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Oct 31 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appellate Case No. 2023-001147

APPEAL FROM BEAUFORT COUNTY
Master in Equity

Marvin H. Dukes, III, Master in
Equity and Special Circuit Court Judge
Case No. 2020-CP-07-00977

BOKF Real Estate Holding, LLC

Respondent,

v.

T & S Management, Inc. and
Turan Strange

Appellants.

RESPONDENT'S MOTION TO CORRECT
RECORD ON APPEAL

Respondent BOKF Real Estate Holding, LLC (“Respondent”) respectfully submits this Motion to correct the Record on Appeal (“Record”) and requests the Court to order (a) that the Record be supplemented to include two items requested by Respondent in its Designation of Matter but omitted from the Record and (b) that two items improperly included in the Record by Appellants T&S Management, Inc. and Turan Strange (“Appellants”) be stricken from the Record.

I.

Facts Pertinent to Motion

On July 19, 2024, the Respondent filed its Designation of Matter to be included in the Record. Respondent specifically requested in the RDOM that the Record include:

- “3. Affidavit of Warren E. Hill, filed on February 23, 2023, with exhibits;
4. Affidavit of Edward M. Kubec, filed on February 23, 2023, with exhibits.”

On October 4, 2024, Appellants filed the Record. However, neither Affidavit referenced above was included in the Record. Instead, the Record includes two copies of Supplemental Affidavits made by Messrs. Hill (pgs. 43-45 and 205-207) and Kubec (pgs. 29-42 and 203-204) that were subsequently filed in the underlying action on March 27, 2023.¹ Moreover, the Record does not include Exhibits A and B to the Hill Affidavit of February 23, 2023, which exhibits consist of the subject Lease and Guaranty of this action.²

In addition, Appellants wrongfully included two items in the Record, an Amended Affidavit of Turan Strange (pgs. 208-210) and deposition testimony of Defendant Strange (pgs. 211-215), that never were filed with trial court in connection with the summary judgment motion, the motion for reconsideration or otherwise. Likewise, these two items were not identified by Appellants in their Designation of Matter filed on February 26, 2024.

II.

Argument

A. The Record Erroneously Omits Two Affidavits Designated by Respondent

Rule 210(b), SCACR, requires the Appellant to file the Record. Rule 210(c), SCACR requires the Record to include all matter designated to be included by any party under Rule 209, SCACR. Appellant did not include as part of the Record the Affidavit of Warren E. Hill and exhibits A and B thereto, filed with trial court on February 23, 2023 and the Affidavit of Edward M. Kubec, filed with the trial court on February 23, 2023, both of which were designated by Respondent. Therefore, the Record should be supplemented to include those two Affidavits and Exhibits A (Lease) and B (Guaranty) attached to the Hill Affidavit.

B. The Record Improperly Includes an Affidavit and Deposition Testimony That Should Be Stricken from the Record

Rule 210(c), SCACR, prohibits a party from including in the Record any “matter which was not presented to the lower court or tribunal.” Appellants wrongfully include two items, an

¹ Respondent did include a request for those two supplemental Affidavits to be included in the Record in the RDOM.

² The Lease and Guaranty were, however, included in the Record as Exhibits A and B to the Complaint. (Pgs. 224-260 and 261-262).

Amended Affidavit of Appellant Turan Strange (pgs. 208-210) and deposition testimony of Appellant Strange (pgs. 211-215), that never were filed with trial court in connection with the summary judgment motion, the motion for reconsideration or otherwise. On this ground alone, the items should be stricken from the Record. *See* Rule 210(c), SCACR (“The Record shall not, however, include matter which was not presented to the lower court or tribunal”); *State v. White*, 372 S.C. 364, 387, 642 S.E.2d 607, 619 (Ct. App. 2007), overruled on other grounds by *State v. Wallace*, 440 S.C. 537, 892 S.E.2d 310 (2023) (witness statement was not presented to the lower court and cannot be properly included in the Record on Appeal); *Croft as Tr. of James A. Croft Tr. v. Town of Summerville*, 428 S.C. 576, 597 at fn.5, 837 S.E.2d 219, 230 (Ct. App. 2019), vacated on other grounds, 433 S.C. 473, 860 S.E.2d 352 (2021).

Moreover, the Appellants failed to designate either the Strange Affidavit or the Strange Deposition testimony in their Designation of Matter pursuant to Rule 209, SCACR, most likely because Rule 209 requires the designation to only include items which may be properly included in the Record. The Appellants failure to designate these two items provides a separate ground to strike them from the Record.

III.

Conclusion

Accordingly, based on the foregoing, Respondent respectfully requests that this Honorable Court grant Respondent’s Motion and order that (a) the Record be supplemented to include the Affidavit of Warren E. Hill and Exhibits A and B thereto, filed with trial court on February 23, 2023, and the Affidavit of Edward M. Kubec, filed with the trial court on February 23, 2023 and (b) the Amended Affidavit of Turan Strange (pgs. 208-210) and deposition testimony of Defendant Strange (pgs. 211-215) be stricken from the Record.

NOVIT & SCARMINACH, P.A.

By: /s/ Edward M. Kubec

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Attorneys for Respondent

October 31, 2024
Hilton Head Island, South Carolina

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Appellants.

PROOF OF SERVICE

On this 31st day of October 2024, the undersigned did serve Respondent's Motion to Correct the Record on Appeal on counsel for Appellants, by email and placing same in the United States mail to:

Michael W. Mogil, Esq.
Mogil Law Firm
2 Corpus Christie Place, Ste. 103
Hilton Head Island, SC 29928
mmogil@mogillaw.com

A copy of the service email is attached hereto.

NOVIT & SCARMINACH, P.A.

By: /s/ Edward M. Kubec

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Attorneys for Respondent

October 31, 2024

Hilton Head Island, South Carolina

From: [Edward Kubec](#)
To: ["Michael Mogil"](#)
Cc: ["Emily Schettler"](#)
Subject: BOKF Real Estate Holding, LLC v. T&S Management, Inc. (Appellate Case No. 2023-001147)
Date: Thursday, October 31, 2024 12:58:00 PM
Attachments: [20241031_Motion to Correct Record on Appeal.pdf](#)

Mike:

I have attached a service copy of Respondent BOKF Real Estate Holding, LLC's Motion to Correct the Record on Appeal with regard to the above-referenced matter. We will file the Motion with the appellate court later today.

Please contact me if you have any questions.

Regards.

Edward M. Kubec, Esq.
ekubec@ns-lawfirm.com



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**NOVIT &
SCARMINACH,
P. A.**

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VIA EMAIL AND REGULAR MAIL

Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211
ctappfilings@sccourts.org

RE: BOKF Real Estate Holdings, LLC v. T&S Management, Inc. and Turan Strange
Appellate Case No. 2023-001147

Dear Ms. Kitchings:

Enclosed please find Respondent's Motion to Correct the Record on Appeal and Proof of Service in the above-referenced matter. Also enclosed is check in the amount of \$50 for the filing fee.

Kindly file the enclosed and return a clocked copy to the undersigned via return email.

The enclosed documents have been served upon counsel of record today as indicated in the Proof of Service.

Thank you for your assistance with this matter and please contact me if you have any questions.

Very truly yours,

NOVIT & SCARMINACH, P.A.

s/Edward M. Kubec

Edward M. Kubec

Enclosures

cc: Michael W. Mogil, Esq. (via regular mail and email: mogil@mogillaw.com)