

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT
EQUITY DIVISION

Civil Action No.: 2013CP1800074
consolidated with Civil Action No.
2013CP1800183

Stephen Dudek, Doreen Cross,
Plaintiffs

Versus

Thomas M Ferro, and Lorraine B Ferro,
Defendants

AND

Molly M Morpew,
Plaintiff

Versus

Stephen Dudek, Doreen Cross, Thomas
Ferro and Lorraine Ferro,
Defendants

ORDER

RECEIVED

JUN 19 2017

SC Court of Appeals

FILED - RECORDING
2017 MAY 17 PM 2:06
CHERYL GRANHAM
CLERK OF COURT
DORCHESTER COUNTY

This matter is before me pursuant to the Remittitur from the Court Of Appeals filed on February 17, 2017, affirming this Court's decision entered November 6, 2014. At question is this Court's Order Setting Closing Schedule & Awarding Attorneys Fees entered April 3, 2017 (the April 3, 2017 order) on the Dudek/Cross Motion for the same.

On April 6, 2017, Morpew/Ferros¹ filed a joint Answer to Dudek & Cross Notice of Motion and Motion to Set Closing Schedule and Award Attorneys Fee. The joint Answer is construed as a Rule 59(e) Motion to alter or Amend the April 3, 2017 order. The joint Answer has 13 points of contention. Paragraph 5 of the joint Answer, addressing the award of attorneys' fees, has merit. Paragraph 6, addressing the issue of the purchase price, has merit. Additionally, at the close of

¹ Morpew as used herein refers to Molly M. Morpew; Ferros as used herein refers to Thomas M. Ferro, a/k/a Thomas Ferro and Lorraine B. Ferro a/k/a Lorraine Ferro, jointly and severally. Dudek/Cross as used herein refers to Stephen Dudek and Doreen Cross, jointly and severally.

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the hearing, Mr. Smith requested the Court order cancellation of the Lis Pendens filed in this action. This too has merit. All remaining issues raised in the joint Answer have no merit.

Morphew and Ferros are *pro se*. Hence, this Court has given broad latitude to them, particularly, in matters of procedure. The Answer follows entry of an Order on a Motion heard in open court and on the record. Morphew appeared in person. Ferros attended by telephone with consent of all parties inasmuch as they live in Colorado. As to the present matter the hearing conducted May 12, 2017 at 10:00 A.M. the same appearances were made, Ms. Morphew *pro se* and in person and the Ferros via telephone². All parties presented arguments. The Ferros were placed under oath as was Ms. Morphew.

Our courts have held that pleadings in a case should be construed liberally so that substantial justice is done between the parties. *Russell v. City of Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 339, 1991 WL 113654 (1991) This Court liberally construes pleadings to conform them to the rules of civil procedure in such a manner that promotes substantial justice between the parties. The primary aim being to give, especially with *pro se* litigants, is to assure them notice of proceedings and an opportunity to be heard, the fundamental of procedural due process³.

Striking this balance is often at the detriment of represented parties by competent counsel. Nonetheless in this case, since a hearing on the record pursuant to adequate notice to all parties on the Dudek/Cross Notice of Motion and Motion to Set The Scheduling For Closing And Award Attorneys' Fees, and all parties were given liberal opportunity to speak to the motion, this Court deems the joint Answer as a Motion pursuant to Rule 59 (e) SCRCF to alter or amend the April 3, 2017 order. At the hearing on the Dudek/Cross Motion, Ferros asserted that the requests

² Since the Ferros attended this hearing by telephone, the Court will enter an order dismissing their motion to attend by telephone filed May 3, 2017 as moot.

³ Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment of the United States Constitution. *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review. S.C. Const. art. 1, § 22; *Stono River Envtl. Protection Ass'n v. S.C. Dep't of Health and Envtl. Control*, 305 S.C. 90, 94, 406 S.E.2d 340, 342 (1991). *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350, 2007 WL 4698492 (2008)

for attorneys' fees had been waived because no motion for fees and costs had been timely filed, and they asserted the attorney's fees were too high.

The affirmed Order, dated January 17, 2017, remittitur entered February 17, 2017, provided the following finding of fact:

"The Court finds Defendants Ferro are in default of the Dudek/Cross Contract for the reasons stated in this Order. Pursuant to Paragraph 16, the Court finds Defendants Dudek and Cross are entitled to recover reasonable costs, including a reasonable attorney fee. To this end, Defendants are at leave to apply, on or before ten (10) days of the date of this Order, for costs and attorneys fees due from Defendants Ferro. This Court will schedule a factual hearing on or after 10 days from the date of filing the application to ascertain a reasonable attorney fee and what costs should be recovered. If Defendants Dudek and Cross fail to apply for costs and attorneys fees within ten (10) days of the entry of this Order, Defendants Dudek and Cross shall be deemed to have waived their rights under Paragraph 16." Page 10, paragraph 21.

As a conclusion of law, this Court stated:

"Defendants Ferro are in default of the Dudek/Cross Contract. Defendants Dudek and Cross have a contractual right to pursue recovery of a reasonable attorney fee and costs of this action. In order to assert this right, Defendants Dudek and Cross shall apply to recover these costs and fees on or before ten (10) days of the entry of this order." Page 12, paragraph 8.

Dudek/Cross did not file an application for attorneys' fees within ten (10) days of the original trial order. Instead on November 19, 2014, counsel for Dudek/Cross sent the Court an email to which he attached an itemization of fees and costs⁴. In reply, the Court instructed Dudek/Cross' attorney to file a motion and affidavit in support of their attorney's fees so as to allow the Ferros an opportunity to be heard on the motion. No motion was filed. Thereafter, on December 5, 2014, Morphew's then counsel⁵ served her Notice of Appeal, which was clocked time-stamped by the Clerk of Court and entered in CMS on December 8, 2014, followed by Ferros' Notice of

⁴ All parties had a copy of the itemization. During the hearing the Court reviewed the itemization. See also footnote 8 *infra*.

⁵ Mr. Massalon served and filed Notice of Withdrawal as Counsel on December 15, 2014 with the Court of Appeals.

Appeal, dated December 12, served December 11, 2014 (emphasis added) and time stamped by the Clerk of Court on December 15, 2014 but entered in CMS on December 16, 2014.⁶

In any event, the Dudek/Cross failure to timely file the appropriate motion supported by an affidavit of attorney's fees only affects the attorneys' fees through the trial of the case. The failure to file a motion supported by an affidavit of attorneys' fees does not preclude the award of attorneys' fees once the case was appealed and following the appeal. In this regard, as to attorneys fees incurred in responding to the appeal, and matters post remittitur, attorneys fees have not been waived and are appropriately before the Court. To this end, the Court turns its attention first.

Dudek/Cross affidavit of attorneys' fees requests \$16,592.60 attorneys' fees for David A. Collins⁷. As stated above, he had previously submitted an itemization of his fees of \$10,150.00 and costs of \$2,683.79, totaling \$12,833.79⁸. Thus, from the affidavit of attorneys' fees, Mr. Collin's fees for representing Dudek/Cross on appeal are \$6,442.60. He incurred \$1,533.72 in costs. The total fees and costs are \$7,976.32.

After Mr. Collins' suspension, Steven L. Smith, Esquire, has appeared on behalf of Dudek/Cross. He claims on behalf of Dudek/Cross a right to recover attorney's fees of \$3,107.05 and costs of 35.00 through the motion hearing resulting in the April 3, 2017 order. In addition he claims attorney's fees of \$2,067.50 through the Rule 59 (e) motion hearing on the Ferros' joint Answer.

In *Seabrook Island Prop. Owners' Ass'n v. Berger*, 365 S.C. 234, 238-39, 616 S.E.2d 431, 434, 2005 WL 1620266 (Ct. App. 2005), the Court of Appeals affirmed Charleston County's Master in Equity who awarded the prevailing party in a contract dispute, in which the contract allowed

⁶ The Court of Appeals did not address the timeliness of the Ferro Notice of Appeal. "Pursuant to Rule 203(b)(1), SCACR, a party wishing to appeal an order from the court of common pleas must serve the notice of appeal on the respondents "within thirty ... days after receipt of written notice of entry of the order." *Wells Fargo Bank, N.A. v. Fallon Properties S.C., LLC*, 413 S.C. 642, 644, 776 S.E.2d 575, 576, 2015 WL 5028852 (Ct. App. 2015). See, also, SCRC 69 (e) providing an additional five (5) days when served by mail.

⁷ In the Matter of David A. Collins, Respondent, *Matter of Collins*, 417 S.C. 72, 789 S.E.2d 577,

⁸ Provided to the Court in the May 12, 2017 hearing by Morphew.

for recovery of attorneys fee, attorneys fees and costs, including fees and costs incurred by the prevailing party during the proceedings on appeal (emphasis added). The Court of Appeals cites a plethora of cases to the following: "In South Carolina, the authority to award attorney's fees can come only from a statute or be provided for in the language of a contract. There is no common law right to recover attorney's fees." Citations omitted. In addition, *Berger* sets out the factors a trial judge must consider, utilizing its sound discretion, in a determination of the award of attorneys' fee.

"There are six factors to consider in determining an award of attorney's fees: 1) nature, extent, and difficulty of the legal services rendered; 2) time and labor devoted to the case; 3) professional standing of counsel; 4) contingency of compensation; 5) fee customarily charged in the locality for similar services; and 6) beneficial results obtained." *Id.*, pp 434-435.

As to Attorneys' Fees due to David A. Collins after the Notices of Appeal

1. Nature, Extent, and Difficulty of the legal services rendered:

Two very talented lawyers tried this case before me. The initial trial order speaks to the nature, extent and difficulty of the legal services. Responding to the appeal equally, if not more, draws into focus the the nature, extent and difficulty of the legal services required. Considering this factual issue, this Court finds the weight of this factual inquiry favors awarding attorneys' fees and costs to Dudek/Cross.

2. Time and Labor Devoted to the Case

Mr. Collins hourly rate according to his itemization of fees is merely \$200.00. I find this rate extremely favorable if not, quite frankly, very low for a lawyer with Mr. Collins' experience. At that rate he devoted 32.2 hours to the appeal. I find this fact weighs extremely favorable in awarding attorneys' fees and costs to Dudek/Cross.

3. Professional Standing Of Counsel

The Court notes Mr. Collins is presently suspended from the practice of law in South Carolina. The reason for this is not a matter of record in this case. Prior to his suspension, this Court notes

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that he was a member in good standing with the South Carolina Bar, and generally enjoyed a reputation of being fair, even-minded, and well qualified in matters pertaining to contractual disputes. This factor weighs in favor of awarding attorneys' fees and costs to Dudek/Cross.

4. Contingency of Compensation

Nothing in the record indicates the attorneys' fees were contingent on a successful outcome. This factor is, therefore, neutral between Ferros and Dudek/Cross.

5. Fee Customarily Charged in the Locality for Similar Services

A 10,000.00 plus fee for the trial of a complex real estate contract is extremely reasonable. Most fees for responding to an appeal exceed \$6,442.60. This factor weighs in favor of awarding attorneys' fees and costs to Dudek/Cross.

6. Beneficial Results Obtained.

Mr. Collins successfully tried the case. All of the appellate work was completed by the time of his suspension and, since the decision was rendered without oral argument, he successfully responded to the appeal. This factor weighs in favor of awarding attorneys' fees and costs to Dudek/Cross.

As To Attorneys' Fees Due To Steven L. Smith From His Appearance Before The Court Of Appeals Through The Present.

7. This Court views each of the 6 factors set forth above with same results. Mr. Smith is a member in good standing with the South Carolina Bar. He is an excellent trial and appellate lawyer⁹. Mr. Smith submits he is entitled to \$5,175.00 in fees and \$35.00 in costs. His total fees and costs are \$5,210.00. He has made 2 court appearances before me as well as undertaken the representation of Dudek/Cross in the appeal albeit primarily perfunctory. At the Court's request he drafted the April 3, 2017 order which the joint Answer addresses (the joint Answer refers to a draft Order although as discussed in the

⁹ A Westlaw search reveals he has represented parties on appeal in 39 cases.

Dudek/Cross Motion hearing, the Court accepted Mr. Smith voluntary offer to submit a proposed Order setting forth the rulings from the Bench). He submitted in his presentation that he has shepherded Dudek/Cross through the scheduling process, and has dealt with issues relating to procuring a closing attorney¹⁰. Although he has failed to prevail on Mr. Collins' fees for the trial, he is blameless for the shortcoming of Mr. Collins' failure to meet the Court's deadline for filing a Motion and supporting affidavit for attorneys' fees and costs. A fair inference to draw from that failure was that Dudek/Cross would likely not have pressed for the attorneys' fees and costs were the case not appealed. However, defending the pursuit of the appeal by the Ferros cannot be ignored when the real estate contract in dispute permits the non-defaulting party to recover costs and attorneys fees.

For the foregoing reasons as to Ferros responsibility for payment of Dudek/Cross Fees and Cost

8. I find as follows: \$7,976.32 in attorneys' fees and cost post the trial of the case is fair and reasonable. These are the fees and cost they incurred with Mr. Collins from the date of the first notice of appeal of the November 6, 2014 trial court order to the time of his suspension. And further,
9. I find Ferros are responsible for the payment of these fees; and as to Mr. Smith's Fees and Cost I find \$5,210.00 in attorneys' fees and costs Dudek/Cross have incurred with Mr. Smith's representation from the beginning of his representation during the appeal and to the present against Ferros is fair and reasonable.
10. The total judgment against Ferros for attorneys' fees and cost iSection 18-n favor of Dudek/Cross is \$13,186.32¹¹.

¹⁰ In a separate action, Morphew has sued lawyers and their staff who were to represent Dudek/Cross. With actual notice of pending litigation, the closing attorney declined to process the closing. Mr. Smith reports the closing attorney's title company would not remove an exception to the title commitment relating to the separate action.

¹¹ The Ferros stated under oath that they would give powers of attorney to an agent to close the real estate transaction with Dudek/Cross. The personal judgment against them will be a cloud on the title. The cloud can be satisfied at closing by deducting the judgment amount from Ferros proceeds and shown as a disbursement to the Dudek/Cross as a line item on the HUD-1 and disbursed at closing from the closing attorney's escrow and process of disbursement. Likewise, Mr. Smith can submit a satisfaction of the judgment to the closing attorney with

11. Ferros assert the contract price should not be changed. This Court agrees. The Contract price shall remain \$303,000.00.
12. Each of the 11 remaining grounds Morphew and Ferros assert in the joint Answer have no merit. In short, all of the remaining terms of the April 3, 2017 order remain in full force.
13. Specifically, Morphew requested proof of financing from Dudek/Cross before she would be required to move from the Ferros property. At the hearing she demanded she receive 5 items: a Good Faith Estimate, Proof of Approved Financing, the HUD 1 closing statement, the Dudek/Cross loan application and the Contract. At the Dudek/Cross Motion hearing to set a closing schedule, proof of approved financing was a fair request though she did not have any legal right to this under the terms of the Ferros and Dudek/Cross contract. The April 3, 2017 order did specifically address granting a right to proof of approved financing, although the Court suggested from the Bench that some evidence of Dudek/Cross's approved financing should be given to her. Morphew's demand for 4 additional items, matters to which she has no right, 46 days after the April 3, 2017 order, when Dudek/Cross cancelled a closing because they had agreed not to close within 45 days to give her ample time to relocate, now raise the inference that she is an obstructionist, who seeks to de-rail the Ferros real estate sale to Dudek/Cross. She took the risk of moving into the property during pending litigation. She must now accept the risk that her contentions were misplaced.
14. Morphew/Ferros submitted no independent corroborating affidavits to support the 11 remaining claims. Neither did they proffer any other testimony in support of their contentions.
15. This matter is now concluded by this Court. To this end, this Court directs the Clerk of Court to mark all Lis Pendens associated with this consolidated case cancelled.

instructions that it is to be delivered to the Ferros upon payment of the judgment amount to Dudek/Cross. Since the Ferros are pro se, and should choose to appeal this order, the Court suggests they review Rule 241 (b) (1) SCACR stating the exception that money judgments are not stayed by an appeal as provided in South Carolina Code Section 18-9-130.

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Conclusions of Law

1. Dudek/Cross have judgment against Ferros in the amount of \$13,186.32.
2. The purchase price of the Ferros and Dudek/crosss contract shall remain at \$303,000.00.
3. All remaining claims of Morphew and Ferros for alteration or amendment of the April 3, 2017 Order are denied. Except as modified herein, the April 3, 2017 Order remains.
4. Each Lis Pendens is and shall be cancelled. The Clerk of Court for Dorchester County is directed to enter appropriate documentation in the record of this case that each and every Lis Pendens cancelled.

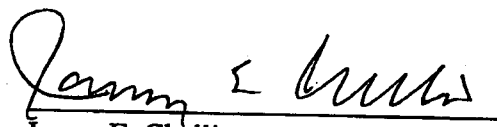
Each of the Court's Findings of Fact shall also be construed as Conclusions of Law. Each of the Court's Conclusions of Law shall are also be construed as Findings of Fact. NOW, THEREFORE, IT IS

1. ORDERED, ADJUDGED, AND DECREED that Dudek/Cross shall be granted judgment against Ferros in the amount of \$13,186.32. AND IT IS
2. ORDERED, ADJUDGED, AND DECREED that the purchase price of the Ferros and Dudek/Cross contract shall remain at \$303,000.00. AND IT IS
3. ORDERED, ADJUDGED, AND DECREED that this order ends the case on remittitur from Court of Appeal. AND IT IS
4. ORDERED, ADJUDGED, AND DECREED that all Lis Pendens in this action are and shall be cancelled. The Clerk of Court is directed to enter cancellation of lis pendens against each lis pendens filed in this action, including such lis pendens filed prior to consolidation of the cases. AND IT IS
5. ORDERED, ADJUDGED, AND DECREED that the Order Setting Closing Schedule & Awarding Attorneys Fees entered April 3, 2017 is altered and amended only as specifically set forth above. AND IT IS

6. ORDERED, ADJUDGED, AND DECREED that all remaining claims set out in the joint Answer to alter or amend the April 3, 2017, order are hereby denied.

AND, IT IS SO ORDERED!

St. George, South Carolina
May 17, 2017


James E. Chellis
Dorchester County Master-in-Equity