

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

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Case No. 2012-CP-10-8241

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George Giannaras as guardian and  
Conservator for Emanuel Kehagias,.....Appellant,

v.

Richard Ruth Sr. and Jane Ruth, both individually and as owners/operators of Richard  
Ruth's Bar & Grill, LLC, Adrian Lamar Smalls, and 2233 Highway 17 North, LLC

Of whom, 2233 Highway 17 North, LLC is.....Respondent.

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**INITIAL BRIEF OF RESPONDENT 2233 HIGHWAY 17 NORTH, LLC**

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**SC Court of Appeals**

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**STATEMENT OF ISSUES ON APPEAL**

1. DID THE TRIAL COURT ERR IN FINDING AND CONCLUDING THAT THERE WAS A VALID, MONTH-TO-MONTH LEASE BETWEEN THE RESPONDENT AND ITS TENANT BAR OWNER AND, AS SUCH, THE RESPONDENT HAD NO DUTY TO PROTECT PATRONS OF THE TENANT BAR FROM CRIMINAL OR TORTIOUS CONDUCT OF OTHER BAR PATRONS?
  
2. DID THE TRIAL COURT ERR IN FINDING AND CONCLUDING THAT THE APPELLANT HAD NOT OFFERED SUFFICIENT FACTUAL ALLEGATIONS TO CREATE AN ISSUE OF FACT AS TO THE EXISTENCE OF A PARTNERSHIP BETWEEN THE RESPONDENT AND ITS BAR OWNER TENANT?

**STATEMENT OF THE CASE**

This case was commenced by the filing of a Summons and Complaint in the Charleston County Court of Common Pleas on December 19, 2012. The Respondent is one of five Defendants in that lawsuit. The Appellant asserted two causes of action against the Respondent: (1) violation of S.C. Code Ann. § 61-4-580 and S.C. Code Ann. § 61-6-2220 and (2) common law negligence. The Respondent answered this Complaint stating that it had no liability under Title 61 of the South Carolina Code because the Respondent is not the holder of a license or permit to serve alcoholic beverages. The Respondent also answered by saying that, as a commercial landlord, the Respondent had no duty to protect the Appellant from criminal or tortious conduct by another patron of the bar. After twelve months of discovery and after the Appellant's deposition of the Respondent's general manager, the Respondent moved for Summary Judgment.

The matter came before the Trial Court on January 7, 2014, Judge R. Markley Dennis, Jr., presiding. Three days later, the Trial Court issued Summary Judgment for the Respondent. The Trial Court made findings and concluded that the South Carolina statutes on alcohol and beverages do not apply to the Respondent. The Trial Court also concluded that the Respondent, as a commercial landlord, has no duty to the Plaintiff to protect him from other patrons of the bar which operated on the leased, commercial premises. The Trial Court also made a finding that no partnership existed between the Respondent and its co-Defendant tenant and bar operator. The Appellant filed its Notice of Appeal on February 17, 2014.

#### **FACTS**

On September 29, 2012, Emanuel Kehagias, the person upon whose benefit this civil action was brought, was playing pool at Richard Ruth's Bar & Grill in Mt. Pleasant, South Carolina. At the conclusion of a pool game, suddenly and without warning or provocation, the other pool player Adrian Lamar Smalls hit Mr. Kehagias on the side of the head with his fist. Mr. Kehagias fell to the floor unconscious. He has not regained full consciousness since that time and is now totally disabled. The Appellant George Giannaris then filed a lawsuit against the Bar Richard Ruth's Bar & Grill, LLC, the bar owners Richard Ruth, Sr. and Jane Ruth, the assailant Adrian Lamar Small and the landlord of the bar premises which is the Respondent 2233 Highway 17 North, LLC. The Appellant has obtained a judgment against all of the Defendants except for the Respondent.

In his Statement of Facts, the Appellant states that a Mr. Warren Holliday is the owner of the leased premises. The Respondent disputes that fact. The Appellant goes on in the next sentence to say that Zeezrom Properties, LLC owns the leased premises. The Respondent also disputes that fact. The ground and building upon which the Bar is situated are owned by the Respondent 2233 Highway 17 North, LLC. The Respondent is wholly owned by a holding company Zeezrom Properties, LLC. That holding company Zeezrom is wholly owned by Warren Holliday. Mr. Holliday is elderly and in poor health. The Respondent limited liability company has, at all relevant times, been managed by Warren Holliday's son Ross Samuel Holliday, whose deposition and Affidavit are part of the Record in this case.

The Respondent had a verbal, month-to-month lease with Richard Ruth's Bar & Grill, LLC which owned and operated the bar. The Respondent collected rent from the commercial tenant on a month-to-month basis. There was no written lease between the parties. Ross Holliday, as manager of the Respondent limited liability company, was responsible for collecting the rent and negotiating any changes to the month-to-month tenancy of the bar operator.

#### **STANDARD OF REVIEW**

Summary judgment shall be rendered where there is no genuine issue of material fact. Rule 56(c) S.C.R.C.P. It is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Café Assocs., Ltd. v. Gerngross*, 305 S.C. 6, 406 S.E.2d 162 (1991). "The purpose of summary judgment is to expedite the disposition of cases which

do not require the services of a fact finder.” *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 533, 438 (2003) citing *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). The appellate court reviews the granting of summary judgment under the same standard applied by the trial court. *George v. Fabri*, 345 S.C. 440, 548 S.E.2d 868 (2001). Summary judgment shall be rendered where there is no genuine issue of material fact. Rule 56(c) S.C.R.C.P. As soon as the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot rely on mere allegations or denials contained in the pleadings. *Regions Bank v. Schmauch*, 354 S.C. 648, 582 S.E.2d 432 (Ct.App.2003). Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial. *Peterson v. West American Ins. Co.*, 336 S.C. 89, 518 S.E.2d 608 (Ct.App.1999); Rule 56(c), SCRPC.

### **ARGUMENTS**

1. THERE WAS A VALID, ENFORCEABLE, VERBAL LEASE AGREEMENT BETWEEN THE RESPONDENT AND ITS COMMERCIAL TENANT AND CO-DEFENDANT RICHARD RUTH'S BAR & GRILL, LLC.

There was a valid, enforceable, verbal commercial lease between the Respondent and its tenant and co-Defendant Richard Ruth's Bar and Grill, LLC. The manager of the Respondent limited liability company testified in deposition that the unwritten, month-to-month lease between the Respondent and its commercial tenant had existed for several years. (Ross Deposition, Pg. 70:22-25; 71:1-22). In the Affidavit submitted to the Trial Court in support of its Motion for Summary Judgment, the Respondent's non-member manager stated under oath

that there was a verbal, commercial, month-to-month lease with the tenant bar owner and the Respondent only collected monthly rental payments (Affidavit of Ross Samuel Holliday). When there is no written agreement and the landlord collects rent on a monthly basis, the relationship is deemed by statute to be a month-to-month tenancy. S.C. Code Ann. § 27-35-30 (1976). There is no requirement under South Carolina law that a commercial lease be in writing. A tenancy not to exceed one (1) year (i.e. month-to-month) may be created by oral agreement. S.C. Code Ann. § 27-35-10 (1976). Under these facts, the Respondent's co-Defendant Richard Ruth's Bar & Grill, LLC meets the definition of a "tenant" under South Carolina law. S.C. Code Ann. § 27-33-10(8) (1976). The Appellant did not offer any document, testimony or affidavit that there was any dispute between the Respondent and its commercial tenant concerning the boundary of the leased premises, the month-to-month term of the lease and the payment of rent on a monthly basis.

The Appellant argued in its Memorandum of Law Opposing the Respondent's Motion for Summary Judgment that the lease agreement between the Respondent and its commercial tenant was not valid because the Respondent's general manager was not a licensed rental property manager under South Carolina law. It is undisputed that the Respondent's general manager Ross Holliday conducted the business of the Respondent's limited liability company. The South Carolina laws governing licensure rental property managers specifically does not apply to the "rental of real estate by an unlicensed owner of the real estate..." S.C. Code Ann. § 40-57-240(1) (1976). South Carolina law provides that a

limited liability company may be managed by a non-owner manager. S.C. Code Ann. § 33-44-301(b)(1) (1996). A limited liability company, like a corporation, being a fictitious entity, can never act except through its officers, employees or servants. Chapman-Storm Lumber Corporation v. Minnesota-South Carolina Land & Timber Company 183 S.C. 31, 190 S.E. 117 (1937). There is no requirement under South Carolina laws that every individual or entity that owns real property in this State must retain the services of a licensed property manager or broker before it can rent out its own property.

2. THERE WAS NO PARTNERSHIP BETWEEN THE RESPONDENT AND ITS COMMERCIAL TENANT AND CO-DEFENDANT RICHARD RUTH'S BAR & GRILL, LLC AND THE APPELLANT HAS NOT OFFERED ANY AFFIRMATIVE EVIDENCE TO THE CONTRARY.

The Respondent pointed out to the Trial Court that the Appellant, in its pleadings, only alleged two (2) causes of action against the Respondent: (1) serving alcoholic beverages under S.C. Code Ann. § 61-4-580 (2013) and §61-6-2220 (1976) and (2) a common law negligence claim that the Respondent failed to protect third party patrons of the Bar from the tortious or criminal acts of other third-party patrons. The Appellant has abandoned that first cause of action because it did not object to dismissal of statutory claims concerning alcoholic beverages in the Motion for Summary Judgment and has not appealed that portion of the Summary Judgment issued by the Trial Court.

The Appellant's second cause of action for negligence was also dismissed on Summary Judgment. The Trial Court found that there was a valid, oral, month-to-month lease between the Respondent and its commercial tenant Richard Ruth's Bar & Grill, LLC. The Court stated "As a commercial landlord, the

moving Defendant did not have a duty to protect patrons of the commercial tenant Bar & Grill from criminal acts of third parties.” Citing Cramer v. Balcor Property Management, Inc. 312 S.C. 440, 441 S.E. 2d 317 (1994) and Jackson v. Swordfish Investments, LLC, 365 S.C. 608, 620 S.E. 2d 54 (2005).

The word “partnership” does not appear anywhere in the Appellant’s Complaint. Paragraph Seven of the Appellant’s Complaint merely alleged that the Respondent 2233 Highway 17 North, LLC “owns the property upon which Richards Bar is located....” The Appellant did not move to amend his Complaint pursuant to Rule 15 SCRPC. Even though the Appellant had not asserted a cause of action against the Respondent based on a theory of joint and several liability of the partners in a partnership, the Court went on inquire of the Appellant’s legal counsel of what, if any, evidence he had to suggest that a partnership existed between the Respondent and its tenant co-Defendant Richard Ruth’s Bar & Grill, LLC (Transcript Hearing 4:14 through 10:9) After an extended discussion with legal counsel for the Appellant, the Trial Court found that there was not any evidence to support the allegation of a partnership and granted the Respondent’s Motion for Summary Judgment. Wyman v. Davis, 223 S.C. 172, 74 S.E.2d 694 (1953); Moore v. Moore, 360 S.C. 241, 599 S.E.2d 467 (Ct. App. 2004). The

Respondent’s general manager testified in deposition that there was no partnership between the Respondent and its commercial tenant and co-Defendant Richard Ruth Bar & Grill, LLC. (Ross Deposition pg. 81:15-24; 82:1-3). The Appellant did not offer to the Trial Court any witness, testimony, affidavit, or document indicating that the Respondent shared profits and losses, had a common

interest in the real estate or the bar business or, finally, that the Respondent had any involvement in control and management of the bar. *Wyman, supra*

The general manager for the Respondent testified in his deposition (Ross Holliday deposition 70:22-71:22 and 81:15-82:3) and stated in his Affidavit supporting the Motion for Summary Judgment (Affidavit of Ross Samuel Holliday) that the Respondent received nothing more than rental payments from the tenant and bar owner. There was no allegation, evidence, affidavit or testimony offered by the Appellant that the Respondent ever participated in “losses” from the operation of the bar.

Likewise, the Appellant has failed to offer any evidence, document or statement that the Respondent has any community of interest in capital or property in the bar business. As with any lease, the landlord is the legal owner of the real property, improvements and fixtures. The tenant is the owner of the tables, chairs, cash register and inventory. While the landlord has legal title to the grounds and building and the tenant has possession under the lease, there is no “community of interest” in the same property. The relationship of the landlord tenant is, more often, adversarial.

Further, the Appellant has failed to offer any evidence, document or testimony of a witness that the Respondent has any authority or duty to control the operations of the commercial tenant’s bar. The Respondent’s general manager testified in deposition that there was no partnership between the Respondent and its tenant Richard Ruth’s Bar & Grill, LLC. (Ross Holliday Deposition Pg. 81:

15-25; 82:1-3). The Appellant did not offer any testimony or affidavit to the contrary.

In this appeal, the Appellant argues that the Respondent was owned by Zeezrom Properties, which was owned by Warren Holliday, who also owned Holliday Amusement Company, Inc., which leased pool tables and video games to the commercial tenant Richard Ruth's Bar & Grill, LLC. The Appellant then proceeds to argue that because the Respondent shares office space, a CPA, and has the same registered agent for service of process, this somehow suggests a "significant connection" between the Respondent and these third party entities. The Appellant then continues a circuitous and tortuous argument that because Holliday Amusement leases pool tables and video games to the bar that, somehow, the Respondent shares in profits of the commercial tenant and bar operator. There is no direct or probative evidence offered by the Appellant that, in fact, the Respondent ever received any monetary benefit from these third-party, legally separate, commercial entities.

In the underlying lawsuit, the Plaintiff has stated no cause of action against the Respondent for reverse piercing of the corporate veil, alter ego or amalgamation of interests. Holliday Amusement Company, Inc. and Zeezrom Properties, LLC are not parties to the lawsuit. If the Appellant wishes to predicate the Respondent's liability in this case on its financial relations with third-party entities, the Appellant should have included such a claim in his Complaint.

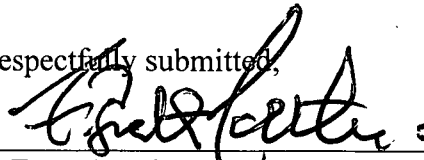
Finally, the Appellants reliance on the case of *Moore v. Moore*, *supra*, is misplaced. In that case, the Plaintiff and Defendant (brothers) both signed a

contract to buy a business; both applied for a bank loan; agreed to hire a Certified Public Accountant; and agreed to share profits on a 50/50 basis. On the basis of those undisputed allegations, the Trial Court sent the matter to the jury to determine whether or not there is a partnership. In this case, there are no documents or witnesses suggesting a partnership between the Respondent and its commercial tenant and co-Defendant Richard Ruth's Bar & Grill, LLC. There are only theories and allegations propounded by the Appellant with a complete absence of evidence to support the same.

### CONCLUSION

There was a valid, non-written, commercial lease between the Respondent and the co-Defendant Richard Ruth's Bar & Grill, LLC. The Appellant has failed to offer any direct or affirmative evidence that the Respondent shared profits and losses, had a community of interest in capital property or a community of interest in control and management of its commercial tenant and bar operator. The Trial Court made a finding and conclusion of law that there was no partnership between the Respondent and the tenant bar operator. For these reasons, this Court of Appeals should affirm the Summary Judgment of the Trial Court.

Respectfully submitted,



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Dated: July 31, 2014

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

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v.

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Of whom, 2233 Highway 17 North, LLC is.....Respondent.

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**CERTIFICATE OF SERVICE**

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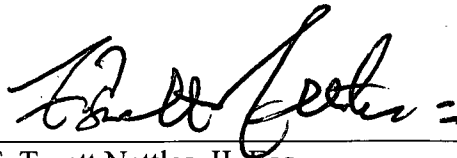
I do hereby certify that I have on this 31<sup>st</sup> day of July 2014, caused the  
foregoing Respondents 2233 Highway 17 North, LLC's Initial Brief, Designation of  
Matter to be Included in the Record of Appeal and Certificate of Mailing to be served  
herein by mailing true and correct copies thereof to the following addresses:

Roy T. Willey, IV, Esq.  
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July 31, 2014

**VIA FEDERAL EXPRESS**

The Honorable Jenny Abbot Kitchings  
Clerk, SC Court of Appeals  
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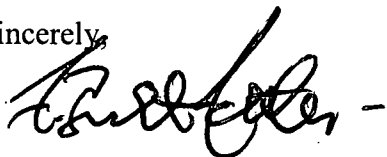
Re: George Giannaras as guardian and Conservator for Emanuel Kehagias v. Richard Ruth Sr. and Jane Ruth, both individually and as owners/operators of Richard Ruth's Bar & Grill, LLC, Adrian Lamar Smalls, and 2233 Highway 17 North, LLC  
Appeal from Charleston County Court of Common Pleas  
Case No: 2012-CP-10-8241

Dear Ms. Kitchings:

This office represents the Respondent 2233 Highway 17 North, LLC in the above-referenced Appeal. Enclosed please find the Initial Brief of Respondent, Designation of Matter to be Included in the Record of Appeal and a Certificate of Service. I also enclose one copy and ask for it to be clocked and returned to this office in the envelope provided.

With best professional regards, I am

Sincerely,



F. Truett Nettles, II

FTN/jlf

Enclosures

cc: Roy T. Willey

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