THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

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Appellate Case No. 2017-000180



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U.S. Bank National Association, as Trustee, as Successor-in-Interest to Bank of America, N.A., as Successor by Merger to Lasalle Bank National Association, as Trustee for the Registered Holders of Bear Stearns Commercial Mortgage Securities, Inc., Commercial Mortgage Pass-Through Certificates, Series 2007-TOP26,

Respondents,

v.

AW-MAGPIG, LLC; HW-MAGPIG, LLC; and MW-MAGPIG, LLC,

Appellants,

v.

Wells Fargo Bank, N.A., and Meridian Capital Group, LLC,

Third-Party Defendants.

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# INITIAL BRIEF OF APPELLANT

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## STATEMENT OF CASE

This is a foreclosure action on a commercial shopping center owned by Respondents. Prior to filing this action, Respondents timely and fully paid their monthly mortgage. *See* Defendants' Notice of Motion and Motion to Dismiss or in the Alternative to Add a Necessary and Indispensable Party and attachments thereto. More specifically, Defendants paid all of the interest, principal and escrowed money for taxes and insurance required of them. Id. At the time Respondents initiated this action, Appellants' mortgage payments were up to date, timely and fully paid. Id.

Respondents commenced this action because they claim and allege a technical default. *See generally*, Plaintiffs' Complaint. Respondents allege that because an anchor tenant moved out of the shopping center that this created a "cash management event" and that under the terms of the

mortgage and related documents Appellants have defaulted on the mortgage. *See* Plaintiffs' Complaint, paragraph 25 and prayer for relief.

The promissory note, mortgage and other documents which Respondents attached to their Complaint and subsequent amended pleadings which Respondents allege entitle them to relief contain two important provisions relevant to this appeal. First, the mortgage documents contain choice of law provisions which provide for application of New York law. Specifically, the promissory note provides: "This Note shall be deemed to be a contract entered into pursuant to the laws of the State of New York and shall in all respects be governed, construed, applied and enforced in accordance with the law of the State of New York." See Exhibit A to Plaintiffs' Complaint, p. 9. The mortgage itself has its own "CHOICE OF LAW" provision which provides that it is "ENTERED INTO PURSUANT TO THE LAWS OF THE STATE OF NEW YORK AND SHALL IN ALL RESPECTS BE GOVERNED, CONSTRUED, APPLIED AND ENFORCED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK..." See Exhibit B to Plaintiffs' Complaint, page 49 (emphasis in original). The Assignment of Leases and Rents states: "CHOICE OF LAW. THIS ASSIGNMENT SHALL BE DEEMED TO BE A CONTRACT ENTERED INTO PURSUANT TO THE LAWS OF THE STATE OF NEW YORK AND SHALL IN ALL RESPECTS BE GOVERNED, CONSTRUED, APPLIED AND ENFORCED IN ACCORDANCE WITH THE LAW OF THE STATE OF NEW YORK." See Exhibit D. to Plaintiffs' Complaint, p. 8 (emphasis in original). The Replacement Reserve and Security Agreement contains a "CHOICE OF LAW" provision that provides that it "SHALL IN ALL RESPECTS BE GOVERNED, CONSTRUED, APPLIED AND ENFORCED IN ACCORDANCE WITH THE LAW OF THE STATE OF NEW YORK..." See Exhibit E to Plaintiffs' Complaint, p. 11 (emphasis in original). The Clearing Account Agreement states in

relevant part: "This agreement shall be governed by and construed in accordance with, the law of the State of New York without regard to any conflict of laws principles. 'See Exhibit F to Plaintiffs' Complaint, p. 5. The Cash Management Agreement states that it "**SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF NEW YORK...**" See Exhibit G to Plaintiffs' Complaint, p. 21 (emphasis in original).

Respondents relied upon these documents as forming the basis for relief when they filed their Motion For Order Requiring Turnover of Collateral and Sequestering Rents. However, Respondents ignored the choice of law provisions cited and quoted above. Instead, they relied entirely upon South Carolina law as forming the legal basis for relief, primarily S.C. Code Ann. Section 29-3-100. The court below also ignored these choice of law provisions and the Order Requiring Turnover of Collateral and Sequestering Rents (hereinafter "Order Sequestering Rents") is based entirely on South Carolina law, not New York law.

The other important provisions relevant to this appeal pertain to venue/forum selection clauses that provide that this case must be litigated in the New York courts. More specifically, the Clearing Account Agreement states in relevant part: "Borrower, Clearing Bank and Lender hereby submit to the exclusive jurisdiction of the state courts or the State of New York for the purposes of all legal proceedings arising out of or relating to this Agreement or the transactions contemplated hereby." See Exhibit F to Plaintiffs' Complaint, p. 5. The Cash Management Agreement contains a similar venue/forum selection clause in favor of New York. See Exhibit G to Plaintiffs' Complaint, p. 21. Respondents simply ignored these forum/venue selection clauses and filed this action in South Carolina. Likewise, the lower court ignored these venue/forum selection clauses and issued the Order Sequestering Rents which is the primary Order now before this Court.

It is also significant that while Respondents captioned their Motion which gives rise to this appeal as a "Motion for Order Requiring Turnover of Collateral and Sequestering Rents" Respondents' Motion is effectively a motion for a preliminary injunction. In the Motion, Respondents sought and received from the lower court a change in the status quo by effectively having rental payments from tenants paid directly to Respondents before litigation or even discovery on the merits. In essence, Respondents sought and received an Order in South Carolina based on South Carolina law that required that rental payments go directly to Respondents and awarded Respondents effective control over the shopping center. In reaching this conclusion through the Order Sequestering Rents, the lower court simply ignored three important things: 1. The choice of law provisions quoted above; 2. The venue/forum selection clause quoted and cited above; and 3. The correct legal standard for issuance of a preliminary injunction. Therefore, this appeal followed.

## ARGUMENTS

### I. THE LOWER COURT ERRED IN APPLYING SOUTH CAROLINA LAW BECAUSE THE CONTRACT DOCUMENTS AT ISSUE CONTAIN CHOICE OF LAW PROVISIONS DICTATING THAT NEW YORK LAW APPLY.

The lower court erred in issuing its Order Requiring Turnover of Collateral and Sequestering Rents (hereinafter "Order Sequestering Rents") because the Order Sequestering Rents is based entirely on South Carolina law. However, the contracts which form the factual basis for the lower court's order contain choice of law provisions which dictate that New York law be applied. The lower court entirely ignored these choice of law provisions and issued the Order Sequestering Rents based on South Carolina statutory law, specifically S.C. Code Ann. 29-3-100. This was reversible error that should now be corrected by this Court.

"Choice of law clauses are generally honored in South Carolina." Team 1A, Inc. v. Lucas, 395 S.C. 237, 248, 717 S.E.2d 103, 108 (Ct. App. 2011). "If the parties to a contract specify the law under which the contract shall be governed, the court will honor the choice of law." Nucor Corp. v. Bell, 482 F. Supp. 2d 714, 728 (D.S.C. 2007). In the context of loan documents pertaining to real property, this Court has specifically recognized this general rule of law. For example, in Pitts v. Fink, 389 S.C. 156, 698 S.E.2d 626 (Ct. App. 2010), this Court affirmed the Circuit Court's Order domesticating an Alabama judgment sought to be enforced in South Carolina. The Defendants in that action argued that Alabama lacked personal jurisdiction over them but the Circuit Court and this Court both noted that the loan documents under which Plaintiff obtained the default judgment contained choice of law provisions favoring Alabama law. Reasoning that the choice of law provisions were valid and enforceable, this Court upheld the judgment issued by the courts in Alabama.

In the case now before this Court, the contractual documents contain choice of law provisions favoring application of New York law. In fact, the "Assignment of Leases and Rents" contained a specific choice of law provision favoring application of New York law and this was the very document Respondents relied upon in asking the Circuit Court to issue an order that sequestered rents. In relevant part, the Assignment of Leases and Rents provides: "THIS ASSIGNMENT SHALL BE DEEMED TO BE A CONTRACT ENTERED INTO PURSUANT TO THE LAW OF THE STATE OF NEW YORK AND SHALL IN ALL RESPECTS BE GOVERNED, CONSTRUED, APPLIED AND ENFORCED IN ACCORDANCE WITH THE LAW OF THE STATE OF NEW YORK." Assignment of Leases and Rents, p. 8 (emphasis in original). Despite the very clear language, the lower court simply ignored the choice of law provision altogether and applied South Carolina law. The lower court's order relies on a specific

South Carolina statute, S.C. Code Ann. 29-3-100. However, application of this statutory provision is misplaced by Respondents and the lower court because according the choice of law provision South Carolina law does not apply. Rather, New York law applies but the lower court's Order Sequestering Rents rests entirely on the application of South Carolina law instead of New York law as the contract documents Respondents rely upon state.

Several other contract documents the lower court relied on in issuing its Order Sequestering Rents also contain choice of law provisions requiring the application of New York law. For example, the Promissory Note provides: "This Note shall be deemed to be a contract entered into pursuant to the law of the State of New York..." Promissory Note, p. 9). The Mortgage states: "THIS SECURITY INSTRUMENT SHALL BE DEEMED TO BE A CONTRACT ENTERED INTO PURSUANT TO THE LAW OF THE STATE OF NEW YORK AND SHALL IN ALL RESPECTS BE GOVERNED, CONSTRUED, APPLIED AND ENFORCED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK..." Mortgage, p. 49 (emphasis in original). The Cash Management Agreement states: "**Governing Law. THE LOAN WAS MADE BY LENDER IN THE STATE OF NEW YORK AND...SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAW OF THE STATE OF NEW YORK.**" Cash Management Agreement, p. 24 (emphasis in original). The Replacement Reserve and Security Agreement states: "CHOICE OF LAW. THIS AGREEMENT SHALL BE DEEMED TO BE A CONTRACT ENTRERED INTO PURSUANT TO THE LAWS OF THE STATE OF NEW YORK AND SHALL IN ALL RESPECTS BE GOVERNED, CONSTRUED, APPLIED AND ENFORCED IN ACCORDANCE WITH THE LAW OF THE STATE OF NEW YORK." Replacement Reserve and Security Agreement, p. 11 (emphasis in original). These were the very documents

Respondents submitted to the lower court and that Respondents relied upon in arguing for the Order Sequestering Rents. However, the lower court simply ignored this language in the documents Respondents submitted. The lower court's Order Sequestering Rents and its Order denying Appellant's Motion for Reconsideration simply do not explain or address how or why the lower court relied upon South Carolina law over New York law in light of the choice of law provisions before it.

To be clear, this issue was presented to the lower court both before and after the lower court issued its Order Sequestering Rents. Before the lower court issued its Order Sequestering Rents, Appellants submitted a Supplemental Memorandum of Law that addressed both the choice of law provisions and venue/forum selection clauses in the contract documents submitted by Respondents. Despite this Supplemental Memorandum of Law, the lower court's Order Sequestering Rents fails to address the issue regarding choice of law and with all due respect to the lower court, the lower court's Order Sequestering Rents blindly applies South Carolina law without any explanation as to why the choice of law provisions were effectively overruled by the lower court. After the lower court issued its Order Sequestering Rents, Respondents filed a Motion for Reconsideration and specifically requested a ruling from the lower court since the lower court's previous Order Sequestering Rents failed to address or consider the choice of law provisions in the contract documents before it. However, the lower court's Order on the Reconsideration Motion also failed to address the choice of law issues raised or explain why South Carolina law was applied over New York law.

As a matter of fact and as a matter of law, there is no plausible explanation or rationale for applying South Carolina law over New York law given the choice of law provisions in the contract documents. On this point of law, this Court has been clear: "Choice of law clauses are

generally honored in South Carolina." Team 1A, Inc. v. Lucas, 395 S.C. 237, 248, 717 S.E.2d 103, 108 (Ct. App. 2011). The lower court's Order Sequestering Rents ignores this well settled principle of law. For this reason, this Court should issue an Order vacating and overruling the Order Sequestering Rents.

## II. THE LOWER COURT ERRED IN ISSUING ITS ORDER SEQUESTERING RENTS BECAUSE THE CONTRACTUAL DOCUMENTS AT ISSUE CONTAIN VENUE AND FORUM SELECTION CLAUSES FAVORING NEW YORK.

The contract documents which Respondents submitted to the lower court in support of the Order Sequestering Rents contained venue and forum selection clauses that provide that this action be filed in the New York courts. The lower court's Order Sequestering Rents specifically relied upon and cited these contract documents but the lower court's Order Sequestering Rents ignores the forum and venue selection clauses altogether. In ignoring these venue and forum selection clauses, both the lower court and Respondents sought to selectively pick and choose from the contract documents those clauses they sought to enforce against Appellants while at the same time disregarding completely a threshold matter of the proper forum and venue. This was legal error that should now be corrected by this Court.

Forum or venue selection clauses in contracts are interpreted by the general rules of contract interpretation. Ashley River v. Ashley River Properties, 374 S.C. 271, 648 S.E.2d 295 (Ct. App. 2007). "When a contract is unambiguous, a court must construe its provisions according to the terms the parties used as understood in their plain, ordinary, and popular sense." Id. (Citations omitted). In the case now before this Court, the lower court violated this basic rule of contract interpretation because the lower court simply ignored and disregarded the forum and venue selection clauses entirely. In fact, the lower court's Order Sequestering Rents and the subsequent Order denying Appellant's Motion for Reconsideration fails to cite or even mention the forum or

venue selection clauses that were in the documents cited and relied upon by Respondents and the lower court in issuing the Order Sequestering Rents. However, these clauses were presented and argued to the lower but were totally disregarded in the lower court's orders now on appeal to this Court.

As is typically the case in foreclosure actions, the documents at issue include both a promissory note and a mortgage on the subject property. In this case and in addition the promissory note and mortgage, the documents relied upon by Respondents as forming the basis for this action also include an "Assignment of Leases and Rents" (Exhibit D to Plaintiffs' Complaint), "Replacement Reserve and Security Agreement" (Exhibit E to Plaintiffs' Complaint), "Clearing Account Agreement" (Exhibit F to Plaintiffs' Complaint), and "Cash Management Agreement" (Exhibit G to Plaintiffs' Complaint). It is these documents which form the basis for Respondents' action against Appellants because at the time that Respondents' filed their action against Appellants, Appellants had fully paid the principle, interest and escrow. Respondents' Complaint and the motions giving rise to the current appeal do not turn on whether Appellant paid the principle, interest and escrow to Respondents. Rather, Respondents allege that in addition to this money they are also entitled to all rents paid to Appellants by tenants at the property. *See generally*, Complaint. That allegation also formed the basis for Respondents' Motion to Sequester Rents. In a nutshell, Respondents' theory of the case is that because an anchor tenant left the property, that triggered a "cash management event" which Respondents allege entitled them to all the rental payments. According to Respondents, tenant rental payments must be paid directly to a clearing bank under the "Clearing Account Agreement" and rent money handled through the "Cash Management Agreement." In making this argument to the lower court Respondents simply ignored the venue and forum selection clauses contained in

the "Clearing Account Agreement" and "Cash Management Agreement" that they rely upon. Even more importantly, the lower court wholly and completely disregarded the venue and forum selection clauses in the "Clearing Account Agreement" and "Cash Management Agreement." Instead of even considering or addressing these clauses, the lower court's Order Sequestering Rents skips past this threshold issue and grants relief to Respondents even though the documents relied upon by Respondents provide forum and venue selection in New York.

Respectfully, this Court should not make the same mistake the lower court made by simply ignoring the forum and venue selection clauses because when enforced, those clauses would require Respondents to pursue this action in New York. More specifically, the "Clearing Account Agreement" states: "Borrower, Clearing Bank and Lender hereby submit to the exclusive jurisdiction of the state court of the State of New York for the purposes of all legal proceedings arising out of or relating to this Agreement or the transactions contemplated hereby." Clearing Account Agreement, p. 5. The Cash Management Agreement also contains a similar venue/forum selection clause that provides for venue "IN ANY FEDERAL OR STATE COURT IN THE CITY OF NEW YORK, COUNTY OF NEW YORK..." p. 24, Cash Management Agreement (emphasis in original). Significantly, the other loan documents relied upon by Respondents and the lower court reference and rely upon the "Clearing Account Agreement" and "Cash Management Agreement." For example, the promissory note references and incorporates the "Cash Management Agreement" and "Clearing Account Agreement." *See* Exhibit A to Plaintiffs' Complaint, p. 11. Thus, the promissory note Respondents drafted incorporates the venue and forum selection clauses they also drafted. Similarly, the Mortgage itself also references and incorporates the "Cash Management Agreement" and "Other Security

Documents" which would include the "Clearing Account Agreement". *See* Exhibit B to Plaintiffs' Complaint, pp. 4, 6, 11 and 15.

Respondents to this action simply didn't follow the terms and conditions of the mortgage documents they drafted. Instead of filing suit in New York and having a New York court apply New York law, they breached the venue selection clauses they drafted and filed suit in South Carolina. Thereafter, they sought and received an Order from the lower court that is based on South Carolina statutory law even though the loan documents relied upon by Respondents in obtaining the Order Sequestering Rents provide for application of New York law in a New York court.

Appellants raised and argued these issues to the lower court on multiple occasions but the lower court's Order Sequestering Rents and subsequent Order on Appellant's reconsideration motion do not address the relevant and important issue of the venue and forum selection clauses. In a Supplemental Memorandum of Law that Appellants submitted to the lower court before it issued its Order Sequestering Rents, Appellants raised the venue/forum selection issue. However, the Order Sequestering Rents wholly ignores and completely fails to address why New York law should not be applied in a New York court when that is what the contract documents relied upon by Respondents and the lower court provide.

After the lower court issued its Order Sequestering Rents, Appellants again asked the lower court for a ruling on the venue/forum selection clause. In their Motion for Reconsideration, Appellants cited and quoted the venue/forum selection clauses cited and quoted above and they urged the lower court to address the issue. Among other things, Appellants' Motion for Reconsideration requests that the lower court: "address the choice of law, venue and jurisdiction issues which were previously raised and which are now raised again." However, the lower

court's Order on Respondent's Motion for Reconsideration never addresses or explains why the venue/forum selection clauses did not apply.

Respondents have brought this lawsuit in the wrong forum/venue. Respondents drafted the mortgage documents at issue and the documents they drafted contain venue/forum selection clauses which require that this action be brought in the New York courts. In filing suit outside of New York, Respondents have failed to comply with the contract documents, the same contract documents they allege Respondents breached. While this issue was raised to the lower court, it was ignored by the lower court. Respectfully, this Court should remedy this mistake by the lower court by issuing an Order/Decision that reverses the lower court's Order Sequestering Rents and which enforces the venue/forum selection clauses.

## III. EVEN IF APPLICATION OF SOUTH CAROLINA LAW IN SOUTH CAROLINA STATE COURT WAS PROPER, THE LOWER COURT ERRED IN ISSUING ITS ORDER SEQUESTERING RENTS BECAUSE THE ORDER EFFECTIVELY GRANTS INJUNCTIVE RELIEF TO RESPONDENT BUT THE LOWER COURT FAILED TO APPLY THE PROPER LEGAL STANDARD BEFORE GRANTING INJUNCTIVE RELIEF.

Even if the court below could ignore the clear and unambiguous language in the contract documents related to choice of law and venue/forum selection, the lower court erred in issuing its Order Sequestering Rents. The Order Sequestering Rents amounts to preliminary injunctive relief but the lower court's Order completely ignores the rigorous legal standard that must be met before preliminary injunctive relief is granted. Thus, this Court should issue an Order vacating the Order Sequestering Rents because Respondents did not and cannot meet the legal burden required for issuance of a preliminary injunction.

"An injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff." Scratch Golf Co. v. Dunes W. Residential Golf Properties, Inc., 361 S.C. 117, 121, 603 S.E.2d 905, 907-08 (2004) (citing S.C. Civil Procedure, 507 (2d ed. 1996)).

"For a preliminary injunction to be granted, the plaintiff must establish that (1) it would suffer irreparable harm if the injunction is not granted; (2) it would likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law." *Id.* at 121, 603 S.E. 2d at 908 (citing Cnty. Of Richland v. Simpkins, 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct. App. 2002)). "The sole purpose of a temporary injunction is to preserve the status quo and thus avoid possible irreparable injury to a party pending litigation." FOC. Lawshe Ltd. P'ship v. Int'l Paper Co., 352 S.C. 408, 413, 574 S.E.2d 228, 231 (Ct. App. 2002) (quoting Zabinski v. Bright Acres Assocs., 346 S.C. 580, 601, 553 S.E. 2d 110, 121 (2001)). Stated differently, a temporary injunction is utilized "to preserve the subject of controversy in the condition which it is at the time of the Order until opportunity is offered for full and deliberate investigation and to preserve the existing status quo during litigation...." Cnty. Of Richland v. Simpkins, 348 S.C. 664, 671, 560 S.E. 2d 902, 905 (Ct. App. 2002) (quoting Cnty. Council of Charleston v. Felkel, 244 S.C. 480, 483-84, 137 S.E.2d 577, 578 (1964)). Due to their drastic and extraordinary nature, courts should issue injunctions with caution and only where no adequate remedy at law exists. Strategic Res. Co. v. BCS Life Ins. Co., 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006).

The lower court never utilized this legal standard. Instead, it granted Respondents the relief they sought without any finding or showing that Respondents met any of the criteria necessary before preliminary injunctive relief was granted. Had the lower court utilized the correct legal standard before issuing preliminary injunctive relief in the form of the Order Sequestering Rents, Respondents' Motion should have been properly denied. Additionally, the relief Respondents sought and received through the Order Sequestering Rents changed the status quo and did not maintain the status quo until full litigation on the merits. When analyzed using the correct legal

standard, it is clear the preliminary injunctive relief the lower court granted was unwarranted and it should now be reversed by this Court.

**A. Respondent did not show it would suffer irreparable harm.**

Because an injunction is a drastic remedy, courts impose a high standard for parties seeking to obtain such relief. The first requirement a party must show is that "irreparable harm" would occur in the absence of injunctive relief. Whether "a wrong is irreparable, in the sense that equity may intervene, and whether there is an adequate remedy at law, are questions that are not decided by narrow and artificial rules." Kirk v. Clark, 191 S.C. 205, 211, 4 S.E.2d 13, 16 (1939). "The fact that no actual damages can be provided, and in an action at law that the jury could only award nominal damages, is often the best reason for a court of equity to interfere to prevent a continuous injury." 27 S.C. Jur. *Injunctions* § 4. Courts have found irreparable harm present where, absent injunctive relief, a party could not be restored to status quo with monetary damages. *See, e.g.,* Peek v. Spartanburg Reg'l Healthcare System, 367 S.C. 450, 455-56, 626 S.E.2d 34, 36-37 (Ct. App. 2005) (granting an injunction where the anesthesiologist's termination of privileges would result in the loss of her patient referral base and potentially her professional practice).

In this case, the lower court's Order Sequestering Rents turned these basic tenants of jurisprudence upside down because what the lower court did was effectively transfer rental payments from tenants from the owner of the property to Respondents. The lower court's Order Sequestering Rents dictates that tenant rental payments are no longer to go to the owners of the property, Appellants, but now are "sequestered" in favor of Respondents. The very nature of the lower court's Order demonstrates how and why Respondents would not suffer irreparable harm if the lower court had not issued its Order Sequestering Rents; specifically, what Respondents sought

and received was monetary relief. This is the same relief they could obtain once the case is fully litigated if they are able to prevail on the merits.

The lower court's Order Sequestering Rents ignores the fundamental purpose for preliminary injunctions: Preliminary injunctions are issued where a party will suffer "irreparable harm" with no adequate remedy in law. However, even a cursory examination of the Order Sequestering Rents demonstrates Respondents have an adequate remedy at law. Absent the lower court's Order Sequestering Rents, Respondents would not suffer any "irreparable harm" because there is an adequate remedy at law. That remedy at law is the very monetary relief Respondents are seeking in this case. As a matter of fact and as a matter of law, the lower court's Order Sequestering Rents gave Respondents exactly the relief sought in their Complaint but without affording Appellants meaningful discovery or basic due process. In short, the lower court's Order Sequestering Rents reads like the end chapter in a novel and the lower court erred in jumping to the conclusion of the novel before the other chapters of the book were written.

The lower court erred because Respondents never demonstrated a likelihood of irreparable harm in the absence of injunctive relief. If they are successful at trial on their claim, they may recover the very monetary damages they sought and received from the lower court through the Order Sequestering Rents. If the finder of fact agrees that an impairment of their rights occurred, there is a clear mechanism and measure for awarding damages at that time. However, at the early stages of litigation before any meaningful discovery Respondents never showed they would suffer irreparable harm. The lower court's Order Sequestering Rents was plain error even under South Carolina law and that Order should be vacated by this Court.

### B. Respondents Failed to Show a Likelihood of Success on the Merits.

In order to obtain injunctive relief through a preliminary injunction, the moving party must demonstrate a likelihood of success on the merits of their action. Scratch Golf Co. v. Dunes W. Residential Golf Properties, Inc., 361 S.C. 117, 121, 603 S.E.2d 905, 907-08 (2004) (citing Cnty. Of Richland v. Simpkins, 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct. App. 2002)). Respondents did not demonstrate a likelihood of success on the merits, a necessary requirement for issuance of a preliminary injunction. Respondents' Complaint is one that is based on basic contract law and a cause of action for breach of contract.[1] As this Court is aware to recover for a breach of contract the plaintiff must allege and prove:

> (1) a binding contract entered into by the parties;
> (2) breach or unjustifiable failure to perform the contract; and
> (3) damage suffered by the plaintiff as direct and proximate result of the breach.

Elements of Civil Causes of Action, Third Edition, p. 44. Respondents failed to establish any of these three elements but the lower court simply disregarded these facts and granted Respondents a preliminary injunction in the form of an Order Sequestering Rents. The lower court's error should now be corrected by this Court.

Respondents never established that the parties to this litigation entered a binding contract. The named Plaintiffs to the lawsuit are different legal entities than the legal entities named in the mortgage documents attached to Plaintiffs' Complaint. The promissory note, mortgage and related documents are all in the name of "Bear Stearns Commercial Mortgage, Inc." That legal entity is not the same legal entity named as a plaintiff to this lawsuit. Instead, the lawsuit caption lists

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[1] While Plaintiffs' Complaint lists the only cause of action as "Foreclosure of Mortgage," Plaintiffs and their Counsel misconstrue the nature of foreclosure actions. Foreclosure is a remedy. It is not a specific cause of action. The remedy of foreclosure is premised and based upon a breach of contract. Thus, while Plaintiffs have pleaded "Foreclosure of Mortgage" this remedy is only available if they prove a breach of contract claim against Defendants.

"Bear Stearns Commercial Mortgage **Securities**, Inc." as the Plaintiff to this lawsuit (emphasis added). The caption of the lawsuit itself lists "U.S. Bank National Association, as Trustee, As Successor-In-Interest to Bank of America, N.A. as Successor by Merger to LaSalle Bank National Association, as Trustee for the Registered Holders of Bear Stearns Commercial Mortgage Securities, Inc. Commercial Mortgage Pass-Through Certificates, Series 2007-TOP26." Respondents never submitted anything to the lower court to show that in fact, U.S. Bank National Association was a trustee and successor-in-interest to Bank of America, as claimed. Respondents submitted nothing evidencing a Merger to LaSalle Bank or that LaSalle Bank was a Trustee for the Registered Holders Bear Stearns Commercial Securities, Inc. There was no evidence submitted of a Commercial Mortgage Pass-Through. In fact, any evidence submitted by Respondents was hardly evidence at all. More accurately described, Respondents' evidence was little more than a wink, a nod and assurance by counsel along the lines of "we are the correct legal entity, take our word for it." Perhaps the named Plaintiffs to this lawsuit are the correct legal parties but they did not establish this fact in the court below.

The lower court, however, never addressed this issue in either its Order Sequestering Rents or any subsequent order. This error should be corrected by this Court by vacating the lower court's Order Sequestering Rents.

### C. Respondents have an adequate remedy at law.

Respondents were not entitled to injunctive relief because there was and is an adequate remedy at law available to them. As a general rule, injunctive relief is not available when an individual seeks money damages. MailSource, LLC v. M.A. Bailey & Assocs., 356 S.C. 363, 369-70, 588 S.E.2d 635, 639 (Ct. App. 2003). The function of equity "is to supplement the law, not to displace it." Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 117, 580 S.E.2d 100, 108 (2003).

The basis of equitable relief is the "impracticability of obtaining full and adequate compensation at law." Nutt Corp. v. Howell Rd., LLC, 396 S.C. 323, 327, 721 S.E.2d 447, 449 (Ct. App. 2011). A party has an adequate remedy at law where the remedy "is as certain, practical, complete and efficient to obtain the ends of justice and its administration in equity." Milliken & Co. v. Morin, 386 S.C. 1, 8, 685 S.E.2d 828, 832 (Ct. App. 2009).

In the case now before this Court, Respondents have an adequate remedy should they ultimately prevail on the merits. In their Complaint, Respondents specifically prayed for the type of relief they sought and received from the lower court through the Order Sequestering Rents. For example, Respondents prayed that Defendants be "jointly and severally [liable], for any and all amounts for which this Court determines Borrowers to be personally liable under the Note, the Mortgage and any other applicable Loan Documents..." Plaintiffs' Complaint, p. 9. They have also prayed for "a receiver to take possession of the Property in accordance with the provisions of the Mortgage and the ALR, and to collect, hold and disburse all Rents and other income or revenue of or from the Property..." Plaintiffs' Complaint, p. 10. In short, the relief Respondents sought and received through the injunction/Order Sequestering Rents is the same or similar to what they could be awarded if they are successful in the lawsuit. However, that did not entitle Respondents to the extraordinary remedy of a preliminary injunction that they sought and received.

This is one of the legal problems with the lower court's Order Sequestering Rents because the lower court essentially hit the fast-forward button, breezed through the merits of the case and awarded Respondents ultimate victory in the Order Sequestering Rents. Indeed, the Order Sequestering Rents is essentially a declaration from the lower court at the very outset that effectively declares Respondents the winners of this lawsuit. To be clear, the lower court's Order Sequestering Rents effectively crushes Appellants' business because it takes their rental income

from the property and effectively shifts control of the shopping center to Respondents. All of this was done even before Respondents answered the lawsuit, were afforded the opportunity to assert counterclaims, engage in discovery or otherwise exercise their due process rights.

However, the purpose of a preliminary injunction is not to declare winners and losers at the outset, as the lower court's Order Sequestering Rents did. Rather, a court should only issue a preliminary injunction to prevent irreparable harm where there is no other remedy. In this case, Respondents demonstrated no irreparable harm for which they have no other remedy but they sought and received an Order Sequestering Rents that effectively declares them the winners while simultaneously declaring Respondents the losers. Respectfully, this Court should correct the legal errors made by the lower court by vacating the Order Sequestering Rents.

### D. The Lower Court Improperly Granted Respondents Injunctive Relief that Changed the Status Quo.

The lower court's preliminary injunction issued as the Order Sequestering Rents is improper because it changes the status quo but does not maintain the status quo. "The ***sole purpose*** of a temporary injunction is to preserve the status quo and thus avoid possible irreparable injury to a party pending litigation." FOC. Lawshe Ltd. P'ship v. Int'l Paper Co., 352 S.C. 408, 413, 574 S.E.2d 228, 231 (Ct. App. 2002) (quoting Zabinski v. Bright Acres Assocs., 346 S.C. 580, 601, 553 S.E. 2d 110, 121 (2001)) (emphasis added). The lower court's Order Sequestering Rents ignores entirely this basic black letter principle of law.

By its wording and in practical effect, the Order Sequestering Rents changes the status quo by mandating and requiring that tenant rental payments which were made to Appellants for years now be turned over and sequestered in favor of Respondents. At no point does the Order Sequestering Rents or subsequent orders explain why the status quo should be changed at such an early stage in litigation particularly given the law as it pertains to preliminary injunctions and

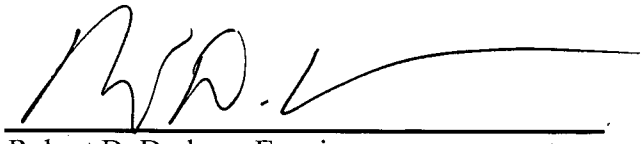
specifically that such preliminary injunctions be granted for the "sole purpose" of maintaining the status quo.

Here, the lower court's Order Sequestering Rents seizes effective control of the shopping center away from Appellants by "sequestering rents" ordinarily paid to Appellants and effectively giving those rental payments to Respondents. This is something that has never been done through the life of the mortgage. In doing so even before Appellants filed an Answer to the lawsuit, the lower court changed the status quo in such a way as to effectively give Respondents the ultimate relief they sought. This was plain error that should be corrected by this Court by vacating the Order Sequestering Rents.

## CONCLUSION

For the reasons argued above, this Court should issue an Order vacating the lower court's Order Sequestering Rents.

Respectfully submitted,



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May 30, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

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Appellate Case No. 2017-000180

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U.S. Bank National Association, as Trustee, as Successor-in-Interest to Bank of America, N.A., as Successor by Merger to Lasalle Bank National Association, as Trustee for the Registered Holders of Bear Stearns Commercial Mortgage Securities, Inc., Commercial Mortgage Pass-Through Certificates, Series 2007-TOP26,

Respondents,

v.

AW-MAGPIG, LLC; HW-MAGPIG, LLC; and MW-MAGPIG, LLC,

Appellants,

v.

Wells Fargo Bank, N.A., and Meridian Capital Group, LLC,

Third-Party Defendants.



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PROOF OF SERVICE

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I certify that I have served Appellants' Initial Brief and Designation of Matter on Respondents U.S. Bank National Association, as Trustee, as Successor-in-Interest to Bank of America, N.A., as Successor by Merger to Lasalle Bank National Association, as Trustee for the Registered Holders of Bear Stearns Commercial Mortgage Securities, Inc., Commercial Mortgage Pass-Through Certificates, Series 2007-TOP26 by depositing a copy of it in the United States Mail, postage prepaid, on May 30, 2017, addressed to their attorneys of record, James H. Pulliam, Esquire, David H. Simpkins, Esquire, Kilpatrick Townsend & Stockton, LLP, 214 N. Tryon Street, Suite 2400, Charlotte, NC 28202-2381.

May 30, 2017

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May 30, 2017

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

RE: U.S. Bank National Association, as Trustee, as successor-in-interest to Bank of America, N.A., as successor by merger to LaSalle Bank National Association, as Trustee for the registered holders of Bear Stearns Commercial Mortgage Securities, Inc., and Commercial Mortgage Pass-Through Certifies, Series 2007-TOP26, Respondents, vs. AW-MAGPIG, LLC, HW-MAGPIG, LLC, AND MW-MAGPIG, LLC, Appellants.

Dear Ms. Kitchings:

Enclosed for filing is Appellants' Initial Brief and Designation of Matter in the above-referenced case.

May 30, 2017

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