FORM 1
NOTICE OF APPEAL IN A CIVIL CASE

68217

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2010-CP-39-405

John Walton Respondent,

v.

Mitchell L. Bagwell Appellant.

NOTICE OF APPEAL

Mitchell L. Bagwell, appeals the order and judgment of the Honorable Edward W. Miller dated March 25, 2013 (a copy of which is attached hereto). Appellant received written notice of entry of this order and judgment on March 27, 2013

April 23, 2013

Kraig A. Pringle
114 Whitsett Street
Greenville, South Carolina 29601
(864) 235-5557
Attorney for Appellant

Other Counsel of Record:
Larry C. Brandt, P.A.
Walhalla, SC 29691
Attorney for Respondent
(864) 864-638-5406

THE STATE OF SOUTH CAROLINA
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John Walton Respondent,

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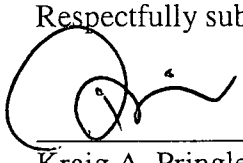
CERTIFICATE OF SERVICE

I certify that on the 24 day of April, 2013, I served the Notice of Appeal on the Respondent by placing a copy of same in the United States mail, first class postage prepaid, addressed to counsel of record as indicated below (and by facsimile also):

South Carolina Court of Appeals
PO Box 11629
Columbia South Carolina 29211
Via Fax also to: 803-734-1839

Respectfully submitted



Kraig A. Pringle
114 Whitsett Street
Greenville, South Carolina 29601
(864) 235-5557
Attorney for Appellant

April 24, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2010-CP-39-405

John Walton Respondent,

v.

Mitchell L. Bagwell Appellant.

CERTIFICATE OF SERVICE

I certify that on the 24 day of April, 2013, I served the Notice of Appeal on the Respondent by placing a copy of same in the United States mail, first class postage prepaid, addressed to counsel of record as indicated below (and by facsimile also):

Larry C. Brandt, P.A.
P.O. Box 738
Walhalla, SC 29691
Facsimile 864-638-7873

Respectfully submitted

Kraig A. Pringle
114 Whitsett Street
Greenville, South Carolina 29601
(864) 235-5557
Attorney for Appellant

April 23, 2013

KRAIG A. PRINGLE

ATTORNEY AT LAW
114 Whitsett Street
Greenville, South Carolina 29601
(864) 235-5557
Fax (864) 467-1945

April 23, 2013

South Carolina Court of Appeals
PO Box 11629
Columbia South Carolina 29211
Via Fax also to: 803-734-1839

Re. Notice of Appeal
John Walton v. Mitchell L. Bagwell
Case No. 2010-CP-39-405

Dear Ms. Kitchens:

Please find enclosed a Notice of Appeal, Certificate of Service and Order under Appeal.

If you have any further questions or you require further information, please feel free to contact our office.

Thanking you in advance,

Warm regards,

Kraig A. Pringle

KAP/id

Cc: Larry C. Brandt, P.A.
P.O. Box 738
Walhalla, SC 29691
Via Fax also: 864-638-7873

Clerk of Court
Pickens County Court
Harold P. Welborn, Jr.
PO Box 215

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF PICKENS
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2010 CP-39-405

John Walton,
PLAINTIFF(S)

Mitchell L. Bagwell,
DEFENDANT(S)

Submitted by: Larry C. Brandt

Attorney for : ☒ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

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), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **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:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
John Walton	Mitchell L. Bagwell	$51,660.00
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:
N/A

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF PICKENS) 2013 MAR 25 P 2:54

John Walton,

Plaintiff,

vs.

Mitchell L. Bagwell,

Defendant.

ORDER

Case #2010-CP-39-405

This case came before the Court on Wednesday, February 20, 2013, at a regularly scheduled Non-Jury Term of the Court Common Pleas for Pickens County, South Carolina, with the Honorable Edward W. Miller presiding.

The parties were present and represented by their attorneys of record, Mr. Larry C. Brandt, Attorney of Walhalla, South Carolina, for Plaintiff, and Mr. Kraig Pringle, Attorney of Greenville, South Carolina, for Defendant.

Upon call of the case, the parties advised the Court that certain documentary exhibits had been agreed upon by counsel to be admitted into evidence prior to any witnesses being called; therefore, the documentary exhibits, Plaintiff's Exhibits Numbers 1-10 and Defendant's Exhibits Numbers 1-10, were entered upon motion of the respective attorneys without objection.

The Plaintiff was then called to testify under oath to the facts supporting his claim, after which the Plaintiff rested his case. Thereafter, Defendant called Nelson Garrison, a Real Estate Agent who represented the Plaintiff in the lease transaction between the parties to testify, as well as Harriett (Dee) Bauknight, the Real Estate Agent who

represented the Defendant throughout the lease negotiations, after which Defendant testified under oath to the facts which he claimed justified his termination of the Lease. The deposition of Mr. Wes Nalley was then entered as a Court Exhibit, by agreement of the parties, with Plaintiff inviting the Court's attention to Pages 8, 9, 12, 13, 17, 18, 19, 20, 22, 23 and 26, and Defendant inviting the Court's attention to Pages 8, 14, 15 and 19.

After careful consideration of all evidence presented, the Court finds as follows:

FINDINGS OF FACT

1. On May 22, 2009, the parties entered into a Lease Agreement for a commercial building owned by Plaintiff, existing on property owned by Forest Acres Real Estate pursuant to a Ground Lease that was subject to restrictions set forth in a Reciprocal Easement Agreement between Forest Acres Real Estate and Lowe's Home Centers, Inc. which restricted the use of the property rented by Defendant. The Lease was signed by the Tenant, Mitchell Bagwell, on May 21, 2009 and by the Landlord, John Walton, on May 22, 2009, and was for a period of nineteen (19) months, beginning June 1, 2009 and ending at midnight on December 31, 2010, for the specific use as a restaurant.

2. On May 21, 2009, at the time the Defendant, Mitchell Bagwell, executed the Lease Agreement, he tendered a check to C. Dan Joyner Commercial Real Estate Company, the company with whom Plaintiff's Agent, Nelson Garrison, and his own Agent, Harriett (Dee) Bauknight, were employed, in the amount of SIX THOUSAND FIVE HUNDRED ($6,500.00) DOLLARS to be applied to his obligations under the Lease.

3. Although the Lease term began on June 1, 2009, Defendant was granted access to the property several weeks prior for the purpose of making renovations, repairs

and up fitting the building to accommodate the business that he intended to operate therein.

4. Thereafter, on June 1, 2009, the Defendant stopped payment on the check and Defendant's attorney at that time, Jacqueline Patterson, notified the Plaintiff that Mr. Bagwell would not honor the Lease as he ***"had decided to pursue an alternate location."***

5. Immediately upon being informed by Plaintiff's counsel that Defendant was not going to honor the Lease Agreement (Plaintiff's Exhibit #1) on June 1, 2009, Plaintiff immediately re-listed his property with Plaintiff's Agent, Nelson Garrison, in an endeavor to find another tenant for the property; however, he was unable to do so until April 1, 2010, at which time Plaintiff procured a Lease with a Mr. Clay Taylor, d/b/a Flying Anchovy, LLC. By that time the market had changed substantially and Plaintiff was unable to negotiate a Lease upon the same terms and conditions as his Lease with Defendant.

6. Pursuant to Plaintiff's Lease with Defendant, Defendant would have paid over the term of the Lease the sum of EIGHTY ONE THOUSAND SEVEN HUNDRED FIFTY AND NO/100 ($81,750.00) DOLLARS to Plaintiff; however, a real estate commission to Mr. Garrison of approximately FOUR THOUSAND AND NO/100 ($4,000.00) DOLLARS would have been paid. Pursuant to the Lease with Mr. Taylor, the total benefit passing to Plaintiff was the sum of TWENTY SIX THOUSAND NINETY AND NO100 ($26,090.00) DOLLARS, after real estate commissions of ONE THOUSAND EIGHTY AND NO/100 ($1,080.00) DOLLARS were paid to C. Dan Joyner, leaving a benefit differential between the two (2) Leases of FIFTY ONE THOUSAND SIX HUNDRED SIXTY AND N0/100 ($51,660.00) DOLLARS.

7. On October 14, 2009, after Defendant had not occupied the premises nor paid any rent called for by the Lease, Plaintiff's attorney wrote a letter to Defendant's attorney demanding that Mr. Bagwell honor the Lease or the matter be referred to arbitration pursuant to an arbitration clause set forth in Item #23 of the General Provisions and entitled ***"Dispute Resolution;"*** however, Defendant's attorney advised that if Plaintiff intended to proceed with attempting to enforce the Lease he needed to serve a Complaint which she would thereafter address appropriately.

8. Thereafter, on March 14, 2010, Plaintiff filed a Complaint claiming damages for breach of the Lease Contract and on, April 4, 2010, Defendant filed an Answer to the Complaint setting forth numerous defenses to Plaintiff's claim. Although Defendant, in his Answer, challenged the jurisdiction of the Court to hear the matter based upon the Dispute Resolution Clause, #23 of the General Provisions, neither Plaintiff nor Defendant thereafter moved the Court to compel arbitration.

9. Both parties in their pleadings, as well as at trial, sought attorney fees and costs incurred in the prosecution and/or defense of the action, pursuant to Item #23 which provided only for attorney fees in the event of arbitration and a subsequent action by the Court to enforce the arbitration award. The Lease, however, did not provide for attorney fees and costs to be recovered by either party in the event the parties proceeded to prosecute the dispute through a court action rather than arbitration.

10. The Plaintiff presented testimony and a computation of what he claimed his damages were, same being entered as Plaintiff's Exhibit #10. The computation, however, did not take into account the commission to C. Dan Joyner Company of approximately

FOUR THOUSAND AND NO/100 ($4,000.00) DOLLARS which Plaintiff would have had to pay had the Lease been honored by Defendant.

11. The evidence clearly showed that Defendant was an educated person having graduated from college with a degree in Business Administration, and Defendant readily admitted under oath, that he voluntarily signed the Agreement, that he understood it, was well aware of the REA Agreement and that he knew he had to adhere to the REA Agreement in the use of the property.

12. Defendant further testified that he did not follow through with his obligations under the Lease Agreement because Forest Acres Real Estate, through its CEO, Wes Nalley, sent an email to his attorney, Jacqueline Patterson, stating that Forest Acres Real Estate would not accept the property being used as a ***"wine bar"*** as that would be in violation of the REA Agreement. Mr. Nalley's email of Friday, May 29, 2009, specifically stated ***"....if it is the intent of Mr. Bagwell to operate in violation of the REA, we will be forced to terminate the Lease Agreement and any other remedies available to us under the law."*** Mr. Nalley then stated in the email ***"....let me know if you have any questions or comment."***

13. Defendant also testified that no effort was made to contact Wes Nalley to discuss what he meant by the email and that he always intended to use the property in compliance with the REA Agreement, that is, that he always intended to operate a restaurant, as well as sell wine.

14. Wes Nalley's deposition testimony stated that a wine bar, incidental to a restaurant, would be in compliance with the REA but that just a wine store would not be.

15. The language of the REA Agreement concerning the use was clear and unambiguous and wine sales, incidental to a restaurant, was, indeed, permitted by the very terms of the REA. The Lease was also clear and unambiguous that the use was restricted to a ***"restaurant."***

16. Defendant did not claim nor offer any proof that Plaintiff breached the Agreement but rather claimed that the person causing the breach was Forest Acres Real Estate, an entity which was not a party to the Agreement.

Based upon these findings of fact, the Court finds as a matter of law:

FINDINGS OF LAW

1. The Lease Agreement between the Defendant, Mitchell Bagwell, as Tenant, and Plaintiff, John Walton, as Landlord, entered into evidence as Plaintiff's Exhibit #1, was a binding agreement upon the parties and obligated them to adhere to the terms thereof.

2. Defendant breached the Lease Agreement, as entered into as Plaintiff's Exhibit #1, without just cause and Plaintiff has been damaged as a result.

3. The language of the REA Agreement restricting wine sales, incidental to a restaurant, is clear and unambiguous and clearly allowed the proposed use of the property as a wine bar, incidental to a restaurant.

4. The theoretical defenses and/or excuses pled and offered through testimony to the Court by Defendant for failing to carry out his obligations under the Lease are not supported by the evidence and do not afford Defendant a legal excuse for terminating the Lease.

5. Pursuant to South Carolina law, attorney fees and costs may only be recovered in a lawsuit if recovery of those fees and costs are provided by a statute or contractual provision authorizing the taxing of attorney fees and costs to the prevailing party. In this case, the parties claimed the contractual obligation was contained in Paragraph 23 of the General Provisions entitled Dispute Resolution, but those provisions apply to arbitration only and not to the prosecution or defense of the matter in a court of law; therefore, the prevailing party in this lawsuit is not entitled to recover attorney fees and costs.

6. Plaintiff's damages are as shown on Plaintiff's Exhibit #10, entitled "Walton Damages," less attorney fees and costs as hereinabove stated, and FOUR THOUSAND AND NO/100 ($4,000.00) DOLLARS which would have been required to be paid in real estate commissions had the Lease been honored by Defendant; therefore, Plaintiff is entitled to judgment against the Defendant, Mitchell Bagwell, in the amount of FIFTY ONE THOUSAND SIX HUNDRED SIXTY AND NO/100 ($51,660.00) DOLLARS.

IT IS, THEREFORE, ORDERED that Plaintiff is hereby granted judgment against the Defendant, Mitchell Bagwell, in the sum of FIFTY ONE THOUSAND SIX HUNDRED SIXTY AND NO/100 ($51,660.00) DOLLARS.

AND IT IS SO ORDERED!

3/18, 2013
Pickens, South Carolina

Edward W. Miller, Presiding Judge
Pickens County Non-Jury Court
of Common Pleas