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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable George M. McFaddin, Jr., Circuit Court Judge

Appellate Case No. 2024-000723

Charleston SC Property Holdings, LLC, Hanahan SC Property Holdings, LLC, and Michael Flanagan, Receiver……..Respondents,

v.

Rittenberg OP, LLC, Hanahan OP, LLC, Goldner Management, LLC, SC Two OP Holdings, LLC, and Samuel Goldner…….……..Appellants.

INITIAL BRIEF OF APPELLANTS

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2. The trial judge err in granting a prejudgment receivership over the the Facilities and all of the Personal Property and Operations and all other property and assets of Lessees where the Respondent failed to establish an apparent right to the property and failed to demonstrate the property at issue was in danger of being lost or materially injured or impaired?

3. To the extent the trial judge's Order appointing a receiver found that S.C. Code Ann. § 15-65-10(4) provided grounds for the appointment of a receiver over a limited liability company, such was a clear error as subsection (4) of S.C. Code Ann. § 15-65-10 is not applicable to entities other than corporations.

4. The trial judge violated Appellants' right to due process by denying Appellants the opportunity to present all relevant and admissible evidence in opposition to Respondents' Motion to Appoint a Receiver because the court was drowning in motion and did not have time to hear Appellants' evidence.

STATEMENT OF THE CASE

This action arises from a dispute concerning a June 14, 2021 Master Lease Agreement between Appellants Hanahan OP, LLC (individually "Hanahan OP") and Rittenberg OP, LLC (individually "Rittenberg OP"), both Delaware limited liability companies, as lessees (collectively "Lessees") and Hanahan SC Property Holdings, LLC and Charleston SC Property Holdings, LLC, each South Carolina limited liability companies, as lessors (collectively "Lessors") for two parcels of real property, one located in Charleston County and the other located in Berkley County (collectively the "Demised Premises"), out of which Lessees were to take over and operate skilled nursing care facilities that had become distressed under the prior tenant/operator ("Master Lease").

On Tuesday, March 28, 2023 Lessors filed a Summons and Complaint in the Charleston County Court of Common Pleas alleging breach of the Master Lease for failure to pay rent and meet other financial benchmarks, in which Lessors requested additional relief as a result of the alleged breach of the Master Lease. See Complaint, Sections I.A., B., and E. At the same time Lessors also filed a Motion for Appointment of Receiver ("MAR") that included a request for an "**EXPEDITED HEARING**". See MAR. Lessors thereafter served their Summons and Complaint along with the MAR on Lessees and Goldner Capital Management, LLC and SC Two OP Holdings LLC, Lessees' parent companies, on Wednesday, March 29, 2023. Thereafter, on Thursday, March 30, 2023, Lessors served a Notice of Hearing for their Motion for Appointment of Receiver ("Notice") on Rittenberg OP, Hanahan OP, Goldner Capital Management, LLC, and SC Two OP Holdings LLC (collectively the "Corporate Defendants"). The Notice stated that the hearing on the MAR was scheduled for Thursday, April 6, 2023, less than ten (10) days from the

date on which the Corporate Defendants were served with the Notice. Samuel Goldner ("Goldner"), though named as an individual defendant by Lessors, was never served with the Summons and Complaint, the MAR, or the Notice by Lessors.[1] Due to Lessors' refusal to continue the hearing on the MAR from April 6, 2023, Appellants filed a Motion for Continuance on April 5, 2023 that was granted by the trial court and which initially moved the hearing on the MAR to Friday, April 7, 2023 before Judge McFaddin "reconsider[ed] the continuance motion" and ultimately moving the MAR hearing to Tuesday, April 11, 2023. See April 5-6, 2023 email correspondence between Court and Counsel.

On Monday, April 10, 2023, despite the inability of Goldner to assist in preparation of Appellants' opposition to the MAR due to his faithful observance of Passover (Thursday, April 6 and Friday, April 7, 2023) and Sabbath (Saturday, April 8, 2023), Appellants, in response and opposition to the MAR, were nonetheless able to obtain and file the Affidavits of Goldner and the Chief Operating Officer ("CEO") and the Chief Nursing Officer ("CNO") for the Corporate Defendants' subsidiary entity that operated the skilled nursing homes in the Demised Premises ("Operating Entity") in conjunction with Appellants' Motion to Dismiss, or in the alternative to

[1] The date of filing of the Summons and Complaint and the attempt to force a hearing on the MAR on April 6, 2023 in violation of Rule 6(d), SCRCP, is also noteworthy in that it appears that Lessors planned the timing of their filings to exploit the fact that Goldner, who is also a principal member of the Corporate Defendants, is a devout practicing member of the Jewish community and Passover in 2023 started at sundown on Wednesday, April 5, 2023. Passover 2023 ran from sundown on April 5, 2023 to nightfall on April 13, 2023, during which period, and including normal Sabbath observance, work, subject to certain restrictions, was only permitted on April 9, 10, and 11. Given that the observance of Passover involves extensive preparation and abstaining from most of the same activities that are avoided on the Sabbath, e.g., no driving or working, during the first and last two days of Passover, Lessors' vociferous refusal to continue the hearing on the MAR from April 6, 2023 appeared to be a conscious tactical decision to utilize Goldner's faithful observance of Passover to handicap Goldner's ability to meaningfully participate in the defense of and opposition to the MAR.

Stay, and Compel Arbitration. See Motion to Dismiss and Compel Arbitration ("Motion to Dismiss") and Exhibits thereto. Given the extremely limited opportunity to prepare and take action in opposition to the MAR and the express language of the Master Lease arbitration clause that provides that "[t]he parties hereto agree that this Section 38.20 [sic][2] has been included to rapidly and inexpensively resolve any disputes between them with respect to the matters described above, and that this paragraph shall be grounds for dismissal of any court action commenced by any party with respect to a dispute arising out of such matters," and the dispositive impact compelling arbitration would have on the request to appoint a receiver, Appellants expressly "request[ed] an order of this Court granting expedited consideration of th[e] Motion [to Dismiss and Compel Arbitration] at the same time as [Lessors]' Motion for Appointment of Receiver."[3] See Motion to Dismiss, pp. 2-3, and Exhibit A, p. 48, Sec. 37.18; see also Apr. 11, 2023 Hr'g Tr. pp. 15:22-16:4.

Based on Lessors' request for one (1) hour for the MAR hearing and subject to the Court "drowning in non-jury matters and motions," the Court held a rushed and time-constrained hearing on Lessors' MAR on Tuesday, April 11, 2023. See April 6, 2023 email from Judge McFaddin to Counsel ; see also Apr. 11, 2023 Hr'g Tr., p. 23:13-14 ("Please you all, I wish I could hear more. I really do, but I've got a lot to do here today."). Despite Appellants securing

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[2] Section 37.18 contains a scrivener's error incorrectly referring to "this Section" as 38.20 instead of the correct section number 37.18. Further confirming the typographical nature of the incorrect identification is the fact that the Lease does not contain a Section 38.20.

[3] Despite the interrelation of the arbitration and receivership question, not to mention the fact that Lessors were clearly fine with Appellants receiving less than ten (10) days' notice of the hearing on Lessors' MAR, the Court, though it allowed and/or received discussion and argument concerning the Motion to Dismiss and Compel Arbitration, issued no ruling on Appellants' Motion to Dismiss and Compel Arbitration.

the attendance of the CEO of the Operating Entity, Mr. Kyle Whimpey ("Mr. Whimpey"), the CNO of the Operating Entity, Ms. Nathalie Francois ("Ms. Francis"), and Goldner, the CEO, founder, principal and managing member of defendant Goldner Capital Management, LLC the entity that owns a majority stake in the parent company (SC Two OP Holdings, LLC) of the entities that operate the facilities in South Carolina, at the MAR hearing and requesting first that the Court allow Mr. Whimpey to testify concerning the operation and improvement of the skilled nursing facilities operated in the Demised Premises, the Court denied Appellants' request to present Mr. Whimpey's testimony and decided instead to rule on the written materials filed by the parties with the Court. See Apr. 11, 2023 Hr'g Tr., pp. 20:1-8, 20:21-21:4 ("I'm just a little reluctant [to] open the doors to testimony today…And I just absolutely don't have time to do it today. I have got a lot of information here from you all"). Despite the Court admittedly "drowning in non-jury matters and motions" in not having read the parties' submissions prior to the hearing, of which there were Four Hundred Seventy-Nine (479) pages filed by Lessors in support of their Complaint and MAR and One Hundred Fifty-Eight (158) pages filed by Appellants in opposition to the MAR and in support of their Motion to Dismiss, the Court, less than twenty-four (24) hours from the conclusion of the hearing on the MAR, filed its initial order appointing a receiver on April 12, 2023 ("Short Order") and requesting Lessors' counsel to draft a formal order for the Court's consideration. See April 6, 2023 email from Judge McFaddin to Counsel; see also Apr. 11, 2023 Hr'g Tr., p. 5:7-15; Short Order. On April 13, 2023 Lessors' counsel filed a proposed Order appointing receiver for Judge McFaddin's consideration, in response to which Appellants immediately circulated specific objections to the proposed Order, including specifically that:

> Both the receivership statutes under which [Lessors] have sought appointment of a receiver and controlling South Carolina Supreme Court precedent require that whenever a receiver is appointed prior to the entry of final judgment, "there shall be inserted in the order of appointment a clause fixing the value of the property for which the bond may be given, as prescribed in § 15-65-50." S.C. Code Ann. § 15-65-60 (emphasis added); see also Truesdell v. Johnson, 144 S.C. 188, 142 S.E. 343, 348 (1928) (interpreting the provision under the previous receivership statute containing substantively identical language to Section 15-65-60 and holding that "[t]he provision for inserting a clause fixing the value of the property in the order appointing a receiver is mandatory").

April 13, 2023 email from Appellants' Counsel. After responding to correspondence from counsel regarding the proposed Order, Judge McFaddin ultimately entered the Order Appointing Receiver, as drafted by Lessors' counsel, on Friday, April 14, 2023 at 11:26 a.m. (the "Order"). See April 14 email from Judge McFaddin to counsel; Order. Despite the fact that it is mandatory under S.C. Code Ann. § 15-65-50 for an order appointing a receiver to insert a clause fixing the value of the property to allow a party to obtain redelivery of the property in question, Judge McFaddin's Order provided no such clause fixing the value of the property and instead stated only that the "Court will entertain any future request for bond by the Defendants in an amount commensurate with the facts of this case and applicable law." Order, p. 17, ¶ 26. Later in the evening on Friday, April 14, 2023, Appellants filed their Rule 59(e) motion for reconsideration seeking to have the court reconsider, alter, and amend the Order on the grounds that it contained errors of law, failed to consider, address, or make findings as to certain statutory requirements, and created manifest injustice for Appellants. See Appellants' Rule 59(e) Motion for Reconsideration, Request for Stay Pursuant to Rule 62(a), and Offer of Bond. Consistent with Rules 7(b)(2), 8(a), and 8(e)(2), SCRCP, Lessors alternatively offered a bond pursuant to Paragraph 26 of the Order, which expressly stated that "the Court will entertain any future

request for bond by the Defendants in an amount commensurate with the facts of this case and applicable law," and requested that the Order be stayed pursuant to Rule 62(a). See Motion for Reconsideration, Request for Stay Pursuant to Rule 62(a), and Offer of Bond; Order p. 17, ¶ 26.

By way of Form 4 Order on April 27, 2023 ("Form 4 Order"), Judge McFaddin denied Appellants' request for reconsideration. See Form 4 Order. By way this same Form 4 Order, and despite Appellants' motion to reconsider clearly and alternatively "request[ing] that the Court approve [Appellants]' Offer of Bond so that [Appellants] may pursue a bond and the execution and filing thereof to vacate the appointment of the receiver and direct the redelivery of the property to [Appellants] in accordance with S.C. Code Ann. § 15-65-60," Judge McFaddin also, baldly and without any explanation, simply denied Appellants' request for stay and offer of bond. See Form 4 Order ("Defendants' Rule 59(e) Motion for Reconsideration, Request for Stay Pursuant to Rule 62(a), and Offer of Bond is respectfully denied.").

As a result of Judge McFaddin's bald and unsupported rejection of Appellants' offer of bond by way of the Form 4 Order that also denied Appellants' request for reconsideration, Appellants timely filed a Motion for Reconsideration of Denial of Request for Stay and Offer of Bond on May 5, 2023. Despite timely filing the May 5, 2023 Motion requesting reconsideration of the April 27, 2023 Form 4 Order, a copy of the May 5, 2023 Motion was inadvertently not transmitted to Judge McFaddin via email or hardcopy as directed by Rule 59(g).[4] Once the oversight concerning transmission of a copy of the timely filed May 5, 2023 Motion pursuant to Rule 59(g) was brought to the attention of Appellants' Counsel on November 17, 2023, a copy of

[4] Undersigned counsel believed, apparently mistakenly, that with the advent of e-filing that a copy of a motion to reconsider a judge's ruling was automatically sent to the ruling judge by the clerk's office upon acceptance of the filing.

the May 5, 2023 Motion was emailed to Judge McFaddin on November 20, 2023. Judge McFaddin ultimately issued an Order on March 28, 2024 denying Appellants' May 5, 2023 Motion. This appeal followed.

STATEMENT OF THE FACTS

The parties to this dispute signed a commercial Master Lease for two properties, including the Demised Premises and the personal property used therein and about, in South Carolina that the Lessors own, in which the Lessees' have a leasehold interest, and at which the Lessees, through their Operating Entity, Vivant Healthcare, operated skilled nursing care facility businesses. See Master Lease; see also Exhibit E to Motion to Dismiss. Lessors allege that Lessees have breached the Master Lease governing the relationships between the parties. The Master Lease, as negotiated and agreed to by Lessors and Lessees, expressly contains an arbitration provision in Section 37.18 calling for all disputes arising out of or in connection with the Master Lease to be submitted to final and binding arbitration before the Chicago Rabbinical Council (the "Beit Din"). Moreover, Section 37.18, as agreed to by and between Lessors and Lessees, further directs that the binding arbitration clause "has been included to rapidly and inexpensively resolve any disputes between [the parties] with respect to the matters described above, and that this paragraph shall be grounds for dismissal of any court action commenced by any party with respect to a dispute arising out of such matters." Master Lease, p. 48, Sec. 37.18.

Disputes have arisen among the Lessors and Lessees regarding primarily financial issues arising out of the Master Lease. Despite the typical landlord-tenant/rent dispute nature of the dispute between the Lessors and Lessees, the Lessors have sought to dishonor and evade the heavily negotiated and agreed upon dispute-resolution procedures in the Master Lease by filing a

state court action on the eve of Passover, a multi-day religious holiday, during which observant Jews are specifically prohibited from working, seeking the emergency appointment of a receiver on the grounds of conclusory allegations regarding operational safety issues that were strongly rebutted in the sworn Affidavits of Goldner, and the CEO and CNO of Lessees' Operating Entity. See Affidavits of Goldner, Whimpey, and Francois. The filing and pursuit of this lawsuit in contravention of the terms of the Master Lease appear to an attempted end-run to secure the termination of Appellants' leasehold rights without requiring Lessors to first satisfy their burden of proof at a trial on the merits of Lessors' breach of contract claims, all at great prejudice to Appellants due process rights and in violation of the express terms of the Master Lease regarding dispute resolution. See Affidavit of Goldner, ¶¶ 5-9. Contrary to Lessors' allegations, Appellants have significantly improved each of the properties since commencement of the Master Lease in June 2021, and were still in the process of making further improvements to the physical structures as well as the level of care provided to residents, and the financial performance of the properties up to the appointment of the receiver. See Affidavit of Goldner, ¶¶ 5-9; Affidavit of Whimpey, ¶¶ 3-8, 12; Affidavit of Francois, ¶¶ 3-5. While there have been some financial issues with the properties resulting in dispute between the Lessors and Lessees regarding rent owed under the Master Lease, many of the issues raised by Lessors in the Complaint and MAR relating to the renovations and citations for code violations at the subject properties arise from the Lessors' own refusal to make available monies set aside in the Master Lease for capital expenditures to be paid by Lessors. Consequently, Appellants maintain that Lessors are breaching their obligations under the Master Lease by, inter alia, not providing proper capital expenditure funding, by refusing to provide access to financial information to which Appellants

are entitled, by not providing proper notice of various actions taken by Lessors' representatives and by not completely disregarding the dispute resolution provisions which the parties bargained for and by which they are bound in the Master Lease.

The dispute resolution provisions in the Master Lease is abundantly clear and unambiguous and expressly states that the parties shall, in good faith, use their reasonable best efforts to resolve any disputes, problems or claims arising out of or in connection with the Master Lease and if such disputes are not resolved after ten (10) days, the parties are to make good faith efforts to agree on a third-party arbitrator; if the parties are not able to agree on an arbitrator after thirty (30) days, either party may submit to final and binding arbitration before the Beit Din, the Chicago Rabbinical Council.

Because Lessors have deliberately ignored and sought to circumvent these dispute resolution procedures by filing this lawsuit requesting extraordinary emergency relief based on conclusory allegations that are refuted by the sworn statements of Appellants' representatives who have direct knowledge of the questions at issue, and because Lessors have been rewarded for such effort by the trial court with an Order appointing a receiver while refusing the inclusion therein of the statutorily mandated clause fixing the value of the property to allow Appellants the obtain redelivery of the property in question, this appeal seeks to curb Lessors' misuse of the judicial system by reversing the drastic imposition of a prejudgment receivership to allow this dispute to be resolved in accordance with the parties expressly agreed upon dispute resolution procedures provided in the Master Lease without further interruption.

STANDARD OF REVIEW

The appointment of a receiver is fundamentally an action in equity. See Wadsworth

Industries, Inc. v. Westgate Knitting, Inc., 264 S.C. 106, 109, 212 S.E.2d 571, 572 (1975). In its review of an action in equity, the appellate court has jurisdiction to find facts and rule upon issues of law in accordance with its own views of the preponderance of the evidence. See Townes Assoc., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

S.C. Code Ann. § 15-65-10(1) establishes the circumstances under which a court may make a prejudgment appointment of a receiver.

> A receiver may be appointed by a judge of the circuit court, either in or out of court:
>
> Before judgment is rendered, on the application of either party, when [the applicant] establishes an apparent right to property which is the subject of the action and which is in the possession of an adverse party and the property, or its rents and profits, are in danger of being lost or materially injured or impaired, . . .

S.C. Code Ann. § 15-65-10(1). In addition to subsection (1) of S.C. Code Ann. § 15-65-10, subsection (4) also provides that:

> When a corporation has been dissolved, is insolvent or in imminent danger of insolvency or has forfeited its corporate rights, and, in like cases, of the property within this State of foreign corporations…

S.C. Code Ann. § 15-65-10(4) (emphasis added). The appointment of a receiver is a drastic remedy, only allowed under the most compelling circumstances, and only should be granted with great caution and reluctance. See Midlands Utility, Inc. v. S. C. Dept. of Health and Environmental Control, 301 S.C. 224, 391 S.E.2d 535 (1989); Vasiliades v. Vasiliades, 231 S.C. 366, 98 S.E.2d 810 (1957); Wrenn v. Wrenn, 228 S.C. 588, 91 S.E.2d 267 (1956). The appointment of a receiver is fundamentally an action in equity, and one who has unclean hands is not entitled to use the sword of equity to his benefit. See Wadsworth Industries, Inc. v. Westgate Knitting, Inc., 264 S.C. 106, 109, 212 S.E.2d 571, 572 (1975).

ARGUMENT

Summary of Argument

The Order issued by the trial court imposes the drastic remedy of a receivership without satisfying mandatory statutory requirements meant to safeguard the rights of the party from whom property is being taken, and as such is void. Moreover, the Order appointing a receiver lacks evidentiary support in the record warranting such appointment and the circumstances present in this case do not begin to approach the instances in which our appellate courts have approved such appointments. Further, the court violated Appellants' due process right to fully present its evidence in opposition to this drastic remedy because the court was "drowning in non-jury matters and motions" and did not have the time to hear the testimony of Appellants' witnesses. The result of the appointment has caused irreparable harm to Appellants and is manifestly unjust. Accordingly, Appellants ask this Court to reverse and vacate the Order appointing the receivership as void to align with the controlling and well-established law of South Carolina.

I. The Order of the trial judge appointing a receiver is void because it did not contain a clause fixing the value of the property placed in the hands of the receiver, in accordance with the requirements of S.C. Code Ann. § 15-65-60.

The Order appointing a receiver issued by the trial court must be vacated because it is void for failure to comply with the "mandatory" statutory requirements for the appointment of a receiver. Truesdell v. Johnson, 144 S.C. 188, 204, 142 S.E. 343, 348 (1928). Specifically, the trial judge failed to insert "a clause fixing the value of the property in the order appointing a receiver." Id.; see also S.C. Code Ann. § 15-65-60 ("Whenever the court or judge before whom such application is made shall appoint a receiver before final judgment in the cause there shall be

inserted in the order of appointment a clause fixing the value of the property for which the bond may be given…") (emphasis added). "The provision for inserting a clause fixing the value of the property in the order appointing a receiver is mandatory, and without such clause the order is void." Truesdell, 144 S.C. at 204 142 S.E. at 348 (emphasis added). The purpose of § 15-65-60 is to protect the interest of the person or entity from whom property is taken and placed in the hands of a receiver. Id. It provides a method for the party to retain possession of the property during litigation. Id.

Both controlling Supreme Court precedent and the applicable statues establish that a party against whom a receivership is sought has an an unequivocal and unconditional right to have the receivership order fix the value of the property in question so that the party from whom property is taken may post a bond to secure redelivery of the property. Given that the South Carolina Supreme Court has repeatedly stated that "[r]eceivership is a drastic course, allowed only under pressing circumstances and granted only with reluctance and caution," Vasiliades, 231 S.C. at 376, 98 S.E.2d at 815 (citation omitted; emphasis added), it is of the utmost importance that all statutory requirements be followed to "protect[] the interests of the person claiming or in possession of the property for which a receiver is sought." Truesdell, 144 S.C. at 203, 142 S.E. at 347-48.

Indeed, our Supreme Court in Truesdell addressed nearly the precise argument raised by Respondents regarding this bond issue, as respondent there contended that "it was a condition precedent to the insertion in the order of a clause fixing the value of the property that the person in possession should 'offer' the bond before the order appointing the receiver was granted, and that, as the appellant did not 'offer' the bond at the hearing on the application for appointment of

a receiver, he cannot now complain of the omission of the clause fixing the value of the property." 142 S.E. at 347. The Supreme Court directly rejected this argument, continuing: "We do not agree with the respondent's position. The appointment of a receiver, as we have said, is a drastic measure, and the Legislature has made provision for protecting the interests of the person claiming or in possession of the property for which a receiver is sought." Id. at 347-48.

Put simply the requirement that an order appointing a pre-judgment receiver must include a clause fixing the value of the property for which the bond may be given is unconditional. As the South Carolina Supreme Court stated while interpreting the precursor statutes to S.C. Code Ann. §§ 15-65-50 and -60, the language of which are substantively identical to the current statutes:

> This subdivision provides that, upon the due execution and filing of such bond as described in subdivision 8 [15-65-50], before final judgment in the cause, the appointment of the receiver shall be vacated, etc. In the latter case, the penalty of the bond must likewise be double the value of the property, and if the value of the property is not fixed by the order appointing the receiver as required by this subdivision, then the person from whose possession the property has been taken cannot give the bond provided for and so obtain redelivery of the property, and subdivision 9 [15-65-60] becomes of no effect.

Truesdell, 144 S.C. at 204, 142 S.E. at 348. Here, despite express statutory requirement to do sound controlling Supreme Court precedent directly on point, the Order appointing the receiver wholly fails to include the "mandatory" clause fixing the value of the property that Lessors contend to be at risk. Id. Moreover, the Order appointing the receiver fails to even provide any explanation for why this required valuation was not made before appointing a receiver, instead merely stating that the "Court will entertain any future request for bond by the Defendants in an amount commensurate with the facts of this case and applicable law." Order, p. 17, ¶ 26. By

failing to make this determination, the trial court has deprived Appellants of any method to relieve themselves from the burden of the receivership and has committed reversible error. Therefore, the Order appointing the receiver is void and must be set aside.

II. The Trial Court Erred in Appointing a Pre-Judgment Receiver Because Respondent Failed to Establish an Apparent Right to the Property and that the Property at Issue was in Danger of Being Lost or Materially Injured or Impaired

The trial court incorrectly found that Lessors proved their apparent right to Lessees' property based solely on allegations that constitute nothing more than a run of the mill dispute between a landlord and tenant concerning a breach of a lease. See Order, p. 2-3, ¶¶ 4-7. In so ruling, the trial court failed to recognize the contested nature of the underlying dispute between the parties concerning the Master Lease and overlooked South Carolina law rejecting the appointment of a receiver in cases concerning contested rights.

Our legislature authorized the pre-judgment appointment of a receiver only under exceptionally narrow circumstances requiring the movant to demonstrate: 1) an apparent right to property in possession of an adverse party and; 2) that the property is in danger of being lost or materially injured or impaired. See S.C. Code Ann. § 15-65-10. Indeed, in examining the application of the statute the South Carolina courts have repeatedly stated that "[t]he appointment of a receiver is a drastic remedy, and should be granted only with reluctance and caution." Richland Cnty. v. S.C. Dep't of Revenue, 422 S.C. 292, 313, 811 S.E.2d 758, 769 (2018) (quoting Midlands Util., Inc. v. S.C. Dep't of Health & Envtl. Control, 301 S.C. 224, 228, 391 S.E.2d 535, 538 (1989)). "[A]s a rule, a receiver will not be appointed during the progress of a cause, unless there is the strongest reason to believe that the plaintiff is entitled to the relief demanded in his complaint, and there is danger that the property will be materially injured before

the case can be determined." Pelzer v. Hughes, 27 S.C. 408, 416, 3 S.E. 781, 785 (1887). In reversing the trial court's appointment of a receiver in the Pelzer case, the Court further explained that the appointment of a receiver "is a stronger measure than that of injunction…[I]t is not allowable in every case, but is confined to those of a particular class or classes. It is universally conceded 'that the power of appointment is a delicate one, and is to be exercised with great circumspection.'" Id.; see also Richland Cty., 422 S.C. at 313, 811 S.E.2d at 769 (affirming the trial court's refusal to appoint a receiver, citing Pelzer as controlling precedent).

Since setting forth the foundational principles guiding the pre-judgment appointment of receivers in Pelzer, our courts have consistently required the party seeking the appointment of the receiver to show it holds legal title to or equivalent ownership interest in the property at issue before an apparent right may be found to exist. See Greenwood Loan and Guarantee Ass'n v. Childs, 45 S.E. 167, 168, 67 S.C. 251 (1903) (rejecting the plaintiff's argument that a mortgage was sufficient to show any apparent right because a mortgage does not convey legal title); See also, Hardin v. Hardin, 34 S.C. 77, 80, 12 S.E. 936 (1890) ("Now, as we have seen, the mortgage gives to the mortgagee no real or even apparent right to the mortgaged premises, and certainly none whatever to the rents and profits thereof"). Indeed, South Carolina courts have been reluctant to appoint receivers when asked to protect only a contested right. See See Kirven v. Lawrence, 244 S.C. 572, 137 S.E.2d 764 (1964) (explaining that due to the contested nature of the case, the right to possession of the property at issue remained in the defendants until there had been a final determination of all issues at trial); DeWalt v. Kinard, 19 S.C. 286 (1883) (finding the appointment of a receiver unwarranted where there was no clear establishment of a right to the property at issue but only a disputed claim). In instances where legal title has not

been established by unrefuted evidence, the court may not rely solely upon the allegations of the complaint but must also consider the facts as alleged in the answer or other filings in the case. See Peeples v. Agricultural Loan Association, 156 S. C. 429, 153 S. E. 283, 285 (1930) (providing that while "[t]he facts alleged in the complaint taken alone, perhaps, would have justified the appointment of a receiver, [it is proper also for the court] to consider, in connection, the matters alleged in the answer of the respondent.").

Despite the drastic nature of the appointment of a receiver and the Supreme Court's recent admonition that only with reluctance and caution and after movant establishing the "strongest reasons to believe" that he is 1) entitled to the relief demanded in his complaint and 2) there is a danger the property will be materially injured before final resolution of the case, the Court granted the appointment of a receiver based on nothing more than speculation and conclusory allegations contained in Lessors' Verified Complaint and the Affidavit of Amanda Colwell ("Ms. Colwell"). Richland Cty., 422 S.C. at 313, 811 S.E.2d at 769. As to Ms. Colwell's Affidavit, upon which Lessors' substantive arguments in favor of the appointment of a receiver rested almost entirely, outside of raising specific matters concerning a dispute between a landlord and tenant, it fails to provide any specific evidence, facts, or material of record to establish the "strongest reasons to believe" that Lessors have a current right to Lessees' property, which includes Lessees' leasehold estate, personal property, and Appellants' ongoing skilled nursing care business, or that the property will be materially injured "before the case can be determined." Id. (emphasis added). Thus, sitting as a court of equity in this appeal, this Court has the authority and responsibility to assess the weight of the evidence and make its own factual determinations, and Appellants urge the Court to do so.

Turning first to the apparent right to the property element, Ms. Colwell's specific assertions concerning the existence of a dispute between landlord and tenant are insufficient to justify the appointment of a receiver. Despite Appellants' Affidavits directly contradicting and calling into question the assertions contained in Ms. Colwell's Affidavit, the Order appointing the receiver fails to recognize the contested nature of the dispute between the parties, the fact that the parties have agreed to resolution of any disputes under the Master Lease through binding arbitration before the Chicago Rabbinical Council Beit Din, and also ignores South Carolina law rejecting the appointment of a receiver in cases concerning contested rights.

Unlike the circumstances in cases where right to possession is uncontested, Lessors' claim to the property in this case is far from undisputed and there is nothing conveying unequivocal title or ownership of the property to Lessors. Instead, Appellants' Affidavits in opposition to Lessors' request for the appointment of a receiver and in support of Appellants' Motion to Dismiss and Compel Arbitration and Appellants' Motion to Dismiss and Compel Arbitration itself call into question the validity and enforceability of Lessors' claims and allegations. In the face of contested rights to the property, Lessors failed to provide the trial court with irrefutable evidence to show that Lessors had a right to possession of the property under the Master Lease. DeWalt, 19 at 293 ("A person in possession of real property is presumed to have title until the contrary appears, and we do not see by what authority he can be deprived of such possession until the question of title has been tried, even though it should be made to appear, prima facie, that he was insolvent.") (emphasis added); see also, Kirven, 244 S.C. 572, 137 S.E.2d 764 (explaining that due to the contested nature of the case, the right to possession of the property at issue remained in the defendants until there had been a final determination of all

issues at trial). Where, as here, one party seeks a pre-judgment receivership despite that the entire crux of the litigation surrounds the enforceability and effect of the agreement which might establish that party's apparent right to property, the trial court should exercise particular caution. "While a court of equity, in proper cases, has the power to place a debtor's property in the hands of a receiver, this power should be exercised with great caution, lest the injury thereby caused be far greater than the injury sought to be averted." Miller v. Land Co., 53 S. C. 367, 31 S. E. 282 (1898).

Turning next to the element of material injury, Ms. Colwell relies solely on vagaries, generalities, and hypotheticals to raise the specter of imminent injury to the property:

- "Permitting [Lessees] to take any action that impedes their care could have devastating consequences for them." See Colwell Affidavit, ¶ 10 (emphasis added).

- "Any such conduct by [Lessees] will almost necessarily result in harm…Any action by [Lessees] to impede use of the Personal Property by [Lessors] or their designee to care for the residents will result in irreparable harm to them. " See Colwell Affidavit, ¶ 13.

- "If [property is] transferred to third parties or access to and use of them is otherwise impeded, the residents' health may be adversely affected which, will likely lead to injury or even death…Even solely as to [Lessors], this kind of harm to [Lessors]' business may prevent them from caring for other vulnerable persons. If [Lessees] are permitted to interfere with use of the Personal Property by [Lessors], that will effectively be the bell that, once rung, cannot be unrung. Although [Lessors] can sue [Lessees] for monetary damages, [Lessees] may be judgment proof. By the time [Lessors] secure a final judgment and are able to recover monetary damages, they may well be out of business. " See Colwell Affidavit, ¶ 14 (emphasis added).

- "[Lessees]…currently are improperly managing the Personal Property and Operations." See Colwell Affidavit, ¶ 16.

- "The nature of the Personal Property and Operations requires immediate and constant protection…." See Colwell Affidavit, ¶ 17.

- "It is necessary to appoint a receiver to prevent immediate and irreparable harm and to provide protection and to prevent the [Lessees] from exercising any control over the Personal Property and Operations or impede use of them by [Lessors] and the receiver." See Colwell Affidavit, ¶ 18.

To warrant the appointment of a receiver to take possession and control of property held by a party prior to the adjudication of the merits, the movant must show that the property at issue is in danger of being lost or materially injured or impaired. See S.C. Code Ann. § 15-65-10. In analyzing this requirement for pre-judgment appointment of a receiver, our courts have consistently required more than a mere assertion of loss but also evidence of some actual loss and that the prospect of recovering the amounts upon judgment in the movant's favor is unlikely. See Richland Cty. v. S.C. Dep't of Revenue, 422 S.C. 292, 310, 811 S.E.2d 758, 767 (2018) (affirming the lower court's denial of a request to appoint a receiver because there was no evidence that the party in possession of the funds would be unable to repay them). Despite the requirement for more than mere assertions, Ms. Colwell's Affidavit interestingly does not even identify what actions of Lessees might cause injury to the property, how these undefined hypothetical actions, "if" they were taken by Lessees, "could" or "may" cause harm to the property in question, or how Lessees are "improperly managing" the property. Also of note is that Ms. Colwell's Affidavit repeatedly references possible harm to facility residents, however the residents are neither the "property" of Lessors or Lessees, nor do Lessors have standing to raise these alleged injuries to facility residents. Moreover, Ms. Colwell's Affidavit also provides neither assertion nor evidence regarding the scope or value of the property at issue so that the Court may properly assess whether there is a likelihood of material harm thereto. Resort to Lessors' Verified Complaint is equally unavailing given that it is essentially a recitation of the

conclusory allegations contained in Ms. Colwell's Affidavit. Consequently, Lessors failed to establish the strongest reasons to believe that Lessors have a current right to Lessees' property or that the property will be materially injured before the case can be determined, and, as such, the granting of a receivership by the Court constitutes an abuse of discretion as it is neither supported by law or sufficiently established facts. Cf. Ex parte Hampton & B.R. & Lumber Co., 45 S.C. 122, 22 S.E. 804, 805 (1895) ("The testimony, derived wholly from affidavits submitted by the parties, is very conflicting upon many of the issues involved; so much so that we cannot say that the petitioner has made such a case as entitles it to the injunction asked for. The burden of proof is upon the petitioner to show that it is a proper case for injunction, and we do not think that the showing made is sufficient to warrant this court in interposing its aid by enjoining the said Goethe & Ulmer from proceeding with their operations, whereby great, and probably irreparable, loss and injury would be incurred by them.").

If Lessors had any evidence that the property was in actual danger of wrongful dissipation, it was required to bring that evidence to the trial court's attention in support of its motion. It is telling that Lessors made no such offer either before or at the hearing.

Lessors' failure to come forth with any evidence to support its arguments establishing that they had an apparent right to the property and that the property was actually at risk of loss, impairment, or material injury or that Lessors will be unable to collect if judgment is rendered in its favor should have been fatal to its motion. Therefore, because Lessors 1) did not establish an apparent right to the property at issue and contested rights are insufficient to provide a basis for dispossessing Appellants of their property at the prejudgment stage of litigation, and 2) did not establish that the disputed property was in any danger of being lost, materially injured, or

impaired, the Order appointing the receiver should be reversed and vacated. Quite simply, the circumstances of this case do not warrant the appointment of a receiver and the imposition of a prejudgment receivership under these circumstances in manifestly unjust.

III. To the extent the trial judge's Order appointing a receiver found that S.C. Code Ann. § 15-65-10(4) provided grounds for the appointment of a receiver over a limited liability company, such was a clear error as subsection (4) of S.C. Code Ann. § 15-65-10 is not applicable to entities other than corporations.

Though it is unclear due to contradictions between the April 12, 2023 Short Order the trial judge drafted and transmitted to the parties and the formal Order appointing the receiver drafted by Lessors' counsel and signed and filed by Judge McFaddin on April 14, 2023, to the extent the trial court granted the appointment of the receiver based on S.C. Code Ann. § 15-65-10(4), such was an error of law as subsection (4) is inapplicable to entities other than corporations. As previously discussed, the legislature authorized the pre-judgment appointment of a receiver under specific and exceptionally narrow circumstances. With regard to subsection (4) of S.C. Code Ann. § 15-65-10 the narrow scope of the legislature was focused specifically on a single type of entity, a "corporation." See Cox v. Woodmen of World Ins. Co., 347 S.C. 460, 469, 556 S.E.2d 397 (Ct. App. 2001) ("The legislature did not expressly provide the statute applies to fraternal benefits associations…Accordingly, the arbitration exception is not applicable to fraternal benefits associations…"). Had the Legislature intended the subsection (4) to apply to limited liability companies or other entities, it would have specifically identified limited liability companies or those other entities within the statutory framework. It did not. City of Rock Hill v. Harris, 391 S.C. 149, 154, 705 S.E.2d 53, 55 (2011) ("[W]hen determining the effect of statutory language, "the canon of construction 'expressio unius est exclusio alterius' or 'inclusio unius exclusio alterius' holds that 'to express or include one thing implies the exclusion of another, or the alternative.'") (citation omitted). Accordingly, S.C. Code Ann. § 15-65-10(4) provides no authority for the trial court to appoint a receiver over a limited liability company or any other entity that is not a corporation, and, to the extent the Order appointing the receiver is based on subsection (4), such is an error of law and the Order should be reversed and vacated.

IV. The trial judge violated Appellants' right to due process by denying Appellants the opportunity to present all relevant and admissible evidence in opposition to Respondents' Motion to Appoint a Receiver because the court was drowning in motion and did not have time to hear Appellants' evidence.

As discussed supra, in reversing the trial court's appointment of a receiver in Pelzer v. Hughes, 27 S.C. 408, 3 S.E. 781, 785 (1887), the Court explained that the appointment of a receiver "is a stronger measure than that of injunction....[I]t is not allowable in every case, but is confined to those of a particular class or classes. It is universally conceded 'that the power of appointment is a delicate one, and is to be exercised with great circumspection.'" Id. at __, 3 S.E. at 785. Given "[t]he appointment of a receiver is a drastic remedy, and should be granted only with reluctance and caution," Appellants were entitled, regardless of the trial court's caseload and limited judicial resources, to present any and all evidence, whether through affidavit or live testimony, in opposition to Lessors' MAR. See April 6, 2023 email from Judge McFaddin to Counsel (stating that the trial judge was "drowning in non-jury matters and motions"); Apr. 11, 2023 Hr'g Tr., p. 23:13-14 ("Please you all, I wish I could hear more. I really do, but I've got a lot to do here today."); see also Richland Cnty., 422 S.C. at 313, 811 S.E.2d at 769 (quoting Midlands Util., Inc., 301 S.C. at 228, 391 S.E.2d at 538). Though Appellants appreciate the Court has limited judicial resources, "[t]he law, however, does not permit a court to issue judgment against a party before giving that party an opportunity to present evidence in support of her position." Halsey v. Simmons, 432 S.C. 54, 58, 849 S.E.2d 578, 580 (2020). Moreover, regardless of what type of hearing or judge a party is before, where fundamental rights, such as a party's property rights, hang in the balance, the party must be given the opportunity to present all relevant and admissible evidence in support of its position, lest the party be denied its right to

due process. See Kurschner v. City of Camden Planning Comm'n, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008) ("The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review."); South Carolina Dept. of Social Services on Behalf of State of Tex. v. Holden, 319 S.C. 72, 78 459 S.E.2d 846, 849 (1995) ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. Due process does not mandate any particular form of procedure. Instead, due process is a flexible concept, and the requirements of due process in a particular case are dependent upon the importance of the interest involved and the circumstances under which the deprivation may occur."). Appellants maintain that each of the affiants who provided Affidavits in opposition to the MAR were present and ready to testify at the MAR hearing and that undersigned counsel, at the conclusion of his initial argument to the Court requested to begin the presentation of live testimony by calling Mr. Kyle only to be denied permission to proceed because the judge "just absolutely d[id]n't have time to [hear the testimony of Appellants' witnesses with firsthand knowledge of evidence material to the request for the appointment of a receiver]. The trial court's refusal to allow Appellants to present all relevant and admissible on the basis that the court was simply too busy is not a legitimate ground upon which to deny the submission of evidence and, as such, constitutes a clear violation of Appellants' due process rights. Accordingly, the Order appointing the receiver should be vacated.

CONCLUSION

The Order issued by the trial court imposes the drastic remedy of a receivership without satisfying mandatory statutory requirements meant to safeguard the rights of the party from whom property is being taken, and as such is void. Further, Lessors did not demonstrate an

apparent right to the property and failed to establish that the property was in danger of being lost. This matter is not of type where our courts have found prejudgment appointment of a receiver to be appropriate. Moreover, subsection (4) of S.C. Code Ann. 15-65-10 is inapplicable to limited liability companies and does not provide the court authority to impose a receiver on an entity other than a corporation. Finally, the court violated Appellants' due process right to fully present its evidence in opposition to this drastic remedy on the improper grounds that the court was "drowning in non-jury matters and motions" and did not have the time to hear the testimony of Appellants' witnesses. Consequently, this Court should reverse and vacate the Order appointing a receiver and remand the matter with instructions for the trial court to order the receiver to return all property to Appellants and finalize invoices for the receiver's services, which Appellants may seek to have assessed against Respondents for instituting the receivership process in bad faith and in violation of the applicable statutes.

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