IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2008-CP-23-05739

Andrew P. (Andy) Ballard, ...Respondent,

v.

Tim Roberson, Rick Thoennes, Rick Thoennes III,
And Warpath Development, Inc., ...Appellants.

RESPONDENT'S MOTION TO DISMISS THE APPEAL OR IN THE ALTERNATIVE TO REQUIRE APPELLANTS TO POST AN APPEAL BOND

Respondent respectfully moves to dismiss this appeal on the ground that the notice of appeal was not timely served under Rule 203(b)(1), SCACR. In the alternative, respondent urges the Court to require appellants to post an appeal bond for the amount of the judgment as a condition to allowing their appeal to proceed, for reasons particular to this case as noted below.

FACTUAL AND PROCEDURAL BACKGROUND

This is a suit by a minority shareholder against the majority shareholders and the corporation for oppression and to require the escrow of shares of the majority shareholders until they have fulfilled their obligations under a contract with the corporation. The plaintiff-respondent, Andy Ballard, is the founder of the corporate defendant, Warpath Development, Inc. ("Warpath"), and was its sole owner, officer, and director for a number of years. The company was formed to develop a marina and related properties (such as rental cabins, a hotel, restaurant, marina store, and the like) on Lake Keowee in the Upstate of South Carolina, and through Mr. Ballard's efforts obtained a potentially perpetual lease from Duke Power Company for the land at the site of the marina. Warpath obtained all necessary permits to construct and develop the marina and related properties by the summer of 2010.

Under a Stock Purchase Agreement dated May 29, 2007, defendant-appellant Roberson purchased 20,000 shares of Warpath stock directly from Mr. Ballard for $1,000,000, and he and the other two individual appellants also received 20,000 shares each from the company in exchange for future services they agreed to provide to the company, as set forth in the Agreement. Mr. Ballard retained ownership of 20,000 shares.

Over the course of the year following the execution of their contract, the parties' relationship deteriorated. By October of 2007, merely five months after signing their agreement with Mr. Ballard, the appellants began discussions among themselves of how to force Ballard out of the company, and then proceeded to try to do so.

Ballard filed suit in July 2008. Following two years of discovery, Circuit Court Judge Edward Miller tried the case nonjury, and on May 4, 2010, entered an Order

finding that the appellants had acted in a manner that was illegal, oppressive, and unfairly prejudicial to Ballard within the meaning of S.C. Code § 33-14-300(2)(ii). Order of May 4, 2010 (**Exhibit A**). Judge Miller ordered the appellants to purchase Ballard's shares at fair value pursuant to S.C. Code § 33-14-310(d)(4) and set up a procedure for determining a fair value at a subsequent hearing. Judge Miller also ordered under S.C. Code § 33-6-210 that the defendants place in escrow the 60,000 shares that were issued to them by Warpath. *Id.*

Before the valuation hearing was held, the defendants appealed. In 2012, the South Carolina Supreme Court affirmed Judge Miller's Order and remanded the case for the valuation hearing. *Ballard v. Roberson*, 399 S.C. 588, 733 S.E.2d 107 (2012).

Following a number of delays, on August 6, 2013, Judge Miller held an evidentiary hearing to determine a fair value of the corporation and of Ballard's ownership interest. Testimony was given by two experts, Perry Woodside and Charles Alford, who appraised the present value of the company at various amounts ranging between $4.4 million and $12 million, depending on how the appraisal was calculated. Andy Ballard testified that, in his opinion, the company was worth $10 to $14 million. Appellant Roberson testified that he thought the $1,000,000 he paid for Ballard's stock in 2007 was a fair price. Evidence was presented that the appellants had represented to third parties that the company was worth at least $6 million and as much as $37 million.[1]

The appellants also "threw themselves on the mercy of the court" and claimed repeatedly that they were impoverished would be unable to pay any significant amount of

[1] This evidence is referred to in Judge Miller's 2013 Order (Exhibit B). Respondent has requested a transcript of the valuation hearing and will supplement this motion with excerpts of the pertinent testimony and exhibits when the transcript has been received.

money to Ballard, not even the $1,000,000 that appellant Roberson had testified was a fair price. They asked Judge Miller to give them years to buy out Mr. Ballard's interest.

On October 3, 2013, Judge Miller issued an Order weighing the evidence and finding that a fair value of the company was $7,178,594. Judge Miller went on to hold that Andy Ballard's ownership interest should be treated as 50% of the whole, because the appellants still had not performed the services for which they received the shares of stock that are being held in escrow. Accordingly, Judge Miller ordered the appellants to buy out Ballard's shares at $3,589,297 (i.e., 50% of $7,178,594). He rejected appellants' request for a lengthy payout period, on the basis of the equitable maxim, "he who seeks equity must do equity," and gave appellants 90 days to pay the judgment. Order of October 3, 2013 (**Exhibit B**).

Appellants moved for reconsideration. On November 8, 2014, the Circuit Court issued a Form 4 Order denying the motion for reconsideration. (**Exhibit C**). At the same time, the Order was posted on the Greenville County Circuit Court website, *see* *http://www.greenvillecounty.org/SCJD/PublicIndex/CaseDetails.aspx?County=23&CourtAgency=23002&Casenum=2008CP2305739&CaseType=V*. On November 12, 2014, the Clerk of Court for the Circuit Court mailed this Order to the attorneys of record. (**Exhibit D**).

Appellants' Notice of Appeal was served on December 20. This was 42 days after the posting on the Circuit Court website of the Order denying the motion for reconsideration, and 38 days after the Order was mailed to counsel by the Clerk of Court. The Notice represents that appellants' counsel did not receive the Order denying the motion for reconsideration until December 19 (when a copy was emailed to appellants'

counsel by respondent's counsel), and asserts that the Notice was therefore timely under Rule 203(b)(1), SCACR. On January 6, 2014, the Clerk of Court for the Court of Appeals advised appellants' counsel that the Notice of Appeal was defective as it did not include copies of the Orders being appealed. Appellants responded on January 7 by mailing copies of Judge Miller's October 3 and November 8 Orders. On January 17, 2014, appellants moved for an enlargement of time in which to request the hearing transcript, noting that they had failed to request the transcript within the ten days prescribed by Rule 207(a)(1), SCACR.

In the meantime, respondent initiated execution on the judgment. Appellants moved for a stay of execution without bond, and respondent moved for supplemental proceedings. Those motions are pending in the Circuit Court.

ARGUMENT

A. The Appeal Should Be Dismissed Because the Notice of Appeal Was Not Timely Served.

Rule 203(b)(1) requires that, when a motion for reconsideration has been filed and denied, the notice of appeal must be served within 30 days of receipt of written notice of the entry of the order denying reconsideration. The 30-day limit for serving the notice of appeal "is a jurisdictional requirement, and the time for service may not be extended by [the appellate] Court." *Hill v. S.C. Dept. of Health & Envtl. Control*, 389 S.C. 1, 21, 698 S.E.2d 612, 623 (2010); *accord Camp v. Camp*, 386 S.C. 571, 689 S.E.2d 634 (2010).

Although respondent does not question the truth of the representation by appellants' counsel that he personally did not receive the Order denying reconsideration until December 19, it is undisputed that the Clerk of Court mailed the Order to him on November 12. Respondent submits that it is much more likely that the Order was

received at the offices of appellants' law firm and then overlooked or misplaced, rather than that it simply vanished in transit while in the mail from the Circuit Court a few blocks away. Further, it is undisputed that the Order was posted on the Greenville County Circuit Court website on November 8, the day the Order was entered, and thus was readily accessible as of that date to anyone who wanted to check for it. *See Ackerman v. 3-V Chemical, Inc.*, 349 S.C. 212, 215-16, 562 S.E.2d 613, 615 (2002) (30-day time under Rule 203(b)(1) is triggered by receipt of notice, not receipt of the order itself).

In these circumstances, the Court should hold that appellants' counsel received effective notice of the Order denying reconsideration either on November 8 (the day it was posted on the Court's website) or at latest on November 17 (the November 12 mailing date plus the five days provided by Rule 6(e), SCRCP, for computing deadlines when a paper is served by mail) – in either event, more than 30 days before the notice of appeal was served on December 20. Otherwise, counsel for a party who wishes to delay the proceedings (which is clearly true of appellants here, *see infra*) would be able to obtain additional time by misrepresenting the date of receipt of the order on appeal, by ignoring a Form 4 Order from the Circuit Court when a motion for reconsideration is pending, or by directing firm administrative personnel not to deliver any such order received in the mail, and thereby delay serving the notice of appeal past the 30-day jurisdictional requirement of Rule 203(b)(1). Respondent does not intend to suggest that appellants' counsel or his staff engaged in any such shenanigans here, but instead wishes to point out that both the incentive and the ability to carry out this kind of manipulation of the Court's jurisdictional time requirement are facilitated if the time for serving the

notice of appeal is dependent solely upon the representation of appellant's counsel as to when notice of the underlying order was received. When, as in this case, it is undisputed objective fact that the Clerk of Court posted the order to the Circuit Court's website and mailed the order to counsel on certain dates, and the notice of appeal is not served until more than 35 days after the latest of those dates, this Court should dismiss the appeal as untimely.

B. Alternatively, the Court Should Require Appellants To Post an Appeal Bond.

Should the Court determine not to dismiss this appeal, respondent urges the Court to require appellants to post an appeal bond as a condition of proceeding with their appeal. Although appeal bonds are not the norm in the South Carolina state appellate system, this is not a normal case. Here, the Circuit Court's Order finding appellants liable to respondent has already been appealed and affirmed by the Supreme Court. Appellants' liability is now final. Thus, there is no chance that the instant appeal could result in a judgment for appellants or a finding of no liability on their part. The only remaining issue is how much appellants should be required to pay respondent, and as the factual summary above shows, there is substantial evidentiary support for Judge Miller's valuation. Thus, an affirmance of his 2013 Order of Judgment seems highly likely.

However, even if the Circuit Court's decision is not affirmed, the best that the appellants can hope for is a retrial on the valuation issue, and they have already admitted that $1,000,000 is a fair price for Mr. Ballard's stock. Appellants should not be able to use the appellate system to cause further delay through this appeal – in a case that has dragged on for six years already – unless they post a bond for at least the minimum amount they concede they owe to Mr. Ballard.

Moreover, as noted above, appellants have represented to the Circuit Court that they are unable to pay even the $1,000,000 they concede is a fair price. Given this representation by them, it is transparent that the only reason they are pursuing this appeal is to try to buy more time. In this situation, they should be required to post an appeal bond for the entire amount of the underlying judgment. In other words, why should appellants be allowed to use up this Court's valuable time and resources dealing with an appeal, when it is a complete certainty that the case will ultimately end in a judgment that appellants claim they will not be able to pay, regardless of how the appeal is decided? Because of the particular, and unusual, circumstances presented by this appeal, the Court should require appellants to post an appeal bond in the full amount of the Circuit Court judgment.

This appears to be an issue of first impression,[2] but respondent submits that the Court has the inherent authority to require such a bond.[3] Otherwise appellants would be enabled to use the Court and its time and resources solely to cause delay when, regardless of how the appeal is decided, the case will be remanded for entry of judgment in an amount that appellants say they are unable to pay.

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[2] Respondent's counsel has not found any authority either supporting or rejecting the Court's authority to require an appeal bond in this situation.

[3] Respondent is not asking this Court at this time to require appellants to post a bond as a condition of the stay of execution they are seeking. Requiring such a bond in connection with a motion for supersedeas is authorized by Rule 241, SCACR, and as provided there must first be sought in the Circuit Court. Instead, appellant is asking the Court to require the bond as a condition of the appeal going forward, regardless of execution of the judgment, as a part of the Court's inherent authority to prevent its time and resources from being used for what otherwise will be an advisory opinion.

CONCLUSION

For the reasons stated above, respondent moves this Court to dismiss the appeal. In the alternative, respondent moves the Court to require, as a condition of the appeal going forward, that appellants post an appeal for the full amount of the judgment in the Circuit Court, or at the very least for the $1 million that appellants have conceded is a fair value for Mr. Ballard's stock.

Respectfully submitted,

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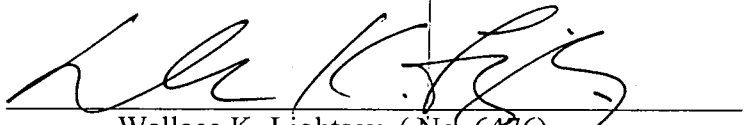
Attorneys for Respondent

Date: January 22, 2014
Greenville, South Carolina

Certificate of Service

This is to certify that I have this date caused to be served a true and correct copy of the foregoing RESPONDENT'S MOTION TO DISMISS THE APPEAL, OR IN THE ALTERNATIVE TO REQUIRE APPELLANTS TO POST AN APPEAL BOND on opposing counsel in this action by causing the same to be deposited in the United States mail, first class postage affixed, addressed as follows:

Joshua L. Howard, Esq.
Haynsworth Sinkler & Boyd, P.A.
P. O. Box 2048
Greenville, SC 29602



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January 22, 2014

Hon. Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

RE: *Ballard v. Roberson*
Case No. 2008-CP-23-05739

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of Respondent's Motion To Dismiss the Appeal or in the Alternative To Require Appellants To Post an Appeal Bond. Also enclosed is a check for the $25 motion fee.

With highest regards,

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Enclosures

Cc with enclosure:
Joshua L. Howard, Esq.
Andy Ballard