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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

Case No. 20008-CP-01-00201

CapitalBank, Respondent,

v.

Garnet J. Borrer, Appellant.

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AUG 01 2012

SC Court of Appeals

Amended Motion to Dismiss For Failure to Comply with Order Filed June 25, 2012

On July 30, 2012, the Respondent, Capital Bank, filed a Motion to Dismiss for Failure to Comply with the Order of the Honorable Jasper M. Cureton filed on June 25, 2012. Respondent now seeks to amend that Motion based on the Initial Appellant's Brief and Designation of Matter attached hereto as Exhibit A. Appellant apparently delivered the pleadings to the Court on July 16, 2012 but did not serve copies on the Respondent until he placed them in the mail on July 26, 2012. The Respondent received the filings on Monday, July 30, 2012. In June, Judge Cureton granted Appellant's motion for extension but made it clear that no further extensions would be entertained. Pursuant to that Order, the Appellant was to serve and file its Initial Brief and Designation of Matter within twenty days, which according to Respondent's calculation, would have been July 16, 2012.

The Appellant appears to have filed its Initial Brief and Designation of Matter with the Court on July 16, 2012 and executed a Proof of Service that reflects the same date. However, the service letter included in Exhibit A to this Motion is dated July 26, 2012, and the envelope bears a postmark of July 27, 2012, which is eleven (11) days after counsel certified that it served the Respondent as required by the Rules 208 and 209.

Additionally, Appellant has not ordered the transcript according to the court reporter, whose correspondence with Respondent's office is attached hereto as Exhibit B.

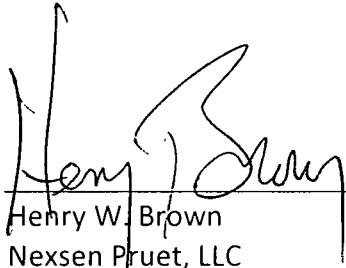
With no transcript, Appellant's Initial Brief utterly fails to comply with Rule 208(b)(4), SCACR, which require initial briefs to reference the page and line number of the transcript to support the salient facts alleged. Moreover, the Appellant shirks his duty to designate only those matters relevant to the appeal, as required by Rule 209(b) and (c), SCACR, when he blindly designates the transcript without having even ordered it.

This latest development is yet another attempt by Appellant to prolong this case that has been plagued with delays and missed deadlines by the Appellant. Seven months have elapsed since the filing of the notice of appeal without any progress whatsoever. It is apparent from the history of this appeal, and in fact the history of the entire case, that the Appellant's conduct has been solely to create as much of a delay in the conclusion of this case as possible.

This conduct is dilatory and prejudicial to the Respondent's right to have this case timely heard and concluded.

The appeal should be dismissed, sanctions should be imposed and Respondent's costs should be reimbursed as provided by Rule 269 of the SCACR.

Respectfully submitted,



Henry W. Brown
Nexsen Pruet, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, SC 29202
PHONE: 803.771.8900
FACSIMILE: 803.253.8277
HBrown@nexsenpruet.com

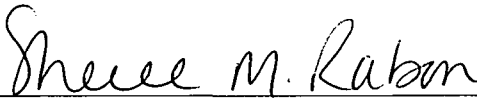
Attorneys for Respondent
CapitalBank

August 1, 2012

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing *Amended Motion to Dismiss For Failure to Comply with Order Filed June 25, 2012 or in the Alternative Allow Extension of Time to File Respondent's Initial Brief* has been served upon the following counsel of record by placing the same in the United States mail, first class postage prepaid, addressed to the following as shown below this 1 day of August, 2012.

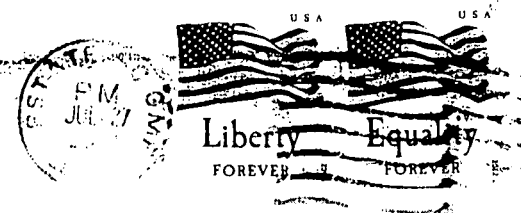
C. Lance Sheek, Esquire
GEOLY, SHEEK & MERRITT, LLC
1225 S. Main Street
Greenwood, S.C. 29646



Sheree M. Rabon
Paralegal for Henry W. Brown

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AUG 01 2012
SC Court of Appeals

Geoly & Sheek
1225 South Main Street
Greenwood, SC 29646



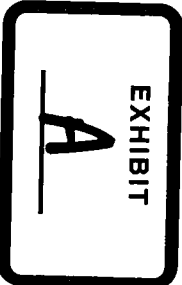
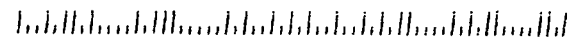
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JUL 30 2012

NEXSEN PRUET, LLC

Henry W. Brown
P.O. Box 2426
Columbia, SC 29202

2920232426 5028



GEOLY, SHEEK & MERRITT, LLC

1225 South Main Street
Greenwood, SC 29646

Attorneys at Law
Stephen D. Geoly
C. Lance Sheek
Robert E. "Bob" Merritt

864-223-3352
864-223-3400 fax

July 26, 2012

Henry W. Brown
P.O. Box 2426
Columbia, SC 29202

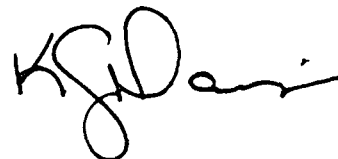
RE: Capital Bank v Garnet J. Borrer
C.A. No: 2008-CP-01-201

Dear Henry:

Please find enclosed the Initial Brief of Appellant, Designation of Matter to be Included on Appeal and proof of service in the above referenced matter.

If you have any questions please do not hesitate to contact us.

With King Regard,



Katrina S. Davis
Paralegal to C. Lance Sheek

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JUL 30 2012

NEXSEN PRUET, LLC

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Circuit Court

Frank R. Addy, Jr., Circuit Court Judge

Case No: 2008-CP-01-201

CAPITALBANK,

Respondent,

v.

GARNET J. BORROR,

Appellant,

INITIAL BRIEF OF APPELLANT

C. Lance Sheek
Attorney for the Appellant
1225 S. Main Street
Greenwood, SC 29646
(864) 223-3352
(864) 223-3400 fax

Other Counsel of Record:

Henry W. Brown
Attorney for the Respondent
P.O. Drawer 2426
Columbia, SC 29202

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JUL 30 2012

NEXSEN PRUET, LLC

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TABLE OF CASES AND AUTHORITIES

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QUESTIONS PRESENTED

DID THE COURT ERR IN FINDING THAT THE RESPONDENT COMPLIED WITH ITS
OBLIGATIONS UNDER THE SETTLEMENT AGREEMENT?

STATEMENT OF THE CASE

In mid 2006 the Appellant entered into an agreement with the Respondent whereby the Respondent would provide a loan to the Appellant for the construction of the private residence on property owned by the Appellant. This loan is secured by a residential mortgage provided to the Respondent by the Appellant. In discussions with the Respondent regarding her intent to construct a residence on this property, the Appellant was provided the name of Travis Davis as a builder recommended by the Respondent for the construction of the residence. It was unknown to the Appellant at this time that Travis Davis was not a duly licensed residential contractor in the State of South Carolina.

Based upon the recommendation of the Respondent, and statements by Travis Davis that he was, in fact, a duly licensed residential contractor, the Appellant entered into a contract with Travis Davis on June 24, 2006 for the construction of the residence. The contract price for the complete construction of the residence was \$290,000.00.

During the course of the construction, the Appellant remained in close and constant communication with the Respondent regarding the progress of the construction and the Respondent's providing funds to Travis Davis. Travis Davis began demanding more money for the completion of the residence and due to concerns regarding the completion of the residence, the Appellant requested that the Respondent not disperse the full amount of the loan to Davis prior to completion of the construction. Despite the concerns and requests of the Appellant, the Respondent did disperse the entire amount of the loan to Davis prior to completion of the residence and in fact provided excess funds to Davis which the Respondent attempted to add to the Appellant's loan.

After receiving the full amount of the loan from the Respondent, Davis abandoned construction of the Appellant's residence without completing the same. Despite demands from the Appellant, Davis never returned to the Appellant's residence nor completed the construction thereof.

The Appellant began communications with the Respondent regarding completion of the construction to no avail. On August 4, 2008, the Respondent filed a Lis Pendens and Complaint for foreclosure of the Appellant's construction loan. The Appellant answered and counterclaimed against the Respondent for Breach of Contract, Fraud, Breach of Contract Accompanied by a Fraudulent Act and Civil Conspiracy.

Pursuant to mediation the Appellant and Respondent entered into a Settlement Agreement whereby the Respondent agreed, among other things, to complete the construction of the Appellant's residence pursuant to the Appellant's original construction plans.

The Respondent hired a contractor by the name of UBuildIt to complete the construction of the Appellant's residence. A Certificate of Substantial Completion of the construction was issued by H2L Consulting Engineers on February 8, 2010. The Appellant refused to accept the residence as constructed due to the fact that it was not completed pursuant to the original plans as required by the terms of the Settlement Agreement. The Respondent filed a Motion to Compel & Enforce the Settlement and the Appellant filed a Motion to Set Aside the Settlement Agreement.

A hearing on the parties' motions was began before the Honorable Eugene C. Griffith in Newberry, South Carolina and recessed upon an agreement of the parties that the Respondent would complete the construction pursuant to the plans and address the numerous concerns of the Appellant regarding the nature and quality of the Respondent's work in relation to the Settlement

Agreement. Upon the Respondent's contention that the deficiencies in the construction had been addressed a second hearing was scheduled before the Honorable Frank R. Addy, Jr. at which time the Respondent contended that it had complied with the terms of the Settlement Agreement and the Respondent provided numerous items of evidence showing incomplete and improper construction as well as the fact that the construction did not comply with the terms of the original constructions plans as required by the terms of the Settlement Agreement. The Honorable Frank R. Addy, Jr. issued an Order finding that the Respondent had complied with the terms of the Settlement Agreement and enforcing the terms thereof. This Appeal follows.

ARGUMENTS AND AUTHORITIES

DID THE COURT ERR IN FINDING THAT THE RESPONDENT COMPLIED WITH ITS OBLIGATIONS UNDER THE SETTLEMENT AGREEMENT?

Pursuant to Rule 43(k) of the South Carolina Rules of Civil Procedure, “No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered into the record...” In the present action, no agreement was entered on the record in court nor was any consent order executed. The agreement of the parties was reduced to a written stipulation in the form of a four page hand written agreement executed by the parties. Accordingly, the only Settlement Agreement before the Court is the before mentioned hand written stipulation entitled “Settlement Agreement”.

Pursuant to the terms of the written Settlement Agreement, the Respondent agreed to “pay the cost of completing the residence in accordance with the plans...” (Settlement Agreement, page 2) It is clear and unambiguous that the parties referred to the original plans for the construction of the residence. There is no provision in the Settlement Agreement that allows for and deviation by the Respondent or its hired contractor from the Appellant’s plans.

Enforcement of a settlement agreement is governed by the law of contracts. See *Harris-Jenkins v. Nissan Car Mart, Inc.*, 348 S.C. 171, 177, 577 S.E.2d 708, 711. To enforce a contract the court looks to the terms of the contract within the four corners of the written document. When the terms are plain and unambiguous, as they are in the present matter, the intent of the parties is clear and enforcement should be of the plain meaning of the written agreement.

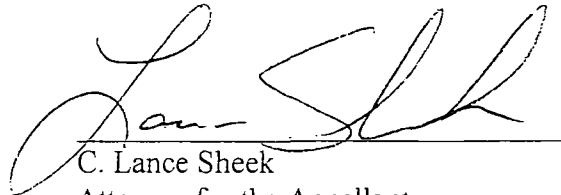
The settlement agreement required that the Respondent complete the construction in accordance with the terms of the Appellant’s plans. Clear and substantial evidence was presented to the Court in the record of the deviations of the Respondent from the plans. The trial

court referred to the Appellant's evidence as a "punch list" apparently indicating that the deviations were insubstantial. However, despite whatever term is applied to the issues, clear evidence was presented that the Respondent had not completed the Appellant's residence pursuant to the plans. Accordingly, the Respondent failed to comply with the clear terms of the Settlement Agreement. The Appellant is unaware of any existence in the statutory or case law of the State of South Carolina that allows for the enforcement of a Settlement Agreement based upon "substantial" compliance with the agreement.

CONCLUSION

It is clear from the evidence presented that the Respondent failed to comply with the terms of the Settlement Agreement in that the Respondent's residence was not completed in accordance with her plans. Pursuant to the terms of the Settlement Agreement, and applying applicable South Carolina contract law, the Respondent has failed to meet its obligations under the agreement and accordingly, the settlement agreement should be set aside and the Counterclaim of the Appellant be reinstated on the trial docket for the Court of Common Pleas for the County of Abbeville.

GEOLY, SHEEK & MERRITT, LLC

A handwritten signature in black ink, appearing to read "C. Lance Sheek", is written over a horizontal line. The signature is stylized and cursive.

C. Lance Sheek
Attorney for the Appellant
1225 S. Main Street
Greenwood, SC 29646
(864) 223-3352
(864) 223-3400 fax

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Circuit Court

Frank R. Addy, Jr., Circuit Court Judge

Case No: 2008-CP-01-201

CAPITALBANK,

Respondent,

v.

GARNET J. BORROR,

Appellant,

PROOF OF SERVICE

The undersigned hereby certifies that on the 16th day of July, 2012, he served a copy of the Appellant's Initial Brief and Designation of Matter to Be Included on Appeal on the Respondent by placing the same in the U.S. Mail, with the appropriate postage affixed thereto, addressed to the Respondent's attorney of record, Henry J. Brown, P.O. Drawer 2426, Columbia, SC 29202-2426.

THE SHEEK LAW FIRM



C. Lance Sheek
Attorney for the Appellant
P.O. Box 49175
Greenwood, SC 29649
(864) 538-0047
(864) 538-0049 fax

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JUL 30 2012

NEXSEN PRUET, LLC

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Circuit Court

Frank R. Addy, Jr., Circuit Court Judge

Case No: 2008-CP-01-201

CAPITALBANK,

Respondent,

v.

GARNET J. BORROR,

Appellant,

DESIGNATION OF MATTER TO BE INCLUDED ON APPEAL

The Appellant designates the following matters be included in the Record on Appeal and hereby certifies that no matter included herein is irrelevant to the issues in this appeal.

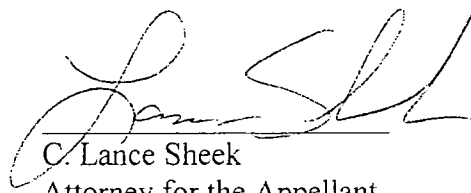
1. Transcript of the whole hearing on the Respondent's Motion to Compel and Enforce Settlement Agreement and Appellant's Motion to Set Aside Settlement Agreement.
2. All pleadings, motions and orders in this litigation.
3. The four page written Settlement Agreement.
4. All exhibits presented at the hearings in this matter.

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JUL 30 2012

NEXSEN PRUET, LLC

THE SHEEK LAW FIRM

A handwritten signature in black ink, appearing to read 'C. Lance Sheek', written over a horizontal line.

C. Lance Sheek
Attorney for the Appellant
1225 S. Main Street
Greenwood, SC 29646
(864) 223-3352
(864) 223-3400 fax
sheeklaw@yahoo.com

Rabon, Sheree M.

From: Rice, Jo <JRice@sccourts.org>
Sent: Tuesday, July 31, 2012 1:47 PM
To: Rabon, Sheree M.
Subject: RE: CapitalBank v. Borrer [IWOV-NPCOL1.FID366574]
Attachments: image001.png; image002.png; image003.png

Hi, Sheree. I have not received a request. Thanks.

Jo Rice
10th Circuit Court Reporter

From: Rabon, Sheree M. [SRabon@nexsenpruet.com]
Sent: Tuesday, July 31, 2012 1:25 PM
To: Rice, Jo
Subject: CapitalBank v. Borrer [IWOV-NPCOL1.FID366574]

Good afternoon Jo:

Lance Sheek filed his initial brief in the above-referenced matter and has designated the entire transcript from the hearing on October 20, 2011 before Judge Addy. You and I last emailed on July 17th and you said at that time he had not ordered the transcript...has anything changed since that time?

Thanks so much for your help with all of this.

Sheree

Sheree M. Rabon
Construction Team Paralegal
NEXSEN PRUET, LLC
1230 Main Street, Suite 700
Columbia, SC 29201
T: 803.540.2015, F: 803.727.1493
srabon@nexsenpruet.com<<mailto:srabon@nexsenpruet.com>>
www.nexsenpruet.com<<http://www.nexsenpruet.com/>>

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[cid:image002.png@01CD6F1F.EE095230][Description: http://www.nexsenpruet.com/L/links_s.png]

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*** IRS CIRCULAR 230 NOTICE *** Any federal tax advice contained in this communication (or in any attachment) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending any transaction or matter addressed in this communication.

Henry W. Brown
Member
Admitted in SC

August 1, 2012

VIA HAND DELIVERY

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

Re: CapitalBank (Respondent) v. Garnet Borrer (Appellant)
Case Tracking No. 2011205107

Dear Ms. Kitchings:

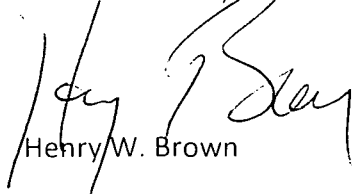
Enclosed herewith for filing, please find an original and eight (8) copies of *Respondent's Amended Motion to Dismiss For Failure to Comply with Order Filed June 25, 2012* in the above-referenced matter. I am also enclosing our firm's check in the amount of \$25.00 representing the filing fees. I would appreciate your returning the "clocked" copies to our courier.

By copy of this letter, I am serving opposing counsel with a copy of the same.

Should you have any questions, please do not hesitate to contact me.

Respectfully yours,

NEXSEN PRUET, LLC



Henry W. Brown

HWB/smr

Enclosures

cc: C. Lance Sheek, Esq. (regular mail)

Faylon B. Parlier (via e-mail)

Randy White (via e-mail)

1230 Main Street
Suite 700 (29201)
PO Drawer 2426
Columbia, SC 29202
www.nexsenpruet.com

T 803.253.8273
F 803.727.1415
E HBrown@nexsenpruet.com
Nexsen Pruet, LLC
Attorneys and Counselors at Law

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