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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM HORRY COUNTY
Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2019-000918
Horry County 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,

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

MOTION TO DISMISS APPEAL

Respondents Ocean Front Guru Real Estate Sales & Development, Inc. and Brian Piercy,
by and through their undersigned counsel, hereby move this Court, pursuant to Rule 240(a),
SCACR, to dismiss the Appeal of the Appellants Lauren Egan, and Lauren K. Egan 2017
Irrevocable Trust.

BRIEF SUMMARY OF STATEMENT OF THE CASE¹

Appellants Lauren Egan and Lauren K. Egan 2017 Irrevocable Trust initiated this
construction defect action by filing a Complaint in the Horry County Court of Common Pleas, on
February 16, 2019, alleging defects and deficiencies with real property Egan purchased via a

¹ For brevity, Respondents incorporate by reference its Statement of the Case and Arguments encompassed in their
Initial Brief filed November 4, 2019, as if set forth fully herein verbatim.

transaction in which she was represented by her agents, Respondents Ocean Front Guru Real Estate Sales & Development, Inc. and Brian Piercy. Respondents filed Answers on March 20, 2019, coupled with Motions to Dismiss pursuant to Rule 12(b)(6), SCRCP.

On March 26, 2019, the trial court provided notice to the parties that Respondents' motions to dismiss would be heard by the Honorable Benjamin H. Culbertson on April 25, 2019 at 1:00 p.m., at the Horry County Courthouse. At no time prior to the hearing date did Appellants raise any objection or complain that they did not know the exact nature of Respondents' motions or the arguments that would be submitted for the court's determination.²

On April 25, 2019, the trial court held a hearing on Respondents' motions. None of Appellants' three attorneys appeared at the hearing. (Tr. of Apr. 25, 2019 Hr'g 3:21- 4:1). At the hearing, the trial court heard oral argument on Respondents' motions to dismiss. (Tr. of Apr. 25, 2019 Hr'g 4:3-5:21). The trial court converted the motions to dismiss into motions for summary judgment and granted the converted motions for summary judgment. A Form 4 Order was issued on April 25, 2019. (Tr. of Apr. 25, 2019 Hr'g at 8:5-7; Apr. 25, 2019 Form 4 Order). Importantly, not only did counsel for Appellants fail to attend the hearing, counsel also failed to file a response opposing Respondents' motions to dismiss.

ARGUMENT

I. APPELLANTS DID NOT PRESERVE ANY ISSUES TO BE HEARD ON APPEAL

Appellants have not preserved any issues for appellate review and cannot challenge the trial court's Order granting summary judgment.

² Respondents motions were properly noticed and scheduled for hearing. It is uncontested that the court provided notice to all parties of the date and time of the hearing on Respondents' motions via email notification dated March 22, 2019. The hearing occurred on the exact date, time and location contained in the notice, i.e. April 25, 2019 at 1 p.m. at the Horry County Courthouse. It is also uncontested that Appellants never filed a formal request and/or motion for a continuance of the hearing. It is also uncontested that Appellants' counsel was never provided notice and/or confirmation from any judge that the hearing would not go forward as scheduled.

A. Motions to Dismiss and Notice of Hearing

Simultaneously with their Answers, Respondents filed Motions to Dismiss on March 20, 2019. On March 26, 2019, the trial court provided notice to the parties that Respondents' motions would be heard by the Honorable Benjamin H. Culbertson on April 25, 2019 at 1:00 p.m. at the Horry County Courthouse. At no time prior to the hearing date did Appellants raise any objection or complain that they did not know the exact nature of Respondents' motions or the arguments that would be submitted for the court's determination. Appellants never filed a response in opposition to Respondents' motions to dismiss and consequently presented no issues for the trial court's consideration. Failure to raise an issue in a memorandum in opposition of summary judgment, or at the summary judgment hearing will preclude appeal on that issue from a grant of summary judgment. Easterling v. Burger King Corp., 416 S.C. 437, 786 S.E.2d 443 (Ct. App. 2016).

B. Motions Hearing

On April 25, 2019, the trial court held a hearing on Respondents' pending motions. Even though Appellants had been notified that no conflict existed because the unrelated case had been continued, none of Appellants' three attorneys appeared at the hearing. (Tr. of Apr. 25, 2019 Hr'g 3:21-4:1). At the hearing, the trial court heard oral argument on Respondents motions to dismiss. (Tr. of Apr. 25, 2019 Hr'g 4:3-5:21). The trial court converted the motions to dismiss into motions for summary judgment and accepted Respondent Piercy's affidavit and the Contract between Appellants and Respondents. (Tr. of Apr. 25, 2019 Hr'g 6:14-24; 8:5-7). Based on Piercy's affidavit and the Contract, the trial court granted the converted motions for summary judgment and issued a Form 4 Order on April 25, 2019. (Tr. of Apr. 25, 2019 Hr'g at 8:5-7; Apr. 25, 2019 Form 4 Order).

Since the Appellants did not appear for the hearing to contest Respondents' motions, no objections and/or arguments were made for the trial court to consider and no opposing issues were brought before the trial court and ruled upon. As such, there are no preserved issues for this Court's review and consideration. *Id.* 416 S.C. 437, 786 S.E.2d 443.

C. Appellants did not file a timely Rule 59, SCRPC Motion

In review, Appellants failed to file a response to Respondents' motions to dismiss, failed to appear at the motions hearing, failed to make objections and/or arguments for the trial court to consider, and failed to preserve even one issue for this Court's review. Appellants then failed to file a Rule 59, SCRPC motion and move for reconsideration of the April 25, 2019 Order.

Despite receiving notice of the Form 4 Order granting summary judgment on April 25, 2019, Appellants did not file a Rule 59, SCRPC motion and did not raise any concerns about their absence at the hearing until May 7, 2019, twelve days after entry and service of the Order.³ Pursuant to Rule 59(e), Appellants had ten days from receipt of the Order to file a motion requesting the trial court alter, amend, or reconsider its judgment. Because of Appellants' failure to file a timely Rule 59 motion, the trial court lost jurisdiction over the case, at least with regard to the summary judgment Order. Rule 59(e) SCRPC; *Pitman v. Republic Leasing Co, Inc.*, 351 S.C. 429, 432-33, 570 S.E.2d 187, 189-90 (Ct. App. 2004) (“[O]ur established case law [is] that a trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed.”) (emphasis added); see also *Overland, Inc. v. Nance*, 423 S.C. 253, 257, 815 S.E.2d 431, 433 (2018) (“The failure to serve a Rule 59(e) motion within ten days of receipt of notice of [order entry] converts the order into a final judgment, and the aggrieved party's only recourse is to file a notice of intent to appeal.”)

³ The Motion filed by Appellants on May 7, 2019, did not include any requested relief pursuant to Rule 59(e) SCRPC.

Moreover, the supreme court has emphasized that “the ten-day deadline in Rule 59(e) is an absolute deadline. A trial court does not have the power to alter or amend a final order if more than ten days passes and no Rule 59(e) motion has been served.” Id. 423 S.C. at 256, 815 S.E.2d at 433; (citing Leviner v. Sonoco Prods. Co., 339 S.C. 492, 494, 530 S.E.2d 127, 128 (2000)). Notwithstanding the ten-day deadline, a party cannot use a motion to reconsider, alter, or amend a judgment to present an issue that could have been raised prior to the judgment but was not. Dixon v. Dixon, 362 S.C. 388, 608 S.E.2d 849 (2005) (holding that issues raised for first time in Rule 59, SCRCP, motion are not preserved for review).

D. Issue preservation is the foundation for appellate review

For an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal. Linda Mc Co., Inc. v. Shore, 390 S.C. 543, 556-57, 703 S.E.2d 499, 506 (2010) (“It is well settled that, but for a very few exceptional circumstances, an appellate court cannot address an issue unless it was raised to and ruled upon by the trial court.” (quoting Lucas v. Rawl Family Ltd. P 'ship, 359 S.C. 505, 598 S.E.2d 712 (2004)). Failure to raise an issue in a memorandum in opposition of summary judgment, in a Rule 59(e) motion, or at the summary judgment hearing will preclude appeal on that issue from a grant of summary judgment. Easterling v. Burger King Corp., 416 S.C. 437, 786 S.E.2d 443 (Ct. App. 2016) (emphasis added).⁴

The supreme court has summarized the minimum requirements of issue preservation:

⁴ “Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.” Home Med. Sys., Inc. v. South Carolina Dep't of Rev., 382 S.C. 556, 562, 677 S.E.2d 582, 586 (2009) (quoting l'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)). “The requirement also serves as a keen incentive for a party to prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case.” l'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) (emphasis added); Ellie, Inc. v. Micchichi, 358 S.C. 78, 594 S.E.2d 485 (Ct. App. 2004).

"Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful review." Queens Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 386 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct.App. 2006). At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. Wilder Corp. v. Wile, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). It is "axiomatic that an issue cannot be raised for the first time on appeal." Id. Imposing such a requirement on the appellants "is meant to enable the lower court to rule properly after it has considered all relevant facts, law and arguments." I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011). Here, the trial court record consists of only 1) Respondents' motions to dismiss (to which Appellants did not file a response in opposition); 2) the transcript from the motions hearing on April 25, 2019 (which Appellants did not attend); and 3) the Form 4 Order dated April 25, 2019 granting Respondents' motions for summary judgment.

Simply stated, the Appellants have done nothing to preserve any issues for review and, therefore, there are no issues for this Court to consider.

II. IF THE COURT DOES NOT DISMISS THE APPEAL, RESPONDENTS MOVE TO STRIKE SPECIFIC DESIGNATIONS PROPOSED BY APPELLANTS IN THEIR DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

Assuming *arguendo* that the Court does not dismiss Appellants' appeal, Respondents, pursuant to Rule 210(c) SCACR, respectfully move to strike the following designations proposed by Appellants in their Designation of Matter to be Included in the Record on Appeal ("Designation of Matter"):⁵

2. Emails to and from the Court, including without limitation those dated:
 - a. March 26, 2019
 - b. April 22, 2019

⁵ The numbers herein correlate to the designation in Appellants' Designation of Matter.

c. April 23-25, 2019

3. Internal email dated April 24, 2019 (Exhibit C to Rule 59 motion, showing photo of motion roster).
4. Order of the Supreme Court dated September 10, 2015 (Exhibit D to Rule 59 motion).
6. Actions tab of Public Index in Lauren Egan, plaintiff, et al VS Dockstreet At The Market Common Inc, defendant, et al.
9. Appellants' motion to amend or to vacate filed May 7, 2019 with attached exhibits and memorandum.
11. Form 4 Order entered June 10, 2019.

Rule 210(c), SCACR unequivocally states “The Record [on Appeal] shall not, however, include matter which was not presented to the lower court.” Here, Appellants have designated matters that were not presented to the trial court and incorporate by reference matters not presented to the trial court, with regard to Respondents’ Motions to Dismiss and/or Motions for Summary Judgment. The above-listed designations first appeared in Appellants’ untimely Rule 59 motion.⁶ The record in this case is exceptionally clear. Appellants did not file a response opposing Respondents’ motions to dismiss, did not appear for the hearing to contest Respondents’ motions and, therefore, no objections and/or arguments were made for the trial court to consider. Furthermore, Appellants did not file a motion pursuant to Rule 59, SCRCF within the requisite ten days. Accordingly, if the Court does not grant Respondents’ motion to dismiss, Respondents

⁶ See Section I, subpart C of this Brief. Appellants’ motion came for hearing before Judge Culbertson on June 10, 2019. The trial court issued a Form 4 order staying Appellants’ motion because the prior motion had been appealed, thereby divesting the trial court of jurisdiction to decide the pending motion. Without question, the trial court did not rule on anything in Appellants’ Rule 59 motion and Appellants did not appeal the June 10, 2019 Order of Judge Culbertson.

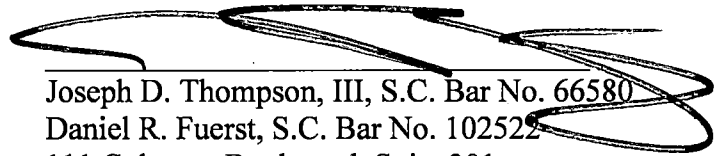
respectfully request the Court strike Appellants' designations 2, 3, 4, 6, 9 and 11, from their Designation of Matter.

III. CONCLUSION

In failing to file a response to Respondents' motions to dismiss, in failing to appear at the motions hearing, in failing to make objections and/or arguments for the trial court to consider, and in failing to file a timely Rule 59, SCRCP, Appellants have not preserved any issues for this Court's review. For the foregoing reasons and cited authorities, Respondents respectfully request this Honorable Court dismiss Appellants' appeal and/or strike Appellants' designated material which was not presented to the trial court.

Respectfully Submitted,

HALL BOOTH SMITH, PC



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Attorneys for Respondents Ocean Front Guru Real Estate Sales & Development, Inc. and Brian Piercy

November 13, 2019
Mount Pleasant, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM Horry COUNTY
Benjamin H. Culbertson, Circuit Court Judge

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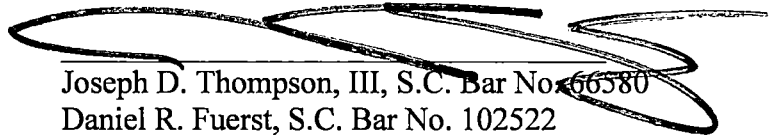
I hereby certify that I have served Respondents' Motion to Dismiss Appeal upon the Appellants by way of U.S. Mail, stamped First Class delivery, on November 13, 2019 addressed to Appellants' attorneys of record as follows:

Lane D. Jefferies, Esquire
Eric M. Poulin, Esquire
Roy T. Willey, IV, Esquire
32 Ann Street
Charleston, South Carolina 29403

Kenneth Thomas David, Esquire
72 N Bedford Street
Unit A
Arlington, Virginia 22201

(Signature appears on succeeding page)

HALL BOOTH SMITH, PC

A large, stylized handwritten signature in black ink, appearing to be 'Joseph D. Thompson, III', written over a horizontal line.

Joseph D. Thompson, III, S.C. Bar No. ~~66580~~

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November 13, 2019
Mount Pleasant, South Carolina



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November 13, 2019

VIA FEDERAL EXPRESS OVERNIGHT DELIVERY

South Carolina Court of Appeals
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Clerk of Court Office
1220 Senate Street
Columbia, South Carolina 29201

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SC Court of Appeals

RE: Egan v. Dockstreet at the Market Common, Inc., et al.
Appellate Case No. 2019-000918
HBS File No.: 6740.0017

Dear Amelia:

As it pertains to the above-referenced appeal, enclosed please find the original and six copies of Respondents' Motion to Dismiss Appeal, along with our firm's check in the amount of \$50.00, representing the motion filing fee.

I have included an extra copy of the Motion and would appreciate your returning the filed copy to our office in the enclosed self-addressed stamped envelope. Thank you for your assistance in this matter. If you have any questions and/or concerns, please do not hesitate to contact our office.

Very truly yours,



Joseph D. Thompson, III

JDT,III/sb

cc: Lane D. Jefferies, Esquire
Eric M. Poulin, Esquire
Roy T. Willey, IV, Esquire
Kenneth Thomas David, Esquire

MOUNT PLEASANT, SC

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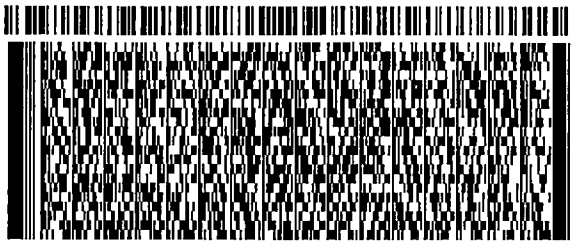
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SOUTH CAROLINA COURT OF APPEALS
CLERK OF COURT'S OFFICE
1220 SENATE STREET
COLUMBIA SC 29201

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(803) 734-1890
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PC:

REF: 6740.0017 EGAN V. DOCKSTREET

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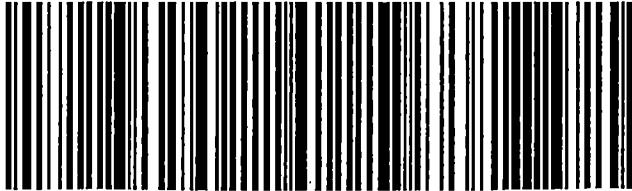
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SC Court of Appeals

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