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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Roger M. Young, Sr., Circuit Court Judge

Trial Court Case No. 2023-CP-10-01512
Appellate Case No. 2023-001494

Charleston SC Property Holdings, LLC, Hanahan SC Property Holdings, LLC, and Michael Flanagan, Receiver.....Respondents,

v.

Rittenberg OP, LLC, Hanahan OP, LLC, Goldner Capital Management, LLC, SC Two OP Holdings, LLC, and Samuel Goldner.....Appellants.

RETURN TO MOTION TO REINSTATE

Respondents Charleston SC Property Holdings, LLC and Hanahan SC Property Holdings, LLC (the “Respondents”) hereby submit their Return (the “Return”) to Appellants’ Motion to Reinstate Pursuant to Rule 260, SCACR (the “Motion”) which was filed with the Court of Appeals (the “Court”) on March 20, 2024.

I. BACKGROUND

Appellants filed their Notice of Appeal with the Court on September 19, 2023. Pursuant to the Notice of Appeal, Appellants appealed (1) Judge George M. McFaddin, Jr.’s April 14, 2023 Order Appointing Receiver and April 27, 2023 Order Denying Appellants’ Rule 59(e) Motion for Reconsideration, Request for Stay Pursuant to Rule 62(a), and Offer of Bond (collectively, the “Judge McFaddin Orders”), and (2) Judge Roger M. Young, Sr.’s August 23, 2023 Order Approving Receiver’s Entry into Operations Transfer Agreement and Lease Termination

Agreement and September 8, 2023 Order Denying Appellants' Motion for Reconsideration (collectively, the "Judge Young Orders").

Rule 207 requires that an appellant, within ten (10) days of service of its notice of appeal, "make satisfactory arrangements (including agreement regarding payment for the transcript), in writing with the court reporter for furnishing the transcript." Rule 207(a)(1), SCACR. Once ordered, "[t]he court reporter shall transcribe and deliver the transcript to appellant no later than sixty (60) days after the date of the request." Rule 207(a)(2), SCACR. Furthermore, Rule 207 also requires that an appellant "shall contemporaneously furnish all parties, the Office of Court Administration, and the clerk of the appellate court with copies of all correspondence with the court reporter." Rule 207(a)(1), SCACR.

Appellants failed to request a transcript within ten (10) days of serving their Notice of Appeal as required by Rule 207(a)(1). Consequently, on October 6, 2023, the Court sent a deficiency notice to counsel for the Appellants. On October 10, 2023 the Appellants finally requested copies of the transcripts and also filed their Motion to Request Transcript Out of Time (which Respondents did not oppose). The Court subsequently entered its order granting the Motion to Request Transcript Out of Time on October 27, 2023 (the "October 27th Order") which, among other things, requested that Appellants provide the Court "with an update regarding the *delivery* of the transcripts *within sixty (60) days from the date of this order.*" (emphasis added).

On November 17, 2023, Respondents filed their Motion to Dismiss Part of Appeal (the "Motion to Dismiss") which sought to dismiss the appeal of the Judge McFaddin Orders due to Appellants' failure to file a timely appeal. The Court subsequently entered its Order granting the Motion to Dismiss on January 23, 2024 (the "Partial Dismissal Order") and the Court sent its Partial Remittitur to the lower court for filing on February 9, 2024. Therefore, after entry of the

Partial Dismissal Order, the only orders that were still subject to appeal were the Judge Young Orders. Furthermore, the stay of the appeal was no longer applicable once the Partial Dismissal Order was entered. *See* Rule 240(b), SCACR.

On February 9, 2024, the Court also sent a letter to Appellants' counsel (the "February 9th Letter") noting that the transcript should have been delivered to Appellants and requested that Appellants "advise the Court of the status of the transcript within ten (10) days of the date of this letter, or your appeal will be dismissed."

The Appellants filed a Motion to Extend Time to File (the "Motion to Extend") on February 20, 2024 which sought an extension of time for the Appellants to file their initial brief and designation of matter to be included in the record on appeal. Notably, however, the Motion to Extend failed to address or otherwise respond to the Court's request about the status of the transcript. In fact, the Motion to Extend was completely devoid of any reference to the transcript even though the date of Appellants' receipt of the transcript was relevant and necessary to determine the original deadlines by which Appellant had to file its initial brief and designation of matter to be included in the record on appeal. *See* Rules 208 and 209, SCACR. The lack of information about Appellants' receipt of the transcript also made it impossible for the Respondents and Court to determine whether the relief sought in the Motion to Extend was even proper.

Appellants' failure to address the status of the transcript was even pointed out the day after the Motion to Extend was filed. On February 21, 2024, Respondents' counsel sent a letter to the Court (the "Respondents' Letter") after reviewing the Motion to Extend and noted, "The Motion fails to address the status of the transcript" and confirmed that neither he nor counsel to the Respondent Receiver "received any correspondence from Appellants' counsel or the court reporter

regarding the transcript since October 10, 2023.” Appellants’ counsel was served with a copy of Respondents’ Letter.

In light of the fact that Appellants (i) never notified the Respondents, the Office of Court Administration, and the Clerk about the status of the transcript as required by Rule 207(a)(1), (ii) never responded to the Court’s October 27th Order, and (iii) failed to address the status of the transcript as specifically requested by the Court in its February 9th Letter, the Receiver filed a Return to the Motion to Extend on March 1, 2024 (the “Receiver’s Return to Motion to Extend”). A similar return was filed by the Respondents on March 1, 2024 as well (the “Respondents’ Return to Motion to Extend”). Both of these Returns to Motion to Extend noted in bold, capitalized letters on the first page as well as in plain text throughout that document that the Appellants had failed to respond to the Court’s February 9th Letter.

Thereafter, the Court sent yet another letter to Appellants’ counsel on March 1, 2024 (the “March 1st Letter”) which said:

As stated in this Court’s letter dated February 9, 2024, you must advise the Court of the status of the transcript. We will not consider your motion for an extension of time to serve and file the appellants’ initial brief and designation of matter, and we will dismiss the appeal, if your response is not received within ten (10) days from the date of this letter.

Appellants failed to respond to the March 1st Letter, and the Court entered its order dismissing Appellants’ remaining appeal on March 18, 2024 (the “Dismissal Order”). The Dismissal Order includes the basis for the Court’s decision and cites the Appellants’ failure to advise the Court of the status of the transcript as required by Rule 207 and the March 1st Letter.

II. Appellants’ Motion Should Be Denied for Lack of Good Cause

The Motion seeks “to reinstate the appeal for good cause” and requests that the Court grant Appellants’ Motion to Extend. Motion, at 1. Pursuant to the South Carolina Appellate Court

Rules, “[a] case shall not be reinstated [after its dismissal] except by leave of the court, upon good cause shown, after notice to all parties.” Rule 260(a). As discussed herein, the Motion fails to provide good cause to warrant the Court’s reinstatement of Appellants’ appeal and should be denied.

The Appellants contend in the Motion that good cause for reinstatement exists because, among other things, they (i) “inadvertently fail[ed] to provide supplemental explanation,” (ii) believed that the Motion to Extend “fully responded to the Court’s February 9, 2024 correspondence,” and (iii) that Appellants’ counsel “mistakenly thought the emails from the Court [sent on March 1, 2024] were simply the filing confirmations....” Motion, at 1-2.

First, it is not clear to the Respondents that the Appellants’ failure to “provide supplemental explanation” was inadvertent. Notwithstanding Rule 207(a)(1)’s requirement that the Appellants “contemporaneously furnish all parties, the Office of Court Administration, and the clerk of the appellate court with copies of *all* correspondence with the court reporter,” it was not until the Motion was filed on March 20, 2024 that the Respondents and Court learned for the first time that the Appellants received the transcript on October 18, 2023 (*i.e.*, more than five months ago). *See* Motion, at 3. Furthermore, as of the date of this Return, Appellants still have not furnished “all parties, the Office of Court Administration, and the clerk of the appellate court with copies” of correspondence the Appellants presumably had with the court reporter on October 18, 2023 (*i.e.*, the date Appellants state they received the transcript).

The Appellants’ failure to comply with the Rules, the October 27th Order, and adequately respond to the Court’s February 9th Letter and March 1st Letter enabled the Appellants to obscure from the Respondents and the Court that they have been in possession of the transcripts since October 2023. This fact – which only came to light after entry of the Dismissal Order – is

significant for a number of reasons, including that it renders Appellants' Motion to Extend (which was pending at the time the Dismissal Order was entered) untimely. Appellants failed to file their initial brief and designation of matter to be included in the record on appeal within the timeframe allotted by Rules 208 and 209 (*i.e.*, within 30 days of receipt of the transcript) and failed to timely request an extension of those applicable deadlines even after taking into account the effect and duration of the stay provided for in Rule 240(b), SCACR. The Motion indicates Appellants received the transcript on October 18, 2023. Consequently, Appellants' initial brief and designation of matter would have been due on November 17, 2023. However, the Motion to Dismiss was filed on November 17, 2023 and therefore the applicable deadlines under Rules 208 and 209 would have been stayed pursuant to Rule 240(b) until entry of the Partial Dismissal Order on January 23, 2024. Appellants' Motion to Extend which was filed on February 20, 2024 was not filed until nearly one month after the entry of the Partial Dismissal Order.

Second, although Appellants contend that they believed the Motion to Extend "fully responded to the Court's February 9th correspondence," it clearly did not and to contend otherwise is not credible based on the applicable facts. The Motion to Extend does not even contain the word "transcript" or make reference to the status of the ordered transcript. The Appellants' failure to adequately respond to the February 9th Letter was noted no less than four different times by a series of filings and correspondence from the Respondents as well as the Court - all of which were served on counsel for the Appellants (*i.e.*, (i) Respondents' Letter dated February 21, 2024, (ii) the Receiver's Return to Motion to Extend dated March 1, 2024, (iii) the Respondents' Return to Motion to Extend dated March 1, 2024, and (iv) the March 1st Letter). Each of these letters and filings clearly indicated that the Appellants failed to advise the Court of the status of the transcript.

Third, Appellants' counsel acknowledges that he "mistakenly thought the emails from the Court [sent on March 1, 2024] were simply the filing confirmations...". Of course, the March 1st Letter from the Court was not simply a filing confirmation. It was follow-up correspondence giving the Appellants yet another opportunity to respond to the Court and advise it of the status of the transcript since the Appellants (i) failed to properly advise the Court (and Respondents) of the status of the transcript as required by Rule 207 even though it was apparently in their possession for more than 5 months, (ii) failed to comply with the terms of the October 27th Order, and (iii) failed to provide an adequate response to the Court's request in its February 9th Letter. The Appellants' repeated failures and omissions were noted multiple times not just by the Court itself but also by and through the Respondents' Letter, the Receiver's Return to Motion to Extend, and the Respondents' Return to Motion to Extend. The Respondents are not certain whether Appellants' counsel received but did not read "the emails from the Court" sent on March 1st or read them and chose to ignore them. Either way, the answer to that question does not equate to good cause warranting the reinstatement of Appellants' appeal.

In support of the relief sought in the Motion, Appellants cite to *Jordan v. Hartford Fin. Grp., Inc.*, 435 S.C. 501 (Ct. App. 2021). In *Jordan*, the Court of Appeals reviewed a decision by the Worker's Compensation Commission (the "Commission") that dismissed an appeal after the appellant failed to file a brief because appellant's counsel's paralegal calendared the filing deadline incorrectly. *Johnson*, 435 S.C. at 504. The appellant thereafter filed a motion to reinstate the appeal due to the paralegal's "honest human mistake" which was supported by affidavit, but the Commission denied appellant's motion without explanation. *Id.* On appeal, the Court of Appeals reversed the Commission's decision and reinstated the appeal for good cause noting, among other things, the Commission's briefing schedule never indicated that the appeal would be dismissed if

a brief was not filed. Furthermore, the Court of Appeals could not determine whether the Commission appropriately exercised its discretion in denying the motion for reinstatement of the appeal because its decision did not contain any explanation of the Commission's reasoning. *See id.* at 505-506.

Appellants' reliance on *Jordan* is misplaced because the facts are clearly distinguishable from those presented here. Unlike the Commission's briefing schedule at issue in *Jordan*, the Court's February 9th Letter and March 1st Letter directed the Appellants to advise the Court of the status of the transcript and expressly stated that their appeal would be dismissed if a response was not received within ten (10) days. Furthermore, Appellants' failure to respond to the Court's directive in the February 9th Letter and March 1st Letter was not attributable to miscalendaring by a subordinate. Instead, Appellants contend their failures are due to (i) a mistaken belief that the Motion to Extend (which does not even reference or include the term "transcript") "fully responded" to the February 9th Letter and (ii) and failure to read the Court's March 1st Letter and calendar anything at all. The excuses that the Appellants are asking this Court to accept are simply that – excuses. They are not instances of good cause justifying the Court's reinstatement of the appeal. *See Jordan*, 435 S.C. at 505 ("Rules are rules, and due dates matter.").

For all of the foregoing reasons, the Respondents request that the Court enter an order denying the Motion and granting such other relief as it deems just and appropriate.

Respectfully submitted,

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April 1, 2024

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PROOF OF SERVICE

I certify that I served a Return to Motion to Reinstate on behalf of Respondents Charleston SC Property Holdings, LLC and Hanahan SC Property Holdings, LLC to counsel of record for the above-referenced parties using the following email addresses on April 1, 2024:

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A copy of the email sent to the above-referenced counsel is attached.

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Elisha Wetmore

From: Charles Summerall
Sent: Monday, April 1, 2024 1:26 PM
To: Michael H. Weaver; Chris Brumback; James W. Clement; Noah Siegel; Aharon Kaye; Ross Durant
Cc: Elisha Wetmore
Subject: RE: Charleston SC Property Holdings, LLC v. Rittenberg OP, LLC (2023-001494) - Respondents' Return to Motion to Reinstate
Attachments: Return to Motion to Reinstate 4-1-2024.pdf

Counsel,

Attached please find and hereby served on you is a copy of the Respondents' Return to Motion to Reinstate, which I am sending to and filing with the Clerk of Court for the Court of Appeals today in connection with the above-referenced matter. The Return and proof of service will be filed shortly.

Regards,

Charles



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