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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Donald B. Hocker, Circuit Court Judge

Case No. 2022-001547

Turner's Marina, LLC,

Respondent-Appellant,

v.

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

Defendants,

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

**REPLY BRIEF OF APPELLANT-RESPONDENT PAIGE N. LORBERBAUM TO
APPELLANT-RESPONDENT TURNER'S MARINA, LLC'S BRIEF**

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STATEMENT OF ISSUES ON APPEAL

1. Appellant-Respondent Paige Lorberbaum Appeal Should Not be Dismissed as Moot.
2. Did the Trial Court commit an error of law by failing to find that the subject Right of First Repurchase violated the rule against perpetuities.

ARGUMENT

I. LORBERBAUM'S APPEAL SHOULD NOT BE DISMISSED AS MOOT DUE TO HER COMPLIANCE WITH THE TRIAL JUDGE'S ORDER.

Turner asserted in its Motion to Dismiss, filed with this Court on January 23, 2023 (“Motion to Dismiss”) that Lorberbaum’s appeal should be dismissed since she “voluntarily” sold the Lot 158 (“Lot”) to Turner for \$54,500 on December 28, 2022. This Court by Order dated March 9, 2023 denied said Motion to Dismiss, citing *Mathis v. S.C. State Highway Dept.*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973). Turner’s Marina’s second attempt at a dismissal of this appeal using the identical arguments rejected by this Court should also be denied for the reasons discussed below.

Turner seeks dismissal of Lorberbaum’s appeal on the grounds of mootness, asserting since she “voluntarily” sold the Lot to Turner during the pendency of the appeal, there is no remaining controversy before the Court. The law in South Carolina on the mootness of a pending appeal is well established. “An appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy.” *Curtis v. State*, 345 S.C. 557, 566, 549 S.E.2d 591, 596 (2001). “A case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief.” *Mathis v. S.C. State Highway Dep’t*. 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973).

Even if a case is moot under the above criteria, our appellate courts will still decide questions on appeal under three exceptions, namely: (1) if the issues raised are capable of repetition but generally will evade review; (2) if the issues are imperative and of manifest urgency to establish a rule for future conduct in matters of important public interest, and (3) the issues raised may affect future events or have collateral consequences for the parties.” *S.C. Pub. Int. Found. v. S.C. Dep’t of Transp.*, 421 S.C. 110, 120, 804 S.E.2d 854, 860 (2017); *Sloan v. Greenville Cnty.*, 356 S.C. 531, 552-54, 590 S.E.2d 338, 349-50 (Ct. App. 2003).

A. The Case is not Moot since a Reversal of the Trial Court’s Decision Would Return Title of the Lot to Lorberbaum.

Under the above standard, this case is not moot since a reversal of the Trial Court’s decision finding Turner’s right-of-repurchase is violative of the Rule Against Perpetuities will result in the return of her Lot, with Turner obtaining a refund of the \$54,500 purchase price. A similar scenario was before the Court in *Skydive Myrtle Beach v. Horry Cnty.*, 428 S.C. 638, 837 S.E.2d 485 (2020), a dispute concerning an ejectment of an aircraft hangar. The tenant, Skydive, was required to vacate the premises by Court Order and thereafter appealed. *Id.* at 642-43, 837 S.E.2d at 487. The landlord, Horry County, sought to dismiss the appeal on the grounds of mootness, asserting there was no longer any justiciable controversy since Skydive had not occupied the property for three (3) years pending the appeal. *Id.* The Court rejected this argument, holding it still had the power to return possession to Skydive if the ejectment was improper. *Id.* at 644, 837 S.E.2d at 488. The Court noted Skydive had consistently and repeatedly contested all rulings with the clear intent to retain possession and had done nothing to delay the resolution of the appeal. *Id.* at 643, 837 S.E.2d at 487. In the instant case, Lorberbaum has also continuously asserted Turner’s Right of Repurchase was invalid and unenforceable and has also not taken any action to delay this appeal.

If the Court determines that Turner's Right of Repurchase was invalid and unenforceable, it can reverse the Order of the Trial Judge and remand the case with instructions to require the Lot be reconveyed to Lorberbaum, upon a refund of the \$54,500. The Trial Court can also provide for whatever other relief Lorberbaum may be due for the loss of use of her property pending the appeal. Turner, in forcing compliance with the sale provisions under its contested Right of Repurchase, knew full well a substantive legal challenge was pending on appeal, thus took said action knowing the risks the sale could be overturned. It had the option to simply wait for the final decision by the appellate courts as to its claimed Right of Repurchase, and then proceed to acquire the Lot. The fact that it did not do so should not result in Lorberbaum having her appeal dismissed. This substantive relief is still available to Lorberbaum and the existing controversy still needs to be decided by this Court.

B. The Sale of the Lot was not "Voluntary."

The entire basis of Turner's argument on Mootness is founded on the false premise that since Lorberbaum "voluntarily" sold the Lot pending her appeal, she has abandoned all rights to further dispute the transaction, and the issue of the validity of Turner's right of first refusal is now moot. In fact, Turner in its Brief and supporting Affidavit of Neil Turner disingenuously states the transfer was "voluntary" or "willingly" a total of nine (9) times.¹ In reality, Lorberbaum was forced and compelled to transfer and sell her primary residence and find another place to live pursuant to the express terms of the Trial Judge's Orders, as explained above. In addition, Turner's Marina, through counsel, made repeated threats of sanctions, civil contempt and award of attorney fees and damages, as outlined below:

¹ Brief of Respondent-Appellant Turner- (1) p. 9, line 13; (2) p. 10, line 4; (3) p. 10, line 13; (4) p. 11, line 14; (5) p. 11, line 17; (6) p. 12, line 13; (7) p. 13, line 4; Affidavit Neil Turner- (8) R. p. 169, line 3; (9) R. p. 169, line 6.

1. October 27, 2022 letter Thomas C. Taylor (“Taylor”) to Russell P. Patterson (“Patterson”): “. . .time is of the essence in the conveyance and Turner’s Marina LLC insists upon strict adherence to the timing set forth in Judge Hocker’s Order of August 4, 2022”. (Ex. 8, Appellant-Respondent Paige Lorberbaum’s Memorandum of Law in Opposition to Appellant-Respondent’s Motion to Dismiss, Feb. 2, 2023, S.C. Ct. Appeals (“Lorberbaum Motion to Dismiss Memo”).
2. October 28, 2022 E-mail Taylor to Patterson: “I trust this will go smoothly and per Judge Hocker’s Order” (Ex. 9, Lorberbaum’s Motion to Dismiss Memo)
3. October 30, 2022 E-mail Taylor to Patterson: “I’ve not heard from you and would appreciate your confirming that you are still representing Ms. Lorberbaum in this matter and that you have alerted her to our letter and demand to close in a timely matter. I want to make sure where to direct correspondence to her if the deed is not received by Wednesday, November 2, 2022.” (Ex. 10, Lorberbaum’s Motion to Dismiss Memo)
4. October 31, 2022 E-mail Taylor to Patterson: “Please let me know if we should expect the deed by Wednesday, or whether we should proceed to seek court assistance.” (Ex. 11, Lorberbaum’s Motion to Dismiss Memo - emphasis added)
5. October 31, 2022 Letter Taylor to Patterson: “On behalf of Turner’s Marina LLC, I reiterate that the Plaintiff insists upon closing the transaction on or before November 2, 2022 and demands the tendering of a General Warranty Deed from Ms. Lorberbaum to Turner’s Marina LLC by that date, along with the abandonment of the premises by midnight We will seek court assistance immediately if the Deed is not timely tendered. We will seek costs and attorney’s fees incurred as a

- result of the failure of Ms. Lorberbaum to comply with the Court Order.” (Ex. 12, Lorberbaum’s Motion to Dismiss Memo - emphasis added)
6. November 2, 2022 E-mail Taylor to Patterson: “Please have the General Warranty Deed delivered to Chet Williams’ office by 1:00 p.m.” (Ex. 13, Lorberbaum’s Motion to Dismiss Memo)
 7. November 2, 2022 Letter Taylor to Patterson: “. . . Turner’s Marina again insists upon closing today, November 2, 2022, which is the 90th day following the filing of the August 4, 2022 Order.” (Ex. 14, Lorberbaum’s Motion to Dismiss Memo)
 8. November 3, 2022 Turner Motion to Compel (Ex. 5, Lorberbaum’s Motion to Dismiss Memo): Motion seeks recovery of Turner damages suffered on a daily basis, sanctions for violating Court Order, to hold Lorberbaum in civil contempt, and attorney fees and costs.
 9. December 1, 2022 Turner Memorandum of Law in Support of Motion to Compel (Ex. 6, Lorberbaum’s Motion to Dismiss Memo): Requests sanctions for willful disobedience of Court Order, legal fees, order of contempt, and daily fine.
 10. December 14 Order (Ex. 7, Lorberbaum’s Motion to Dismiss Memo): The Trial Judge denied Turner’s request to hold Lorberbaum in contempt or to pay penalties or attorney fees to Turner. “Further, upon a careful review of the action of Lorberbaum in seeking an expedited decision on the disputed closing date, this Court cannot find any actions on her part that would justify the relief requested by Plaintiff.” P. 2
 11. December 15, 2022 Taylor e-mail to Patterson: “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.” (Ex. 15, Lorberbaum’s Motion to Dismiss Memo)

12. December 18, 2022 Taylor e-mail to Patterson: “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? Would you please let me know your and her intentions?” (Ex. 16, Lorberbaum’s Motion to Dismiss Memo)
13. December 27, 2022 E-mail Taylor to Patterson: “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.” (Ex. 17, Lorberbaum’s Motion to Dismiss Memo)

Under any type of reasonable review of the above events, it is clear the transfer of Lorberbaum’s home on December 28, 2022 was anything but voluntary. Pursuant to Court Order, and threat of serious sanctions sought by Turner, she complied with the Trial Judge’s Order, but under no circumstances did she somehow give up or lose her right to continue her appeal challenging the validity of the Right of Repurchase.

Turner’s argument of a “voluntarily” sale of the Lot rendering the appeal moot is the same argument made by Horry County in *Skydive*. *Skydive* at 642, 837 S.E.2d at 487. Horry County argued that since Skydive had voluntarily vacated the premises for three (3) years, it had rendered its appeal moot. *Id.* The Court concluded the move was not voluntary by any means, but occurred after ten (10) Horry County deputies arrived at the hanger to force SkyDive out. *Id.* at 643, 837 S.E.2d at 487. As can be seen above, Lorberbaum’s “voluntary” sale was the result of similar pressure, and is not an indication she woke up one morning and simply decided to sell what is essentially her home and end the dispute.

C. The Validity of Turner’s Right of Repurchase Is Capable of Repetition.

The appellate court will still decide issues that are moot if they are capable of repetition but evade review. *See Byrd v. Irmo High School*, 321 S.C. 426, 432, 468 S.E.2d 861, 864 (1996) (Contested ten day suspension of students, after suspension hearing capable of repetition but would evade review); *Sloan* at 555, 590 S.E.2d at 351 (Court heard dispute over expedited public contract provision and projects although projects complete); *S.C. Pub. Int. Found. v. S.C. Dep’t of Transp.*, 122, 804 S.E.2d at 861. There is no requirement that the issue will arise again between the same parties. *Byrd* at 432, 468 S.E.2d at 864.

In the present case Turner asserts the right to exercise its right-of-repurchase over all 200 lots in the RV Resort. There is pending in the Beaufort County Court of Common Pleas a lawsuit filed by Turner seeking to enforce said rights today (*Turner’s Marina LLC v. Daniel Hyde*, C.A. No. 2021-CP-07-2165 – Ex. 18, Lorberbaum’s Motion to Dismiss Memo). It is not only likely, but inevitable that the identical issue raised by Lorberbaum in her appeal will arise again. If the lower courts in the future order or force the sale of said property, as was the case with Lorberbaum, the determination of the validity of the Right of Repurchase will never be determined. The issues raised by Lorberbaum fit squarely into this exception and the Court should not dismiss this appeal.

D. The Validity of Turner’s Right-of-Repurchase May Affect Future Events or Have Collateral Consequences for the Parties.

Even if the Court determines the issues raised by Lorberbaum are moot, they still can be decided under the second exception allowing for the appellate court to hear an appeal since said issues may have effect on future events or have collateral consequences for the parties. *Curtis* at 556, 549 S.E.2d at 596; *Sloan* at 554-55, 590 S.E.2d at 351; *S.C. Pub. Int. Found.* at 349-350, 590 S.E.2d at 552-553.

As discussed above, if the Court determines Turner’s Right of Repurchase is invalid, and determines for whatever reason the Trial Court’s forced sale of December 22, 2022 cannot be reversed, Lorberbaum still will have legal remedies for damages caused by the unlawful loss of her home and Lot, or possibly other remedies. In addition, these same issues will clearly come up again and again as Turner seeks to enforce the purported Right of Repurchase in the future, at all times seeking to avoid appellate review.

E. Lorberbaum was not Required Under South Carolina Law to Obtain a Stay or Supersedeas.

Turner asserts Lorberbaum was required to obtain a stay pursuant to Rule 62 SCRPC and to Rule 241 SCACR in order to continue her appeal. Such a position is inconsistent with said rules and South Carolina appellate law.

Rule 62(a) and (d), SCRPC provides a judgment after an appeal is generally not stayed, but a party “may obtain a stay,” consistent with the South Carolina Appellate Court Rules. Rule 62(a)&(d), SCRPC. The stay is effective when a supersedeas bond is approved by the Court. Rule 241(b)(4), SCACR provides an appeal does not automatically stay an order directing the delivery of real property unless the appealing party requests and obtains a supersedeas under Rule 241(c), SCACR. Rule 241(b)(4), SCACR. As in Rule 62(a)&(d), SCRPC, this rule also states any party “may move for an order imposing a supersedeas of matters decided in the order, judgment”
Id.

Turner’s interpretation of these provisions requiring Lorberbaum to obtain a stay or supersedeas upon the posting of a significant bond would require this Court to completely re-write the above rules, deleting “may” and inserting “shall” obtain a stay or supersedeas, or the party’s appeal will be dismissed. This Court simply does not have the power to make said changes.

It is clear if Lorberbaum had sought a stay or supersedeas under the above rules, Turner would have sought a very significant bond to cover any of its claimed damages incurred during the pendency of the appeal. Lorberbaum is not in a financial position to post a significant bond, and the Court rules do not require her to do so in order for this Court to review the validity of Turner's Right of Repurchase. Lorberbaum's counsel has found no South Carolina case finding the failure to seek or obtain a stay or supersedeas resulted in the dismissal of a party's appeal under these circumstances.

II. THE TRIAL COURT COMMITTED AN ERROR OF LAW BY FAILING TO FIND THE SUBJECT RIGHT OF REPURCHASE VIOLATED THE RULE AGAINST PERPETUITIES.

A. Under *Webb v. Reames*, 326 S.C. 444, 485 S.E.2d 384 (Ct. App. 1997) Turner's Right of Repurchase is Unenforceable.

Webb v. Reames, 326 S.C. 444, 485 S.E.2d 384 (Ct. App. 1997) is directly on point and results in Turner's Right of Repurchase as being found in violation of our State's long-standing common law rule against perpetuities. Admitting, Lorberbaum in her Initial Brief, mistakenly cited the South Carolina Uniform Statutory Rule Against Perpetuities (S.C. Code Ann. §§ 27-6-10 et. seq. – "Perpetuities Act"). However, the substance of Lorberbaum's brief, and in fact her entire appeal, is founded entirely on *Webb*. The *Webb* decision was cited in Lorberbaum Pre-Trial Brief (R. pp. 50 - 54); her Motion to Alter or Amend (R. pp. 63 - 65), and her Reply Brief to its Motion to Alter or Amend (R. pp. 88-96). Lorberbaum admits § 27-6-60(A) of the Perpetuities Act does not apply to the 1981 Right of Repurchase since it does not apply to property interest created before July 1, 1987, but the Right of Repurchase is still subject to South Carolina common law rule against perpetuities applied in *Webb*.

Turner, for the first time, in its Brief, asserts *Webb* is bad law and should be overturned. This argument was never presented to the Trial Judge before and cannot be raised for the first time

on appeal. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (it is axiomatic that an issue cannot be raised for the first time on appeal but must have been raised to and ruled upon by the trial court to be preserved for appellate review).

Even if such an argument was available, *Webb* should not be overturned. The *Webb* decision has been cited by approval by our Courts a total of four (4) times² in reported decisions, and in one (1) unreported decision.³

The Court in *Webb* applied properly the long-standing common law rule against perpetuities. *Webb* at 447, 485 S.E.2d at 386. “No interest is good unless it must rest, if at all, no later than twenty-one years after some life in being at the creation of the interests. *Abrams v. Templeton*, 320 S.C. 325, 327, 465 S.E.2d 117, 119 (Ct. App. 1995). Following the precedent of *Webb*, this Court should also find Turner’s Right of Repurchase violates this long-established rule and is void. Turner has asserted no substantive public policy arguments or any other logical reasons why this long-standing precedent should suddenly be overturned other than its conclusion that “bad or hard facts equals bad law.” Turner’s analysis of what counsel for the parties in *Webb* were thinking during the case, as well as the unstated logic of the Appellate Court are simply unfounded assumptions on its part – not facts or evidence.

B. Turner Never Asserted to the Trial Judge the Right of Repurchase Was Not Subject to S.C. Code Ann. § 27-6-60(A).

Turner, for the first time in this case, raises the issue that since the Right of Repurchase was created under the 1981 Covenants, § 27-6-60(A) by operation of law is not applicable since

² See *Clark v. Fine Hous*, 438 S.C. 174, 181, 882 S.E.2d 763, 767 (2023); *Peoples Fed. Sav. & Loan Ass’n of S.C. v. Res. Plan. Corp.*, 358 S.C. 460, 477, 596 S.E.2d 51, 60 (2004); *Auto-Owners Ins. Co. v. Rhodes*, 385 S.C. 83, 94, 682 S.E.2d 857, 863 (Ct. App. 2009), aff’d in part, rev’d in part, 405 S.C. 584, 784 S.E.2d 781 (2013); *Queen’s Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 369, 628 S.E.2d 902, 917 (Ct. App. 2006).

³ *Page v. Page*, Op. No. 2004-UP-110 at *2 (S.C. Ct. App. Feb 24, 2004).

said statute only applies to interest created after July 1, 1987. S.C. Code Ann. § 27-6-60(A) This argument was never presented to the Trial Judge during the trial or in the parties' post-trial pleadings (See: R. pp. 76 - 83, Turner Memorandum in Opposition to Lorberbaum Motion to Alter or Amend. The issue has thus not been preserved for review. *Wilder Corp.* at 76, 497 S.E.2d 733. As stated above, Lorberbaum admits the position asserted by Turner is correct, but it never raised said argument below.

C. Turner's Arguments that Its Right of Repurchase is not an Unreasonable Restraint of Alternative is Irrelevant.

Turner, citing *Clark v. Fine Hous*, 483 S.C. 174, 882 S.E.2d 763 (2023) and the Restatement of the Law, Third, Property, Servitudes, Section 3.4, argues its Right of Repurchase should be upheld since under the analysis in said legal authorities finds the Right of Repurchase is not an unreasonable restraint of alienation. No such argument has ever been asserted by Lorberbaum in this case, as she confirmed in her Brief at p. 9. Her sole issue on appeal is that the Right of Repurchase violates the rule against perpetuities under the 1997 *Webb* decision and subsequent cases citing same. This issue is simply not relevant to this appeal.

D. Turner's Argument That Since Its Rights Under A Separate Lease and Easement Expire In 2080, There Can Be No Violation Of The Rule Against Perpetuities Should Be Denied.

Turner, for the first time in this case, asserts that there can be no violation of the rule against perpetuities since its interest in the property will lapse in 2080 when its 99-year Lease and 99-year Easement expires . This argument should be rejected by this Court for at least three (3) reasons.

First, this argument was never presented to the Trial Judge and thus cannot be raised for the first time on appeal. *Wilder Corp.* at 76, 497 S.E.2d 733.

Second, there is no factual finding or evidentiary record before the Court as to what is a "sufficient property interest in the development" to meet the parameters in *AJG Holdings v. Dunn*,

401 S.C. 346, 764 S.E.2d 912 (2014). Turner points to its 99-year Lease and 99-year Easement, but it also owns the adjoining land, a fuel dock, marina, and at least four (4) other R.V. lots (R. p. 175; pp. 178 – 179; pp. 190 - 191). These interests, separate and apart from the 99-year Lease and 99-year Easement, may be sufficient to meet a “sufficient property interest” under *Dunn, Id.*

Finally, what interest Turner, or its successors or assigns may hold in 2080 is sheer speculation at this point. The 99-year Lease and 99-year Easement may be extended, Turner may buy some or all of the remaining 200 R.V. lots, etc. One possible scenario presented today by Turner, out of literally dozens, which may occur over the next fifty-seven (57) years, does not resolve the rule against perpetuities issues under *Webb*.

E. The Application of the “Saving” Provision of S.C. Code Ann. § 27-6-60(B) by this Court is Premature and Inappropriate.

In its Brief at Page 19, Turner asks the Appellate Court to reform its Right of Repurchase if it is found in violation of the rule against perpetuities under *Webb* pursuant to S.C. Code Ann. § 27-6-60(B) . The Court should not take such action. If this Court determines Turner’s Right of Repurchase is violative of the rule against perpetuities, the appropriate next step would be to remand the case back to the Trial Judge consistent with this Court’s decision. The Trial Judge can then determine the next steps, including determining if reformation of said Right of Repurchase is appropriate.

CONCLUSION

The appeal filed by Lorberbaum is not moot. Even if it is from a legal standpoint, one or more exceptions apply.

Turner's Right of Repurchase is violative of the rule against perpetuities under *Webb* and should be declared void. The case should be remanded back to the Trial Court.

Respectfully submitted,

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