

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF CHARLESTON )  
 )  
 JAMES J. KERR, CRAYTON W. WALTERS )  
 AND KWK, LLC )  
 ) Plaintiffs, )  
 ) vs. )  
 )  
 FXM & COMPANY, LLC, STRUCTURTECH, )  
 LLC, FRANZ MEIER, INDIVIDUALLY, and )  
 SKYWAVES I CORP. )  
 ) Defendants. )  
 )

IN THE COURT OF COMMON PLEAS  
 FOR THE NINTH JUDICIAL CIRCUIT

CASE NO. 08-CP-10-1642

ORDER DENYING MOTION TO  
 ALTER OR AMEND

FILED  
 2015 MAY -7 AM 9:14  
 JULIE J. ARMSTRONG  
 CLERK OF COURT

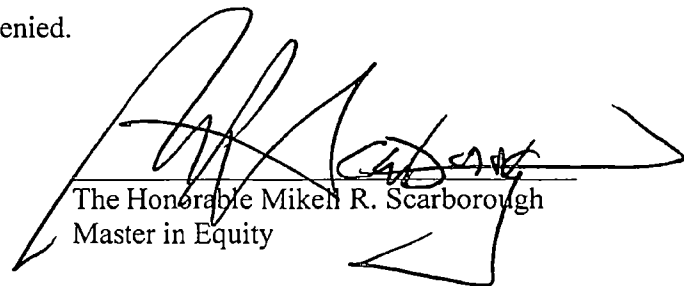
This matter is before the Court on FXM and Company, LLC's ("FXM's") motion to alter or amend this Court's Order of February 4, 2015 granting Plaintiffs' motion for summary judgment as to the counterclaims of FXM pursuant to Rules 59 and 60 SCRPC. After reviewing the submissions of counsel and hearing oral argument, I find as follows:

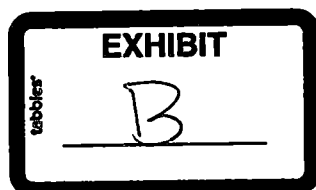
1. I find this case is one of primary and secondary obligations.
2. I find the primary obligation at issue is Skywaves Corporation's ("Skywaves") obligation to pay rent to FXM pursuant to the December 18, 2003 lease.
3. I find KWK, LLC's ("KWK's") obligation to be secondary to that of Skywaves.
4. I find that Judge McDonald's Order granting Ron Konersmann (another secondary obligor of Skywaves) summary judgment in case no. 2009-CP-10-2374 on the grounds that FXM suffered no damages as a result of Skywaves' default applies in this case.
5. I find the conduct of Skywaves' bankruptcy proceeding is relevant to this case as to the issue of FXM's release of the primary obligor.

Accordingly, FXM's motion to reconsider is denied.

IT IS SO ORDERED.

On this 30 day of April 2015  
 Charleston, SC

  
 The Honorable Miken R. Scarborough  
 Master in Equity



## Mikell Scarborough

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**From:** Aaron Edwards <Aaron@RichterFirm.com>  
**Sent:** Tuesday, April 28, 2015 11:51 AM  
**To:** 'Michelle Endemann'; Mikell Scarborough  
**Cc:** 'Andrew K. Epting'; Ryan W. Conner; 'Angela Gross'  
**Subject:** RE: KWK, et al v. FXM, et al; case no. 2008-CP-10-1642  
**Attachments:** Copy of KWK Calculations.xlsx

Judge Scarborough,

As you requested, attached is the calculation of damages due to FXM as a result of KWK failing to forward the rental payments it received pursuant to its lease with Oz Technologies.

As you may recall, at the hearing on FXM's Motion to Alter or Amend, we discussed the fact Judge McDonald's order found that FXM fell short of exhausting its security deposit with Skywaves by approximately \$85,000. We further discussed the fact that even if Judge McDonald's order precluded recovery by FXM against KWK under a secondary obligation theory, to the extent FXM's damages exceeded the approximately \$85,000 shortfall, that amount may be recoverable and it is FXM's position that any dispute between the parties as to the extent or amount of damages is certainly a genuine issue of material fact that would make summary judgment improper. As you can see from the attached spreadsheet, the payments KWK received but failed to forward to FXM clearly exceeds the \$85,000 minimum threshold.

Further, the affidavit attached to opposing counsel's email regarding the "oral agreement" extending the written lease agreement at issue does nothing to circumvent KWK's obligations to forward the rental payments it was receiving to FXM. The affidavit states the written lease expired March 31, 2009 and that OZ and KWK entered into an oral agreement that existed until January 2011. However, any agreement for the use or occupation of real estate for more than one year shall be void unless in writing. See SC Code 27-35-20. The absence of a writing confirming this alleged oral agreement for OZ to occupy the property renders the oral arrangement void and obliges the court to impose the terms contained in the written agreement, including the provision that required KWK to forward all rents received to FXM.

Moreover, the purported oral agreement, even if it weren't specifically voided by the aforementioned statute, would be subject to a determination of the terms, conditions, and intent of the parties to the oral agreement by the fact finder. This would require testimony from representatives of both OZ and KWK. However, there is no evidence in the record from OZ or KWK regarding the intent or terms of this purported oral agreement. This creates another genuine issue of material fact when determining whether or not FXM is entitled to recover for the rents received by KWK during the time period of April 2009-January 2011.

Accordingly, I would ask the court to grant FXM's motion to alter or amend, finding a genuine issue of material fact exists regarding FXM's damages, and to allow for the issue of FXM's damages to be resolved by the fact finder. I think a form order would suffice but I would be happy to submit a proposed order to that effect if you prefer. Should you have any questions, please let me know.

Aaron E. Edwards  
**THE RICHTER FIRM, LLC**  
Attorneys & Counselors at Law  
622 Johnnie Dodds Blvd.  
Mt. Pleasant, SC 29464  
Phone: (843) 849-6000  
Fax: (843) 881-1400

Date	Check #	Check Amount
4/8/2008	991	\$3,472.88
5/1/2008	1013	\$3,646.52
9/15/2008	1128	\$7,000.00
10/29/2008	1162	\$3,472.88
11/29/2008	1189	\$3,472.88
12/15/2008	1205	\$3,646.52
12/15/2008	1206	\$11,232.60
1/2/2009	1278	\$3,646.52
1/7/2009	1249	\$3,646.52
3/6/2009	1317	\$3,646.52
4/3/2009	1344	\$3,646.52
5/12/2009	1397	\$3,646.52
6/2/2009	1421	\$3,646.52
7/1/2009	1442	\$3,646.52
9/9/2009	1522	\$3,646.52
9/30/2009	1551	\$3,646.52
11/4/2009	1590	\$3,646.52
12/2/2009	1631	\$3,646.52
1/27/2010	1668	\$3,646.52
2/19/2010	1690	\$3,646.52
3/2/2010	1708	\$3,646.52
4/7/2010	1765	\$3,646.52
6/8/2010	1836	\$7,293.04
7/1/2010	1869	\$3,646.52
8/4/2010	1927	\$3,646.52
9/7/2010	1970	\$3,646.52
10/22/2010	2019	\$3,646.52
12/29/2010	2112	\$3,646.52

2008	\$38,460.10
2008 & 2009	\$84,666.89
2008-2010	\$134,137.01
2008-2011	\$144,197.29
2008-2012	\$155,012.09
2008-2013	\$166,638.00
2008-2014	\$179,135.85
008-2015 (4/30	\$183,553.05

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**From:** Michelle Endemann [<mailto:mne@epting-law.com>]  
**Sent:** Friday, April 24, 2015 3:42 PM  
**To:** Mikell Scarborough  
**Cc:** Andrew K. Epting; Aaron E. Edwards; Ryan W. Conner; Angela Gross  
**Subject:** KWK; et al v. FXM, et al; case no. 2008-CP-10-1642

Dear Judge Scarborough,

Attached per your instructions at last week's hearing, please find the draft Order denying FXM's motion to alter or amend.

Also attached is the affidavit of Crayton Walters previously submitted at the summary judgment hearing.

Have a great weekend.

Best Regards,

Michelle N. Endemann, Esq.  
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46A State Street, Charleston, SC 29401  
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F: 843-377-1310  
[mne@epting-law.com](mailto:mne@epting-law.com)

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