

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell Scarborough, Master-In-Equity

Appellate Case No. 2013-002065

Bank of America, N.A.,

Respondent,

v.

Frank Cook a/k/a Frank W. Cook,
Judith H. Cook and Ian Cook, Defendants

Of whom Frank Cook and Judith H. Cook
are the

Appellants

RESPONDENT'S MOTION TO DISMISS

MICHAEL W. SMITH
S.C. Bar No. 71184
Baker, Donelson, Bearman,
Caldwell and Berkowitz, PC
P.O. Box 1549
Orlando, FL 32802
(407) 367-5437

SEAN M. FOERSTER
S.C. Bar No. 77466
ROGERS TOWNSEND & THOMAS, PC
220 Executive Center Drive (29210)
Post Office Box 100200
Columbia, South Carolina 29202-3200
(803)771-7900

Attorneys for Respondent

RECEIVED

DEC 06 2013

SC Court of Appeals

70594

INDEX

Index.....2
Table of Authorities.....3
Legal Memorandum.....4
Conclusion.....5

TABLE OF AUTHORITIES

Cases:

Camp v. Camp, 386 S.C. 571, , 689 S.E.2d 634 (2010) 4

Elam v. S.C. DOT, 361 S.C. 9, 602 S.E.2d 772 (2004) 4

Rules:

Rule 6(e), SCRCF 4

Rule 203, SCACR..... 4

Rule 224, SCACR..... 4

Rule 234, SCACR..... 4

MEMORANDUM

Respondent Bank of America, N.A., ("Bank of America") moves under Rule 224 SCACR for an order dismissing this appeal. Appellants did not timely file a notice of appeal and, therefore, this Court lacks jurisdiction to hear the appeal. The appeal must be dismissed.

A notice of appeal is required to be served on all respondents within thirty (30) days after receipt of written notice of entry of the order of judgment. Rule 203, SCACR. The order of judgment which Appellants are appealing was entered on August 2, 2013. *See* Exhibit A. Counsel for Appellants stated that he received the written notice of entry of the order of judgment from the county clerk of court on August 9, 2013. *See* Exhibit B. Appellants filed the notice of appeal on September 9, 2013. *See* Exhibit C.

In computing the thirty-day time period within which Appellant was required to serve the appeal, the day of receipt of the written notice of entry of the order of judgment is not included. *See* Rule 234, SCACR. Thirty days after August 9, 2013 is September 8, 2013. By rule, Appellants were therefore required to serve the notice of appeal by September 8, 2013.¹ Rule 203, SCACR.

The Supreme Court has previously stated that "[s]ervice of the notice of appeal is a jurisdictional requirement, and [the] Court has no authority to extend or expand the time in which the notice of intent to appeal must be served." *Camp v. Camp*, 386 S.C. 571, 574-575, 689 S.E.2d 634, 636 (2010) (internal quotations omitted); *Elam v. S.C. DOT*, 361 S.C. 9, 602 S.E.2d 772 (2004) (if a party misses the deadline, the appellate court lacks jurisdiction to


¹ In Appellants' counsel's letter to the court, he appears to rely on Rule 6(e), SCRCP for the proposition that the time period in which to file the notice of appeal was increased by an additional five days from when the trial court's judgment was mailed to him. However, Rule 6 only allows an additional five days when a prescribed time period is calculated based on "service of a notice" by mail. Rule 6(e) SCRCP (emphasis added). The time period in which a notice of appeal must be filed is very clearly calculated based upon "receipt of written notice," not on service of the notice. Rule 203, SCACR (emphasis added). Therefore, there is no additional allowance based upon the mailing date of the order.

consider the appeal and has no authority or discretion to extend or ignore the deadline for service of the notice.) Since Appellants did not file the notice of appeal within the required time period, the Court of Appeals lacks jurisdiction and the appeal must be dismissed.

CONCLUSION

Appellants did not file a notice of appeal within thirty days of receipt of written notice of the entry of the trial court's judgment. Therefore, the Court of Appeals does not have jurisdiction to consider the appeal and it must be dismissed.

Respectfully submitted,



MICHAEL W. SMITH
S.C. Bar No. 71184
Baker, Donelson, Bearman,
Caldwell and Berkowitz, PC
P.O. Box 1549
Orlando, FL 32802
(407) 367-5437

✓SEAN M. FOERSTER
S.C. Bar No. 77466
ROGERS TOWNSEND & THOMAS, PC
220 Executive Center Drive (29210)
Post Office Box 100200
Columbia, South Carolina 29202-3200
(803)771-7900

Attorneys for Respondent

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell Scarborough, Master-In-Equity

Appellate Case No. 2013-002065

Bank of America, N.A.,

Respondent,

v.

Frank Cook a/k/a Frank W. Cook,
Judith H. Cook and Ian Cook, Defendants

Of whom Frank Cook and Judith H. Cook are the

Appellants

PROOF OF SERVICE

I certify that I have served Respondent's Motion to Dismiss on all attorneys and parties of record by depositing a copy of it in the United States Mail, postage prepaid, on December 6, 2013, to the addresses on the attached service list.

December 6, 2013


SEAN M. FOERSTER

S.C. Bar No. 77466

ROGERS TOWNSEND & THOMAS, PC

220 Executive Center Drive (29210)

Post Office Box 100200

Columbia, South Carolina 29202-3200

(803)771-7900

Attorneys for Respondent

RECEIVED

DEC 06 2013

SC Court of Appeals

cc:

Dwayne M. Green, Esquire
Hampton Green, LLC
602 Rutledge Ave
Charleston, SC 29413

H. Guyton Murrell, Esquire
Teresa D. Van Vlake, Esquire
P.O. Box 11264
1300 Pickens St
Columbia, SC 29211-1264

ROGERS TOWNSEND & THOMAS, PC
POST OFFICE BOX 100200 (29202)
220 EXECUTIVE CENTER DRIVE
COLUMBIA, SOUTH CAROLINA 29210
P 803.771.7900 F 803.343.7017
W RTT-LAW.COM

Sean M. Foerster
Sean.Foerster@RTT-LAW.COM
P 803.744-1855



December 6, 2013

Via Hand Delivery

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals Clerk of Court
1015 Sumter Street
Columbia, South Carolina 29201

Re: *Bank of America, N.A. vs. Frank Cook a/k/a Frank W. Cook, Judith H. Cook and Ian Cook*
Appellate Case# 2013-002065

Dear Ms. Kitchings:

Enclosed are the original and seven copies of Respondent's Motion to Dismiss and Certificate of Service in the above referenced matter, along with a check in the amount of \$25.00. Please return a filed copy of these documents to me in the enclosed self-addressed, postage pre-paid envelope provided for your convenience.

By copy of this letter, I am serving copies of the Respondent's Motion to Dismiss and Certificate of Service on all parties of this appeal.

Thank you for your assistance in this matter.

Very truly yours,

A handwritten signature in black ink, appearing to be "Sean M. Foerster", is written over a printed name.

Sean M. Foerster

/tds
Enclosure

RECEIVED
DEC 06 2013
SC Court of Appeals