

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Robin B. Stilwell, Circuit Judge

RECEIVED
FEB 04 2019
SC Court of Appeals

Appellate Case No. 2019-000070

Richard A. Gorman,.....Appellant,

v.

John C. Monarch; Direct Outbound Services, LLC; ShipChain, Inc.;
Aaron Kelly; Sami Rusani; and Brian Evans,.....Respondents.

RETURN TO RESPONDENT BRIAN EVANS' MOTION TO DISMISS

Appellant hereby submits this return to Respondent Brian Evans' motion for the court to dismiss this appeal as to him and for attorneys' fees and costs. This motion to dismiss presents a novel issue created by the adoption of e-filing in South Carolina and the apparent failure of a clerk of court to transmit a notice of the electronic filing of a motion to reconsider. Respondent Evans contends, apparently, that this constitutes failure on Appellant's part to serve the notice of appeal timely as to Respondent Evans. Appellant does not believe that it is proper to dismiss this appeal as to Respondent Evans; however, should the court disagree with that, it would still not be proper to award Respondent Evans attorneys' fees and costs in connection with this motion.

On October 28, 2015, the Supreme Court of South Carolina created the E-Filing Pilot Program, under which the Court's Electronic Filing Policies and Guidelines "govern E-Filing during the Pilot Program in the Court of Common Pleas, and will be effective upon the adoption of E-Filing on a county-by-county basis[.]" In re: South

Carolina Filing Policies and Guidelines; Pilot Version-Common Pleas, S.C. Sup. Ct. Order dated Oct. 28, 2015 (Shearouse Adv. Sh. No. 42). E-Filing was adopted by Greenville County, where the instant case is pending at the trial level, on March 22, 2016. In re: Expansion of Electronic Filing Pilot Program – Court of Common Pleas, S.C. Sup. Ct. Order dated March 10, 2016 (Shearouse Adv. Sh. No. 11).

Under the E-Filing Policies and Guidelines, service of a document upon counsel of record is typically effected by the e-filing of the document, as follows:

[U]pon the E-Filing of any pleading, motion, or other paper subsequent to the summons and complaint or other filing initiating a case, the E-Filing System will automatically generate and transmit an NEF [i.e., Notice of Electronic Filing] to all Authorized E-Filers associated with that case. Where the parties are proceeding in the E-Filing System and a pleading, motion, or other paper must be filed, made, or served under the SCRCF, the E-Filing of that pleading, motion, or other paper, together with the transmission of an NEF, constitutes proper service under Rule 5, SCRCF, as to all other parties who are E-Filers in that case. It is the responsibility of an E-Filer to review the content of the E-Filed document in the E-Filing System to determine its force and effect.

...

Service of a pleading, motion, or other paper by NEF subsequent to the summons and complaint or other filing initiating a case is complete at the time of the submission of the pleading, motion, or other paper for E-Filing, provided an NEF is transmitted by the E-Filing System in accordance with paragraph (e)(2) of this Section. The act of E-Filing the pleading, motion or other paper is the equivalent of depositing it in the United States Mail under Rule 5(b)(1), SCRCF.

S.C. Elec. Filing Policies & Guidelines 4(e)(2)&(3).

Here, the motion to reconsider that Respondent Evans contends was not served on him was timely e-filed, which was the equivalent of serving it by mail under Rule

5(b)(1), SCRCP, on George G. Robertson, Esquire, who was Respondent Evans' attorney of record and an authorized e-filer who had appeared as such in this case. Mr. Robertson himself e-filed documents in this case, as shown by the motion and NEF attached hereto, and was, thus, "proceeding in the E-Filing System[,]" such that Respondent Evans was one of the "parties who [were] E-Filers" in this case. S.C. Elec. Filing Policies & Guidelines 4(e)(2). An NEF noting the filing of Appellant's motion to reconsider was transmitted by the clerk of court, though, apparently, for reasons unknown, not to Mr. Robertson.

Appellant's counsel was not aware that the clerk of court failed to send an NEF to Respondent Evans' counsel until after Mr. Robertson sent his January 15 letter. (At that point, Respondent Evans' counsel had already received the motion to reconsider, a copy of which was sent to Appellant's counsel with the letter.) Regardless of that, however, Appellant did all that he was required to do under the E-Filing Policies and Guidelines to serve the motion to reconsider. S.C. Elec. Filing Policies & Guidelines 4(e)(2)&(3). That service was complete when Appellant e-filed the motion to reconsider, since the clerk of court transmitted an NEF. S.C. Elec. Filing Policies & Guidelines 4(e)(3). It is not Appellant's fault that the clerk of court apparently did not send that NEF to Respondent Evans' counsel. This is the equivalent of a document being properly served under Rule 5(b)(1), SCRCP, by being placed in the mail, even though the intended recipient never gets the document because the postal service fails to deliver it. The failure of the delivery process does not make the service improper. Regardless of the clerk's failure to send an NEF to Respondent Evans' registered e-filer counsel of record, Appellant did all that *he* was required to do to serve the motion to reconsider. S.C. Elec. Filing Policies & Guidelines 4(e)(2)&(3).

To the undersigned's knowledge, never before has the effect on service of a clerk of court's failure to send an NEF come before this court or any appellate court in this state. Accordingly, while Appellant is confident in his reading of the E-Filing Guidelines, were this court to disagree with him, that would not mean that Appellant had done anything frivolous. Under the Restatement of Law Governing Lawyers, "[a] frivolous position is one that a lawyer of ordinary competence would recognize as so lacking in merit that there is no substantial possibility that the tribunal would accept it." Restatement (Third) of Law Governing lawyers § 110, cmt. d (2000). This very restrictive view of what is frivolous is followed in other jurisdictions (though there are examples of what has been found frivolous in South Carolina jurisprudence, the term does not appear to have been expressly defined here, to the undersigned's knowledge). See, e.g., Double Oak Const., L.L.C. v. Cornerstone Dev. Intl. L.L.C. 97 P.3d 140, 151 (Colo. App. 2003) (claim is frivolous if its proponent can present no rational argument based on evidence or law to support it); Riston v. Butler, 149 Ohio App. 3d 390, 2002-Ohio-2308, 77 N.E.2d 857 (2002) (claim is frivolous if it is absolutely clear under the existing law that no reasonable lawyer could argue the claim).

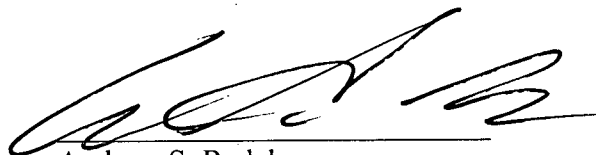
In addition, while Respondent Evans notes that "sanctions are available against an attorney who requires the Court to review a meritless appeal[,]" Morrisette v. Barnes, 285 S.C. 123, 125, 328 S.E.2d 627, 628, Appellant points out that there has been no review of the merits of this appeal, and a review of the merits is not even what is sought by Respondent Evans.

Finally, Appellant observes that Respondent Evans has made no record from which the court could determine whether or in what amount he has incurred any attorneys' fees in this case, much less whether the factors our courts assess to determine

the reasonableness of attorneys' fees have been satisfied. E.g., Baron Data Systems, Inc. v. Loter, 297 S.C. 382, 383, 377 S.E.2d 296 (1989). For that independent reason, any award of attorneys' fees would be improper.

Accordingly, the court should deny Respondent Evans' motion to dismiss and for attorneys' fees and costs.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'A. S. Radeker', written over a horizontal line.

Andrew S. Radeker
S.C. Bar No. 73743
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Post Office Box 50143
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(803) 779-2211
Attorney for Appellant

February 4, 2019

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2014-CP-23-04432

Richard A. Gorman,

Plaintiff,

-vs-

John C. Monarch; Direct Outbound Services,
LLC; ShipChain, Inc.; Aaron Kelly; Sami
Rusani; and Brian Evans,

Defendants.

**Defendant Brian Evans's Motion To
Dismiss Pursuant to SCRPC 12(b)(2)**

Jury Trial Demanded

TO: ANDREW S. RADEKER, ATTORNEY FOR PLAINTIFF

YOU WILL PLEASE TAKE NOTE THAT Defendant, Brian Evans (“Evans”), will at a time and place to be determined, pursuant to Rule 12(b)(2) of the South Carolina Rules of Civil Procedure, move this Court for its Order dismissing this action for lack of jurisdiction over the person of Evans under both the South Carolina long-arm statute and Constitutional Due Process.

The grounds for this Motion:

1. Neither Evans nor anyone acting on his behalf are citizens or residents of the State of South Carolina;
2. Neither Evans nor anyone acting on his behalf consented to this Court's exercise of jurisdiction; and,
3. Subjecting Evans to personal jurisdiction in South Carolina would offend constitutional due process standards as neither Evans, nor any one acting on his behalf, conducts and/or conducted business in South Carolina, nor has engaged in any activity or conduct to support the exercise of personal jurisdiction in South Carolina, nor has not directed any activity toward a resident of this state. (See Affidavit of Brian Evans, attached hereto as Exhibit A).

This Motion will be supported by the pleadings, any supporting Affidavits and attachments thereto, and any Reply Affidavits filed herewith and after, as well as any discovery record.

Dated: September 14, 2018

Respectfully submitted,

HOLLAND & KNIGHT LLP

/s/ George G. Robertson
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* denotes national counsel who will seek *pro hac vice* admission

Attorneys for Defendant Brian Evans

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 14, 2018, I electronically filed the foregoing with the Clerk of the Court by using the South Carolina Courts E-Filing system, which will transmit the foregoing document via email to all counsel of record.

/s/ George G. Robertson
George G. Robertson

Certificate of Electronic Notification

Recipients

George Robertson - Notification transmitted on 09-14-2018 10:49:18 AM.

Spencer Langley - Notification transmitted on 09-14-2018 10:49:18 AM.

Eric Englebardt - Notification transmitted on 09-14-2018 10:49:18 AM.

Christopher Brumback - Notification transmitted on 09-14-2018 10:49:18 AM.

Steve Matthews - Notification transmitted on 09-14-2018 10:49:18 AM.

John Scully - Notification transmitted on 09-14-2018 10:49:18 AM.

Andrew Radeker - Notification transmitted on 09-14-2018 10:49:18 AM.

Grenville Morgan - Notification transmitted on 09-14-2018 10:49:18 AM.

***** IMPORTANT NOTICE - READ THIS INFORMATION *****

NOTICE OF ELECTRONIC FILING [NEF]

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A filing has been submitted to the court RE: 2014CP2304432

Official File Stamp: 09-14-2018 10:46:56 AM

Court: CIRCUIT COURT

Common Pleas

Greenville

Case Caption: Richard A Gorman vs. John C Monarch ,
defendant, et al

Document(s) Submitted: Motion/Dismiss
- Exhibit/Filing of Exhibits

Filed by or on behalf of: George Gostin Robertson

This notice was automatically generated by the Court's auto-notification system.

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The following people were served electronically:

George Gostin Robertson for Brian Evans

Steve A. Matthews for ShipChain Inc

Andrew Sims Radeker for Richard A Gorman

John Hampton Scully for John C Monarch, Direct
Outbound Services LLC

Grenville D. Morgan, Jr. for John C Monarch,
Direct Outbound Services LLC

Christopher Todd Brumback for John C Monarch,
Direct Outbound Services LLC

Spencer Davis Langley for John C Monarch,
Direct Outbound Services LLC

Eric K. Englebardt

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:

Sami Rusani
Aaron Kelly

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PROOF OF SERVICE

I certify that I served the foregoing return to motion to dismiss in this case by depositing a copy of it on the date shown below in the United States Mail, postage prepaid, addressed as follows:

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P.O. Box 2048
Greenville, SC 29602

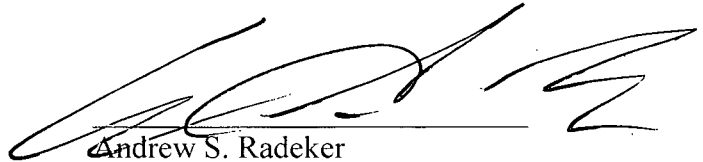
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February 4, 2019

Respectfully submitted,

A handwritten signature in black ink, appearing to read "A. S. Radeker", written over a horizontal line.

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