

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable Frank R. Addy, Jr.

Case No.: 2014-00091

James Spencer, individually and on behalf of the Estate of Doris Holt
and on behalf of Southern Holdings, Inc.; and Irene Santacroce, Plaintiffs,

of whom James Spencer is the Appellant, Appellant,

v.

John R. Rakowsky, Adrian L. Falgione, and The Law Offices
of Adrian Falgione, LLC, Respondents,

of whom John R. Rakowsky and Adrian L. Falgione are the Respondents.

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SC Court of Appeals

**RESPONDENT ADRIAN L. FALGIONE'S RETURN TO
APPELLANT'S MOTION FOR APPELLANT TO STAY CASE**

Respondent Adrian Falgione ("Respondent") submits for the Court's consideration this Return to the Appellant's Motion For Appellant To Stay Case For Thirty Days Due To Misunderstanding Of Financial Process And Attempting To Live Within Appellants Means ("Motion"), filed April 2, 2014 in this matter. Respondent submits this Return to bring to the Court's attention issues the Appellant's filings do not reveal. In short, Appellant's motion should be denied because it is moot, the Appellant failed to serve it, it is untimely, and it is meritless.

DISCUSSION

As an initial matter, the relief Appellant seeks is to stay the deadline to order the transcript and to reconsider its denial of his motion to proceed *in forma pauperis*. What the motion does not seek is to reconsider its *Order of Dismissal* and reinstate the case. Even if the Court grants Appellant the relief sought, the Order of Dismissal would still stand because Appellant failed to timely seek relief from that Order. Therefore, the Motion should be denied as moot.

Second, Appellant's motion should be denied because he failed to serve it on this Respondent. Although the Appellant certified (by way of a Certificate of Service he signed and filed) that he served his motion, neither the undersigned nor his firm has received a copy of the motion from the Appellant. Respondent's Counsel first received Appellant's Motion this morning as an attachment to an e-mail from the Clerk's Office. Appellant has a history of filing inaccurate certificates of service. For example, on the certificate of service he filed with his notice of appeal he claimed he served Respondent's Counsel on Monday, January 13th, thirty-one days¹ after he received a copy of the Circuit Court's Order denying his Rule 59 Motion. (Letter from Bruner to Spencer dated December 13, 2013, attached as **Exhibit A**; Certificate of Service dated January 13, 2014, attached as **Exhibit B**.) However, the meter stamp on the envelope Appellant mailed shows he served it on January 15th, two days after he filed it, and two days after the deadline to serve his Notice of Appeal expired. (See **Exhibit C**.) Therefore, Appellant's motion should be denied based on his failure properly serve it pursuant to Rules 221, 240 and 262(b). See also Rules 240(g) and 260(a).

Third, Appellant's motion is untimely because he filed it on the 16th day after the Order of Dismissal, which was filed March 17, 2014. See Rule 221(a), SCACR. Moreover,

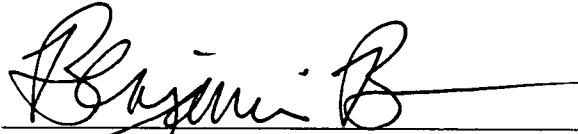
¹ Admittedly, if service occurred on January 13th, then it was timely because the thirtieth day fell on a Sunday.

Appellant's motion seeks not to reinstate his appeal, pursuant to Rule 221, but rather to stay the deadline to request the transcript, which passed long ago. In effect, what the Appellant requests is an order *nunc pro tunc* granting him a four-month extension because he believed his motion to proceed *in forma pauperis* stayed the deadline to order the transcript. Rule 240(b), however, clearly states that filing a motion does not stay that deadline, especially a motion filed nearly three months after the deadline has run. Appellant's statement that he received the Order on April 1st is questionable at best, for this Respondent's Counsel received the Order by mail on March 18th, the day after it was filed. That statement is also irrelevant since Appellant's time to file a motion to reinstate his case ran from the date the Order was filed, not from the date he claims he received it.

Finally, Appellant asks this Court to reconsider its denial of his motion to proceed *in forma pauperis* so he can prolong this litigation without paying any costs. This Court properly denied that request once. Like other representations he has made to this Court, Appellant's claim that he is indigent and received indigent status is questionable. The Circuit Court denied Appellant's request, (*See Exhibit D*), and this Respondent is unaware of any Court Order granting Appellant leave to proceed *in forma pauperis* in the Lexington County Court of Common Pleas or any other court for that matter. As the appellant, Mr. Spencer had the obligation to follow up with this Court to determine the status of his motion, rather than assume it would be granted and that all deadlines would be stayed. Therefore, to the extent Appellant's motion is construed as one to reinstate his appeal, he has failed to show good cause, rendering his motion meritless. See Rule 260(a), SCACR

For these reasons, the Respondent respectfully requests that the Appellant's motion be denied and that this case be remanded for entry of judgment.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Benjamin C. Bruner", written over a horizontal line.

Warren C. Powell, Jr.

Benjamin C. Bruner

Bruner, Powell, Wall & Mullins, LLC

P.O. Box 61110

Columbia, SC 29260

(803) 252-7693

Attorneys for Respondent Adrian L. Falgione

Columbia, South Carolina

April 11, 2014

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IN THE COURT OF APPEALS

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AFFIDAVIT OF COUNSEL

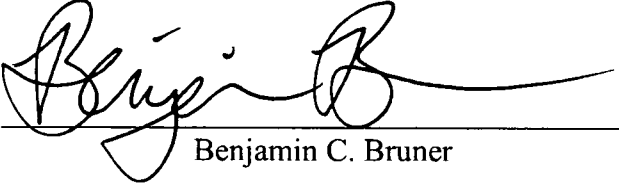
PERSONALLY APPEARED BEFORE ME, Wesley D. Peel, who being duly sworn, deposes
and says as follows:

1. I am the attorney for Respondent Adrian Falgione.
2. On December 13, 2013, I had a runner hand-deliver a copy of the Circuit Court's order denying the Appellant's Rule 59 Motion to the Appellant at his address: 7001 Saint Andrews Road, Suite 183, Columbia, South Carolina 29212. A true and accurate copy of that letter is attached as **Exhibit A**.
3. The document attached as **Exhibit B** is a true and accurate copy of the envelope I received from Mr. Spencer containing the notice of appeal he filed in this matter.

4. During a hearing before the Circuit Court in this matter, the Court denied the Appellant's motion to proceed *in forma pauperis*. The document attached as **Exhibit D** is a true and accurate copy of Page 63 of the transcript from that hearing with the relevant portion highlighted.

5. I am aware of no court order granting the Appellant in forma pauperis status, either in Lexington County or in any of the other courts where the Appellant has filed a lawsuit.


FURTHER AFFIANT SAYETH NOT.



Benjamin C. Bruner

SWORN TO ME this

11th Day of April, 2014



Bridget S. Steele

Notary Public for South Carolina

My Commission Expires: 5-27-2018

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PROOF OF SERVICE

I certify that I have RESPONDENT ADRIAN L. FALGIONE'S RETURN TO APPELLANT'S MOTION FOR APPELLANT TO STAY CASE on James Spencer, pro se, and on Amanda K. Dudgeon, Esquire, by depositing a copy of it in the United States Mail, postage prepaid, on April 11, 2014, and addressed as follows: James B. Spencer, 7001 Saint Andrews Road, Suite 183, Columbia, South Carolina 29212; and Amanda K. Dudgeon, Carlock, Copeland & Stair, LLP, 40 Calhoun Street, Suite 400, Charleston, South Carolina 29401.

April 11, 2014



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AUTHOR'S E-MAIL: BBRUNER@brunerpowell.com

April 11, 2014

Ms. Elizabeth Carter
S.C. Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

RE: *James Spencer, et al. v. John R. Rakowsky, et al.*
Court of Appeals Case No.: 2014-000091
BPWM File No.: 3-1742-108

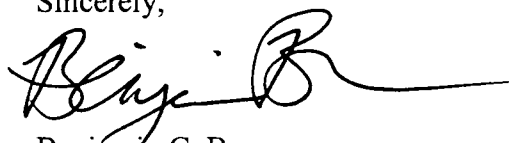
Dear Ms. Carter:

Thank you for taking the time to speak with me this morning about this case and send me a copy of the Appellant's Motion to Stay. While the Rules do not require a Return, I am compelled to respond on my client's behalf to several of the statements and misrepresentations which I believe Mr. Spencer has made. Therefore, please find enclosed herewith for filing our Return to the Appellant's Motion filed April 2, 2014 in this matter. I ask that you file six copies and return a copy to me in the envelope provided. By copy of this letter, I am serving the same on Mr. Spencer and on counsel for Mr. Rakowsky.

Thank you for your attention to this matter. If you have any questions or need anything further from me, please do not hesitate to write or call.

With my warmest regards, I am

Sincerely,



Benjamin C. Bruner

BCB/nys

cc: James B. Spencer, *pro se*
Amanda K. Dudgeon, Esquire

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SC Court of Appeals

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