

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

Appellate Case No.: 2014-002202

D&B Partnership, LLC,

Appellant,

v.

Shangrila Affiliates, LLC,

Respondent.

MEMORANDUM

Steven S. McKenzie, Esquire
Matthew J. Burgess, Esquire
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SC Court of Appeals

The matter before the Court was heard in a bench trial in Williamsburg County Magistrates Court on January 9, 2014. Thereafter, a Judgment (hereinafter, "Judgment") for the Lessor, D&B Partnership ("Appellant"), was rendered, along with an Order of Eviction ("Order"), both filed on January 16, 2014. However, the contents of the file at the Williamsburg County Magistrates Court ("Magistrates Court") for the above-captioned case include no affidavits of service, nor do they specify upon whom notice of that Judgment and Order were served. Upon finally learning of that Judgment, the Lessee, Shangrila ("Respondent") filed its Notice of Appeal ("Notice of Appeal") with the Williamsburg County Court of Common Pleas ("Circuit Court") on February 24, 2014, which contained the following therein:

1. The Judgment and Order, both at issue, are unconstitutionally vague, as both documents fail to provide an explanation in regard to why judgment was rendered against Defendant.
2. Assuming the Judgment was rendered on the merits, the Defendant would appeal based, also, upon the Court's determination that the Defendant violated the terms of the Lease Agreement. The Defendant would maintain that William Kellahan qualifies as an expert in structural engineering, and that the installation at issue is not a "structural change," pursuant to the terms of the lease agreement, as well as the report of that expert witness.

The Magistrate Court was served with a copy of the Notice of Appeal and filed its Return ("Return") on March 6, 2014.

Thereafter, following a hearing on that appeal, the Circuit Court held that the issues were properly preserved. Additionally, when Respondent drew attention to the Return, the Circuit Court voiced concern in relation to the fact that the Magistrate Judge took it upon himself to visit the location of the alleged structural alteration before issuing his Judgment and Order, which Appellant acknowledged was not properly served upon the Respondent.

An Order remanding the case to the trial court was issued by the Circuit Court on July 3, 2014.

Respondent filed its Motion to Alter or Amend Judgment on July 17, 2014, which contained the following:

The order of the Court state “Remanded to the Lower Court to clarify its ruling on the definition of ‘Structural Alterations’ and its finding of fact on the issue.” The [Appellant] argued in his Brief and in oral argument that this issue was not properly preserved for appeal. This Honorable Court has not ruled on whether this issue was properly preserved for appeal in its Order and Judgment. . . On **all** [emphasis added] of the grounds raised on appeal, the magistrate judge was not given an opportunity to rule with finality. The [Respondent] could not raise the sufficiency of the magistrate court’s ruling at trial, so a Rule 59(e) motion would be necessary in order to preserve the issue for review. The issue of the sufficiency of the magistrate court’s order was not raised before the magistrate court. The [Respondent] did not file a motion to reconsider in order to preserve the issues for review. This is critical to preserve the issue for appellate review. If an issue is raised but not ruled upon, a party must file a Rule 59(e) motion to preserve an issue that a trial court fails to rule upon. Johnson v. Lloyd, Opinion No. 273883 (Decided April 24, 2014) citing Elam v. S.C. Dep’t of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004). The South Carolina Supreme Court stated in Wilder Corporation v. Wilke, “it is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised and ruled upon by the trial judge to be preserved for appellate review.” 330 S.C. 71, 71, 497 S.E.2d 731, 733 (1998).

First of all, even in the event Respondent was required to file a 59(e) motion in the Magistrates Court, which Respondent denies, Respondent was never properly served with the Judgment and Order of Eviction, both filed on January 16, 2014. Upon finally learning of that Judgment, Respondent filed its Notice of Appeal to the Circuit Court on February 24, 2014. Regardless, the Judgment issued by the Magistrates Court was a final judgment subject to appeal pursuant to our State’s law.

Rule 54 of the South Carolina Rules of Civil Procedure sets forth the following: “A ‘Judgment’ as used in these rules includes any decree or order which dismisses the action as to any party or finally determines the rights of any party. A judgment need not contain a

recital of pleadings, the report of a master, or the record of prior proceedings.” Rule 201 of the South Carolina Rules of Appellate Practice states that appeals “may be taken, as provided by law, from any final judgment, appealable order or decision.”

Appellant has seemingly fashioned its appeal as if Respondent’s appeal to the Circuit Court was based solely on the alleged vagueness of the Judgment and Order issued by the Magistrates Court. It is true that Respondent did allege in its Notice of Appeal to the Circuit Court that the Judgment was unconstitutionally vague, and that this contention was likely rendered moot when the Magistrates Court issued its Return. Rule 18 of the South Carolina Rules of Magistrates Courts governs the appeals of judgments rendered by the magistrates courts:

(b) Within thirty (30) days of the date of filing of the notice of appeal with the Circuit Court, the magistrate shall file the return to the notice of appeal with the Clerk of the Circuit Court for the county wherein the judgment was rendered, together with the record, a statement of all proceedings in the case, and, if necessary, the testimony taken at trial. Upon motion for good cause shown, the Circuit Court may allow a definite extension of time in which to file the return.

Rule 18, SCRMC. The return, filed by the Magistrates Court on March 6, 2014, prior to the hearing conducted in the Circuit Court in relation to the appeal, provided the explanation offered by Magistrates Court for its Judgment.

However, Appellant disregards the second issue presented in Respondent’s Notice of Appeal to the Circuit Court- whether or not the disputed alteration, an exhaust fan installed by Respondent, constitutes a “structural change,” and the Magistrate Court’s determination that the Respondent violated the terms of the Lease Agreement- which was the primary basis of Respondent’s appeal. The Magistrates Court certainly rendered a final judgment on that issue. In this case, Appellant filed an Application for Eviction, to which

Respondent responded with an Answer and Counterclaims. The issues concerning the Lease Agreement and whether or not the installation of the vent constituted a structural alteration were raised in each of these pleadings and addressed at the trial court level, when Respondent's expert witness in structural engineering testified that the installation of the vent did not constitute a "structural change." Appellant admitted that these issues were ruled upon by the trial court in the brief it filed in response to Respondent's appeal to the Circuit Court: "The only issue raised in the Application for Eviction was the alteration made to the building. By issuing the Order of Eviction, the trial court found that the Appellant violated the terms and conditions of the lease." These issues were raised in the pleadings, as admitted by Appellant. These issues were ruled upon in the Order of Eviction, as admitted by Appellant. Thus, the Judgment issued by the Magistrates Court was a final judgment and a 59(e) motion would have been the inappropriate means with which to seek relief. Therefore, the Circuit Court was justified in its determination that Respondent properly submitted these grounds for appeal in its appeal to the Circuit Court.

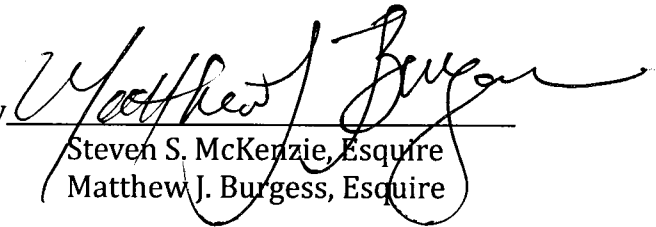
Additionally, Respondent would contend that the Order(s) issued by the Circuit Court are not appealable orders. Again, an appealable order is "any decree or order which dismisses the action as to any party or finally determines the rights of any party." The Order(s) issued by the Circuit Court merely remand the case to the trial court for further clarification on its definition of "structural alterations." Thus, the Order(s) do not "finally determine the rights" of the Appellant. Further, Respondent would contend that Appellant did not file its Notice of Appeal with the Court of Appeals within the requisite thirty-day timeframe.

Based on the foregoing, Attorneys for the Respondent , Shangrila Affiliates, LLC, would hereby move this Honorable Court to dismiss this appeal and uphold the Order remanding the case to the trial court.

Respectfully Submitted,

November 5, 2014

COFFEY, CHANDLER & McKENZIE, P.A.

By 
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Matthew J. Burgess, Esquire

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PROOF OF SERVICE

I certify that I have served the Memorandum on D&B Partnership, LLC by depositing a copy of it in the United States Mail, postage prepaid, on November 5, 2014, addressed to its Attorney of Record, M. Amanda Shuler, Post Office Drawer 980, Kingstree, SC 29556.

November 5, 2014.



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*OF COUNSEL

November 5, 2014

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: *D&B Partnership, LLC v. Shangrila Affiliates, LLC.*

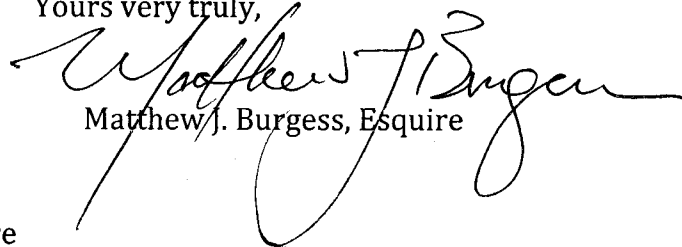
Dear Madam Clerk:

Please find enclosed herewith the original and two copies of the Memorandum requested in your letter, dated October 24, 2014. Please file the original and return the copies to my office in the self-addressed stamped return envelope provided.

By copy of this letter, I am serving counsel for Appellant with a copy of the same. Should you have any questions or concerns, please do not hesitate to contact my office.

Thanking you for your consideration in this matter, I am

Yours very truly,

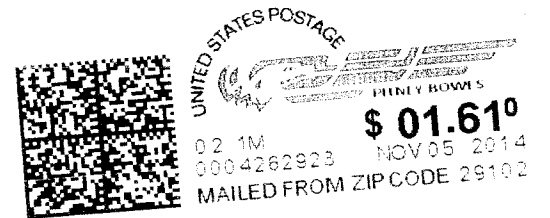

Matthew J. Burgess, Esquire

cc: M. Amanda Shuler, Esquire
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