

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

Appellate Case No. 2017-000180

U.S. Bank National Association, as Trustee,
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,

Respondent,
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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SC Court of Appeals

RESPONDENT'S MOTION TO DISMISS APPEAL

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Attorneys for Respondent and Third-
Party Defendant Wells Fargo Bank, N.A.

COMES NOW, Respondent, U.S. Bank National Association, as Trustee, 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 (“**Respondent**”), and pursuant to Rule 240, SCACR, moves this Honorable Court for an Order dismissing this appeal as moot. Pursuant to Rule 240(c)(3), SCACR, this motion is supported by the Affidavit of S. Michael Dickerson (“**Dickerson Aff.**”) and the Affidavit of David H. Simpkins, Esq. (“**Simpkins Aff.**”). In further support of its motion, Respondent shows to the Court the following:

RELEVANT FACTUAL BACKGROUND

This is a commercial mortgage foreclosure action commenced by Respondent to foreclose a mortgage granted by Appellants on certain real and personal property and other collateral (collectively, the “**Property**”) that is primarily comprised of a retail shopping center in Columbia. Dickerson Aff. ¶¶ 4.a. and 5, and Ex. B (the “**Mortgage**”). Respondent holds the Mortgage, the underlying promissory note, an Assignment of Leases and Rents and all other documents executed by Appellants in connection with the underlying loan. Dickerson Aff. ¶¶ 4 and 6, and Exs. A (promissory note) and C (the “**ALR**”). The Mortgage and the ALR both contain valid assignments of the Rents (as defined therein), which term effectively includes all rents and other income of the Property. Mortgage §§ 1.1(f), 1.2 and 3.7; ALR at §§ 1.1(c) and 2.1.

The Honorable Robert E. Hood entered an Order Requiring Turnover of Collateral and Sequestering Rents dated November 18, 2016, and filed in this action on November 28, 2016. Simpkins Aff. ¶ 2 and Ex. A (the “**Sequester Order**”). Thereafter, Judge Hood entered an Order filed on December 30, 2016, denying Appellants’ motion for reconsideration or in the alternative

staying enforcement of the Sequestration Order. Simpkins Aff. ¶ 3 and Ex. B (the “**Reconsideration Order**”).

On December 16, 2016, upon Respondent’s motion, the Honorable Jean H. Toal entered an order appointing a receiver for the Property, which order was filed in this action on December 22, 2016. Simpkins Aff. ¶ 4 and Ex. C (the “**Receiver Order**”). Respondent sought the appointment of a receiver because, following entry of the Sequester Order, Appellants indicated their intent to, among other things, abandon management of the Property and deliver tenant rent checks to Respondent’s counsel, in violation of the Sequester Order. Receiver Order ¶ 9 at p. 4.

Appellants did not move to alter or amend, and did not appeal, the Receiver Order. Simpkins Aff. ¶ 5.

Appellants have appealed the Sequester Order and the Reconsideration Order (the “**Appeal**”). See Notice of Appeal. As set forth herein, the Receiver Order has rendered the Appeal moot and the Appeal should therefore be dismissed.

ARGUMENT

I. A DECISION ON THIS APPEAL WILL HAVE NO PRACTICAL LEGAL EFFECT UPON THE EXISTING CONTROVERSY.

An appellate court will not review moot questions or make an adjudication where there remains no actual controversy. *Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001), citing *Jackson v. State*, 331 S.C. 486, 489 S.E.2d 915 (1997). An appeal becomes moot when a decision thereon “will have no practical legal effect upon [the] existing controversy.” *Curtis*, 345 S.C. at 567, 549 S.E.2d at 596 (quoting *Mathis v. S.C. State Highway Dep’t*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973)). Mootness generally results from an intervening event that makes it impossible for the reviewing Court to grant effectual relief. *Curtis*, 345 S.C. at 567, 549 S.E.2d at 596.

The Sequester Order decreed that: (a) Appellants and all other Borrower Parties (as defined therein) (i) remit all Rents then in their possession to Respondent, and (ii) provide a list of bank accounts in which Rents were being deposited. Sequester Order ¶ A, p. 7; (b) Appellants deliver to Respondent (i) an accounting of tenant security deposits, (ii) copies of all existing leases of the Property and all new leases or lease amendments thereafter entered into, (iii) certain prior monthly rent rolls and financials required under the Mortgage, (iv) on a going forward basis, the monthly net income from the Property, monthly rent rolls and financials and annual financials required under the Mortgage. Sequester Order ¶¶ B-D, ps. 7-8; (c) the banks maintaining accounts where Rents were deposited to provide a list of accounts in the name of Appellants or other Borrower Parties along with the current balance and certain prior bank statements for such accounts. Sequester Order ¶ E, ps. 8-9; and (d) directed that no other distribution of Rents should be made. Sequester Order ¶ F, p. 9.

Pursuant to the Receiver Order, the lower court ordered that possession of the Property be delivered to the receiver, who was granted broad powers and duties. *See* Receiver Order, ps. 5-19. As relevant to this motion, a portion of the relief granted in the Receiver Order is nearly identical to the relief granted by the Sequester Order. The similarity in relief is demonstrated by comparing the above-referenced provisions of the Sequester Order with the relevant provisions of the Receiver Order:

- *Compare* the relief described in clause (a)(i) above *with* Receiver Order ¶ 6 at ps. 13-14 (“Each Borrower Party is hereby further ordered and directed to turn over to Receiver...any and all Rents...held or hereafter received by or on behalf of such Borrower Party...”);

- *Compare* clause (a)(ii) above *with* Receiver Order ¶ 8 at ps. 14-15 (“[E]ach Borrower Party shall immediately deliver or cause to be delivered to Receiver a complete listing of all account numbers for all bank or other accounts...into which Rents...were or are being deposited...”);
- *Compare* clause (b)(i) above *with* Receiver Order ¶ 6 at ps. 13-14 (“Each Borrower Party is hereby further ordered and directed to turn over to Receiver...a separate accounting of all tenant security deposits...”);
- *Compare* clauses (b)(ii) and (iii) above *with* Receiver Order ¶ 5 at p. 13 (“Each Borrower Party, as applicable, is hereby ordered to immediately turn over possession of the Property to Receiver together with all Project Information...”); *see also* Receiver Order ¶ 1 at p. 6 (defining “Project Information” to include, *inter alia*, “the originals of all Leases and other agreements relating to the rental, occupancy, licensing and/or use of the Property or any portion thereof” and “monthly rent rolls and monthly operating statements for [certain prior months], and an annual balance sheet and profit and loss statement for 2014 and 2015, all in compliance with the applicable provisions of the Mortgage”);
- *Compare* clause (c) above *with* Receiver Order ¶ 8 at p. 15 (“Each Financial Institution shall provide to Receiver a complete listing of account numbers under the name of any Borrower Parties...the current balance [of such accounts]...and upon request by Receiver shall provide monthly bank statements...”); and
- *Compare* clause (d) above *with* Receiver Order ¶ 6 at p. 14 (“Except as set forth in this paragraph, no Borrower Party shall make any disbursement or distribution of

any Rents or other income of the Property unless otherwise permitted by Receiver in writing”).

In essence, the relief granted under the Sequester Order was supplanted by relief granted under the Receiver Order. Appellants did not move to amend or alter the Receiver Order. *Simpkins Aff.* ¶ 5. In addition, the Receiver Order was subject to possible appellate review. S.C. Code Ann. § 14-3-330(4) (providing for appellate review of “[a]n interlocutory order or decree in a court of common pleas...granting...the appointment of a receiver”). However, Appellants did not appeal it. *Simpkins Aff.* ¶ 5. Accordingly, the Receiver Order is the law of this case. *Hotel and Motel Holdings, LLC v. BJC Enterprises, LLC*, 414 S.C. 635, 659, 780 S.E.2d 263, 276 (Ct. App. 2015) (appellants’ failures to move to alter or amend, or appeal, an order appointing a receiver resulted in the order becoming the law of the case).

Given the foregoing, a decision on this Appeal would have “no practical legal effect upon [the] existing controversy because any grant of effectual relief [would be] impossible for the Court”. *South Carolina Retirement System Inv. Com’n v. Loftis*, 402 S.C. 382, 384, 741 S.E.2d 757, 758 (2013) (citations omitted). *Cf. Hotel and Motel Holdings, LLC*, 414 S.C. at 659 (order appointing receiver to take possession of the borrower’s assets rendered secured lender’s claim and delivery action moot).

II. NO EXCEPTION TO MOOTNESS APPLIES.

There are three exceptions to the doctrine of mootness:

First, if the issue raised is capable of repetition but generally will evade review, the appellate court can take jurisdiction. Second, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest. Application of the public interest exception requires the question at issue to be (1) of public importance, and (2) of imperative and manifest urgency. Third, if a decision by the trial court may affect future events, or have collateral consequences

for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case.

S.C. Public Interest Found. v. S.C. Dep't of Transp., 412 S.C. 18, 26-27, 770 S.E.2d 399, 403-404 (Ct. App. 2015), quoting *Sloan v. Greenville County*, 380 S.C. 528, 535, 670 S.E.2d 663, 667 (2009) (citations omitted).

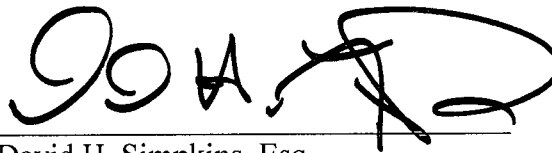
The first exception applies where an issue is raised “that is capable of repetition, but which usually becomes moot before it can be reviewed.” *South Carolina Dep't of Mental Health v. State*, 301 S.C. 75, 76, 390 S.E.2d 185 (1990). As with the Sequester Order at issue, an order sequestering rents serves the purpose of enforcing a valid assignment of and/or security interest in rents during the pendency of a foreclosure or other enforcement action. *See* Sequester Order, ps. 5-7, Conclusions of Law. Once ordered, such relief generally would continue for the duration of the action, as was contemplated under the Sequester Order. *See* Sequester Order ¶¶ C. – F at ps. 8-9. Accordingly, the issue presented in this Appeal is not one that “can be repeatedly presented to the trial court yet escape review at the appellate level because of its fleeting and determinate nature.” *McClam v. State*, 386 S.C. 49, 56, 686 S.E.2d 203, 206 (Ct. App. 2009), quoting *Citizen Awareness Regarding Educ. v. Calhoun County Publ'g, Inc.*, 185 W.Va. 168, 406 S.E.2d 65, 67 (W. Va. 1991) (cited in *Curtis v. State*, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001)).

This Appeal does not involve a matter of public interest and thus the second exception is inapplicable. This is a dispute between private entities involving private contracts, and none of the issues involved in this Appeal warrant a determination to guide the future conduct of public officers. *Ashmore v. Greater Greenville Sewer Dist.*, 211 S.C. 77, 96, 44 S.E.2d 88, 96-97 (1947) (“If this were an ordinary case, our opinion might well stop here ... But the case is not an ordinary one; it is not a private controversy between individuals, as such. On the contrary, it is defended by an intended governmental agency ... and raised on the record are earnestly argued public questions of importance. ... [Q]uestions of public interest originally encompassed in an action

should be decided for future guidance.”); *Sloan v. Greenville County*, 356 S.C. 531, 553, 590 S.E.2d 338, 350 (2003), citing *People ex rel. Wallace v. Labrenz*, 411 Ill. 618, 622, 104 N.E.2d 769, 772 (1952) (“Among the criteria considered in determining the existence of the requisite degree of public interest are the public or private nature of the question presented, the desirability of an authoritative determination for the future guidance of public officers, and the likelihood of future recurrence of the question”).

Finally, the third exception is inapplicable because the relief granted in the Sequester Order will not affect future events or have collateral consequences for the parties. As noted above, relief granted by the Receiver Order effectively supplanted the relief granted by the Sequester Order, and the Receiver Order is the law of the case. Therefore, the relief granted in the Sequester Order will not affect future events or have collateral consequences for the parties.

For the foregoing reasons, Respondent respectfully requests that the Court dismiss the Appeal.



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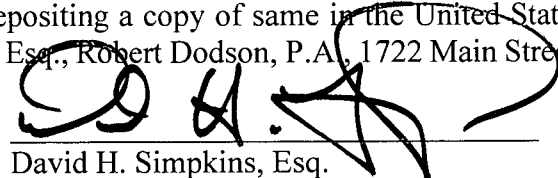
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CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2017 I have caused a copy of the foregoing Respondent's Motion to Dismiss Appeal and the Affidavit of S. Michael Dickerson and Affidavit of David H. Simpkins, Esq. to be served upon Appellants by depositing a copy of same in the United States Mail, addressed to their counsel, Robert D. Dodson, Esq., Robert Dodson, P.A., 1722 Main Street, Suite 200, Columbia, South Carolina 29201.



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SC Court of Appeals

RE: *U.S. Bank National Association, as Trustee, et al. Respondent, vs. AW-MAGPIG, LLC; HW-MAGPIG, LLC; and MW-MAGPIG, LLC, Appellants*
Appellate Case No. 2017-000180

Dear Jessica:

Enclosed for filing is an original and six copies of Respondent's Motion to Dismiss Appeal, Affidavit of David H. Simpkins, Esq. and Affidavit of S. Michael Dickerson, along with our motion filing fee of \$25.00, in the above-referenced case.

Please forward the filed copies to our office in the enclosed self-addressed UPS overnight envelope.

Thank you.

Very truly yours,

David H. Simpkins

Other Counsel of Record:

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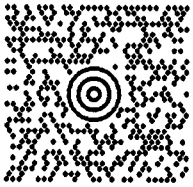
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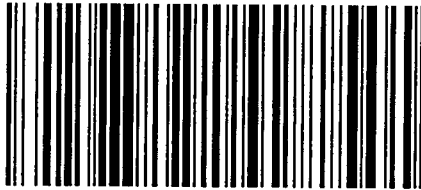
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