

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Deadra L. Jefferson, Circuit Court Judge
Trial Court Case No. 2018-CP-10-00872

Appellate Case No.: 2019-002002

Estate of Patricia B. Holliday.....Appellant,

vs.

Ross S. Holliday.....Respondent.

**RESPONDENT'S REPLY TO APPELLANT'S EMERGENCY MOTION
FOR RELIEF FROM AUTOMATIC STAY TO FILE RULE 60 MOTION
FOR RELIEF FROM JUDGMENT IN LOWER COURT**

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On September 22, 2020, Appellant filed a motion pursuant to Rule 241, SCACR, requesting emergency relief from the automatic stay because the deadline to file a motion pursuant to Rule 60(b), SCRCR may expire on October 11, 2020. Appellant's request for emergency relief is based on the alleged discovery of the original promissory note of which Appellant sought the recovery of damages. Because the "original" promissory note does not bear on the legal conclusions of the lower Court or create a genuine issue of material fact as to any of the lower Court's findings of fact, this motion must be denied. The lower Court's determination was based on grounds having nothing to do with the original promissory note and should not be remanded to the lower Court. Overland, Inc. v. Nance, 423 S.C. 253, 255, 815 S.E.2d 431, 432 (2018) (citing Rule 220(c), SCACR)

BACKGROUND

This is an appeal from the circuit court's grant of summary judgment in favor of Respondent Ross S. Holliday (hereinafter "Respondent") by Order dated October 11, 2019, and the November 15, 2019, Order denying Appellant's Motion for Reconsideration. Appellant sued Respondent, her son, in an effort to collect on Promissory Note, which had been payable to the order of the Warren Holliday, Appellant's now deceased ex-husband, and Appellant, and given in 2004 when Warren and Appellant were married. The Circuit Court granted summary judgment for the following stated reasons:

- (1) "[T]he Marital Settlement Agreement, by its terms, resolved all issues of ownership of marital assets."
- (2) Appellant admitted that the Promissory Note at issue was a marital asset;
- (3) The Marital Settlement Agreement gave Warren "all property (whether personal or business) that was not specifically given to [Appellant];"

(4) Appellant “expressly released Respondent, “who is an heir, personal representative, successor and assignee of Warren – from ‘all suits, actions, causes of action’ that result from or arise out of the ‘marital relationship ... from the beginning of the world to the date of this agreement.”

(5) Appellant “released any claims to the Note repeatedly throughout the document.”¹

While the original promissory note at issue was never found, the parties had a copy of the note. The alleged finding in March of 2020 of the alleged original note by the now deceased Appellant’s personal representative, who is another son, does not create an issue of fact that is material to any of the grounds on which the Trial Court granted Respondent’s motion for summary judgment. Furthermore, Respondent presented an additional ground to support summary judgment that the Circuit Court did not reach, and granting Appellant’s Motion would be futile because the Note cannot constitute “newly discovered evidence” for purposes of Rule 60(b)(2), nor can Appellant establish the required elements of Rule 60(b)(2).

ARGUMENT

I. Granting Appellant’s Motion would be futile because the Circuit Court granted summary judgment to Respondents on multiple grounds, none of which are disturbed by Appellant’s alleged possession of the original Note.

The Trial Court granted Appellant’s Motion on a number of grounds based solely on the testimony of Appellant and the Marital Settlement Agreement. The Trial Court found that the Appellant released her claim to the Note in “multiple ways.” The agreement by its terms provided for ownership of all claims to marital assets. Appellant admitted that the Note was a marital asset. Moreover, because Respondent was the son and heir of Appellant’s late husband, Warren P. Holliday, the Trial Court found that Appellant released any claims against him. And finally, the

¹ Order, p. 5.

Trial Court found that the Marital Settlement Agreement gave Warren P. Holliday all assets (whether business or personal) that were not “specifically mentioned in the agreement.” Order, p. 2. Whether Appellant had possession of the original Note has no relevance to whether the Note was a marital asset, whether Appellant released her claims against Respondent, or whether Warren P. Holliday received the Note as part of the divorce settlement. There is nothing in the record that would suggest that Appellant’s possession of the original Note would have disturbed the Trial Court’s findings. Appellant’s contention that this was a “contested issue” is disingenuous, at best.²

Additionally, this Court can sustain the grant of summary judgment to Respondent on an additional ground which is also unaffected by the purported finding of the original Note. Overland, Inc. v. Nance, 423 S.C. 253, 255, 815 S.E.2d 431, 432 (2018) (“This Court may affirm the trial court on any ground appearing in the record.”). At the lower court, Respondent argued that Appellant’s claim was barred by the applicable statute of limitations. To prevent rehashing the argument here, Respondent refers to, and incorporates, Section III of his Amended Final Brief. Whether Appellant retained a copy of the original Note has absolutely no bearing on Respondent’s statute of limitations argument.

II. The original Note is not “newly discovered evidence” because Appellant knew of its existence and maintained possession of the original Note during this litigation.

Evidence is not newly discovered when it was (1) known to the party at the time of trial, and (2) in the party’s possession. Lanier v. Lanier, 364 S.C. 211, 218, 612 S.E.2d 456, 459 (Ct. App. 2005) (citing Lans v. Gateway 2000, Inc., 110 F.Supp.2d 1 (D.D.C. 2000)). In both Lanier and Lans, the party claiming to have newly discovered evidence knew that the evidence existed during the trial. Id. Moreover, the “newly discovered evidence” was in the possession of the

² In fact, Appellant testified that Warren always had the original note. R. p. 52-53.

moving party. For these reasons, in both Lanier and Lans, the evidence did not constitute newly discovered evidence for the purpose of Rule 60(b)(2).

Here, both Appellant and Respondent testified that the original Note existed. R. p. 52-53. While Appellant testified that she did not have possession of it, she certainly acknowledged its existence. As for the second element, like in Lanier, Appellant has now admitted that the Note was in her possession. See Affidavit of Mark Holliday. Therefore, the original Note cannot be “newly discovered evidence” for the purpose of Rule 60(b)(2).

III. Even if the original Note is “newly discovered evidence” under Rule 60(b)(2), granting Appellant’s Motion would be futile because Appellant cannot satisfy the conditions of Rule 60(b)(2).

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). Other than the second element, Appellant cannot meet any of the required elements of Rule 60(b)(2).

As addressed in Section I, Appellant’s possession of the original Note has no effect on the Trial Court’s Order, which granted summary judgment to Respondent on several grounds which are unrelated to possession of the Note. Appellant argues that “summary judgment” will likely be vacated if the new hearing is granted,” because the “trial court’s ruling is based on the assumption that Warren Holliday retained possession of the Note.” Brief of Appellant, p. 3. The Trial Court does not even *mention* the original Note or who possessed it in its Conclusions of Law. Order, p. 3-7. While the possession of the Note is addressed on the second page of the Order, the possession of the Note was not a material fact of the Court’s ruling. The Marital Settlement Agreement, which

the Trial Court interpreted to release Appellant's claim to the Note in "multiple ways," speaks for itself, and certainly does not depend on who possessed the original Note. It appears that Appellant is claiming that possession of the Note would be evidence of the parties' intentions. However, the Trial Court did not address the parties' intentions in the Order because the "Marital Settlement Agreement, by its terms, resolved all issues of ownership of marital assets." Order, p. 5.

At best, the fact that Appellant possessed the original Note is impeaching because there was conflicting testimony as to who had the original Note. In Appellant's background section, it states "[a]t the time the order was entered, the parties had not been able to locate the original Note." If this is true, then clearly 'who possessed the original note' could not have any bearing on the Trial Court's Order, which was decided only on undisputed facts.

As to element (2), it is not "undisputed that the original Note was discovered in 2020." Brief of Appellant, p. 3. Respondent doubts the authenticity of this document, particularly because of the circumstances of its finding. Appellant filed its emergency motion on September 22, 2020, with an affidavit of Mark Holliday that says the Note was found on March 7, 2020. Interestingly, Appellant filed a Motion to Substitute Party on May 14, 2020, two months after the original copy of the Note was purportedly found by Mark Holliday, yet made no mention of this "newly discovered evidence."³ Moreover, even if the document is authentic, Appellant's contention that the note could not have been found by due diligence misconstrues the meaning of due diligence. Black's Law Dictionary defines "due diligence" as "[t]he diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation." Lanier v. Lanier, 364 S.C. 211, 220, 612 S.E.2d 456, 460 (Ct. App. 2005). "Diligence

³ Mark Holliday, the son of Appellant and brother of Respondent, has been aggressively litigating against Respondent for years, which continues to this day. The circumstances surrounding this Motion are peculiar, and likely made in bad faith.

looks not to what the litigant actually discovered, but what he or she could have discovered.” Id. “When a party simply misplaces evidence at home, the court will treat the failure to discover it as a failure to exercise due diligence.” Id. (citing Johnson Waste Materials v. Marshall, 611 F.2d 593, 598–99 (5th Cir.1980)). Even if Appellant could not access the upstairs of her house, she certainly could have someone go up and check for her. She had a duty to produce all relevant documents in her possession, custody, or control, which would certainly have included the original Note. Her duty included her agents taking reasonable steps to retrieve all relevant discovery. If a party can simply ignore the requirements of discovery by claiming that the upstairs of her house was inaccessible, then by that logic, a party could refuse to produce electronically stored information (“ESI”) by merely saying metadata is inaccessible. A party has a duty to produce a document, and that duty is not defeated merely because the party cannot access the document without the assistance of an agent.

Appellant, the moving party, cannot meet the requirements of Rule 60(b)(2) because the possession of the Note is irrelevant to the Order, the Note could have been discovered with reasonable due diligence, and there are additional sustaining grounds for this Court to affirm the Trial Court’s Order.

CONCLUSION

In conclusion, Appellant’s request for emergency relief should be denied because there are additional sustaining grounds for the Trial Court’s Order; the original Note cannot be newly discovered evidence because its existence was always known by Appellant and was in Appellant’s possession the entire time; and, alternatively, even if the Note constitutes “newly discovered evidence,” Appellant cannot meet the requirements of Rule 60(b)(2).

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PROOF OF SERVICE

I do hereby certify that on October 2, 2020, I have served all counsel in this action with a copy of the documents herein below specified via email:

Documents: **Respondent's Reply to Appellant's Emergency Motion for Relief from Automatic Stay to File Rule 60 Motion for Relief from Judgment in Lower Court**

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SC Court of Appeals

VIA EMAIL: ctappfilings@sccourts.org

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

Re: Estate of Patricia B. Holliday v. Ross S. Holliday
Appellate Case No.: 2019-002002

Dear Ms. Kitchings:

Enclosed for filing please find Respondent's Reply to Appellant's Emergency Motion for Relief from Automatic Stay to File Rule 60 Motion for Relief from Judgment in Lower Court and Proof of Service in connection with the above referenced matter.

Should you have any questions or concerns, please do not hesitate to contact us. Thank you for your assistance with this matter.

Sincerely yours,

s/ Taylor Davis

Taylor Davis
Legal Assistant to Alice Paylor

/tnd

Enclosures

cc: Matthew Tillman, Esquire (via email only)