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**THE STATE OF SOUTH CAROLINA
In the Supreme Court**

OCT 22 2019

S.C. SUPREME COURT

**APPEAL FROM HORRY COUNTY
Court of Common Pleas**

**The Honorable Larry B. Hyman, Jr.
Circuit Court Judge**

Opinion No. 5537

Heard March 5, 2018 Filed July 11, 2018

Petition for Rehearing Denied September 20, 2018

Appellate Case No. 2018-001910

SKYDIVE MYRTLE BEACH, INC. Petitioner

v.

HORRY COUNTY Respondent

SUPPLEMENTAL BRIEF OF RESPONDENT

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ISSUES ON APPEAL

- Ia. Whether the circuit court correctly denied SDMB’s waiver/counterclaim argument when SDMB did not raise this argument to the magistrate, which means it is not preserved.
- Ib. Whether the Court should affirm the denial of the waiver argument-lack of preservation notwithstanding-when Horry County’s claim for summary ejectment was not a compulsory counterclaim to SDMB’s separate lawsuit seeking money damages.
- II. Whether the circuit court and the magistrate correctly held SCRCP 12(b)(8), which applies when another action is pending between the same parties, did not bar the County from proceeding with summary ejectment at the same time SDMB was pursuing a separate suit for damages.
- III. Whether SDMB received due process when the circuit court and the magistrate correctly followed the rules of court.
- IV. Whether the circuit court and the magistrate correctly found a landlord-tenant relationship between SDMB and the County and that SDMB did not have a right to continue occupying the County’s property.
- V. Whether the circuit court correctly held that the ejectment order was no longer stayed when the magistrate’s order explains its stay will expire at the conclusion of the circuit court appeal.

STATEMENT OF THE CASE

Pursuant to the Order of Chief Justice Donald W. Beatty dated September 26, 2019, Horry County submits this supplemental brief addressing the merits of the case. Horry County hereby adopts its Final Brief of Horry County filed with the S.C. Court of Appeals and transferred to the South Carolina Supreme Court through a Writ of Certiorari. Horry County will attempt avoid unnecessary repetition of the contents of its brief filed in the S.C. Court of Appeals. Horry County will provide supplemental arguments and request the Court to take judicial notice of court orders which have been issued since the final brief was filed in the S.C. Court of Appeals on July 15, 2016.

STANDARD OF REVIEW

An appellate court will presume that an affirmance by a circuit court of a magistrate's judgment was made upon the merits where the testimony is sufficient to sustain the judgment of the magistrate and there are no facts that show the affirmance was influenced by an error of law. Burns v. Wannamaker, 281 S.C. 352, 357, 315 S.E.2d 179, 182 (Ct. App. 1984), aff'd as modified, 288 S.C. 398, 343 S.E.2d 27 (1986). Specifically, “[i]n ejectment proceedings first heard in magistrate's court, the appellate court is without jurisdiction to reverse the findings of fact of the circuit court if there is any supporting evidence.” Vacation Time of Hilton Head Island, Inc. v. Kiwi Corp., 280 S.C. 232, 233, 312 S.E.2d 20, 21 (Ct. App. 1984). Unless the appellate court finds an

error of law, the court will affirm the judge's holding if there are any facts supporting his decision. Id.

The appellate court still retains de novo review of whether the facts show the circuit court's affirmance was controlled or affected by errors of law. In Stanford v. Cudd, 93 S.C. 367, 370, 76 S.E. 986, 987 (1913), the court held that where the testimony is sufficient to sustain a judgment of the magistrate's court, and it is affirmed on appeal to the circuit court, this court will assume the circuit court affirmed the judgment on the merits, in the absence of facts showing the affirmance was controlled or affected by errors of law. Bowers v. Thomas, 373 S.C. 240, 244–45, 644 S.E.2d 751, 753 (Ct. App. 2007).

The burden of proof is on the SDMB to convince the appellate that the lower court was in error. *See* Conran v. Joe Jenkins Realty, Inc., 263 S.C. 332, 334, 210 S.E.2d 309, 310 (1974).

STATEMENT OF FACTS

In addition to the matters stated in the Statement of the Case and Statement of Facts in Horry County's final brief in the S.C. Court of Appeals, Horry County includes the circuit court's findings of facts which it contends are supported by the record. [R.11]

CIRCUIT COURT FINDINGS OF FACT

1. Horry County is the landlord and owner of Hangar 7 at Grand Strand Airport CRE.

2. On May 10, 2012, SDMB Skydive Myrtle Beach, Inc. entered an agreement (jump agreement) with Grand Strand Aviation to provide tandem parachute jumps for SDMB from the Grand Strand Airport.
3. Paragraph 5 of the jump agreement provides: "There will be no packing fees charged to Skydive MB. Skydive shall be provided with a **minimum of 2,500 square feet during daylight hours** without fee seven days a week, including holidays, 365 days a year."
(emphasis added).
4. Paragraph 18 of the jump agreement provides the agreement will remain in effect through Grand Strand Aviation's lease with Horry County Department of Airports through July 2020.
5. Grand Strand Aviation's lease with Horry County Department of Airports was terminated by agreement in 2013.
6. On September 13, 2013, Horry County through its Department of Airports entered a new commercial agreement with SDMB permitting SDMB to use the approximately 6800 square feet of space in Hangar 7 twenty four hours a day seven days a week until January 31, 2014. The fee for the use of the space in Hangar 7 was monthly payments of One Thousand Two Hundred & no/100's (\$1200.00) dollars per month. Horry County reserved the right to adjust the amount of the fee for use of the space upon thirty days' notice to SDMB.
7. Paragraph 14 of the Hangar 7 permit agreement provided: "This permit constitutes the entire agreement of the parties with respect to the subject matter hereof and supersedes all previous agreements, representations and understandings concerning the same, whether written or oral. The provisions of the Permit may be modified, amended or waived only by written instrument executed by the County (Horry County) and Company (SDMB)."
(Parenthesis added).

8. The Hangar 7 agreement was duly signed by Horry County and SDMB.
9. The Hangar 7 permit expired by its own terms on January 31, 2014.
10. SDMB is now occupying Hangar 7 without permission or authority from Horry County.
11. On or about June 5, 2014, Horry County duly served and filed in Magistrate's Court an Ejectment Proceeding/Rule to Vacate. On June 13, 2014, SDMB responded by filing a Motion to Remove pursuant to S.C. Code Ann. § 22-3-30 contesting the Court's jurisdiction.
12. On July 2, 2014, Judge Christopher Arakas denied the Motion to Remove and set an original trial date for Horry County's Rule to Vacate for July 23, 2014.
13. SDMB did not file a second responsive pleading within 15 days of the denial of its Motion to Remove on by Judge Arakas on July 2, 2014.
14. On July 21, 2014, the Magistrate's office received a letter dated July 18, 2014, requesting that the Magistrate reconsider his order of July 2, 2014, or in the alternative grant SDMB a jury trial and permission to file a counterclaim. On July 23, 2014, Judge Arakas denied SDMB's request to reconsider his Motion to Remove and his request for a jury trial plus 30 days to file a counter claim. Judge Arakas denied both requests on the grounds that the requests were untimely. Judge Arakas tried the Horry County's Ejectment Action/Rule to Vacate in a nonjury trial and ruled in favor of the Horry County granting the eviction of the SDMB.
15. Judge Arakas found that the lease agreement between Horry County and SDMB had expired. Horry County is the rightful Landlord and did present SDMB with a new agreement/lease. SDMB did not agree with it and refused to sign the new agreement/lease. Therefore, SDMB had no legal right to be on the property or in the building.

SUPPLEMENTAL ARGUMENTS

1(a) Whether the circuit court correctly denied SDMB's waiver/counterclaim argument when SDMB did not raise this argument to the magistrate, which means it is not preserved.

Horry County repeats and reiterates its arguments stated in its Respondent's Brief to the S.C. Court of Appeals.

1(b). Even if the waiver argument was preserved, and it is not, the Court should affirm because Horry County's claim for summary ejectment was not a compulsory counterclaim to SDMB's separate lawsuit, which principally seeks money damages.

Horry County's argument that SDMB cannot oust the Magistrate's jurisdiction by the assertion of a superior title in itself is stated in Section I (b) of its brief to the S.C. Court of Appeals. The following argument contends that when Horry County filed its answer in *Skydive Myrtle Beach, Inc. (f/k/a Skydive Myrtle Beach, LLC) v. Horry County & Horry County Department of Airports, H. Randolph Haldi, Pat Apone, Tim Jackson and Jack Teal*, C/A No. 2014-CP-26-01193 Horry County's counterclaim had not accrued. Horry County could not have filed a counterclaim for eviction when it answered SDMB's state court lawsuit 2014-CP-26-01193.

Horry County served and filed its answer in SDMB's state court action on March 18, 2014. [R 75] At the time the answer was filed both parties were still in negotiations over entering a second agreement for the rental of Hangar 7. Horry County had notified SDMB in writing that it had until April 15, 2014, to execute Horry County's standard form Space Use Permit. [R 333] On April 18, 2014, SDMB notified Horry County that SDMB "cannot agree to the material change in the Space Use Permit." [R 333] Horry County then notified SDMB the operating permit would terminate on May 27, 2014, and

Horry County bring an action to eject SDMB from the premises. [R 333] Horry County did not have basis to bring a counterclaim for ejectment on March 18, 2014.

SDMB claimed that the claims in its state court action involved the same transaction or occurrence as Horry County's eviction and were therefore a compulsory counterclaim and were barred by res judicata or estoppel by judgment because Horry County did not assert a counterclaim. Beach Co. v. Twillman, Ltd., 351 S.C. 56, 62, 566 S.E.2d 863, 865 (Ct. App. 2002). Horry County contends that SDMB's claims were not the same transaction or occurrence as Horry County's statutory eviction action. All of SDMB's claims pending in the state court action arose before February 28, 2014, the date SDMB filed its state court complaint. [R 34] Horry County's right to evict SDMB did not arise until after May 27, 2014. [R 333]

II. Whether the circuit court and the magistrate correctly held SCRCP 12(b)(8), which applies when another action is pending between the same parties, did not bar the County from proceeding with summary ejectment at the same time SDMB was pursuing a separate suit for damages.

In addition to Horry County's above stated arguments that SDMB's state court lawsuit did not involve the same claims, Horry County respectfully requests that this Court take judicial notice of a recent companion case in connection with the parties to the state court lawsuit. Skydive Myrtle Beach, Inc. v. Horry Cty., 426 S.C. 175, 826 S.E.2d 585 (2019). In that case the court found that SDMB alleged that an individual defendant, Tim Jackson, defamed Skydive by communicating to other tenant businesses "false statements that were intended to impeach the honesty, integrity, virtue, or reputation" of SDMB. Jackson allegedly "published these statements with actual or implied malice" in an attempt "to injure [SDMB] in its office, business, or occupation," thereby exposing

Skydive “to public hatred, contempt, [and] ridicule.” Id. The Court further found that SDMB alleged certain other individuals named as defendants acted in the scope of employment but outside the scope of their official duties. For example, SDMB claims the individuals acted “under cloak of state authority” to carry out “malicious actions.” The named individual defendants were not allowed to be dismissed from the lawsuit under the South Carolina Tort Claims Act which prohibits naming individual employees as defendants. None of the named individual defendants were parties or had standing to be parties in Horry County’s above captioned eviction action.

SDMB’s attorney claimed that because SDMB alleged constructive eviction in SDMB’s Circuit Court case, the eviction proceeding in Magistrate’s Court was barred by SCRCP 12(b)(8). Horry County contends that a claim for constructive eviction and a claim for summary eviction pursuant to S.C. Code Ann. § 27-37-10, et. seq. are different claims.

A tenant asserting constructive eviction must show: (1) some intentional act or omission of the landlord deprived the tenant of possession or substantially interfered with the tenant’s beneficial use or enjoyment of the leased premises and (2) as a result of the act or omission by the landlord, the tenant abandoned the premises. Pleasantburg Warehouse Co. v. Glob. Distribution, Inc., 287 S.C. 422, 423, 339 S.E.2d 135, 136 (Ct. App. 1985). There is no “constructive eviction” if the tenant continues in possession of the premises however much he may be disturbed in the beneficial enjoyment. To establish a constructive eviction of the premises, in order to avoid liability for rent, the

tenant must surrender or abandon the premises within a reasonable time after the landlord's wrongful act. 49 Am. Jur. 2d Landlord and Tenant § 598 (footnotes omitted). Thomas v. Hancock, 271 S.C. 273, 246 S.E.2d 604 (1978); 52 C.J.S. Landlord & Tenant § 455; 49 Am. Jur. 2d Landlord and Tenant § 301. Pleasantburg Warehouse Co., 287 S.C. at 424. Under a summary eviction proceeding pursuant to SC Code Ann. §27-37-10, et. seq. tenant may be ejected (1) if the tenant fails or refuses to pay the rent when due or when demanded, (2) if the term of tenancy or occupancy has ended, or (3) if the terms or conditions of the lease have been violated. S.C. Code Ann. § 27-37-10. The two claims are not the same under SCRPC 12(b)(8). The lower courts found that the terms of the lease had ended in January, 2014. [R 3 & R 17]

III. *Whether SDMB received due process when the circuit court and the magistrate correctly followed the rules of court.*

For Section III's arguments, Horry County would reiterate its arguments stated in its Respondents Brief filed in the S.C. Court of Appeals for the present appeal. Horry County would supplement its arguments by requesting the Court to take notice of the fact that in addition to the claims now pending in South Carolina Circuit Court, SDMB and its employees filed multiple separate actions in the Federal court system. The first claim was a claim for discrimination that was filed with the Federal Aviation Administration (FAA). That claim was dismissed with prejudice by FAA and the dismissal was affirmed by the Fourth Circuit Court of Appeals. See *Skydive Myrtle Beach, Inc. v. Horry Cty. Dep't of Airports*, FAA Docket No. 16-14-05, Director's Determination at 1 (Oct. 7, 2015)

and Skydive Myrtle Beach Inc. v. Horry Cty. Dep't of Airports, 735 F. App'x 810 (4th Cir. 2018). The other federal claims began as separate claims by the individual employees of SDMB who brought separate claims in their individual names. The employees' claims were repeats of essentially SDMB's same claims in state court. Those claims were dismissed on a motion to dismiss with prejudice by the U.S. District Court because SDMB's employees did not have standing to bring SDMB's claims against Horry County. See Davis v. Horry Cty. Council, No. 4:17-CV-391-DCC, 2019 WL 3407121 (D.S.C. July 25, 2019).

IV. *Whether the circuit court and the magistrate correctly found a landlord-tenant relationship between SDMB and the County and that SDMB did not have a right to continue occupying the County's property.*

Horry County supplements its brief in the Court of Appeals by noting SDMB claims that Horry County's Space Use Permit was an illegal contract which is unenforceable due to violation of the Anti-Head Act, 49 U.S.C.A. § 40116 (West). SDMB claims that pursuant to federal law, an airport "may not levy or collect a tax, fee, head charge or other charge on (I) an individual traveling in air commerce; . . . or (4) the gross receipts from that air commerce or transportation. 49 USC § 40116(b). Horry County contends that if SDMB were correct, the 2012 eight year jump agreement between SDMB and Grand Strand Aviation would also be illegal for the same reasons. [R359-360] In the 2012 agreement between Grand Strand Realty and SDMB, Grand Strand was paid 14% of the income and Horry County was paid 5% of the gross

income Grand Strand received directly from jumpers on all jumps. [R 359]

Further, the decision to evict SDMB from Hangar 7 was not based upon a breach of a lease. The Magistrate and the Circuit Court Judge found SDMB had no legal right to be on the property or in the building. The lower courts found that there were no remaining agreements which permitted SDMB to occupy Hangar 7. [R. p. 3 & p. 13]

Under those circumstances Horry County was the landlord because it was owner or person in possession or entitled to possession of the real estate used or occupied by SDMB. S.C. Code Ann. § 27-33-10. SDMB was a tenant at will because it was occupying Hangar 7 without an oral or written agreement. When the summary eviction proceedings were conducted under S.C. Code Ann. § 27-33-10, the relationship between the Horry County and SDMB would still be that of a landlord and a tenant at will. See Bruce v. Durney, 341 S.C. 563, 570, 534 S.E.2d 720, 724 (Ct. App. 2000). In addition to the reasons set forth in the Horry County's Respondent's brief in the SC Court of Appeals, the circuit court and the Magistrate correctly found a landlord-tenant relationship and the Magistrate correctly found SDMB did not have a right to continue occupying the County's property. S.C. Code Ann. § 27-33-10, et seq.

V. *Whether the circuit court correctly held that the ejectment order was no longer stayed when the magistrate's order explains its stay will expire at the conclusion of the circuit court appeal.*

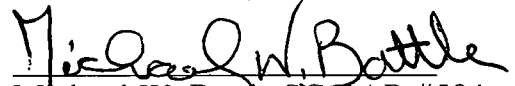
Horry County will rely on the arguments stated in it Respondent's Brief in

the S.C. Court of Appeals to the effect that: 1) The Magistrate's Bond order clearly states its limited terms; and 2) SCACR 241, clearly states the process for obtaining a stay for appeals that are exceptions to the automatic stay rule contained in SCACR 241. See United Dominion Realty Tr., Inc. v. Wal-Mart Stores, Inc., 307 S.C. 102, 413 S.E.2d 866 (Ct. App. 1992). SDMB did not follow the process set forth in SCACR 241, and therefore SDMB cannot claim protection under the Magistrate's Bond order or under the automatic stay provisions of SCACR 241. SDMB vacated the premises and the appeal of the summary eviction proceeding is now moot. Berry v. Zahler, 220 S.C. 86, 66 S.E.2d 459 (1951)

CONCLUSION

SDMB's appeal should be dismissed because it is moot. Even if the Court were to decide SDMB's appeal was not moot, SDMB's appeal should be dismissed on its other merits for the reasons stated above and for the reasons stated in Horry County's Respondent's Brief filed in the South Carolina Court of Appeals.

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October 21, 2019

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PROOF OF SERVICE

Teresa Phillips certifies that she is an employee with the Battle Law Firm, LLC, representing Respondent, and that she has mailed the Supplemental Brief of Respondent to the addressee shown this 18th day of October, 2019, with the proper postage attached thereto.

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