

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Honorable S. Phillip Lenski, Administrative Law Judge

RECEIVED
OCT 10 2017
SC Court of Appeals

Appellate Case No. 2017-001260

(Case No. 2012-ALJ-17-0031-CC)

South Carolina Department of Revenue..... Appellant/Respondent,

v.

Duke Energy Corporation..... Respondent/Petitioner.

**REPLY TO APPELLANT’S RESPONSE IN OPPOSITION TO RESPONDENT’S
MOTION TO DISMISS**

Respondent Duke Energy Corporation (“Duke” or “Respondent”), through its undersigned counsel, submits this Reply to Appellant’s Response in Opposition to Respondent’s Motion to Dismiss.

INTRODUCTION

It is undisputed that no attorney representing Duke in this case was properly served notice that the South Carolina Department of Revenue (the “Department” or “Appellant”) had appealed the decision of the Administrative Law Court (“ALC”).

The Department’s Response offers several arguments as to why the Department’s defective service subjects Duke to the jurisdiction of this Court. The common theme is that because the Department *tried* to serve one of the three lawyers representing Duke in this case, by sending a notice for an entirely unrelated case, and actually served another lawyer who had *previously*

represented Duke in a *different* case, but did not represent Respondent in the instant case, this appeal should be allowed to proceed. The Department's argument conflicts with the South Carolina appellate court rules which provide this Court with jurisdiction only if and when an appellant serves its notice of appeal on *all parties of record* within thirty days of receipt of an appealable decision. Serving a notice of appeal for an entirely different and unrelated case or serving a lawyer who does not represent the Respondent in this case does not constitute proper service under the rules and thus lacks any legal effect. Accordingly, this case should be dismissed for insufficient service of process.

AUTHORITY AND ARGUMENT

1. Appellant did not properly serve Respondent or Respondent's Counsel.

The South Carolina Supreme Court has unequivocally stated that “[t]he requirement of service of the notice of appeal is jurisdictional, *i.e.*, if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to ‘rescue’ the delinquent party by extending or ignoring the deadline for service of the notice.” *USAA Property & Cas. Ins. Co. v. Clegg*, 661 S.E.2d 791, 795 (S.C. 2008) (*quoting Elam v. S.C. Dep’t of Transp.*, 602 S.E.2d 772, 775 (S.C. 2004)). Rule 203 of the South Carolina Appellate Court Rules (“SCACR”) (“Rule 203”) requires the notice of appeal be served within thirty days from the date of the appealable decision. Rule 203(b)(6) and (d)(2).

As explained more fully in Respondent's Memorandum of Law in Support of its Motion to Dismiss for Insufficiency of Service of Process (Resp. Mem. at 3-4, 6), neither Mr. Maybank nor Mr. Friedman represented Duke in this case, and Mr. Friedman never received the Department's notice of appeal because it was sent to the wrong address. Mr. Tresh, who represented Duke in this case, was sent a notice of appeal for an entirely different case.

(Department's Response at 3.) No attempt was made by the Department to serve the two other lawyers who represented Duke in this case before the ALC. Indeed, if it had not been for Mr. Tresh's diligence to inquire with the Department as to why he was receiving a notice of appeal for another case, Duke might have still been unaware of the Department's appeal.¹

The Department argues that the mere "placing its Notice of Appeal and proof of service in the United States Mail," constitutes a timely and proper service on Mr. Tresh that vests this Court with jurisdiction under Rule 203(b)(6) (Department's Response at 5), even though it was the wrong notice of appeal. Rule 203 is clear that an appellant must serve a notice of appeal on the opposing party "by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of court." Rule 203(a); Rule 262, SCACR. "Delivery of a copy" means "handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there be no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving a copy at his dwelling place or usual place of abode with some person of suitable age and discretion then residing therein." *Id.* An *attempted* service of process or service of process via e-mail is not listed as an acceptable method of service under Rule 203. Neither Mr. Tresh nor the other two lawyers representing Duke in this case (Ms. Marsha Ward or Mr. Zack Atkins²) were served a copy of the Department's notice of appeal for this case – "by delivering" or "mailing it" - within the requisite thirty-day period for appealing the ALC decision. Indeed, as of the filing of this memorandum, none of the attorneys of record for Duke have been served in accordance with Rule 203.

¹ The Department only e-mailed the notice of appeal after Mr. Tresh called the Department.

² Contrary to the Department's allegation, Mr. Atkins was listed on the firm's website at the time the notice of appeal was filed with this Court, and continued to be listed on the website until his departure from Everheds Sutherland (US) LLP on June 24, 2017.

Appellant also argues that even if its service on Mr. Tresh were invalid, its service of process was valid because it mailed a copy of the notice of appeal to lawyers (Mr. Friedman and Mr. Maybank) who did not represent Duke in this case, but had represented Duke in a different case. That cannot be – and is not - the rule for proper service in South Carolina. If it were, an appellant could simply serve any lawyer who has at any point in time represented a respondent, with no regard to whether that lawyer actually still represents the respondent. Such an absurd and unjust result cannot be – and is not – supported under South Carolina law. Accordingly, Appellant’s attempted service of process lacks any legal effect and this Court thus has no jurisdiction to review this case.

2. Whether or not Respondent was prejudiced by Appellant’s error is irrelevant.

Appellant asserts that its appeal should not be dismissed because Respondent was not prejudiced by its error. However, whether or not Respondent is prejudiced by the Department’s failure to make proper service of process is not relevant to the Court’s inquiry. Rule 203’s requirement of service of process is categorical and not conditioned upon whether the lack of service would prejudice a receiving party.

Appellant further argues that its failure to make proper service of process in this case amounts to a mere clerical error that can be corrected. Generally, a clerical error is defined as a mistake in writing or copying. *Dion v. Ravenel, Eiserhardt Assocs.*, 449 S.E.2d 251, 253 (S.C. Ct. App. 1994). The Department’s failure to make proper service of process is neither a mistake in writing nor copying and is therefore not a clerical error.³

³ However, none of the cases cited by the Department lend support for that proposition. Two of the three cases cited - *Moody v. Dickinson.*, 32 S.E. 563 (S.C. 1899); and *Charleston Lumber Co., Inc. v. Miller Housing Corp.*, 458 S.E.2d 431, (S.C. Ct. App. 1995) - are inapplicable because each of these cases dealt with clerical errors in a *timely* notice of appeal. The third case - *State v. Scott*, 571 S.E.2d 700, (S.C. 2002) - is also inapplicable because it did not involve untimely service as the error committed by the serving party was corrected before the expiration of the deadline applicable in that case.

3. Appellant has not shown good cause under Rule 260.

A failure to make proper service of process under Rule 203 can only be excused upon a showing of good cause. Rule 203(d)(3); Rule 260, SCACR (“Rule 260”). Appellant summarily asserts that it “acted in good faith and its clerical errors satisfy the good cause standard of Rule 260.” (See Department’s Response at 7.)

In analyzing the good cause requirement under Rule 260, South Carolina courts have relied on South Carolina precedent explaining the good cause standard under Rule 55(c), SCACR, governing default judgments (“Rule 55”). *Harl C. Duffey, Jr., Appellant*, 04-ALJ-08-0392-AP, 2005 WL 902872, (Mar. 22, 2005). To show good cause, a party must “provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice.” *Sundown Operating Co. v. Intedge Indus., Inc.*, 681 S.E.2d 885, 888 (S.C. 2009).

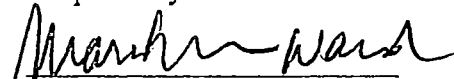
Appellant has not provided any explanation for its errors other than to summarily state that “its efforts to timely serve the notice of appeal constitute good cause sufficient to warrant reinstatement of the appeal.” (Department’s Response at 7). Nor has Appellant demonstrated or explained why the interests of substantial justice are served by the Court excusing its substantial error. Consequently, Appellant has not demonstrated good cause under Rule 260.

CONCLUSION

For the foregoing reasons, Duke respectfully requests that the Court enter an order granting its Motion and dismissing this action pursuant to Rule 203(d)(3).

DATED this 10 day of October, 2017.

Respectfully Submitted


Marsha A. Ward, Esq. SC Bar #5823
Eric S. Tresh, Esq. (*Pro Hac Vice*)

Maria M. Todorova, Esq. (*Pro Hac Vice*)
Eversheds Sutherland (US) LLP
999 Peachtree Street NE, Suite 2300
Atlanta, Georgia 30309
Tel. No. (404) 853-8000
Fax No. (404) 853-8806

Attorneys for Duke Energy Corporation

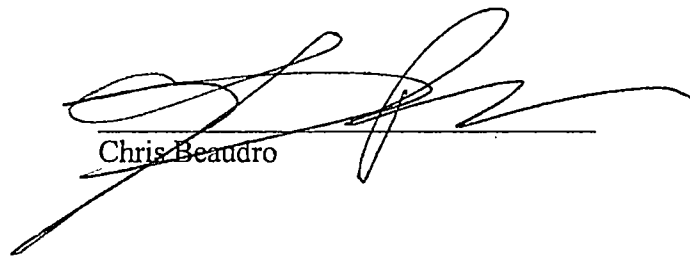
CERTIFICATE OF SERVICE

I certify that I have this day served a copy of the foregoing REPLY TO APPELLANT'S RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS by United States mail, postage prepaid, addressed as follows:

Sean G. Ryan
Jason Luther
Counsel for Litigation
South Carolina Department of Revenue
P.O. Box 12265
Columbia, SC 29211-9979

RECEIVED
OCT 10 2017
SC Court of Appeals

This 10 day of October, 2017.


Chris Beaudro

October 10, 2017

Via Hand Delivery

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

RECEIVED
OCT 10 2017
SC Court of Appeals

**Re: Duke Energy Corporation v. South Carolina Department of Revenue
Appellate Case No. 2017-001260**

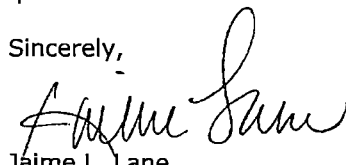
Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of the Reply to Appellant's Response in Opposition to Respondent's Motion to Dismiss on behalf of Duke Energy Corporation in the above-referenced matter.

Please file the original and six (6) copies and return one file-stamped copy to the awaiting messenger.

Thank you for your assistance in this matter. Please do not hesitate to contact me with any questions.

Sincerely,



Jaime L. Lane
Paralegal Specialist

Enclosures

cc: Sean G. Ryan, Esq. (via U.S. Mail)
Jason P. Luther, Esq. (via U.S. Mail)
Marsha A. Ward, Esq.
Eric S. Tresh, Esq.
Maria M. Todorova, Esq.