

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)
)
A & B ASSOCIATES, L. P.)
)
)
Plaintiff,)
)
vs.)
)
FCRE REL, LLC, and TIDELANDS)
REALTY, INC.,)
)
Defendants.)

IN THE COURT OF COMMON PLEAS
CASE NUMBER: 2016-CP-07-1778

ORDER GRANTING PLAINTIFF'S
MOTION FOR CONTEMPT

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SC Court of Appeals

This matter is before the undersigned on the Plaintiff's Motion for Contempt, which was filed on September 9, 2016. This case was commenced by the Plaintiff on August 15, 2016. Among other things, the Plaintiff sought an *ex parte* Temporary Restraining Order, and moved for a Temporary Injunction. On August 15, 2016, following consideration of the Plaintiff's Verified Complaint, I signed a Temporary Restraining Order, and set a hearing on the Plaintiff's Motion for Temporary Injunction to commence at 3:30 P. M., on August 24, 2016.

The hearing on the Plaintiff's Motion for Temporary Injunction did not commence until approximately 4:40 o'clock, P. M., on August 24, 2016. At the hearing on Plaintiff's Motion for Temporary Injunction, having reviewed and considered the Verified Complaint and affidavits, the Court made various findings and granted Plaintiff's Motion for Temporary Injunction. An Order granting the Temporary Injunction was signed on August 26, 2016. Thereafter, Defendant FCRE REL, LLC, sought relief from the Temporary Injunction, and following a hearing, FCRE REL, LLC's



Motion for Relief was denied on September 1, 2016. On September 1, 2016, FCRE REL, LLC, filed its Answer, Counterclaims and Third-Party Complaint.

The Temporary Injunction ordered, in part, that:

1. The Plaintiff shall have possession of its real property described above and all of its money, business files, leases, and personal property without hindrance or interference from the Defendants, and the Plaintiff is entitled to maintain and manage its property as it sees fit.

...
3. No later than 12:00 Noon, on Friday, August 26, 2016, the Defendants shall return and turn over to Plaintiff all of Plaintiff's money, including, but not limited to, all leases, applications, paperwork, files, tools as referenced in Christopher Kettles' affidavit, all money received from rents, and to return of all money removed from any of Plaintiff's bank accounts, including reserve accounts, and to provide a full accounting of all such money and any expenses Defendants have paid or incurred with Plaintiff's money.

On September 8, 2016, A & B Associates, L. P., filed its Motion for Contempt, alleging that FCRE REL, LLC, willfully failed to comply with both the Temporary Restraining Order and the Temporary Injunction. The Court set a hearing on Plaintiff's Motion for September 16, 2016. In support of its Motion, Plaintiff filed the affidavits of L. Christopher Kettles and Curtis Coltrane. Plaintiff's Motion for Contempt and supporting affidavits alleged among other things, that FCRE REL, LLC failed to return to Plaintiff rental income, reserve account funds, and personal property to Plaintiff. A & B Associates, L. P., also alleged that FCRE REL, LLC continued to interfere with Plaintiff's business and had altered sweeping instructions on Plaintiff's bank accounts, and had imposed a claim of default interest on the loan.

After filing its Motion for Contempt, Plaintiff filed additional affidavits from Curtis L. Coltrane and Timothy J. Granitz that included an accounting of their respective firm's legal billings that Plaintiff incurred from August 26, 2016 through the

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morning of September 15, 2016. The legal billings were incurred by Plaintiff in an effort to enforce the Temporary Injunction, were incurred in responding to Defendant FCRE REL, LLC's Motion for Relief from Order Granting Temporary Injunction, and were incurred in preparing Plaintiff's Motion for Contempt.

Defendant FCRE REL, LLC filed a brief in opposition to Plaintiff's Motion for Contempt on September 15, 2016. Attached to the brief were the affidavits of Mary Davenport, Jami Rankin, Benjamin Coppage, and Brian White. Defendant FCRE REL, LLC's responsive brief alleged that it had complied with the Court's Orders and that Plaintiff has unclean hands. Prior to the hearing on September 16, 2016, Plaintiff served an affidavit of Alison E. Plank Mealing on Counsel for FCRE REL, LLC, and Tideland Realty, Inc.¹

On September 16, 2016, I heard Plaintiff's Motion for Contempt. After reviewing the Motion, Reply, and several affidavits, and after hearing and considering the arguments of counsel, I found, and confirm by this Order, that FCRE REL, LLC has violated, and continued to violate, the Temporary Injunction. I further found, and confirm by this Order, that FCRE REL, LLC's violation of the Temporary Injunction was willful. I therefore granted Plaintiff's Motion for Contempt.

Specifically, FCRE REL, LLC has violated the Temporary Injunction by:

1. Failing to return to Plaintiff all of the rental money FCRE REL, LLC, or its agent, collected while it was in control and possession of Plaintiff's Real Property;

¹ The claim of "unclean hands" was based on FCRE REL, LLC's claim that A & B Associates, L. P., failed to have a licensed property manager. The Affidavit of Brian White included a statement that Mr. White had met Alison Mealing at the property and that she identified herself as the property manager. FCRE REL, LLC, asserted that Alison Mealing was not a licensed property manager. In her affidavit, Ms. Mealing confirmed that she holds a "Property Manager In Charge" license and attached a copy of it to her affidavit. The claim of FCRE REL, LLC, as to the "unclean hands" is unfounded, and is denied.



2. Failing to return to Plaintiff all of the money that was swept from any reserve accounts that Plaintiff owned or had an interest in;
3. Failing to return to Plaintiff any overpayment funds that Plaintiff made on the August 2016 debt service payment;
4. Charging default interest against Plaintiff; and,
5. Changing the sweeping instructions on Plaintiff's Wells Fargo bank account such that the money in the account would sweep into an account owned or controlled by FCRE REL, LLC.

The Court reiterated, as it has done so previously in this matter, that its intention was to re-establish the status quo that existed prior to the time that FCRE REL, LLC, declared a default and removed A & B Associates, L. P., from its property. I believe that it was clear that the Orders are and were designed to place the parties in the position that they were in prior to Defendant FCRE REL, LLC's declaration of non-monetary default on or about July 18, 2016.²

In its Motion for Contempt, A & B Associates, L. P., the Plaintiff sought the attorney's fees incurred by in the course of attempting to secure compliance with the Temporary Injunction. In a civil contempt proceeding, a contemnor may be required to

² In its Reply and at the September 16, 2016, Hearing, FCRE REL, LLC, argued that the language in the Temporary Injunction requiring it to return the Plaintiff's money was open to interpretation. FCRE REL, LLC, argued that the effect of the loan documents was that all of the money collected by the Plaintiff from rents was, in fact, FCRE REL, LLC's money, and thus, there was nothing to return to the Plaintiff. This position is contrary to the plain language of the Temporary Injunction, which was clear as to what was required of FCRE REL, LLC.



reimburse a complainant for the costs incurred in enforcing the court's order, including reasonable attorney's fees.³

In this case, the attorneys for A & B Associates, L. P., Curtis L. Coltrane and Timothy J. Granitz submitted affidavits detailing the attorney's fees incurred by A & B Associates, L. P., in connection with their effort to achieve compliance with the Temporary Injunction. The affidavits included statements of the attorneys' time and a description of what was done.

With respect to the clam for attorney's fees, I have considered the six factors set out in *Baron Data Systems v. Loter*, 297 S.C. 382, 377 S.E.2d 296 (1989), as follows:

(a) The nature, difficulty and extent of the legal services rendered: This case involves a dispute over a note and mortgage in the face amount of Three Million Nine Hundred Thousand and no/100 (\$3,900,000.00) Dollars. The facts that have been presented in the course of the hearings on the Motion for Temporary Restraining Order, Motion for Temporary Injunction, the Motions for Relief from both of them filed by FCRE REL, LLC, show that this is an unusual case with complex issues.

(b) The time and labor devoted to the case. The affidavit of fees set out in detail the amount of time spent by counsel in prosecuting this case. No evidence was presented to show that the time was not actually spent, or that the amounts of time spent were unreasonable.⁴

(c) The professional standing of counsel. Curtis L. Coltrane has been a member of the South Carolina Bar for 34 years. He has tried many foreclosure cases as well as other types of cases. He is experienced with real estate and title matters. His professional standing with the bar is good. The *pro hac vice* applications, which are of record, of Timothy J. Grantiz shows that he is a member in good standing of the Wisconsin Bar, and that Brian H. Mahany is a member of numerous bar associations, and that each has qualified for admission *pro hac vice* in South Carolina, and have qualified elsewhere.

³ See: *Cannon v. Georgia Attorney General's Office, et al.*, 397 S.C. 541, 725 S.E.2d 698 (2012).

⁴ The attorneys for A & B Associates, L. P., were offered for cross examination, and FCRE REL, LLC, declined to do so.



(d) The contingency of compensation. This case was not a contingency fee matter.

(d) The fee customarily charged in the locality for similar services. The rates charged by the attorneys are as follows:

(a)	Paralegals	\$	85.00 Per Hour
(b)	Timothy J. Granitz	\$	400.00 Per Hour
(c)	Curtis L. Coltrane	\$	300.00 Per Hour
(D)	Brian H. Mahany	\$	450.00 Per Hour

These rates are in line with those charged by law firms in Beaufort County, South Carolina, for this type of service.

(e) The beneficial results obtained. The attorneys have been successful, in the face of a vigorous defense, in their efforts in this case on the matters presented thus far.

Based on the foregoing, I find that the attorney's fees in the sum of Fourteen Thousand Three Hundred Thirty Nine and no/100 (\$14,339.00) Dollars is a reasonable amount to allow for attorney's fees incurred by A & B Associates, L. P., in connection with this matter.

CONCLUSION

Now, therefore, based on the forgoing findings and conclusions:

IT IS ORDERED:

1. FCRE REL, LLC is ordered to return to Plaintiff the sum of Fifty Six Thousand Seven Hundred Seventy Four and 94/100 (\$56,774.92) Dollars, being the funds either collected by FCRE REL, LLC, or removed from its accounts, and the overpayment made to FCRE REL, LLC, with the August, 2016, payment.⁵

⁵ This amount is exclusive of the money that FCRE REL, LLC's accounting showed it had spent making improvements to the Plaintiff's property. No ruling is made with respect to those funds, and those funds have not been ordered to be returned at this time.

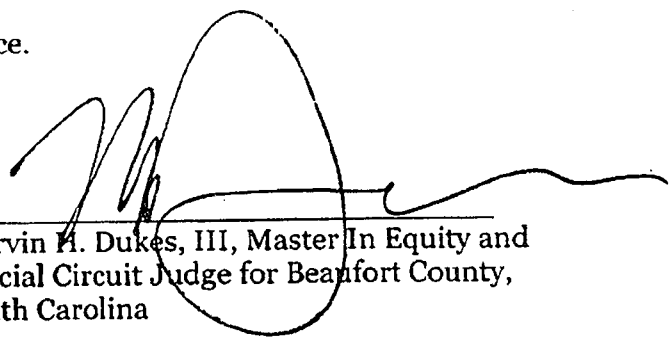
2. Defendant FCRE REL, LLC is ordered to return all default interest that was charged to Plaintiff and that which was paid by Plaintiff, in the amount of Twenty Five Thousand Five Hundred Thirty Two and 76/100 (\$25,532.76) Dollars;
3. Defendant FCRE REL, LLC is ordered to pay Plaintiff's attorney fees that Plaintiff has incurred as a result of its willful and contemptuous conduct. The amount of the Attorney fees awarded to Plaintiff are as set forth in the Affidavits of Timothy Granitz and Curtis Coltrane, in the total amount of Fourteen Thousand Three Hundred Thirty Nine and no/100 (\$14,339.00) Dollars.
4. FCRE REL, LLC, has proposed, and the Court has accepted, a proposal for the handling of funds remaining in the Wells Fargo bank account (Account #4246161459), as follows: (1) the Wells Fargo bank account (Account #4246161459) will be closed effective September 23, 2016; (2) FCRE REL, LLC, shall direct Wells Fargo to deliver the sum of Fifteen thousand seven hundred forty five Dollars (\$15,745) (representing a September rent payment by the Beaufort Housing Authority) to counsel for A & B Associates, L.P.; (3) Any remaining amounts in the DACA after customary and usual Bank fees and the minimum balance requirement shall be delivered to counsel for A & B Associates, L.P. (4) A & B Associates, L. P. shall deposit rent payments into its own operating account, until further Order of this Court; (5) FCRE REL, LLC, shall notify the Beaufort Housing Authority that until further Order of the Court, it shall deliver any payments for rent related to August on Southside directly to A & B Associates, L. P.; and (6) neither the closure of the Wells Fargo bank account as of September 23, 2016, nor the failure of the Borrower to make any deposits into



that account, or any DACA account, after September 23, 2016 will be asserted as an Event of Default under the Loan Documents. The foregoing is incorporated in this Order.

At the hearing on September 16, 2016, I ordered from the bench that FCRE REL, LLC would pay a fine to the Beaufort County, South Carolina, Clerk of Court, in the amount \$10,000.00 per calendar day, which fine is to begin accruing at 5:00, o'clock, P. M., on September 16, 2016, and continuing thereafter until the Order was complied with. FCRE REL, LLC, made diligent efforts to comply with the Court's order of September 16, 2016, and has done so. This Court has the inherent ability to change a verbal ruling from the bench when it makes a written order. *E.G., McComb v. Conard*, 715 S.E.2d 662, 394 S.C. 416 (S.C. Ct. App. 2011) ("*Until written and entered, the trial judge retains discretion to change his mind and amend his oral ruling accordingly. Because it was an oral ruling, the family court was fully within its rights to change its decision in the written order.*") As a result, the ruling related to the imposition of a fine is rescinded. It now appears that FCRE REL, LLC, has moved to comply as quickly as possible. In light of that, I hereby rescind the portion of the ruling related to the imposition of a fine for non-compliance.

IT IS SO ORDERED.



Marvin H. Dukes, III, Master In Equity and
Special Circuit Judge for Beaufort County,
South Carolina

Beaufort, South Carolina

This 23 Day of September, 2016.