

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' AMENDED 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

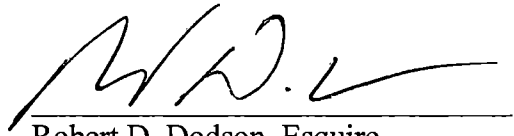
not raised to Judge Toal is misleading. It is misleading because at the time Judge Toal heard Respondents' Motion for Appointment of a Receiver and at the time she issued her Order Appointing a Receiver, Judge Hood was still considering but had yet to issue an Order that addressed the venue/forum selection 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. See attached Exhibit A, December 14, 2016 Hearing Transcript.

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.

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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EXHIBIT A

State of South Carolina)
County of Richland)

In The Court of Common Pleas
Fifth Judicial Circuit
2016-CP-40-2470

U.S. Bank National Association, as)
Trustee, as successor-in-interest to)
Bank of America, N.A., as successor)
by merger to LaSalle Bank Nation)
Association, as Trustee for the)
registered holders of Bear Stearns)
Commercial Mortgage Securities, Inc.,)
and Commercial Mortgage Pass-Through)
Certificates, Series 2007, TOP26,)

Plaintiff,)

vs.)

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

Defendants.)

Transcript of Record)

December 14, 2016
Columbia, South Carolina

B E F O R E:

The Honorable Jean H. Toal, Judge

A P P E A R A N C E S:

David H. Simpkins, Esquire
Attorney for the Plaintiff

Robert D. Dodson, Esquire
Attorney for the Defendants

Elizabeth B. Harris, CVR-M-CM
Circuit Court Reporter

I N D E X

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<u>Witness/Description</u>	<u>Page No.</u>
Certificate Page.	28

E X H I B I T S

<u>No.</u>	<u>Description</u>	<u>ID.</u>	<u>Ev.</u>
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No exhibits introduced.

1 THE COURT: Now we have the matter, the two matters of
2 U.S. Bank National Association against AW-MAGPIG, LLC, two
3 matters: motion to refer to master and motion for
4 appointment of receiver. We ready to proceed?

5 MR. SIMPKINS: Yes, Your Honor.

6 THE COURT: All right, gentlemen, just a second. Let
7 me grab hold of your file.

8 (A PAUSE.)

9 THE COURT: All right, this is Mr. Simpkins for U.S.
10 Bank?

11 MR. SIMPKINS: Yes, ma'am.

12 THE COURT: And Mr. Dodson for the defendant?

13 MR. DODSON: That's correct, Your Honor.

14 THE COURT: All right. Well, it says motion to refer
15 to master. Why wouldn't I just do that without hearing a
16 whole lot of argument about it?

17 MR. DODSON: I think that's probably addressed at me,
18 Your Honor, so I'll answer the question.

19 THE COURT: All right, you may have a seat.

20 MR. DODSON: And the answer is we've pleaded for a
21 jury trial in our answer, counterclaims, and third-party
22 complaint. And as I read Rule 53(b), there's an order of
23 reference and if a party pleads for a jury trial, then we
24 are in -- then, then the order -- it would come back even
25 if it had already been referred. At the time the motion

1 was filed, we had not filed our answer, counterclaim, and
2 third-party complaint. That's the short answer, Your
3 Honor. I have a longer answer, but I think he would
4 probably like to respond to my short answer.

5 THE COURT: I agree with you, and I wonder, in the
6 process of both of you responding to that, you know, we've
7 got that old case of Anna Mary Jones against the
8 Tricentennial Commission. She was a past master trying to
9 avoid foreclosures and other type debt collection
10 activities by asserting that she had all these jury trial
11 matters, so forth. That was basically a battle over of
12 order of reference, late '80s, early '90s case, and that
13 always sticks in my mind as a little bit of a
14 counterbalance to this thing of, hey, you automatically get
15 one even though you started off in equity.

16 So, for the bank.

17 MR. SIMPKINS: Yes, Your Honor. David Simpkins for
18 the plaintiff, and we are also representing a third-party
19 defendant, Wells Fargo Bank.

20 I think that the key thing from our perspective is
21 that this is a foreclosure case, and in multiple loan
22 documents the defendants waived jury trial on all claims
23 related to -- indirectly or directly related to the loan:
24 the loan documents, the loan, the application for the
25 loans, and any acts or omissions of the plaintiff, its

1 officers, employees, or agents. And all of the
2 counterclaims and third-party claims that they have
3 asserted, they all boil down to either being directly or
4 indirectly related to the loan, the application for the
5 loan because they've, they've asserted claims against the,
6 the loan broker. Those claims would be directly or
7 indirectly related to the loan or the loan application.

8 They've asserted claims that their payments weren't
9 processed correctly. Well, those apply to Wells Fargo,
10 third-party defendant, which is the master servicer for the
11 plaintiff. Those obviously relate to the loan, and the
12 waivers were knowing and voluntary.

13 There's a section in the mortgage that each defendant
14 separately initialed that says that they read the mortgage,
15 that they were -- all the -- all of their questions
16 regarding the legal effects, the provisions of the mortgage
17 were fully answered by their counsel prior to them signing
18 the mortgage. And then there's also in the cash management
19 agreement with the jury trial waiver there, it says that
20 they knowingly and voluntarily waived a jury trial.

21 So, our short answer is that all this stuff that they
22 asserted, they waived jury trial on, or it's a permissive
23 counterclaim and all of this should go to the master
24 anyway. That's, that's all I have for now.

25 THE COURT: All right. How about it?

1 MR. DODSON: Thank you. Now if I may give my bit of a
2 longer answer?

3 THE COURT: Yes, sir.

4 MR. DODSON: And if I may approach, Your Honor, I'd
5 like to pass up a couple of things. This is already in the
6 court's file.

7 THE COURT: Yes.

8 MR. DODSON: The file is getting ---

9 THE COURT: It's getting bigger by the minute, but I
10 have got that, and the documents he referred to, I've got
11 right here.

12 MR. DODSON: Okay. What I have for Your Honor is just
13 sort of the condensed version of the documents.

14 THE COURT: Sure. Sure. I think that would be very
15 helpful.

16 MR. DODSON: They have the relevant pages that I want
17 to talk about today.

18 THE COURT: All right.

19 MR. DODSON: And then I have -- the other thing I'm
20 passing up is a motion to dismiss for improper venue and
21 jurisdiction, and I think that will be clear as I get into
22 this.

23 THE COURT: All right.

24 MR. DODSON: I'm happy that he mentioned the cash
25 management agreement to Your Honor. That is actually --

1 the relevant portions of that for my argument are actually
2 attached there at G, and I've highlighted those in orange
3 for Your Honor.

4 But the cash management agreement itself has a venue
5 selection clause, and it provides that venue is proper in
6 New York. In each of the loan documents that he has
7 referenced, in addition to, to the venue selection clause
8 ---

9 THE COURT: Well, let me just stop you right there.
10 It says at lender's option.

11 MR. DODSON: It says at lender's option as it pertains
12 to state or federal court in New York is what that at
13 lender's option provided, but if you look at the other
14 document that I submitted which is at tab F, it also has a
15 venue selection clause that provides for New York law, and
16 it provides that disputes are to be litigated in New York,
17 and the note itself references those, those documents. The
18 note is at tab A, and I've highlighted for Your Honor on
19 page 5 of that.

20 THE COURT: Well, this doesn't -- wait a minute. Hold
21 it. This is just a choice of law provisions. That doesn't
22 set venue.

23 MR. DODSON: Well, it ---

24 THE COURT: It simply says that you: Governed,
25 construed, applied, and enforced in accordance with the

1 laws of the State of New York. That's very typical. We
2 deal with those all the time. That doesn't select the
3 venue.

4 MR. DODSON: It, it -- well, if you read further it
5 does, Your Honor, because the next sentence is:

6 Borrower, clearing bank, and lender hereby submit
7 to the exclusive jurisdiction of the state courts
8 of New York for the purposes of all legal
9 proceedings arising out of ---

10 THE COURT: Where are you talking about?

11 MR. DODSON: I am at tab F on page 5 there.

12 THE COURT: You're talking about the highlighted
13 material?

14 MR. DODSON: Yes, ma'am, that's correct.

15 THE COURT: It says:

16 This agreement shall be deemed to be a contract
17 entered into pursuant to the laws of the State of
18 New York and shall in all respects be governed,
19 construed, and applied, and enforced in
20 accordance with the laws of the State of New
21 York.

22 Now, that's tab E.

23 MR. DODSON: And I'm at tab F. I'm sorry, Your Honor.

24 THE COURT: I'm getting there: Governing law and
25 venue. Okay:

1 Governed and construed in accordance with the law
2 of the State of New York, borrower, clearing
3 house, and lender hereby submit to the exclusive
4 jurisdiction of the state courts of New York for
5 the purpose of all legal proceedings arising out
6 of this agreement or transactions contemplated
7 therein.

8 I see what you're talking about, okay.

9 MR. DODSON: That's what I'm referring to. Thank you,
10 Your Honor.

11 THE COURT: All right.

12 MR. DODSON: And if you look at the actual note on
13 page 5, it actually incorporates that document that you
14 just read from in the note itself because it says -- and
15 again I've highlighted it. The note is secured by the
16 security instruments and other security documents, and what
17 you just read is one of those because it provides later in
18 that paragraph:

19 All of the terms, covenants, conditions contained
20 in the security instrument and other security
21 documents are hereby made a part of this note to
22 the same extent and with the same force as if
23 they were fully set forth.

24 THE COURT: Now, is this a suit on the note.

25 MR. DODSON: It, it is. They've attached the note to

1 the complaint, and they have, they have ---

2 THE COURT: Well, this is a foreclosure proceeding,
3 though, is it not?

4 MR. DODSON: It is but my point is ---

5 THE COURT: I never have heard of a foreclosure taking
6 place in a state other than the state where the property is
7 located.

8 MR. DODSON: Your Honor, I don't know how you can have
9 a foreclosure without a note. I've actually ---

10 THE COURT: Well, the foreclosure of the mortgage is
11 an attempt to enforce a debt that's owed, right?

12 MR. DODSON: But the debt comes from ---

13 THE COURT: And the mortgage ---

14 MR. DODSON: --- the note.

15 THE COURT: Well, the mortgage is the security that
16 you're attempting to foreclosure, right?

17 MR. SIMPKINS: Your Honor, if I may?

18 THE COURT: Yes, sir.

19 MR. SIMPKINS: The mortgage that we are foreclosing
20 on, it says that:

21 New York law applies except with respect to the
22 creation, perfection, and enforcement of the lien
23 and security interest created by the mortgage.

24 THE COURT: Exactly.

25 MR. SIMPKINS: Where, where the state ---

1 THE COURT: And this is enforcement of a security
2 agreement. The note is a little different kettle of fish.
3 They may have some deficiencies in their ability to
4 foreclose, depending on what you contend about the note,
5 but at the moment what we're talking about is the
6 foreclosure of the security interest.

7 MR. DODSON: I guess my only point is this, Your
8 Honor. Well, it's not the only point, but, but my only
9 point is this. All of these documents are interconnected;
10 the plaintiff has pleaded it that way. They have attached
11 those documents, and they all reference one another.

12 THE COURT: No question about that.

13 MR. DODSON: And each and, and each and every document
14 has, with the exception of the description of property, but
15 each and every document has a choice of law provision for
16 application of New York law, and two of the loan documents
17 have a choice of law or forum selection clause that provide
18 that cases are to be litigated in the state of New York.
19 And so as it pertains to both the order of reference and
20 the other pending motion, my argument is -- and I passed up
21 the motion to dismiss that we filed for improper venue.

22 THE COURT: Yeah.

23 MR. DODSON: Now, Mr. Simpkins is going to point out
24 that he has not had his ten days' notice on that, and if he
25 says that, he's correct about it because, I mean, it was

1 filed December 8th. It's a timely motion. We're raised
2 that in our answer. We raised it in our amended answer,
3 but the simple fact is that they have filed suit in the
4 wrong court to enforce the terms of these documents because
5 the documents have in them choice of law, forum selection
6 clauses that all provide that a New York court should apply
7 New York law in New York. And so what we would ask is that
8 you hold any ruling in abeyance until the motion to dismiss
9 can be heard.

10 THE COURT: All right, Mr. Dodson.

11 What you got to say to that?

12 MR. SIMPKINS: Your Honor, we haven't even received
13 this motion.

14 THE COURT: Listen, you all can stand on
15 technicalities if you want to, but the truth about the
16 matter is y'all have been battling about this issue for
17 some time, and it's a pretty straightforward one. Whether
18 you characterize it as a motion to dismiss or a motion to
19 refer to the master, the issue remains the same, and that
20 is is this thing in the right court.

21 He says that because of what the note says, that with
22 its choice of not only the law of New York but the venue of
23 New York, that that controls. You say because you are
24 foreclosing on a security instrument, the mortgage, which
25 has a little clause in it that, says, hey, you can't.

1 There's one exception to this choice of venue, and that is
2 if you're trying to enforce a lien on a security interest.
3 The property is here; the lien would have to be reinforced
4 here.

5 I well understand why it would be done, why,
6 therefore, the foreclosure would work that way. You may
7 have some problems when you get to the master if you
8 haven't got the ability to prove the failure to pay the
9 note, but I don't know that you've got to have a judgment
10 on the note in order to enforce your security interest.
11 That's not raised in these pleadings.

12 So, my inclination is to send this thing to the
13 master, to deny the -- well, you've got a motion to appoint
14 a receiver. That's another thing that's got to be done.
15 Is there any objection to that?

16 MR. DODSON: There is, Your Honor, and the objection
17 as to that, until we get the issue of where the case should
18 be litigated and who should be making -- what court should
19 be making decisions on it, we would object to the
20 appointment of a receiver on that ground.

21 THE COURT: Well.

22 MR. DODSON: But the other ---

23 THE COURT: Let me just stop, stop you there.

24 MR. DODSON: Yes, Your Honor.

25 THE COURT: When I send you to the master, if I do,

1 that's not going to preclude you from raising all these
2 things with the master. All I would be doing is referring
3 this thing to the master and taking the circuit court out
4 of it, but the master might well decide, and the order
5 would give the master the leeway to decide this overarching
6 question.

7 As it sits before me at the present time, it's a
8 foreclosure and an attempt to enforce a lien on a piece of
9 property in South Carolina. That's clearly a master-type
10 situation. Now, and the document that creates that lien
11 specifically accepts this business about where venue should
12 be in order to allow for enforcement of the lien where the
13 property is. That would be the basis upon which I would
14 send the foreclosure to the master, but I would do it
15 without prejudice to the right of -- to your right to make
16 further assertions about the interrelation between the debt
17 and the lien, et cetera.

18 MR. DODSON: Yes, Your Honor.

19 THE COURT: And that's what I would do is just -- then
20 you would be in a South Carolina court that still has to
21 determine whether New York law makes part of this thing go
22 there or all of this thing go there.

23 I know one thing with pretty good certainty. The
24 enforcement of a lien based on a debt that has become past
25 due is enforceable where the property is, and that's what

1 this foreclosure does, and it would be on that basis that I
2 would send the foreclosure to Judge Strickland. But I
3 could do it without getting you into the two-judge rule by
4 simply saying that one of the things that would be decided
5 by the master would be the interrelationship of these other
6 documents. I personally think you would lose that, to be
7 quite honest with you, because ---

8 MR. DODSON: Yes, and I might.

9 THE COURT: And you might because to me, the
10 enforcement of the note does not have to be sued on in
11 order to prove the existence of the debt, the lack of
12 payment thereof, which would then lead to the enforcement
13 of the lien. And it would not preclude the appointment of
14 a receiver because the receiver would be appointed to,
15 again, protect the potentially liened upon property, as I
16 understand it. But that's something that could be explored
17 in a hearing.

18 MR. DODSON: Yes, Your Honor, and, and ---

19 THE COURT: But I think the first thing is we decide
20 which South Carolina court is going to make all these
21 determinations, and to me it just makes a whole lot more
22 sense to put it where a lien can be enforced with an
23 exploration of the normal issues that are explored in a
24 foreclosure.

25 MR. DODSON: And if Your Honor -- I mean, I do have --

1 I mean, if you wanted to -- I mean, obviously you're the
2 judge. You can do anything you want to, but if, if it --
3 you know, one possibility, as what I was about to bring up
4 to Your Honor, was you could make an order of reference and
5 hold all other -- hold all the other motions in abeyance
6 and either let ---

7 THE COURT: It doesn't make any sense to have you have
8 to come to circuit court. The master has got complete
9 authority to settle all those things with appeal directly
10 to the regular courts.

11 I mean, I realize that when you're trying to protect
12 the debtor, you try to use every means at your disposal,
13 but it doesn't seem sensible to -- and I don't know that
14 you really want your debtors to have to go to New York.

15 MR. DODSON: Well, my debtors are in New York, so I
16 do. I mean, they all -- that's where they live.

17 THE COURT: Well, maybe you do want them there, but it
18 makes for simply a lot of delay in enforcing a debt if
19 it's, in fact, due by having to enforce the note in New
20 York and then enforce the lien here when you've got a court
21 here who can make the decision as to whether the debt can
22 be pursued without getting a judgment from the New York
23 courts on the note just as a matter of proof in the
24 foreclosure action. So, that's how I'm going to do it.

25 Counsel.

1 MR. SIMPKINS: Yes, Your Honor. We would still like
2 to have our motion for receiver heard today because we
3 think there's an urgent situation with the property that
4 would need to be -- that we think needs to be addressed
5 because just ---

6 THE COURT: What's the problem? I mean, they're up in
7 New York. The property is down here.

8 MR. SIMPKINS: Right. Well.

9 THE COURT: Y'all want to rent it to a Piggly Wiggly,
10 and you can't do that because you can't ---

11 MR. SIMPKINS: Well.

12 THE COURT: --- get a receiver appointed, right?

13 MR. SIMPKINS: No. About a week and a half ago --
14 well, you have to -- Judge Hood entered an order last month
15 sequestering the rents which basically made -- forced them
16 -- they're going to have -- they're supposed to deliver us
17 all of the rents they had on hand at the time, which they
18 haven't done. They're supposed to ---

19 MR. DODSON: That's not true, Your Honor. We
20 absolutely -- that is not true. We've done that.

21 THE COURT: Okay. All right.

22 MR. SIMPKINS: Regardless, deliver us financials, some
23 other documentation, and within a day of serving that on
24 the defendants, Mr. Dodson informed us that his clients
25 were going to cease managing the property. They were going

1 to turn off the utilities and turn off other services, and
2 they then sent us -- he then sent us, even though we
3 instructed him not to do so, he then sent us tenant rent
4 checks. And you have to understand. Judge, Judge Hood's
5 order said that they were to collect the rents, pay the
6 normal operating expenses each month, and send the rest to
7 us.

8 So, their response to that was, well, we're -- you
9 know, we can't bilk the property of any more, any more
10 cash, so now we want to abandon it. And so our response
11 was fine. Then we'll just have a receiver put in place,
12 and we asked Mr. Dodson multiple times. Well, you guys,
13 you guys willing to consent to that? He never responded
14 and today before the hearing, I find out that they're going
15 to contest it.

16 Well, there should be no basis to contest. When
17 you're saying you're not going to manage the property,
18 you're going to turn off the utilities, we're, we're going
19 to abandon the services that we give to tenants, we're not
20 going to abide by Judge Hood's order, I don't know that
21 there's a better ---

22 THE COURT: Yeah, I know the dilemma you're facing.

23 Mr. Dodson you sure ought to allow them, if they want
24 to, to keep the business running.

25 MR. DODSON: Your Honor.

1 THE COURT: And keep the tenants satisfied. I would
2 not be inclined to create a situation where that can't be
3 done.

4 MR. DODSON: Your Honor, I want to be very clear on a
5 couple of things. This is just simply not, not true. This
6 idea that my clients are not complying with Judge Hood's
7 earlier order is not true.

8 The -- as soon as we got the rent checks in for --
9 Judge Hood's order was, I think, signed on November 28th.
10 I think it was served on me the following day. Served on
11 my clients that day, too. As soon as that happened, I told
12 my client give me -- get the rent checks to me. Don't cash
13 them. Get them to me because Judge Hood's order
14 specifically said on page 7:

15 Borrowers and all other borrower parties are
16 hereby ordered and directed to remit and provide
17 to plaintiff within five days of the entry of
18 this order all rents.

19 And so we specifically did that. We didn't, we didn't
20 attempt to cash any checks. I sent the checks to him; he
21 sent them back to me. I have additional checks.

22 Now, we'll figure out ---

23 THE COURT: Have you told him you're going to turn off
24 the lights?

25 MR. DODSON: I, I wrote that as part -- and I -- as

1 part of a settlement letter to him, and I think it's
2 inappropriate to ---

3 THE COURT: Well, have the lights been ---

4 MR. DODSON: The lights have not been ---

5 THE COURT: Have the lights ---

6 MR. DODSON: --- turned off. The water has not been
7 turned off, and to be very clear, the tenants at the
8 property control their own utilities. The only lights --
9 the only water would be to the sprinkler systems and to the
10 -- like the outside lights, the parking lot lights. And to
11 be very clear, Your Honor, that had -- nothing has
12 happened. Since Judge Hood's order was issued, nothing had
13 changed. My clients continued to manage the property, but
14 what he's referring to is a settlement letter. In light of
15 Judge Hood's order ---

16 THE COURT: No, I'm not going to go there. So,
17 let's ---

18 MR. DODSON: Yeah.

19 THE COURT: I'm not going there. Why aren't you
20 cashing the checks that Judge Hood ordered to be sent to
21 you?

22 MR. SIMPKINS: Well, they -- what he ordered was that
23 all rents they had on hand at that time, which would have
24 been in November, be delivered to us. The rest of his
25 order said after that point, then on the 10th of every

1 month beginning on December 10th and the 10th of each month
2 after that, they are to send us the net operating income,
3 which would have been the rents that they then collected
4 thereafter for December moving forward, and then paid the
5 operating expenses, and then they would send us the, the
6 net operating income after that.

7 The other thing, you know ---

8 THE COURT: Well, so, why wouldn't you take the first
9 check?

10 MR. SIMPKINS: Because they have to, they have to take
11 the checks and pay the ---

12 THE COURT: Well, he's talking about the checks for
13 last month. I'm not talking about these other checks.
14 I'll get into that in a minute.

15 MR. SIMPKINS: Right. Well, my point being his order
16 said give us -- give them the rents, the money that you
17 have from the property on hand at that time.

18 THE COURT: Right.

19 MR. SIMPKINS: And it clearly contemplated that they
20 would continue taking in rents and paying in the -- paying
21 the operating expenses moving forward. What he sent us
22 were unendorsed checks and he said -- and, Your Honor, I've
23 got the ---

24 THE COURT: Well, now ---

25 MR. SIMPKINS: I've got the ---

1 THE COURT: You can't cash them, but they just sent
2 them to you unendorsed?

3 MR. SIMPKINS: They sent them, they sent them
4 unendorsed, and it's not in keeping with his order. And,
5 Your Honor, there's other facts that support our, our
6 motion for the appointment of a receiver.

7 THE COURT: Well, just hold it on that one.

8 Counsel, how about it? Have they endorsed the checks?

9 MR. DODSON: I, I don't, I, I don't think they have,
10 but I don't think that ---

11 THE COURT: Well, that's not acceptable; that's not in
12 compliance. If the judge said you're supposed to turn the
13 money over to the plaintiffs, it's not acceptable to ---

14 MR. DODSON: Well, they have in there, in the -- in
15 Judge Hood's order ---

16 THE COURT: How are they supposed to cash those
17 checks?

18 MR. DODSON: Based on Judge Hood's order, which
19 specifically has ---

20 THE COURT: Nobody is going to allow them to start
21 signing somebody else's name and attach to ---

22 MR. DODSON: If ---

23 THE COURT: --- it an order ---

24 MR. DODSON: If a bank ---

25 THE COURT: --- that a bank has got to sort through.

1 MR. DODSON: Your Honor, if there was confusion on my,
2 on my part or my client's part about we need to endorse the
3 checks over to them, we'll do that.

4 THE COURT: Well, you need to do that.

5 MR. DODSON: Okay. We will because ---

6 THE COURT: Because otherwise I'm going to appoint a
7 receiver. If we don't have some -- you're supposed to be
8 managing these properties in the meantime until y'all get
9 this worked out, either by trial or by settlement, right?

10 MR. DODSON: We are managing the property; nothing has
11 changed.

12 THE COURT: Well, part of that includes endorsing the
13 checks, the net checks over to them period.

14 MR. DODSON: And, and the only, the only problem with
15 that was a, was a breakdown in communication.

16 THE COURT: Well, let's go back and get that solved.

17 MR. DODSON: I mean, that will get resolved because I
18 told my client, I said don't cash the checks. Send them to
19 me. They, they didn't probably think to endorse them. I
20 didn't think to ask them, to be honest with you.

21 THE COURT: Well, that, that ---

22 MR. DODSON: We'll get that resolved.

23 THE COURT: That's got to get resolved.

24 MR. DODSON: It will get resolved.

25 THE COURT: Otherwise, Judge -- well, it hadn't been

1 resolved yet. The checks hadn't been endorsed, so don't
2 say that anymore. Those checks need to be endorsed so that
3 -- it's not enough to send them to them. They've got to be
4 endorsed so they can cash them, and that's got to be done
5 every month, and y'all have got to continue to manage this
6 property. Otherwise, I'm going to appoint a receiver.
7 It's just that simple.

8 MR. DODSON: And we have, we have continued to manage
9 the property. That's the, that's the only point I'm trying
10 to make.

11 THE COURT: Well, but you haven't complied with the
12 fundamental thing that was ordered, which was to give the
13 money to the plaintiffs, and you've not giving it to them
14 when these games are being played by, well, don't cash them
15 but send them to them where they can't cash them either.
16 That's not satisfactory.

17 MR. DODSON: Your Honor, I want to make clear, I
18 really do because we are not trying to play games with them
19 on the checks.

20 THE COURT: It looks like it.

21 MR. DODSON: And if it looks like it, I want to
22 explain that because I want to make very clear, Your Honor,
23 that when we got Judge Hood's order, I specifically told my
24 client don't cash those checks.

25 THE COURT: I tell you what.

1 MR. DODSON: Send them to me.

2 THE COURT: Here's what I'm going to do. I'm not
3 going to have these kinds of disputes. I am going to
4 appoint a receiver.

5 Counsel, draw me up an order that, first of all, sends
6 this to the master and leaves to the master the decision as
7 to whether or not any part of this controversy has to be
8 tried in New York. In addition to that, draw an order
9 appointing a receiver for this defendant.

10 MR. SIMPKINS: Your Honor, I ---

11 THE COURT: Just a second.

12 MR. SIMPKINS: Sorry.

13 (A PAUSE.)

14 THE COURT: As I said, we're going to appoint a
15 receiver. We're going to send this matter to the master.
16 He is fully empowered to make all rulings about whether the
17 provisions in the note require that the note be sent to New
18 York for enforcement and whether that -- if that is so,
19 whether that precludes the plaintiff from going forward
20 with the foreclosure here. But it's clear to me that the
21 foreclosure at least is in South Carolina and ought to be
22 tried by the master.

23 And my own opinion is that the provisions of the note
24 don't preclude that because you do not have to collect the
25 note or even get a judgment on the note to enforce the lien

1 for lack of payment, but I will leave that to y'all. I
2 won't preclude you from arguing that to Judge Strickland.

3 Get that to me as quickly as possible, counsel, as
4 you've got some time constraints that you are concerned
5 about.

6 MR. SIMPKINS: I do have a draft order appointing
7 receiver that I sent to Mr. Dodson this morning. If I
8 could bring that up?

9 THE COURT: Yeah. Let me see it.

10 MR. SIMPKINS: I mean, it's kind of lengthy, but I did
11 want to go ahead and present that. I can also email it to
12 you.

13 THE COURT: This is much more lengthy than -- it's
14 almost 5 o'clock.

15 MR. SIMPKINS: Right.

16 THE COURT: This is a lot more lengthy than ---

17 MR. SIMPKINS: Sure.

18 THE COURT: --- what I can do. We will take a look at
19 it. I want you to get to me by tomorrow a proposed order
20 with respect to the matter of reference. Send it to me at
21 the same time you send it to counsel, and either Ms. Waring
22 or myself will advise you as to whether we require further
23 information before deciding whether to sign it or consider
24 anything Mr. Dodson might have to say about it.

25 MR. SIMPKINS: Thank you, Your Honor.

1 THE COURT: Okey doke.

2 MR. DODSON: Thank you, Your Honor.

3 THE COURT: Yes, sir.

4 --- END OF TRANSCRIPT OF RECORD ---

CERTIFICATE

I, THE UNDERSIGNED ELIZABETH B. HARRIS, CERTIFIED VERBATIM OFFICIAL COURT REPORTER FOR THE FIFTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR RICHLAND COUNTY, SOUTH CAROLINA, ON THE 14TH DAY OF DECEMBER, 2016.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST IN ANY PARTY HERETO.

/s/ELIZABETH B. HARRIS, CVR-M-CM

COLUMBIA, SOUTH CAROLINA

JULY 17TH, 2017

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, 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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SC Court of Appeals

PROOF OF SERVICE

I hereby certify that on July 21, 2017 I have served Respondents the APPELLANTS' AMENDED 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 21, 2017


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