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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
The Honorable Donald B. Hocker, Circuit Court Judge
Beaufort County
Trial Court Case No. 2020-CP-07-1064

APPELLATE CASE NO. 2022-001547

Turner's Marina LLC,

Respondent-Appellant,

vs.

Paige Lorberbaum, Jeffrey Klapper, and Diane L. Klapper,

Defendants,

Of whom Paige Lorberbaum is the Appellant-Respondent and Jeffrey A. Klapper and Diane L. Klapper are Respondents.

RESPONDENT-APPELLANT TURNER'S MARINA LLC'S REPLY TO APPELLANT-RESPONDENT LORBERBAUM'S RETURN TO MOTION TO DISMISS

Pursuant to SCACR 240, the Respondent-Appellant Turner's Marina replies as follows to the Appellant-Respondent Lorberbaum's Memorandum in Opposition to Motion To Dismiss, as filed on February 2, 2023. Turner's Marina incorporates by reference all arguments made in its Motion to Dismiss and Memo In Support filed January 23, 2023.

Addressing the specific arguments posited against the Motion to Dismiss, Turner's Marina replies as follows:

1. The assertion that "The Case is not Moot since a Reversal of the Trial Court's Decision Would Return Title of the Lot to Lorberbaum" is simply legally incorrect. Ms. Lorberbaum voluntarily tendered a General Warranty Deed to Turner's Marina in exchange for $54,500 tendered by Turner's Marina on December 28, 2022. Turner's Marina accepted the deed, recorded same and is the bona fide owner of the real property. The real property was not transferred by a Master's Deed or other similar court-initiated transfer that could arguably "be reversed" or "set aside" should this Court reverse the trial court. That is why the case was rendered moot by the sale, and why Ms. Lorberbaum should have elected to stay Judge Hocker's judgment by seeking a supersedeas, which would have, if issued, maintained ownership of the real property in Ms. Lorberbaum until a decision was made on the appeal.

As this basis for her argument, the Appellant-Respondent relies solely on Skydive Myrtle Beach, Inc. v. Horry County, 428 S.C. 638, 837 S.E.2d 485 (Ct.App. 2020), a case in which the unique fact situation gave rise to the Court of Appeal's ability to return the appellant to the leasehold from which it was ejected under color of law. The facts in Skydive were inapposite to those herein. In Skydive, Horry County owned the Grand Strand Airport, and Horry leased the airport to Grand Strand Aviation, which in turn subleased a portion of a hanger to the appellant therein, Skydive Myrtle Beach, Inc. Horry then terminated its lease with Grand Strand (then operating under the name "Ramp 66"), and Horry entered into a "Space Use Permit" with Skydive. Due to alleged "safety related concerns" Horry on February 19, 2014, notified Skydive that the Space Use Permit had expired, and told Skydive that "you will need to vacate the premises immediately." 428 S.C. at 641.

Skydive then turned around and filed a lawsuit in circuit court on February 28, 2014, against Horry County, the Horry County Department of Airports and several individually named county employees alleging civil conspiracy and tortious interference with Skydive's business.

In apparent response, Horry County then filed an ejectment action in Magistrate's Court, and when the Magistrate ordered Skydive ejected from the premises, Skydive appealed to the circuit court. (The Magistrate's Order allowed Skydive to maintain use of the premises pending the circuit court appeal, by making a bond payment (in essence, a supersedeas) equal to the rent that was paid under the Space Use Permit.)

Of critical importance, and distinguishing Skydive from the case at bar, "After the circuit court affirmed the ejectment order and denied Skydive's request for a stay of the order, ten Horry County sheriff's deputies arrived at the hangar to ensure Skydive vacated the premises by the court-ordered deadline." Id. at 642. The Court of Appeals then went on to further distinguish Skydive from Berry V. Zahler, 220 S.C. 86, 66 S.E.2d 459 (1951) (discussed in Respondent-Appellant's Brief in Support of Motion to Dismiss), where the tenant, like Ms. Lorberbaum, voluntarily relinquished possession of their leasehold, id. at 642-43, by noting that in addition to the deputies arriving under color of law, Skydive had "repeatedly contested all rulings by the courts in an obvious effort to remain in the bird hangar." Id. at 643. The Court of Appeals also noted that "[a]t oral argument before this Court, counsel for Skydive confirmed his client's intent to resume possession if the magistrates court ejectment order is reversed." Id.

Contrary to the actions and proclamations of the Skydive appellant, which evidenced a clear pattern of challenging every ruling, since the filing of Judge Hocker's original Order on August 4, 2022 and his September 27, 2022 Order denying Ms. Lorberbaum's Motion to Alter of Amend that Order, Ms. Lorberbaum has consistently advised the court and opposing counsel of

her intention to voluntarily transfer the deed to Turner's Marina. See, e.g., Lorberbaum's Motion for Clarification of Order filed November 1, 2022: "It is clear it was the Court's original intent to give Lorberbaum sufficient time to make the transition when it originally set forth the time period of ninety (90) days. Now that a 'final' decision has been rendered, Lorberbaum is entitled to the full ninety (90) days to make arrangements to find another suitable location for her RV, or make other living arrangements." Exhibit 4 to Lorberbaum Memo in Opposition to Motion to Dismiss, p.2.

One month after she filed her "Motion for Clarification" as to when she was to convey the Lot, Ms. Lorberbaum filed a Memorandum in support of that motion in which she repeatedly reiterated her intentions to voluntarily convey the lot in lieu of continuing to challenge Judge Hocker's Orders: "**It is Lorberbaum's position that the ninety (90) day time period to convey the Subject Property** is on or about December 28, 2022, ninety (90) days from when the Court's decision was final upon the denial of the Rule 59(b) SCRCP Motion on September 27, 2022." "Until the Court's Order was deemed a "final" decision upon the resolution of the Rule 59(b) SCRCP motion, **it was unknown whether Lorberbaum would eventually be required to move.**" "It was only when the September 27, 2022 Order was filed denying the Rule 59 SCRCP motion was **it confirmed Lorberbaum would have to move**. Now that a "final" decision has been rendered, **Lorberbaum is entitled to the full ninety (90) days to make arrangements to find another suitable location for her RV, make other living arrangements**, etc." "Lorberbaum has done everything possible to quickly bring this matter to the Court's attention, and **clearly did not seek to merely delay closing for spurious reasons.** If the Court determines Lorberbaum must move before December 27, 2022, **she is prepared to do so within seventy-two (72) hours notice.**

[Emphasis added.] See Lorberbaum Memo in Support of Motion for Clarification as filed on December 2, 2022, attached hereto as Exhibit A.

Judge Hocker then entered his Order of December 14, 2022 reaffirming that Ms. Lorberbaum was to convey the property by December 28, 2022 (see Exhibit 7 to Lorberbaum's Memo in Opposition to Motion to Dismiss).

In sum, in reply to the assertion that a reversal would return the title of the lot to Lorberbaum, that assertion is simply incorrect and the sole case relied upon therein, Skydive, is not supportive of the argument. Skydive involved a leased space that was still owned by the respondent landlord at the time of the appeal, and to which the reversal of the ejectment action could result in a return of the appellant to the leasehold. Here, the real property was voluntarily transferred by the appellant in exchange for $54,500.

2. As to the second assertion that "The Sale of the Lot was not "Voluntary," the Respondent-Appellant refers this Court to the arguments above, and again reminds this Court that in Skydive, ten Horry Sheriff's Deputies descended upon the hangar under color of law to physically remove Skydive and enforce the Court's Order after the circuit court "denied Skydive's request for a stay of the order." Skydive, 428 S.C. at 642. Here, Ms. Lorberbaum has never filed a Rule 241 Motion for Supersedeas with either the Circuit Court nor this Court of Appeals, and clearly, voluntarily made the choice to convey the property and pocket the $54,500.

As to the veiled assertions that Turner's Marina's counsel somehow pressured Ms. Lorberbaum into the conveyance (see the 13 quotations set forth at pages 6-8 of the Memo in Opposition), it is difficult to see how such assertions as " Can you please confirm to me that Ms. Lorberbaum will be tendering a General Warranty Deed on or before December 28, 2022 and vacating the premises by that date;" "Russell, I wrote you a few days ago about this and also asked

you if Ms. Lorberbaum is going to transfer the lot on December 28, 2022? Would you please let me know her intentions?;" and "It would certainly be helpful if you'd let me know your and her intentions as soon as possible so we can make preparation for the money transfer," could be seen by this Court as anything other than courteous efforts to move the case forward toward a closing that Ms. Lorberbaum's counsel had acknowledged was coming a month earlier. If anything, the quotes simply affirm that Turner's Marina's counsel was zealously representing his client, but they are 180 degrees opposite of Horry County sending ten sheriff's deputies to physically remove Skydive from their claimed leasehold. All Ms. Lorberbaum and her counsel had to do if they had actually intended to "contest" all rulings by the courts as to ownership, was make a Motion for Supersedeas to Judge Hocker and then, if denied, to this Court, under the Appellate Court Rules. Instead, she voluntarily (as her counsel had advised for months that she would) tendered a General Warranty Deed on the property and accepted the $54,500 and kept it.

3. As to the argument that "The Validity of Turner's Right of Repurchase Is Capable of Repetition," the argument fails because for circumstances to support such an exception to the general rule on mootness, it must reasonably appear that the issue not only is capable of repetition, but will likely "evade review" warranting this Court's action now. As the Supreme Court noted in Byrd v. Irmo High School, 321 S.C. 426, 468 S.E.2d 861 (1995), the "evading review" exception requires some sort of unusual circumstances, such as a high school suspension that is normally completed "long before an appellate court can review the issues they implicate." Id. at 432.

The Respondent-Appellant acknowledges that a similar argument might be raised regarding the Rule Against Perpetuities in the future, if it becomes necessary for Turner's Marina to again seek court assistance to enforce its Right of Repurchase, but it is only reasonable to presume that if that occurs and the lot owner does not willingly decide to accept the money in

exchange for the deed as Ms. Lorberbaum did (thereby rendering any appeal moot), then the appellant will most likely seek a stay or order of supersedeas, thereby preserving the issue for appeal. There is no reasonable basis to assert that this issue would evade review in the future, and thus this exception to the general rule is inapplicable.

In fact, given the curative process created by the Legislature for holders of Rights Of Repurchase to avoid a "Rule Against Perpetuities" attack,[1] the Respondent-Appellant verily disputes Ms. Lorberbaum's assertion that "[i]t is not only likely, but inevitable the identical issue raised by Lorberbaum in her appeal will arise again." Lorberbaum Memo in Opposition, p. 9. That is probably why none of the Defendants in the case cited by Ms. Lorberbaum in her brief (p. 9) as supporting the notion that the issue will arise again, have actually raised any claim of defense based upon the "Rule Against Perpetuities" and the issue is not being litigated therein. See the Answers of all Defendants in Turner's Marina LLC v. Daniel Hyde et al, Civil Action No. 2021-CP-07-2165, attached as Exhibits B and C hereto, none of which assert any defense based upon the "Rule Against Perpetuities."

4. As to the assertion that "The Validity of Turner's Right-of-Repurchase may Affect Future Events or Have Collateral Consequences for the Parties," that argument too fails as misplaced. Ms. Lorberbaum voluntarily conveyed Lot 158 in exchange for payment by Turner's Marina LLC of $54,500. There is no continuing relationship between the parties that would give rise to any future events between them or produce collateral consequences for the parties. Attempting to create an argument here, Ms. Lorberbaum asserts that even if the sale "cannot be

[1] See South Carolina Code Annot. Section 27-6-60, which allows an "interested person" to petition a court to reform a nonvested property interest created before July 1, 1987 by inserting a savings clause that preserves most closely the transferor's plan of distribution and that brings that plan within the limits of the rule against perpetuities applicable when the nonvested property interest or power of appointment was created. See also Exhibit D to this Memo, the Plaintiff's Petition For Reformation of Right of Repurchase Pursuant to S.C. Code Annot. 27-6-60, as filed in this case on September 21, 2022.

reversed, Lorberbaum still would have legal remedies for damages caused by the unlawful loss of her home and Lot, or possibly other remedies." (Lorberbaum Memo, p. 9.) However, during the entirety of Ms. Lorberbaum's testimony at trial, she never asserted that Lot 158 was worth more than the $54,500 original purchase price (that she accepted on December 28, 2022), thereby negating any later argument that she could have suffered damages—if this court were to hold she was wrongfully compelled to convey the Lot.

5. As to the assertion that "Lorberbaum was not Required Under South Carolina Law to Obtain a Stay or Supersedeas," Turner's Marina LLC replies that it has never asserted that Ms. Lorberbaum "was required to obtain a stay pursuant to Rule 62 SCRCP and to Rule 241 SCACR in order to continue her appeal." In fact, Turner's Marina LLC only mentions a stay or supersedeas in its Memo in Support of Motion to Dismiss twice, once at page 3 where it is noted that "[i]nstead of seeking a stay or supersedeas as both the Rules of Civil Procedure and the South Carolina Appellate Court Rules allow, Ms. Lorberbaum voluntarily complied with Judge Hocker's orders on December 28, 2022 by conveying Lot 158 to Turner's Marina by General Warranty Deed in exchange for $54,500…" and once at p. 5, when noting that the issue of whether the Rule Against Perpetuities would impact the right to repurchase may be reviewed by this Court if a later case arises and the appellant "simply follows the Appellate Court rules and seeks a stay or supersedeas during the pendency of the appeal, in lieu of taking $54,500 from Turner's Marina and conveying their lot."

Rule 241 SCACR was available to Ms. Lorberbaum and her counsel to stay the effect of Judge Hocker's Order requiring the conveyance of Lot 158 until this appeal is resolved, and they literally had from August 4, 2022 until December 28, 2022, to consider it and use it. The Rule is specifically designed to allow parties in Ms. Lorberbaum's position to seek and obtain a stay for

the very purpose of avoiding an action (such as the conveyance of Lot 158) that would render the case moot:

> In determining whether an order should issue pursuant to this Rule, the lower court, administrative tribunal, appellate court, or judge or justice of the appellate court should consider whether such an order is necessary to preserve jurisdiction of the appeal **or to prevent a contested issue from becoming moot.** [Emphasis added.]

Rule 241(c)(2) SCACR

Following Judge Hocker's August 4, 2022 Order, and his later denial of Ms. Lorberbaum's Motion to Alter or Amend and his granting of her Motion For Clarification (as to date to convey), Ms. Lorberbaum and her counsel had several options. First, they could have petitioned Judge Hocker and then this Court if necessary under Rule 241, for a supersedeas staying the effect of Judge Hocker's Order requiring her to convey Lot 158 to Turner's Marina LLC. Notwithstanding her counsel's assertion to the contrary at p. 10 of the Memo in Opposition, there is no requirement under the Rules for the posting of a bond, much less a "significant bond" of which Ms. Lorberbaum was allegedly "not in a financial position to post." (Memo in Opposition at p. 10.) Instead, Rule 241 leaves the determination as to whether a bond will be necessary to first, the circuit court judge, and then this Court. "The granting of supersedeas or the lifting of the automatic stay under this Rule may be conditioned upon such terms, including but not limited to the filing of a bond or undertaking, as the lower court, administrative tribunal, appellate court, or judge or justice of the appellate court my deem appropriate." Rule 241(c)(3) goes on to provide that if the granting of supersedeas is insufficient to afford complete relief, the lower court or this Court "may order other affirmative relief upon such terms as are deemed appropriate." The Rules afforded Ms. Lorberbaum an opportunity to stay the Order and continue her appeal, but she chose not to take advantage of them. Turner's Marina LLC does not assert that she was required to seek a stay or supersedeas; Turner's Marina LLC asserts that she was required to do so if she wanted to "contest

all rulings by the courts to remain" on the property. See Skydive Myrtle Beach, Inc., 428 S.C. at 643. Ms. Lorberbaum and her counsel instead took a second option, and made a knowing and conscientious decision to forego the available motion for supersedeas and instead Ms. Lorberbaum voluntarily conveyed the lot and accept the $54,500, thereby rendering this appeal moot.

As a third alternative, Ms. Lorberbaum and her counsel could have refused to convey Lot 158 on December 28, 2022, thereby showing this Court that she was making an obvious "Skydive" effort to remain on the premises, and thereby forced Turner's Marina LLC to take further legal action to require the conveyance. There is little doubt that such an action would have resulted in Turner's Marina LLC seeking Judge Hocker's or this Court's assistance, which would have brought the issue of a supersedeas front and center via the actions of Turner's Marina. However, Ms. Lorberbaum and her counsel also chose to waive this avenue to a potential stay, by voluntarily closing the conveyance on December 28, 2022.

In sum, Ms. Lorberbaum and her counsel had readily available avenues to them to stay the Circuit Court-ordered conveyance until this appeal was decided, and knowingly and intentionally waived them to secure the payment of the full $54,500. But by doing so, they rendered their appeal of Judge Hocker's Orders moot. "A case becomes moot when judgment, if rendered, will have no practical effect upon existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief." Mathis v. South Carolina State Highway Dep't., 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973).

For the foregoing reasons, Turner's Marina LLC urges this Court to dismiss the Appellant-Respondent's Paige N. Lorberbaum's appeal as moot, while allowing the cross-appeal of current Respondent-Appellant Turner's Marina LLC to continue.

s/Thomas C. Taylor

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PROOF OF SERVICE

I hereby certify that this law firm represents the Respondent-Appellant Turner's Marina LLC in the above-captioned matter and that on the date below, in Bluffton, South Carolina, I served a copy of the forgoing on the following persons via electronic mail to their AIS E-mail address:

Documents Served: **RESPONDENT-APPELLANT TURNER'S MARINA LLC'S REPLY TO APPELLANT-RESPONDENT LORBERBAUM'S RETURN TO MOTION TO DISMISS**

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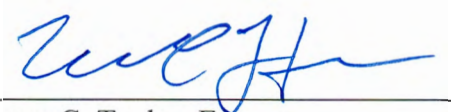

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