

STATE OF SOUTH CAROLINA
In the Court of Appeals

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Sep 22 2020

SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2019-002002

Patricia B. Holliday.....Appellant,

v.

Ross S. Holliday.....Respondent.

APPELLANT’S EMERGENCY MOTION FOR RELIEF FROM AUTOMATIC STAY TO
FILE RULE 60 MOTION FOR RELIEF FROM JUDGMENT IN LOWER COURT

Pursuant to Rule 241, SCACR, Appellant hereby moves for relief from the automatic stay to file a motion for relief from judgment pursuant to Rule 60(b), SCRCRCP in the trial court. Since the deadline to file a motion pursuant to Rule 60(b), SCRCRCP may expire on October 11, 2020, Appellant requests that a decision on this motion be expedited.

BACKGROUND

This lawsuit is a note collection matter. The subject note was made by Respondent Ross Holliday in favor of his parents, Warren P. and Patricia B. Holliday on or about June 18, 2004 (“Note”) (R. p. 68). The trial court entered an order granting summary judgment to the defendant on October 11, 2019 and an order denying Appellant’s motion to alter or amend on November 15, 2019 (R. p. 1; R. p. 9). At the time the order was entered, the parties had not

been able to locate the original Note. In fact, Respondent Ross Holliday testified that he recalled that Warren Holliday had marked the Note “paid in full” in 2016. (R. pp. 73-74)¹

Warren Holliday and the Appellant divorced on December 9, 2013. (R. pp. 218-220). The Divorce Decree incorporated by reference the August 9, 2013 Marital Settlement Agreement between Warren Holliday and the Appellant. (R. pp. 232-244). The Marital Settlement Agreement set forth the terms of the agreement between Warren Holliday and the Appellant concerning division of their marital assets.

The trial court based the Order on the provisions of the Marital Settlement Agreement entered into between Warren Holliday and the Appellant in 2013. Specifically, the trial court held that “[w]hen Warren and Patricia obtained a divorce, they entered into a Marital Settlement Agreement that gave Warren all property (whether personal or business) that was not specifically given to Patricia.” (R. p. 5). The Order further holds that:

The Court finds that the language of the Marital Settlement Agreement provides that Patricia expressly released any and all claims she had to the marital assets, both business and personal of Patricia and Warren, except as provided in the Agreement. The Court concludes that Patricia has no claim to, or interest in, the Promissory Note at issue in this matter.

(R. p. 6).

The Appellant passed away on February 23, 2020. *Exhibit 1*, Affidavit of Mark Holliday. While searching for life insurance records and other financial records involving the estate, the Personal Representative of the Estate of Patricia Holliday discovered what appears to be the original Note in the former residence of the Appellant. *Id.* The Note is not marked “paid in full.” *Id.*

¹ Warren Holliday passed away in 2016.

ARGUMENT

1. Patricia Holliday's possession of the Note creates a genuine issue of material fact, a fact which warrants a Rule 60(b), SCRPC motion.

As set forth above, the Order was entirely based on the (incorrect) assumption that Warren Holliday retained possession of the Note after the Hollidays' divorce, and that the Appellant released any claims she had as a holder of the Note. The Plaintiff's possession of the Note therefore contradicts the trial court's finding that the Appellant released claims to the Note. Indeed, it would be nonsensical for the Appellant to release all claims to the Note and retain possession of it. Further, it impeaches the Respondent's testimony and renders it unreliable.

The circuit court may relieve a party from a final judgment where "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." Rule 60(b), SCRPC. "To obtain a new trial based on newly discovered evidence, a movant must establish that the newly discovered evidence: (1) will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching. *Lanier v. Lanier*, 364 S.C. 211, 217, 612 S.E.2d 456, 459 (Ct. App. 2005) (citation omitted).

In the present case, the trial court's ruling is based on the assumption that Warren Holliday retained possession of the Note. Therefore, the summary judgment order will likely to vacated if the new hearing is granted. It is undisputed that the original Note was discovered in 2020, many months after the Order was entered. The Appellant passed away prior to the discovery of the Note, but she was elderly and in poor health and unable to access the attic of her home or lift and search through heavy boxes. Therefore, the Note could not have been discovered before the hearing on Respondent's motion for summary judgment. *Exhibit 1*,

Affidavit of Mark Holliday. Possession of the original Note is clearly material to determining whether the Appellant intended to release any claims on the Note in the Marital Settlement Agreement. Finally, the original Note, and the circumstances in which it was found, are not merely cumulative or impeaching. Indeed, the fact that the Appellant possessed the original Note in her residence is certainly evidence that the Appellant and Warren Holliday did not intend that the Appellant would release her claims on the Note in the Marital Settlement Agreement. Therefore, that fact is sufficient to create a genuine issue of material fact and cause the trial court to reverse her Order.

In sum, if the Appellant is precluded from presenting the original Note and the circumstances under which it was found to the trial court, it will be deprived of presenting evidence that would warrant a reversal of the Order. Therefore, a contested issue would become moot upon expiration of the one-year deadline to file a motion pursuant to Rule 60, SCRPC.

CONCLUSION

For the reasons set forth above, the Appellant requests an expedited order lifting the automatic stay in the trial court and permitting Appellant to file a motion for relief from summary judgment pursuant to Rule 60, SCRPC.

WOMBLE BOND DICKINSON (US) LLP

S://Matthew Tillman
Matthew Tillman, SC Bar No. 70338
5 Exchange Street
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Charleston, SC 29402
Telephone (843) 722-3400
Facsimile (843) 723-7398
Attorneys for the Appellant

Charleston, South Carolina
September 22, 2020

EXHIBIT 1

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AFFIDAVIT OF MARK HOLLIDAY

I, Mark Holliday, hereby swear under penalty of perjury that the following are true and correct statements.

1. I am over the age of 18 and am competent to provide the statements set forth in this affidavit.

2. I have personal knowledge, or have obtained personal knowledge through investigation, concerning all statements made in this affidavit.

3. My mother, Patricia Holliday, passed away on February 23, 2020.

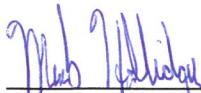
4. I was appointed a Personal Representative for the Estate of Patricia Holliday in Charleston County Probate Court, and I currently serve in that position.

5. On or about March 7, 2020, my sister and I were searching for life insurance documents in certain boxes located in the attic at 766 Gypsy Lane, Mt. Pleasant, South Carolina 29464, a home previously owned by my mother.

6. My mother was elderly and in very poor health. For the last several years, she could not access the attic of her home due to the steep stairs that led to the attic.


7. In one of many heavy banker's box among my mother's possessions in her attic, we located what appears to be an original of the June 18, 2004 Promissory Note signed by Ross Holliday in favor of Warren P. Holliday and Patricia S. Holliday.

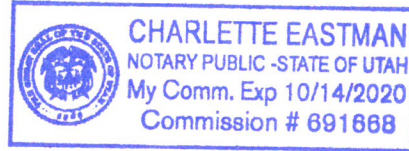
8. I have attached a copy of the Promissory Note to this affidavit. The original is in the possession of Matthew Tillman, attorney for Patricia Holliday.



Mark Holliday

Sworn to and subscribed before me
this 22 day of September, 2020

By: 
Print: Charlette Eastman
Notary Public for Utah
My Commission Expires: 10/14/2020



PROMISSORY NOTE

June 18, 2004

\$2,000,000

FOR VALUE RECEIVED, Ross S. Holliday, the undersigned borrower, promises to pay to Warren P. Holliday and Patricia B. Holliday, as joint tenants or the survivor of them, or order, the sum of Two Million Dollars (\$2,000,000) together with interest on the unpaid balance at the rate equal to the prime rate of National Bank of South Carolina plus one-half percent (1/2%), payable upon demand. Provided, however, in the event demand is made for payment of this Promissory Note ("Note"), then borrower shall have six (6) months following the date of such demand to complete repayment of this Note. The borrower will make all payments at such place as the holder designates in writing.

At the option of the holder of this Note until payment in full or maturity, upon default, all monies payable under this Note are due and immediately payable. The Note is in default if any payment remains unpaid beyond the date six (6) months following the date of demand for payment.

The borrower may prepay all or part of the loan without penalty. Each payment first applies to the payment of accrued interest and the balance of each payment applies to the payment of principal.

If the borrower does not pay this Note when due, the borrower promises to pay all costs of collection and reasonable attorneys fees incurred by the holder of this Note on account of such collection, whether or not the holder files suit on this Note.



Ross S. Holliday, Borrower

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Ross S. Holliday.....Respondent.

PROOF OF SERVICE

I do hereby certify that on the 22nd day of September, 2020, I served a copy of the within **APPELLANT’S EMERGENCY MOTION TO FOR RELIEF FROM AUTOMATIC STAY TO FILE RULE 60 MOTION FOR RELIEF FROM JUDGMENT IN LOWER COURT** on all counsel of record via electronic mail, addressed as follows, as evidenced by Exhibit “A” attached hereto:

F. Truett Nettles, II, Esq.
Finkel Law Firm LLC
4000 Faber Place Drive, Suite 450
North Charleston, SC 29405
tnettles@finkellaw.com

Attorneys for Defendant

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Attorneys for Defendant

WOMBLE BOND DICKINSON (US) LLP

S://Matthew Tillman
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(843) 722-3400

Attorneys for the Appellant

September 22, 2020

EXHIBIT A

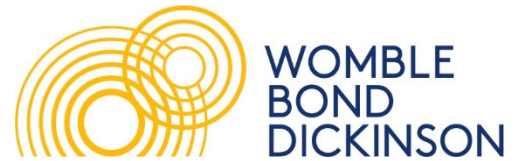
From: [Casey, Carol](#)
To: ["tnettles@finkellaw.com"](#); ["apaylor@rosenhagood.com"](#); ["Bijan Ghom"](#)
Cc: [Tillman, Matthew \(Matthew.Tillman@wbd-us.com\)](#)
Bcc: ["Holliday Patricia 101682 0001 1 Patricia Holliday Marital Trust and Other Matters Email"](#)
Subject: Patricia B. Holliday v. Ross S. Holliday - Appellate Case No. 2019-002002 Appellant's Motion for Relief from Stay
Date: Tuesday, September 22, 2020 2:35:52 PM
Attachments: [Letter to Counsel serving Appellant's Motion for Relief from Stay 9.22.2....pdf](#)
[Motion for Relief from Stay.pdf](#)

Dear Counsel:

Attached for service, please find Appellant's Emergency Motion for Relief from Automatic Stay to File Rule 60 Motion for Relief from Judgment in Lower Court and correspondence from Matt Tillman regarding same.

Thank you,

Carol Casey
Paralegal
Womble Bond Dickinson (US) LLP



September 22, 2020

Womble Bond Dickinson (US) LLP

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VIA E-MAIL

ctappfilings@sccourts.org

Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Patricia B. Holliday v. Ross S. Holliday
Appellate Case No. 2019-002002
WBD Ref. 101682.0001.1

Dear Ms. Kitchings:

Enclosed please find Appellant's Emergency Motion for Relief from Automatic Stay to File Rule 60 Motion for Relief from Judgment in Lower Court, with Proof of Service. Please file the same and return a filed copy to me via email.

This firm's check in the amount of \$50.00 to cover the filing fee is being mailed to the Court under separate cover.

Thank you for your assistance.

Sincerely,

Womble Bond Dickinson (US) LLP

s/Matthew Tillman
Matthew E. Tillman, Esq.

cbc
Enclosures

cc via email: F. Truett Nettles, II, Esq.
Alice F. Paylor, Esq.
Bijan Ghom, Esq.