

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

William F. Tomz and Francis W. Tomz,
Individually and as Class Representatives,

Plaintiffs,

vs.

Capital Investment Funding, LLC, and
Arthur M. Field,

Defendants.

IN THE COURT OF COMMON PLEAS

C.A. No.: 2008-CP-23-3665

ORDER

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SC Court of Appeals

This order addresses several motions and matters currently pending before the Court. By and through its court-appointed receiver, Capital Investment Funding, LLC (“CIF”) has filed the following motions:

1. Plaintiffs’ Motion to Kirsten White To Comply with the Terms of the Global Settlement Agreement Executed on February 24, 2017, filed July 26, 2017. This motion sought to compel Defendant White to comply with the Global Settlement Agreement regarding the insurance, inspection and sale of her residence;
2. Plaintiffs’ Motion As To Allyson Field, Kathryn Taillon & Arthur Field To Comply With The Terms of the Global Settlement Agreement, filed July 26, 2017. This motion alleged the property (“Property”) located at 310 Thornblade Blvd., Greer, South Carolina, which is a material component of the Global Settlement Agreement (“GSA”), incurred damaged from a hail storm that occurred in March 2017, and sought this Court to: (a) declare these parties are responsible for restoring the Property to the condition existing at the time the GSA was executed; (b) order repairs to the Property be conducted with this Court’s oversight to ensure proper conduct, with due haste to minimize any additional consequential damages; (c) order the named parties to immediately deliver all insurance proceeds to CIF counsel, to be held in escrow, and require all receipts and disbursements of insurance proceeds related to such damage and repairs be conducted with this Court’s oversight to ensure proper application of funds; and (d) declare that CIF is not responsible for paying any deductible amount of the insurance policy; and

3. Plaintiffs' Amended Motion to Defendant Arthur Field Compelling Compliance To The Terms of the Global Settlement Agreement, filed August 18, 2017. This motion alleged that Defendant Arthur Field (hereinafter "Defendant Field" or "Field") has failed to fulfill his obligation under the terms of the GSA to schedule a hearing to modify his restitution and parole terms ("Restitution Hearing") and sought this Court to direct Defendant Field to have the Restitution Hearing promptly, or in the alternative, find that Defendant Field has willfully failed to comply with the material terms of the GSA and sanction him accordingly.

The Court has two (2) other matters still under advisement: Plaintiffs' Motion to Approve the Global Settlement Agreement, filed March 8, 2017 and various Rules to Show Cause as to Defendant Field related to multiple complaints as to his willful violations of the terms of the original Mediated Global Settlement Agreement, memorialized by order of this Court on August 24, 2009. These matters were addressed in a hearing held on September 5, 2017.

The following counsel appeared on behalf of the following parties:

Capital Investment Funding:

George Brandt, III, Esq.

Stanley T. Case, Esq.

Gene Connell, Esq.

Rodney F. Pillsbury, Esq.

Allyson Field

Bruce Bannister, Esq.

Kirsten White, pro se.

Arthur M. Field, Jr.:

Micajah P. Caskey, Esq.

Bradford Martin, Esq.

Kathryn Taillon

Jeffrey P. Dunlaevy, Esq.

Upon convening the hearing, and upon inquiry of counsel, it was brought to this Court's attention that Defendant Field engaged and brought a private court reporter to this hearing for the sole purpose of recording this Court's proceedings, and specifically to include the private conversations between myself and my law clerk. This Court advised and admonished counsel that this action is in clear violation of Rule 605(b) SCACR, which prohibits the recording of any court proceeding. This Court further advised that, as with every prior proceeding and hearing in this case, the hearing proceedings were documented and transcribed solely by the Court's court reporter, who is approved and assigned by Court Administration. This Court then dismissed the private court reporter who was in attendance at Defendant Field's request. This Court then further advised that any recording by anyone other than the Court Administration's court reporter was prohibited and any violation of such by anyone could be dealt with as contempt of court.

This Court further advised that any conversations between judges and their law clerks are privileged, as are the conversation between counsel and their clients, and are not includible in the records of the proceedings.

At the beginning of the hearing, CIF's counsel informed the Court that he believed a settlement conference with all parties and their counsel could be fruitful. The Court has strongly encouraged any measures that would bring to a close all matters pending to this case and its related litigation. Whereupon the parties were excused and engaged in private discussions for nearly an hour.

Upon reconvening, the parties reported that they had reached an understanding which would resolve the majority of the matters pending within the first two motions noted above. Towards that end, the parties reported on the record specific actions agreed to be taken by the parties regarding and asked for the Court's acknowledgement and approval of the same.

1. **Regarding CIF's Motion to Compel Kirsten White (Ms. White)**, which alleged that Ms. White failed to comply with the terms of the GSA in that she willfully failed to take any actions to make her house available for inspection, placing her house on the market, etc., as required by the GSA. Ms. White appeared *pro se* and submitted to this Court that she believed she was not required to perform any of the actions set forth in the GSA until after all terms of the Settlement Agreement had become final. Ms. White further explained and expressed concern that if she sold her house and the GSA was not approved for any reason, then she would unfairly have sold her house but still be subject to liability of the claims of the pending lawsuits. However, Mr. Brandt, counsel for CIF, noted that, in the conference after the commencement of this hearing, the parties agreed that the GSA should be interpreted, particularly the terms and conditions of Sections 13 and 14 of the GSA (incorporated fully herein by reference) as it relates to the sale of the 5 Aldgate Way property, in a manner that, in the event Ms. White sells her house and CIF retains the proceeds proscribed in the GSA, Ms. White should be dismissed with prejudice from all pending actions set forth within the GSA, and released from all liability related thereto. Accordingly, CIF and Ms. White respectfully request this Court to approve and declare such interpretation of the GSA.

2. **Regarding CIF's Motion to Compel Allyson Field, Kathryn Tailon and Arthur Field**, which alleged the Property incurred damaged from a hail storm that occurred in March 2017, the counsel for Allyson Field and Arthur Field acknowledged the hail storm damage to the Property, the subsequent insurance claim filed and receipt of certain insurance proceeds received for the damage, and their willingness to provide this Court and CIF all information related thereto, and Mr. Brandt, counsel for CIF, acknowledged the same. Upon this Court's further inquiry as to the details of the insurance proceeds, Mr. Bannister, counsel for Allyson Field, acknowledged that his firm had received from Mr. Field and is currently holding in trust the insurance proceeds. Mr. Bannister was not able to provide this Court with the specific amount, dates, maker, and endorser of the check his firm received. Counsel for Defendant Field informed this Court that as of this date no action had been taken to repair the damage to the Property.

In response to the directives from Court at the hearing, a copy of the insurance check deposited by Mr. Bannister's law firm was mailed to this Court and received by this Court on September 14, 2017. The Court notes that the \$17,000 check was a bank check drawn on First Citizens Bank dated June 12, 2017, made payable to "Bruce Bannister trustee", with a memo reference "Remitter Allyson Field" inscribed on the check. Mr. Bannister's transmittal letter dated September 6, 2017, stated that the check was deposited into his firm's trust account on July 14, 2017.

3. **Regarding CIF's Amended Motion to Compel Arthur Field Regarding the Field's Obligations to Seek Modification of Restitution**, which alleged that Defendant Arthur Field failed to fulfill his obligation under the terms of the GSA to schedule the Restitution Hearing, the parties offered no agreed settlement of this matter at this time. The Court heard commentary from Mr. Caskey, counsel for Defendant Field, and from Mr. Brandt, counsel for CIF, and Mr. Case, counsel for the Class in this matter. While no witness testimony was offered, Mr. Brandt submitted for this Court's records copies of 32 emails that Creighton Waters, Deputy Attorney General for the State of South Carolina, had provided to all parties and to this Court by way of emails to all earlier this morning. Mr. Brandt made further commentary that Mr. Case had made extraordinary efforts since March to have the Restitution Hearing scheduled, while Defendant Field has not demonstrated any effort to accomplish the same, despite his duty to do so under the GSA.

After hearing commentary from the parties, this Court ordered from the bench on September 5, 2017, that Defendant Arthur Field's counsel is to request on or by noon on September 7, 2017, two days from this hearing, the Restitution Hearing be heard before Judge Maddox no more than forty-five (45) days from this day (no later than **October 20, 2017**). This Court further ordered that, should the Restitution Hearing not occur prior to that time, the Court will reconvene this matter to rule on all pending matters. This Court further asked Mr. Bannister, to make certain this oral order is promptly and accurately relayed to Todd Rutherford, Defendant Field's counsel in the matter of the Restitution Hearing.

In subsequent review of this September 5, 2017 hearing, this Court reviewed the copies of emails submitted to this Court prior to the hearing by Mr. Waters and separately at the hearing by Mr. Brandt. This Court notes that:

1. These emails all pertained to the Motion to Modify Restitution Order filed by Defendant Field pursuant to the terms of the GSA;
2. These emails were generally copied to all parties, or the counsels to all parties, of the GSA and Judge Maddox or his law clerk;
3. The earliest email was dated beginning March 7, 2017 and the last was dated August 25, 2017;
4. These emails include 7 emails dated in March 2017 from Mr. Ryan Volonis, law clerk to Mr. Todd Rutherford, counsel for Defendant Field, one email from Mr. Rutherford dated April 2017, and one email from Ms. Sierra Hampton, legal assistant to Mr. Rutherford dated June 9, 2017;
5. These emails include 13 emails, issued from March 2017 through August 25, 2017, from Creighton Waters, Deputy Attorney General;
6. These emails include 5 emails, issued from March 2017 through August 25, 2017, from Judge Maddox;
7. At Mr. Rutherford's request and consent, the Restitution Hearing was scheduled to be heard by Judge Maddox on June 13, 2017;
8. On June 9, 2017, Mr. Rutherford, through his legal assistant, Ms. Sierra Hampton, filed a Motion for Continuance of the scheduled Restitution Hearing claiming legislative immunity; and

9. On June 9, 2017, Creighton Waters responded to Mr. Rutherford's Motion for Continuance with emails to Judge Maddox pointing out to Judge Maddox that:
 - a. Legislative immunity does not apply when the legislative lawyer consents to the hearing, which applies in this matter since the Restitution Hearing was scheduled at the specific request of Mr. Rutherford;
 - b. The general session of the SC Legislature was adjourned, and Mr. Rutherford advised Mr. Waters on June 9, 2017, that the SC Legislature was not in a special session; and
 - c. Mr. Water's office, the Office of the Attorney General of the State of South Carolina, had mailed hundreds of notices of the scheduled Restitution Hearing to victims, as required by law, and that, with only the weekend and one business day before the scheduled Restitution Hearing, there was not sufficient time to mail additional notices to the victims advising them of the cancellation of the Restitution Hearing.

Upon further review of records by this Court, Mr. Rutherford's Motion for Continuance filed on June 9, 2017, included the following language:

.... moves this Honorable Court to grant a continuance in the above-captioned case, due to defense counsel's required presence for Legislative Session at The State House the week of June 12, 2017.

Defendant hereby asserts this continuance is not submitted for unreasonable or unnecessary delay. Further, Defense counsel has consulted with the State of South Carolina and believes this motion is unopposed.

On March 17, 2017, in a lengthy hearing held by this Court, the parties made a presentation, explaining in great detail the terms and conditions of the GSA. While the parties requested this Court approve the GSA, this Court chose at that time to defer its decision on its approval and took the matter under advisement. In the presentation at that hearing, the parties represented that the GSA was achieved through extremely arduous negotiations over many months. This Court has since carefully reviewed the GSA and makes these important and critical observations:

1. The GSA includes 13 pages of single space terms and conditions and 11 Exhibits, all totaling 85 pages, including signature pages.

2. The language in the GSA is clear, concise, specific, and unambiguous, except as noted below.
3. The GSA is signed by 21 persons, representing over 700 individuals and entities, who are each bound to the terms and conditions of the GSA and are thereby affected by the settlement;
4. Because GSA requires specific actions be performed by various parties over the course of time, some of which are to be performed prior to approval of the GSA by this Court, this Court finds that the GSA is an *executory contract* by definition; based on the language chosen in the GSA, those specific actions to be performed by various parties over the course of time were contemplated when the parties signed the GSA.
5. Section 14.I.vi. of the GSA specifically binds all parties to cooperate with each other fully, timely and without delay.
6. Section 14.I.vii. of the GSA specifically states that “**Time is of the Essence**”, which importantly appears in bold letters as the last provision in the GSA before signatures.
7. The following caption is inscribed in large bold letters at the top of each signature page:

“By signature placed below, each of the undersigned acknowledges that he or she has read this Agreement, understands it, has received a complete copy of it including all Exhibits, has had the opportunity to review it with legal representation of his or her choice, and accordingly does hereby approve this Agreement, consents to it, and agrees to be bound to all of the terms contained within it, and asks the applicable court to approve this Agreement:”

Ruling

Regarding CIF’s Motion to Compel Kirsten White,

This Court reviewed prior testimony by Ms. White in previous hearings in this Court, and her related deposition, and found:

1. Ms. White is well educated, being a college graduate and having earned a bachelor’s degree in business from Furman University.
2. In the December 8, 2016 Hearing before this Court, Ms. White apologized for and admitted to misleading this Court by falsely testifying in her November 24, 2015 deposition [see page 99 of transcript] that she had discarded CIF records in a dumpster, when in fact she testified in the December 8, 2016 Hearing before this Court that she did not discard the records but left the records in the rented space.

3. Also in the December 8, 2016 Hearing before this Court, while testifying as to her knowledge and involvement in certain motions she filed as *pro se*, this Court acknowledged that Ms. White “changed her answers right here in this court a couple of times” [see page 200 of transcript].

In this Hearing, Ms. White acknowledged she signed the GSA and no one coerced her to do so. Ms. White stated that, though she tried, she was unable to engage counsel to advise her on the GSA, and therefore no one no gave her legal advice about the GSA prior to her signing it.

While this Court views Ms. White as intelligent by her credentials, her propensity to change her testimony causes the Court to find that she is not a credible witness.

The evidence demonstrates that Ms. White did, in fact, sign the GSA, which clearly states that each signer read the GSA, understood it, received a complete copy of it, had the opportunity to review the GSA with legal representation of his or her choice, and accordingly consented to it and agreed to be bound to all of the terms contained within it. Furthermore, because Section 14.I.vi. of the GSA specifically binds all parties to cooperate with each other fully, timely and without delay, Ms. White had and has the duty to act in accordance with the obligations set forth in the GSA in a timely fashion. Her duty to act was not and is not contingent upon the approval of the GSA, and can only be voided by the disapproval of the same, which has not yet happened.

As mentioned above, the parties agreed that upon her satisfying all terms of sale in Paragraphs 13 and 14 of the GSA, Ms. White will be released from all liabilities as set forth in the GSA. Additionally, Ms. White has agreed, and it is so ordered, to provide copies to counsel for CIF any and all documents pertaining to any insurance claim(s) for repairs to the home since the execution of the GSA.

Regarding CIF’s Motion to Compel Allyson Field, Kathryn Taillon and Arthur Field:

The parties agreed to provide copies of all documents pertaining to any insurance claim for the Thornblade residence made since executing the GSA. The parties also agreed that, with forty-eight (48) hours’ notice, CIF will be granted full access to the Thornblade property to effectuate all repairs related to storm damage covered by the insurance claim Field filed with the insurance company. The parties will cooperate for whatever may be necessary to complete all repairs for

storm-related damages, including the prompt execution of all required paperwork. This Court will not tolerate any delay, hindrance or misconduct by any party towards this end.

Regarding CIF's Amended Motion to Compel Arthur Field

The Court is **extremely** frustrated with the apparent lack of cooperation or lack of interest Mr. Field (by and through his counsel) has demonstrated in this regard. The Court, the victims, and all other counsel have been waiting six (6) months, for Field to fulfil this requirement to which he expressly under the GSA. The Court has placed on hold other pending civil litigation: (Capital Investment Funding, LLC, v. Arthur Field, et al., C.A. No.:15-CP-23-01263 (13th Judicial Circuit, Court of Common Pleas, Greenville County, SC) to await final approval of the GSA.

The Court is dismayed that Field has not fulfilled his obligations under the GSA to seek a modification of his restitution, as required by Paragraph 8 of the agreement. Counsel for the Class of Plaintiffs, Mr. Stan Case, recounted the extensive efforts he has undertaken to make the hearing happen.

The Court ordered from the bench on September 5, 2017, that Defendant Arthur Field's counsel shall, within two (2) days of the hearing (September 7, 2017) request a hearing before Judge Maddox to have the pending motion for modification of restitution heard. The Court was informed on October 24, 2017 that a hearing before Judge Maddox is scheduled on Wednesday, November 1, 2017. Should the hearing not occur on this date, the Court will reconvene this matter to rule on all pending matters.

Signature Page to Follow

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	C.A. No.: 2008-CP-23-3665
COUNTY OF GREENVILLE)	
William F. Tomz and Francis W. Tomz, Individually and as Class Representatives Plaintiffs,)	CERTIFICATION OF CONSULTATION
vs.)	
Capital Investment Funding, LLC, and Arthur M. Field, Defendant.)	

Pursuant to Rule 11 of the South Carolina Rules of Civil Procedure, counsel certifies that consultation would serve no useful purpose.

BUTLER, MEANS, EVINS & BROWN, PA

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October 11, 2017
Greenville, South Carolina



Greenville Common Pleas

Case Caption: William F Tomz , plaintiff, et al vs. Capital Investment Funding Llc ,
defendant, et al
Case Number: 2008CP2303665
Type: Order/Other

So Ordered

s/ Edward W. Miller