

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APR 27 2017
SC Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Dale E. Van Slambrook, Master-in-Equity

Appellate Case No. 2016-000292

Branch Banking and Trust Company.....Respondent,

vs.

Wilton H. Cain; Cassandra M. Durrah-Cain;
Liberty Hall Residential Property Owners
Association, Inc.....Defendants,

Of whom

Wilton H. Cain and Cassandra M. Durrah-Cain, are Appellants.

**RESPONDENT’S MOTION TO DISMISS
(OR, IN THE ALTERNATIVE, MOTION TO CORRECT THE RECORD ON APPEAL)
AND
MOTION TO STAY TIME TO FILE FINAL BRIEF**

Pursuant to Rule 240(a), SCACR, Respondent Branch Banking and Trust Company moves to dismiss the above-captioned appeal in its entirety. The basis for this motion is that Appellants Wilton H. Cain and Cassandra M. Durrah-Cain have failed to properly address the letters of deficiency sent to them from the South Carolina Court of Appeals and have failed to comply with multiple court orders regarding correcting the Record on Appeal. As a result of Appellants’ failure to comply with their obligations, Respondent is unable to properly respond to this appeal.

FACTS

On August 10, 2016, Appellants filed and served Respondent with the Record on Appeal. On September 12, 2016, Respondent filed and served its Initial Brief and Designation of Matter for Record on Appeal. Pursuant to the Rules, Appellant had until October 12, 2016, to file the Record on Appeal following Respondents' filing of the Initial Brief and Designation of Matter. An Amended Record on Appeal was filed by the Appellant on January 30, 2017, after a deficiency letter was issued by the Court. Pursuant to the Order Granting Respondent's Motion to Strike entered on February 17, 2017, Appellants had until April 19, 2017, to file a Second Amended Record on Appeal correcting deficiencies in First Amended Record on Appeal. Appellant's Second Amended Record on Appeal dated April 15, 2017 still fails to meet the requirements of the SCACR.

ARGUMENT

I. Appellant's Second Amended Record on Appeal does not comply with the SCACR or the Court's Order to Appellants to file a Second Amended Record on Appeal, and the Appeal should therefore be dismissed.

On March 30, 2017, this Court granted the Respondent's Motion to Strike Record on Appeal wherein this Court indicated the following:

On January 12, 2017, this Court ordered Appellants to file and serve an amended record on appeal within twenty days. On February 1, 2017, Appellant served and filed the amended record.

Respondent has now filed a renewed motion to strike, arguing the amended record on appeal still: (1) omits documents that were designated in Respondent's designation of matter; (2) includes matter not presented to the lower court; and (3) fails to comply with the South Carolina Appellate Court Rules.

After consideration of the motion and Appellant's return, Respondent's motion is granted. Within twenty days of this order, Appellants shall serve and file a second amended record on appeal. The amended record shall include all matters designated by the parties, including unaltered copies of the following documents in their entirety:

1. Order Confirming Deficiency Judgment and Denying Motion to Alter, Amend or Reconsider dated January 26, 2016;
2. BB&T Complaint for Foreclosure dated October 4, 2010; and
3. Brief Regarding Deficiency Judgment and Exhibit dated January 7, 2016

Furthermore, the second amended record shall not include any matters not presented to the lower court. See Rule 210(c), SCACR. Appellant shall specifically exclude their brief from the second amended record on appeal and shall also exclude the documents set forth as items (a) through (i) on pages three and four of Respondents motion to strike.

Finally, the record shall be arranged in the order set forth in Rule 210(c), SCACR, and the pages of the record must be consecutively numbered beginning with the index.

The Appellants' Second Record on Appeal does correct some of the issues addressed by the Court's March 30, 2017, Order; namely, documents not presented to the lower court have been removed and documents with handwritten notations by Appellants have been removed or replaced.

However, Appellants have again failed to create a proper Record on Appeal in the following ways:

- (1) Appellants have not included all documents designated by Respondent. Specifically, the Promissory Note dated September 19, 2007, is not included.
- (2) Appellants have also failed to remove portions of their brief from the Record. It appears that the Table of Contents and Table of Authorities from the Initial Brief are still included.
- (3) Further, the Record still does not comport with Rule 210(c), SCACR, with regard to the formatting and order of the Record. Notably, the Record is still not consecutively numbered, the documents in the Index are not properly ordered, and the documents are not properly named or identified.

(4) The Index does not include all documents included in the Record or contains an incorrect reference to the documents which are contained. The BB&T Complaint for foreclosure, dated October 4, 2010, is included in the Record, but not in the Index. References in the Index to the Transcript and Mortgage appear to be referring to partial documents or only a few pages of the document when the whole document is included. Finally, the RMIC Master Policy is listed on the Index (as a partial document), though it has not been individually included as a document for the Record, but instead is an exhibit to the Brief Regarding Deficiency Judgment which has been designated for inclusion.

An incomplete Record and an incomplete index and improperly formatted record prevents Respondent from being able to cite to the Record in its Final Brief and creates concern regarding review of all designated matters. At this stage in the appeal, Appellant has been given numerous opportunities to comply with the Appellate Court Rules and has failed to do so. As such, Respondent seeks dismissal of the Appeal.

In the alternative, Respondent requests an Order from the Court requiring Appellant to again correct the Record on Appeal to conform to the South Carolina Appellate Court Rules.

CONCLUSION

For these reasons, Respondent respectfully moves for an order dismissing the appeal, or, in the alternative, moved for an order again requiring Appellants to correct the Record on Appeal. Additionally, Respondent respectfully moves for an order staying the time for Respondent to be required to file its final brief until such time as the Motion to Dismiss, or alternative motion, has been ruled upon.

Respectfully submitted,



Erica G. Lybrand (SC Bar # 79052)
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ATTORNEYS FOR RESPONDENT
Rogers Townsend & Thomas, PC and its staff are debt collectors.

April 27, 2017

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Association, Inc.....Defendants,

Of whom

Wilton H. Cain and Cassandra M. Durrah-Cain, are Appellants.

PROOF OF SERVICE

I HEREBY CERTIFY that I have served the **RESPONDENT'S MOTION TO DISMISS (OR, IN THE ALTERNATIVE, MOTION TO CORRECT THE RECORD ON APPEAL) AND MOTION TO STAY TIME TO FILE FINAL BRIEF** on Appellants Wilton H. Cain and Cassandra M. Durrah-Cain by depositing copies of it in the United States Mail, postage prepaid, on April 27, 2017, at 6476 N. Highway 17, Awendaw, SC 29429.



Erica G. Lybrand (SC Bar # 79052)

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April 27, 2017

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
The South Carolina Court of Appeals Clerk of Court
1015 Sumter Street
Columbia, SC 29201

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SC Court of Appeals

RE: *Branch Banking and Trust Company v. Wilton H. Cain; Cassandra M. Durrah-Cain; Liberty Hall Residential Property Owners Association, Inc.*
C/A # 2010-CP-08-03514
RTT File # 504335-02111

Dear Ms. Kitchings:

Enclosed is an original and 7 copies of Respondent's Motion to Dismiss (Or, in the Alternative, Motion to Correct the Record on Appeal) and Motion to stay Time to File Final Brief and Proof of Service in the above referenced matter. Also enclosed is a check in the amount of \$25.00 representing the motion filing fee.

Please file the original document, and return a clocked copy to our courier.

With kind regards, I remain

Cordially yours,

A handwritten signature in black ink, appearing to read "K. Richardson".

Karissa Richardson
Paralegal for Erica G. Lybrand

Enclosures

cc:

Wilton H. Cain
Cassandra M. Durrah-Cain
6476 North Hwy 17
Awendaw, SC 29429