THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 2016-001194

Allenwood Owners Association, Inc., Stephen Seefeld, John Kovitch, Yvette Smith, Everett Butler, and Amanda Johansson, Plaintiffs,

Of Whom Allenwood Owners Association, Inc. is Appellant,

Appellant,

v.

Mike Prince, Stacy Keller, Jeff Miller, Debra Reed, Fran Stevens, Meredith Florencio, and Jacques Talbot,

Respondents.

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

Appellant hereby offers the following points of clarification and rebuttal to the arguments brought by Respondents before this Court without restating the issues for its consideration or setting forth redundant arguments thoroughly set forth before the Court in its opening brief.

I. AS TO APPELLANT'S ALLEGED FAILURE TO COMPLY WITH THE LOWER COURT'S ORDERS REGARDING DISCOVERY AND MEDIATION.

When present, "[a] final written order contains the binding instructions which are to be followed by the parties." (Ford v. State Ethics Comm'n, 344 S.C. 642, 646, 545 S.E.2d 823 (2001)). In support of their contention that Appellant failed to comply with the lower court's regarding mediation, Respondents cite Barnette v. Adams Bros. Logging, Inc. for the proposition that an oral ruling is binding regardless of a written judgment of the court. (Resp't Br., p 16). However, Barnette is inapplicable here, as the lower court imposed sanctions based on a party's failure to comply with an oral ruling made from the bench and never reduced to a final writing, as the lower court did in this case. 355 S.C. 588, 594-95, 586 S.E.2d 572, 575-76 (2003).

Respondents have failed to cite any legal standard that would cast doubt on our Supreme Court's holding in Ford. Respondents further claim that the Woodson case is inapplicable to this matter based on its facts. (Resp't Br., p. 20.) However, Respondents do not challenge the legal standard repeated by the Woodson court, citing Ford, that "a written order constitutes a final order and final judgment of the lower court." Woodson v. DLI Properties, LLC, 406 S.C. 517, 528, 753 S.E.2d 428, 433-34 (2014) (citation omitted).

The lower court's final ruling on the matter is clear in that it does not specifically order Mr. Seefeld, individually or as a representative of Appellant, or any other representative of the Appellant to attend a second mediation in person:

> In addition to the foregoing, I hereby Order the parties in this case to participate in a mediation as soon as practicable, with one of the following individuals serving as mediator: Colden Battey, Ned Tupper or Mitch Griffith.
>
> (R. p. 6).

Therefore, the lower court's February 8, 2016 Order dismissing Appellant's claims due to Mr. Seefeld's failure to attend a second mediation on November 11, 2015 in person is improperly based on a violation of its October 13, 2015 Order, which by its own terms carries no personal attendance requirement by any representative on behalf of Appellant. Although Rule 6, SCADRR requires personal attendance, Appellant's attendance by phone and subsequent settlement negotiations with the mediator and Respondents' counsel for five hours demonstrates that the physical attendance requirement under Rule 6 was waived at the November mediation. (R. p. 194).

II. AS TO APPELLANT'S ALLEGED FAILURE TO COMPLY WITH THE SOUTH CAROLINA COURT-ANNEXED ALTERNATIVE DISPUTE RESOLUTION RULES.

In further support of its positions, Respondents raise numerous factual arguments not before this Court in an attempt to show that Appellant did not comply with the South Carolina Court-Annexed Alternative Dispute Resolution Rules.

Significantly, Respondents claim that Appellant violated Rule 6, SCADRR on two occasions by failing to have a representative present during both the first mediation on February 27, 2015 and the second scheduled mediation on November 11, 2015. (Resp't Br., p. 22). Respondents are adamant that there was no agreement to allow a representative of Appellant to attend either mediation remotely. (Id.)

With regard to the February 27, 2015 mediation, the record is clear that mediation occurred and reached an impasse on that date. (See R. p. 217). While a representative of

Appellant was unable to attend due to travel difficulties, the parties, their counsel, and the mediator agreed to move forward. (R. p. 199). Again, despite the arguments of counsel, there is no evidence before this Court that such mediation was improper. The mediator, Respondents, and Respondents' counsel elected to mediate this matter without the Appellant's physical presence, no objection to such mediation was ever made, and the Respondents chose to incur attorneys' fees and mediator fees to pursue resolution.

With regard to Rule 6, however, Respondents' argument is unavailing given their conduct on the second scheduled mediation date. As admitted in their brief, after arriving at the designated mediation location, "[r]espondents immediately left and drove back to Hilton Head from Beaufort." (Resp't Br., p. 23.) Although no party was physically present for mediation on that date, the record makes clear that a representative for the Appellant participated by phone for over five hours while counsel attempted to resolve the matter despite Respondents' admission that they were "not present in any capacity" on November 11, 2015. (R. p. 194; Resp't Br., pp. 23-24.) Nevertheless, as with the first mediation on February 28, Respondents and Appellant undisputedly and voluntarily agreed to incur attorneys' fees and mediator fees in an effort to resolve the matter. (R. pp. 191-92, 194; Resp't Br., pp. 23-24.)

II. AS TO APPELLANT'S ALLEGED FAILURE TO COMPLY WITH THE DISCOVERY RULES OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE.

Pursuant to its Brief in this matter, Appellant admits that it did not Answer and Respond to seven (7) Interrogatories and Requests for Production contained in three separate sets of Interrogatories and Requests for Production served on it by Respondents. (R. pp.1-6). Other than this oversight, there is no evidence in the record that establishes, as Respondents describe, "eighteen months of non-responsiveness, violation of court orders, and dilatory tactics employed

by Appellant." (Resp't Br., p. 25.)

Specifically, Respondents contend that Appellant failed to appear for deposition and forced them to file numerous Motions to Compel, which demonstrates a history of failure to comply with the South Carolina Rules of Civil Procedure. (Resp't Br., p. 24.) However, Respondents can cite no holding, statute, or Rule in support of their position that a party is prejudiced by having to file such a Motion. Further, Appellant made numerous efforts to schedule its deposition with no response from Respondents and made the same offer of availability before the lower court, an offer which Respondents have made no effort to take and now seek to complain of before this Court. (R. p. 193).

Respondents have failed to demonstrate any prejudice against them as a result of Appellant's alleged failure to prosecute its case. Indeed, it appears the sole basis of Respondents' claim of prejudice is based on the lack of physical presence of Appellant's representative at the two mediations held by the parties. (Resp't Br., p. 24.) As explained fully above, Respondents actively participated in mediation on February of 2015 without objection, and Appellant, Appellant's counsel, and Respondents' counsel participated at mediation in November of 2015 for five hours. Respondents' counsel consented to settlement efforts on that day, and as such, they cannot claim that the attorneys' fees and mediator fees voluntarily incurred as a result "prejudiced" them in any manner.

CONCLUSION

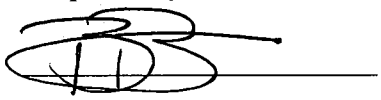
In sum, a dismissal of Appellant's claims is improper in law and unfounded in fact. First, Respondents and the lower court claim that Appellant should be punished for failing to have a representative physically present for mediation on February 28, 2015. Respondents did not object to the form of mediation, but instead actively participated in resolution and voluntarily incurred attorneys' fees and mediator fees such that proof of mediation was ultimately filed with the lower court. Second, Respondents and the lower court claim that Appellant should be punished for failing to have a representative physically present for the November 11, 2015 mediation in which Respondents' counsel participated. The lower court committed an error of law by basing its dismissal with prejudice on an oral ruling not contained in its final order.

In essence, Respondents are asking this Court to uphold dismissal of Appellant's claims with prejudice based on the failure to Answer and Respond to seven (7) Interrogatories and Requests for Production contained in three separate sets of such requests served over the course of many months. As the record makes clear, the lower court failed to tailor a sanction that properly responds to the inadvertent failure of the Appellant to so respond, and failed entirely to make a finding of willful or intention action by Appellant in so acting, and failed to consider any sanction other than dismissal with prejudice. In no manner is a dismissal with prejudice a proper sanction for failure to respond to seven (7) discovery requests. As such, the lower court abused its discretion and should be reversed.

[Signature Page to Follow]

January 17, 2016

Respectfully submitted,



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