the State, and the undersigned (i) consent and submit to the in personam jurisdiction of any state or federal court located within the State, (ii) waive any right to transfer or change the venue of litigation brought against the undersigned, and (iii) agree to service of process, to the extent permitted by law, by mail.

TO THE EXTENT PERMITTED BY APPLICABLE LAW, AND ACKNOWLEDGING THE CONSEQUENCES OF SAID WAIVER ARE FULLY UNDERSTOOD, THE UNDERSIGNED HEREBY EXPRESSLY WAIVE THE RIGHT TO TRIAL BY JURY, THE RIGHT TO INTERPOSE ANY DEFENSE BASED UPON ANY STATUTE OF LIMITATIONS, ANY CLAIM OF LAMES AND ANY SET-OFF OR COUNTERCLAIM OF ANY NATURE OR DESCRIPTION IN ANY ACTION OR PROCEEDING INSTITUTED AGAINST THE UNDERSIGNED OR ANY OTHER PERSON LIABLE ON THE LEASE.

Signatures contained on following page

~~15th~~ IN WITNESS WHEREOF, Guarantor has caused this instrument to be executed the
~~day of September, 2018.~~
16th October

Witnesses:

GUARANTOR:

[Signature]

WELCOME TO MOE'S, INC., a Florida
corporation

By: [Signature]

Name: Daniel [Signature]

[Signature]

Its: Authorized Signatory

Exhibit C

Assignment, Assumption and Amendment of Lease dated May 8, 2020

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

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: Kenneth R. Davenport II

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

ASSIGNOR:

MSG KING STREET, LLC, a Florida
limited liability company

By: Brad Chasteen

Name: Brad Chasteen
Title: Manager

ASSIGNEE:

QUALITY FRESCA I, LLC.
a Delaware limited liability company

By: Matthew Airey

Name: Matthew Airey
Title: Authorized Person

[Signature Page to Assignment, Assumption and Amendment to Lease Agreement]

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



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



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



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 it is 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



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@QRLLC.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

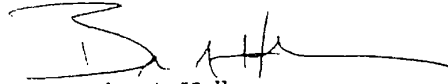
September 4, 2020
Page 2

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

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Property Manager
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Subject: RE: Moes 381 King St

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Best regards,

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

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?

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Kenneth Davenport

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To: kenneth@jacksondavenport.com
Subject: RE: Moes 381 King St

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Best regards,

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



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.

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



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



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



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

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



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



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

QF 13

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE MAGISTRATE COURT
CASE NO: 2020CV1010700554

**KENNETH DAVENPORT, PR FOR ESTATE
PLAINTIFF**

**RULE TO SHOW CAUSE
EVICTION**

VS

**QUALITY FRESCA, MOE'S
DEFENDANT**

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

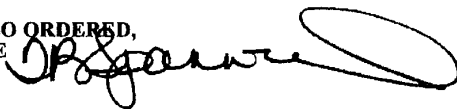
THE COURT RULES:

Disposition Code:

☒ 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

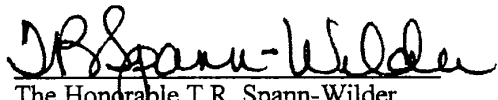
already reached an agreement with a new tenant, which of course cannot be undone by Defendant.

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 Landlord's use of the premises. On November 9, 2020, the Tenant timely appealed the Judgment of the Magistrate.

Pursuant to the findings of the Magistrate Court, the Tenant(s) is obligated to pay the Landlord, Common Area Maintenance (CAM) as a result of the parties lease agreement upon deferral payment until the 1st day of each month beginning with the December 1st, 2020. The amount of \$9,593.88 as the deferral rental amount for November 2020 and shall pay the amount of \$1,906.00 for November 2020 and shall pay the amount of \$7,814.60 base rent per month as it is adjusted by the amount of \$1,906.00 per month for the amount of \$999.88 due on the 1st day of January 1, 2021 shall be in the amount of the deferral rental amount of \$1,906.00 (additional grace period).

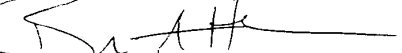
Bond to
Stay Appeal

of \$7,814.60 base rent per month as it is adjusted by the amount of \$1,906.00 per month for the amount of \$999.88 due on the 1st day of January 1, 2021 shall be in the amount of the deferral rental amount of \$1,906.00 (additional grace period).

Tenant(s) hereby undertakes to pay the penalty to the Circuit Court to stay execution on the Judgment of the Magistrate Court.

findings of the Court and moves for a stay of execution on appeal and decided by the Court.

Dated on November 25, 2020:



Brian Hellman, Esq., Attorney/Tenant's Counsel

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)

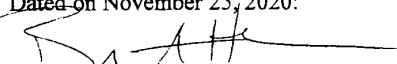
TO: Circuit Court

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).

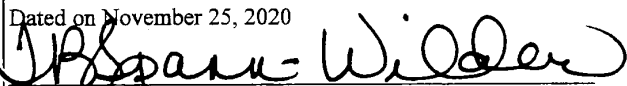
Tenant(s) hereby undertakes to pay the periodic rent hereinafter due according to the aforesaid findings of the Court and moves the Circuit Court to stay execution on the Judgment for Ejectment until this matter is heard on appeal and decided by the Circuit Court.

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,)

Appeal from Charleston Magistrate Court
(Case 2020CV101070554)

v.)

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

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 Appellant / Tenant did not pay a security deposit, even though Respondent refused Appellant’s attempts to pay all amounts due. Further, the Magistrate

NOV 16 2020

FILED IN 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

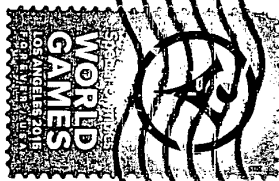
The Honorable Tiffany Spann-Wilder
City of Charleston Magistrate Court
995 Morrison Drive
Charleston, SC 29403

CHARLESTON SC 294
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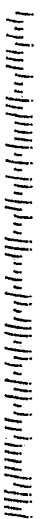
CITY MAGISTRATE COURT

NOV 16 2020

FILED IN CHARLESTON COUNTY



29403-425750



Tiffany Spann-Wilder
Charleston County Magistrate



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



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
Civil Appeal Return

2021 FEB 23 AM 10:17
JULIE ARMSTRONG
CLERK OF COURT

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,

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

Enclosure: Magistrate's Return and supporting documents

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 for 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.

Tiffany Spann-Wilder
Charleston County Magistrate



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

March 3, 2021

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

FILED
021 MAR -5 AM 11:54
JULIE ARMSTRONG
CLERK OF COURT

CASE NO: 2020-CP-10-04936

RE: Quality Fresca, I, LLC dba Moe's Southwest Grill v Kenneth R. Davenport, II
Civil Case Number 2020-CV-10107-00554

Dear Mrs. Armstrong,

Please find enclosed another copy of the Bond to Stay Execution of Appeal in the above matter. The original document sent to the court was scanned with a note from this Court's file attached. Please supplement the same with this such that the reviewing Judge has a full record.

Sincerely,

Tiffany Spann-Wilder
Judge
City Magistrate
995 Morrison Drive
Charleston, SC 29403

Enclosure: Bond to Stay Execution on Appeal

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)

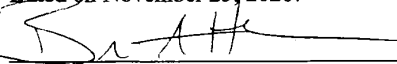
TO: Circuit Court

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).

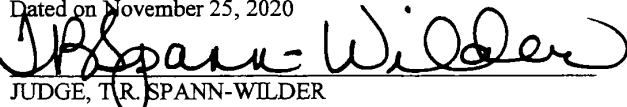
Tenant(s) hereby undertakes to pay the periodic rent hereinafter due according to the aforesaid findings of the Court and moves the Circuit Court to stay execution on the Judgment for Ejectment until this matter is heard on appeal and decided by the Circuit Court.

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.)
Case No. 2021-CP-10-04936
Appeal from Charleston Magistrate Court
(Case 2020CV101070554)
BRIEF OF APPELLANT

Appellant Quality Fresca, LLC d/b/a Moe's Southwest Grill ("Moe's"), through undersigned counsel, submits this Brief in support of its request to reverse the decision of the Magistrate Court granting Respondent's Application for Ejectment.

INTRODUCTION

Respondent, the Estate of Kenneth R. Davenport ("Davenport" or "Landlord"), filed an Application for Ejectment to terminate the valuable tenancy of Appellant, which operates a Moe's Southwest Grill at the leased premises located at 381 King Street in Charleston (the "Premises"). The Magistrate Court misconstrued the facts and law and granted Respondent's Application and ordered Moe's to vacate the Premises. Appellant filed this appeal of the Magistrate Court's decision, and execution has been stayed pursuant to the Magistrate's bond order, which Appellant has been paying in accordance with the terms of the order.

I. STANDARD OF REVIEW

This Court has broad authority in reviewing the decision of the Magistrate Court.

S.C. Code Ann. §18-7-170 provides as follows:

Upon hearing the appeal, the appellate court shall give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits. In giving judgment, the court may affirm or reverse the judgment of the court below, in whole or in part, as to any or all the parties and for errors of law or fact.

This Court can determine findings of fact, and the application of those facts to the law.

See also Hadfield v. Gilchrist, 343 S.C. 88, 92–93, 538 S.E.2d 268, 270 (Ct. App. 2000) (citations omitted). The Circuit Court has the ability to make determinations in the same manner as if it was hearing a trial without a jury. Vacation Time of Hilton Head Island, Inc. v. Kiwi Corp., 280 S.C. 232, 312 S.E.2d 20 (Ct.App.1984) (Circuit Court reversed a magistrate's findings of fact in an ejectment action).

II. FACTUAL BACKGROUND

Since at least October 2013, a Moe's restaurant has been operated at the Premises. In May 2020, Appellant assumed the Lease from the prior tenant by way of the Assignment, Assumption and Amendment to Lease Agreement ("Assignment") entered into as of May 8, 2020 and included with Plaintiff's Rule to Show Cause or Vacate (Eviction). The initial term of the Lease ran through September 30, 2020 and provided Tenant with the option to extend the term of the Lease for two additional five-year periods. (See Section B.2 of the Lease, attached to Plaintiff's Rule to Show Cause). The option for the additional five-year periods was essential to Appellant as the original lease term had less than five (5) months left when assumed. Section 3 of the Assignment

specifically acknowledges that Appellant assumed the Lease with the existing two (2) additional five (5) year renewal options.¹

Since March 2020, the global Coronavirus pandemic has been significantly impacting Charleston as well as most of the nation. In response to the pandemic, starting in March 2020, various governmental authorities began issuing closure orders and other restrictions on businesses in the City of Charleston, including restaurant businesses such as Moe's. Moe's was still closed on May 8, the date Appellant bought the Moe's restaurant and assumed the lease through the Assignment. The Assignment provided, among other things, reduced and deferred rent for April, May and June to accommodate the loss of business due to the pandemic and government-mandated restrictions on restaurants and other businesses in downtown Charleston. The deferred rent was to be paid back in installments commencing on July 1, 2020 and continuing on the first day of each calendar month up through and including December 1, 2020.

As both parties testified at the hearing, the Moe's restaurant at 381 King Street was closed in April and May. It opened for business on a limited basis in June, July and August. Chris Grooms, Vice President of Operations for Appellant and responsible for the oversight of the Moe's location at issue, testified at the hearing that Moe's resumed full operations in September, aided by the return of College of Charleston students to campus.

¹ Section 3 of the Amendment document provides, "Landlord acknowledges and agrees that from and after the Closing Date, Assignee [Defendant] shall be entitled to exercise any of Assignor's options or rights . . . 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." (See Assignment document attached to Plaintiff's Rule to Show Cause)

On Wednesday, July 22, 2020, Landlord's property manager, Steven Milonas, emailed Landlord's representative, Mr. Davenport, and Moe's representative, Bob Hartmann, and asked for a proposal for the anticipated lease renewal. This email is the first of twelve (12) emails introduced into evidence via stipulation by the parties at the hearing and marked as QF 1-12.² On Monday, July 27, 2020, Mr. Hartmann responded to Mr. Milonas and provided a detailed proposal which, among other things, offered a flexible monthly rent tied to gross sales until sales achieved a specified level. See QF 2.

On Thursday afternoon, August 6, 2020, Landlord's representative, Mr. Davenport responded:

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're not going to exercise the option and would be vacating the property?

QF 3. Mr. Hartmann responded shortly after receiving Mr. Davenport's email as follows:

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. . .

QF 4.

According to Mr. Davenport, the email from Mr. Hartmann put the Landlord in a "tough position" because Moe's may not move forward with the lease renewal, and the Landlord needed to find a tenant to lease the space. (Hearing Tr. at 13). Mr. Davenport conceded at the hearing that Moe's could have waited until the "very last day of the lease to exercise the option." (Hearing Tr. at 41). Thus, Mr. Hartmann's email did not put Mr. Davenport in a different position than if Moe's had waited until the last day to exercise

² Mr. Davenport testified that he had no telephone calls or other communications with Mr. Hartmann, and that the emails in evidence were their only communications.

the renewal option. As any prudent landlord would do, Mr. Davenport sought out potential new tenants if Moe's elected not to exercise the renewal option.

Although the Landlord did not produce any documents at the hearing reflecting an agreement with a broker or prospective new tenant, Mr. Davenport testified that he entered into an "agreement" with an undisclosed tenant on August 7 to rent the Premises—*one day* after the August 6, 2020 afternoon email exchange quoted above. Neither Mr. Davenport nor anyone on behalf of Landlord advised Moe's that it had entered into an agreement to lease the Premises to a new tenant.

On Monday, August 24, 2020, Mr. Hartmann emailed Mr. Davenport to follow up on his original proposal. QF 5. On Tuesday, August 25, 2020, Mr. Davenport responded, "At this current time we are not in a position to accept your proposal regarding the lease. I understand this means [Defendant] has elected to not exercise their option regarding the lease extension. . ." QF 6. That same day, Mr. Hartmann responded, "I will speak with our CEO, but **to be clear, the guys have not fully decided the option.**" QF 7 (emphasis added).

Notwithstanding the alleged agreement to lease the Premises to a new tenant, negotiations between the parties continued over the next few days. On Wednesday, August 26, 2020, Mr. Davenport emailed Mr. Hartmann identifying for the first time two issues with the Moe's restaurant - first the restaurant was not open 6 days per week and second there were ongoing issues with trash. The email concluded, "**Given these issues we are not inclined to extend any further lease concessions for the Moe's.**" QF 8 (emphasis added). Mr. Hartmann replied the next day, "What about a short extension, say for 1 year?" QF 9. Mr. Davenport replied on Friday, August 28, 2020, "Thanks for

the alternate option. At this time we are not agreeable to your proposal.” QF 10.

Despite these ongoing negotiations during an unprecedented pandemic and government restrictions, the parties were unable to reach an agreement.

On Thursday, September 3, 2020 Mr. Hartmann emailed Mr. Davenport to let him know that Moe’s had decided to exercise its first 5-year renewal option on the original terms provided in the Lease for the option period. QF 11. Defendant sent formal notice to Plaintiff of its election to exercise its first renewal option via letter dated September 3, 2020 in accordance with the lease notice provision. QF 12.

Moe’s paid rent and CAM (common area maintenance) as required by the Assignment and Lease from May through September. Moe’s attempted in both late September and early October to pay the October rent and CAM and a security deposit required by the terms of the Assignment, but Landlord rejected all payments. Landlord’s property manager testified that the amounts Moe’s tendered would have brought it current on all amounts due. It is also undisputed that at no time between May 8, 2020 and September 29, 2020 were there any written or oral communications about Moe’s failure to pay the security deposit. (Hearing Tr. at 48-49). Indeed, the security deposit was never mentioned until Moe’s exercised its option to renew the Lease for an additional five years and tendered the amount of the deposit.

Although Mr. Davenport testified that he was “concerned” that he may “have to incur expenses with respect to the broker [he] engaged and with respect to the new tenant and that opportunity being lost,” Landlord offered no evidence of any such damages—only Mr. Davenport’s “concern.” Landlord did not offer into any evidence an agreement

with the broker or new tenant, any evidence of actual expenses incurred, or any potential damages.

III.ARGUMENT

At the hearing and in its brief in support of its Application for Ejectment, Landlord argues that Moe's was equitably estopped from exercising its option to renew based largely on Mr. Hartmann's August 6 "Unfortunately it does" email. QF 4. This argument fails for several reasons, including the utter lack of evidence in support of Davenport's alleged detrimental reliance. The six-week history of the email exchanges between the parties' representatives reflect good faith negotiations for lease concessions and renewal terms in the middle of the unprecedented coronavirus pandemic and government restrictions on restaurants like Moe's.

The Landlord's and the Magistrate Court's reliance on Ingram v. Kasey's Associates, 340 S.C. 98, 531 S.E.2d 287 (2000) is misplaced as that case is easily distinguishable from the facts of the case at bar. In Ingram, Ingram entered into a 10-year lease expiring March 1, 1994 with the landlord, Kasey's Associates, to lease a restaurant. Ingram then entered into an oral sublease with Prescott for the operation of that restaurant at the leased premises. The lease granted Ingram the option to buy the leased premises upon certain terms. Near the expiration of the lease term, Ingram told his landlord (Kasey's) that Ingram did not intend to exercise the purchase option, and that Kasey's was free to negotiate a lease with Prescott, the existing sub-tenant, for the premises. In reliance on these representations, Kasey's (1) entered into a new lease effective March 1, 1994 with Prescott and (2) spent \$135,000 to acquire adjacent property to expand the restaurant. On February 22, 1994, six days before the lease ended, Ingram sent Kasey's a

letter stating he was exercising his option to purchase the property. Ingram never purchased the property, and he never provided proof that he had the funds necessary to purchase the property. To the contrary, several lenders testified that Ingram did not have financing to purchase the property. Nonetheless, Ingram sued for specific performance of the purchase option. The Court denied Ingram's request for specific performance.

The facts of Ingram are very different from those in the instant case. First, in Ingram, Ingram stated clearly, several months before the end of the lease term, that he was foregoing his option to buy and that Kasey's was free to negotiate a new lease for the restaurant with Prescott. In reliance on that representation, Kasey's entered into a new lease with Prescott, and it incurred \$135,000 to acquire an adjacent property to expand the restaurant.

Here, there is no credible evidence that Landlord (Davenport) took any actions of any consequence in reliance on Moe's representations. As noted above, Davenport did not produce a lease or any evidence of damages it incurred as a result of the representations made by the Moe's representative during the course of the negotiations. In addition, as Mr. Davenport conceded, Moe's could have waited until the last day of the lease term to exercise its renewal option. Thus, there is no evidence that Davenport took any action that it would not have otherwise undertaken in the absence of the email communications.³

Moreover, in Ingram, evidence was introduced that Ingram's conduct was particularly egregious because he knew that Kasey's was planning to purchase the

³Mr. Davenport testified that he entered into "an agreement" with a new tenant on August 7, 2020, one day after the August 6, 2020 email communications, which suggests that Mr. Davenport or his agent had been exploring potential tenants in the event that Moe's elected not to renew the lease well before the August 6 email exchange.

adjacent property based on Ingram's representations of not planning to exercise Ingram's purchase option, and Ingram decided to exercise the option only because he had a dispute with Prescott (the subtenant and operator of the restaurant). Unlike Ingram, Moe's was simply attempting to negotiate a more favorable lease renewal due to the financial impact caused by the unprecedented pandemic. There is no evidence that Moe's acted with an unlawful or improper purpose or in bad faith.

This case is analogous to the facts in Kiriakides v. United Artists Comm., Inc., 312 S.C. 271, 440 S.E.2d 364 (1994). There, the landlord, Kiriakides, tried to terminate a lease as a result of the tenant's failure to timely pay a rent increase. Kiriakides filed an application for ejectment. United Artists, the tenant, opposed the application. In deciding the case on appeal, the Supreme Court of South Carolina identified the following factors to be considered in determining if a breach is material to justify the forfeiture of a lease:

In determining whether a failure to render or to offer performance is material, the following circumstances are significant:

- (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., 312 S.C. at 276, 440 S.E.2d at 366-67. After considering the factors, the Supreme Court affirmed the trial court's ruling that even though United Artists breached the lease, a forfeiture of its rights under the lease would be inequitable. United Artists presented

evidence that the value of its leasehold improvements after depreciation was \$1.2 million; that the lease had a term of more than twenty (20) years remaining; and that United Artists had tried to cure the default by tendering the past due amount of \$4,732.

Here, Moe's just acquired the restaurant in May 2020 at which time it entered into the Assignment; it had a ten (10) year remaining lease term if it elected to exercise both the lease extensions; and it had tendered all amounts due and owing. And, Moe's had to operate during the restrictions caused by the pandemic. Considering the factors articulated in Kiriakides, all of which weigh in favor of Moe's, the circumstances here do not justify the forfeiture of Moe's valuable leasehold interests under the Lease.

For the reasons set forth above and any other reasons raised at oral argument, Moe's respectfully requests that the Magistrate Court's ruling in favor of Davenport's Application for Ejectment be reversed and for such other and further relief as the nature of its cause may require.

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

Matthew T. Murnane, Esq. (*pro hac vice*)

Venable LLP

750 E. Pratt Street, Suite 900

Baltimore, MD 21202

Tel 410.244.7518

Fax 410.244.7742

MTMurnane@Venable.com

Attorneys for Appellant

Certificate of Service

The undersigned certifies that on March 12, 2021, a true and correct copy of this *Notice of Appeal* was emailed and mailed via U.S. first class mail to the following:

Brian Hellman, Esq. Hellman, Yates & Tisdale, PA 105 Broad Street Charleston, SC 29401 bh@hellmanyates.com	
---	--

/s/theodore huge

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Quality Fresca I, LLC,
 Appellant,

v.

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

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2020-CP-1004936

RESPONDENT'S APPEAL BRIEF

I.

INTRODUCTION

The Magistrate Court correctly and equitably granted an order of ejectment in this matter. The record supports that Appellant (tenant) represented to Respondent (landlord), in writing, 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 that representation, engaged the services of a broker, and entered an agreement to lease the premises to a new tenant. Appellant later claimed that its representation was just a negotiation tactic, 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 any other issues it may attempt to raise in its brief or at the upcoming hearing.

The four unpreserved issues Appellant attempts to raise in the notice of appeal, moreover, are nothing more than boilerplate arguments, which are not explained, not substantiated, and not correct. Appellant, in sum, argues that the record is devoid of any evidence to support the Magistrate Court's decision. That argument blindly ignores 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. Appellant's notice of appeal makes no attempt to particularly articulate any error by the Magistrate Court.

For these reasons, both procedural and substantive, the appeal should be dismissed and the Magistrate Court's order should be affirmed.

II.

PROCEDURAL GROUNDS FOR DISMISSAL

A. FAILURE TO PERFECT THE APPEAL

The statute at issue, entitled "Ejectment of Tenants," S.C. Code Ann. §§ 27-37-10 *et seq.* expressly provides, pursuant to subsection S.C. Code Ann. § 27-37-130, that an appeal of an ejectment shall be dismissed if the tenant fails to file a bond within five days after serving its notice

of appeal, as follows:

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

S.C. Code Ann. § 27-37-130.

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

Here, Appellant filed its notice of appeal on November 9, 2020. Appellant thereafter made no attempt to give or file an appeal bond within five days. That was a dispositive failure. Nine days after the jurisdictional, condition precedent deadline passed, the Magistrate Court, *sua sponte*, on November 18, 2020, scheduled a bond hearing, held on November 25, 2020, and thereafter accepted a bond from Appellant. But the Magistrate Court’s gracious leniency toward Appellant could not and did not revive this unperfected appeal, which this Court is precluded from

considering on jurisdictional grounds.

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

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

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

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

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

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

with Rule 59(e), SCRCF:

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

Further, the statute for Ejectment of Tenants, pursuant to S.C. Code Ann. § 27-37-120, expressly provides, that this "appeal shall be heard and determined as other appeals in civil cases from the magistrate's court." And the South Carolina Rules of Civil Procedure, pursuant to Rule 81, SCRCF, provides that its rules "apply insofar as practicable in magistrates courts . . . to the extent they are not inconsistent with the statutes and rules governing those courts." *See Walton v. Mazda of Rock Hill*, 657 S.E.2d 67, 376 S.C. 301 (Ct. App. 2007) ("Therefore, we find Rule 56, SCRCF, 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) (S.C. App. 2010) (holding that 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), SCRCF).

Here, 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, and any other issues it may attempt to raise in its appeal brief and at the upcoming hearing.

III.

SUBSTANTIVE GROUNDS TO AFFIRM ON THE MERITS

A. STANDARD OF REVIEW

In an appeal from the Magistrate Court, it is incumbent upon the appellant to raise grounds with particularity in the notice of appeal for this Court’s appellate review. 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 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*, 544 S.E.2d 620, 344 S.C. 382, 387-88 (S.C. 2001) (citing *Dorchester County Dep’t of Soc. Servs. v. Miller*, 324 S.C. 445, 477 S.E.2d 476 (Ct. App. 1996). “Moreover, the appellant is not relieved of his burden of convincing the appellate court the trial judge committed error in his findings.” *Id.*; see also Jean Hoefer Toal, *et al.*, APPELLATE PRACTICE IN SOUTH CAROLINA (3d ed. 2016) at 224 (discussing *de novo* review, and explaining that, “In 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.”).

B. STATEMENT OF FACTS

Before the Magistrate Court, and now before this Court on appeal, is an Application for Ejectment filed by Respondent, the landlord, Kenneth R. Davenport II, Personal Representative of the Estate of Kenneth R. Davenport, against Appellant, the tenant, Quality Fresca I, LLC. A bench trial was conducted on October 27, 2020. The parties expressly waived any right to a jury trial. Respondent, Mr. Davenport, and Mr. Daniel Ravenel, property manager for Respondent, testified as witnesses. Appellant called its Vice President of Operations, Mr. Chris Grooms, as its sole witness. The parties stipulated to the authenticity of the documentary evidence in the record and each party was afforded the opportunity to testify at the hearing.

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

Under the Lease, Respondent is the landlord and Appellant is the tenant. Appellant became the tenant 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.

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:

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

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

Regarding a security deposit required by the Lease:

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

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

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

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

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

Thank you for your email. These are definitely unprecedented times. We appreciate your attempts at seeking solutions to your lack of business. If we are unwilling to accept these terms or terms similar to what you are proposing and the lease terms would remain as they currently are, does that mean you are not going to exercise the option and would be vacating the property?

To which Appellant responded:

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

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

After Appellant's August 6 and August 24 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 leased premises at reduced rent either month-to-month or for a year. The e-mails and Mr. Davenport's testimony show that Respondent rejected these alternative, extra-contractual offers. Then, contrary to its prior representations, by email 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. (Later, by letter dated September 25, 2020, Appellant attempted to justify its prior contrary representations

as being “fairly typical negotiations regarding terms.”).

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.

Respondent filed the Application for Ejectment on October 1, 2020.

C. 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 our Supreme Court, this statute must be applied with “equity and common sense.” *Kiriakides v. United Artists Communications, Inc.*, 312 S.C. 271, 276, 440 S.E. 2d 364, 366 (1993). In applying equity and common sense, a court must assess whether a breach is “material.” *Id.* In determining materiality, the following factors should be considered: “(a) the extent to which the injured party will be deprived of the benefit which he reasonably expected; (b) the extent to which the injured party can be adequately compensated [by damages] for the part of

that benefit of which he will be deprived; (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.” *Id.*

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

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

H. She Who Seeks Equity Must Do Equity [] This is a broad principle and is used in a variety of situations. The premise is that a

court may impose equitable obligations on a party as a condition of granting relief. In another fairly recent case, *Ingram v. Kasey's Associates*, Ingram leased property with an option to purchase and told the optionee he had no plans to exercise the option. Relying on this representation, the optionee entered into a new lease with another tenant and spent \$135,000 to purchase adjacent land so the optionee could expand the leasehold estate. Ingram then notified the optionee that he did, in fact, intent to exercise his option and sued for specific performance, an equitable remedy. The South Carolina Supreme Court, also citing the unclean hands doctrine discussed next, said that Ingram's misrepresentation regarding his plans not to exercise the option precluded him from invoking equitable remedies. Of course, under our SUEM analysis, Ingram's actions were bad, and bad guys often do not win in equity.

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

D. ARGUMENT

1. The Magistrate Court's Order Is Legally Correct And Equitable

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".¹ In other words, 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.*

¹ As noted above, Appellant's Vice President of Real Estate, Bob Hartmann, author of the emails was notably not present at trial, and Appellant's agent, Mr. Grooms, testified at trial that he was in "operations" and could not testify as to Appellant'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.*").

It is clear that the emails from Mr. Hartmann to Mr. Davenport stating that Appellant “couldn’t afford” the rent, would not exercise the option, would be vacating the property at the expiration of the term, and would be putting “together the closing and de-branding plan” were all false representations and a concealment of material facts, that Mr. Hartmann intended Respondent to act upon, either by renegotiating the Lease terms with Appellant to provide reduced rent, a shorter lease term, or both. Further, it is clear that Hartmann had knowledge of the true facts, that Appellant had not yet “decided fully the option.” Mr. Davenport testified at trial that he accepted Mr. Hartmann’s representations as true, and that in reliance thereon he engaged a real estate broker and negotiated for and obtained a new tenant. Davenport further testified that Respondent would suffer financial damages if the new tenant did not take occupancy of the premises. The doctrine of unclean hands therefore applies because Appellant’s representation that it would not extend the Lease was unfair, at best. *Ingram*, 340 S.C. at 106-7, 531 S.E.2d 287. The doctrine of equitable estoppel also applies because Appellant concedes the falsity of its representation that it would not extend the Lease, as well its intent to influence Respondent by causing Respondent to be concerned about finding a new tenant. *Id.* Respondent indeed 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 all 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.

2. The Four Issues Raised In The Notice Of Appeal Are Without Merit

Appellant raises four issues in its notice of appeal, which are each without merit, as set forth below.

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

This argument blindly ignores all of 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.

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.”

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

Fourth, Appellant argues: “There was insufficient evidence presented at trial to support a finding that Appellant / Tenant did not pay a security deposit, even though Respondent refused Appellant’s attempts to pay all amounts due. Further, the Magistrate Court’s finding ignored the plain language of the lease which required notice of default and right to cure, neither of which were given by Respondent.”

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

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

IV.

CONCLUSION

This appeal is both procedurally and substantively deficient. Appellant cannot escape the

legal consequences of its own bad faith negotiating tactic of making a false representation about not extending the lease, to attempt to compel Respondent to agree to lesser rent. Appellant, furthermore, has not perfected its right to appeal, not preserved any issues for appeal, and not particularly set forth any legitimate argument to reverse the Magistrate Court. This appeal, accordingly, should be dismissed and the Magistrate Court's order should be affirmed.

Dated: March 12, 2021

Respectfully submitted,

/s/ Brian A. Hellman
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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Quality Fresca I, LLC,
Appellant,

v.

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

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2020-CP-1004936

ORDER

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

FINDINGS OF FACT

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

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

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

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

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

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

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

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

Regarding the end of the Lease:

Tenant agrees to rent the Leased Premises from Landlord for a term of Seven (7) years, beginning on the 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.

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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:

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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 24¹ 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.

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

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

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

Thereafter, this litigation commenced and proceeded as follows:

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

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

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

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

These conclusions of law are more particularly set forth below.

PERFECTING THE APPEAL

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

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

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

S.C. Code Ann. § 27-37-130.

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

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

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

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

PRESERVING ISSUES FOR APPEAL

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

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

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

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

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

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

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

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

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

MERITS OF THE APPEAL

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

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

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

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

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

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

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

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

Appellant's representations in this matter are analogous to those in *Ingram*, as highlighted above by Judge Young and Professor Spitz. Appellant cannot maintain any legal or equitable right to remain in the leased premises after representing that it would not extend the Lease and that it did not have the financial ability to pay full rent, but would "try and make this location work."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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

To the extent Appellant expounded upon these four unpreserved issues in its appeal brief and during the appeal hearing, such further arguments were equally unpreserved and without merit.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

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.



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

Electronically signed on 2021-03-26 12:58:44 page 18 of 18

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

Pursuant to Rule 59(e), SCRPC, Appellant Quality Fresca I, LLC (hereafter “Tenant”) seeks reconsideration by this Court of its order affirming the Judgment of the Magistrate Court, which order was filed on March 29, 2021. Tenant requests the circuit court to vacate the order of the magistrate’s court and issue an order denying relief to Landlord.

PROCEEDINGS BELOW

The lease applicable to the parties to this action (the “original lease”) was executed on September 25, 2013 between the Landlord (hereafter “Landlord”) and Appellant’s predecessor in interest, Ochlocknee Ventures, LLC. (Magistrate’s Return Vol. 1, pp. 13-24). The lease was amended by an Assignment, Assumption and Amendment of Lease executed October 16, 2018. (Magistrate’s Return Vol. 1, pp. 40-49). Lastly, a subsequent Assignment, Assumption and Amendment to Lease Agreement was executed as of May 8, 2020, to include the current tenant, Appellant Quality Fresca I, LLC (Magistrate’s Return Vol. 1 p. 50 – Vol. 2, pp. 1-4) (hereafter referred to as “Tenant”). The May 8, 2020 Assignment, Assumption and Amendment is referred to here as the “Covid-19 Amendment.”

At the time of 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 reduced level, 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 “incorporating guidelines established by the South Carolina Restaurant and Lodging Association, in addition to undertaking and implementing all reasonable steps to comply with any applicable sanitation guidelines promulgated by the CDC, DHEC, or any other state or federal public official.” (McMaster Executive Order 2020-05-08).

The Covid-19 amendment (to which Landlord consented) was executed the same date as Governor McMaster’s executive order 2020-05-08. The Covid-19 amendment included, *inter alia*, assignment to the present Tenant and amendments to the October 2018 lease to include *deferral of rent* contingent upon payment in advance of certain monthly rent and all CAM for April and May 2020. (Magistrate’s Return Vol. 2, p 1, Assignment, Assumption and Amendment May 8, 2020).

Thus, the Covid-19 Amendment to lease was executed in the midst of the pandemic, making those circumstances relevant to the intent of the parties at the time the document was executed on May 8, 2020. Tenant’s restaurant was still shut down at the time the Covid-19 amendment was executed.¹ (Tr. p. 57, lines 9-24).

The Covid-19 Amendment included the following provision:

Landlord acknowledges and agrees that . . . 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.

(Covid-19 Amendment dated May 8, 2020, Section 3).

¹ The record reflects that the restaurant reopened “the first week of June. . . temporarily for . . . Thursday, Friday and Saturdays, and then slowly expanded days of the week until the college students returned.” (Tr. p. 58, lines 2-6).

Thus, when the parties executed the Covid-19 Amendment, everyone knew that restaurants were closed and any date for reopening was speculative at best. Nonetheless, Landlord expressly renewed the existing option for two (2) five-year extensions of the lease with full knowledge that operating restaurants was an assumed risk.

Tenant notified Landlord in writing on September 3, 2020 that Tenant was exercising its option to renew. (Magistrate's Return Vol. 2, pp. 24-25). The email enclosed a letter dated September 3, 2020 from tenant, formally exercising its option to renew the lease for the first five-year period. (Magistrate's Return Vol. 2, pp. 25-26). This was well before the lease had expired on September 30, 2020. (Tr. p. 24, line 14 – p. 25, line 10). In response, Landlord's attorney wrote a letter via email to Tenant on September 4, 2020 attempting to claim a default by tenant. (Magistrate's Return Vol. 1, pp. 12-13). The subject line of the letter was "[d]efault of and waiver of option under that certain . . . lease dated September 25, 2013. . ."

The letter also pointed out for the first time, that the security deposit from the Covid-19 amendment had not been paid, which prompted tenant to send it. *See* discussion, *infra*.

Landlord's lawyer attempted to characterize emails that had been exchanged during the summer of 2020 as "notice" that tenant "would be vacating. . ." which is a misstatement of the content of the emails.² According to Landlord, an agent of Appellant/tenant contacted the Landlord during the summer of 2020 to "solidify the lease that was coming up with – coming up for renewal with options." (Tr. p. 19, lines 1-6). This is not a case of Tenant or Landlord asking for advance notice of renewal. To the contrary, Landlord testified that no notice of the option to

² The emails were admitted into evidence by stipulation as to "authenticity [and] foundation." (Tr. p. 9, line 13 – p. 10, line 5; p. 15). They are listed as without an exhibit number in the Magistrate's Return Vol. 1, p. 4.

renew was required, and under the lease “[Tenant] could wait till the very last day of the lease to exercise the option.” (Tr. p. 41, lines 17-21.)

The summer 2020 emails included a July 27, 2020 email with Tenant’s agent saying, ‘let us know if you find another tenant.’³ (Tr. p. 25, lines 13-18; p. 43, lines 2-16; Magistrate’s Return Vol. 2, p. 15). Landlord’s agent testified on direct that they “made a few phone calls” and found “a new tenant. . .” because they “had the impression” tenant was not going to exercise its option to renew. (Tr. p. 21, lines 17-20; p. 26, line 14).

Only on cross did Landlord admit the “new tenant” was vacuous, in that the lease that no copy was produced, its terms supposedly existed “for a period of time” and that the new tenant was not obligated to do anything was the current tenant remains in the space. (Tr. p. 32, lines 11 – p. 33, line 2). At no point did landlord identify the shadowy “new tenant” or even if whether it had a written agreement with the “new tenant.” (Tr. p. 36, lines 6 – 15). Landlord did not produce a signed lease and offered no testimony that it had sustained any damages as a result of making “a few phone calls.”⁴

The representative for landlord admitted that on July 27, 2020, it had agreed to notify tenant if it found a new tenant. (Tr. p. 43, lines 2 – 16). However, no such notice was ever given to tenant. (Tr. p. 35, lines 15-22; p. 43, lines 2-6; lines 14-16; p. 45, lines 13-19). On August 25, 2020, Tenant made clear in an email to Landlord that Tenant was still considering exercising the

³ The emails, which were admitted by stipulation, are identified on the Magistrate’s Return as Item 7 of exhibits, but with no exhibit number. Magistrate’s Return Vol. 1, p. 4. The documents are included in the Magistrate’s Return Vol. 2 at pp. 14-25.

⁴ In fact, the only speculative “damages” which landlord testified would have occurred was if the shadowy “new tenant” leaves, not if the current Tenant stays. (Tr. p. 42, lines 17-25). The testimony (via an extremely leading question) was merely that Landlord was “concerned that . . . the estate is going to have to incur expenses with respect to the broker that it engaged and with respect to the new tenant and that opportunity being lost.” (Tr. p. 42, lines 20-25). There was no testimony that any action of the existing Tenant had caused any damages at all to Landlord.

option. (Magistrate's Return Vol. 2, p. 20). At that time, Landlord for the first time raised other issues that suggested Landlord did not want Tenant to renew the lease. *Id.* at page 21.

Landlord wanted tenant to leave. Landlord attempted on August 25, 2020 to characterize Tenant's July 27, 2020 email as "Quality Fresca has elected to not exercise their option regarding the lease extension. . .". Magistrate's Return Vol. 2, p. 19. Tenant immediately disputed that, and responded within a day to clarify that no such notice had yet been given and Tenant was still considering the option of exercising the option. (Magistrate's Return Vol. 2, p. 20). Only then did Landlord decide to find fault with Tenant's occupancy of the premises. *Id.* p. 21.

It is impossible to find detrimental reliance when Tenant made clear it was still considering exercising the option long after the "unfortunately it does" email of August 6, 2020. (Magistrate's Return Vol. 2, p. 17). Tenant made clear that nothing in the emails should be construed as notice of tenant intended to vacate. Landlord demonstrated absolutely no detrimental reliance on the summer 2020 emails and if it so relied, it did so despite the August 26, 2020 email that expressly said the option was still being considered. *Id.* Any claimed detrimental reliance was unreasonable in light of the express statement on August 25, 2020 that the option was still being considered.

The original 2013 lease included several specific terms relevant to the issues before the Courts, none of which was raised by landlord, nor addressed by the magistrate's court or the circuit court.

- A. Section B.1 provided that the lease ended on the 30th day of September 2020.
- B. Section B.2 permitted two (2) additional five (5) year tensions with no date specified for tenant's election to extend the Lease.⁵

⁵ The landlord Kenneth Davenport testified "there's no defined period that says they have to exercise that option within a certain period of time. So they could wait till the very last day of the lease to exercise that option." (Tr. p. 41, lines 17-21).

C. Section 21.b requires “written notice” to Tenant of any default under the lease, which written notice shall “specify[] any such event of default” and advising of the right to cure within 20 days in the written notice of default.

The pleadings in this matter alleged, erroneously, that “Tenant never made the \$30,496.00 Security Deposit required by Paragraph 4.c of the Assignment, Assumption and Amendment of Lease dated May 8, 2020.” Landlord made this allegation even though the option to extend the lease for another five years was made September 3, 2020, before the expiration of the lease, (Tr. p. 24, lines 14 – p. 25, line 10). This false statement was also made despite Tenant’s tendering of the Security Deposit and future advance rental on September 29, 2020, which was both before the end of the lease and before this action was filed. The full amount was tendered a second time, as discussed herein.

Testimony established that tenant tendered the full Security Deposit before the expiration of the lease on September 29, 2020. “The – balance owed on the security deposit was not paid until September 29, 2020.” (Tr. p. 47, lines 8 – 19; p. 48, lines 12-16). Evidence further reflected that at no time had Landlord requested payment of the security deposit after the Covid-19 amendment was executed. The issue arose only after Tenant exercised its option, via counsel’s September 4, 2020 letter, which was an attempt by landlord to terminate the lease after the option had already been exercised. (Tr. p. 48, lines 11 – 25).

Landlord instructed the property manager not to accept the security deposit when it was paid on September 29, 2020 (before this lawsuit had been filed). Landlord’s agent testified that the payment, if accepted, would have brought Appellant tenant’s financial obligations current. (Tr. p. 49, line 5 -25; p. 51, line 2 – 6). Landlord testified that tenant paid \$41,995.99 on September

29, 2020, but Landlord rejected the payment on October 1, 2020.⁶ Appellant\tenant then made as second payment on October 12 “in the same amount and that was rejected on October 14. As “instructed to by the owner of the property.” (Tr. p. 49, lines 1 – 21). The reason the Landlord gave for rejected both payments sent by Appellant/tenant is that “Moe’s was not exercising their option and the money was not to be collected.” (Tr. p. 49, line 16 – p. 50, line 1). This was clearly false, and Landlord lied to his agent because the option had been exercised on September 3, 2020.

These funds were rejected *despite* the option having already been exercised and this action already having been filed. (Tr. p. 52, lines 3-11); Clearly, Landlord did not want Tenant to exercise its option to renew, and is attempting to use the summer 2020 correspondence as a reason to terminate the lease even though the option was exercised and the full payment tendered *before* the lease expired.

The magistrate personally questioned Landlord’s witness regarding this payment, confirming the amount paid on September 29, 2020 was \$41,995.88, which included “deposit, rent, cam charges, taxes, insurance.” (Tr. p. 52, lines 14-23). The magistrate asked for further explanation about the payment (which was twice received but rejected). (Tr. p. 54, line 4 – 55, line 12). Landlord’s attorney stated “[s]o Quality Fresca offered to pay a security deposit in exchange for the termination of those guarantees. . .” (referring to personal guarantees executed in conjunction with prior leases). (Tr. p. 54, line 12 – p. 55, line 19).

⁶ The record is silent as to whether Landlord deposited the check and issued a refund, or simply returned the checks sent September 29, 2020 and October 13, 2020. Since it was Landlord’s burden to establish that the funds were not paid, it was critical to know whether Landlord initially accepted the funds before rejecting them. Since Landlord failed to introduced evidence as to the manner in which it received and rejected Tenant’s payments, the trial courts should have applied the inference that evidence in control of a party that is not introduced by that party supports an inference that the evidence, if produced, would be detrimental to the party who secretes the evidence. Sanders, Trial Handbook for South Carolina Lawyers (SC Bar 2019), Section 41.1, p. 1590. See also *Johnson v. Windham*, 224 S.C. 502, 80 S.E.2d 234 (1954).

RELIEF REQUESTED BEFORE MAGISTRATE

After Tenant exercised its option to renew the lease, and after it had tendered all funds due including deposit, tax, insurance and advance rent, on October 1, 2020, Landlord instituted a proceeding entitled “Rule to Vacate or Show Cause (Eviction) alleging “the terms of your tenancy or occupancy have ended” and “[y]ou have violated the terms of conditions of your lease. . .” (Magistrate’s Return Vol. 1 p. 7). The lease would have expired the day before, but Tenant had already exercised the option to renew and tendered all funds due including rent in advance. Landlord instituted this action not because Tenant did not exercise its option and tender all funds due, but because tenant did exercise its option and pay the sums due. Clearly, Landlord wants Tenant out, not the other way around.

The alleged violation of the lease was described in the Application for Ejectment as “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, which ended on September 30, 2020.” That is completely false. The last communications between the two was an agreement for Landlord to notify Tenant if a new tenant was located. Even if a new tenant really existed, Landlord never told Tenant about it. Tenant exercised its option. End of story.

No provision of the lease allowed email communications to be relied upon the parties to the Covid-19 2019 Amendment. To the contrary, the original lease and all subsequent documents required written notice. Instead, Landlord attempted to terminate the lease by letter to tenant dated September 4, 2020 from its counsel, before the lease had expired, after the option had been exercised and after the security deposit and all funds due on renewal of option were paid. By twice rejecting landlord’s payment in September and October, landlord breached the lease.

Throughout trial, Landlord's lawyer attempted to persuade a witness to testify that Tenant had the financial ability to exercise its option and was merely posturing to get a better deal on the renewal. (Tr. p. 59, line 17-p.60, line 17). No witness had any knowledge of that, and there is no evidence as to whether or not tenant's financials in the summer of 2020 were or were not sufficient to exercise its option. Tenant only had to decide whether it would exercise its option prior to September 30, 2020, which it did. Where the money came from was never explored, nor was it relevant.

APPLICABLE LAW

An action for ejectment is an action at law. *Rogers v. Nation*, 284 S.C. 330, 326 S.E.2d 182 (Ct.App. 1985). When both legal and equitable claims are joined in a single action, each retains its own separate identity as legal or equitable. *Future Group II v. Nationsbank*, 324 S.C. 89, 478 S.E.2d 45 (1996).

Respondent/landlord argued only equitable issues at trial and both the magistrate's court and the circuit court addressed the issues presented under equitable principles. That was error.

As a general rule, the construction of a contract is a matter of law for the court, unless the contract is ambiguous, in which case the intention of the parties is a question of fact for the jury. *Soil Remediation Co. v. Nu-Way Environmental Inc.*, 325 S.C. 231, 482 S.E.2d 554 (1997). In *Rogers, supra*, the Court of Appeals determined that the presence of legal questions as a predicate to application of equitable principles did not convert the action from one at law to one in equity. *Rogers, supra* 284 S.C. at 332-33.

Accordingly, in an ejectment proceeding, the court is obligated to look to the documents which form the contract between the parties to determine the parties' rights under the contract. Only then can equitable issues be addressed. A question of breach of contract is a matter at law.

Moore v. Crowley & Associates, 254 S.C. 170, 174 S.E.2d 240 (1977); *Jacobs v. Service Merchandise Co. Inc.*, 297 S.C. 123, 375 S.E.2d 1 (Ct.App. 1985).

Neither the magistrate's court nor the circuit court addressed whether the action was one at law or in equity, neither set forth the burden of proof and neither understood that tenant had twice tendered all funds due to landlord, including advance payment of future rent, prior to the expiration of the lease.

In support of the motion, Appellant will show:

1. The magistrate court and the circuit court erred in failing to construe the action as a matter of law and in failing to address the legal issues before applying any equitable doctrines.
2. The magistrate court and the circuit court erred in failing determining the rights of the parties pursuant to the written lease and Covid 19 Amendment.
3. The magistrate court and the circuit erred in concluding that Appellant tenant has not paid the security deposit required by the May 9, 2020 Assignment,
4. The circuit court erred in failing to apply the applicable scope of review on an appeal from magistrate's court.
5. In adopting the factual findings of the magistrate's court, the circuit court erred in failing to determine the weight of the evidence in support of its findings. The appeal before the circuit court was subject to a *de novo* review and the court instead reviewed the matter with deference to the finding of the magistrate's court, which deprived appellant of its rights on appeal. *Vacation Time of Hilton Head v. Kiwi Corp.*, 280

S.C. 232, 312 S.E.2d 20 (Ct.App. 1984).⁷ Further appeal from the circuit court's order will be compromised by the failure of the circuit court to apply the proper scope of review.

6. The circuit court erred in affirming the magistrate's court, which adjudicated the matter solely on the basis of equitable relief sought by the Respondent and equitable doctrines of law. This is an action at law, and the court was required to interpret the legal issue presented by the contract documents prior to considering any equitable defenses or remedies.
7. The circuit court erred in finding the Respondent landlord detrimentally relied on verbal/email statements of Appellant's representative, when the parties' rights were spelled out in contract and took precedence over any equitable arguments. While Landlord's counsel attempted to elicit this evidence, he was unsuccessful in doing so.
8. Landlord failed to provide any competent evidence that it sustained any damages or that Landlord had a viable substitute tenant ready to occupy the space.
9. The threshold issue before the circuit court was whether Appellant tenant materially breached the lease. Neither the magistrate's court nor the circuit court addressed this issue in their respective orders.
10. Had the courts addressed the legal issues presented, the courts would have determined that the lease by which Tenant held the leased premises controlled and that Tenant properly exercised its option to renew prior to the expiration of the lease.

⁷ The Court of Appeals' scope of review will be to determine whether there is any evidence to support the circuit court judge's findings of fact. *Id.* Because the circuit court gave deference to the magistrate's court's factual findings, the Court of Appeals will be unable to apply the proper scope of review on appeal.

11. The courts erred in finding *Ingram v. Kasey's Associates*, 340 S.C. 98, 531 S.E.2d 287 (2000) as binding precedent in that its holding was inapplicable to the facts and distinguishable from this case.
12. The circuit court erred in failing to apply the proper standard of review while sitting as an appellate court, and in failing to reverse the factual findings of the magistrate's court. *Vacation Time of Hilton Head Island v. Kiwi Corp.*, 280 S.C. 232, 312 S.E.2d 20 (Ct.App. 1984).
13. The circuit court erred in making a *sua sponte* ruling that the appeal had not been perfected, since no motion was made for that relief.⁸ *Transportation Ins. Co. v. South Carolina Second Injury Fund*, 298 S.C. 255, 379 S.E.2d 732 (Ct.App. 1989) (appellate courts do not answer questions which have not been asked.); *See also Miles Construction Co. v. Weaver*, 296 S.C. 466 n. 10, 373 S.E.2d 905 n 10 (Ct.App. 1988) (same).
14. The circuit court's ruling that it lacked jurisdiction to review the appeal was error in that a court sitting in an appellate capacity cannot address issues not raised by the parties. Not only was *Wheeler*⁹ adopted prior to the enactment of the South Carolina Rules of Civil Procedure, 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*

⁸ Section 27-37-130, the statute which requires bond during appeal, is applied by the magistrate court setting a bond hearing after the Notice of Appeal is filed or by issuing a writ of ejectment. Section 27-37-30(C)(2). The audio recording of the bond hearing has been requested but not yet received. The magistrate judge explained the process during the appeal bond hearing, but the circuit court did not have the benefit of the hearing of that proceeding because the issue was not raised on appeal. The audio has been requested so a transcript can be produced for this proceeding. Had the issue been raised in defense of the appeal to the circuit court, the record would have been provided earlier.

⁹ The circuit court relied upon *Wheeler v. Hylar*, 228 S.C. 584, 91 S.E.2d 265 (1956), which incorrectly equated a condition precedent to an appeal to a jurisdictional question.

Citizens Bank & Trust Co. v. Taylor, 431 S.C. 149, 847 S.E.2d 249 (Ct.App. 2020).

No existing precedent¹⁰ 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 issues, especially one not raised by the parties and instead addressed *sua sponte* by the appellate court.

ADDITIONAL RELIEF REQUESTED

The audio transcript from the appeal bond hearing on August 25, 2020 has been requested but not yet received, as it was not known by existing counsel Mr. Huge that a transcript from that proceeding was necessary. On information and belief, the magistrate's clerk is believed to be providing the audio electronic file this week, and it is believed a transcript can be produced within ten (10) days after receipt.

Undersigned counsel is new to the party, and seeks permission to leave the motion to amend open for supplementation after receipt of the transcript of proceedings of the bond hearing. Tenant respectfully requests a ten-day period of time within which to submit any amendments or supplements to the instant motion, after receipt and transcription of the audio of the bond proceeding. Counsel will notify the Court immediately upon receipt of the audio and resulting transcript.

In the interim, the Motion to Extend Appeal Bond, filed herewith, need not be stayed for any reason.

[signature appears next page]

¹⁰ 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).

Respectfully submitted,

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ATTORNEYS FOR APPELLANT

April 8, 2021

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

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

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ATTORNEYS FOR APPELLANT

April 8, 2021



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

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 Moc'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	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
	)	
Quality Fresca I, LLC,	)	Case No. 2020-CP-10-04936
	)	
	)	
Appellant,	)	
vs.	)	<u>MEMORANDUM IN SUPPORT:</u>
	)	<u>MOTION TO RECONSIDER</u>
	)	<u>RULE 59(E), SCRPC</u>
Kenneth R. Davenport II, Personal	)	
Representative of the Estate of	)	
Kenneth R. Davenport,	)	
Respondent.	)	
	)	

Pursuant to Rule 59(e), SCRPC, 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 court¹ and remand the matter to the magistrate with instructions to enter judgment in favor of Tenant.

Pursuant to Rule 10(c), SCRPC, 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.

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 BOND⁴

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.

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, lines 14-22).

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

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.

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 appellant⁸ makes no Rule 59(e) SCRPC 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 rent⁹ 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

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 TEN¹²

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.

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 D¹³ 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).

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.

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.

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.

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: BURDEN OF PROOF AND SCOPE OF REVIEW

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.

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.

Landlord postured the case as one in equity¹⁷ 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.

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.

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.

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.

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 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,

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.

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 precedent¹⁹ 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).

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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April 22, 2021

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DAVENPORT vs. QUALITY FRESCA I, LLC

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AUDIO TRANSCRIPTION OF HEARING HELD ON

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NOVEMBER 25, 2020

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TRANSCRIBED BY: CAROL T. LUCIC, RPR, RMR

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1 A P P E A R A N C E S

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3 ON BEHALF OF THE PLAINTIFF:

4 HELLMAN, YATES & TISDALE

5 BY: BRIAN A. HELLMAN, ESQ.

6 105 BROAD STREET, THIRD FLOOR

7 CHARLESTON, SC 29401

8

9 ON BEHALF OF THE DEFENDANT:

10 HARRIS & HUGE, LLC

11 BY: THEODORE H. HUGE, ESQ.

12 3202 MAYBANK HIGHWAY

13 JOHNS ISLAND, SC 29455

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1 THE COURT: Good morning. We are now on
2 the record. Today is November 25, 2020, and this
3 is the matter of Davenport versus Quality Fresca,
4 LLC, doing business as Moe's Southwest Grill. This
5 matter came before the Court on an eviction, and
6 the eviction was granted to the plaintiff,
7 Mr. Davenport; however, Moe's has appealed that
8 decision, and so this hearing was set as a bond to
9 stay execution on appeal.

10 I want to note that I am in receipt of the
11 letter from Brian Hellman, which had a check for
12 \$10 to execute the eviction that was based on the
13 original order, which I do believe was for November
14 18 for the vacating of the premises. The Court is
15 not going to apply that \$10 because they are
16 entitled to a hearing to the bond on the appeal,
17 and that's kind of procedurally how it's done in
18 Magistrate Court that we actually have that.
19 Because he timely filed the appeal, that stayed
20 everything, and thus we're here with this
21 opportunity for us to figure out what the figure is
22 going to be.

23 So this \$10 check I'm going to return to
24 your firm. I probably need to make a copy of it
25 and then just note that we returned it. So I just

1 wanted to address that. I would have had you guys
2 here probably last week, but I ended up having to
3 quarantine for a couple of days because my kids had
4 to take COVID tests because of an exposure at
5 school, and so that shut me down a little bit, and
6 I wasn't going to pass something like this on to
7 another judge because I heard it and all that good
8 stuff.

9 So I just want to establish that and just
10 make it clear that what I am trying to accomplish
11 here today is just to figure out what the basic
12 rent is. I have gone through the contract some. I
13 know there is a CAM. I know that there is a
14 deferral payment that should be kicking in to this
15 time period as well. So essentially we want to get
16 that number on board.

17 Mr. Hellman, I know your folks may have
18 issues about accepting payment and all that kind of
19 stuff, but I think it's due you if they're there,
20 and if not, you will probably have to just post it
21 with the Clerk of Court.

22 Apparently the statute calls for us to
23 hold it as a possibility, too, but I don't think
24 we're quite set up here or the powers that be don't
25 appreciate it because we would probably have to set

1 up a separate trust account because of the amount
2 of the rent and all those fun bar rules about the
3 interest and where does that go and all that, and I
4 think our wonderful Clerk of Court, Julie
5 Armstrong, is really best suited to do that than
6 this office here.

7 So I want to hear from the plaintiffs
8 first about what you believe is due, and I will
9 tell you I am wanting to confirm what the base rent
10 is, confirmation of the CAM, and then that 1,906
11 per month that was a part of the deferral, how long
12 is that supposed to go on. Because again I will
13 not control when the Circuit Court hears this. So
14 I know it's a back end kind of payment, and so it's
15 possible that maybe the Circuit Court doesn't hear
16 this until that has run out. So to be fair to the
17 defendants I want to make sure that I would put
18 parameters on that for when it ends, just not being
19 certain where it all plays out.

20 MR. HELLMAN: Thank you, Your Honor.
21 Brian Hellman on behalf of Mr. Davenport.

22 Your Honor, with respect to my November 20
23 letter, I understand the Court's position on that
24 and would just incorporate that into the record.

25 THE COURT: Okay.

1 MR. HELLMAN: So as it stands today
2 according to my client the base rent -- Quality
3 Fresca paid November 1.

4 THE COURT: They did?

5 MR. HELLMAN: They did, Your Honor, marked
6 as November rent. They paid an amount of
7 \$9,593.88.

8 THE COURT: What was that encompassing?

9 MR. HELLMAN: What that number would
10 encompass is a CAM amount, which is currently
11 \$1,779.28 per month.

12 THE COURT: Okay.

13 MR. HELLMAN: That number I believe is in
14 the process of being revised for next year, so that
15 number may change. We just went through a
16 countywide reassessment, so the taxes, which are a
17 substantial portion of that, may vary some over the
18 course of this, but as it stands right now, a CAM
19 of \$1,779.28. Then they paid base rent of
20 \$7,814.60.

21 What that number would represent is base
22 rent that I believe incorporates a 2-1/2 percent
23 increase that would have applied had the option --

24 THE COURT: Been executed.

25 MR. HELLMAN: -- been exercised.

1 THE COURT: So this does reflect that
2 increase.

3 MR. HELLMAN: This does reflect that
4 increase, yes, Your Honor. It did not include the
5 amount --

6 THE COURT: The deferral?

7 MR. HELLMAN: -- the deferral payment,
8 which is an additional \$1,906. I believe they had
9 paid that through the expiration of the term
10 because they had paid obviously through September
11 30. So I don't believe that that 1,906 had been
12 paid for October or November, and it would have
13 been due for a six-month period, so it would have
14 been due for October and November and the last
15 payment of 1,906 in December.

16 THE COURT: So the 1,906 was being paid
17 along the way?

18 MR. HELLMAN: It was, Your Honor. It
19 started on January 1 and was supposed to conclude
20 on December 1.

21 THE COURT: So wait a minute. I'm
22 confused because I thought the deferral was based
23 on the reduction that happened in the summer
24 because of COVID, so I don't know that that would
25 have gone back to January.

1 MR. HELLMAN: I'm sorry. If I said
2 January, I meant to say July.

3 THE COURT: Okay.

4 MR. HELLMAN: I'm sorry, Your Honor. It's
5 my aging eyes.

6 THE COURT: Join the club.

7 So the 1,906 was supposed to be July
8 through December on the deferral.

9 MR. HELLMAN: Yes, Your Honor.

10 THE COURT: One thing because I don't
11 recall us even having this discussion from the
12 original hearing, was rent being paid along the
13 way; it was just the option check that was refused?
14 I know there was a check that was refused.

15 MR. HELLMAN: What was refused, Your
16 Honor, was the payment that was attempted to be
17 made on September 28, and that included the October
18 rent, the fourth installment of the deferral
19 payment for October, and the four-month deposit
20 that was also due and hadn't been paid. That was
21 for \$30,496.

22 THE COURT: Really the big issue was about
23 the \$30,000.

24 MR. HELLMAN: Right.

25 THE COURT: So has the October rent been

1 paid at all less that deposit on the option
2 exercise?

3 MR. HELLMAN: Your Honor, I had one issue
4 in confirming that, and perhaps Mr. Huge has some
5 confirmation. The person who I deal with at
6 Ravenel, her father is in hospice right now, and I
7 was unable to confirm that with her. She had
8 emailed me about a payment, but I couldn't get back
9 in touch with her, and maybe Mr. Huge has some --

10 MR. HUGE: Your Honor, Ted Huge for the
11 defendant, Quality Fresca I, LLC. I had from my
12 client two remittance (inaudible) which essentially
13 represents a payment. I should have made copies
14 and I apologize. One says the November rent, which
15 includes the CAM, for \$9,593.88 was paid on
16 November 1.

17 THE COURT: So we're good on that but for
18 the 1,906.

19 MR. HUGE: You're right. The 1,906 --

20 THE COURT: Is missing for November.

21 MR. HUGE: It may be. It's not missing
22 for --

23 THE COURT: October.

24 MR. HUGE: Well, according to this -- we
25 can all look at it -- it says invoice number --

1 well, it says October 1, deferral payment 4 of 6,
2 \$1,906. So I think that means -- it says 4 of 6.

3 MR. DAVENPORT: That's correct. I was
4 paid on 11/16, so that is correct.

5 THE COURT: So October's rent was taken
6 care of. Your client, Mr. Hellman, just did not
7 accept the \$30,000 option renewal.

8 MR. HELLMAN: I stand corrected, Your
9 Honor. So that corroborates with what Miss Carroll
10 emailed me beforehand. So on November 16 I think
11 is the date they re-sent the rejected October rent,
12 the October deferral payment, and the past due or
13 unpaid security deposit, 30,496. So that has been
14 received for October. So really the issue we
15 have --

16 THE COURT: Is going forward.

17 MR. HELLMAN: -- is for November. We have
18 not received the November deferral payment of
19 1,906.

20 THE COURT: Got you. And then there would
21 only be one more deferral payment due.

22 MR. HELLMAN: Correct.

23 THE COURT: For December.

24 MR. HELLMAN: Correct.

25 THE COURT: I guess my issue here is with

1 the CAM adjustment. The way the system is set up
2 it gives us a form that the judges can kind of
3 alter a little, but it's a bond to stay form that
4 is signed off by the plaintiff or their
5 representative and the judge about the terms.

6 Mr. Huge, are your clients -- the lease
7 calls for those adjustments. This is probably a
8 hard issue to have sometimes is trying to
9 anticipate things so that they don't come back as
10 litigated issues. I can tweak the order to say --
11 I can't state what the CAM would be for I guess --
12 I don't know. It would probably hit for the
13 February payment or so.

14 Do either of you know once the numbers are
15 run when that adjustment occurs, and is it retro,
16 like if they don't figure it out until your March
17 payment, do you retro your January and February?

18 MR. HELLMAN: Your Honor, it's
19 recalculated. I'm wondering if -- it seems to me
20 that in summary we have an ongoing rent of
21 9,593.88.

22 THE COURT: Yes.

23 MR. HELLMAN: We have two payments, one
24 that would be currently due and one due for
25 December of 1,906, and then perhaps once the CAM

1 reconciliation is done and the new CAM is
2 calculated, that Mr. Huge and I can get together
3 and perhaps just prepare maybe a consent order as
4 to what that would be.

5 THE COURT: That would be fine, and I can
6 tweak this to say when the CAM is adjusted, you can
7 present to the Court, and we'll sign off on it. I
8 can certainly do that, but it might get heard
9 sooner. I have no clue.

10 So we would be looking then -- so it says
11 pursuant to the findings of the Magistrate the
12 tenant is obligated to pay a base rent then of
13 \$9,593.88, common area maintenance of \$1,779.

14 COUNSEL: Your Honor, I'm sorry to
15 interrupt, but actually the base rent is \$7,814.60.

16 THE COURT: I'm sorry. I gave the total
17 figure. \$7,814.60, CAM of 1,779.28, and I'll have
18 it say per month until adjusted -- something like
19 adjusted per parties' lease agreement and county
20 tax provisions.

21 COUNSEL: That sounds fine, Your Honor.

22 THE COURT: And 1,906 per month for the
23 deferral payment, and that's going to be for
24 November and December of 2020. So I'll have to
25 tweak this. So there is no past due rent, but what

1 I'll say is past due deferral payment for November
2 2020, and that needs to be taken care of I would
3 say November 30. Your clients can have that
4 squared away?

5 MR. HUGE: I believe so.

6 Your Honor, I'm sorry to interrupt. Just
7 for clarification, I have a record of payment that
8 Quality Fresca did pay 9,593 for November on
9 November 1.

10 MR. HELLMAN: Yes, we received November.
11 We received the 9,593.

12 MR. HUGE: I thought you said in November
13 it was not received.

14 THE COURT: So the 9,593, I thought
15 Mr. Hellman said it did not include the deferral
16 payment.

17 COUNSEL: Correct.

18 COUNSEL: Correct. The 1,906 for November
19 sounds like it's due.

20 THE COURT: For the deferral. They give
21 you these block things, and then so I'm trying to
22 cut out -- I'll have to get back to the computer to
23 clear it up because I need to do it now because it
24 does ask for the signature of the tenant to it.

25 Of course, if your clients fail to meet

1 the terms, then they can move forward with the writ
2 of ejectment. The way this sets up is if they fail
3 to make the payment within five days of any due
4 date, then they can move forward, and that's why I
5 try to be really specific because I'm here part
6 time, so if you come in and the clerk is here, it
7 should be apparent to her that if it's due on the
8 1st and you come in on the 10th -- they come in on
9 the 10th like we didn't get the money, okay. We
10 can move forward with the writ. So I just want to
11 clarify.

12 Mr. Hellman, for signatures it just lists
13 you as attorney for Davenport.

14 MR. HELLMAN: Yes, Your Honor.

15 THE COURT: Any other issues? I want to
16 run into my office and make a quick revision and
17 let you all look at it and make sure it's good, and
18 we can call this one a day.

19 MR. HUGE: Your Honor, just one quick
20 thing.

21 THE COURT: Yes, sir.

22 MR. HUGE: This is probably for
23 Mr. Hellman, too. Can I just tell my client to
24 keep paying as they have been? They pay through
25 ACH. It looks like they pay Ravenel.

1 MR. HELLMAN: They do.

2 THE COURT: Yes, they would continue to
3 pay. The only thing that would be different is if
4 they weren't willing to accept it, post it with the
5 Clerk of Court because your matter has moved to the
6 Circuit Court.

7 If you all give me a second, I'm going to
8 make you a copy of this check that we're returning,
9 and then I will tweak that. Hold tight, please.
10 We'll do a little mathematical exercise here just
11 to make sure we're good. Being lawyers we don't
12 always do math.

13 (Discussion off the record)

14 THE COURT: It is weird because there is
15 just that one last payment, deferral payment.

16 COUNSEL: I believe your math is correct,
17 Your Honor, but I'm going to use my calculator.

18 THE COURT: Please do.

19 COUNSEL: It jibes with what I've got in
20 my notes, but I'll wait for the calculator to
21 confirm.

22 THE COURT: I'll clear out the highlights
23 and print it. You know what I did not put in
24 there? Well, I guess everything doesn't have to be
25 spelled out. I did say subject to the adjustment

1 by the landlord and the tax provisions. Just again
2 if there is an issue, if you want to put it in
3 writing, I will update it.

4 COUNSEL: Okay.

5 THE COURT: I'll put that in my notes.

6 COUNSEL: You've got in here, Your Honor,
7 as such time as adjusted by the landlord as a
8 result of the parties' lease agreement.

9 THE COURT: Yes, but I'll make a note to
10 update the bond with the new CAM if there is any
11 issue.

12 COUNSEL: The numbers all match, Your
13 Honor.

14 THE COURT: Okay. Miss Shelly gave you
15 your check back, Mr. Hellman?

16 MR. HELLMAN: Yes, Your Honor.

17 THE COURT: I will fix this, we'll get it
18 signed, and we are good to go.

19 (Hearing concluded.)
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1 CERTIFICATE OF REPORTER
2 STATE OF SOUTH CAROLINA
3 COUNTY OF CHARLESTON

4

5 I, Carol T. Lucic, Registered Professional
6 Reporter and Notary Public for the State of South
7 Carolina at Large, do hereby certify that the
8 foregoing hearing was transcribed by computer-aided
9 transcription and that the foregoing is a full,
10 complete, and true record of the hearing.

11 I further certify that I am neither
12 related to nor counsel for any party to the cause
13 pending or interested in the events thereof.

14

15 Witness my hand, I have hereunto affixed
16 my official seal on April 13, 2021, at Charleston,
17 Charleston County, South Carolina.

18

19

20

21 Carol T. Lucic
22 NCRA MERIT REPORTER
23 REGISTERED PROFESSIONAL REPORTER

24

25 My Commission expires: November 27, 2027.

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Quality Fresca I, LLC,

Appellant,

v.

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

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2020-CP-1004936

**RESPONDENT'S OPPOSITION TO
TO APPELLANT'S MOTION
FOR RECONSIDERATION**

Respondent, the landlord, Kenneth R. Davenport II, Personal Representative of the Estate of Kenneth R. Davenport, files this opposition to Appellant, the tenant, Quality Fresca I, LLC's, April 8, 2021, motion for reconsideration of this Court's, March 26, 2021, appellate decision and order affirming the Magistrate Court's, November 4, 2020, order of ejectment in this matter.

INTRODUCTION

The instant motion for reconsideration, and the future appeals that Appellant indicates will follow, constitute nothing more than a strategy to protract this litigation, while Appellant refuses to vacate the premises and denies access to the new tenant. There is no objectively reasonable legal basis to justify this strategy.

It is undisputed that Appellant did not file for a bond within 5 days of its notice of appeal. This procedural fact is dispositive, by statute, as a matter of jurisdiction. There is no saving argument that can be made, and Appellant's attempt to invent one fails.

Equally dispositive, Appellant did not file a motion for reconsideration with the Magistrate Court. The issues Appellant attempted to raise in its appeal, therefore, were not preserved. This Court held so accordingly. Appellant ignores that ruling in its motion for reconsideration. Old

arguments are lost. New ones cannot now be raised.

Also dispositive, the issues raised in Appellant's notice of appeal (which was little more than 1 page, listing 4 enumerated points) were not stated with particularity, as required by the unique ejectment appeal statute governing this appeal from the Magistrate Court. This Court so held. Appellant's motion for reconsideration does not object to that ruling.

Notwithstanding the above dispositive issues that Appellant did not challenge and cannot overcome, none of the other issues Appellant presents in its motion for reconsideration have any merit. Appellant's numerous arguments, enumerated as 14 points, can be sorted into four general categories. First, Appellant addresses the bond issue, without disputing the dispositive fact that it did not file for a bond within 5 days of its notice of appeal. (*See* # 13 and 14). Second, Appellant challenges this Court's scope of review. (*See* # 4, 5, and 12). Third, Appellant argues that this Court applied the wrong caselaw. (*See* # 1, 2, 6, 9, 10, and 11). Fourth, Appellant contends that this Court misconstrued the facts. (*See* # 3, 7, and 8). These arguments are all as misguided as they are unpreserved or ineffective, as will be detailed below.

ARGUMENT

1. Appellant did not file for a bond within 5 days of its notice of appeal

Critically absent from the motion for reconsideration, Appellant does not dispute this Court's correct finding that Appellant did not file for a bond within 5 days of its notice of appeal, which this Court detailed as follows in its findings of fact:

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 . . .

(Order, p. 5).

This procedural fact, that Appellant did not file for a bond within 5 days of its notice of appeal, dispositively requires dismissal of the appeal, by statute, as a matter of appellate jurisdiction, under the authorities cited in this Court's order, principally, S.C. Code Ann. § 27-37-130 and *Wheeler v. Hyler*, 91 S.E. 2d 265, 228 S.C. 584 (1956). (Order, pp. 6-8).

Ignoring this dispositive procedural fact and effectively conceding it, Appellant attempts to challenge the result it mandates in six decipherable ways. (*See* #13 and 14 of the 14 enumerated grounds in the motion).

First, Appellant attacks *Wheeler*, arguing that it is outdated because it was decided before the rules of civil procedure were adopted, that it does not construe S.C. Code Ann. § 27-37-130, and that it was incorrectly decided by our Supreme Court. These attacks on *Wheeler* are unfounded. *Wheeler* was cited as recently as 2020. *See In re Arrieta*, 612 B.R. 342 (Bankr. D.S.C. 2020) (citing *Wheeler*). The holding of *Wheeler* is not affected by any later adopted rule of civil procedure. Indeed Rule 74, SCRCP, expressly makes it clear that the adoption of the rules of civil procedure did not change the fact that the "procedure on appeal to the circuit court . . . shall be in accordance with the statutes providing such appeals." *Wheeler*, furthermore, did in fact construe the same statutory provision at issue here, known now as S.C. Code § 27-37-130 (1976), but known at that time as S.C. Code § 41-113 (1952), as explained in the annotations to the statute. *See* S.C. Code Ann. § 27-37-130 ("HISTORY: 1962 Code Section 41-113; 1952 Code Section 41-113; 1946 (44) 2584; 1950 (46) 2305."). The statutory language has been virtually unchanged since 1946. *Compare* the statutory language from the Act of 1946:

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 trial 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 (5) days after service of the notice of appeal such appeal shall be dismissed.

with the current statutory language from S.C. Code Ann. § 27-37-130:

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.

And lastly, *Wheeler* has not been overturned by our Supreme Court, so Appellant's contention that it is "incorrect" is contrary to binding law.

Second, Appellant suggests that a case *Wheeler* cites, *Horn v. Blackwell*, 212 S.C. 480, 48 S.E. 2d 322 (1948), is likewise outdated. *Horn* involved the same, virtually unchanged statutory provision, as set forth above. In *Horn*, the Supreme Court noted that the "Appellant apparently concedes that under the terms of the foregoing section dismissal of an appeal by a tenant is mandatory unless bond is filed within the time stipulated." *Id.*, 212 S.C. 480, 48 S.E. 2d at 323. *Horn* goes on to explain that the statute is constitutional, concluding that the "General Assembly may lawfully require the filing of a bond as provided for by Section 30 of the Act under consideration as a condition precedent to the right to appeal from an order of ejectment." *Id.*

Third, Appellant asserts that the issue of its failure to perfect the appeal was "not raised" by Respondent. That is just not true. The issue was raised by Respondent to the Magistrate Court, both before (by letter attached hereto as Ex. A) and at the untimely bond hearing (scheduled and held, *sua sponte*, by the Magistrate Court, after Appellant failed to perfect the appeal), and then again in its responsive brief to the appeal taken to this Court, and yet again at the hearing held by this Court. Notwithstanding, it does not matter when or how the issue was raised – because it is a statutory matter of appellate jurisdiction, as will be discussed next.

Fourth, Appellant contends that this Court considered the issue of its failure to perfect the appeal *sua sponte*, and that it did not have the authority to do so. As already explained, the Court,

in fact, did not raise the issue *sua sponte*, rather it was raised by Respondent, numerous times, as detailed above. But regardless, as *Wheeler* explains, the failure to perfect an appeal divests an appellate court of jurisdiction, and the statute itself expressly required the appeal to be dismissed. S.C. Code Ann. § 27-37-130.

Fifth, Appellant suggests a need to look to the transcript of the untimely bond hearing, scheduled and held, *sua sponte*, by the Magistrate Court, after Appellant failed to perfect the appeal. The transcript of the bond hearing is not something that should be presented to this Court by Appellant for the first time in a memorandum supporting a motion for reconsideration. But regardless, the transcript is of no help to Appellant. The dispositive fact is that Appellant did not timely file for a bond. The Magistrate Court's gracious leniency could not save Appellant from its own jurisdictional failure to perfect its appeal. Further, as mentioned already, the transcript only confirms that Respondent duly objected.

NOTE: At the time Appellant filed its motion for reconsideration, on April 8, 2021, Appellant made a motion for additional time (beyond the 10 days allowed by Rule 59, SCRCP) to supplement its motion for reconsideration. That motion was premised on Appellant's desire to obtain and provide the Court with a transcript of the bond hearing held *sua sponte* by the Magistrate Court on November 25, 2020. Appellant obtained the transcript on April 13, 2021 and so advised the Court. The Court then declined to sign Appellant's proposed order granting additional time to supplement the motion for reconsideration, and instead instructed both parties to submit supporting memoranda on the same day, April 22, 2021. Respondent prepared this opposition based on the 14 enumerated grounds raised in Appellant's motion for reconsideration, without having the opportunity to see the supporting memoranda that Appellant will be submitting on this same day. Respondent expects that Appellant's supporting memorandum will be limited to discussing the 14 enumerated grounds in its motion for reconsideration, so as to not effectively extend the absolute

ten-day deadline to file a motion for reconsideration, and prejudice Appellant. *See Overland, Inc. v. Nance*, 815 S.E.2d 431, 423 S.C. 253 (2018) (“[W]e repeat that the ten-day deadline in Rule 59(e) is an absolute deadline. A trial court does not have the power to alter or amend a final order if more than ten days passes and no Rule 59(e) motion has been served, nor does a trial court have any power to grant the moving party an extension of time in which to file a Rule 59(e) motion[.]”) (internal citation omitted).

2. Appellant did not preserve the issues it attempted to raise in its appeal

Appellant does not object to this Court’s correct ruling that Appellant did not preserve the issues it attempted to raise in its appeal because it did not file a reconsideration motion with the Magistrate Court raising the same issues. (Order, pp. 8-10). Indeed, Appellant makes no attempt whatsoever to explain why it failed to file a reconsideration motion before the Magistrate Court, or otherwise explain why that was not necessary to preserve the issues Appellant attempted to raise in its appeal. Appellant simply ignores the issue, thereby effectively conceding that this Court’s ruling was correct. This failure to object and effective concession is fatal to Appellant’s effort to continue making arguments in this litigation, both before this Court, and in any future appeals. The only consequence of Appellant’s instant motion for reconsideration is to shine a light upon its failure to make such a motion for reconsideration to the Magistrate Court.

Appellant cannot revive the unpreserved issues it attempted to raise in its appeal by making a reconsideration motion now. Specifically, the issues Appellant attempted to raise on appeal are enumerated in its notice of appeal as the following four points:

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 Appellant / Tenant did not pay a security deposit, even though Respondent refused Appellant's attempts to pay all amounts due. Further, the Magistrate Court's finding ignored the plain language of the lease which required notice of default and right to cure, neither of which were given by Respondent.

(Notice of Appeal). To have preserved these issues for appeal, Appellant would have had to first try to convince the Magistrate Court that there was insufficient evidence to support its findings, and that it erred in considering facts not entered into evidence at the hearing. *See I'ON, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("The losing party must first try to convince the lower court it has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred.").

Nor can Appellant raise any new issues that could have been raised previously, by way of a reconsideration motion. There is little discernable presence of any of the 4 issues enumerated in the notice of appeal within the 14 issues enumerated in the motion for reconsideration. Instead, the 14 issues enumerated in the motion for reconsideration present a host of new issues and theories that Appellant asks this Court, ostensibly, to "reconsider." *See Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 563, 762 S.E.2d 693, 695 (2014) ("The circuit court, relying on well-settled precedent, declined to reach this issue because it was improperly raised for the first time in the Rule 59(e) motion. The court of appeals should have refused to entertain that theory as well for the same reasons . . . It is improper for the City to concede the sole issue before the circuit court and attempt to inject new issues and theories on appeal.").

3. Appellant did not state the requisite particulars in its notice of appeal

Appellant does not challenge this Court's correct ruling that Appellant did not state the requisite particulars in its notice of appeal, as required by the controlling statute governing appeals

of ejectment orders from Magistrate Court. (Order, pp. 10, 15) (citing 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.”)). Appellant ignores this issue too, making no effort to justify its inadequate notice of appeal, which is barely more than 1 page, with 4 enumerated points, set forth in their entirety above, visibly lacking particularity. This is another fatal failure and effective concession that should prevent Appellant from protracting this litigation.

4. Appellant’s arguments are otherwise without merit

a. Scope of review

Appellant challenges the Court’s scope of review. (# 4, 5, and 12 of the 14 enumerated grounds in the motion). Appellant more specifically accuses the Court of failing to review the case *de novo*, and instead, of deferring to the Magistrate Court. That accusation is not true. As explicitly stated in its order, this Court recognized the *de novo* standard of review provided by S.C. Code Ann. § 18-7-170, performed its own review of the record below and the parties’ appellate filings, held a WebEx hearing, and then took the matter under advisement before issuing its order. (Order, pp. 1, 10-11). That this Court ultimately agreed with the Magistrate Court’s findings of fact and conclusions of law, summarized and restated as its own, and adding additional procedural grounds for affirmance, does not constitute a dereliction of duty in acting as an appellate court in this matter. *See Parks v. Characters Night Club*, 548 S.E.2d 605, 345 S.C. 484, 490 (Ct. App. 2001) (“The Court of Appeals will presume that an affirmance by a Circuit Court of a magistrate’s judgment was made upon the merits where the testimony is sufficient to sustain the magistrate’s judgment and there are no facts that show the affirmance was influenced by an error of law.”); *Pinckney v. Warren*, 544 S.E.2d 620, 344 S.C. 382, 387-88 (S.C. 2001) (citing *Dorchester County Dep’t of Soc. Servs. v. Miller*, 324 S.C. 445, 477 S.E.2d 476 (Ct. App. 1996) (“[T]his 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.”); *id.* (“Moreover, the appellant is not relieved of his burden of convincing the appellate court the trial judge committed error in his findings.”); *see also* Jean Hoefer Toal, *et al.*, APPELLATE PRACTICE IN SOUTH CAROLINA (3d ed. 2016) at 224 (discussing *de novo* review, and explaining that, “In 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.”).

b. Caselaw

Appellant argues that this Court applied the wrong caselaw on the merits. (# 1, 2, 6, 9, 10, 11 of the 14 enumerated grounds in the motion). This Court principally applied two cases in its order, both of which are decisions of our Supreme Court: *Kiriakides v. United Artists Communications, Inc.*, 312 S.C. 271, 440 S.E. 2d 364 (1993) and *Ingram v. Kasey*, 340 S.C. 98, 110, 531 S.E.2d 287 (2000). (Order, pp. 11-14). *Kiriakides* is the seminal case (cited in nearly 100 other reported cases) that provides the multi-factor test for analyzing whether a commercial tenant should be ejected under the statute, “Ejectment of Tenants,” S.C. Code Ann. §§ 27-37-10 *et seq.*; and it explicitly states that the statute must be applied with “equity and common sense.” 312 S.C. at 276, 440 S.E. 2d at 366. *Ingram* involves analogous false representations about not exercising a lease option, and it too explicitly requires a tenant to “do equity” to obtain specific performance of the option. 340 S.C. at 106-7, 531 S.E.2d 287.

Appellant’s motion for reconsideration does not even mention *Kiriakides*, or its controlling multi-factor test. And Appellant says very little about *Ingram*, asserting in a conclusory manner that it is “inapplicable” and “distinguishable,” without offering any explanation why.

Instead, Appellant suggests that *Rogers v. Nation*, 284 S.C. 330, 326 S.E.2d 182 (Ct. App. 1985), a foreclosure dispossession case, is the leading case on point, and that it, along with a few

other random cases, dictate that this Court should have disregarded “equity” and held that Appellant had an absolute right to exercise the lease option, regardless of its false representations to Respondent. This is a new, unpreserved argument. It is contrary to what Appellant argued in its own appeal brief, which is that *Kiriakides* applied in its favor, making no mention of *Rogers* or the other cases. And substantively, neither *Rogers*, nor any of the other cases cited by Appellant, even involve the applicable statute, “Ejectment of Tenants,” S.C. Code Ann. §§ 27-37-10 *et seq.* *Rogers* involves a residential mortgage foreclosure decree, governed by an entirely different body of law. It is not a landlord-tenant case. It is wholly inapposite and inapplicable to the matter at issue.

This Court properly applied *Kiriakides* and *Ingram*, together with other authorities, as detailed in its order. Appellant has provided no legitimate reason for this Court to question its application of this controlling caselaw.

c. Facts

Appellant contends that the Court misconstrued the facts, principally involving the Appellant’s e-mails, Respondent’s uncontroverted testimony of reliance on Appellant’s e-mails, and Appellant’s incurably late attempt to pay the security deposit. (# 3, 7, 8 of the 14 enumerated grounds in the motion). These are unpreserved arguments, which were also not articulated with particularity in the notice of appeal, as discussed above. Notwithstanding, the Court’s findings about these facts are correct, supported by the record, and set forth and analyzed in its order. (Order, pp. 1-6, 10-16).

CONCLUSION

Appellant’s motion for reconsideration fails to challenge dispositive and correct rulings in this Court’s order and otherwise raises no issues of merit among its 14 enumerated grounds. Meanwhile, by protracting this litigation, Appellant remains in the premises, preventing

Respondent from making it available to the new tenant. For the reasons detailed above, respectfully, the Court should deny the motion for reconsideration.

Dated: April 22, 2021

Respectfully submitted,

/s/ Brian A. Hellman

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Jason S. Smith

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Counsel for Respondent

Exhibit A

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November 20, 2020

Via Hand Delivery

The Honorable Tiffany Spann-Wilder
Charleston City Magistrate
995 Morrison Drive
Charleston, South Carolina 29403

Re: Kenneth R. Davenport II, PR v. Quality Fresca I, LLC d/b/a Moe's
Trial Case No.: 2020CV1010700544
Appeal Case No.: 2020CP1004936
Our File No.: 04227 - Davenport

Dear Judge Spann-Wilder,

As the Court is aware, Defendant filed a Notice of Appeal in the above matter on November 9. This letter is to advise the Court that Defendant failed to stay the writ of ejectment and perfect its appeal. Defendant also did not timely vacate the premises, as Your Honor ordered. Accordingly, by law, the Court should dismiss the appeal and execute the writ of ejectment.

The pertinent procedural background is as follows:

- This Court issued an Order of Ejectment on November 4, 2020, ordering Defendant to "vacate the premises on or before November 18, 2020."
- Defendant filed and served a Notice of Appeal on November 9, 2020.
- At the time its appeal, Defendant did not move this Court to set a bond to be paid into the Court; and within five days after appealing, Defendant did not pay a bond into the Court.
- Defendant did not file an application for supersedeas.
- Without an appeal bond or supersedeas in place, Defendant did not vacate the premises on or before November 18, 2020, as required by the Order of Ejectment.

The applicable statutes, rules, and case law are follows:

CITY MAGISTRATE COURT

NOV 20 2020

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- S.C. Code Ann. § 27-37-130: “Bond required to stay ejectment on appeal. 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.*” (Emphasis added).
- *Wheeler v. Hyler*, 228 S.C. 584, 91 S.E. 2d 265 (1956) (“...the giving of the bond required by Section 41-113 [now S.C. Code Ann. § 27-37-130] is a condition precedent to the right of appeal by a tenant from an order of ejectment . . . the dismissal of the appeal by the ‘trial magistrate’ is merely the means of establishing the absence of this condition precedent . . . Because of appellants’ non-compliance with this mandatory provision of the statute, the appeal is not properly before us.”); *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”).
- Rule 241, SCACR: providing that “Ejectment orders as provided in S.C. Code Ann. § 27-37-130” are an “exception” to the “general rule” of an “automatic stay” pending appeal, requiring an “application” for “supersedeas” to the court that issued the order on appeal.
- *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).

The legal analysis, based on the above procedural background and law, is straightforward. Defendant failed to comply with S.C. Code Ann. § 27-37-130 because it did not move this Court to set a bond at the time of appealing, nor did it pay a bond within five days of the Notice of Appeal. Defendant instead simply filed its Notice of Appeal, making no mention of a bond. Defendant then remained in the premises with no legal right of possession in violation of the Order of Ejectment. As the South Carolina Supreme Court held in *Wheeler*, this means that Defendant did not satisfy the statutory condition precedent to the right to appeal the writ of ejectment. Your Honor, the trial magistrate in this matter, is therefore expressly required to dismiss the appeal.

Concurrently, the constable should execute the writ of ejectment, which was not stayed by bond under S.C. Code Ann. § 27-37-130 or by application for supersedeas under Rule 241, SCACR. Notably, any separate appeal Defendant may attempt to file after the ejectment would be moot, under *Skydive*.

CITY MAGISTRATE COURT

NOV 20 2020

FILED IN CHARLESTON COUNTY

November 20, 2020
Page 3

Enclosed herewith is the \$10 fee for the constable to execute the writ of
ejectment.

With kindest regards, I am

Very truly yours,

A handwritten signature in black ink, appearing to read 'B. A. Hellman', with a horizontal line extending to the right.

Brian A. Hellman

Enclosure

cc: Theodore Huge, Esq.

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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)

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), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRPC; ☐ 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), SCRPC.

Upon careful consideration of the arguments and memoranda of counsel, and the record before the Court, this Court finds no controlling errors of 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 li Personal Representative
Brian A Hellman for Kenneth R Davenport, II, Kenneth R Davenport Estate, Kenneth R Davenport, Kenneth R Davenport li 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

Electronically signed on 2021-04-27 12:01:07 page 3 of 3

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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

Desa Ballard

Harvey M. Watson III

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April 29, 2021

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Dated: May 21, 2021

Respectfully submitted,

/s/ Brian A. Hellman

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Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this date, May 21, 2021, I have served the foregoing on Appellant's counsel of record by e-mail.

/Jason S. Smith/
Jason S. Smith

RECEIVED

May 21 2021

SC Court of Appeals