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MAR 20 2015

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Gordon G. Cooper, Master in Equity

Appellate Case No. 2015-000157

Lower Court Case No. 2010-CP-42-4430

Wells Fargo Bank, N.A., successor-by-merger to
Wachovia Bank, N.A., Respondent, Respondent,

v.

Fallon Properties South Carolina, LLC, Timothy R. Fallon,
Susan C. Fallon, Fallon Luminous Products Corporation,
G. E. Business Capital Corporation, formerly Transamerica
Business Capital Corporation, FSD Repurchase Solutions, LLC,
and South Carolina Department of Revenue, Defendants,

OF WHOM Fallon Properties South Carolina, LLC,
Timothy R. Fallon, and Susan C. Fallon are Appellants.

MOTION TO DISMISS APPEAL

Respondent respectfully moves to dismiss this appeal for failure to timely serve the Notice of Appeal within thirty (30) days after the receipt of written notice of the entry of the appealed order as required by Rule 203(b)(1) and (b)(4), SCACR. This motion is based upon the grounds set forth herein and upon the exhibits attached hereto. The critical inquiry is whether an email from the trial court is written notice of the entry of an order.

INTRODUCTION

This is a commercial mortgage foreclosure case. The master granted foreclosure and sold the mortgaged property. Thereafter, the Appellants timely petitioned for an order of appraisal under S.C. Code Ann. § 29-3-680 (Rev. 2007). Respondent opposed the petition upon the ground that the Appellants had waived their right to petition for an order of appraisal under the procedures set forth in § 29-3-680(B). The master held an evidentiary hearing on the petition and, on December 15, 2014, the master entered an order denying the petition, finding that the Appellants had waived any right to petition for an order of appraisal. (Tab A at 6-9).

The Appellants served their Notice of Appeal on January 15, 2015, which was thirty-one (31) days after the entry of the appealed order. (Tab B). As shown below, the Appellants received written notice of the entry of the appealed order on December 15, 2014. Thus, the Appellants were required to serve their Notice of Appeal no later than Wednesday, January 14, 2015.

FACTS

On December 15, 2014, the trial court emailed the trial attorneys for both parties, and this email stated in full:

Gentlemen:

Please see attached copy of *signed and clocked Form 4 and Order*.
I have also mailed a copy to all listed on the Form 4.

Thanks,
Sharon

(Tab A at 3)(emphasis added).¹ Signed and entered copies of the Form 4 and the appealed order were attached to the email. (Tab A at 4-5; 6-9). Weyman C. Carter, trial counsel for the Respondent, received this email on December 15, 2014. (Tab A at 2, ¶ 4). Rodney Pillsbury, trial

¹ “Sharon” is Sharon Winstead, the administrative assistant to the master who schedules hearings and handles submissions to the master, including proposed orders.

counsel for the Appellants, would have received the email on the same date. Thus, the controlling inquiry is whether the email from the trial court constitutes written notice of the entry of the appealed order. If so, the Appellants' appeal is untimely and must be dismissed.

ARGUMENT

The timely service of the notice of appeal is an absolute jurisdictional requirement and, upon the failure of an appellant to timely serve the notice, an appellate court must dismiss the appeal. *Elam v. South Carolina Dep't of Transp.*, 602 S.E.2d 772, 775 (S.C. 2004). Research reveals no case directly on point with the issue presented in this motion. The cases discussed below, however, compel the conclusion that the appeal must be dismissed.

In *Canal Ins. Co. v. Caldwell*, 524 S.E.2d 416 (S.C. App. 1999), this Court held that the time to serve a notice of appeal commenced on the date that the respondent's attorney faxed a letter to the appellant's counsel advising that the appealed order had been entered. *Id.* at 417-418. The appellant did not serve the notice of appeal on or before the thirtieth day after receipt of the fax and, therefore, this Court held it did not have jurisdiction over the appeal. *Id.* at 418.

In *Ackerman v 3-V Chemical, Inc.*, 562 S.E.2d 613, 615 (2002), the Supreme Court held that the time to make a post-trial motion commenced when the appellant's counsel received a Form 4 from the court stating that an order had been entered, even though the order was not attached to the Form 4. The Court held that receipt of the Form 4 was "written notice of the entry of the order" and, therefore, the appellant's post-trial motion was untimely. *Id.* Thus, the trial court did not have jurisdiction to issue an order on the motion. *Id.*

In *White v. South Carolina Dep't of Health & Env'tl. Control*, 708 S.E.2d 812 (S.C. App. 2011), this Court held that the time to serve the notice of appeal from an ALC order did not

commence when the appellant's attorney received an email from a party with a copy of the filed order attached to the email. This Court distinguished *Canal* and *Ackerman*, both *supra*, as follows:

1. *Canal* and *Ackerman* involved appeals under Rule 203(b)(1), SCACR, which requires service of the notice of appeal within 30 days after receiving "written notice of the entry of the order." In contrast, *White* involved an appeal from an ALC order under Rule 203(b)(6), SCACR, which requires service of the notice of appeal within 30 days after "receipt of the decision." *Id.* at 815-816.
2. The ALC rules contemplated service of the ALC decision "by the ALC via the United States Postal Service and not by a party via electronic mail." *Id.* at 815 (underlining in original).

Based on these differences, this Court held that *Canal* and *Ackerman* did not control in *White*, and that the appellant timely served the notice of appeal within 30 days after receiving the decision from the ALC. *Id.* at 816.

Here, the appeal is from an order by a master-in-equity under Rule 203(b)(4), SCACR, which provides in full as follows: "The notice of appeal from an order or judgment issued by a master or special referee shall be served in the same manner as provided by Rule 203(b)(1)." Thus, as with *Canal* and *Ackerman*, this appeal involves receipt of "written notice of the entry of the order" as opposed to "receipt of the decision" under Rule 203(b)(6). Moreover, and unlike *White*, the email in this appeal came from the trial court, not a party. Finally, the email from the trial court provided notice of the entry of the order in three separate ways:

1. The body of the email notified the appellant that the order had been entered as did the fax in *Canal*.

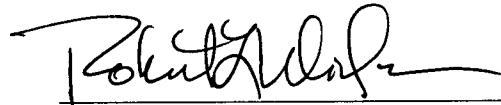
2. A signed and filed copy of the Form 4 was attached to the email and gave the same notice of entry of the order that the Supreme Court found sufficient in *Ackerman*.
3. Finally, a signed and filed copy of the order itself was also attached to the email.

In short, the Appellants received written notice of the entry of the order on December 15, 2014. Thus, they had to serve their notice of appeal on or before January 14, 2015. They failed to do so and, therefore, this appeal must be dismissed for lack of jurisdiction.

CONCLUSION

There is no meaningful difference between the email in this case and the fax relied upon by this Court in *Canal, supra*, except that the email in this case gave far more notice of entry than the fax in *Canal*. Here, like the fax in *Canal*, the body of the email gave notice that the appealed order had been entered. Here, unlike the fax in *Canal* and the email in *White*, the email came from the trial court, not a party. Here, unlike the fax in *Canal*, signed and filed copies of the Form 4 and the appealed order were attached to the email. For these reasons, and for the reasons set forth above, it is respectfully submitted that this appeal must be dismissed.

Respectfully Submitted,



Robert L. Widener
MCNAIR LAW FIRM, P.A.
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Columbia, South Carolina 29211
(803) 799-9800

Weyman C. Carter
MCNAIR LAW FIRM
Post Office Box 447
Greenville, South Carolina 29602
(864) 271-4940

March 20, 2015
Columbia, SC

ATTORNEYS FOR RESPONDENT

TAB A

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Gordon G. Cooper, Master in Equity

Appellate Case No. 2015-000157
Lower Court Case No. 2010-CP-42-4430

Wells Fargo Bank, N.A., successor-by-merger to
Wachovia Bank, N.A., Respondent,Respondent,

v.

Fallon Properties South Carolina, LLC, Timothy R. Fallon,
Susan C. Fallon, Fallon Luminous Products Corporation,
G. E. Business Capital Corporation, formerly Transamerica
Business Capital Corporation, FSD Repurchase Solutions, LLC,
and South Carolina Department of Revenue, Defendants,

OF WHOM Fallon Properties South Carolina, LLC,
Timothy R. Fallon, and Susan C. Fallon are..... Appellants.

AFFIDAVIT OF WEYMAN C. CARTER

PERSONALLY APPEARED BEFORE ME, Weyman C. Carter, who first being duly sworn, does
depose and state as follows:

1. I was the trial attorney of record for the Respondent in the proceedings before the
Master-in-Equity on December 11, 2014. At this hearing, the master ruled in favor of the
Respondent and directed me to make certain changes to the proposed order that I had submitted
prior to the hearing, and to send the revised order to Appellants' trial counsel (Mr. Pillsbury).

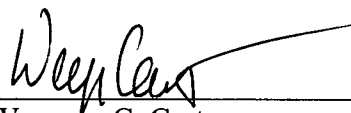
2. On December 11 and 12, 2014, I exchanged drafts and comments with Mr. Pillsbury via email. That exchange resulted in a revised proposed order acceptable to both of us.

3. On December 12, 2014, I emailed the final proposed order and proposed Form 4 to Sharon Winstead, the master's administrative assistant, copying Mr. Pillsbury on this email. (See email at p. 3, *infra*).

4. On December 15, 2014, I received Ms. Winstead's reply to all email to my December 12 email. Ms. Winstead's email advised that the Form 4 and Order had been signed and entered, and she attached signed and filed copies of the Form 4 and Order. Mr. Pillsbury was copied on this email. (See email at p. 3, *infra*; see print outs of the attached Form 4 and Order at pp. 4-9, *infra*).

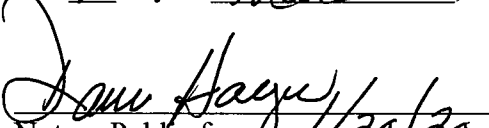
5. On January 30, 2015, after receiving the Notice of Appeal by the Appellants, I emailed the Appellants' appellate counsel (Mr. Alexander) with a copy to Mr. Pillsbury. In this email, I forwarded the December 15, 2014 email from Ms. Winstead (together with copies of the Form 4 and Order) and raised the question about the timeliness of the Notice of Appeal. (See email at p. 10, *infra*). Mr. Pillsbury replied by email on January 30, attaching a copy of the signed order that he received in the U.S. Mail, asserting that he received this order on December 18, 2014, and asserting that the Notice of Appeal was timely. (See email at p. 10, *infra*).

FURTHER AFFIANT SAYETH NOT.



Weyman C. Carter

Sworn to and subscribed before me
this 1st day of March, 2015.



Notary Public for 1/20/20 (Seal)

FORM 4

STATE OF SOUTH CAROLINA
 COUNTY OF SPARTANBURG
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2010-CP-42-4430

Wells Fargo Bank, N.A.

Fallon Properties South Carolina, LLC., et al.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Weyman C. Carter	Attorney for : <input checked="" type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
	or <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court: Order Denying Petition for Appraisal

2014 DEC 15 PM 9:21

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : This is a foreclosure action

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Wells Fargo Bank, N.A.	Fallon Properties South Carolina, LLC, Timothy R. Fallon, and Susan C. Fallon	N/A-deficiency judgment already entered

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.



Master-in-Equity

[Handwritten Signature]

3065

Judge Code

12-15-2014

Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 2014 and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 2014 to attorneys of record or to parties (when appearing pro se) as follows:

Weyman C. Carter
P.O. Box 447
Greenville, SC 29602

Rodney F. Pillsbury
Pillsbury & Read, P.A.
1204-A East Washington Street
Greenville, SC 29601

*Attorney for Fallon Properties South Carolina, LLC,
Timothy R. Fallon and Susan C. Fallon*

Patrick Clisham
ENGELMAN BERGER, PC
3636 North Central Avenue
Suite 700
Phoenix, Arizona 85012
Attorney for Fallon Luminous Products Corporation

2014 DEC 15 PM 2:11

Barry T. Mehlman
LOEB & LOEB LLP
345 Park Avenue
New York, NY 10154
Attorney for FSD Repurchase Solutions

GE Business Capital Corporation, formerly Transamerica Business Capital Corporation
c/o CT Corporation, Registered Agent
2 Office Park Court, Suite 103
Columbia, SC 29223

Milton G. Kimpson
South Carolina Department of Revenue
Post Office Box 12265
Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

PRO SE DEFENDANT(S)

CLERK OF COURT

Court Reporter: _____

THE STATE OF SOUTH CAROLINA
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Timothy R. Fallon; Susan C. Fallon;
Fallon Luminous Products Corporation;
G. E. Business Capital Corporation, formerly
Transamerica Business Capital Corporation;
FSD Repurchase Solutions, LLC; and
South Carolina Department of Revenue, Defendants,

Of Whom Fallon Properties South
Carolina, LLC; Timothy R. Fallon;
Susan C. Fallon are, Appellants.

CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of the McNair Law Firm, certify that I have served the Motion to Dismiss Appeal by depositing a copy in the United States Mail, postage prepaid, on March 20, 2015 addressed to the attorney of record, as follows:

Alexander Hray, Jr., Esquire
389 E. Henry Street, Suite 107
Spartanburg, SC 29302


Ann Shuler