

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 the Appellant.

APPELLANT'S REPLY BRIEF

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SC Court of Appeals

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STATEMENT OF THE ARGUMENTS IN REPLY

I. RESPONDENT FAILED TO MAKE A PRIMA FACIE SHOWING FOR THE INJUNCTION

Respondent A&B Associates, L.P.'s ("Respondent" or "A&B") brief on appeal fails to overcome the errors committed by the trial court when it issued an order granting temporary injunction against Appellant FCRE REL, LLC ("Appellant" or "FCRE") on August 26, 2016 (the "Injunction Order"). Respondent bore the burden of proving its right to an injunction. *Strategic Resources Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006) (citing *Calcutt v. Calcutt*, 282 S.C. 565, 572, 320 S.E.2d 55, 59 (Ct. App. 1984)). As an applicant for a preliminary injunction, Respondent was required to demonstrate sufficient facts to establish a basis for an injunction and to further demonstrate that the drastic relief of an injunction is necessary to preserve the rights of the parties during the litigation. *Compton v. S.C. Dep't of Corr.*, 392 S.C. 361, 366, 709 S.E.2d 639, 642 (2011). Appellant failed to do so.

A&B did not prove that it was likely to succeed on the merits of its claim that Respondent was not legally entitled to (1) terminate the property management agreement for the August on Southside Apartments (the "Property") and (2) install a licensed, professional manager to manage the Property and protect its collateral. None of the affidavits submitted by Respondent in support of its application for a temporary injunction addressed Appellant's contractual right to exercise the remedy of terminating the property management agreement and installing a new, licensed property manager. The trial court made only a single finding on this prong of the test for a temporary injunction, when it held in the Injunction Order that "Plaintiff has made out a prima facie case for the claims asserted in the Verified Complaint."¹ This conclusory finding by the trial court is itself

¹ Injunction Order, p. 6.

reversible error. Rule 65(d), SCRPC, mandates that the order be specific and not merely reference the complaint, which is exactly what the trial court did here.

The Injunction Order contains no factual support for this conclusory finding, and the trial court did not address the content of the subject Loan Documents² at all in the Injunction Order or at the hearing on August 24, 2016 (the “Injunction Hearing”). Indeed, at the hearing, the presiding judge below relied only on his experience with South Carolina loan documents and the procedure for appointing a receiver.³ However, the Loan Documents are governed by New York law, and it was error for the trial court below to base its decision on prior experience with loan documents generally rather than on the actual agreements at issue in this case.

In its Complaint, the sole “evidence” on which the trial court below relied, Respondent confirmed the execution of the Loan Documents.⁴ However, the trial court declined to consider the Loan Documents, which show that A&B not only granted FCRE a security interest in, but, in fact, had willingly, and with full knowledge and intent, irrevocably assigned, transferred and conveyed it rights and interests in all matters of ownership which run with the Property, including but not limited to leases, rents, contracts, personal property and agreements to FCRE, as evidenced by a duly recorded and perfect first lien mortgage as well as recorded Uniform Commercial Code filings. Therefore, from and after the date of the execution of the Loan Documents and until A&B fully repays the loan, all of these interests were and are owned by FCRE and not A&B. From and

² Loan Agreement dated April 15, 2015, Promissory Note dated April 15, 2015, Guaranty of Recourse Obligations and Environmental Indemnity Agreement dated April 15, 2015, Assignment of Management Agreement and Subordination of Management Fees dated April 15, 2015, Mortgage, Assignment of Leases and Rents, Security Agreement and Fixture Filing dated April 15, 2015, Recorded 4/29/2015 as Bk 3395 Pgs 1895-1922, Beaufort County, SC Register of Deeds; UCCI recorded 4/29/2015 as File Number 2015020639, Bk 9 Pgs. 1534-1539, Beaufort County, SC Register of Deeds; UCCI recorded May 13, 2015 as File IF Number 150513-1051328, South Carolina Secretary of State; UCCI recorded 4/24/2015 as Document ID 028784270005, Chatham, Ga. Clerk Superior Court., collectively the “Loan Documents.”

³ Injunction Hearing Transcript, pp. 22:15-23:22.

⁴ Complaint, ¶4, p. 4

after the time of the loan closing, A&B was granted solely a revocable license to use the rents, which license is fully conditioned upon its compliant performance and adherence to the Loan Documents. The Loan Documents, and specifically the Mortgage, utterly refute A&B's claims.⁵

The trial court's decision to issue the Injunction Order due to its belief that FCRE was wrongfully in possession of A&B's property, business files, leases and personal property⁶ was based solely on inaccurate statements presented in the Complaint, and nothing else. Since FCRE became and continues to be the beneficial owner of the interests by irrevocable assignment and transfer on April 15, 2015, A&B suffered no harm from any alleged seizure of any property or interests whatsoever, as A&B had already willingly, freely and with full knowledge and intent relinquished its ownership to FCRE by the execution of the Loan Documents and in consideration for the Loan extended by FCRE. In its brief, Respondent makes no effort to avoid the application or effect of the Loan Documents. Instead, Respondent merely recited the trial court's conclusory findings.⁷ Thus, Respondent has failed to address the primary issue of whether Appellant was legally authorized to exercise its remedies under the Loan Documents, which, as set forth in Appellant's Initial Brief and as uncontroverted by Respondent, it was.⁸ It was legal error for the trial court to disregard the terms of the Loan Documents.

II. THE TRIAL COURT DENIED APPELLANT THE OPPORTUNITY TO PRESENT A DEFENSE

The trial court compounded this clear legal error when it prevented Appellant from presenting evidence, which was to include the Loan Documents, the poor and deteriorating condition of the Property, as well as the complaints by tenants and observations of the local police

⁵ Complaint, pp. 12-22.

⁶ Injunction Order, ¶ 6 and 7, p. 3.

⁷ Respondent's Brief, p. 11-13.

⁸ Appellant's Initial Brief, p. 5-6 (reciting FCRE's explicit right to exercise the remedies it exercised in this case).

and housing authority representatives.⁹ The facts shown by this evidence would have led to the inescapable conclusion that Appellant had the legal right to appoint a new property manager and was justified in doing so.

While the admission or exclusion of testimony is a matter within the court's discretion, when a motion is based on facts not appearing of record, the court may hear the matter on affidavits presented by the respective parties, but may direct that the matter be heard wholly or partly on testimony or deposition. Rule 43(e) SCRCF. Live evidence is preferable, where, as in this case, the evidence is in conflict. *See* J. Flanagan, *South Carolina Civil Procedure* § 65.C.2 (3d. Ed. 2010). Here, FCRE never had the opportunity for a fair hearing. The trial court barred FCRE from offering any evidence whatsoever, and even barred it from being able to confront Respondent's affiants who submitted affidavits without personal knowledge and that were rife with hearsay.¹⁰

In its brief, Respondent repeats the incorrect reading of Rule 65 by relying on the language of the rule relating to temporary restraining orders.¹¹ Temporary restraining orders are extremely short-term remedies, which are meant to be in place only for so long as it takes the court to conduct a hearing on a motion for temporary injunction which will remain in place throughout the pendency of the case.¹²

Here, the trial court below had already entered a temporary restraining order¹³ and the parties convened on August 24, 2016 to conduct a hearing on Respondent's motion for a temporary injunction. The trial court's Injunction Order confirms the procedural posture: "On August 15,

⁹ Injunction Hearing Transcript, p. 10, line 5 – p 11, line 13.

¹⁰ Injunction Hearing Transcript, p. 24, lines 16-20

¹¹ Respondent's Brief, pp. 17-18, n. 69.

¹² Rule 65 (b), SCRCF

¹³ The *Ex Parte* Temporary Restraining Order (the "TRO") was executed by the court on August 15, 2016.

2016, following consideration of the Plaintiff's Verified Complaint, I signed a Temporary Restraining Order, and set a hearing on the Plaintiff's Motion for Temporary Injunction to commence at 3:30 P.M. on August 24, 2016."¹⁴ Respondent relies entirely on Rule 65(b), SCRCP, which, by its terms, is explicitly limited to temporary restraining orders as opposed to injunctions.¹⁵ Respondent then used this false premise – the applicability of Rule 65(b), SCRCP – to rely upon Rule 6(d), SCRCP. But that rule only applies to the manner in which affidavits are exchanged if an affidavit is to be used to support or oppose a motion. It says nothing about a litigant's right to an evidentiary hearing before it is enjoined with the force of law against exercising its contractual rights. The trial court, having adopted A&B's argument to preclude FCRE from presenting a defense or requiring A&B to prove its prima facie case,¹⁶ committed legal error.

There is no merit to A&B's assertion that FCRE failed to make a proffer of the evidence it would offer to the trial court if permitted.¹⁷ This argument is based on a false premise, because the trial court did not preclude a particular witness or exclude a particular exhibit. To the contrary, the trial court completely barred FCRE from offering *any* evidence whatsoever.¹⁸ A proffer cannot be required for such a blanket ruling.

FCRE was prepared to present substantial, admissible evidence that would demonstrate that no injunction was warranted. And FCRE sufficiently identified the witnesses and general subject matter of their testimony in the very limited time permitted by the trial court during the hearing.¹⁹ Under properly issued subpoenas, as well as on a voluntary basis, FCRE was prepared

¹⁴ Injunction Order, p. 1.

¹⁵ Respondent's Brief, p. 18, n. 69.

¹⁶ Injunction Order, p. 2.

¹⁷ Initial Brief of Respondent, ¶ (b), p. 17.

¹⁸ Injunction Hearing Transcript, p. 24, lines 16-20

¹⁹ Injunction Hearing Transcript, p. 10, lines 8-25, p. 11, lines 1-10

to present live witness testimony and offer documentary evidence to corroborate and support its claims as presented in its opposition papers.²⁰ FCRE further outlined for the trial court a clear and detailed summary of who the witnesses were, and the subject matter of their testimony.²¹

For example, a representative of FCRE, Mary Davenport, who had been personally present both at a Property inspection conducted in December 2015²² and, on July 20, 2016, was prepared to testify about the deterioration of the Property from time of the loan closing on April 15, 2015. Ms. Davenport was prepared to authenticate correspondence between FCRE and A&B evidencing that, despite numerous attempts to work on a cooperative basis with A&B to ensure its compliance with the Loan Documents and the proper repair, maintenance and management of the Property, A&B steadfastly refused to cooperate at each and every juncture.²³ Ms. Davenport would also authenticate the Loan Documents and point the trial court to the germane provisions. This witness' testimony would have served to clarify any and all mischaracterizations A&B asserted as to the type of security interest it had granted FCRE, the covenants and conditions A&B was bound by under the Loan Documents, and its failure to abide by multiple covenants which resulted in numerous breaches and the subsequent issuance of the Notice of Event of Default dated July 18, 2016 (the "Default Notice") and the notice of FCRE's election to terminate the management company dated July 18, 2016 (the "Termination Letter").

Ms. Davenport would also authenticate the actual Default Notice and the Termination Letter to the trial court in support of its claims that the actions taken by FCRE were permitted under the Loan Documents, and lawful in all aspects. The testimony of this witness would have confirmed that A&B had, in fact, not been thrown off its property, nor had its leases, money or

²⁰ Defendant's Brief in Opposition to Plaintiff's Application for a Temporary Injunction filed August 22, 2016

²¹ Injunction Hearing Transcript p. 10, lines 8-25, p. 11, lines 1-13.

²² Injunction Hearing Transcript, p.17, lines 1-11.

²³ Injunction Hearing Transcript, p. 17, lines 12-19

contracts seized, nor put them out of business.²⁴ Rather, the evidence would demonstrate that the sole action taken on July 20, 2016 at the Property was to terminate a management agreement, and relieve an unlicensed manager of its responsibilities at the Property and install a properly licensed Property manager to manage FCRE interests, including the rents, leases and contracts accordingly. The testimony of this witness would serve to outline the intent of its actions, and the fact that it sought to remedy the deteriorated condition of the property caused solely through A&B's own inactions, and preserve the collateral.²⁵ By the trial court's denial of this live testimony, it deprived FCRE of due process and the preservation of its claims.

Four (4) Port Royal Police officers also were prepared to testify at the Injunction Hearing.²⁶ Two of the officers were personally present at the Property on July 20, 2016. Their testimony would refute A&B's unsupported and undocumented claims that it was forcibly removed from its real property.²⁷ It would also serve to refute the trial court's misunderstanding of the events which transpired on that date.²⁸ As A&B did not file any affidavits from any representative(s) of A&B, or any other affiliated entity to A&B, who were personally present at the property on July 20, 2016, any and all claims by A&B as to the actions that transpired that day are inadmissible hearsay. The Port Royal Police Officers were prepared to proffer written reports which detailed the rising level of crimes and incidents occurring at the Property over a period of years. This evidence would have served to underscore the trial court's concern with this very same subject.²⁹

Two representatives of the Beaufort Housing Authority (the "BHA") were prepared to testify as to the unacceptable living conditions they had witnessed while performing unit

²⁴ Injunction Hearing Transcript, p. 13, lines 8 - 15

²⁵ Injunction Hearing Transcript, p. 16, lines 12 - 19

²⁶ Injunction Hearing Transcript, p. 10, lines 23 - 23, pp. 11, lines 1 - 13

²⁷ Initial Brief of Respondent, ¶ 3, p. 12

²⁸ Injunction Hearing Transcript, p. 23, lines 12 - 17

²⁹ Injunction Hearing Transcript, p. 19, lines 11 - 15

inspections for tenants residing at the Property under its various housing assistance programs over a period of years. The BHA has represented approximately thirty percent (30%) of the tenant base, on average, over the past several years at the property. The BHA routinely inspects units prior to tenant's taking occupancy, annually, and when complaints are issued for deficiencies by the tenants. Contrary to A&B's claims it has maintained the property in good condition, the BHA was prepared to proffer a report detailing the myriad notices of unit deficiencies, including the presence of mold, issued to A&B by the BHA, and the numerous re-inspections which were required to be performed by the BHA.

In the trial court's denial to allow testimony from local government authorities, it failed to take into account a fourth element often included in the consideration of granting injunctive relief – the public interest. While there are no South Carolina cases explicitly addressing the necessity of this consideration, it can be presumed that the element is subsumed in the other three factors and should be considered.³⁰ Consideration of the public interest in determining whether a preliminary injunction should be issued is required by federal courts and, as such, their rulings are instructive.³¹ In each case in which such an injunction is sought, courts must balance the competing claims of injury and consider the effect of granting or withholding the requested relief, paying particular regard to the public consequences.³² In this matter, both the Port Royal Police and the BHA are government institutions entrusted with the safety and well-being of members of the public, which were otherwise being adversely affected through A&B's actions or lack thereof.

³⁰ J. Flanagan, *South Carolina Civil Procedure* § 65.B (3d. Ed. 2010)

³¹ *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 271 (4th Cir. 2002); *Blackvelder Furniture Co. v. Seilig Manufacturing Co.*, 550 F.2d 189, 193 (4th Cir. 1977).

³² *Winter v. Natural Res. Def. Council, Inc.*, 129 S.Ct. 365, 172 L.Ed.2d 249, 555 U.S. 7, 77 USLW 4001 (2008).

Four representatives from Tideland Realty, Inc. (“Tideland”) were prepared to testify regarding the management activities at the property.³³ Two of the representatives were personally present on July 20, 2016. These two representatives were prepared to testify that the on-site management representative for A&B’s third party unlicensed management agent was not forcibly removed, but vacated the office of her own free will, contrary to A&B’s undocumented, hearsay claims.

All four Tideland representatives were prepared to testify as to the deplorable condition of the units, with many tenants left without functioning bathrooms, ranging from several days to several months.³⁴ Three representatives were prepared to testify as to the improper handling of management files and leases in accordance with S.C. Code Ann. Title 40, Chapter 57. One representative was prepared to testify as to the lack of proper general maintenance at the property, and the need for extensive plumbing and building repairs. This same representative was prepared to testify that, in the presence of the Port Royal Police, all machinery and maintenance tools were surrendered to A&B on August 16, 2016, as required by the TRO. The Police Officer, who was present at this meeting, was prepared to corroborate this statement.³⁵

Numerous tenants were prepared to testify as to the uninhabitable living conditions of the units, including severe bug infestations and mold.³⁶ Several of the tenants were prepared to proffer medical records pertaining to health issues they have experienced as a result of the unsafe and unfit conditions of the units at the Property. Had the trial court below considered the foregoing, it would necessarily have found that the issuance of the temporary injunction would have been detrimental to the public.

³³ Injunction Hearing Transcript, p. 10, line 24

³⁴ Injunction Hearing Transcript, p. 18, lines 17 – 25, p. 19, lines 1 - 10

³⁵ Injunction Hearing Transcript p. 10, lines 24-25, p. 11, lines 1-10

³⁶ Injunction Hearing Transcript, p. 10, line 23

III. THE TRIAL COURT ERRED BY DISREGARDING THE LOAN DOCUMENTS

A&B attempts to avert the legal error made by the trial court by arguing that the trial court did not find the Loan Documents to be unconscionable.³⁷ The trial court was ambiguous about the legal basis it had for disregarding the Loan Documents. The trial court did assert during the hearing that any provision in a loan document that permitted a lender to exercise remedies without first suing in court would be unconscionable.³⁸

Moreover, the trial court relied upon a bond for title case, *Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 568 S.E. 2d 361 (2002), as being analogous to commercial loan transactions. However, as argued in FCRE's Appellant Brief, this case is distinguishable from the current case as it involves an installment contract.³⁹ *Lewis* involves a contract for residential real estate. Documents governing commercial real estate mortgage lending are significantly different than residential documents; containing many more provisions, assignments, terms and conditions, and rights and remedies. Further, they are typically entered into by institutional, knowledgeable parties advised by counsel, as is the case here.⁴⁰

The trial court did not address the Loan Documents in the Injunction Order, because the trial court completely disregarded the Loan Documents in reaching its conclusion. The trial court was required to consider FCRE's authority under the Loan Documents to exercise the remedies it exercised. But the trial court gave no consideration to the language of the Loan Documents and therefore made no specific findings as required by Rule 65, SCRPC. Therefore, the trial court erred in granting the Injunction Order.

³⁷ Initial Brief of Respondent, Argument 1(a), p. 16.

³⁸ Injunction Hearing Transcript, p. 22, line 15- p. 23, line 22.

³⁹ Appellant Brief, p. 22, ¶ 2 -3.

⁴⁰ Injunction Hearing Transcript, p. 11, line 24-25, p. 12, lines 1 -12

IV. THIS COURT SHOULD REVERSE THE CONTEMPT ORDER

First, the Injunction Order was an error of law, and therefore the Contempt Order imposed against FCRE based upon an alleged violation of the Injunction Order should be reversed.

Second, the trial court itself noted that the Injunction Order would be conditional.⁴¹ The injunction was conditioned on A&B engaging a licensed property manager by 12:00 p.m. on August 26, 2016.⁴² A&B failed to do so, and therefore FCRE should not be held in contempt for allegedly not following the Injunction Order.

Third, the Contempt Order was itself an error because the trial court punished FCRE for an alleged violation of an ambiguous provision in the Injunction Order. The trial court's language in the Injunction Order, was not based on factual evidence due to A&B's failure to produce such evidence and the trial court's preclusion of any evidence by FCRE. The truncated oral argument prevented a full vetting of the facts and Loan Documents, and prevented the trial court from considering and incorporating into its Injunction Order the binding definitions in the Loan Documents and the covenants to which each party agreed to be bound. Rather, the trial court's definitions of what is or was "Plaintiff's money" was not based on any actual, legal definition; but rather a contrived meaning resulting only from A&B's conclusory assertions.

FCRE again asserted that under the clear and unambiguous language in the Loan Documents, there is no concept of "Plaintiff's money".⁴³ Even under the requirements of the Injunction Order to place the matter in *status quo ante*, there was no such concept or legal

⁴¹ Injunction Hearing Transcript, p. 25, lines 2-7.

⁴² Injunction Hearing Transcript, p. 25, lines 2-7 ("I'm going to conditionally grant the temporary restraining order that Mr. Coltrane's client has sought. I'm going to order that the plaintiff have a licensed property manager in place by noon this coming Friday") Injunction Order, at p. 6 ("No later than 12:00 Noon, on Friday, August 26, 2016, the Plaintiff is required to have a licensed property manager in place at the property).

⁴³ Contempt Hearing Transcript, p. 18, lines 10 - 17

definition of “Plaintiff’s money”.⁴⁴ The rents and revenues derived from the Property were, at all times from April 15, 2015, FCRE’s property. The Loan Documents are clear in the specific handling of the rents received by A&B under the revocable license granted it.⁴⁵ A&B even confirmed that this was the circumstance under *status quo ante*.⁴⁶

A&B’s own contradictions further demonstrate the lack of clarity to the order. On the one hand, A&B claims that FCRE’s use of funds for repairs and maintenance during the time period that Tideland was the Property manager constitutes a misappropriation of the funds and a violation of the Injunction Order.⁴⁷ The Injunction Order contains no provisions or language whatsoever regarding any such use of funds. Yet, at the Contempt Hearing, A&B refuted its own allegations that the use of these funds was in contravention of the Injunction Order, and stated that such use was acceptable.⁴⁸ The Order Granting Plaintiff’s Motion for Contempt on September 23, 2017 (the “Contempt Order”) identified that FCRE violated the Injunction Order by failing to return all the rental money to A & B⁴⁹ in direct contradiction of the fact that the Injunction Order was silent as to funds spent in the manner above, and which were affirmed as acceptable by the trial court and A&B. Given this ambiguity, it was error for the trial court to enter the Contempt Order against FCRE.

CONCLUSION

For the foregoing reasons and for the reasons set forth in its Initial Brief, Appellant respectfully requests that this Court reverse the Injunction Order and the Contempt Order and remand the case to the trial court for further proceedings.

⁴⁴ Contempt Hearing Transcript, p. 16, lines 21 – 25, p. 17, lines 1 - 8

⁴⁵ Contempt Hearing Transcript, p. 19, lines 10 - 15

⁴⁶ Contempt Hearing Transcript, p. 19, lines 20 - 21

⁴⁷ Contempt Motion, ¶ 1, p. 10

⁴⁸ Contempt Hearing Transcript, pp. 24, lines 12 - 17

⁴⁹ Contempt Order, ¶ 3, item 1, p. 3

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July 31, 2017
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THE STATE OF SOUTH CAROLINA
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Of whom FCRE REL, LLC is the Appellant.

PROOF OF SERVICE

I certify that I have served the **Appellant's Reply Brief** in the above-captioned matter upon the following counsel of record by depositing the same in the United States Mail with proper postage affixed and addressed as follows:

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Appellate Case No. 2016-001899
Lower Court Case No. 2016-CP-07-1778

Dear Ms. Kitchings:

Please find enclosed for filing an original and one copy of the **Appellant's Reply Brief, Designation of Matter to be Included in the Record on Appeal, and Proofs of Service** of both in the above-referenced matter. Please file the originals and return filed copies to me in the enclosed self-addressed, postage-paid envelope.

By copy of this letter, I am serving all counsel of record with a copy of the same. Please do not hesitate to contact me if you need any additional information.

With warmest regards,



Benjamin T. Coppage

Enclosures

cc: Curtis L. Coltrane
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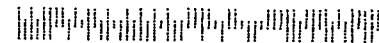
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