

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

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SC Court of Appeals

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.

APPELLANTS' RETURN TO RESPONDENT'S MOTION TO DISMISS APPEAL

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I. THE ORDER ON APPEAL IS NOT MOOT.

Respondents' contention that Judge Hood's Order Requiring Turnover of Collateral and Sequestering Rents (hereinafter "Order Sequestering Rents") is moot is misguided and off base. While Respondents correctly note that an appeal becomes moot when a decision thereon "will have not practical legal effect upon [the] existing controversy" they misapply the law to the facts in this case. Curtis v. State, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001)(citations omitted). More specifically, this Court's Decision regarding venue/forum selection clauses and choice of law provisions has a direct "legal effect upon [the] existing controversy." *Id.*

Among other things, Appellants challenged Judge Hood's Order Sequestering Rents on the grounds that the lower court ignored venue/forum selection clauses and ignored choice of law provisions within the contract documents. *See* Initial Brief of Appellant, pp. 4-12. The thrust of Appellants' argument is that in seeking and receiving the Order Sequestering Rents, Respondents sought to have their cake and eat it to. On the one hand, they effectively sought injunction relief from the lower court based on contract documents but on the other hand the same contract documents contained venue/forum selection clauses and choice of law provisions that provide that litigation shall be in the State of New York pursuant to New York law. How this Court decides those issues will have a direct "practical legal effect" going forward because if this Court agrees with the arguments advanced by Appellants in this appeal, it impacts the remainder of this case.

Respondents also miss the mark when they suggest that Judge Toal's Order Appointing a Receiver effectively vacates and voids Judge Hood's Order Sequestering Rents. As this Court is keenly aware, one Circuit Court Judge cannot overrule, vacate or void a material Order of another Circuit Court Judge. For Respondents to suggest otherwise is disingenuous. Moreover, Respondents' argument that the same venue/forum selection and choice of law provisions were

not raised to Judge Toal is misleading. It is misleading because at the time Judge Toal heard Respondents' Motion for Appointment of a Receiver and at the time she issued her Order Appointing a Receiver, Judge Hood was still considering but had yet to issue an Order that addressed the venue/forum selection and choice of law provisions at issue in this appeal. It would have been improper for Appellants' Counsel to effectively argue the same points of law to Judge Toal before Judge Hood had made a decision regarding those arguments. In fact, as the hearing transcript before Justice Toal will show, she acknowledged at the hearing that the venue/forum selection and choice of law issues were raised to Judge Hood and would be decided by him.¹

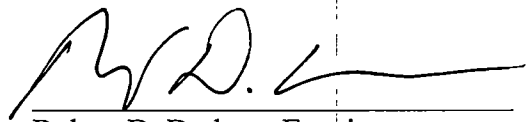
II. AN EXCEPTION TO THE MOOTNESS DOCTRINE APPLIES TO THIS APPEAL.

“[I]f 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 Foundation v. S.C. Dept. of Transportation, 412 S.C. 18, 27, 770 S.C.2d 399, 404 (*citations omitted*). In the case now before this Court, the issues of venue/forum selection and choice of law affect future events and have collateral consequences. For example, if this Court were to vacate Judge Hood's Order on the ground that the lower court should not have issued an Order based on South Carolina law when contract documents provide for application of New York law, such a decision would impact the rest of this case moving forward. Similarly, if this Court were to vacate Judge Hood's Order on the ground that a South Carolina court should not effectively issue injunction relief on contract documents when the contract documents contain venue/forum selection clauses that favor New York, such a decision would have an impact on the remainder of this case.

¹ Appellants have requested but have yet to receive a copy of this hearing transcript. It will be filed with this Court once it is available.

Respondents simply ignore this exception entirely by reaching the naked conclusion that the “exception is inapplicable because the relief granted in the Sequester Order will not affect future events or have collateral consequences for the parties...” Such unexplained conclusory statements simply ignore the heart of Appellants’ appeal: That the lower court erred in effectively granting injunctive relief to Respondents based on contract documents but at the same time ignoring completely the venue/forum selection clauses and choice of law provisions in those contract documents that favor New York law being applied in New York courts.

Respectfully submitted,



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PROOF OF SERVICE

I hereby certify that on July 17, 2017 I have served Respondents the APPELLANTS' RETURN TO RESPONDENT'S MOTION TO DISMISS APPEAL by depositing a copy of it in the United States Mail, postage prepaid, addressed to their attorneys of record, James H. Pulliam and David H. Simpkins, Kilpatrick Townsend & Stockton, LLP, 214 N. Tryon Street, Suite 2400, Charlotte, North Carolina 28202-2381.

July 17, 2017



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