

THE STATE OF SOUTH CAROLINA
In The Court of Appeals
Case No. 2013-000327

APPEAL FROM YORK COUNTY
Court of Common Pleas

Hon. John C. Hayes, III
Presiding Circuit Court Judge

Consolidated case no. 2010-CP-46-2326

Juontonio Pinckney, et al..... Appellants,

v.

Epcon Communities, Inc.,
Epcon Communities Franchising, Inc.,
Brock L. Fankhauser, Fankhauser Property Group, Inc.,
Stonecrest Villas of Tega Cay, LLC,
And Stonecrest Villas of Tega Cay Owners'
Association, Inc. Respondents

RESPONDENT CROSS-APPELLANT'S REPLY TO APPELLANTS' RETURN TO
MOTION TO DISMISS AND MEMORANDUM IN SUPPORT OF SAME

Brett Dressler
301 S. McDowell Street, Suite 410
Charlotte, North Carolina 28204
Telephone: 704.377.5050
Facsimile: 704.927.2868
Attorney for Respondent-Cross-Appellant

RECEIVED
MAY 23 2013

SC Court of Appeals

Respondent/Cross-Appellant, Stonecrest Villas of Tega Cay Owners' Association, Inc., pursuant to Rule 240(f) of the South Carolina Appellate Court Rules, hereby files this Reply to the "Appellants' Return to Respondent/Cross Appellant's Motion to Dismiss and Memorandum in Opposition". Appellants' Return to the Motion to Dismiss fails to provide an adequate response or justification for Appellants' failure to perfect their appeal of the January 23 and February 27 Lower Court orders; therefore, it must be dismissed.

PROCEDURAL BACKGROUND

The Appellants' Return states that the "Appellants agree generally with the Procedural Background recited by Respondent's memorandum." (See Appellants' Return at p. 2). Given that Appellants have agreed with Cross-Appellant's rendition of the procedural history, the issue before this Court is whether Appellant has properly perfected their appeal of the January 23, 2013 and February 27, 2013 Lower Court Orders, which granted the Respondent/Cross-Appellant's motion for summary judgment.

On October 12, 2012, the Respondent/Cross-Appellant filed a Motion for Summary Judgment asking the Lower Court to dismiss all parties' claims for damages to the common-elements due to the settlement. (See Exhibit E to Motion to Dismiss, 00044-00049). Oral argument on Respondent/Cross-Appellant's Motion for Summary Judgment was held on December 19, 2013. (See Appellants' Return at pp. 2-3). On January 23, 2013, the Lower Court granted the motion and dismissed all parties' claims for the cost to repair the construction defects within

the common-elements, including the identical claims of the plaintiff Appellants. (See Exhibit F to Motion to Dismiss, 00050-00062). Appellant's sought reconsideration of the January 23, 2013 Order by filing a motion to alter or amend. (See Exhibit G to Motion to Dismiss, 00063-00075). Appellant's motion was denied on February 27, 2013. (See Exhibit H to Motion to Dismiss, 00076-00078).

Prior to filing a Notice of Appeal, Appellants ordered and received a transcript of the December 19, 2013 hearing. (See Return at pp.2-3). Appellant served the transcript on all parties on March 15, 2013. (Id.) Then, on March 25, 2013, Appellants filed a Notice of Appeal of the January 23 and February 27 orders. Because the transcript was already received by Appellant, Appellant's brief was due on April 24, 2013. Appellant failed to file a brief or request to extend time prior to April 24, 2013.

A. The Filing of Appellant's Motion to Dismiss Cross-Appeal did not Stay Appellants' Appeal

Appellants' Return appears to argue that the briefing schedule for Appellants' appeal of the January 23, 2013 and February 27, 2013 Lower Court Orders was stayed when Appellants' filed a Motion to Dismiss the Cross-Appeal. Appellant cites no rule or fact to support this conclusion. To the contrary, Appellants' Motion to Dismiss Cross-Appeal specifically argues that the issues in Appellants' Notice of Appeal and the Cross Notice of Appeal are separate and distinct.

Respondent filed a Cross Notice of Appeal on March 28, 2013. In the Cross Notice of Appeal, Respondent appeals the August 27, 2012 Lower Court Order. On April 4, 2013, Appellant filed a Motion to Dismiss the Cross-Appeal, arguing that the Cross-Appeal should be dismissed because the January 23, 2013 Lower Court order is unrelated to the August 27, 2012 Order. (See Appellant's Motion to Dismiss Cross-Appeal at p. 2). Appellant further stated that the cross-appeal should be dismissed as "untimely, collateral and raising issues not properly preserved for review." Id. at p. 3. Appellant alleges in the motion that the Respondent's cross-appeal "attempts to link prior un-challenged orders of the trial court and consolidate them with the appeal matters now pending appeal." Id.

Appellants' arguments undermine Appellants' current position that filing of a motion to dismiss the cross-appeal had any effect on the Appellants' appeal. Because each Notice of Appeal is separate and distinct, dismissal of one part of the appeal for procedural or other reasons has no affect on the other. Accordingly, the filing of the Motion to Dismiss the Cross-Appeal did not operate to stay the briefing schedule related to Appellants' appeal of a separate order.

B. Appellants Did Not File a Motion for Extension to File Their Brief

Appellants argue that they filed for an extension of time and therefore, they should be excused from failing to file their brief. However, Appellants'

Motion for Extension and Motion for Consolidation was not at all related to the filing of the brief in this appeal.

To understand Appellants' reference to the Motion to Consolidate and Motion for Extension, additional background information is required. To date, there are three separate appeals of the Lower Court rulings. The first appeal was filed in 2012 and is styled Juontonio Pinckney, et al. v. Epcon Communities, CA No. 2012-213730. It was initiated by the filing of a Notice of Appeal by the Fankhauser Property Group, Inc. (See Exhibit J, which is a true and accurate copy of the Notice of Appeal) (hereinafter referred to as the "First Appeal"). In the First Appeal, the Fankhauser Property Group appealed orders entered by the Lower Court on October 2, 2012 and November 12, 2012.

The Second Appeal is the one at issue in this Motion. On March 25, 2013, Appellants filed a Notice of Appeal of the January 23 and February 27 Lower Court Orders (hereinafter "Second Appeal"). The Second Appeal had a briefing deadline of April 24, 2013 for the Appellate Brief. No documents were filed in this case as of April 24, 2013.

On or about April 25, 2013, Appellants filed "Appellant Motion for Extension of Time and Motion to Consolidate." See Exhibit K. It appears that the Appellant intended for this Motion to be filed in the Second Appeal; however, it has been docketed by the Clerk in the First Appeal. In that Motion, Appellants request that the Court "consolidate the three attached trial court orders dated

April 5, 2013 for appeal before this Court". Id. at p. 1.¹ Appellant states in the Motion that those orders "raise the same issues and questions of law involved in the January 23, 2013 order granting dismissal of the common element damage claims now on appeal". Id. Appellant then requested an extension of time to order the hearing transcript relating to the April 5, 2013 orders. Id. at pp. 1-2. Appellants Motion to Consolidate makes no mention of the briefing schedule and does not request an extension of time to file their brief.

C. Motion to Consolidate Was Improperly Filed And Did Not Toll the Timeframes for Filing the Appellate Brief

Appellant's Motion to Consolidate had no impact on the timeframes for the Appellate brief in this case.² As of the date of the Motion, the April 5, 2013 orders were not the subject of any appeal before this Court. Rule 214 states:

Where there is more than one appeal from the same order, judgment, decision or decree, or where the same question is involved in two or more appeals in different cases, the appellate court may, in its discretion order the appeal to be consolidated.

Accordingly, Rule 214 only relates to appeals that are actually pending before this Court. It does not permit random inclusion of the orders from the Lower

¹ The orders were entered on April 10, 2013, but signed on April 5, 2013..

² Appellant even failed to file a Proof of Service as required by the South Carolina Appellate Court Rules. See Exhibit L. On May 9, 2013, the Clerk notified Appellant of his failure. Id. In response to the Clerk's notice, on May 14, 2013, Appellant filed a Proof of Service for the Motion for Consolidation and Motion for Extension. See Exhibit M. The Proof of Service states that the Motion was served on April 26, 2013, instead of April 25, 2013. Id.

Court that have not been properly appealed to this Court. Because the Motion to Consolidate was improper, it had no impact on the perfection of this appeal or the deadlines relating to the same.³

Further, even if the Motion to consolidate related to an actual appeal pending before the Court, it would not have tolled the time limits in the Rules.

Rule 240(b) specifically states:

Unless otherwise provided by these Rules or ordered by the appellate court, the time limits imposed by these Rules shall not be stayed by the filing of a motion or petition.

Therefore, Motions to Consolidate do not toll timeframes in the Rules.

Finally, even if the Motion to Consolidate was proper and could toll the timeframes, it was filed after the deadline for the brief. The Proof of Service recently filed by Appellant states that it was served on April 26, 2013, two days after the deadline to file their brief expired. See Exhibit M.

On May 17, 2013, Appellant filed yet another Notice of Appeal. See Exhibit N. This Notice of Appeal is now purportedly an appeal of the Lower Court Orders dated April 5, 2013. Id. It is Respondent's position that the May 17, 2013 Notice of Appeal has no impact on the briefing schedule in this appeal. At this point, there are three separate appeals pending before the Court, all of which

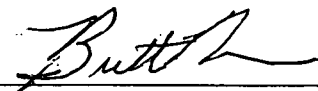
³ Appellants also attempt to "consolidate" the Lower Court's October 15, 2012 order denying Appellants' motion or summary judgment against the COA. (See Appellant's Notice of Motion and Motion to Dismiss Cross Appeal Involving The Trial Court's August 27, 2012 Order Or Alternatively To Consolidate All Trial Court Orders, p. 5, filed on or about April 4, 2013). Appellant's apparent effort to appeal the October 15, 2012 order through a "motion to consolidate" is likewise improper.

have their own deadlines and must be treated separately. Each appeal must comply with the South Carolina Appellate Court Rules. Because Appellants has failed to perfect the Second Appeal by filing the Appellant Brief, the Second Appeal must be dismissed.

CONCLUSION

Appellants have failed to perfect their appeal by filing the Appellate brief and took no action to extend their deadline to do so. According, Appellants appeal of the January 23 and February 27 Lower Court orders should be dismissed.

Respectfully submitted,



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Telephone: 704.377.5050

Facsimile: 704.927.2868

Attorney for Respondent

May 22, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals
Case No. 2013-000327

APPEAL FROM YORK COUNTY
Court of Common Pleas

Hon. John C. Hayes, III
Presiding Circuit Court Judge

Consolidated case no. 2010-CP-46-2326

Juontonio Pinckney, et al.Appellants,

v.

Epcon Communities, Inc., Epcon Communities Franchising, Inc.,
Brock L. Fankhauser, Fankhauser Property Group, Inc.,
Stonecrest Villas of Tega Cay, LLC, and
Stonecrest Villas of Tega Cay Owners' Association, Inc.Respondent

PROOF OF SERVICE

I certify that I have served the foregoing RESPONDENT CROSS-APPELLANT'S REPLY TO APPELLANTS' RETURN TO MOTION TO DISMISS AND MEMORANDUM IN SUPPORT OF SAME on counsel for Appellants Juontonio Pinckney, et al, J. Cameron Halford, Halford Niemiec & Freeman, L.L.P., 238 Rockmont Drive, Fort Mill, South Carolina 29708, by depositing a copy in the U.S. Mail, postage prepaid, on May 22, 2013 with all other parties served by U.S. Mail.



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Attorney for Respondent

May 22, 2013

Other Counsel of Record Served:

(Via U.S. Mail)

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Attorney for Stonecrest Villas of Tega Cay Owners' Association, Inc.

(Via U.S. Mail)

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Case No. 2010-CP-46-2326

Juontonio Pinckney, et al. Plaintiffs,

v.

Epcon Communities, Inc. and Epcon Communities Franchising,
Inc. Codefendants/Respondents,

-and-

Fankhauser Property Group, Inc. Codefendant/Appellant

NOTICE OF APPEAL

Fankhauser Property Group, Inc. appeals the Order regarding Epcon Communities Franchising, Inc. and Epcon Communities, Inc.'s Motion for Summary Judgment on its Cross-Claims for Indemnification against Fankhauser Property Group, Inc. This Order and judgment was entered by the Honorable John C. Hayes, III on October 2, 2012. The Order and judgment is attached hereto as Exhibit A. Fankhauser Property Group, Inc. filed a timely Motion to Alter or Amend, but the same was denied by Order entered on November 12, 2012. This Order is attached hereto as Exhibit B. Appellant received written notice of entry of judgment and the denial of its Motion to Alter or Amend on December 7, 2012 (indirectly via electronic mail from Respondents' counsel).

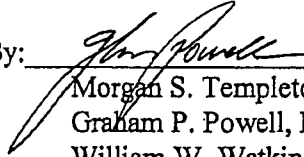
December 17, 2012.

FILED-RECEIVED
2012 DEC 20 PM 1:15
DAVID M. HAMILTON
C.O. CLERK
YORK COUNTY, SC



WALL TEMPLETON & HALDRUP, P.A.

By:



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William W. Watkins, Jr., Esquire
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Attorney for The Southeastern Group, Inc.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Hon. John C. Hayes, III
Presiding Circuit Court Judge

Consolidated case no. 2010-CP-46-2326

Juontonio Pinckney, et al. Apellants,

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Epcon Communities, Inc., Epcon Communities Franchising, Inc.,
Brock L. Fankhauser, Fankhauser Property Group, Inc.,
Stonecrest Villas of Tega Cay, LLC,

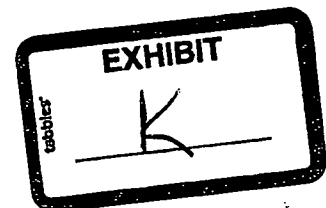
and

Stonecrest Villas of Tega Cay Owners' Association, Inc. Respondent

APPELLANT MOTION FOR EXTENSION OF TIME
AND MOTION TO CONSOLIDATE

Appellants respectfully move the court of appeals pursuant to Rule 214, SCACR to consolidate the three attached trial court orders dated April 5, 2013 for appeal before this court. The undersigned certifies that the April 5, 2013 orders were served upon appellants' counsel on April 19, 2013 by Respondent's counsel. The orders are attached as Exhibit A, Exhibit B and Exhibit C to this motion and raise the same issues and questions of law on appeal that are involved in the January 23, 2013 order granting dismissal of common element damage claims now on appeal.

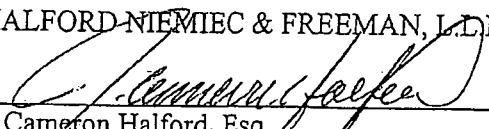
Appellants further move for extension of time pursuant to Rule 234(b), SCACR to obtain the hearing transcript of the motion for summary judgment argued before the



circuit court on March 20, 2013. A request for a copy of the transcript was made on April 19, 2013 and is attached as Exhibit D.

Respectfully submitted,

HALFORD-NIEMIEC & FREEMAN, L.L.P.


J. Cameron Halford, Esq.
238 Rockmont Drive,
Fort Mill, South Carolina 29708
Telephone: 803-547-6618
Facsimile: 803-547-6638
Attorneys for Appellants

April 25, 2013
Other Counsel of Record:

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The South Carolina Court of Appeals

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CLERK

V. CLAIRE ALLEN
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FAX: (803) 734-1839
www.sccourts.org

May 09, 2013

Mr. J. Cameron Halford
238 Rockmont Drive
Fort Mill SC 29708

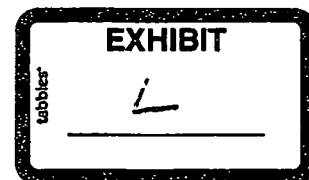
Re: Juontonio Pinckney v. Epcor Communities
Appellate Case No. 2012-213730

Dear Counsel:

Upon reviewing your motion for extension of time and motion to consolidate, the following deficiency or deficiencies have been noted under the South Carolina Appellate Court Rules (SCACR), and any deficiency must be corrected within ten (10) days of the date of this letter:

- A proof of service has not been provided. You must serve and file a proof of service substantially in the format shown by Form 7 in Appendix C to part II of the SCACR.

Very truly yours,



V. Claude Allen, Deputy
CLERK

cc: Morgan S. Templeton
Graham Pollock Powell
William ("Trey") Wharton Watkins, Jr.
Melissa Memolo Nichols
Brett E. Dressler
Curtis W. Dowling

18
COPY

LAW OFFICES
HALFORD NIEMIEC & FREEMAN LLP

A Registered South Carolina Professional Association Including
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TELEPHONE: 803-547-6618
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J. Cameron Halford, LLC ^
Matthew R. Niemiec, LLC
P. John Freeman, LLC

May 14, 2013

South Carolina Court of Appeals
Jenny Abbot Kitchings, Clerk of Court
Post Office Box 11629
Columbia, South Carolina 29211

Re: Juontonio Pinckney, et al v. Brock L. Fankhauser, et al.
Consolidated Case No. 2010-CP-46-2326

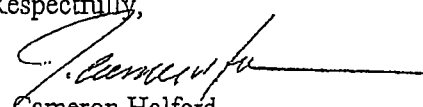
Dear Ms. Kitchings:

Pursuant to the court's instructions of May 9, 2013 I am enclosing the original and seven copies of the Appellants' Proof of Service as to the Motion for Extension and Motion for Consolidation. I appreciate the court permitting us to cure the oversight.

Please file the originals and return a clocked copy. By copy of this letter, we are providing all counsel with a copy of the same. Thank you.

With regards, I am

Respectfully,


J. Cameron Halford

JCH:krw

cc: Curtis Dowling, Esq.
cc: Brett Dressler, Esq.
cc: Graham P. Powell, Esq.
cc: Mike Wilkes, Esq.
cc: Bradford W. Cranshaw, Esq.

^ ARBITRATOR & MEDIATOR

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Hon. John C. Hayes, III
Presiding Circuit Court Judge

Consolidated case no. 2010-CP-46-2326

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Brock L. Fankhauser, Fankhauser Property Group, Inc.,
Stonecrest Villas of Tega Cay, LLC,

and

Stonecrest Villas of Tega Cay Owners' Association, Inc.Respondent

PROOF OF SERVICE

I certify that I have served Appellants' Notice of Motion and Motion for Extension of Time and Motion for Consolidation on the attorneys identified below by electronic mail and by depositing the same in the United States mail, postage prepaid, and addressed as follows, on the 26th day of April, 2013.

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SC Court of Appeals

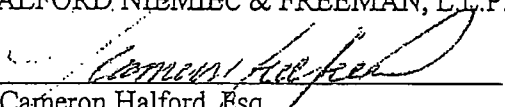
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Respectfully submitted,

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Attorneys for Appellants

May 14, 2013

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J. Cameron Halford, Esquire
Matthew R. Niemiec, Esquire
P. John Freeman, Esquire

May 17, 2013

South Carolina Court of Appeals
Jenny Abbott Kitchings, Clerk
Post Office Box 11629
Columbia, South Carolina 29211

Re: Consolidated Case No. 2010-CP-46-2326
Notice of Appeal of April 10, 2013 Orders
Court of Appeals File: 2013-

Dear Mrs. Kitchings:

Please find enclosed and attached the Notice of Appeal of three trial court orders which were entered April 10, 2013 along with our mailing to the trial court. Please return a clocked copy in the envelope provided with this mailing. Thank you.

With regards, I am

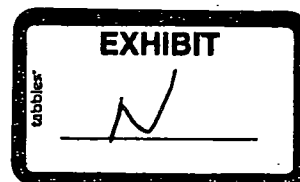
Sincerely,


J. Cameron Halford

JCH:krw

cc: Brett E. Dressler (via email)
cc: Curtis Dowling, Esq. (via email)
cc: Graham P. Powell, Esq. (via email)
cc: Mike Wilkes, Esq. (via email)
cc: Brad Cranshaw (via email)

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and

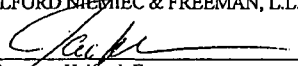
Stonecrest Villas of Tega Cay Owners' Association, Inc. Respondent

NOTICE OF APPEAL
OF APRIL 10, 2013 TRIAL COURT ORDERS

Appellants here give notice of Appeal of the trial court orders dated April 5, 2013 entered April 10, 2013 pursuant to SCACR 203. Counsel for Appellants here certifies that the orders were received via e-mail delivery from respondent's counsel on April 19, 2013.

Respectfully submitted,

HALFORD NIEMIEC & FREEMAN, L.L.P.



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MARK D. GOTT ††
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T. PATRICK JENKINS
CHARLES E. LYONS II *
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** Also Admitted in West Virginia
† Also Admitted in Georgia
†† Also Admitted in Alabama
††† Also Admitted in Texas
‡ Certified Mediator

May 22, 2013

VIA FEDERAL EXPRESS

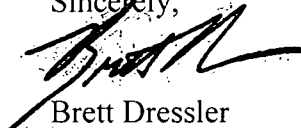
Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: *Juontonio Pinckney, et al. v Brock L. Fankhauser, et al.*
Consolidated Case No.: 2010-CP-46-2326

Dear Ms. Kitchings:

Please find enclosed an original and seven copies of Respondent Cross-Appellant's Reply to Appellants' Return to Motion to Dismiss and Memorandum in Support of Same in the above matter. Please file the originals and return a file-stamped copy to me in the enclosed envelope. By copy of this letter, I am serving all counsel of record with the same. Thank you.

Sincerely,



Brett Dressler

BED/mb
Enclosures

cc: J. Cameron Halford, Esquire
Curtis W. Dowling, Esquire
Graham P. Powell, Esquire
Mike Wilkes, Esquire
J. Derham Cole, Esquire

RECEIVED
MAY 23 2013

SC Court of Appeals

Bradford W. Cranshaw, Esquire