STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	Case No.: 2018-CP-10-00872
The Estate of Patricia B. Holliday, Plaintiff,	)	
	)	**ORDER DENYING PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT**
v.	)	
	)	
Ross S. Holliday, Defendant.	)	

Presiding Judge:	Hon. Deadra L. Jefferson
Plaintiff's Attorney:	Matthew Tillman, Esq.
Defendant's Attorney:	Alice Paylor, Esq. and Bijan Ghom, Esq.
Date of Hearings:	September 27, 2019/March 31, 2021
Court Reporter:	Elizabeth Harris/Joyce Rueger

This matter came before the Court on Plaintiff's Motion for Relief from Judgment, filed October 9, 2020. The Plaintiff asks the Court to reconsider its Order Granting Defendant's Motion for Summary Judgment, filed October 11, 2019, and the Court's Order Denying Plaintiff's Motion to Alter or Amend, filed November 25, 2019. The Court received a copy of the Plaintiff's Motion for Relief from Judgment via email from Plaintiff's counsel on October 21, 2020. The Defendant filed its Memorandum in Opposition to Plaintiff's Motion for Relief from Judgment on October 21, 2020. The Plaintiff filed its Reply to Defendant's Memorandum in Opposition on November 4, 2020. After consideration of the record, as well as the various interests balanced by the Court at the time of the ruling, the Plaintiff's Motion for Relief from Judgment pursuant to Rule 60(b)(2), SCRCP is heard and respectfully Denied.

PROCEDURAL HISTORY

This matter originally came before the Court on September 27, 2019 on Defendant's Motion for Summary Judgment, filed June 11, 2019. On October 11, 2019, the Court entered an Order Granting Defendant's Motion for Summary Judgment. The Plaintiff filed a Motion to Alter

or Amend Judgment pursuant to Rule 59(e), SCRCP on October 29, 2019. The Court entered an Order Denying Plaintiff's Motion to Alter or Amend on November 25, 2019.

The Plaintiff filed a Notice of Appeal on December 3, 2019. On October 7, 2020, the Court of Appeals issued an Order permitting the Plaintiff to file a Rule 60, SCRCP motion with the Circuit Court. On October 9, 2020, the Plaintiff filed the present Motion for Relief from Judgment pursuant to Rule 60(b)(2), SCRCP.

FACTUAL BACKGROUND

On June 18, 2004, the National Bank of South Carolina ("NBSC") loaned $2,000,000 to Warren Holliday ("Warren"), the now deceased ex-husband of the now deceased Plaintiff, Patricia Holliday[1] ("Patricia" or "the Plaintiff"), and the father of Defendant Ross Holliday ("Ross" or "the Defendant"). That loan was secured by a business asset owned by Warren. On that same day, Warren loaned the $2,000,000 to Ross, who gave a Promissory Note payable to "Warren P. Holliday and Patricia B. Holliday, as joint tenants or the survivor of them, or order…."

In 2013, Patricia filed for divorce from Warren. On December 9, 2013, Warren and Patricia were divorced by Order of the Family Court, which adopted and incorporated the Marital Settlement Agreement that Warren and Patricia had executed prior to the entry of the divorce. The Family Court Order provided that "[t]he personal property acquired by and between the parties during the marriage has been equitably divided to their mutual satisfaction."

Ross made payments on the Promissory Note to Warren, but not to Patricia. On January 22, 2016, prior to Warren's death, the loan from NBSC was paid off in full by Zeezrom Properties,

[1] The Plaintiff died on February 23, 2020. The Plaintiff filed a Motion for Substitution of Parties on October 9, 2020 to substitute the Estate of Patricia B. Holliday as the Plaintiff. On March 9, 2021, the Honorable Debra R. McCaslin entered a Consent Order Granting Plaintiff's Motion for Substitution of Parties, and substituted the Estate of Patricia B. Holliday as the Plaintiff in this action.

LLC, a business wholly owned by Warren.[2] In September of 2016, Warren died and, in his will, left all of his business properties and personal assets to his sons Ross and Lea Holliday.[3] On July 12, 2017, Patricia's lawyer made a demand that Ross repay the $2 million Promissory Note. On February 19, 2018, Patricia initiated this action to collect from Ross on the Promissory Note.

On September 27, 2019, this Court conducted a hearing on Defendant's Motion for Summary Judgment, filed June 11, 2019. At the time of the hearing, neither party believed that the original Promissory Note was in their possession.[4] However, a copy of the Promissory Note was part of the record when the Court considered and ruled on the Defendant's Motion for Summary Judgment. See Exhibit 1 to Plaintiff's Summons and Complaint, filed February 20, 2018; see also Exhibit D to Defendant's Memorandum in Support of Motion for Summary Judgment, filed June 11, 2019. On October 11, 2019, the Court entered an Order Granting Defendant's Motion for Summary Judgment. The Plaintiff filed a Motion to Alter or Amend Judgment pursuant to Rule 59(e), SCRCP on October 29, 2019. The Court entered an Order Denying Plaintiff's Motion to Alter or Amend on November 25, 2019.

On February 23, 2020, the Plaintiff died. See Affidavit of Mark Holliday at Paragraph 3. On or about March 7, 2020, Mark Holliday and his sister, Pamela Wallin, discovered certain boxes located in the Plaintiff's attic. Id. at Paragraph 6. In one of these boxes, Mark Holliday and Pamela Wallin discovered what the Plaintiff purports to be the original Promissory Note. Id. at Paragraph 8. On October 9, 2020, the Plaintiff filed the present Motion for Relief from Judgment based on

[2] The parties do not contest this fact. The record is void of the date of Zeezrom Properties, LLC's creation.
[3] The record is unclear as to the shared parentage of Ross Holliday, Lea Holliday, Mark Holliday, and Pamela Wallin.
[4] In her deposition, the Plaintiff testified that she did not have possession of the original Promissory Note, and that last she knew, the original Promissory Note was located at Warren's offices at 1808 Meeting Street, Charleston, South Carolina. Deposition of Patricia B. Holliday at 29-30.

the discovery of the purported original Promissory Note. Pursuant to Rule 60(b)(2) the Plaintiff is petitioning the Court to relieve it from the final judgment of the grant of Summary Judgment.

CONCLUSIONS OF LAW

"Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge." Curry v. Carolina Insurance Group of SC, Inc., 428 S.C. 60, 77, 832 S.E.2d 760, 768 (Ct. App. 2019) (quoting BB&T v. Taylor, 369 S.C. 548, 551, 633 S.E.2d 501, 502 (2006)). "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: … (2) 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)(2), SCRCP. "A party seeking to set aside a judgment pursuant to Rule 60(b) has the burden of presenting evidence entitling him to the requested relief." Lanier v. Lanier, 364 S.C. 211, 215, 612 S.E.2d 456, 458 (Ct. App. 2005).

> 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.

Id., 364 S.C. at 217, 612 S.E.2d at 459.

A Rule 60(b) motion made on the basis of newly discovered evidence must be made "not more than one year after the judgment, order or proceeding was entered or taken." Rule 60(b), SCRCP.[5]

[5] The parties do not contest the timeliness of the Plaintiff's Motion for Relief. The Court entered its Order Granting Defendant's Motion for Summary Judgment on October 11, 2019. The Court entered an Order Denying Plaintiff's Motion to Alter or Amend on November 25, 2019. See Se. Hous. Found. v. Smith, 380 S.C. 621, 640, 670 S.E.2d 680, 690 (Ct. App. 2008) (holding that a party does not have to file a 60(b) motion until the trial court issues a ruling on the party's Rule 59(e) motion). Therefore, the Plaintiff must have filed its Rule 60(b) Motion on or before November 25, 2020. The Plaintiff filed the present Motion for Relief on October 9, 2020.

I. The Plaintiff's discovery of the purported original Promissory Note is not newly discovered evidence.

As an initial matter, the Court notes that the Plaintiff states that it has discovered "what appears to be" an original of the Promissory Note.[6] Plaintiff's Motion for Relief at 4. The purported original Promissory Note has not been authenticated, and the Defendant asserts that he "has no reason to believe that it is the original." Defendant's Memorandum in Opposition at 1.

"[C]ourts have found evidence is not newly discovered evidence for the purposes of Rule 60(b)(2) where the evidence was (1) known to the party at the time of trial, and (2) in the party's possession." Lanier, 364 S.C. at 218, 612 S.E.2d at 459.

The Court makes no finding as to the authenticity of the purported original Promissory Note. However, even assuming that what the Plaintiff discovered is, in fact, the original Promissory Note, the Court finds that it does not constitute newly discovered evidence, as the original Promissory Note was known to the Plaintiff at the time of the September 27, 2019 hearing and was in the Plaintiff's possession.

A. The original Promissory Note was known to the Plaintiff at the time of the September 27, 2019 hearing.

In Lanier, the plaintiff in a divorce action was unable to locate an antenuptial agreement that she knew the parties had entered into. Id. at 215, 612 S.E.2d at 459. The plaintiff did not plead the contents of the agreement in the divorce action, but proceeded with her action. Id. After the family court entered its final order, the plaintiff found a copy of the agreement and moved pursuant to Rule 60(b)(2), SCRCP for a new trial on the basis that the agreement was newly discovered evidence. Id. In determining whether the plaintiff's discovery of the agreement was newly

[6] The document attached to the Motion for Relief and filed with the Court on October 9, 2020, appears to be a copy and not an original and is also identical to the document initially filed with the Summons and Complaint.

discovered evidence, the Lanier court considered the facts of Lans v. Gateway 2000, Inc., 110 F.Supp.2d 1 (D.D.C. 2000).

In Lans, the movant, Lans, made a Rule 60(b)(2) motion based on a contract which he found after trial. Id. at 218, 612 S.E.2d at 459. Lans knew that the document existed prior to trial, but was unable to locate it and did not notify the court of the potential existence of the contract. Id. at 218, 612 S.E.2d at 459-60. The Lans court held that since Lans knew of the contract's existence, he could not claim that it was newly discovered evidence. Id.

The Lanier court found Lans to be persuasive, holding that because the plaintiff knew the agreement existed but did not plead the agreement's contents, the subsequent discovery of the agreement did not constitute newly discovered evidence. Id. at 218, 612 S.E.2d at 460; see also Andrews Distrib. Co. v. Oak Square at Gatlinburg, Inc., 757 S.W.2d 663, 667 (Tenn. 1988) (finding that when both parties know an item of evidence existed before trial, but the evidence is simply lost or misplaced, finding it afterward does not transform it into newly discovered evidence) (overruled on other grounds by Spence v. Allstate Ins. Co., 883 S.W.2d 586 (Tenn. 1994).

Here, although the Plaintiff did plead the contents of the Promissory Note, unlike the movants in Lans and Lanier, the Court finds that the discovery of the purported original Promissory Note is not newly discovered evidence because the existence of the original Promissory Note was known to the Plaintiff at the time of the September 27, 2019 hearing. Moreover, the Plaintiff believed that the original Promissory Note was in Warren's possession.[7] The fact that the Plaintiff's children discovered the purported original Promissory Note in her own possession does not negate

[7] Deposition of Patricia B. Holliday at 29-30.

the fact that the Plaintiff knew the original Promissory Note existed prior to the September 27, 2019 hearing.

B. The purported original Promissory Note was in the Plaintiff's possession.

"[T]his Court has previously held that evidence "in the possession of the party before the judgment was rendered ... is not newly discovered evidence that affords relief." Lanier, 364 S.C. at 219, 612 S.E.2d at 460.

The Plaintiff asserts that the purported original Promissory Note was discovered in a banker's box of personal items in the Plaintiff's attic on or about March 7, 2020. Affidavit of Mark Holliday at Paragraph 8. Further, the Plaintiff asserts that the Plaintiff has owned her home and resided there since 2015. Id. at Paragraph 5. The Plaintiff makes no allegation that the Promissory Note may have come into the Plaintiff's possession after the September 27, 2019 hearing. Accordingly, the Court finds that purported Promissory Note was in the Plaintiff's possession prior to the September 27, 2019 hearing.

Therefore, having found that the purported original Promissory Note was (1) known to the Plaintiff at the time of the September 27, 2019 hearing, and (2) in the Plaintiff's possession prior to the September 27, 2019 hearing, the Court concludes that the purported original Promissory Note is not newly discovered evidence for the purposes of Rule 60(b)(2), SCRCP.

C. Even if the purported original Promissory Note did constitute newly discovered evidence, the Plaintiff fails to establish that the newly discovered evidence (1) will probably change the result if a new trial is granted; (2) has been discovered since the September 27, 2019 hearing; (3) could not have been discovered before the September 27, 2019 hearing; (4) is material to the issue; and (5) is not merely cumulative or impeaching.

For the following reasons, even if the purported original Promissory Note did constitute newly discovered evidence, the Court finds that the Plaintiff fails to establish the required elements for obtaining a new hearing under Rule 60(b)(2), SCRCP.

1. The original Promissory Note will not probably change the result if a new trial is granted.

As more fully discussed, infra, the original Promissory Note, the location of the original Promissory Note, or which party had possession of the original Promissory Note, was not dispositive to the Court's ruling on Defendant's Motion for Summary Judgment.[8] Therefore, the subsequent discovery of the purported original Promissory Note would not change the Court's ruling on Defendant's Motion for Summary Judgment. Accordingly, the Court finds that the Plaintiff fails to meet the first element for obtaining a new hearing pursuant to Rule 60(b)(2), SCRCP.

2. The purported original Promissory Note has been discovered since the September 27, 2019 hearing.

Taking the Plaintiff's allegations as true, the purported original Promissory Note was discovered by the Plaintiff on or about March 7, 2020, approximately five (5) months after the September 27, 2019 hearing. Affidavit of Mark Holliday at Paragraph 3. Accordingly, taking the Plaintiff's allegations as true, the Plaintiff meets the second required element of Rule 60(b)(2), SCRCP.

3. The purported original Promissory Note could have been discovered before the September 27, 2019 hearing.

"Where a litigant could have discovered the new evidence prior to trial, he or she is not entitled to relief under Rule 60(b)(2)." Raby Constr., L.L.P. v. Orr, 358 S.C. 10, 21, 594 S.E.2d 478, 484 (2004).

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[8] The Defendant's statute of limitations argument may very well be viable. Conceivably, the statute of limitations could be a question of fact based on the Defendant's last date of payment on the Note, specifically when the pleadings are silent as to the Defendant's date of last payment on the Note. However, the Court did not address the statute of limitations issue in its October 11, 2019 Order because it found the releases contained in the Marital Settlement Agreement to be dispositive. See In re Richard D., 388 S.C. 95, 101, n. 5, 693 S.E.2d 447, 450 (Ct. App. 2010) (citing Fultch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding that the court need not rule on remaining issues when the disposition of prior issues is dispositive).

> Rule 60(b)(2) allows the court to grant a new trial only if the newly discovered evidence could not have been discovered by due diligence prior to trial. 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." "Diligence looks not to what the litigant actually discovered, but what he or she could have discovered."

Lanier, 364 S.C. at 220, 612 S.E.2d at 460 (internal citations omitted). "When evidence is misplaced, a party must make a specifically targeted search to find the missing evidence." 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)).

Here, the Plaintiff's children found the purported original Promissory Note in a banker's box in the attic of Patricia Holliday's home subsequent to her demise. The Court finds that the Plaintiff, through the exercise of due diligence, could have located the purported original Promissory Note prior to the initiation of this cause of action and certainly prior to the September 27, 2019 hearing by conducting a more thorough search of her home.[9] Accordingly, the Court finds that the Plaintiff fails to meet the third element for obtaining a new hearing under Rule 60(b)(2), SCRCP.

4. The purported original Promissory Note is not material to the issue.

As more fully discussed, infra, the purported original Promissory Note, the location of the purported original Promissory Note, or which party had possession of the purported original Promissory Note, was not the underlying basis for the Court's ruling on Defendant's Motion for Summary Judgment. Therefore, the subsequent discovery of the purported original Promissory

[9] The Plaintiff asserts that due to her advanced age and poor health, the attic was inaccessible to the Plaintiff. Plaintiff's Motion for Relief at 4. While the Court is sympathetic to the Plaintiff's condition, the Court finds that this is insufficient justification to relieve the Plaintiff of her duty of due diligence as required by Rule 60(b)(2), SCRCP. If the Plaintiff was unable to access the attic in search of the original Note, the Plaintiff could have sought the assistance of, and or employed the services of another to access the attic and search for the original Note.

Note is not material to the findings of fact and conclusions of law contained in the Court's ruling on Defendant's Motion for Summary Judgment. Accordingly, the Court finds that the Plaintiff fails to meet the fourth element for obtaining a new hearing pursuant to Rule 60(b)(2), SCRCP.

5. The purported original Promissory Note is merely cumulative or impeaching.

As more fully discussed, infra, the purported original Promissory Note, the location of the purported original Promissory Note, or which party had possession of the purported original Promissory Note, did not form the basis of the Court's October 11, 2019 Order. Therefore, the discovery of the location of the purported original Promissory Note is merely cumulative of other evidence presented to the Court at the September 27, 2019 hearing. Accordingly, the Court finds that the Plaintiff fails to meet the fifth element for obtaining a new hearing pursuant to Rule 60(b)(2), SCRCP.

II. The Court's October 11, 2019 Order granting Summary Judgment was not premised on either party's possession of the original Promissory Note.

To the extent that the Court's October 11, 2019 Order was unclear as to the basis for the Court's ruling, the Court takes this opportunity to clarify. The dispositive issue in the Court's grant of summary judgment in its October 11, 2019 Order were the releases contained in the Marital Settlement Agreement. Specifically, the determinative factor in the Court's October 11, 2019 Order was that, pursuant to the terms of the Marital Settlement Agreement, Warren was to receive *all* assets and *all* liabilities, business, personal, or otherwise, and in exchange, Patricia would receive tax-free monthly payments of $16,000.00 for her life, ownership of the family home, and a life insurance policy on Warren's life in the amount of $645,000.00.

In exchange for this, Patricia gave up any responsibility for all liabilities, business, personal, or otherwise, and all claims to any business or personal assets of the marriage not

specifically given to her in the Marital Settlement Agreement. Clearly, the rights and obligations conferred by the Promissory Note are both business and personal assets within the meaning of the parties' Martial Settlement Agreement, and Patricia released all interests in the Promissory Note pursuant to the terms of the parties' mediated Agreement.

The Family Court entered a Final Order incorporating the Marital Settlement Agreement on December 9, 2013. The Marital Settlement Agreement gave Warren all property (whether personal or business) that was not specifically given to Patricia. The Settlement Agreement further provided that Warren and Patricia were "limited to the receipt of those properties or monies as outlined" in the Settlement Agreement. The essence of the parties' dispute lies in the interpretation of the Marital Settlement Agreement and how the rights and obligations of the Promissory Note were intended to be distributed by the Marital Settlement Agreement, [10] thereby reinforcing this Court's ruling regarding the applicability of the releases contained in the Marital Settlement Agreement.[11]

The basis of the Court's October 11, 2019 Order and grant of summary judgment was that Patricia released all interest in the Promissory Note in exchange for the conditions discussed supra. The Promissory Note is clearly an asset within the meaning of the parties' mediated, arm's length Marital Settlement Agreement, and Patricia relinquished any rights she may have had to the Promissory Note.

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[10] The Plaintiff asserts that this Court "interpreted the Marital Settlement Agreement [sic] to provide that, by implication, all marital property that was not specifically given to the Plaintiff was assigned to Warren. The discovery of the purported original Note is evidence that Plaintiff retained the Note and the parties intended that she retain legal ownership of the collection rights." Plaintiff's Motion for Relief at 6. The Defendant asserts that Plaintiff's physical possession of the purportedly original Promissory Note is irrelevant because the rights and obligations under the Promissory Note were marital assets, that the Plaintiff released any claims to the marital assets, and that the Marital Settlement Agreement gave Warren "all assets (whether business or personal) that were not 'specifically mentioned in the agreement.'" Defendant's Memorandum in Opposition at 6.

[11] The Marital Settlement Agreement is unambiguous in its terms.

More importantly, the Plaintiff's assertion that the party having physical possession of the original Promissory Note was a dispositive factor in the Court's October 11, 2019 is without merit. The basis of the Court's grant of summary judgment was that the Marital Settlement Agreement gave Warren all property (whether personal or business) that was not specifically given to Patricia. Moreover, the unambiguous terms of the Marital Settlement Agreement do not confer the rights and obligations of the Promissory Note to the party having physical possession of the Promissory Note.

Accordingly, for the foregoing reasons, the Plaintiff's Motion for Relief is Denied, as the basis for the Court's October 11, 2019 Order was not premised on either party's possession of the original Promissory Note.[12]

CONCLUSION

Pursuant to Rule 60(b), SCRCP, the Plaintiff's Motion for Relief from Judgment is heard and respectfully Denied.

AND IT IS SO ORDERED.

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Hon. Deadra L. Jefferson
Presiding Judge
Ninth Judicial Circuit

June _____, 2021
Charleston, South Carolina

[12] The Court cannot discern, and the parties could not explain, the Plaintiff's reasoning for failing to bring this action prior to Warren's death.

Charleston Common Pleas

Case Caption: Patricia B Holliday VS Ross S Holliday

Case Number: 2018CP1000872

Type: Order/Relief

IT IS SO ORDERED.

s/D.L. Jefferson Ninth Judicial Circuit Judge 2128