THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

RECEIVED
FEB 15 2018
SC Court of Appeals

Case No. 2016-CP-26-00673
Case No. 2016-CP-26-00674
Case No. 2016-CP-26-00743
Case No. 2016-CP-26-00744

Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated, ... Plaintiffs,

v.

Ocean Front Spa Horizontal Property Regime, Inc., Bill Cameron, Walter Jordan, Ralph Jump, Stanley Jordan, Ray Coghill, and John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc., ...Defendants,

And

Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated, ... Plaintiffs,

v.

The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Wayne Urban, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc., ...Defendants,

And

Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders, ... Plaintiffs,

v.

K.A. Diehl and Associates, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Walter Jordan, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc., ... Defendants,

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Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders of Ocean Front Spa Horizontal Property Regime, Inc., ... Plaintiffs,

v.

Ocean Front Spa Horizontal Property Regime, Inc., Walter Jordan, Ralph Jump, Ray Coghill, John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Ken Perkins, John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc., and K.A. Diehl and Associates, Inc. .....Defendants,

Of whom Mark Dos Santos is the Appellant,

And

Ocean Front Spa Horizontal Property Regime, Inc., Walter Jordan, Ralph Jump, Ray Coghill, John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Ken Perkins, John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc., and K.A. Diehl and Associates, Inc., are the Respondents.

REPLY MEMORANDUM IN SUPPORT OF RESPONDENTS' MOTION TO DISMISS

Respondents submit this Reply Memorandum in Support of their Motion to Dismiss Appellant Mark Dos Santos' ("Santos") consolidated appeal based on the untimeliness of his Notice of Appeal.

Santos' Return to Respondents' Motion to Dismiss does not contest or contradict any of the following undisputed facts:

- On December 5, 2017, the trial court entered a consolidated Order Denying Plaintiffs' Motions to Reconsider ("Order on Appeal"), which denied Plaintiffs' Motions to Reconsider in all of the above-captioned cases (C.A. Nos. 2016-CP-26-00673, 2016-CP-26-00674, 2016-CP-26-00743, and 2016-CP-26-00744) (collectively, the "Actions").[1]
- Santos' counsel before the trial court received "written notice of entry of the" Order on Appeal on December 5, 2017, through the court's auto-notification system.[2]
- The consolidated Order on Appeal affirmed that the single, consolidated Settlement Agreement that resolved all four Actions is valid and binding.
- Santos did not file his Notice of Appeal until January 8, 2018, a full 34 days after his receipt of written notice of entry of the Order on Appeal.

Rather than dispute the above facts—which he cannot—Santos offers two arguments in an attempt to resuscitate his untimely appeal.

Santos' primary contention is that the Order on Appeal "may be interlocutory and not yet ripe for appeal," which may justify dismissal of the entire appeal.[3] This argument is perplexing: the act of filing the appeal and attempting to invoke this Court's jurisdiction constitutes Santos'

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1 The Order on Appeal (electronically filed in the -673 Action on December 5, 2017) is included as Attachment C to the initial Memorandum in Support of Respondents' Motion to Dismiss, and is referenced in the initial Memorandum as "Order 2".

2 Attachment D to the initial Memorandum in Support of Respondents' Motion to Dismiss.

3 Appellant's Return to Respondents' Motion to Dismiss ("Return") at 4.

assertion that the Order on Appeal was immediately appealable.[4] The Court should disregard Santos' newfound and convenient argument to the contrary.

Moreover, the nature of the Order on Appeal makes clear that it was immediately appealable. In enforcing the Settlement Agreement, the trial court fully and finally determined the rights of the named parties, including Santos, and prevented trials on the merits in the Actions. The only step remaining before the trial court is the fairness hearing under Rule 23(c), which addresses and resolves the rights of the absent class members, not the named parties (including Santos) who individually entered into the Settlement Agreement.

Santos' alternative contention is equally puzzling: while he concedes that his appeal of the -673 Action was untimely, he argues that his appeal of the other three actions complies with Rule 203, SCACR. This argument fails for two reasons.

First, in so arguing, Santos relies on an interpretation of Rule 203 not found in the Rule. Santos contends that his 30 days under Rule 203 begins to run "after receipt of entry of a final order *in that particular case*." (Return at 7.) Rule 203 contains no such limitation. Rather, Rule 203 clearly mandates the commencement of the 30-day period upon "receipt of written notice of entry of the order or judgment" on appeal.

Santos received such written notice on December 5 when the trial court electronically filed the single, consolidated Order on Appeal in the -673 Action. Santos all but acknowledges this fact. He filed a single Notice of Appeal, to which he attached and referenced a single copy

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[4] Santos' betrays a lack of confidence in this ripeness argument, as he waffles between suggesting that his appeal "may be" premature to asserting that the Order on Appeal "is not immediately appealable." The following is a sampling of his equivocation: (1) the Order on Appeal "may be interlocutory and not yet ripe for appeal" (Return at 4); (2) the Order on Appeal is "likely not immediately appealable" (Return at 5); (3) the Order on Appeal is flatly "not immediately appealable" (Return at 6); and (4) "there may be a sufficient basis to dismiss the appeal as being interlocutory." (Return at 8.)

of the Order on Appeal (albeit a copy that was electronically filed on December 7 rather than the Order on Appeal filed December 5). This act makes clear Santos' understanding that the Order on Appeal was a single, consolidated Order addressing all four Actions.

Santos' alternative argument fails for a second reason, because of the result that naturally flows from the untimeliness of the appeal of the -673 Action. Once the appeal of the -673 Action is declared untimely—a conclusion that Santos has already acknowledged to be true—the trial court's holding that the Settlement Agreement is valid and binding becomes the law of the case and is binding for preclusion purposes. Because the Settlement Agreement was a single, consolidated Agreement that resolved all of the Actions, the validity and binding nature of the Settlement Agreement in any one of the Actions mandates its validity and binding nature in all of the Actions. Thus, applying preclusion doctrines, the untimely nature of the appeal in the -673 Action will preclude Santos from pursuing his appeal in the other three Actions, as a matter of law, as he is barred from arguing that the Settlement Agreement is not binding or otherwise invalid.

Santos' appeal should be dismissed, in its entirety.

A. The Order on Appeal is Immediately Appealable, as it Conclusively Determined the Rights of All Named Parties in the Actions.

Santos filed this appeal and challenged the Order on Appeal on January 8, 2018. In so doing, Santos represented to this Court his belief and understanding that the Order on Appeal was immediately appealable. Now that Santos recognizes that his appeal is untimely, he has changed course and now contends that the Order on Appeal is "likely not immediately appealable." While the rules do not prohibit Santos from making such a reversal, doing so to escape his untimely appeal rings hollow.

Santos' argument is analogous to the following scenario:

- A plaintiff files a complaint;
- The plaintiff fails to properly serve the complaint within 120 days or within the statute of limitations, rendering the causes of action untimely under the statute of limitations;
- The defendant moves to dismiss, with prejudice, based on the untimely nature of the action; and
- The plaintiff, in response to the motion to dismiss, argues that the action was not ripe after all and that the case should be dismissed without prejudice on that basis.

It would be odd, indeed, for a plaintiff to make such an argument. If the plaintiff genuinely believed the action was not ripe, why would the plaintiff file the action in the first place?

This is identical to Santos' argument regarding the appealability of the Order on Appeal. If Santos genuinely believed the Order on Appeal was not ripe for review, he would not have filed his appeal to begin with.

Placing aside Santos' newfound concern for ripeness and his confusing contention that the Order on Appeal is not immediately appealable, the controlling authority demonstrates that the Order on Appeal was immediately appealable.[5] Section 14-3-330 of the South Carolina Code

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[5] Santos concedes that this is a novel issue under South Carolina case law. However, the only case to which Santos cites that is in any way comparable is a federal decision holding that "the correctness of a decision regarding the enforceability of a class action settlement is a controlling question of law amenable to interlocutory review." *In re Frascella Enters.*, No. 08-100, 2008 WL 4155676, *2 (E.D. Pa. Sept. 10, 2008). Santos attempts to distinguish this holding by referencing South Carolina cases regarding the appealability of class certification decisions. Those cases are entirely inapposite to the appealability of an order enforcing settlement. Regardless, the controlling statute makes clear that the Order on Appeal was ripe for review.

of Laws dictates when an order is immediately appealable. Subsections (1) and (2)(a) of the statute are both applicable to and allow for the immediate review of the Order on Appeal.

Section 14-3-330(1) allows parties to immediately appeal "[a]ny intermediate judgment, order or decree . . . involving the merits." S.C. Code Ann. § 14-3-330(1). The Order on Appeal clearly "involv[ed] the merits": by enforcing the Settlement Agreement, the trial court thereby prevented the parties from holding trials on the merits of the Actions.

Section 14-3-330(2) allows parties to immediately appeal "[a]n order affecting a substantial right . . . when such order . . . in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action." S.C. Code Ann. § 14-3-330(2)(a). The Order on Appeal unquestionably "affect[ed] a substantial right" of the parties in the Actions. By holding that the Settlement Agreement was valid and binding on the parties, the trial court precluded them from any further litigation of the Actions. The Order on Appeal also "prevent[ed] a judgment from which an appeal might be taken," as the enforcement of the Settlement Agreement precluded a trial (or other judgment) on the merits in the Actions as to the named Plaintiffs and the Defendants.

After the Order on Appeal was entered on December 5, the only matter remaining before the trial court was to hold a fairness hearing under Rule 23(c) to allow absent class members the opportunity to receive notice of and opt-out of the settlement to which the named parties had agreed. The rights of the named parties have already been fully and finally determined through the Order on Appeal, and the procedural requirement of the fairness hearing for absent class members does not in any way render the Order on Appeal unripe for review as to the named parties.

B. **Santos Received Written Notice of Entry of the Order on Appeal when the Trial Court Electronically Filed it in the -673 Action on December 5, and the Subsequent Electronic Filing of the Order on Appeal in the other Actions does not Remedy His Untimeliness.**

The language of Rule 203(b)(1), SCACR, is straightforward: it requires a notice of appeal to be served "within thirty (30) days after receipt of written notice of entry of the order or judgment." Santos admits (or does not dispute) that (1) the Order on Appeal was electronically filed in the -673 Action on December 5, (2) he received written notice of entry of the Order on December 5, (3) the Order on Appeal applied to all four Actions, (4) the Order on Appeal found the Settlement Agreement to be valid and binding with respect to all four Actions, (5) the Order on Appeal contained the captions of all four Actions, (6) his January 8 Notice of Appeal contained the captions of all four Actions, and (7) his Notice of Appeal relied on the single, consolidated Order on Appeal. Thus, his 30-day deadline under Rule 203(b)(1) was triggered on December 5, and his appeal on January 8 was untimely.

Santos' Return hopes to persuade the Court that he really is appealing four separate orders. His Notice of Appeal dispels this suggestion: it is a single, consolidated pleading that makes clear that he is appealing a single, consolidated "Order Denying Plaintiffs' Motion to Reconsider." Indeed, Santos' includes a single copy of the Order on Appeal (albeit a copy filed on December 7, 2017) with his Notice of Appeal. This demonstrates his acknowledgment that a single copy of the Order, electronically filed in one of the four Actions, was sufficient to place him on notice of the Order on Appeal and trigger his 30-day deadline under Rule 203(b)(1), SCACR.

Santos' appeal was untimely, and he is jurisdictionally barred from pursuing his appeal. *See Quality Trailer Prods., Inc. v. CSL Equip. Co.*, 349 S.C. 216, 221, 562 S.E.2d 615, 618 (2002) ("timely service of the notice of intent to appeal is a jurisdictional requirement, and th[e

appellate] Court has no authority to extend or expand the time in which the notice of intent to appeal must be served." (citing *Mears v. Mears*, 287 S.C. 168, 337 S.E.2d 206 (1985))). Respondents' Motion to Dismiss must be granted accordingly.

C. Santos' Untimely Appeal in the -673 Action Precludes Him from Pursuing His Appeal in any Action, as the Valid and Binding Nature of the Settlement Agreement in the -673 Action Prevents any Argument to the Contrary in the other Actions.

Santos's final argument is that even if the Order on Appeal is immediately appealable, the appeal was untimely only for the -673 Action, and his appeal was timely for the other three Actions. This concession actually mandates dismissal of his appeal in all of the Actions.

The Settlement Agreement was a single, consolidated Agreement that covered all four Actions. After the issues were fully and fairly litigated by the named parties, the Order on Appeal enforced the Settlement Agreement, finding it valid and binding in all four Actions. Because the appeal of the -673 Action was untimely, the trial court's decision on the validity and binding nature of the Settlement Agreement is now final and no longer subject to challenge of any kind. Santos' attempt to sever the Notice of Appeal to salvage an appeal in the other three Actions contradicts that very holding. Preclusion doctrines will prevent this result. Thus, if the Court grants Respondents' Motion to Dismiss only as to the -673 Action, the appeal of the remaining Actions would be subject to challenge based on *res judicata* and/or collateral estoppel.

This further highlights the conclusion that the Order on Appeal was a single, consolidated Order, and Santos' untimeliness in appealing that Order in the -673 Action renders the appeal untimely in all of the Actions. Santos' appeal must be dismissed as untimely, in its entirety.

D. Conclusion.

The Order on Appeal was an immediately appealable Order under S.C. Code Ann. § 14-3-330, which is precisely why Santos pursued his appeal in the first place. However, Santos did so in an untimely matter, serving his Notice of Appeal 34 days after written notice of entry of the

Order on Appeal. The untimely nature of Santos' appeal is a jurisdictional bar to further pursuit of his appeal, mandating dismissal of the appeal in its entirety. Respondents' Motion to Dismiss must be granted accordingly.

Respectfully submitted,

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February 17, 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

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PROOF OF SERVICE

I certify that I have served the Reply Memorandum in Support of Respondents' Motion to Dismiss on Appellant Mark Dos Santos by sending to his attorneys of record a copy of the same via electronic mail and first class mail, properly addressed, postage prepaid at the following addresses: Kirby D. Shealy III, Adams and Reese LLP, 1501 Main Street, 5th Floor, Columbia, South Carolina 29201; *Kirby.Shealy@arlaw.com.*

February 12, 2018

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February 12, 2018

The Hon. Jenny Abbott Kitchings
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RECEIVED
FEB 15 2018
SC Court of Appeals

RE: **Jim Perkins v. Ocean Front Spa**
Appellate Case No. 2018-000041

Dear Ms. Kitchings:

Please find enclosed the original and seven copies of a Reply Memorandum in Support of Respondents' Motion to Dismiss in the above-referenced matter. Please file the original and return a filed copy to us in the self-addressed, stamped envelope enclosed.

If you have any questions or concerns, please do not hesitate to contact our office. Thank you for your assistance with this matter.

Sincerely,

OGLEREE, DEAKINS, NASH,
SMOAK & STEWART, P.C

Lucas J. Asper

LJA:lah

Enclosures

cc: Kirby D. Shealy, III, Esq., via email and regular mail
Henrietta U. Golding, Esq., via email and regular mail

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