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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

The Honorable Perry M. Buckner, III, Circuit Court Judge

The Honorable Bentley D. Price, Circuit Court Judge

Common Pleas Case No.: 2019-CP-15-00218

Consolidated Appellate Case No.: 2020-000607

Larry Rahn, ……...Respondent,

v.

Barbara Smith, ……..Appellant.

APPELLANT'S REPLY BRIEF

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REINTRODUCTION

This matter concerns the "Settlement Agreement 2" (the "Settlement Agreement" or "Agreement") executed on November 20, 2015, and deals with a particular parcel of land known as Home Place ("Home Place" or the "Property"). The Agreement provides, in full:

> In light of mediation, Loretta R. Harriett has relinquished her interest in the Home Place Tract [of] property. Due to such, the current ownership of the Home Place Tract is 1/3 interest to Larry L. Rahn [Respondent], 1/3 interest to Barbara R. Smith [Appellant], 1/6 interest to Kenneth F. Rahn, and 1/6 interest to Nancy R. Crosby.
>
> 1. Barbara R. Smith [Appellant] will deed her interest in this property to Larry L. Rahn [Respondent], Kenneth F. Rahn, and Nancy R. Crosby for the sum of three hundred and twelve thousand and 00/100 ($312,000.00) [D]ollars. Larry L. Rahn [Respondent], Kenneth F. Rahn, and Nancy R. Crosby have 24 months to deliver funds to Barbara R. Smith [Appellant] in exchange for her interest in the land.
>
> 2. Each party is responsible for their own deed and plat preparation as well as surveying cost[s] or other cost[s] necessary.

(R. p. 14).

On March 21, 2019, more than 40 months after the Agreement was executed, Larry Rahn ("Respondent"), commenced the instant action seeking specific performance of the Agreement. (R. pp. 10-11). Appellant ("Smith") answered, asserting the Agreement expired, pursuant to its plain terms, 24 months after it was executed—and roughly 16 months before Respondent brought suit. (R. pp. 35-37).[1] Before any discovery was conducted Respondent filed a motion for summary judgment. Respondent submitted no evidence in support of this motion and his written argument consisted of only a single conclusory statement: "Despite [Smith's] execution of the [Agreement] she has refused to comply with its terms, [and therefore] Plaintiff prays for an order granting the relief sought in the complaint"—*i.e.*, specific performance. (R. p. 38). At issue was whether the

[1] The remaining parties to the Agreement (*i.e.*, Kenneth Rahn and Nancy Crosby) are not parties to this suit.

24-month deadline had expired. While Smith asserted it had, Respondent claimed the parties had until July 11, 2020, to perform. Judge Buckner ultimately agreed with Respondent, and on December 3, 2019, Judge Buckner issued an order holding: "[Smith] is hereby ORDERED to transfer her interest in the [Property] upon payment of $312,000.00 per the terms of the Settlement Agreement, [and] the Parties are further ORDERED to fully comply with the terms of the Settlement Agreement on or before July 11, 2020." (R. p. 4).

Smith appealed Judge Buckner's Order, and the July 11, 2020, deadline subsequently passed without payment by Respondent. Therefore, because this Order was not stayed by the appeal—a fact Respondent now concedes[2]—when the deadline passed without payment, Smith filed a Rule 60 Motion on the premise the Order had expired. (R. pp. 99-105)[3]. Smith's Rule 60 motion was heard by Judge Price. Although agreeing that Judge Buckner's Order had expired, Judge Price *sua sponte* ordered its expiration was equitably tolled. (R. pp. 92-93). Smith timely filed a Motion to Alter or Amend this ruling under Rule 59, SCRCP. (R. p. 134). In response to this Motion Judge Price determined that his *sua sponte* grant of equitable tolling would expire on February 1, 2020. (R. p. 95). Again, this even later deadline passed without Respondent tendering the required payment.[4]

[2] Respondent conceding "the issues addressed in the Circuit Court's December 3 Order were not stayed by this appeal." *See* (Resp. Br. p. 9).

[3] Smith received leave of this Court to file her Rule 60 Motion.

[4] When it became apparent that this deadline would also pass without Respondent tendering payment, Smith offered to place her performance in escrow by executing the deed and having Respondent place his performance in escrow. (R. pp. 176-177). Respondent declined this offer, and Smith filed a motion requesting the same. Judge Price declined to have the parties place their performance in escrow. (R. p. 97). In response to this request, Judge Price "impose[d] a supersedeas pending the outcome of the [] appeal." (R. p. 97).

Smith appealed Judge Price's Order (Appeal No. 2021-001540) which was consolidated with her appeal from Judge Buckner's Order (Appeal No. 2020-000607). Because both these orders have expired, there arises a threshold question of whether this matter has become moot.

SUMMARY OF ARGUMENT IN REPLY

It is not disputed that Respondent never tendered the required $312,000.00. Despite this, Respondent's recurrent theme on appeal is that *Smith* has refused to comply with Judge Buckner's Order, and therefore, it would be unfair to find Respondent's rights under this Order and/or the Agreement have expired. However, this argument overlooks the basic fact that Judge Buckner's Order only required Smith to convey the Property "upon payment of $312,000.00." (R. pp 3-4). According to Respondent, he declined to make this payment "primarily because Smith appealed [Judge Buckner's] Order." (Resp. Br. p. 29). The problem with this is that Respondent concedes that "the issues addressed in [Judge Buckner's] December 3 Order were not stayed by this appeal." (Resp. Br. p. 9). Respondent also concedes that he "could have sought relief from the Circuit Court, either under Rule 70 or through contempt proceedings, at any time after July 11, 2022." (Resp. Br. p. 30). It is befuddling how Respondent can, in the face of these concessions, claim it would be unfair to find his rights have expired following his nonperformance. It is plain from Respondent's own admissions that the appeal neither excuses his failure to pay, nor did the appeal impair his ability to enforce Judge Buckner's Order.

Respondent's argument seems to confirm Smith's contention that Respondent simply does not have the money to pay. If he was truly ready, willing, and *able* to perform, he could have sought execution of Judge Buckner's Order at any time, despite the appeal. That he chose not to is telling. It seems Respondent's unspoken assumption is that he is entitled to have Smith convey her interest in the Property before Respondent is obligated to deliver payment. This is not only

inconsistent with common convention, but also directly contrary to the terms of both Judge Buckner's Order and the Agreement—neither of which require Smith to convey her interest until payment is made. (R. p. 4). (Judge Buckner's Order directing Smith to convey the Property "upon payment"); and (R. p. 14) (Agreement proving Respondent had "24 months to deliver funds to [Smith] in exchange for her interest in the land" and also making each party "responsible for their own deed and plat preparation").

There is no support for Respondent's repeated assertion that Smith refused to comply with Judge Buckner's Order. In the absence of Respondent delivering payment and preparing the deed for Smith's execution, Smith had neither the opportunity, nor the ability to comply with the directives of Judge Buckner's Order. The only conduct that Respondent points to as evidence of Smith's refusal to comply with Judge Buckner's Order is the fact that Smith appealed—an act Respondent concedes neither stayed the Order nor impaired his ability to enforce it. (Resp. Br. pp. 9 and 29-30) (*supra*).

At bottom, Respondent is asking this Court to find that "equity" should somehow afford him relief that he concedes is inconsistent with the law. This Court should refuse to do so—particularly where Respondent has slept on the rights that he concedes the law provided him. *See Collins v. Sigmon*, 299 S.C. 464, 468, 385 S.E.2d 835, 837 (1989) (reaffirming the "the ancient maxim that equity aids the vigilant and diligent"); *accord, Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n*,298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989) ("the court's equitable powers must yield in the face of an unambiguously worded statute."); *Regions Bank v. Wingard Props., Inc.*, 394 S.C. 241, 254, 715 S.E.2d 348, 355 (Ct. App. 2011) ("When providing an equitable remedy, the court may not ignore statutes, rules, and other precedent.") (*citing Lonchar v. Thomas,* 517 U.S. 314, 323, 116 S. Ct. 1293, 1298 (1996) ("the fact that the [request] has been called an

'equitable' remedy [ ] does not authorize a court to ignore [the] body of statutes, rules, and precedents.")).

ARGUMENT IN REPLY

I. This matter is moot because the underlying Orders have expired and Respondent's attempts to explain otherwise are inconsistent and self-defeating.

Respondent concedes that Judge Buckner's Order, to the extent it compelled Smith to convey an interest in land, was not stayed by the appeal. Furthermore, it is undisputed that Respondent did not make the required payment of $312,000.00 to trigger Smith's obligation to convey the Property, "primarily because Smith appealed." (*supra*). As such, there can be little debate that Judge Buckner's Order has expired—Respondent merely wants this expiration excused.[5] Both July 11, 2020, and February 2, 2022, have passed without payment (*i.e.,* the initial deadline in Judge Buckner's Order, and the later date to which Judge Price *sua sponte* tolled this deadline). Thus, the propriety of Judge Buckner's Order and/or Judge Price's decision to *sua sponte* toll that Order has become a purely academic question and is therefore moot.

A. Respondent's attempts to draw a distinction between an option contract and sales contract, and to rebrand this action as one to construe a contract rather than for specific performance are irrelevant to the issue of mootness and only serve to illustrate why Smith is correct.

Respondent first takes exception with Smith's classification of the Agreement as an option, claiming instead it is a sales contract. Ostensibly this is because, unlike an option, a sales contract does not require strict compliance by the plaintiff. However, as it concerns the issue of mootness, the distinction between an option contract and a sales contract is immaterial. For the purposes of

[5] Judge Price agreed the Order had expired. *See* (R. p. 93, n. 1) (finding that "notice of appeal did not say execution under the statutes and rules); and (R. 171, lines 3-7) (Judge Price clarifying his *sua sponte* order by declaring "I'm going to set a new date as of now. And I'm going to agree that [Judge Buckner's] has expired, however I tolled it I'm giving it a new date.").

mootness, the merits of Judge Buckner's Orders are not disputed. In other words, the issue is not whether Respondent was entitled to specific performance of the Agreement.[6] The issue of mootness is only concerned with the effect of Respondent's decision not to comply with or enforce Judge Buckner's Order *after* this Order was issued. Whether the Agreement was an option, or a sales contract has nothing to do with the fact that Respondent failed to comply with or enforce Judge Buckner's Order (and/or Judge Price's Order).[7]

While irrelevant to mootness, Respondent's claim that the Agreement is not an option does serve a purpose—it highlights a fundamental flaw that infects this entire case. Although Respondent brought suit for specific performance, at the summary judgment hearing it became apparent that Respondent asserted the parties' performance would not become due until July 11, 2020—well after the complaint was filed (March 12, 2019), and well after Judge Buckner issued his December 3, 2019 Order. Because Smith's performance had not come due, it follows there could be no breach to trigger specific performance. Therefore, even if the Agreement were a sales contract, as Respondent now claims, it remains that specific performance was never available to him. *See e.g., White v. Felkel*, 225 S.C. 453, 455, 82 S.E.2d 813, 814 (1954) (recognizing specific performance as a remedy for a "breach of a land sale contract"); *accord Mullins, Inc. v. Benton*,

[6] For clarity, Smith does not concede this Order was correct, but merely assumes it to be for the limited purpose of the mootness analysis.

[7] Although it does not matter to this specific point, Smith maintains the Agreement was an option, offered in consideration of the settlement, and meeting the definition of an offer which could not be revoked prior to its expiration and could only be accepted by delivery of the money. *See Faulkner v. Millar*, 319 S.C. 216, 220, 460 S.E.2d 378, 380 (1995). ("An option contract is a promise which limits the promisor's power to revoke an offer [and] the chief difference between a contract to sell [] real property, and an option to purchase said property lies in the fact that, while the former creates a mutual obligation on the part of one party to sell and the other to purchase, the option merely gives the right to purchase, at a fixed price, within a fixed time, without imposing any obligation to do so.").

309 S.C. 85, 90, 419 S.E.2d 838, 840 (Ct. App. 1992) (finding specific performance premature where the seller's obligation to convey had not yet arisen).[8] Therefore, it does not matter whether the Agreement is deemed an option or a sales contract because in either case Respondent was not entitled to immediate performance by Smith. This point is underscored by Judge Buckner's Order which itself did not direct Smith to immediately convey the Property. Instead, the Order directed Smith to convey the Property **if** Respondent delivered payment. (R. p. 4) (*supra*) (directing conveyance "**upon payment** of $312,000.00") (emphasis added). Of course, this pre-condition to Smith's obligation to convey the Property never occurred, and therein lies the mootness problem.

Perhaps recognizing that he had painted himself into a logical corner, Respondent tried to "re-brand" his lawsuit, stating: "while [Respondent's] complaint was framed as one for specific performance, technically this case should have been construed as an action to construe a contract." (Resp. Br. p. 17). Of course, this assertion is "technically" (and actually) wrong. Respondent could have brought a declaratory judgment action but did not, choosing instead to seek specific performance and repeatedly describing the claim as such. *See* (R. p. 10); (R. p. 122, line 8); (R. p. 65, line 3); *accord Skull Creek Club Ltd. Partnership v. Cook and Book, Inc.*, 313 S.C. 283, 289, 437 S.E.2d 163, 166 (Ct. App. 1993) ("It is well settled that parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise."). If this case was "technically" not for specific performance, then it was "technically" error for Judge Buckner to grant summary judgment on that claim and that order must be reversed.

[8] On the other hand, if the Agreement were considered an option such that July 11, 2020, was the purported expiration date of the option, then it would be permissible for an optionee to seek specific performance prior to July 11, 2020, provided the optionee had performed. Therefore, because Respondent brought his action for specific performance prior to the date on which he asserted performance was due, counsel for Smith properly classified the Agreement as an option. To assume the Agreement to be a sales contract would mean Respondent's complaint was premature.

Perhaps what Respondent meant—and what is more accurate—is that because Respondent was not yet entitled to specific performance, Judge Buckner did not "technically" order specific performance. Unlike a typical specific performance scenario, Judge Buckner did not order Smith's immediate performance. Instead, he ordered her performance upon the happening of a future event—*i.e.*, "upon payment." (R. p. 4) (*supra*). In this way, even though Respondent did not bring this suit as one for declaratory judgment, the *effect* of Judge Buckner's Order is similar to that which could have flowed from a declaratory judgment action. *See* S.C. Code Ann. § 15-53-30 (a party "may have determined any question of construction or validity arising under the [contract] . . . and obtain a declaration of rights status or other legal relations thereunder").

The problem for Respondent is that even if this action were viewed as one for declaratory judgment, this would still not excuse his failure to deliver payment and/or take further judicial action to enforce the Order. To obtain affirmative relief based upon the rights declared by the Court, the Declaratory Judgment Act requires a party, like Respondent, to separately and subsequently petition the Court. *See* S.C. Code Ann. § 15-53-120 ("Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree to show cause why further relief should not be granted forthwith.") (emphasis added).

In other words, if Judge Buckner's Order were simply one for declaratory judgment, then Respondent would still be obligated to comply with that Order and initiate a separate and subsequent proceeding to enforce that Order—just like the process contemplated by Rule 70, SCRCP, under which Respondent concedes he could have sought relief at any time. *See* (Resp. Br.

p. 30) ("[Respondent] could have sought relief form the Circuit Court, either under Rule 70 or through contempt proceedings, **at any time** after July 11, 2020.") (emphasis added).

Finally, Respondent's contention that this action was "technically" one for interpretation of a contract is wholly inconsistent with his argument that Judge Price was justified in his *sua sponte* grant of equitable tolling. Respondent specifically defends Judge Price's *sua sponte* Order by relying on the notion that "[e]quitable principles govern the specific performance remedy." (Resp. Br. p. 27). However, this cannot be reconciled with Respondent's attempt to now claim this was "technically . . . an action to construe a contract." Unlike an action for specific performance, an action to construe a contract sounds in law, not equity. *See Silver v. Aabstract Pools & Spas, Inc.*, 376 S.C. 585, 590, 658 S.E.2d 539, 541 (Ct. App. 2008) (citing *Pruitt v. S.C. Med. Malpractice Liability Joint Underwriting Ass'n,* 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001)). Therefore, if Respondent is correct that this is an action at law, then it strikes a fatal blow to Respondent's claim that equitable tolling was justified. The fact that Respondent's arguments are logically and legally incongruous highlights why his arguments must fail.

B. Smith's Mootness Argument is preserved.

In a footnote, Respondent claims this issue is not preserved because it was not specifically ruled on in Judge Price's initial order denying Smith's Rule 60 Motion, and that Smith did not subsequently raise this argument in her Rule 59 Motion to Judge Price. (Resp. Br. p. 10, n. 3). Presumably Respondent relegates this offhand assertion to a footnote because it is utterly false. *See* (R. p. 147, line 25–p. 148, line 3) ("The relief that I'm seeking from you is relief from the judgment, essentially declaring the judgment to be moot because the deadline has passed under Rule 60(b)(5)."); (R. p. 148, lines 5-7) ("the relief that we had requested in our Rule 60(b)(5) motion initially was, this judgment is, in essence, moot."); (R. p. 149, lines 14-15) ("So, in essence,

to go back to your question of the top, the relief we are requesting is, Judge Buckner's order is moot.").[9]

C. In arguing that the expiration of Judge Buckner's Order does not render it moot, Respondent misapplies Rule 70, SCRCP.

Respondent claims that to find this matter moot would be improper because it would mean that "any time a circuit court orders specific performance by a certain date, an incalcitrant litigant may refuse to comply with the specific performance order by that date, appeal the order, then on appeal argue that the specific performance is moot because the deadline as passed." (Resp. Br. p. 13).

First, this suggestion is wholly inconsistent with Respondent's assertion that this action is "technically" not for specific performance. This fallacy aside, Respondent is wrong. Although Respondent concedes that Judge Buckner's Order required the parties—including Respondent—to "comply with the terms by July 11, 2020," it seems Respondent wants to act as though he had no obligation under this Order. (Resp. Br. p. 14). Plainly Judge Buckner's Order only required

[9] Because Smith plainly raised mootness in the course of her Rule 59 Motion, Respondent's contention that it was not ruled on is immaterial, however, it bears mention this claim is nonetheless wrong. *See e.g., Elam v. S.C. DOT*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (recognizing that raising an issue in the Rule 59 motion which has not been ruled on will preserve the issue). Although Judge Price may not have used the word "moot" in his initial April 5, 2021 order denying Smith's Rule 60 Motion, this order specifically recognizes that Smith's argument is that Judge Buckner's Order had expired. (R. p. 92). The effect of this expiration *is* Smith's mootness argument. *See* (App. Br. p. 2) (stating the issue to be "Because the underlying Orders have expired the matter is moot, and Respondent's right to specific performance, even if it existed, has expired. . ."). Plainly, Judge Price ruled against Smith on this issue, otherwise he would have granted Smith's Rule 60 Motion. Thus, Smith's mootness argument was "ruled on." *See Pryor v. Nw. Apartments*, 321 S.C. 524, 528 n.2, 469 S.E.2d 630, 632 (Ct. App. 1996) (finding an issue preserved where it was apparent from the order that "the trial court implicitly ruled on and rejected this [appellant's] argument."); *Gartside v. Gartside*, 383 S.C. 35, 44, 677 S.E.2d 621, 626 (Ct. App. 2009) (finding appellant's argument preserved because the trial court's denial of the relief appellant sought was an implicit rejection of the arguments appellant made in support of that relief).

Smith to convey her interest "**upon payment** of $312,000.00 per the terms of the Settlement Agreement." (R. p. 4). Similarly, the Agreement provides Respondent "ha[d] 24 months **to deliver funds** to [Smith]." (R. p. 4). There is simply no way around the fact that neither the Order nor the Agreement required Smith to perform (*i.e.*, convey the Property) in the absence of payment. What Respondent overlooks (and what makes this case different than the hypothetical Respondent proposes) is that because Respondent has not paid the $312,000.00 Smith is not the "incalcitrant litigant," Respondent is.

Respondent claims this matter is not moot because "after the expiration of the deadline, either party could have applied to the Circuit Court to enforce the Judgment under Rule 70, SCRCP or [] petitioned the Circuit Court for a writ of execution" under Rule 70. (Resp. Br. p. 14). While either party *could* have done this, they did not, and it is Respondent's decision not to that is relevant to the issue now before the Court.

Moreover, in citing Rule 70, Respondent conveniently omits the portion of the rule that provides this relief is only available "On application of the **party *entitled* to performance**." Rule 70, SCRCP. (all emphasis added). Even if Respondent had requested this relief (which he did not) he would not be entitled to specific performance. Having failed to make payment by the July 11, 2020, deadline—a date he concedes was not stayed by the appeal—Respondent is not (and never will be) "*entitled* to performance." Thus, the matter is moot. Had the Legislature intended the result Respondent proposes it would have drafted a statute to provide for an automatic stay in this case. But, as Respondent concedes, it did not.

D. This case does not fall under the "capable of repetition yet evading review" exception to mootness.

There is nothing about this matter that is capable of repetition. The July 11, 2020, deadline can only expire once. Moreover, considering that Respondent concedes he could have brought an

action to enforce the Order at any time, there is no basis for his suggestion that this matter could avoid review.

The essence of Smith's mootness argument on appeal is that even if this Court were to affirm, it would provide no practical relief to Respondent. (App. Br. pp. 9-13). In response, Respondent asserts that if this matter were "affirmed, [Respondent] may pursue relief" by seeking "to execute the judgement, hold the other party in contempt, or apply for relief pursuant to Rule 70." (Resp. Br. p. 9). However, the problem is that all the "relief" Respondent claims he would receive by this Court's affirmance, he also concedes has always been available to him. *See* (Resp. Br. p. 30) (admitting "[Respondent] could have sought relief form the Circuit Court, either under Rule 70 or through contempt proceedings, **at any time** after July 11, 2020." *see also* (Resp. Br. p. 9) (*supra*) & (Resp. Br. p. 26) (recognizing the circuit court retained jurisdiction to enforce matters not stayed by the appeal); & (Resp. Br. p. 27) (Respondent conceding that despite the appeal, the Circuit Court "retained authority under Rule 70, SCRCP to enforce the Order even if the deadline had expired.") (emphasis added).[10]

Having conceded this relief was always available to him, it follows this relief cannot possibly depend upon an affirmance by this Court—the quintessential hallmark of a moot appeal. *See Croft v. Town of Summerville*, 433 S.C. 473, 480, 860 S.E.2d 352, 356 (2021) ("An appellate court will not pass on moot and academic questions . . . [and] A moot case exists where a judgment rendered by the court will have no practical legal effect") (internal citation omitted); *McDill v.*

[10] Smith does not dispute that the Circuit Court retained the jurisdiction to entertain an action under Rule 70, SCRCP. However, Smith asserts that such an action can no longer be maintained in *this particular case,* not because the Circuit Court lacks jurisdiction, but because in failing to comply with the payment deadline required by the Order, Respondent is not a "party entitled to performance."

Nationwide Mut. Ins. Co., 368 S.C. 29, 31, 627 S.E.2d 749, 750 (Ct. App. 2006). Thus, Respondent's argument fails.

II. Judge Price erred in *sua sponte* tolling the July 11, 2020 deadline.

Smith asserts Judge Price's *sua sponte* Order of equitable tolling was error for two primary reasons. First, because the Circuit Court was without jurisdiction to amend the July 11, 2020 deadline, Judge Price's Order amounted to an improper *nunc pro tunc* order. Second, Smith argues that because Respondent neither requested equitable tolling, nor submitted any evidence to support equitable tolling, this *sua sponte* Order was inconsistent with the law which mandates the party seeking the benefit of equitable tolling bears the burden of establishing sufficient facts and extraordinary circumstances to support it. Respondent does not appear to address Smith's second argument. Respondent offers no argument or explanation of why it was permissible for the Circuit Court to order relief that was never requested. Moreover, Respondent does not point to a single fact or piece of evidence (because none was submitted) that supports equitable tolling. Instead, Respondent just makes the broad and conclusory assertion that equitable tolling was needed to avoid some purported unfairness that Respondent claims resulted "primarily because Smith appealed."

A. Judge Price's Order is an improper *Nunc Pro Tunc* Order.

Respondent argues that because Judge Buckner could not have known (when he issued his December 3 Order) that Smith would refuse to comply, Judge Buckner could not have included the equitable tolling directives in that Order. (Resp. Br. p. 25). This misses the point entirely. Of course, Judge Buckner would not have ordered equitable tolling. At the time he issued his Order, performance (even according to Respondent) was not yet due. (*supra*). The effect of Judge Buckner's Order was to determine that the 24-month timeframe in the Agreement extended until

July 11, 2020. The point directly at issue in the appeal from this Order is when the parties' performance was due under the Agreement, and whether Smith was obligated to convey the Property if Respondent made payment on or before July 11, 2020.

Rule 241 provides that once an appeal is taken, the Circuit Court only "retains jurisdiction over matters **not affected** by the appeal." (emphasis added). When the parties' performance was due is an issue "affected by the appeal." Therefore, the Circuit Court lacked jurisdiction to pass on anything that would affect the date on which either parties' performance was due under the Agreement. Yet, in granting equitable tolling, that is exactly what Judge Price did: "The Court finds that the Parties shall have until February 1, 2022, to complete **performance under the contract** after which the non-performing party(s) rights shall expire." (R. p. 95) (emphasis added).

Respondent asserts Judge Price had jurisdiction to extend the prospective application of the Judge Buckner's Order because Rule 241, SCACR provides that during an appeal the Circuit Court retains "the authority to enforce any matters not stayed by the appeal." (Resp. Br. p. 26) (*citing* Rule 241, SCACR). Respondent claims that Judge Price's *sua sponte* Order was a proper "exercise [of] its authority not only to enforce its prior Order, but also to make an equitable finding that the Order should have prospective application." (Resp. Br. p. 27) (stating "In order for the Order to have prospective application the Court in its discretion [properly] determined that it was necessary to toll the July 11, 2020 deadline."). However, this is a fundamental misapplication of both Rule 60, SCRCP and Rule 241, SCACR.

First, the matter was before Judge Price on a motion pursuant to Rule 60(b)(5) which provides that "the court may **relieve** a party" from an order or judgment if (among other things) "it is no longer equitable that the judgement should have prospective application." Rule 60, SCRCP (entitled "**relief** from [a] judgment or order") (emphasis added). The ability to grant **relief**

from the prospective application of a judgment is entirely, and fundamentally different than the ability to extend the prospective application of a judgment. There is nothing in Rule 60 (or any other jurisprudence) that permits a Court to extend or expand the prospective application of an otherwise expired order—much less to do so *sua sponte*. Yet that is precisely what occurred. (R. p. 171; lines 3-7) (Judge Price ruling "I'm going to set a new date as of now. And I'm going to agree that [Judge Buckner's] has expired, however I tolled it I'm giving it a new date.").

Second, Respondent incorrectly asserts that Judge Price's *sua sponte* Order was a proper exercise of the Circuit Court's authority to "enforce any matters not stayed by the appeal" under Rule 241, SCACR. (Resp. Br. p. 26) (citing Rule 241, SCACR). Respondent concedes there were no efforts made to enforce the Order. (*supra*). Smith's Rule 60 Motion requested **relief** from the judgment, it did **not** seek or request "**enforcement**" of the Order. Enforcement of Judge Buckner's Order was never before the Circuit Court. Thus, Judge Price's *sua sponte* Order—delivered in response to Smith's Rule 60 motion—cannot logically be deemed an exercise of its authority to "enforce" an order. This dovetails into the final reason Judge Price erred.

B. Respondent's claim of unfairness is not compelling because the expiration of his rights are the result of his own conduct.

Respondent's primary effort to justify Judge Price's *sua sponte* Order is the claim that it would unfair not to equitably toll the expiration of Judge Buckner's Order. However, there is nothing equitable about the *sua sponte* decision to toll Judge Buckner's Order. Respondent overlooks that the "unfairness" he claims is the result of his own doing. Other than filing an appeal, Respondent fails to identify any action or conduct on the part of Smith that has resulted in any unfairness. *See* (Resp. Br. p. 29) (claiming he never made the payment required "primarily because Smith appealed [Judge Buckner's] Order on April 14, 2020, and had previously refused to agree accept the agreed upon amount.").

There is not a shred of evidence in the record that Smith failed to comply with Judge Buckner's Order. To the contrary, because Respondent neither paid nor prepared the deed for Smith to execute, Smith had neither the ability nor opportunity to comply (or not comply) with Judge Buckner's Order. The fact that Respondent failed to deliver payment after Judge Buckner issued his Order is not disputed (R. pp. 111-113). Yet Respondent claims that "it would be egregiously unfair and an affront to the Circuit Court's authority for Smith to have been ordered to comply with the agreement, only then to permit her to escape from the Order's directives by virtue of the fact that she continued to refuse to comply with the Circuit Court's deadline." (Resp. Br. p. 30). There is no other way to describe this assertion than to say Respondent is simply making things up.

As stated above, Judge Buckner's Order directed *both* parties—not just Smith—to comply with the Settlement Agreement, and to do so by July 11, 2020. However, Respondent completely ignores his own obligations under this Order. This is particularly troubling given the fact that his obligation to pay and prepare the deeds was a precursor to Smiths' obligation to convey title. (R. p. 4) (Smith was only to convey "upon payment of the $312,000.00 per the terms of the Settlement Agreement."); (R. p. 14) (the Settlement Agreement providing Respondent was obligated to prepare the deed). Respondent's claim that Smith "continued to refuse to comply with the Circuit Court's deadline" is a shocking misstatement.

It is confounding how Respondent can acknowledge that the law plainly provided him the ability to enforce the Order under Rule 70, but in the same breath claim it is unfair that he chose not to avail himself of this remedy. Equity does not absolve Respondent of his obligation to comply with the law, nor does it permit a court to disregard the law. *Contra, Collins*, 299 S.C. at 468, 385 S.E.2d at 837 ("equity [only] aids the vigilant and diligent"); *accord, Regions Bank*, 394 S.C. at

254, 715 S.E.2d at 355 ("When providing an equitable remedy, the court may not ignore statutes, rules, and other precedent."); *Bishop v. Tolbert*, 249 S.C. 289, 299, 153 S.E.2d 912, 917 (1967) ("He, therefore, who demands the execution of an agreement, ought to show that there has been no default in him in performing all that was to be done on his part; for, if either he will not, or through his own negligence cannot perform the whole on his side, he has no title in equity to the performance of the other party, since such performance could not be mutual. And, upon this reasoning, it is that where a man has trifled or shown a backwardness in performing his part of the contract, equity will not decree a specific performance in his favor").

Respondent has admitted the July 11, 2020, deadline has passed without payment; Respondent has admitted the matter was not stayed by the appeal; Respondent has admitted that he could have brought an action to enforce the Order, but he did not. To the extent Respondent deems the current circumstances unfair, the blame for that falls squarely upon himself. Yet, through some perversion of logic, Respondent would impose equitable tolling to extend the life of the Order and to save him from the results of his own failure to perform.

III. Judge Buckner erred in finding the 24-month deadline extended until July 11, 2020.

Respondent claims that Judge Buckner properly determined that he had until July 11, 2020, to deliver payment because finalizing the Glover Place transaction was "a condition precedent to the Settlement Agreement and its 24-month time limit." (Resp. Br. p .19). This claim lacks merit.

As a threshold matter, it is misnomer to suggest that there was a condition precedent to the existence of the Settlement Agreement.[11] The question should be framed as whether there was a

[11] A condition precedent is a fact, other than the passage of time upon which a party's duty to perform is conditioned. *See Cobb v. Gross*, 291 S.C. 550, 553, 354 S.E.2d 573, 575 (Ct. App. 1987). To the extent Respondent suggests there is a condition precedent to the existence of the Agreement, this would leave the Agreement is a legal nullity. The condition is upon a party's obligation under the contract. If there is a condition precedent to the formation of a contract, then

condition precedent to Respondent's obligation to "deliver payment within 24 months." Rather than analyzing Respondent's obligations, Judge Buckner instead focused solely on Smith's obligations to convey the Property upon delivery of the payment. Judge Buckner determined that it was "impossible for any of the parties to successfully perform under the terms of the Settlement Agreement" prior to the Glover Place transactions. (R. p. 3). However, there is nothing to indicate that it was "impossible" for Respondent to "deliver the payment" prior to the completion of the Glover Place transaction. This is particularly true when considering that no money was exchanged or even contemplated by the Glover Place transaction. *See generally, Morin v. Innegrity, LLC*, 424 S.C. 559, 570, 819 S.E.2d 131, 137 (Ct. App. 2018) (recognizing "the fact that one is unable to perform a contract because of his inability to obtain money, whether due to his poverty, a financial panic, or failure of a third party on whom he relies for furnishing the money" does not render his performance impossible).

The conclusion that *both* parties' performance was impossible, and the resulting decision to treat the Glover Place transaction as a condition precedent to *Respondent's* obligation to pay was based on the trial court's incorrect assertion that Smith "did not possess a 'current ownership' consisting of the 1/3 interest in [the Property] that would have entitled her to consideration" prior to the completion of the Glover transaction. (R. p. 4). In this way, the court seemingly found Respondent's payment was impossible, not because it was *actually* impossible, but because

there is no contract. *See Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 575, 762 S.E.2d 696, 699 (2014) (recognizing an agreement to agree upon some future occurrence is not a contract); *Fici v. Koon*, 372 S.C. 341, 347, 642 S.E.2d 602, 605 (2007) (a signed document which amounts to "nothing more than an agreement to agree is unenforceable."). Thus, the analysis must focus on the parties' respective duties to perform.

Smith's performance was seen as impossible.[12] However, as explained in Smith's brief, it was neither impossible nor illegal for Smith to convey the requisite interest in the Property prior to conclusion of the Glover Place transaction for the simple reason that the law permits the conveyance of a future interest in property. (App. Brief pp. 23-24). Therefore, because the Circuit Court's ruling was based upon the incorrect finding that Smith's performance was impossible, it was error.

As it regards Respondent's suggestion that this argument is not preserved, this (like so many of Respondent's claims) is just wrong. At summary judgment, and in response to inquiries from Judge Buckner on the precise point of the timing and ability for Smith to convey, counsel for Smith raised this point repeatedly. *See* (R. p. 75, line 3) ("I believe [Smith] could have conveyed her interest at any point following" the execution of the Settlement Agreement); *see also* (R. p. 73, lines 20-24) and (R. p. 79, lines 7-15) (asserting there were no conditions precedent to the 24-month period which ran from execution of the Settlement Agreement); (R. p. 43).

Finally, Respondent claims that Judge Buckner was correct in granting specific performance, asserting there is evidence that Respondent was ready, willing and able to perform, and that Smith refused to accept performance prior to Respondent filing suit. That Respondent would allude to his purported preparedness and ability to perform makes his decision not to enforce Judge Buckner's Order all the more significant. Moreover, Respondent's suggestion that he performed, or that Smith refused this performance, misrepresents the record.

Respondent points to a small snippet of the summary judgment transcript to suggest that counsel for Smith conceded she refused to accept payment of the $312,000.00. However,

[12] Respondent does not concede the apparent assumption that simply because something may be a condition precedent to one party's performance that it automatically follows the same thing is also a condition precedent to the other party's performance.

Respondent conveniently fails to put this statement by counsel in context. Smith's counsel plainly explained his comments in this regard, stating as to "Mr. Crosby's [*i.e.*, Respondent's counsel] contention that [Respondent] has been ready and willing to deliver the $312,000 to [Smith] which **she has never been offered cash**. **What she has been offered is her consenting to them clearing timber of which she's the 1/3 own [and] essentially pay[ing] her back"** with her own money. (R. p. 76-77) (emphasis added). Thus, there is no evidence Respondent made payment, nor is there evidence that Smith ever refused payment. This portion of the record merely indicates that Smith refused an arrangement whereby Respondent would pay Smith with the proceeds from her own timber. Considering that Judge Buckner did not find Respondent's obligation to pay to be conditioned upon the sale of timber—a ruling Respondent has not appealed, and which is now the law of the case—it follows that there is nothing improper about Smith rejecting a proposal that necessitates the sale of timber, something the Agreement does not contemplate or require. Therefore, like the rest of Respondent's arguments this one also fails.

CONCLUSION

For the reasons stated above, this Court should find this matter moot and vacate the Orders of both Judge Buckner and Judge Price. Alternatively, for the reasons stated herein, this Court should reverse either or both of Judge Price's denial of Smith's Rule 60 Motion and/or Judge Buckner's Order and vacate the other.

[signature page to follow]

Respectfully submitted,

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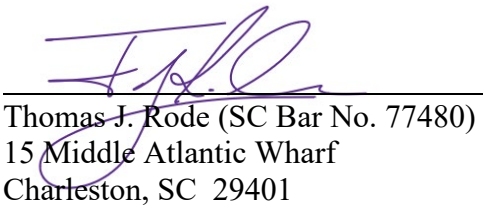

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In the Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

The Honorable Perry M. Buckner, III, Circuit Court Judge

The Honorable Bentley D. Price, Circuit Court Judge

Common Pleas Case No.: 2019-CP-15-00218

Consolidated Appellate Case No.: 2020-000607

Larry Rahn, ……...Respondent,

v.

Barbara Smith, ……..Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that the enclosed complies with Rule 211, SCACR.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned certifies that she served a copy of the foregoing **Appellant's Reply Brief** to all counsel of record on April 5, 2023, by mailing a copy of same, electronically or with proper postage affixed thereto, as follows:

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