

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2019-000918
Case No. 2019-CP-26-00946

Lauren Egan, and Lauren K. Egan
2017 Irrevocable Trust,

.....Appellants

v.

Dockstreet at the Market Common, Inc.;
Dock Street Homes and Communities,
Inc.; Sands Building Group, Inc.;
Sterling Homes; Real Estate Modo Inc.;
Ocean Front Guru Real Estate
Sales & Development, Inc.; and
Brian Piercy, Defendants,

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AUG 26 2019

SC Court of Appeals

Of which Ocean Front Guru Real Estate
Sales and Development, Inc., and Brian
Piercy are the Respondents,

.....Respondents

INITIAL BRIEF OF APPELLANT

[SIGNATURE ON FOLLOWING PAGE]

August 21, 2019



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STATEMENT OF ISSUES ON APPEAL

- I. Did the Trial Court err in hearing Respondents' motions to dismiss in violation of the Supreme Court's Order dated September 10, 2015?
- II. Did the Trial Court err in converting Respondents' motions to dismiss into motions for summary judgment without providing Appellants a reasonable opportunity to present all material made pertinent to such a motion by Rule 56?
- III. Did the Trial Court err in granting Respondents' motions to dismiss based upon an untimely affidavit?
- IV. Did the Trial Court err in hearing Respondents' motions to dismiss despite Rule 601 and without proper notice to Appellants?
- V. Did the Trial Court err in hearing Respondents' motions to dismiss in the absence of Appellants' counsel?

STATEMENT OF THE CASE

This is a construction defect case. On February 16, 2019, Plaintiff filed suit against several defendants, including the real estate agent who sold the property – Brian Piercy – and the company for whole which the agent worked – Ocean Front Guru Real Estate Sales and Development, Inc. Defendants Brian Piercy and Ocean Front Guru Real Estate Sales and Development, Inc. are the Respondents in this appeal.

On March 20, 2019, Respondents filed bare-bones Motions to Dismiss. (*Respondents' motions dated March 20, 2019*). They did not file any supporting memoranda as required. They did not file their affidavits with their motions as required.

On March 26, 2019, a hearing roster was released setting hearings on Respondents' motions for April 25, 2019. Respondents still did not file supporting memoranda or affidavits. (*Email from Court*).

On April 22, 2019, Appellants' counsel advised the Trial Court that he had a Rule 601, SCACR, conflict that prevented the hearings going forward on April 25, 2019. (*Email to Court*). As a result, the hearings were shown on the roster as not going forward. (*Internal email dated April 24, 2019 (Exhibit C to Rule 59 motion, showing photo of motion roster)*).

On April 23, 2019, after receiving notice of the Rule 601 conflict, Respondents then filed their untimely affidavit – 43 hours before their motions were heard. (*Affidavit of Brian Piercy filed April 23, 2019 with Exhibit*). Respondents did not file any supporting memoranda at all. (*Actions tab of Public Index*).

On April 25, 2019, Respondents appeared and made the following statement to the Trial Court: “MR. THOMPSON: Plaintiffs’ counsel, I don't know where they are or why they’re not here. Mr. Jefferies sent the court an email on Monday asking that this matter be continued due to a conflict on the trial roster. Your office sent back an email to him on Monday indicating that that trial conflict didn’t exist any longer because the case was continued. I have not heard anything more from him since that time.” (*Transcript p.3, line 21 – p.4, line 2*).

Without further inquiry, the Court heard Respondents’ motions to dismiss. (*Transcript p.4, line 3*) (“THE COURT: All right. All right. Let me hear from you.”).

Respondents made an argument and then requested that the trial court consider matters outside the pleadings – specifically including the untimely affidavit – and convert their motions to dismiss into Rule 56 motions for summary judgment. (*Transcript, p. 6, lines 3-13*).

The trial court asked Respondents if they could provide matters outside the pleadings (*Transcript p.6, lines 14-16*) (“THE COURT: Well, I mean, have you got an affidavit? Have you got anything other than your answer denying the allegation in the complaint?”). Respondents replied in the affirmative. The trial court entertained further argument concerning the affidavit.

The trial court then converted the motions to dismiss into motions for summary judgment and granted them. (*Transcript p.8, lines 5-7*) (“THE COURT: All right. I’m going to convert this to a motion for summary judgment based upon the affidavit of Mr. Piercy, and I’m going to grant the motion.”).

At 4:14 p.m. on April 25, 2019, the Trial Court entered a Form 4 Order granting summary judgment to Respondents (*Form 4 Order entered April 25, 2019*).

On May 7, 2019, Appellants filed a motion under Rules 59 and 60, SCRPC, to amend or vacate the Form 4 Order. (*Appellants’ motion to amend or to vacate filed May 7, 2019 with attached exhibits and memorandum*).

The May 7, 2019 motion contained the same arguments that Appellants raise again in this appeal.

On May 20, 2019, Appellants filed a Notice of Appeal. (*Notice of Appeal May 20, 2019*).

On June 20, 2019, the Trial Court declined to consider Appellants’ May 7, 2019 motion based on purported lack of jurisdiction due to the notice of appeal having been filed. (*Form 4 Order entered June 10, 2019*).

STANDARD OF REVIEW

Whether the trial court properly heard and decided Respondents’ motions in Appellants’ absence despite Rules 6, 12, 40, and 56, SCRPC, Rule 601, SCACR, and the Supreme Court’s Civil Motions Pilot Program Order dated September 10, 2015, is an issue of law that is reviewed de novo. Fairchild v. S.C. Dep’t of Transp., 398 S.C. 90, 108, 727 S.E.2d 407, 416 (2012) (“The interpretation of court rules and statutes presents an issue of law that is reviewed de novo.”); Id. (“In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes.”); Catawba Indian Tribe of S.C. v. State,

372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007) (“The issue of interpretation of a statute is a question of law for the court. The determination of legislative intent is a matter of law. We are free to decide a question of law with no particular deference to the circuit court.”) (internal quotations and citations omitted).

ARGUMENT

The circuit court should not have heard nor decided Respondents’ motions on April 25, 2019 for multiple reasons, any one of which is sufficient on its own to require reversal and remand. First, the circuit court erred in hearing Respondents’ motions because the motions were not ready to be heard pursuant to the Supreme Court’s Civil Motions Pilot Program Order dated September 10, 2015. Second, the circuit court erred in converting Respondents’ motions to summary judgment motions without providing “all parties [with a] reasonable opportunity to present all material made pertinent to such a motion by Rule 56.” Third, the circuit court erred in basing its decision on an “ambush affidavit” which was untimely filed under Rule 6(d). Fourth, the circuit court erred in hearing Respondents’ motions despite Appellants’ counsel having notified the court and Respondents of a Rule 601, SCACR, conflict. Fifth, the circuit court erred in hearing Respondents’ motions when the roster unequivocally showed that the hearings were not going forward at that date and time.

I. The Trial Court erred in hearing Respondents’ motions to dismiss in violation of the Supreme Court’s Order dated September 10, 2015.

Respondents did not meet the prerequisites for having their motions heard. Accordingly, the Trial Court erred in hearing the motions. The Supreme Court’s Civil Motions Pilot Program order dated September 10, 2015 required Defendants to submit “a supporting memorandum of law” contemporaneously with their motions and *prior* to any hearing on the matter. (*Order of the Supreme Court dated September 10, 2015 (highlighting added)*). The sole exception for instances

where “a full explanation of the motion is contained within the motion and a memorandum would serve no useful purpose” is facially inapplicable here, as both of Respondents’ motions to dismiss are bare-bones motions containing scarcely any facts and no legal argument at all. (*Respondents’ Motions to Dismiss filed March 20, 2019*).

Defense counsel is presumed to be aware of the governing orders, rules, etc. in the counties where they practice. However, contrary to the Supreme Court’s Order, Defendants did not submit a memorandum of law with their motions, nor did they submit one prior to the Hearings. (*Actions tab of Public Index*). As a result, the Hearings were held, and a Form 4 Order issued, all contrary to the mandatory procedure required by the Supreme Court’s September 10, 2015 Order.

Non-compliance with the Supreme Court’s Order is not in the nature of an affirmative defense, which may only apply when asserted. Rather, each of us – lawyers and Judges alike – is required to comply with the Supreme Court’s valid orders even when no one reminds us. In return, each of us is entitled to presume that *others* will comply with the Supreme Court’s valid orders – even when no one is watching. Non-compliance with the Supreme Court’s Order alone is sufficient to require this Court to vacate the Form 4 Order. See e.g. Matter of Krawcheck, 417 S.C. 470, 473, 790 S.E.2d 781, 782 (2016) (not proper “to willfully violate a valid order of the Supreme Court.”).

II. The Trial Court erred in converting Respondents’ motions to dismiss into motions for summary judgment without providing Appellants a reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Rule 12(b) provides that when a 12(b) motion is converted to a summary judgment motion, “all parties shall be given reasonable opportunity to present all material made pertinent

to such a motion by Rule 56.” Rule 12(b), SCRCP. Appellant was not provided with any opportunity to present any material, let alone a *reasonable* opportunity to present *all* material.

This is not only because the hearings were held in Appellants’ counsel’s absence. Even if Appellants’ counsel had been present, he would not have been able to obtain affidavits, depositions, answers to interrogatories, or admissions on file during the hearings. It was not proper for Defendants to wait until almost the eve of the Hearings, file an improper ambush affidavit (see Section III below), and then deny Appellant any opportunity to submit any pertinent material in response (especially when they knew or should have known that Appellants’ counsel would not be there). Accordingly, the Court should not have converted the Rule 12(b) motions into summary judgment motions without any notice to Appellant that it was doing so and without providing Appellant any opportunity to present all pertinent material.

III. The Trial Court erred in granting Respondents’ motions to dismiss based upon untimely affidavits.

The Trial Court based its decision on the Affidavit of defendant Brian Piercy. (*Transcript p.8, lines 5-7*) (“THE COURT: All right. I’m going to convert this to a motion for summary judgment based upon the affidavit of Mr. Piercy, and I’m going to grant the motion.”). This reliance on Defendant’s affidavit is improper, as the affidavit was untimely. The affidavit was filed at 2:17 p.m. on April 23, 2019, less than 48 hours before the Hearings. (*Affidavit of Brian Piercy filed April 23, 2019 with Exhibit*). This is improper under Rule 6(d), Rule 56, and the Supreme Court’s September 10, 2015 Order. Rule 6(d), SCRCP, (“When a motion is to be supported by affidavit, the affidavit shall be served with the motion”); Supreme Court Order dated September 10, 2015 (“Affidavits and other materials supportive of the motion shall be filed

and served with the motion.”); Rule 56(c) (not even the non-moving party may file affidavits later “than two days before the hearing.”).

Use of the term “shall” indicates that contemporaneous filing of affidavits is not optional. Collins v. Doe, 352 S.C. 462, 470, 574 S.E.2d 739, 743 (2002) (“Under the rules of statutory interpretation, use of words such as ‘shall’ or ‘must’ indicates the legislature’s intent to enact a mandatory requirement.”). Nonetheless, instead of filing their affidavit with the motions as required, Defendants waited over a month and filed the affidavit just 43 hours before the Hearings, and (perhaps not coincidentally) the day *after* Defendants learned that Appellants’ counsel would not be present on the morning of the 25th. The grossly untimely “ambush affidavit”¹ cannot form the basis of a valid order.

IV. The Trial Court erred in hearing Respondents’ motions to dismiss despite Rule 601 and without proper notice to Appellant.

On April 22, 2019, Appellants advised the Court of a Rule 601 conflict that prevented the hearings on Defendants’ Motions to Dismiss (“Hearings”) going forward on the morning of April 25, 2019. (*Email to the Trial Court dated April 22, 2019*). As a result, by “automatic operation of the Rule—without the permission of the lower priority tribunal—[Appellants’] attorney [was] excused from appearing in the lower priority tribunal.” Spalt v. S.C. Dep’t of Motor Vehicles, 423 S.C. 576, 588, 816 S.E.2d 579, 585 (2018). Accordingly, the roster was revised to show that the Hearings were not going forward on April 25, 2019, and Plaintiff’s counsel removed them from his calendar. (*Internal email dated April 24, 2019 (Exhibit C to Rule 59 motion, showing photo of motion roster)*).

¹ Ambush by affidavit “demeans our adversarial system.” *South Carolina Lawyer* November-December 2000 - Michael F. Gillen Civility Among Lawyers.

The dispositive fact – which is undisputed – is that Appellants’ counsel notified the circuit court and Respondents of the Rule 601 conflict. This notification prevents the hearing going forward “*even if* the judge or hearing officer reasonably believes the attorney has not adequately complied with Rule 601(c).” Spalt v. S.C. Dep’t of Motor Vehicles, 423 S.C. 576, 588, 816 S.E.2d 579, 585 (2018) (emphasis added). As discussed in Spalt, trial judges have a variety of options to deal with attorneys who are not compliant with Rule 601 or whom they believe are abusing the privileges it confers, but dismissing the case is not one of those options. Id.

Subsequently, the trial that created the Rule 601 conflict was continued. However, no notice was given to Appellants that the Hearings would again go forward, and the roster continued to show that the Hearings were not going forward. Appellants’ counsel did receive notice via email that a hearing *in a different case* was being placed back on the roster for the afternoon of the 24th (*Emails to and from the Trial Court dated April 22-25*), and indeed the roster reflected that the other hearing was going forward. However, as of 3:04 p.m. the afternoon before the Hearings were held, the roster still showed that the Hearings in this case were *not* going forward. (*Internal email dated April 24, 2019 (Exhibit C to Rule 59 motion, showing photo of motion roster)*). The roster showed the same information when Appellants’ counsel checked again on the morning of the 25th.

Based on notice and the change to the roster for the afternoon 4/24 hearing and *no notice* and *no change* to the roster for the morning 4/25 Hearings, Appellants’ Counsel reasonably concluded that the morning Hearings at issue had not been placed back on the roster to be heard on the 25th. Appellants’ counsel checked the roster the afternoon of the 24th, and it was consistent with counsel’s understanding — that the afternoon hearing would be held on the 24th,

but the 4/25 morning Hearings would not be held. The same was true when counsel checked the roster again on the morning of the 25th.

As a result of the above, Appellants' counsel had no notice at all that the hearings were going to go forward on the morning of the 25th, let alone the required 10-day notice. The Form 4 Order was thus granted without due process (i.e. without notice and an opportunity to be heard). Kurschner v. City of Camden Planning Comm'n, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008) ("The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review."). Accordingly, it should be vacated, and the matter remanded for a hearing on the merits.

V. The Trial Court erred in hearing Respondents' motions to dismiss in the absence of Appellants' counsel.

Opposing counsel was copied on the Rule 601 conflict email, and therefore knew that Appellants had advised the court of the Rule 601 conflict that prevented the Hearings going forward. (*Email to the Trial Court dated April 22, 2019*). If opposing counsel had taken any steps to locate Appellants' counsel before proceeding with the Hearings – by calling, emailing, texting, etc. – he would have found that Appellants' counsel was less than a mile from the courthouse all morning, preparing for his afternoon hearings. Respondents' counsel did not take any such action. Instead, he simply told the Trial Court "I don't know where they are or why they're not here. Mr. Jefferies sent the court an email on Monday asking that this matter be continued due to a conflict on the trial roster. Your office sent back an email to him on Monday indicating that that trial conflict didn't exist any longer because the case was continued. I have not heard anything more from him since that time." (*Transcript p.3, line 21 – p.4, line 2*).

Appellants' counsel could easily have appeared had anyone advised him that (despite what the roster said) the Hearings were going to be held. However, opposing counsel did not take


any steps that we are aware of to contact or alert Appellants' counsel that he intended to proceed with the Hearings. Instead, the matter was heard when the roster said it was not going to be and without Appellants' counsel being present. The Form 4 Order was thus granted without due process, and it should be vacated. See McIntyre v. Sec. Comm'r of S.C., 425 S.C. 439, 452, 823 S.E.2d 193, 200 (Ct. App. 2018) (reversing an order obtained by denial of due process).

CONCLUSION

Wherefore, based on the foregoing, the Trial Court's decision should be reversed because (a) the circuit court erred in hearing Respondents' motions because the motions were not ready to be heard pursuant to the Supreme Court's Civil Motions Pilot Program Order dated September 10, 2015; (b) the circuit court erred in converting Respondents' motions to summary judgment motions without providing "all parties [with a] reasonable opportunity to present all material made pertinent to such a motion by Rule 56."; (c) the circuit court erred in basis its decision on "ambush affidavits" which were untimely filed under Rule 6(d); (d) the circuit court erred in hearing Respondents' motions despite Appellants' counsel having notified the court and Respondents of a Rule 601, SCACR, conflict; and/or (e) the circuit court erred in hearing Respondents' motions when the roster unequivocally showed that the hearings were not going forward at that date and time. Therefore, Appellants respectfully request that this Court reverse the Trial Court's dismissal and remand the matter to the Trial Court for a proper hearing on Respondents' motions to dismiss.

[SIGNATURE ON FOLLOWING PAGE]

August 21, 2019

A handwritten signature in black ink, appearing to be "Lane D. Jefferies", written over a horizontal line.

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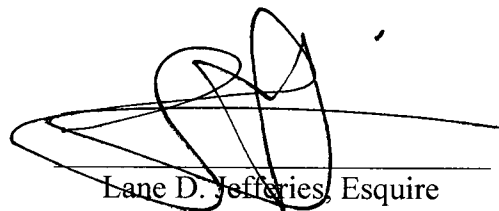
.....Respondents

PROOF OF SERVICE FOR NOTICE OF APPEAL

I certify that Appellants' Initial Brief and Designation of Matter was served on Respondents by U.S. Mail Postage Prepaid on August 21, 2019, addressed to Respondent's attorney of record, Joseph D. Thompson, III, 111 Coleman Boulevard, Suite 301, Mount Pleasant, South Carolina 29464.

August 21, 2019

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August 21, 2019

Sent Via Regular U.S. Mail

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RE: *Lauren Egan v. Dock Street at the Market Common, et al.*
Case No.: 2019-CP-26-00946

Dear Ms. Kitchings:

Enclosed for filing please find the original of Appellants' Initial Brief pursuant to Rule 208.
If you should have any questions, please do not hesitate to contact us.

Regards,

4


Lane D. Jefferies, Esq.

Enclosures as stated

Cc: Joseph D. Thompson, III, Esq. (Via U.S. Mail and Email)

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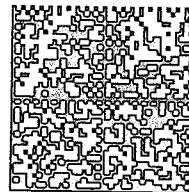
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