THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Charles B. Simmons, Jr., Master-in-Equity

Case No.: 2010-CP-23-1321
Appellate Case No.: 2014-002381

Deutsche Bank National Trust Company as Trustee for First Franklin Mortgage Loan Trust 2006-FFI Pass-Through Certificates, Series 2006-FFI ..... Respondent,

v.

Dora S. Morrow, Ray Martin, and Lease and Rental Management Corp. d/b/a Auto Use and Auto Loan, a Massachusetts Corporation, Southern New Hampshire Bank and Trust Company, a New Hampshire Bank, and Edman Hackworth ..... Defendants.

Edman Hackworth ..... 3rd Party Plaintiff,

v.

John Morrow ..... 3rd Party Defendant.

John Morrow and Dora Morrow ..... 3rd Party Plaintiffs,
Of Whom John Morrow and Dora Morrow are ..... Appellants,

v.

Edman Hackworth and Debbie Hackworth ..... 3rd Party Defendants,
Of Whom Edman Hackworth is ..... Respondent.

FINAL BRIEF OF RESPONDENT

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2. DID THE TRIAL COURT ERR BY ENFORCING THE SETTLEMENT AGREEMENT WHERE DORA MORROW REVOKED HER ASSENT PRIOR TO ENTERING INTO A WRITTEN AGREEMENT SIGNED BY ALL PARTIES AND COUNSEL AS REQUIRED BY RULE 43(K), SOUTH CAROLINA RULES OF CIVIL PROCEDURE?

3. DID THE TRIAL COURT ERR BY GRANTING HACKWORTH'S MOTION TO ENFORCE SETTLEMENT WHERE THE SETTLEMENT AGREEMENT EXPIRED PER ITS OWN TERMS?

STATEMENT OF THE FACTS

This case started as a foreclosure action filed by Deutsche Bank in 2010 against Appellant Dora Morrow, the sole owner of the subject property. Respondent Edman Hackworth intervened in 2012 and brought claims against Appellants, Dora and John Morrow, who then both brought claims against Respondent. Respondent's claim arose from a contract with Appellant Dora Morrow from a lease purchase contract for the subject property.

A trial was held before the Honorable Charles B. Simmons, Jr. on August 13, 2013 on only the third-party action between Appellants and Respondent. The Court gave notice of its decision of judgment in favor of Respondent at the close of testimony on August 13, 2013 (**R. p. 8**). The Order granting Respondent judgment against the Appellants was filed on September 12, 2013. It was never appealed. (**R. pp. 10-18**).

After the trial, it was agreed that to resolve the foreclosure case and Respondent's Judgment, Appellant Dora Morrow would sell the property via a short sale to Respondent if

Deutsche Bank agreed and waived any deficiencies against her and Respondent would satisfy his judgment against Appellants. On August 23, 2013, Appellant Dora Morrow and Respondent signed a Contract for the Sale of Real Estate. (**R. pp. 126-129**). This Contract was submitted to Bank of America as servicer for Deutsche Bank[1]. Pursuant to the terms of that Contract, the purchase price of $52,000 would be paid by Respondent to Bank of America, in full satisfaction of the promissory note and mortgage on the property. Appellant Dora Morrow would deed the property to Respondent free and clear. An integral part of this Contract was acceptance of this short sale by Bank of America and Bank of America agreeing to not seek a deficiency. At closing, Respondent would cancel his judgment against Appellants. This settlement would fully resolve the pending foreclosure and Respondent's Judgment.

Thereafter, Bank of America sent the necessary documents to effectuate the short sale, including but not limited to a Short Sale Purchase Contract Addendum. These were Bank of America's standard documents sent from Bank of America to be completed by Respondent and Appellant Dora Morrow. These documents were signed by both Appellant Dora Morrow ***and*** Respondent on or about September 30, 2013. (**R. pp. 159-164**) (collectively "Short Sale documents"). A portion of this document was also signed by Edwin David King, as the licensed realtor handling the short sale. (**R. pp. 163-164; R. pp. 179-180**). All documents were signed and returned to Bank of America. It is noteworthy that there are **no** places on these documents for Bank of America to sign. Moreover, Appellant John Morrow did not sign because he had no interest in the property.

[1] At all times mentioned herein, Bank of America was acting on behalf and in the interest of Deutsche Bank.

On or about November 27, 2013, Bank of America sent its approval letter of the short sale to Respondent and Appellant Dora Morrow with additional documents for Appellant Dora Morrow to sign. (**R. pp. 130-138**) (collectively "Approval Letter"). At this point, there was written assent from all parties to the Agreement. As can be ascertained from a review of the Approval Letter, it was requested of Appellant Dora Morrow to sign the Bank of America Approval Letter, as well as an Assignment of Unearned Premium Refund which was sent to Appellant Dora Morrow in a separate letter from Bank of America dated December 2, 2013. (**R. p. 135**). These were the only additional documents that Bank of America asked Appellant Dora Morrow to sign.

But, Appellant John Morrow called Respondent and told him that his wife (Appellant Dora Morrow) would not sign the additional documents requested of her unless Respondent paid Appellant John Morrow $1,000.00. (**R. p. 155; R. p. 182**). When Respondent rightly refused to pay Appellant John Morrow to have the additional paperwork signed, Appellants took out a trespass notice against Respondent, dated December 13, 2013. (**R. p. 165; R. p. 182**). This prevented Respondent from inspecting the premises or obtaining an appraisal in order to close. (**R. p. 155; R. pp. 182-183**).

Respondent was then forced to file two separate motions, one to enforce settlement (**R. pp. 123-125**); the other to allow access to the property (**R. pp. 151-152**) as Appellants were then renting the house to a third party. The lower court issued an Order Enforcing Settlement dated April 24, 2014, which directed Appellant Dora Morrow to "cooperate fully and sign the documents necessary to give effect to the Settlement as indicated in the Short Sale Agreement" (**R. p. 21**). Appellant Dora Morrow never complied with the

terms of the April 24 Order. In a separate order dated October 1, 2014, the Court ordered Appellant John Morrow to not interfere with the short sale and settlement (**R. p. 31**).

Appellants then retained attorney J.J. Andrighetti, who, on May 7, 2014 filed a Motion for Relief from Order to Enforce Settlement, pursuant to SCRCP, Rule 60, (**R. pp. 146-147**) based on the allegation that Deutsche Bank's new loan serving agent, Select Portfolio Servicing, Inc. would not agree to the short sale. This motion was unsupported by Affidavit or any other document. Interestingly, it sought an Order compelling the bank to "comply with the settlement agreement or vacate the settlement agreement." (**R. p. 147**). While not stated in the Court's October 1, 2014 Order, Appellants' Motion to Reconsider was denied by the Court at the September 19, 2014 hearing. (**R. p. 117, line 22**). This appeal follows.

ARGUMENT

I. APPEAL WAS FILED UNTIMELY

As a preliminary matter that affects all assignments of error, Respondent contends this appeal was filed untimely.

The Order to Enforce Settlement on Respondent's motion was filed on April 24, 2014. Appellants only ever filed a Motion for Relief from Judgment, citing Rule 60, S.C.R.Civ.P. (**R. p. 146**). This motion was filed on May 7, 2014. The point made in Appellants' motion dealt with an allegation that a new loan servicing provider that indicated the settlement would violate Federal law. The motion contained **no** Affidavits or supporting documentation for the position stated therein. More importantly, the motion did not seek to alter or amend the Order to Enforce Settlement. In fact, it requested the Court to order Deutsche Bank to comply with the settlement agreement. (**R. p. 147**). In no

part of the motion does it cite or seek the Court to rule on a matter raised at the hearing but not ruled upon in the Order as would be done under a Rule 59 motion. Even though the Court's October 1, 2014 Order styles the motion erroneously as a motion to reconsider, the substance of the motion is clearly under Rule 60 as the motion states. A motion made under Rule 60 does not toll the running of the time for appeal. *Otten v. Otten*, 287 S.C. 166, 337 S.E.2d 207, 208 (1985).

Appellants' motion requested that the Court alter or amend the Order, but the substance of the motion was not to rule on or change a ruling that was raised at the hearing like a motion to reconsider. The motion did not seek reconsideration, but relief from the judgment based on apparently new evidence, although wholly unsubstantiated. Looking at the substance of the motion, it is clear that Appellants were seeking relief pursuant to S.C. Rules Civ. P. Rule 60, not a Rule 59. **(R. pp. 146-147).**

In *Rowe v. Advance America, et al.*, 2006 WL 7285680, UP-047, the Court of Appeals addressed a similar issue. In the *Rowe* case, the motion was captioned as a motion to reconsider but was actually stated as being made pursuant to Rule 60 and the substance of the motion is consistent with a Rule 60 Motion. In the present matter, the Appellants' motion says it is being made under Rule 60. **(R. p. 146)**. In *Rowe*, the relief sought was to set aside, not reconsider. In the present matter, the prayer for relief says it is to "alter or amend", but what is seeks is to have "Deutsche Bank ... comply with the settlement agreement or vacate the settlement agreement", not to reconsider or actually alter or amend the ruling. **(R. p. 147)**.

Substantively, Appellants' motion is for relief from judgment pursuant to Rule 60, not Rule 59. As the Court in *Rowe* stated,

> "[i]t is well-recognized legal concept in South Carolina that motions should be treated based on substance and effect as opposed to how they are styled by the moving party." *Rowe* citing *Mickle v. Blackmon*, 755 S.C. 136, 140; 177 S.E.2d 548, 549 (1970).
>
> The Court in *Rowe* also noted that,
>
> "[t]he court must examine the relief sought to understand the true nature of the pleadings." *Rowe* citing *Standard Fed. Sav. & Loan Ass'n. v. Mungo*, 306 S.C. 22, 26; 410 S.E.2d 18, 20 (Ct. App. 1991).

Appellants' motion in style and substance was made pursuant to SCRCP, Rule 60. Rule 60 motions do not operate to stay the time to file a notice of appeal. Appellants' Notice of Appeal was dated November 5, 2014, which was more than thirty (30) days since the filing of the Court's April 23, 2014 Order that Appellants' seek to appeal. Therefore, Appellants' appeal is untimely and should be dismissed.

II. ISSUE OF PRESERVATION

Appellants also failed to preserve all their arguments for appeal.

The questions presented for appellate review must first have been fairly and properly raised in the lower court and passed upon by the court. *Hubbard v. Rowe*, 192 S.C. 12; 5 S.E.2d 187 (1939). A party may not use a post-trial motion to raise an issue that could have been raised at trial. *Patterson v. Reid*, 318 S.C. 183, 456 S.E.2d 436 (Ct. App. 1995); see *Commercial Credit Loans, Inc. v. Riddle*, 334 S.C. 176, 512 S.E.2d 123 (Ct. App. 1999).

At the hearing on Respondent's motion to enforce settlement, Appellant Dora Morrow did not attend. (**R. p. 104, lines 3-4; R. pp. 19-20**). Appellant John Morrow

never raised any substantive issues, except a request for a continuance, which was denied.[2] **(R. p. 102, lines 15-16; R. p. 104, line 2; R. p. 20)**.

Further, Appellants' motion raised an issue not raised at the hearing and new issues cannot be raised for the first time in a Motion to Reconsider. *Anderson Memorial Hospital v. Hansen*, 313 S.C. 497, 443 S.E.2d 329 (Ct. App. 1994). **(R. p. 150)**. The issue raised by Appellants in their motion was something that allegedly occurred after the hearing to enforce settlement and was never argued at the hearing. **(R. p. 150)**.

As the current issues raised on appeal were never raised at the hearing or ruled upon by the lower court, they were not preserved for appeal and should be dismissed. **(R. pp. 101-105)**.

APPELLANTS' ISSUES ON APPEAL

III. THE TRIAL COURT CORRECTLY GRANTED RESPONDENT'S MOTION TO ENFORCE SETTLEMENT AS THERE WAS EVIDENCE OF A WRITTEN AGREEMENT OF ALL PARTIES GIVING ASSENT TO THE AGREEMENT.

As stated earlier, this issue was not timely appealed and never raised by Appellants at the hearing and therefore it is not appealable. See *Hubbard, supra; Patterson, supra;* and *Commercial Credit Loans, supra.*

Further, Appellants lack standing to raise this claim of error. It is undisputed and not contradicted by any evidence that Appellant Dora Morrow, the sole owner of the subject real estate, signed the settlement agreement. **(R. pp. 126-129)**. Although Appellants assert in their appeal the lack of Bank of America's signature on the short sale documents generated by the Bank of America, Appellants lack standing to assert such a

[2] The denial of the request for a continuance has not been appealed.

claim. Only Bank of America could have raised that issue and it did not appeal the Court's Order.

It is undisputed that Appellant Dora Morrow also signed documents for a short sale that were sent to her and Respondent by Bank of America (**R. pp. 159-164**), which were consistent with the settlement agreement. It is undisputed and not raised as an issue on appeal that Bank of America approved this agreement.

Appellants can point to no evidence presented at any hearing that Appellant Dora Morrow did not sign the Contract for Sale of Real Estate (**R. p. 129**) or the Bank of America short sale documents (**R. pp. 159-164**). It is undisputed and uncontradicted that Appellant Dora Morrow signed the Bank of America short sale purchase contract and third party authorization forms, both of which are Bank of America pre-printed forms. (**R. pp. 159-162**). These documents were also signed by Respondent (**R. p. 129; R. pp. 161-162**) and approved in writing by Bank of America. (**R. pp. 130-132; R. pp. 140-141; R. pp. 159-164**). Further, in their Motion for Relief, Appellants requested the Court to order the bank to "comply with the settlement agreement." (**R. p. 147**), which is a clear admission of the substance of the settlement agreement and Appellants' assent. Appellants submitted no evidence to contradict Respondent's allegation that Appellant John Morrow told Respondent that his wife would not sign the additional Bank of America documents to consummate the settlement unless Respondent paid him $1,000.00. (**R. p. 155; R. p. 182**). Appellants do not dispute nor argue against the existence of the Settlement Agreement or its terms.

"Rule 43(k) is intended to prevent disputes as to the existence and terms of agreements regarding pending litigation." *Farnsworth v. Davis Heating & Air*

Conditioning, Inc., 367 S.C. 634, 627 S.E.2d 724 (2006). The purpose of Rule 43(k) is to insure that there are no questions as to what the settlement involved. Since there is not a dispute as to this, the intent of Rule 43(k) has clearly been met.

Although the Bank of America short sale documents do not have a space for Bank of America to sign, the documents are Bank of America's pre-printed forms which were delivered to Appellant Dora Morrow and to Respondent by Bank of America. (**R. pp. 130-132; R. pp. 140-141; R. pp. 159-164**). Notably, Bank of America subsequently provided its approval of the short sale, in writing (**R. pp. 130-132**), to all parties once Bank of America received the signed short sale documents back from the parties.

Bank of America has not appealed the lower court's order to comply with and give effect to the short sale that ends the pending foreclosure sale and will cancel Respondent's Judgment.

Additionally, the documents constituting the settlement agreement (**R. pp. 126-129; R. pp. 130-132; R. pp. 159-164**) were entered in the record when Respondent filed his Motion to Enforce Settlement (**R. pp. 126-142**) on March 24, 2014 and his Motion Seeking Contempt Against Dora Morrow filed on August 19, 2014 (**R. pp. 159-164**).

Neither Appellants nor Bank of America have ever contested the existence or terms of the settlement agreement. The best evidence of this is that the bank has not appealed any Orders of the lower court.

As stated above, this issue is not timely made or appealable and further, Appellants lack standing for the issue they raise, and therefore Appellants' appeal should be dismissed. Most importantly, the intent of Rule 43(k) was satisfied.

IV. THE TRIAL COURT CORRECTLY ENFORCED THE SETTLEMENT AGREEMENT; DORA MORROW DID NOT REVOKE HER ASSENT PRIOR TO ENTERING INTO A WRITTEN AGREEMENT.

As previously stated, this issue was not timely appealed and never raised by Appellants at the hearing and is therefore not appealable. See *Hubbard, supra; Patterson, supra;* and *Commercial Credit Loans, supra.*

Moreover, Appellants can point to no evidence to support this position. In addition to there being no such testimony, there are no affidavits, verified pleadings, letters or emails that would lend credence to Appellants' claim that Appellant Dora Morrow gave notice that she revoked her agreement to the settlement.

The only evidence presented to the Court are the signed contract for sale, signed by Appellant Dora Morrow on August 23, 2013 (**R. pp. 126-129**) and the short sale pre-printed documents from the Bank of America, signed by Appellant Dora Morrow on September 30, 2013 (**R. pp. 159-162**), which contradict this argument only now being raised by Appellants.

Bank of America sent written notice of its approval of the short sale on November 27, 2013. (**R. p. 130**). At that point, revoking acceptance by Appellant Dora Morrow was not possible as a binding agreement had been reached. As can be seen in the Affidavit of Respondent, Appellant John Morrow claimed that Appellant Dora Morrow would not sign the additional documents unless he received $1,000.00 from Respondent. (**R. p. 182**). This conduct was not revocation but extortion; further, it was too late.

The record is devoid of any evidence of Appellant Dora Morrow giving notice that she was revoking the settlement agreement. Moreover, when Bank of America agreed to the short sale (**R. p. 130**), it was too late for Appellant Dora Morrow to revoke.

Appellants argue with no support from the record that the deal had changed. In fact, nothing had changed.

On April 7, 2014, the Court filed a Second Supplemental Order of Judge Simmons, dated March 25, 2014, showing the deficiency was waived. (**R. pp. 23-24**). This shows that Bank of America was on board with the settlement and agreed to waive deficiency.

Further, there was nothing raised before the Court at either the April 23, 2014 hearing or the September 19, 2014 hearing that suggests Appellant Dora Morrow was revoking her assent to the settlement agreement. (**R. pp. 101-105; R. pp. 109-118**).

As there is nothing in the record to support this allegation of error, and therefore this issue was not preserved for appeal, Appellants' appeal should be dismissed.

V. THE TRIAL COURT CORRECTLY GRANTED HACKWORTH'S MOTION TO ENFORCE SETTLEMENT, AS THE SETTLEMENT AGREEMENT DID NOT EXPIRE.

As previously stated, this issue was not timely appealed and never raised by Appellants at the hearing and therefore not appealable. See *Hubbard, supra; Patterson, supra;* and *Commercial Credit Loans, supra.*

Appellants argue that the settlement agreement expired by its own terms. First, the reason the closing did not take place is solely because of the acts, or inaction, of Appellants. The Court determined this and Appellant provided no evidence to the contrary. The only evidence is that Appellants, without any justification and based solely on economic extortion, refused to sign the additional documents sent by Bank of America to close on the short sale unless Respondent paid them more money, despite there being absolutely no obligation or duty of any kind for Respondent to do so. (**R. pp. 181-183**).

This fact was asserted by Respondent in his Affidavit and was not refuted nor contested by Appellants either by affidavit or oral argument. (**R. p. 182**).

A party cannot withhold a key for the other party's performance and then complain about non-performance. *Mozingo & Wallace Architects, LLP v. Grand,* 379 S.C. 478, 666 S.E.2d 267 (Ct. App. 2008).

It is uncontested that Appellants held the key for Respondent to perform and refused to perform causing the time period to be missed. Appellants cannot use their wrongful conduct as a defense. Further, this is more of a claim for Deutsche Bank to make, but Deutsche Bank has not appealed.

Appellants cannot withhold the keys for performance and then complain when Respondent cannot perform. *Mozingo, supra.*

As this issue has not been preserved for appeal, Appellants' appeal should be dismissed.

CONCLUSION

For the foregoing reasons, this appeal should be denied.

Respectfully submitted,

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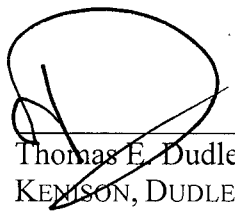
Certificate of Counsel

The undersigned hereby certifies that Respondent's Final Brief complies with Rule 211(b), SCACR.



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PROOF OF SERVICE

The undersigned hereby certifies that a true copy of the Respondent Edman Hackworth's Final Brief in the above-referenced case has been served on all parties of record by mailing a copy of same in the United States mail, postage prepaid this 23 day of July, 2015, addressed

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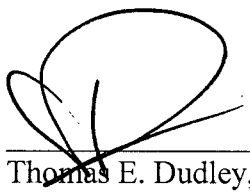

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