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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 25

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In the Matter of the Application of:
HANS FUTTERMAN,

Petitioner,

For a Judgment Pursuant to CPLR 5225 and 5227 to Compel Payment of Debt Owed to Judgment Creditor

-against-

J.P. MORGAN CHASE BANK, N.A.,

Respondent.

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Index No. 104341/11

DECISION & ORDER

Motion Sequence Nos: 001 & 002

HON. SHLOMO S. HAGLER:

Motion sequence numbers 001 and 002 are consolidated for disposition.

This turnover proceeding involves a dispute over lien priority, concerning funds held by respondent J.P. Morgan Chase Bank, N.A. (Chase). Petitioner Hans Futterman (Futterman) claims that he is entitled to the funds, as assignee of a judgment in a separate action, captioned *Racanelli Dev. Group, LLC v Empire Dev. Corp.* (Sup Ct, Nassau County, September 24, 2010, Bucaria, J., Index No. 11687/06) (Judgment). Petition, Ex. 2. The Judgment is in favor of Empire Developers Corp. (Empire) and against Racanelli Development Group, LLC (RDG), in the amount of $2,046,808.78. *Id.* In Motion Sequence No. 001, Futterman seeks an order and judgment, pursuant to CPLR 5225, directing Chase to turn over RDG funds sufficient to satisfy the Judgment.

By cross petition, RDG and Domenic Racanelli (together, RDG), and their attorney, Hollander & Strauss, LLP (Hollander), seek permission to intervene in this proceeding and to dismiss Futterman's petition due to pending arbitration proceedings, and for failure to join 2280 FDB LLC (2280 FDB) as a necessary party. Alternatively, RDG and Hollander request to stay this proceeding until arbitration is completed. In Motion Sequence No. 002, RDG moves to dismiss the proceeding for failure to join 2280 FDB as a necessary party.

FACTS

Futterman's Petition

RDG commenced a Nassau County action against Empire, among others, under Index Number 11687/06. The court dismissed the complaint and awarded damages to Empire on its counterclaims, as memorialized in the Judgment. Petition, Ex. 2. By letter dated December 3, 2010, Chase informed Empire that Chase held $2,129,278.34 on deposit in two (2) RDG accounts under account numbers 3748533755 and 801754680 (together, Accounts). *Id.*, Ex. 3. The moving parties do not dispute that no part of the Judgment has been paid. Nor do they dispute that, by "Agreement" dated March 28, 2011, Empire assigned the Judgment to Futterman (Assignment). Petition, Ex. 3.

According to Futterman, Chase held the Accounts pursuant to a Cash Collateral Agreement, dated June 30, 2008, entered into by RDG, 2280 FDB, and Washington Mutual Bank.[1] Petition, ¶ 15; Cash Collateral Agreement, 6/3/11 Hollander Aff., Ex. K. This agreement was made in contemplation of 2280 FDB borrowing up to $39 million from Chase to build residential condominiums located at 2278-2286 Frederick Douglas Boulevard, New York, New York (Project). Cash Collateral Agreement, at 1-2. As a condition to Chase making the loan, and "as security for [2280 FDB] and [RDG's] duties, obligations and responsibilities" under an "AIA contract dated January 1, 2008 made between [2280 FDB] and General Contractor . . . and as security for [RDG's] obligations under the Guaranty and the General Contract," the Cash Collateral Agreement required RDG to deposit $2,279,908 in a "blocked" account held by Chase. *Id.* at 2.

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1. The parties do not dispute that Chase is a successor in interest to Washington Mutual Bank. Petition, ¶ 15; 6/13/11 Hollander Supplemental Brief, at 2 n 1. Therefore, this decision refers to Washington Mutual Bank and Chase, together, as "Chase."

In paragraph 2 of the agreement, RDG "unconditionally and irrevocably pledge[d] . . . [and] grant[ed] a security interest in" these deposited funds to Chase "as security for the due performance of all respective duties, obligations and responsibilities of [2280 FDB] and [RDG] under the Building Loan Agreement, the Note, the Mortgage, the General Contract, the Guaranty and this Agreement." *Id.* at 3. In paragraph 4, RDG represented that it: owned the pledged funds "free and clear of any liens, security interests, charges or encumbrances thereon, except the first security interest granted to [Chase] under this Agreement"; had "good right and lawful authority to pledge, mortgage, assign, grant a security interest in, deliver, deposit, set over and confirm unto [Chase] the Cash Deposit as provided in this Agreement"; and would "warrant and defend [RDG's] title to the funds and ownership thereof and the lien thereon and security interest therein created . . . against all claims of all persons" and "maintain and preserve [Chase's] lien and security interest in the Cash Collateral." *Id.* at 3-4.

Paragraph 10 of the agreement contained a termination clause, providing for termination:

> upon the earlier of (a) receipt by [Chase] of (i) Substantial Completion of the Improvements, (ii) lien waivers from all subcontractors (up to Substantial Completion percentage of Improvements); (iii) punchlist agreed to among [Chase], its Construction Consultant, [2280 FDB] and [RDG], and (iv) the Retainage Percentage, as defined in the Building Loan Agreement is maintained or (b) the Loan from [Chase] being paid off in full.

Id. at 5.

Futterman claims that 2280 FDB terminated RDG from the Project, that RDG never completed the Project, and that the Project was completed by 2280 FDB.[2] Petition, ¶¶ 17-18. According to Futterman, all conditions for termination have been satisfied and a Certificate of

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2. The cross petition alleges that RDG was terminated in June 2009.

Occupancy was issued for the Project and, therefore, "neither [RDG] nor 2280 FDB presently have a lien on the Accounts being held by the Bank." Petition, ¶ 20. Futterman submits a Temporary Certificate of Occupancy for the residential building, effective July 21, 2010 and expired on October 19, 2010. Petition, Ex. 4.

Cross Petition of RDG and Hollander

The cross petition of RDG and Hollander claims that Futterman is the individual "in control" of the Project and another construction contract involving 271 West 122nd Street (together, Projects).[3] Cross Petition, ¶¶ 6-7. RDG and Hollander claim that the construction contracts for both Projects contained dispute resolution procedures, including mandatory arbitration. They submit the cover page and selected provisions of a contract between 271 West 122, LLC and RDG, dated January 1, 2008, stating that "[a]ll disputes arising hereunder, unless resolved by mutual agreement of the parties, shall be resolved by arbitration in the County of New York" (271 Contract).[4] Hollander Aff., Ex. A, § 23.18.

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3. RDG and Hollander refer to section 23.18 of the 271 Contract, together with the purported contract between RDG and 2280 FDB, as "Contracts." Cross Petition, ¶ 8. RDG and Hollander refer to these "Contracts" interchangeably. However, their submission is limited to the title page of the 271 Contract and selected contractual provisions, without providing the entire agreement or any evidence of a separate agreement with 2280 FDB. As a result, the court is unable to discern whether the contracts contain the same language. The court notes that, according to the Cash Collateral Agreement, the "AIA Contract" is dated January 1, 2008, the same date as the 271 Contract. Cash Collateral Agreement, at 2. This decision assumes that the purported contract between RDG and 2280 FDB contains the same cited language as the 271 Contract, as is asserted by RDG and Hollander.

4. The title page of the 271 Contract refers to 271 West 122, LLC as "Owner." Cross Petition, Ex. A. By referring to the 271 Contract, together with the purported contract between RDG and 2280 FDB, as "Contracts" (Cross Petition, ¶¶ 8, 22), RDG and Hollander suggest that the purported contract between 2280 FDB and RDG contains the same language and that 2280 FDB is an "Owner" for purposes of construing article XI. However, as discussed above, the parties fail to submit any contract between 2280 FDB and RDG and, as a result, it is not clear to the court whether 2280 FDB or Futterman are "Owner[s]" under article XI.

On October 26, 2009, 271 West 122, LLC submitted a Demand for Arbitration Before JAMS, naming RDG as respondent and seeking damages for breach of contract. *Id.*, Ex. B. The parties allegedly participated in mediation but failed to reach a settlement, and formal arbitration proceedings allegedly commenced on March 14, 2011. On March 11, 2011, RDG submitted a counterclaim in the arbitration proceedings, "for breach of construction contract due to nonpayment and anticipatory repudiation of contract" (Arbitration Counterclaim). *Id.*, Ex. C. The Arbitration Counterclaim caption includes both 271 West 122, LLC and 2280 FDB as "Claimants" (under Case Number 1425005364), and alleges that "Claimant was notified by written notice dated August 7, 2009 of its material breach of contract due to nonpayment for the failure to pay several requisitions and for anticipatory repudiation by effectively 'throwing' [RDG] off the two construction projects." *Id.*; Cross Petition, ¶ 18. The Arbitration Counterclaim seeks $5,449,285.26 in damages, $2,279,908 of which is allegedly owed under the Cash Collateral Agreement for "Project 1 - 2280 FDB." Hollander Aff., Ex. C. With respect to 2280 FDB, the Arbitration Counterclaim is also based upon RDG's assertion that "the collateral security held by Claimant is not in dispute and RDG is unquestionably entitled to the return of such collateral in the event it prevails in the instant action." *Id.*

RDG and Hollander also submit article XI of the 271 Contract, which required RDG to deliver to "Owner . . . a clean, irrevocable, transferable and unconditional standby letter of credit . . . (the 'Letter of Credit')," and the Letter of Credit was to, among other things, "be for the account of Owner," "be in the amount of the Contract Sum," "be fully transferrable by Owner without any fees or charges therefor," and "provide that Owner or lender shall be entitled to draw upon the Letter of

Credit upon presentation to the Issuing Bank of a sight draft and a certification by Owner or lender that Contractor is in default."[5] *Id.*, Ex. F. Under article XI, RDG

> acknowledge[d] and agree[d] that the Letter of Credit shall be delivered to Owner as security for the faithful performance and observance by [RDG] of all of the covenants, agreements, terms, provisions and conditions of this Agreement, and that Owner shall have the right to draw upon the entire Letter of Credit in any instance in which Owner would have the right to demand of a surety on a performance bond that it perform the obligations of [RDG], had such bond been in existence.

Id. While Futterman alleges that Chase holds the Accounts pursuant to the Cash Collateral Agreement, the cross petition claims that "RDG provided approximately $2,279,908 in collateral security to 2280 [FDB]" under article XI of the 271 Contract (or an analogous contract with 2280 FDB), and that these funds are "still held by [Chase], monies only to be released upon a finding that the parties materially breached the contract." Cross Petition, ¶ 23. The cross petition alleges that various factual issues are presently before the arbitration panel, including: Futterman's liability for anticipatory repudiation and unlawful termination; and RDG's liability for completion of the Projects, and its obligations under the Letter of Credit and the Cash Collateral Agreement.

Hollander claims to have a stake in the instant proceeding by virtue of its representation of RDG in the arbitration proceedings. Hollander submits its retainer agreement with RDG, dated January 31, 2011, which states that Hollander is entitled to 40% of the "gross recovered amount" in arbitration proceedings commenced by 2280 FDB and 271 West 122nd Street against RDG, including amounts recovered for "RDG's claims and the $2.3 million dollars of collateral security held by

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5. The title page of the 271 Contract refers to 271 West 122, LLC as "Owner." Cross Petition, Ex. A. By referring to the 271 Contract, together with the purported contract between RDG and 2280 FDB, as "Contracts" (Cross Petition, ¶¶ 8, 22), RDG and Hollander suggest that the purported contract between 2280 FDB and RDG contains the same language and that 2280 FDB is an "Owner" for purposes of construing article XI. However, as discussed above, the parties fail to submit any contract between 2280 FDB and RDG and, as a result, it is not clear to the court whether 2280 FDB or Futterman are "Owner[s]" under article XI.

claimants" (Retainer Agreement). Hollander Aff., Ex. G. The Retainer Agreement states that Hollander "shall also maintain a lien on any affirmative claim or recovery received as well as against any of your files in the event of an unpaid balance." *Id.* On May 13, 2011, Domenico Racanelli signed, individually and on behalf of RDG, a Notice of Attorney's Lien, identifying the attorney-client relationship between RDG and Hollander and claiming a lien on any funds awarded to RDG during the arbitration proceedings. *Id.*, Ex. H.

Chase

On April 23, 2009, Chase filed a Uniform Commercial Code (UCC) Financing Statement, naming Chase as secured party and 2280 FDB as debtor, in connection with Chase financing the construction of the Project (UCC-1). 6/13/11 Hollander Supp. Brief, Ex. L. The UCC-1 describes the Project property, and the "Rider" to the UCC-1 refers to the "(i) Building Loan Mortgage, Assignment of Leases and Rents and Security Agreement and (ii) Project Loan Mortgage, Assignment of Leases and Rents and Security Agreement" as "Security Instrument[s]," made in June 2008, in connection with financing the Project. *Id.* The UCC-1 Rider "covers all right, interest and estate of [2280 FDB]" in the Project property (Rider, ¶ 1), "[a]ll agreements, contracts . . . pertaining to the use, occupation, construction" of the Project property "including, without limitation, the right, upon the happening of any default hereunder, to receive and collect any sums payable to [2280 FDB] thereunder" (*id.*, ¶ 13), and "[a]ll . . . deposit accounts . . . maintained by [2280 FDB] with respect to the Property," including "all deposit accounts established or maintained pursuant to Security Instrument, together with all deposits . . . made to such accounts and all cash, . . . letter-of-credit rights, . . . financial assets, . . . accounts, . . . and other property held therein from time to time and all proceeds . . . distributions . . . thereon and thereof." (*id.*, ¶ 15)

The only papers submitted by Chase on these motions are letters dated May 25 and June 3, 2011 (Chase Letters). The May 25th letter acknowledges Chase's receipt of Hollander's Notice of Attorney's Lien. This letter states Chase's understanding that Futterman's Judgment, perfected on September 24, 2010, predates Hollander's May 13, 2011 Notice of Attorney's Lien, and that, therefore, any order requiring the turn-over of funds held pursuant to the Cash Collateral Agreement would not be subject to Hollander's lien. 6/1/11 Greene Aff., Ex. B. Chase's June 3rd letter acknowledges receipt of RDG and Hollander's cross petition and motion to dismiss in the instant proceeding, and their position that Hollander holds a vested property interest in the Accounts that is superior to any prior security interest by virtue of the Retainer Agreement. The June 3rd letter acknowledges the potentially competing interests in the Accounts and indicates that Chase will abide by the court's determination of priority and distribution of funds. The Chase Letters both state that they are "made without prejudice to or waiver of Chase's rights under the Cash Collateral Agreement."

ANALYSIS

As a preliminary matter, under CPLR 5225(b), "[t]he court may permit the judgment debtor to intervene in the proceeding," and the court may also "permit any adverse claimant to intervene in the proceeding and may determine his rights in accordance with section 5239." It is undisputed that RDG is the judgment debtor, and Hollander is an adverse claimant. Therefore, RDG and Hollander's request to intervene is granted and their papers are properly before the court.

CPLR 5225(b) provides for an expedited special proceeding by a judgment creditor to recover "money or other personal property" belonging to a judgment debtor "against a person in possession or custody of money or other personal property in which the judgment debtor has an interest" in order to satisfy a judgment. *Starbare II Partners L.P. v Sloan*, 216 AD2d 238, 239 (1st Dept 1995). Here, Futterman demonstrated that he is a judgment creditor of RDG, based upon the Judgment and

Assignment. It is undisputed that Chase is in possession of RDG funds in the Accounts. Chase neither claims an interest in the Account funds nor opposes Futterman's petition. Chase's submissions are limited to the Chase Letters, where Chase indicated its willingness to turn over the funds. Having satisfied the criteria of CPLR 5225(b), Futterman is entitled to the Account funds.

RDG and Hollander's cross petition is based upon Hollander's purported charging lien on the Account funds, the pending arbitration proceedings, and Chase's security interest in the funds. With respect to the charging lien, section 475 of New York's Judiciary Law provides that "the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, judgment or final order in his client's favor, and the proceeds thereof in whatever hands they may come." Section 475-a provides that, "[i]f prior to the commencement of an action, special or other proceeding, an attorney serves a notice of lien upon the person or persons against whom his client has or may have a claim or cause of action, the attorney has a lien upon the claim or cause of action from the time such notice is given," and this lien "attaches to a verdict, report, determination, decision or final order in his client's favor . . . and to any money or property which may be recovered on account of such claim or cause of action in whatever hands they may come."

Here, the Judgment predates the Retainer Agreement and the interposition of RDG's counterclaim. While Hollander may have a charging lien over RDG's counterclaim in the arbitration, Hollander fails to cite legal authority that would support subordinating the Judgment to a purported charging lien on the specific Account funds. All of the cases cited by RDG and Hollander recognize an attorney's charging lien, but only over specific funds procured for the client as a result of the attorney's efforts. *LMWT Realty Corp. v Davis Agency*, 85 NY2d 462 (1995); *People v Keeffe*, 50 NY2d 149 (1980). Hollander did not procure the Account funds on behalf of RDG, and it is

undisputed that the Account funds were deposited long before Hollander's involvement in the arbitration proceedings. Therefore, the cases cited by RDG and Hollander are distinguishable on their facts.

RDG and Hollander argue that Futterman is barred from demanding payment pursuant to the "Collateral Security Agreement/Letter of Credit" until the arbitrators determine liability based upon RDG being unable or unwilling to perform its contractual obligations. 5/26/11 Hollander Brief, at 7. They claim that "every single issue currently before JAMS . . . will affect whether Futterman or RDG may collect monies held by Chase pursuant to the Cash Collateral Agreement/Letter of Credit." *Id.* at 8. However, it is undisputed that Futterman is not a party to the arbitration proceedings or the Cash Collateral Agreement. Even assuming for the moment that "Futterman is the individual 'in control' of [the Projects]," as is alleged in the Cross Petition (Cross Petition, ¶ 7), RDG and Hollander fail to explain why Futterman should be treated as 2280 FDB. RDG and Hollander do not assert any legal theories based upon piercing the corporate veil or reverse piercing, and, in any event, it is axiomatic that "[t]he law permits the incorporation of a business for the very purpose of escaping personal liability." *Bartle v Home Owners Co-op.*, 309 NY 103, 106 (1955). Nor is there any allegation that either the Judgment or the Assignment to Futterman is invalid. In short, Futterman's right to enforce the Judgment is distinct from the arbitration proceedings. Therefore, RDG and Hollander's argument is unpersuasive.

RDG and Hollander next argue that the Cash Collateral Agreement and the UCC-1 create a security interest in the Account funds. The Cash Collateral Agreement, by its express terms, created a security interest in the Account funds on June 30, 2008. Under UCC § 9-314(a), Chase's security interest was perfected by virtue of Chase's control over the Accounts. If there were any doubt concerning perfection, the UCC-1 filed by Chase expressly included all agreements pertaining to the

construction of the Project and all accounts maintained by 2280 FDB pursuant to the various loan documents relating to the Project. However, the Cash Collateral Agreement did not secure the interests of RDG, Hollander, or 2280 FDB, but rather, it secured Chase's interests. The UCC-1 names Chase as the secured party, and 2280 FDB is named as the debtor. Chase does not contest Futterman's petition or oppose releasing the Account funds; in fact, the Chase Letters indicate Chase's willingness to turn over the Accounts funds. Thus, any security interest in the Account funds belonged to Chase – not RDG, Hollander, or 2280 FDB – and any priority was waived by Chase, as indicated in the Chase Letters and by Chase's failure to oppose Futterman's petition. For the foregoing reasons, the cross petition is dismissed to the extent that it is based upon Hollander's purported charging lien, the arbitration proceeding, and Chase's security interest.

In the cross petition and motion sequence number 002, RDG and Hollander seek dismissal of this proceeding based upon Futterman's failure to join 2280 FDB as a necessary party. RDG and Hollander argue that, while Futterman is an alleged shareholder of 2280 FDB, it is unknown whether other shareholders, officers or principals of 2280 FDB are aware of Futterman's petition and whether 2280 FDB is represented in the instant proceeding by Futterman.

CPLR 1001(a) provides that "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants." Under CPLR 1003, "[n]onjoinder of a party who should be joined under section 1001 is a ground for dismissal of an action without prejudice unless the court allows the action to proceed without that party under the provisions of that section."

As a preliminary matter, it is not clear to the court how RDG has standing to seek intervention on behalf of 2280 FDB. In any event, 2280 FDB does not seek permission to intervene under CPLR

5225(b), and it is not required to be noticed under that provision. The necessary parties under section 5225(b) are the judgment creditor and the third party "in possession" of the "money . . . in which the judgment debtor has an interest," with notice to the judgment debtor. While "[t]he court may permit any adverse claimant to intervene in the proceeding" (CPLR 5225[b]), 2280 FDB submits no papers on these motions and there is no evidence before the court of 2280 FDB having a lien or any priority over the Account funds.[6] None of the evidence submitted by RDG and Hollander shows that 2280 FDB is a necessary party or a proposed permissive intervenor, that complete relief cannot be accorded without 2280 FDB, or that 2280 FDB might be inequitably affected by a judgment in this proceeding.

In support of their motion to dismiss, RDG and Hollander rely upon *Bergdorf Goodman, Inc. v Marine Midland Bank* (97 Misc 2d 311 [Civ Court, NY County 1978]), a turnover proceeding where the petitioner sought a judgment directing the respondent bank to pay over amounts held in the joint account of the judgment debtor and his wife. The court held that, because the wife was not a judgment debtor, any decision on the merits "would necessarily involve a determination of the rights of both [the judgment debtor] and [his wife] in the accounts." *Id.* at 313. The court concluded that the wife's "present interest," therefore, rendered her a "necessary party." *Id.*

Here, conversely, 2280 FDB is not a secured party under the Cash Collateral Agreement. RDG may have provided 2280 FDB with a Letter of Credit under article XI of the 271 Contract. However, RDG and Hollander conflate the purported Letter of Credit and the Cash Collateral Agreement, asserting, without evidentiary support, that they are the same funds. Cross Petition, ¶¶ 23-26. All of the evidence before the court suggests that the Account funds are held by Chase pursuant to the Cash Collateral Agreement, not the 271 Contract. In any event, none of the evidence shows that 2280 FDB

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6. Futterman's counsel represents to the court that 2280 FDB "has been given actual notice and has opted not to join these proceedings or contest the turnover." 6/1/11 Greene Aff., ¶ 6.

owns a present interest in the Account funds. If anything, it has a potential future interest in RDG's funds, depending upon the outcome of the arbitration proceeding, but none of the evidence supports the conclusion that 2280 FDB owns a present interest in the Account funds. Therefore, *Bergdorf Goodman* is distinguishable on its facts. For the same reasons, the other two cases upon which RDG relies (*Citibank (S.D.) v Island Fed. Credit Union*, 190 Misc 2d 694 [App Term, 2d Dept 2001] and *Mendel v Chervanyou*, 147 Misc 2d 1056 [Civ Ct, Kings County 1990]) are distinguishable on their facts.

Accordingly, it is hereby

ADJUDGED that the petition is granted; and it is further

ORDERED and ADJUDGED that J.P. Morgan Chase Bank, N.A. is directed, upon receipt of a certified copy of this order and judgment, to turn over to the petitioner, Hans Futterman, all funds in the account of Racanelli Development Group LLC, judgment debtor, held in said Bank [under account numbers 3748533755 and 801754680], up to a maximum of $2,046,808.78; and it is further

ADJUDGED that upon such turn-over of funds, the respondent J.P. Morgan Chase Bank, N.A. shall be discharged of all liability on these accounts to the extent of payment made; and it is further

ORDERED that the cross petition is dismissed; and it is further

ORDERED that the motion to dismiss of Racanelli Development Group, LLC and Domenic Racanelli (motion sequence number 002) is denied.

ENTER:

Shlomo Hagler
J.S.C.

Dated: August 16, 2011
New York, New York

Hon. Shlomo S. Hagler, J.S.C.