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SC Court of Appeals

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 BRIEF OF APPELLANT

Andrew S. Radeker
S.C. Bar No. 73743
Harrison, Radeker & Smith, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
drew@harrisonfirm.com
Attorney for 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?**

STATEMENT OF THE CASE

This is an appeal of orders sanctioning the Appellant (hereinafter “Salon Proz”), purporting to sanction its manager, Yvonne Jones (who joins in this appeal to the extent there is any order against her, as do The Event Hall, LLC and Office Suites, LLC), and striking Salon Proz’s counterclaims. (R. pp. 1-9.)

This case is a commercial mortgage foreclosure action with counterclaims and a jury demand on those counterclaims. (R. pp. 24-33, 47-57.) Previous appellate proceedings were had in this case, resulting in this court’s reversal of the master-in-equity’s denial of the motion to return this case to the general jury docket of the circuit court. S.C. Community Bank v. Salon Proz, LLC, 420 S.C. 89, 800 S.E.2d 488 (Ct. App. 2017).

After remand, the circuit court granted the Respondent (hereinafter “SCCB”)’s motion to appoint a receiver and appointed D. Christopher Twitty (hereinafter “Twitty”) as receiver. (R. pp. 12-15.) The order appointing Twitty provided as follows:

D. Christopher Twitty is appointed receiver to take charge of the real property, which is subject of this action and to collect rent, debts, and any fees pertaining to the property. The Receiver is to take charge of the property including the building used for a hair and nail salon. The Receiver will maintain all keys, books, records, indicies, rental proceeds, bank accounts, funds, deposits, and other tangible items or documents involving the property. The Receiver is entitled to appropriate compensation based on a percentage of gross rental and usage proceeds collected.

(R. p. 14.)

Salon Proz then filed for bankruptcy. (R. pp. 16-17.) Salon Proz voluntarily dismissed its bankruptcy petition. (R. pp. 18-19.) SCCB sought a rule to show cause, claiming that Salon Proz had not complied with the order appointing the receiver. (R. pp. 58-60.) The court held a hearing on October 25, 2021, and ruled as follows:

After the Order was entered but prior to the hearing of this matter on October 25, 2021, Defendant provided a few additional documents; however, the Receiver confirms that he has still not been provided with a substantial amount of documents and information both he and Plaintiff's counsel have requested from Defendant. Specifically, the Receiver has not yet received the following:

1. Historical rent rolls, rental agreements, and accounting of all tenants, rent received, and where rent payments went for the time period preceding the Order;
2. Keys to all areas of the property;
3. All current leases not yet provided;
4. All rental payments received since October 2, 2020 and documents related to where payments were deposited, otherwise negotiated, or spent; and
5. All documents related to any bank account(s) owned, used, or accessible by Defendant. Moreover, as set forth on page 2 of the Order, Defendant is to immediately transfer access and oversight of the aforementioned accounts to the Receiver, provide a copy of the Order to the bank where any account is held, and facilitate Receiver's ability to exercise control over the account.

Based on the filings and evidence properly before the Court, I find that the Defendant has failed to comply with Judge Lee's March 2, 2020 Order. I further find that Defendant shall have 30 days from the date of this Order to provide the above documents and information and complete the associated arrangements with any bank. Defendant and Defendant's counsel shall provide copies of all such documents and communications to Plaintiff's attorney as well.

Also, because the Receiver has not been able to recover rents and other proceeds at this time, he has requested that the Court order Defendant to make arrangements so that he can be paid for his work. Defendant's obligation to compensate the Receiver is expressly provided for in Judge Lee's Order. However, this Court will hold in abeyance its ruling on the details of the Receiver's compensation until Defendant has fully complied with her obligations set forth above. Once this has been done, counsel for Plaintiff shall notify the Court and seek further instructions on how to proceed with seeking this relief. Alternatively, if Defendant has not complied with this Order by the deadline set above, Plaintiff's counsel shall promptly notify the Court so that it can take further action.

Lastly, in its Petition, Plaintiff also requested its attorneys' fees and costs associated with the enforcement of the Order from the preparation and filing of the Petition through Defendant's full compliance with same. As with the Receiver's fees and costs, the Court holds this matter in abeyance under the same conditions as described above.

(R. pp. 21-22.)

SCCB moved shortly thereafter for contempt sanctions on the basis that Salon Proz had not complied with the latest order. (R. pp. 101-05.) SCCB did not file this motion with an affidavit or other sworn testimony. (R. pp. 106-32.) SCCB did not petition for the issuance of a rule to show cause, and no rule to show cause issued. (R. pp. 101-05.)

A hearing on SCCB's motion was set for January 28, 2022. On January 18, SCCB filed an affidavit of Twitty, in which Twitty claimed as follows:

Despite several requests to Ms. Jones [i.e., Yvonne Jones, member of Salon Proz] and her counsel, Ms. Jones has failed to provide bank records, all leases for the subject property, and other rental ledgers. She has also refused to allow me to transfer the utilities out of her name.

Ms. Jones has interfered with my duties as Receiver since the date of my appointment. She had contacted tenants and instructs them not to pay rent to me, lease agreements have been terminated, and she has not allowed me to collect all rent.

I received notice that as recently as December 21, 2021, Ms. Jones is directly contacting some tenants and instructing them not to pay their rent to me, but to instead pay the rent to a separate LLC owned by Ms. Jones.

On January 5, 2022, I received notice that Ms. Jones threatened to discontinue utilities for certain tenants if they did not pay the rent to her immediately.

I have requested, but have still not received, keys to all areas of the property, all current leases, ledgers or history of rental payments, bank deposits, and access/control of the bank accounts.

I am aware that Ms. Jones has received rent payments since the date of my appointment that she has not turned over to me.

I am concerned with the increasing vacancies at the property, Ms. Jones interference in collecting rent and dealing with tenants, the lack of funds, and Ms. Jones continued involvement and visiting the Subject Property.

(R. pp. 216-17.) Twitty's affidavit was presented with no exhibits. (R. pp. 216-17.)

The hearing began on January 28, but the court determined that not enough time had been allocated for the parties' presentations and that the hearing would need to be rescheduled to resume. (R. p. 140 ln. 1-8, p. 150 ln. 20 through p. 157 ln. 15.) SCCB's counsel stated to the court on January 28 that "a tenant of the property, Midtown Fellowship Church . . . [t]he preacher, Pastor Anthony Frederick called me on January 6th and said that Ms. Jones was demanding that he pay her rent directly or she was going to cut off utilities." (R. p. 146 ln. 6-15.)

Resumption of the hearing was scheduled for February 8. In an effort to streamline the time needed for live witness examination, Salon Proz filed an affidavit of Yvonne Jones (hereinafter "Jones") in advance of the hearing. (R. p. 163 ln. 18 through p. 165 ln. 6, pp. 218-85.) Jones' affidavit provided as follows:

My name is Yvonne Jones. I am a member of and the operator of Salon Proz, LLC. I have personal knowledge of the facts set forth in this affidavit and am competent to testify about them.

I am also the operator and member of two other companies, Office Suites, LLC and The Event Hall, LLC. These are separate companies from Salon Proz.

Salon Proz rents space to hairstylists and also rents space to The Event Hall and Office Suites.

The Event Hall and Office Suites have their own tenants.

One of The Event Hall's tenants is Midtown Fellowship Church, pastored by Antony Frederick, as shown by Exhibit 1 to this

affidavit, which is a copy of the lease agreement between The Event Hall and the church.

As noted in that lease, utilities are included in the rent.

As shown in Exhibits 2 and 3 to this affidavit, which are, respectively, the docket report and an order from the bankruptcy case, Salon Proz filed for bankruptcy protection on March 23, 2021, and that bankruptcy case was dismissed without prejudice on August 20, 2021.

Salon Proz is exploring refinancing as a way to resolve this case, based on an offer the Plaintiff made in the bankruptcy case. Those refinancing efforts are underway.

In August of 2021, on the day the bankruptcy case was dismissed, I met with Chris Twitty, the receiver in this case. During that meeting, he offered to have his company, the Shandon Group, serve as property manager for Salon Proz at the property that is involved in this case. I was interested in engaging his company to do that, and I exchanged emails with his office about it, which are shown in Exhibit 4 to this affidavit. We entered into that property management arrangement, but, a few days later, he said that he could not do that because the bankruptcy case had ended.

I notified Salon Proz's tenants to pay their rent to Mr. Twitty's company, the Shandon Group, on August 25, 2021, and a copy of the email giving that notice is Exhibit 5 to this affidavit. Most tenants actually sent their rent to Salon Proz directly despite the notice. I don't know if anyone paid Mr. Twitty directly.

I also gave Mr. Twitty during that time Salon Proz's account information and, as shown on Exhibit 6 to this affidavit, which is a spreadsheet I gave him, account numbers and balances for Salon Proz's utility bills and other maintenance bills for the property involved in this case. He acted as though this information was sufficient for him, never asked me for more information about these accounts, and never asked me to do anything to change in whose name any of these accounts were or to provide him any further access to them.

Salon Proz made a payment to Dominion Energy of \$1,403.22 on September 2, 2021.

Mr. Twitty collected Salon Proz' tenants' rent for October, November, and December of 2021.

Concerned about non-payment of utilities, I contacted Mr. Twitty on October 8, 2021, as shown in my email to him that (with its attachments) is Exhibit 7 to this affidavit, letting him know that power and water bills were due and unpaid.

Later that day, I sent Mr. Twitty an email message noting that his company had been paid \$4,700 in rent and that the bills were for less than that amount, though they still had not been paid.

On November 4, 2021, I sent Chris Twitty the email message that is Exhibit 9 to this affidavit, which notes bills of Salon Proz that Salon Proz paid. The content of that email message is accurate.

In November of 2021, Mr. Twitty's company sent a tenant a supposed past due notice for \$5, threatening her with eviction even though she was current in paying her \$650 rent. A copy of that notice is Exhibit 10 to this affidavit.

As shown by copies of checks that are Exhibits 11, 12, and 13 to this affidavit, Salon Proz paid further expenses related to this property which Mr. Twitty did not pay from rent he collected.

Mr. Twitty paid only two bills, related to this property in 2021, Dominion Energy on October 14 and the landscaper, despite collecting \$4,700 in rent for October, November, and December of 2021.

The Dominion Energy statements for the account for this property for September through December of 2021 are Exhibit 14 to this affidavit. Except for the October 14 payment, all the payments shown on those statements were made by Salon Proz, me personally, Office Suites, or The Event Hall in order to prevent the utilities from being turned off. I got the \$956.60 that had to be paid by January 6, 2022, paid as well.

I never told any tenant or anyone that I would have utilities turned off if rent was not turned over to me, nor did I say anything like that. I did tell Pastor Frederick of the church that is a tenant in the building that I was afraid that, if the rent was not paid to me and was paid to Mr. Twitty instead, Mr. Twitty would not pay the utility bills.

As noted in Exhibit 15 to this affidavit, I emailed a receipt showing payment to Dominion Energy to Pastor Frederick on January 5, 2022, to let him know that the power would not be disconnected.

I got the water bill that is Exhibit 16 to this affidavit paid.

I got the Spectrum bill that is Exhibit 17 to this affidavit paid, to avoid disconnection of the tenants' cable, wifi, and internet services.

I got the alarm system bill that is Exhibit 18 to this affidavit paid.

I got insurance on the building paid, as noted in Exhibit 19 to this affidavit, which also correctly noted that Salon Proz has had and has paid for insurance on this building with Liberty Mutual since 2010.

I got a payment arrangement for Salon Proz made with the Richland County Treasurer, as shown by Exhibits 20 and 21 to this affidavit, so that unpaid property taxes could be dealt with.

I asked Salon Proz's tenants to pay their rent to salon Proz directly because I was fairly certain that Mr. Twitty would not pay the utilities those tenants need to function from any rent he collected, since he had never done so before.

During the ice and snow storms in January, neither Mr. Twitty nor anyone from his company came to the property to do anything like put salt down to keep the parking lot and sidewalk from icing. I did that.

I have had to pay the cleaning company out of my own pocket in order to keep the property clean, as Mr. Twitty has never paid them.

Salon Proz never wanted to disobey any order of this court and tried to comply with them. Mr. Twitty put Salon Proz in such a position that it had to choose between having the building cease to function and losing all tenants and complying with orders of the court.

(R. pp. 218-21.)

Jones' affidavit was filed with 21 exhibits in support of the facts stated in it. (R. pp. 218-85.)

At the February 8 hearing, Salon Proz called Pastor Frederick of Midtown Fellowship Church as a witness. (R. p. 166 ln. 3 through p. 171 ln. 6.) Pastor Frederick testified that his church is a tenant of The Event Hall, LLC, and he further testified as follows:

Q Did Ms. Yvonne Jones who's here with us today, did she ever contact you or to your knowledge anyone else at the church

demanding that the church pay rent to her directly or that she would cut off the utilities?

A She did ask us to continue to pay rent to her. She did not say that she would go turn off the utilities, she expressed concerns about utilities being turned off, but did not state that she would go and turn off the utilities.

THE COURT: Alright. Ask that question, I didn't quite follow that question Mr. Radeker, ask that question again, please.

MR. RADEKER: Alright. I'll try. My question was, I believe, is whether Ms. Jones ever contacted him or to his knowledge anyone else at the church and told the church to pay it's rent to her directly or that she would cut off the utilities.

THE COURT: And give me your answer again Reverend.

PASTOR FREDERICK: She did reach out to us saying that we should pay rent to her, but she did not say that she was going to go and turn off the utilities, though she did express concerns about those utilities being turned off if we did not pay rent to her.

Q Tell me more about the concerns she expressed.

A She stated that the Court appointed receiver was not paying the utilities at that time and she expressed concern about other tenants, the tenants that were in the building having utilities cut off on them.

Q Did you ever have a conversation with Billy McGee who represents the bank in this case?

A I called, as I was trying to figure out who we were legally obligated to pay at the time, I called Billy McGee. I believe I only left a voice mail when I made that phone call.

Q Okay. Did you state in that voice mail that Ms. Jones had threatened to have the utilities cut off if the rent was not paid to her?

A No, I do not, I'm confident that I didn't say that. I believe I expressed, I don't know if I can give you the exact words that I used, but I believe I expressed similar to what I just shared about, or some amount of that, maybe not all that even, to be honest

with you, I can't give you exactly, like, the words that I used. But I do know that I was concerned about the utilities not being paid and not being on and I was, again, trying to figure out legally what our obligations were and, you know, as a pastor, I was concerned about, you know, we need utilities on for us to do what we do at the church.

Q Okay. Thank you. Did the church pay, to whom did the church pay rent for the January rent for 2021?

A To the receiver.

Q Okay. How about the December rent for 2020?

A To be a hundred percent honest with you, I am not sure. I don't, I don't remember which exact month we began paying the receiver. If we paid the December rent to the receiver, that would have been the first one, I do know that. I, we have a business department team and a finance team that handles that. And I do know, yeah, so I'm not a hundred percent sure to be honest with you.

Q Thank you very much.

(R. p. 167 ln. 8 through p. 169 ln. 6.)

Salon Proz called Twitty to the stand to testify. (R. p. 171 ln. 17-22.) Twitty testified that he could not remember how much rent he had collected as receiver, but that he “[thought it was] approximately \$14,000.00.” (R. p. 172 ln. 2-9.) Twitty expressed that he was not sure how much rent he had collected when and from whom. (R. p. 173 ln. 24 through p. 175 ln. 18.) After repeated questioning, Twitty was unsure how much, if any, of that money he had used to pay utility bills associated with the property. (R. p. 172 ln. 10 through p. 173 ln. 23, p. 175 ln. 19 through p. 176 ln. 4.) Twitty testified that the rent he had collected was “sitting in [his] account[,]” less whatever amount, if any, had been used to pay utility bills. (R. p. 175 ln. 19-23.)

The court called Jones to testify. (R. p. 181 ln. 12-19.) Jones testified that she had provided the documents that SCCB claimed had not been provided to the receiver. (R. p. 182 ln. 13 through p. 185 ln. 10, p. 186 ln. 1-6.) She testified she had provided the receiver with the leases for all of Salon Proz's tenants. (R. p. 182 ln. 24 through p. 184 ln. 6, p. 186 ln. 1-6.) She also testified as follows:

THE COURT: Alright. Now, is it your position that all rent payments that you received since Judge Lee's order has been turned over to Mr. Twitty?

MS. JONES: If they were leases for Salon Proz, LLC, yes. I turned all, anyone that had a lease with Salon Proz, LLC, I gave him all, yes.

THE COURT: Well, he stated that he hasn't gotten all the rent.

MS. JONES: I have.

THE COURT: Alright. What sort of proof do you have that, that every rent payment since Judge Lee's order has been turned over to, to Mr. Twitty? What sort of proof do you have?

MS. JONES: The tenants pay him directly, so -

THE COURT: No. Apart from what has been paid directly to Mr. Twitty, what proof do you have that every rent payment given to you has been turned over to Mr. Twitty since Judge Lee's order of October 2020?

MS. JONES: The tenants paid their bank directly; they don't give me money. It either drafts from out of their account or they pay it directly. So I have paid Mr. Twitty personally, The Event Hall, LLC, and Office Suites, LLC a thousand dollars per month, and that's in my bank statement, so, I mean -

THE COURT: Well, you just heard the reverend testify that some rent was paid to you by the, by the church.

MS. JONES: That rent paid by the church went to The Event Hall, LLC, not, how can I explain it. I'm the owner of The Event Hall, LLC and I pay rent to Salon Proz. The pastor, they are a sublease, and they pay The Event Hall, I guess that's the best way I can explain it. I paid Mr. Twitty rent, The Event Hall, LLC, I'm the owner of The Event Hall and I pay him rent, I pay him rent -

THE COURT: Alright. Let's, let's, you're just dancing all around my question, Ms. Jones. What do you mean in paragraph 31 of your affidavit that you chose to not lose tenants and not having the building cease to function as opposed to complying with the orders of the Court? What, what did you mean by that?

MS. JONES: I'm sorry -

THE COURT: Alright. I'm going to read to you. This is paragraph 31 of your affidavit. Salon Proz never wanted to disobey any order of this Court and tried to comply with them. Mr. Twitty put Salon Proz in such a position that it had to choose between having the building cease to function and losing all tenants and complying with the orders of the Court. I read that to mean that you chose, right or wrong, you chose to not comply with the orders of the Court in order to keep the building functioning and in order not to lose tenants. So what did you decide to do in not complying with the orders of the Court?

MS. JONES: When I received disconnection notices and when I was notified that utilities were going to be turned off less than 24 hours, I felt like that was an emergency and I had no choice but to pay the utilities because Mr. Twitty was not paying the utilities since October, November, December, even though we were paying him rent, he had not paid any of the utilities. So -

THE COURT: How is you paying the utilities not complying with the prior Court orders?

MS. JONES: Had I not paid the utilities -

THE COURT: No. Listen to my question, ma'am. I'm not trying to be rude or disrespectful.

MS. JONES: Okay.

THE COURT: But you said you did not, in your affidavit, that you did not comply with the prior Court orders, you stated that in your sworn affidavit. How is paying the utilities not complying with prior Court orders?

MS. JONES: All I can state is I paid the utilities to avoid the lights being turned off, the water and the building to stop functioning, and being shut down. I just, I didn't have a choice, I mean, I didn't want the lights to be turned off, the utilities, the hair salons, they need utilities to do hair, they would have been out of work. They have leases that state their utilities are included in their rent, so I didn't want them to not be able to function and not earn income and, and lose tenants and money

because I didn't know when Mr. Twitty was going to take that money and apply it to the bills because he wasn't paying any bills, I was still paying the bills.

THE COURT: And you were paying it with rent money from the tenants?

MS. JONES: The tenants? Yes. They deposited their rent money, and I paid the utilities.

THE COURT: Alright. So you're admitting that not all rent payments were turned over to the receiver, correct?

MS. JONES: The last three months, October, November, and December, that rent money that was Salon Proz, LLC rent money, that was paid to the receiver. The only month that, January was when I paid the utilities with the rent money that I collected to keep the utilities on, January. December, we all paid Mr. Twitty rent. November, we all paid Mr. Twitty rent. Salon Proz, Office Suites, and The Event Hall. October, we all paid Mr. Twitty rent. I didn't meet Mr. Twitty until August, the end of August, after the bankruptcy case. I went to his office, introduced myself and asked him what did he need from me, and that's when I gave him everything he asked of me. And so, you know, he didn't, when I turned everything over to him, when he did not pay the bills then that's when I stepped in and paid them to stop the building from being shut down. Because the hair salon, they need electricity to do hair, they need water to do hair, so I felt like I didn't have a choice if he, I felt like I was being forced to do it, you know, if I didn't do it, then we would have just been shut down, everybody would have just been shut down completely.

THE COURT: Alright. Do you have documentation to show all of these various bills, utilities or otherwise that you paid with rent money? Do you have proof of that?

MS. JONES: Yes, Your Honor.

THE COURT: Okay. Have you provided that to, to Mr. Radeker?

MS. JONES: Yes, Your Honor.

THE COURT: Okay. Is that in the packet of stuff?

MR. RADEKER: That's correct, it's in those exhibits that are filed with her affidavit, Your Honor.

THE COURT: Okay. Alright.

...

THE COURT: I understand. How about keys? Mr. Twitty said he has one key.

MS. JONES: I gave him Mr. Twitty a master key. When he came to the building, I went to my car, I keep a master key in my car, and I gave him my spare master key. And then, I guess, months later he told me that he couldn't get in and he needed additional keys. And I was out of state, I work out of state, so I told him that when I got back in town, you know, I'll see whatever it was that he needed in addition to that. But I did give him my master key to the building which opens the Salon Proz side of doors and The Event Hall side of doors. So I'm not sure why he couldn't get in.

THE COURT: How about bank records, looking at the list of things, documents related to the bank accounts? How about, have you provided any bank account records?

MS. JONES: Salon Proz does not have a bank account during bankruptcy, I was ordered to close it.

THE COURT: I realize bankruptcy was filed, but it was soon thereafter dismissed, so I don't think necessarily bankruptcy should even factor into our discussion.

MS. JONES: Salon Proz doesn't have a bank account.

THE COURT: There are no bank accounts for anything related to this property?

MS. JONES: For Salon Proz, no. Only the account that was opened during bankruptcy, in possession, I think that's what it means.

(R. p. 186 ln. 7 through p. 190 ln. 21, p. 192 ln. 9 through p. 193 ln. 9.)

The following exchange between counsel and the court also occurred during Jones' testimony:

MR. MCGEE: Your Honor, if I could, just a point of clarification, I'm not going to address anything with her, but the reason that there's some confusion, I feel, is that she keeps saying that the rent that was received from tenants of Salon Proz, LLC. So there are two other LLCs that are renting, subleasing -

THE COURT: Right.

MR. MCGEE: --- at this property.

THE COURT: Right.

MR. MCGEE: And Judge Lee's order specifically states it's not tenants of Salon Proz that have to turn this over. Judge Lee's order says that Mr. Twitty's theap pointed receiver to take charge of the real property

THE COURT: Right.

MR. MCGEE: --- all of it. The receiver is to take charge including the building, the receiver is to maintain all keys and to collect all rents from everybody. So again, the church for example that the pastor that was here, he is not a Salon Proz tenant, he is a tenant of one of Ms. Jones' other LLCs at the subject property. They pay \$4,000.00 a month in rent, that has not been given or was not given between October of 2020 and Your Honor's order. It appears that the position that she's taking including in her affidavit is that only the tenants of Salon Proz, LLC are subject to this receivership and that's, I think, causing some of the, the disconnect here. So I apologize for interrupting.

THE COURT: That's fine. How about keys? Mr. Twitty says he has one key. How about keys?

MR. RADEKER: Your Honor, if I may, while we're mixing up argument and testimony, if I may speak to something. The Event Hall, LLC and Office Suites, LLC are not parties to this action and couldn't have been ordered to turn over anything. It's Salon Proz's rents that are ordered to be turned over, and the order can say that everyone in the world is, must turn their rent over to Mr. Twitty, but everyone in the world isn't a party to the case, only Salon Proz.

(R. p. 190 ln. 22 through p. 192 ln. 8.)

Salon Proz argued against the imposition of any sanctions. (R. p. 194 ln. 12 through p. 196 ln. 8.) Salon Proz also moved to terminate the receivership. (R. p. 195 ln. 1-2.)

Following the hearing, SCCB filed an affidavit of its attorney as to attorneys' fees and costs and an affidavit of Twitty in which Twitty stated fees and costs he took the position that he had incurred. (R. pp. 286-91.)

The court issued an order on March 22, 2022, that ruled as follows:

1. That the Defendant, Salon Proz, LLC., and its managing partner, Yvonne Jones, have willfully failed to comply with the above two Orders. Because there has not been a filing and service of a Rule to Show Cause, this Court is not going to make a finding of contempt but will sanction the Defendant and its managing partner for non-compliance of the above two Orders. The sanctions imposed is that the Defendant, Salon Proz, LLC., and its managing partner, Yvonne Jones, are jointly and individually liable for the payment of attorney's fees/costs, in the amount of \$8,531.57 and payment of receiver fees of \$10,292.00. These fees are to be paid within forty-five (45) days from the date of this Order;
2. That on the issue of granting Plaintiff's request to strike the Counterclaims from the Answer, the Court requests that Plaintiff's counsel submit a proposed Order for the Court's consideration (Note: The Court has not decided for sure to grant this request notwithstanding what the Court ruled from the Bench);
3. That this case is referred to the Richland County Master-In-Equity for hearing and disposition as soon as possible;
4. That all rental payments from this date forward shall be paid to the Receiver and there shall be no interference by the Defendant and its managing partner;
5. That if the Defendant and its managing partner has collected any rent since the hearing of February 8, 2022 then the same shall be reimbursed to the Receiver within fifteen (15) days from the date of this Order;
6. That refinancing is encouraged.

(R. pp. 2-3.)

A week later, the court issued an order dismissing and striking Salon Proz's counterclaims with prejudice. (R. p. 8.) That order found that both Salon Proz and Jones were in contempt of court for willfully failing to comply with court orders. (R. p. 7.) That order concluded as follows:

In the case at bar, this Court finds that Defendant Salon Proz, LLC and its managing partner, Yvonne Jones, have willfully failed or refused to comply with the Order of Appointment and RTSC Order. This finding is consistent with prior rulings of this Court. The continued failure or refusal to comply with the orders is sufficient to justify the striking of Defendant Salon Proz, LLC's counterclaims against the Plaintiff. This case has been pending for nearly 11 years and no mortgage payments have been made in that time. Defendant has had ample opportunity to comply with this Court's orders.

Defendant's actions or inaction has caused Plaintiff prejudice by hindering its fundamental ability to defend against the counterclaims. Moreover, Plaintiff has had to expend substantial time, fees, and costs to seek Defendant's compliance with the Court Orders. Plaintiff has proven that court orders and awards of fees and costs are insufficient remedies for Defendant's actions.

(R. pp. 7-8.)

Salon Proz moved for reconsideration of both these orders. (R. pp. 133-38.) Jones, Office Suites, and The Event Hall "join[ed] in this motion to echo it and to note that this court had no jurisdiction over them and that the court lacked the power or authority to issue any orders against them." (R. p. 138.) The court denied that motion. (R. pp. 10-11.) This appeal followed.

STATEMENT OF FACTS

As shown by the affidavit testimony and live testimony quoted above, the receiver was loose about his demands from Salon Proz, which lulled Salon Proz into believing it had satisfied the receiver's requests, and the receiver was reckless in his management of the property he was charged to maintain. Out of desperation – out of the business equivalent of taking the only option to stay alive – Salon Proz violated orders and collected rent in order to prevent the termination of utilities necessary for the operation of its tenants' businesses. That is not contempt, nor is it conduct that merits sanctions. For Salon Proz's efforts to survive –

just survive – the circuit court issued sweeping sanctions against it. (R. pp. 2-3, 8.) The lower court doubled down on its harshness by sanctioning Salon Proz for failing to turn over rents collected owed to and collected by non-party entities and by making Jones, also a non-party, personally liable for sanctions. (R. p. 2.)

STANDARD OF REVIEW

When reviewing a judge’s order of sanctions, the appellate court takes its own view of the facts. Where the appellate court agrees with the trial court’s findings of fact, it reviews the decision to award sanctions, as well as the terms of those sanctions, under an abuse of discretion standard. An abuse of discretion may be found if the trial court’s conclusions lack reasonable factual support.

Ex parte Bon Secours–St. Francis Xavier Hosp. Inc., 393 S.C. 590, 597, 713 S.E.2d 624, 628 (2011).

“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 court’s exercise of personal jurisdiction over a party will not be disturbed on appeal unless wholly unsupported by the evidence or 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).

A receiver may be removed for good cause. Faust v. Bank of Brunson, 96 S.C. 411, 81 S.E. 7, 10 (1914).

ARGUMENT

I. The lower court had no jurisdiction over Jones, The Event Hall, LLC, or Office Suites, LLC.

The lower court lacked personal jurisdiction over Jones, The Event Hall, and Office Suites. (R. p. 135, p. 192 ln. 1-8.) “A court usually obtains personal jurisdiction by the service of the summons and complaint.” Stearns Bank Nat’l Ass’n v. Glenwood Falls, LP, 373 S.C. 331, 644 S.E.2d 793, 796 (Ct. App. 2007). It is also possible to obtain jurisdiction over a non-party, usually for a limited purpose, through the issuance and service of a rule to show cause. Ex parte S.C. Dept. of Revenue, 350 S.C. at 407-08. Here, neither Jones, nor The Event Hall, nor Office Suites was ever joined as a party through the service of a summons, nor was any rule to show cause directed at any of them. (R. pp. 2, 24-33, 101-06.)

“Without jurisdiction, a court cannot proceed at all in any cause[,]” and a court without personal jurisdiction over a party cannot issue an order that affects that party’s rights. Limehouse v. Hulsey, 404 S.C. 93, 104, 744 S.E.2d 566, 572 (2013). “A judgment is void if a court acts without personal jurisdiction.” BB&T v. Taylor, 369 S.C. 548, 551, 633 S.E.2d 501, 503 (2006).

Jones could not have violated an order in this case; she was never ordered to do anything. Limehouse, 404 S.C. at 104; BB&T, 369 S.C. at 551. It is impossible for her to have violated, willfully or otherwise, orders that were never directed to her. Limehouse, 404 S.C. at 104; BB&T, 369 S.C. at 551.

Similarly, regardless of what the order appointing a receiver stated, the circuit court was without the ability to affect non-parties The Event Hall and Office Suites’ right to collect rent from their tenants. (R. pp. 12-15, 138, p. 192 ln. 1-8.) Salon Proz leases to tenants, two of which are The Event Hall and Office Suites. (R. p. 187 ln. 7-11, p. 218.) The Event Hall

and Office Suites have their own tenants under subleases. (R. p. 187, pp. 218, 222-31.) Under South Carolina law, “upon the sublease of property, the sublessor is, in legal effect, the landlord and the sublessee the tenant,” with the sublessee’s rent due to the sublessor, not to the sublessor’s landlord. Diminich v. 2001 Enterprises, Inc., 292 S.C. 141, 145 n.1, 355 S.E.2d 275,277 n. 1 (Ct. App. 1986). The Event Hall and Office Suites are Salon Proz’s tenants, and the order appointing the receiver authorizes the receiver to collect the rent they owe to Salon Proz. (R. pp. 12-15.) That order does not and could not have taken from The Event Hall and Office Suites the right to collect rent from their *own* tenants (e.g., Midtown Fellowship Church), regardless of what the order stated. See Limehouse, 404 S.C. at 104; BB&T, 369 S.C. at 551. The failure of The Event Hall and Office Suites to pay the rent they were owed by their tenants to the receiver could not have constituted a violation by Salon Proz of any order in this case. See Limehouse, 404 S.C. at 104; BB&T, 369 S.C. at 551.

It was reversible error for the lower court to make any orders against Jones. It was reversible error for the lower court to issue sanctions on the basis that Office Suites and The Event Hall – entities that have never been made parties to this case or otherwise subjected to jurisdiction in it – did not pay the rent they received from their tenants to the receiver. The lower court’s orders in this regard are “wholly unsupported by the evidence [and] manifestly influenced or controlled by error of law.” Ex parte S.C. Dept. of Revenue, 350 S.C. at 407. This court should reverse the decisions below, grounded as they are in so fundamental an error as the purported exercise of jurisdiction over these non-parties.

II. There was no procedural basis to impose sanctions here.

The orders subject of this appeal are internally inconsistent. (R. p. 136.) One expressly decides that the proper procedure for contempt sanctions was not followed and declines to

impose sanctions on a contempt basis. (R. pp. 2, 136.) The other, on the basis of contempt, sanctions Salon Proz by striking its counterclaim. (R. pp. 7-8, 136.)

In its first order, the circuit court was correct to rule that the procedural requirements for contempt proceedings had not been met, which precluded sanctioning Salon Proz on a contempt basis. (R. p. 2.) The contempt that SCCB contended occurred was constructive contempt, defined as contempt occurring outside the presence of the court, as opposed to in the courtroom or otherwise in the presence of the court. Toyota of Florence, Inc. v. Lynch, 314 S.C. 257, 267, 442 S.E.2d 611, 617 (1994). Constructive contempt proceedings must be brought by a rule to show cause based upon an affidavit or verified petition. Id. Failure of the proceedings to be brought in this way “is a fatal defect.” Id. Here, there was no verified petition, SCCB’s motion was not filed with an affidavit, and no rule to show cause ever issued. (R. pp. 101-32, p. 194 ln. 12-16.) Salon Proz could not be held in contempt.

As noted in Salon Proz’ motion to reconsider, “[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.) Indeed, SCCB sought sanctions only for violation of court orders. (R. pp. 101-06.) There was indeed no other possible basis for sanctions other than contempt. See State ex rel. McLeod v. Hite, 272 S.C. 303, 251 S.E.2d 746 (1979) (nature of contempt sanctions is to ensure enforcement of judgments); State v. Goff, 228 S.C. 17, 88 S.E.2d 788 (1955) (same). As the requirements for contempt sanctions were not met, contempt was taken off the table as an available basis for sanctions. Toyota of Florence, 314 S.C. at 267.

The lower court committed reversible error in issuing sanctions here. The lower court's decision is based on an error of law, and this court should reverse. Henderson, 316 S.C. at 173.

III. The were no grounds shown for sanctions of the ordered character or harshness.

“It is well settled that contempt results from willful disobedience of a court order; and before a person may be held in contempt, the record must be clear and specific as to acts or conduct upon which the contempt is based.” State v. Bevilacqua, 316 S.C. 122, 129, 447 S.E.2d 213, 217 (Ct. App. 1994) (citing Whetstone v. Whetstone, 309 S.C. 227, 420 S.E.2d 877 (Ct. App. 1992)).

There is no basis for any sanction here. The lower court did not take into account the evidence that was before it. Any noncompliance with previous orders by Salon Proz arose from desperation at the receiver's failure to meet his responsibilities and from the receiver lulling Salon Proz's operating member into believing that Salon Proz had done what was needed to comply or that strict compliance would not be required. (R. p. 182 ln. 1 through p. 193 ln. 9, pp. 218-85.)

Jones provided detailed testimony showing efforts to comply with the orders and that disobedience of the orders was undertaken only as a last resort to prevent collapse of the business altogether when Twitty failed to pay the utilities. (R. p. 182 ln. 1 through p. 193 ln. 9, pp. 218-85.) Twitty's testimony, on the other hand, was vague at best and unsupported by documentation. (R. p. 172 ln. 1 through p. 181 ln. 1, pp. 216-17.) In fact, Twitty's affidavit and live testimony did not supply the court with the facts it found. Most of the lower court's findings came from what SCCB's counsel said, not what any evidence showed. (R. pp. 1-2, 4-8.) Indeed, the court at one point noted that “counsel for [SCCB] emailed the Court” after

the hearing with factual assertions, and the court took those assertions as fact. (R. p. 2 n. 1.) To take these representations as fact was error. SCCB's counsel did not offer testimony. (R. pp. 101-32, 162-197.) Arguments of counsel are not evidence. 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). Indeed, SCCB's predilection to overstate and misstate facts in this case is epitomized by its lawyer's misrepresentation of communications with a witness, Pastor Frederick. (R. p. 146 ln. 6-15, p. 167 ln. 8 through p. 169 ln. 6.) There are good reasons why arguments of counsel are not evidence.

The record shows no willful disobedience of any order, no bad faith, and no ill intention on the part of Salon Proz. (R. pp. 134, 162-97, 216-21.) Acts done in desperation to save a business because of a receiver's failure to perform his duties do not constitute contempt, willful disobedience of an order, or sanctionable conduct. Cf. Bevilacqua, 316 S.C. at 129.

But even if some sanction were proper, the sanctions imposed here would still be inappropriately harsh. (R. p. 136.) The record lacks support for the imposition of a sanction as harsh as dismissal of the counterclaims, let alone dismissal with prejudice *and* payment of fees and costs. (R. p. 136.)

Our Supreme Court has observed that where a "sanction would be tantamount to granting a judgment by default, the moving party must show bad faith, willful disobedience or gross indifference to its rights to justify the sanction." Davis v. Parkview Apts., 409 S.C. 266, 762 S.E.2d 535, 544 (2014) (quoting Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co., 334 S.C. 193, 198, 511 S.E.2d 716, 718 (Ct. App. 1999)). While SCCB's claim will

remain pending and a default judgment was not rendered, the court's decision to strike and dismiss Salon Proz's counterclaims is somewhat similar in that it will end Salon Proz's counterclaims without a trial on their merits. (R. pp. 8, 136.) The Court of Appeals has observed that "[a] sanction that results in a default or dismissal is a severe punishment that should be imposed only if there is some showing of *bad faith, willful disobedience, or gross indifference* to the rights of the adverse party." Rickerson v. Karl, 412 S.C. 215, 770 S.E.2d 767, 770 (Ct. App. 2015) (emphasis in original). No bad faith, willful disobedience, or gross indifference to SCCB's rights was shown here. (R. p. 136.) Again, Salon Proz violated the order and directed its tenants to pay their rent to Salon Proz rather than Twitty because Twitty had sat on ample funds to pay the property's utility bills and had declined to pay them, frightening Salon Proz that strict compliance with the orders would result in collapse of the business altogether. (R. pp. 134-35, 136.)

The lower court made the conclusion – without supporting findings and without support in the record – that failure to comply with the receivership orders hindered SCCB's ability to defend against Salon Proz's counterclaims. (R. pp. 8, 137-38.) No such hindrance occurred, and none was shown. (R. pp. 139-98, 216-85.) It makes no logical sense that any noncompliance with the orders at issue would have affected SCCB's ability to defend against the counterclaims in any way. (R. pp. 137-38.) The counterclaims are not about the matters subject of the receivership orders, and compliance with the orders would not help or do anything to maintain SCCB's ability to meet the counterclaims on their merits. (R. pp. 52-56.) Notwithstanding the circuit court's conclusory assertion, noncompliance with the orders did not affect the defense of the counterclaims in any way, and the sanction of dismissing and

striking the counterclaims was anything but tailored to the conduct that was before the court. (R. p. 8.)

The closest that the lower court came to articulating a basis for prejudice does not come very close at all. The court in both of its orders stated that the case had been pending for nearly 11 years and that no mortgage payments had been made. (R. pp. 2, 7-8.) This case has indeed been pending for a long time. Salon Proz did not cause that. Indeed, at every turn, Salon Proz has cooperated in and sometimes led the charge to get this case on trial and motions dockets. (R. p. 137, p. 150 ln. 1-10.)

But, moreover, the length of time the case has been pending has no logical connection to the issues that were before the court on SCCB's motion for sanctions. (R. pp. 101-06.) Salon Proz not making mortgage payments is not a permissible basis for sanctions. The lower court's orders assume, wrongly, that SCCB is entitled to victory in this case. (R. pp. 1-9, 137.) Whether SCCB or Salon Proz has the right to prevail remains to be proven. The circuit court did what is unfortunately quite common in our legal system: it assumed that, since a bank brought a foreclosure action, it must be entitled to win it. (R. pp. 1-9, 137.) This is not the law. In accordance with the general principle that in a civil action the plaintiff bears the burden of proof, it is incumbent upon the party seeking foreclosure of a mortgage to prove all the elements of its case. See Baugh & Sons Co. v. Graham, 150 S.C. 398, 401, 148 S.E. 220 (1926) (plaintiff bears burden of proof in civil case); Paramount Fund, Inc. v. Cusaac, 282 S.C. 497, 499, 319 S.E.2d 354, 355 (Ct. App. 1984) (“[i]n an action to foreclose a mortgage on real property, the mortgagee has the burden of proving a disputed mortgage by the preponderance of the evidence”). The lower court, it seems, sanctioned Salon Proz for asserting counterclaims at all, for not lying down and taking whatever SCCB would have the courts do to Salon Proz.

The lower court erred reversibly in issuing these sanctions, and this court should reverse the lower court.

IV. Reference to the master-in-equity was error.

The lower court referred the case to the master-in-equity. (R. p. 3.) The lower court seemingly did so as a sanction of some sort, as a motion to impose sanctions against Salon Proz was all that SCCB had put before it. (R. pp. 3, 101-06.) As discussed above, the long pendency of the case provided no basis for this sort of ruling.

This action should not have been referred to the master-in-equity, who cannot conduct jury trials. Rule 53, SCRCp. Reference to a master-in-equity does not serve as a punishment; rather, it is only appropriate where there is no right to a jury trial or none has been demanded. See Rule 53, SCRCp. Here, this case was referred to the master-in-equity at a time when compulsory at-law counterclaims were still pending, and this was error. Salon Proz, 420 S.C. at 97. This court has already held that Salon Proz is entitled to a jury trial on at least one of its counterclaims. Id.

As the counterclaims never should have been stricken or dismissed, this is not a harmless error that comes out in the wash. Reference to the master-in-equity was reversible error, and this court should reverse it.

V. The lower court should have granted the motion to terminate the receivership.

Salon Proz moved to terminate Twitty's receivership. (R. p. 195 ln. 1-2.) That motion should have been granted. (R. pp. 134-35.) The receiver failed to do his job. That is what the evidence shows. Twitty's inattention and misleading conduct caused Salon Proz to believe it had sufficiently complied with orders, as discussed above, only to discover later that SCCB took a different position. Twitty collected more than enough rent to cover the utilities for Salon

Proz's building but, inexplicably, failed to pay any of that money to keep the water and power on. (R. p. 172 ln. 2 through p. 176 ln. 4.) Twitty's conduct has amply demonstrated that he is not an appropriate person to serve as receiver in this case. Were it not for the rescuing actions of Salon Proz and Yvonne Jones, utility service (such as power and water) to the property would have been shut off. The receiver undertook to threaten with eviction tenants who had paid their rent. (R. pp. 220, 256.) Twitty should not serve as receiver for this property. A receiver may be removed for good cause, Faust, 96 S.C. 411, 81 S.E. at 10, and good cause of removal of the receiver was shown here.

CONCLUSION

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

Respectfully submitted,

/s/ Andrew S. Radeker
Andrew S. Radeker
S.C. Bar No. 73743
Harrison, Radeker & Smith, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
drew@harrisonfirm.com
Attorney for Appellant

June 19, 2023

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

Jun 19 2023

SC 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.

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

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

Respectfully submitted,

/s/ Andrew S. Radeker
Andrew S. Radeker
S.C. Bar No. 73743
Harrison, Radeker & Smith, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
drew@harrisonfirm.com
Attorney for Appellant

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

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.

Thomas William McGee, Esq., at billy.mcgee@nelsonmullins.com

/s/ Andrew S. Radeker
Andrew S. Radeker
S.C. Bar No. 73743
Attorney for Appellant

June 19, 2023