The South Carolina Court of Appeals

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

v.

Fallon Properties South Carolina, LLC, Timothy R. Fallon, Susan C. Fallon, Fallon Luminous Products Corporation, GE 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 the Appellants.

Appellate Case No. 2015-000157

ORDER

Appellants have served and filed a notice of appeal from the circuit court's order denying a petition for appraisal. On December 15, 2014, the master-in-equity[1] sent attorneys for both parties an email that stated, "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." The "signed and clocked" copies of the Form 4 and order were attached to the email. The court[2] sent the parties a printed copy of the order through the US mail, which Appellants received on December 18, 2014. Appellants served the notice of appeal on January 15, 2015. Respondent has filed a motion to dismiss, contending the service of the notice of appeal was untimely because Appellants served Respondent thirty-one days after receiving the December 15, 2014 email.

[1] The email was from Sharon Winstead, the administrative assistant to the master.
[2] This court's file does not indicate whether the printed copy was sent by the master or the clerk of court.

Pursuant to Rule 203(b)(1), SCACR, the notice of appeal must have been served on Respondent within thirty days "after receipt of written notice of entry of the order." Since the adoption of Rule 203 in 1990, the only limitation ever expressed on how notice can be received is that it must be "written notice." For the reasons set forth below, this court finds the December 15, 2014 email constitutes "receipt of written notice of entry of the order" by Appellants.

The circumstances in this case are analogous to those in *Canal Insurance Company v. Caldwell*, 338 S.C. 1, 5-6, 524 S.E.2d 416, 418 (Ct. App. 1999), in which this court held a fax constituted written notice under Rule 203(b)(1). In *Canal*, the trial court issued its order on March 17, 1997; however, counsel for the appellants apparently never received a copy of the order, and they contacted counsel for the respondent in June 1997 to inquire about the status of the order. 338 S.C. at 4, 524 S.E.2d at 417. On July 8, 1997, counsel for the respondent "responded via fax and mail," stating the order "had been entered on March 19 as Judgment Roll Number 211763." *Id.* Counsel for the appellants waited a month to request a copy of the order from the clerk of court and did not serve the notice of appeal until March 17, 1998. 338 S.C. at 5, 524 S.E.2d at 417-18. This court held it did not have subject matter jurisdiction due to the appellants' failure to timely serve the notice of appeal, noting "there is no question that [counsel for the appellants] received written notice of the entry of the judgment . . . on July 8, 1997." 338 S.C. at 5, 524 S.E.2d at 418. July 8, 1997 is the date counsel for the appellants received the fax from opposing counsel. *See* 338 S.C.at 4, 524 S.E.2d at 417.

Respondent's argument in this case that the email is "written notice of entry of the judgment" is more persuasive than the argument we adopted in *Canal* that the fax is written notice. First, the email in this case was sent from the court itself, rather than an opposing party. Second, the email included a copy of the signed and clocked order, whereas the fax in *Canal* did not.[3] *See* 338 S.C.at 4, 524 S.E.2d at 417. Finally, although neither the rules of civil or appellate procedure specifically authorized service by fax, email has actually been contemplated by the rules. *See, e.g.*, Rule 410, SCACR; Rule 77, SCRCP. Attorneys practicing in South Carolina have been required, since November 18, 2011, to keep a valid e-

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[3] In *Canal*, the court states that the fax from the respondent's counsel merely "express[ed] surprise that opposing counsel had not been notified of the judgment and stat[ed] that it had been entered on March 19 as Judgment Roll Number 211763." 338 S.C.at 4, 524 S.E.2d at 417. The court notes the appellants waited over a month to request a copy of the order. 338 S.C.at 6, 524 S.E.2d at 418.

mail address on file with the Attorney Information System (AIS). *RE: Attorney Information System Amendments and Requirements*, S.C. Sup. Ct. Order dated Oct. 17, 2011. Rule 410(e), SCACR, allows "[t]he mailing and e-mail address shown in the AIS [to] be used for the purpose of notifying and serving the [bar] member." Here, counsel for Appellants was notified of entry of the order presumably through the e-mail address he was required to keep on file with the AIS. Accordingly, following the precedent set in *Canal*, the December 15, 2014 email was sufficient to constitute "written notice of entry of the order."

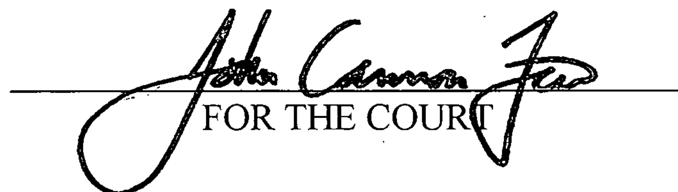
Appellants contend *White v. South Carolina Department of Health and Environmental Control*, 392 S.C. 247, 708 S.E.2d 812 (Ct. App. 2011) is controlling. In *White*, this court interpreted Rule 203(b)(6), SCACR, which governs appeals to this court from the Administrative Law Court (ALC) and provides the notice of appeal must be served on all parties of record within thirty days after "receipt of the decision." *See* 392 S.C. at 252, 708 S.E.2d at 814-16. In *White*, the appellant received an email on January 28, 2009, containing a signed and filed copy of the decision. 392 S.C. at 252, 708 S.E.2d at 814. This court held Rule 203(b)(6) contemplates receipt of the decision through proper service by mail or hand delivery; accordingly, the time for serving the notice of appeal "did not commence on the day that counsel received the decision via e-mail." 392 S.C. at 253, 708 S.E.2d at 815.

White is distinguishable from this case for two reasons. First, this appeal falls under Rule 203(b)(1), rather than 203(b)(6). The court in *White* stressed that service of the ALC decision via the United States Postal Service was imperative because Rule 203(b)(6) requires actual "receipt of the decision," noting this is a different requirement than "receipt of notice of entry of the order" as provided in Rule 203(b)(1). 392 S.C. at 254-55, 708 S.E.2d at 815-16. Here, because this is an appeal from the court of common pleas, the time for initiating the appeal began to run from "written receipt of notice of entry of the order," not "receipt of the decision." *See* Rule 203(b)(1); Rule 203(b)(6).

Second, the due process concerns addressed by the court in *White* are not present in this case. The court in *White* reasoned that due process would not allow it to recognize an email as sufficient "receipt of the decision" under Rule 203(b)(6) because there is nothing "that authorizes service of a decision of the ALC by electronic mail." 392 S.C. at 254, 708 S.E.2d at 815. The court explained that in a prior case, we declined to hold a fax of an agency's decision sufficient to initiate the time for serving a notice of appeal under Rule 203(b)(6); and accordingly, due process would not allow the court to then recognize service by electronic mail

when "there was no official written rule or notice about the binding effect of the service of an order by electronic mail." 392 S.C. at 253-54, 708 S.E.2d at 815 (citing *Trowell v. S.C. Dep't of Pub. Safety*, 384 S.C. 232, 681 S.E.2d 893 (Ct. App. 2009)). Conversely, in an appeal from the court of common pleas, the parties are on notice that a fax is sufficient for initiating the time for serving a notice of appeal under Rule 203(b)(1). *See Canal*, 338 S.C. at 5-6, 524 S.E.2d at 418.

Receipt of written notice is the critical event under Rule 203(b)(1), and this court finds Appellants received written notice of the entry of the order on December 15, 2014, the date of the email. Accordingly, Appellants should have served the notice of appeal by January 14, 2015. Because Appellants failed to timely serve the notice of appeal, Respondent's motion to dismiss is granted. *See* Rule 263(b), SCACR ("The time prescribed by these Rules for performing any act except the time for serving the notice of appeal under Rules 203 and 243 may be extended or shortened by the appellate court, or by any judge or justice thereof."); *Canal*, 338 S.C. at 5, 524 S.E.2d at 418 ("Rule 203(b), SCACR, requires a party to serve his notice of appeal within thirty days after receiving written notice of the entry of a final order or judgment, and failure to do so divests this court of subject matter jurisdiction and results in dismissal of the appeal."). Remittitur will be sent down as provided by Rule 221(b), SCACR.



FOR THE COURT

Columbia, South Carolina

cc:
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FILED
6/15/15