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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
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,

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SC Court of Appeals

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

.....Respondents

APPELLANTS' MOTION FOR LEAVE AND RETURN TO MOTION TO DISMISS

Respondents' Motion to Dismiss should be denied in its entirety, and Appellants' Motion for Leave should be granted, for the reasons set forth below.

I. Respondents' statement to this Court that "Appellants did not preserve any issues to be heard on appeal" is incorrect. (**Motion to Dismiss Appeal, p. 2**). The truth is that Appellants preserved the issues by filing a Motion to Vacate. (**Exhibit 1**). Respondents are attempting to have

their cake and eat it to. Respondents successfully argued to the Trial Court that the Motion to Vacate could not be heard because this appeal was pending. (**Exhibit 2**). Now Respondents argue circularly to this Court that the appeal cannot go forward because the Motion to Vacate was not heard. (**Motion to Dismiss Appeal, p. 6**).

Respondents cannot have it both ways – either the Motion to Vacate must go forward or this appeal must go forward. The Trial Court merely stayed Appellants’ Motion to Vacate it – it was not dismissed. (**Exhibit 2**). As a result, Appellants’ Motion to Vacate remains pending before the Trial Court. Accordingly, Appellants hereby move this Court pursuant to Rule 60(b), South Carolina Rules of Civil Procedure, for leave to have the Motion to Vacate heard by the Trial Court.¹

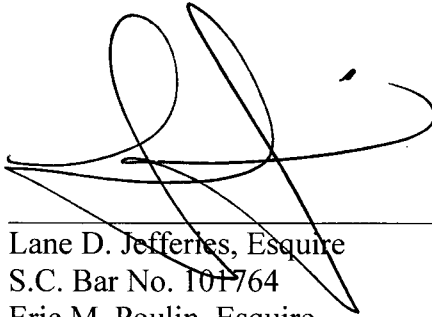
Appellants also note that Respondents’ argument that dismissal of this appeal is proper because none of this came before the Trial Court at the April 25, 2019 hearing is disingenuous. Indeed, the gravamen of this appeal is exactly that – that Appellants were prevented from raising any issues at all at the hearing because the hearing was improperly scheduled and held. This is described in detail in Appellants’ Initial Brief on file with this Court and incorporated herein by reference. To raise the very *raison d’être* of the appeal as a basis for its dismissal is nonsensical.

II. Respondents’ statement to this Court that Appellants’ designations of matter “were not presented to the trial court” is likewise incorrect for the very same reasons as described above. (**Motion to Dismiss Appeal, p. 7**). In support of this incorrect statement, Respondents make the further incorrect statement that “[t]he above-listed designations first appeared in Appellants’ untimely Rule 59 motion.” (**Motion to Dismiss Appeal, p. 7**). However, Plaintiff’s May 7, 2019 Motion to Vacate is *not* an “untimely Rule 59 motion.” Instead, it is a timely “Motion to *Vacate*,

¹The Motion to Vacate has already been filed; it was filed prior to service of the Notice of Appeal. However, the hearing was originally scheduled for June 10, 2019, which fell *after* service of the Notice of Appeal.

Alter, or Amend . . . pursuant to Rules 59(b) and **60(a) and (b) . . .**" (**Exhibit 1**) (**emphasis added**).
According, the matter was presented to the Trial Court, the designations are proper, and this Court should not strike them.

For the reasons set forth above, Appellants respectfully request that this Court DENY Respondents' Motion to Dismiss in its entirety, and GRANT Appellants' Motion for Leave to have the Motion to Vacate heard by the Trial Court.



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January 2, 2020

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Exhibit 1

ELECTRONICALLY FILED - 2019 May 07 9:34 PM - HORRY - COMMON PLEAS - CASE#2019CP2600946

IN THE STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FOR THE 15TH JUDICIAL CIRCUIT
CASE NO: 2019-CP-26-00946

LAUREN EGAN, and LAUREN K.
EGAN 2017 IRREVOCABLE TRUST,

Plaintiff(s),

v.

**PLAINTIFF'S MOTION TO VACATE,
ALTER, OR AMEND FORM 4 ORDER
DATED APRIL 25, 2019.**

DOCKSTREET AT THE MARKET
COMMON, INC.; DOCK STREET
COMMUNITIES, INC.; DOCK STREET
HOMES & COMMUNITIES, INC.;
SANDS BUILDING GROUP, INC.;
STERLING HOMES; REAL ESTATE
MODO, INC.; OCEAN FRONT GURU
REAL ESTATE SALES &
DEVELOPMENT, INC.; and BRIAN
PIERCY,

Defendant(s).

TO: THE HONORABLE COURT AND ALL COUNSEL OF RECORD

YOU WILL PLEASE TAKE NOTICE that the Plaintiff Lauren Egan, by and through undersigned counsel, will move the presiding judge of the Horry County Court of Common Pleas for an Order Vacating, Altering, or Amending its Form 4 Order dated April 25, 2019, pursuant to Rules 59(b) and 60(a) and (b), and other applicable law for the reasons set forth below.

COMES NOW the Plaintiff and does so move.

PROCEDURAL BACKGROUND

Defendants filed bare-bones Motions to Dismiss. They did not file any supporting memoranda as required. They did not file their affidavits with their motions as required. Instead, Defendants waited until they learned that Plaintiff's counsel had a Rule 601 conflict on the

original hearing date. Only then did they file affidavits – 43 hours before their motions were heard.

Defendants then appeared on the original hearing date, and despite the roster clearly stating that the hearings were not going forward, and despite the complete lack of notice to Plaintiff, Defendants argued their motions anyway. There is no evidence that Defendants attempted to contact Plaintiff's counsel when he did not appear. There is no evidence of which Plaintiff is aware that Defendants informed the Court of the reason for Plaintiff's counsel's non-appearance.

Instead, Defendants proceeded. They presented their untimely affidavits. They succeeded in converting their Motions to Dismiss into summary judgment motions. Without giving Plaintiff any opportunity to obtain or present any pertinent material in response, the Court granted summary judgment in favor of Defendants by Form 4 Order dated April 25, 2019 ("Form 4 Order").

The Form 4 Order came as a complete surprise to Plaintiff's counsel, as the Hearings should not have been held in the first place.

LEGAL ANALYSIS

1. The hearings on Defendants' motions to dismiss were held without proper notice to Plaintiff.

On April 22, 2019, Plaintiff 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. **Exhibit A.** As a result, the Hearings were shown on the roster as not going forward on April 25, 2019, and Plaintiff's counsel removed them from his calendar.

Subsequently, the trial that created the Rule 601 conflict was continued. However, no notice was given to Plaintiff that the Hearings would go forward. Plaintiff's 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 (**Exhibit B**), 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. **Exhibit C**. The roster showed the same information when Plaintiff's 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, Plaintiff's Counsel reasonably concluded that the morning Hearings at issue had not been placed back on the roster to be heard on the 25th. Plaintiff's 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. The same was true when counsel checked the roster again on the morning of the 25th.

As a result of the above, Plaintiff's 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.

2. The Hearings were held in the absence of Plaintiff's counsel.

Opposing counsel was copied on the Rule 601 conflict email, and therefore knew that Plaintiff had advised the court of the Rule 601 conflict that prevented the Hearings going forward. **Exhibit A**. If opposing counsel had taken any steps to locate Plaintiff's counsel before

proceeding with the Hearings – by calling, emailing, texting, etc. – he would have found that Plaintiff’s counsel was less than a mile from the courthouse all morning, preparing for his afternoon hearings.

Plaintiff’s 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 Plaintiff’s counsel that he intended to proceed with the Hearings. It is unclear whether opposing counsel informed the Court of Plaintiff’s counsel’s anticipated absence, or the reason for it. Nonetheless, the matter was heard when the roster said it was not going to be, and without Plaintiff’s 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).

3. The Hearings were held in non-compliance with the Supreme Court’s Order dated September 10, 2015.

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.¹ **Exhibit D (highlighting added)**. 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. As a

¹ 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.

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 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 looking. 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.”).

4. Defendants' affidavit in support of their motions was untimely in multiple respects.

The Form 4 Order's apparent 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. 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. 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 Plaintiff's counsel would not be present on

the morning of the 25th. The grossly untimely “ambush affidavit”² cannot form the basis of a valid order.

5. Defendants’ motions to dismiss were converted to motions for summary judgment without proper notice to Plaintiff and without any opportunity for Plaintiff to present pertinent materials.

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. Plaintiff 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 Plaintiff’s counsel’s absence. Even if Plaintiff’s 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, and then deny Plaintiff any opportunity to submit any pertinent material in response (especially when they knew or should have not that Plaintiff’s 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 Plaintiff that it was doing so, and without providing Plaintiff any opportunity to present all pertinent material.

CONCLUSION

In the interest of justice, because of deprivation of due process, because of mistake, inadvertence, surprise, and/or excusable neglect, to avoid willfully violating a valid order of the Supreme Court, and for such other reasons as may be described in supplemental memoranda or

² Ambush by affidavit “demeans our adversarial system.” *South Carolina Lawyer* November-December 2000 - Michael F. Gillen Civility Among Lawyers.

during a hearing on the matter, Plaintiff respectfully requests that this Court VACATE its Form 4 Order dated April 25, 2019, and set Defendants' Motions to Dismiss to be heard on the next available motions roster.

Respectfully Submitted,

ANASTOPOULO LAW FIRM, LLC

s/ Lane D. Jefferies

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Charleston, South Carolina
May 7, 2019

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Horry Common Pleas

Case Caption: Lauren Egan , plaintiff, et al VS Dockstreet At The Market Common Inc , defendant, et al
Case Number: 2019CP2600946
Type: Order/Electronic Form 4

Presiding Circuit Court Judge

s/Benjamin H. Culbertson, Judge Code 2148

Electronically signed on 2019-06-10 11:06:56 page 3 of 3

ELECTRONICALLY FILED - 2019 Jun 10 11:55 AM - HORRY - COMMON PLEAS - CASE#2019CP2600946

Exhibit A

LECTRONICALLY FILED - 2019 May 07 9:34 PM - Horry - COMMON PLEAS - CASE#2019CP2600946



From: Lane Jefferies lane@akimlawfirm.com
Subject: Rule 601 conflict as to thee hearings on April 25, 2019
Date: April 22, 2019 at 8:40 AM
To: Benjamin H. Law Clerk Culbertson BCulbertsonlc@sccourts.org, Culbertson, Benjamin H. bculbertsonj@sccourts.org, cessenac@horrycounty cessenac@HorryCounty.org
Cc: TeamJefferies teamjefferies@googlegroups.com, Joseph Thompson, III JThompson@hallboothsmith.com, preston@brittainlawfirm.com

Dear Judge Culbertson:

We have two hearings currently on the roster for Thursday, April 25, 2019 in 2019-co-26-00946, Lauren Egan v. Docstreet. Unfortunately, a Rule 601 conflict has arisen which prevents those hearings going forward. Specifically, we are #2 on the jury trial roster with Judge Hyman in 2017CP2607342 Kathie Dehoyos VS Wanda Sokol. Please let us know if your Honor has any questions.

Best regards,
Lane Jefferies

--

Lane D. Jefferies
Trial Lawyer
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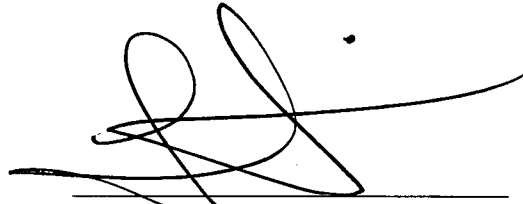
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PROOF OF SERVICE FOR APPELLANT'S MOTION
FOR LEAVE AND RETURN TO MOTION TO DISMISS

I certify that Appellant's Motion for Leave and Return to Motion to Dismiss was filed with the Clerk of the Court of Appeals of South Carolina and served on Respondents by U.S. Mail Postage Prepaid on January 2, 2020, addressed to Respondents' attorney of record, Joseph D. Thompson, III, 111 Coleman Boulevard, Suite 301, Mount Pleasant, South Carolina 29464.

[SIGNATURE ON FOLLOWING PAGE]

January 2, 2020



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HERB F. GLASS (SC)
J. CAMDEN HODGE (SC)
LANE D. JEFFERIES (SC)
THOMAS D. KANDLER, II (NC)
BYRON V. LEARY, II (SC)
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L. CRAYTON WILLIAMS (SC)

*OF COUNSEL

January 2, 2020

Sent Via Regular U.S. Mail

The Honorable Jenny Abbott Kitchings
Clerk of Court, S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

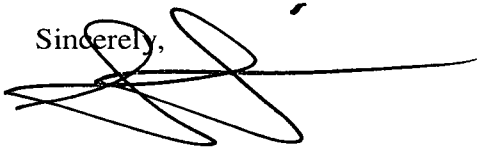
RE: *Lauren Egan v. Dock Street at the Market Common, et al.*
Case No.: 2019-CP-26-00946
Appellate Case No. 2019-000918

Dear Ms. Kitchings:

Enclosed for filing find the original and six (6) copies of Appellants' Motion for Leave and Return to Motion to Dismiss and Proof of Service. Additionally, we have enclosed a \$50.00 filing fee for the Motion. Please do not hesitate to contact our office if you have any questions.

Thank you.

Sincerely,



Lane D. Jefferies, Esq.

Enclosures as stated.

Cc: Joseph D. Thompson, III (By U.S. Mail and E-Mail)
Daniel R. Fuerst
Hall Booth Smith, PC
111 Coleman Boulevard, Suite 301
Mount Pleasant, South Carolina 29464

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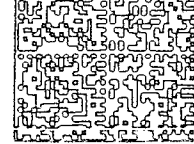
MAILING: 32 Ann Street, Charleston, South Carolina 29403

North Charleston: 2170 Ashley Phosphate Road, 3rd Floor, North Charleston, South Carolina 29406 * **Greenville:** 418 River Street, Greenville, SC 29601

Florence: 150 W. Evans Street, Florence, South Carolina 29501 * **Myrtle Beach:** 2411 N. Oak Street, Suite 407, Myrtle Beach, South Carolina 29577

Columbia: 1201 Main Street, Suite 1100, Columbia, South Carolina 29201 * **Raleigh, NC:** 8801 Fast Park Drive, Suite 301, Raleigh, NC 27617

Wilmington, NC: Appointment Only



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LAW FIRM

32 Ann Street
Charleston, SC 29403

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The Honorable Jenny Abbott Kitchings
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