

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M. Strickland, Master-in-Equity

Case No. 2018-00106

CitiMortgage, Inc.,.....

v.

Satara Lopez and Francisco Lopez,.....

Respondent,

Appellants.

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OCT 10 2018

SC Court of Appeals

MOTION TO DISMISS

Respondent CitiMortgage, Inc. (“CitiMortgage”) requests that this Court enter an Order dismissing the above-captioned appeal. This motion should be granted for three reasons: (1) Appellants failed to order transcripts within the time specified by the South Carolina Appellate Court Rules (“SCACR”), (2) the appeal is untimely, and (3) Appellants failed to appeal the only order relevant to their substantive claims for relief.

I. Dismissal is appropriate under Rule 260(a), SCACR.

First, dismissal is warranted for the reasons CitiMortgage detailed in its Return in Opposition to Appellants’ Request for Permission to Order Transcript Out of Time.¹ Appellants

¹ CitiMortgage hereby incorporates the arguments raised in its Return in Opposition, filed August 27, 2018, by reference herein. *See* Rule 207(a)(1), SCACR.

filed their Notice of Appeal on June 6, 2018. Pursuant to Rule 207(a)(1), SCACR, Appellants had ten days in which to order the transcript. Appellants did not meet this deadline.

When the transcript was not ordered within the ten day period, the Clerk of Court sent Appellants a deficiency letter dated June 27, 2018. The letter gave Appellants ten days to file proof of ordering the transcripts along with a letter requesting permission to order out of time. Appellants filed a request for permission, but failed to file proof that the transcripts had been ordered within the ten day deadline.

This Court sent a *second* deficiency letter to Appellants on August 13, 2018. Appellants were given another ten days to file proof that they ordered the transcripts along with a letter requesting permission to order out of time. Once more, Appellants sent a request for permission to order the transcripts out of time, but, to date, have not filed proof that they ordered the transcripts from the court reporters. Moreover, the docket does not reflect acknowledgements from any court reporters.

Rule 260(a), SCACR provides that “[w]henver it appears that an appellant or a petitioner has failed to comply with the requirements of these Rules, the clerk shall issue an order of dismissal.” *Id.* Here, Appellants have not only failed to comply with the appellate court rules but also failed to comply with the Court’s two letters regarding the failure to order transcripts.

Appellants’ contention that they have had “difficulty” in ascertaining the names of the court reporters is without merit, particularly at this juncture. CitiMortgage informed Appellants on August 3, 2018 of the names of the court reporters from the three hearings that took place before the entry of the Order of Judgment of Foreclosure and Sale.² Nevertheless, despite having the

² As CitiMortgage detailed in its Return, CitiMortgage’s counsel emailed the information to counsel for Appellants on August 3, 2018. *See* CitiMortgage Ret. in Opp’n at 4 & Exhibit 1. As

information for over nine weeks, Appellants have not filed any proof that the transcripts were ordered. Appellants have not, and simply cannot, identify any meritorious reason for their failure to accomplish ordering the transcripts, as required by the appellate court rules.

Due to Appellants' disregard of Rule 207(a)(1) and the two deficiency letters from this Court, dismissal is warranted under Rule 260(a). *Wise v. S.C. Dep't of Corr.*, 372 S.C. 173, 174, 642 S.E.2d 551, 551 (2007) ("Whenever it appears that an appellant has failed to comply with the requirements of the SCACR, an order of dismissal shall be issued.").

II. Appellants' appeal is untimely.

Dismissal is also warranted because Appellants failed to timely file their appeal. CitiMortgage brought this action asserting claims for foreclosure, quiet title, and declaratory judgment against John Mitchem ("Mitchem") and the Appellants Satara Lopez and Francisco Lopez. The quiet title and declaratory judgment claims related to a lost quitclaim deed signed by Appellants in 2003 conveying the property to Mitchem. Appellants asserted an affirmative defense (the statute of frauds) and a counterclaim for slander of title, contending they never signed a deed to the property and were still the rightful owners. The Court's order granting partial summary judgment conclusively ruled that Appellants transferred title to the property via the lost quitclaim deed and they did not have any interest in the property after June 27, 2003. Therefore, all claims asserted against Appellants and asserted by them were disposed by this Order, and Appellants no longer had any interest in this case after its entry.

CitiMortgage explained, Wanda K. Ceil with A. William Roberts, Jr. & Associates was the court reporter present for the April 19, 2017 hearing, Amy R. Cope also with A. William Roberts, Jr. & Associates was the court reporter present for the June 29, 2017 hearing, and Sarah E. Young with A. Williams Roberts, Jr. & Associates was the court reporter for the final merits hearing on November 7, 2017. *Id.*

The Court's order, therefore, was "a final order because it left nothing further for determination" as to Appellants. *Olson v. Faculty House of Carolina, Inc.*, 344 S.C. 194, 213, 544 S.E.2d 38, 48 (Ct. App. 2001), *aff'd*, 354 S.C. 161, 580 S.E.2d 440 (2003). *Olson*, like this matter, was a multi-party action, and the court's Order granting summary judgment expressly adjudicated all claims as to one defendant. *Id.* at 214, 544 S.E.2d at 48. The court explained that because the claims were "separate and discrete" from the claims against the other defendant, the fact that the plaintiff's claims continued against the other defendant was "irrelevant." *Id.* The defendant was therefore required to file a timely notice of appeal to meet the appellate jurisdictional requirement. *Id.* The court noted that "[i]n today's world the proliferation of parties is a common occurrence," and to hold otherwise would place a dismissed party "'on hold' indefinitely." *Id.*; *see also* *Rodriguez v. Eline*, No. 2006-UP-048, 2006 WL 7285681, at *3 (S.C. Ct. App. Jan. 20, 2006) (finding that party was required to serve notice of appeal within 30 days of entry of order granting summary judgment on entirety of claims against one party despite other claims remaining pending against separate defendant).

As the Supreme Court has explained, "the ten-day deadline in Rule 59(e) is an **absolute** deadline," and the trial court "does not have the power to alter or amend a final order if more than ten days passes and no Rule 59(e) motion has been served." *Overland, Inc. v. Nance*, 423 S.C. 253, 256-57, 815 S.E.2d 431, 433 (2018) (emphasis added). After 10 days expires, the order becomes a final judgment, "and the aggrieved party's only recourse is to file a notice of intent to appeal." *Id.* A **timely** Rule 59 motion tolls the time for filing a notice of appeal until receipt of written notice of entry of the order ruling on the motion. *Coward Hund Const. Co. v. Ball Corp.*, 336 S.C. 1, 5-6, 518 S.E.2d 56, 59 (Ct. App. 1999) (quoting 12 James W. Moore et al., *Moore's*

Federal Practice ¶ 59.11[4][b] at 59-38 (3d ed. 1999)). A Rule 60 motion, however, does not have any tolling effect of the time to file an appeal. *Id.*

Where no timely Rule 59 motion is filed, the Notice of Appeal must be served on all respondents within 30 days after receipt of written notice of entry of the judgment. *See* Rule 203(b)(1), SCACR. This is a **jurisdictional** requirement, meaning that “if a party misses the deadline, the appellate court **lacks jurisdiction to consider the appeal.**” *Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 15, 602 S.E.2d 772, 775 (2004).

The Court entered its Order granting CitiMortgage’s motion for partial summary judgment, which fully and finally disposed of all claims involving the Appellants and ended the case as to them, on July 27, 2017. Counsel for CitiMortgage provided notice of entry of the Order to counsel for Appellants via email dated July 28, 2017. *See* Email dated 7/28/2017, attached as **Exhibit A**. The deadline for serving any Rule 59(e) motion was within 10 days of this date, which was August 7, 2017. Moreover, if Appellants did not intend to file a Rule 59(e) motion, any notice of appeal was due on August 28, 2017.³ Appellants, however, did not file anything challenging the summary judgment order until November 6, 2017, when they filed a Rule 60 motion.

Appellants’ failure to timely file a notice of appeal deprives this Court of jurisdiction and therefore the appeal should be dismissed.

III. Appellants failed to appeal the operative order and thus the court cannot consider the merits of their appeal.

This appeal should also be dismissed because Appellants failed to appeal the only order addressing the substantive claims asserted by or against them. Moreover, the Orders that they did

³ The 30 day deadline for serving a notice of appeal fell on Sunday, August 27, 2017. Therefore, the deadline was extended to Monday, August 28, 2017.

appeal do not provide any non-frivolous appellate grounds. Therefore, the appeal must necessarily fail.

A. Appellants did not appeal the Order ruling on the claims asserted by and against them.

The initial notice of appeal did not include copies of the orders that Appellants purported to appeal. Following receipt of a June 8, 2018 deficiency letter from this Court, Appellants submitted copies of the Court's: (1) September 14, 2016 Order of Reference, (2) December 7, 2017 Order Restoring the Case, (3) December 7, 2017 Master in Equity's Order and Judgment of Foreclosure and Sale, (4) December 7, 2017 Order Denying Motion Pursuant to Rule 60, and (5) January 25, 2018 Master's Report on Sale and Disbursements and Order of Confirmation. Appellants, however, did not appeal the Court's July 27, 2017 Order Granting CitiMortgage's Motion for Partial Summary Judgment.

The Order granting summary judgment is the only order addressing the claims asserted by the Appellants and the claims asserted by CitiMortgage as to their record interest in the subject property. This is a foreclosure and quiet title case brought by CitiMortgage against its borrower John Mitchem. Appellants Satara Lopez and Francisco Lopez were named as defendants on the quiet title claim due to a deed from them to Mitchem dated June 27, 2003, that was lost and not recorded. Appellants contested CitiMortgage's claims, asserting that they never transferred the property and, therefore, continued to maintain an interest in the property. CitiMortgage moved for partial summary judgment, asserting that: (1) Appellants were judicially estopped from denying that they transferred their interest in the property due to representations they made in a 2003 Family Court, (2) the Statute of Frauds would not bar the enforcement, (3) Appellants were bound by representations made in a 2010/2011 Magistrate Court case where they were admitted paying rent

to Mitchem after they transferred the property to him, and (4) the slander of title claim was barred by the two-year statute of limitations.

The Master-in-Equity considered all of the evidence presented and the arguments of counsel at the hearing, and agreed with CitiMortgage on each of these arguments. The Master entered an order granting CitiMortgage's motion for summary judgment on all of Appellants' claims and declaring and quieting title to the property in the name of John Mitchem III retroactive to June 27, 2007. Appellants' interest in the property, and this case, ceased upon the entry of this Order.

Appellants, however, failed to appeal this Order and therefore it is the law of the case. *See In re Morrison*, 321 S.C. 370 n. 2, 468 S.E.2d 651 n. 2 (1996) (noting that an unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal); *see also Fitzjohn v. Player*, No. 2012-UP-383, 2012 WL 10844384, at *2 (S.C. Ct. App. June 20, 2012) (noting that where the appellant failed to appeal an order it became the law of the case). Because the Master's findings are the law of the case, Appellants' cannot argue on appeal that they have an interest in the property or challenge the subsequent foreclosure proceedings against Mitchem. This eliminates any argument that Appellants could raise in this appeal, as any challenge would necessarily be predicated on challenging the Court's finding that they had no interest in the property. Thus, the appeal should be dismissed.

B. None of the other Orders identified by Appellants provide a basis for a potentially meritorious appeal.

As noted above, Appellants appealed several other orders, but none would provide a meritorious ground for appeal. First, Appellants appealed the Order of Reference to the Master-in-Equity. Appellants objected to this order on the basis that they were entitled to a jury trial on

their counterclaims. However, because this was an issue affecting the mode of trial, Appellants were required to immediately appeal the Order of Reference to preserve this issue. *See Creed v. Stokes*, 285 S.C. 542, 542-43, 331 S.E.2d 351, 352 (1985) (finding that the Order of Reference “order was not interlocutory, and should have been appealed immediately because it affected the mode of trial, a substantial right”); *Goddard v. Fairways Dev. Gen. P’ship*, 310 S.C. 408, 417, 426 S.E.2d 828, 833 (Ct. App. 1993) (“Additionally, an order of reference which deprives a party of a mode of trial to which he is entitled as a matter of right is immediately appealable. Appellants’ failure to immediately appeal the issue leaves it unpreserved for our review.” (citation omitted)).

Appellants also appealed the Master-in-Equity’s order restoring the case to the active docket. On September 12, 2017, the Court entered an omnibus order administratively dismissing thousands of cases without prejudice in anticipation of the court’s transition to an electronic filing system. A few weeks later, the Court entered the order restoring this case to the active docket to correct this administrative issue. This docket-management Order simply cannot form the basis of any meritorious appellate issue. *Cf. Penn-Am. Ins. Co. v. Mapp*, 521 F.3d 290, 295-96 (4th Cir. 2008) (“An order administratively closing a case is a docket management tool that has no jurisdictional effect.”).

Furthermore, the Order and Judgment of Foreclosure and Master’s Report on Sale and Disbursements and Order of Confirmation cannot provide Appellants with any viable appellate grounds either. As detailed above, Appellants’ interest in this litigation was conclusively determined by the Court’s order granting CitiMortgage’s motion for summary judgment. The Court’s finding in that Order that Appellants transferred all of their interest in the property to Mitchem is the law of the case. Because Appellants had no interest in the property and were not the borrowers, they lack standing to challenge the orders issued subsequent to this ruling. *See*

Nance v. Nationwide Ins. Co., 273 S.C. 617, 619, 258 S.E.2d 105, 106 (1979) (“As a general rule, a party as to whom an action has been dismissed is ordinarily not aggrieved by the judgment or decree subsequently rendered therein, and for that reason, as well as because he is no longer a party, he cannot appeal the judgment.”); *see also Powell ex rel. Kelley v. Bank of Am.*, 379 S.C. 437, 447, 665 S.E.2d 237, 243 (Ct. App. 2008) (noting that only a party “aggrieved” by an order or judgment has the ability to appeal, and that “[a] party is aggrieved by a judgment or decree when it operates on his or her rights of property or bears directly on his or her interest” (quoting *Beaufort Realty Co. v. Beaufort Cnty.*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001))). The foreclosure orders had no bearing on Appellants since they had no interest in the property, and they cannot appeal from those decisions. *See First Union Nat. Bank of S.C. v. Soden*, 333 S.C. 554, 565, 511 S.E.2d 372, 378 (Ct. App. 1998) (“A party cannot appeal from a decision which does not affect his interest, however erroneous and prejudicial it may be to the rights and interests of some other person.”).

Finally, Appellants also appeal the Court’s Order denying their Rule 60 motion for relief from the Court’s order granting summary judgment. Appealing the Rule 60 order, however, without appealing the underlying summary judgment order fails to place the merits of the summary judgment order before this Court. *See, e.g., Citifinancial Mortg., Inc. v. Kennedy*, No. 2007-UP-062, 2007 WL 8325959, at *2 (S.C. Ct. App. Feb. 12, 2007) (explaining that appeal of the denial of a Rule 60(b) motion did not provide appellant with mechanism to challenge the rulings in prior order which was not appealed and thus was the law of the case); *Ralphs v. Trexler*, No. 2005-UP-219, 2005 WL 7083860, at *2 (S.C. Ct. App. Mar. 24, 2005) (explaining that the appellant had to appeal from the original order or the denial of a Rule 59 motion to reconsider that order to preserve his challenge to the merits of the original order—appeal from a Rule 60 motion collaterally

attacking the Order was not sufficient); *see also Aikens v. Ingram*, 652 F.3d 496, 512 (4th Cir. 2011) (“Furthermore, we have said that ‘we may not review the merits of the underlying order’ in reviewing the denial of Rule 60(b) relief.” (quoting *MLC Auto., LLC v. Town of S. Pines*, 532 F.3d 269, 277 (4th Cir. 2008))).

Accordingly, none of the Orders identified by the Appellants provide a mechanism to place any non-frivolous ground for appeal before this Court. This also supports dismissal.

III. Conclusion

For the reasons stated above, the Court should dismiss the above-captioned appeal.

Respectfully submitted,

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Attorneys for CitiMortgage, Inc.

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October 10, 2018

Exhibit A

From: Sarah Nielsen
Sent: Friday, July 28, 2017 1:56 PM
To: robersonlawfirm@sc.rr.com; josephhenry929@bellsouth.net; dwalker@rogerslewis.com
Cc: Thad Westbrook; Diane Argabright; Pamela Baker (pbaker@rogerslewis.com)
Subject: CitiMortgage, Inc. v. John Mitchem, Satara Lopez, Francisco Lopez, et al. (2015-CP-40-3832)
Attachments: 7_27_17 Order re SJ.pdf

Counselors:

Please find attached a copy of the Order Granting Partial Summary Judgment in the above-referenced matter that was signed on July 25, 2017, and entered on July 27, 2017.

Thank you,
Sarah



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Joseph M. Strickland, Master-in-Equity

Appellate Case No. 2018-00106

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PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondent, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified at the following address(es):

Documents Served: Motion to Dismiss

Counsel Served: **U.S. Mail**
Joseph Henry, Esquire
1708 B Richland Street
Columbia, SC 29201
AND
Nathaniel Roberson, Esquire
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Kelli D. Martin
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Dated: October 10, 2018.



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October 10, 2018

Hand Delivered

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
P.O. Box 11629
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SC Court of Appeals

RE: CitiMortgage, Inc. v. John F. Mitchem, III, et al.
Civil Action No. 2015-CP-40-03832
Our File No. 26019/01842

Dear Ms. Kitchings:

Enclosed are the original and eight (8) copies of a *Motion to Dismiss* in the above-referenced matter. Also enclosed please find our firm's check in the amount of \$50, which represents the filing fee for this Motion. We would appreciate it if you would file the original document and return a clocked copy to us via our firm's courier.

By copy of this letter to all counsel, we are hereby serving them with copies of the above referenced pleading.

Very truly yours,

Blake T. Williams

BTW:kdm
Enclosures
cc: Joseph Henry, Esquire
Nathaniel Roberson, Esquire