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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. 2021-000460

Quality Fresca I, LLC,Appellant,

v.

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

INITIAL REPLY BRIEF

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REPLY TO ALL ISSUES

Initially, Tenant would point out that Respondent's initial brief does not respond to the issues Tenant raised on appeal. Instead, Landlord has attempted to reframe the issues by ignoring the issues argued by Tenant in its brief and posturing entirely different questions¹ in its Respondent's Initial Brief. To be specific, Tenant's initial brief argues three issues:

- (1) A strictly legal issue as to whether equitable principles can be considered prior to a determination of the legal right of the parties as spelled out by the contract between the parties;
- (2) Equitable principles are flexible and were applied incorrectly at the trial and appellate court; and
- (3) Landlord's unpreserved argument regarding what it refers to as subject matter jurisdiction.

(Appellant's Initial Brief, p. 1).

Instead, Landlord has argued different questions and thus failed to respond to the issues on appeal:

- (1) The trial and appellate courts should have found that Tenant breached the lease.
- (2) Tenant failed to file a motion to reconsider to the magistrate's court.
- (3) The notice of appeal to the circuit court was statutorily deficient.
- (4) Subject matter jurisdiction exists even though Landlord did not appeal the order setting the appeal bond.²

¹ Tenant's Issue III is restated differently in Landlord's Issue 4, but Landlord still does not address its failure to appeal the grant of the appeal bond.

² See footnote 1.

REPLY TO RESPONDENT'S ISSUE ONE

Landlord argues on appeal that Tenant breached the lease by failing to pay a security deposit. This is a new issue, raised for the first time in its Respondent's Initial Brief. It is, in fact, the opposite of the grounds alleged by Landlord when the application for ejectment was filed. The Application for Ejectment set forth two grounds upon which Landlord was seeking ejectment: "the terms of your occupancy have ended" and "you have violated the terms or conditions of your lease by [discussion of summer emails and an equitable analysis]." (10.1.2020 Application for Ejectment, pp. 1-2). Ejectment was not sought on the grounds that Tenant had not paid the security deposit that was due at the time the Covid-19 lease was signed. This is a new issue, raised for the first time on in Respondent's brief.³ Notwithstanding, Landlord asserts "three terms of the Lease are pertinent..." (Respondent's Brief p. 5). Again, this is the first time the Landlord has even mentioned the terms of the lease during these proceedings.

Moreover, Landlord has not responded to Issue One of Tenant's brief, which asks whether the lower courts erred in considering the action solely on equitable issues and notwithstanding the terms of the contract between the parties, which must be decided first. (Appellant's Initial Brief pp. 15-17). Rule 208(b)(2) (setting forth requirements for a Respondent's brief). Moreover, Landlord does not even acknowledge the argument that legal issues are required to be decided before equitable relief is addressed.

This Court has repeatedly noted that short, conclusory arguments made without supporting authority "are deemed abandoned on appeal." *State ex rel. Wilson v. Ortho-McNeil-Janssen*

³ The appellate order of the circuit court "notes" this issue, even though it was not before the Court on appeal. (Order on Appeal 3.29.2021, p. 17, footnote 4).

Pharm Inc., 414 S.C. 333, 777 S.E.2d 176 (Ct. App. 2015); *Brouwer v. Sisters of Charity Providence Hospital*, 409 S.C. 514, 753 S.E.2d 200 (Ct. App. 2014).

There is, perhaps unsurprisingly, a scarcity of authority⁴ that addresses an appellate court's options when a Respondent fails to file a Respondent's brief addressing the arguments raised by an Appellant. In *Ables v. Gladden*, 378 S.C. 558, 664 S.E.2d 442 (2008), the Supreme Court noted that a Respondent's failure to submit any filings "at either appellate level" made an issue "the law of the case" as an "unappealed ruling." In *State v. Hepburn*, 406 S.C. 416, 430 n.16, 753 S.E.2d 402 (2014), the Supreme Court mentioned the failure of the State to file a respondent's brief following an amicus brief filed by the South Carolina Association of Criminal Defense Lawyers, but made no explicit ruling as to the effect of the State's failure to file a brief. In *Turner v. Santee Cement Carriers Inc.*, 277 S.C. 91, 96, 282 S.E.2d 858 (1981) the Supreme Court stated that a failure by a Respondent to file a brief on appeal "allows this Court to take such action upon the appeal as it deems proper. This failure alone would justify reversal; however, we simply consider it as an additional ground." (emphasis added).

This Court mentioned the failure of a Respondent to file a brief on appeal without noting its effect in *Longshore v. Saber Security Services Inc.*, 365 S.C. 554, 619 S.E.2d 5 (Ct. App. 2005).

By way of comparative analysis, the appellate court rules do not expressly state the effect of the failure of a respondent to file a brief in opposition to issues on appeal. However, the rules do provide that when a party fails to file a response to a motion pending before the appellate court "may be deemed a consent by that party to the relief sought in the motion..." Rule 240(e), SCACR.

⁴ A Respondent's failure to file a brief to the Supreme Court in a lawyer disciplinary matter appears to happen with some frequency. See *In re: Hall*, 341 S.C. 98, 533 S.E.2d 588 (2000) and *In re: Kern*, 423 S.C. 567, 816 S.E.2d 574 (2018) by way of example.

The only issue raised by Landlord in its brief to this Court that requires any reply is Landlord's argument that Tenant did not address *Kiriakides v. United Artists Communications Inc.*, 312 S.C. 271, 440 S.E.2d 366 (1994). Respondent describes that case as the "seminal case construing the commercial ejectment statute at issue, cited in more than 100 reported cases, and relied upon by the circuit court and the magistrate." (Respondent's Initial brief p. 12). Tenant did not cite *Kiriakedes*, however, because it has no bearing on the issues before this Court, but to the extent it was relevant, *Kiriakedes* supports Tenant's arguments.

In *Kiriakedes*, a landlord attempted to terminate a lease because of a delay in payment of an increased rental. Landlord sent notice of the increase to an incorrect address on two occasions, but finally sent notice to the Tenant at the correct address. Once the Tenant was notified of the increase in rent, Tenant paid the increase immediately. "On... the same day that [Tenant] mailed the check for the past due amount, Landlord commenced this action for ejection..." *Id.* at 365.

Both the trial court and the appellate court in *Kiriakides* "denied the forfeiture of the lease and ejectment" of the Tenant, and Landlord appealed. As should have done here, the lower courts construed the terms of the lease and a statutory provision, S.C. Code Ann. §27-37-10. Landlord argued that "equitable principles" should have been applied and that even a "trivial, inadvertent, non-prejudicial or technical" breach of a provision of a lease should constitute grounds for termination of the lease.

The Supreme Court disagreed, finding that a Landlord should not be granted the equitable relief of ejectment when a Tenant's breach of the lease terms was "trivial or immaterial." The Court held that "the only benefit Landlord reasonably could have expected was the [payment of] past due rent, which could be adequately compensated by damages." *Id.* 312 S.C. at 367.

In Respondent's new argument, that Tenant failed to pay the consideration due at the time of the execution of the Covid-19 lease, the facts of *Kiriakedes* are instructive. Tenant paid the unpaid renewal sum as soon as that non-payment was called to its attention. Regardless of the amount of the payment, Landlord here never mentioned the failure to pay the renewal amount following the execution of the Covid-19 lease until Landlord decided it wanted to find grounds to eject Tenant from the premises and sent notice of default.

The Court in *Kiriakedes* did exactly what Tenant argues should have been done by the lower courts here, *i.e.*, judge the rights of the parties based on the contract documents, and, even if a trivial or immaterial breach was found to have occurred, conclude that ejection was not equitable under the facts. "There is no evidence... that the breach was willful or in bad faith."⁵ To the contrary, the evidence shows that as soon as [Tenant]'s accounting department received notice of default, it immediately tried to contact Landlord to ascertain the amount due." *Id.* at 367.

As shown by this record, as soon as the failure to pay the Covid-19 lease renewal fee was called to Tenant's attention, the money was sent to Landlord. This is discussed in detail in Tenant's brief, which reflects Landlord attempted to improve its position when Tenant learned of the omission in payment of the Covid-19 lease renewal by refusing the money from Tenant on several occasions. (Initial Appellant's Brief p. ____).

Appellant Tenant re-asserts its argument made in its initial brief, which Respondent has not disputed in any way. Landlord set itself up for failure by arguing equitable issues only and

⁵ As pointed out in Tenant's Initial Appellant's Brief, Landlord attempted to show bad faith or trickery on the part of Tenant, but Landlord's argument was not supported by any evidence. (Appellant's Initial Brief p. ____). Similarly, Landlord's argument that it had found and signed up a new tenant was never proven, and the record is sketchy as to whether Landlord did anything other than "make a few phone calls" in anticipation of the possibility that Tenant would not renew the lease.

ignoring the language of the contracts between the parties, which as set forth in Appellant's brief should have been the initially applied framework for consideration.

ADDITIONAL GROUNDS FOR AFFIRMANCE

Presumably, by its response brief the Landlord is attempting to raise additional sustaining grounds. *Protestant Episcopal Church in the Diocese of South Carolina v. Episcopal Church*, 421 S.C. 211, 806 S.E.2d (2017).

Landlord argues that tenant's appeal does not argue the Rule 19 ruling by the circuit court. That's true. Rule 19(d) provides a procedure by which a motion for reconsideration or amendment of judgement in magistrate's court may be made. However, Tenant can find no authority in the published (or unpublished) authority that requires that a motion for reconsideration be filed with the magistrate's court in order to preserve prior to appealing to the circuit court. Rule 19 merely provides a procedure by which a motion for reconsideration can be made. The case cited by Landlord, *I'On LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000) was not a magistrate's court case, and Tenant cites no cases that mandate the motion prior to appeal from magistrate's court to the circuit court.

Moreover, Landlord's reference to Rule 19 before the circuit court was cursory, and was not even an argument but a mere reference. (Circuit Court Tr. p. 12, line 15). At no point did Landlord argue that Rule 19 prevented the circuit court from addressing the appeal from magistrate's court. Any ruling by the circuit court on that issue was gratuitous and was not a ruling on any issue properly before the circuit court.

As to the appeal bond issue argued repeatedly by Landlord, if Landlord wanted to preserve that issue for appeal, Landlord should have filed an appeal from the order granting the appeal bond. It did not do so and may not properly do so at this late date.

CONCLUSION

Landlord has not disputed the issues on appeal (although it filed a lengthy brief arguing issues that were not discussed by Tenant in this appeal). The order of the magistrate's court and the circuit court should be reversed. The bulk of Landlord's brief is irrelevant and more rehashing of its attempt to ignore the legal issues in favor of a strictly equitable analysis. Pursuant to Rule 220(b)(2) this Court may reverse the decisions, in that the failure of Landlord to dispute the issues raised on appeal make its brief manifestly without merit, and remand for entry of judgment in favor of Tenant.

Respectfully submitted,

s/ Desa Ballard

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STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Appellate Case No. 2021-000460

Quality Fresca I, LLC,Appellant,

v.

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 September 1, 2021, I served a copy of the **Initial Reply Brief**, in the above-captioned case on the following individuals by electronic mail, addressed as follows:

Brian Hellman, Esquire
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Beth Cogan

Beth Cogan, Paralegal

September 1, 2021

Beth Cogan

From: Beth Cogan
Sent: Wednesday, September 1, 2021 5:33 PM
To: Brian Hellman; Jason Smith
Cc: Desa Ballard; ted@harrisandhuge.com
Subject: (Quality Fresca I, LLC v. Kenneth R. Davenport, II//2021-000460) Ltr to COA encl Initial Reply Brief
Attachments: 2021 09 01 Ltr to COA encl IRB.pdf; 2021 09 01 IRB.pdf; 2021 09 01 POS IRB.pdf

Good afternoon,

The attached Initial Reply Brief for the above-referenced matter is being filed today.

Kindest Regards,

-Beth

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September 1, 2021

Via Email (ctappfilings@sccourts.org)

Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
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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 the **Initial Reply Brief** 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 Respondent. Thank you for your time in this matter. If you have any questions, please do not hesitate to contact our office.

Please do not hesitate to contact our office if you should have any questions. With warm personal regards, I am,

Sincerely yours,

Desa Ballard
desab@desaballard.com

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