

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

The Honorable Mikell R. Scarborough, Master in Equity

Appellate Case No. 2018-000056

Churchill Park,

Respondent,

v.

Alan G. Nix, Norma J. Nix and the Estate of Norma J. Nix,

Defendants,

Of which Alan G. Nix is the

Appellant.

RESPONDENT’S RETURN TO APPELLANT’S MOTION TO JUST DO THE DO THE PROPER AND PRUDENT THING AND APPELLANT’S MOTION FOR EXTENTION OF TIME, REMAND TO CORRECT TRANSCRIPTS, AND DECLARATORY JUDGMENT

This appeal arises out of a foreclosure action initiated by Respondent against Appellant for unpaid homeowners’ association dues. Trial was held before the Master in Equity for Charleston County on September 26, 2017. The trial court ruled in favor of Respondent and issued its final order on November 9, 2017. Appellant timely filed a motion to reconsider pursuant to Rule 59(e), SCRCF on November 22, 2017. The trial court denied Appellant’s 59(e).

motion by order dated December 1, 2017. Appellant timely served his notice of appeal of that order on January 8, 2018. Three weeks later Appellant filed an Amended Notice of Appeal adding six additional orders from which he wishes to appeal. Both appeals were dismissed in April 2018. At Appellant's request, this Court reinstated Appeal 2018-00056 and reinstated and consolidated Appeal 2018-00174 into Appeal 2018-00056 by orders dated May 9, 2018. Appellant raised no issue with either order at the time they were filed and served. Instead, Appellant proceeded to file six separate motions with this court and a third Notice of Appeal. On November 15, 2018 Respondent filed a Motion to Dismiss Appellant's appeal for failure to serve his initial brief despite having possession of all transcripts for more than sixty days.

On December 21, 2018 this court entered an Order denying Respondent's Motion to Dismiss while also ordering Appellant serve and file his initial brief and designation of matter by January 21, 2019. Instead of serving the required brief Appellant filed a Motion to Properly Restore on January 11, 2019, arguing for the first time that the appellate cases were not properly restored in May 2018 because they lacked a specific stamp. Appellant's motion lacked any citation to legal authority for this position and failed to address why he waited over eight months to raise the issue. This court denied Appellant's motion and warned Appellant that his initial brief was overdue and would be dismissed if not served by March 25, 2019.

On March 25, 2019 Appellant filed a Motion to Just Do the Proper and Prudent Thing. This motion essentially repeated the same request for relief contained in the January 11, 2019 motion. Appellant also filed a separate motion requesting an extension of time to file his initial brief and designation of matter, requesting the court remand this matter to the trial court to correct transcripts, and for a declaratory judgment regarding the enforceability of the restrictive covenants at issue.

Request to "Properly" Restore Appellate Cases

In the January 11, 2019 motion and the subsequent March 25, 2019 renewed request, Appellant argues that the appellate cases were not properly restored because the orders purporting to restore and consolidate the cases did not bear an official Court of Appeals stamp. Appellant's March 25, 2019 motion further complains that a formal order was not issued denying his request. First, Appellant cites no authority for the stamp requirement and Respondent could

not locate any such authority. Because Appellant failed to cite any authority for his position as required by Rule 240(c)(2), SCACR, his request was abandoned pursuant to Rule 240(g) and required no consideration or ruling from this court.

Additionally, the March 25, 2019 Motion to Just Do the Proper and Prudent Thing is effectively a request that the court reconsider its denial of the January 11, 2019 motion. The request to review an order of an individual judge is properly made by a petition for rehearing. Rule 240(j), SCACR. The appellate court will not consider “petitions for rehearing. . . unless the action of the court . . . has the effect of dismissing or finally deciding a party’s appeal.” Rule 240(i). The court’s denial of the January 11, 2019 motion did not dismiss or finally decide Appellant’s case. Accordingly, the court need not rule on Appellant’s March 25, 2019 request for an order on the January 11, 2019 motion.

Extension of Time to File Initial Brief and Designation of Matter

Appellant argues this court must enter an order denying his January 11, 2019 motion before his appeal can be dismissed. However, as discussed above, Appellant’s motion failed to meet the requirements of Rule 240(c)(2) and is therefore considered abandoned. Additionally, the January 11, 2019 motion and any decision thereon did not stay Appellant’s time to file and serve his initial brief and designation of matter. Pursuant to Rule 240(b), the time limits imposed by the appellate court rules are not stayed by the filing of a motion or petition. As more fully discussed in Respondent’s prior Motion to Dismiss, Respondent admittedly received all of the transcripts in this matter by May 30, 2018. Accordingly, Appellant’s initial brief and designation were due, at the latest, September 10, 2018. This court extended Appellant’s deadline to January 21, 2019. Pursuant to Rule 240(b) that deadline was not stayed by his January 11, 2019 motion. Appellant’s initial brief and designation of matter were due January 21, 2019. When Appellant failed to file and serve those items by the deadline, this court advised his appeal would be dismissed if he did not file these matters by March 25, 2019. Because the Appellant has failed to serve and file the required items his appeal should be dismissed pursuant to Rule 208(a)(4), SCACR.

Remand Case to Correct Transcripts

Appellant repeats his allegation that the transcripts in this matter must be corrected before his appeal can continue, however, Appellant fails to provide a comprehensive and detailed list of the errors he claims exists in the transcript or explain how those errors prejudice him. “Most jurisdictions require an appellant to demonstrate specific prejudice flowing from an incomplete or reconstructed record.” State v. Ladson, 373 S.C. 320, 324, 644 S.E.2d 271, 273 (Ct. App. 2007). During post-trial motions the trial court repeatedly asked Appellant to articulate (1) corrections he believed should be made and (2) what prejudice he suffered by the alleged errors. Appellant freely admitted that he was not present at either of the hearings from which the allegedly incorrect transcripts were produced, and therefore cannot complete an errata sheet showing the additional, missing, or corrected information. Additionally, Appellant refused to explain what prejudice he would suffer in proceeding with this appeal based on the transcripts in their current state. Appellant bears the burden of demonstrating the error in the transcript as well as the prejudice he suffers as a result of such error. Appellant’s motion does not discuss the various alleged errors, the proposed corrections, or the prejudice he suffers. For those reasons Appellant’s motion should be dismissed.

Declaratory Judgment

For the first time since the Notice of Appeal in this matter was filed over a year ago, Appellant now alleges there is a new title issue absolving him of all liability allocated to him by the lower court’s judgment and asks this court to issue a Declaratory Judgment to that effect. Appellant cites no legal authority empowering this court to issue a declaratory judgment and Respondent could find none.

Appellant’s argument is strikingly similar to that made in Sanders v. Salley, 283 S.C. 458, 322 S.E.2d 829 (Ct. App. 1984). Sanders involved the foreclosure of a mortgage. After the order of foreclosure was entered the appellant’s attorney located a mortgage they alleged changed the priority decided by the foreclosure order and asked the Court of Appeals to use the after-discovered documents to reverse the lower court decision. The court declined, holding that “[the] Court does not sit as a trial court to receive evidence on disputed issues of fact; [its] function is to review the judgment of the circuit court for reversible error based on the issues and evidence presented to that court.” Sanders, 283 S.C. at 460, 322 S.E.2d at 830 (citing S.C. Code § 14-8-200).

Rather than providing the court and Respondent with an appellate brief setting forth the alleged reversible error and requesting relief this court has jurisdiction to grant, Appellant instead asks this court to review items not presented to the trial court below and declare that Appellant is not bound by the restrictive covenants. This court's jurisdiction is limited to reviewing the record below and determining whether the lower court made any reversible error. Accordingly, Appellant's Motion for Declaratory Judgment should be denied.

April 1, 2019



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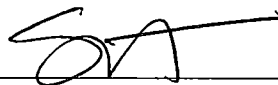
Appellant.

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PROOF OF SERVICE

I certify that I served Respondent's Motion to Dismiss on Alan G. Nix by depositing a copy of it in the United States Mail, postage prepaid, on April 1, 2019 as follows:

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