THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Donald B. Hocker, Circuit Judge

Appellate Case No. 2022-000704

South Carolina Community Bank,..……...……...…...Respondent,

v.

Salon Proz, LLC, Columbia Empowerment Zone, Inc. d/b/a The Columbia Empowerment Zone, and Frank Mitchell, Defendants,

Of whom Salon Proz, LLC is the……Appellant.

FINAL REPLY BRIEF OF APPELLANT

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STATEMENT OF ISSUES

I. Did the lower court err reversibly in issuing an order against Yvonne Jones, a non-party over whom there was no personal jurisdiction?

II. Did the lower court err reversibly in concluding that previous orders required a receiver to be paid rent that was payable to non-parties over whom the court had no jurisdiction?

III. Did the lower court err reversibly in issuing sanctions against Salon Proz, including striking and dismissing its counterclaims and ordering it to pay attorneys' fees and costs and receiver's fees and costs?

IV. Did the lower court err reversibly in referring this case to the master-in-equity?

V. Did the lower court err reversibly in failing to grant Appellant's motion to terminate a receivership?

Appellant (hereinafter "Salon Proz"), submits this brief in reply to the Respondent (hereinafter "SCCB")'s brief. Yvonne Jones, The Event Hall, LLC and Office Suites, LLC join in this brief to the extent there is any order against them. Examination of SCCB's arguments further shows that the law requires reversal here.

ARGUMENT

I. The lower court lacked jurisdiction to make the kind of intertwining or amalgamation findings to which SCCB alludes.

SCCB argues that "South Carolina law will allow courts to disregard such separate entity status when there is evidence of the entities' intertwining *along with* evidence of 'bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the entities' legal distinctions.' See Pertuis v. Front Roe Restaurants, Inc., 423 S.C. 640, 655, 817 S.E.2d 273, 280 (2018)." (Initial Brief of Respondent p. 4.) This argument puts the substantive cart before the procedural horse. No proceeding was ever initiated in which disregarding separate entity status with regard to Salon Proz and Jones, Event Hall, or Office Suites was ever a possibility.

An order affecting the rights and liabilities of Jones, Event Hall, or Office Suites was never on the table in this case, because neither Jones, Event Hall, nor Office Suites was ever made a party to this case or otherwise brought within the jurisdiction of the lower court. (R. pp. 2, 24-33, 101-06, 138, p. 192 ln. 1-8.) In the Pertuis case cited by SCCB and in every case in which our courts have allowed the separate personhood of corporate entities to be ignored, all of those entities were parties over which the court had already obtained personal jurisdiction. Pertuis, 423 S.C. at 643-57; accord, e.g., Stoneledge at Lake Keowee Owners' Assn., Inc. v. IMK Development Co., LLC, 435 S.C. 109, 120, 866 S.E.2d 542, 548 (2021) (reversing amalgamation, but observing that entities for which amalgamation was sought were

named as parties in the summons and complaint). Entering orders disregarding the distinction between Salon Proz, Jones, Event Hall, or Office Suites was not procedurally possible in the instant case, since the prerequisite jurisdiction over Jones, Event Hall, and Office Suites was never obtained.

In any event, the lower court never undertook an analysis of whether to disregard the corporate form here. (R. pp. 1-9.) The lower court simply purported to exercise jurisdiction over non-parties who had not been brought before the court on a rule to show cause. (R. pp. 1-9.) This exercise of personal jurisdiction was without basis and was "wholly unsupported by the evidence" and "manifestly influenced or controlled by error of law." Ex parte S.C. Dept. of Revenue, 350 S.C. 404, 407, 566 S.E.2d 196 (Ct. App. 2002) (internal quotation marks omitted).

Reversal on this point is required.

II. SCCB ignores that contempt sanctions were improper procedurally and contradicted an earlier order.

SCCB's brief offers no argument against Salon Proz's argument that the procedural requirements for a contempt basis were not met, which is what the lower court had already decided. (R. pp. 2, 136.) Where the appellant briefs an issue and the respondent fails to respond to that issue in its own brief, the appellate court may treat that failure to respond as a concession that appellant is correct on the issue. First Union Nat. Bank v. FCVS Communications, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996). As Salon Proz pointed out when the incompatible orders were issued, "[t]he only theoretically possible basis for sanctions here would be for contempt, but, as the court has ruled, contempt sanctions would not be proper procedurally. No basis for sanctions remained." (R. p. 136.)

SCCB concedes there was no procedural basis for the sanctions. First Union, 321 S.C. at 502. This concession appears to be dispositive, entitling Salon Proz to reversal. See Toyota of Florence, Inc. v. Lynch, 314 S.C. 257, 267, 442 S.E.2d 611, 617 (1994) (describing procedural requirements of contempt proceedings).

III. SCCB asks this court to use the wrong standard of review.

SCCB writes that "[f]or nonjury actions such as this one, the 'trial court's findings of fact . . . should not be disturbed on appeal unless they are without evidentiary support.' Hunt v. Forestry Comm'n, 358 S.C. 564, 569, 595 S.E.2d 846, 848-49 (Ct. App. 2004) (emphasis added)." (Initial Brief of Respondent p. 2.) This is the wrong standard of review. SCCB cites the standard for review of factual findings in an action at law tried without a jury, as the language SCCB quotes, presented in context, shows: "While a trial court's findings of fact in a nonjury action at law should not be disturbed on appeal unless they are without evidentiary support, a reviewing court is free to decide questions of law with no particular deference to the trial court." Hunt, 358 S.C. at 569.

What happened below was not a trial at all. (R. pp. 1-9, 139-98.) It was a motions hearing, not the bench trial of a law case. (R. pp. 1-9, 139-98.) SCCB's search for a more favorable standard of review fails.

IV. SCCB makes a number of unsupported claims.

In its brief, SCCB makes a number of contentions that lack support. That SCCB has to stretch so far to find supporting arguments is telling.

For example, SCCB quotes State ex rel. McLeod v. Hite, 272 S.C. 303, 305, 251 S.E.2d 746, 747 (1979), citing it for the proposition that a court has "inherent power to punish conduct that is 'calculated to obstruct, degrade, and undermine the administration of justice[.]'" (Initial

Brief of Respondent pp. 5-6.) That case is hardly on all fours with this one. Hite was a case about whether a defendant serving a contempt sentence for jury tampering was able to be paroled by the South Carolina Probation, Parole, and Pardon Board. 272 S.C. at 304, 305. The quotation, presented in context, describes that Hite "was convicted of contempt for jury tampering. His actions constituted an offense against the court and were calculated to obstruct, degrade, and undermine the administration of justice. The court has the inherent authority to punish such conduct. This power cannot be abridged." Id. at 305. This passage is 1) hardly an apt comparison to Salon Proz's conduct in bypassing the receiver to make sure bills got paid and 2) not about whether the sentencing court had jurisdiction over Hite. Id. The Hite opinion did not provide a basis for the lower court to exercise personal jurisdiction over Jones. See id.

Also, SCCB tries to downplay the extent to which the lower court treated its attorney's unsworn contentions as evidence. (Initial Brief of Respondent p. 11 n. 4.) SCCB writes as follows:

> Although Salon Proz argues that the circuit court took certain assertions emailed to the court by SCCB "as fact," there is nothing in the March 22 order that indicates the assertions in SCCB's email were considered at all in the final determination. In fact, the reference to SCCB's email is included in a footnote *after* the Court describes the evidence it considered in making its ruling.

(Initial Brief of Respondent p. 11 n. 4.)

The footnote in the order comes after this sentence: "Quite frankly, the testimony of Ms. Jones was not credible other than her admission that she in fact did collect some rent herself in order to 'pay bills.'" (R. pp. 1-2.) The footnote states that, "[s]ubsequent to the hearing, counsel for the Plaintiff emailed the Court on March 11, 2022, and informed the Court that in fact Ms. Jones had not provided the Receiver with the keys, leases, and other documents,

and continues to collect rent from the tenants." (R. p. 2 n. 1.) It is the *only* factual finding made by the circuit court to support its determination that Jones' testimony was not credible. (R. pp. 1-2.) Indeed, SCCB thinks this finding is very important, arguing that "Salon Proz even disregarded the Court's warnings and rulings in the February 8 hearing at dispute in this appeal by continuing to contact tenants and instruct them to pay her directly." (Initial Brief of Respondent p. 8.)

To treat a statement made by a party's own counsel as the evidence that supports a finding in favor of that party is erroneous as a matter of law. See Trivelas v. S.C. Dept. of Transportation, 348 S.C. 125, 141, 558 S.E.2d 271, 279 (Ct. App. 2001); Higgins v. MUSC, 326 S.C. 592, 599 S.E.2d 269, 272 (Ct. App. 1997); Historic Charleston Foundation v. Krawcheck, 313 S.C. 500, 508 n. 7, 443 S.E.2d 401, 406 n. 7 (Ct. App. 1994); Gilmore v. Ivey, 290 S.C. 53, 58, 348 S.E.2d 180, 183 (Ct. App. 1986). The circuit court lumped what SCCB's lawyer said into the same category as the actual evidence that was before the court, performing a legally improper analysis.

"A trial court's determination regarding contempt is subject to reversal where it is based on findings that are without evidentiary support or where there has been an abuse of discretion. An abuse of discretion can occur where the trial court's ruling is based on an error of law." Henderson v. Puckett, 316 S.C. 171, 173, 447 S.E.2d 871, 872 (Ct. App. 1994). The circuit court's findings here were without evidentiary support, being based on the sole "evidence" of SCCB's counsel's unsworn email statement. They were based in an error of law: the treatment as fact of statements by SCCB's lawyer.

The lower court committed reversible error here. Id.

V. Salon Proz's motion to terminate the receivership is ripe for review.

Rule 7(b)(1), SCRCP, allows for the making of an oral motion "during a hearing or trial in open court with a court reporter present[.]" Salon Proz made such an oral motion and does not understand how SCCB could take the words "we'd move to terminate their receivership" any other way. (R. p. 195 ln. 2.) The fact that Salon Proz also later made a motion to remove the receiver, based mostly on events that had not yet occurred at the time of the last hearing that produced the orders appealed here, does not mean that this oral motion was not before the court. (R. p. 195 ln. 2-5.)

"Where a matter is not ruled on by the circuit court, the issue is not preserved for appellate review unless the complaining party moves to amend the judgment pursuant to Rule 59(e)." Vespazziani v. McAlister, 307 S.C. 411, 413, 415 S.E.2d 427, 428 (Ct. App. 1992). If the appealing party made the argument to the trial court in the first instance and did not receive a ruling on it, if he presents the argument again in a Rule 59 motion, it is then preserved for review, even if the trial court does not rule on it in response to that motion. Vespazziani, 307 S.C. at. 413.

That is what happened here. Salon Proz made this motion, the circuit court did not rule on it, and Salon Proz then raised it again in its motion under Rule 59(e), SCRCP, which was denied. (R. pp. 1-11, 134-35, p. 195 ln. 2-5.) It is ripe for review and preserved for review. Vespazziani, 307 S.C. at 413.

VI. Desperate times called for desperate measures. That is not the same thing as willful disobedience of a court order.

The motivating reason behind the direct collection of rent that bypassed the receiver was the receiver's failure to meet his responsibilities and pay bills for utility services needed for the businesses in the building to operate. (R. p. 182 ln. 1 through p. 193 ln. 9, pp. 218-21.)

The utilities would have been cut off if not for these actions taken in desperation. (R. p. 182 ln. 1 through p. 193 ln. 9, pp. 218-21.)

"A willful act is . . . one 'done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law.'" Spartanburg Cnty. Dept. of Soc. Servs. v. Padgett, 296 S.C. 79, 82-83, 370 S.E.2d 872, 874 (1988) (quoting Black's Law Dictionary 1434 (5th ed. 1979)). Absent evidence that a party acted with the intention of violating a court order, a finding of contempt cannot be sustained, even when the party plainly did something that violated the order. See Hook v. S.C. Dept. of Health & Environ. Control, Op. No. 5973 (S.C. Ct. App. filed March 15, 2023) (Howard Adv. Sh. No. 10 at 40, 61-62).

No evidence that Salon Proz (or Jones) acted with such intention was ever put before the court. Instead, what was before the court was evidence that the rent was collected and paid out to keep utilities on because of a well-grounded fear that the receiver would not pay the utility bills. (R. p. 182 ln. 1 through p. 193 ln. 9, pp. 218-21.) That is not a willful violation of an order. Hook, (Howard Adv. Sh. No. 10 at 61-62); Padgett, 296 S.C. at 82-83. Without proof of a willful violation of an order, Salon Proz could not have been properly held in contempt. Hook, (Howard Adv. Sh. No. 10 at 61-62); Padgett, 296 S.C. at 82-83.

VII. SCCB ignores the things that require reversal.

SCCB's brief simply leaves off mentioning most of the ways that the lower court did not conduct the correct analysis. It does not discuss the procedural impropriety of contempt sanctions or the impossibility of non-parties Office Suites and The Event Hall being bound by earlier orders in the case. SCCB does not argue that Salon Proz is wrong about the circuit court

having no personal jurisdiction over Jones, The Event Hall, or Office Suites. SCCB makes no mention of these things because they reveal the lower court's abuse of discretion.

Our state's Supreme Court recently "clarif[ied] that no court is entitled to the deference associated with the discretion standard of review until that court has earned deference by fulfilling the responsibility of exercising its discretion according to law." Morris v. BB&T Corp., Op. No. 28131 (S.C. Sup. Ct. filed Jan. 25, 2023) (Howard Adv. Sh. No. 4 at 11, 13).

> The exercise of discretion is not to simply make a decision. The *exercise* of discretion requires first that the trial court recognize it has the responsibility of discretion. The exercise of discretion is then to follow a thought process that begins with the trial court's clear understanding of the applicable law, continues with the court's sound analysis of the situation before it in light of the law, and ends with the trial court's ruling that follows the law and is supported by the facts and circumstances. The trial court's recognition of its responsibility to exercise discretion will be apparent when the record indicates the court followed such a thought process. Thus, when a trial court's - or the [Workers' Compensation] commission's - thought process of applying sound principles of law to the court's view of the facts and circumstances is evident in the record of proceedings in a hearing, in a written order, or otherwise, the appellate court will defer to the trial court's exercise of discretion, even when the judges on the appellate court might have made the decision differently.

Morris, (Howard Adv. Sh. No. 4 at 14-15) (emphasis in original, citations and citation-related parentheticals omitted).

The circuit court did not "follow a thought process that begins with the trial court's clear understanding of the applicable law, continues with the court's sound analysis of the situation before it in light of the law, and ends with the trial court's ruling that follows the law and is supported by the facts and circumstances." Id. Instead, the lower court began with the legally incorrect understanding that a previous order had bound non-parties to turn the rent

owed to them over to the receiver, engaged in an unsound and contradictory analysis, and ended with the imposition of harsh sanctions without a procedural basis to do so, including sanctions against a non-party over which jurisdiction was never obtained.

That is abuse of discretion. Morris, (Howard Adv. Sh. No. 4 at 14-15).

CONCLUSION

This court should reverse the lower court and remand this case for further proceedings consistent with that reversal.

Respectfully submitted,

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CERTIFICATE OF COUNSEL
REGARDING COMPLIANCE WITH RULE 211(b), SCACR

I certify that the foregoing final brief complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I certify that I have served the foregoing final brief on the date given below by emailing it to counsel for the Respondent at the address(es) noted below.

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