

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.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

On April 18, 2016, Respondent commenced this action to foreclose a \$4,500,000.00 commercial mortgage granted by Appellants. Appellants own the subject property, which is primarily comprised of a retail shopping center and the underlying land located in Columbia (collectively, the “**Shopping Center**”), along with the leases and the rents thereof.

On August 22, 2016, Respondent filed a Motion for Order Requiring Turnover of Collateral and Sequestering Rents (the “**Sequester Motion**”) (R. pp. 540-553). In support, Respondent submitted a Memorandum of Law (R. pp. 564-574) and the Affidavit of S. Michael Dickerson (“**Dickerson Affidavit**” or “**Dickerson Aff.**”) (Supp. R. 787-838), each dated October 19, 2016 and filed October 21, 2016. In opposition, Appellants submitted a Memorandum of Law dated October 19, 2016 and filed October 21, 2016.

A hearing on the Sequester Motion was held on October 26, 2016 before the Honorable Robert E. Hood. On November 9, 2016, Judge Hood’s law clerk emailed the parties to request a proposed order granting the Sequester Motion, stating that Judge Hood wanted to first review a proposed order before ruling on the Sequester Motion. Thereafter, Appellants filed a Supplemental Memorandum of Law dated and filed November 16, 2016. On the same day, Respondent submitted a letter to Judge Hood responding to the issues raised in Appellants’ Supplemental Memorandum. Appellants did not submit any affidavits in opposition to the Sequester Motion.

On November 18, 2016, Judge Hood executed the proposed order as submitted, which was filed on November 28, 2016 (the “**Sequester Order**”) (R. pp. 2-11). In general terms, the Sequester Order (a) ordered Appellants to deliver to Respondent (i) all Rents (defined below) then in their possession, (ii) certain documents and information related to the Rents, the Shopping Center and its tenants, and (iii) the monthly net income (Rents less operating expenses) on an

ongoing basis, and (b) ordered banks maintaining related accounts to provide certain information to Respondent. In addition, the Sequester Order contemplated Appellants remaining in control of the Shopping Center.

On or about December 8, 2016, Appellants filed a Motion for Reconsideration or in the Alternative Requiring that Plaintiff Post a Bond and/or Staying Enforcement of the Sequester Order (the “**Reconsideration Motion**”) (R. pp. 578-587). Thereafter, Judge Hood denied the Reconsideration Motion by Order dated December 28, 2016 and filed December 30, 2016 (R. pp. 12-13) (the “**Reconsideration Order**”; with the Sequester Order, collectively the “**Subject Orders**”).

On February 1, 2017, Appellants appealed the Subject Orders.

I. STATEMENT OF FACTS

A. The Loan and the Loan Documents.

Respondent is the current owner and holder of a \$4,500,000.00 loan originally made by Bear Stearns Commercial Mortgage, Inc. (“**Original Lender**”) to Appellants on March 1, 2007 (the “**Loan**”). Complaint ¶¶ 6 and 18 (R. pp. 19, 22); Dickerson Aff. ¶¶ 6 and 7 (Supp. R. pp. 788-789). The Loan is evidenced by a Promissory Note dated March 1, 2007, executed by Appellants and payable in the original principal amount of the Loan (the “**Note**”) (R. pp. 31-42), and secured by, without limitation: (i) a Mortgage, Fixture Filing and Security Agreement dated March 1, 2007, executed by Appellants and recorded in the Richland County Register of Deeds (the “**Register**”) on March 6, 2007 in Book 1288 at Page 3842 (the “**Mortgage**”); (ii) an Assignment of Leases and Rents dated March 1, 2007, executed by Appellants and recorded in the Register on March 6, 2007 in Book 1288 at Page 3902 (the “**ALR**”); (iii) a Replacement Reserve and Security Agreement dated as of March 1, 2007, between Appellants and Original Lender (the “**Reserve Agreement**”);

(iv) a Cash Management Agreement dated March 1, 2007, between Appellants, Original Lender and The Bank of New York Trust Company, N.A. (the “**Cash Management Agreement**” or “**CMA**”); and (v) a Clearing Account Agreement dated March 1, 2007 between Appellants, Original Lender and North Fork Bank (the “**Clearing Account Agreement**” or “**CAA**”). Complaint ¶¶ 7, 9, 13, 15 and 16 (R. pp. 19-22), and Exs. B and D through G, respectively (R. pp. 45, 112, 131, 164 and 151).¹

B. Relevant Provisions of the Loan Documents.

1. The Mortgaged Property; Assignments of Leases and Rents.

Pursuant to the Mortgage, Appellants have granted Respondent a mortgage lien and security interests against and in the “**Property**” (as defined therein), which includes, among other collateral, the Shopping Center, the Leases (as defined therein) and the Rents (as defined therein). Complaint ¶¶ 9-11 (R. p. 20) and Ex. B, Mortgage § 1.1 (R. pp. 46-49).

In addition, pursuant to both the Mortgage and the ALR, Appellants have assigned to Respondent all of their right, title and interest in and to, among other collateral, the Leases and the Rents.² Complaint ¶¶ 13 and 17 (R. pp. 20-21, 22), and Ex. B, Mortgage §§ 1.1(f), 1.2 and 3.7 (R. pp. 47-48, 49, 56-57 (§ 3.7(a)), and Ex. D, ALR at §§ 1.1(c) and 2.1 (R. pp. 113-114, 115). Upon said assignment, Appellants were granted a revocable license to operate and manage the Property and to collect and receive the Rents (the “**License**”). Complaint ¶ 17 (R. p. 22); Mortgage § 3.7 (R. p. 57 (§ 3.7(a))); ALR § 2.1 (R. p. 115). Upon Appellants’ default under the Loan Documents,

¹ The Note, Mortgage, ALR, Reserve Agreement, CMA, CAA and all other documents executed or delivered in connection with the Loan are collectively referred to herein as the “**Loan Documents**”.

² The term “Leases” encompasses, *inter alia*, all existing and future leases of the Shopping Center or any portion thereof. Mortgage § 1.1(f) (R. pp. 47-48); ALR § 1.1(a)-(b) (R. p. 113). The term “Rents” essentially includes all rents, revenue, tenant security deposits and other income generated by the Property. Mortgage § 1.1(f) (R. pp. 47-48); ALR § 1.1(c) (R. p. 113-114).

the License is automatically revoked and Respondent becomes immediately entitled to collect and receive the Rents whether or not Respondent enters or takes control of the Property. Id.; ALR § 3.1 (R. pp. 115-116).

2. Loan Generally Nonrecourse.

Subject to certain limited exceptions, the Loan is generally nonrecourse to Appellants.³ Note Art. 14 (R. pp. 37-39). In addition, Appellants have agreed that the Property is and will be their sole asset. Mortgage §§ 4.3(a) and (b) (R. p. 61). Therefore, the Property (including the Rents) is of paramount importance to Respondent because it is the primary, if not sole, source of repayment of the Loan, and in any event Appellants have no other assets that Respondent could realize upon.

3. Cash Management; Excess Cash.

The Clearing Account Agreement and the Cash Management Agreement emphasize the critical importance of the Rents as part of Respondent's security. Appellants are obligated thereunder to cause all Rents to be deposited directly into a designated bank account (the "**Clearing Account**"). CAA § 4 (R. p. 153); CMA §§ 2.1(a) and 3.1 (R. pp. 176, 178-179). Appellants are to have control over the Clearing Account unless a "**Cash Management Event**" (as defined in the CMA) occurs. CAA § 1(c)(i) (R. p. 152).

A Cash Management Event occurs upon, among other events: (i) the date the Property's anchor tenant, Piggly Wiggly, ceases operations at the Property, vacates the Property or otherwise "goes dark," or terminates its lease, or (ii) an Event of Default. CMA § 1.1, p. 2 (R. p. 169). Upon a Cash Management Event, Appellants are obligated to, among other things, establish a second

³ Neither this statement nor any other statement contained in this brief is to be construed as a waiver of any provisions of, or rights or remedies of Respondent under, the Note or any other Loan Documents.

account (the Cash Management Account) and cause all Clearing Account funds to be deposited therein. CMA § 2.1(b) (R. p. 176). Funds deposited in the Cash Management Account are then to be applied in a specified order to (a) pay amounts owed under the Loan Documents, (b) disburse funds to Appellants for payment of the Property's operating expenses, and (c) disburse all remaining amounts (collectively, "**Excess Cash**") to Respondent to be held as additional security. CMA §§ 2.7, 3.4, 4.1 (R. pp. 178, 179-181); Mortgage § 3.15 (R. pp. 60-61).

In essence, as a material condition to obtaining a \$4,500,000.00 loan, Appellants agreed that if the Property's anchor tenant vacated the Property or an Event of Default occurred (in either event jeopardizing Respondent's security), the Rents would be applied in a specified manner.

4. Required Financials.

Further emphasizing the importance of the Property (including the Rents) as Respondent's security, throughout the term of the Loan Appellants are required to provide Respondent monthly rent rolls, monthly and annual financial statements, and, upon Respondent's request, other documents and information pertaining to the Property and its operations (collectively, "**Property Performance Information**"). Mortgage § 3.11 (R. pp. 59-60).

5. Governing Law and Venue.

Although certain Loan Documents contain provisions generally providing for the application of New York law, the Mortgage and the ALR, along with the Reserve Agreement, provide for the application of South Carolina law in certain instances, including as directly relevant to this appeal. Note Art. 16 (R. p. 39); Mortgage § 18.1 (R. p. 96); ALR § 6.7 (R. p. 120); CAA § 11 (R. p. 155); CMA § 8.11 (R. p. 188); Reserve Agreement § 16 (R. p. 141).

C. Piggly Wiggly vacates.

In the spring or summer of 2014, Piggly Wiggly (the Shopping Center's anchor tenant) closed its store and vacated the Property, which Appellants have admitted. Dickerson Aff. ¶ 11 (Supp. R. pp. 789-790); Answer ¶ 32 (R. p. 225); First Amended Answer, Counterclaims and Third-Party Complaint ¶ 33 (R. p. 249); Appellants' Initial Brief ("**App. Brief**") at p. 1 ("...anchor tenant moved out of the shopping center...") and p. 9 ("...anchor tenant left the property..."). As a result, a Cash Management Event (herein, the "**Piggly Wiggly Event**") occurred. Complaint ¶ 25 (R. p. 23); Dickerson Aff. ¶ 11 (Supp. R. pp. 789-790); CMA § 1.1 at p. 2, "Cash Management Event" definition (R. p. 169).

D. The Defaults.

On August 1, 2014, Respondent notified Appellants of the Piggly Wiggly Event and demanded that Appellants comply with the Cash Management Agreement. Complaint ¶ 26 (R. pp. 23-24) and Ex. H (R. pp. 210-212); Dickerson Aff. ¶ 11 (Supp. R. pp. 789-790). Appellants failed to establish a Cash Management Account or otherwise comply with the Cash Management Agreement, resulting in one or more defaults (collectively, the "**CM Default**"). Complaint ¶ 29 (R. p. 24); Dickerson Aff. ¶ 12 (Supp. R. p. 790); Mortgage § 10.1(q) (R. p. 79); ALR § 3.1 (R. pp. 115). Thereafter, Respondent, through counsel, notified Appellants of the CM Default. Complaint ¶ 30 (R. pp. 24-25) and Ex. I (R. pp. 215-217); Dickerson Aff. ¶ 12 (Supp. R. p. 790). Appellants nonetheless failed to comply. Dickerson Aff. ¶ 12 (Supp. R. p. 790). Notably, Appellants have never contested their noncompliance with the Cash Management Agreement.

In addition, beginning in October 2014 – after Respondent had demanded Appellants' compliance with the Cash Management Agreement – Appellants ceased providing Property Performance Information to Respondent, effectively preventing Respondent from obtaining an

accurate financial picture of the Property - including the Excess Cash that accrued and should have been disbursed to Respondent. Dickerson Aff. ¶ 15 (R. p. 790). Despite multiple demands, Appellants failed to provide Property Performance Information, resulting in additional defaults. Dickerson Aff. ¶ 16 (Supp. R. p. 791) and Ex. 3 (Supp. R. pp. 807-819); Mortgage § 10.1(o) (R. p. 79).

Further defaults also occurred due to Appellants' failure to pay monthly replacement reserve deposits due under the Reserve Agreement beginning in January 2015 and each month thereafter.⁴ Reserve Agreement § 1(b) (R. p. 132); Dickerson Aff. ¶ 13 (Supp. R. p. 790).

By letter to Appellants dated February 24, 2016, Respondent, through counsel, among other things accelerated all amounts due and owing under the Loan Documents and demanded payment thereof. Dickerson Aff. Ex. 3 (Supp. R. pp. 808 (1st par.), 815 (2nd par. and 3rd par.)). Appellants have failed to pay all such amounts, resulting in an additional default (together with the CM Default and the other above-referenced defaults, collectively the “**Defaults**”).⁵

For the reasons set forth herein, the appeal lacks merit and the Subject Orders should be affirmed.

⁴ In their Initial Brief, assert the timely and full payment of “interest, principal, and escrowed money for taxes and insurance”, thus sidestepping their nonpayment of replacement reserve deposits. App. Brief at p. 1 (citing to an unverified motion).

⁵ Despite the additional defaults, Appellants only mention the CM Default in their Initial Brief and attempt to minimize it as a “technical default”. App. Brief, Statement of the Case at p. 1. However, as demonstrated above, the CM Default arose from the breach of an express, material condition to Appellants obtaining the \$4,500,000.00 Loan. When the Property’s anchor tenant vacated, it substantially jeopardized Respondent’s security (the Property, including the Rents). Further, as a result of the CM Default, Respondent has likely been deprived of several hundred thousand dollars in Excess Cash accruing after the anchor tenant vacated, based on financials Appellants submitted for the 3rd quarter of 2014. Dickerson Aff. Ex. 4 (Supp. R. pp. 821-822); Sequester Order ¶ 12 (R. p. 7).

ARGUMENTS

I. THE LOWER COURT CORRECTLY APPLIED SOUTH CAROLINA LAW IN ISSUING THE SEQUESTER ORDER.

The lower court applied South Carolina law, including S.C. Code Ann. § 29-3-100, in issuing the Sequester Order. Sequester Order ¶ C at ps. 5-6 (R. pp. 7-8). According to Appellants, this was error and New York law should have been applied based on certain governing law provisions of the Loan Documents. *See* App. Brief at I., ps. 4-8. However, as set forth below, the lower court's application of South Carolina law was appropriate under both the Loan Documents and applicable law.

As an initial matter, Respondent's interests in the Leases and the Rents as granted in the Mortgage and the ALR served as the basis for the relief granted in the Sequester Order. Sequester Order ¶¶ B-C at ps. 5-6 (R. pp. 7-8).

As to governing law, the Mortgage and the ALR contain similar provisions:

Section 18.1 CHOICE OF LAW. THIS SECURITY INSTRUMENT SHALL BE DEEMED TO BE A CONTRACT ENTERED INTO PURSUANT TO THE LAWS OF THE STATE OF NEW YORK AND SHALL IN ALL RESPECTS BE GOVERNED, CONSTRUED, APPLIED AND ENFORCED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK, PROVIDED HOWEVER, THAT WITH RESPECT TO THE CREATION, PERFECTION, PRIORITY AND ENFORCEMENT OF THE LIEN OF THIS SECURITY INSTRUMENT, AND THE DETERMINATION OF DEFICIENCY JUDGMENTS, THE LAWS OF THE STATE WHERE THE PROPERTY IS LOCATED SHALL APPLY.

Mortgage § 18.1 (emphasis added) (R. p. 96).

Section 6.7 CHOICE OF LAW. THIS ASSIGNMENT SHALL BE DEEMED TO BE A CONTRACT ENTERED INTO PURSUANT TO THE LAWS OF THE STATE OF NEW YORK AND SHALL IN ALL RESPECTS BE GOVERNED, CONSTRUED, APPLIED AND ENFORCED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK, PROVIDED, HOWEVER, THAT WITH RESPECT TO THE CREATION, PERFECTION, PRIORITY AND ENFORCEMENT OF THE LIEN OF THIS

ASSIGNMENT, THE LAWS OF THE STATE WHERE THE PROPERTY IS LOCATED SHALL APPLY.

ALR § 6.7 (emphasis added) (R. p. 120).^{6,7}

Accordingly, pursuant to the Mortgage and the ALR, South Carolina law applies to the creation, perfection, priority and enforcement of the liens thereunder.

“A mortgagee has [a] specific lien upon the rents and profits of the mortgaged land [if] he has in the mortgage stipulated for a specific pledge of them as part of his security.” *Reeder v. Dargan*, 15 S.C. 175, 185 (1881) (citation omitted). Here, Appellants specifically pledged Rents as part of the security (the Property) encumbered by the Mortgage. Mortgage §§ 1.1(f) and 1.2 (R. pp. 47-48, 49); *see also* Mortgage § 7.1 (“[Appellants] ... will cause this Security Instrument... to be ... recorded ...to...fully to protect and perfect...the lien or security interest hereof upon, and the interest of Lender in, the Property”) (R. p. 72-73). In addition, Appellants specifically pledged the Rents as part of the security encumbered by the ALR. ALR §§ 1.1(a) – (c) (R. pp. 113-114); *see also* ALR § 3.2 (referencing “the lien and security interest created by this Assignment”) (R. p. 116).

The findings of fact, conclusions of law and relief in the Sequester Order pertain to the creation and enforcement of Respondent’s liens against, security interests in and assignments of the Rents as contained in the Mortgage and the ALR. Sequester Order ¶¶ 1-3, 6 and 12 at ps. 2-5 (R. pp. 4-5, 6, 7), ¶¶ B – C at ps. 5-6 (R. pp. 7-8), and ¶¶ A – F at ps. 7-9 (R. pp. 9-11). Therefore,

⁶ As in the lower court, Appellants failed to quote the full governing law provisions of the Mortgage and the ALR, notably omitting the underlined provisions above. App. Brief at ps. 2, 5-6; Reconsideration Motion at ps. 2-3 (R. pp. 581-582). Prior to issuance of the Sequester Order, Respondent’s counsel called the omitted provisions to the lower court’s attention and argued that South Carolina law applied to the relief sought in the Sequester Motion. *See* Letter dated Nov. 16, 2016 from David H. Simpkins to Judge Hood (Supp. R. pp. 840-841).

⁷ The Reserve Agreement contains similar provisions regarding the application of South Carolina law, which Appellants also omitted. Reserve Agreement § 16 (R. p. 141); App. Brief at p. 2.

the lower court's application of South Carolina law, including S.C. Code Ann. § 29-3-100, was proper under the express terms of the Mortgage and the ALR.

Moreover, South Carolina law properly applies to an assignment of rents where the related real property is located in this State, notwithstanding any choice of law provisions amongst the contracting parties. *Butner v. United States*, 440 U.S. 48, 55, 99 S.Ct. 914, 918 (U.S. 1979) (“Property interests are created and defined by state law...The justifications for application of state law are not limited to ownership interests; they apply with equal force to security interests, including the interest of a mortgagee in rents earned by mortgaged property”);⁸ see also *In re Jason Realty, L.P.*, 59 F.3d 423, 427 (3rd Cir. 1995) (citing *Butner* as support, the Third Circuit Court of Appeals held that “[a]ssignments of rents are interests in real property and, as such, are created and defined in accordance with the law of the situs of the real property”).

For the foregoing reasons, the lower court correctly applied South Carolina law in issuing the Sequester Order.

II. VENUE IN RICHLAND COUNTY, SOUTH CAROLINA IS PROPER UNDER THE LOAN DOCUMENTS AND APPLICABLE LAW.

Appellants argue that this foreclosure action involving real and personal property in Richland County, South Carolina should have been filed in a New York state or federal court due to certain forum selection clauses in certain Loan Documents. This argument ignores basic principles of real property and jurisdictional law and, in any event, the relevant Loan Documents do not require this action to be filed in New York. Moreover, South Carolina law permits this action to be filed in South Carolina notwithstanding any forum selection clauses.

⁸ Although *Butner* was superseded in part by statute (United States Bankruptcy Code, Pub.L. 95-598, 92 Stat. 2549 (1978)), the U.S. Supreme Court subsequently reiterated its holding. See *Barnhill v. Johnson*, 503 U.S. 393, 397-98, 112 S.Ct. 1386 (U.S. 1992).

As an initial matter, despite the implications in Appellants' brief, only two of the Loan Documents contain forum selection provisions, the Cash Management Agreement and Clearing Account Agreement. The Note, Mortgage, ALR and Reserve Agreement have no forum selection provisions whatsoever.

Under the Cash Management Agreement, the bringing of an action in New York state or federal court is permissive, not mandatory. CMA § 8.11 (“ANY LEGAL SUIT ... AGAINST ... [APPELLANTS] ... MAY AT LENDER’S OPTION BE INSTITUTED IN ANY FEDERAL OR STATE COURT IN THE CITY OF NEW YORK, COUNTY OF NEW YORK...”)(emphasis added) (R. p. 188).⁹

The Clearing Account Agreement – an agreement on North Fork Bank’s form - provides that the parties agreed to the exclusive jurisdiction of New York state courts for all actions “arising out of or relating to this Agreement or the transactions contemplated hereby”. CAA § 11 (R. p. 155). However, such provisions have no impact on this action. Respondent is not pursuing an action under the Clearing Account Agreement. Respondent is seeking to foreclose the Mortgage and, in connection therewith, has sought to enforce the assignment of rents provisions of the Mortgage and the ALR. The underlying Defaults arise from Appellants’ breaches of the Mortgage, Cash Management Agreement and Reserve Agreement.

Perhaps most importantly, Appellants’ position that a foreclosure of South Carolina real property should be pursued in New York contradicts basic principles of real property and jurisdictional law, including precedent in this State. 55 Am. Jur. 2d Mortgages § 582 (“It is a fundamental principle of jurisprudence that a judgment or decree cannot operate extraterritorially

⁹ Appellants omitted the above underlined language as well. App. Brief p. 10; Reconsideration Motion p. 3 (R. p. 582).

so as to affect the title to land in another state or country, and, therefore, it is beyond the power of any court to render a binding judgment in foreclosure proceedings as to land located in another state”); *Fidelity-Bankers Trust Co. v. Little*, 181 S.E. 913, 921, 178 S.C. 133 (1935) (deficiency judgment action in South Carolina following foreclosure of Tennessee real property in Tennessee) (“The property referred to is located in the state of Tennessee, and, of course, could not be sold under an order issued by the courts of this state; and the courts of this state could not entertain a suit involving the title to said lands...”); *see also* S.C. Code Ann. § 15-7-10(3) (requiring a foreclosure action to be filed in the county where the real property is located); *Federal Land Bank of Columbia v. Davant*, 355 S.E.2d 293, 297, 292 S.C. 172 (Ct. App. 1987) (“It is axiomatic that an action to foreclose a mortgage must be brought where the mortgaged property is situated. See, Section 15-7-10(3), Code of Laws of South Carolina, 1976 and cases cited thereunder.”).

Finally, S.C. Code Ann. § 15-7-120(A) permits this action to be filed in Richland County, South Carolina regardless of any forum selection provisions in any Loan Documents: “Notwithstanding a provision in a contract requiring a cause of action arising under it to be brought in a location other than as provided in this title and the South Carolina Rules of Civil Procedure for a similar cause of action, the cause of action alternatively may be brought in the manner provided in this title and the South Carolina Rules of Civil Procedure for such causes of action.”

For the foregoing reasons, the lower court did not err in issuing the Sequester Order due to the forum selection provisions in two of the Loan Documents.

III. THE SEQUESTER ORDER DOES NOT GRANT INJUNCTIVE RELIEF, AND APPELLANTS' POSITION CONTRAVENES PUBLIC POLICY AND S.C. CODE ANN. § 29-3-100. MOREOVER, THE STANDARD FOR OBTAINING AN INJUNCTION IS NONETHELESS MET.

A. Appellants have not demonstrated the existence of injunctive relief.

Although asserting that the Sequester Order grants injunctive relief, Appellants fail to show how or why the relief granted under the Sequester Order constitutes injunctive relief. Appellants simply call it injunctive relief and then proceed to argue that the required elements for injunctive relief were not met. On this basis alone the Court should disregard Appellants' argument.

B. The Sequester Order does not grant injunctive relief.

Notwithstanding the foregoing, the Sequester Order does not grant injunctive relief. It simply grants Respondent relief to which it is statutorily entitled under S.C. Code Ann. §29-3-100.

The Mortgage and the ALR each constitute an "assignment of leases, rents, issues, or profits" as defined in S.C. Code Ann. 29-3-100(A)(2) because each is a "document assigning, transferring, pledging, mortgaging, or conveying an interest in leases...and rents, issues, or profits arising from real property..." Mortgage §§ 1.1(f), 1.2 and 3.7 (R. pp. 47-48, 49, 56-58); ALR §§ 1.1(a)-(c) and 2.1 (R. pp. 113-14, 115) (the assignments of Rents contained in the Mortgage and the ALR will be referred to herein as the "**Rent Assignments**"); Sequester Order ¶ C(1) at p. 6 (R. p. 8). As such, upon recording of the Mortgage and the ALR, the Rent Assignments became "enforceable...to pass the interest granted, pledged assigned, or transferred as against [Appellants],...perfected from the time of recording against subsequent assignees, lien creditors, and purchasers for a valuable consideration from [Appellants]." S.C. Code Ann. § 29-3-100(B); Sequester Order ¶ C(1) at p. 6 (R. p. 8).

Further, the Rent Assignments each constitute a "collateral assignment" as defined un S.C. Code Ann. §29-3-100(A)(3) because each was "delivered in connection with the grant of [the

Mortgage]...where the [Appellants] retain the right to collect or to apply the [Rents] after assignment and prior to default,” said right being the above-referenced License. Mortgage §§ 1.2 and 3.7 (R. pp. 49, 56-58)); ALR § 2.1 (R. p. 115); Sequester Order ¶ C(2) at p. 6 (R. p. 8).

S.C. Code Ann. § 29-3-100(C) provides in part as follows:

Where an assignment of leases, rents, issues, or profits is a collateral assignment, after a default under the mortgage ... or evidence of indebtedness which the assignment secures, the assignee is thereafter entitled ... to collect and receive any accrued and unpaid or subsequently accruing lease revenues, rents, issues, or profits subject to the assignment, without need for the appointment of a receiver, any act to take possession of the property, or any further demand on the assignor. (emphasis added)

Notably, the statute does not require that any elements for obtaining an injunction be established, nor does it require the assignee to post a bond. To become entitled to receive the lease revenues, rents, issues, or profits, the assignee must simply show that it holds a collateral assignment and that a default has occurred. No further action or demand is necessary.

Through the Dickerson Affidavit and the verified Complaint, Respondent demonstrated the occurrence and existence of the Defaults. Dickerson Aff. ¶¶ 12, 13 and 16 (Supp. R. pp. 790, 791); Complaint ¶ 29 (R. p. 24). Appellants failed at any point to contest the Defaults through opposing affidavits or other competent evidence.

Therefore, as determined by the lower court, upon any of the Defaults (beginning with the CM Default in Fall 2014) Respondent became statutorily entitled to collect and receive the Rents without the need for any further action or demand. S.C. Code Ann. § 29-3-100(C); Sequester Order ¶ C(3) at p. 6 (R. p. 8). Accordingly, the Sequester Order ordered that the Rents then on hand and the monthly net operating income (Rents less operating expenses) moving forward be delivered to Respondent. Sequester Order ¶¶ A(i) and C(i) at ps. 7-8 (R. pp. 9, 10). In order to properly account for such Rents and obtain an accurate status of the Property, Respondent

requested that Appellants be required to deliver certain Property Performance Information and that Respondent receive related bank account information, which the lower court allowed. Sequester Order ¶¶ A(ii), B, C(ii) and D at ps. 7-8 (R. pp. 9-10).

C. Appellants' position contravenes public policy and the plain meaning of S.C. Code § 29-3-100.

Assignments of rents are commonly required by lenders in commercial mortgage transactions nationwide. S.C. Code Ann. § 29-3-100 evinces the Legislature's intent that assignments of rents delivered in connection with commercial mortgage loans in South Carolina be enforceable by lenders to receive the subject rents without the need for further action, including, without limitation, seeking the appointment of a receiver or possession of the real property or even making demand upon the borrower.

Requiring lenders to establish entitlement to an injunction and post a bond, in addition to meeting the statute's requirements, would contravene the Legislature's clear intent and the plain wording of the statute itself, thus rendering the statute ineffectual and meaningless. In addition, the security afforded by assignments of rents in South Carolina would be substantially hindered, negatively impacting commercial mortgage lending in this State.

The situation at hand is a prime example. In exchange for obtaining a \$4,500,000.00, generally nonrecourse loan that enabled them to purchase a retail shopping center, Appellants granted, among other things, a lien on and assignments of the Rents and agreed that upon a default the lender (now Respondent) would be entitled to receive the Rents. The anchor tenant closed its store at the Property, significantly jeopardizing Respondent's security for the Loan. Making matters far worse, Appellants then defaulted by refusing to comply with multiple provisions of the Loan Documents, in the process depriving Respondent of the security afforded by the Cash Management Agreement (dictating the application of Rents), depriving Respondent of substantial

Excess Cash,¹⁰ depriving Respondent of the security afforded by the Reserve Agreement, and concealing the Property's operations and financial performance for well over two years. See § I.D. above.

Faced with such a situation, Respondent should be able to expect that its statutory right to receive the Rents will be enforced. To additionally require Respondent, or any other commercial mortgage lender holding a defaulted loan, to go beyond S.C. Code Ann. § 29-3-100 and prove entitlement to a preliminary and then permanent injunction would simply be unconscionable and would substantially hinder assignments of rents as bargained-for security, in addition to contravening the statute itself and the Legislature's intent.

D. Even if the Sequester Order grants injunctive relief, the necessary elements are satisfied.

Although Respondent disagrees that the Sequester Order grants injunctive relief, Respondent has nonetheless demonstrated the necessary elements to obtain an injunction.

To obtain a preliminary injunction, the movant must show that it (1) will suffer irreparable harm if the injunction is not granted, (2) has a likelihood of success on the merits and (3) has no adequate remedy at law. *Poynter Investments, Inc. v. Century Builders of Piedmont*, 694 S.E.2d 15, 17, 387 S.C. 583 (2010). The granting of temporary injunctive relief is within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. *Zabinski v. Bright Acres Associates*, 346 S.C. 580, 553 S.E.2d 110 (2001).

Respondent demonstrated that it would suffer irreparable harm absent entry of the Sequester Order. As noted above, the anchor tenant, Piggly Wiggly, closed its store and vacated the Property in the spring or summer of 2014. See § I.C. above at ps. 5-6. In August 2014,

¹⁰ Dickerson Aff. Ex. 4 (Supp. R. pp. 821-822); Sequester Order ¶ 12 (R. p. 7); see also FN5 above.

Respondent demanded that Appellants comply with the Cash Management Agreement. See § I.D. above at p. 6. Appellants failed to do so, despite further demands, resulting in Respondent being deprived of the security afforded by the Cash Management Agreement (agreed application of Rents), including substantial Excess Cash (likely totaling several hundred thousand dollars) to which Respondent was and is entitled. *Id.*; see also FN10. In addition, shortly after the above-referenced demand, Appellants ceased providing Property Performance Information, including following multiple demands, thereby concealing the Property's operations and financial performance for well over two years. See § I.D. above at p. 6. Absent entry of the Sequester Order, Respondent would have been deprived of further substantial Excess Cash and also been unable to determine the status of the Property, including whether or was being properly maintained or operated.

Appellants argue that Respondent could not have suffered irreparable harm because it has an adequate remedy at law in the form of monetary damages. App. Brief § III.A. at p. 15 and III.C. at ps. 17-19. However, this ignores a critical distinction arising from the particular terms of the Loan Documents. As mentioned above, subject to certain exceptions the Loan is generally nonrecourse as to Appellants, meaning the Property is Respondent's primary, if not sole, source of repayment of the Loan. Note Art. 14 (R. pp. 37-39). Moreover, Appellants have agreed that the Property is and will be their *sole* asset. Mortgage §§ 4.3(a) and (b) (R. p. 61). Therefore, although Respondent made a customary request for a deficiency judgment against Appellants as part of its foreclosure claim (see Complaint ¶ B at p. 9) (R. p. 26), even if Respondent secures such a judgment it is near certain to be worthless because the foreclosure will divest Appellants of their sole asset. Accordingly, Respondent would have continued to suffer irreparable harm absent entry of the Sequester Order. In fact, although the Property generated hundreds of thousands in Excess

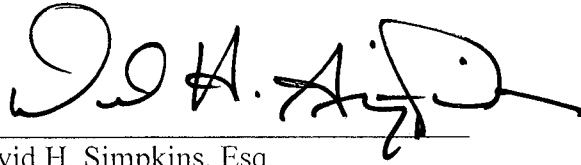
Cash following the CM Default in Fall 2014, only a minute fraction of that amount was ultimately turned over by Appellants.

Finally, Respondent demonstrated a likelihood of success on the merits of its foreclosure claim. “Generally, the party seeking foreclosure has the burden of establishing the existence of the debt and the mortgagor's default on that debt.” *U.S. Bank Trust National Association v. Bell*, 385 S.C. 364, 374-375, 684 S.E.2d 199, 205 (Ct. App. 2009). Respondent established the existence of the debt (the Loan) and the Loan Documents, as well as Appellants’ Defaults. See §§ I.A. (ps. 2-3) and I.D. (ps. 6-7) above. Respondent also established its ownership of the Loan and the Loan Documents, Appellants’ counsel’s continued, or feigned, confusion notwithstanding. Complaint ¶ 18 (R. p. 22); Dickerson Aff. ¶¶ 6 and 7 (Supp. R. pp. 788-789, 795-802); App. Brief § III.B.

Finally, the Sequester Order did not grant Respondent possession of the Shopping Center and clearly contemplated Appellants remaining in control of and maintaining and operating same, with operating expenses to be paid before the excess Rents (net operating income) were to be remitted to Respondent. Sequester Order ¶ C(i) at p. 8 (R. p. 10). Therefore, Appellants’ assertions that the Sequester Order “seize[d] effective control of the shopping center away from Appellants by ‘sequestering rents’ ordinarily paid to Appellants and effectively giving those rental payments to Respondents” (App. Brief at p. 20) are both histrionic and false.

CONCLUSION

For the foregoing reasons, this appeal lacks merit and the Subject Orders should be affirmed.



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