RECEIVED
Dec 30 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the 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.

INITIAL BRIEF OF RESPONDENT

ROSEN HAGOOD, LLC

Alice F. Paylor, Esquire
F. Truett Nettles, II, Esquire
Bijan Ghom, Esquire
151 Meeting Street, Suite 400
Charleston, SC 29401
(843) 577-6726 (o)
(843) 266-2258 (f)

Attorneys for Respondent

Charleston, South Carolina
December 30, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF ISSUES ON APPEAL

I. Did Patricia Holliday release her claim to the Promissory Note in the Marital Settlement Agreement?

II. Did Patricia Holliday release Ross Holliday from any obligation to pay her on the Promissory Note in the Marital Settlement Agreement?

III. Does the statute of limitations and/or the doctrine of laches bar Appellant's claim for breach of contract?

IV. Did the Circuit Court abuse its discretion in finding that the alleged discovery of the alleged original note is not newly discovered evidence to merit relief under Rule 60(b)(2)?

COUNTER-STATEMENT OF THE CASE

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. The case was initially brought by Patricia Holliday ("Patricia") on February 20, 2018, who alleged that her son, Ross Holliday ("Ross"), had breached his obligations to her under a Promissory Note, payable to Warren Holliday ("Warren") and Patricia, "as joint tenants or the survivor of them," for $2 Million, executed by Ross on June 18, 2004. Ross answered, *inter alia*, that Patricia had provided no consideration to him; that he had satisfied the note through payments to, and services performed for, his father, Warren, prior to Warren's death on September 28, 2016; that Patricia had released any claim that she had to Promissory Note in the Order of Divorce, including the Marital Settlement Agreement, dated December 9, 2013; and that Patricia's claims were barred by the applicable statute of limitations and/or laches.

Ross moved for summary judgment based on (1) lack of consideration; (2) the terms of the Marital Settlement Agreement releasing Ross; (3) satisfaction of the note by payments to Warren and to NBSC, the source of the $2 Million loaned to Ross; and (4) the Statute of Limitations and/or the doctrine of laches.

By Order, dated October 11, 2019, the Court granted summary judgment to Ross based on the terms of the Marital Settlement Agreement and declined to rule based on the other grounds asserted. 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) Patricia 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 [Patricia];"

(4) Patricia 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) Patricia "released any claims to the Note repeatedly throughout the document."

On October 29, 2019, Patricia filed a Motion to Reconsider, Alter, or Amend the prior Order. By Order, dated November 25, 2019, the Court denied that motion. Patricia filed a Notice of Appeal.

On February 23, 2020, Patricia died. On October 9, 2020, Patricia's estate, which had been substituted for Patricia after her death, filed a Motion for Relief from Judgment pursuant to Rule 60(b)(2), SCRCP, arguing that the finding of what the estate claimed to be the "original note" in a box in Patricia's attic amounted to "newly discovered evidence" requiring the Court to relieve it from the judgment previously ordered. By Order dated June 25, 2021, the Court denied that motion.

On July 13, 2021, Patricia's estate filed a Notice of Appeal from that Order, and this Court consolidated the two appeals into this appeal by Order dated July 23, 2021.

There is no material issue of fact in the record on any of these issues. The record supports a grant of summary judgment to Respondent for all the reasons stated in the Order of the circuit court, as well as an additional ground that the circuit court did not reach as set forth herein.

STATEMENT OF FACTS

On June 18, 2004, the late Warren Holliday ("Warren") obtained a $2 million line of credit from the National Bank of South Carolina ("NBSC"). This loan was secured by one of the business rental properties that he owned in an LLC. On that same date, Warren drew down the entire $2 million to loan to his son, Respondent Ross Holliday ("Respondent"), who signed a Promissory Note payable to the order of Warren and his wife at the time, Patricia. Appellant provided no money or other security and was not a borrower on the loan from NBSC. See Deposition of Patricia (Pages 13-15); Deposition of Ross (Pages 16 -18, 25-27, and Exhibit 2). At the time, Warren included his wife as a payee on the Promissory Note as part of Warren's and her "estate plan." Deposition of Patricia (Pages 39-40); Deposition of Ross (Pages 24-25). Patricia considered the Promissory Note to be a "joint asset" along with all of Warren's business properties and assets. R. pp. 48-50, 51-52, 55.

Warren loaned the money to Ross to fund the purchase of an interest in a Utah construction business in which Warren had considered investing. Both Patricia and Ross testified that the loan was a business transaction between Warren and Ross. Deposition of Patricia (Pages 38-42); Deposition of Ross (Pages 18-20). The NBSC Note stated that the "purpose of the loan" was "revolving line of credit for business investments." R. p. 69. The NBSC Note was fully paid off in 2016 and, as the trial court noted, Patricia did not contest this fact. See June 25, 2021, Order, p. 3.

In 2005, Warren made a demand for payment, and Ross made approximately $800,000 in payments on the note between 2005 and 2007. In 2010, Ross made a further payment of approximately $371,000 to Warren out of the sale of a piece of property owned by Ross to CSX Railroad. Deposition of Patricia (Pages 31-34); Deposition of Ross (Pages 22-23, 37, 43-45, 52-

53).

In 2010, Ross began managing Warren's business in Charleston. In March of 2012, Patricia, Warren, and Ross executed a Financial Arrangements Agreement, in which both Patricia and Warren agreed that Ross would manage each of their business affairs and that "their financial dealings will henceforth be separate and that they will take no action which will bind or obligate the other in regard to the financial dealings or obligations of themselves." See Deposition of Ross, (Pages 30-31, 35-36, 74) and Exhibit D to Memorandum in Support of Motion for Summary Judgment.

In 2013, Patricia sought and obtained a divorce from Warren. Deposition of Patricia (Page 42). Patricia and Warren executed a Marital Settlement Agreement, Exhibit A to Memorandum in Support of Summary Judgment, which was incorporated into the Order of Divorce from the Family Court on December 9, 2013. See Court Order. Patricia released all her claims to Warren's business and personal assets, including all assets in his possession, in exchange for the marital abode, payments of $16,000 per month for life, and other assets. See R., pp. 31-43. On December 9, 2013, the Family Court issued its Final Order and Decree of Divorce which adopted the Marital Settlement Agreement and the Addendum thereto as the Order of the Court. See R., pp. 218-220.

In the Marital Settlement Agreement, Patricia released any and all claims that she might have had to Warren's business assets, which included the Promissory Note from Ross. The Marital Settlement Agreement contained numerous statements that Patricia released all her claims to any property arising out of and during her marriage other than as set forth in that agreement. The Agreement provided in pertinent part:

> "Whereas, the parties now consider it to be in their respective best interests to settle all issues between themselves and all matters heretofore arising or hereafter

to arise from their marital union; they have reached a permanent, complete, and final agreement; … and they desire that [the agreement] shall constitute the total agreement between them, both now and following any divorce which either might obtain, with respect to all matters which were raised or could have been raised between the parties hereto, other than the issue of divorce itself."

"The parties do hereby waive, release and forever acquit, and do hereby discharge each other, their administrators, successors, heirs, assigns of and from any and all suits actions, causes of action, claims, demands, damages (known, unknown, foreseen and unforeseen), … including, but not limited to, those resulting from or arising out of the marital relationship between Warren and Patricia, their marriage, separation or divorce, or any tort, or other legal or equitable claim (except those arising from a breach of this Agreement) from the beginning of the world to the date of this Agreement. The parties hereby expressly waive and release any claim either party may have in or against the Probate Estate of the other party pursuant to a Will, a spousal election or any other provision of the S.C. Probate Code."

"The parties agree that Warren shall retain and continue full ownership and interest in any and all [of his] companies and other business assets which Warren holds at this time. Patricia hereby relinquishes and waives any claim she may have in or against these business assets, except as provided in the Patricia Anne Holliday Trust [which provided for the $16,000 monthly payments]. Warren shall retain sole authority to manage these business assets personally, or at his sole discretion, delegate or appoint management of these business assets to a person holding durable power of attorney."

"Except to the extent set forth in this Agreement, Warren and Patricia have made a physical division of all other personal property acquired during the marriage, including, but not limited to, household furnishings, appliances, bank accounts, retirement accounts, money situated in other accounts, jewelry, sporting equipment and all other personal property of value. The parties each release the other from all claims of interest to any monies or assets in the possession of the other… Each shall retain sole ownership of all such properties in his or her possession or titled in his or her name unless such property is made the property of the other pursuant to the terms of this Agreement."

"Warren and Patricia each waive any claim of inheritance or right that they may be entitled to by virtue of the SC Probate Code to share in the other's estate… Warren and Patricia are limited to the receipt of those properties or monies as outlined in this Agreement."

R., pp. 31-43.

Patricia has received every payment to which she is entitled under the Marital Settlement Agreement both before and after Warren's death.[1] Although Patricia clearly remembered the existence of the Promissory Note, as evidenced by her filing a Financial Declaration on December 10, 2013, the day after her divorce was entered, stating that the Promissory Note was a marital asset, she failed to include the Promissory Note in the property to which she was entitled under the terms of the Marital Separation Agreement. [2]

Warren died on September 26, 2016. At no time while Warren was alive did Patricia assert any claim to Warren or make a demand for payment to Ross. On July 12, 2017, Patricia's lawyer made her first and only demand that Ross repay the $2 million note, more than thirteen years after the note was given. On February 19, 2018, Patricia initiated this action to collect from Ross on the note.

STANDARD OF REVIEW

When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. Turner v. Milliman, 392 S.C. 116, 121–22, 708 S.E.2d 766, 769 (2011). Summary judgment should be affirmed if there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Companion Prop. & Cas. Ins. Co. v. Airborne Exp., Inc., 369 S.C. 388, 390, 631 S.E.2d 915, 916 (Ct. App. 2006). Where the record is devoid of any allegation or evidence tending to show there is a material fact in issue, the moving party is entitled to summary judgment as a matter of law. Milligan v. Liberty Life Ins. Co., 313 S.C. 478, 481, 443 S.E.2d 381, 382 (1994); Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 117, 410 S.E.2d 537, 546 (1991) ("[B]ald allegations are

[1] On Patricia's death, the payments ceased.

[2] This filing was of no force, because Appellant's claims to the Note had already been addressed in the Marital Settlement Agreement and, even if not specifically addressed, implicitly addressed because Appellant did not raise the issue of the Note during the proceedings.

insufficient to create a genuine issue of fact."); George v. Empire Fire & Marine Ins. Co., 344 S.C. 582, 593, 545 S.E.2d 500, 505 (2001) ("The party opposing summary judgment cannot simply rest on mere allegations or denials contained in the pleadings."). Thus, Patricia cannot rely upon the mere allegations of her complaint, but instead, she must offer proof of the existence of a genuine issue of fact. Dyer v. Moss, 284 S.C. 208, 211, 325 S.E.2d 69, 70 (Ct. App. 1985).

Appellate courts may affirm any ruling, order, decision, or judgment upon any ground(s) appearing in the Record on Appeal. See Rule 220, SCACR; see also I'On, L.L.C. v. Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) (explaining that a party may raise additional reasons to affirm the lower court's ruling because it would "be inefficient and pointless" to require a party "to return to the judge and ask for a ruling on other arguments to preserve them for appellate review").

ARGUMENT

I. ANY CLAIM PATRICIA HAD TO THE PROMISSORY NOTE WAS RELEASED IN THE MARITAL SETTLEMENT AGREEMENT.

The Family Court has exclusive jurisdiction "to hear and determine actions for divorce … and for settlement of all legal and equitable rights of the parties in the actions in and to the real and personal property of the marriage…" S.C. Code Ann. § 63-3-530(A)(2). The Family Court Final Order and Decree of Divorce, dated December 9, 2013, stated that the parties presented the Marital Settlement Agreement to the Court and that it "purports to resolve all issues by and between the parties with the exception of the ultimate divorce." R., pp. 218-220. It further stated that: "The Parties read an additional addendum to the Marital Agreement into the record: 1. The personal property acquired by and between the parties during the marriage has been equitably divided to their mutual satisfaction…" R., pp. 218-220. The Court made a finding that "the Parties entered into [the Marital Agreement, the Addendum to the Marital Agreement and

The Patricia Anne Holliday Marital Trust] voluntarily, without duress, and after having been fully apprized [sic] of the financial status of one another." R., pp. 218-220. The Marital Settlement Agreement provided that, "in the event this Agreement is incorporated in said [Family Court] decree or order, it shall be a final resolution of the rights of the parties…" R., p. 41.

A beneficiary may contract away her beneficiary interest through a separation or property settlement agreement, even if the beneficiary designation is not formally changed. Estate of Revis by Revis v. Revis, 326 S.C. 470, 477, 484 S.E.2d 112, 116 (Ct. App. 1997). When a separation agreement provides general language of release without specifically addressing the policy/account providing the expectancy interest (like in the Marital Settlement Agreement), a named beneficiary is precluded from recovery when the general waiver is intended to apply to the expectancy interest. Stribling v. Stribling, 369 S.C. 400, 407, 632 S.E.2d 291, 294 (Ct. App. 2006) (noting that there is no distinction between the expectancy interest in various contractual documents when determining the issue of a release).

As set forth hereinabove, the Marital Settlement Agreement distributed the marital assets to Patricia and Warren. It specifically provided that Warren retained "full ownership and interest in any and all [business entities listed in Exhibit A] and ***other business assets which Warren holds at this time."*** R., p. 36. Patricia confirmed that this Note was a business asset when she testified that this was a "business transaction." R. p. 55.

Even if the Promissory Note was not a "business asset," the Marital Settlement Agreement discussed "Other Items of Property" and stated: "Except to the extent set forth in this Agreement, Warren and [Patricia] have made a physical division of all other personal property acquired during the marriage … The parties each release the other from all claims of interest to

any monies or assets in the possession of the other …unless stated otherwise herein. Each shall retain sole ownership of all such properties in his or her possession … unless such property is made the property of the other pursuant to the terms of this Agreement." R., p. 37.[3] Contrary to Patricia's argument that she did not give up her interest in the Promissory Note because it was not specifically discussed in the Marital Settlement Agreement, there was a catchall that included all personal property, and that provision established that Warren owned the Promissory Note.[4]

Patricia also asserts that summary judgment is improper because the Marital Settlement Agreement is completely ambiguous "as to whether or how physical division of the Note was made."[5] However, a party cannot create ambiguity by pointing out a single sentence or clause. North American Rescue Products, Inc. v. Richardson, 411 S.C. 371, 769 S.E.2d 237 (2015). To determine if a contract term is "reasonably susceptible of more than one interpretation," the court must look at its plain language with reference to all of the agreement's provisions. See generally, § 30:5. Ambiguity as a prerequisite to interpretation and construction—The determination of ambiguity, 11 Williston on Contracts § 30:5 (4th ed.). On the issue of property, the document is not ambiguous, because it clearly provides that Warren was to have all business assets and all personal property not in Patricia's possession at the time. Therefore, Patricia's argument, although disguised as one dealing with ambiguity, is merely an evidentiary argument that contradicts her own evidence.

---

[3] The Promissory Note at issue in this case is a "negotiable instrument" as defined by the Negotiable Instruments Section of the South Carolina Commercial Code. See S.C. Code Ann. § 36-3-104.

[4] Patricia testified that she never had possession of the note and that Warren held it. Patricia Deposition, pp. 29-33.

[5] Appellant spends much of the first section of its brief discussing evidence of Patricia and Warren's "intent." However, South Carolina law requires the court must first find that the contract is ambiguous before considering evidence of intent. Hawkins v. Greenwood Development Corp., 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997). According to Appellant, if a contract requires the parties to take some action (like a physical division of property), then it is ambiguous if we do not know if the action has been taken. That is clearly not the law.

There is another problem with Patricia's attempt to create ambiguity here. Neither party has even alleged that a "physical division" of the Note ever occurred. In fact, and as the trial court noted in its Order denying Plaintiff's Motion for Relief from Judgment, "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." See Order, p.3 (citing Patricia's Deposition at page 29-30). Further still, Patricia fails to even address the fact that the Family Court had exclusive jurisdiction to settle "all legal and equitable rights … to the real and personal property of the marriage" (S.C. Code Ann. § 63-3-530(A)(2)) and that the Family Court did settle all such rights "to the real and personal property of the marriage" in its Final Order and Decree of Divorce. R., pp. 218-220.

II. IN ACCORDANCE WITH S.C. CODE § 36-3-604, PATRICIA DISCHARGED ANY OBLIGATION OF ROSS TO PAY HER ON THE NOTE.

S.C. Code § 36-3-604(a) provides that "[a] person entitled to enforce an instrument, with or without consideration, may discharge the obligation of a party to pay the instrument (i) by intentional voluntary act…, or (ii) by agreeing not to sue or otherwise renouncing rights against the party by a signed record." The Marital Separation Agreement is a signed record where Patricia agreed to release Ross from any obligation to pay her on the Note.[6]

On the very first page, the Marital Settlement Agreement states "the parties … settle all issues between themselves and all matters heretofore arising or hereafter to arise from their marital union; they have reached a permanent, complete, and final agreement … with respect to all matters which were raised or ***could have been raised*** between the parties hereto." See R., p.

[6] In her brief, Appellant cites In re Washington, 581 N.R. 150 (Bkrtcy. D.S.C. 2017), as support for her argument that the Marital Separation Agreement did not discharge her claim to the Promissory Note. However, this case has no bearing on the issues herein and merely hold that an IRS Form 1099-C does not discharge a claim under § 36-3-604(a)(i). Respondent's argument is that Appellant's claim was discharged under § 36-3-604 (a)(ii).

31. On page 6 of the Marital Settlement Agreement, Patricia "hereby relinquishes and waives any claim she may have in or against these business assets, except as provided in the Patricia Anne Holliday Trust." R., p. 36. On page 7 of the Marital Settlement Agreement, it states she releases and waives "any and all right, title, or interest he or she has, or may have had, to any trust funds, inheritances, accounts, gifts, or property of any kind inherited by the other party, or gifted to the other party, or held in trust for the benefit of that party, except as may be specifically provided herein." R., p. 37. Then again on page 9, it says "Warren and Patricia are limited to the receipt of those properties or monies as outlined in this Agreement." R., p. 39. A signed record could not be more clear on this point.

Patricia expressly released all rights to property stemming from her marriage with Warren—which most obviously included the Note (as admitted by Patricia). R., pp. 49-50.

In the Marital Settlement Agreement, Patricia expressed multiple releases. A release is a contract and contract principles of law should be used to determine what the parties intended. Curry v. Carolina Ins. Grp. of SC, Inc., 428 S.C. 60, 73, 832 S.E.2d 760, 766 (Ct. App. 2019). When the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect. Id. at 73-74; 832 S.E.2d at 767. The terms of the contract must be "interpreted according to the terms the parties have used, and the terms are to be taken and understood in their plain, ordinary, and popular sense." Bluffton Towne Ctr., LLC v. Gilleland-Prince, 412 S.C. 554, 569, 772 S.E.2d 882, 890 (Ct. App. 2015).

Patricia executed a General Release of Liability on page 3 of the Settlement Agreement:

> **GENERAL RELEASE OF LIABILITY.** The parties do hereby waive, release and forever acquit, and do hereby discharge each other, their administrators, successors, heirs, assigns of and from any and all suits, actions, causes of action, claims, demands, damages (known, unknown, foreseen, and unforeseen), costs, expenses, compensation, and all consequential damages, including, but not limited to, those resulting from or arising out of the marital

> relationship between Warren and Patricia, their marriage, separation or divorce, or any tort, or other legal or equitable claim (except those arising from a breach of this Agreement) from the beginning of the world to the date of this Agreement….

R., p. 33. In this provision, Patricia released Warren Holliday's "administrators, successors, heirs, assigns" from "all suits, actions, causes of action," etc. that result from or arise out of the "marital relationship … from the beginning of the world to the date of this agreement." R. p. 33.

On page 11, the Agreement states: "there are no representations, warranties, promises, covenants, or undertakings other than those expressly set forth herein, and this Agreement shall be binding upon and shall inure to the benefit of the heirs, personal representatives, executors, administrators, successors, and assigns of the parties hereto." R. p. 41.

It is undisputed that the Note was entered into during the marriage of Patricia and her husband Warren. Patricia testified that her consideration for the Note was her "marital assets." See R. pp. 49-50 and 55. She even testified that this was a "business transaction." R. p. 55. Ross was an heir, a successor, an assign, and the Personal Representative of Warren. Ross holds all of those titles; therefore, Patricia expressly waived any and all claims arising out of the marital relationship against Ross.

III. AS AN ADDITIONAL GROUND FOR THE GRANT OF SUMMARY JUDGMENT, PATRICIA'S CLAIM FOR PAYMENT ON THE NOTE IS BARRED BY THE STATUTE OF LIMITATIONS.

As the Circuit Court Order recognized, Ross argued that Patricia's claim is barred by the applicable statute of limitations. In fact, S.C. Code Ann. § 36-3-118(b) applies to a Note payable on demand[7] and requires that a plaintiff bring an action within six years after a demand for payment has been made or within ten (10) years of the date of the note if no payments have been made. Patricia never made a demand for payment and testified that she had no knowledge as to

[7] The Note expressly states that it is "payable upon demand." By its terms, the Note requires full payment within six months following the date of demand.

whether Ross made any payments to Warren. Deposition of Patricia (Page 10); see, also, p. 31, 38. Thus, Patricia went thirteen (13) years without requesting payment on the Note or even inquiring as to whether the Note had been, or was being, paid.

Ross testified that his father made a demand for payment in late 2005 or early 2006. R., p. 65. Patricia testified that her husband had called Ross to tell him that he had to make payments "on a couple occasions because we were in need of money" and that he was "going to have to make some effort to pay on this loan." R., p. 53-54. If Warren made a demand for payment in 2005, which is uncontested in the record, then the time to bring a lawsuit on the note expired six years after the demand—2011. This lawsuit was not commenced until 2018. Patricia's claim is therefore barred by the statute of limitations, which is a separate ground for the granting of summary judgment to Ross.

Aside from the *uncontested* testimony that Warren made a demand for payment well before the statutory bar of six years, Patricia's failure to bring an action until after Warren died should prevent recovery on this Note. See Pee Dee Health Care, P.A. v. Estate of Thompson, 424 S.C. 520, 537, 818 S.E.2d 758, 767 (2018). The doctrine of laches prevents a party—who has knowledge of her rights but fails to seasonably assert them—from enforcing said rights when doing so would cause her adversary "to incur expenses or enter into obligations or otherwise detrimentally change his position." Id. Most importantly, Patricia has known about this loan from the time of its making in 2004 and has testified that she never denied knowledge of her right to the Note. Nonetheless, Plaintiff's testimony is replete with admissions of inactivity, negligence, and general lack of knowledge. See, e.g., Deposition of Patricia (responding to Defendant's counsel as to why she took so long to request payment, Patricia said she "assumed" it was being paid). It is difficult to comprehend how someone could go a period of 13 years

without requesting payments on a purported $2M Note or inquiring whether they were paid or not.[8] Patricia's failure to timely enforce any rights she might have had under the Note has essentially ambushed Ross. Prior to this lawsuit, Ross believed the Note was paid off in full, and Patricia's delay in taking action confirmed this for him over the years. Due to Plaintiff's unreasonable delay, if the note is not satisfied as Plaintiff claims, Ross has incurred interest over a long span of time and no longer has access to bank records and other documents necessary to show that he paid off the loan. In addition, Ross has incurred obligations and tied up capital in his role as a business manager that would have been otherwise used to pay off this Note. Ross has certainly been prejudiced by enforcing a 15-year-old Note that has been accruing interest throughout its life and would require a large payment in the immediate future.

For this additional legal basis, Ross is entitled to have the Trial Court's grant of summary judgment affirmed.

IV. THE ALLEGED DISCOVERY OF THE ALLEGED ORIGINAL NOTE IN PATRICIA'S HOME DOES NOT CONSTITUTE THE DISCOVERY OF NEWLY DISCOVERED EVIDENCE TO ALLOW RELIEF UNDER RULE 60(b)(2).

The Trial Court issued its Order granting summary judgment to Ross because Patricia released any claims that she might have had to the Promissory Note when she executed the Marital Settlement Agreement. As the Court stated:

> First, the Marital Settlement Agreement, by its terms, resolved all issues of ownership of marital assets. As even Plaintiff recognized, the Promissory Note at issue herein was a marital asset. Marital property is defined as all real and personal property acquired by the parties during marriage and owned as of the date of filing or commencement of marital litigation regardless of how title is held. Equitable distribution of marital assets is based on a recognition that marriage is, among other things, an economic partnership. When a marriage ends, division of the property acquired is determined by the guiding equities set forth in Section 20-3-620 of the South Carolina Code. Similarly, South Carolina law recognizes that a beneficiary may contract away her beneficiary interest through a

[8] This can likely be attributed to the fact that she gave nothing of value; has suffered no legal damage; and the fact that she was never supposed to be paid on this Note.

> separation or property settlement agreement, even if the beneficiary designation is not formally changed. [Citations deleted.]
>
> It is undisputed that the loan made to Ross was done during the marriage of Patricia and Warren. All debts and receivables arising during the marriage of the parties constitutes marital property. When 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. Patricia expressly released Ross – 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." In addition, Patricia released any claims to the Note repeatedly throughout the document. The release specifically says that "Warren Holliday shall remain solely liable for any and all business debts that Warren has incurred" and that "Warren and Patricia are limited to the receipt of those properties or monies as outlined in this Agreement."
>
> …
>
> 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 personally 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.

Order, dated October 11, 2019, pp. 5-6.

In March of 2020, six (6) months after the Court's Order, Mark Holliday, who is another son of Patricia and Warren, as well as the Personal Representative and beneficiary of Patricia, purportedly found the "original" promissory note in Patricia's house, even though Patricia had testified that she had never had possession of the original note. Deposition of Patricia (pages 29-30). As the Trial Court concluded, the discovery of the alleged original note does not create an issue of fact that is material to the grounds on which this Court granted summary judgment to Ross.

In addition, the original note is not "newly discovered evidence" to require that relief be granted under SCRCP 60(b)(2). This rule provides:

> 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) …

There is no question that the document found by Mark Holliday was known to Patricia as she brought a lawsuit on it, and it was allegedly in her possession during the litigation. In Lanier v. Lanier, 364 S.C. 211, 218, 612 S.E.2d 456, 459 (Ct. App. 2005), this Court opined that 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. Thus, the found document is not "newly discovered evidence" and cannot be the basis for relief from the judgment granted.

In any event, the lower court did not rely on Patricia's testimony that Warren had possession of the original note in its findings and conclusions of law. Instead, the Court based its Order solely on the terms of, and releases given by, Patricia in the Marital Settlement Agreement. ("The Marital Settlement Agreement, by its terms, resolved all issues of ownership of marital assets." Order, dated October 11, 2019, p. 5.)

Patricia did not meet the requirements of Rule 60(b)(2) and is not entitled to relief from the summary judgment.

CONCLUSION

For all the above reasons, Respondent Ross Holliday respectfully requests that this Court affirm the circuit court's grant of summary judgment to Ross on October 11, 2019, and further affirm the circuit court's November 15, 2019, denial of Patricia's Motion for Reconsideration and its June 25, 2021, denial of Patricia's Motion for Relief under Rule 60.

[SIGNATURE ON FOLLOWING PAGE]

ROSEN HAGOOD, LLC

By: *s/ Alice F. Paylor*

Alice F. Paylor, Esquire
F. Truett Nettles, Esquire
Bijan Ghom, Esquire
P.O. Box 893
Charleston, SC 29402
(843) 577-6726
apaylor@rosenhagood.com
tnettles@rosenhagood.com
bghom@rosenhagood.com

ATTORNEYS FOR RESPONDENT

Charleston, South Carolina
December 30, 2021