THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

Appellate Case No. 2017-001267

William A. Brazell,
Individually and as Personal
Representative of the Estate of
Geneva J. Brazell, deceased, Appellant,

v.

Judith D. Haley, Respondent.

FINAL BRIEF OF APPELLANT

Samuel M. Price, Jr.
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1413 Main Street, P. O. Drawer 836
Newberry, South Carolina 29108
ATTORNEY FOR APPELLANT

Judith D. Haley
2428 Heyward Brockington Road
Columbia, South Carolina 29203
RESPONDENT, Pro Se

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2. In this case in equity, did the judge err in dismissing this action with prejudice for the benefit of a respondent who has breached her contract of sale and falsely represented to the court that attorney for appellant missed four (4) court appearances?

STATEMENT OF THE CASE

This case by which appellant brought this action to determine if respondent had breached a contract to purchase real estate. Appellant sought an order requiring respondent to vacate the premises immediately. Appellant sought a court order determining that the contract created a constructive mortgage and/or an equitable mortgage. Appellant further sought a determination that respondent had no equitable interest in the real estate and appellant was entitled to legal costs, attorney's fees and administrative costs. The case was filed as a non-jury matter.

The following describes the timeline and the activities:

DATE	FILED	DETAIL
July 28, 2016	August 2, 2016	Summons and Complaint (R. pp. 230-237)
September 19, 2016	September 20, 2016	Defendant's Answer and Counterclaim by which respondent asked that the

		Complaint be dismissed, she be awarded all costs including reasonable attorney's fees, and all claims as stated in her counterclaim and requiring appellant to immediately issue a general warranty deed to her. Respondent sought a jury trial. (R. pp. 244-252)
October 6, 2016	October 11, 2016	Plaintiff's Reply to Defendant's Answer and Counterclaim. By such Reply to Answer and Counterclaim, appellant sought that the case be referred to the Master-in-Equity, that respondent's counterclaim and affirmative defenses be dismissed, for the court to determine that respondent had breached the contract and had no rights in the equity in the real estate, for an order requiring respondent to vacate the premises immediately, or in the alternative, to determine that the contract creates constructive mortgage and/or equitable mortgage. (R. pp. 253-257)
October 6, 2016	October 11, 2016	Appellant filed a Motion to have the matter referred to the Master-in-Equity. (R. pp. 267-270)
November 4, 2016		Notice of roster meeting scheduled for December 5, 2016, by email.
December 5, 2016		Attorney for appellant attended the roster meeting.
December 9, 2016		Notice of roster meeting scheduled for January 9, 2017, by email.
January 4, 2017		Email sent to Judge Benjamin advising that the undersigned would not be present for the roster meeting scheduled for January 9, 2017. Attorney for appellant had called Judge Benjamin's office and was advised by administrative assistant to send email. The undersigned did not attend the January 9, 2017, roster meeting. (R. p. 275)

January 25, 2017	January 27, 2017	Judge Benjamin's Order dismissing case for failure to prosecute. (R. p. 110)
January 30, 2017		Judge Benjamin's Order dismissing the case received by attorney for appellant.
January 30, 2017		Email sent to Judge Benjamin by the undersigned requesting the judge reconsider the dismissal. (R. p. 276)
March 3, 2017	March 6, 2017	Motion to Reconsider and to Reinstate the Case. (R. p. 100-109)
April 25, 2017	May 2, 2017	Judge Hood's Order Dismissing Case with prejudice. (R. p. 69)
	May 10, 2017	Motion for Reconsideration (R. pp. 4-68)
May 16, 2017	May 17, 2017	Judge Hood's Order Denying Reconsideration (R. pp. 1-3)
May 31, 2017	June 2, 2017	Notice of Intent to Appeal (Court of Appeals)
May 31, 2017	June 7, 2017	Notice of Intent to Appeal (Richland County)

FACTS

Subject property is known as 2426 Heyward Brockington Road, Columbia, South Carolina on which there is a residence, and 2428 Heyward Brockington Road, Columbia, South Carolina, which is additional property in the rear of the residence. At the time the action was filed, William A. Brazell, appellant herein, owned 2428 Heyward Brockington Road in fee and appellant owned an undivided one-half (1/2) interest in 2426 Heyward Brockington Road which was formerly the residence of Geneva J. Brazell, his mother, who owned an undivided one-half (1/2) interest the life estate. The remainder interest

therein was owned by appellant. Geneva J. Brazell died February 1, 2015. The Probate is still open.

In November of 2013, respondent's older son moved into the residence with the intent that respondent would purchase the property. On April 9, 2014, a final contract was signed by respondent and her then husband Michael D. Haley. Reference is made to the contract of April 9, 2014. (R. pp. 111-120) At the signing of the contract, respondent paid One thousand five hundred and no/100 ($1,500.00) dollars to appellant. There were no further payments of Five hundred and no/100 ($500.00) dollars per month or One thousand five hundred and no/100 ($1,500.00) dollars per quarter. There was reimbursement to appellant for taxes and insurance and other expenses paid for the benefit of appellant in 2014 and 2015. The total payments and reimbursed expenses were Two thousand seven hundred sixty and no/100 ($2,760.00) dollars (including the $1,500.00 paid on April 9, 2014). No other amount has been paid. The other detail facts are set forth in an Affidavit of William A. Brazell and Brenda R. Brazell dated November 12, 2015. (R. pp. 121-172) Respondent claims that she has paid no further amount because appellant refused to sign a deed by which respondent would be purchasing the property at the rate of Two (2%) percent interest per annum with payments at the rate of Five hundred and no/100 ($500.00) dollars per month until paid in full. Respondent takes the position that she has not paid anything because appellant has refused to sign the deed. Respondent further alleges that pursuant to the terms of the contract, she has made Five hundred ($500) dollars in improvements each month.

Respondent has paid no monthly or quarterly amount since April 9, 2014.

Respondent has failed to keep the property insured. Respondent has failed to pay the Richland County ad valorem property taxes for the years 2015 and 2016.

ARGUMENT

1. Can a letter emailed to the Common Pleas judge presiding over a roster meeting giving notice that counsel will not be at a roster meeting be considered a motion for continuance? Likewise, can a letter emailed to the Common Pleas judge presiding at a roster meeting issuing a dismissal of the case be considered a motion for reconsideration?

This issue was addressed in the case of Mictronics, Inc. v. South Carolina Department of Revenue, 548 S.E.2d 223 (S.C.App. 2001),

> Mictronics, Inc. (Mictronics) filed a request for a contested case hearing with the Administrative Law Judge Division (ALJD) claiming it was entitled to an exemption from the South Carolina sales and use tax. Mictronics filed a prehearing statement as directed by the administrative law judge (ALJ). On March 7, 1996, the parties were served with notice of a hearing scheduled for May 14.
>
> Due to a conflict in his schedule, the ALJ rescheduled the hearing for May 22 by issuing an order and amended notice of hearing dated April 26. Additionally, a member of the ALJ's staff telephoned Mictronics and spoke with its president, Thomas Blocker, telling him the hearing was rescheduled. Blocker understood the hearing to be rescheduled for June 22 and made a note in his file to that effect. DOR's counsel received a similar phone call, but understood the rescheduled hearing dated to be May 22.
>
> Because of Blocker's misunderstanding about the date of the rescheduled hearing, Mictronics did not appear at the May 22 hearing. The ALJ issued an order dismissing the action with prejudice and treating Mictronics' failure to appear at the hearing as a default under Rule 23, SCRALJD. Blocker received this order of dismissal and immediately wrote the ALJ stating he had mistaken the date of the hearing. Blocker apologized for the mistake and requested the matter to be reopened with a new hearing date.

The ALJ denied his request. (P 224)

Although the case on appeal before this Court is not an administrative case, certain determinations in the Mictronics case are controlling, to wit:

> We find the motion to reopen falls under Rule 29(D), SCRALJD. The relevant portion of this rule reads: "Any party may move for reconsideration of a final decision of an administrative law judge in a contested case, subject to the grounds for relief set forth in Rule 60(b)(1 through 5), SCRCP ..." The ALJ's order dismissing Mictronics' claim with prejudice was a final order. Thus, under the ALJD rules, it appears the only grounds for reconsideration are those contained in Rule 60(b), SCRCP.
>
> No South Carolina case discusses the Rule 60(b)(1) standards as applied to Rule 29(D), SCRALJD. For that reason, we look to cases interpreting Rule 60(b) generally. Under Rule 60(b)(1), SCRCP, a party may be relieved from a final order for "mistake, inadvertence, surprise, or excusable neglect." In determining whether to grant a motion under Rule 60(b), the trial judge should consider: (1) the promptness with which relief is sought, (2) the reasons for the failure to act promptly, (3) the existence of a meritorious defense, and (4) the prejudice to the other party. New Hampshire Ins. Co. v. Bey Corp., 312 S.C. 47, 50, 435 S.E.2d 377, 379 (Ct.App.1993) (quoting Harry M. Lightsey & James F. Flanagan, South Carolina Civil Procedure 82 (1985)).
>
> Here, Mictronics made an error with respect to the hearing date and immediately sought relief from the dismissal. In Columbia Pools, Inc. v. Galvin, 288 S.C. 59, 339 S.E.2nd 524 (Ct.App.1986), this court found that a trial judge abused his discretion in refusing to grant a motion to set aside a default judgment granted after an answer was received one day late. The court there held that "where there is a good faith mistake of fact, and, no attempt to thwart the judicial system, there is basis for relief." 288 S.C. at 61, 339 S.E.2d at 525. **This is consistent with South Carolina's policy favoring the disposition of issues on their merits rather than on technicalities. Id.; see also Balloon Plantation, Inc. v. Head Balloons, Inc., 303 S.C. 152, 153, 399 S.E.2d 439, 400 (Ct.App.1990)** (emphasis added) (finding sanction dismissing counterclaim too severe). We find no evidence in the record that the mistake was anything but a good faith error, as shown by Blocker's explanation coupled with his speed in asking the ALJ for relief.

> Moreover, it appears that Mictronics had a meritorious defense. To establish a meritorious defense, a party is not required to show an absolute defense. Thompson v. Hammond, 299 S.C. 116, 120, 382 S.E.2d 900, 903 (1989). (P 225-226)

In determining whether to grant a motion under Rule 60(b), the trial judge should consider the following:

(1) The promptness with which relief is sought. Attorney for appellant received Judge Benjamin's Form Order of Dismissal on January 30, 2017, by email. (R. p. 110) Attorney for appellant believed the dismissal was merely a misunderstanding. He immediately sent an email to Judge Benjamin on January 30, 2017, asking for a reconsideration based on his conversation with the administrative assistant of Judge Benjamin. (R. p. 276) Attorney for appellant used email because he thought email was the preferred method of communication with the judge.

(2) The reasons for the failure to act promptly. It is true that a motion for a continuance was not filed related to the January 9, 2017, roster meeting. However, attorney for appellant talked with Judge Benjamin's administrative assistant. Pursuant to her instructions, an email dated January 4, 2017, was sent. (R. p. 275) Upon receipt of the January 27, 2017, Order of Dismissal, an email was sent requesting a reconsideration. (R. p. 276) Attorney for appellant believed the dismissal was simply a misunderstanding by Judge Benjamin. After some time passed with no response from Judge Benjamin's office, a formal Motion to Reconsider and to Reinstate the Case dated March 3, 2017, was filed March 6, 2017. (R. pp. 100-109) This was beyond the ten (10) days as required by the rules. However, attorney for appellant was relying on his emails as Judge

Benjamin's preferred method of communication.

(3) The existence of a meritorious defense. The basis of this action is respondent's breach of contract as to a contract to purchase real estate. According to the terms of the contract dated April 9, 2014, respondent was to make payments at the rate of $500.00 per month or $1,500.00 per quarter (R. p. 112), pay Richland County ad valorem property taxes, (R. p. 111) and keep the real estate insured. (R. p. 111) Respondent has breached each of these requirements and other matters related to the purchase of subject property.

(4) The prejudice to the other party. The final order in this case dismisses the case with prejudice. The status of the title of the real estate is as follows: Appellant owns the property in fee. Respondent may or may not have some equitable interest in the property. The final order creates a questionable status of legal and equitable ownership. Because this dismissal is with prejudice, attorney for appellant is at a loss as to how to remove the cloud on title and respondent seems to have the right to continue to use the real estate.

The Order of the Honorable Robert E. Hood, the judge who dismissed this case with prejudice, provided in part, "The Court takes notice that plaintiff's counsel missed several hearings and a roster meeting set by the Court, including December 5, 2016, January 4, 2017, and January 9, 2017. Judge Benjamin signed an order dismissing the case for lack of prosecution on January 25, 2017." (R. p. 3) The undersigned did not miss the roster meeting set for December 5, 2016. See attached Affidavit of Attorney Brian Boger. (R. p. 272) There was no roster meeting nor motion hearing set for January

4, 2017. See attached email response of Anne R. Henley, Civil Non-Jury Court Scheduler for Richland County. (R. pp. 273-274) According to her notes, there were two (2) roster meetings (December 5, 2016 and January 9, 2017). There were no other roster meetings or motion hearings related to this case. Ms. Henley's notes indicated that at the December 5, 2016 roster meeting: respondent was not present, attorney for appellant was present. Her notes indicated that at the January 9, 2017 roster meeting: respondent was not present, attorney for appellant was not present, therefore, she sent a form 4 dismissing the case to Judge Benjamin. As for January 9, 2017, roster meeting, the undersigned had called Judge Benjamin's administrative assistant on January 4, 2017. He was told to send an email to Judge Benjamin indicating that he would not be present for that roster meeting. The email also stated "I believe that it would be premature to set this case for trial before determining whether it should be on the jury or non-jury roster." (R. p. 275)

Judge Hood's order dismisses this action with prejudice which has resulted in a real estate issue. The respondent has a contract of sale which she has breached. The ownership of the property is still in appellant's name. By dismissing this case with prejudice, Judge Hood has made it impossible to ever resolve this issue.

Based upon this information, the undersigned believes that the motion for reconsideration should have been heard by Judge Benjamin who originally dismissed the case on January 25, 2017.

2. In this case in equity, did the judge err in dismissing this action with prejudice for the benefit of a defendant who has breached her contract of sale?

It has been established in this State that an uncompleted contract to convey is an equitable mortgage. Adams EQ., 123, Blackwell v. Ryan, 21 S.C. 112 (1884 SC). In Dockside Association, Inc. v. William J. Detyens, a/k/a William James Detyens and Marie Detyens Burbic a/k/a Marie D. Burbic, 362 S.E.2d 874, (S.C. 1987) states "An action to foreclose a real estate mortgage is one in equity. *Bryn v. Walker*, 275 S.C. 83, 267 S.E.2d 601 (1980)."

Doctrine that "He who seeks equity must do equity" and that "He who comes into equity must come with clean hands" is firmly established in South Carolina as applicable to any of multitude of matters which may arise in equity. Associated Spring Corp. v. Roy F. Wilson and Avnet, Inc., 410 F.Supp. 967 (D.S.C. 1981). Respondent has not come into the court with clean hands. She has failed to make monthly or quarterly payments. She has failed to insure the real estate. She has failed to pay the 2015 and 2016 Richland County ad valorem property taxes. She has misrepresented to the court the number of hearings and/or docket meetings missed by attorney for appellant. In order for respondent to seek equity, she must do equity which she has not done.

Rule 60 provides, in part:

> On motion upon such terms as are just, the court may relieve a party of his legal representative from a final judgment, order or proceeding for the following reasons:
> (1) mistake, inadvertence, surprise or excusable neglect.
> (3) fraud, misrepresentation, or other misconduct of an adverse party.

At the hearing before Judge Hood at which time he dismissed this case with prejudice, respondent Judith D. Haley stated:

> . . . Well, I first want to state that this is the fourth time that he has chosen

not to show or not appear or whatever. This is his scheduled hearing. He chose this motion hearing. This is the fourth time he has chosen to not appear or be late or whatever the instance may be. 1

I received his motion to reinstate and motion for reversal some 45, 50 days after the judge had dismissed the case, and he knew at that time, you know, nothing had changed. But then he still is -- keeps drawing -- drawing everything out.

I'm asking with my motion to dismiss this -- not only his motion to reinstate the case, the motion for reversal of dismissal, but there's some other motion which I just got in the mail which I really don't understand. It's some motion to amend.2

I'm at a loss as to what that is, but I'm asking for that to also be dismissed with prejudice because this -- I keep coming before the court, and it's wasting my time and the court's time and the people's time and money. And I'm asking for it to be dismissed.

In my counterclaim, I had stated that there exists no mortgage, no note, no deed because this whole entire -- my counterclaim to his original which was filed -- he had no idea where to file anything, so he started at the bottom and filed it in Landlord/Tenant; realized the landlord tenant judge said, no, you have got to take this up in civil court. So he did.

My counterclaim is for breach of contract. The plaintiff's breach of contract -- because I still have never received a deed. I sent them copies of my mortgage, my note that was negotiated between myself and the plaintiff, and I sent that in November of 2014.

Then again in March of 2015, I personally sent it to Mr. Price's office to make sure that he could deliver it to them and get them to sign it.

I had spoken personally with the plaintiff. She had come to my house that day and said send it to him, we'll sign it.

The plaintiff has filed numerous and extremely voluminous documents in order to harass, overburden, and attempt to I think confuse me and to try to

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1 It appears that she is talking about the hearing of April 25, 2017, because attorney for plaintiff had a Social Security hearing in Greenwood at 9:00 a.m.

2 There was no motion to amend. It may have been copies of what had been filed. The undersigned wanted to be certain she had received copies.

bully me into just caving to his desires.

The plaintiff agreed to execute the General Warrantee (sic) Deed on November 13th, 2013, and they were given the deed and copies of the mortgage and the note.

And we had all agreed. They were personally at my house. They agreed on the terms, and the plaintiff said -- called -- when came to my house and said that she had lost the papers. Could I send them to her attorney. Therefore, I did.

And this -- my response -- I'm also asking that this court issue an order directing them to execute a General Warranty Deed, but I realize that that might be a moot point if I can just get you to execute an order dismissing his motions and this case in its entirety with prejudice so that I can proceed in civil court under breach of contract.
(R. p. 281, line 21-p. 284, line 3)

What respondent Haley did not say was that she had agreed to pay plaintiff Five hundred and no/100 ($500.00) dollars per month or One thousand five hundred and no/100 ($1,500.00) dollars per quarter which she has not paid. At the time Judge Hood's final order was signed on May 16, 2017, respondent Haley was Sixteen thousand two hundred forty and no/100 ($16,240.00) dollars behind in monthly payments. She was supposed to pay the cost of keeping the property insured. She had not done so. When she first moved in, Beverly Griffith who then worked with Bowers and Floyd, Inc. prepared four (4) insurance contracts which respondent refused to pay the premium. (R. pp. 179-225) That respondent Haley had agreed to pay the Richland County ad valorem property taxes which she did not pay for 2015 and she did not pay for 2016. It would certainly be proper to give relief from judgment for fraud, misrepresentation and other misconduct of the adverse party under Rule 60(b)(3).

In her testimony before Judge Hood at the motion hearing to reconsider or

reinstate, respondent stated, "Well, I first want to state that this is the fourth time that he has chosen not to show or not appear or whatever. This is his scheduled hearing. He chose this motion hearing. This is the fourth time he has chosen to not appear or be late or whatever the instance may be." (R. p. 281, line 21-p. 282, line 1) Respondent mispresented to the court that attorney for appellant had missed four appearances. Appellant's attorney attended the December 5, 2016 roster meeting which respondent did not attend. There was no January 4, 2017 hearing or roster meeting. Attorney for appellant had noticed Judge Benjamin that he would not be present for the January 9, 2017 roster meeting. Attorney for appellant was late for the 9:30 a.m. motion hearing on April 25, 2017, because he had a 9:00 a.m. Social Security Disability hearing in Greenwood, South Carolina. Judge Hood had been advised of the conflict and instructed attorney for appellant to come to the 9:30 a.m. motion hearing as soon as he could. Attorney for appellant arrived at the hearing late.

In her testimony, respondent stated "The plaintiff has filed numerous and extremely voluminous documents in order to harass, overburden, and attempt to I think confuse me and to try to bully me into just caving to his desires." (R. p. 283, lines 10-13) Respondent represented herself pro se. Copies of documents, pleadings, motions and the like were sent to her as required by the rules. Attorney for appellant has not harassed or bullied respondent. Attorney for appellant has treated her professionally and courteously.

Equity will relieve for mutual mistake or mistake on one party's part accompanied by some inequitable conduct on the part of the other. Warden & Smith, Inc. v. Carter, 384 S.E.2d 590, 299 S.C. 265 (Sup.Ct.1989) Respondent misrepresented to Judge Hood

the number of hearings that had been set and the number of hearings that attorney for appellant had missed. Respondent had failed to live up to her terms under the contract of sale, to wit: no monthly or quarterly payments since April 9, 2014, failure to keep the property insured, and failure to the 2015 and 2016 Richland County ad valorem property taxes.

On January 4, 2017, attorney for appellant contacted the office of Judge Benjamin and spoke to her administrative assistant. The undersigned explained that he was running for a family court judge seat and he would not be able to attend the January 9, 2017, roster meeting and asked what he should do. He was told to send an email and was given the email address. (R. p. 275) Mr. Price relied on the information given to him by Judge Benjamin's administrative assistant. He was not told to do a motion for continuance but he did as instructed. Therefore, when he received a copy of Judge Benjamin's order dismissing the case for failure to prosecute, he was stunned. He immediately wrote Judge Benjamin an email that same day requesting a reconsideration. He emailed her because he believed that was her preferred method of communication pursuant to his earlier conversation with her administrative assistant.

It appears that all motions for reconsideration should be heard by the judge who presided over the case.

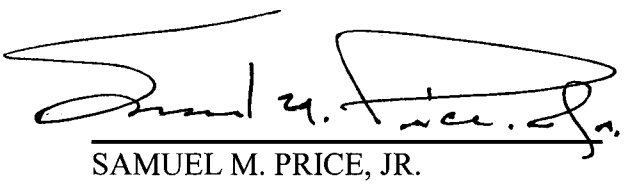
CONCLUSION

Appellant respectfully requests that this court set aside the dismissal and reinstate the case. Attorney for appellant relied on his conversation with Judge Benjamin's

administrative assistant that the email of January 4, 2017, would prevent the case from being dismissed. He was wrong. The case got Dismissed. Under the South Carolina Rules of Civil Procedure, Rule 60(b)(1) and (3), the orders of dismissal should be reversed so that this case may go forward. The standard for granting relief is reversing for good cause shown. Good cause has been shown in appellant's actions in an effort to prosecute this matter. There have been no dilatory actions by appellant. It is true that the undersigned missed the January 9, 2017 roster meeting; however, he was running for a family court judgeship, had communicated with Judge Benjamin's office, and in good faith, believed it was not a problem for him to miss the January 9, 2017 roster meeting. It is important to note that attorney for appellant is a sole practitioner. Under the principles of equity, the law established by Mictronics, Id., and the fact the South Carolina policy favoring the disposition of issues on their merits rather than on technicalities, the dismissal of this case should be reversed and the case remanded for trial.

Respectfully submitted,

October 13, 2017



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CERTIFICATE OF COUNSEL

The undersigned counsel of appellant does hereby certify that the Final Brief of Appellant is in compliance with Rule 211(b), SCACR.

October 13, 2017

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