THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Master-In-Equity

Joseph M. Strickland, Master-In-Equity Judge

Case No. 2009-CP-40-03264

Appellate Case No. 2021-000576

The unnamed Joint Venture of Craig. B. Stoneburner and Gary McLaurin with Respect to Property Located at 301 South Edisto Avenue, by and through Craig B. Stoneburner, it's managing Venturer,

Appellant,

v.

George Anthony Moluf, III, James Whittington Clement, and James Venable Revercomb, III,

Respondents.

FINAL REPLY BRIEF OF APPELLANT

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Appellant, by way of reply to Respondents' brief, replies as follows:

REPLY TO RESPONDENTS' STATEMENT OF FACTS

Appellant asserts its own Statement of Facts as a first Reply to Respondents' Statement of Facts, but will highlight some specific issues and objections to Respondents' facts as stated. The Appellant waited nine months after the lease was signed to file suit in an attempt to mitigate the damages, but it was difficult to rent the house after the school year started. The alleged amount of lawsuits the Appellant has filed in unrelated matters is immaterial to this appeal and the affidavit of Sara Printz, Respondents' counsel assistant should be stricken. Appellant's managing member owns many rental properties; thus, he often is required to litigate matters related to those properties in court. The court should note from this, that in those lawsuits, Appellant has often prosecuted those cases to settlement or judgment, evidencing that Appellant is not dilatory, but the obstacles here, as set out in his Brief, kept him from doing so in this matter.

Appellant notes that it filed a motion to amend the pleadings on March 29, 2010 to correct the technical defect to change the Plaintiff (the property was not owned individually but as a joint venture) which led to the initial dismissal by Judge Manning. (R. pp. 46-47) The Respondents eventually agreed to the amendment; however, while the case was on appeal, the Respondents delayed consenting to the amendment, which meant the case was delayed from March 29, 2010 until November 14, 2011 when the remittitur was filed with Richland County (a delay of almost 18 months attributable to the Respondents). (R. p. 17)

The Respondents then fast-forward to the consent order of reference (9/17/12); however, this fails to inform the court the matter appeared on the February 16, 2012 and April 10, 2012 non-jury trial rosters but was not called or reached. (R. pp. 15-16) The matter also appeared as

number 6 on the May 7, 2012 roster and Respondents' counsel wrote Judge James R. Barber, a letter requesting a date certain, preferably after May 15, 2012. (R. p. 185) It appears that Appellant's counsel, Barry Stanton appeared at that roster meeting and noted in handwriting on an email dated May 8, 2012, "Transfer to Master Boger" and in the body of the email that Judge Barber knows, and has marked it referred on a form order, with formals to follow. (R. p. 140) Mr. Stanton also confirmed that Respondent's counsel would prepare the order of reference "with attempt at a date certain June 14, or if not, June 13, or if not, ASAP after June 25." *Id.* Appellant's counsel followed up with Respondent's counsel about the reference by email on May 31, 2012. (R. p. 141) On September 05, 2012, Appellants counsel again inquired of Respondent's counsel about the order of reference pointing out that the matter was on the trial roster for next week and offered to try the matter non-jury before a circuit judge. (R. p. 142) Respondent's counsel replied "my fault" and prepared a consent order of reference which was signed and filed by the parties on September 17, 2012. (R. pp. 15-16) The point here is that there were at least two separate opportunities for the case to have been tried, but instead it was referred, primarily at the Respondents instance, to secure a date certain trial. Also, as the Master-in-Equity relies on the parties to schedule their hearings, it was clearly Appellant's expectations as confirmed by his counsel's emails to Respondents' counsel, that Respondent would contact the Master and schedule the hearing for a date certain trial.

Respondents claim, "From January 2015, after the Appellant parted ways with his lawyer until September of 2017, the Appellant did nothing to move his case forward." This is not accurate as Appellant contacted the Master-in-Equity and asked that the case be transferred to circuit court after learning from the master's support staff that landlord tenant matters were not heard by the master. He specifically wrote the master asking this case be transferred, and it was

his understanding that it had been transferred. (R. p. 186) Indeed, the case subsequently appeared on a non-jury trial roster after Appellant's request.

While Appellant thought the matter was pending in circuit court to be scheduled, the matter was dismissed by an omnibus order from Judge Strickland (9/12/17). (R. p. 14) Respondents claim that Appellant did nothing and another fifteen months passed, but Appellant did not learn of the order of dismissal until December 2018, after he called the Richland County Clerk's office to see why the matter had not been scheduled. He immediately notified the Master-in-Equity that the matter was not resolved, and the case was restored on December 19, 2018. (R. p. 13) This is further evidence of Appellant's diligence in prosecuting the case. Shortly thereafter, Appellant retained new counsel when the matter appeared on the non-jury trial roster on February 4, 2019.

As noted by Richland County's Non-Jury Coordinator on March 1, 2019 in response to an inquiry by Clarke Newton, Appellant's new counsel, "This case was referred to the Master's office a while back, was inadvertently closed out and then reopen [sic] without being referred back. The case has now been properly referred back to the MIE." (R. p. 85)

Appellant was ready, willing and able to prosecute the case and diligently pursued the case through his new counsel until it was dismissed for lack of prosecution over a year after new counsel filed his appearance and tried to have the matter heard.

REPLY TO RESPONDENT'S ARGUMENTS

I. RESPONDENT FAILS TO ADDRESS ALL THE FACTORS TO BE CONSIDERED BEFORE DISMISSING A CASE FOR FAILURE TO PROSECUTE.

Respondents devote much of their brief to blaming the Appellant for the passage of time; however Appellant has steadfastly prosecuted this case despite numerous procedural and

practical obstacles: an early dismissal and appeal, a referral to a master who "generally does not hear landlord tenant cases", the failure of Respondents to schedule the case as agreed despite reminders and follow-ups by the Appellant's counsel and an offer to try the case non-jury, the withdrawal of Plaintiff's counsel, the transfer to circuit court where it was "inadvertently closed out and then reopened", a transfer back to the Master and two omnibus dismissals of multiple cases and restorations.

Furthermore, Respondents ignore two of the elements set forth in *McComas v. Ross*, 368 S.C. 59, 626 S.E. 2d 902 (Ct. App. 2006) to be considered in the dismissal for failure to prosecute.

First, there is an absence of a repeated history of deliberately proceeding in a dilatory fashion. Appellant responded to Plaintiff's discovery and served his own. There is no evidence Appellant failed to appear at roster meetings, motions, or other hearings in which he received proper notice. As previously noted, it was the Respondents who asked the case be continued to get a date certain, and refer the case to the Master, where, again, the Respondents had agreed to schedule the case. When the case was referred back to circuit court, the Appellant justifiably believed the court would schedule a hearing, but the case had been "inadvertently closed out and then reopened" per the non-jury coordinator.

Second, Respondents fail to consider the effectiveness of sanctions less drastic than a dismissal. There was no "if this case is not tried by a certain date your case will be dismissed." Furthermore, while the master allows the parties to schedule their own cases, when the master believes the parties are being dilatory or that a case is too old, then the master has several less drastic alternatives to a dismissal: the master could set the case for a date certain; the master could provide a deadline for trial; the master could impose a scheduling order; or the master

could schedule a status conference and require the parties to submit a scheduling order. None of these less drastic alternatives were considered or provided to the Appellant before dismissal of the case.

For these reasons and the argument set forth in Appellant's brief, this court should find the master abused his discretion in granting a dismissal for lack of prosecution.

II. THE *GARRISON* CASE REFUTES RATHER THAN SUPPORTS RESPONDENTS ARGUMENT THAT LACHES DID NOT NEED TO BE PLED AS AN AFFIRMATIVE DEFENSE AND IN ANY EVENT, THE RESPONDENT AND MASTER MISAPPLY THE DOCTRINE OF LACHES TO THIS CASE.

The Respondents argue that even though they did not plead the affirmative defense of laches, it falls within an exception mentioned in *Garrison v. Target Corp*., 429 S.C. 324, 838 S.E.2d 18 (S.C. Ct. App. 2019). *Garrison* involved a personal injury case in which punitive damages were awarded. The specific issue concerning affirmative defense was that Target failed to plead the statutory caps on punitive damages in S.C. Code §15-32-530. Target, like the Respondents attempted to excuse its failure to plead. Ultimately, the court held, "Therefore, we conclude that Target was required to plead the recovery limits in section 15-32-530 or, at the very least, raise the defense prior to the conclusion of discovery so that the Garrisons would have had prior notice of the additional evidence they needed to lift the punitive damages limit. Because Target failed to do so, fairness dictates that we deem the application of the statutory damages limit to this case waived. *Garrison v. Target Corp.*, 429 S.C. 324, 838 S.E.2d 18 (S.C. App. 2020)

The quote extracted by the Respondents as an exception -that a Defendant does not waive an affirmative defense if he raised the issue at a pragmatically sufficient time and did not prejudice the Plaintiff-was part of a survey of cases and their treatment of affirmative defenses and statutory damage limits. The court went on to state that in the one case where that exception

applied, "The court noted, 'the applicability of the Texas statutory cap on malpractice damages is purely a legal issue [that] can be resolved without the need for factual proof .' Id. (emphasis added)." *Garrison v. Target Corp.*, 429 S.C. 324, 838 S.E.2d 18 (S.C. App. 2020)

In contrast, "Whether laches applies in a particular situation is a highly fact-specific inquiry; therefore, the merits of each case must be closely examined. *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 297, 519 S.E.2d 583, 599 (Ct. App.1999)..." *Kelley v. Kelley*, 629 S.E.2d 388, 368 S.C. 602 (S.C. App. 2006)

This court should conclude that laches is an affirmative defense that must be pled or is waived and that it was error for the master to base his ruling on laches.

Finally, both the Respondents and the master, misapply the doctrine of laches to this case. "To establish laches as a defense, the defendant must show the complaining party unreasonably delayed its assertion of a right, thereby prejudicing the defendant. Id." *Jones v. Leagan*, 681 S.E.2d 6, 384 S.C. 1 (S.C. App. 2009)(citing *Kelley v. Kelley*, 368 S.C. 602, 606, 629 S.E.2d 388, 391 (Ct.App.2006) Here, Appellant timely asserted its right by filing for breach of the lease by Respondents within nine months of the breach and prior to the expiration of the lease term. Thus, Appellant timely asserted its rights. The master and Respondents conflate the separate issues of laches and alleged failure to prosecute.

III. THE RESPONDENTS CLAIMS OF PREJUDICE ARE SUPERFICIAL

Respondents deserve high marks for their use of language in describing their alleged prejudice as “faded memories” and a claim that has “collected dust over the years”; however prejudice is a lack of notice and opportunity to prepare and be heard on an issue. *Pool v. Pool*, 329 S.C. 324, 328-29, 494 S.E.2d 820, 823 (1998) In this case, the Respondents have been aware of all the issues for a long time. The parties engaged in discovery. The case is not overly

complex focused on the alleged breach of a lease by abandonment of the prospective student tenants. Respondent's counsel candidly admitted in the hearing in November 2020, that "In terms of dealing with prejudice to the parties, I have now found my people, and, you know, they're happy to respond."

As to the alleged financial prejudice, there is no prejudice. If the case is reversed and the matter remanded for a trial on the merits and Appellant prevails at trial, then the Respondents will have evaded their financial obligations under the lease for years and the interest which has accrued is an appropriate compensation for that delay.

CONCLUSION

For the reasons set forth herein and in the Appellant's brief, this court should reverse the order of the trial court dismissing this case for lack of prosecution and laches and remand the case for a trial on the merits.

Respectfully Submitted,

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Dated: December 6, 2021

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CERTIFICATE OF COUNSEL
PURSUANT TO RULE 211(b) SCACR

The undersigned certifies that the Appellant's Final Reply Brief is in compliance with Rule 211(b) SCACR.

December 6, 2021

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