THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Please

Honorable L. Casey Manning, Circuit Court Judge

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Appellate Case No.: 2016-001334

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Caria Gorritz.....Appellant

v.

Prime Financial Services.....Respondent

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# BRIEF OF APPELLANT

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Caria Gorritz
128 Castlewood Lane
Elgin, South Carolina 29045
803-446-7841
Pro-Se

Table of Contents

## TABLE OF AUTHORITIES

## CASES



## OTHER AUTHORITIES

## STATEMENT OF ISSUES ON APPEAL

1. **DID THE TRIAL COURT ERR IN DISMISSING THE APPELLANTS CASE FOR FAILURE TO PROSECUTE WHEN APPELLANT DID NOT RECEIVE NOTICE OF THE HEARING AND WHEN RESPONDENTS ATTORNEY FILED A MOTION FOR CONTINUANCE ON THE SAME DAY THE COURT DISMISSED THE CASE WHEN THERE WAS NO HISTORY OF APPELLANT PROCEEDING IN A "DILATORY FASHION" AND WHEN RESPONDENT'S ATTORNEY FAILED TO DISCLOSE TO THE COURT THE FILING OF THE MOTION FOR CONTINUANCE?**

## STATEMENT OF THE CASE

This appeal results from the dismissal of the Appellant's case by the Honorable Casey Manning, on May 20, 2016, in the Richland County Court of Common Pleas, Civil Action No. 2016-CP-40-1407.

Appellant appealed a ruling in favor of Respondent on an Ejectment Action in the Pontiac Magistrate's Court by the Honorable Judge Andy Surles that she was a tenant and did not have an ownership interest in her home based upon a written lease agreement with Respondent. Appellant posted a cash bond in the amount of $5,629.70 to be held in escrow and complied with term of the lease agreement by paying Respondent a monthly amount of $830.99. Appellant did not receive notice of the hearing scheduled on May 20, 2016. As a result of dismissal of Appellant's case, the cash bond amount of $5,629.70 was released to Respondent by order of the Honorable Judge Andy Surles on June 15, 2016.

Judge Manning's Order of May 26, 2016, written by Respondent's attorney, dismissing the Appellant's case, did not reflect what took place at the hearing and the Order does not comport with the case law in South Carolina. The Appellant clearly did not fail to prosecute her case. Appellant asserts that Judge Manning erred in dismissing Appellant's case. Appellant received a notice of eviction from the Richland county Sheriff's Office on June 21, 2016 and filed this appeal.

## FACTS

Appellant did not receive notice by mail from the Court for the hearing scheduled on May 20, 2016 and there is no mailing receipt, proof of service, or any other evidence in the Transcript of Record (the "Record") that Appellant was given proper notice of the hearing. No exhibits were introduced during the hearing (R. p.3). When asked by Judge Manning whether Appellant received notice, Respondent's attorney responded that he "never talked to her" (R. p.4. lines 5-7). Judge Manning then asserts, "Yes, she got notice", but does not state where that information came from (R. p.4. lines 8-9). There is no proof of service, mailing receipt, or any other evidence that either the court or Respondent's attorney provided notice of the hearing to Appellant in the Record (R. p.3). The Appellant did not know about the May 20th hearing until she received the Order of Dismissal by mail from Respondent's attorney.

Moreover, the Order states "Attorney for the Respondent asked the court to allow him to withdraw a motion of continuance filed with the Clerk of Court", (Order, page 1). However, the Record shows that this conversation never took place. When asked by Judge Manning if he had a motion, Respondent's attorney replied, "Yes. Our motion is to deny her appeal" (R. p.4. lines 8-12). No such motion was made and Respondent's attorney did not disclose to Judge Manning that he had filed a motion seeking a continuance. In fact, an awkward exchange shows that it was Judge Manning's idea to dismiss the appeal for lack of prosecution, and not Respondent's attorney (R. p4. Lines 13).

## ARGUMENTS

### BECAUSE THE APPELLANT DID NOT RECEIVE NOTICE OF THE HEARING AND APPELLANT HAD POSTED A CASH BONDTO PROTECT RESPONDENT'S RIGHTS THE SANCTION OF DISMISSAL IS TOO HARSH UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE.

Both Federal and State court decisions support the policy that a person should be

given the opportunity to try their case and that dismissal is reserved for extreme cases only. "Dismissal is a harsh sanction which should be resorted to only in extreme cases." Dyotherm Corporation v. Turbo Machine Company, 392 F.2d 146 (3rd Cir. 1968); McCargo V. Hedrick, 545 F.2d 393 (4th Cir. 1976); McComas v. Ross (S.C. Ct. App. 2006); and Richman v. General Motors Corporation, 437 F.2d 196 (1st Cir. 1971). "A sanction imposed should be reasonable, and the court should not go beyond the necessities of the situation to foreclose a decision on the merits of the case." QZO, Inc. v. Moyer, 358 S.C. 246, 594 S.E.2d 541 (Ct. App. 2004); Karppi v. Greenville, 327 S.C. 538, 489 S.E.2d 679 (Ct. App. 1997); The Balloon Plantation, Inc. v. Head Balloons, Inc., 303 S.C. 152, 399 S.E.2d 439 (1990); Griffin Grading and Clearing v. Tire Service Equipment Manufacturing Company, Inc., 334 S.C. 193, 511 S.E.2d 716 (Ct. App.1999). In Durham v. Florida East Cost Ry. Co., the Court held that "except in extreme circumstances, the court should first resort to the wide range of lesser sanctions which it may impose upon the litigant..." 385 F.2d 366 (5th Cir. 1967). The Durham court, "while recognizing and enforcing the exercise of the power of final disposition of litigation as a sanction in some cases, has adopted the view that such action is too harsh except in extreme circumstances." *Id.* "Indeed, dismissal is generally permitted only in the face of a clear record of delay or contumacious conduct by the plaintiff," Dailey v. Paine, 539 F.2d 705 (4th Cir. 1976); Durham, *Supra.* Other cases decided upon by the same court emphasize the importance, "except in the most flagrant circumstance, of resorting to sanctions that do not deprive a litigant of his day in court" are Woodham v. American Cycstoscope Company of Pelham, 335 F.2d 551 (5th Cir. 1964) and Council of Federated Organizations v. Mize, 339 F.2d 898 (5th Cir. 1964). "Dismissal of an action... is a drastic remedy, which should be used only in extreme situations, as the court has a wide range of lesser sanctions." Flaska v. Little River Marine Construction Co., 389 F.2d 885 (5th Cir. 1968).

In the present case, Appellant has made continuing efforts in prosecuting this matter, including posting a bond in the amount of $5,629.70, at great financial hardship, to be able to have her day in a

court with proper jurisdiction to interpret and enforce her lease purchase agreement which has been breached by Respondent. It is not reasonable to argue that Appellant received notice of the May 20th hearing since she knew she would be lose her cash bond. Appellant has unnecessarily been deprived of, not only her day in court, but of $5,629.70, which has been turned over to Respondent by the Magistrate Court (Magistrate Order attached). From these facts and circumstances, it is clear that her absence from the hearing was not an intentional delay and she was clearly not actin in a "dilatory fashion."

Judge Manning erroneously stated in the Record; "She filed a notice of continuance but she withdrew it. Put all of that in there. Don't put too much in it. Protect yourself" (R. p.5. lines-2-5). In fact, Appellant never filed a motion for continuance and there is no evidence in the Record of such motion being filed with the Clerk of Court for this case. Furthermore, Respondent did not need to "protect" himself because of the cash bond. This was not an intentional delay but the result of not receiving proper notice from either Respondent's attorney or the Court as supported by the Record. The circumstances of this case would not be considered an "extreme situation" or "flagrant circumstance" or "unreasonable neglect" by Appellant under case law and does not warrant the harsh sanction of dismissal. The Court in Dailey stated that, "...the discretion granted under [South Carolina Rules of Civil Procedure, Rule 41(b)] Fed. R. Civ. P. 41(b) should be exercised discreetly, and only after due consideration of the availability of sanctions less severe than dismissal." *Supra.*

BECAUSE RESPONDENT'S ATTORNEY FILED A MOTION OF CONTINUANCE WITH THE CLERK OF COURT ON MAY 20, 2016 AND RESPONDENT'S RIGHTS WERE PROTECTED APPELLANT DID NOT FAIL TO PROSECUTE HER CASE AND APPELLANT'S CASE SHOULD NOT HAVE BEEN DISMISSED FOR FAILURE TO PROSECUTE

In McComas, the Court rejected an argument supporting dismissal based on Bond v. Corbin, 68 S.C. 294, 47 S.E.2d 374 (1904) due to distinguishable facts. "The trial court gave the plaintiff in Bond two opportunities to correct his failure to appear, including the benefit of an extra day, although his

counsel had agreed to the trial date." *Id.* A look at the Federal authority discloses that "[a] sanction which results in a default or dismissal is harsh punishment which should be imposed only if there is some showing of willful disobedience or gross indifference to the rights of the adverse party." QZO, Inc., *Supra.* "The decided cases, while noting that dismissal is a discretionary matter, have generally permitted it only in the face of a clear record of delay or contumacious conduct by the plaintiff," Richman, *Supra*; Reizakis v. Loy, 490 F.2d 1132 (4th Cir. 1974).

As in McComas, the facts in the present case do not show any history of delay or deliberately proceeding in a dilatory fashion. Nor is there "some showing of willful disobedience or gross indifference to the rights of the adverse party." QZO, Inc., *Supra.* To the contrary, Appellant actively pursued her case including paying a cash bond to protect Respondent's rights. Appellant has unjustly been deprived of the full amount of the cash bond because of this dismissal. The Respondent's attorney's filing for a motion of continuance on the day of the hearing is important because it clearly shows that Judge Manning could have imposed a lesser sanction (a continuous) to give Appellant another opportunity to appear, and, most importantly, that granting the continuance to Respondent would not have prejudiced Respondent in any way. McComas, and QZO, Inc. Unfortunately, the Record shows that Respondent's attorney took advantage of Appellant's absence to withdraw the motion of continuance in favor of dismissal. The motion for continuance was filed at 9:03 A.M. on May 20, 2016 and the motion to withdraw was filed at 10:39 A.M. on the same day. There is absolutely no record of any history of the Appellant deliberately proceeding in a "dilatory fashion". The Record clearly shows that Judge Manning did not contemplate or consider any sanctions less drastic than dismissal.

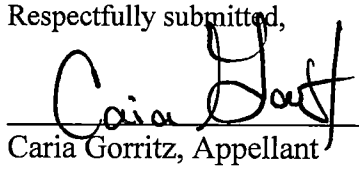
The Court entered dismissal in this case for failure to prosecute. The Court has recognized in the past that "in those instances in which our supreme court has affirmed dismissal of the action based upon the failure to prosecute, the dismissal has been imposed to maintain the orderly disposition of the cases in the face of repeated warnings to the offending party or multiple opportunities to proceed with trial, and only then, with a finding of unreasonable neglect." Joyner v. Glimcher Properties, 356 S.C. 460, 589

S.E.2d 762 (Ct. App. 2002); Small v. Mungo, 254 S.C. 438, 175 S.E.2d 802 (1970). The Appellant did not show unreasonable neglect and was not repeatedly warned. Considering the circumstances of this case, the facts do not demonstrate any history of her deliberately proceeding in a dilatory fashion.

## CONCLUSION

It is clear that the Appellant's case should not have been dismissed. The Judge erred by dismissing the Appellant's case for failure to prosecute. If the Judge found grounds that the Appellant failed to prosecute her case, he erred by not including such grounds in the Record and he erred in not choosing a sanction less harsh than dismissal based on the Appellant's history of pursuing relief in this case and based on cash bond in the amount of $5,629.70 paid by Appellant for the right to have her case heard at trial before the Circuit Court. For the reasons set forth above, and for the Judge's error in dismissing this matter, this dismissal should be reversed and the case remanded.

Respectfully submitted,



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August 22, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals



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APPEAL FROM RICHLAND COUNTY
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Honorable L. Casey Manning, Circuit Court Judge

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Appellate Case No.: 2016-001334

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PROOF OF SERVICE

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I certify that I have served the Brief of Appellant and Designation of the Matter to be included in the Record on Appeal on Prime Financial Services by hand delivery on August 22, 2016 to its attorney of record: Larry C. Marchant, Jr., Esquire, 3020 Devine Street, Columbia, SC 29205.

August 22, 2016

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CARIA GORRITZ
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August 22, 2016



Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: Caria Gorritz v. Prime Financial Services
Appellant Case No. 2016-00134

HAND DELIVERED

Dear Ms. Kitchings:

Enclosed please find the original Brief of Appellant and 15 copies for filing in the above referenced matter.

Also find the Designation of Matter to be included in the Record on Appeal.

By copy of this letter and pursuant to the enclosed Proof of Service, I am serving three copies of the documents upon counsel for the Respondent, Larry C. Marchant, Jr., Esquire, 3020 Devine Street, Columbia, SC 29205.

Should you need anything further, please call. Thank you for your continued assistance and attention to this matter.

Respectfully,

Caria Gorritz