

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M. Strickland, Jr.
Master-in-Equity

Case No. 2009-CP-40-0511

1634 Main, LP, Appellant v. Shirley Hammer, Respondent

v.

Howard Hammer, Appellant

and

Howard Hammer, Appellant

v.

Shirley Hammer Respondent

Appellate Case No. 2014-000965

APPELLANTS' RETURN TO RESPONDENT'S MOTION TO DISMISS APPEAL

Appellants, responding to Respondent's Motion to Dismiss this appeal, respectfully submit that Respondent has not been prejudiced by request for and concerning transcripts of the three separate hearings in this case. Appellants further respectfully submit that the purpose of the requirement for the timely requests for transcripts is to ensure that an appeal does not

languish and that a briefing schedule can be orderly set. In the instant matter, it has now been determined that the transcripts were supplied as of May 21, 2014 (Exhibit 1). Appellants are waiting for confirmation that the briefs are due June 20, 2014. Filing of the briefs and record of appeal on or before June 20, 2014 means that Appellants' initial brief and designation of matter will be filed within sixty (60) days of the Notice of Appeal, which appellant respectfully suggests would comply with the purpose of the rule requiring prompt requests for transcripts in appeals.

The following facts further support denial of Respondent's Motion to Dismiss:

1. This appeal was commenced by timely service of Notice of Appeal from both Appellants on April 24, 2014. The Notice of Appeal was thereafter timely filed in the Supreme Court and the trial Court.
2. The initial briefs and designation of matter are scheduled to be filed less than sixty (60) days from the time of service of the Notice of Appeal. Filing of Appellants' brief and designation of matter within sixty (60) days of service of the Notice of Appeal makes for an expedited appeal. In most appeals, court reporters have a sixty (60) day deadline to produce copies to supply hearing transcripts relevant to appeals. The rule provides that this deadline can be extended by request of the court reporter, and Appellants are informed and believe that extensions for delivery of transcripts are routinely granted in the normal course of appeals filed in this Court.
3. In the instant case, the briefs and designation of record are to be filed within the time period ordinarily allotted to the court reporter for delivery of the transcript thereby substantially expediting the appeal process.
4. Although the transcripts had been ordered and supplied to one of the Appellants prior to the Notice of Appeal, at least two of those transcripts could not to be located upon the

issuance of the last Order that is the subject of this appeal. The transcripts had not been shared with all counsel. After issuance of the last Order subject to this appeal, the Respondent changed the lock on Appellant, Howard Hammer's, door to his office located in the building the ownership of which is the subject of this appeal. Respondent refused Appellant, Howard Hammer, access to his office, files and belongings in the building and thereafter gave an arbitrary deadline for removal of his possessions, property and furnishings from the building and then refused to grant sufficient access to the property so that the Appellant, Howard Hammer, could meet the Respondent's deadline. In the process of the chaotic removal of his belongings from the subject building, the Appellant, Howard Hammer lost the transcripts from two of the hearings in the trial courts. After the service of the Notice of Appeal, Appellant, Howard Hammer, attempted to find the missing transcripts, and when the transcripts could not be found, a letter was sent to the court reporter. (Exhibit 3) Thereafter, Appellants notified the Clerk of this Court of the request for the transcripts. (Exhibit 4) Because of the lost transcripts, Appellants advised that upon confirmation of receipt of any missing transcripts, they would notify the Clerk so that the appeal would not languish and the deadlines for briefs and designations of matter could be established.

5. On May 21, 2014, counsel for the Appellants received an email from the court reporter with transcripts of all hearings in the trial court attached. (Exhibit 2) The next day counsel for the Appellants sent a letter to the Clerk of this Court in which he confirmed receipt of the transcripts and confirmed a deadline of June 20, 2014 for filing and service of Appellants' initial brief and designation of matter. (Exhibit 1)

The purpose of the rule regarding requests for transcript is to prevent appeals from languishing in this Court without proper safeguards to ensure timely submission of briefs and timely disposition of appeals. In the instant matter, the short delay in writing to the court reporter resulted from the mistaken belief that Appellants had all of the transcripts. That error has now been cured by email receipt of the missing transcripts. Moreover, with the receipt of the transcripts, Appellants' initial brief and designation of matter are now due prior to the expiration of the sixty (60) days from the time of filing of Notice of Appeal.

Filing of Appellant's initial brief and designation of matter by June 20, 2014 will surely comply with the intent if not the letter of the requirement that the Appellants must timely order the transcripts in this case. Moreover, no prejudice will result from the brief filing schedule now understood to be in effect. (Exhibit 1)

In her Motion to Dismiss, Respondent asserts that this appeal is interposed for purposes of delay. Nothing could be farther from the truth. This appeal goes to the critical issue of a trial court's power in granting relief in supplemental proceedings, an issue on which there is little law in South Carolina. Attached is a copy of the Motion to Alter or Amend the trial court's last Order. (Exhibit 5) That Motion sets forth the important issues that will have to be addressed in this appeal.

For the foregoing reasons, this Court should deny the Respondent's Motion to Dismiss this appeal.

Respectfully Submitted,

AIKEN & HIGHTOWER, PA



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ATTORNEYS FOR APPELLANTS

Columbia, SC
May 29, 2014

HOWARD HAMMER, PRO SE



HOWARD HAMMER

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APPELLANT

Columbia, SC
May 29, 2014

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M. Strickland, Jr.
Master-in-Equity

Case No. 2009-CP-40-0511

1634 Main, LP, Appellant v. Shirley Hammer, Respondent

v.

Howard Hammer, Appellant

and

Howard Hammer, Appellant

v.

Shirley Hammer Respondent

Appellate Case No. 2014-000965

PROOF OF SERVICE

I hereby certify that I served Appellants' Return to Respondent's Motion to Dismiss by depositing a copy of it in the U.S. Mail, postage prepaid, on May 29, 2014, addressed to her attorney of record, Desa A. Ballard, PO Box 6338, West Columbia, SC 29171-6338.

(SIGNATURE ON THE FOLLOWING PAGE)

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May 29, 2014

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Arthur K. Aiken

A. Bea Hightower

May 22, 2014

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

Re: Howard Hammer v Shirley Hammer and 1634 Main, LP v Shirley Hammer
Appellate Case No. 2014-000965

Dear Mr. Shearouse:

This is to confirm that we received copies of all of the transcripts for the hearings in the above matter yesterday. By my calculations, our initial brief of appellants and initial designation of matter are due on June 20, 2014.

Please notify me if my calculation of this due date is incorrect.

Sincerely,

Arthur K. Aiken
art@aikenandhightower.com

cc: Desa Ballard

EXHIBIT 1

Art Aiken

From: Robin Reibold <ReiboldR@rcgov.us>
Sent: Wednesday, May 21, 2014 2:04 PM
To: Desa Ballard; art@aikenandhightower.com; Thomas W. Bunch, II
Subject: transcripts in 09-5911 and 10-2889
Attachments: 09-5911,10-2889.1.9.14.printed3.17.14.doc; 09-5911,10-2889.6.4.13.doc;
09-5911,10-2889.8.12.13.doc

There should be three transcripts attached. Let me know if you have trouble opening them.

Robin

Robin K. Reibold
Official Court Reporter
Master-in-Equity, Richland County
1701 Main Street
Columbia, South Carolina 29201
(803) 576-1902

AIKEN & HIGHTOWER, P.A.

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Arthur K. Aiken, Esq.

A. Bea Hightower, Esq.

May 12, 2014

Attn: Robin Reibold
Master-In-Equity
P.O. Box 192
Columbia, SC 29202

RE: Hammer v. Hammer JR#: 2010-CP-40-02889 and 2009-CP-40-05911
Hammer v. 1634 Main, LP. JR#: 2010-CP-40-02889

Dear Ms. Reibold:

I am writing on behalf of all appellants in above cases regarding appeals from supplemental proceedings. It is my understanding you have furnished a transcript of all hearings to one of appellants. If correct and it is agreeable for that to be used from which to submit record on appeal please advise so that time to begin to run for briefs can be calculated from date of receipt of confirmation from you.

If transcript you have already supplied is not complete or cannot be used, please consider this letter as request on behalf of all for transcript of all hearings in the matter. Please also consider this as agreement to pay.

Please advise in accordance with above request.

Sincerely,

Arthur K. Aiken, Esq.
Aiken and Hightower, P.A.
2231 Devine Street Suite 201
Columbia, SC 29205

CC: Desa Ballard, Esq.
Howard Hammer
Court Administration

EXHIBIT 3

AIKEN & HIGHTOWER, PA

Attorneys at Law

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Columbia, SC 29205

Phone: 803-799-5205

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Arthur K. Aiken

A. Bea Hightower

January 23, 2014

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

Re: Hammer v. Hammer-2010-CP-40-02889
!634 Main, LP v Hammer v Hammer-2009-CP-40-05911

Dear Mr. Shearouse:

Howard Hammer and I filed Notices of Appeal in the above matters on May 2, 2014. We sent the enclosed letter requesting the transcripts to the court reporter and others, but we neglected to send it to you. We apologize for this oversight.

We have what we believe to be complete transcripts of all of the relevant hearings, but we need confirmation of this from the court reporter. As soon as we have confirmation that we have complete transcripts, we will notify your office.

Sincerely,

Arthur K. Aiken
art@aikenandhightower.com

Enclosures as stated

cc: Desa Ballard (w/enclosures)

EXHIBIT 4

**STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND**

Howard Hammer,

Plaintiff,

vs.

Shirley Hammer a/k/a Shirley Grace Hightower,

Defendant,

) **COURT OF COMMON PLEAS**

) **FIFTH JUDICIAL CIRCUIT**

) Case No.: 2009-CP-40-05911

) **MOTION OF HOWARD HAMMER**

) **TO ALTER OR AMEND**

) **JUDGMENT WITH ANNEXED**

) **MEMORANDUM IN SUPPORT**

**STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND**

1634 Main, L.P.,

Plaintiff,

vs.

Shirley Hammer a/k/a Shirley Grace Hightower,

Defendant,

vs.

Howard Hammer,

Additional Defendant on Counterclaim

) **COURT OF COMMON PLEAS**

) **FIFTH JUDICIAL CIRCUIT**

) Case No.: 2010-CP-40-2889

) **MOTION OF HOWARD HAMMER**

) **AND 1634 MAIN, LP TO ALTER**

) **OR AMEND JUDGMENT WITH**

) **ANNEXED MEMORANDUM IN**

) **SUPPORT**

MOTION

The Plaintiff/Third-Party Defendant, Howard Hammer (HH) and the Plaintiff, 1634 Main, LP (1634 Main) (collectively moving parties) hereby move, in accordance with Rule 59(e) SCRPC, to alter or amend and for reconsideration of this Court's Order in supplemental proceedings, which transferred certain real and personal property from the moving parties to SH. The subject Order was filed with the Clerk on January 21, 2014, and the moving parties' counsel received written notice of the entry of the Order by mail on January 22, 2013.

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COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

The moving parties base their Motion on the general grounds that, in the Order, this Court erred in its application of the law to the facts and that the Order does neither raises nor rules upon significant arguments made by the moving parties' counsel in opposition to the relief granted to the Defendant, Shirley Hammer (SH) in the subject Order. For specific grounds for this Motion, the moving parties rely on the issues raised in the Memorandum in Support annexed to this Motion.

WHEREFORE, the moving parties prays that this Court alter the Order to rule upon all issues raised and argued in opposition to the relief granted in the Order; reconsider that Order and amend that Order to deny the relief granted in that Order.

MEMORANDUM IN SUPPORT

ARGUMENT

I. INTRODUCTION

The above are actions in which SH sought supplemental proceedings to enforce judgments in her favor and against HH and 1634 Main. The judgments that are the subjects of these actions are on appeal the South Carolina Supreme Court This Court heard these matters on May 30, 2013, June 4, 2013, August 12, 2013 and January 9, 2014 (collectively hearings). The subject Order which was entered on January 21, 2014, provides for a transfer by deed of all right tile and interest of HH and 1634 Main in 1634 Main, LP, real property commonly known as 1634 Main Street in Columbia, SC and SH5, LLC (transferred property).¹ On January 22, 2014, this Court executed a Master's Deed making these transfers.

¹ Counsel for SH represented to this Court more than once that the property transferred had a value of between \$900,000 and \$1,000,000.

II. THE PURPOSES FOR A MOTION UNDER RULE 59(e) SCRPC

A motion under Rule 59(e) SCRPC serves two purposes. First, the motion must be made to preserve for appellate review arguments of the moving party that were made to the trial court but were not explicitly addressed in the trial court's order. Elam v SCDOT, 361 S.C.9, 602 S.E.2d 772 (2004). Second, the motion may be made in an effort to convince the trial court to reconsider the result reached in its order and rule in favor of the moving party. Elam, supra. Barr make his Rule 59(e) SCRPC Motion for both of these purposes.

III. THIS COURT SHOULD ALTER THE SUBJECT ORDER TO RULE EXPLICITLY ON SEVERAL ARGUMENTS THAT COUNSEL FOR THE MOVING PARTIES RAISED DURING THE HEARINGS.

The moving parties raised the following arguments at the hearings that are neither raised in nor ruled upon in the subject Order:

- that this Court was without authority to make a naked transfer of the transferred property under the Order and the Master's Deed according to S.C. Code §§ 15-39-310 et seq.;
- that if this Court ordered a sale of the transferred property, which it did, the order would have to set, as a condition of the sale, a requirement that SH post a bond in an amount equal to two times the value of the property all of which is required by S.C. Code § 18-9-130(A)(2);
- that this Court was without authority under the due process clauses of S.C. Const. art. 1, § 3 and U.S. Const. amend. XIV, § 3 to make a naked transfer of the transferred property because one of the minor children of HH and SH was a part owner of 1634 Main and was never made a party to or represented in any way in these actions; and
- that this Court could not order sanctions under the South Carolina Frivolous Civil Proceedings Sanctions Act (SCFCPSA) because SH did not comply with the procedural requirements for pursuing a claim under that the SCFCPSA; namely, that a motion must be filed giving the nonmoving party notice of the conduct alleged to violate the SCFCPSA, S.C. Code § 15-36-10(C)(1) and (D), and that the nonmoving has thirty (30) days to respond to any sanctions motion under the SCFCPSA, S.C. Code §15-36-10(D).

This Court should amend its Order to raise and rule upon these important arguments.

IV. THIS COURT SHOULD RECONSIDER ITS DECISION, ALTER ITS ORDER AND DENY THE RELIEF GRANTED IN THE SUBJECT ORDER.

- A. This Court exceeded its authority in making the naked transfer of the property transferred under the subject Order.**

In supplemental proceedings, the supervising court has the authority to undertake proceedings “for the application of the property of the judgment debtor towards the satisfaction of the judgment as are provided upon the return of an execution.” S.C. Code § 15-39-310 (emphasis added). On the return of an execution, the “sheriff...shall and may sell (the judgment debtors’ property), by auction.” S.C. Code § 15-36-610 (parenthetical added).

The language underlined above indicates that the General Assembly intended to give to the supervising judge in supplemental proceedings only those powers conferred upon the sheriff on the return of an execution, the power to sell the property of the judgment debtor. In other words, this Court had authority to order the sale of the transferred property but no authority to order a naked transfer of that property.

This Court exceeded its authority as supervising judge in supplemental proceedings by ordering a naked transfer of the transferred property. For this reason, this Court should alter the subject Order to deny SH the relief of a naked transfer of the subject property.

B. HAVING ORDERED AN EVENTUAL SALE OF THE PROPERTY, THIS COURT HAD TO REQUIRE SH TO POST A BOND IN AN AMOUNT EQUAL TO TWO TIMES THE VALUE OF THE PROPERTY.

“A plaintiff (judgment creditor) may not enforce a sale of property after a notice of appeal is filed without giving an undertaking or bond to the defendant (judgment debtor), with two good sureties, in double the appraised value of the property or double the amount of the judgment, conditioned to pay all damages the defendant (judgment debtor) may sustain by reason of the sale in case the judgment is reversed.” S.C. Code § 18-9-130 (parentheticals added). This Court should alter the subject Order to impose the bond requirement as a condition of any sale of the transferred property.

C. THIS COURT EXCEEDED ITS AUTHORITY IN GRANTING A NAKED TRANSFER OF THE PROPERTY, BECAUSE A PART OWNER OF 1634 MAIN, A MINOR CHILD OF HH AND SH, WAS NEVER MADE A PARTY TO AND WAS NEVER REPRESENTED IN ANY WAY IN THESE ACTIONS.

Both the United States and the South Carolina Constitutions prohibit deprivation of a property interest without due process of law. S.C. Const. art. 1, § 3 and U.S. Const. amend. XIV, § 3 The right guaranteed by these due process clauses includes procedural due process or fair procedures as a condition for deprivation of a property interest. See, U.S. v James Daniel Good Real Property, 510 U.S. 43, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993) and Ross v Medical University of South Carolina, 328 S.C. 51, 492 S.E.2d 62 (1977). At a minimum, procedural due process requires reasonable notice and a meaningful opportunity to be heard. James Daniel, 510 U.S. at 48, 114 S.Ct. at 494; Ross, 328 S.C. at 66-67, 492 S.E.2d at 70-71.

The minor child as a partial owner of 1634 Main was entitled to notice and a meaningful opportunity to be heard in these cases. Since the minor child was never made a party or given any opportunity to be heard in these actions, this Court did not have authority to make a naked transfer of 1634 Main to SH. This Court should alter the subject Order to deny the naked transfer of the transferred property.

D. SH DID NOT COMPLY WITH THE PROVISIONS OF THE SCFCPSA.

The SCFCPSA requires a motion that notifies “the court and all parties of the conduct constituting a violation of the provisions of this section and explain(s) the basis for the potential sanction imposed.” S.C. Code § 15-36-10(C)(1) and (D). Once the moving party served its motion notifying the nonmoving party of the specific conduct violating the SCFCPSA and the basis for the sanction, the nonmoving party “has thirty days to respond to the allegations.” S.C. Code § 15-36-10(D) This Court’s Order violates both of these statutory provisions, and this Court should amend the subject Order to deny sanctions under the SCFCPSA.

CONCLUSION

This Court should reconsider its decision and enter an amended order denying SH the relief granted to her in the subject Order. Short of that, this Court should alter or amend its Order to address explicitly the important arguments set forth above.

Respectfully submitted,

(SIGNATURE ON THE FOLLOWING PAGE)

AIKEN & HIGHTOWER, PA

By: _____

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**ATTORNEYS FOR THE JUDGMENT
DEBTORS**

Columbia, South Carolina
February 3, 2014

