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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
The Honorable Marvin H. Dukes, III, Special Circuit Court Judge

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Appellate Case No. 2016-001899
Case No. 2016-CP-07-1778

A&B Associates, L.P. ..... Plaintiff/Respondent,

v.

FCRE REL, LLC, and TIDELAND REALTY, INC. ..... Defendants,

Of whom FCRE REL, LLC is the ..... Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. **Did the trial court abuse its discretion in issuing the Injunction Order because it failed to properly consider the three injunction elements: (1) irreparable harm; (2) likelihood of success on the merits; and (3) no adequate remedy at law?**

II. **Did the trial court abuse its discretion in issuing the Contempt Order because the underlying Injunction Order lacked adequate specificity?**

STATEMENT OF THE CASE

I. Procedural History

On August 15, 2016, Plaintiff A&B Associates, L.P. ("A&B") filed the Verified Summons and Complaint (the "Complaint"). On that same date, the trial court issued the Ex Parte Temporary Restraining Order (the "TRO"). Also on August 15, 2016, A&B filed the Notice of Motion and Motion for Temporary Injunction and Notice of Hearing.

On August 16, 2016, Defendant FCRE REL, LLC ("FCRE") filed a Notice of Motion and Motion to Vacate Ex Parte Temporary Restraining Order (the "Motion to Vacate"). In support of the Motion to Vacate, on August 16, 2016, FCRE filed the Affidavits of Mary F. Davenport and Nichole Kim. The trial court denied the Motion to Vacate without a written order.

On August 22, 2016, FCRE filed Defendant's Brief in Opposition to Plaintiff's Application for a Temporary Injunction. On August 24, 2016, A&B filed the Memorandum in Support of Motion for Temporary Injunction, along with the Affidavits of Christopher Kettles, Sharan Kettles, Traci Oates, Sheytoria Rivers, and Sabania Norris, which were signed and attested to between August 20th and August 23, 2016.

On August 24, 2016, the trial court conducted the hearing on the Motion for Temporary Injunction (the "Injunction Hearing"). At the conclusion of the hearing, the trial court granted the temporary injunction. On August 26, 2016, the trial court issued and filed the Order Granting Temporary Injunction (the "Injunction Order").

On September 6, 2016, FCRE and Defendant Tideland Realty, Inc. ("Tideland") filed the Answer, Counter-Claims, and Third Party Complaint (the "Answer").

On September 9, 2016, A&B filed a Motion for Contempt, alleging that FCRE violated the Injunction Order. In conjunction with the Motion for Contempt, A&B filed the Affidavits of Timothy J. Granitz, Curtis L. Coltrane, Christopher Kettles, and Sharan Kettles.

On September 12, 2016, FCRE filed a Notice of Appeal of the Injunction Order.

On September 15, 2016, FCRE filed a Brief in Opposition to the Motion for Contempt. On that same date, FCRE filed the Affidavits of Mary F. Davenport, Jami Rankin, Benjamin T. Coppage, and Brian White.

On September 16, 2016, the trial court conducted the hearing on the Motion for Contempt. At the conclusion of the hearing, the trial court granted the Motion for Contempt. On September 23, 2016, the trial court issued and filed the Order Granting Motion for Contempt (the "Contempt Order").

On October 20, 2016, FCRE filed a Notice of Appeal of the Contempt Order. The appeals of the Injunction Order and the Contempt Order are consolidated under Appellate Case No. 2016-001899.

II. Statement of the Facts

FCRE, a Delaware limited liability company, is a commercial real estate lender. *See* Answer, pp. 1 & 9. FCRE is in the business of originating loans for Commercial Mortgage-Backed Securities ("CMBS") transactions. *See* Response to Motion for Contempt, p. 1. A&B is a Georgia Limited Partnership that owns a residential rental property located at 2208 Southside Boulevard Port Royal, South Carolina (the "Property"). *See* Complaint, pp. 1-2. A&B's general partner is AGBP, Inc., the president of which is L. Christopher Kettles ("Kettles"). *See* Complaint, p. 2.

On February 18, 2015, A&B, as the borrower, and Kettles, as the sponsor, submitted an application for a loan to refinance existing first mortgage debt on the Property. *See* Answer, p. 9. In conjunction with FCRE's standard due diligence, specific documents and certification from the borrower and sponsor were required. *See* Answer, pp. 9-10. As part of the document submission package, A&B provided written confirmation that: (1) thirteen of the apartments at the Property were leased by tenants receiving housing assistance payments from the Beaufort Housing Authority ("BHA"), a self-governing public agency created by South Carolina state and local laws; (2) it was A&B's intention not to renew those tenants' leases; and (3) it was A&B's intention not to lease additional apartments to tenants receiving such governmental assistance. *See* FCRE's Brief in Opposition to A&B's Application for Temporary Injunction ("Brief in Opposition to Injunction"), p. 2; Answer, p. 10. In addition, A&B provided FCRE with a then-current rent roll and property operating statements which were certified by Kettles to be true and accurate. *See* Answer, p. 10. Upon FCRE's review of these statements, other verbal and written certified statements provided by A&B, as well as other loan due diligence documentation regarding the Property and A&B, FCRE and A&B entered into a Loan Agreement on April 15, 2015, for the provision of first mortgage financing to A&B in the amount of three million nine hundred thousand dollars ($3,900,000.00). *See* Brief in Opposition to Injunction, p.2; Answer, pp. 9-12. In connection with the funding of that loan, and in addition to the Loan Agreement, A&B also executed a Promissory Note, Guaranty of Recourse Obligations and Environmental Indemnity Agreement, and Mortgage, Assignment of Leases and Rents, Security Agreement and Fixture Filing, and an Assignment and Subordination of Management Agreement (hereinafter these

documents and the Loan Agreement are collectively referred to as the "Loan Documents"). *See* Brief in Opposition to Injunction, p. 2; Answer, p. 12. A&B was represented by experienced legal counsel relating to all aspects of the transaction and all of the Loan Documents. *See* Brief in Opposition to Injunction, pp. 2-3.

In executing the Mortgage, Assignment of Leases and Rents, Security Agreement and Fixture Filing (hereinafter "Mortgage"), A&B absolutely and unconditionally assigned to FCRE all of A&B's right, title, and interest to do all other things which A&B or any lessor was or may become entitled to do under the Leases or the Lease Guaranties, as defined in the Mortgage. *See* Brief in Opposition to Injunction, p. 3; Response to Motion for Contempt, p. 2. Pursuant to the Mortgage, A&B also granted FCRE an irrevocable power of attorney coupled with an interest for the purpose of exercising and perfecting any and all rights and remedies available to Lender at law and in equity. *See* Brief in Opposition to Injunction, p. 3; Response to Motion for Contempt, p. 2. These same provisions were contained in loan documents executed by A&B in connection with two previous mortgage loans. *See* Response to Motion for Contempt, p. 2; Davenport Aff., dated September 14, 2016, p. 3. A&B granted FCRE the ability, under an event of default, to do those things necessary to protect the Property, including entry upon the Property. *See* Brief in Opposition to Injunction, p. 3. Even in the absence of an event of default, A&B gave FCRE the right to enter on the Property:

> without liability for trespass, damages or otherwise and exclude [A&B] and its agents or servants wholly therefrom, and take possession of all books, records and accounts relating thereto and [A&B] agree[d] to surrender possession of the Property and of such books, records and accounts to Lender upon demand, and thereupon [FCRE] may (i) use, operate, manage, control, insure, maintain, repair, restore and otherwise deal with all and every part of the Property and conduct the business thereon; (ii) complete any construction on the Property in such manner and form as Lender deems

> advisable; (iii) make alterations, additions, renewals, replacements and improvements to or on the Property; (iv) exercise all rights and powers of [A&B] with respect to the Property, whether in the name of [A&B] or otherwise, including, without limitation, the right to make, cancel, enforce or modify Leases, obtain and evict tenants, and demand, sue for, collect and receive all Rents of the Property and every part thereof; (v) require [A&B] to pay monthly in advance to [FCRE], or any receiver appointed to collect the Rents, the fair and reasonable rental value for the use and occupation of such part of the Property as may be occupied by [A&B]; [and] (vi) require [A&B] to vacate and surrender possession of the Property to [FCRE] . . . .

See Response to Motion for Contempt, pp. 2-3.

In Section 1.2 of the Mortgage, A&B absolutely and unconditionally assigned all of its right, title and interest in and to all current and future Leases and Rents and all rights, powers, privileges, options and other benefits of A&B as lessor under the Leases and beneficiary under the Lease Guaranties, including without limitation the immediate and continuing right to make claim for, receive, collect and receipt for all rents payable or receivable under the Leases. *See* Response to Motion for Contempt, p. 3. Under Section 1.2, FCRE granted to A&B "a revocable license to collect, receive, use and enjoy the Rents." *See* Response to Motion for Contempt, p. 3. Pursuant to Section 7.1(h) of the Mortgage, that license was immediately and automatically revoked upon A&B's default under the provisions of the Loan Documents. *See* Response to Motion for Contempt, p. 3. Under that section, with or without an event of default, FCRE is immediately entitled to possession of all rents and sums due under or arising from the Property and could:

> apply the receipts from the Property to the payment of the Debt, in such order, priority and proportions as [FCRE] shall deem appropriate in its sole discretion after deducting therefrom all expenses (including reasonable attorneys' fees) incurred in connection with the aforesaid operations and all amounts necessary to pay the Taxes, Other Charges, insurance and other expenses in connection with the Property, as well as just and reasonable compensation for the services of [FCRE], its counsel, agents and employees.

See Response to Motion for Contempt, p. 3. The "Debt," as referred to in the foregoing sentence, is defined as "the outstanding principal amount of the Loan together with all interest accrued and unpaid thereon and all other sums . . . owing to [FCRE] in respect of the Loan under the Note, this Agreement, the Mortgage or any other Loan Document." *See* Response to Motion for Contempt, pp. 3-4.

The Assignment of Management Agreement and Subordination of Management Fees (hereinafter "Management Assignment") unconditionally transferred, set over, and assigned to FCRE all of A&B's right, title and interest in and to a Management Agreement with the August Group, Inc. (hereinafter "August Group") under which A&B employed August Group to exclusively rent, lease, operate and manage the Property. *See* Brief in Opposition to Injunction, p. 6; Response to Motion for Contempt, p. 2. The Management Assignment provided that, upon an event of default by A&B under any of the Loan Documents, FCRE would be entitled to terminate the Management Agreement and require August Group to transfer its responsibility for the management of the Property to a management company selected by FCRE. *See* Brief in Opposition to Injunction, p. 6; Answer, p. 16; Response to Motion for Contempt, p. 2.

In addition, the Loan Agreement grants FCRE the right to perform any act as may be appropriate to cause all the material terms, covenants, and conditions of the Management Agreement to be performed and observed. *See* Response to Motion for Contempt, p. 4. A&B granted an irrevocable power of attorney to FCRE to exercise and perfect any and all rights and remedies available to FCRE under the Loan Documents and at law and equity, including without limitation such rights and remedies available to FCRE pursuant to Sections 10.2, 10.3, and 10.4 of the Loan Agreement. *See* Brief in Opposition

to Injunction, p. 3; Response to Motion for Contempt, p. 4. Section 10.3 of the Loan Agreement provides that FCRE is authorized to enter upon the Property, make, do, or perform any obligation of A&B under the Loan Agreement. *See* Brief in Opposition to Injunction, p. 3; Response to Motion for Contempt, p. 4.

The Loan Agreement also requires the establishment of a clearing account. *See* Answer, pp. 23-24. Section 2.6 of the Loan Agreement states that "Borrower shall establish and maintain a segregated Eligible Account (the "Clearing Account") with the Clearing Bank in trust for the benefit of Lender, which Clearing Account shall be under the sole dominion and control of Lender." *See* Response to Motion for Contempt, p. 4. It also states that "during any Cash Management Period, Lender shall cause the Clearing Bank to transfer to the Deposit Account in immediately available funds by federal wire transfer all amounts on deposit in the Clearing Account once every Business Day." *See* Response to Motion for Contempt, p. 4. A Cash Management Period is "the period commencing with a Lockbox Trigger Event and terminating upon the applicable Lockbox Trigger Event Cure, if any." *See* Response to Motion for Contempt, p. 4. An event of default is a Lockbox Trigger Event. *See* Response to Motion for Contempt, p. 4.

Also in the Loan Agreement, the parties agreed that, for so long as any Event of Default occurs and continues, the outstanding principal balance of the Loan shall accrue interest at the Default Rate, calculated from the date such payment was due without regard to any grace or cure periods. *See* Response to Motion for Contempt, p. 4.

A. Causes Leading to the Issuance of a Notice of Default

1. A&B failed to make two of the first four monthly payments in a timely manner.

On or about July 6, 2015, FCRE was advised by its loan servicer, Midland Loan Services ("Midland"), that A&B did not make the required second monthly payment. *See* Answer, p. 12. Further, on or about September 6, 2015, FCRE was advised by Midland that A&B did not make the required fourth monthly payment. *See* Answer, p. 13. In both instances, FCRE contacted A&B to advise that monthly payments were to be made in a timely manner, and prior to or on the due date of the 6th of the month. *See* Answer, pp. 12-13. In support of FCRE's claims that A&B never intended to fulfill its contractual obligations under the Loan Documents, A&B contacted Midland on January 29, 2016, without FCRE's knowledge or consent, and attempted to have the payment due date changed. *See* Answer, p. 13.

2. A&B failed to maintain proper security at the Property to ensure tenant safety.

On or about October 27, 2015, FCRE became aware that one of the occupants residing at the Property had been shot while in his apartment unit at the Property. *See* Answer, p. 13. FCRE immediately contacted Kettles to inquire about the safety of the tenants and whether any measures were being taken to ensure their safety and the protection of the Property. *See* Answer, p. 13. Kettles replied that the shooting had been a random incident, that the Port Royal Police Department had saturated the Property, that the Property was one of the least crime affected complexes in Port Royal and Beaufort County, and that the Property was not located in a high-crime area. *See* Answer, p. 13; Brief in Opposition to Injunction, p. 3. Despite these assurances, FCRE continued to contact Kettles and other agents of A&B, including representatives of August Group, regarding the safety of the Property. *See* Answer, p. 13; Davenport Affidavits, dated August 16, 2016 and September 14, 2016.

Though FCRE requested that A&B provide proof that action had been or was being taken to ensure the safety of the tenants and the Property, A&B failed to offer any such proof. *See* Answer, pp. 13-14; Davenport Affidavits, dated August 16 and September 14, 2016. Therefore, on December 8, 2015, FCRE's Executive Vice President, Mary F. Davenport, and Senior Vice President, Nichole Kim, visited the Property and met with Sharan Kettles and Amanda Pett, agents of August Group. *See* Answer, p. 13; Davenport Aff., dated August 16, 2016. The on-site visit revealed that no measures had been taken to ensure the safety of the tenants or the Property. *See* Answer, p. 14; Davenport Aff., dated August 16, 2016. It also became obvious that A&B had allowed the condition of the Property to significantly deteriorate in the eight months subsequent to the funding of the loan. *See* Answer, p. 14; Davenport Affidavits, dated August 16 and September 14, 2016.

In addition to the property site visit and interview of the August Group agents, on December 8, 2015, Ms. Davenport and Ms. Kim met with Captain John Griffith of the Port Royal Police Department to discuss the safety concerns. *See* Brief in Opposition to Injunction, p. 4; Answer, p. 14. Captain Griffith provided reports that revealed the Property was located in a high-crime area and that a great deal of criminal activity occurred on the Property. *See* Brief in Opposition to Injunction, p. 4; Answer, p. 14. These reports further showed that the crime level at the Property had not abated since FCRE's funding of the loan to A&B or since A&B's contact with Kettles following the shooting. *See* Brief in Opposition to Injunction, p. 4; Answer, p. 14.

3. A&B failed to engage a properly licensed management company.

Concurrent with this visit, FCRE learned that August Group did not have properly licensed agents, including but not limited to Sharan Kettles and Amanda Pett, under the South Carolina Real Estate Commission regulations representing it, and was therefore not

properly qualified to act as a property manager in the state of South Carolina. *See* Brief in Opposition to Injunction, p. 4; Answer, p. 14.

4. A&B's continued failure to correct property and security deficiencies, as well as engage a properly licensed management company.

On December 21, 2015, FCRE contacted Kettles, letting him know that A&B's failure to make the Property safe for tenants and failure to prevent the deterioration of the Property were violations of provisions of the Loan Documents. *See* Answer, p. 14; Davenport Aff., dated August 16, 2016. FCRE suggested steps that could be taken to avoid default under those provisions. *See* Answer, p. 14; Davenport Aff., dated August 16, 2016. Kettles responded by arguing that A&B had no duty to make the Property safe for tenants but that he was considering increasing security measures on the Property. *See* Brief in Opposition to Injunction, p. 5; Answer, p. 14. In the months following that contact, FCRE repeatedly reached out to A&B to inquire as to whether measures were being taken to ensure the safety of the Property and prevent its further deterioration. *See* Answer, p. 15; Davenport Affidavits, dated August 16 and September 14, 2016. A&B's few responses to these inquiries did not confirm that any such measures were being taken but were only statements that A&B was investigating its options regarding security. *See* Answer, p. 15; Davenport Affidavits, dated August 16 and September 14, 2016.

5. A&B's continued failure to properly maintain the physical condition of the Property.

On or about May 4, 2016, FCRE received a report of a third party inspection of the Property that noted continued and significant physical waste and deterioration of the Property. *See* Answer, p. 15; Davenport Affidavits, dated August 16 and September 14, 2016. FCRE contacted A&B and requested confirmation that the waste and deterioration

had been or were being corrected. *See* Answer, p. 15; Davenport Affidavits, dated August 16 and September 14, 2016. FCRE received no response from A&B. *See* Answer, p. 15; Davenport Affidavits, dated August 16 and September 14, 2016.

6. A&B's failure to provide true and accurate financial reports pertaining to the Property.

Concerned about the state of the Property, the safety of the tenants, and A&B's ability to legally and effectively manage the Property, in May, June, and July of 2016, FCRE requested financial information pertinent to the management of the Property. *See* Brief in Opposition to Injunction, p. 5; Answer, p. 15; Davenport Aff., dated September 14, 2016. Much of the information requested was provided by A&B, Kettles, and August Group. *See* Brief in Opposition to Injunction, p. 5; Answer, p. 15; Davenport Aff., dated September 14, 2016. Upon FCRE's review of the same, it was discovered that the information provided was inconsistent with information provided to FCRE during the loan application process and other financial information previously provided to FCRE. *See* Brief in Opposition to Injunction, p. 5; Answer, p. 15; Davenport Aff., dated September 14, 2016. Notably, it was clear that A&B never deposited the full amount of rent collected on a monthly basis into a clearing account as required by the Loan Agreement. *See* Brief in Opposition to Injunction, p. 5; Answer, pp. 15-16. It was also clear that A&B consistently reported collecting thousands of dollars less than the amount due from tenants according to the rent rolls submitted to FCRE. *See* Brief in Opposition to Injunction, p. 5; Answer, p. 16.

B. Issuance of the Notice of Default

As a result of A&B's (1) failure to address issues regarding the safety of the Property; (2) allowance of continued deterioration and physical waste of the Property; (3)

failure to provide documentation showing that its property manager was properly licensed; (4) failure to provide financial reports, including missing, late, inaccurate, inconsistent, and misleading tenant occupancy reports; (5) failure to remedy defects; (6) failure to notify FCRE of A&B's change of place of business; and (7) permitting leases of less than twelve months in duration, FCRE sent A&B a "Notice of Event of Default" dated July 18, 2016, which notified A&B of the foregoing events of default and gave A&B notice that FCRE would be exercising its right, under the Loan Documents, to act under power of attorney for A&B to replace August Group as the manager of the Property with a property manager of FCRE's choosing. *See* Brief in Opposition to Injunction, p. 6, Answer, pp. 16-18.

On July 18 and 21, 2016, FCRE issued a letter to A&B and August Group informing August Group that its Management Agreement with A&B had been terminated, that it was necessary that a full accounting of all security deposits held by August Group be submitted to the new property manager, Tideland, and that any security deposits held by August Group were to immediately be remitted to Tideland. *See* Brief in Opposition to Injunction, p. 6; Answer, p. 16.

C. Discovery of Additional Breaches by A&B

On July 20, 2016, Tideland took over the management of the Property and acted as Property Manager until August 16, 2016. *See* Rankin Aff. During that time, Tideland applied rents and receipts from the Property to the Debt, including expenses incurred in connection with operating and managing the Property. *See* Rankin Aff.

Also during that time, a review of the accounting records associated with the Property revealed what appeared to be fraudulent checks that were issued from A&B's SunTrust operating account to numerous parties, endorsed to August Group, and deposited

into the Wells Fargo clearing account. *See* Davenport Aff., dated September 14, 2016. Further investigation revealed other suspicious activity related to the use of both the SunTrust and Wells Fargo accounts. *See* Davenport Aff., dated September 14, 2016.

D. Granting of the TRO

On August 15, 2016, A&B filed the Complaint and Motion for TRO. *See* Complaint & Motion for TRO. The motion was granted and the trial court issued the TRO which required FCRE to cease any alteration of the Property and to restore A&B to possession of the Property on August 16, 2016 at 3:00 p.m. *See* TRO, p. 1. On August 16, 2016 at 3:00 p.m., Tideland vacated the Property. *See* Rankin Aff. Subsequent to Tideland's cessation of management of the Property, pursuant to the TRO and prior to the issuance of the Injunction Order, A&B and its agents re-entered the Property. *See* Brief in Opposition to Injunction, p. 7. A&B caused damage and waste to the Property by destroying those improvements effected by Tideland. *See* Brief in Opposition to Injunction, p. 7. A&B also harassed several of the tenants and caused general civil unrest among the tenants on the Property. *See* Brief in Opposition to Injunction, p. 7. A&B also continued to employ property managers who were not licensed to perform management duties in the State of South Carolina. *See* Brief in Opposition to Injunction, p. 7.

On August 26, 2016, the court issued the Injunction Order which required the parties to take particular actions and refrain from others with regard to the Property. *See* Injunction Order. The provisions of the Injunction Order which applied to FCRE were set out in items 1 and 3 of page 6 of the Injunction Order. Item 1 provided that:

> The Plaintiff shall have possession of its 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.

Item 3 provided that:

> 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 all money removed from any of Plaintiff's bank accounts, including reserve accounts, and to provide a full accounting of all such money and or expenses Defendants have paid or incurred with Plaintiff's money.

See Injunction Order, p. 6.

On Friday, August 26, 2016, counsel for FCRE made all of the items addressed in the foregoing provisions available at his office (with the exception of several receipt books which, due to a shipping error, were not available until August 29, 2016). *See* Coppage Aff. Kettles retrieved these items on August 30, 2016, and acknowledged his receipt of them. *See* Coppage Aff. Those items retrieved by Kettles were the only items belonging to A&B in either Defendants' possession. *See* Rankin Aff.

E. Filing of Motion for Contempt

On September 9, 2016, A&B filed its Motion for Contempt. The Motion for Contempt asserted that FCRE failed to return all of A&B's property, money and possessions to A&B by 12:00 PM on August 26, 2016. *See* Motion for Contempt, p. 6. Further, the Motion for Contempt asserted that FCRE's Mary F. Davenport has been interfering with A&B's business and bank accounts. *See* Motion for Contempt, p. 7. Finally, the Motion for Contempt asserted the trial court had made it clear to FCRE that it was granting the injunction and subsequently denying FCRE's Motion to Vacate in order to preserve the *status quo* as it was before FCRE declared a default.

F. Filing of FCRE's Response to Motion for Contempt

On September 15, 2016, FCRE filed FCRE's Response to A&B's Motion for Contempt. In this Response, FCRE asserted that on Friday, August 26, 2016, counsel for FCRE made all of the items addressed in the foregoing provisions available at his office (with the exception of several receipt books which, due to a shipping error, were not available until August 29, 2016). *See* Coppage Aff. Kettles retrieved these items on August 30, 2016, and acknowledged his receipt of them. *See* Coppage Aff. Those items retrieved by Kettles were the only items belonging to A&B in either Defendants' possession. *See* Response to Motion for Contempt, p. 7; Rankin Aff.

FCRE argued that A&B has failed to show facts establishing FCRE's noncompliance with the Injunction Order. FCRE maintained that pursuant to the provisions of the Injunction Order and the Loan Documents, when read together as they must be, FCRE has not deprived A&B of possession, or interfered with A&B's possession of its Property, money, business files, leases or personal property. Finally, FCRE asserted that it has allowed A&B to maintain and manage its property free from any hindrance or interference. *See* Response to Motion for Contempt, p. 8.

G. Order Granting A&B's Motion for Contempt

On September 29, 2016, the trial court executed the Contempt Order. *See* Order for Motion for Contempt. The trial court ruled that FCRE had violated the TRO for, among other reasons, failing to return to A&B all of the rental money FCRE, or its agent, collected while it was in control and possession of A&B's Property. *See* Order for Motion for Contempt, p. 3. Furthermore, the trial 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 declared a default and removed A&B from its Property. *See* Order for Motion for Contempt, p. 4.

ARGUMENTS

I. The trial court abused its discretion in issuing the Injunction Order because it failed to properly consider the three injunction elements: (1) irreparable harm; (2) likelihood of success on the merits; and (3) no adequate remedy at law.

An injunction is a drastic remedy issued by the trial court in its discretion to prevent irreparable harm. *Scratch Golf Co. v. Dunes West Residential Golf Props.*, 361 S.C. 117, 122, 603 S.E.2d 905, 907 (2004). The party seeking an injunction has the burden of demonstrating facts and circumstances warranting an injunction. *Strategic Resources Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006) (citing *Calcutt v. Calcutt*, 282 S.C. 565, 572, 320 S.E.2d 55, 59 (Ct. App. 1984)). An applicant for a preliminary injunction must allege sufficient facts to state a cause of action for an injunction and demonstrate that this relief is reasonably necessary to preserve the rights of the parties during the litigation. *Compton v. S.C. Dep't of Corr.*, 392 S.C. 361, 366, 709 S.E.2d 639, 642 (2011). A preliminary injunction should issue only if necessary to preserve the status quo, and only upon a showing by the moving party that without such relief; (1) it will suffer irreparable harm; (2) that it has a likelihood of success on the merits; and (3) there is no adequate remedy at law. *Id.*

The grant or denial of an injunction by the trial court will be reversed upon a showing of an abuse of discretion. *Gilley v. Gilley*, 327 S.C. 8, 11-12, 488 S.E.2d 310, 312 (1997); *MailSource, L.L.C. v. M.A. Bailey & Assocs.*, 356 S.C. 363, 367, 588 S.E.2d 635, 637-38 (Ct. App. 2003). An abuse of discretion occurs when the decision of the trial court is unsupported by the evidence or controlled by an error of law. *Ledford v. Pa. Life Ins. Co.*, 267 S.C. 671, 675, 230 S.E.2d 900, 902 (1976); *Cnty. of Richland v. Simpkins*, 348

S.C. 664, 668, 560 S.E.2d 902, 904 (Ct. App. 2002). In other words, when granting or denying injunctive relief, a trial court abuses its discretion when it fails to consider and make a record of the factors relevant to its determination, relies on clearly erroneous factual findings, considers clearly irrelevant or improper factors, gives too much weight to one factor, relies on erroneous conclusions of law or equity, or misapplies its factual or legal conclusions. *See* 42 Am Jur 2d Injunctions § 16 (2nd 2015). An order issuing a temporary injunction must be reversed when the trial court does not make findings of fact as to all elements necessary to establish a temporary injunction. *See Looney v. GrassRoots of S.C., Inc.*, Op. No. 2013-UP-177, 2013 S.C. App. Unpub. LEXIS 260 at *2 (S.C. Ct. App. May 1, 2013) (citing *Simons v. Simons*, 263 S.C. 509, 515, 211 S.E.2d 555, 559 (1975); and *State v. Bd. Of Med. Exam'rs v. Gandy*, 248 S.C. 300, 306, 149 S.E.2d 644, 646 (1966). In summary, the trial court abused its discretion in issuing the Injunction Order because it failed to properly determine that A&B was likely to succeed on the merits and failed to consider whether A&B suffered a complete loss of business or irreparable harm under South Carolina law.

A. The trial court abused its discretion in failing to properly determine that A&B was likely to succeed on the merits.

1. The trial court failed to state with specificity the basis for its finding that A&B was likely to succeed on the merits.

The trial court abused its discretion in issuing the Injunction Order because it failed to follow Rule 65(d) of the South Carolina Rules of Civil Procedure by stating the specific reasoning for its ruling. In South Carolina, the standard for satisfying the likelihood of success on the merits is as follows: "Once a prima facie showing has been made entitling the plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits." *Helsel v. City of N. Myrtle Beach*, 307

S.C. 29, 33, 413 S.E.2d 824, 826 (1992). The phrase, "prima facie showing has been made entitling the plaintiff to injunctive relief," is somewhat misleading. As applied in cases in this state, the trial court must determine that a moving party has presented a prima facie case for relief on the claims or defenses that underlie the case. *See Columbia Broad. Sys., Inc. v, Custom Recording Co.*, 258 S.C. 465, 477, 189 S.E.2d 305, 311 (1972) (explaining that the plaintiff needed to present a prima facie case showing that the defendants breached the plaintiff's rights); *Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 456, 626 S.E.2d 34, 37 (Ct. App. 2005) (finding that Peek made a prima facie showing that she was entitled to protection under the Hospital bylaws). "When seeking a preliminary injunction, the plaintiff need not prove an absolute legal right; the plaintiff need only present 'a fair question to raise as to the existence of such a right.'" *Peek*, 367 S.C. at 456, 626 S.E. 2d at 37 (quoting *Williams v. Jones*, 92 S.C. 342, 347, 75 S.E. 705, 710 (1912)). Stated another way, when the party moving for an injunction is the plaintiff, the trial court must find that the plaintiff has stated a prima facie case for relief under the causes of action stated in the complaint. In the present case, A&B asserted the following causes of action in the Complaint: (1) Breach of Contract; (2) Unjust Enrichment; (3) Conversion; (4) Declaratory Judgment (that the Loan Documents violate public policy and are unenforceable); (5) Tortious Interference with Contracts; (6) Accounting; and (7) Permanent Injunction. *See* Complaint, pp. 12-22.

In the Injunction Order, the trial court made only the following finding in regard to A&B's likelihood of success on the merits: "the Plaintiff has made out a *prima facie* case for the claims asserted in the Verified Complaint." Injunction Order, p. 6, ¶(g). The Injunction Order does not refer to any specific cause of action or whether A&B satisfied

one or all of the causes of action with a prima facie showing. Rule 65(d), SCRCP, requires that "[e]very order granting an injunction . . . *shall* set forth the reasons for its issuance; *shall* be specific in terms; *shall* describe in reasonable detail, *and not by reference to the complaint or other document*, the act or acts sought to be restrained[.]" (emphasis added); *see also* Rule 52(a), SCRCP ("In all actions tried upon the facts without a jury . . . the [trial] court shall find the facts specially and state separately its conclusions of law thereon, . . . and in granting or refusing interlocutory injunctions the [trial] court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds for its action."). The trial court's broad proclamation that A&B made a prima facie case does not satisfy the requirements of Rule 65(d). The trial court violated Rule 65(d) in making a required finding of likelihood of success on the merits based solely on a general reference to the Complaint. Accordingly, the Injunction Order must be reversed. *See* Rule 65(d), *SCRCP; Looney*, 2013 S.C. App. Unpub. LEXIS 260 at *2.

2. The trial court relied on erroneous conclusions of law in issuing the injunction.

The Injunction Order did not make a specific finding on the validity of the remedy provisions in the Loan Documents. The trial court's decision to grant the temporary injunction, instead, rests upon the erroneous conclusion that the remedy provisions in the Loan Documents are unenforceable. Injunction Hearing Trans., p.15, l.12-p.16, l.5; p.22, l.15-p.23, l.22. In arriving at this determination during the hearing, the trial court relied on a line of "bond for title cases" and a broad proclamation that the Loan Documents are "unconscionable". Injunction Hearing Trans., p.15, l.12-p.16, l.5; p.22, l.15-p.23, l.22.

Underlying the fact that the trial court improperly relied on these erroneous legal conclusions is the trial court's total failure to review or consider the actual Loan

Documents. The written terms of the Loan Documents lie at the heart of each of A&B's claims. A&B, as the moving party, had the burden to present adequate evidence in support of its application for injunctive relief. In this case, however, none of the Loan Documents were actually submitted to the trial court for its consideration.

The transcript of the Injunction Hearing and the language of the Injunction Order reveal that the trial court never considered the relevant terms of the Loan Documents at issue. *See* Injunction Hearing Trans., pp. 3-26; Injunction Order. At the start of the Injunction Hearing, the trial court stated, "the issue as I recall . . . is whether or not there's been a material breach that would permit the lender . . . to come in and do what they've done." Injunction Hearing Trans., p. 9, l.24- p.10, l.1. For the trial court to consider this issue, it was imperative for the trial court to consider whether FCRE's actions taken pursuant to the Loan Documents were contractually authorized. There is simply no reasonable basis for the trial court to determine a likelihood of success on the merits without analyzing the terms of the Loan Documents.

The trial court's error is further demonstrated by the fact that the trial court ignored the relevant facts and, rather, focused on the trial court's lack of familiarity with the issues in the case. At the hearing, the trial court stated, "And that's the problem. Ordinarily, a case like this would have been brought by the lender, and they would have asked for a receiver . . . . This sort of upside down, backwards part of this is, is that the self-help issue is unique in my experience." Injunction Hearing Trans., p. 11, ll. 14-22. The Injunction Hearing transcript reveals that the trial court was distracted by the fact that it does not regularly encounter the fact pattern at issue in this case. And rather than making the requisite findings based on the facts presented by the parties and the controlling case law,

the trial court declared the actions of FCRE to be unwarranted. *See Barrett v. Flowers*, Op. No. 2011-UP-007, 2011 S.C. App. Unpub. LEXIS 2, at *10 (S.C. Ct. App. Jan. 20, 2011) (quoting 27A Am. Jur. 2d Equity § 76 (2008) ("The court must have a cognizable basis for granting equitable relief and is not authorized to take a particular course of action simply because it thinks such action is just and appropriate.", and citing *Cagle v. Schaefer*, 115 S.C. 35, 42, 104 S.E. 321, 323 (1920)). The ordering of a temporary injunction must be based on the merits of A&B's case with a record to support that order. *See* 42 Am Jur 2d Injunctions § 16 ("In granting or denying injunctive relief, a trial court abuses its discretion when it . . . considers clearly irrelevant or improper factors . . . .").

a. The trial court erroneously relied on a line of bond for title cases.

The case at bar involves defaults in the commercial Loan Documents and does not involve a bond for title arrangement. As such, the trial court's reliance on bond for title cases in reaching its decision was improper. During the Injunction Hearing, the trial court stated:

> I mean, sort of what bothers me a little bit this is I think we're probably all familiar with the line of cases that say bond for title doesn't really work in South Carolina. I mean there are lots of bonds for title, and you still have to foreclose. I mean, those bonds for title all say some things like, you know, if you miss a payment, the property goes back to the renter. And Magistrates Court actually enforced that for a while, and then they caught on to the fact that the law of South Carolina doesn't allow that. And I can't remember the name of the case, but the main case in that with regard to those bond for titles made it clear that if a party has an equitable interest in Property, that self-help of this type isn't really permitted. It's not equitable.

Injunction Hearing Trans., p.15, l.12-p.16, l.5. The seminal bond for title case, to which it appears the trial court was referring, is *Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 568

S.E.2d 361 (2002). *Lewis* addressed the enforceability of a forfeiture provision in an installment land contract. *Id.* *Lewis* is distinguishable from the present case.

In *Lewis*, an individual entered into an installment sales contract to purchase real estate. *Id.* at 169, 568 S.E.2d at 362. The installment contract contained a forfeiture clause, which when enforced, would enable the seller to terminate the contract, recover the property, and retain all installments paid upon default by the purchaser. *Id.* at 171, 568 S.E.2d at 363. The South Carolina Supreme Court held that "a provision in an installment land contract declaring forfeiture in the event of purchaser default can, in particular circumstances constitute a penalty" and "would be inequitable to enforce . . . without first allowing the purchaser an opportunity to redeem the installment contract by paying the entire purchase price." *Id.* at 172, 568 S.E.2d at 364.

In the present case, the trial court erred in relying on *Lewis* in granting the temporary injunction because *Lewis* is a case pertaining to the forfeiture of an entity's right to the property. In *Lewis*, the remedy was complete forfeiture of the property and installment payments made up until the time of the consumer's default. *Id.* at 171, 568 S.E.2d at 363. The present case does not involve the forfeiture of property, but rather a lender's exercise of its right to change management and revoke a license under the Loan Documents. A&B did not forfeit the Property, which can be readily evidenced by a deed search. The exercise of the right to change management is a lesser remedy than foreclosure, and the success of the manager would accrue to A&B, not to FCRE. Moreover, in the case at bar FCRE actually took actions to improve A&B's Property. Therefore, unlike *Lewis*, there was no forfeiture of value.

Furthermore, *Lewis* is a consumer case and not applicable to this case which concerns the enforceability of provisions in the commercial Loan Documents. Here, the Loan Documents were entered into by two sophisticated commercial entities. This is an important distinction because the burden on commercial entities to understand the terms and conditions to a contract is far above the expectation placed on individual consumers. *See S.C. Electric & Gas Co. v. Combustion Engineering, Inc.*, 283 S.C. 182, 189, 322 S.E.2d 453, 457 (Ct. App. 1984) ("[I]t would strain credulity to hold that a business like [SCE&G] was not, or should not have been, aware of the language disclaiming implied warranties.").

Accordingly, the trial court abused its discretion to the extent it relied on *Lewis* in deciding to issue the temporary injunction.

b. The trial court erroneously declared the Loan Documents unconscionable.

The trial court erroneously relied on the conclusion that the Loan Documents were unconscionable in deciding to grant the temporary injunction. The court explained,

> Well, I mean every commercial – of course, I've dealt with a lot of commercial foreclosures, and ever commercial lease ever written in South Carolina has an assignment of rents provision, it has a receiver. I mean they all have that. The all have the same language. I mean, it's written by the lender in favor of the lender. I don't blame them. They pay good money to lawyers to do that, but, you know some of it is simply unconscionable in South Carolina.

Injunction Hearing Trans., p. 22, ln. 15 – p. 23, ln. 2.

In South Carolina, unconscionability is the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 74, 749 S.E.2d

139, 142 (Ct. App. 2013). Thus, unconscionability is due to both an absence of meaningful choice and oppressive, one-sided terms. *Id.* In the context of a claim of unconscionability, absence of meaningful choice on the part of one party speaks to the fundamental fairness of the bargaining process. *Id.* In determining whether a contract was tainted by an absence of meaningful choice, courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause. *Id.*

In the present case, the trial court made no such findings. In fact, as stated above, the trial court did not even review or consider the actual Loan Documents in making this conclusion. The provisions in the Loan Documents are standard in all types of commercial mortgage lending, throughout the country and in South Carolina, and in particular to loans originated with the intent to securitize the loans in CMBS bond transactions. *See* Response to Motion for Contempt, p.1. Additionally, A&B and Kettles agreed to be bound by and executed substantially the same documents for first mortgage financing on this Property at least two times prior to April 15, 2015, and over a period of many years. *See* Davenport Aff., p. 3. If the terms and conditions of the Loan Documents were unacceptable to A&B and Kettles, they were not forced nor under any duress to execute them and accept $3,900,000 in exchange for the promises and covenants to abide by the Loan Documents. *See* Injunction Hearing, p. 11, l.24-p. 25, l. 12.

A finding of unconscionability has no application to contracts entered into by sophisticated parties who bargained at arms' length and were represented by counsel

throughout the negotiations. *Riesett v. W.B. Doner & Co.*, 293 F.3d 164, 173 (4th Cir. 2002). The construction of a clear and unambiguous contract presents a question of law for the court. *U.S. Bank Trust Nat'l Ass'n v. Bell*, 385 S.C. 364, 379, 684 S.E.2d 199, 207 (Ct. App. 2009). Courts are without authority to alter an unambiguous contract by construction or to make new contracts for the parties. *Id.* "A court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or parties' failure to guard their rights carefully." *Id.* Where an agreement is clear and capable of legal interpretation, the court's only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it. *York*, 406 S.C. at 74, 749 S.E.2d at 142.

Under the terms of the Loan Documents, FCRE is entitled to exercise certain remedies in the event of default. *See* Brief in Opposition to Injunction, pp. 2-3; 9-11. The parties to the contract are businesses who were represented by competent counsel during the contract negotiations. As such, there was no basis for declaring the Loan Documents unconscionable. *See S.C. Electric & Gas Co. v. Combustion Eng'g, Inc.*, 283 S.C. 182, 189, 322 S.E.2d 453, 457 (Ct. App. 1984) (upholding disclaimer of warranties in contract between "commercially sophisticated businesses").

Significantly, there is no South Carolina precedent declaring the contractual remedies exercised by FCRE to be unenforceable. Conversely, well-known statutory authority permits secured creditors to directly attach collateral and collect payment from collateral without resorting to judicial process. Article 9 of the Uniform Commercial Code (the "UCC") is a comprehensive statutory scheme which governs the rights and relationships between secured parties, debtors, and third parties. *McCullough v. Goodrich*

& Pennington Mortg. Fund, Inc., 373 S.C. 43, 53, 644 S.E.2d 43, 49 (2007). Under the UCC, a secured party has several means available for protecting its interest in collateral without judicial intervention. *Id.* at 54, 644 S.E.2d at 50.

Section 36-9-609 of the South Carolina Code provides, in part, that a secured party has, upon default, the right to repossess collateral without judicial process if done without breaching the peace. *See* S.C. Code Ann. § 36-9-609(b)(2); *see also Skinner v. Elrod*, 308 S.C. 239, 245, 417 S.E.2d 599, 603 (Ct. App. 1992) (affirming the trial court's finding that the seller was not guilty of conversion in repossessing business assets under S.C. Code Ann. § 36-9-503, the former section to S.C. Code Ann. § 36-9-609). Under S.C. Code Ann. § 36-9-607, when a debtor pledges its accounts as collateral defaults, the secured creditor has the right to collect payment directly from those accounts. S.C. Code Ann. § 36-9-607(a)(2). Accordingly, the trial court abused its discretion in issuing the temporary injunction because, without review of the Loan Documents, it relied on the erroneous legal conclusion that the remedies contained within the Loan Documents are unconscionable.

c. The trial court refused to consider FCRE's evidence based on an erroneous interpretation of Rule 65, SCRCP.

The trial court abused its discretion in failing to consider FCRE's evidence at the hearing. The trial court refused to allow FCRE to present live testimony during the Injunction Hearing in support of its defenses and counterclaims. The following exchange took place at the hearing:

> THE COURT: What are all these witnesses going to tell me with regard to a material breach in the loan documents?
>
> MR. COPPAGE: That would be the crux of it, Your Honor. I'd start out by saying of course we're here on those elements that Mr. Coltrane just now said, that irreparable harm to the plaintiff, there not being a legal remedy available and likelihood of success on the merits.

> All the witnesses would go to both there not being any irreparable harm, no harm of any kind, and there is very little likelihood for their success on the merits.
>
> Most of these folks are going to testify to the conditions on the property to show that those material breaches did exist. They were there. Some of them are tenants. Some of them are property managers. Some of them are police officers who have been very closely involved with all this on the Southside Apartments...and have witnessed firsthand the deplorable, deplorable conditions that the tenants there have been subjected to, and the physical waste, the deterioration, just the very poor treatment of the people on the property that is precluded by the loan documents and which does constitute a breach of them.

Injunction Hearing Trans., p. 10, ll. 8-25, p. 11, ll. 1-10. Opposing counsel, citing to Rule 65, SCRCP, represented to the trial court that it would be improper for the trial court to receive live testimony or other evidence not included in the Complaint and affidavits. Injunction Hearing Trans., p. 7, l. 8-p. 8, l. 21. The trial court adopted this reading of Rule 65 and sustained counsel's objection to presenting the witnesses' testimony at the hearing. Injunction Hearing Trans., p. 24, ll. 17-22 ("I'm going to grant his petition not to hear this or deal with the live testimony.").

Rule 65 governs the procedure for obtaining a TRO and a temporary injunction. When ruling on a motion for a TRO, the trial court is limited to considering affidavits and a verified complaint. Rule 65, however, does not include any limitation on what evidence can be considered at a hearing on a temporary injunction. There is no South Carolina precedent that precludes a party from presenting live witness testimony at a preliminary injunction hearing. "[E]xcept for the additions concerning mandamus, habeas corpus and other remedial writs, [Rule 65, SCRCP,] is substantially the Federal Rule which, in turn, is very much the same as present State practice." Notes to Rule 65, SCRCP. Accordingly,

federal courts' interpretation and application of Rule 65, FRCP, relating to the evidence presented at an injunction hearing, are persuasive in this case.

Where factual disputes are established on a central issue, a District Court should permit live testimony. *See Consolidation Coal Co. v. Disabled Miners of S. W. Va.*, 442 F.2d 1261, 1263 (4th Cir. 1971); *Syntex Ophthalmics, Inc. v. Tsuetaki*, 701 F.2d 677, 682 (7th Cir. 1983); *Swiderek v. Cont'l Micro, Inc.*, 680 F.2d 37, 38 (7th Cir. 1981); *SEC v. Spectrum, Ltd.*, 489 F.2d 535, 540-41 (2d Cir. 1973); *Marshall Durbin Farms, Inc. v. National Farmers Org.*, Inc., 446 F.2d 353, 356 (5th Cir. 1971). The Fourth Circuit Court of Appeals has stated:

> Rule 65(a)(1) is explicit that no preliminary injunction shall be issued without notice to the adverse party; and as stated in *Sims v. Greene*, 161 F.2d 87, 88-89 (3rd Cir. 1947):
>
> Notice implies an opportunity to be heard. Hearing requires trial of an issue or issues of fact. Trial of an issue of fact necessitates opportunity to present evidence and not by only one side to the controversy. It should be pointed out also that subsection (b) of Rule 65 provides that a motion for a preliminary injunction shall be set down for a hearing and speaks of the motion coming on for hearing. The conclusion is inescapable that since a district court is required by the rule to make findings of fact, the findings must be based on something more than a one-sided presentation of the evidence.

Consolidation Coal Co., 442 F.2d at 1263 (citations and internal quotation marks omitted). The Sixth Circuit Court of Appeals has explained:

> The issue as to the necessity for hearing before the granting of a preliminary injunction has been before this Court previously, *Carpenters' District Council, etc. v. Cicci*, 261 F.2d 5, wherein the Court, speaking through the late Judge Shackelford Miller, Jr., stated at page 8:
>
> But if the allegations of a complaint are denied by a defendant [as was true in this case] he is entitled to a hearing, which includes the right to offer evidence in support of his factual claims. A hearing embodies the right to be heard on the controverted facts, as well as upon the law.

Detroit & T. S. L. R. Co. v. Bhd. of Locomotive Firemen & Enginemen, 357 F.2d 152, 153-54 (6th Cir. 1966).

In the present case, A&B alleged that its actions and omissions did not constitute breaches under the Loan Documents, while FCRE contended the opposite. *See* Complaint, pp. 16-17; Answer, pp. 9-32. Furthermore, A&B alleged that FCRE breached the Loan Documents by exercising certain remedies, which FCRE expressly denied. *Id.* The live testimony of FCRE's witnesses would have provided the trial court insight into how A&B's actions and omissions constituted breaches under the Loan Documents and how FCRE's actions taken pursuant to the terms of the Loan Documents were lawful and standard within the commercial mortgage industry. In light of the clear dispute over the key underlying facts in this case, it was improper to deny FCRE the chance to present evidence in favor of its position. The trial court's refusal to admit the witnesses' testimony based on an erroneous interpretation of Rule 65, SCRCP, was an abuse of discretion. As such, the Injunction Order should be reversed.

B. The trial court abused its discretion in finding that A&B would suffer irreparable harm and that there was no adequate remedy at law.

1. The trial court failed to find that A&B suffered a *complete* loss of business.

In its filings and at the Injunction Hearing, A&B represented to the trial court that "loss of business is irreparable harm". Memorandum in Support of Motion for Temporary Injunction, p. 5; Injunction Hearing Trans., p. 13, l.7-p. 14, l.12. The trial court adopted this proposition, but in doing so, failed to consider the extent of the loss of business and failed to articulate the facts supporting its finding that there was indeed a complete loss of business that amounted to irreparable harm. Injunction Order, p. 6. Because a mere

disruption in business is not considered irreparable harm in South Carolina, the trial court abused its discretion.

A *complete* loss of business *can* be considered irreparable harm in South Carolina. *Peek v. Spartanburg Reg'l. Healthcare Sys.*, 367 S.C. 450, 455, 626 S.E.2d 34, 37 (Ct. App. 2005). In *Peek*, an anesthesiologist was terminated from the hospital, which was the doctor's only source of client referrals. *Id.* Without an injunction, the trial court found that the doctor would no longer receive clients and thus would suffer a complete loss of her business. *Id.* On this basis, the trial court found the presence of irreparable harm, and the Court of Appeals affirmed this finding. *Id; see also Prof'l. Wiring Installers, Inc. v. Sims*, Op. No. 2008-UP-173, 2008 S.C. App. Unpub. LEXIS 199, at *6-7 (S.C. Ct. App. Mar. 12, 2008) (holding plaintiff failed to allege or present any evidence of irreparable harm where the alleged lost business represented only thirty percent of the plaintiff's overall business and was not a "complete loss of business").

Other courts have also considered when loss of business constitutes irreparable harm. If the act at issue threatens only a disruption in an ongoing business and not its destruction, then there is no irreparable harm because the moving party possesses an adequate remedy at law. *See Hughes Network Sys. v. Interdigital Commc'ns Corp.*, 17 F.3d 691, 693-94 (4th Cir. 1994); *Jack Kahn Music Co., Inc. v. Baldwin Piano & Organ Co.*, 604 F.2d 755 (2d Cir. 1979); *Jackson Dairy Inc. v. H. P. Hood & Sons Inc.*, 596 F.2d 70 (2d Cir. 1979); *see, e.g., Mach. Sols., Inc. v. Doosan Corp.*, Civil Action No. 3:15-cv-03447-JMC, 2015 U.S. Dist. LEXIS 125351, at *19-24 (D.S.C. Sep. 18, 2015) (finding plaintiff failed to show irreparable harm because plaintiff was able to continue its business and any harm it suffered could be compensated through monetary damages); *Vera, Inc. v.*

The Tug "Dakota" or "Miss Natalie," 769 F. Supp. 451, 454 (E.D.N.Y. 1991) (holding no irreparable harm when plaintiff did not present evidence that the very existence of its business was threatened, but simply that it would suffer lost income); *Newport Tire & Rubber Co. v. Tire & Battery Corp.*, 504 F. Supp. 143, 152 (E.D.N.Y. 1980) (holding termination of distributorship of line of tires threatened plaintiff with disruption in business, but not destruction of business, was not irreparable harm).

The hearing transcript from the trial court does not contain facts regarding the extent of A&B's loss of business. The hearing transcript does not establish whether the title to the Property was transferred out of the name of A&B and into another entity name, thereby eliminating any means of revenue generation. The management of the Property by a new property manager appointed by FCRE cannot constitute the complete loss of business to A&B. A&B does not even allege that it is in the business of managing the Property. In fact, the existence of a third party management agreement between A&B and August Group evidences that A&B is not in the business of managing the Property. The Property was initially managed by August Group, under a management agreement that was later terminated by FCRE due to various Events of Default on the part of A&B, and specifically the fact that August Group does not have properly licensed agents. The unlicensed manager was replaced with Tideland, a duly and properly licensed property management company in the state of South Carolina. Even if the trial court determined that A&B's business included the management of the Property, the appointment of a new property manager would not constitute a complete loss of A&B's business because A&B still retained its ownership of the Property, as evidenced by the recorded Deed, while Tideland managed the Property.

For A&B to establish a complete loss of business it was required to present evidence to show that it would not be able to conduct business at all. For example, A&B may have been able to establish a complete loss of business in the event FCRE sought condemnation of the Property by proper local authorities and/or subsequently evicted all of the tenants. A&B put forth no evidence to suggest that people would not rent the Property from A&B. Conversely, the Property was fully rented at the time Tideland managed the Property. Furthermore, Tideland sought to improve the conditions of the Property, which would have increased the likelihood of existing tenants renewing their leases or new tenants leasing in the future, thereby benefiting A&B. Beyond its bald assertions, A&B failed to offer any proof of how FCRE's actions would result in a *complete* loss of business.

FCRE intended to present witness testimony to address this issue, among other issues. In particular, Jami Rankin, an employee of Tideland was prepared to testify. Ms. Rankin would have offered testimony regarding the role of a property manager at the Property, as well as the method and plans for handling rents. *See* Injunction Hearing Trans., p. 10, l. 15-p.11, l. 13; Rankin Aff. Tenants from the Property were also prepared to testify. *See* Injunction Hearing Trans., p. 10, l. 15-p.11, l. 13. The tenants intended to offer testimony about the condition of the Property under A&B's supervision and the improvements that were made while Tideland was handling the property management. *See* Injunction Hearing Trans., p. 10, l. 15-p.11, l. 13. The BHA intended to offer testimony as to the multitude of unit inspection failures for various deficiencies, including mold, which were repeatedly noticed to A&B. *See* Injunction Hearing Trans., p. 10, l. 15-p.11, l. 13; Brian White Aff. The Port Royal Police were prepared to provide police records

evidencing the large number of times, including the nature of the incidents, that the Police Department was required to respond to at the Property. *See* Injunction Hearing Trans., p. 10, l. 15-p.11, l. 13. The trial court refused to hear testimony from Ms. Rankin, the BHA, the police, or the tenants on any issues. The refusal to even consider evidence on this critical element was an abuse of discretion and is grounds for reversal of the Injunction Order.

2. A&B's alleged harm can be remedied with monetary damages.

The evidence presented by A&B reveals that the only harm that A&B would suffer, if any, economic harm that can be remedied with money damages. The "general rule is that an injunction should be granted only where some irreparable injury is threatened for which there is no adequate remedy at law." *MailSource,* 356 S.C. at 370, 588 S.E.2d at 639; *see also Prof'l Wiring Installers, Inc. v. Sims*, Op. No. 2008-UP-173, 2008 S.C. App. Unpub. LEXIS at *6-7 ("Generally, pure economic loss is not sufficient to satisfy the requirement of showing an irreparable harm where an adequate remedy is available at law."). A party generally cannot obtain injunctive relief for a loss of profits or mere economic injury. 42 Am Jur 2d Injunctions 27. With respect to irreparable harm, the United States Supreme Court stated:

> The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

Sampson v. Murray, 415 U.S. 61, 90, 94 S. Ct. 937, 39 L. Ed. 2d 166 (1974). Harm is not considered irreparable if it can be compensated by money damages during the normal

course of litigation. *Hughes Network Sys., Inc. v. Interdigital Communications Corp.*, 17 F.3d 691, 694 (4th Cir. 1994).

A&B claimed that they have suffered irreparable harm due to Tideland managing the Property and not receiving the rental proceeds from the tenants of the Property. In support of this claim, A&B relied on the Complaint and five affidavits. The following statements in the Complaint address the question of irreparable harm: FCRE has replaced A&B's management company (¶22); Tideland has interfered with contracts with tenants and is collecting all rental payments (¶23); A&B is unaware if Tideland is planning to make the debt service payments (¶24); A&B has been informed that FCRE will not return excess funds (¶25); Tideland and FCRE have undertaken unnecessary remodeling projects (¶¶26 & 27); Defendants have made misleading and untruthful statements to the tenants (¶28); Defendants have told tenants that Kettles stole rents (¶29); Defendants have taken possession of A&B's files and possessions (¶30); and Defendants have posted rent rolls on the Property (¶31). All of these allegations of harm arise from the legal causes of action contained in the Complaint and all can be remedied with monetary damages. To this end, all of the legal causes of action in the Complaint describe monetary damages demand remuneration for economic loss, if proven at trial. None of the statements in the Complaint prove that A&B would suffer irreparable harm that cannot be remedied with monetary damages. Conversely, there would be irreparable harm to FCRE if A&B is allowed to continue to allow the Property to deteriorate. *See* Brief in Opposition, pp. 8-9.

The affidavits, similarly, fall short of proving irreparable harm. The Kettles' Affidavit states: (1) that he personally had to pay August 2016 loan payment; (2) FCRE failed to return all of A&B's property; (3) A&B did not receive rents accepted by Tideland;

and (4) some tenants failed to move in or had their leases altered by Defendants. *See* C. Kettles Aff. Kettles' affidavit contains few facts to substantiate these broad allegations. *See* C. Kettles Aff. All of the claims raised in Kettles' affidavit can be remedied with monetary damages and there is no showing of irreparable harm contained in this affidavit. More importantly, the absence of rents does not alleviate a borrower's obligations to make loan payments. In essence, if all the tenants moved out of the Property, and no rent was generated at all, A&B would still remain liable to pay the loan payments. The Affidavit of Sharan Kettles expresses that an eviction action was filed against her while Tideland was acting as the property manager. *See* S. Kettles Aff. It neither speaks to the reason for the eviction or the merits of the case, nor raises a question of irreparable harm to A&B. *Id.* The Affidavit of Traci Oates states that a representative from Tideland requested that she file a police report "against Plaintiff or Plaintiff's representative if I felt they were harassing me or if I saw Plaintiff and its representatives harassing anyone." *See* Oates Aff. Based on the facts included in her affidavit, Ms. Oates was not harassed and did not file a police report. *See* Oates Aff. As such, this affidavit raises no evidence of irreparable harm to A&B. The Affidavit of Sabania Norris is illegible. *See* Norris Aff.

It appears that two affidavits were submitted for Sheytoria Rivers. The handwritten Affidavit of Ms. Rivers states, "I was told that Ms. Amanda was stealing money..." *See* Handwritten Rivers Aff. The affidavit does not describe who told Ms. Rivers this fact or that Ms. Rivers took any action against the interest of A&B as a result. *See* Handwritten Rivers Aff. Therefore, the handwritten affidavit does not present evidence of irreparable harm to A&B. The typed Affidavit of Ms. Rivers describes her interactions with Tideland after it became the property manager of the Property. *See* Typed Rivers Aff. As such, the

typed affidavit does not contain any evidence of irreparable harm to A&B. *See* Typed Rivers Aff.

A&B, as the moving party, has the burden of proving irreparable harm. *Calcutt*, 282 S.C. at 572, 320 S.E.2d at 59 ("[T]he party seeking the injunction . . . must show such facts and circumstances entitling her thereto."). The statements contained in the Complaint and supporting affidavits fail to establish irreparable harm. Even if this Court determines FCRE's actions threatened the disruption of A&B's business, FCRE's actions would not have led to the *complete* loss of A&B's business. Accordingly, the trial court erred in finding A&B would suffer irreparable harm for which there was no adequate remedy at law if the injunction was not granted. For this reason, the Injunction Order should be reversed.

II. The trial court abused its discretion in issuing the Contempt Order because the underlying Injunction Order lacked adequate specificity.

FCRE maintains that the trial court should not have issued the Contempt Order because of the failures noted above in the Injunction Order. Regardless, the Contempt Order was improper because of vague language contained in the Injunction Order. The Injunction Order sought to reinstate the *status quo*, such that both parties would be in the same position as prior to the July 18, 2016 Notice of Event of Default. *See* Order for Motion for Contempt, p. 4. In executing the Mortgage on April 15, 2015, A&B absolutely and unconditionally assigned to FCRE all of A&B's right, title, and interest to do all other things which A&B or any lessor was or may become entitled to do under the Leases or the Lease Guaranties. *Id* at p. 3: A&B was granted a revocable *license* to *use* the rents and receipts so long as no default exists and was continuing. (emphasis added). *Id.* In addition, under the Loan Documents, A&B granted FCRE an irrevocable power of attorney for the

purpose of exercising any and all rights and remedies available to Lender at law and in equity. *Id* at p. 2. Therefore, under the *status quo*, all rents and receipt were actually the property of FCRE and not, as the trial court erroneously interpreted, the property of A&B.

FCRE disagreed with the Injunction Order, and filed an appeal, but acted in good faith under the plain meaning of the Injunction Order to return management control to A&B and to provide an accounting of its receipts and disbursements. *See* Brief in Opposition to Injunction, p. 7. The Loan Documents were never reviewed by the trial court, and thus remained in full force and effect to govern the ownership of funds and other property. *Supra*.

"Contempt results from the willful disobedience of a court order and before a person may be held in contempt, the record must be clear and specific as to the acts or conduct upon which the contempt is based." *Spartanburg Buddhist Ctr. of S.C. v. Ork*, 417 S.C. 601, 606, 790 S.E.2d 430, 433 (Ct. App. 2016). A willful act is defined as one done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to de done; that is to say with bad purpose either to disobey or disregard the law. *Cheap-O's Truck Stop, Inc. v. Cloyd*, 350 S.C. 596, 607-08, 567 S.E.2d 514, 520 (Ct. App. 2002). On appeal, the appellate court will reverse a contempt order if it is without evidentiary support or the trial court abused its discretion. *Spartanburg Buddhist*, 417 S.C. at 606, 790 S.E.2d at 433.

The Injunction Order does not provide in certain and clear terms what money of A&B it is to return and how FCRE is supposed to handle funds in certain bank accounts. Because the trial court did not review the Loan Documents, it was unaware of other covenants and requirements under the Loan Documents, such as the establishment of

deposit and cash management accounts in favor of FCRE by A&B, establishment of various escrow accounts which serve as loan collateral, or the absolute and irrevocable assignment of rents, all of which are relevant to the determination of what property should be returned under the Injunction Order. In the hearing transcript from September 16, 2016, FCRE's counsel states:

> MR. COPPAGE: No, Mr. Coltrane is not incorrect about the facts, however the – as to what has actually happened. However, I believe that his characterization of what is the Plaintiff's money is in error. Now back to the loan documents that were signed. One of the things was an assignment of rents, which Mr. – or A & B, the Plaintiff, assigned all rents profits, any money coming out of the real property to FCRE which – and, in turn FCRE allowed a license to the Plaintiff to enjoy those, but that license could be revoked at any time. So any rents, profits coming from that real property are not and have never been the money of the Plaintiff as the term is used in the order.

See Hearing Trans. p. 16, ll. 19-25, p. 17, ll. 1-8.

In fact, the definition of "Plaintiff's money" under the Loan Documents simply does not exist. Had the trial court reviewed the Loan Documents, it would have seen the clear and unambiguous language which governs the contractual relationship between FCRE and A&B. For instance, in Section 1.2 of the Mortgage, A&B absolutely and unconditionally assigned to FCRE all of its right, title and interest in and to all current and future Leases and Rents and all rights, powers, privileges, options and other benefits of A&B as lessor under the Leases and beneficiary under the Lease Guaranties, including without limitation the immediate and continuing right to make claim for, receive, collect and receipt for all rents payable or receivable under the Leases. Since the execution of the Mortgage, rents have at no time been "Plaintiff's money" or in any way belonged to A&B. A&B has only enjoyed a revocable license to collect, receive, use, and enjoy rents. Mortgage, Section 1.2. Pursuant to Section 7.1(h) of the Mortgage, that license was

immediately and automatically revoked upon A&B's default under the provisions of the Loan Documents. The Loan Documents demonstrate that none of the money at issue is "Plaintiff's money".

As such, FCRE should not have been held in contempt for violation of the Injunction Order. The provisions of the Injunction Order which applied to FCRE were set out in items 1 and 3 of page 6 of the Injunction Order:

> 1. The Plaintiff shall have possession of its 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 all money removed from any of Plaintiff's bank accounts, including reserve accounts, and to provide a full accounting of all such money and or expenses Defendants have paid or incurred with Plaintiff's money.

A comparison of the Injunction Order to the Contempt Order reveals that the terms of Injunction Order were unclear as to exactly what money FCRE was supposed to return to A&B and how FCRE was supposed to handle funds in specific accounts. The Contempt Order sets forth additional acts of FCRE which are prohibited, demonstrating that the Injunction Order was not clear, and that the trial court did not review or understand the Loan Documents by stating its terms were unusual. At the hearing, the record shows FCRE's assertion:

> COURT: And so I guess my question is are you saying that they – it sounds like you are saying they are not complying with the record, but they have some reason why they are not complying? Is that what you are saying?
>
> MR. COPPAGE: That's correct. And we can certainly talk about the purpose and what may have been intended, but from the reading of the order

and any ambiguity created in the order and if there is any ambiguity relying on these documents that these two parties signed, the conclusion, and I certainly think a fair conclusion, that my client has come to is that all of the money that Mr. Coltrane is now talking about is not Plaintiff's money. As the order says, it is FCRE's money and it can be applied to the debt owed by the Plaintiff in any manner that FCRE chooses.

COURT: That is a very unusual mortgage.

See Hearing Trans. p. 18, ll. 3-22.

The Contempt Order provided that FCRE was in contempt for:

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

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 Well Fargo bank account such that the money in the account would sweep into an account owned or controlled by FCRE . . . .

See Contempt Order, pp. 3-4. Further, in the Contempt Order's findings and conclusions, the trial court ordered FCRE to return specific amounts of money to A&B and provided very detailed instructions on how FCRE was to handle funds in specific bank accounts. Contempt Order, pp.6-7. The Contempt Order stated:

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]

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 Plaintiffs 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/loo ($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 . . . as follows: (1) the Wells Fargo bank account . . . 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.

[FN #5:] This amount is exclusive of the money that FCRE REL, LLC's accounting showed it had spent making improvements to 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.

In *Spartanburg Buddhist*, the defendant appealed the trial court's order holding him in contempt of the trial court's injunction order. *Spartanburg Buddhist*, 417 S.C. at 603-04, 790 S.E.2d at 431. The trial court held the defendant in contempt because the defendant wrote checks removing funds from a bank account after the trial court's injunction required him to redeposit the disputed funds into the account in violation of the injunction. *Id* at 606, 790 S.E.2d at 433. The Court of Appeals held that the injunction order did not

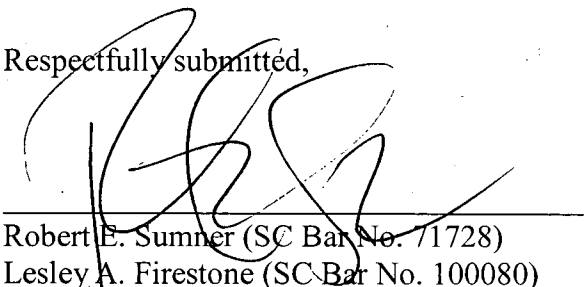
specifically reference safeguarding center money or how the money could be spent. *Id.* Accordingly, the Court of Appeals found that the trial court erred in placing the defendant in contempt for spending money from the account when the injunction order failed to specify such restrictions and the restrictions were only implied. *Id.*

Unlike the Contempt Order, the Injunction Order in the present case does not state in specific terms what money is to be returned to A&B and how FCRE is supposed to handle the funds in certain bank accounts. Following *Spartanburg Buddhist*, the trial court erred in finding FCRE in contempt for failing to return certain money to A&B, changing the sweeping instructions on A&B's Wells Fargo bank account, and charging default interest when the Injunction Order failed to specify in definite terms what FCRE was supposed to do in regard to the money and certain bank accounts. *See City of Greenville v. Mann*, 347 S.C. 427, 435, 556 S.E.2d 383, 387-88 (2001) ("One may not be convicted of contempt for violating a court order which fails to tell him in definite terms what he must do. Therefore, because the Order is ambiguous and contradictory, [appellant] cannot be held in contempt for failing to comply with the Order." (internal quotation marks and citations omitted)); *Phillips v. Phillips*, 288 S.C. 185, 188, 341 S.E.2d 132, 133 (1986) (providing that before a person may be convicted of contempt for violating a court order, the language of the commands in the court order "must be clear and certain rather than implied"); *id.* ("A court need go no further in reviewing the evidence in a contempt action where there is uncertainty in the commands of an order.").

CONCLUSION

For the foregoing reasons, Appellants request that the Court reverse the Injunction Order and Contempt Order and remand the case to the trial court for further proceedings.

Respectfully submitted,



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