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THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

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MAY 15 2013

APPEAL FROM GREENVILLE COUNTY
Thirteenth Judicial Circuit

SC Court of Appeals

The Honorable Edward W. Miller, Circuit Court Judge

Case No. 2012-CP-23-06319

Shaw Funding, LLC, Build A House, LLC d/b/a Multifamily
Products, Builders Design House, LLC, Builders First Mortgage,
Builders First Funding, LLC, Investor Funding, LLC, Total Stone, LLC,
American Lighting Co., Contract Supply, LLC, Global Solution, and
MS Mechanical Solutions, LLC.....Respondents,

v.

Multifamily Products, LLC and Paul Taylor, as a member
of Build a House, LLC and individually.....Appellants.

MOTION TO DISMISS AND/OR FOR CLARIFICATION

Respondents Shaw Funding, LLC, Build A House, LLC d/b/a Multifamily
Products, Builders Design House, LLC, Builders First Mortgage, LLC, Builders First
Funding, LLC, Investor Funding, LLC, Total Stone, LLC, American Lighting Co.,
Contract Supply, LLC, Global Solutions and MS Mechanical Solutions, LLC. ("BAH")
submits the following Motion to Dismiss pursuant to Rule 240, SCACR.

FACTUAL AND PROCEDURAL BACKGROUND

On October 4, 2012, the Business Court for Greenville County Court in the
Thirteenth Judicial Circuit (the "Business Court") granted two orders from which
Taylor has appealed – Order Granting Temporary Restraining Order ("TRO Order")

and an Order Appointing Receiver ("Temporary Receiver Order").¹ BAH's Motion for Temporary Restraining Order sought to temporarily restrain Defendants, Paul Taylor ("Taylor") and Multifamily Products, LLC ("Multifamily") from: (1) Utilizing the assets, confidential, proprietary and trade secret information of Build A House, LLC d/b/a Multifamily Products ("BAH") for the operation of Multifamily as a competing business; (2) continuing to operate the Multifamily website; (3) continuing any business operations of Multifamily; (4) misusing or otherwise misappropriating the assets of BAH; (5) interfering with the business endeavors of BAH, including ongoing construction projects; (6) taking and/or transferring money out of any accounts owned, held by or in which BAH has an interest in any manner that violates the corporation's Operating Agreement; and (7) using, selling, liquidating, or disposing of in any manner BAH corporate funds or assets of any kind.

BAH's Motion for Appointment of a Receiver requested the Court appoint a Receiver to be given full authority to take possession and control and marshal of all of BAH's corporate property and assets and take possession and control and marshal of all of Multifamily Products, LLC's assets.

On October 3, 2012, the Business Court heard BAH's Motion for Temporary Restraining Order and Motion for Appointment of a Receiver. The Business Court granted both motions by Orders dated October 4, 2012. Specifically, the Business Court granted an *Ex Parte* Temporary Restraining Order ("TRO") temporarily restraining Defendants as stated in the Order. The Business Court's Order Appointing a Receiver

¹ The TRO Order was filed on October 10th and Receiver Order filed on October 9th.

appointed a *temporary* receiver to take control and possession and marshal the property and assets of BAH until such a time as all parties could appear before the Business Court.

On October 12, 2012 Taylor filed a Motion to Void Vacate or Reconsider the Order Granting TRO or to Appoint Receiver. On October 22, 2012 Taylor filed a Notice of Appeal of the TRO and Temporary Receiver Order. Following his filing of this appeal, Taylor took the position that all matters decided in both orders, but especially the Temporary Receiver Order, were stayed pending the appeal. This opposition frustrated the purpose of the Temporary Receiver Order and endangered the business the Temporary Receiver was put in place to protect. BAH disagreed with Taylor's position regarding the stay and argued that an order appointing a receiver is an explicit exception to the automatic stay of Rule 241(a) SCACR.

Since the Orders were entered and Taylor filed this appeal, the parties have appeared before the Business Court on two occasions to address the receiver issue. Following these hearings the Business Court entered an Order Appointing a Permanent Receiver ("Permanent Receiver Order") on April 26, 2013. The Business Court's entry of the Permanent Receiver Order vacated the previous Temporary Receiver Order from which Taylor appeals. Therefore, the issues before this Court are moot and the action should be dismissed. Furthermore, BAH contends that both the TRO and Temporary Receiver Order fall within exceptions to the general automatic stay rule codified in Rule 241(a) and are therefore not automatically stayed in the absence of Taylor petitioning for and obtaining a superdeas bond.

Accordingly, BAH respectfully moves this Court to dismiss the Appellants' appeal of the TRO and Temporary Receiver Order.

STATEMENT OF ISSUE BEFORE THE COURT

Taylor has appealed the issuance of both the TRO and Temporary Receiver Order. He argues that the TRO was improperly issued in violation of Rule 65 of the South Carolina Rules of Civil Procedure merely because it did not explicitly state that it would expire 10 days following its issuance. Taylor attacks the validity of the Temporary Receiver Order alleging inadequate notice or opportunity to be heard in contravention of S.C. Code Ann. § 15-65-20.

LEGAL ARGUMENT AND AUTHORITIES

A. THE ISSUES ON APPEAL ARE MOOT

A case is moot where a judgment rendered by the Court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the Court. *Ex parte Doe*, 393 S.C. 147, 151, 711 S.E.2d 892, 894 (2011)(quoting *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 26, 630 S.E.2d 474, 477 (2006)); *Sloan v. Greenville Cnty.*, 361 S.C. 568 572, 606 S.E.2d 464, 467 (2004). Where there is no actual controversy, the appellate court will not decide moot or academic questions. *Sloan v. Friends of the Hunley, Id* at 26.

Defendant appealed the issuance of the Temporary Receiver Order and Ex Parte TRO as noted above. Pursuant to Rule 65 of the South Carolina Rules of Civil Procedure, the Ex Parte TRO expired 10 days following its entry on October 10, 2012. Therefore, the TRO actually expired prior to Taylor filing this appeal and any exception taken by him as to that order is now moot. Furthermore, since the time the Business Court entered the Temporary Receiver Order on October 9, 2012 and Taylor filed this appeal, the parties appeared before the Business Court on two occasions to address the

receiver issue. Following these hearings the Business Court entered an Order Appointing a Permanent Receiver (“Permanent Receiver Order”) on April 26, 2013. The Business Court’s entry of the Permanent Receiver Order vacated the previous Temporary Receiver Order from which Taylor appeals, making the issues raised in regards to that order moot.

B. THE BUSINESS COURT’S *EX PARTE* TEMPORARY RESTRAINING ORDER WAS NOT IN ERR SIMPLY BECAUSE IT DID NOT EXPLICITLY STATE IT WOULD EXPIRE IN TEN DAYS

Should this Court decide that the issues on appeal are not moot, Taylor’s argument attacking the Business Court’s *Ex Parte* TRO do not invalidate that order. Rule 65 states in part that “[e]very temporary restraining order granted without notice shall be endorsed with the date and hour of issuance, shall be filed forthwith in the Clerk’s office and entered of record, shall be served, together with a summons and complaint, in the event no summons and complaint have been previously served in the action, upon the adverse party in accordance with the provisions of Rule 4; shall define the injury and state why it is irreparable and what the order was granted without notice; and *shall expire by its terms within such time after entry, not to exceed ten days....*” 65 S.C. R. Civ. P.(emphasis added). Taylor argues that because the TRO does not expressly state that it expired 10 days following its entry it was invalid. This argument distorts and ignores the plain language of Rule 65 which does not require the court to state in an *ex parte* TRO expires in ten days following entry. Rather the clear and express language of the Rule simply says an *ex parte* temporary restraining order “shall expire by its terms within such time after entry not to exceed ten days.” Thus, if no expiration time frame is set forth in such an order, it by Rule, expires within ten days following entry.

Taylor’s attack upon the Business Court’s *Ex Parte* TRO is therefore without

merit or consequence and the lower court's ruling should be affirmed.

C. THE ORDERS FROM WHICH TAYLOR APPEALS ARE EXCEPTIONS TO THE AUTOMATIC STAY CODIFIED IN RULE 241(A) SCACR

Rule 241 states that “[a]s a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order...on appeal, and to automatically stay the relief ordered in the appealed order [and] [t]he lower court...retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal.” Rule 241 SCACR. Subsection (b) provides exceptions to the general rule, including “judgments directing the assignment or delivery of documents or personal property as provided in S.C. Code Ann. § 18-9-150 [and] an appeal from an order granting an injunction or temporary restraining order.” Rule 241(b)(2) and (8) SCACR. In order to stay matters decided in orders falling within the exceptions to Rule 241(a), a party must move for and obtain a supersedeas order. Rule 241(c) SCACR states that “[i]n a case subject to an exception [to the general rule], any party may move for an order imposing a supersede of matters decided in the order...on appeal after service of appeal. The effect of the granting of a supersedeas is to suspend or stay the matters decided in the order...on appeal.”). Unless and until a party obtains a supersedeas, an order falling within an exception to the general automatic stay under Rule 241(a) remains in effect during the pendency of the appeal.

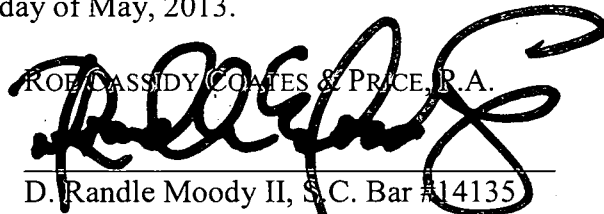
Both the TRO and Temporary Receiver Order fall within the exception to the automatic stay under Rule 241(b) SCACR. The plain language of 241(b) states that an order “granting an injunction or temporary restraining order” is not subject to the automatic stay. An Order appointing a receiver likewise falls within the purview of 241(b). Specifically, it has been held that an appeal of an order appointing a receiver

does not operate to stay the execution of the order. *Harman v. Wagner*, 33 S.C. 487, 12 S.E. 98 (1890). Therefore, Taylor's appeal of the TRO and Temporary Receiver Order did not act to automatically stay the issues decided in those orders as both are exceptions to the automatic stay provisions of Rule 241 SCACR.

CONCLUSION

The issues on appeal in this matter are moot and the appeal should be dismissed. Should the Court find that any justiciable controversy continues to exist under the circumstances, the exceptions taken by Taylor in his appeal cannot invalidate or vacate the orders of the Business Court and any arguments that the appeal operates as a stay should be rejected.

Respectfully submitted this 14th day of May, 2013.



ROE/CASSIDY/COATES & PRICE, P.A.
D. Randle Moody II, S.C. Bar #14135
Joseph O. Smith, S.C. Bar # 77475
1052 North Church Street
Greenville, South Carolina 29601
(864) 349-2600
(864)-349-0303 fax
RMoody@roecassidy.com
JSmith@roecassidy.com
Attorneys for Respondents

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COURT OF COMMON PLEAS

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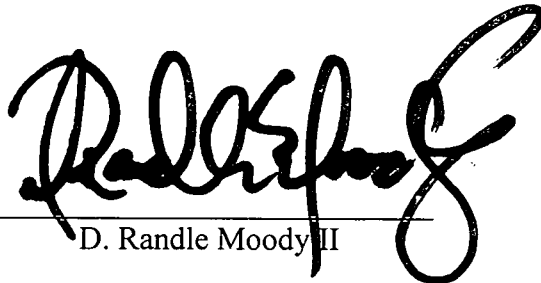
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PROOF OF SERVICE

I, D. Randle Moody II, attorney for the Respondents, hereby certify that I have served a copy of the foregoing **Motion to Dismiss and/or for Clarification** upon the below named Counsel for the Appellants this the 15th day of May 2013 via U.S. Mail, postage prepaid and addressed as follows:

Randall S. Hiller
865 Wade Hampton Boulevard
Greenville, SC 29609


D. Randle Moody II