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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM YORK COUNTY  
Court of Common Pleas

S. Jackson Kimball, Special Circuit Judge

Appellate Case No. 2015-001150  
Civil Case No. 2012-CP-46-00472

RECEIVED

MAY 26 2016

SC Court of Appeals

R&J Restaurants, LLC d/b/a Steve's Bar & Grille, LLC.....Plaintiff  
v.

Sotirios Mantekas and Kelman, Inc.....Defendants

J&S Real Estate Holdings, LLC.....Cross-claim Plaintiff  
v.

Sotirios Mantekas and Kelman, Inc.....Cross-claim Defendants

Sotirios Mantekas and Kelman, Inc.,.....Cross-claim Plaintiffs  
v.

J&S Real Estate Holdings, LLC, and John Sherwood.....Cross-claim Defendants

Of whom, J&S Real Estate Holdings, LLC, as Cross-claim Plaintiff, is the Appellant and Sotirios Mantekas, as Cross-claim Defendant, is the Respondent.

MOTION TO DISMISS APPEAL

Charles B. Burnette, III  
Burnette & Payne, P.A.  
414 East Main Street  
Rock Hill, South Carolina 29730  
(803) 328-1800

Lucy L. McDow  
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ATTORNEYS FOR THE RESPONDENT

May 23, 2016

ORIGINAL

The respondent, Sotirios Mantekas ("Mantekas"), moves to dismiss this appeal. The Court of Appeals lacks jurisdiction to entertain the appeal because the appeal has not been perfected within the time and manner required by Rule 203, SCACR.

*Parties*

This lawsuit arises from the lease of a property in Tega Cay, South Carolina, by a commercial landlord to two successive tenants operating restaurants there. Allegations among the parties revolved around the existence of and responsibility for defective property conditions and certain fire, electrical, water, and sewage events.

The successor tenant and plaintiff, R&J Restaurants, LLC ("R&J"), settled its claims against the landlord defendant, J&S Real Estate Holdings, LLC ("J&S"), prior to trial and proceeded to trial against the predecessor tenant and defendant Kelman, Inc. ("Kelman") and Kelman's principal, Mantekas. At trial, the landlord, J&S, remaining in the case as a cross-claim party only, sought damages against Kelman and Mantekas, and Kelman and Mantekas sought damages against J&S (and its principal, John Sherwood) by cross-claim.

Following a nonjury trial, no party was awarded actual damages. Neither R&J nor J&S recovered actual damages against Kelman or Mantekas, and Kelman and Mantekas recovered no damages against J&S or Sherwood.

R&J did not appeal its loss and its dispute with Mantekas ended with the trial. J&S did not appeal its loss against Kelman, but did attempt to appeal against Mantekas, Kelman's principal. The grounds for that appeal are not yet known, as the appeal has remained in the pre-briefing stage for the past year.

Prior to and throughout trial, the plaintiff R&J was represented by its counsel of record, attorneys D. Bradley Jordan and Geoffrey Dunn of the Rock Hill firm of Jordan & Dunn, LLC.<sup>1</sup> Neither R&J nor Jordan & Dunn are involved in this appeal. Jordan & Dunn have never represented Kelman or Mantekas. Jordan & Dunn were adversarial to Kelman and Mantekas in all proceedings.

Prior to trial, through trial, and now, Kelman and Mantekas have been represented by their counsel of record, attorneys Charles B. Burnette III and Lucy McDow (“Burnette and McDow”).<sup>2</sup> Although J&S appeals against Mantekas, J&S has never served its Notice of Appeal on Mantekas, Burnette, or McDow and has not advised the Court of Appeals that Burnette and McDow represent Mantekas.

***Notice of Appeal and subsequent events***

Special Circuit Judge S. Jackson Kimball issued his original trial verdict on December 11, 2014.<sup>3</sup> Following post-trial motions, Judge Kimball issued a subsequent Rule 59, SCRPC, order on March 4, 2015, and a final Rule 59 order on April 21, 2015.<sup>4</sup>

J&S attests in its filed Notice of Appeal dated May 26, 2015, that it received notice of the final Rule 59 order on April 23, 2015. That Notice of Appeal has never been timely or untimely served on Mantekas or his counsel.

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<sup>1</sup> See, e.g., the recitations of representation contained in the trial court orders filed with the Notice of Appeal.

<sup>2</sup> Id.

<sup>3</sup> This order is filed with the Notice of Appeal.

<sup>4</sup> These orders are filed with the Notice of Appeal.

J&S instead apparently served the Notice of Appeal on Bradley Jordan of Jordan & Dunn, R&J's attorney (see the filed Notice of Appeal and its accompanying Proof of Service). Having settled with J&S prior to trial and having chosen not to appeal the verdict in favor of Mantekas, R&J is neither an appellant nor a respondent in this appeal. J&S has not filed the Notice of Appeal with the Common Pleas clerk, as Rule 203(d)(1)(a), SCACR, requires. Although apparently changing counsel between the trial and the appeal, J&S has not filed with either court, or served, any substitution of counsel notice or motion.

After the Notice of Appeal was served on Mr. Jordan, Mr. Jordan wrote on July 7, 2015, to attorney William Hopkins, who had signed the Notice of Appeal on behalf of J&S, to tell him that Jordan did not represent Mantekas.<sup>5</sup>

Mantekas and his counsel were unaware that any appeal was pending until sometime after the thirty-day deadline of Rule 203, SCACR had expired, when J&S's trial counsel, Tracy T. James, advised that she believed J&S had appealed. Ms. James provided the name of J&S's new counsel, Mr. Hopkins. In response to a June 20, 2015, e-mail, Mr. Hopkins confirmed that he was now J&S's counsel and that J&S had, in fact, appealed.

Thereafter, on July 1, 2015, Mr. Hopkins' paralegal e-mailed an untimely copy of J&S's Notice of Appeal to Burnette and to McDow. The Notice of Appeal has never been sent to Mantekas, Burnette, or McDow in any other fashion.

A month later, on August 4, 2015, Mr. Hopkins submitted an "Amended Proof of Service" to the Court of Appeals, in which he stated that the Notice of Appeal "has been served upon counsel of record by electronic delivery" on July 1 and it identified Burnette and McDow as the

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<sup>5</sup> A copy of this letter was later sent by Mr. Jordan to the Court of Appeals and is in the Court's file with the date stamp of 2/22/16.

e-mail recipients. The Amended Proof of Service, apparently filed by J&S with no accompanying explanation, now showed McDow and Burnette as Mantekas's counsel, although using a wrong law firm and mailing address for McDow and an incorrect e-mail address for Burnette.

J&S did not advise the Court of Appeals with the Amended Proof of Service about the erroneous original service on attorney Bradley Jordan or the lack of any timely service on Mantekas's counsel. The Court of Appeals' records continued to reflect Mr. Jordan as Mantekas's attorney, so that neither McDow nor Burnette were copied on any correspondence from the Court.

J&S prepared a "Second Amended Proof of Service" on August 10, 2015, to correct some of the erroneous information about McDow's address and Burnette's e-mail address. The Second Amended Proof of Service was likewise filed with no apparent explanation to the Court by J&S. The Court of Appeals' records continued to reflect Mr. Jordan as Mantekas's attorney, so that McDow and Burnette remained uncopied on correspondence or notices from the Court.

Mr. Jordan finally advised the Court directly by letter dated February 18, 2016, that R&J was his client and that he was "no longer involved in the suit."<sup>6</sup> Burnette and McDow likewise wrote the Court on February 22, 2016, to advise that they are Mantekas's attorneys but that no appeal has ever been perfected against Mantekas. J&S, although copied on this correspondence, did not respond.

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<sup>6</sup> This letter was received by the Court and is in the Court's file with a date stamp of 2/22/16.

The Court responded to Burnette and McDow that this motion would be necessary. It is therefore submitted.

***As a matter of law, no appeal has been perfected and the Court of Appeals lacks jurisdiction to do anything other than dismiss it.***

Rule 203, SCACR, specifically states the steps necessary to institute an appeal. 203(b) (1) says "A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment." When a complete order or judgment has been issued, that time is only tolled until receipt of written notice of entry of the order granting or denying specified post-trial motions. J&S states in its Notice that it received that notice on April 23, 2015. The 30 days for appeal expired on May 26, 2015, with no service of the Notice in any manner on Mantekas or his counsel.

The situation leaves the Court with no choice but to dismiss the appeal. "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." *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 14, 602 S.E.2d 772, 775 (2004).

Service must be "on all respondents" as Rule 203 specifies. Here, service has been on no respondents.

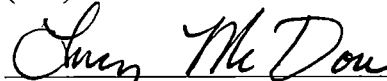
Service under the appellate rules must be made upon the party's attorney and "shall be made by delivering a copy to [the attorney] or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of court." Rule 262(b), SCACR. "Delivery" means handing it to the attorney or leaving it at the attorney's office with a person in charge or in a

conspicuous place in the office. *Id.* There is no provision for service of a Notice of Appeal by e-mail, even if such an e-mail had taken place on or before May 26, 2015, rather than July 1, 2015.

J&S did not serve the Notice of Appeal on the respondent Mantekas by any means within the required 30-day period. Its untimely later e-mailing of the Notice failed to restore the appeal or constitute service in any accepted manner. Mantekas remains unserved to this day, an entire year after the time for appeal expired. This Court lacks jurisdiction to hear this appeal and must dismiss it.

Respectfully submitted,

Charles B. Burnette, III  
Burnette & Payne, P.A.  
414 East Main Street  
Rock Hill, South Carolina 29730  
(803) 328-1800



Lucy L. McDow  
P.O. Box 767  
Rock Hill, South Carolina 29731-6767  
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May 23, 2016

ATTORNEYS FOR THE RESPONDENT

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Of whom, J&S Real Estate Holdings, LLC, as Cross-claim plaintiff, is the Appellant and Sotirios Mantekas, as Cross-claim defendant, is the Respondent.

PROOF OF SERVICE

I certify that I have served a copy of the respondent's Motion To Dismiss and this proof of service on the appellant, J&S Real Estate Holdings, LLC, by mailing a copy by United States Mail, postage prepaid, on May 23, 2016, addressed to its attorney as shown on this Court's records and addressed as shown below. A copy has also been mailed at the same time and in the same manner, addressed as shown below, to attorneys D. Bradley Jordan and Geoffry Dunn:

William E. Hopkins, Jr.  
P.O. Box 1885  
Pawleys Island SC 29585

D. Bradley Jordan/Geoffry Dunn  
P.O. Box 11785  
Rock Hill SC 29731

Lucy L. McDow

ORIGINAL

Lucy L. McDow  
Attorney  
P.O. Box 767, 514 Oakland Avenue  
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Telephone: (803) 327-1700; Fax: (803) 327-4200  
LucyLMcDow@mcdowlaw.com

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SC Court of Appeals

The Honorable Jenny Abbott Kitchings, Clerk  
The South Carolina Court of Appeals  
P.O. Box 11629  
Columbia SC 29211

RE: R&J Restaurants v. J&S Real Estate  
Appellate Case No. 2015-001150

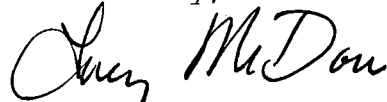
Dear Ms. Kitchings:

Enclosed for filing are:

1. The original and six copies of a motion to dismiss;
2. A proof of service; and
3. The filing fee of \$25.

Thank you.

Sincerely,



Lucy L. McDow

Enclosure

cc w/enc: William E. Hopkins, Jr.  
D. Bradley Jordan/Geoffry Dunn

