

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM HORRY COUNTY
Court of Common Pleas

S.C. SUPREME COURT

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 PETITIONER

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Pursuant to the Order of September 26, 2019, the Appellant/Petitioner Skydive Myrtle Beach, Inc. (“Appellant” or “SDMB”) submits the following Supplemental Brief of Appellant against the Respondent Horry County (“Respondent” or “Horry County”). SDMB relies on, and incorporates herein by reference, the arguments made in its *Final Brief of Appellant* [R. pp. 362-409] and its *Final Reply Brief of Appellant* [R. pp. 443-459], filed with the South Carolina Court of Appeals in 2016.

STANDARD OF REVIEW

Whereas the circuit court maintains a broad scope of review in deciding an appeal of a magistrate's order, the [appellate court], when reviewing the circuit court's adjudication of an appeal of an ejectment proceeding in magistrate's court, does so under a more limited standard, under which (1) findings of fact are to be upheld if there is any supporting evidence and (2) absent an error of law, the circuit court's holding is to be affirmed. *McNair v. United Energy Distributors*, 390 S.C. 44, 49-50, 699 S.E.2d 723, 726 (Ct. App. 2010); *Bowers v. Thomas*, 373 S.C. 240, 244, 644 S.E.2d 751, 753 (Ct. App. 2007). Where the circuit court has affirmed the magistrate court decision, this court looks to whether the circuit court order is “controlled by an error of law or is unsupported by the facts.” *Parks v. Characters Night Club*, 345 S.C. 484, 490, 548 S.E.2d 605, 608 (Ct. App. 2001). “

LEGAL ARGUMENT

SDMB reorders its arguments made in the *Final Brief of Appellant* to the Court of Appeals.

A. The circuit court was guided by errors of law in failing to reverse or vacate the magistrate's order for his improper application of the rules of court – which deprived SDMB of its due process protections. [Argument III].

South Carolina recognizes that a court's *obligation* is to provide a forum for a fair and just resolution of disputes between parties. *See Williams v. Watkins*, 380 S.C. 319, 327, 681 S.E.2d. 87, 96 (Ct. App. 2009) ("law favors the resolution of disputes based upon all parties having their day in court."). With respect to cases originating in magistrate court, South Carolina rules mandate that the "magistrate court shall be lenient in the allowance of changes or amendments to complaints, answers, and counterclaims, and in granting continuances of trials for good cause shown when necessary to serve the ends of justice." Rule 14, South Carolina Magistrate's Court Rules ("SCMCR").

Moreover, the General Assembly has specifically legislated that in hearing appeals from magistrate's court, "the appellate court shall give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits." S.C. Code Ann. § 18-7-170 (emphasis added); *see also Burns v. Wannamaker*, 281 S.C. 352, 357, 315 S.E.2d 179, 181 (Ct. Ap. 1984) (holding this court will not grant the presumption the circuit court correctly upheld the magistrate court where, as here, "it clearly appears that the circuit court applied an erroneous standard of review and failed to accord the contested facts the scrutiny which Section 18-7-170 contemplates").

In its two briefs [R. pp. 386-390, 451-453] to the Court of Appeals, Appellant has already detailed all of its arguments that the magistrate court denied it is substantive due process rights in an arbitrary and capricious manner. *Worsley Cos. v. Town of Mt. Pleasant*, 339 S.C. 51, 56, 528 S.E.2d 657, 660 (2000). Two of the issues, however, call out for supplemental attention: (1) the denial of the right to a jury trial; and (2) the right to a continuance to file its answer and counterclaims.

Denial of Right to a Jury Trial.

SDMB was deprived of its right to a jury trial. SDMB submitted its request five (5) days in advance of the trial date. [R. p. 88]. The Magistrate Court, however, claimed that this request was out of time because the five (5) day period included an intervening Saturday and Sunday (in contravention of Rule 2, SCRMC). [R. p. 3]. The Circuit Court affirmed under this narrow interpretation. [R. p. 15, ¶¶ 10-12].

The South Carolina Constitution provides that the right to a jury trial shall be preserved *inviolata*. See S.C. CONST. ART. I, § 14; *see also In re Kevin R.*, 409 S.C. 297, 298, 762 S.E.2d 387, 388 (2014). Whether a party is entitled to a trial by jury depends on whether the right to a jury was secured at the time of the adoption of our state constitution. *Mims Amusement Co. v. S.C. Law Enforcement Div.*, 366 S.C. 141, 150, 621 S.E.2d 344, 348 (2005) (“The right to a trial by jury is guaranteed in every case in which the right to a jury was secured at the time of the adoption of the Constitution in 1868.”).

“Generally, the relevant question in determining the right to a trial by jury is whether the action is legal or equitable.” *Carolina First Bank v. BADD, LLC*, 414 S.C. 289, 293, 778 S.E.2d 106, 108 (2015). Whether a party is entitled to a jury trial is a question of law, which [an appellate] [c]ourt reviews de novo, owing no deference to the [trial court's] decision. *Id.*, 414 S.C. at 292, 778 S.E.2d at 108. In this case, an ejectment action is legal in nature. *Cf. Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 566 S.E.2d 863 (Ct. App. 2002).

In *South Carolina Community Bank v. Salon Proz*, 420 S.C. 89, 93-94, 800 S.E.2d 488, 490-491 (Ct. App. 2017) – which was handed down after briefing in the case at bar – the Court of Appeals (Lockemy, C.J.) held that the Defendants did not waive a right to jury trial merely because the clerk had issued an order of reference to the master-in-equity,

when the Defendants' counsel never had notice. ("Under these circumstances, and given the **important** right involved here, we find no waiver of the right to a jury trial occurred following the proper jury demand."(emphasis added)). The Court of Appeals then went on to hold at least one of Defendants' counterclaims was legal in nature, thus warranting a trial by jury. *Id.*, 420 S.C. at 97, 800 S.E.2d at 492.

Here, though, SDMB did not get the same ruling. The magistrate court's nitpicking over weekend days before a jury trial demand is inconsistent with the purposes of S.C. Code Ann. § 18-7-170 and, at a minimum, should have been grounds for a continuance under Rule 14, SCRMC. Rule 14 guides the magistrate to be *lenient* with a continuance when matters are raised at a hearing in the first instance, and to be liberal in granting amendments "when necessary to serve the ends of justice." *Id.* The circuit court should have reversed on these grounds. Instead, it sifted through the Magistrate's Court Rules looking for any reason to deny the Appellant the right to a jury trial.

Depriving SDMB of its right to a jury trial is a severe abuse of discretion warranting reversal. *Hamm v. South Carolina Pub. Serv. Comm'n*, 312 S.C. 238, 241, 439 S.E.2d 852, 853 (1994) (absent an abuse of discretion, the court's decision to deny a continuance will not be disturbed on appeal); *Samples v. Mitchell*, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997) (the failure to exercise discretion, however, is itself an abuse of discretion).

Denial of a continuance to file its Answer and Counterclaims.

SDMB should also have had fifteen (15) days to file an answer and counterclaim, pursuant to Rule 12(a)(1), SCRCP (as applicable via Rule 2, SCRMC) when the magistrate ruled on the second motion to dismiss. [R. p. 3]. Because SDMB filed a timely motion to reconsider the original motion to dismiss and the magistrate entertained it, the magistrate

only completed resolution of the Rule 12, SCRCP motions to dismiss on the day of the trial. [*Id.*]. By insisting on a trial that day, without notice, the magistrate did not afford SDMB its opportunity to answer and counterclaim. [R. p. 3, 88].

Despite, this the circuit court ruled, however, to affirm the magistrate. [R. pp. 14-15, ¶¶ 8-10]. Again, this is clearly in error which is further grounds for reversal. Rule 14, SCMCR; *Hamm*, 312 S.C. at 241, 439 S.E.2d at 853; *Samples*, 329 S.C. at 112, 495 S.E.2d at 216; *Worsley Cos.*, 339 S.C. at 56, 528 S.E.2d at 660.

B. The circuit court was guided by errors of law in not reversing or vacating the magistrate's order by virtue of the fact the Respondent's magistrate case was a mandatory counterclaim in ongoing circuit court litigation, which the Respondent waived under Rule 13(a), SCRCP by not pleading it in the circuit court. [Argument 1].

SDMB filed 14-CP-26-1193 on February 28, 2014, which Horry County answered without a counterclaim on March 18, 2014. [R. pp. 33-68, 69-75]. However, *after* it answered 14-CP-26-1194 without a counterclaim or amendment, Respondent now says it notified the Appellant on April 15, 2014 that the permit would terminate on May 27, 2014. [Resp. Supp. Brief, pp. 8-9; R. p. 333].

Despite this, Horry County *admits* in its Supplemental Statement of Fact that “[t]he Hangar 7 permit expired by its own terms on January 31, 2014.” [Resp. Supp. Brief, p. 7]. Accordingly, Horry County maintains (unconvincingly), that its right to evict did not arise until after May 27.

Respondent cannot have it both ways. How can it say that on the one hand the permit expired in by its own terms at the end January – but that Horry County somehow, somehow gave SDMB until the end of May to adhere to it (motivated by compassion it has not otherwise shown to SDMB in any other facet of the case). Under the “logical

relationship” test established in *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 217, 493 S.E.2d 826, 835 (1997) – and based on the holding of *Beach Co. v. Twillman*, 351 S.C. 56, 61, 566 S.E.2d 863, 865 (Ct. App. 2002) that a commercial tenant’s claims and a commercial landlord’s eviction **which arise out of the same lease agreement** are logically related to one another – then *Horry County had to bring its eviction in 14-CP-26-1194 as a mandatory counterclaim*. It had the right to evict Appellant in January; therefore, it should have done so when it answered the complaint.

Keep in mind that Horry County filed its Magistrate Court eviction action in June 2014 based on the expiration of the permit in January – not that SDMB had failed to pay it rent or for some other breach. [R. pp. 1, 3, 78]. Yet, this was the *identical permit* that SDMB had attacked (every which way) as unlawful in 14-CP-26-1194. If Rule 13(a), *Crestwood* and *Twillman* mean what they say – and say what they mean – then Horry County had to fight to evict SDMB as a *counterclaim* in 14-CP-26-1194¹ and not as a separate proceeding before the magistrate’s court.

Horry County clearly went “judge shopping” in the Magistrate Court and found exactly what it was looking for. Accordingly, the Supreme Court should not let Respondent get away a blatant violation of Rule 13(a), SCRCP – especially when it: (a) does not analyze how the claims are not logically related and (b) brings up a new ground [i.e., it could not have possibly brought the claim until after May although it had ever right to after January] not previously argued to any court.

¹ This is further demonstrated later in Horry County’s Supplemental Brief, when Horry County states that SDMB’s eviction “was not based on the breach of a lease” and that SDMB had “no legal right to be on the property or in the building.” [Resp. Supp. Br. p. 13]. Such a position by the County has to be based on the permit, rather than the original contract; and this was precisely the point brought by SDMB in 14-CP-26-1194.

Appellant also respectfully relies on its previous arguments as well [R. pp. 377-382, 447-449].

C. The circuit court was guided by errors of law in not reversing or vacating the magistrate’s order by virtue of Rule 12(b)(8), SCRCP. [Argument 2].

The same holds true for Respondent’s arguments in response to the grounds for appeal under Rule 12(b)(8). Here, 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.” [Resp. Supp. Brief, p. 10]. Thus, it argues, Rule 12(b)(8) does not apply.

However, in *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 106, 674 S.E.2d 524, 531-532 (Ct. App. 2009), the Court of Appeals previously held that Rule 12(b)(8) is extended to where the claims are substantially the same. It should be noted that the Supreme Court cited *Capital City* favorably in Justice Kittredge’s opinion in *Freemantle v. Preston*, 398 S.C. 186, 196, 728 S.E.2d 40, 45 (2012). Thus, *Capital City* remains good law.

Here, SDMB filed 14-CP-26-1194, stating that it was being illegally evicted by Horry County’s adoption of the permit; Horry County – for its part – filed its magistrate court case trying to evict SDMB by virtue of the *same, identical* permit. The first case (14-CP-26-1194) is therefore substantially the same case as the Magistrate Court action, against the same parties, arguing over the efficacy of the permit. *Capital City* is therefore satisfied. 382 S.C. at 106, 674 S.E.2d at 531-532

Thus, Rule 12(b)(8) applies. Once again, it does not matter that SDMB sued other Defendants, or that Horry County chose a friendlier court to litigate eviction. Judge Hyman, however, ignored Appellant’s Rule 12(b)(8) argument. If the Supreme Court

allows Horry County to escape dismissal of the magistrate court case, then Horry County is merely encouraged to keep undertaking the same kind of forum shopping. Here, the Supreme Court should instead strike a blow against the practice.

SDMB further relies on its prior arguments in support of this argument, as well. [R. pp. 382-386, 451-452].

D. The circuit court was guided by the same error of law as the magistrate in ruling that the Space Use Permit (a temporary, revocable 90-day license between the parties, without consideration) had superseded, modified and novated a prior eight (8) year, long-term lease between them. [Argument IV].

In its Supplemental Brief, Horry County argues that if the Space Use Permit is illegal, then so was the jump agreement. This does not matter; only the permit is before the Supreme Court and an illegal contract (i.e., the Permit) is unenforceable – especially since it was the expiration of the *permit*, and not the original lease, which Respondent used to secure SDMB’s ouster. This simply cannot be done. *Berkebile v. Outen*, 311 S.C. 50, 53 n. 2, 426 S.E.2d 760, 762 n. 2 (1993); *Beach Co. v. Twillman*, 351 S.C. 56, 64, 566 S.E.2d 863, 866 (Ct. App. 2002).

SDMB relies on its earlier analysis of novation law contained in the argument. [R. pp. 390-400, 452-453].

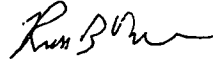
E. The circuit court committed an error of law in holding that its ruling was not automatically stayed during the pendency of the instant appeal. [Argument V].

For this issue, SDMB relies on its earlier analysis of the law involving the bond, [R. pp. 400-407, 453-457], as well as its briefing and argument before the Supreme Court on *certiorari*.

CONCLUSION

Since this action is not moot, SDMB therefore requests that the Supreme Court reverse the circuit court's ruling as it is based on numerous procedural errors and errors of law, and vacate the magistrate's judgment based on its errors of law.

Respectfully submitted.



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PROOF OF SERVICE – SUPPLEMENTAL BRIEF OF PETITIONER

The undersigned attorney for Petitioner hereby certifies that a true copy of the *Supplemental Brief of the Petitioner* in the above-referenced matter has been served on all counsel of record by sending a copy via U.S. Mail on this the 28th day of October 2019, to the following:

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