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Jun 01 2021

SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
DEBRA R. MCCASLIN., CIRCUIT COURT JUDGE

Appellate Case No. 2020-001472

Quality Fresca I, LLC,Appellant,

vs.

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

**REPLY TO RETURN:
PETITION FOR WRIT OF SUPERSEDEAS**

Appellant Quality Fresca I, LLC d/b/a Moe’s Southwest Grill (hereafter referred to as “Tenant”) replies to the Return filed by Respondent Landlord as follows, and renews its request for a Writ of Supersedeas to maintain the *status quo* in this matter.

While Respondent Landlord has filed a document labeled “Response” to the Petition for Writ of Supersedeas, Respondent did not address the merits of the Petition. The Petition asked for *either* a Writ of Supersedeas to maintain the *status quo*, or an extension of the existing appeal bond which has been in place since it was issued by the Magistrate’s Court on November 20, 2020, which also maintains the *status quo*. Copy of Appeal Bond attached hereto as **Exhibit A**.

More importantly, Respondent Landlord doesn’t dispute that the existing appeal bond (or a writ of supersedeas if issued by this Court) maintains the *status quo*, fully compensates Respondent for the use by Tenant of the commercial space during the pendency of this appeal, and

allows this Court to focus on the many factual and legal issues raised below which resulted in erroneous decisions below. The existing appeal bond expressly reserves to Respondent Landlord the ability to adjust the Common Area Maintenance (CAM) payments pursuant to the terms of the lease. At any time during the pendency of this appeal, this Court can alter or amend the terms of the supersedeas which it issues, should Respondent Landlord present any evidence whatsoever that it is not being fully compensated for the use of the commercial space by the terms of the magistrate's appeal bond. A response to the Petition for Writ of Supersedeas would have been the logical time to raise the issue that it is not being fully compensated, yet it did not do so. At no point has Respondent Landlord argued with the amount of funds it is receiving for Appellant Tenant's occupancy of the premises during the appeal.

Respondent Landlord does not oppose the Petition for Supersedeas because it cannot argue against the logic of permitting it. Instead, it argues in its motion to dismiss the appeal (to which Appellant Tenant responds separately) an issue that it didn't even argue before the magistrate's court. **Exhibit B.**

Appellant Tenant renews its request for a Writ of Supersedeas or a continuation of the magistrate's appeal bond to permit the *status quo* to remain in effect. If the supersedeas does not remain in effect, and if Appellant-Tenant is required to vacate the premises, there will be little in substance for this Court to address on the merits, because the damage to Appellant Tenant will have already occurred, and other than academically, the issues on appeal would become moot.

Respectfully submitted,

s/ Desa Ballard
Desa Ballard
Harvey M. Watson III
BALLARD & WATSON

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

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

ATTORNEYS FOR APPELLANT

June 1, 2021



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



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DAVENPORT vs. QUALITY FRESCA I, LLC
AUDIO TRANSCRIPTION OF HEARING HELD ON
NOVEMBER 25, 2020

TRANSCRIBED BY: CAROL T. LUCIC, RPR, RMR

CLARK & ASSOCIATES, INC.
CHARLESTON, SC 29405
843-762-6294
WWW.CLARK-ASSOCIATES.COM

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A P P E A R A N C E S

ON BEHALF OF THE PLAINTIFF:

HELLMAN, YATES & TISDALE

BY: BRIAN A. HELLMAN, ESQ.

105 BROAD STREET, THIRD FLOOR

CHARLESTON, SC 29401

ON BEHALF OF THE DEFENDANT:

HARRIS & HUGE, LLC

BY: THEODORE H. HUGE, ESQ.

3202 MAYBANK HIGHWAY

JOHNS ISLAND, SC 29455

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.

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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
DEBRA R. MCCASLIN., CIRCUIT COURT JUDGE

Appellate Case No. 2020-001472

Quality Fresca I, LLC,Appellant,

vs.

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

PROOF OF SERVICE

I, Beth Cogan, an employee with Ballard & Watson, do hereby certify that on June 1, 2021, I served a copy of the **Reply to Return to Petition for Writ of Supersedeas and Response to Motion to Dismiss**, in the above-captioned case on the following individuals by electronic mail, addressed as follows:

Brian Hellman, Esquire
Hellman Yates & Tisdale, PA
bh@hellmanyates.com

Jason Smith, Esquire
Hellman Yates & Tisdale, PA
js@hellmanyates.com



Beth Cogan, Paralegal

June 1, 2021

Beth Cogan

From: Beth Cogan
Sent: Tuesday, June 1, 2021 3:04 PM
To: Jason Smith; Brian Hellman
Cc: Desa Ballard; Ted Huges
Subject: (Quality Fresca v. Davenport 2021-000460) Reply to Response Petition/Response MTD
Attachments: 2021 06 01 Ltr to COA encl Reply to Return and Resp. MTD.pdf; 2021 06 01 Response to Motion to Dismiss.pdf; 2021 06 01 Reply to response to Supersedeas.pdf; 2021 06 01 POS Reply to Return and Resp. MTD.pdf

Good afternoon,

Please see the attached pleadings that are being submitted for filing for the above-referenced matter.

Kindest Regards,

-Beth

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Ballard & Watson, Attorneys at Law
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West Columbia, South Carolina 29169
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Ballard & Watson
Attorneys at Law
PERSISTENT. UNWAVERING.

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Harvey M. Watson III

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June 1, 2021

Via Email (ctappfilings@sccourts.org)
The Honorable Jenny Abbot Kitchings
Court of Appeals Clerk of Court
Post Office Box 11629
Columbia, South Carolina 29211

RECEIVED
Jun 01 2021
SC Court of Appeals

Re: *Quality Fresca I LLC v. Kenneth R. Davenport II, et al.*
Appellate Case No.: 2021-000460

Dear Ms. Kitchings:

Enclosed for filing please find a Reply to Return to Petition for Writ of Supersedeas, Response to Motion to Dismiss and Proof of Service for the above-referenced matter.

By copy of this letter and as evidenced by the Proof of Service, these filing has been served upon counsel for the Respondents. Thank you for your time in this matter. If you have any questions, please do not hesitate to contact our office.

With warm personal regards, I am,

Sincerely yours,

Desa Ballard
desab@desaballard.com

Enclosures

cc: *Via Electronic Mail*
Brian Hellman, Esquire
Jason Smith, Esquire