

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr., Master in Equity

Case No. 2013-CP-23-03075

Sherman Financial Group, LLC Appellant,

v.

FM FRI Greenville, LLC Respondent.

RESPONDENT'S MEMORANDUM OF LAW
IN SUPPORT OF MOTION TO DISMISS APPEAL

Cynthia Buck Brown, SCB 66172
Calvin T. Vick, Jr., SCB 68187
R. Patrick Smith, SCB 68270
HARPER, LAMBERT & BROWN, P.A.
420 East Park Avenue, Suite 220 (29601)
PO Box 908
Greenville, South Carolina 29602
PH: (864) 235-5535
FAX: (864) 235-6866
cbrown@hlblegal.com
tvick@hlblegal.com
psmith@hlblegal.com

Attorneys for Respondent,
FM FRI Greenville, LLC

Pursuant to Rule 240, SCACR, FM FRI Greenville, LLC, Respondent/Landlord, hereby moves that the above-captioned appeal of Sherman Financial Group, LLC, the Appellant/Tenant, be dismissed for lack of jurisdiction. The Circuit Court's Orders of November 13, 2013 and December 23, 2013, which are the subject of this appeal, are interlocutory orders and are not subject to immediate appeal. The Respondent/Landlord respectfully requests that this Court dismiss this appeal and remand so that the Circuit Court can proceed with the proper administration of this lawsuit.

FACTUAL BACKGROUND

The Notice of Appeal filed in this matter concerns two orders arising out of a lawsuit filed in the Court of Common Pleas for Greenville County by Appellant/Tenant for breach of contract, breach of implied covenant of quiet enjoyment, *quantum meruit*, conversion, violation of the South Carolina Unfair Trade Practices Act, and a claim for injunctive relief. At issue is the interpretation of a certain lease (the "Lease¹"), Respondent/Landlord's right to rent and damages, and Appellant/Tenant's right to a certain unapplied tenant allowance² under the Lease. The Lease requires, among other things, that monthly rent payments be made by Appellant/Tenant to Respondent/Landlord during its term, which is now expired. Specifically, Appellant/Tenant agreed to pay, without any notice, demand, offset or reduction whatsoever, the rent to Respondent/Landlord in equal monthly installments, in advance on the first day of each calendar month, during the term of the Lease. The Lease explicitly mandates that the Appellant/Tenant's duty to pay rent is not subject to offset. See pertinent sections of

¹ The Lease at issue is a May 15, 2003 lease agreement, as amended from time to time, between Appellant/Tenant and Respondent/Landlord's predecessor, DD Greenville, LLC. Respondent/Landlord subsequently acquired the building and assumed the rights of DD Greenville, LLC and its successors under the Lease, as provided in certain agreements pertaining to such transactions.

² Appellant/Tenant never complied with the Lease's condition(s) precedent for recovery of said allowance, and its alleged rights thereto, never exercised, have long expired.

Lease, attached hereto as **Exhibit 1**, § 4.1, p. 12, p. 17 hereto. Failure to pay rent is an event of default. See Exhibit 1, § 9.1(1), p. 54, p. 18 hereto.

On June 11, 2013, Appellant/Tenant filed a motion in the Circuit Court for leave to deposit certain rents with the Circuit Court. Appellant/Tenant's motion indicated that Appellant/Tenant sought leave to deposit with the Circuit Court the amount of its monthly rent obligation until the disputes at issue in the litigation could be resolved. See Motion³, attached hereto as **Exhibit 3**. As this Court will note, Appellant/Tenant contended as part of said motion that it had offset rights, which it had expressly relinquished in the Lease. See Exhibit 3, p. 2, p. 36 hereto (“[c]ontinuing to pay Landlord rent at the same time Landlord owes Tenant over one million dollars [presumably a reference to Appellant/Tenant's unapplied tenant allowance claim], and may be unable to pay Tenant the amounts owed, would prejudice Tenant and is not in the interest of justice.”).

At the hearing related to such motion, Appellant/Tenant's counsel conceded that certain rents were due under the Lease from the Appellant/Tenant to the Respondent/Landlord but argued that the Circuit Court had the discretion to direct that such rents be paid into Circuit Court, given the issues presented in the lawsuit. Appellant/Tenant asserted that, among other things, its alleged right to the unapplied tenant allowance, which is one of several ultimate questions to be resolved at trial or summary judgment, somehow deprived Respondent/Landlord of its bargained-for right to rents, immune from offset, during the pendency of this suit. Such position was, and continues to be, in explicit contravention of the Lease. See Exhibit 1, § 4.1, p. 12, p. 17

³ As of June 11, 2013, Appellant/Tenant was in default under the Lease for, *inter alia*, failure to timely pay rent. As such, its May 31, 2013 Verified Complaint was no longer accurate. See Verified Complaint, attached hereto as **Exhibit 2**, ¶ 12, p. 24 hereto (“Tenant is not, and has never been, in default.”).

hereto. Respondent/Landlord argued that the rents should be paid directly to Respondent/Landlord during the pendency of this suit, based on, *inter alia*, the Lease, the common law, and S.C. Code Ann. § 27-37-155.

On July 31, 2013, the Circuit Court entered an Order agreeing with Respondent/Landlord and directing Appellant/Tenant to “bring the rent current by making the full payment of both June and July [2013] rent to the Defendant in accordance with the terms of the lease.” See July 31, 2013 Order, attached hereto as **Exhibit 4**⁴, p. 39 hereto. The Order found that “the specific terms of the lease require payment.” The June and July 2013 rent represented the rent due as of July 31, 2013. Appellant/Tenant filed a motion to reconsider. The Circuit Court denied such motion by way of Order dated August 23, 2013. In said Order, the Circuit Court remarked that “[t]he arguments advanced in [Appellant/Tenant’s] Motion to Reconsider suggest that the [Appellant/Tenant] has convoluted and confused the meaning of the Court’s previous Order... The [Appellant/Tenant’s] Motion for Reconsideration is thereby DENIED.” See August 23, 2013 Order, attached hereto as **Exhibit 5**, p. 42 hereto. The Circuit Court indicated that it “made no rulings with respect to the merits of the case” and that the “Order is without prejudice to any party with respect to allocations of an unpaid allowance or a breach under the contract.” See **Exhibit 5**, p. 42 hereto.

On or about September 4, 2013, Respondent/Landlord filed a Motion for Contempt and Sanctions. See Motion, attached hereto as **Exhibit 6**. As a result of said motion, the Circuit Court entered that certain Order dated November 13, 2013, which is one of the orders currently under appeal. A copy of said Order is attached hereto as

⁴ Respondent/Landlord publishes said Order to this Court for review exclusively for purposes of the instant motion and reserves all rights with regard to Appellant/Tenant’s failure to appeal said Order.

Exhibit 7. As this Court will note, the Circuit Court utilized the law of the case doctrine and simply enforced a prior order. The Circuit Court ruled that Appellant/Tenant was required to make payment of June and July rent to Respondent/Landlord in the amount of \$313,757.86 on or before November 15, 2013. See Exhibit 7, p. 3, p. 53 hereto. The Circuit Court expressly held that “[a]ll other issues related to [Respondent/Landlord’s] motion for contempt and sanctions, including [Respondent/Landlord’s] alleged right to additional months’ rent, are held in abeyance and preserved.” See Exhibit 7, p. 3, p. 53 hereto.

On or about November 15, 2013, Appellant/Tenant filed a motion to reconsider the November 13, 2013 Order, which motion was denied by order dated December 23, 2013. The December 23, 2013 Order affirmed the November 13, 2013 Order based on, *inter alia*, the law of the case doctrine and S.C. Code Ann. § 27-37-155. As the Circuit Court expressly noted, “...there is no contempt issue before the Court at this time nor has there been a finding of contempt by the Court relative to [Appellant/Tenant’s] continued nonpayment of rent as directed by Judge Stilwell in his Order filed July 31, 2013. Rather, [Appellant/Tenant] argues the Court exceeded its authority by stating that it could be held in contempt for failure to comply with orders of the Court. Such is simply not the law.” Order, attached hereto as **Exhibit 8**, p. 3, p. 58 hereto.

Appellant/Tenant asks this Court to ignore established precedent and allow an immediate appeal of the Circuit Court’s interlocutory orders, which by their express terms made no rulings with respect to the merits of the case and made no findings whatsoever as to contempt. Such appeal is impermissible and this matter should be immediately remanded to the Circuit Court.

ARGUMENT AND CITATION OF AUTHORITY

I. The Subject Orders Are Interlocutory and Not Immediately Appealable.

The right of appeal arises from and is controlled by statutory law. Hagood v. Sommerville, 362 S.C. 191, 194-95, 607 S.E.2d 707, 708 (2005). An appeal ordinarily may be pursued only after a party has obtained a final judgment. Id. The determination of whether a party may immediately appeal an order issued before or during trial is governed by S.C. Code Ann. § 14-3-330, and an order generally must fall into one of several categories set forth in that statute in order to be immediately appealable. Id. S.C. Code Ann. § 14-3-330 indicates in pertinent part that appellate jurisdiction for correction of errors of law exists for (1) final judgments, (2) intermediate judgments involving the merits, and (3) orders affecting a substantial right. The Orders under appeal fall into none of such categories and this appeal should be immediately remanded.

A. The Orders appealed are not final.

South Carolina adheres to the final judgment rule. Accordingly, with certain exceptions, an appeal lies only from a final judgment. Brunson v. Am. Koyo Bearings, 367 S.C. 161, 165, 623 S.E.2d 870, 872 (Ct. App. 2005). The Orders appealed are not final, by their express terms. The Orders appealed simply made an award of rent for several months, based on, *inter alia*, the law of the case doctrine, and arose out of prior orders that simply applied the express terms of the Lease. Appeal may only be taken, as provided by law, from any final judgment, appealable order or decision. Rule 201(a), SCACR; see also Rule 72, SCRCR.

B. The Orders do not involve the merits.

“To involve the merits,” pursuant to S.C. Code Ann. § 14–3–330(1), the order must finally determine some substantial matter forming the whole or part of some cause of action or defense. Tatnall v. Gardner, 350 S.C. 135, 138, 564 S.E.2d 377, 379 (Ct. App. 2002), internal citations omitted. An order which does not put a final end to the case, nor establish any principle which will finally affect the merits of the case, nor deprive the party of any benefit which he may have at a final hearing, ought to be considered an interlocutory order, from which no appeal ought to be allowed. Id., internal citations omitted. The Orders at issue, by their explicit terms, do not finally determine some substantial matter, do not end the case and will not affect the Appellant/Tenant’s ability to put on its case as to the unapplied tenant allowance or any other issues in dispute. The Orders are without prejudice as to all claims, counterclaims, and defenses. Accordingly, the Orders do not involve the merits and should be dismissed.

C. The Orders do not involve a substantial right.

An order affects a substantial right and is immediately appealable when it (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action. S.C. Code Ann. § 14-3-330(2). Pursuant to S.C. Code Ann. § 14–3–330(2), this Court may not review an order that does not prevent a judgment from being rendered in the action, and from which an appellant can seek review in any appeal from the final judgment. An order which does not finally end a case or prevent a final judgment from which a party may seek appellate review usually is considered an interlocutory order from which no immediate appeal is allowed.

Hagood v. Sommerville, 362 S.C. 191, 195, 607 S.E.2d 707, 709 (2005). The Orders under appeal do not end the case, do not prevent a final judgment, and could in any event be appealed after such time as an appealable order is entered by the Circuit Court. Accordingly, the Orders under appeal do not involve a substantial right and are subject to dismissal.

D. Dismissal and remand will prevent a piecemeal appeal by Appellant/Tenant.

Further, in this case, dismissal of the Appellant/Tenant's instant appeal would also prevent and discourage the Appellant/Tenant from appealing the orders of the Circuit Court in a piecemeal fashion. For example, if this Court were to immediately substantively review the interlocutory Orders under appeal, affirm them, and remand the matter for disposition, the Appellant/Tenant may, and Respondent/Landlord submits will, still refuse to comply with the November 13, 2013 order requiring the payment of certain rent. The Circuit Court would then presumably enter an order imposing contempt sanctions. The Appellant/Tenant could foreseeably then file a second appeal, complaining that the Circuit Court erred in some manner in imposing the sanctions. This Court would then have to hear the second appeal. Such piecemeal litigation and appeals would not promote judicial economy.

II. Appellant/Tenant Has an Adequate Remedy to Appeal the Order After the Circuit Court Enters a Final, Appealable Order

The South Carolina Supreme Court has recognized that a party compelled to engage in certain actions in an order may preserve its claim of error by refusing to comply with the order, and appealing the contempt order that results from its failure to comply. On January 9, 2014, Respondent/Landlord filed a motion in the Circuit Court

seeking a contempt order based on the November 13, 2013 and December 23, 2013 Orders. See Motion, attached hereto as **Exhibit 9**. As of this writing, the Circuit Court has held such matter in abeyance, based on the Appellant/Tenant's filing of the instant Notice of Appeal, so that this Court can determine whether it will hear the instant appeal, i.e., whether the Orders under appeal are final. The future order that the Circuit Court has stated it will likely enter in this case based on Respondent/Landlord's January 9, 2014 Motion will be a civil contempt order, which will likely result in an appeal. See Appellant/Tenant's counsel's January 28, 2014 letter to Circuit Court memorializing certain of the Circuit Court's present inclinations about future rulings, attached hereto as **Exhibit 10**, p. 84 hereto ("...we understand that ... you are also presently inclined to find Sherman in contempt...").

Instead of appealing an order immediately, a party has two alternatives. It may either comply with the order, or refuse to comply with the order and appeal after it is held in contempt for its failure to comply. This is the same rule applied by the federal courts. See Ex parte Whetstone, 289 S.C. 580, 580, 347 S.E.2d 881, 881-82 (1986) (appeal of order directing a party to participate in discovery deemed interlocutory). Since an order actually holding a party in contempt is final in nature, it is appealable. Tucker v. Honda of S.C. Mfg., Inc., 354 S.C. 574, 577, 582 S.E.2d 405, 406-07 (2003) (citing Ex parte Whetstone).

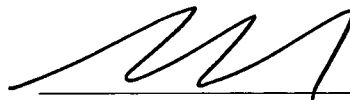
The Supreme Court has established that the Appellant/Tenant will, in fact, have an adequate remedy of appeal when and if Appellant/Tenant is actually held in contempt by the Circuit Court for failure to comply with prior orders, but the current appeal is

premature. Respondent/Landlord respectfully requests that the Court dismiss the appeal and allow this case to proceed in the ordinary course.

CONCLUSION

It is beyond dispute that the Circuit Court's November 13, 2013 and December 23, 2013 Orders are interlocutory and not immediately appealable. Though the Appellant/Tenant disagrees with the Circuit Court's holdings, the Supreme Court has clearly established the choices available to the Appellant/Tenant under these circumstances. It may choose to comply with the order to pay certain rent, or it may continue its non-compliance and appeal a final order making explicit findings as to Appellant/Tenant's contempt of court that will likely be forthcoming from the Circuit Court. The Respondent/Landlord respectfully requests that this Court dismiss the appeal, and allow the Circuit Court to proceed with the proper administration of this case.

Respectfully Submitted,



Cynthia Buck Brown, SCB 66172
Calvin T. Vick, Jr., SCB 68187
R. Patrick Smith, SCB 68270
HARPER, LAMBERT & BROWN, P.A.
420 East Park Avenue, Suite 220 (29601)
PO Box 908
Greenville, South Carolina 29602
PH: (864) 235-5535
FAX: (864) 235-6866
cbrown@hlblegal.com
tvick@hlblegal.com
psmith@hlblegal.com

Attorneys for Respondent,
FM FRI Greenville, LLC

February 4, 2014
Greenville, South Carolina