THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr., Master-in-Equity Judge

Case No.: 2010-CP-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, Of whom John Morrow and Dora Morrow are the	3rd Party Plaintiffs, Appellants,
v.	
Edman Hackworth and Debbie Hackworth, Of whom Edman Hackworth is the	3rd Party Defendants, Respondent.

FINAL REPLY BRIEF OF APPELLANTS

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ARGUMENTS IN REPLY

The arguments supporting Appellants' Issues on Appeal have already been adequately briefed, thus further Reply to Respondent's rebuttal arguments as to the Issues on Appeal is not necessary. Without restating the issues or making redundant arguments that have been thoroughly set forth in their opening brief, the Appellants offer the following points of clarification and rebuttal to the arguments raised by Respondents that Appellants' appeal was filed untimely and that Appellants' arguments were not preserved for appeal.

I. APPELLANTS' APPEAL WAS NOT FILED UNTIMELY.

Respondent argues that Appellants' appeal was not filed in a timely manner following the trial court's Order to Enforce Settlement filed April 28, 2014. Respondent argues that the Motion for Relief from Order to Enforce Settlement filed by Appellants John Morrow and Dora Morrow on May 7, 2014, was actually made pursuant to Rule 60, *South Carolina Rules of Civil Procedure*, and was not made pursuant to Rule 59 (*See* **R. pp. 146-147**). Therefore, Respondent argues, Appellant's Motion for Relief of Order did not toll the time to appeal the Order to Enforce Settlement, so that Appellants' Notice of Appeal dated November 5, 2014, was not timely, even though it was filed within thirty (30) days of the Order on Motion Seeking Contempt for Non-Compliance filed October 6, 2014, which denied Appellant's Motion for Relief.

It is well-settled in South Carolina that motions should be treated based on substance and effect rather than how they are styled by the moving party. *See* Mickle v. Blackmon, 255 S.C. 136, 140, 177 S.E.2d 548, 549 (1970) (treating motion based on its "substance and effect" as opposed to how it was styled by plaintiff); Standard Fed.

Sav. & Loan Ass'n v. Mungo, 306 S.C. 22, 26, 410 S.E.2d 18, 20 (Ct. App. 1991) (stating that it is the substance of the relief sought that matters "regardless of the form in which the request for relief was framed"). Although Appellants' motion was titled "Motion for Relief from Order to Enforce Settlement," and cited Rule 60, *SCRCP*, it actually requested that the Court "alter or amend its Order to Enforce Settlement issued on April 28, 2014" (*See* **R. p. 146**). The substance of the motion requested (1) that "the Court alter or amend its Order to require Plaintiff Deutsche Bank and its representatives to comply with the settlement agreement" or (2) that the Court "vacate the settlement agreement because it violates federal law and public policy" (*See* **R. p. 147**). The additional issue of whether the enforcement could be enforced against Deutsche Bank was the proper subject of a Rule 59 motion since it was not ruled upon by the trial court (*See* **R. pp. 146-147**). Therefore, even if the text of the motion only cited Rule 60 without citing Rule 59, *SCRCP*, the substance of the motion requested that the order be altered or amended pursuant to Rule 59, or, in the alternative, vacated pursuant to Rule 60.

At the September 19, 2014, hearing on Appellants' Motion for Relief from Order and Hackworth's Motion Seeking Contempt Against Dora Morrow and Motion to Enforce Settlement Against Deutsche Bank, all parties understood Appellants' Motion for Relief from Order to have been a motion to reconsider the trial court's April 28, 2014, Order to Enforce Settlement filed April 28, 2014. Counsel for Respondent understood Appellant's motion to be a "Motion to Reconsider" (*See* **R. p. 110, line 21-p. 111, line 3**). Counsel for Appellants also treated the motion as a "Motion to Reconsider" (*See* **R. p. 113, lines 2-11**). Finally, the trial court specifically denied "the Motion to Reconsider

filed by the Morrows" and declined "to hold Mrs. Morrow in contempt in light of the Motion to Reconsider." (*See* **R. p. 117, line 20-p. 118, line 2**). After the hearing, the trial court issued an Order on Motion Seeking Contempt for Non-Compliance filed October 6, 2014, which held that Appellants' attorney "filed a prior motion to reconsider" which "stayed the order until resolved" (*See* **R. p. 31**). The trial court's findings that Appellants filed a "motion to reconsider" were not appealed by Respondent, and the motion was not treated by Respondent as anything but a motion to reconsider pursuant to Rule 59 until Respondent filed his Initial Brief.

A timely motion to alter or amend filed pursuant to Rule 59 stays the time for appeal for all parties. *See* Rule 59(f), *SCRCP*. It matters not whether a party's motion also contains arguments made pursuant to Rule 60. Appellants were required to file a motion pursuant to Rule 59 because the trial court's order was silent as to whether the order could be enforced against the other party to the alleged settlement agreement, Deutsche Bank. The court failed to consider this issue, in part, because the Respondent failed to make Deutsche Bank a party to the initial Motion to Enforce Settlement. Appellants' timely motion pursuant to Rule 59 stayed the time to appeal the trial court's Order to Enforce Settlement filed April 28, until the trial court denied the motion in its Order on Motion Seeking Contempt for Non-Compliance filed October 6.

Moreover, Respondent Hackworth did not include John Morrow or Deutsche Bank in his initial motion to enforce, even though the alleged settlement agreement in question purported to resolve litigation involving Deutsche Bank, Dora and John Morrow, and Hackworth (*See* **R. pp. 120-125; R. p. 190; R. pp. 184-185,** *and* **R. p. 191).** As a result, the trial court's initial Order to Enforce Settlement filed on April 28

was not a final order because it did not resolve the rights of the other two (2) of the four (4) parties whose interests would be determined on the motion (*See* **R. pp. 19-21**).

It is settled in South Carolina that the better practice is to await appeal from final judgment and then have reviewed errors and defects in intermediate and interlocutory orders. *See* Capell v. Moses 36 S.C. 559, 15 S.E. 711 (1892). Appellate jurisdiction is conferred by statute, which sets out four (4) subsets of orders which can be appealed. *See* S.C. Code § 14-3-330. An order generally must fall into one of several categories set forth in the statute governing appellate jurisdiction in order to be immediately appealable. *See* State v. Wilson, 387 S.C. 597, 693 S.E.2d 923 (2010), *rehearing denied.* Until the trial court determined that the alleged settlement agreement could be enforced against all parties to the litigation, including Deutsche Bank and John Morrow there was no final order that Appellants could appeal.

Finally, to the extent that Appellants' Motion for Relief from Order is determined to have been made pursuant to Rule 60, *SCRCP*, Appellants retained their right to appeal the trial court's denial of that motion in its Order on Motion Seeking Contempt for Non-Compliance filed October 6, 2014. This right is especially important in light of Respondent's failure to make John Morrow a party to either of its Motion(s) to Enforce Settlement. "Generally, a party interested in resisting the relief sought by a motion has a right to notice sufficient to give him an opportunity to be heard." Brown v. Mickens, 256 S.C. 346, 348, 182 S.E.2d 417, 417 (1971). In its opinion in Galloway v. Galloway, 249 S.C. 157, 160-61, 153 S.E.2d 326, 328 (1967), the Supreme Court elaborated as follows:

> Where notice is necessary, it should be given to all parties who have an interest in the question to be determined on the motion, and who have appeared in the action. If the adverse party appears for any reason entitled

> to be heard in opposition to the whole or any part of the relief sought, the application must be made on notice to such adverse party.

John Morrow did not have standing to appeal the trial court's Order Enforcing Settlement as to Dora Morrow that was filed on April 28, because he was not a party to the order. Instead, he timely filed a Motion for Relief from that Order pursuant to Rule 60, *SCRCP.* When his motion was denied by the trial court in its Order on Motion Seeking Contempt for Non-Compliance filed October 6, 2014, he timely filed his appeal of that Order (*See* **R. pp. 28-32**).

II. APPELLANTS' ISSUES ON APPEAL WERE PRESERVED.

Respondent further argues that appellants failed to preserve all their arguments for appeal. "It is axiomatic that an issue cannot be raised for the first time on appeal." State v. Haygood, 409 S.C. 420, 430, 762 S.E.2d 69, 74 (Ct.App. 2014). However, our courts have also held that:

> This is not a 'gotcha' game aimed at embarrassing attorneys or harming litigants, but rather is an adherence to settled principles that serve an important function. Though our appellate courts should follow longstanding precedent and resolve an issue on preservation grounds when it clearly is unpreserved, *it is good practice for us to reach the merits of an issue when error preservation is doubtful* (emphasis supplied).

Id., at 430, 74.

Our courts have further held that:

> Error preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review. Instead, a litigant is only required to fairly raise the issue to the trial court, thereby giving it an opportunity to rule on the issue.

State v. Brannon, 388 S.C. 498, 502, 697 S.E.2d 593, 595-96 (2010).

The fundamental issue on appeal is whether the documents constituting the alleged settlement agreement were enforceable pursuant to Rule 43(k), *SCRCP.* This

issue was absolutely before the court when it ruled on Respondent's Motion to Enforce Settlement following the hearing on April 23, 2014. In his motion to enforce settlement, Hackworth alleged that the settlement agreement "completely complies with S.C. Rules Civil Procedure 43" (*See* **R. p. 124**), and provided copies of the Contract for Sale dated August 23, 2013, and the letter from Bank of America dated November 27, 2013, which were purported by Respondent to constitute an enforceable settlement agreement (*See* **R. pp. 126-129** *and* **R. pp. 130-142**). Respondent further alleged that John Morrow had notified Hackworth that Dora Morrow would require a payment of cash "in order to sign follow up documents required by Deutsche Bank" (*See* **R. p. 124**), and provided copies of the documents that Dora Morrow had refused to sign, which required her to assign her unearned hazard insurance premium to Bank of America, which was not a condition that Dora Morrow had previously agreed to (*See* **R. pp. 134-136**).

The trial court understood that it was reviewing the Contract of Sale dated August 23, 2013, and the letter from Bank of America dated November 27, 2013, and determining whether those agreements were enforceable (*See* **R. pp. 99-105**). The trial court expressly stated that it was ruling on "a Motion pursuant to S.C.R.C.P. 43" to determine whether the alleged Settlement Agreement was enforceable pursuant to that rule (*See* **R. p. 20**); and it held that the settlement agreement "resolves the judgment entered against Morrow and ends the pending foreclosure on Ms. Morrow," and that Dora Morrow would be required to comply with the settlement agreement by signing all documents required to effectuate the short sale (*See* **R. p. 21**).

The trial court, therefore, not only had an opportunity to rule on the issue of enforceability pursuant to Rule 43(k), it expressly ruled on the issue, so that any error of

law regarding the ruling was not clearly unpreserved for review. At a minimum, error preservation regarding this fundamental issue is doubtful enough that it would be good practice for the appellate courts to reach the merits of the issue. *See* State v. Haygood (holding that defendant's hearsay argument was preserved for review where magistrate cited the excited utterance exception to overrule defendant's objection under the Confrontation Clause). *See also* State v. Brannon (holding that the issue of whether defendant was seized under the Fourth Amendment so that he would be entitled to direct verdict on the charge of resisting arrest was properly preserved where he argued that an arrest was not being made when he ran from police, even though defendant did not use the terms "seizure" or "Fourth Amendment" when arguing for directed verdict).

The additional issue of whether the enforcement could be enforced against Deutsche Bank was the proper subject of Dora Morrow's Rule 59 motion filed on May 7 since the issue was not ruled upon by the trial court (*See* **R. pp. 146-147**). The issue of whether the settlement agreement was enforceable as to Deutsche Bank was argued by Dora Morrow not only in the written motion for relief from order, but also in the letter dated April 30, 2014, from counsel for the Morrows (*See* **R. pp. 192-193**). The additional issue of whether the order enforcing settlement was void as against public policy was properly raised by Dora Morrow by Rule 60 motion.

The same arguments were also affirmatively raised by John Morrow, who was also a party affected by alleged settlement agreement but was not made a party to the original Motion to Enforce Settlement, by Rule 60 motion (*See* **R. p. 146-147**). When Appellant's Motion for Relief from Order was heard by the trial court on September 19, 2014, Appellants' counsel again raised the issue of enforceability, expanding on that

argument by pointing out to the court that the alleged settlement agreement expired by its own terms in September of 2013, and that there had never been a meeting of the minds between Respondent, Appellants, and Deutsche Bank (*See* **R. p. 112, line 10-p. 113, line 15).** The facts are that the trial court was given multiple opportunities to rule on the fundamental issues on appeal, which relate to the enforceability of the alleged settlement agreement pursuant to Rule 43(k).

CONCLUSION

Appellant's appeal of the trial court's Order Enforcing Settlement filed April 28, 2014, was not untimely, because Appellants filed a motion to reconsider the order on May 7, which was not ruled upon until the trial court's Order on Motion Seeking Contempt for Non-Compliance filed October 6, 2014. Even if the text of the Appellant's motion to reconsider did not cite Rule 59, *SCRCP,* the substance of the motion requested that the order be altered or amended pursuant to Rule 59, or, in the alternative, vacated pursuant to Rule 60. All parties understood Appellants' Motion for Relief from Order to have been a motion to reconsider the trial court's Order to Enforce Settlement filed April 28; and the trial court's findings that Appellants filed a "motion to reconsider" were not appealed by Respondent (*See* **R. pp. 28-32**). Appellants' timely motion pursuant to Rule 59 stayed the time to appeal the trial court's Order to Enforce Settlement filed April 28, until the trial court denied their motion in its Order on Motion Seeking Contempt for Non-Compliance filed October 6, 2014.

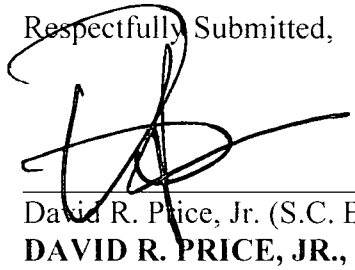
Moreover, since Respondent Hackworth did not include John Morrow or Deutsche Bank in his initial motion to enforce, even though the alleged settlement agreement in question purported to resolve litigation involving Deutsche Bank, Dora and

John Morrow, and Hackworth, the trial court's initial Order to Enforce Settlement filed on April 28 was not a final order since it did not resolve the rights of the other two (2) of the four (4) parties whose interests would be determined on the motion. Finally, to the extent that Appellants' Motion for Relief from Order is determined to have been made pursuant to Rule 60, Appellants' retained their right to appeal the trial court's denial of that motion in its Order on Motion Seeking Contempt for Non-Compliance filed October 6. John Morrow, in particular, retained his right to appeal the denial of his motion, since did not have standing to appeal the trial court's Order Enforcing Settlement as to Dora Morrow that was filed on April 28.

Appellants also preserved the issues raised on appeal, which fundamentally involve the question whether the documents constituting the alleged settlement agreement were enforceable pursuant to Rule 43(k), *SCRCP*. This issue was absolutely before the court when it ruled on Respondent's Motion to Enforce Settlement following the hearing on April 23, 2014. The trial court expressly stated that it was ruling on "a Motion pursuant to S.C.R.C.P. 43" to determine whether the alleged Settlement Agreement was enforceable pursuant to that rule (*See* **R. p. 20**); and it held that the settlement agreement "resolves the judgment entered against Morrow and ends the pending foreclosure on Ms. Morrow," and that Dora Morrow would be required to comply with the settlement agreement by signing all documents required to effectuate the short sale (*See* **R. p. 21**). The trial court therefore not only had an opportunity to rule on the issue of enforceability pursuant to Rule 43(k), it expressly ruled on the issue, so that any error of law regarding the ruling was not clearly unpreserved for review. Other aspects of the enforceability of

the alleged settlement agreement were properly raised and elaborated on by counsel for Appellants during the trial court's consideration of Appellants' motion(s).

Respectfully Submitted,



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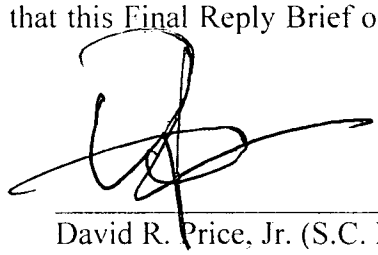
CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief of Appellants complies with Rule 211(b), SCACR.



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PROOF OF SERVICE

I certify that I have served the FINAL REPLY BRIEF OF APPELLANT and CERTIFICATE OF COUNSEL to the Respondents, on the counsels addressed below, by depositing a copy of it in the United States Mail with postage prepaid on July 27, 2015.

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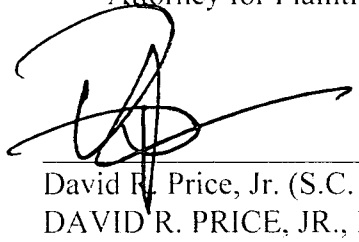

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