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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr., Master in Equity

Case No. 2020-CP-23-02076

Jerry Powers, ...Appellant

v.

Rizan Properties, LLC, Anthony Pearson and Tiesha Dash.....Respondent

Of which Rizan Properties, LLC is the Respondent

REPLY BRIEF OF APPELLANT

May 28, 2021

SOUTH CAROLINA LEGAL SERVICES

Mark Fessler
SC Bar # 77376
701 South Main St.
Greenville, SC 29601
Office: (864) 679-3254
Fax: (864) 679-3260
markfessler@sclegal.org

Attorney for Appellant

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ARGUMENTS

I. RESPONDENT IS WRONG ABOUT THE STANDARD OF REVIEW.

Respondent cites a standard of review applicable on appeal from a trial on the merits of an action at law. Initial Br. Resp., pp. 4-5. It is not applicable to a matter decided on summary judgment. That this case arises from cross motions for summary judgment does not alter the standard of review. *See Garnett v. WRP Enters.*, 368 S.C. 549, 554, 630 S.E.2d 44, 46 (Ct. App. 2006), *reversed on other grounds*, 380 S.C. 206, 669 S.E.2d 591 (2008) (citing *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002)) (applying the standard contained in Rule 56, SCRCP, to an appeal from cross motions for summary judgment in a contract dispute).

However, even under the standard of review the Respondent cites, this Court may decide questions of law "with no particular deference to the trial court." *Byrd v. Livingston*, 398 S.C. 237, 241, 727 S.E.2d 620, 622 (Ct. App. 2012). Thus, if it applies, this Court should find that the 2013 option contract ("Option") was valid when Appellant exercised it because the parties had not provided otherwise in either the 2013 lease ("Lease") or the Option.

II. THE RULE THAT OPTIONS ARE STRICTLY CONSTRUED DOES NOT DICTATE WHETHER BREACHING A LEASE VOIDS AN OPTION.

Respondent asserts that the trial court correctly interpreted the 2013 Lease and 2013 Option because option contracts are strictly construed and because documents executed as

part of a transaction are read together.[1] Initial Br. Resp., pp. 5-7. The rule about strict construction of options cannot mean that a breach of a lease voids a corresponding option because that is not the law. *Jackson v. Rogers*, 111 S.C. 49, 96 S.E. 692 (1918); 49 *Am. Jur. 2d Landlord and Tenant* § 341 (2021). Instead, the law says that the viability of the option depends on the intent of the parties as expressed in their written agreement. *Id.*

If the strict construction rule applied as Respondent contends it does, then any breach[2] of any provision in a lease would automatically void a corresponding option to buy regardless of what the parties intended or of what they wrote into the lease and option. Implying such a term in an option where one otherwise does not exist would put the court in the position of making a contract that the parties themselves did not make. *Lowcountry Open Land Trust v. Charleston S. Univ.*, 376 S.C. 399, 410, 656 S.E.2d 775, 781 (Ct. App. 2007) ("Courts only have the authority to specifically enforce contracts that the parties themselves have made; they do not have the authority to alter contracts or to make new contracts for the parties."). *Cf. Adams v. Willis,* 225 S.C. 518, 83 S.E.2d 171 (1954) (noting, in a case involving a lease and option to purchase, that "people make their own contracts; they have a right to grant fifteen year options if they so desire; and the holder of an option may exercise it at any time while it is in force, even on the last day . . ."). Instead, the court should "enforce an unambiguous contract according to its terms, regardless of the

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[1] Appellant addressed the rule about reading documents that are part of the same transaction together in his Initial Brief, so he only addresses the other rule here.

[2] Respondent asserts that Appellant's breaches consisted of damaging the property in addition to paying rent late and then vacating and paying rent elsewhere. Initial Br. Resp., p. 6. Appellant denies that he breached the lease by damaging the property. (R. p.___ Reply). Furthermore, the issue of whether Appellant damaged the property, or whether it was damaged at all as Respondent alleges, is not at issue in this appeal. The trial court retained jurisdiction of that issue and will try that issue separately.

contract's wisdom or folly, or the parties' failure to guard their rights carefully." *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 92-93, 594 S.E.2d 485, 493 (Ct. App. 2004).

Moreover, the trial court did not rely on this rule when coming to its conclusion although Respondent also argued this to the trial court. (R. pp. ____ (Respondent's Memorandum, Order, and Reconsideration Order). And none of the cases Respondent cites apply the rule to hold that breaching a lease voids an option to purchase.[3]

The *Southern Silica* case cited by Respondent demonstrates that the intent of the parties is the primary legal question. There the option at issue was one to renew a lease of a business with the accompanying site and equipment, not an option to buy. The parties' "intent was that at the end of the lease period the lessor should be put back into possession of the plant in good running order." *Southern Silica Mining & Manufacturing Company v. Hoefer*, 215 S.C. 480, 497, 56 S.E.2d 321, 328 (1949). Central to the court's decision to disallow the lease renewal was Hoefer's inequitable goals of allowing the leased sand pit operation to sit idle, continuing to divert Southern Silica's business customers to her children's sand business, and permitting Southern Silica's machinery to remain in disrepair. *Id.*

In this case, the parties intended for Respondent to sell real estate for $52,800. The

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[3] *Pope v. Goethe*, 175 S.C. 394, 179 S.E. 319 (1935) held that an option to renew a timber lease expired when the lessee did not give written notice of an unequivocal intent to renew the lease for the price stated in the contract at least ninety (90) days before the expiration of the lease.
Edwards Lumber & Land Company v. Smith, 191 N.C. 619, 132 S.E. 593 (1926) held that an option was not exercised where the contract provided for a purchase price but the optionee did not tender the purchase price in accordance with the written contract. Appellant's Option is different. It provides that the parties will enter into a purchase contract upon exercise of the Option. (R. p. ____) (Option).
Dargan v. Page, S.C. 520, 73 S.E.2d 705 (1952) involved a belated attempt to exercise an option to purchase timber.

Option provided the grantee eight years within which to exercise the option to buy the property. (R. p. ___(Option)). To exercise the Option, Appellant was required to "notify the Grantor in writing and the parties shall execute a contract of sale incorporating the price and terms herein at that time." (R. p. ___(Option)). Appellant exercised the Option when his attorney notified Mr. Rigdon's Estate's attorney in that he was exercising the Option. (R. p. ___ (Pl. Sum. Judgment Ex. 13 (Req to Admit)). If Respondent is required to comply with the Option, it will receive exactly the bargain it struck. Appellant complied with the terms set forth in the Option for exercising it, and the rule regarding strict construction of options has no application to this case.

III. WHAT RESPONDENT'S CLOSING ATTORNEY MAY OR MAY NOT HAVE SAID ABOUT THE MEANING OF THE LEASE AND OPTION IS NOT LEGALLY RELEVANT.

Respondent relies heavily on an affidavit from Rizan's attorney, Jack Heckman, yet misconstrues what that affidavit says and its legal significance. Initial Br. Resp., pp. 2, 6, 8. "A court is without authority to consider parties' secret intentions, and therefore words cannot be read into a contract to impart an intent unexpressed when the contract was executed." *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009).

Part of this issue comes back to whether the Lease and Option are ambiguous or not. Extrinsic evidence, such as the affidavit, may not be considered to interpret an unambiguous contract. *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004). Because the trial court granted summary judgment, the trial court must have found them to be unambiguous since, if they were ambiguous, summary judgment is improper. *Pee Dee Stores, Inc.*, 381 S.C. at 241, 672 S.E.2d at 802 ("Summary judgment

is improper when there is an issue as to the construction of a written contract and the contract is ambiguous because the intent of the parties cannot be gathered from the four corners of the instrument."). Thus, the affidavit that Rizan's attorney gave Rizan to use in this litigation in order to reconstruct what he allegedly said at the closing is irrelevant extrinsic evidence.

Furthermore, the Respondent misconstrues what the affidavit says. It says that Mr. Heckman "would have" done or said various things. (R. p. ____ (Heckman Aff)). That is not the same as averring that he did in fact say or do those things in this case. Use of the auxiliary verb "would" demonstrates that Mr. Heckman believes that he would have said those things at the closing. But the affidavit does not, as Respondent asserts, state that Mr. Heckman did in fact make these statements at this closing to these parties. He nowhere confirms that he has a specific recollection of this closing beyond confirming what is obvious, that he prepared the Lease and Option and conducted a closing at his office. (R. p. ____ (Heckman Aff)).

Finally, Mr. Heckman's affidavit is at odds with the language of the Lease and Option that he drafted. He drafted them as separate agreements. The parties to the Lease are referred to as the Lessee and Lessor, the parties to the Option as Grantee and Grantor. (R. p. ___). The Lease solely refers to obligations of the Lessee while the Option refers to the separate obligations of a Grantee. (R. pp. ____ (Lease and Option). Not once does the Lease refer to any obligation contained in the Option. Both agreements also recite separate considerations. (R. p. ___ (Lease and Option)).

Other textual evidence that the Lease and Option are separate agreements comes from comparing Article X of the Lease with paragraph 3 of the Option. Article X describes

how the Lessor may terminate the Lease due to fire or casualty damage to the property. Paragraph 3 of the Option reproduces Article X nearly verbatim except for the last two sentences of Article X. If, as Mr. Heckman hypothesizes, the Lease and the Option form one indivisible contract, it makes no sense to include a separate provision in the Option for cancellation of the Option in the event of fire or casualty as Article X already supplies that right. In short, the intent of the parties, as expressed by the Lease and Option, was that the Option could and was intended to exist independently of the Lease.

Thus, Mr. Heckman's affidavit is inadmissible extrinsic evidence, was not relied on by the trial court and is at odds with the textual evidence contained in the Lease and Option. It has no relevance to this case or appeal.

Compounding Respondent's erroneous interpretation of Mr. Heckman's affidavit, Respondent relies exclusively on it to argue that Appellant waived his right to exercise the Option. Respondent asserts, without citation to the record, that "Mr. Powers knew that in order to exercise the Option or for the Option to remain in force, he was required to comply with the Lease . . . and further knew that defaulting under the Lease would result in an extinguishment of the Option." Initial Br. Resp., p. 8. The record does not support that Appellant had this understanding. Respondent cites to no statement by Appellant affirming that he had this understanding. Nor did Respondent make this argument to the trial court either in writing or at the summary judgment hearing. (R. pp.___ (Def's Br.; Summ. Judgment Tr.). To the contrary, as Appellant argues in his second Argument in his Initial Brief, he did not waive this right.

IV. ESTOPPEL AND LACHES DO NOT APPLY TO THIS CASE.

Respondent asserts that estoppel and laches are additional sustaining grounds.

Initial Br. Resp., p. 9. Respondent did not argue estoppel or laches to the trial court, nor could Respondent articulate any prejudice from being required to comply with the Option. (R. p. ____ (Rizan brief and Summ Judg. Tr.). Respondent still fails either to argue the elements of those defenses or to advance any legally cognizable theory of prejudice in its Initial Brief. Initial Br. Resp., p. 9. As such, these defenses do not apply. Furthermore, by failing to cite any authority, Respondent has abandoned these arguments. *See Hunt v. Forestry Comm'n*, 358 S.C. 564, 573, 595 S.E.2d 846, 851 (Ct. App. 2004) ("Issues raised in a brief but not supported by authority are deemed abandoned and will not be considered on appeal.")

During the summary judgment hearing, the trial court asked Rizan's attorney, "[A]re there not factual issues under the different equitable aspects we've talked about that preclude the Court granting summary judgment at this point?" To which he replied, "No, sir. To answer your question, the legal issue is the Plaintiff breached his contract by failing to pay rent and abandoning the property. And that breach of contract extinguishes the Plaintiff's claim for specific performance of the option." (Tr. p. 21). There was no argument that these equitable principles apply.

The primary reason neither legal doctrine applies is because Respondent can show no legally relevant prejudice. There is no factual allegation in the record demonstrating any prejudice that Respondent would face if held to its bargain. Furthermore, there is no evidence that Respondent took any action in reliance on Appellant's act in vacating the property. There is no evidence that it entered into another binding contract to sell such that it incurred competing contractual obligations. Nor is there any evidence of it investing money into the Property such as to make it inequitable to allow Appellant to come back

now and seek to complete the purchase of the house he contracted to buy. *See Jackson v. Rogers*, 111 S.C. 49, 57, 96 S.E. 692, 694 (1918) (finding estoppel did not apply because "[t]here is no proof that Rogers has been misled, or that he has acted on what Jackson said or did to his hurt.").

At the summary judgment hearing, the only explanation of prejudice Respondent put forward is that the "price of real estate in Greenville, even in not particularly safe areas of Greenville, has gone up dramatically since the first lease for this house was done." (R. p. ___ Tr.10:4-7). The trial court correctly dismissed this as legally irrelevant. (R. p.___ Tr. 13:19-23). *See Holly Hill Lumber Co. v. McCoy*, 201 S.C. 427, 445, 23 S.E.2d 372, 380 (1942) ("The question of adequacy of price must be considered as of the date of the contract, and the subsequent enhancement in value would not justify refusal of specific performance.").

Respondent also asserts with no authority that Appellant "failed to assert his alleged rights for an unreasonable period of time . . ." Initial Br. Resp., p. 9. Asserting a right within the time allowed by law is not unreasonable. *See Wall v. Huguenin*, 305 S.C. 100, 102-103, 406 S.E.2d 347, 349 (1991) (finding an option exercised thirteen years after execution was timely where the contract provided that it could be exercised "when convenient."). According to the Option, Appellant had eight years within which to exercise it. (R. p. ___(Option)). The time he did take before exercising the Option was spent seeking out financing. (R. p. ____ (Powers Depo. 116:7-15; 183:24-184:3)).

In this case there was approximately an eight to nine month gap between when Appellant last made a payment to Respondent in early January and then vacated the Property in late January 2019 and October 15, 2019, when Appellant's attorney exercised

the Option on his behalf. (R. p. ____Powers Depo. 49, 129, Req to Admit). Neither laches nor estoppel apply to this record.

CONCLUSION

For these reasons and those stated in Appellant's Initial Brief, this Court should reverse the judgment of the trial court.

Respectfully submitted,

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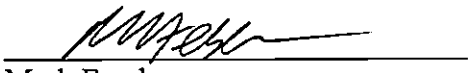

Mark Fessler
SC Bar # 77376
701 South Main St.
Greenville, SC 29601
Office: (864) 679-3254
Fax: (864) 679-3260
markfessler@sclegal.org
Attorney for Appellant

Greenville, South Carolina

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CERTIFICATE OF SERVCE

I certify that I have served the *Appellant's Reply Brief* on Respondent Rizan Properties, LLC by U.S. Mail, Postage Paid on **May 28, 2021** to the following addresses:

Knox L. Haynsworth, III, Esq.
P.O. Box 2464
Greenville, SC 29602

Mark Fessler
Attorney for Appellant Jerry Powers
South Carolina Legal Services
701 South Main St.
Greenville, South Carolina 29601
Office: (864) 679-3254
Fax: (864) 679-3260
markfessler@sclegal.org

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701 South Main Street, Greenville South Carolina 29601
Phone: (864) 679-3232 Fax: (864) 679-3260
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May 28, 2021

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O Box 11629
Columbia, SC 29211

Re: Jerry Powers v. Rizan Properties, LLC
Appellate Case No. 2021-000218

Dear Ms. Kitchings:

Enclosed for filing is the Appellant's reply brief. By copy of this letter, I am serving these documents upon Respondent's counsel.

Sincerely,

Mark Fessler
Staff Attorney
ph: 864-679-3254

enclosures

cc: Knox Haynsworth, Esq.

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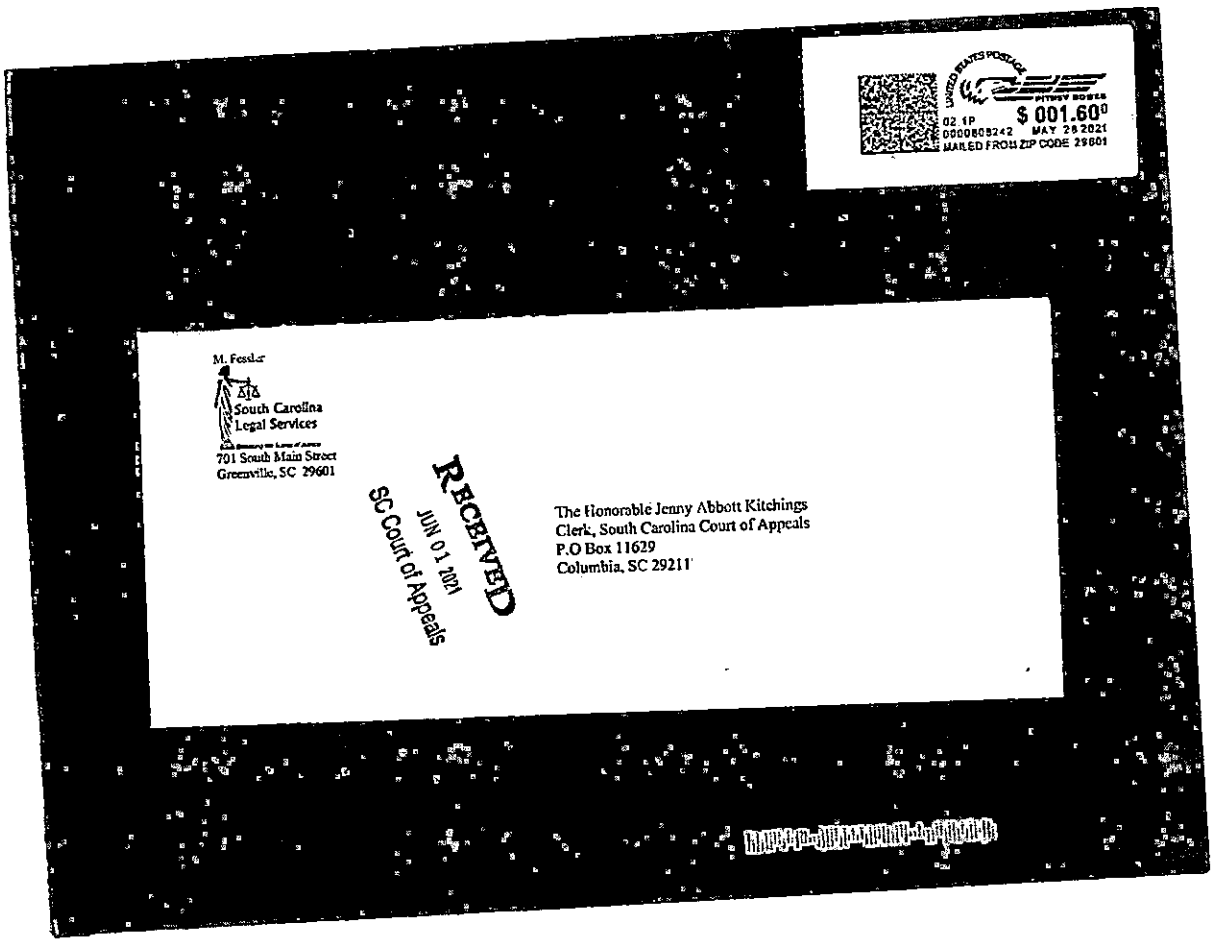

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The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
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