

A brief hearing – lasting less than two hours – was held after only four days’ notice to the Appellant. This was over a year after the Respondent began its investigation and almost a month after the Greenville County Sheriff’s Office seized all of the Appellant’s documents, surveillance footage and other relevant evidence, none of which has ever been returned to the Defendants. On Wednesday, May 6, 2015, the Honorable Charles B. Simmons, Jr., issued a written order granting the Solicitor’s request for a temporary injunction and ordering Platinum Plus to cease operations within forty-eight (48) hours and the Sheriff to padlock the doors to the building until the resolution of a trial on the merits. (Exhibit A).

Appellant is requesting this Court issue a supersedeas and conduct an expedited review of the lower court order compelling Platinum Plus to immediately cease all operations at the Greenville location no later than 11:54 AM, Friday, May 8, 2015.

SUMMARY OF ARGUMENT

The Circuit Court has issued an order that requires Platinum Plus to cease all operations within forty-eight hours of the entry of the order (11:54 AM, Friday, May 8, 2015). Appellant now seeks appellate review of this May 6, 2015 order granting the Solicitor’s request for a temporary injunction. The Court should issue a writ of supersedeas under Rule 241, SCACR, order briefing to be completed in twenty (20) days, and review the Circuit Court’s decision requiring the immediate closure of Platinum Plus in Greenville.

PROCEDURAL AND FACTUAL BACKGROUND

Platinum Plus has operated in Greenville County for over fourteen years. (Exhibit B). In April 2014, the Greenville County Sheriff’s Office began an investigation into alleged prostitution and lewd acts that were believed to have occurred at Platinum

Plus in Greenville. Beginning in the early Spring of 2015, as a result of this investigation, law enforcement officers arrested a number of individuals and, on March 27, 2015, pursuant to a search warrant, entered Platinum Plus and seized documents and video evidence. That same day, law enforcement served a Notice of Abatement pursuant to S.C. Code. Ann. § 15-43-120 upon Appellant and the property owner, Frontage Road Associates (Exhibit C).

The Respondent, the State of South Carolina on the relation of William Walter Wilkins, III, Solicitor of the Thirteenth Circuit, filed this action on April 17, 2015. That same day, counsel for the Solicitor arranged a hearing before the Honorable Charles Simmons for April 25, 2015, just one week later. (Exhibit D). The hearing was not scheduled for the next regular term of Common Pleas non-jury motions, but was wedged into the middle of Judge Simmons's existing roster of probation revocation hearings originally set for that Friday. (Exhibit E). As of the time the Solicitor set the hearing, neither defendant had been served with a copy of the Summons and Complaint or provided notice of the hearing on the Solicitor's motion. The Solicitor was unable to effect service on the Appellant, but finally "served" an employee at the club on April 21, 2015.

Four days later, despite Appellant's repeated protestations over the extremely short notice of the hearing (Exhibit F), on April 25th, the Court held a brief hearing, lasting less than two hours, at which no live testimony was introduced. At the hearing, and in its submittals to the Court, the Appellant objected to personal jurisdiction over Elephant, Inc. on the grounds that the Solicitor failed to properly serve Elephant, Inc. (Exhibit G; Exhibit H). The Court acknowledged Elephant, Inc.'s objection and noted on the record that the appearance by counsel on Elephant, Inc.'s behalf would not be

considered a waiver of Elephant, Inc.'s objection to the Court's exercise of personal jurisdiction over it.

After the brief hearing on Friday, the parties were instructed to submit additional briefs by the following Wednesday, April 29th. The Court then held a conference call with counsel two days later, on Friday, May 1st, wherein he advised counsel and the Solicitor of his preliminary ruling, but instructed all counsel to refrain from discussing his tentative ruling with anyone, including the Appellant, Elephant, Inc., until the written order was entered. The Court entered its written order at 11:54 AM on May 6, 2015.

The Temporary Order requires the Defendants to cease all operations of Platinum Plus, as operated by Elephant, Inc. at 805 Frontage Road in Greenville, South Carolina 29615, and the closure of the subject property located at the same address until a trial can be conducted on the merits of the above-captioned matter. The Order provides the Appellant forty-eight hours, or until 11:54 AM, Friday, May 8, to wind-down the business.

The Appellant immediately appealed from the May 6, 2015, Order. Appellant received written notice of the entry of the Order on May 6, 2015. Appellant filed and served the Notice of Appeal on all counsel of record on May 6, 2015. (Exhibit I).

GROUNDS FOR THE PETITION

As a general rule, service of the notice of appeal in a civil case automatically stays matters and relief contained in the order under appeal.¹ Rule 241(a), SCACR. However,

¹ Rule 62, SCRCP, provides generally for a 10 day stay of all judgments to give a litigant the opportunity to challenge some aspect of the order by motion pursuant to Rules 52 and 59, SCRCP. An exception to this rule is that "unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction...shall not be stayed during the period after its entry and until an appeal is taking or during the pendency of an appeal." Rule 62(a), SCRCP. Rather, it is within the discretion of the court to suspend, modify, restore, or grant an injunction during the appeals pendency "upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party." Rule 62(c), SCRCP. Therefore, either the court should provide some terms upon which the State can hold its temporary

there are exceptions to this rule, including “[a]n appeal from an order granting an injunction or temporary restraining order.” Rule 241(b)(8), SCACR. Thus, Appellant must obtain a supersedeas to halt the immediate execution of the provisions of the order.

Rule 241(c)(1), SCACR provides that “[t]he effect of the granting of a supersedeas is to suspend or stay matters decided in the order ... on appeal.” A supersedeas is necessary to preserve the *status quo* pending appeal. As was stated in *Graham v. Graham*, 301 S.C. 128, 130, 390 S.E.2d 469, 470 (Ct. App. 1990), “[t]he purpose of a supersedeas ... is to ... stay proceedings in the trial court, to preserve the *status quo* pending the determination of the appeal ... and to preserve to appellant the fruits of the meritorious appeal where they might otherwise be lost to him.”

Here, without personal jurisdiction over the Appellant, and based on a misreading of the Nuisance Statute, the lower court’s order abruptly ends all operations of Platinum Plus, resulting in a significant hardship not only for Appellant, but also for the hundreds of employees, vendors, and independent contractors who rely on the operation of Platinum Plus to earn a living to support themselves and their families. The Appellant has had no time to prepare for such a drastic action – closing its entire business and effectively padlocking the doors so no one can enter the building without facing contempt, including potential imprisonment. In fact, despite the Court informing Counsel and the Solicitor of its potential ruling last Friday, Counsel was instructed not to inform anyone, including the Appellant, until the written order was entered. As a result, Appellant is now left scrambling to wind down a fourteen-year business with over 85,000 patrons annually; inform employees, vendors, and patrons; cancel contracts; and

injunction, such as a bond, or Appellant must obtain a supersedeas to stop the operation of the order until this Court completes its review.

secure necessary records and documents prior to the doors being padlocked by the Sheriff shortly after noon tomorrow, Friday, May 8, 2015. Such a drastic measure – closing down Platinum Plus’s entire business – would undoubtedly prove fatal to the Appellant by the time this appeal is resolved.

The burden on the state is minimal when compared to the burden on the Appellant. There is no urgent need to cease the operations of Appellant at its Greenville location and close the building. The Public Nuisance statute is not part of the penal code. The Public Nuisance statute is not a regulatory statute relating to matters of public health. Rather, the statute’s sole aim is abating the “use of buildings or places for lewdness and the like.” S.C. Code Ann. § 15-43-10. There has been no evidence, or even argument, that any alleged criminal or lewd activity is continuing to occur at Platinum Plus. In fact, but for the recent rush to obtain an injunction prior to a trial on the merits, the Respondent has not demonstrated any great hurry whatsoever to crack down on any of the alleged nuisance activities the Solicitor contends occurs at Platinum Plus. The law enforcement investigation into the allegations contained in the complaint went on for almost one year prior to a single arrest being made and before the Defendant was served with any notice of the alleged nuisance.

No criminal charges have ever been brought against the Appellant. None of the individuals charged by law enforcement at the conclusion of its investigation have been convicted or entered guilty pleas, and none of these individuals currently facing charges are allowed inside Platinum Plus. No employee of the Appellant has ever been convicted of prostitution, assignation, or lewd activity while working for or on the premises of Platinum Plus. At the same time the Greenville County Sheriff’s Department was conducting its raid of Platinum Plus during the early morning hours of

March 27, 2015 and seizing all evidence on which the Appellant might rely in its defense of this action, the Sheriff simultaneously served on the Appellant a notice of abatement. There have been no additional arrest warrants issued since March 27, 2015, and the Solicitor presented no evidence of any alleged nuisance activities occurring after March 27, 2015.

Appellant intends to challenge the Court's ruling granting the Solicitor's Motion for Temporary Injunction on a number of grounds and believes it will likely prevail on the merits of this appeal. Just two of these many grounds for reversal are outlined *infra*.

(1) The Appellant expects to prevail on the question of whether the Nuisance Statute allows a defendant the opportunity to abate an alleged nuisance prior to the institution of any civil action. This is a novel issue in South Carolina. The Nuisance Statute provides: "No proceeding against the owner of the real estate shall be commenced hereunder unless ten days' written notice be given by the prosecuting attorney to such owner or his agent and upon his failure thereafter to abate the nuisance." S.C. Code Ann. § 15-43-120.

As an initial matter, the Court misconstrued the statute to find that no one but the owner, not even a tenant acting as an agent of the owner, could abate an alleged nuisance. However, the Court's error did not stop there. The Court went on to state that it rejected the notion that a defendant could abate a nuisance under the Nuisance Statute and avoid a nuisance action such as this despite the plain language to the contrary found in the statute. Such a construction effectively renders Section 15-43-120 superfluous to the rest of the statute and a nullity. It also directly contradicts the statutory requirement that no proceeding shall be commenced until after notice is provided and the owner fails "thereafter to abate the nuisance." The Court's error

becomes even more important when considered in light of the fact that the Solicitor failed to provide any evidence whatsoever of any allegedly lewd activities, including prostitution or assignation, occurring at Platinum Plus after service of the Abatement Notice on March 27, 2015.

Additionally, Appellant expects to prevail on the merits. At this point there has been no trial. The State took possession of key evidence and has not made it available to Appellant for its defense. Apart from prevailing as a matter of law on application of the plain language of the statute, Appellant will prevail once the facts are presented for the trial court to make an informed and intelligent decision based upon facts, not bald accusations and untested affidavits. Without a supersedeas, however, Appellant's business will fail and any relief obtained will be hollow.

(2) As a second matter, the lower court's reliance on *Schenk v. National Healthcare, Inc.*, 322 S.C. 316, 471 S.E.2d 736 (Ct. App. 1996) to determine that service was perfected when the Sheriff's Office served Rick Zurich, the day manager of the Platinum Plus location, such that the court had personal jurisdiction over the Appellant, was misplaced. *Schenk* involved service on the office manager of a corporation at corporate headquarters who was authorized to accept service on behalf of the defendant and informed the process server that she could do so. *Schenk* did not involve service on a lower level manager, with no supervisory authority, no authority to accept service, and no representation that he could accept service, as is the case here.

Indeed, the Court's misplaced reliance on *Schenk* becomes even more apparent when considered against the backdrop of the Supreme Court's more recent ruling in *Graham Law Firm, P.A. v. Makawi*, 396 S.C. 290, 721 S.E.2d 430 (2012), which addressed the fundamental question at issue in this case: whether an employee like Zurich was a

“managing agent.” *Id.*; see also *Bage v. Southeastern Roofing*, 373 S.C. 457, 467, 646 S.E.2d 153, 158(Ct. App. 2007), *vacated following settlement* 383 S.C. 489, 681 S.E.2d 867 (2009) (“Not every employee of a corporation is an ‘agent’ of the corporation for purposes of service of process. If the employee in question is not a managing or general agent, the question is whether the individual possessed ‘specific authorization to receive process.’”). The Solicitor provided no evidence to establish Zurich was a “managing agent” for Appellant, relying solely on the Affidavit of the process server detailing the timeline of service. (Exhibit J). The Appellant, however, submitted affidavits proving that Zurich was not a “managing agent” under *Graham*. (Exhibits K&L).

Accordingly, Appellant has a high likelihood of prevailing through appellate review. However, if supersedeas is not entered, the Appellant will be put out of business before it ever has the opportunity to prevail on the merits much less even make the arguments. Appellant cannot recover from closure of its business for such a prolonged length of time. The damage will be irreversible and irremediable. In accordance with Rule 241(c)(1), SCACR, a supersedeas pending appeal is warranted.

EXTRAORDINARY CIRCUMSTANCES MAKING IT IMPRACTICABLE TO PRESENT AN INITIAL APPLICATION TO THE TRIAL COURT

The Circuit Court has ordered Platinum Plus to close within forty-eight hours of its order. Counsel for the Appellant has made two written requests, one prior to the entry of the lower court order and one shortly after receipt of the order and filing of the Notice of Appeal to this Court, requesting that the lower court stay enforcement of the temporary injunction. (Exhibit M; Exhibit N). In response, the Judge stated: “In light of the time constraints ... I would think it best for your motion to be filed with and addressed by our appellate courts.” (Exhibit O).

Unless this Court intervenes to maintain the *status quo*, Platinum Plus will be closed a little before noon tomorrow, placing a tremendous, and irreversible, burden on the Appellant, as well as all of its employees who will be suddenly out of a job. By the time an appeal can be heard, it will be impossible for Appellant, or its employees, to recover from the damage such a lengthy shut down would inevitably cause even though Appellant ultimately expects to prevail on the merits of this appeal.

Appellant therefore requests that this Court enter an emergency order of supersedeas. Furthermore, Appellant requests that the Court expedite briefing and a decision concerning whether the trial court erred in granting the Solicitor's Motion for Temporary Injunction shutting down Platinum Plus until a trial on the merits.

Respectfully Submitted,



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May 7, 2015

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