

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Jr., Circuit Court Judge

Case No. 2011-CP-42-2538
Appellate Case No. 2014-000902

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JUL 03 2014

SC Court of Appeals

Gary G. Harris, Appellant,

v.

Tietex International, Ltd., Respondent.

REPLY MEMORANDUM IN SUPPORT OF
RESPONDENT'S MOTION TO DISMISS

Respondent Tietex International, Ltd. ("Tietex") submits this Reply Memorandum in Support of its Motion to Dismiss Appellant Gary G. Harris' ("Harris") appeal based on his repeated failure to comply with South Carolina Appellate Court Rules.

A. Harris Has Not Submitted an Affidavit or Anything Beyond His Unsupported Allegations to Substantiate the Date on Which He Supposedly Received the Transcript.

Rule 240(c)(3), SCACR, requires that "[w]here the Record on Appeal or Appendix has not been filed, or where the facts relied upon in support of the motion are not contained in the Record on Appeal or Appendix, the parties shall file affidavits and other documents in support of their positions." Tietex complied with this requirement by attaching as Exhibit 1 to its Motion the Affidavit of Fred W. Suggs, Jr. In turn, Mr. Suggs' Affidavit authenticated the USPS Tracking Log received from the Court Reporter,

which unequivocally showed that the transcript was delivered to Harris' home address on May 9, 2014. (Respondent's Mot. to Dismiss at Ex. 1.)

Harris has not complied with Rule 240(c)(3), SCACR, in filing his Return to Tietex's Motion. Harris contends in his Return that "[u]pon inquiry, Mr. Harris informed counsel that he had received the transcript on May 13, 2014." (Appellant's Return to Mot. to Dismiss at 2.) Harris did not file an affidavit or any other document to support this contention. In fact, Harris did not even attempt to explain why he allegedly did not receive the transcript until Tuesday, May 13, when the Tracking Log conclusively shows it was delivered on Friday, May 9.

Harris' unsubstantiated allegation that he received the transcript on May 13 is insufficient to overcome the documentary evidence Tietex has filed showing that delivery was effectuated on May 9. Accordingly, the Court should disregard Harris' allegation regarding the date on which he purportedly received the transcript.

B. Harris Filed His Motion to Extend Time Beyond His Initial Brief Deadline Regardless of whether He Received the Transcript on May 9 or May 13.

The only affidavits and documents before the Court show that Harris received the transcript in this matter on May 9, 2014. Under Rules 208 and 209, SCACR, Harris was required to file and serve his Initial Brief and Designation of Matter to be Included in the Record on Appeal no later than June 9—30 days after he received the transcript. Even accepting as true Harris' unsubstantiated allegation that he received the transcript on May 13, his deadline under Rules 208 and 209, SCACR, was June 12. Harris admits that he did not file his Motion to Extend Time until June 13. Thus, irrespective of which transcript receipt date the Court recognizes, Harris filed his Motion to Extend Time

beyond his deadline to file his Initial Brief and Designation under Rules 208 and 209, SCACR.

C. **Harris Gives No Explanation for Why He Waited Twenty-Four Days After His Counsel Made an Appearance to Request an Extension, and His Motion to Extend Time does not Remedy His Untimeliness.**

Harris readily concedes that his counsel made an appearance in this appeal on May 20. (Appellant's Return to Mot. to Dismiss at 2.) In attempting to explain the tardiness of his Motion to Extend Time, Harris provides only the following:

In the interim between May 20, 2014 and June 13, 2014, counsel was dealing with several urgent and time consuming legal matters related to a client's murder. On June 13, realizing the deadline was at hand and that, without the normal 30 days to prepare and the exigent circumstances at hand, counsel needed and requested a standard 30 day extension of time to prepare the initial brief.

(*Id.*) Nothing in this explanation provides any justification for why Harris was unable to request the extension he allegedly needed between May 20 and June 13. If counsel was truly "dealing with several urgent and time consuming legal matters" during this twenty-four day period, Harris surely could have requested an extension before "the deadline was at hand." Harris failed to do so. Instead, Harris waited until after the deadline to file his Initial Brief and Designation had passed, and then requested a 30-day extension.

Tietex does not contend, as Harris suggests in his Reply, that "Harris purportedly should have requested an extension of time four days earlier than he did." (*Id.* at 3.) Harris should have complied with Rules 208 and 209, SCACR, and filed his Initial Brief and Designation four days before he filed his Motion to Extend Time. By waiting until after his deadline to file his Initial Brief and Designation had passed to request an

extension—providing no legitimate explanation for why he needed that extension—Harris engaged in dilatory tactics that fly in the face of the Appellate Court Rules.

Moreover, the explanation Harris provides in his Return is suspect because it is inconsistent with his assertion in his Motion to Extend Time that he required an extension because he had only recently obtained appellate counsel. Regardless of the underlying reason, Harris cannot evade the fact that he failed to file his Initial Brief and Designation within the allotted time and instead requested an extension after his deadline to file his Initial Brief and Designation had already passed.

D. The South Carolina Appellate Court Rules are not Mere Technicalities, and Harris' Violations of those Rules Warrants Dismissal.

Harris cites to three cases in his Return in attempting to convince the Court that his failure to comply with Rules 207, 208, and 209, SCACR, does not warrant dismissal. However, none of the three cases to which Harris cites involved a party completely failing to file an initial brief within the allotted time as Harris did here. Rather, all three of the cases on which Harris relies involved appellants who failed to comply with formatting requirements in their initial briefs. *See Henning v. Kaye*, 307 S.C. 436, 437, 415 S.E.2d 794, 794 (1992) (“Appellant’s brief fails to comply with the Rule 207 in the following particulars: the components of the brief are incorrectly organized and labeled, the issues are not distinctively headed, the table of authorities is not alphabetized or referenced to the body of the brief, the statement of the case contains contested matter and omits required information, and the arguments contain no citations to the record or to the cases listed in the table of authorities.”); *Kunkle v. S.C. Elec. & Gas Co.*, 251 S.C. 138, 143-44, 161 S.E.2d 163, 164 (1968) (“[T]he plaintiff has moved to dismiss the appeal upon the grounds that (1) defendant’s exceptions violate Rule 4, Section 6, of the

Rules of this Court and (2) the defendant's brief contains statements of factual matters not properly included therein."); *Martin v. Floyd*, 282 S.C. 47, 49, 317 S.E.2d 133, 135 (Ct. App. 1984) ("In their brief, respondents complain that appellants failed to comply with Supreme Court Rule 8, § 2. However, their brief indicates they had no difficulty in ascertaining the question involved on appeal.").

Harris has not provided any support for his argument that failing to file an initial brief in the allotted time does not warrant dismissal. Conversely, the Supreme Court noted as follows in the primary case on which Harris relies: "Counsel is advised that the South Carolina Appellate Court Rules are not mere technicalities but provide the parties and this Court with an orderly mechanism through which to guide appeals in this State." *Henning*, 307 S.C. at 437, 415 S.E.2d at 794 (emphasis added). Additionally, Rule 260(a), SCACR, makes clear that failure to comply with the Rules mandates immediate dismissal of an appeal: "Whenever it appears that an appellant or a petitioner has failed to comply with the requirements of these Rules, the clerk shall issue an order of dismissal, which shall have the same force and effect as an order of the appellate court." (Emphasis added). Accordingly, Harris' violations of the Rules warrants the immediate and permanent dismissal of his appeal, in its entirety.

E. Conclusion.

Nothing in Harris' Return remedies or even adequately explains his repeated violations of the South Carolina Appellate Court Rules in this matter, specifically including Rules 207(a)(1), 208, and 209. Harris' failure to comply with the Rules mandates dismissal of his appeal. Accordingly, Tietex requests that the Court grant its Motion to Dismiss and dismiss Harris' appeal, with prejudice.

Respectfully submitted,

Fred W. Suggs, Jr.

Fred W. Suggs, Jr.

Lucas J. Asper

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ATTORNEYS FOR RESPONDENT

July 2, 2014

THE STATE OF SOUTH CAROLINA
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Case No. 2011-CP-42-2538
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Gary G. Harris, Appellant,

v.

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PROOF OF SERVICE

I certify that I have served Reply Memorandum in Support of Respondent's Motion to Dismiss on Appellant Gary G. Harris by sending to his attorneys of record a copy of the same via first class mail, properly addressed, postage prepaid at the following addresses: D. Alan Lazenby, Ginger D. Goforth, Lazenby Law Firm, Post Office Box 6099, Spartanburg, South Carolina 29304.

July 2, 2014


Fred W. Suggs, Jr.

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SC Court of Appeals

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July 2, 2014

VIA FEDEX

The Honorable Jenny Abbott Kitchings
Clerk of Court for the Court Of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: Gary G. Harris v. Tietex International, Ltd.
Case No.: 2011-CP-42-4538
Appellate Case No.: 2014-000902

Dear Ms. Kitchings:

Enclosed for filing are the original and seven (7) copies of the Respondent's Reply Memorandum In Support Of Respondent's Motion To Dismiss. As appears on the Proof of Service, opposing counsel have been duly served. Please return a stamped "Filed" copy to us in the enclosed prepaid envelope.

Please contact us with any questions or concerns.

Sincerely,

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.


Fred W. Suggs, Jr.

FWS, Jr./blg
Enclosures

cc: D. Alan Lazenby, Esq. w/ Enc. (via U.S. Mail)
Ginger D. Goforth, Esq. w/Enc. (via U.S. Mail)

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