

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2012-CP-46-03040

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SC Court of Appeals

Deutsche Bank National Trust Company, as Trustee for
J.P. Morgan Mortgage Acquisition Trust 2007-CH1,
Asset Backed Pass Through Certificates, Series 2007-
CH1, Respondent,

v.

Cora B. Wilks, David C. Wilks, Chase Bank USA,
N.A., and Midland Funding, LLC, Defendants.
Of whom Cora B. Wilks and David C. Wilks are Appellants

Reply to the Appellants' Return to the Motion to Dismiss Appeal

Pursuant to Rule 240(f) of the South Carolina Appellate Court Rules, Respondent Deutsche Bank National Trust Company, as Trustee for J.P. Morgan Mortgage Acquisition Trust 2007-CH1, Asset Backed Pass Through Certificates, Series 2007-CH1 ("Deutsche Bank") files this reply to the Appellants' Return to the Motion to Dismiss the Appeal. Appellants' arguments cannot overcome the fact that Appellants failed to serve Deutsche Bank with a Notice of Appeal as mandated by Rule 203, SCACR. As a result, this Court lacks jurisdiction over this appeal.

In the Return, Appellants' counsel contends that the Motion to Dismiss should be denied because "[t]o his recollection" the July 15, 2013 Letter contained and served the Notice of Appeal. See Return p. 1. This is insufficient to overcome the affidavit submitted by Deutsche Bank. Counsel for Deutsche Bank submitted a sworn affidavit that affirmatively stated that the materials served on July 15, 2013, did not include the Notice of Appeal. See Affidavit of Michael J. Anzelmo, Esquire, attached to the Motion to Dismiss as Exhibit B (averring that "[t]he only documents received by Deutsche Bank were (1) the cover letter to this Court, (2) the cover letter to the trial court, and (3) the order on appeal" but "the correspondence did not include any Notice of Appeal or Proof of Service of the Notice of Appeal on Deutsche Bank.")). Appellants' counsel failed to set forth, by evidence or affidavit, that service of the Notice of Appeal on Deutsche Bank was actually and timely effected in this case. Instead, counsel merely stated that "[t]o his recollection, and according to his regularly kept records" he served the Notice of Appeal on Deutsche Bank. See Affidavit of Appellants' counsel ¶ 3, attached to Return.¹ While service of the Notice of Appeals may constitute counsel's regular practice, the fact of the matter is that no Notice of Appeal was served on Deutsche Bank. See Affidavit of Michael J. Anzelmo, Esquire, attached to the Motion to Dismiss as Exhibit B.

¹ Counsel's affidavit likely refers to the fact that he did file a Notice of Appeal with the Court. Counsel for Deutsche Bank obtained a copy of the clocked filing made by Appellants on July 15, 2013. That filing did have a Notice of Appeal. However, filing cannot replace service of the Notice of Appeal. The appellant must file and serve a Notice of Appeal. Rule 203(a), SCACR; Toal, Vafai & Muckenfuss, Appellate Practice in South Carolina 2d. p. 116 ("Of course, *servng* and *filing* are two separate acts defined by [the Rules]") (emphasis in original). Counsel failed to serve Deutsche Bank with the Notice of Appeal.

Moreover, if an Appellant could avoid dismissal of an appeal for failing to timely serve a Notice of Appeal by simply stating Appellant recalled serving the Notice of Appeal, then a Respondent could never obtain dismissal of the appeal for failure to serve the Notice of Appeal. The rule would be rendered illusory and without meaning. This cannot be the intent of the Appellate Court Rules. In this case, Deutsche Bank was not served with a Notice of Appeal within the time set forth in Rule 203(b), SCACR.

Appellants also claim the Motion to Dismiss “is analogous” to a claim of failure of service and invoke rules related to personal jurisdiction to defeat dismissal. See Return p. 2-3. This argument lacks merit. The failure to serve any Notice of Appeal precludes this Court from acquiring subject matter jurisdiction over the appeal. See, e.g., Elam v. S.C. Dept. of Transp., 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004) (“The requirement of service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal. . . .”). Deutsche Bank does not assert Appellants utilized an improper method of service or that service by mail of the Notice of Appeal was improper. Deutsche Bank admits they could via mail. However, the issue is not whether Appellants properly served Deutsche Bank under the rules of service. The issue is that Appellants failed to serve any Notice of Appeal on Deutsche Bank as required by the Appellate Court Rules. Thus, the arguments advanced in the Return have no bearing on the issue presented in the Motion to Dismiss and should be disregarded by this Court.

Therefore, this Court lacks jurisdiction to consider the appeal and must dismiss the appeal. Coker v. Cummings, 381 S.C. 45, 52, 671 S.E.2d 383, 387 (Ct. App.

2008) (“The requirement of service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal. . .”).²

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Columbia, South Carolina
September 4, 2013
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² Again, this is not a situation where a minor or clerical error exists in a notice of appeal. Rather, Appellants have wholly failed to serve any Notice of Appeal on Deutsche Bank. Our rules mandate service of the Notice of Appeal and require dismissal when an appellant fails to do so. See Rule 203(b), SCACR.

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v.	
Cora B. Wilks, David C. Wilks, Chase Bank USA, N.A., and Midland Funding, LLC,	Defendants.
Of whom Cora B. Wilks and David C. Wilks are	Appellants

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I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Deutsche Bank National Trust Company, as Trustee for JPMorgan Acquisition Trust 2007-CH1, Asset Backed Pass Through Certificates, Series 2007-CH1, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings: Reply to the Appellant's Return to the Motion to Dismiss Appeal

Counsel Served:

John Martin Foster
Post Office Box 106
Rock Hill, SC 29731

A handwritten signature in black ink, appearing to read "J. Lee", written over a horizontal line.

Jennifer B. Lee
Administrative Assistant

September 5, 2013

Nelson Mullins

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September 5, 2013

Hand Delivered

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
1015 Sumter Street - 5th Floor
Columbia, SC 29201

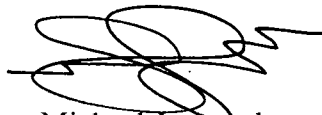
RE: Deutsche Bank v. Wilks, Cora and David, et al.
Appellate Cse No. 2013-001524
Our File No.: 11281.01675

Dear Ms. Kitchings:

Enclosed please find an original and seven copies of a Reply to Appellants' Return to the Motion to Dismiss Appeal in the above-referenced matter. Please file the original and return a clocked-in copy to me via our courier. Should you have any questions, please do not hesitate to contact me.

By copy of this letter, I am hereby serving opposing parties.

Very truly yours,



Michael J. Anzelmo

MJA:jlee
Enclosures

cc: John Martin Foster

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