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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Shannon M. Phillips, Master-in-Equity

Spartanburg County Case Nos. 2021-CP-42-00086 and 2021-CP-42-00504

Consolidated Appellate Case No. 2022-001420

Gibbs International, Inc. Respondent,

vs.

Vidalia Industrial Facilities, LLC,..... Appellant.

AND

Vidalia Industrial Facilities, LLC and
Indigo Industrial Investments, LLC,..... Appellants,

vs.

Gibbs International, Inc., Gregory R. Boozer, and
Jimmy I. Gibbs,..... Respondents.

AND

GBPT, LLC..... Respondent,

vs.

Rumsfeld Indigo, LLC Appellant.

RETURN TO MOTION TO STRIKE
IMPROPER DESIGNATIONS

Pursuant to Rule 240(e) of the South Carolina Appellate Rules (“SCACR”), Appellants Rumsfeld Indigo, LLC, Vidalia Industrial Facilities, LLC, and Indigo Industrial Investments, LLC (collectively, “Appellants”) return and respond to Respondents Gibbs International, Inc. and GBPT, LLC’s (“Respondents”) Motion to Strike Improper Designations as follows:

ARGUMENT

I. The Settlement Agreement should be included in the Record on Appeal because it was incorporated into the record prior to the trial court’s order denying Appellants’ motion to strike.

Respondents move to strike from the Record on Appeal Appellant’s Motion for Reconsideration, as well as the related Brief in Support of Motion for Consideration and Exhibits thereto (hereinafter, “Disputed Documents”). *Mot. to Strike Improper Designations*, filed Nov. 22, 2022. Appellants filed the Disputed Documents with the trial court on September, 20, 2022. Appellants contend that Respondents’ objections to inclusion of the Disputed Documents into the Record on Appeal are designed to preclude the Court from considering the underlying settlement agreement that Respondents contend resolved various claims between Respondents and Appellants (the “Settlement Agreement”) and upon which the Confession of Judgment, which is the subject of this appeal, was purportedly triggered. As discussed below, the Court may properly address the validity of the Confession of Judgment without considering the Settlement Agreement. However, because the Settlement Agreement was incorporated by reference into Respondent’s Confession of Judgment, it is properly included in the Record on Appeal.

SCACR Rules 209(b) and 210(c) provide that matters relevant to the appeal and presented to the lower court may be properly designated and included in the Record on Appeal. The Disputed Documents are relevant to—although not dispositive of—the Appellants’ contentions in this appeal as the Settlement Agreement serves as the basis for the Confession of Judgment. Further,

because Respondent incorporated the Settlement Agreement by reference in its June 21, 2022 filings, the Settlement Agreement was properly presented to the lower court.

On June 21, 2022, Respondents filed their purported Confession of Judgment (“Confession of Judgment”). The Confession of Judgment was included as Exhibit B to the Affidavit of Gregory R. Boozer (the “Affidavit”). The Affidavit states that “the parties entered into a settlement agreement on April 4, 2022, which is attached hereto as Exhibit A.” Affidavit, ¶ 2. The Confession of Judgment itself was supposedly “required in and made a part of the Settlement Agreement.” *Id.* at ¶ 4. Despite acknowledging the Settlement Agreement and stating that it was to be included in the record, counsel for Respondent did not attach the agreement as Exhibit A for reasons unknown to Appellants’ counsel. However, because the Judgment was presented as “required in and made part of the Settlement Agreement,” the Settlement Agreement is incorporated by reference and is part of the Record on Appeal.

The trial court’s statement, in its Order Denying Motions to Strike, that the “complete settlement agreement . . . was not presented to the Court for consideration,” *Ord. Den. Mots. To Strike*, p. 3, is incorrect as a matter of law. Rather, the Settlement Agreement was “raised [] and ruled on,” as required by the SCACR. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (parenthetical). Courts routinely, and without controversy, hold that documents referenced in other documents or filings are incorporated by reference. *See, e.g., American Fidelity Fire Ins. Co. v. Binnings Constr. Co.*, 302 So. 2d 320, 323 (La. App. 4th Cir. 1974) (“The matters which we have discussed in connection with the validity of the default judgment were not pleaded by American in the trial court but they have been brought up on appeal. The entire record of the original proceedings is a part of the record on appeal having been incorporated by reference in the original exception filed by Binnings to the action of nullity.”); *Patterson v. Witter*, 425 S.C. 213,

821 S.E.2d 677 (S.C. May 24, 2018), reh'g denied (trial court may properly consider a pre-suit demand letter that was discussed in but not attached to complaint); *235 L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 422 (2d Cir. 2011) (a complaint may be deemed to include materials attached as exhibits and incorporated by reference). Because the June 21, 2022 filing incorporated the Settlement Agreement, the Settlement Agreement practically and necessarily is part of the Record, despite Respondent's failure to actually attach the Settlement Agreement.

Regardless of whether this Court determines that the Motion to Reconsider and Brief in Support were presented to the lower court, the purported Settlement Agreement was incorporated by reference by the Affidavit to the Confession of Judgment and is relevant to the appeal. As such, the Settlement Agreement was properly included in Appellant's Designation of Matters to be Included on Appeal.

II. Inclusion of the Motion for Reconsideration and Brief in Support thereof are necessary to a proper adjudication of this Appeal.

Even if the Court were to find that Motion for Reconsideration and brief in support thereof should not be included in the record on appeal, there remains an ample Record on Appeal on which to find in favor of Appellants.

Appellants' Motions to Strike addressed only the Confession of Judgment entered by the Gibbs Parties on June 21, 2022. *Mot. to Strike Confession of Jud.*, filed June 29, 2022. Citations contained Appellants' initial brief to the settlement agreement are provided simply to give context to the procedural history and factual background of the present litigation. *See Br. of Appellants*, filed November 17, 2022, p. 2 ("Initial Brief") (citing *Br. in Supp. of Mot. For Recons.*, Ex. A, for purposes of showing that that the purported Settlement Agreement was procured in relation to various claims between the Parties and that it contemplated a Confession of Judgment); *see also id.* p. 3 (citing Appellants' *Mot. For Recons.*, filed September 20, 2022, for purposes of illustrating

the procedural history of this matter and acknowledging that Appellants Motion for Reconsideration was filed); *see also id.*, p. 9, fn. 6 (highlighting that the Settlement Agreement did not contain the kind of conspicuous language contemplated by ABA Formal Opinion 11-461).

ABA Formal Opinion 11-461 contemplates the disclosures which should be made on “an enforceable obligation” drafted by one party’s counsel and sent to another party without informing their counsel. ABA Formal Opinion 11-461, p. 5 (“ABA Opinion”). Appellants discussed these requirements at length in their initial brief as they relate to the present matter. Appellants further explicitly noted that these obligations apply to the Confession of Judgment. Initial Br., p. 9, fn. 6 (“The Confession of Judgment, however, was filed with the trial court, and is intended to be ‘an enforceable obligation,’ ABA Opinion at 5, just as the Gibbs Parties contend the Settlement Agreement is an enforceable obligation.”). It is the actions and omissions related to the Confession of Judgment which are the subject of this appeal, not the Settlement Agreement.

Appellants explained in their Initial Brief that they attached the Settlement Agreement to the Brief in Support of Motion for Reconsideration “solely for purposes of demonstrating that the language recommended in the ABA Opinion [was also] ‘notably absent’” from the Settlement Agreement. *Id.* (internal citations omitted). Appellants cited the purported Settlement Agreement solely to show that the Gibbs Parties did not include the recommended language on any other purportedly “enforceable obligation.” ABA Opinion at 5. It is not Appellants’ contention that the lack of conspicuous language contained in the Settlement Agreement should warrant a finding in their favor on appeal. Rather, citation to the Settlement Agreement simply provides insight into the universe of disclosure – or lack thereof – which were made to Appellants without informing their counsel. While the Settlement Agreement helps provide color to Respondents’ actions, the

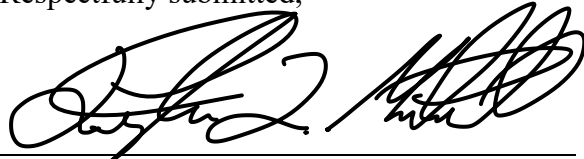
four corners of the Confession of Judgment itself was violative of Rule 4.2 of the South Carolina Rules of Professional Conduct.

As stated above, the Settlement Agreements were properly included in their Designation of Matters to be Included in the Record on Appeal as they were incorporated in Respondents' June 21, 2022. Should the Court disagree, however, the absence of Settlement Agreements should have no bearing on this Court's determination that the Confession of Judgment should have been stricken and the trial court's entry of judgment against Appellants was improper.

CONCLUSION

For the reasons stated herein, Appellants pray the Court denies Respondents' Motion to Strike Improper Designations, and for all other relief just and proper.

Respectfully submitted,



Date: December 2, 2022

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CERTIFICATE OF SERVICE -
APPELLANTS' RETURN TO MOTION TO
STRIKE IMPROPER DESIGNATIONS

I certify that I have served Appellants' *Return to Motion to Strike Improper Designations* on all Respondents by, pursuant to the Supreme Court of South Carolina's May 6, 2022 Order (Case No. 2020-000447), delivering each a copy via electronic mail to the following addresses on December 2, 2022:

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Respectfully submitted,



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