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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM COLLETON COUNTY
COURT OF COMMON PLEAS

The Honorable Doyet A. Early, III
Circuit Court Judge

Appellate Case No. 2015-002383
Circuit Court Case No. 2013-CP-15-1023

James C. Kincannon, James J. Kincannon
and Carolyn R. Kincannon,

Appellants,

vs.

U.S. Bank National Association, U.S. Bank
National Association ND, Palmetto Property
Conservation, and Mark Brown,

Defendants,

of whom

U.S. Bank National Association and U.S.
Bank National Association ND are

Respondents.

MOTION TO DISMISS APPEAL

Pursuant to Rule 240, SCACR, U.S. Bank moves to dismiss this appeal as untimely, as Appellants did not file their notice of appeal until 175 days after receiving written notice of entry of the Orders that they have appealed. Likewise, Appellants previously consented to one of the Orders which they now appeal. Accordingly, the Court should dismiss this appeal.¹

¹ James J. "Todd" Kincannon, James C. Kincannon, and Carolyn R. Kincannon ("Appellants") apparently appear *pro se* in this appeal. Until recently, James J. "Todd" Kincannon ("Mr. Kincannon") represented himself and his parents in this and three related lawsuits. However, the Supreme Court transferred Mr. Kincannon to incapacity inactive status by Order dated August 24,

BACKGROUND

Appellants have belatedly attempted to appeal two Orders issued by Judge Early resolving their meritless case—including one that they actually consented to at the trial level. The timing of the proceedings below and Appellants' service of their notice of appeal demonstrate the impropriety of this appeal:

1. On April 14, 2015, the Honorable Doyet A. Early, III, heard oral argument on two motions: (1) U.S. Bank's Amended Motion to Strike Plaintiffs' Form 4 and Judgment by Confession, and (2) U.S. Bank's Motion for Summary Judgment.

2. On April 17, 2015, Mr. Kincannon sent a letter to the Court consenting to summary judgment but continuing to oppose U.S. Bank's Motion to Strike. (Exhibit A, Kincannon Letter.) That letter was unequivocal, stating:

On April 14, 2015, you heard two motions made by U.S. Bank in the above case. One was a motion for summary judgment as to the fourth cause of action in Plaintiffs' complaint, a claim for permanent injunctive relief. Please be advised that after further consideration, Plaintiffs now consent to U.S. Bank being awarded summary judgment as to that cause of action.

The claim for permanent injunctive relief was the only remaining cause of action.

2015. *In the Matter of J. Todd Kincannon*, Respondent, Appellate Case No. 2015-001824. As of this writing, Mr. Kincannon remains on inactive status, and appears to be proceeding *pro se* in this matter.

Additionally, this is not the first time that Appellants and U.S. Bank have been before this Court and several others involving the note and mortgage presented in this case. Related cases involving the same parties include (1) *U.S. Bank v. Kincannon*, 2012-CP-15-885 (S.C. Cir. Ct.), dismissed without prejudice on July 18, 2013 after the parties entered into a Loan Modification Agreement; (2) *Kincannon v. U.S. Bank*, 2013-CP-15-708 (S.C. Cir. Ct.), dismissed with prejudice on October 22, 2013; and (3) *Kincannon v. U.S. Bank*, C.A. No. 2:14-CV-04775-DCN (D.S.C.), dismissed by Appellants instead of responding to Motion to Dismiss. In the instant case, Appellants previously appealed an Order Granting Partial Summary Judgment on March 18, 2014. After ten months of briefing, and after U.S. Bank had filed its Final Brief with the Court of Appeals, Appellants filed a Notice of Abandonment of Appeal and the Court of Appeals entered an Order dismissing the appeal on January 16, 2015. That prior appeal was Appellate Case Number 2014-000661 (S.C. Ct. App.).

3. On **April 24, 2015**, Judge Early executed two orders in favor of U.S. Bank: (1) Order Granting U.S. Bank's Motion to Strike Plaintiffs' Form 4 Orders and Judgments by Confession filed January 13, 2015 and January 30, 2015; and (2) Order Granting U.S. Bank's Motion for Summary Judgment (collectively, the "Orders"). The Orders were filed on **May 6, 2015**. The Orders are attached as exhibits to the Notice of Appeal and are the only rulings on appeal.

4. On **May 11, 2015**, U.S. Bank's counsel both emailed and mailed filed copies of the Orders to Mr. Kincannon. *Two minutes after U.S. Bank emailed Appellants copies of the filed Orders*, Mr. Kincannon acknowledged receipt of the Orders, stating by return email: "Thx. No need to mail unless you already have. I'll accept by email." (Exhibit B, May 11, 2015 Email.)

5. On **May 26, 2015**—fifteen days after receiving written notice of entry of the Orders—Appellants filed a Motion to Reconsider Order Entered Granting Motion to Strike and Sua Sponte Relief, but they never sought reconsideration of the Order Granting Summary Judgment. When U.S. Bank pointed out that their motion was untimely, Appellants filed a 23-page memorandum attempting to explain away their tardiness. (Exhibit C, Appellants' Reply in Support of Reconsideration.)

6. On **September 14, 2015**, Judge Early signed a Form 4 Order ending the case. (Attached as Exhibit D.)

7. On **November 2, 2015**, Appellants served the Notice of Appeal for both Orders—175 days after receiving written notice of their entry—but they did not appeal Judge Early's denial of their untimely Rule 59 motion.

Against this background, it is hornbook law that this appeal should be dismissed. For one, the Court lacks subject matter jurisdiction, as Appellants untimely filed and served their Notice of Appeal. Moreover, because they consented to Judge Early's Order Granting Summary Judgment, they cannot appeal that ruling. Each basis for dismissal is discussed below.

ARGUMENT

I. The Court lacks jurisdiction over this appeal because Appellants missed their deadline to file and serve their Notice of Appeals by almost five months.

In order to activate this Court's jurisdiction, the "notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of the order or judgment." Rule 203(b)(1), SCACR. If a notice of appeal is not served within 30 days of receipt of written notice of the orders on appeal, this Court lacks jurisdiction over the appeal. *See, e.g., Elam v. S.C. DOT*, 361 S.C. 9, 14–15, 602 S.E.2d 772, 775 (2004) ("The requirement of service of the notice of appeal is jurisdictional, *i.e.*, if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice."); *Mears v. Mears*, 287 S.C. 168, 169, 337 S.E.2d 206, 207 (1985) ("Service of the notice of intent to appeal is a jurisdictional requirement, and this Court has no authority to extend or expand the time in which the notice of intent to appeal must be served.").

Appellants received filed copies of the Orders on appeal by email dated May 11, 2015, and they acknowledged their receipt of those Orders two minutes after U.S. Bank transmitted them. They waited 175 days—or 145 days too many—to file and serve their Notice of Appeal of those Orders. As a matter of law, they are too late to activate the

Court's jurisdiction, and dismissal is appropriate. *See, e.g., Wells Fargo Bank, N.A. v. Fallon Props. SC, LLC*, 776 S.E.2d 575, 576 (S.C. Ct. App. 2015) (dismissing appeal for lack of jurisdiction after appellant failed to serve notice of appeal within 30 days of receipt of emailed order from trial court).

Nor can Appellants rely on their Rule 59 motion to save this appeal. For one, they never sought reconsideration of the Order Granting Summary Judgment, to which they consented. More fundamentally, though, their motion was untimely.

Rule 59(e), SCRCF, provides that "[a] motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order." Here, Appellants received written notice of the filed Orders on May 11, 2015, and they acknowledged their receipt of those Orders moments later. Under Rule 59(e), any motion to reconsider was due to be served no later than May 21, 2015.

Despite this, Appellants waited until May 26, 2015, to file and serve their Rule 59 motion. Because they missed the ten-day deadline, Appellants' untimely Rule 59 motion cannot resuscitate their untimely appeal. *See* Rule 203(b)(1), SCACR ("When a *timely* motion for judgment n.o.v., motion to alter or amend the judgment, or a motion for a new trial has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion.") (emphasis added); Rule 59(f), SCRCF ("The time for appeal for all parties shall be stayed by a *timely* motion under this Rule and shall run from the receipt of written notice of entry of the order granting or denying such motions.") (emphasis added).

Accordingly, the Court should dismiss the appeal due to a lack of appellate jurisdiction. *Mears*, 287 S.C. at 169, 337 S.E.2d at 207.

II. Appellants consented to the Order Granting Summary Judgment and therefore cannot now appeal the Order.

Just as it is black letter law that this Court lacks jurisdiction to consider an untimely appeal, so too is it prohibited from reviewing consent orders. *See Rush v. State*, 368 S.C. 144, 145, 628 S.E.2d 42, 43 (2006) (“A party cannot appeal an order issued with the consent of the party.”); *Hooper v. Rockwell*, 334 S.C. 281, 290, 513 S.E.2d 358, 363 (1999) (holding that consent orders “are not appealable”); *Calcutt v. Calcutt*, 282 S.C. 565, 572, 320 S.E. 2d 55, 59 (Ct. App. 1984) (“It is well settled an appeal will not be entertained from an order by consent.”).

By letter dated April 17, 2015, Appellants unequivocally consented to summary judgment on the last remaining cause of action. Judge Early even attached that letter to his Order Granting Summary Judgment. Accordingly, that Order is not appealable as a matter of law, and the Court should dismiss Appellants’ appeal for this additional reason.

CONCLUSION

For the reasons set forth above, U.S. Bank respectfully requests that the Court of Appeals dismiss this appeal.

Signature Page Attached

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November 30, 2015
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NOV 30 2015

SC Court of Appeals

November 30, 2015

The South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: James C. Kincannon v. US Bank National Association
Appellate Case No. 2015-002383

Dear Ms. Kitchings:

Enclosed for filing please find a Motion to Dismiss and our check in the amount of \$25.
Please file the original and return a clocked copy to us.

With kind regards, I remain

Very truly yours,

M. Todd Carroll

Enclosure

cc: James C. Kincannon
James J. Kincannon
Carolyn R. Kincannon