THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM YORK COUNTY

COURT OF COMMON PLEAS

S. Jackson Kimball, III, Master-in-Equity

Appellate Case No. 2017-001254

Triple M Partners, LP, Plaintiff

vs.

Suzette Lefebvre, as Individual and as trustee of the Suzette Lefebvre Trust N/A, and BLANCO GmbH+CO.KG, Defendants.

Of whom Suzette Lefebvre, as individual and as Trustee of the Suzette Lefebvre Trust N/A is the Appellant,

And

Of which BLANCO GmbH+CO.KG is the Respondent.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

The present action was instituted on November 16, 2016, by the filing of a Lis Pendens, Summons and Complaint by Triple M Partners, LP, seeking specific performance of a contract for the sale of real estate (*Summons, Complaint, Lis Pendens, 11/16/2016*). The Defendants to the action were the record owners of the property, Appellant Suzette Lefebvre, individually, and as Trustee of the Suzette Lefebvre Trust N/A. The Appellant was served with the Summons and Complaint on November 23, 2016 (*Affidavit of Service, 12/8/2016*). Neither Defendant filed an Answer to the Complaint or otherwise appeared in the action.

On January 9, 2017, Plaintiff Triple M Partners, LP filed a Motion for Default Judgment, which was served upon Appellant Lefebvre on the same date (*Motion fro Default Judgment, 1/9/2017*). On February 14, 2017, Respondent BLANCO GmbH+CO.KG (hereinafter referred to as "BLANCO") filed a Motion to Intervene in the action, along with an Affidavit and Memorandum in support of Intervention, and a proposed Answer to be filed upon intervention (*Motion to Intervene, Memorandum in Support, Answer, 2/14/2017*). BLANCO claimed an interest in the property and, thus the proceeds from the sale of the property which was the subject of the action, by reason of a judgment entered against a prior owner of the property. The Motion, Affidavit, Memorandum and proposed Answer were all served upon Defendant Lefebvre on February 13, 2017 (*Certificate of Service, Filed 2/14/2017).*

On February 16, 2017, a hearing was conducted by the Court upon the Plaintiff's Motion for Default Judgment, and upon the Motion by BLANCO to Intervene[1] (*Order Permitting Intervention,*

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[1] Appellant incorrectly states in the Statement of Facts portion of her brief that the Court did not hold

March 14, 2017). Although he had not made an appearance in the case on behalf of Appellant Lefebvre at the time, current counsel for Appellant Lefebvre was present in the courtroom at the time of the hearing upon the motions[2] (*Supplemental Order for Default Judgment, 4/4/2017*). The Court granted the Plaintiff's Motion for Judgment by Default (*Default Judgment Order, 2/24/2017*), granted the Motion by BLANCO to Intervene (*Order Permitting Intervention, 3/14/2017*), and directed the Clerk of Court to file the Answer of BLANCO attached to the Motion. The Answer of BLANCO was filed on March 14, 2017 (*Answer, 3/14/2017*).

On March 15, 2017, Respondent BLANCO filed a Motion to Modify the Order of Default Judgment, and requested an expedited hearing (*Motion for Modification of Default Judgment and For Expedited Hearing, Memorandum in Support of Motion, 3/15/2017*). On March 20, 2017, an Order was entered referring the action to the Master in Equity for York County *(Order of Reference, 3/21/2017*). Also on March 20, 2017, the Master in Equity notified all parties that a hearing upon the expedited Motion to Modify the Order of Default Judgment would be conducted on March 22, 2017. Defendant Lefebvre responded to the Notice of Hearing on March 21, 2017 (*Supplemental Order of Default Judgment, 4/4/2017*). On March 22, 2017, a hearing was conducted upon the Motion of BLANCO for an Order Modifying the Order of Default Judgment. On March 24, 2017,

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a hearing on the Motion to Intervene, and granted the relief without a hearing; this is in error. The Court did call the Motion to intervene for a hearing, no one objected, and the Court granted the Motion. The Order granting the relief, entered on March 14, 2017, specifically referenced that a hearing was conducted on February 16, 2017. In Appellant's Memorandum in Support of her Motion to Alter or Stay presented to the lower court, she acknowledged on page 3 that the motion was heard on February 16, 2017.

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Although he had not entered an appearance in the present action, counsel for Appellant Lefebvre was actively representing and defending Appellant Lefebvre in related litigation pending in the United States District Court for the District of South Carolina, Rock Hill Division.

the amount of $809,190.02 was deposited with the Clerk of Court for York County pursuant to the Order of Default Judgment (*Letter to Court, 3/24/2017*).

On April 4, 2017, the Master in Equity entered a Supplemental Order of Default Judgment, ordering that the property be transferred to Triple M Partners, and that the funds from the sale be disbursed to Respondent BLANCO (*Supplemental Order of Default Judgment, 4/4/2017*). On April 7, 2017, three days after the entry of the Supplemental Order of Default Judgment, the Appellant appeared in the action for the first time, through counsel (*Notice of Appearance, 4/7/2017*). On April 13, 2017, Appellant Lefebvre filed a Motion to Alter or Amend the Court's Order of April 4, 2017, as well as a Motion to Stay its enforcement (*Motion to Ament or Alter; Motion to Stay, 4/13/2017*). On April 14, 2017, Respondent BLANCO filed a Motion for Disbursement of Funds (*Motion for Disbursement of Funds and Memorandum in Support, 4/14/2017*). A hearing was held on those Motions on April 20, 2017. By Order dated April 26, 2017, the Court denied the Motion to Alter or Amend, or to stay enforcement (*Order denying Rule 59(e) Motion, 4/26/2017*). The Notice of Appeal was filed on May 24, 2017, and served on the same date. Appellant petitions this Court to reverse the Order denying the Motion to Alter or Amend.

STATEMENT OF FACTS

Appellant Suzette Lefebvre was formerly in a relationship with Vito Antonio Laera. It is disputed whether Lefebvre and Laera had ever been married; Appellant Lefebvre contended that they had been married, while Respondent BLANCO asserted that they had not[3]. Mr. Laera and Ms.

[3]The issue of the validity of the marriage had been the topic of extensive litigation in the United States District Court for the District of South Carolina, Rock Hill Division, which is not relevant to the issues presented upon this appeal.

Lefebvre resided in Mecklenburg County, North Carolina, and never resided together in South Carolina. On May 23, 2007, during the course of the couple's cohabitation, Vito Antonio Laera was granted fee simple title to property located at 419 York Southern Road, in Fort Mill, South Carolina (hereinafter the "Property").

On January 21, 2014, Respondent BLANCO was granted judgment against Vito Antonio Laera by the United States District Court for the Southern District of Florida, in the amount of $834,634.31 (hereinafter the "Judgment"). On March 25, 2014, Appellant Lefebvre filed a Complaint against Vito Antonio Laera in the York County Family Court seeking a divorce; no lis pendens was filed in that action (*Exhibit 3, hearing upon Motion for Disbursement of Funds*). On October 3, 2014, the Judgment was filed with the York County Clerk of Court. Appellant Lefebvre and Vito Antonio Laera entered into an agreement regarding the divorce, and on October 31, 2014, the agreement was adopted by and made a Consent Order of the York County Family Court. Under the terms of the Consent Order, Vito Antonio Laera was to transfer his interest in the Property to Appellant Lefebvre. On January 7, 2015, Vito Antonio Laera transferred a half interest in the Property to Appellant. On May 16, 2016, Vito Antonio Laera transferred his remaining half interest in the Property to the Appellant, as Trustee of the Suzette Lefebvre Trust N/A *(Lis Pendens, 11/16/2016*).

On August 30, 2016, Appellant signed a contract with Triple M Partners, LP for the sale of the Property for $1.96 million, with a closing date set for December 15, 2016 (Complaint, 11/16/2016). Appellant denied Triple M Partners access to the Property to conduct its due diligence under the sale contract. Upon conducting a property search, Triple M Partners discovered the Judgment and demanded that Lefebvre remove the Judgment from the Property, and convey the

Property free and clear of the Judgment lien. Appellant insisted that the Property sale close notwithstanding the existence of the Judgment, and indicated her intention to withdraw from the contract if the sale price was not paid to her. On November 16, 2016, Triple M Partners, LP instituted the action below for specific performance requiring Lefebvre to permit it access to the Property and to convey the Property free and clear of liens. Appellant was served with the Summons and Complaint on November 23, 2016, but did not file an Answer.

On January 9, 2017, Triple M Partners, LP filed a Motion for Default Judgment; a hearing on that Motion was scheduled for February 16, 2017. On February 14, 2017, Respondent BLANCO filed a Motion to Intervene in the action below, asserting as the basis therefor its Judgment lien interest in the Property and its interest in the net proceeds from a sale of the Property. The Motion to Intervene, Affidavit in Support, Memorandum in Support, and proposed Answer were served upon Appellant on February 13, 2017.

On February 16, 2017, The Honorable S. Jackson Kimball, sitting as appointed Circuit Judge, conducted a hearing upon the motion for Default Judgment and the Motion to Intervene. No opposition was presented to either motion[4], and the Court verbally granted both motions. On February 23, 2017, Judge Kimball entered an Order requiring Appellant to execute such documents as were necessary to convey the Property free and clear of liens to Triple M Partners, LP, and directed that the funds from the sale be used to pay the first mortgage, with excess funds to be

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[4] Judge Kimball specifically noted that Appellant's counsel, who was representing Lefebvre in the pending federal court litigation, was present for the February 16 hearing, but represented to the Court that he had not been retained to appear for the Appellant in this litigation and was not appearing on her behalf.

deposited with the Clerk of Court for York County until further Order of the Court. On March 14, 2017, the Court entered a written Order granting the Motion of BLANCO to Intervene, and ordered that its Answer be filed.

The closing on the Property was rescheduled for the week of March 13, 2017. Triple M Partners requested that BLANCO release its lien rights against the Property so the closing could occur, and BLANCO refused to do so unless all parties agreed that the lien rights would transfer to the proceeds of the sale. Appellant refused to sign a document agreeing that the lien rights would transfer to the proceeds from the sale, and BLANCO refused to release its lien. On March 15, 2017, BLANCO filed a Motion for an Expedited hearing to Modify the Order of Default Judgment to have the Court provide that the Judgment lien would attach to the proceeds of sale. On March 20, 2017, the case was referred to Judge Kimball, with finality, and he set a hearing on the Motion to Modify the Default Judgment Order for March 22, 2017. BLANCO sought an Order from the Court attaching its Judgment lien to the proceeds of sale in the same order of priority that it had to the Property.

The Court e-mailed notice of the hearing to defaulting Appellant Lefebvre, who responded by e-mail to the notice on March 21, 2017, informing the Court that she would **not** attend the hearing, but asking that the proceeds from the sale be distributed to her.

The court conducted a hearing upon the Motion to Modify the Order of Default Judgment on March 22, 2017[5]. The Court ruled that the Appellant had failed to comply with the prior Default

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[5]Although no court reporter was present for the hearing, the Court engaged recording equipment to record the hearing. The recording equipment apparently failed to record the hearing, and no transcript exists of that hearing.

Judgment Order requiring that the Appellant execute such documents as were necessary to convey the Property to Triple M Partners, LP free and clear of liens. Counsel for BLANCO indicated to the Court that, although the balance due under the Judgment exceeded the amount of the net proceeds generated from the sale, BLANCO would be willing to release its Judgment against the Property if the proceeds were paid toward the Judgment. The Court held that it had the power, as a court sitting in equity, to effectuate the transfer of the Property free and clear of liens. The Court ruled that the Judgment lien of BLANCO predated the transfer of Vito Antonio's interest in the Property to the Appellant, and BLANCO held a priority interest to the net proceeds. The Court therefore ruled that the net proceeds shall be paid to BLANCO. On March 23, 2017, the closing took place and the proceeds were deposited with the York County Clerk of Court on March 24, 2017. On April 4, 2017, the Court entered a written Order confirming its oral rulings from the March 22, 2017 hearing. On April 5, 2017, the Clerk of Court disbursed the funds to counsel for BLANCO.

On April 7, 2017, Counsel for the Appellant filed a Notice of Appearance in the action below. On April 13, 2017, Appellant Lefebvre filed a Motion to Alter or Amend the Court's Order of April 4, 2017, as well as a Motion to Stay its enforcement. On April 14, 2017, Respondent BLANCO filed a Motion for Disbursement of Funds. A hearing was held on these Motions on April 20, 2017, wherein the Court heard arguments of the parties and denied the Motion to Alter or Amend, and found the Motion to Stay and Motion for Disbursement of Funds to be moot. In a written Order entered on April 26, 2017, the Court confirmed its earlier denial of the Motion to Alter or Amend, or to stay the enforcement of the Order. The present appeal ensued.

ARGUMENT

I. DID THE TRIAL COURT ERR IN FINDING LEFEBVRE FAILED TO RAISE ISSUES BEFORE THE COURT AT THE MARCH 22 HEARING?

In her first exception, the Appellant contends that the lower court erred in ruling that the Appellant raised issues not raised in the March 22, 2017 hearing. The Court correctly ruled that the Appellant had not presented the arguments during the March 22, 2017 hearing, and could not raise those arguments for the first time in the Motion to Alter of Amend, citing *Johnson v. Sonoco Products Co.*, 381 S.C. 172, 672 S.E.2d 567 (2009) and *Poch v. Bayshore Concrete Products/South Carolina, Inc.*, 386 S.C. 13, 686 S.E.2d 689 (2009). It is undisputed that Appellant did not appear at the March 22, 2017 hearing, either in person or through counsel. Appellant did not present any issue, by Answer, motion, or otherwise, concerning any claim to the proceeds, any issue of a marital interest in the Property, any competing claim to priority over BLANCO's Judgment, or any other issue; she simply did not appear. Indeed, the March 22, 2017 hearing dealt with modification of a default judgment; the Appellant was in default, and had not at any time moved to be relieved of her default.

The Appellant asserts herein that she is not limited to the issues actually raised at the March 22, 2017 hearing, but contends she is entitled to present additional issues by way of the Rule 59(e) motion to have the Court reconsider its ruling in light of additional considerations. In support of this contention, the Appellant cites *Elam v. South Carolina Dept. Of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004).

> Our rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party must file such a motion when an issue or argument has been raised, but not

ruled on, in order to preserve it for appellate review.

Elam, supra, 361 S.C. at 24, 602 S.E.2d at 780. The Appellant cities only a portion of the quoted language for her assertion, i.e., contending that she may wish to have the court reconsider an issue when she believes the court has misunderstood or failed to rule upon it. She ignores the requirement that the issue must have been initially presented to the court in order to be reviewable in a Motion for Reconsideration. The Appellant does not have the right to raise an entirely new issue for consideration by the court in a Rule 59(e) motion. Rule 59(e) motions are limited to issues actually raised before the court, and may not be used to present a new issue not previously presented to the court.

The Appellant would have the lower court consider that she has a marital interest in the Property, and that this marital interest has some priority over the Judgment lien interest of the Respondent. The Appellant, however, was in default, and at no time prior to filing her Rule 59(e) motion did she raise any claim of a marital interest attaching with priority over the Judgment lien of the Respondent. "A party must file such a motion when an issue or argument ***has been raised, but not ruled on,*** in order to preserve it for appellate review." *Elam, supra*, 361 S.C. at 24, 602 S.E.2d at 780 (emphasis added). Having failed to present the issue to the Court in the hearings conducted on March 22, 2017, Appellant had no legal authority or right to raise them for the first time by way of a Rule 59(e) motion.

Appellant had several opportunities to appear in the action and make any claims she desired as to the net proceeds. Appellant could have filed an Answer to the Complaint; she did not. Appellant could have objected to the Motion by Respondent to intervene and make claim to the

proceeds; she did not. Appellant could have appeared at the hearing regarding the modification of the default judgment Order; she did not. Appellant could have made a motion at any time seeking to set aside the Judgment by Default based upon mistake, inadvertence or excusable neglect under Rule 60, SCRCP, seeking permission to plead with respect to the funds at issue; she did not. The Court was left with only two parties to the action, i.e., the Plaintiff Triple M Partners, LP seeking the specific performance of the contract, and Respondent BLANCO making the claim to the funds. Having multiple opportunities to appear in this underlying litigation and protect her interests, yet failing to avail herself of those opportunities[6] until after the disposition of the funds, the Appellant cannot now be heard to complain as to the lack of opportunity to protect her interests.

II. DID THE TRIAL COURT ERR BY GRANTING RELIEF TO RESPONDENT INTERVENOR NOT REQUESTED BY PLAINTIFF OR RESPONDENT INTERVENOR?

Appellant contends that, because Respondent did not file a cross claim against Appellant, it was not entitled to make claim to the net proceeds from the sale. Appellant acknowledged that Respondent pled in its Answer the right to recover the net proceeds from the sale. Appellant now claims that Respondent's failure to plead a cross claim against Appellant prevents it from recovering the net proceeds; Appellant argument is incorrect.

Rule 13(g), SCRCP, states

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Indeed, counsel for Appellant acknowledges that he was actively representing the Appellant in the federal court litigation at the time of the default judgment hearing and further that he was present for the default judgment hearing (Transcript, page17, line 12 to Page 8, line 5) - at the time when the Court also considered and ruled upon the Respondent's Motion to Intervene. Counsel's presence was noted by the Court in the Order granting the default judgment (see Supplemental Order of Default Judgment, Page 1, fn 1). Appellant and Appellant's counsel were keenly aware that Respondent had made claim to the net proceeds.

> A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

A cross claim is by definition a claim against another party arising from the same transaction which is the subject of the action. The fallacy of the Appellant's assertion is that Respondent did not, has not and never intended to make any claim against Appellant for any liability; Respondent's claim was solely against the Property and net proceeds from the sale. In its Answer, the Respondent **did** make a claim against the Property which was the subject of the action, as well as the proceeds thereof; it **did not** make a claim for recovery against Appellant. Appellant likewise could have at any time made a claim to the proceeds; she chose to remain in default and make no claim at all.

The Respondent's claim was *in rem* against the Property which was within the jurisdiction of the Court, not against the Appellant; there was neither the obligation, nor the basis, to make any claim against the Appellant. An action *in rem* is a claim against the property itself, not against the individual. *Sexton v. Harleysville Mut. Casualty Co.*, 242 S.C. 182, 130 S.E.2d 475 (1963).

> "This is the distinction between an action in personam and an action in rem. In an action 'in rem' a valid judgment may be obtained so far as it affects the res without personal service of process; while in an action to recover a judgment 'in personam' process must be personally served, or there must be a personal or authorized appearance in the action." *White v. Glover*, 138 A.D. 797; 123 N.Y.S. 482.
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> Again the writer of that opinion quotes from the case of *Dulin v. McCaw*, 39 W. Va. 721, 727; 20 S.E. 681, 684, as follows:
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> "It is a distinguishing peculiarity of a proceeding in rem that the jurisdiction of the Court, in the particular case, rests merely upon the seizure or attachment of the property. No personal notice to any individual is required. The res, being brought within the jurisdiction of the Court, becomes subject to its adjudication, and all parties interested are supposed to be duly apprised of the proceedings by the mere taking of the property, or by the usual proclamation or published notice."

Tolbert v. Buick Car, 142 S.C. 362, 367-368, 140 S.E. 693, 695(1927)

In the present action, the Respondent made its claim against the Property being held by the Court; the Appellant had every opportunity to do so, and failed to make such a claim. The Appellant was served with the Complaint, the Default Judgment Order wherein the Court ordered the proceeds held pending further Order of the Court, the Motion to Intervene, the Answer of the Respondent, and the Motion to Modify the Judgment by Default; yet she failed to take any action to make claim against the funds. Inasmuch as the Respondent was the only party in the litigation making claim to the funds, and the Appellant was held to be in default, the Court properly awarded the funds to the only party making claim to the funds.

Rule 55(b), SCRCP, does not require that a hearing be conducted on cases involving other than liquidated damages; if the Court has sufficient evidence in the record for the entry of the judgment, no further hearing is necessary to render judgment.

> *If, in order to enable the court to enter judgment or to carry it into effect,* ***it is necessary to take an account*** *or to determine the amount of damages* ***or to establish the truth of any averment by evidence*** *or to make an investigation of any other matter, the court* ***may conduct*** *such hearing* or order such references ***as it deems necessary and proper*** and shall accord a right of trial by jury to the parties if a proper demand therefor has been made pursuant to Rule 38 and not withdrawn, or when and as required by any statute.

Rule 55(b), SCRCP (Emphasis added).

In the present action, the Court did not deem it necessary to hold any further hearing with respect to the disposition of the funds to be held by the Clerk. There was no need for any hearing to determine damages; the court had the evidence necessary to make a determination, and the Appellant had not appeared as of the date when the determination was made.

Appellant argues that she had no notice that Respondent would make claim to the funds at the hearing conducted on March 22, 2017, and the Order awarding such funds thus should be set aside. The fallacy of this argument is twofold: a) the Appellant was in default and was not entitled to notice of any kind regarding the hearing of March 22, 2017; and b) the Appellant did make a request for the disposition of the funds, despite informing the court that she would not appear, and is upset because the Court did not order their distribution to her.

a) ***The Appellant defaulted in the underlying action, and was not entitled to any notice of proceedings subsequent to the entry of default.***

Although the Appellant has argued that she did not receive notice of the action by the Court, the Appellant was not entitled to notice as a result of her default. Rule 5, SCRCP, governs when and the extent that parties are entitled to receive notice of court proceedings when they are in default. While written notice of pleadings and court proceedings following the initial pleadings should be served upon the parties who have appeared in the action,

> No service need be made on parties in default for failure to appear, except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for serving of summons in Rule 4, and notice of any trial or hearing on unliquidated damages shall also be given to parties in default.

Rule 5(a), SCRCP. Appellant cannnot, and does not, dispute that she was in default; thus, no further notice was required unless there were new pleadings asserting additional claims against her or there was a hearing on unliquidated damages. The Motion hearing made no additional claims for recovery other than those asserted in the Respondent's Answer, which had been served upon the Appellant. Furthermore, the sole claims being made were against the Property, and the net proceeds from the sale being held by the Court, not against the Appellant. She was not entitled to notice of the March

22 proceedings (though she did receive notice), and thus cannot now complain that she did not receive notice that the Court would order the disbursement of the funds.

b) The Appellant was given notice of the March 22 hearing and the subject thereof, and made claim to the funds, yet chose not to appear.

The Court specifically did give notice of the March 22 hearing to the Appellant, through the use of e-mail, and the Appellant failed to request a continuance or otherwise request that the matter be postponed until she could present further evidence. Rather, the Appellant wrote to the Court acknowledging the hearing and requesting that the funds be distributed to her. The Appellant cannot contend that she was unaware that the Court could make a decision regarding the disposition of the funds, as she was aware that the Respondent was requesting that its lien apply against those funds, and she made a specific request that the Court direct the disposition of the funds to her. If the Appellant was unable to attend, she could have hired counsel to appear in her behalf, or could have requested that the matter be continued to permit her to travel and appear in person. Having notice that the Court was making a decision with respect to the proceeds to be held by the Clerk upon the closing, the Appellant had the opportunity to protect her rights and failed to take action to do so.

III. DID THE TRIAL COURT ERR IN NOT FINDING THAT THE DEFENDANT APPELLANT LEFEBVRE WAS DENIED HER PROCEDURAL DUE PROCESS RIGHTS?

The Appellant contends that she was not given procedural due process, insasmuch as the notice of the hearing failed to apprise her of the fact that the Court may make a determination regarding the disposition of the funds. As stated previously, however, the Appellant was not entitled to any notice, inasmuch as she had defaulted and was only entitled to notice in the event of a damages hearing. Nonetheless, notice was in fact provided to the Appellant that the Respondent was

seeking to have its Judgment lien attach to the sale proceeds, and the Appellant was further on notice - through the Answer of the Respondent, which had been served upon her - that the Respondent was seeking claim to the funds to be deposited with the Court.

> Procedural due process requires that a litigant be placed on notice of the issues which the court is to consider. *Cameron & Barkley Co. v. South Carolina Procurement Review Panel,* 317 S.C. 437, 454 S.E.2d 892 (1995); *Abbott v. Gore*, 304 S.C. 116, 403 S.E.2d 154 (Ct. App. 1991). The family court is limited by the scope of due process, and the rule that family court pleadings are to be liberally construed may not be stretched so as to permit the judge to award relief not contemplated by the pleadings. *Id.; Henry v. Henry*, 296 S.C. 285, 372 S.E.2d 104 (Ct. App. 1988). See also *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865, 873 (1950) (The Due Process Clause demands "notice reasonably calculated under all circumstances, to apprize interested parties of the pendency of the action and afford them an opportunity to present their objections."). In *Webster v. Clanton*, 259 S.C. 387, 391, 192 S.E.2d 214, 216 (1972), the Supreme Court held:
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> > It is a fundamental doctrine of the law that a party whose personal rights are to be affected by a personal judgment must have a day in court, or opportunity to be heard, and that without due notice and opportunity to be heard a court has no jurisdiction to adjudicate such personal rights. A judgment by a court without jurisdiction of both the parties and the subject matter is a nullity and must be so treated by the courts whenever and for whatever purpose it is presented and relied on.

Murdock v. Murdock, 338 SC 322, 333-34, 526 SE 2d 241, 247 (Ct.App. 1999).

> "Due process is flexible and calls for such procedural protections as the particular situation demands." *Ogburn-Matthews v. Loblolly Partners*, 332 S.C. 551, 561, 505 S.E.2d 598, 603 (Ct. App. 1998) (*quoting Stono River Envtl. Prot. Ass'n v. S.C. Dep't of Health & Envtl. Control*, 305 S.C. 90, 94, 406 S.E.2d 340, 341 (1991)). "The requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review." *Ogburn-Matthews*, 332 S.C. at 562, 505 S.E.2d at 603; *see also Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 94 L. Ed. 865, 70 S. Ct. 652 (1950) (stating that the Due Process Clause demands "notice reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections"); *cf.* S.C. Const. art. I, § 22 ("No person shall be finally bound by a judicial or quasi judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be

heard . . . .").

Brown v. Malloy, 345 S.C. 113, 121, 546 S.E.2d 195, 199(Ct.App. 2001).

The Appellant received her procedural due process rights as to the hearing in question. The Appellant was served with the Complaint, and if the Appellant had filed an Answer to the Complaint or otherwise appeared in the action, she would have been entitled to a notice on the general subject of the hearing - in this case, the transfer of the Respondent's Judgment lien to the proceeds of the sale of the Property. Notwithstanding the lack of a requirement that the Appellant be served with any notice of the proceedings, the Appellant was actually served with the Default Judgment Order which required that she execute such documents as are necessary to convey the Property, and that the funds be held by the Clerk of Court pending further order of the court. The Appellant also was served with Respondent's Motion to Intervene and the Answer of the Respondent making claim to the funds. Appellant received notice that the Respondent claimed priority to the proceeds of the sale and that a hearing would be conducted to effectuate transfer of the lien to the proceeds of sale. Appellant had multiple opportunities and received ample notice, yet failed to take any action to protect or assert her interests. The claim that the defaulting Appellant's procedural due process rights were violated lacks merit.

If this Court were to countenance the argument that a defaulting Defendant is entitled to notice and a right to be heard on all matters following the entry of default, it effectively would vitiate the Rules 5 and 55 of the South Carolina Rules of Civil Procedure, which specifically provide that a defaulting defendant is not entitled to be served with any further notice of proceedings after the Complaint, except as to a damages hearing. Multiple default judgments heretofore entered by the circuit courts of this State could be attacked upon the grounds that the defaulting defendant, against

whom a judgment has been entered, was denied his or her due process rights because they were not informed of proceedings subsequent to their default. The result would be that no default judgment entered by our courts could stand scrutiny if the defaulting party was not provided notice of each hearing in the case. Judicial precedent and finality demand a finding that the Appellant was afforded her procedural due process protections.

IV. DID THE TRIAL COURT ERR IN NOT FINDING THAT THE DEFENDANT APPELLANT LEFEBVRE WAS DENIED HER SUBSTANTIVE DUE PROCESS RIGHTS?

The Appellant asserts in her brief that she was denied her substantive due process rights, in that she was deprived of a property right because the Court failed to appreciate that she had a property right in the real estate which was the subject of the sale, and thus she had a property right in the proceeds from that sale. While the Appellant did claim a property right, the deprivation was neither arbitrary, capricious, nor unwarranted, but was instead based upon sound legal principles.

> Substantive due process provides that one may not be deprived of property for arbitrary reasons. *Worsley Co. v. Town of Mount Pleasant*, 339 S.C. 51, 56, 528 S.E.2d 657, 660 (2000) ("Substantive due process protects a person from being deprived of life, liberty or property for arbitrary reasons."). To support a substantive due process violation, a party must show "he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law." Id.

Anonymous Taxpayer v. S.C. Dep't of Revenue, 377 S.C. 425, 437-438, 661 S.E.2d 73, 79, (2008).

> Substantive due process protects a person from being deprived of life, liberty, or property for arbitrary reasons. *Worsley Companies, Inc. v. Town of Mount Pleasant,* 339 S.C. 51, 56, 528 S.E.2d 657, 660 (2000). To establish a substantive due process claim, a plaintiff must show he possessed a constitutionally protected property interest that was deprived by state action so far beyond the limits of legitimate governmental action, no process could cure the deficiency. *Sylvia Dev. Corp. v. Calvert County,* 48 F.3d 810, 827 (4th Cir. 1998).

Seabrook v. Knox, 369 S.C. 191, 198, 631 S.E.2d 907, 911 (2006).

Substantive due process requires that state action which deprives a person of life,

> liberty, or property must have a rational basis, that is, the reason for the deprivation must not be so inadequate that the judiciary will characterize it as arbitrary. *Hamilton v. Board of Trustees of Oconee County School District,* 282 S.C. 519, 319 S.E. (2d) 717 (Ct. App. 1984).

South Carolina Dep't of Health & Environmental Control v. Armstrong, 293 S.C. 209, 214, 359 S.E.2d 302, 304 (Ct.App. 1987).

It is insufficient for Appellant to state she had a property interest of which she was deprived; the Appellant must show that the Court acted arbitrarily and capriciously. As set forth previously, the Appellant never appeared in the action and asserted any property right to the Property. The Court as presented with a fund and only one party making an appearance and claiming an interest in the Property; the decision to award the net proceeds to the only participant making that claim can in no way be deemed to be arbitrary or capricious. Even if it is determined that her e-mail to the Court of March 21, 2017 constituted an attempted entry into the case to protect her interests and to make a claim to the proceeds, the Appellant already had been held in default and the default judgment had been entered. No attempt was made to have the default judgment set aside and formally appear in the action, and her attorneys specifically stated that they were not appearing in the action. Further, Appellant failed to participate in the hearing the following day, and failed to request an extension of the hearing or other relief, despite being given the opportunity to do so either personally or through counsel. The circuit court was justified in making its ruling regarding the property right, it was not arbitrary or capricious, and the claim of a violation of substantive due process lacks merit.

More significantly, the deprivation of the claimed property right was lawful and appropriate, for the reason that her property rights did not arise vis-a-vis the Respondent, for the reasons which are specifically set forth in Section V of this Brief of the Appellant. The assertion that the Appellant was denied substantive due process is wholly without merit.

V. SHOULD THE JUDGMENT BELOW BE UPHELD ON THE ADDITIONAL SUSTAINING GROUND, UNDER RULE 220(C), SCRAP, THAT RESPONDENT BLANCO GMBH+CO.KG HAD A PRIORITY INTEREST IN THE REAL PROPERTY AS A MATTER OF LAW, AND THEREFORE IN THE PROCEEDS OF SALE ?

a) Rule 220(c), SCRAP, permits this Court to review additional grounds for the affirmance of the lower court ruling

Rule 220(c), SCRAP, permits this Court to review additional grounds for the affirmance of the lower court ruling and affirm upon such grounds, regardless of whether the lower court actually ruled upon those grounds. It is of no consequence that the Court failed to reach the additional sustaining ground for the result; the appellate court can decide issues of law and affirm, rather than to remand a case to the trial court for an additional legal ruling upon the additional grounds.

> Under the present rules, a respondent - the "winner" in the lower court - may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court. It would be inefficient and pointless to require a respondent to return to the judge and ask for a ruling on other arguments to preserve them for appellate review. It also could violate the principle that a court usually should refrain from deciding unnecessary questions. *Cf. Fairway Ford, Inc. v. County of Greenville*, 324 S.C. 84, 476 S.E.2d 490 (1996) (illustrating Court's "firm policy" of declining to reach constitutional issues when it is not necessary to resolve a case).
>
> The basis for respondent's additional sustaining grounds must appear in the record on appeal, but other requirements contained in former rules and pre-1990 precedent no longer apply. Of course, a respondent may abandon an additional sustaining ground under the present rules - just as a respondent could under the former rules - by failing to raise it in the appellate brief. *Maxey v. R.L. Bryan Co.*, 295 S.C. 334, 336 n.2, 368 S.E.2d 466, 467 n.2 (Ct. App. 1988); *May v. Hopkinson*, 289 S.C. 549, 558, 347 S.E.2d 508, 513 (Ct. App. 1986); *see also* Rule 208(b)(1)(B), SCACR ("ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal").
>
> The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment. An appellate court may not rely on Rule 220(c), SCACR, when the reason does not appear in the record, or when the court believes it would be unwise or unjust to do so in a particular case. It is within the appellate court's discretion whether to address any additional sustaining grounds.

I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419-420, 526 S.E.2d 716, 723(2000). "Notwithstanding the circuit court's rationale, [the appellate] court is authorized to consider any sustaining ground pursuant to Rule 220(c), SCACR." *Jamison v. Ford Motor Co.*, 373 S.C. 248, 267, 644 S.E.2d 755, 765 (Ct.App. 2007).

b) The Respondent's lien rights against the real estate and proceeds were entitled to priority over the Appellant's claimed marital interest as a matter of law.

The Appellant claims she was denied her right to argue that her marital interest in the Property was entitled to priority over the Respondents's Judgment lien, and therefore she was denied due process. Even if this Court were to determine that the Appellant was entitled to notice and an opportunity to be heard to present this argument, it fails as a matter of law, and this Court should sustain the circuit court's ruling on this additional sustaining ground.

The Respondent obtained a Judgment lien against the real Property titled in the name of Vito Antonio Laera at the time it filed its foreign Judgment with the York County Clerk of Court, i.e., on October 3, 2014.

> Final judgments and decrees entered in any court of record in this State . . . shall constitute a lien upon the real estate of the judgment debtor situate in any county in this State in which the judgment or transcript thereof is entered upon the book of abstracts of judgments and duly indexed, the lien to begin from the time of such entry on the book of abstracts and indices and to continue for a period of ten years from the date of such final judgment or decree.

S.C. Code Ann. §15-35-810.

The Appellant asserted for the first time in her Rule 59(e) motion before the lower court that she had a marital interest in the Property which arose as of the date she filed her divorce proceedings in March, 2014. The Appellant attempts to rely upon S.C. Code Ann. §20-3-610, which states:

During the marriage a spouse shall acquire, based upon the factors set out in Section

> 20-3-620, a vested special equity and ownership right in the marital property as defined in Section 20-3-630, which equity and ownership right are subject to apportionment between the spouses by the family courts of this State at the time marital litigation is filed or commenced as provided in Section 20-3-620.

Appellant contends that she obtained a vested equity and ownership right in the subject Property due to her "marriage" to the titled property owner, Vito Antonio Laera. Even if the parties were in fact married and the South Carolina Family Court had jurisdiction to entertain the divorce action between the couple, Appellant would not be entitled to claim a marital interest in the Property superior to the Judgment lien interest of Respondent, and thus Respondent was entitled to priority as to the net proceeds as a matter of law.

The special equity interest in a spouse's property is not a matter of common law, but is instead statutory. Where a property interest has no basis in common law, but the interest is strictly created by statute, the law is a statute of creation, and strict compliance with the terms of the statute is required to claim an interest thereunder. *Simpson v. Sanders*, 314 S.C. 413, 445 S.E.2d 93 (1994); *Gallagher v. Evert*, 353 S.C. 59, 577 S.E.2d 217 (2002).

Because the interest is created by statute, the Court must examine the entire statutory provisions to determine whether the right arises and the priority of the claimants in and to the property. Although the statute clearly creates the right of a spouse to an interest in the property subject to apportionment between the divorce parties as of the date of the filing of the divorce action, the statutory scheme specifically provides that the right does not impair the rights of third parties in and to the same real property. Pursuant to S.C. Code Ann §20-3-670:

> (A)(1) In a proceeding under this article, either party may record a notice of the pendency of proceedings in the manner provided in civil actions generally, which has the same effect as a notice in civil actions. *The rights and interests of each spouse in the other's property created by this article are not effective against third parties: (a) with regard to any parcel of real property in which an interest under this article*

is claimed until a Notice of Pendency of Action is filed as provided in Section 15-11-10 with the clerk of court of the county in which such parcel of real property is situated;

(Emphasis added).

It is undisputed that the Appellant did not file a lis pendens at the time she instituted the divorce proceeding in South Carolina, or at any time before the entry of the Respondent's Judgment with the York County Clerk of Court. The Respondent presented evidence in the lower court that no such lis pendens had been filed, and the Appellant presented no evidence to the contrary. BLANCO's Judgment attached to the Property on October 3, 2014, before the entry of the Family Court Order providing for the transfer of the real estate to Appellant (October 24, 2014), and before the deeds from Laera to the Appellant transferring the interests in the Property (January 7, 2015 and May 16, 2016).

Appellant argued in the lower court that the Order of the Family Court awarding the Property to the Appellant acts to retroactively transfer the interest of the Appellant to the date of the filing of the divorce action; while that argument may have some validity as between the parties to the divorce proceeding, it has no basis under the law with respect to third parties, such as BLANCO, and is in contravention of express statutory language. The sole basis for claiming the interest arises by statute, and the statutory scheme specifically provides that it has no effect against those not who are not parties to the litigation unless and until a lis pendens is filed:

> The rights and interests of each spouse in the other's property created by this article are not effective against third parties:
> (a) with regard to any parcel of real property in which an interest under this article is claimed until a Notice of Pendency of Action is filed as provided in Section 15-11-10 with the clerk of court of the county in which such parcel of real property is situated . . . .

S.C. Code Ann. §20-3-670(a)(1). Even assuming arguendo that Appellant and Laera were lawfully

married, and that the Family Court had subject matter jurisdiction, the Respondent's rights in its lien against the Property attached before the filing of a lis pendens (none was filed) before the Family Court Order and before the subsequent deeds were signed and recorded; the Respondent's lien rights have priority as a matter of law, notwithstanding the arguments presented by the Appellant. This conclusion results even if: 1) the Appellant was married to Vito Antonio Laera; 2) the South Carolina Family Court had jurisdiction over a divorce proceeding; and 3) the Appellant obtained an equitable interest in the Property as of the date of the filing of the Family Court proceeding. The equitable interest is "not effective against third parties" under the statute, and thus could not trump the Respondent's lien rights against the Property. Thus, even if the Appellant failed to receive a required notice of the action of the court to disburse the proceeds from the sale, the assertion that she has a priority interest over Respondent to the proceeds fails, and this Court should affirm the ruling of the lower court under Rule 220(c), SCRAP.

CONCLUSION

The Appellant had ample and multiple opportunities to appear in the underlying action and take steps to protect whatever interests she claimed in the Property, as well as the ensuing proceeds. The Appellant failed to take even the most basic steps to protect her alleged interests, and the lower court was justified in entering judgment awarding the net proceeds of sale to Respondent. The Appellant failed to present facts and arguments to the lower court, thereby preventing her from raising those arguments for the first time in a Rule 59 Motion to Alter or Amend. The Appellant was afforded all constitutional due process rights, both procedural and substantive, and the Respondent was entitled to payment of the proceeds from the sale as a matter of law. For the foregoing reasons,

the judgment of the lower court should be affirmed.

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November 3, 2017

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM YORK COUNTY

COURT OF COMMON PLEAS

Jackson S. Kimball, III, Master-in-Equity

Appellate Case No. 2017-001254

Triple M Partners, LP., Plaintiff

vs.

Suzette Lefebvre, as Individual and as trustee of the Suzette Lefebvre Trust N/A, and Blanco GmbH+CO.KG, Defendants.

Of whom Suzette Lefebvre, as individual and as Trustee of the Suzette Lefebvre Trust N/A is the Appellant,

And

Of which Blanco GmbH+CO.KG is the Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that I am the attorney for the Respondent in the above case and that on November 3, 2017, I did serve a copy of the Initial Brief of the Respondent and the Respondent's Designation of Matter to be Included in the Record on Appeal upon counsel for the Appellant by depositing a copy of the same in the United States Mail, postage prepaid, and addressed as follows:

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(Retired)

November 3, 2017

The Honorable Jenny Abbott Kitchings
Clerk of SC Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Triple M Partners, LP.
vs. Suzette Lefebvre, as Individual and as trustee of the Suzette Lefebvre Trust N/A, and Blanco GmbH+CO.KG
Of whom Suzette Lefebvre is the Appellant, and Blanco GmbH+CO.KG is the Respondent
Appellate Case No. 2017-001254

Dear Ms. Kitchings:

Enclosed herein for filing please find the original and one copy of the Initial Brief of the Respondent and the Respondent's Designation of Matter to Be Included in the Record on Appeal, with the Certificate of Service hereof. By copy of this correspondence to M. Heath Gilbert, Attorney for the Appellant, we are serving the Appellant with a copy of these documents. Thanking you for your consideration, we are

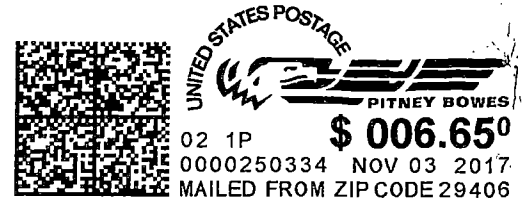
Yours Very Truly,

BERNSTEIN & BERNSTEIN, P.A.

Robert A. Bernstein

Robert A. Bernstein

cc: M. Heath Gilbert, Jr., Esquire
Daniel J. Ballou, Esquire
Jerome F. Gallagher, Esquire
Laura Budd, Esquire



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ADDRESS CORRECTION REQUESTED

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