

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas
R. Ferrell Cothran, Circuit Court Judge

Appellate Case No. 2017-000998
Civil Action No. 2015-CP-43-596

RECEIVED

AUG 14 2017

Paul Branco and Branco Investments,
Inc., d/b/a Great American Cookie Co., Respondents,

SC Court of Appeals

v.

Hull Storey Retail Group, LLC, and
Sumter Mall, LLC.....Appellants.

APPELLANTS' AMENDED REPLY IN SUPPORT OF THE MOTION FOR REMAND
WITHOUT PREJUDICE FOR THE DISPOSITION OF THEIR POST-TRIAL MOTION

Pursuant to Rule 240(f) of the South Carolina Appellate Court Rules, Appellants respectfully file this Amended Reply in support of their request that this Court remand the appeal, without prejudice to refile, for the trial court to dispose of their pending post-trial motion. As explained below, the pending post-trial motion was timely and properly filed under Rule 52(b), SCRCPP, and this Court should grant the requested remand.

BACKGROUND

The procedural facts are not in dispute. Following a bench trial, the trial court emailed the parties' trial counsel a copy of the order the court intended to file. In response, Defendants filed a Motion to Amend on March 21, 2017. Two days later, the trial court filed its order, which was substantively identical in its rulings to the copy previously shared with counsel. The trial court did not schedule a hearing on the Motion to Amend or otherwise indicate whether it intended to

consider and rule on it. Accordingly, out of an abundance of caution, Defendants timely filed a Notice of Appeal.

On August 2, 2017, Appellants learned the pending Motion to Amend had been scheduled for a hearing. Two days later, Appellants filed a Motion to Remand the appeal without prejudice to refile if necessary following the trial court's disposition of the post-trial motion. Respondents filed a Return opposing the Motion to Remand. The Return erroneously argues that remand without prejudice to refile (or, alternatively, dismissal without prejudice to refile) is inappropriate because (1) the post-trial motion was not properly filed and thus there is no pending motion for the trial court to adjudicate, and (2) even if there *is* a motion pending before the trial court, the trial court should nevertheless have the discretion on remand to refuse to rule on the motion. *See* Resp. Return at 2–4. As explained below, Respondents' arguments misapprehend the plain language of Rule 52, are contrary to precedent from South Carolina and other jurisdictions, and are inconsistent with the intent and spirit of the procedural Rules.

ARGUMENT

The crux of the arguments before this Court is whether there is a timely-filed motion pending before the trial court. If there is, then remand (or dismissal) without prejudice to refile the appeal is appropriate, and upon remand the trial court may not disregard this Court's ruling by refusing to rule on the post-trial motion. If there is not a timely-filed motion before the trial court, then neither remand nor dismissal without prejudice are warranted.¹ As explained below, a

¹ Contrary to Respondents' argument, there is no third option whereby Appellants are forced into a jurisdictional twilight zone in which this Court sends the matter back to the trial court but the trial court refuses to rule on the post-trial motion, leaving Appellants no chance to appeal the underlying judgment. The post-trial motion either is pending or is not pending. Remand (or dismissal) is appropriate only if a motion is pending, in which case the trial court is obliged to rule on it, and either party is free to appeal from that ruling. *See Hudson v. Hudson*, 290 S.C.

post-trial motion was timely filed and is pending, and this matter should be returned to the trial court for disposition of that motion with leave to subsequently refile the notice of appeal.

The question of whether a timely-filed Motion to Amend is pending before the trial court is resolved by reference to the language of Rule 52(b), SCRCP, which states that a Motion to Amend shall be “made *not later than 10 days after* receipt of written notice of entry of judgment.” Defendants’ Motion to Amend satisfies the Rule’s requirement: it was made prior to the expiration of 10 days after the parties received written notice of the entry of judgment. Simply put, the rule establishes a final deadline beyond which a motion may not be filed, but does not say *anything* about the earliest such a motion can be filed. Stated differently, the plain language of the rule prohibits filings that are *late*, but does not prohibit filings that are “early.”

Though South Carolina’s appellate courts have not previously ruled on this precise question, courts of other jurisdictions to consider this scenario agree that—as Appellants argue here—remand is appropriate for the trial court to rule on a party’s Motion to Amend filed prior to the entry of judgment. *See Haynes v. Troxel*, 670 P.2d 812, 813 (Colo. Ct. App. 1983) (“[The Rule] specifies that . . . ‘[a] motion to alter or amend the judgment may be filed but *not later than* fifteen days after entry of the judgment.’ There is nothing in the rules prohibiting early filing; they only proscribe motions filed too late. Therefore, this matter must be remanded for consideration of plaintiffs’ motions on their merits.”) (second alteration and emphasis in original); *Hawkins v. Hawkins*, 883 S.W.2d 622 (Tenn. Ct. App. 1994) (holding a motion to alter or amend a judgment, though filed before the entry of final judgment, was timely, and also noting that “[i]n construing Rule 59(e),” which states a motion to alter a judgment shall be filed

215, 216, 349 S.E.2d 341, 342 (1986) (remanding for ruling on post-trial motion and stating, “Any party can appeal within ten (10) days after the order disposing of the post-trial motion.”).

“not later than 10 days after entry of the judgment,” “the federal courts have consistently held a pre-judgment motion is ‘timely’”).

Not only is this interpretation consistent with the language of Rule 52(b), but it also comports with the aims of fairness and equity that undergird the South Carolina Rules. *See* Rule 1, SCRCP (noting that the rules of procedure shall be construed to secure to achieve a “just” resolution of every action); *Diamond Jewelers of Spartanburg, Inc. v. Naegele Outdoor Advertising Co.*, 290 S.C. 260, 349 S.E.2d 888 (1985) (remanding for trial court to rule on the appellant’s post-trial motions and noting “it is inequitable in this case to strictly apply the ten days from entry of judgment rule to preclude its post-trial motions”). The order Defendants sought to amend is essentially the same order formally filed two days later. The formality of filing made no difference, and there was no need under the Rules or in practical effect for Defendants to file a duplicate motion making identical arguments challenging an order whose rulings were substantively identical to the version previously circulated by the court.

Conclusion

For the foregoing reasons, Appellants respectfully request this Court remand the matter to the trial court with leave to refile the appeal following the trial court’s ruling or declining to rule

on the Motion to Amend. In the alternative, Appellants request this Court construe this motion as a request for dismissal without prejudice to refile following the trial court's decision.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: Timothy E. Madden

Timothy E. Madden
SC Bar No. 11786
E-Mail: tim.madden@nelsonmullins.com
104 South Main Street / Ninth Floor
Post Office Box 10084 (29603-0084)
Greenville, SC 29601
(864) 250-2300

Attorney for Appellants

August 14, 2017
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas
R. Ferrell Cothran, Circuit Court Judge

Case No. 2015-CP-43-596
Appellate Case No. 2017-000998

RECEIVED

AUG 14 2017

SC Court of Appeals

Paul Branco and Branco Investments,
Inc., d/b/a Great American Cookie Co.,..... Respondents,

v.

Hull Storey Retail Group, LLC, and
Sumter Mall, LLC Appellants,

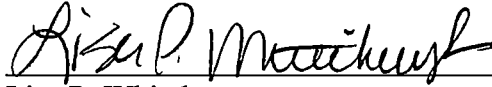
PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Hull Storey Retail Group, LLC, and Sumter Mall, LLC, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address:

Pleadings: Appellants' Amended Reply in Support of the Motion for Remand Without Prejudice for the Disposition of Their Post-Trial Motion

Counsel Served: Patrick M. Killen
MCGOWAN, HOOD & FELDER, LLC
E-Mail: pkillen@mcgowanhood.com
28 N. Main Street
Sumter, SC 29150
(803) 774-5026

John L. Warren, III
Simmons Law Firm, LLC
E-Mail: jwarren@simmonsfirm.com
1711 Pickens Street
Columbia, SC 29201
(803) 779-4600

A handwritten signature in black ink, appearing to read "Lisa P. Whitehurst", written over a horizontal line.

Lisa P. Whitehurst
Administrative Assistant

August 14, 2017

Nelson Mullins

Nelson Mullins Riley & Scarborough LLP
Attorneys and Counselors at Law
104 South Main Street / Ninth Floor / Greenville, SC 29601
Tel: 864.250.2300 Fax: 864.250.2328
www.nelsonmullins.com

Timothy E. Madden
Tel: 864.250.2279
Fax: 864.250.2381
tim.madden@nelsonmullins.com

August 14, 2017

Hand Delivered

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

RE: Branco *et al.* v. Hull Storey Retail Group, LLC *et al.*
Appellate Case No. 20017-000998
Civil Action No. 2015-CP-43-596
Our File No. 53746/01500

RECEIVED

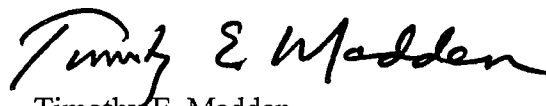
AUG 14 2017

SC Court of Appeals

Dear Ms. Kitchings:

Enclosed please find the original and seven copies of Appellants' Amended Reply in Support of the Motion for Remand Without Prejudice for the Disposition of Their Post-Trial Motion in the above-referenced matter. Counsel realized the Reply filed earlier today contained an inadvertent omission in the fourth sentence of the Background section and in the final two sentences of the Argument section, which may be relevant to the Court's consideration. No other alterations have been made to the filing. We ask that you withdraw the Reply filed earlier this afternoon and in its place file this Amended Reply. We ask that you file the original and return a clocked-in copy to us via our courier. A copy of this filing has been served by mail on opposing counsel.

Very truly yours,



Timothy E. Madden

TEM/tem

Enclosures

cc: Patrick M. Killen, Esq.
John Warren, Esq.