

THE STATE OF SOUTH CAROLINA
In the 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

RECEIVED
JAN 14 2020
SC Court of Appeals

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.

RESPONDENTS' RETURN TO APPELLANTS' MOTION FOR LEAVE

This matter comes before the Court on Appellants' purported Motion for Leave to have their Motion to Vacate heard by the trial court. Essentially, Appellants are asking the Court to have their appeal remanded to the trial court to raise issues through their Motion to Vacate due to their failure to file a Rule 59(e), SCRCP motion.¹ Respondents respectfully submit that Appellants' Motion should be denied.²

¹ Appellants never filed a Rule 59(e) motion. Instead, they filed an untimely Rule 59(b) motion.

² In consideration of this Court, for brevity purposes, Respondents incorporate by reference their Statement of the Case and Statement of Facts detailed in their Initial Brief and Motion to Dismiss as if set forth fully herein verbatim.

ARGUMENT

I. APPELLANTS DID NOT PRESERVE ANY ISSUES TO BE HEARD ON APPEAL BY THIS COURT OR THE TRIAL COURT

Appellants contend they preserved the issues on appeal by filing a “Motion to Vacate, Alter, or Amend Form 4 Order Dated April 25, 2019” with the Horry County Court of Common Pleas on May 7, 2019. (Appellants’ Return to Motion to Dismiss, p. 1). In their motion, Appellants move the Court for an Order pursuant to Rules 59(b) and 60(a) and (b). Appellants never filed a Rule 59(e) motion and their untimely Rule 59(b) motion cannot, and does not, accomplish issue preservation or the relief of a Rule 59(e) motion.

A Rule 59(b) motion is a motion for a new trial, not a motion to vacate, alter, or amend an Order. A Rule 59(b) motion must be made no later than 10 days after the receipt of written notice of the entry of judgment or of the filing of an order disposing of the action, if no judgment has been entered.³ Even if a Rule 59(b) motion was an appropriate vehicle, it was filed late and out of time. A proper motion would have been a timely Rule 59(e) motion for reconsideration.

A Rule 59 motion is dissimilar to a Rule 60 motion.⁴ Both are distinct in their relief, filing deadlines and analysis. A Rule 60(b) motion is treated as a motion to vacate, not a motion for reconsideration or to alter or amend a judgment. Moreover, 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

³ Rule 59(b) Time for Motion. In non-jury actions the motion shall be made not later than 10 days after the receipt of written notice of the entry of judgment or of the filing of an order disposing of the action, if no judgment has been entered.

⁴ Rule 59 SCRPC New Trials; Amendment ff Judgments; Rule 60 SCRPC Relief from Judgment or Order.

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).

A. Appellants did not file a Rule 59(e), SCRCP Motion

Appellants received notice of the Form 4 Order granting summary judgment on April 25, 2019, and never filed a timely Rule 59(e) motion. Even assuming *arguendo* that Appellants filed a proper Rule 59(e) motion, such a motion would have been late. 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 Order. Appellants’ failure to file a timely Rule 59(e) motion divested the trial court of jurisdiction over the case with regard to the summary judgment Order. Rule 59(e) SCRCP; 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.”); 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.”)

Our 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)). Appellants

impermissibly attempt to piggyback an untimely Rule 59 motion with a timely, although improper, Rule 60 motion.

B. Issues raised for first time in a Rule 60, SCRPC, motion are not preserved for appellate review

Appellants' assertion that they preserved the issues on appeal in their motion to vacate under Rule 60(a) and (b) is incorrect. (Appellants' Return to Motion to Dismiss, p. 1). "Relief from judgment under Rule 60 should not be considered a substitute for appeal from a final judgment, particularly when it is clear the party seeking relief could have litigated at trial and on appeal the claims he now makes by motion." Smith Co. of Greenville, Inc. v. Hayes, 311 S.C. 358, 359, 428 S.E.2d 900, 902 (Ct. App. 1993). The issues asserted by Appellants were never properly preserved for this Court or the trial court's review. An issue must be ruled upon by the trial judge or raised by way of a Rule 59(e) motion, if the trial court failed to rule on the issue to be preserved for appellate review. Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991). Appellants' introduction of the issues pursuant to a Rule 60(b), SCRPC motion is improper.

Here, the trial court record consists of 1) the transcript from the motions hearing on April 25, 2019 (which Appellants did not attend); 2) the Form 4 Order dated April 25, 2019, granting Respondents' motions for summary judgment; and 3) the Form 4 Order dated June 10, 2019 in which the trial court stayed Appellants' Motion to Vacate, Alter or Amend Form 4 Order Dated April 25, 2019.⁵ None of Appellants' stated issues before this Court were addressed and/or ruled upon in either of the two Orders issued by the trial judge. As a result, Appellant's issues have not been preserved.

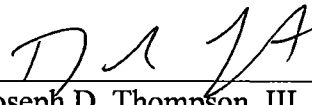
In failing to file a response to Respondents' motions to dismiss, in failing to appear at the motions hearing, in failing to make objections and/or arguments for the trial court to consider, and

⁵ Appellants have not appealed the trial court's Order dated June 10, 2019.

in failing to file a timely and proper Rule 59(e) motion, Appellants have not preserved any issues for this Court's or the trial court's review. Respondents respectfully request this Honorable Court deny Appellants' Motion to Vacate (Remand) their own appeal.

Respectfully Submitted,

HALL BOOTH SMITH, PC



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January 13, 2020
Mount Pleasant, South Carolina

THE STATE OF SOUTH CAROLINA

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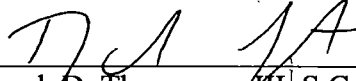
I hereby certify that I have served Respondents' Return to Appellants' Motion for Leave by way of U.S. Mail, stamped First Class delivery, on January 13, 2020 addressed to Appellants' attorneys of record as follows:

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(Signature appears on succeeding page)

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January 13, 2019

VIA FEDERAL EXPRESS OVERNIGHT DELIVERY

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

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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' Return to Appellants' Motion for Leave.

I have included an extra copy of the Return 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

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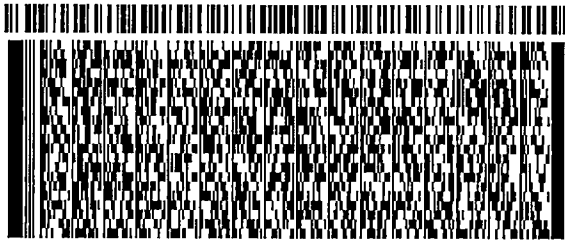
TO **ATTN: AMELIA**
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CLERK OF COURT'S OFFICE
1220 SENATE STREET
COLUMBIA SC 29201

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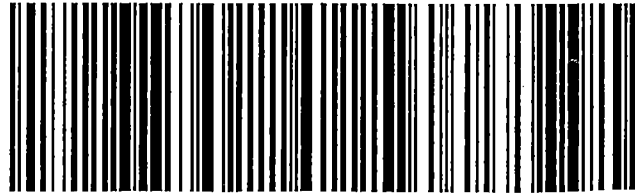
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