THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SALUDA COUNTY
Court of Common Pleas
Kathy O. Rushton, Special Referee

Case No. 2008-CP-41-00099
Appellate Case No. 2012-208166

Bobby Jo Clark, as personal representative of the Estate of Richard Clark,

Respondent

v.

Fairy Bell Irving, Andrew Irving, A/K/A Andrew Erving, Alfonzo Irving, A/K/A Alfonzo Erving, John D. Irving, A/K/A John D. Erving, William T. Irving, A/K/A William T. Erving, Robert Irving, Sr., A/K/A Robert Erving, Sr., Sally May Morgan, F/K/A Sally May Irving, Minnie Lee Butler, F/K/A Minnie Lee Irving, Joyce Thelma Taylor, F/K/A Joyce Thelma Irving, Mary Irving, A/K/A Mary Erving, Mamie Irving A/K/A Mamie Erving, Jessie Ina Irving, A/K/A Jessie Ina Erving, Julious Irving, A/K/A Julious Erving, Rashell Irving, Fairy May Irving, Thelma Irving, Annell I. Ray, Julious Irving, Jr., Alfreda Irving, Thelma Cartlele, Bennie Warren Butler and persons claiming any right, title estate, interest in or lien upon the real estate described in the complaint herein, any unknown adults being a class designated as John Doe; and any unknown minors or other persons under legal disability being a class designated as Richard Roe, Defendants,

Of whom Joyce Thelma Irving is the Appellant

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STATEMENT OF ISSUE ON APPEAL

Respondent, Bobby Jo Clark, as personal representative of the Estate of Richard Clark, disagrees with the statement of the issues on appeal set out in the brief of appellant, Joyce Thelma Irving. Pursuant to Rule 208(a)(2) of the South Carolina Appellate Court Rules, respondent provides this statement of the only issue properly before this Court on appeal:

> Did the special referee abuse her discretion in denying appellant's motion to set aside the judgment previously entered?

STATEMENT OF THE CASE

Respondent also disagrees with certain statements contained in the statement of the case provided by appellant. Below, respondent points out the inaccuracies of the appellant's statement of the case and provides a correct, more detailed, statement of the proceedings in the court below and the appellate court.

A. Inaccuracies in Appellant's Statement of the Case.

The order on appeal was dated December 9, 2011, not December 9, 2010, as stated by appellant. R. pp. _ (order). Appellant's notice of appeal recites that appellant received written notice of entry of the order on appeal on January 6, 2012, not February 26, 2011, as stated by appellant. R. pp. __ (notice). Appellant references a "Motion to Set-Side the Order" and implies that the motion pertained to the order on appeal. That motion, dated June 15, 2011, and filed June 20, 2011, predated the order on appeal and pertained to an earlier, unappealed order dated June 1, 2010, and filed June 2, 2010. R. pp.__ (2010 order).

Appellant states that respondent filed a motion to dismiss the appeal and that appellant was given leave to proceed with the appeal. In fact, the order of the appellate court addressed appellant's multiple notices and amended notices of appeal and clarified that the appeal could proceed *only* as to the order dated December 9, 2011, not as to the order dated June 1, 2010. R. pp. ___ (Court of Appeals order).

B. Respondent's Statement of the Case.

Richard Clark brought this action in the Saluda County Court of Common Pleas by summons and complaint filed June 10, 2008, seeking partition and/or sale of a 110-acre tract of real estate in Saluda County, formerly owned by David Irving. R. pp. ___(summons, complaint). The complaint listed as defendants more than 20 named individuals. R. p. __(complaint p.1). The complaint also named as defendants unknown adults (designated as "John Doe") and minors or other persons under a legal disability (designated as "Richard Roe") claiming an interest in the property. R. p. ___(p.1). Appellant, Joyce Thelma Irving, was one of the named defendants. R. p. __(p.1).

By notice of representation dated December 23, 2008, Willie B. Heyward notified plaintiff's counsel that he represented the defendant, Thelma Irving[1] (hereafter, "appellant"). R. p. __ (notice of rep). On June 1, 2009, attorney Heyward accepted service of the summons and complaint on behalf of appellant.[2] R. p. __ (acceptance of service). No answer was filed on behalf of appellant or any other defendant. On

[1] Appellant was variously referred to in the court below as Thelma Irving, Joyce Thelma Irving, Joyce Irving Taylor, and Joyce Thelma Irving Taylor.

[2] Personal service was performed or an affidavit of non-service was in the court file with respect to all the defendants. An order of publication was signed by Judge William P. Keesley and filed with the clerk, and service by publication was carried out as ordered. R. pp. __ (order pp. 1-2).

November 5, 2009, plaintiff's counsel filed an affidavit of default with respect to all of the defendants. R. pp. ___ (affidavit).

By order of reference dated December 21, 2009, Judge William P. Keesley referred this action to Kathy Ouzts Rushton, Special Referee, to take testimony to determine the issues and to make appropriate findings of fact and conclusions of law, with leave to enter a final judgment and with appeal directly to the South Carolina Court of Appeals. R. pp. ___ (order of reference). Henrietta Gill served as guardian ad litem for the unknown adult defendants (John Doe) and for the unknown minor defendants and defendants under a disability (Richard Roe). R. p. ___ (2010 order p. 2).

A hearing in this matter was initially scheduled for March 9, 2012. That hearing was continued so that the plaintiff's attorney could notify the defendants of the right to advise the court of their interest in purchasing the property. R. p. __ (order p. 2). The defendants were notified of the new hearing date, April 27, 2010, and of their right to advise the court of their interest in purchasing the property. R. p. __ (notice; cert. of serv; order p. 2, p. 6, ¶ 4).[3] Appellant's copy of this notice was mailed to her attorney of record, Willie B. Heyward, on April 5, 2010. R. p. __ (cert. p. 2).

On April 21, 2010, counsel for appellant filed a motion for continuance. R. pp. __ (motion). This motion and an attached affidavit of counsel recited that counsel received the aforesaid notice on April 7, 2010. R. p. ___ (motion p. 1; affidavit). Appellant was not present at the hearing April 27, 2010, but her attorney appeared on her behalf. At the outset of the hearing, counsel moved for a continuance, and the motion was denied. R. p. __ (order, p. 3).

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[3] In addition to notice by mail to certain defendants, including appellant, notice was also given by publication. R. p. __ (order p. 2; p. 6, ¶ 4).

Also at this hearing, counsel objected to the court's proceeding without a court reporter. The court determined that all the defendants were in default, the matter had been set as an uncontested hearing, and no court reporter was necessary. This ruling was confirmed in the court's order dated June 1, 2010. R. p. __ (order for sale, p. 3).

The plaintiff presented an affidavit and in-court testimony concerning the property and its ownership. R. pp. __ (affidavit). The plaintiff also introduced numerous exhibits, documenting the purchase of the subject property by David Irving in 1917, the descendants of David Irving, the ownership history of the property through intestate and testate succession of those descendants, and the acquisition by Richard Clark of the ownership interests of some of the descendants of David Irving. R. pp. ___ (exhibits). In addition, the special referee heard testimony concerning the feasibility of partition in kind. R. p. __ (order p. 3). On the basis of this evidence, the special referee made detailed findings of fact and conclusions of law. R. pp. ___ (order pp. 6-11, ¶¶ 1-35).

Among the findings of the special referee were findings as to the owners of the property and their respective ownership interests. R. pp. __ (order pp. 9-10, ¶ 22). Specifically, the special referee held the plaintiff, Richard Clark, owned 67.916 percent and appellant owned 12.5 percent of the subject property. R. pp. __, ¶ 22. These findings were not challenged by a motion to alter or amend the order pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, and they are not challenged in this appeal.

The special referee also made findings that partition in kind is not feasible and that no owner has sought partition in kind. R. p. __ (order p. 10, ¶¶ 23, 24). These

findings were not challenged by a motion to alter or amend, and they are not challenged in this appeal.

The special referee also made a finding that counsel for appellant requested an appraisal to determine the value of the property in the event she desired to purchase the property and a finding that the attorneys for the plaintiff and appellant agreed to an appraiser. R. p. __ (order p. 10, ¶¶ 25, 26). These findings were not challenged by a motion to alter or amend, and they are not challenged in this appeal.

The order for sale containing the court's findings and conclusions was dated June 1, 2010, and filed June 2, 2010. R. pp. ___ (order). This order is referred to hereafter as the "June 2010 order."[4] Counsel for defendant Joyce Thelma Irving received written notice of entry of this order on February 26, 2011. R. pp. __ (mem. p. 2), ¶ 26; order p. 3. Appellant did not file a motion, pursuant to Rule 59(e), to alter or amend this order.

Appellant attempted to appeal this order, filing a notice of appeal in the office of the Saluda County Clerk of Court. R. p. __ (notice). However, appellant never filed the notice of appeal in the Court of Appeals. R. p. __ (Allen letter).

On June 2, 2011, respondent filed a motion to dismiss the appeal filed in the lower court but not in the appellate court. R. pp. __ (motion). The special referee heard this motion at a hearing held November 15, 2011, and dismissed the notice of appeal filed in the lower court. R. p. __ (tr. pp. 19-21; order p. 2).

On June 20, 2011, appellant filed a notice of motion and supporting memorandum pursuant to Rule 60(b) of the South Carolina Rules of Civil Procedure, seeking to set

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[4] After the entry of the June 2010 order, the plaintiff, Richard Clark, passed away. His personal representative, Bobby Jo Clark, sought to be substituted as plaintiff in this action. R. pp. ___ (motion). By order dated January 24, 2011, the court granted this motion. R. pp. ___ (order).

aside the June 2010 order. R. pp. __ (notice of motion; memorandum). This motion was also heard November 15, 2011. Tr. pp 3-18. By order dated December 9, 2011, filed December 20, 2011, the special referee denied the motion. R. pp. ___ (order). This order is referred to hereafter as the "December 2011 order." Appellant brought this appeal from the December 2011 order. R. pp __ (notice). Thereafter, appellant filed multiple amended notices of appeal, purporting to also appeal the June 2010 order, as to which no timely appeal had been filed.

Respondent filed a motion to dismiss this appeal. By order filed February 8, 2013, the Court of Appeals held that there has never been a proper notice of appeal filed from the June 2010 order, and allowed this appeal to proceed only as to the December 2011 order. R. pp. __ (order of Court of Appeals). The effect of this Court's February 8, 2013, order was to dismiss or finally decide the purported appeal from the June 2010 order. Appellant did not seek rehearing of this order pursuant to Rule 240(i) of the South Carolina Appellate Court Rules. Nor did appellant file a petition for writ of certiorari in the Supreme Court with respect to the Court of Appeals' holding that the June 2010 order is not properly before the Court in this appeal.

STANDARD OF REVIEW

The standard of review invoked by appellant is not applicable in this appeal. Appellant's brief states the standard of review with respect to a novel question of law regarding the interpretation of a statute. The order on appeal did not construe any statute, and no novel question of law related to interpretation of a statute is presented in this appeal.

The order on appeal is the denial of appellant's motion filed pursuant to Rule 60(b) of the South Carolina Rules of Civil Procedure. Whether to grant or deny a motion to set aside a judgment under Rule 60(b) is within the sound discretion of the trial judge. *Perry v. Heirs at Law & Distributees of Charles Gadsen*, 357 S.C. 42, 46, 590 S.E.2d 502, 504 (Ct. App. 2003). On appeal, the reviewing court is "limited to determining whether the trial court abused its discretion in granting or denying such a motion." *Id.*

ARGUMENT

The *only* matter before this Court is whether the special referee abused her discretion in denying the Rule 60(b) motion filed by appellant. That ruling is contained in the December 2011 order which is the subject of this appeal.

Appellant's Rule 60(b) motion sought to have the special referee set aside the June 2010 order. The burden rested upon appellant, as the party seeking to set aside a judgment, to present evidence entitling her to the requested relief. *See Perry*, 357 S.C. at 46, 590 S.E.2d at 504. At the hearing of the Rule 60(b) motion, appellant presented no exhibits and no witness testimony. R. pp. __ (tr pp 1-36; order, 4). Having failed to present any evidence to show she was entitled to have the judgment set aside, appellant failed to meet her burden of proof. The special referee did not abuse her discretion in denying the motion.

The only issue stated by appellant that pertains to a ruling in the December 2011 order is appellant's Issue I. The remaining issues and arguments address matters pertaining to the June 2010 order. No appeal was perfected with respect to that order, and appellant's Issues 2, 3, and 4 are not properly within the scope of this appeal. R. pp. __ (letter of Court of Appeals; Court of Appeals order).

The motion to set aside the judgment was appellant's attempt to undo a situation of appellant's own making. It was, however, the wrong vehicle to address the matters about which she complains. The motion was properly denied, and this Court should affirm the order on appeal.

Appellant was a named defendant in this partition action. R. p. __ (complaint p. 1). She was represented by counsel. R. p. __ (notice). She was properly served with the summons and complaint, through acceptance of service by her attorney of record. R. p. __ (acceptance). Notwithstanding *actual notice* of this action and her right to file responsive pleadings, she did not file any answer and was in default.[5] R. p. __ (affidavit).

Even though appellant was in default, she was given notice of the proceedings, including the hearing held April 27, 2010. R. p. __ (notice). In addition, she was given notice of her right, pursuant to S.C. Code Ann. § 15-61-25, to notify the court of her interest in purchasing the property. R. p. __ (notice). The notice also informed her of the statutory requirement that she advise the court of such interest no later than ten days prior to the date set for the trial. *See id.* The notice was provided to appellant and *actually received* by her attorney 20 days prior to the hearing. R. p. __ (cont. motion, affidavit). Despite having *actual notice* of the hearing a full 20 days in advance, appellant did not appear to offer any evidence to contradict the evidence offered by the plaintiff concerning the ownership of the property and the non-feasibility of partition in kind.

[5] In addition to the inaccuracies in the documents filed by appellant in the appellate court, many of the documents filed by appellant in the lower court also contain statements that are not correct. In one of the lower court filings, appellant stated that she "properly filed" an answer to the complaint. R. p. __ (cont. motion, p. 2). This statement is incorrect. In fact, no answer was ever filed.

Appellant's counsel attended the hearing and was allowed to participate, notwithstanding appellant's default. Appellant made motions and procedural objections, which were ruled upon by the special referee. Appellant moved for a continuance but the continuance was denied. This ruling was confirmed in the referee's June 2010 order. R. p. __ (order, p. 3). Appellant also objected to the court's proceeding without a court reporter. The referee overruled this objection upon a finding that a court reporter was not necessary. R. p. __ (order, p.3). This ruling was also confirmed in the June 2010 order. Appellant did not perfect an appeal from that order.

This Court has determined, in an order that has become final,[6] that appellant cannot use the instant appeal to appeal the June 2010 order, for which a proper notice of appeal was never filed. R. pp. __ (Ct. App. order). However, that is essentially what appellant continues to attempt to do – she seeks to have this Court void the June 2010 order because she did not appear at the April 27, 2010, hearing and because the special referee proceeded without a court reporter. Those issues – her motion for continuance and the objection to proceeding without a court reporter – were raised to the special referee and ruled upon at the hearing, and they were confirmed in the June 2010 order. Appellant attempted to appeal that order, but she did not comply with the proper procedures and never perfected that appeal.

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[6] As noted in respondent's statement of the case, *supra*, the Court of Appeals' order dated February 8, 2013, had the effect of dismissing or finally deciding appellant's attempted belated appeal from the June 2010 order. No petition for rehearing and no petition for writ of certiorari were filed from the Court of Appeals' order, and the determination that this appeal may proceed only as to the December 2011 order and not as to the June 2010 order is the law of the case. *See Mazloom v. Mazloom*, 392 S.C. 403, 403-04, 709 S.E.2d 661, 661 (2011); *South Carolina Farm Bureau Mut. Ins. Co. v. S.E.C.U.R.E. Underwriters Risk Retention Group*, 353 S.C. 249, 250-51 n.1, 578 S.E.2d 8, 9 n.1 (2003).

An unappealed ruling, whether right or wrong, is the law of the case. *Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012). Under the law-of-the-case doctrine, a party is precluded from relitigating matters that were not raised on appeal, but should have been. *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009). This Court should not allow appellant to use this appeal to resurrect an appeal she failed to perfect in a timely manner, in contravention of the Court's order dated February 8, 2013.

I. THE SPECIAL REFEREE DID NOT ABUSE HER DISCRETION IN DENYING THE MOTION TO SET ASIDE THE ORDER FOR SALE.

The only issue properly before this Court that challenges a ruling in the December 2011 order is appellant's Issue I. This issue addresses the purported "motion" for relief under Rule 60(b) and the special referee's finding that appellant "failed to property (sic) file any motion and failed to pay the required filing fee." R. p. __ (order p. 4), ¶ 1. The referee did not abuse her discretion in making this finding.

The special referee correctly noted that no true motion was filed, only a notice of a motion was filed. R. pp. __ (notice); order p. 3. She also noted that it had come to her attention that no filing fee had been paid. R. pp. __ (order pp. 2-3). Appellant did not offer any evidence to establish that she filed an actual motion or that she paid the required filing fee. In the absence of any such evidence by the party with the burden of proof, the referee's finding was appropriate and not an abuse of discretion.

Notwithstanding this procedural finding and an additional finding that the motion, if properly made, was not made timely, the special referee proceeded to address the merits of the motion, as though a proper motion had been filed. R. pp. __ (order, pp. 4-5). Accordingly, even if there were some error in the ruling that the motion was not

properly filed, that ruling is not controlling, because the referee denied the motion on the merits. The referee's order denied the motion to set aside the June 2010 order based on (1) appellant's failure to present any evidence to establish any of the grounds for setting aside a judgment pursuant to Rule 60(b) and (2) the lack of prejudice to appellant. R. pp. __ (order pp. 4-5). Those rulings, not challenged in this appeal, are the law of the case. *See Byrd v. City of Hartsville*, 365 S.C. 650, 655, 620 S.E.2d 76, 78 (2005) (an appellant is bound by any unappealed factual findings and conclusions of law, which are the law of the case).

If this Court reviews the unappealed findings and conclusions on the merits, however, it should find that appellant did not meet her burden of proof and the special referee did not abuse her discretion in denying the Rule 60(b) motion. As previously noted, the burden rested upon appellant as the moving party to *present evidence* to establish her entitlement to relief pursuant to Rule 60(b). *See Perry*, 357 S.C. at 46, 590 S.E.2d at 504. As the transcript of the motion hearing reveals and as the special referee held, appellant presented no evidence whatsoever in support of her motion:

> it is clear that Defendant Thelma Irving is the last surviving direct heir of the original owner and that she is entitled to 12.5% of the subject property. No evidence was entered or even discussed that her share should be more. There were no affidavits entered which would tend to show that any of the Court's previous findings were erroneous; that there was any mistake, inadvertence, surprise, or neglect; that there was any newly discovered evidence; that there was any fraud, misrepresentation, or misconduct by anyone; that the judgment was void; or that the judgment was satisfied, released or discharged. There was no evidence placed into the record at all by Defendant Thelma Irving.

R. pp. __ (transcript; order p. 4). The referee did not abuse her discretion in denying the motion based on appellant's failure to present evidence establishing any of the grounds

for relief under Rule 60(b). This Court should affirm the order denying the Rule 60(b) motion.

II. THE ABSENCE OF A COURT REPORTER'S TRANSCRIPT DOES NOT VOID THE JUNE 2010 ORDER.

The stated basis for appellant's Rule 60(b) motion was that the special referee's failure to have a court reporter at the April 27, 2010, hearing renders the June 2010 order void. This issue, addressed in appellant's Issue II, is not properly before the Court. The absence of a court reporter was addressed in both the hearing held April 27, 2010, and in the June 2010 order which resulted from that hearing. The special referee heard appellant's objection and ruled that all the defendants were in default, the matter had been set as an uncontested hearing, and no court reporter was necessary. R. p. __ (order, p. 3). Appellant did not appeal that ruling, and it is the law of the case. *See Byrd*, 365 S.C. at 655, 620 S.E.2d at 78. Moreover, the Court of Appeals has held this appeal does not encompass the June 2010 order but is limited to the December 2011 order, an unappealed ruling which also is the law of the case. R. p. __ (Court of Appeals order). Appellant cannot use this appeal to challenge the unappealed June 2010 order.

If the appellate court considers appellant's Issue II, it should affirm the court's determination that a court reporter was not necessary, both for the reasons stated by the special referee and for additional reasons set forth below. Respondent may advance additional reasons for affirmance and the appellate court may affirm the judgment of the lower court on any ground appearing in the record. *See* Rules 208(b)(2) and 220(c), SCACR; *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000).

First, the rule of court on which appellant relies does not contain a requirement of a court reporter, of a recording, or of a transcript prepared by a court reporter. *See* Rule 71(e), SCRCP. Nowhere in Rule 71(e) is there any mention of a court reporter or a recording, as appellant has argued. Rather, the rule simply requires that a record be made and preserved in the case file in the office of the clerk of court. *See* Rule 71(e), SCRCP. In this case, such a record exists, in the form of (1) the affidavit of Richard Clark; (2) the voluminous body of exhibits that documented the ownership history of the property at issue, the Irving family tree, the intestate and testate succession of those who held ownership interests in this property throughout the years, and the deeds conveying some of those ownership interests; and (3) the referee's order reciting all of the evidence presented. *See* R. pp. __ (order; affidavit; exhibits). Rule 71(e) simply states that "a transcript of record shall be made and preserved in the case file in the office of the clerk of court." The special referee correctly held that Rule 71(e) does not require a court reporter and that the referee's order, along with the exhibits retained in the clerk of court's files, satisfy the requirement of a record of the proceedings. R. p. __ (order, p. 3).

Second, the use of the word "transcript" in Rule 71(e) does not necessitate a court reporter or a verbatim transcription. Rather, "transcript" has multiple meanings, including simply "the record of proceedings." *See* Black's Law Dictionary (5th ed. 1979) at 1342. Rule 4 of the former South Carolina Supreme Court Rules used the same phrase as Rule 71(e) – "transcript of record" – and the meaning of "transcript of record" under former Rule 4 was not a court reporter's verbatim transcription but a compilation of the various materials documenting the proceedings in the court below. In fact, Section 4 of Rule 4 required that undisputed facts be merely stated, without inclusion of the testimony

itself. *See* Rule 4, former S.C. Sup. Ct. Rules. Because Rule 71(e) makes no reference to a court reporter, its use of the phrase "transcript of record" is more in keeping with the meaning of that phrase under former Rule 4. Moreover, where no evidence was offered to contradict the evidence presented by the plaintiff, it was sufficient that the exhibits documented and the referee's order summarized the undisputed facts. In this case, the record of the proceedings in the form of the plaintiff's affidavit, the exhibits, and the referee's detailed order complies with Rule 71(e).

Third, the special referee was correct in finding that, because all the defendants were in default, no court reporter was necessary. Even if the language of Rule 71(e) could be construed to require a court reporter under ordinary circumstances, where no defendant answered to contest the allegations of the complaint and where no defendant appeared to offer evidence contradictory to that offered by the plaintiff, the special referee could dispense with the formality of a court reporter and prepare an alternative record of the proceedings. The referee's order, together with the plaintiff's affidavit and other exhibits retained in the clerk's file, is an appropriate alternative record of the proceedings.

Fourth, the word "shall" in Rule 71(e) is merely discretionary or directory, not mandatory. *Cf. Guinyard v. State*, 260 S.C. 220, 225, 195 S.E.2d 392, 394 (1973) (compliance with statute requiring that state "shall" respond to a post-conviction relief application within 30 days was deemed discretionary, not mandatory). Any technical non-compliance with the rule does not render the judgment void.

Fifth, appellant has shown no prejudice from the failure to have a court reporter record the testimony. As the special referee found, appellant has never offered any

evidence that her share in the property would be more than the 12.5 percent found in the June 2010 order. She has never claimed that she has a larger ownership interest. The absence of a court reporter's transcript of the April 27 hearing resulted in no prejudice to appellant. R. p. __ (order, p. 4).

Sixth, in other contexts where a transcript requirement has not been met, the remedy is not to set aside the judgment order. Rather, the courts undertake to reconstruct a record of the proceedings. *See Whitehead v. State*, 352 S.C. 215, 221, 574 S.E.2d 200, 203 (2002); *China v. Parrott*, 251 S.C. 329, 334, 162 S.E.2d 276, 278 (1968); *Dolive v. J.E.E. Developers, Inc.*, 308 S.C. 380, 383, 418 S.E.2d 319, 321 (Ct. App. 1992). In this case, the special referee's June 2010 order serves as a contemporaneous reconstruction of the record. It was signed by the referee on June 1, 2010, a mere 35 days following the April 27 hearing. It was drafted by the guardian ad litem for the John Doe and Richard Roe parties. R. p. __ (tr. p. 10) lines 18-19. It was circulated among the attorneys, including appellant's attorney, and appellant's attorney had the opportunity to suggest changes, and did so. R. p. __ (tr. p. 15) lines 6-14. The order as ultimately entered reflected in detail the substance of the proceedings and the evidence presented. The factual recitals in the order are consistent with the exhibits offered during the hearing. Appellant did not make a Rule 59(e) motion seeking to alter or amend any of the order's recitals of the evidence presented. Nor did appellant offer any evidence in the Rule 60(b) hearing to establish that the order was not an accurate reflection of the April 27 proceedings.

Seventh, appellant has not established any prejudice resulting from the absence of a court reporter. She has never offered or proffered any evidence to contradict the

evidence presented by the plaintiff or the findings of the special referee. She does not, and has never in the court below, asserted that she owns more than the 12.5 percent share determined by the court. If this Court were to reverse and set aside the June 2010 order, a new hearing would be required, with the expense of new notice by publication, but the outcome would be identical to that reached in 2010. There is simply no meritorious ground for setting aside the judgment.

III. APPELLANT RECEIVED THE NOTICE REQUIRED BY S.C. CODE ANN. § 15-61-25.

Appellant's Issue IV and Argument III address the notice requirement of S.C. Code Ann. § 15-16-25. On page 6 of her brief, appellant makes the following statement: "The Court in its Order, declared that Respondent (sic) was in default and therefore not to be accorded any further notice nor any other rights as enumerated in Section 15-61-25." That statement is simply not correct. The order made no such finding. To the contrary, the special referee was very cognizant of the requirements of Section 15-61-25 and continued the case from its originally scheduled hearing date of March 9, 2010, for the express purpose of allowing notice to be given to all of the defendants of their right to advise the court of any interest in purchasing the property. R. p. __ (order, p. 2). Notice was given as to both the new hearing date and the right to notify the court of an interest in purchasing the property. R. pp. ___ (notice). That notice was *actually received* by appellant's counsel 20 days in advance of the rescheduled hearing. R. pp. ___motion, p. 1; affidavit). Appellant's Issue IV and Argument III are non-sensical, since appellant received the notice she claims she was due. The notice requirement was met, and this issue is baseless.

IV. APPELLANT WAS NOT DENIED AN OPPORTUNITY TO BE HEARD OR ANY OTHER ASPECT OF HER RIGHT TO PROCEDURAL DUE PROCESS.

Appellant's Issue III and Argument V purport to make a due process argument. She contends: "Appellant's absences coupled with the lack of an opportunity to be heard greatly prejudiced her rights in regards to this action." This contention is unfounded. Appellant was given notice of this action, through the service of a summons and complaint, accepted on her behalf by her attorney of record. R. pp. ___ (S&C, acceptance). She was represented at the April 27, 2010, hearing by her attorney, who actively participated in the proceedings. R. p. __ (order pp. 2-4). She had *actual notice* of the hearing. Her attorney received the notice 20 days in advance of the hearing. R. pp. __ (mot p. 1; affidavit).

Appellant was never denied an opportunity to be heard. She was in default. Despite notice, she did not appear to testify or offer any evidence to contradict the evidence presented by the plaintiff. She was represented by counsel, but her attorney did not proffer any testimony she would have given had she been present. Appellant was not denied any of the protections that are a part of procedural due process.

To the extent appellant's due process argument addresses the court's denial of the request for a continuance of the April 27, 2010, hearing, that argument is not properly before the court. The continuance motion was denied, and that ruling was confirmed in the June 2010 order. R. p. _ (order, 3). No appeal was perfected as to that order, and the denial of the continuance cannot properly be raised in this appeal. R. pp. __ (ltr; order).

However, if the denial of the continuance had been appealed, it should have been affirmed. The grant or denial of a continuance is a matter within the sound discretion of the trial court. *Plyler v. Burns*, 373 S.C. 637, 650, 647 S.E.2d 188, 195 (2007); *M & M*

Group, Inc. v. Holmes, 379 S.C 468, 474-75, 666 S.E.2d 262, 265 (Ct. App. 2008). Denial of a continuance is not reversed absent a clear showing of abuse of discretion. *M & M*, 379 S.C. at 475, 666 S.E.2d at 265.

The basis for the continuance motion was that appellant had not had adequate time to make travel arrangements to appear at the hearing. But the record reflects that she had *actual notice* fully 20 days in advance of the hearing. The special referee found that notice of the hearing was timely given, no motion for continuance was made in a timely manner prior to the hearing, notice had also been published in the newspaper, the matter had been on the docket for almost two years, and continuing the action would only delay the sale and the amount the individual parties will receive. R. pp. __ (order, 2-4). These findings are not challenged on appeal. Moreover, granting a continuance would have required new notice to be given to all of the defendants, including the expense of a new notice by publication. Appellant had ample time to arrange to be present. Under the totality of the circumstances, there was no abuse of discretion in denying the continuance.

As with the other issues appellant raises, there has never been any showing of prejudice that resulted from denial of the continuance motion. Although counsel stated that appellant would have testified concerning second marriages of some of the descendants, he has never asserted that appellant's ownership interest is anything other than the 12.5 percent interest determined by the special referee. In fact, as the order reflects, he agreed that the basic divisions were correct. R. p. __ (2010 order, p. 3). He fully participated in the proceedings, notified the court of his client's desire to purchase the property, requested an appraisal, and agreed upon an appraiser. R. p. __ (order, p. 3).

Appellant's interests have been protected, not prejudiced, by the manner in which the referee conducted the proceedings. There was no abuse of discretion.

In this argument, appellant also complains that there were procedural objections made by counsel that are not found in the order. This argument is unfounded. The order details the motions and objections made by counsel and the court's rulings. It recites the matters counsel raised and the court's treatment of those matters. R. pp. __ (order pp. 3-6). The proposed order was circulated among all the attorneys, and appellant's counsel was given the opportunity to review the draft order and make suggested changes. R. p. __ (tr. p. 15), lines 8-14. After the order was entered, counsel could have filed a Rule 59(e) motion seeking rulings on any omitted matters, but did not.

Appellant makes the conclusory assertion that her interest was "adversely effected" by the absence of a court reporter, without stating how. As is discussed more fully in section II, *supra*, the assertion that her interest was adversely affected is without any evidentiary support and groundless. There is no claim that her interest is other than the 12.5 percent the special referee determined, and her desire to purchase the property was duly noted in the proceedings. Indeed, the referee allowed an appraisal for that purpose. Appellant has been fully afforded all of the process that she was due.

CONCLUSION

No prejudice has resulted to appellant from any of the matters about which she complains. None of the issues raised in this appeal have merit. The special referee did not abuse her discretion in denying the motion to set aside the unappealed June 2010 order.

This matter has been pending in the lower court since 2008. Since 2011, appellant has made many lower court and appellate court filings, all in an effort to attack the June 2010 order which she failed to appeal. There has never been any showing that, if the order were set aside, the outcome would be any different. Rather, it would merely be delayed by requiring yet another evidentiary hearing as to the undisputed evidence concerning the ownership interests in the subject property, at significant additional expense and a resulting diminishment of the ultimate proceeds to be received by each owner for his or her respective ownership interest. For all the procedural and substantive reasons set forth above, this Court should affirm the special referee's order denying appellant's motion to set aside the June 2010 order for sale and allow this action to proceed to its long-overdue conclusion.

Respectfully submitted,

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