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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,

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RESPONSE TO MOTION TO DISMISS

Appellant Quality Fresca I, LLC d/b/a Moe's Southwest Grill (hereafter referred to as "Tenant" or "Appellant Tenant") opposes the motion by Respondent Landlord (also referred to as "Landlord") to Dismiss this Appeal. Landlord is attempting to do to this Court what it did to both the Magistrate's Court and the Circuit Court: urging the Court to ignore the terms of the lease between the parties. Landlord cannot win on the merits, so Landlord asks this court to ignore the law and rely solely on equity to excuse its own attempt to undermine the occupancy by Appellant Tenant.

It is important to realize that Appellant Tenant assumed this lease during the pandemic, only months before the initial lease was to expire during the early months of the Covid 19 shutdown, when no one knew what was coming or when, particularly as to restaurants. In retrospect it seems Respondent Landlord counted on Appellant Tenant to fail and not to exercise

the option to renew in September 2020. Respondent-Landlord *hoped* Appellant Tenant would fail, and when it exercised the option to renew the lease for another five-year term, Respondent Landlord's plans were foiled. As a result, a motion to eject Appellant Tenant was made only after the option to renew the lease had been exercised.[1]

Initially, Appellant Tenant would point out that Respondent Landlord did not seek to dismiss this appeal when it was pending before the Circuit Court on appeal from the magistrate's court. Additionally, Respondent Landlord did not object to the magistrate's court setting an appeal bond when the Circuit Appeal was filed. Lastly, Respondent Landlord did not appeal from the order setting the appeal bond.

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 filed 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.

[1] The Wall Street Journal reported in late April 2021, there were more than 200,000 extra business closures during the pandemic's first year. https://www.wsj.com/articles/covid-19s-toll-on-u-s-business-200-000-extra-closures-in-pandemics-first-year-11618580619. The survival of Appellant-Tenant's appears not to have been consistent with Respondent-Landlord's plans.

PROCEEDINGS ON APPEAL BOND[2]

The Transcript of proceedings before the magistrate on setting the appeal bond is attached hereto as **Exhibit A.**

Magistrate Tiffany R. Spann-Wilder (hereafter "the magistrate")[3] held a hearing on Tenant's application for appeal bond on November 25, 2020. 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.[4] (Bond Tr. p. 3, lines 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).

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[2] 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).

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

[4] The Magistrate's Return to Tenant's appeal (a part of the record before the circuit court) does not include any correspondence from Landlord's counsel which addresses the relief the Landlord was requesting. (Magistrate's Return Vol. 1 & 2). 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.

The magistrate noted Landlord may have "issues" about accepting payment of bond during appeal, but 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 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. Dep't of Transp.*, 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 Tenant paid the amount ordered, the issue became moot. An issue is moot, precluding review, when "a judgment rendered by the Court will have no practical legal effect upon an existing controversy. . ." *Wachesaw Plantation v. Alexander*, 414 S.C. 355, 778 S.E.2d 898 (2015).

Since Landlord did not appeal the denial of its request or the setting of the appeal bond, nor did Landlord ask the magistrate's court for reconsideration, the issue was not preserved for consideration by the circuit court. "When a trial court does not explicitly rule on an argument raised, and the appellant[5] makes no Rule 59(e) SCRCP motion to obtain a ruling, the appellate

[5] 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.

court may not address the issue. *Smith v. Ncci Inc.*, 369 S.C 236, 631 S.E.2d 268 (Ct.App. 2006). Since an order of the circuit court on the appeal bond can have no effect on the rights of the parties, the circuit court should not address an issue that is moot.

During the hearing on the appeal bond, the magistrate was surprised to learn that Tenant had been paying rent[6] at all times since the Covid-19 Amendment had been executed, and had paid 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. (Tr. p. 6, line 1 p 24; p. 10, lines 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.[7] (Tr. p. 7, line 1 – p. 8, line 9).[8]

PROCEEDINGS BELOW[9]

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

[6] 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 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.

[7] 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. (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. (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.

[8] 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. (Tr. p. 10, lines 8-24). Landlord's lawyer stated "in summary, we have an ongoing rent of $9,593.88). (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. (p. 12 p 14). 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. (Tr. p. 14, line 23 – p. 15, line 1; p. 16, lines 6-13).

[9] Unlike Respondent, Appellant Tenant is not using this motion to fully brief the appeal. The citations in this section of the Return are to the record before the circuit court, but the documents are not attached as Exhibits to this filing.

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 additional 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.[10] (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).

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. . ."

[10] 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).

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. 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 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.'[11] (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, line 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."[12]

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 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

[12] 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.

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.[13]

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, line 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 <u>both</u> before the end of the lease and before this action was filed. The full amount was tendered a second time, as discussed herein.

[13] 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).

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, lines 5 -25; p. 51, lines 2 – 6). Landlord testified that tenant paid $41,995.99 on September 29, 2020, but Landlord rejected the payment on October 1, 2020.[14] 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

[14] 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).

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).

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.

CONCLUSION

The motion to dismiss the appeal made by Landlord should be denied. The appeal is ready for initial briefs to be filed. The only outstanding issue before this Court is Tenant's request for a writ of supersedeas or continuation of the Magistrate's appeal bond during the term of this appeal.

Respectfully submitted,

s/ Desa Ballard

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ATTORNEYS FOR APPELLANT

June 1, 2021

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

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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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Okay.

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

THE COURT: They did?

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

THE COURT: What was that encompassing?

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

THE COURT: Okay.

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

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

THE COURT: Been executed.

MR. HELLMAN: -- been exercised.

THE COURT: So this does reflect that increase.

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

THE COURT: The deferral?

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

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

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

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

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

THE COURT: Okay.

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

THE COURT: Join the club.

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

MR. HELLMAN: Yes, Your Honor.

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

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

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

MR. HELLMAN: Right.

THE COURT: So has the October rent been

paid at all less that deposit on the option exercise?

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

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

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

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

THE COURT: Is missing for November.

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

THE COURT: October.

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

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

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

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

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

THE COURT: Is going forward.

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

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

MR. HELLMAN: Correct.

THE COURT: For December.

MR. HELLMAN: Correct.

THE COURT: I guess my issue here is with

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

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

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

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

THE COURT: Yes.

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

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

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

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

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

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

COUNSEL: That sounds fine, Your Honor.

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

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

MR. HUGE: I believe so.

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

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

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

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

COUNSEL: Correct.

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

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

Of course, if your clients fail to meet

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

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

MR. HELLMAN: Yes, Your Honor.

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

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

THE COURT: Yes, sir.

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

MR. HELLMAN: They do.

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

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

(Discussion off the record)

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

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

THE COURT: Please do.

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

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

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

COUNSEL: Okay.

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

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

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

COUNSEL: The numbers all match, Your Honor.

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

MR. HELLMAN: Yes, Your Honor.

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

(Hearing concluded.)

CERTIFICATE OF REPORTER
STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

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

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

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

Carol T. Lucic
NCRA MERIT REPORTER
REGISTERED PROFESSIONAL REPORTER

My Commission expires: November 27, 2027.

WORD INDEX

WORD LIST

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

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 Huge
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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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

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 LLC

Desa Ballard
desab@desaballard.com

Enclosures

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