

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

JUN 21 2017
SC Court of Appeals

Hon. Marvin H. Dukes, III, Master In Equity and Special Circuit Judge
Appellate Case Number 2016-001899
Case Number 2016-Cp-07-1778

A & B Associates, L. P.,

Plaintiff/Respondent,

vs.

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

Defendants,

OF WHOM FCRE, REL, LLC, is the

Appellant.

INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF QUESTIONS PRESENTED 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 7

ARGUMENT NUMBER 1 11

 The only evidence in the record is that FCRE REL, LLC, unlawfully removed A & B Associates, L. P., from its own property, seized its bank accounts and rents and converted the same to its own use, and seized and interfered with its leases and contracts. A & B Associates, L. P., demonstrated that it had suffered and would suffer irreparable harm, that it had a likelihood of success on the merits of its claims and that it had no adequate remedy at law .. 11

 (a) There is no finding in the August 24, 2016, Order Granting Temporary Injunction that the loan documents are unconscionable. 16

 (b) Having failed to make a proffer of excluded evidence at the August 24, 2016, hearing, FCRE REL, LLC, has failed to preserve any issue for appeal. .. 17

 (c) The facts as found by Judge Dukes support the conclusion that A & B Associates, L. P., made a *prima facie* showing of a likelihood of success on the merits with respect to its claims. 19

ARGUMENT NUMBER 2 22

 The only evidence in the record is that FCRE REL, LLC, refused to comply with the plain language of the August 26, 2016, Order Granting Temporary Injunction, and that its non-compliance was willful. (Question Presented Number 2). 22

CONCLUSION 25

TABLE OF AUTHORITIES

SOUTH CAROLINA CASES

Brailsford v. Brailsford, 380 S.C. 443, 669 S.E.2d 342, 346 (Ct. App. 2008) 17

Carson v. South Carolina Department of Natural Resources, 371 S.C. 114, 638 S.E.2d 45, (2002) 18

Case v. Case, 243 S.C. 447, 134 S.E.2d 394 (1964) 17

County of Richland v. Simpkins, 348 S.C. 664, 560 S.E.2d 902 (Ct. App. 2002) 15

First Union National Bank v. Hitman, Inc., 306 S.C. 327, 411 S.E.2d 681 (Ct.App. 1991), *aff'd*, 308 S.C. 421, 418 S.E.2d 545 (1992) 16

Ford v. State Ethics Commission, 344 S.C. 642, 646, 545 S.E.2d 821, 823 (2001) 16

Peek v. Spartanburg Regional Healthcare System, 367 S.C. 450, 626 S.E.2d 34 (Ct.App. 2005) 15, 20, 21

Poynter Investments, Inc. v. Century Builders of Piedmont, Inc., 387 S.C. 583, 694 S.E.2d 15 (2010) 15

Williams v. Jones, 92 S.C. 342, 75 S.E. 705 (1912) 21

Zabinski v. Bright Acres Associates, et al., 346 S.C. 580, 553 S.E.2d 110 (2001) 15

SOUTH CAROLINA STATUTES

S. C. Code Ann. § 29-3-10, *et seq.* (Supp. 2016) 12

SOUTH CAROLINA APPELLATE COURT RULES

Rule 210(h), SCACR 17, 18

SOUTH CAROLINA RULES OF CIVIL PROCEDURE

Rule 6(d), SCRCP 18

Rule 65, SCRCP 15, 18

Rule 65(b), SCRCP 18

STATEMENT OF QUESTIONS PRESENTED

1. When the only evidence in the record is that a mortgage lender, in the absence of a monetary default, has:

- (a) without bringing a lawsuit, obtaining an order for appointment of a receiver or without any other order or process of any kind;
- (b) enlisted a uniformed, municipal police officer to forcibly remove a borrower from its own real property;
- (c) seized the borrower's business files, contracts and leases;
- (d) seized the borrowers bank accounts; and,
- (e) seized rents paid by the borrower's tenants,

should a trial judge issue a temporary injunction to restore the borrower to possession of its real and personal property and restore the *status quo* as it existed prior to the mortgage lender's unlawful actions?

2. When a party has willfully refused to comply with an unambiguous temporary injunction order requiring it to return real and personal property to its owner, should a judge find that party to be in contempt of the temporary injunction order?

STATEMENT OF THE CASE

A & B Associates, L. P., commenced this case by the filing of its Summons, Verified Complaint, Motion for *Ex Parte* Temporary Restraining Order, and Motion for Temporary Injunction on April 15, 2016.¹ In its Verified Complaint, A & B Associates, L. P., alleged claims for Unjust Enrichment, Conversion, Violation of Public Policy and Declaration of Non-Default, Tortious Interference with Contracts, Accounting and Permanent Injunction.²

On August 15, 2016, the Hon. Marvin H. Dukes, III, signed an Order Granting *Ex Parte* Temporary Restraining Order, and set a hearing on the Motion for Temporary Injunction for August 24, 2016.³

On August 16, 2016, FCRE REL, LLC, filed its Motion To Vacate *Ex Parte* Temporary Restraining Order. The Motion was supported by the Affidavits of Mary F. Davenport and Nichole Kim.⁴ Following a telephone hearing on August 16, 2016, Judge Dukes signed an Order denying the Motion.⁵

On August 24, 2016, Judge Dukes convened a hearing on A & B Associates, L. P.'s

¹ The Summons, Verified Complaint, Motion for *Ex Parte* Temporary Restraining Order, and Motion for Temporary Injunction are dated August 12, 2016, but were filed on August 15, 2016. Many of the documents were dated prior to the date of filing but were filed on the same date. For clarity, the date the documents referred to is used, rather than the date the document was clocked in by the Clerk.

² August 12, 2016, Verified Complaint, pages 12-20, Counts I, II, III, IV, V, VI, and VII.

³ August 15, 2016, Temporary Restraining Order; August 12, 2016, Motion for Temporary Injunction.

⁴ August 16, 2016, Motion to Vacate *Ex Parte* Temporary Restraining Order; August 16, 2016, Affidavit of Mary F. Davenport; August 16, 2016, Affidavit of Nichole Kim.

⁵ August 16, 2016, Order Denying Motion to Vacate *Ex Parte* Temporary Restraining Order; August 26, 2016, Order Granting Temporary Injunction, page 1.

Motion for Temporary Injunction.⁶ In addition to the Verified Complaint, A & B Associates, L. P., served affidavits of L. Christopher Kettles, Sharan S. Kettles, Sheyloria Monique Rivers, Sabanio A. Norris, Traci Oates and Sheyaloria Rivers.⁷ FCRE REL, LLC, did not file any additional affidavits.

Following the August 24, 2016, hearing, Judge Dukes signed an Order Granting the Motion for Temporary Injunction on August 26, 2016.⁸

On August 31, 2016, FCRE REL, LLC, filed its Motion for Relief from Order Granting Temporary Injunction. The Motion was supported by affidavits of Brian White and Demone Atkins.⁹ On September 1, 2016, A & B Associates, L. P., filed its Motion in Opposition to Defendant's Motion for Relief from Order Granting Temporary Injunction, supported by the affidavits of L. Christopher Kettles and Sharan S. Kettles.¹⁰

Following a telephone hearing convened on September 1, 2016, Judge Dukes signed

⁶ Transcript of August 24, 2016, hearing; August 26, 2016, Order Granting Temporary Injunction, p. 1.

⁷ August 19, 2016, Affidavit of Sabanio A. Norris; August 19, 2016, Affidavit of Sheyloria Monique Rivers; August 20, 2016, Affidavit of Traci Oates; August 22, 2016, Affidavit of Sharan Kettles; August 23, 2016, Affidavit of Sheloria Rivers; August 22, 2016, Affidavit of L. Christopher Kettles.

⁸ August 26, 2016, Order Granting Temporary Injunction.

⁹ August 31, 2016, Motion for Relief from Order Granting Temporary Injunction; August 16, 2016, Affidavit of Brian White; August 30, 2016, Affidavit of Demone Atkins.

¹⁰ September 1, 2016, Motion in Opposition to Defendants's Motion for Relief from Order Granting Temporary Injunction; September 1, 2016, Affidavit of L. Christopher Kettles; September 1, 2016, Affidavit of Sharan S. Kettles.

an Order denying the Motion for Relief from Order Granting Temporary Injunction.¹¹

On September 6, 2016, FCRE REL, LLC, filed its Answer, Counterclaims and Third Party Complaint.¹² In it, FCRE REL, LLC, denied the material allegations of the Verified Complaint, alleged that all necessary parties had not been joined, and alleged defenses styled Waiver, Fraud, Existence of a Written Contract, Equitable Estoppel and a Right of Possession.¹³ FCRE REL, LLC, also alleged counter claims for Foreclosure, Appointment of a Receiver, Fraud in the Inducement, Fraud, Breach of Contract, Quantum Meruit, and alleged a Third Party Complaint against L. Christopher Kettles for Breach of Guaranty.¹⁴

On September 9, 2016, A & B Associates, L. P., filed its Motion for Contempt for Defendant FCRE REL, LLC's Failure to Follow Court Orders (hereinafter, the Motion for Contempt). The Motion was supported by the affidavit of Curtis L. Coltrane.¹⁵

On September 12, 2016, FCRE REL, LLC, filed its Notice of Appeal of the August 26, 2016, Order Granting Temporary Injunction.

On September 15, 2016, A & B Associates, LLC, filed additional affidavits of L.

¹¹ September 7, 2016, Order Denying Motion for Relief from Temporary Injunction.

¹² September 6, 2016, FCRE REL, LLC, filed its Answer, Counterclaims and Third Party Complaint.

¹³ September 6, 2016, FCRE REL, LLC, Answer, Counterclaims and Third Party Complaint, pp. 1-9.

¹⁴ September 6, 2016, FCRE REL, LLC, Answer, Counterclaims and Third Party Complaint, pp. 9-31.

¹⁵ September 13, 2016, Motion for Contempt for Defendant FCRE REL, LLC's Failure to Follow Court Orders; September 9, 2016, Affidavit of Curtis L. Coltrane.

Christopher Kettles and Sharan S. Kettles in support of the Motion for Contempt.¹⁶

On September 15, 2016, FCRE REL, LLC, filed its Response to Plaintiff's Motion for Contempt.¹⁷ The Response was supported by the Affidavits of Mary F. Davenport, Jami Rankin, Brian White and Benjamin T. Coppage.¹⁸

On September 15, 2016, A & B Associates, L. P., served the Affidavits of Attorney's Fees of Curtis L. Coltrane and Timothy J. Grantiz.¹⁹ On September 16, 2016, A & B Associates, L. P., served the Affidavit of Alison Plank Mealing.²⁰

Following a hearing on September 16, 2016, Judge Dukes signed an Order on September 23, 2017, in which he found FCRE REL, LLC, to be in willful contempt of the August 26, 2016, Order Granting Temporary Injunction.²¹

On October 4, 2016, A & B Associates, L. P., and L. Christopher Kettles filed their Reply to Counterclaims and Answer to Third Party Complaint. In it, A & B Associates, L. P., and L. Christopher Kettles denied the material allegations of the Answer, Counterclaims

¹⁶ September 1, 2016, Affidavits of L. Christopher Kettles and Sharan Kettles; September 8, 2016 Affidavit of L. Christopher Kettles.

¹⁷ September 15, 2016, FCRE REL, LLC's Response to Motion for Contempt.

¹⁸ September 14, 2016, Affidavit of Mary F. Davenport; September 14, 2016, Affidavit of Brian White; September 15, 2016, Affidavit of Jami Rankin; September 15, 2016, Affidavit of Benjamin T. Coppage.

¹⁹ September 15, 2016, Affidavit of Attorney's Fees of Timothy J. Grantiz; September 15, 2016, Affidavit of Attorney's Fees of Curtis L. Coltrane.

²⁰ September 16, 2016, Affidavit of Alison Plank Mealing.

²¹ September 23, 2016, Order Granting Plaintiff's Motion for Contempt.

and Third Party Complaint of FCRE REL, LLC.²²

FCRE REL, LLC, filed its Notice of Appeal of the September 23, 2016, Order Granting Plaintiff's Motion for Contempt on October 20, 2016. By Order of the South Carolina Court of Appeals dated October 26, 2016, the appeals of the August 26, 2016, Temporary Injunction Order and the September 23, 2016, Order Granting Plaintiff's Motion for Contempt were consolidated.

²² October 4, 2016, Reply to Counterclaims and Answer to Third Party Complaint, pp. 1-17. The October 4, 2016, Reply of A & B Associates, L. P., and L. Christopher Kettles does not make out any issue relevant to this Appeal. The filing of it is included to show that a timely response was made to the Answer, Counterclaims and Third Party Complaint of FCRE REL, LLC.

STATEMENT OF FACTS

The facts that are relevant to the August 26, 2016, Order Granting Temporary Injunction, and the September 23, 2016, Order Granting Contempt Motion are as follows:

A & B Associates, L. P., is the owner of a 96 unit residential apartment development located in the Town of Port Royal, South Carolina.²³ FCRE REL, LLC, holds a first priority mortgage on the property of A & B Associates, L. P.²⁴

On or about July 18, 2016, FCRE REL, LLC, declared a non-monetary default of A & B Associates, L.P.'s obligations under the mortgage.²⁵ On July 20, 2016, a representative of FCRE, REL, LLC, appeared at the property of A & B Associates, L.P., accompanied by a uniformed Town of Port Royal police officer, and forced A & B Associates, L. P., from its property.²⁶ At or about the same time, FCRE REL, LLC, seized A & B Associates, L. P.'s bank accounts, leases, contracts and personal property, and installed Tideland Realty, Inc., as the property manager.²⁷

At the time that FCRE REL, LLC, took these actions, there was no existing monetary default under the note and mortgage, and FCRE REL, LLC, did not claim the existence of a monetary default.²⁸ At the time that FCRE REL, LLC, took these actions, it had not commenced a lawsuit to enforce its claimed rights under the note and mortgage, sought the

²³ August 12, 2016, Verified Complaint, page 1, paragraph 2.

²⁴ August 12, 2016, Verified Complaint, page 2, paragraph 4.

²⁵ August 12, 2016, Verified Complaint, page 5, paragraph 12.

²⁶ August 12, 2016, Verified Complaint, page 10, paragraph 18.

²⁷ August 12, 2016, Verified Complaint, page 11, paragraphs 22-25.

²⁸ August 12, 2016, Verified Complaint, page 5, paragraphs 11-12

appointment of a receiver or obtained any court order authorizing the actions that it took.²⁹

As of July 20, 2016, as result of FCRE REL, LLC's actions, in the absence of due process or any process, A & B Associates, L. P., was forcibly removed from its own real property, its bank accounts were seized, the rents paid by its tenants were seized, its tenant leases and contracts were seized, its personal property was seized, and a stranger to its business and its interests was placed in its property. While FCRE REL, LLC, was in possession of A & B Associates, L. P.'s property, it seized the rents paid by the tenants of A & B Associates, L. P.³⁰

Despite the fact that FCRE REL, LLC, seized the bank accounts of A & B Associates, L. P., and began seizing the rents due to A & B Associates, L. P., as the same were paid, it applied none of the money it seized to the payment of the amounts due under the terms of the note and mortgage given by A & B Associates, L. P., to FCRE REL, LLC.³¹

In order to avoid a monetary default that would be caused by FCRE REL, LLC's refusal to apply A & B Associates, L.P.'s money to the payment of the debt, L. Christopher Kettles advanced an amount to FCRE REL, LLC, that was in excess of the amount due under the terms of the note and mortgage. FCRE REL, LLC, refused to return the excess to L. Christopher Kettles.³²

On August 15, 2016, A & B Associates, L. P., filed its Summons, Verified Complaint,

²⁹ August 12, 2016, Verified Complaint, paragraph 17, page 5.

³⁰ August 12, 2016, Verified Complaint, Counts I, II, III, IV, V, VI, and VII, pages 12-20.

³¹ August 12, 2016, Verified Complaint, paragraph 8, page 7.

³² August 12, 2016, Verified Complaint, paragraph 8, page 7; August 26, 2016, Order Granting Temporary Injunction, page 3, paragraph 6.

Motion for *Ex Parte* Temporary Restraining Order, Motion for Temporary Injunction and Notice of Hearing.³³ On August 15, 2016, the Hon. Marvin H. Dukes, III, executed his *Ex Parte* Temporary Restraining Order.³⁴ In his *Ex Parte* Temporary Restraining Order, Judge Dukes ordered FCRE REL, LLC, to restore A & B Associates, L. P., to the possession of its property, funds and other property by 3:00 P. M., on August 16, 2016.³⁵

Judge Dukes also set a hearing on A & B Associates, L. P.'s, Motion for Temporary Injunction to begin at 3:30 P. M., on August 24, 2016.³⁶

As of the date of the hearing for the Motion for Temporary Injunction, August 24, 2016, A & B Associates, L. P., had been restored to the possession of its real property, but FCRE REL, LLC, had not returned any of the money it seized.³⁷

On August 26, 2016, Judge Dukes issued his Order Granting Temporary Injunction.³⁸ In his August 26, 2016, Order Granting Temporary Injunction, Judge Dukes Ordered FCRE REL, LLC, to return to A & B Associates, L. P., all of its money, including “all money received from rents,” and “all money removed from Plaintiff’s bank accounts,

³³ August 12, 2016, Verified Complaint, Summons, Motion for *Ex-Parte* TRO, Motion for Temporary Injunction, and Notice of Hearing.

³⁴ August 15, 2016, *Ex-Parte* Temporary Restraining Order.

³⁵ August 15, 2016, *Ex-Parte* Temporary Restraining Order, page 1, paragraph 3.

³⁶ August 15, 2016, *Ex-Parte* Temporary Restraining Order, page 2, paragraph 5.

³⁷ August 22, 2016, Affidavit of Christopher Kettles, page 2, paragraphs 6 and 7.

³⁸ August 26, 2016, Order Granting Temporary Injunction.

including reserve accounts.”³⁹

FCRE REL, LLC, did not file any motion seeking clarification of what was required by the plain language in the August 26, 2016, Order Granting Temporary Injunction.⁴⁰

On September 9, 2016, A & B Associates, L. P., filed its Motion for Contempt, seeking to hold FCRE REL, LLC, in contempt for its failure to comply with the requirements of the August 26, 2016, Order Granting Temporary Injunction.⁴¹ The basis for the motion was that FCRE REL, LLC, had failed to return the money as required by the August 26, 2016, Order Granting Temporary Injunction.⁴²

As of the date of the filing of the Motion for Contempt, and as of the date of the hearing on the Motion for Contempt, FCRE REL, LLC, remained in possession of the sum of Fifty Six Thousand Seven Hundred Seventy Four and 92/100 (\$56,774.92) Dollars that it had been ordered to return to A & B Associates, L. P.⁴³

³⁹ August 26, 2016, Order Granting Temporary Injunction, page 6, paragraph 3.

⁴⁰ FCRE REL, LLC, did file a Motion on August 31, 2016, seeking relief from the Temporary Injunction on grounds other than that the order was unclear. The motion of FCRE REL, LLC, was denied on September 7, 2016. *See*: August 31, 2016, Notice of Motion and Motion for Relief from Order Granting Temporary Injunction; September 7, 2016, Order Denying FCRE REL, LLC’ Motion.

⁴¹ September 9, 2016, Motion for Contempt.

⁴² September 9, 2016, Motion for Contempt, page 9, paragraph 1.

⁴³ September 9, 2016, Affidavit of Curtis L. Coltrane; Exhibit “C” to September 9, 2016, Affidavit of Curtis L. Coltrane.

ARGUMENT NUMBER 1

The only evidence in the record is that FCRE REL, LLC, unlawfully removed A & B Associates, L. P., from its own property, seized its bank accounts and rents and converted the same to its own use, and seized and interfered with its leases and contracts. A & B Associates, L. P., demonstrated that it had suffered and would suffer irreparable harm, that it had a likelihood of success on the merits of its claims and that it had no adequate remedy at law. (Question Presented Number 1)

In this case, based on the only evidence in the record, the Hon. Marvin H. Dukes, III, made the following findings of fact in his August 26, 2016, Order Granting Temporary Injunction:

1. A & B Associates, L. P., is the owner of a 96 unit residential rental apartment development located in the Town of Port Royal, South Carolina.⁴⁴ FCRE REL, LLC, holds a mortgage on the property of A & B Associates, L. P.⁴⁵
2. On or about July 18, 2016, FCRE REL, LLC, declared a non-monetary default of A & B Associates, L.P.'s obligations under the note and mortgage.⁴⁶

⁴⁴ August 12, 2016, Verified Complaint, paragraph 1, page 2; paragraph 3, page 4; August 26, 2016, Order Granting Temporary Injunction, page 2, paragraph 1.

⁴⁵ August 12, 2016, Verified Complaint, page 4, paragraph 4; August 26, 2016, Order Granting Temporary Injunction, page 4, paragraphs 4-5.

⁴⁶ August 12, 2016, Verified Complaint, page 5, paragraph 12; August 26, 2016, Order Granting Temporary Injunction, page 3, paragraphs 3 and 4. In its "Statement of Facts" FCRE REL, LLC, makes the unsupported claim that its notice of default was, in part, based on two payments having been made late in 2015, or one year prior to the claim of default. *Brief of Appellant*, pp. 8-9. There is no evidence in the record that FCRE REL, LLC, claimed the existence of a monetary default in 2015, or on July 18, 2016. Irrespective of whether two payments were made late, there is no evidence that such was all or any part of FCRE REL, LLC's July 18, 2016, declaration of default. The evidence submitted by FCRE REL, LLC, refutes this assertion. *See*: August 16, 2016, Affidavits of Mary F. Davenport and Nichole Kim. Neither mentions the existence of any late payment or of any monetary default or states such as the basis for the claimed default.

3. On July 20, 2016, FCRE REL, LLC, with the aid of an officer of the Port Royal Police Department, forcibly removed A & B Associates, L. P., from its real property.⁴⁷
4. On July 20, 2016, FCRE REL, LLC, seized the bank accounts of A & B Associates, L. P., and installed its own agent in the property of A & B Associates, L. P. The agent began collecting rents from the tenants of A & B Associates, L. P.⁴⁸
5. At the time that FCRE REL, LLC, took these actions, it had not filed a case in Beaufort County, South Carolina, or anywhere, to enforce its claimed rights under its note and mortgage. It had not sought or received an order appointing a receiver, or any other order authorizing it to forcibly remove A & B Associates, L. P., from its own property and seize its bank accounts, funds, contracts, leases and other personal property.⁴⁹ The rights of A & B Associates, L. P., were violated without due process or any process.⁵⁰
6. Following the forcible removal of A & B Associates, L. P., from its property, FCRE

⁴⁷ August 12, 2016, Verified Complaint, page 10, paragraph 18; August 26, 2016, Order Granting Temporary Injunction, page 3, paragraph 5. No mention of FCRE REL, LLC'S, unlawful act is made by it in its Brief. FCRE REL, LLC, offered no evidence before the Hon. Marvin H. Dukes, III, to refute that it did this. *See:* August 16, 2016, Affidavits of Mary F. Davenport and Nichole Kim. In the hearings before the Hon. Marvin H. Dukes, III, FCRE REL, LLC, did not deny that it committed this unlawful act. *See:* Transcripts of Hearings of August 24, 2016, and September 16, 2016.

⁴⁸ August 12, 2016, Verified Complaint, page 11, paragraph 23; August 26, 2016, Order Granting Temporary Injunction, page 3, paragraphs 5, 6 and 7; page 5, paragraph 12(a).

⁴⁹ South Carolina is a judicial foreclosure state. S. C. Code Ann. § 29-3-10, *et seq.* (Supp. 2016). The extra-judicial actions of FCRE REL, LLC, had no basis in law.

⁵⁰ August 12, 2016, Verified Complaint, page 10, paragraphs 18, 19 and 20; August 26, 2016, Order Granting Temporary Injunction, page 3, paragraph 5. FCRE REL, LLC, offered no evidence before the Hon. Marvin H. Dukes, III, to refute this fact. *See:* August 16, 2016, Affidavits of Mary F. Davenport and Nichole Kim. In the hearings before the Hon. Marvin H. Dukes, III, FCRE REL, LLC, did not deny that this fact. *See:* Transcripts of Hearings of August 24, 2016 and September 16, 2016.

REL, LLC, commenced to make alterations to the property, without the consent of A & B Associates, L. P.⁵¹

7. Following the forcible removal of A & B Associates, L. P., and the seizure of its bank accounts, rents and other money, FCRE REL, LLC, did not use any part of the money to make the debt service payments due under the note and mortgage.⁵²

8. While in possession of the real property of A & B Associates, L. P., FCRE REL, LLC, and its agent made false and defamatory statements to tenants of A & B Associates, L. P., regarding A & B Associates, L. P., and its agents, and took other actions to interfere with the leases between A & B Associates, L. P., and its tenants.⁵³

Based on the above facts, which are supported by the only evidence in the record, Judge Dukes concluded:

1. A & B Associates, L. P., had suffered and would suffer immediate and irreparable harm because, in the absence of a monetary default and without due process, A & B Associates, L. P.,

(a) had been forcibly removed from its real property;

⁵¹ August 12, 2016, Verified Complaint, page 11, paragraphs 26 and 27; August 24, 2016, Order Granting Temporary Injunction, page 5, paragraph 12(c).

⁵² August 12, 2016, Verified Complaint, page 11, paragraphs 24 and 25; August 26, 2016, Order Granting Temporary Injunction, page 3, paragraph 6. FCRE REL, LLC, offered no evidence before Judge Dukes to refute this fact. *See*: August 16, 2016, Affidavits of Mary F. Davenport and Nichole Kim. In the hearings before Judge Dukes, FCRE REL, LLC, did not deny this fact. *See*: Transcripts of Hearings of August 24, 2016 and September 16, 2016.

⁵³ August 19, 2016, Affidavit of Sheyloria Monique Rivers; August 20, 2016, Affidavit of Traci Oates; August 24, 2016, Affidavit of L. Christopher Kettles, page 2, paragraph 7.

(b) had its bank accounts, money and rents seized; and,

(c) had its contracts and leases seized.⁵⁴

2. Based on the findings of fact regarding the actions of FCRE REL, LLC, A & B Associates, L. P., met its burden of demonstrating a likelihood of success on the merits.⁵⁵

3. Without a Temporary Injunction, the business of A & B Associates, L. P., would be destroyed, because it was put out of possession of its real property, bank accounts, money, rents, leases and contracts.⁵⁶ These items constitute the entire business of A & B Associates, L. P., which is the ownership, leasing and operation of a residential apartment complex. Since FCRE REL, LLC, failed to apply the money and rents it had seized to the payment of the mortgage debt, FCRE REL, LLC, utilized its seizure of all of assets of A & B Associates, L. P., to cause a monetary default which would further erode A & B Associates, L. P.'s position.⁵⁷

In South Carolina, a preliminary injunction is issued to preserve the *status quo ante*, and only upon a showing by the moving party that without such relief it will suffer irreparable harm, that it has a likelihood of success on the merits, and that there is no

⁵⁴ August 26, 2016, Order Granting Temporary Injunction, pp. 5-6, paragraph 12.

⁵⁵ August 26, 2016, Order Granting Temporary Injunction, page 5, paragraph 12(g).

⁵⁶ August 26, 2016, Order Granting Temporary Injunction, pp. 5-6, paragraph 12.

⁵⁷ The effort of FCRE REL, LLC, to manufacture a monetary default failed because L. Christopher Kettles advanced the money to make the payments. August 12, 2016, Verified Complaint, page 7, paragraph 8; August 22, 2016, Affidavit of L. Christopher Kettles, p. 1, paragraph 2; August 26, 2016, Order Granting Temporary Injunction, page 3, paragraph 6.

adequate remedy at law.⁵⁸ The sole purpose of a temporary injunction is to preserve the *status quo* and thus avoid possible irreparable injury to a party pending litigation.⁵⁹

The August 26, 2016, Order Granting Temporary Injunction includes specific factual findings on the unlawful actions of FCRE REL, LLC, that make a *prima facie* showing with respect to the causes of action alleged by A & B Associates, L. P. The August 26, 2016, Order Granting Temporary Injunction makes specific findings that in the absence of a Temporary Injunction, the actions of FCRE REL, LLC, would destroy the business of A & B Associates, L. P.⁶⁰ The destruction of a business is irreparable harm that is not remedied by the existence of a claim for money damages.⁶¹

⁵⁸ Rule 65, SCRPC; *Poynter Investments, Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15 (2010).

⁵⁹ *County of Richland v. Simpkins*, 348 S.C. 664, 560 S.E.2d 902 (Ct. App. 2002); *Zabinski v. Bright Acres Associates, et al.*, 346 S.C. 580, 553 S.E.2d 110 (2001).

⁶⁰ FCRE REL, LLC, also argued that Judge Dukes based his Order Granting Temporary Injunction on “the erroneous conclusion that the remedy provisions in the Loan Documents are unenforceable.” *Brief of Appellant*, p. 20. This argument is without merit because: first, no such conclusion appears in the August 26, 2016, Order Granting Temporary Injunction; and, second, FCRE REL, LLC, did not offer its loan documents into evidence. Having failed to make a record on this point, FCRE REL, LLC, has failed to preserve this issue for review.

⁶¹ *Peek v. Spartanburg Regional Healthcare System*, 367 S.C. 450, 626 S.E.2d 34 (Ct.App. 2005). The opinion in *Peek, supra.*, includes the following text:

Other appellate courts have upheld injunctive relief to prevent the loss of a business or business goodwill. *District of Columbia v. E. Trans-Waste of Md., Inc.*, 758 A.2d 1, 15 (D.C.2000) (“While economic loss does not, in and of itself, constitute irreparable harm, such harm will be found if economic loss threatens the very existence of [plaintiff’s] business.”); *Campbell Inns, Inc. v. Banholzer, Turnure & Co.*, 148 Vt. 1, 527 A.2d 1142, 1146 (1987) (“The potential loss of a business satisfies the irreparable harm requirement for the issuance of an injunction.”); *IAC, Ltd. v. Bell Helicopter Textron, Inc.*, 160 S.W.3d 191, 200 (Tex.App. 2005) (“Loss of business goodwill or loss that is not easily calculated in pecuniary terms is sufficient to show irreparable

On that point, FCRE REL, LLC, argues that Judge Dukes did not find that A & B Associates, L. P. would “suffer a *complete* loss of business” in the absence of the Temporary Injunction.⁶² To the contrary, that is precisely what Judge Dukes found. The text of the August 26, 2016, Order Granting Temporary Injunction is that FCRE REL, LLC, had deprived A & B Associates, L. P., of its property, money, leases and contracts, and that in the absence of a temporary injunction: “the *status quo* will be irretrievably lost, as the Plaintiff’s business will be destroyed.”⁶³

(a) There is no finding in the August 24, 2016, Order Granting Temporary Injunction that the loan documents are unconscionable.

In its Brief, FCRE REL, LLC, claims that the Hon. Marvin H. Dukes, III, found its loan documents to be unconscionable.⁶⁴ This is untrue, as the text of the August 26, 2016, Order Granting Temporary Injunction includes no such finding.

FCRE REL, LLC’s argument is based on comments made by Judge Dukes during the August 24, 2016, hearing, and not on the text of the August 26, 2016, Order Granting Temporary Injunction. The argument of FCRE REL, LLC, is contrary to the law, which is: comments, or even orders, made by a judge at a hearing are not the ruling. The judge’s ruling is the written order, and until the written order is entered, the judge is free to change his mind.⁶⁵ An oral order of the court is not final and binding until reduced to writing,

injury for purposes of obtaining a temporary injunction.”).

⁶² *Brief of Appellant*, p 30.

⁶³ August 26, Order Granting Temporary Injunction, page 6, paragraph 12(f).

⁶⁴ *Brief of Appellant*, pp. 24-27.

⁶⁵ *Ford v. State Ethics Commission*, 344 S.C. 642, 646, 545 S.E.2d 821, 823 (2001); *First Union National Bank v. Hitman, Inc.*, 306 S.C. 327, 411 S.E.2d 681 (Ct.App.

signed by the judge, and delivered for recordation.⁶⁶

Because the August 26, 2016, Order Granting Temporary Injunction does not include a finding that the loan documents are unconscionable, FCRE REL, LLC's argument is without merit.⁶⁷

(b) Having failed to make a proffer of excluded evidence at the August 24, 2016, hearing, FCRE REL, LLC, has failed to preserve any issue for appeal.

FCRE REL, LLC, argues that Judge Dukes improperly excluded evidence that it intended to offer at the August 24, 2016, hearing.⁶⁸ However, FCRE REL, LLC, failed to make any proffer, or make any effort to proffer, the evidence.⁶⁹

1991), *aff'd*, 308 S.C. 421, 418 S.E.2d 545 (1992).

⁶⁶ *Case v. Case*, 243 S.C. 447, 134 S.E.2d 394 (1964); *Brailsford v. Brailsford*, 380 S.C. 443, 451–52, 669 S.E.2d 342, 346 (Ct. App. 2008). FCRE REL, LLC, also argues that the August 26, 2016, Order Granting Temporary Injunction was improper because of “. . . the Trial Court's reliance on bond for title cases. . . .” *Brief of Appellant*, p. 22. Again, FCRE REL, LLC, relies solely on statements made by Judge Dukes at the hearing, and not the text of the August 26, 2016, Order Granting Temporary Injunction. Comments made by a trial judge are not the judge's ruling. The judge's ruling appears in the final written order. *Case v. Case*, *supra.*; *Brailsford v. Brailsford*, *supra.*

⁶⁷ In its argument, without any supporting evidence, and in violation of Rule 210(h), SCACR, FCRE REL, LLC, asserts that the loan documents are “standard in all types of mortgage lending.” *Brief of Appellant*, p. 25. First, as FCRE REL, LLC, admits on page 25 of its Brief, it did not offer the loan documents into evidence. Second, the affidavit of Mary F. Davenport relied on by FCRE REL, LLC, to make this argument was not before the Court at the August 24, 2016, hearing. Rather, it was submitted in connection with the September 16, 2016, hearing on the Motion for Contempt. That said, the text from the affidavit relied on by FCRE REL, LLC, is inadmissible speculation, as Ms. Davenport cannot testify as to what A & B Associates, L. P., did or did not know. The loan documents were not attached to Ms. Davenport's affidavit. The documents that Ms. Davenport refers to as “Exhibits A and B” in her affidavit were not attached to the affidavit that was filed and served, and so her testimony regarding them is inadmissible hearsay.

⁶⁸ *Brief of Appellant*, pp. 27-30.

⁶⁹ August 24, 2016, Transcript, pp. 3-26. In addition to its failure to preserve any issue for review with respect to Judge Dukes' ruling on the procedure for hearing, FCRE

The failure to make a proffer of proof precludes consideration of the issue of exclusion of evidence on appeal.⁷⁰ A reviewing court may not consider error alleged in the exclusion of testimony unless the record on appeal shows fairly what the rejected testimony would have been.⁷¹

REL, LLC, has not shown any error in Judge Dukes' ruling. Motions for Temporary Injunctions and hearings on them are governed by Rule 65, SCRPC. Rule 65(b), SCRPC, reads, in relevant part:

No temporary restraining order shall be granted without notice of motion for the order to the adverse party unless it clearly appears from specific facts shown by affidavit or by a verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before notice can be served and a hearing had thereon.

The filing and service of affidavits in connection with motions to be heard on affidavits is governed by Rule 6(d), SCRPC, which reads, in relevant part:

When a motion is to be supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), additional or opposing affidavits may be served not later than two days before the hearing, unless the court permits them to be served at some other time. The moving party may serve reply affidavits at any time before the hearing commences.

The plain language of Rule 65(b), SCRPC, and Rule 6(d), SCRPC, sets out the procedure for a hearing on a motion for Temporary Injunction. FCRE REL, LLC, failed to follow the requirements Rule 65(b) and Rule 6(d), SCRPC, and its effort to sidestep those requirements was correctly denied by Judge Dukes.

⁷⁰ *Carson v. South Carolina Department of Natural Resources*, 371 S.C. 114, 121, 638 S.E.2d 45, 48 (2002).

⁷¹ *Carson v. South Carolina Department of Natural Resources, supra*. On page 33 its Brief, FCRE REL, LLC, in contravention of Rule 210(h), SCACR, makes statements purporting to describe testimony it now claims would have given by certain witnesses. This is not in the record and was neither presented to Judge Dukes, nor proffered at the August 24, 2016, hearing. Further, FCRE REL, LLC, made no mention of this claim in its August 31, 2016, Motion for Relief from Order Granting Temporary Injunction. FCRE REL, LLC's failure to preserve this issue for review is complete.

(c) The facts as found by Judge Dukes support the conclusion that A & B Associates, L. P., made a *prima facie* showing of a likelihood of success on the merits with respect to its claims.

FCRE REL, LLC, argues that Judge Dukes failed to make specific findings with respect to whether or not A & B Associates, L. P., had made a *prima facie* showing on its claims. To the contrary, the facts as found by Judge Dukes demonstrate that A & B Associates, L. P., made out a *prima facie* showing in support each of cause of action.

1. Breach of Contract. The only evidence in the record is that FCRE REL, LLC, in the absence of a monetary default, and without due process or any process, enlisted the aid of the Town of Port Royal Police Department to forcibly remove A & B Associates, L. P., from its own property, and seized its bank accounts, rents, money, contracts and leases.⁷²
2. Unjust Enrichment. Although involuntary, FCRE REL, LLC, did obtain a benefit from A & B Associates, L. P., through its unlawful seizure of its real and personal property. Since there was no monetary default, and no due process or any process, allowing FCRE REL, LLC, to retain possession of A & B Associates, L. P.'s real and personal property would be inequitable.⁷³
3. Conversion. FCRE REL, LLC, seized A & B Associates, L. P.'s, money, leases and

⁷² August 26, 2016, Order Granting Temporary Injunction, page 3, paragraph 5. FCRE REL, LLC, argues that A & B Associates, L. P., failed to meet its burden because it did not enter the loan documents into evidence. *See: Brief of Appellant*, p. 21. FCRE REL, LLC, has it backwards. A & B Associates, L. P., met its burden by demonstrating the unlawful actions of FCRE REL, LLC, and the damage caused by them. To the extent that FCRE REL, LLC, contends that the loan documents justified its unlawful acts, it bore the burden of proof. FCRE REL, LLC, failed to make any record at all to show the existence of any facts that support its claims regarding the Temporary Injunction.

⁷³ August 26, 2016, Order Granting Temporary Injunction, page 3, paragraphs 5, 6 and 7; page 5, paragraph 12(a).

contracts. It failed to apply the money to payment of the obligation of the mortgage, but put it to other uses for its own benefit.⁷⁴

4. Violation of Public Policy and Declaration of Non-Default. There was no monetary default by A & B Associates, L. P. FCRE REL, LLC, without due process or any process, forcibly removed A & B Associates, L. P., from its own property, seized its bank accounts and rents, seized its contracts and leases, interfered with its contract relationships and made unauthorized changes to the real property.⁷⁵

5. Tortious Interference with Contracts. FCRE REL, LLC, made alterations to leases and other contracts, and made defamatory statements about A & B Associates, L. P., and its principals and agents to its tenants.⁷⁶

6. Permanent Injunction. See above. All of these facts make out a prima facie claim for a permanent injunction related to the actions of FCRE REL, LLC.

The facts as found by Judge Dukes fully support the conclusion that A & B Associates, L. P., made a *prima facie* showing and presented a fair question with respect to each of its causes of action. 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.⁷⁷ The party seeking a temporary injunction

⁷⁴ August 26, 2016, Order Granting Temporary Injunction, page 3, paragraph 6.

⁷⁵ August 26, 2016, Order Granting Temporary Injunction, page 3, paragraphs 3, 5.

⁷⁶ August 26, 2016, Order Granting Temporary Injunction, page 3, paragraph 7; page 5, paragraph 12(b).

⁷⁷ Rule 65, SCRPC. *Peek v. Spartanburg Regional Healthcare System, supra.*

is not required to demonstrate an absolute legal right or certainty of success but rather that he has a fair question to raise as to the existence of such a right.⁷⁸

⁷⁸ *Peek v. Spartanburg Regional Healthcare System, supra.*; *Williams v. Jones*, 92 S.C. 342, 75 S.E. 705 (1912).

ARGUMENT NUMBER 2

The only evidence in the record is that FCRE REL, LLC, refused to comply with the plain language of the August 26, 2016, Order Granting Temporary Injunction, and that its non-compliance was willful. (Question Presented Number 2).

In his August 26, 2016 Order Granting Temporary Injunction, Judge Dukes, among other things, ordered:

No later than 12:00 Noon, on Friday, August 26, 2016, the Defendants shall return and turn over to Plaintiff all of Plaintiff's money, including, but not limited to, all leases, applications, paperwork, files, tools as referenced in Christopher Kettles' affidavit, all money received from rents, and to return of all money removed from any of Plaintiff's bank accounts, including reserve accounts, and to provide a full accounting of all such money and any expenses Defendants have paid or incurred with Plaintiff's money.⁷⁹

FCRE REL, LLC, did not return the money received from rents or the money removed from A & B Associates, L. P.'s bank accounts, including reserve accounts. Following advice from FCRE REL, LLC's attorney that it would not comply with the August 26, 2016, Order, A & B Associates, L. P., filed its Motion for Contempt.⁸⁰

On September 16, 2016, Judge Dukes convened a hearing on A & B Associates, L. P.'s, Motion for Contempt. At that hearing, FCRE REL, LLC, argued that the August 26, 2016, Order Granting Temporary Injunction did not require it to return money to A & B Associates, L. P., because under its own interpretation of its own documents (which it did not put in the record), it did not have to, the August 26, 2016, Order notwithstanding.⁸¹

⁷⁹ August 26, 2016, Order Granting Temporary Injunction, paragraph 3, page 6.

⁸⁰ September 9, 2016, Affidavit of Curtis L. Coltrane, page 2, paragraph 6; September 9, 2016, Motion for Contempt.

⁸¹ Transcript of September 16, 2016, hearing, page 17, l. 19 to page 18, l. 11.

At the September 16, 2016, hearing, FCRE REL, LLC's counsel explained its position as follows:

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. And upon the event of default, that license was revoked. And the Plaintiff no longer enjoyed that license. It just went back to -- ⁸²

And:

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.⁸³

FCRE REL, LLC's argument ignores the plain language of the August 26, 2016, Order, which is that FCRE REL, LLC, was to return: "...all money received from rents, and to return of all money removed from any of Plaintiff's bank accounts, including reserve accounts," and substitutes in its place FCRE REL, LLC's interpretation of the loan documents that it did not offer into record.⁸⁴

⁸² Transcript of September 16, 2016, hearing, page 17, l. 19 to page 18., l. 5. FCRE REL, LLC, did not offer its loan documents into evidence.

⁸³ Transcript of September 16, 2016, hearing, page 18, l. 6-11.

⁸⁴ In its Brief, FCRE REL, LLC, argues that the August 26, 2016, Order Granting Temporary Injunction was unclear because of references in it to the "Plaintiff's money." While such descriptors do appear in the text of the August 26, 2016, Order, the plain language is that FCRE REL, LLC, was to return: "...all money received from rents, and to

FCRE REL, LLC's own statements establish that it did not comply with the requirements of the August 26, 2016, Order Granting Temporary Injunction, and that its non-compliance was willful. The evidence supports the Trial Judge's findings that FCRE REL, LLC, did not comply and that its actions were willful. FCRE REL, LLC, has shown no error in the September 23, 2016, Order For Contempt, and we urge this Court to affirm it.

return of all money removed from any of Plaintiff's bank accounts, including reserve accounts." FCRE REL, LLC's claim that it did not know what it was required to return to A & B Associates, L. P., is baseless. This is nothing more than a continuation of the argument made to Judge Dukes that FCRE REL, LLC's own declaration that a default had occurred trumped its obligation to comply with the plain language of the August 26, 2016, Order Granting Temporary Injunction. As was shown in note 69, *supra.*, FCRE REL, LLC, did not make this argument in its August 31, 2016, Motion for Relief from the August 26, 2016, Order Granting Temporary Injunction.

CONCLUSION

The only evidence that is in the record for this case shows that A & B Associates, L. P., demonstrated that, in the face of the unlawful acts of FCRE REL, LL, a Temporary Injunction was necessary to preserve the *status quo ante*. Further, the only evidence shows that A & B Associates, L. P., demonstrated that it had and would continue to suffer irreparable harm due to the unlawful acts of FCRE REL, LLC, that it had a likelihood of success on the merits, and that there was no adequate remedy at law. FCRE REL, LLC, has failed to show any error in the August 26, 2016, Order Granting Temporary Injunction.

The only evidence in the record is that FCRE REL, LLC, failed to comply with the August 26, 2016, Order Granting Temporary Injunction, and that its failure to comply was willful. FCRE REL, LLC, has failed to show any error in the September 23, 2016, Order for Contempt.

For these reasons A & B Associates, L. P., urges this Court to affirm the August 26, 2016, and September 23, 2016, Orders of the Hon. Marvin H. Dukes, III.

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Hilton Head Island, South Carolina

This 19th day of June, 2017.

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

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 theAppellant.

PROOF OF SERVICE

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JUN 21 2017

SC Court of Appeals

I, Curtis L. Coltrane, with the law firm of Coltrane & Wilkins, LLC, certify that I have this

date, served one (1) copy the Respondent's Initial Brief and Designation of Matter by depositing
a copy of the same, with first class postage affixed thereto, and addressed as follows:

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Dated this 19th day of June, 2017
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⁺Also member Virginia Bar & Certified
Circuit Court Mediator & Arbitrator

June 19, 2017

The Hon. Jenny Abbott Kitchings
Clerk, S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

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JUN 21 2017

IN RE: A&B Associates, L.P. v. FCRE REL, LLC et al.
Civil Action Number 2016-CP-07-1778
Appellate Case No. 2016-001899

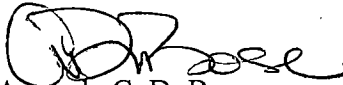
SC Court of Appeals

Dear Ms. Kitchings:

Enclosed please find an original and one (1) copy of Respondent's Initial Brief, Designation of Matter to be Included in Record on Appeal and Proof of Service.

Please file these as appropriate and return a clocked copy to me in the enclosed envelope. Should you have any questions or need additional information, please do not hesitate to contact me.

Sincerely,
COLTRANE & WILKINS, LLC


Amanda C. DuBose
Paralegal

Enclosures

Cc: Benjamin T. Coppage, Esq.

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