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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LANCASTER COUNTY
In The Circuit Court

Brian Gibbons, Circuit Court Judge

Appellate Case No. 2019-001243

KATKAMS VENTURES, LLC
and SUPREMA, LLC,
as successors in interest to 521, LLC,

Respondents,

v.

NO LIMIT, LLC, d/b/a No Limit Financial, LLC
and Erich Simpson,

Appellants.

PETITION FOR REHEARING
OF REHEARING *EN BANC*

John Martin Foster
Post Office Box 106
Rock Hill, South Carolina 29731
(803) 324-8100
Attorneys for Appellants

STATEMENT OF THE CASE

In June, 2016, NO LIMIT, LLC, doing business as No Limit Financial, LLC leased commercial space from 521, LLC, the assignor of the Respondents KATKAMS VENTURES, LLC and SUPREMA, LLC. ERICH SIMPSON, now deceased, executed a guaranty for the lease

Under the lease, base monthly rent was set as follows:

the first two months:	No rent
3 rd through the 12 th months:	\$ 2,296.00
12 th through the 24 th months:	\$ 2,364.88
25 th through the 36 th months:	\$ 2,435.67
37 th through the 48 th months:	\$ 2,508.38
49 th through the 60 th months:	\$ 2,583.96
Total:	\$59,081.42

Under the lease, NO LIMIT, LLC was also to pay a proportion of other upkeep or “CAM” fees in the amount of \$406.58 per month, as well as late charges and brokerage fees in the event of default.

In July, 2017, NO LIMIT, LLC vacated the premises and requested the lease be terminated. In December, 2017, the Respondents re-rented the premises for a term beginning in February, 2018 at a lesser rent. Under the term of the re-rental, base monthly rent was set as follows:

months 1-2:	rent free period
months 3-14:	\$ 2,296.00
months 15-26:	\$ 2,364.88
months 27-38:	\$ 2,435.67

The new lease maintained the “CAM” fees in the same amount. ERICH SIMPSON, now deceased, became ill and the rental property was abandoned. [RECORD ON APPEAL, p. ____]

Suit was filed March 12th, 2018 against NO LIMIT and on his guaranty against SIMPSON. The Respondents moved for summary judgment; by Memorandum to that Motion, they sought:

- a. Unpaid Rent from July 1, 2017 to January 30, 2018: 6,209.76
- b. Late Fees at five percent (5%) of the monthly rent

from July 1, 2017 to January 30, 2018:	\$ 952.79
c. Past Due CAM fees:	\$ 2,846.06
d. Calculated Loss from Difference in Rent:	\$28,862.32
e. Broker Commission to re-let property:	\$ 3,406.36
f. <u>Attorney's fees and costs:</u>	<u>\$11,584.24</u>
Total:	\$63,825.53 ¹

By their Memorandum in support of summary judgment and in argument, the Respondents sought the full difference between the old lease amounts and the lesser, new rent payments. [RECORD ON APPEAL, p. ____] That is, the “Calculated Loss from Difference in Rent”, or the “Total Rent Difference” referenced above; that amount is a calculation of the rental difference from breach by the Appellant through the end of the new lease, 38 months after November 1st, 2017, that is through December, 2020. In short, the item alleged by Respondent and awarded by the Circuit Court is for future damages.

At the Motion for summary judgment, counsel for Appellants argued for a reduction in the awarded amount based on present value, as calculated as of the date of judgment. However, by Order filed February 8, 2019, the Circuit Court awarded the full amount of \$63,825.53 recited in the Respondents’ Memorandum.

At hearing on the Motion to Reconsider, the Appellants submitted evidence of present value of the damages sought. The Motion to Reconsider was denied. This Appeal followed.

STANDARD OF REVIEW

The matter in question is an error of law.

ARGUMENT

The damages as awarded included the “Calculated Loss from Difference in Rent”, or the “Total Rent Difference” referenced above; in other words, future damages were a) assumed to exist and b) were not reduced to the present value of that item as of the date of judgment.

¹ The true total is \$ 63,861.53; the amount recited above is the Respondent’s stated total, which was adopted by the Circuit Court.

The general rule is that an allowance for future damages must be reduced to its present worth. 22 AM.JUR.2D *Damages* § 678 (09/2002). The commentators of AMERICAN JURISPRUDENCE 2D state:

Therefore, the amount awarded for damage to be suffered in the future is such sum as, being put at interest, will amount (at the dates the damage will be suffered) to the sum the jury finds the plaintiff will lose in the future by reason of the alleged tort or breach of contract.

[*Id.*, citing *Hollwedel v. Duffy-Mott Co.*, 263 N.Y. 95, 188 N.E. 266 (N.Y. 1933); *Gallaspy v. Warner*, 324 P.2d 848, *reh. denied* (Okla. 1958); and *Look v. Werlin*, 590 S.W.2d 526 (Tex.Civ.App. Houston (1st Dist) (1979); the last case cited dealing with future rent payments on a commercial lease.]

The same rule has been applied by other Courts dealing with damages under a lease. See 720 *Lex Acquisition LLC v. Guess? Retail, Inc.* 09-cv-7199 (AJN) (S.D.N.Y. 08/17/2015); *IN RE United American Financial Corp.*, 55 B.R. 117 (Bankr. E.D.Tenn. 1985); *Consumers United Ins. Co. v. Smith*, 644 A.2d 1328 (D.C. 1994).

The rule reducing future damages to present value has been followed in many South Carolina cases. See, *e.g.*, *Hamilton v. Martin*, 270 S.C. 223, 241 S.E.2d 569 (1978); *E & S Investment Corp. v. Richland Bowl, Inc.*, 264 S.C. 582, 216 S.E.2d 522 (1975); *Frampton v. S.C. Dep't of Transp.*, 406 S.C. 377, 752 S.E.2d 269 (Ct.App. 2014). In these cases, the Supreme Court recognized the propriety of reducing future damages to a present value. All the above cited cases involved the present value of future rentals, as in this case.

The Respondents produced no evidence as to present value of the claimed future rent other than the rental amount under the new lease. [RECORD ON APPEAL, p. 55–86.] Even taking that as given, the Appellants are entitled to the difference between the two rental amounts, reduced to present value as of the date of judgment, as recognized by the cited precedent of our Supreme Court.

The Appellants cited, and supplied to the Circuit Court, the opinion of a Certified Public Accountant as to such value, which was calculated at \$ 7,976.65, far beneath the \$ 28,862.32 awarded as a por-

tion of the Order granting summary judgment. [RECORD ON APPEAL, p. 124-137.] That is the figure to which that item in the awarded damages should be reduced.

CONCLUSION

The Appellants are entitled to a judgment reducing that portion of the awarded damages to its present value, based upon the sole evidence presented. The present decision of this Court should be amended accordingly.

June 2, 2022

Respectfully submitted,



John Martin Foster
S.C. Bar No. 2086
Post Office Box 106
Rock Hill, SC 29731-6106
803 324-8100
Attorney for Appellants

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as successors in interest to 521, LLC, Respondents,

v.

No Limit, LLC, d/b/a No Limit Financial, LLC
and Estate of Erich Simpson, Appellants.

CERTIFICATE OF SERVICE

The undersigned, counsel for Appellants in the civil appeal above, hereby certifies that, on the date written below, he served copies of the following pleadings or documents in the above-captioned and numbered civil action:

Petition for Rehearing or Rehearing *En Banc*; and
this Certificate of Service,

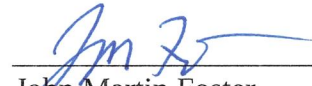
by depositing the same with the United States mail, with sufficient first class postage attached, properly addressed to the clerk of the Court, and with a copy also directed to the respective last known address(es) of those attorney(s) and/or persons set out below; or

by hand delivering copies of the same to the following persons, or by leaving the same at that person's office with that person's clerk or some other person in charge thereof, or by leaving it in a conspicuous place therein; of if the office was closed or the person to be served has no office, by

leaving a copy at that person's dwelling place or usual place of abode with some person of suitable age and discretion then residing therein. all pursuant to Rule 262, S.C.A.C.R.

Brian W. Tyson
Law Office of Paul H. Bass, LLC
16928 Lancaster Highway, Suite 109
Charlotte, NC 28277
Attorney for Respondent

June 2, 2022



John Martin Foster
S.C. Bar No. 2086
Post Office Box 106
Rock Hill, South Carolina 29731-6106
(803) 324-8100
Attorney for Appellants