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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DeAndrea G. Benjamin, Circuit Court Judge

Case No. 2011-CP-40-05170R

Jerry Gadson and Shelia Gadson, Appellants,
v.
Caroline Deloatch and Bank of America, Respondents.

Motion to Strike Portions of Record on Appeal

Pursuant to Rules 210 and 240 of the South Carolina Appellate Court Rules, Respondents Caroline Deloatch and Bank of America ("Bank of America) move this Court for an order striking items improperly included in the Record on Appeal by Appellants. In this matter, Appellants included several items in the Record on Appeal that were not presented to the trial court as required by Rule 210(c) of the Appellate Court Rules. Most troubling, Appellants include items on pages 78 and 79 of the Record on Appeal despite the fact that Appellants never provided these items to Bank of America at any stage of this litigation. In fact, Bank of America has never seen these items until their inclusion in the Record on Appeal. These items, therefore, should be struck from the Record on Appeal.

In the Record on Appeal, Appellants included a (1) letter dated December 6, 2010 on page 78 of the Record, and (2) "Plaintiff's Answers to Defendant's (sic)

Requests for Admission” dated December 6, 2010, on page 79 of the Record. This Court should strike these items from the record for several reasons. First, these items were not presented to the trial court. Rule 210(c), SCACR, provides that the “Record shall not, however, include matter which was not presented to the lower court or tribunal.” Despite the key issue in this appeal centering on Appellants’ failure to timely respond to Bank of America’s Requests for Admissions, Appellants did not present these alleged responses to the trial court.

At the hearing on the motion for summary judgment, Bank of America asserted that Appellants’ failure to answer the Requests for Admissions eliminated all genuine issues of material fact from this matter. Despite bank of America’s position, Appellants never asserted that they had responded¹ to the Requests for Admissions on December 6, 2010, nor did Appellants provide the letter dated December 6, 2010 (included on page 78 of the Record) or “Plaintiff’s Answers to Defendant’s (sic) Requests for Admission” dated December 6, 2010 (included on page 79 of the Record) to the trial court for consideration. To the contrary, Appellants admitted to the circuit court that they had never responded.

Rather than present the trial court with these purported December 6, 2010 responses, Appellants filed a Motion to Extend Time to Respond to Bank of America’s Request for Admission and/or Motion to Withdraw Admissions filed with the circuit court on January 31, 2012. {R.114}. In that motion, Appellants sought an extension

¹ Even if Appellants had answered Bank of America’s Requests for Admission on December 6, 2010, which they did not do, the circuit court still properly deemed the answers admitted and granted summary judgment to Bank of America. The December 6, 2010 responses would have still failed to meet the temporal mandates of Rule 36(a) of the South Carolina Rules of Civil Procedure. Bank of America served the Requests for Admission on Appellants on April 9, 2010. Thus, the response to the Requests for Admission was due no later than May 10, 2010. Any response given on December 6, 2010 would have been 7 months untimely pursuant Rule 36(a), SCRCF.

of time to file their answers to the Requests for Admission. There would have been no need to request an extension of time to answer the Requests for Admission at that time if Appellants had in fact answered on December 6, 2010. Importantly, Appellants **admitted** that they never responded to the Requests for Admission in that same filing. In that motion, Appellants admitted as follows: (1) that the “Gadsons could not respond to [Bank of America’s] request” in reference to the Requests for Admission; (2) that “[t]he Gadsons would have responded to or would have at least sought to Defendants’ request for admission (sic);” (3) that “[b]ecause Gadsons did not respond to these and other such requests, they are now deemed admissions (sic);” and (4) that “[t]he reason behind Gadson’s failure to respond (sic). . . .” {Id. at p. 2, 3, and 5; R. 116, 117, 118, 121}.

In sum, Appellants failed to provide the letter dated December 6, 2010 (included on page 78 of the Record) or “Plaintiff’s Answers to Defendant’s (sic) Requests for Admission” dated December 6, 2010 (included on page 79 of the Record) to the trial court for consideration. Further, Appellants’ admissions to the contrary in the Motion to Extend Time to Respond to Bank of America’s Request for Admission and/or Motion to Withdraw Admissions refute any logical claim that Appellants responded on December 6, 2010. Because these items were not presented to the trial court for consideration, inclusion in the Record on Appeal violates the mandates of Rule 210(c), SCACR. This Court should strike the letter dated December 6, 2010 (included on page 78 of the Record) and “Plaintiff’s Answers to Defendant’s (sic) Requests for Admission” dated December 6, 2010 (included on page 79 of the Record) from the Record on Appeal.

This Court should also strike the letter dated December 6, 2010 (included on page 78 of the Record) and “Plaintiff’s Answers to Defendant’s (sic) Requests for Admission” dated December 6, 2010 (included on page 79 of the Record) from the Record on Appeal for a second reason. In their briefing to this Court, Appellants argued, for the first time at any stage of this litigation, that they responded on December 6, 2010 to Bank of America’s Request for Admissions. Prior to this brief, Bank of America had never heard of such a claim. **Again, this was the first time that this argument had ever been presented in this matter.** As a result, Bank of America responded to this claim in its Initial Respondents’ Brief as follows:

Bank of America must initially respond to the Gadsons’ incorrect representations to this Court that they did respond to Bank of America’s Requests for Admission, albeit untimely. This assertion is unequivocally untrue. To be clear: the Gadsons still, to date, have **never** responded or answered Bank of America’s Requests for Admission. In fact, the Gadsons admitted to the circuit court that they never responded. The Gadsons cannot take a position to the contrary at this stage of the litigation. This Court should disregard this claim.

. . .

As noted in the statement of facts, *supra*, the Gadsons provided answers and responses to the First Interrogatories and Request for Production to Bank of America on December 6, 2010. That correspondence did **not** contain any responses/answers to the Requests for Admission. {See Letter enclosing Answers and Responses to First Interrogatories and Request for Production dated December 6, 2010; R. 134}. The Gadsons did **not** answer or respond to the Requests for Admission at that time.

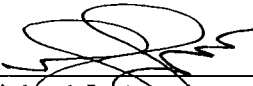
{Brief of Bank of America p. 6-7}.

In response to this argument, Appellants included the letter dated December 6, 2010 and “Plaintiff’s Answers to Defendant’s (sic) Requests for Admission” dated December 6, 2010 in the Record on Appeal. The inclusion of these documents is especially troubling because Appellants never provided these items to Bank of America at any stage of this litigation. As noted, Bank of America had never seen these items until their inclusion in the Record on Appeal. **In short, Bank of America questions the authenticity of these items.**² Thus, the letter dated December 6, 2010 (included on page 78 of the Record) and “Plaintiff’s Answers to Defendant’s (sic) Requests for Admission” dated December 6, 2010 (included on page 79 of the Record) should not be included in the Record on Appeal. This Court should strike them from the Record on Appeal. Failing that, Bank of America requests, that at a minimum, this Court require Appellants’ counsel to submit an affidavit attesting to the authenticity of these documents, including the details regarding their creation, and attest to that they were, in fact, served on Bank of America as claimed in the items (because Bank of America avers that no service was ever made).

{Signature Page Follows}

² As noted in the statement of facts of Bank of America’s initial brief, Appellants provided answers and responses to the First Interrogatories and Request for Production to Bank of America on December 6, 2010. That correspondence did not contain any responses/answers to the Requests for Admission. {See Letter enclosing Answers and Responses to First Interrogatories and Request for Production dated December 6, 2010; R. 134}. **Appellants did not answer or respond to the Requests for Admission at that time. Appellants did not serve Bank of America with the letter dated December 6, 2010 (included on page 78 of the Record) and “Plaintiff’s Answers to Defendant’s (sic) Requests for Admission” dated December 6, 2010 (included on page 79 of the Record) on December 6, 2010.**

NELSON MULLINS RILEY & SCARBOROUGH LLP

By:  _____

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December 3, 2012

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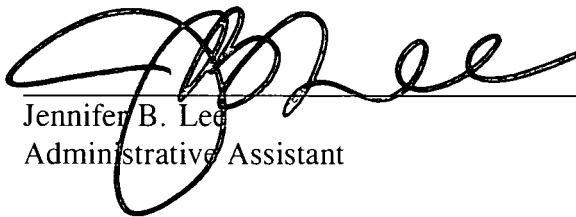
Jerry Gadson and Shelia Gadson, Appellant.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for defendants, Caroline Deloatch and Bank of America, 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(es):

Pleadings: Motion to Strike Portions of Record on Appeal

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Jennifer B. Lee
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December 3, 2012

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December 3, 2012

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
1015 Sumter Street - 5th Floor
Columbia, SC 29201

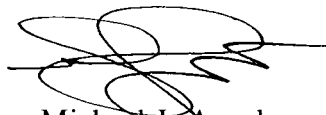
RE: Jerry Gadson and Sheila Gadson vs. Caroline Deloatch and Bank of America
C/A No. 2009-CP-40-03817
Our File No. 05100/02104

Dear Ms. Kitchings:

Enclosed please find an original and seven copies of a Motion to Strike Portions of Record on Appeal in the above-referenced matter. Please file the original and return a clocked-in copy to me via our courier. Should you have any questions, please do not hesitate to contact me.

By copy of this letter, I am hereby serving opposing counsel.

Very truly yours,



Michael J. Anzelmo

MJA:jlee
Enclosures

cc: Mary P. Miles, Esquire

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