

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM GREENVILLE COUNTY
Before the Master In Equity

Charles B. Simmons, Jr., Master In Equity

Case No. 2007-CP-23-3206

RECEIVED
JUN 13 2013

SC Court of Appeals

North American Rescue Products, Inc.,.....Appellant,

v.

P. J. Richardson,.....Respondent.

REDACTED INITIAL BRIEF OF APPELLANT
(Un-redacted Version Filed Under Seal)

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STATEMENT OF ISSUES

1. The trial court erred in refusing to require Richardson to post a bond during the pendency of the appeal.
2. The trial judge erred in refusing to require Richardson to deposit the judgment during the pendency of the appeal.
3. In the alternative, the trial judge erred in refusing to restrict Richardson's use of his assets during the pendency of the appeal.

STATEMENT OF THE CASE

This appeal is directly related to this Court's opinion issued earlier in this case, in which this Court held that the Respondent (Richardson) must buy 7.5% of the stock of the Appellant (NARP) for \$2,936,300.00. *North American Rescue Prods., Inc. v. Richardson*, 720 S.E.2d 53, 61 (S.C. App. 2011), hereinafter cited in short form as *NARP*.

In April 2007, Richardson falsely claimed a contractual right to purchase 7.5% of NARP's stock of one-penny per share (approximate total price of \$118.00) under an alleged option agreement. *NARP*, 720 S.E.2d at 57; (see also *NARP* ROA at 1061-1062).¹ Consequently, NARP filed suit and sought a declaratory judgment that Richardson had no contractual right to purchase any of NARP's stock. (*NARP* ROA at 6-7). Richardson answered and counterclaimed, again asserting a right to purchase 7.5% of NARP's stock for one-penny per share. (*NARP* ROA at 13-15, ¶¶ 39-43, 52-55). He continued to make this claim in his amended answer and counterclaim, and in his second amended answer

¹ This brief references materials from the Record on Appeal in the first appeal before this Court under the rule that an appellate court may take judicial notice of its own records. *Wise v. Wise*, 716 S.E.2d 117, 122 (S. C. App. 2011). For the convenience of this Court, these materials have been designated for inclusion in the Record on Appeal in this case and set forth in a section entitled "Excerpts from Record on Appeal in First Appeal."

and counterclaim. (*NARP* ROA at 28-31, ¶¶ 53-54, 63-66, 69; and ROA at 41, ¶¶ 53-54). At trial, however, Richardson finally admitted that he did not have any right to buy NARP's stock for one-penny per share. *NARP*, 720 S.E.2d at 57 n.1. Also at trial, Richardson made a new claim that he was entitled to buy 7.5% of NARP's stock for \$415,988.00. *Id.*

The jury found that Richardson was entitled to receive 7.5% of NARP's stock but must pay \$2,936,000.00 for the stock – the trial court entered judgment accordingly. *NARP*, 720 S.E.2d at 57, 59. Both parties appealed. In October 2008, shortly after commencing its appeal, NARP tendered 7.5% of its stock to Richardson for \$2,936,300.00, stating that NARP would withdraw its appeal if Richardson accepted the tender. (Exh. B to Motion for Limited Remand in *NARP* I). Richardson refused the tender, and NARP made a motion in this Court for a limited remand to have the judgment marked satisfied. (Motion for Limited Remand in *NARP* I). Richardson opposed the motion, contending *inter alia* that NARP's tender contained arbitrary conditions, *e.g.*, acceptance of the tender and full payment within five (5) business days. (Memo. in Opposition to Limited Remand Motion).² NARP replied that it would tender the stock at any reasonable time and place designated by Richardson (Reply to Return to Limited Remand Motion). Richardson never identified a time or place that we would accept the tender. This Court denied the motion for limited remand.

On appeal, this Court affirmed the jury's verdict and the trial court's judgment that Richardson had to buy the stock for \$2,936,000.00. Both parties petitioned for

² This objection was not well grounded. It is axiomatic that a person obtaining an order of specific performance, as Richardson did here, must be ready, willing and able to perform at the time of the judgment. See, *e.g.*, *Ingram v. Kasey's Associates*, 531 S.E.2d 287, 291 (S.C. 2000) (person seeking specific performance must be ready, willing, and able to perform at all times).

rehearing, and this Court denied both petitions. Both parties filed certiorari petitions with the Supreme Court, which remain pending at this time.

On November 11, 2011, shortly after this Court's opinion in *NARP I*, NARP again tendered the stock to Richardson, and Richardson again refused the tender. Thereafter, on November 28, 2011, NARP filed a petition for rule to show cause, requesting that Richardson be ordered to appear before the court and show cause why he had not performed the judgment and whether he had the intent or ability to do so. (Order at 1). NARP also requested that Richardson be required to deposit the judgment amount plus post-judgment interest, or post a bond in like amount, during the continued pendency of the appeal, or that his use of assets be restricted during the pendency of the appeal. (Order at 2-3). The court issued the Rule to Show Cause on December 5, 2011, and a hearing was held on January 25, 2012. (Rule to Show Cause). At the hearing, Richardson claimed a net worth of [REDACTED] but admitted that all property was owned in a joint tenancy by entirety with his wife, who is not a party to this lawsuit and not subject to the appealed judgment. (Tr. 5-6, 8-12, 14-15). Richardson also admitted that [REDACTED] was held solely in the name of his wife, thus reducing his potential net worth to approximately [REDACTED] all held jointly with his wife. (Tr. 16-17). In July 2012, the trial court issued an order denying the relief requested by NARP, and NARP timely appealed.

ARGUMENT

The trial court erred in refusing to require Richardson to secure payment of the judgment during the pendency of the appeal.

The trial judge refused the relief requested by NARP for the following reasons:

(1) Richardson [REDACTED] amount referenced in this Court's opinion in *NARP I*; and (2) there was no evidence tending to show he had transferred or concealed assets or that he intended to do so or remove the assets from the jurisdiction. (Order at 2). This was error for the following reasons: (1) Richardson's wife is not a party to this lawsuit and is not subject to the judgment; (2) she has unfettered access to all assets and no duty to pay the judgment; and (3) if Richardson dies during the pendency of the appeal, sole ownership of all assets immediately transfers to his wife with no corresponding duty to pay the judgment.

Moreover, an order of specific performance is an injunction order. See *O'Shea v. Lesser*, 416 S.E.2d 629, 631 (S.C. 1992) (no error in requiring party to elect between legal remedy of damages and injunctive relief of specific performance). Injunction orders are not stayed automatically by an appeal and, therefore, Richardson has an existing and immediate obligation to perform the judgment entered by the trial court. Rule 241(b)(8), SCACR (injunction orders not automatically stayed by appeal). In addition, the judgment ordered the payment of money, directed the assignment and delivery of documents and personal property (stock) in exchange for the payment of money, and directed the execution of conveyance for the stock. Thus, the appeal did not stay Richardson's obligation to perform the judgment found by the jury, entered by the trial court, and affirmed by this Court. See S.C. Code Ann. §§ 18-9-130(A)(1) (Supp. 2012) (appeal does not stay a judgment "directing the payment of money"); 18-9-150

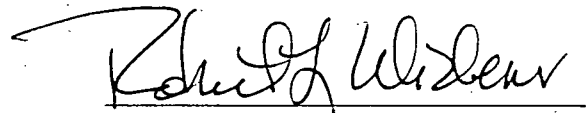
(Supp. 2012) (appeal does not stay a judgment directing the “assignment or delivery of documents or personal property”); 18-9-160 (Supp. 2012) (appeal does not stay a judgment directing the “execution of a conveyance or other instrument”).

In short, Richardson has an existing obligation to perform the appealed judgment that is not stayed by the appeal. Thus, he must secure payment of that judgment during the appeal by deposit or bond, and the trial court erred in requiring him to do so. At the very least, the trial court should have restricted Richardson’s use of the assets during the pendency of the appeal.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the appealed order should be reversed.

Respectfully Submitted,

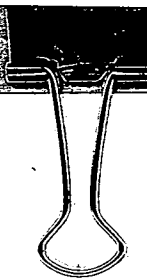


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