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Oct 04 2022

SC Court of Appeals

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**APPEAL FROM BEAUFORT COUNTY
COURT OF COMMON PLEAS
THE HONORABLE BENTLEY D. PRICE
CIRCUIT COURT JUDGE**

**APPELLATE CASE NO. 2022-000469
CASE NO. 2019-CP-07-02629**

Margaret A. Eberly and Barbara J. Pavelik,

PLAINTIFFS,

versus

Advanced Flooring & Design Division of ISI, LLC;
Archer Exteriors, Inc.; Crossroads Enterprises, LLC;
D.R. Horton, Inc.; East Coast Construction Cleanup Corp.; Lather
Landscapes, Inc.; Lather Construction SC, Inc.;
Lather Construction, Inc.; Professional Drywall & Paint Services, LLC;
Professional Exteriors II, LLC; and Valim Construction, LLC,

DEFENDANTS,

Of whom

D.R. Horton, Inc.^{is}

APPELLANT,

versus

Hutton's Landscapes, Inc.; Lather Construction SC, Inc.; and
Lather Construction, Inc.

RESPONDENTS.

**RESPONDENTS LATHER CONSTRUCTION, INC., AND LATHER
CONSTRUCTION, SC, INC.'S RETURN TO D.R. HORTON, INC.'S
PETITION FOR REHEARING**

Respondents Lather Construction, Inc., and Lather Construction, SC, Inc.'s (hereinafter collectively referred to as "Lather") hereby submit their Return to the Petition for Rehearing filed by Appellant D.R Horton, Inc. ("D.R. Horton"):

Lather incorporates herein by reference its May 31, 2022 Reply to D.R. Horton's Response in Opposition to the Motion to Dismiss Appeal as if fully restated herein. Simply put, for this Court to obtain jurisdiction over D.R. Horton's appeal against Lather, D.R. Horton must show that it timely and properly served Lather with a notice of appeal naming it as a respondent in accordance with the Appellate Court Rules. It cannot do so.

D.R. Horton in its Petition for Rehearing does not put forth any relevant information that the Court might have overlooked or misapprehended and therefore there is no basis to grant such a request for rehearing. D.R. Horton attempts to divert the Court's attention from the clear facts and law that led the court to its sound decision to dismiss the appeal. The applicable rules say that respondents must be served within thirty days after notice of entry of the order or judgment. *See* Rule 203(b)(1), SCACR. As to Lather, to serve its attorneys, D.R. Horton was to e-mail the pleading to the lawyer's primary e-mail address listed in the Attorney Information System. *See Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022)*, S.C. Sup. Ct. Order dated May 6, 2022. D.R. Horton did not do that within the above-described thirty-day window. Further, there is no confusion in the electronic service rules and no scrivener errors. Simply, D.R. Horton did not name Lather in its original appeal. A scrivener's error, or clerical error, is "an error resulting from a minor mistake or inadvertence, especially in writing or copying something on the record, and not from judicial reasoning or determination." *Clerical Error*. Black's Law Dictionary (8th Ed. 2004). Not filing an appeal against three parties cannot be a scrivener's error. D.R. Horton's failure to serve Lather with

a notice of appeal naming it as a respondent within the thirty (30) day time period for the service of the notice of appeal is not a mere clerical or scrivener's error which can be corrected because this Court has no authority to rescue a litigant from an untimely notice of appeal. Elam v. S.C. Dep't of Transp., 361 S.C. 9, 14–15, 602 S.E.2d 772, 775 (2004).

As to Lather Construction SC, Inc., the Court does not need to address anything as to that entity, as the appeal was properly dismissed, and any issue as to the lower court not yet ruling on Lather Construction SC, Inc.'s Motion for Summary Judgment can be addressed by the lower court once the case resumes.

Accordingly, for the reasons set forth herein, in its May 31, 2022 Reply to D.R. Horton's Response in Opposition to the Motion to Dismiss Appeal, in the Motion to Dismiss Appeal, and incorporating arguments of Hutton's Landscapes, Inc. as to the same (to the extent they apply to Lather), Respondents Lather Construction, Inc., and Lather Construction, SC, Inc. therefore respectfully request this Court to deny the Petition for Rehearing from Appellant D.R. Horton, Inc.

Respectfully submitted,

/s Scott H. Winograd

Jeffrey A. Ross, Bar No.: 74254

Philip P. Cristaldi, III, Bar No.: 102219

Scott H. Winograd, Bar No.: 103483

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Attorneys for Lather Construction, Inc. and Lather Construction SC, Inc.

Mt. Pleasant, South Carolina

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DEFENDANTS,

Of whom

D.R. Horton, Inc. is

APPELLANT,

versus

Hutton's Landscapes, Inc.; Lather Construction SC, Inc.; and
Lather Construction, Inc.

RESPONDENTS.

Proof of Service

I certify that I have served Lather Construction, Inc. and Lather Construction, SC, Inc.'s Return to D.R. Horton, Inc.'s Petition for Rehearing dated October 4, 2022, by personally serving the same pursuant to Rule 262 (c)(3), SCACR, and S.C. Supreme Ct. Order dated August 25, 2021 on the

following counsel of record using the primary email address listed in the Attorney Information System (if applicable):

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Attorneys for D.R. Horton, Inc.

A copy of the sent email is enclosed with this Certificate of Service.

s/ Scott H. Winograd
Jeffrey A. Ross, Bar No.: 74254
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Scott H. Winograd, Bar No.: 103483
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***Attorneys for Lather Construction, Inc. and Lather
Construction SC, Inc.***

Bobbi Myers

From: Bobbi Myers
Sent: Tuesday, October 4, 2022 5:02 PM
To: 'Jason Imhoff'; 'John Crawford'; 'Tom Dudley'; 'carl@carlmullerlaw.com'; 'Alexandra Williams'; Ben@bentraywicklaw.com
Cc: Cassaro, Teresa; Megan White; Emily Gifford Lucey; Carmen Ganjehsani; 'cappy@bentraywicklaw.com'; Kay Kelly; lin@mlf.law; tom@mlf.law; HGrate@RichardsonPlowden.com; 'Scott Winograd'; Philip Cristaldi; Jeff Ross
Subject: Appellate Case no.: 2022-000469 - Return to DR Horton's Petition for Rehearing
Attachments: 2022.10.04 SHW to Ct. Appeals re Return to DRH Petition for Rehearing.pdf

Counselors,

Attached please find Lather Construction, Inc., and Lather Construction SC, Inc.'s Return to DR Horton, Inc.'s Petition for Rehearing and Certificate of Service being filed with the Court of Appeals today by electronic service in connection with the above referenced matter.

Thank you,



Bobbi Myers
Paralegal/Office Manager
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*Please note our email address change – our entire firm will now be “first initial, last name @rclawsc.com”
Please note our firm address change*

This e-mail and the information transmitted herein may contain privileged and/or confidential information and is the property of the sender. If you are not the intended recipient, or the employee or agent responsible for delivering it to the intended recipient, you are hereby notified that any dissemination or copying of this information, or the taking of any action in reliance on the content of this email, is strictly prohibited. If you have received this e-mail in error, please immediately contact Jeff Ross or Phil Cristaldi at Ross & Cristaldi, LLC, (843) 329-4040, and please delete the original email, all attachments and any copies thereof.

ROSS & CRISTALDI LLC
ATTORNEYS AT LAW

Jeffrey A. Ross
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*Admitted in OH, NC, & SC

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SC Court of Appeals

VIA E-MAIL (ctappfilings@sccourts.org)

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

Re: Margaret A. Eberly and Barbara J. Pavelik v. DR Horton, Inc.
Appellate Case No.: 2022-000469

Dear Ms. Kitchings:

Enclosed please Respondents Lather Construction, Inc. and Lather Construction SC, Inc.'s Return to D.R. Horton, Inc.'s Petition for Rehearing and Certificate of Service for filing.

Thank you very much for your attention to the above.

Very truly yours,



Scott H. Winograd

SHW/bm

Enclosures

Cc: Jason Imohoff (jmhoff@conlaw.com)
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