mgc

Reply To
HELEN F. HISER
Direct Dial: (843) 576-2930
helen.hiser@mgclaw.com

April 20, 2017

Via U.S. Mail
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: Jack Powell v. Knology of Charleston Inc.

Civil Action No.:	2013-CP-10-6019 (Charleston)
Date of Incident:	June 21, 2012
Carrier Claim No.:	YVC KL 99682
MGC File No.:	2071.13109
Appellate Tracking No.:	2016-001035

Dear Ms. Kitchings:

Upon review of this Court's C-Track system, we discovered that Appellant Jack Powell has filed with this Court a copy of the Motion for Relief of Judgment that he filed with the Charleston County Circuit Court on April 4, 2017. Although he served Respondents with a copy of his Motion as filed with the Circuit Court, he did not serve or provide notice to Respondents that he was filing his Motion with this Court. Nonetheless, it is unclear from his cover letter why Appellant has "notified" and provided this Court with a copy of his Circuit Court Motion.

As noted in the attached opposition which Respondents filed in response with the Circuit Court, (Exh. A, without attachments), the Circuit Court no longer has jurisdiction to hear Appellant's claims, as they are basically the same claims currently pending before this Court. There is no reason to delay finalizing the briefing and record in this appeal. Pursuant to this Court's April 7, 2017 Order, Appellant is required to serve the Record on Appeal on or before April 27, 2017.

Yours truly,

McAngus Goudelock & Courie, LLC

Helen F. Hiser

Attachments
cc: Jack Powell, *pro se*

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON)

JACK POWELL,) Civil Action No. 2013-CP-10-6019

Plaintiff,

vs.

KNOLOGY OF CHARLESTON INC., **DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR RELIEF OF JUDGMENT**

Defendant.

TO: JACK POWELL, PRO SE PLAINTIFF:

Pursuant to Rule 7, SCRCP, Defendant, Knology of Charleston Inc., through their undersigned counsel, hereby opposes Plaintiff Jack Powell's Motion for Relief of Judgment ("Motion"). As Plaintiff acknowledges, this matter is currently pending before the South Carolina Court of Appeals on Plaintiff's notice of appeal filed May 16, 2016. (Exh. 1). That appeal currently is in the briefing process, as the Court of Appeals recently ordered Plaintiff to file the Record on Appeal by or before April 27, 2017. (Exh. 2). Plaintiff's current Motion involves this Court's prior grant of summary judgment in favor of Defendant, which is pending on appeal.

Defendant further bases its objection to Plaintiff's Motion on the following:

1. Plaintiff initiated this action by filing a Complaint with this court on October 28, 2013 alleging he suffered physical injuries when he tripped over an unburied cable line while walking along Folly Road, in Charleston, South Carolina, after dark on June 21, 2012. He alleged three causes of action: 1) Gross Negligence; 2) Negligent Supervision of Employees & Sub-Contractors; and 3) Breach of Duty. Plaintiff sought damages in the

amount of "$150,000 for the emotional harm and his pain & suffering," as well as other financial losses claimed because he alleged he could not work due to his injuries. (Complaint, filed Oct. 28, 2013 and served on Defendant Nov. 14, 2013).

2. Defendant Knology of Charleston Inc. filed its Answer on December 16, 2013, denying Plaintiff's claims. (Answer of Defendant, filed Dec. 16, 2013). Among other defenses, Defendant argued that Plaintiff's injuries were caused either by his own actions or those of a third party over which Defendant had no control.

3. The parties engaged in discovery for over a year. Dissatisfied with Defendant's discovery responses, Plaintiff filed two motions: 1) Plaintiff's Motion to Compel responses to his Request for Admissions, and 2) Plaintiff's Motion to Compel (Priority Matter) responses to his Production Request. (Plaintiff's Motions to Compel, dated June 10, 2014 and June 16, 2014).

4. Plaintiff's motions were heard by Judge Markley Dennis on July 30, 2014. Without objection, defense counsel informed Judge Dennis at the hearing that the parties had reached "an agreement as to [Mr. Powell's] motion to compel, request for production. He has agreed to submit some revised requests for production as to a couple of his requests and make them a little more specific." Plaintiff agreed with Judge Dennis' suggestion that Plaintiff his pending motion to compel without prejudice and then, if necessary, submit another one. (July 30, 2014 Tr. p. 2, lines 12-21 (Exh. Q to Plaintiff's Motion)). With regard to Plaintiff's Requests to Admit, Judge Dennis held that Defendant's responses were sufficient. (July 30, 2014 Tr. p. 2, line 24 – p. 8, line 20 (Exh. Q to Plaintiff's Motion)).

5. Defendant supplemented its response to Plaintiff's requests for production on August 19,

2014 and again on September 5, 2014, producing 225 pages of material as well as a radiology film.

6. On November 18, 2014, Plaintiff filed a motion for summary judgment, (Plaintiff's Notice for Motion Summary Judgment, filed Nov. 18, 2014), and a Memorandum in Support on December 9, 2014. (Plaintiff's Memorandum in Support of Motion for Summary Judgment, filed Dec. 9, 2014). Plaintiff's motion was heard by Judge Deadra Jefferson on January 8, 2015. Judge Jefferson denied Plaintiff's summary judgment motion in a Form 4 Order, filed January 9, 2015. (Form 4 Judgment in a Civil Case, filed Jan. 9, 2015).

7. In response to a series of emails from Plaintiff, Defendant explained that Judge Dennis had ruled that Defendant's discovery responses were adequate and that Defendant had not obtained new information that would require it to supplement its responses further. Defendant also explained that the parties had agreed that Plaintiff's Request for Production #15 was overly broad and that Plaintiff would "prepare more narrowly tailored requests and serve them as Supplemental Requests for Production." (Letter from B. Davis to J. Powell, dated Jan. 21, 2015, page 2 attached as Exh. F to Plaintiff's Informal Request to the Court for Second Motion for Summary Judgment, filed March 2, 2015) ("Plaintiff's Second MSJ").

8. Plaintiff served Supplemental Requests to Admit on Defendant, asserting that "Judge Dennis ordered during Plaintiff's Compel hearing for Evasive and Incomplete on July 30, 2914 [sic]." (Exh. E to Plaintiff's Motion for Reconsideration, filed April 13, 2015) ("Motion for Reconsideration"). Defendant replied, explaining its position that Plaintiff's supplemental requests to admit and for production were "simply reasserted selections

from your original RFA's and RFP's." (Letter from B. Davis to J. Powell, dated March 23, 2015, attached as Exh. D to Motion for Reconsideration).

9. In March 2015, Plaintiff filed a second motion for summary judgment. (Plaintiff's Second MSJ). Defendant also moved for summary judgment, (Defendant Knology of Charleston Inc.'s Notice of Motion and Motion for Summary Judgment, filed March 16, 2015), and filed a memorandum in support of its motion with supporting documentation. (Memorandum in Support of Defendant Knology's Motion for Summary Judgment/in Opposition to Plaintiff's Second Motion for Summary Judgment, filed April 2, 2015) ("Defendant's Memorandum in Support").

10. The parties were heard by Judge Dennis on April 2, 2015. In two separate Form 4 Orders, Judge Dennis denied Plaintiff's Second Motion for Summary Judgment and granted Defendant's Motion for Summary Judgment. (Form 4 Judgment in a Civil Case, filed April 8, 2015, denying "Plaintiff's 2nd Motion for Summary Judgment") (Form 4 Judgment in a Civil Case, filed April 8, 2015, granting "Defendant's Motion for Summary Judgment ... Formal order to follow").

11. Plaintiff moved for reconsideration, (Motion for Reconsideration), which this Court denied. Judge Dennis explained that the Motion to Reconsider was premature because the full order granting Defendant's motion for summary judgment had not yet been filed, adding that Plaintiff "can refile his Motion to Reconsider once a formal order has been filed." (Order, filed May 6, 2015).

12. On April 6, 2016, this Court filed its formal Order Granting Defendant's Motion for Summary Judgment. (Summary Judgment Order). In particular, this Court held that Defendant owed Plaintiff no duty because there was no evidence that it "owned, installed,

controlled, or otherwise had any connection to the cables sufficient to give rise to any duty owed" to Plaintiff. (Summary Judgment Order, p. 3). In fact, Plaintiff could not specify which of the three cables depicted in photographs attached to his Complaint caused his fall. (*Id.*). Citing the standard for summary judgment, this Court held that, despite the fact that the parties had engaged in discovery for over a year, Plaintiff failed to come forward with any evidence to oppose Defendant's summary judgment motion. (*Id.* pp. 3-4). Furthermore, Plaintiff's prior discovery objections previously had been decided in favor of Defendant and his current objections were not properly before this Court, as Plaintiff had not filed another motion to compel. In addition, Plaintiff failed to demonstrate that additional discovery would "uncover additional relevant evidence," and that he was "not merely engaged in a 'fishing expedition.'" (Summary Judgment Order, p. 4, *quoting* Baughman v. American Tel & Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 544 (1991)).

13. Plaintiff did not file a motion to reconsider the Summary Judgment Order. Instead, Plaintiff appealed directly to the South Carolina Court of Appeals. (Exh. 1).

14. The appeal filed by Plaintiff is pending before the Court of Appeals. (Exh. 2).

15. The matters raised in Plaintiff's current Motion involve the same matters that are pending before the Court of Appeals. For example, Plaintiff alleges he has discovered new evidence that is relevant to the motions for summary judgment addressed in this Court's Summary Judgment Order. In addition, he complains about mistakes in the discovery process leading up to the summary judgment hearing.

16. Because the subject matter of the Motion is the same as the basis for his pending appeal, this Court does not have jurisdiction to hear the matters raised in Plaintiff's Motion. Rule

205, SCACR ("[u]pon service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal," except for "matters not affected by the appeal"); Chem-Nuclear Sys., LLC v. South Carolina Bd. of Health & Envt'l Control, 374 S.C. 201, 206, 648 S.E.2d 601, 604 (2007) (the service of the notice of appeal "divests the lower court of jurisdiction over the order appealed"); Jackson v. Speed, 326 S.C. 289, 311, 486 S.E.2d 750, 761 (1997) (although "the lower court retains jurisdiction over matters not affected by the appeal," the "service of notice of an intent to appeal divests the lower court of jurisdiction over the order appealed").

17. In addition, Rule 60, SCRCP, requires that, while appeal is pending, leave to make a motion pursuant to this Rule "must be obtained from the appellate court." Plaintiff has not moved before the Court of appeals for leave to file his Motion with this Court.

18. Even if this Court had jurisdiction to hear Plaintiff's Motion, which it does not, Plaintiff's Motion is untimely. Rule 60, SCRCP, requires that a motion for relief of judgment be "made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken." The formal order granting Defendant summary judgment was filed April 6, 2016. Although Plaintiff's Motion was filed just two days before the year expired, on April 4, 2017, that is not within a reasonable time particularly where, as here, the Plaintiff has been aware of these emails since at least December 2016 when he moved before the Court of Appeals for relief from judgment based, in part, on his discovery of the alleged emails from a Jason Tant. (Exh. 3). The Court of Appeals properly denied that request. (Exh. 4).

19. Even if this Court had jurisdiction to hear Plaintiff's Motion, which it does not, Plaintiff's Motion is appears to be based on Plaintiff's discovery of new evidence. However, under

Rule 60(b)(2), SCRCP, which provides for motions for relief from judgment based on newly discovered evidence, the definition of newly discovered evidence is that "which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." The alleged emails attached to Plaintiff's Motion as Exhs. L and O would have been in Plaintiff's possession as they purport to be either addressed to him or sent from him. Exhs. M and N purport to be downloads from the "linkedin" website. In order to qualify as newly discovered evidence under Rule 60, the movant must establish, among other things, that the new evidence "could not have been discovered before the trial." Lanier v. Lanier, 364 S.C. 211, 217, 612 S.E.2d 456, 459 (2005). In particular, evidence that is known to a party and in that party's possession "is not newly discovered evidence that affords relief." Id., 364 S.C. at 218-219, 612 S.E.2d at 460. Plaintiff's explanation that his lack of diligence should be excused because he was allowed to use the public library computers for only two hours per day is woefully inadequate. As the Supreme Court observed, due diligence is "the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation." In short, due diligence "looks not to what the litigant actually discovered, but what he or she *could* have discovered .... Where a litigant could have discovered the new evidence prior to trial, he or she is not entitled to relief under Rule 60(b)(2)." Id., 364 S.C. at 220, 612 S.E.2d at 460. "South Carolina's strong policy towards finality of judgments trumps a party's ability to set aside a judgment where, as here, the party could have discovered the evidence prior to trial." Id., 364 S.C. at 220, 612 S.E.2d at 461. The items Plaintiff is attempting to "add" to the record at this late date do not qualify as newly discovered evidence under Rule 60(b)(2) and should be stricken from the record.

CONCLUSION

For all the reasons stated herein, Plaintiff's Motion should be dismissed and the materials attached to his Motion stricken from the record.

McANGUS, GOUDELOCK & COURIE, L.L.C.

Benjamin B. Davis
Bar No: 74955
Post Office Box 650007
735 Johnnie Dodds Blvd, Suite 200 (29464)
Mt. Pleasant, South Carolina 29465
(843) 576-2900

ATTORNEYS FOR DEFENDANT, KNOLOGY OF CHARLESTON INC.

April 11, 2017

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON)

JACK POWELL,)

Plaintiff,)

vs.)

KNOLOGY OF CHARLESTON INC.,)

Defendant.)

Civil Action No. 2013-CP-10-6019

FILED
2017 APR 12 PM 2:21
JULIE ARMSTRONG
CLERK OF COURT
BY

CERTIFICATE OF SERVICE

I certify that on this date, I have served a copy of **Defendant's Opposition to Plaintiff's Motion for Relief of Judgment** in this action on counsel of record by

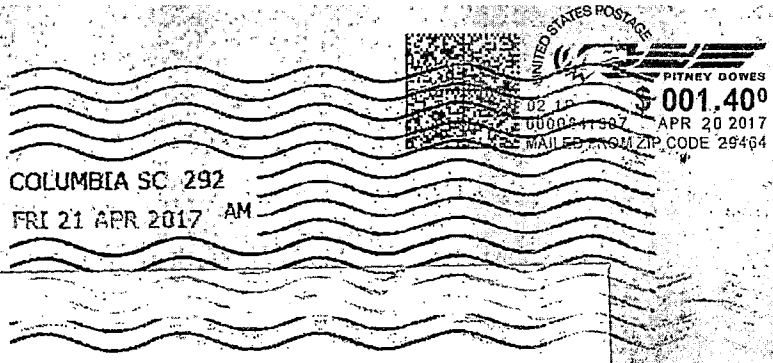
☐ Delivering it to him/her personally;

☒ Mailing it to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Jack Powell
1402 Camp Road Unit 8-A
Charleston, South Carolina 29412
***Pro Se* Plaintiff**

April 11, 2017
Date

Charlotte Gay
Charlotte E. Gay
Legal Assistant to Benjamin B. Davis



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The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29201