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SC Court of Appeals

In
The State of South Carolina
The Court of Appeals

Case No. 2023-001733

Jian-yun (John) Dong, M.D., Ph.D., Appellant

v.

The Medical University of South Carolina, Respondent

Appeal From Charleston County Court of Common Pleas
The Honorable Jean Toal, District Court Judge
Trial Court Case No. 2016-CP-10-06683

REPLY BRIEF OF THE APPELLANT

John Dong, M.D., Ph.D.
Appellant, *pro se*
71 Delahow St.
Charleston, SC 29492
Email: johnny.dong@gmail.com
Phone: (843)-991-2332

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ARGUMENT

Respondent does not raise any opposition or argument to the issues that Appellant has raised in his Initial Brief, including that Respondent failed to its burden to prove “there is no genuine issues as to any material fact” in seeking the Summary Judgment, and the Summary Judgment was issued before Appellant could conduct a meaningful discovery. Therefore, based on the Court’s long-established standard that “unopposed [issues] should be granted by the court without further proceedings.” *Citations omitted.*

Instead, Respondent raised arguments that are not responsive to the Appellant’s Brief and are meritless.

A. The Appellant filed a timely Notice of Appeal.

Respondent’s argument that because the Motion to Alter or Amend was “too late” and “therefore, Appellant’s Notice of Appeal was untimely.” This argument is without the support of fact and law.

Rule 203(b)(1), SCRCP states:

Appeals From the Court of Common Pleas. A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment. When a timely motion for judgment n.o.v. (Rule 50, SCRCP), a motion to alter or amend the judgment (Rules 52 and 59, SCRCP), or a motion for a new trial (Rule 59, SCRCP) has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion. (Emphasis added) When a form or other short order or judgment indicates that a more full and complete order or

judgment is to follow, a party need not appeal until receipt of written notice of entry of the more complete order or judgment.

Based on this rule, Appellant's filed the Notice of Appeal withing thirty days after the District Court's ruling of two pending Motions, including the Motion to Amend. Therefore, the Notice of Appeal is timely (See Appellant's Notice of Appeal). Respondent does not argue otherwise. Instead, Respondent argues that Appellant's Motion to Amend was entered by the Court Clerk on the 11th day instead of the 10th day after the Circuit Court entered the Order. In turn, this made the Notice of Appeal untimely. Response Brief, p9.

1. This argument is factually incorrect.

Unlike the Respondent's attorney, Appellant is a layman representing himself in the case. The district Judge denied Appellant's request to access the Electronic Court Filing System (ECF), even though it is routinely granted in courts. Therefore, Appellant could not receive or file court documents electronically but could only do so officially through the U.S. Postal Service. Therefore, Appellant was receiving court filings in US Mail sent by the Court Clerk's Office, normally days after the filing dates. When filing, it also took days for Appellant to send the documents to the Clerk's Office by mail, or at least an extra day or two when Appellant was able to have the document hand delivered to the Clerk's Office during business hours. The extra time is allowed under the common law, known as the "Mailbox Rule."¹

The record show, as Respondent admitted, the Order for Summary Judgement was entered on July 17, 2023, Appellant submitted the Motion to Amend on July 27, 2023, and was entered into record by the Clerk in the morning of July 28, 2023. *Response Brief, P9.*

To push it's "one-day-late" theory, Respondent misplaced case laws, none of which applies to the current case. The cited cases, such as "notice from the clerk is not required when the party otherwise has the notice of the order," or "email may constitute written notice," are limited to attorneys of both parties who have equal access to the court filing systems. This is not true here, because Appellant, a *pro se* pleader, was denied access to the ECF system and the ability to file pleadings by email sent to the Judge directly. In contrast, Respondent's attorney had full access to the ECF and direct communications with the judge by email. For obvious reasons, Respondent is silent on the issue that extra days are allowed for mailing and courts may "hold a lower standard" and "give leeway to pro se pleader in the interest of due process." *Citations omitted.*

Therefore, Respondent's convoluted argument about Appellant submitting the Motion to Amend one day late is baseless.

¹ Under the long-established ruling of the Supreme Court of the United States, and the well-established common law, for a party who has no access to the ECF system, the receipt date is when the party receives the court filing in the mail; the filing date is when the party signs the document and placed it in the mailbox. This "Mailbox Rule" was established before the ECF system was established and is extended to those who do not have access to the ECF in the modern days.

2. Respondent’s expansive interpretation of the law is illegitimate.

Under rule 203, Appellant timely submitted the notice of appeal, within thirty days of receipt of notice of denying Motion to Amend. See Notice of Appeal. This Court has the exclusive authority to decide if the Notice of Appeal is timely.

Respondent does not argue against timeliness of Appellant’s Notice of Appeal under the Statute. Instead, Respondent argues under a novel and expansive theory that if it argues that Appellant’s Motion to Amend was entered one day late at the Clerk’s Office, it can expand the untimeliness into the Notice of Appeal and make it also “untimely.” This expansive interpretation of the statutes is not only unsupported by the fact, but also contradict to the Law.

Record shows that Appellant timely submitted the Motion to Amend, the Respondent filed a Response to the Motion, Appellant filed a Reply, and the Judge made a ruling after “careful consideration of the arguments by both Parties.” Rule 203(b)(1) states that when such a motion has been filed, “the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion.” (Emphasis added). The Supreme Courts has long established that “courts must enforce a statute as it is written, any expansion from the language is illegitimate.” *Citations omitted*. Here, the statute unequivocally states: “shall be stayed” and “shall run” to protect a party’s right to appeal a court’s decision.

After the judicial process, even if the district judge issued an order denying the Motion², such order does not expand its authority to nullify the statutorily authorized the Stay of the timeline and to deprive a party's Right to Appeal. Such an expansion is "illegitimate." id.

Therefore, Respondent's argument is meritless and should be rejected by the Court.

B. Circuit Judge's Issuing the Summary Judgment without allowing Appellant to Complete his Discovery is improper.

Respondent does not argue against the fact that it failed its burden to prove "there are no genuine issues of material fact" in seeking the Summary Judgment. Respondent also does not dispute that the district Judge granted the Summary Judgment without allowing the Appellant to conduct any meaningful discovery, including taking depositions of witnesses. In fact, Appellant could not get any documents as he requested from Respondent and could not depose a single witness because the district court strictly restricted the time and scope of Appellant's discovery. As the result, Respondent did not produce any document or witness as requested by Appellant. Therefore, Respondent presented no facts to meet its burden of "proving there are no of genuine issues of material fact" as required by the Law.

² The Order was legally deficient because the Judge ruled that Appellant's Motion to Amend was untimely and meritless but did not explain why and cite any evidence based on which the conclusions were reached.

1. Appellant's Request for Production.

Respondent does not dispute the fact that among a long list of documents requested by Appellant, Respondent only provided a repeated chain of emails in the form of scambly printed documents. At Respondent's request, the District Court repeatedly denied all of Appellant's Motions to Compel, to Expansion the Scope of Discovery, and Motions for Extension of Time for Discovery when Respondent was non-responsive to Appellant's request and refused to produce any additional documents. As stated in Appellant's Initial Brief, the District Court denied all of Appellant's motions without stating a legal or factual basis. In contrast, District Court granted 100% of Respondent's motions over Appellant's objections.

To argue for that "the District Court exercised its discretion in placing limitations on the scope of discovery," Respondent cited the only time that District Court "granting, in part, Appellant Motion to Compel." Noticeably, Respondent could not cite any fact or legal authority that justify the District Court's "limitations on the scope of discovery" beyond the set of emails produced by the Respondent.

Respondent further argues: "[i]t is Appellant's burden to show an abuse of discretion, and Appellant has failed to do so." This argument is meritless because the Law squirely place the burden on Respondent (the moving party) to prove "there are no genuine issues of material fact" after unincumbered discoveries have been completed by both parties. Here, Respondent admitted the fact that Respondent kept

Dr. Dong's research assets for the use by other faculty members and blocked Dr. Dong's access to the campus facilities and his academic activities. These are the major issues in this controversy.

2. "Depositions Cancelled by Appellant" Is Untrue.

Here, Respondent does not dispute the fact that District Court issued the Scheduling Order by allowing the Respondent's attorney to propose and prepare the Order, and purportedly to allow Appellant to comment and making objections. The proposed schedule was one-sidedly favored Respondent. For example, under a short discovery timeline, Appellant must have his deposition taken at the time and location requested by the Respondent's attorney, while Appellant only could take deposition of Respondent's employees "when [they are] willing and available." (Scheduling Order, 10/7/22) The district Judge denied all Appellant's objections and signed the Respondent-proposed Order.

The record show, under the short and fixed discovery deadline, Respondent's counsel caused extensive delays to deprive Appellant the time to prepare and take the depositions of his witnesses. Examples include, but not limited to, the following:

1) On the day initially scheduled for the Respondents to take Appellant's deposition, Appellant asked if he could record his deposition for his reference while the court reporter making the official recording. Respondent's counsel immediately decided to reschedule the deposition, stating court rules prohibit such recording

because only licensed stenographer is allowed to record a deposition. However, the counsel could not cite any rule that prohibited a person from record his deposition for his own reference while a court reporter making the official recording. Even when Appellant agreed not to take the recording, the counsel insisted on rescheduling the deposition because he wanted to “file a motion asking the Judge to clarify the issue.” While in fact, the Judge instructed that either party “can call [the Judge] if there is any question during the deposition.” This rescheduling delayed the deposition for many weeks until after the Judge issued an order prohibiting Appellant from making any recording without citing any legal authority.

2) After Appellant provided his deposition list, it took many weeks and repeated requests to get a response from Respondent’s counsel stating he needed “to coordinate with [his] client’s General Counsel to find out when the people may be available.”

3) Respondent’s counsel filed the first round of Motion for Protection Order because his previously scheduled vacation, and the Judge granted the Motion and stayed discovery process. However, the Judge did not want to extend the discovery deadline.

4) Under the authority of the Scheduling Order, deposition of Respondent’s employees only can be taken “when willing and available,” the counsel dictated a narrow window for Appellant to take the depositions of

Respondent's employees. Appellant had to take the depositions of one or two witnesses at a specific time and in consecutive days. Appellant would have no time to prepare for the deposition or review the deposition before taking the next one.

5) Respondent refused to produce any of employee who left or retired from MUSC since the filing of the Complaint and claimed it does not have their current addresses even though these employees were collecting monthly benefits from MUSC.

6) Respondent filed multiple motions requesting the Judge to "clarify the issues," such as, if MUSC had the obligation to produce the witness who retired from MUSC or to provide their current address; if Appellant could take the depositions in his home office, even after Appellant agreed to take deposition in a conference room at MUSC or at a third-party location; and if Appellant must take depositions of Respondent's employees in the Respondent's attorney's office.

The Judge granted each of these Respondent's motions and stayed Appellant's deposition before issuing the orders. Again, the Judge did not extend the deadline for the discovery. In contrast, the Judge refused to stay the discovery timeline when Appellant filed his motions and denied all Appellant's Motions for Extension of the discovery deadline. The district Judge did not evaluate Appellant's motion based on the "for good cause" standard but based on that "the Motions violates the Scheduling Order."

As the result of these repeated and extensive delays, Appellant was deprived of sufficient time to prepare and to take depositions of his witness and not be able to obtain discovery documents. Therefore, the district erred in depriving Appellant's right for discovery and granted Respondent's Summary Judgement when Respondent failed its burden of proving "there are no genuine issues of material facts" and Appellant could not complete his discovery.

Respondent's assertion that Appellant could not take depositions "was his failure alone" was untrue. Noticeably, Respondent only cited a sentence in Dr. Dong's email: "Please give me a couple of days to look into my schedule in February" to blame Appellant for all the delays. Respondent further asserts that "Appellant does not dispute that between October 7, 2022, and February 28, 2023, appellant did not take deposition." However, Respondent failed to mention that during this time, Appellant was given a Briefing Order by the United States Court of Appeals for the Fourth Circuit in a separate case. Appellant had filed a Motion for Protection Order to the district court. Again, the Judge did not stay the deposition deadline while the Motion was pending and denied Appellant's Motion because "it violates the Scheduling Order." Appellant had no choice but to place the priority to the Briefing Order issued by the superior Court.

Under the Supreme Court's mandate, this Court has long established that "the due process interest, sometimes, outweigh the courts' interests in procedural

timelines,” and “judges may give leeway to pro se pleaders,” and “review [pro se pleader’s] motion liberally” and “with a lower standard than those prepared by an attorney.” *Citations omitted*. To its contrary, the district Judge held a stiff timeline and a stringent standard to Dr. Dong at the expenses of depriving Appellant’s due process right.

C. Granting Summary Judgment Was Improper When the Moving Party Failed to Prove “There Are No Genuine Issues of Material Fact” and The Non-moving Party Was Not Allowed a Reasonable Opportunity for Discovery.

Respondent does not dispute the fact that Respondent did not produce any documents or a single witness to testify on its behalf. What the Respondent presented was pure speculation and unsupported theory created by the attorney himself. Even if these speculations were true, but they are not, they do not constitute the proof that “there are no genuine issues of material fact” as required by the law for granting the Summary Judgment.

Without the support of any document or a witness, Respondent’s counsel results in misrepresentation of the fact and the law to the Court. At the District Court's hearings, the Respondent's counsel blatantly testified about the facts and the meaning of the contract. When this was objected to by Appellant, the counsel changed his testimonies to “my client’s contention is...,” knowingly, his client is an

entity, not a person, and no person testified on behalf of the entity. Here, Respondent's counsel covers up his misrepresentations of facts by using the wording: "appellant asserts..." or "Appellant's contention is....." However, Respondent's counsel failed to cite any Appellant's testimony in supporting the counsel's assertions.

Respondent also misrepresented the law. Respondent asserts: "in this action for breach of a contract, the burden is on appellant to prove the contract, its breach, and damages caused to him by such breach." This citation is misplaced. Appellant only has the burden of proof in the trial, not when the Respondent seeking a summary judgment. The law squarely placed the burden of proving the absent of material issues on Respondent when it seeks the Summary Judgment. Respondent failed in meeting its burden of proof.

Instead, Respondent recycled its tried and tired issues that (1) If Respondent has proved that the breach occurred prior to the expiration of the contract, therefore, making the Complaint untimely and barred by the statute of limitation; and (2) If the Appellant provided sufficient evidence to prove the breach of the contract and damages to him.

Appellant firmly stand by his arguments on these two issues in his Initial Brief and will not repeat his arguments here, except to reply briefly with the following points:

1. Both of these issues are questions of facts that should be determined by the jury of a trial. They do not constitute the proof of the absent of genuine issues of material fact.

2. Respondent's counsel's arguments on these two issues are misrepresentations of facts. It was neither "the Appellant's contention" nor Appellant's testimony that the breach occurred prior to the expiration of the Agreement, so that making Appellant's Complaint untimely. Contrarily, Appellant testified that the Agreement specified a duration of eighteen (18) months, and there were no specific deadlines for the Respondent to transfer Appellant's research assets and to give Appellant the access to campus facilities in the Agreement as it was written by the MUSC's General Counsel. Therefore, the Agreement could not be breached until the expiration of the Agreement and MUSC failed to transfer Appellant's research assets back to him. At minimum, this is a question of fact to be determined by the jury.

3. Respondent's argument that "Appellant's claim is barred by the Statute of Limitation because Appellant failed to address in Initial Brief" is without any legal support. Appellant's Brief addresses the legality of the Summary Judgment and requests the Court to vacate the Summary Judgment.

4. Respondent's argument about Appellant could not provide sufficient evidence to prove the breach of the contract was also based on the counsel's

misrepresentation of the fact and pure speculation without the support of any documents or testimony. It is rudimentary that attorneys cannot testify about any facts on behalf of their client. Here, Respondent does not dispute, but actually admitted, that MUSC never did transfer Dr. Dong's research assets to the off-campus location and never unblock Dr. Dong's access to the compass facilities. Instead, the Counsel selected and paraphrased some minor or detailed terms based on his own interpretation and claimed that none of these terms was breached. Noticeably, the counsel does not mention the major issues of the Agreement, all of which were breached by Respondent.

The center issues of the Agreement are MUSC to transfer Dr Dong's research equipment, biological materials, technologies, and documents (research assets) to an off-campus location in order for him to reinitiate his research while continue his academic activity on MUSC campus and restore Dr. Dong's access to MUSC facilities for his academic activities. The research assets not only belong to Dr. Dong but also are essential for his research and teaching activity. By depriving Dr. Dong's research assets and his teaching activity on campus Respondent completely destroyed Dr Dong's career and made him stuck at the off-campus location – a startup company established by MUSC's Foundation for Research and Development for profit.

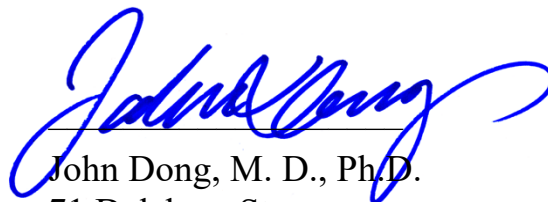
Therefore, Respondent’s arguments in supporting its request for the Summary Judgment are meritless and do not meet the burden of proving “there are no genuine issues of material facts” in seeking the Summary Judgment as required by the Law.

CONCLUSION

For the reasons stated above and those stated in Appellant’s Initial Brief, Appellant respectfully request the Honorable Court to Vacate the Summary Judgment in the interest of the Justice.

Respectfully Submitted, pro se

September 18, 2024



John Dong, M. D., Ph.D.

71 Delahow St.

Charleston, SC 29492

Email: Johny.dong@me.com

Phone: (843)-991-2332