THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr., Master in Equity

Case No. 2013-CP-23-03075

Appellate Case No. 2014-000086

Sherman Financial Group, LLC . . . . . Petitioner,

v.

FM FRI Greenville, LLC . . . . . Respondent.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on July 18, 2014.

QUESTIONS PRESENTED

1. DID THE COURT OF APPEALS ERR IN DISMISSING APPELLANT'S APPEAL WITHOUT ADDRESSING THE "LAW OF THE CASE" ISSUE EMBEDDED IN THE LOWER COURT ORDERS?

2. DID THE COURT OF APPEALS ERR IN DISMISSING APPELLANT'S APPEAL FOR THE REASON THAT NO CONTEMPT ORDER HAS BEEN RENDERED AGAINST APPELLANT?

3. DID THE COURT OF APPEALS ERR IN DISMISSING APPELLANT'S APPEAL FOR THE REASON THAT NO SUBSTANTIAL RIGHT HAS BEEN AFFECTED?

STATEMENT OF THE CASE

Appellant, Sherman Financial Group, LLC ("Sherman"), entered into a commercial lease agreement (the "Lease") with Respondent, FM FRI Greenville, LLC ("Landlord").[1] The Lease concerns approximately 80,000 square feet of office space (the "Premises") located within a building in downtown Greenville, South Carolina, now known as the Wells Fargo Building (the "Building"). The Lease term began on November 30, 2003, and expired on November 30, 2013. Under the Lease, Sherman is entitled to an unpaid tenant allowance in excess of $1,200,000 (the "Unpaid Allowance"). The Lease provides that Sherman can seek the Unpaid Allowance as a direct payment from Landlord or as an offset against future rent.

On May 15, 2013, before the expiration of the Lease, Sherman requested the Unpaid Allowance from Landlord. (R.122-124). Rather than pay the Unpaid Allowance, or allow an offset of rent from May 2013 to November 2013 (the Lease expiration date) and pay the balance of the Unpaid Allowance, Landlord chose to play hard ball. On May 24, 2013, Landlord, through Florida counsel, declared Sherman in default for "abandonment" and pronounced that Sherman's possessory rights to the Premises would end a week later. (R.126). Landlord further threatened to seize and dispose of Tenant's personal property if it was not removed before that time.

Landlord's response was not commercially reasonable, and was done solely for the purpose of trying to avoid its contractual obligation under the Lease: To pay the Unpaid Allowance. The claim that Tenant was in default for "abandonment" was pure

[1] Technically, Sherman entered into a lease agreement with Landlord's predecessor-in-interest, DD Greenville, LLC. The parties do not dispute that Landlord assumed the rights held by DD Greenville, LLC under the Lease.

pretext—Landlord had (and has) no intention of paying the Unpaid Allowance, and ginned up the "abandonment" claim as a way to declare Tenant in default. Further, the claim that Landlord could simply kick Tenant out of the Premises and destroy its personal property is wholly unsupported by South Carolina law. The South Carolina Ejectment Statute, S.C. Code Ann. § 27-37-10, *et seq.* (the "Ejectment Statute"), which is completely unmentioned in Landlord's response, contains the statutory requirements a landlord must follow to eject a tenant. Landlord either was unaware of this process—Landlord's counsel was a Florida lawyer unlicensed in South Carolina—or intentionally ignored it.

If Landlord truly believed it was not obligated to pay the Unpaid Allowance, or that Sherman could not offset future rent, Landlord *should* have sought a writ of ejectment under the Ejectment Statute. Instead, Landlord ignored the Ejectment Statute and sought to forcibly dispossess Sherman, a remedy not available under South Carolina law. In the face of Landlord's threats, Sherman had no choice but to bring suit and seek a temporary restraining order preventing Landlord from executing on its unlawful threats. At the same time, Sherman moved to deposit future rent payments into court as a means of preserving contested possessory rights to the Premises. This, Sherman believed (wrongfully, as it turns out) was a reasonable way to stop Landlord's unlawful threats and allow Landlord the opportunity to follow the Ejectment Statute.[2]

Landlord, however, did not immediately avail itself of the process provided for by the Ejectment Statute. It was not until July 16, 2013 (forty-six days after Sherman filed

[2] Sherman has consistently argued to both Landlord and the lower court that there is no self-help eviction by force in South Carolina, asserting instead that the due process requirements of the Ejectment Statute must be followed.

suit seeking the Unpaid Allowance) that Landlord proffered a Rule to Show Cause as required under the Ejectment Statute. In the meantime, Sherman's Motion to Deposit Funds into Court was heard by Judge Stilwell. Importantly, this was not a Rule to Show cause hearing, and was not a hearing on the merits of the action. Judge Stilwell denied Sherman's motion, but also ordered payment of the June and July rent in accordance with Section 27-37-155 of the Ejectment Statute. (R. 128-129).

Sherman moved for reconsideration because no Rule to Show Cause hearing had been notice or held in accordance with the Ejectment Statute. Judge Stilwell denied Sherman's Motion for Reconsideration, but reassured the parties that the Order awarding pre-trial rent was not a merits-based decision and was without prejudice. (R. 131-132). The Order stated that the court "has made no rulings with respect to the merits of the case and leaves open for a trial on the merits all justiciable issues raised in the parties' pleadings." (R. 131). The Order further stated that it was "without prejudice to any party with respect to allocations of an unpaid allowance or a breach under the contract." (R. 131). Accordingly, Sherman presumed it would be entitled to fight on another day whether the Unpaid Allowance was owed.

On September 4, 2013, Landlord filed a Motion for Contempt on the basis of Sherman's refusal to pay rent. Landlord's argument was that Judge Stilwell had actually ordered Sherman to pay rent *or else be held in contempt* (rather than pay rent or else be ejected from the Premises under the Ejectment Statute). Judge Stilwell's Order, of course, made no such finding and, indeed, Judge Stilwell would have had no authority under the Ejectment Statute to do so in any event.

The matter was referred to Judge Simmons by Order dated September 16, 2013. Upon hearing the Landlord's Motion, Judge Simmons declared that the prior Orders of Judge Stilwell—which explicitly declare themselves to be non-prejudicial and not merits-based—are the law-of-the-case. (R.55-58). Judge Simmons consequently ordered Sherman to pay pre-trial damages in excess of $300,000 at peril of contempt. (R. 55-58, 60-63).

Sherman, faced with an order declaring that it must pay rent *or else be held in contempt*, which was based on a prior order in clear contravention of the Ejectment Statute, was forced to appeal. Sherman filed its Notice of Appeal on January 8, 2014. (R.1-2). Landlord moved to dismiss the appeal, arguing that the Judge Simmons Orders are not immediately appealable because Sherman has not yet been held in contempt. (R.5-16).

In response, Tenant argued that the threat of contempt by Judge Simmons is sufficient and that, even if it is not, the lower court rulings completely deprive Sherman of its due process rights and, therefore, affect a substantial right. (R. 90-144).

On April 23, 2014, the Court of Appeals granted Landlord's Motion to Dismiss. (R.162-163). The Court of Appeals found that "the circuit court's orders are not appealable under section 14-3-330," but did not explain why. (R. 162). On May 8, 2014, Sherman filed a Petition for Rehearing seeking a clarification of the reasons for the dismissal, and particularly a clarification that its right to future appeal would not be based on any "law of the case" finding. (R. 164-174). On July 18, 2014, the Court of Appeals denied Sherman's Petition for Rehearing. (R. 175-176).

This Petition follows.

FACTS

Discovery is still ongoing and, therefore, ultimate factual disputes persist. The following relevant details, however, are supported by third-party subpoena responses, or are a matter of record documentation.

Landlord owes the Unpaid Allowance, and has repeatedly acknowledged this obligation over time. In 2005, when Landlord sought to obtain funding to purchase the Building, Landlord's principal, Michael McCloskey, memorialized and quantified the debt owed to Sherman in the subject loan documents. (Relevant excerpts of such Loan Agreement are attached hereto). (R. 111-115).

The following additional facts have been unearthed:

(1) Landlord, at the insistence of its mortgage lender, deposited $1,272,400.00 in a cash reserve account to cover the Unpaid Allowance (*See* Schedule IV of the Loan Agreement) (R. 115);

(2) Landlord sought to deprive Sherman of the Unpaid Allowance on the hope that Sherman would simply overlook the debt (*See* email from President of FRI Investors) (R. 117-118); and

(3) Landlord eventually converted the Unpaid Allowance cash reserve to its use—as purchase-money to acquire the building in which the premises are situated (*See* email from principal of Landlord) (R. 119-120).

In sum, Landlord has consistently acknowledged Sherman's entitlement to the Unpaid Allowance, and Landlord has refused to pay cash set aside to cover this obligation in hopes that Sherman would "overlook" the debt owed. Sherman did not overlook the debt, and yet Landlord has refused to pay it.

ARGUMENT

1. THE COURT OF APPEALS ERRED IN DISMISSING APPELLANT'S APPEAL WITHOUT ADDRESSING THE "LAW OF THE CASE" ISSUE EMBEDDED IN THE LOWER COURT ORDERS, WHICH WRONGFULLY INTERPRETED A PRIOR ORDER FROM A DIFFERENT JUDGE AS ESTABLISHING THE LAW-OF-THE-CASE. (THIS RULING DEPRIVES APPELLANT OF THE RIGHT TO TRIAL, AND COULD EVADE REVIEW IF NOT ADDRESSED AT THIS TIME).

The lower court has declared that a pre-trial, damages award somehow constitutes the law of this case. Such an erroneous ruling is immediately appealable because it deprives Sherman of the right to a trial on the merits. *E.g.*, *Lester v. Dawson*, 327 S.C. 263, 491 S.E.2d 240 (1997); *C&S Real Estate Services. Inc., v. Massengale*, 290 S.C. 299, 350 S.E.2d 191 (1986); *Creed v. Stokes*, 285 S.C. 542, 331 S.E.2d 351 (1985); *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 511 S.E.2d 372 (Ct. App. 1998); *Preferred Sav. Bank, Inc. v. Elkholy*, 303 S.C. 495, 399 S.E.2d 195 (Ct. App. 1990). The foregoing line of cases establishes that an order depriving a party of a mode of trial to which it is entitled is immediately appealable. In the present case, the lower court's orders would preclude not only the mode of trial, but any trial at all—including presentation of witnesses and determinations by a finder of fact—as to more than $300,000 of contested contract damages. The rulings of Judge Simmons, based on blind obedience to a prior decree, must be appealed; otherwise, Sherman would be deemed to forego any contest of these damages—which is the ultimate matter in dispute.

In amplification of the foregoing, Sherman is compelled to expound on the lower court's law-of-the-case ruling. The law-of-the-case doctrine allows that "an appealable order from which no appeal is taken becomes the law of the case in all subsequent proceedings involving the same parties and the same subject matter." *Prof'l Bankers*

Corp. v. Floyd, 285 S.C. 607, 613, 331 S.E.2d 362, 365 (Ct. App. 1985). The doctrine applies to both findings of fact and principles of law. *See, e.g., Lucas v. Rawl Family Ltd. P'ship*, 359 S.C. 505, 598 S.E.2d 712 (2004); *McCullough v. Urquhart*, 248 S.C. 348, 149 S.E.2d 909 (1966). Moreover, the law-of-the-case doctrine applies regardless of any patent error in the unappealed ruling. *McCall v. State Farm Mut. Auto. Ins. Co.*, 359 S.C. 372, 597 S.E.2d 181 (Ct. App. 2004). Given the grave and imposing consequences of the doctrine, it is not surprising that appellate courts have confined its effect to matters actually determined in a ruling that was in fact appealable. *E.g., Prof'l Bankers Corp.*, 285 S.C. at 613, 331 S.E.2d at 365.

In the present action, Sherman has consistently pointed out that the lower court's rent-payment decree is founded on the Ejectment Statute. The pre-trial rent-payment remedy of the Ejectment Statute is not intended as a means to a final and appealable damages decree upon which contempt might stand. Indeed, Judge Stillwell cites to Section 27-37-155 of the Ejectment Statute, which provides as follows:

> ***If the court orders that the tenant pay all rent due and accruing*** as of and during the pendency of the action as provided by Section 27-37-150 and this section, the order may require the payments to be made (a) directly to the commercial landlord or to the clerk of court, to be held until final disposition of the case, or (b) through the magistrate's office.... ***If the tenant fails to make a payment*** as provided in Section 27-37-150 and this section, ***the tenant's failure to comply entitles the landlord to execution of the judgment for possession*** and, upon application of the landlord, the magistrate shall issue a warrant of ejectment and the landlord must be placed in full possession of the premises by the sheriff, deputy, or constable.

S.C. Code Ann. § 27-37-155(B)(5)(2007) (emphasis added). In its Motion for Reconsideration submitted to Judge Stilwell, Sherman urged the court to amend its order to declare that the consequence of a failure to pay rent is dispossession from the Premises (not contempt). In response, Judge Stilwell advised that Sherman:

> has convoluted and confused the meaning of the Court's previous Order. This Court has made no rulings with respect to the merits of the case and leaves open for a trial on the merits all justiciable issues raised in the parties' pleadings. The Court's Order is without prejudice to any party with respect to allocations of an unpaid allowance or a breach under the contract.

(R.46). Having thus received equal parts admonishment and reassurance, Sherman contented itself with the prospects of either payment or eviction. In summary, Judge Stilwell's Orders declare no consequence; they beg further action, and are, therefore, not final-appealable rulings. Judge Stilwell's rulings are explicitly non-prejudicial and cannot be the basis for establishing the law of this case.

In finding that Judge Stilwell's Orders are law-of-the-case, however, Judge Simmons has completely deprived Sherman of the opportunity to contest the very issue that is in dispute between the parties—whether Sherman owes Landlord any rent at all in light of the Unfunded Allowance, which by its terms requires Landlord *to pay Sherman.* Thus, Sherman has not been given an opportunity to be heard on this issue, let alone a merits-based decision before the trier-of-fact. Worse, this issue may evade review if it is not resolved by this Court. Accordingly, the Court of Appeals should have denied Landlord's Motion to Dismiss, and this appeal should have been addressed.

2. THE COURT OF APPEALS ERRED IN DISMISSING APPELLANT'S APPEAL FOR THE REASON THAT NO CONTEMPT ORDER HAS BEEN RENDERED AGAINST APPELLANT, BECAUSE THE LOWER

COURT ORDERS DECLARE THAT APPELLANT'S FAILURE TO PAY RENT IS CONTEMPTUOUS CONDUCT.

The orders issued by Judge Simmons declare that Sherman's failure to pay pre-trial damages is contemptuous conduct; therefore, Judge Simmons' rulings are immediately appealable. *E.g.*, *Tucker v. Honda of S.C. Mfg., Inc.*, 354 S.C. 574, 582 S.E.2d 405 (2003); *Ex parte Whetstone*, 289 S.C. 580, 347 S.E.2d 881 (1986); *Ex parte Cannon*, 385, S.C. 643, 685 S.E.2d 814 (Ct. App. 2009). The foregoing cases adopt the nearly universal position that contempt citations are final and immediately appealable. The non-prejudicial/non-merits rulings of Judge Stilwell, by themselves, do not constitute final judgments as contemplated by Section 14-3-330(1) of the South Carolina Code of Laws. After all, Judge Stilwell's rulings merely provided for interim statutory relief. By contrast, Judge Simmons' subsequent rulings ascribing contempt to Sherman's refused payment are final and are thus immediately appealable.

3. THE COURT OF APPEALS ERRED IN DISMISSING APPELLANT'S APPEAL FOR THE REASON THAT NO SUBSTANTIAL RIGHT HAS BEEN AFFECTED, BECAUSE THE LOWER COURT WRONGFULLY INTERPRETED THE SOUTH CAROLINA EJECTMENT STATUTE TO COMPEL APPELLANT, A COMMERCIAL TENANT, TO PAY RENT OR ELSE BE HELD IN CONTEMPT. (UNDER THE EJECTMENT STATUTE, A TENANT MUST PAY RENT *OR ELSE BE EJECTED*—THE EJECTMENT STATUTE DOES NOT PROVIDE THAT A TENANT MUST PAY RENT *OR ELSE BE HELD IN CONTEMPT*).

Landlord's Motion to Dismiss should have further been denied on the basis that the appealed orders affect a substantial right and prevent Sherman from achieving a judgment from which appeal might be taken. S.C. Code Ann. § 14-3-330(2) (1976), *See also Graham Law Firm, P.A. v. Makawi*, 396 S.C. 290, 721 S.E.2d 430 (2012); *Ex parte S.C. Farm Bureau Mut. Ins. Co.*, 314 S.C. 487, 431 S.E.2d 252 (1993). In *Graham*, appellant argued that the lower court's refusal to allow a factual inquiry deprived it of

due process and would likely have the effect of defeating appellant's underlying claims. *Graham*, 396 S.C. at 300, 721 S.E.2d at 436. The same is true in the present case. Here, the lower court has ruled that Sherman is obligated to pay in excess of $300,000.00 to Landlord. Moreover, Judge Simmons has proclaimed this pre-trial payment obligation to be law of the case. Judge Simmons' rulings constitute a de facto judgment which cannot be undone without the present appeal, and worse, such judgment was rendered without due process. Sherman was given no opportunity to present its case before a trier-of-fact; Sherman was given no opportunity to conduct meaningful discovery; and Sherman was given no opportunity to depose Landlord's witnesses.

The lower court's failure to afford due process is even more patent upon review of statutory provisions relied upon by Judge Stilwell, specifically Section 27-37-155. Because the Ejectment Statute is in derogation of common law, it must be strictly construed. *Grier v. AMISUB of South Carolina, Inc.*, 397 S.C. 532, 536, 725 S.E.2d 693, 696 (2012); *Wallace v. Wannamaker*, 231 S.C. 158, 97 S.E.2d 502 (1957). Thus, the Section's "application must not be extended beyond the clear intent of the legislature." *Crosby v. Glasscock Trucking Co., Inc.*, 340 S.C. 626, 628, 532 S.E.2d 856, 857 (2000). No provision of Section 27-37-155 grants the Court the power to hold a tenant in contempt for failure to pay rent. Rather, the Ejectment Statute fundamentally provides a means for a landlord to recover possession of realty. "[A] tenant may be ejected...when (1) tenant fails or refuses to pay rent when due or when demanded." SC Code Ann. § 27-37-10(A).

The plain language of the Ejectment Statute allows that a landlord may pursue eviction on grounds of an alleged rental default. S.C. Code Ann. § 27-37-10(A)(2007).

Unequivocally, an action for ejectment is commenced by issuance and service of a written Rule to Show Cause. S.C. Code Ann. § 27-37-20(2007). Section 27-37-40 requires that a warrant of ejectment shall issue in the instance of a non-appearing tenant; however, recognizing that landlords do not have a monopoly on the truthful default allegations, Section 27-37-60 mandates that a tenant appearing in contest of ejectment shall be entitled to a trial on the merits over the opposing claims just "as in any other civil case." Depriving Sherman of its right to due process, the lower court's ruling disregards the prerequisite Rule to Show Cause—which is not perfunctory, but is instead a hallmark to the tenant that an ejectment action has been properly engaged. Though proffered to the lower court by Landlord, no Rule to Show Cause was ever issued or served in this matter. Judge Stilwell's payment decree cites to—and fundamentally depends upon—Section 27-37-155 of the Ejectment Statute as grounds for commanding Sherman's pre-trial payment. Without the issuance of a Rule to Show Cause, however, Sherman cannot have been prepared to make arguments in contest of such payment. Because Sherman has been deprived of due process in a manner that would preclude judgment, the lower court rulings are immediately appealable.

CONCLUSION

For these reasons, Sherman respectfully petitions this Court for a writ of certiorari to review the decision of the Court of Appeals.

Respectfully submitted,

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August 12, 2014

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August 15, 2014

Honorable Daniel E. Shearouse, Clerk
South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

Re: *Sherman Financial Group, LLC v. FM FRI Greenville, LLC*
Appellate Case No. 2014-000086

Dear Mr. Shearouse:

Enclosed for filing please find the original and seven copies of our Petition for Writ of Certiorari along with our Proof of Service. Also enclosed are three copies of the Appendix (one unbound). Also enclosed is our check in the amount of $100.00 for the filing fee. Please return a file stamped copy of these documents in the enclosed, self-addressed envelope.

By copy of this correspondence to counsel for Respondent, we are serving them, with a copy of our Petition for Certiorari and Appendix. A copy of the Petition for Writ of Certiorari is also being sent to Jenny Abbott Kitchings, Clerk of the Court of Appeals, for filing.

Yours very truly,

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