

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.

REPLY TO APPELLANTS' AMENDED RETURN TO RESPONDENT'S
MOTION TO DISMISS APPEAL

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SC Court of Appeals

David H. Simpkins, Esq.
James H. Pulliam, Esq.
Kilpatrick Townsend & Stockton LLP
214 N. Tryon St., Suite 2400
Charlotte, NC 28202
(704) 338-5000
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 submits its reply to Appellants’ Amended Return to Respondent’s Motion to Dismiss Appeal (the “**Return**”). This reply is supported by the Affidavit of David H. Simpkins, Esq., sworn to on July 26, 2017 (“**2nd Simpkins Aff.**”). Capitalized terms used but not defined herein shall have the same meanings ascribed in Respondent’s Motion to Dismiss Appeal (the “**Dismissal Motion**”).

Appellants argue that the issues raised in this appeal regarding choice of law and venue provisions in the underlying loan documents render this appeal not moot because a decision by the Court on those issues would impact the remainder of this case. Return p. 1. Alternatively, Appellants advance the same argument to support application of the “collateral consequences” exception to mootness. Return ps. 2-3. As set forth below, both arguments fail.

I. THIS APPEAL IS MOOT.

The Sequester Order entered by Judge Hood enforced Respondent’s assignments of the Rents and thereby required the delivery to Respondent of certain Rents and related documents. Dismissal Motion p. 3. Shortly after the Sequester Order was entered, Appellants violated the Sequester Order and indicated their intent to abandon management of the Property. Dismissal Motion p. 2. As a result, Judge Toal entered the Receiver Order, which, in addition to appointing a receiver for the Property and granting other relief, granted virtually the exact same relief as the Sequester Order with the exception that the said Rents and documents were to be delivered to the receiver. Dismissal Motion, I. at ps. 3-5.

Accordingly, the relief granted by the Receiver Order effectively supplanted the relief granted in the Sequester Order.¹ Moreover, Appellants did not seek reconsideration of, or appeal, the Receiver Order (including on the basis of choice of law or venue) and the Receiver Order is thus the law of this case. Dismissal Motion ps. 2 and 5.² In addition, the Reconsideration Order simply denied Appellants' motion to reconsider or stay enforcement of, or require a bond in connection with, the Sequestration Order (the "**Reconsideration Motion**");³ it did not rule on a motion for change of venue or decide which state law will apply to all issues in this case moving forward.

The foregoing goes to the heart of mootness because, as a result, a decision on this appeal would have no "practical legal effect upon [the] existing controversy" because relief identical or nearly identical to that in the Sequester Order will continue in place (via the Receiver Order) nonetheless, thus "making it impossible for [this] Court to grant effectual relief." *Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001). For these reasons alone, Appellants' opposition fails and this appeal should be dismissed as moot.

Appellants have attempted to bolster their argument that this appeal is not moot by making certain assertions regarding the hearing before Judge Toal on December 14, 2016, and providing the transcript thereof. *See* Return at p. 2 and Ex. A (the "**Transcript**"). However, such assertions are both plainly false and unwittingly shed light on facts that serve to further unravel Appellants' opposition to the Dismissal Motion.

¹ Despite Appellants' attempt to misconstrue Respondent's argument, Respondent did not argue that Judge Toal, via the Receiver Order, actually "vacated" or "voided" the Sequester Order issued by Judge Hood. Return p. 1, third paragraph.

² For clarification, Respondent did not argue that "the same venue/forum selection and choice of law provisions were not raised to Judge Toal." Return at ps. 1-2. Rather, Respondent simply stated that Appellants did not move for reconsideration of, or appeal, the Receiver Order.

³ A copy of the Reconsideration Motion is attached as Exhibit A to the 2nd Simpkins Aff.

At the hearing Judge Toal properly had before her Respondent's motions for an order of reference to the Master and for the appointment of a receiver. Transcript 3:1-4. However, Appellants' counsel presented and sought to be heard on a motion to dismiss for improper venue and/or lack of jurisdiction filed just 8 days earlier (the "**Venue & Jurisdiction Motion**"), which Respondents' counsel had not yet received. *See* Venue & Jurisdiction Motion, Certificate of Service⁴; *see also* Transcript 6:19-21, 11:23-12:1 and 12:12-13.

Notably, the Venue & Jurisdiction Motion seeks dismissal of the entire case based on the same choice of law and venue issues presented by Appellants to Judge Hood as a basis to reconsider and set aside the Sequester Order.⁵ *Compare* Venue & Jurisdiction Motion at ps. 1-3 *with* Reconsideration Motion at ps. 1-4, 7-8. Appellants' counsel proceeded to argue such issues at length before Judge Toal, although Appellants imply otherwise in the Return. *Compare* Transcript 6:24-12:9 *with* Return p. 2⁶.

Judge Toal decided not to rule on the Venue & Jurisdiction Motion and instead granted Respondent's motion for an order of reference and specifically reserved to the Master the authority to decide the Venue & Jurisdiction Motion. 2nd Simpkins Aff., Ex. C (the "**Reference Order**") p. 2.^{7,8}

⁴ A copy of the Venue & Jurisdiction Motion is attached as Exhibit B to the 2nd Simpkins Aff.

⁵ Appellants' argue that despite being an action to foreclose on South Carolina property, this case should have been filed in New York and that assignments of and security interests in the rents from such property should have been construed under New York law. *See* Venue & Jurisdiction Motion ps. 1-3, Reconsideration Motion ps. 1-4, 7-8; *see also* Appellants' Initial Brief ps. 1-12. These arguments run counter to basic tenets of real property law and the provisions of the loan documents.

⁶ "It would have been improper for Appellants' Counsel to effectively argue the same points of law [regarding choice of law and venue] to Judge Toal before Judge Hood had made a decision regarding those arguments."

⁷ "NOW, THEREFORE, IT IS HEREBY ORDERED that this case is referred to the...Master-in-Equity...who...shall exercise all power and authority which a Circuit Judge sitting without a jury would have, including...to hear any and all...motions (including, without limitation, Defendants' pending Motion to Dismiss for Improper Venue and/or Lack of Jurisdiction)..."

⁸ The Venue and Jurisdiction Motion is still pending and has not been heard by the Master.

Nonetheless, to defend against dismissal of their appeal of Judge Hood's orders, Appellants claim that the Transcript shows that Judge Toal "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." Return p. 2. This is simply not true. As evidenced by the Transcript, Judge Toal made no such acknowledgement and there was no mention whatsoever of the Reconsideration Motion, much less any mention that choice of law and venue arguments were made therein to Judge Hood.⁹ Instead, as noted above, Appellants advanced such arguments in support of the Venue & Jurisdiction Motion seeking dismissal of the entire case, but Judge Toal reserved decision on said motion to the Master.

The arguments made in the Venue & Jurisdiction Motion and its pendency before the Master further undercut Appellants' opposition to the Dismissal Motion. Appellants argue that this appeal is not moot because a decision by this Court on the choice of law and venue issues could impact the remainder of this case. Return ps. 1-2. However, this appeal only involves such issues as they pertain to the Sequester Order and Appellants have the opportunity to be heard on such issues through the Venue & Jurisdiction Motion. It is a decision on the Venue & Jurisdiction Motion, not this appeal, that could impact the remainder of the case.

Ultimately, the relief granted by the Receiver Order effectively supplanted the relief granted in the Sequester Order, the Receiver Order is the law of this case, and a decision on this appeal would therefore have "no practical legal effect upon [the] existing controversy", thus "render[ing] any grant of effectual relief 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).

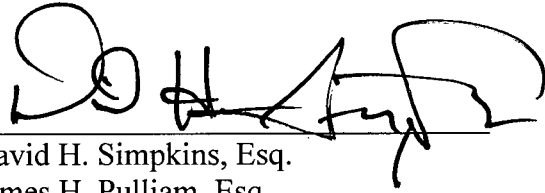
⁹ The only discussion regarding Judge Hood pertained to the provisions of the Sequester Order, Appellants' violation thereof and the resulting appointment of a receiver. See Transcript 17:14-25:4.

II. THE COLLATERAL CONSEQUENCES EXCEPTION IS INAPPLICABLE.

Appellants' argument in support of application of the collateral consequences exception is misplaced, and such exception is inapplicable. Appellants focus on the impact that a decision by this Court may have on the rest of the case. *See* Return p. 2 (“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...[or] 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.”).

However, the focus of the collateral consequences exception is whether “a decision by the trial court may affect future events, or have collateral consequences for the parties.” *S.C. Public Interest Found. v. S.C. Dep’t of Transp.*, 412 S.C. 18, 26, 770 S.E.2d 399, 404 (Ct. App. 2015), quoting *Sloan v. Greenville County*, 380 S.C. 528, 535, 670 S.E.2d 663, 667 (2009) (citations omitted) (emphasis added). Here, the decisions by the lower court – the Sequester Order and the Reconsideration Order – will not affect future events or have collateral consequences for the parties. As set forth above, the relief granted by the Sequester Order has been effectively supplanted by the relief granted in the Receiver Order, which is the law of this case. In addition, the Reconsideration Order concerned issues raised only with respect to the Sequester Order, not the remainder of the proceedings in this case, and, in any event, those same issues remain pending before the Master through the Venue & Jurisdiction Motion (seeking dismissal of the entire case).

For the reasons set forth above and in the Dismissal Motion, Respondent respectfully requests that the Court dismiss this appeal as moot.



David H. Simpkins, Esq.
James H. Pulliam, Esq.
Kilpatrick Townsend & Stockton LLP
214 N. Tryon St., Suite 2400
Charlotte, NC 28202
(704) 338-5000
Attorneys for Respondent and Third-Party
Defendant Wells Fargo Bank, N.A.

July 26, 2017
Charlotte, NC

THE STATE OF SOUTH CAROLINA
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Robert E. Hood, Circuit Court Judge

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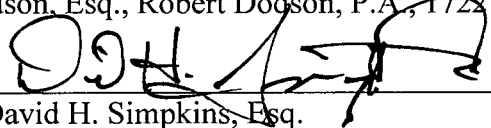
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CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2017 I have caused a copy of the foregoing Reply to Appellants' Amended Return to Respondent's Motion to Dismiss Appeal and the 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., 1723 Main Street, Suite 200, Columbia, South Carolina 29201.


David H. Simpkins, Esq.

Kilpatrick Townsend & Stockton LLP
214 N. Tryon St., Suite 2400
Charlotte, NC 28202
(704) 338-5000
Attorneys for Respondent

July 26, 2017

direct dial 704 338 5287
direct fax 704 371 6416
dsimpkins@kilpatricktownsend.com

VIA U.S. REGULAR MAIL

Attn: Jessica, Case Manager
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Calhoun State Office Building
1220 Senate Street
Columbia, SC 29211

**RE: U.S. Bank National Association, as Trustee, et al. Respondent, vs. AW-MAGPIG, LLC;
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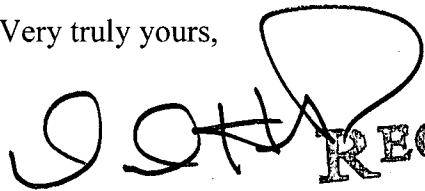
Dear Jessica:

Enclosed for filing is an original and six copies of a Reply to Appellants' Amended Return to Respondent's Motion to Dismiss Appeal and an Affidavit of David H. Simpkins, Esq. in the above-referenced case.

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

Thank you.

Very truly yours,


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David H. Simpkins

Other Counsel of Record:
Robert D. Dodson, Esq.
Robert Dodson, P.A.
1722 Main Street, Suite 200
Columbia, SC 29201



David H. Simpkins, Esq.
Suite 2400, 214 North Tryon Street
Charlotte, NC 28202-2381

Attn: Jessica, Case Manager
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Calhoun State Office Building
1220 Senate Street
Columbia, SC 29211

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