THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Jocelyn Newman, Circuit Court Judge

RECEIVED
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SC Court of Appeals

Civil Action No. 2016-CP-40-03478
Appellate Case No. 2018-001062

Cricket Store 17, LLC d/b/a Taboo,.....Appellant,

v.

City of Columbia Board of Zoning Appeals,.....Respondent.

And

City of Columbia Zoning Administrator,.....Counterclaimant,

v.

Cricket Store 17, LLC d/b/a Taboo,.....Counterdefendant.

RESPONDENT'S RETURN OPPOSING APPELLANT'S MOTION TO RECONSIDER AND MOTION TO HOLD BRIEFING IN ABEYANCE

Taboo's untimely motion to reconsider is prohibited by multiple rules, and thus should be denied. The City does not object to the relief sought in Taboo's second motion—to hold the deadlines for filing the record on appeal and final briefs—in abeyance for 60 days, making the new deadline October 21, 2019.

I. Taboo's motion to reconsider violates multiple Appellate Court Rules, and thus should be denied.

A. Taboo's request for rehearing of the Court's July 18, 2019 Order[1] is prohibited.

The Court's July 18, 2019 Order (the "Order") construed the City's objections to Taboo's designation of matter to be included in the record on appeal as a motion to strike, and then granted that motion in part and denied it in part. The Order also separately denied Taboo's motion to supplement the record on appeal. On the docket, the Court designated the Order as a "Non-Dispositional Decision." Per Rule 240(i), SCACR, such a decision is not subject to reconsideration or rehearing.

Rule 240(i), SCACR, states "[t]he court will not entertain petitions for rehearing on a motion or petition unless the action of the court on the motion or petition has the effect of dismissing or finally deciding a party's appeal." Rule 221(c), SCACR, reiterates the same restriction on seeking reconsideration of an order that does not finally decide an appeal.

The Order at issue resolved two motions concerning the contents of the record on appeal. It did not have "the effect of dismissing or finally deciding a party's appeal." So the Order is not subject to a motion for rehearing or reconsideration. For this reason alone, the Court should deny Taboo's motion to reconsider the Order.

B. Even if Taboo's motion were not prohibited, the Court should deny it because it is untimely.

Taboo's motion to reconsider is also untimely.

Rule 221(a), SCACR, states that "[p]etitions for rehearing *must* be actually received by the appellate court no later than fifteen (15) days after the filing of the opinion, order, judgment, or decree of the court." (emphasis added).

[1] The title of Taboo's motion refers to the Court's "July 28, 2019" Order, but there is no such order. The referenced Order was filed by the Court on July 18, 2019, as Taboo's motion recognizes at the top of page 2: "... the Appellant moves for an Order amending the Court's July 18, 2019, Order striking portions of Appellant's Designation of Contents of Record on Appeal."

Taboo seeks rehearing of the July 18, 2019 Order. Fifteen days after July 18, 2019 is August 2, 2019. But Taboo's motion was not filed until August 15, 2019—thirteen days *after* the August 2, 2019 deadline passed. Taboo's motion is thus untimely under the Court's mandatory deadline, and should be denied for that reason as well.

Taboo concedes that it did not timely file a return to the City's April 16, 2019 objections to its designation of matter to be included in the record on appeal. Taboo claims that its failure to file a return due to its counsel having a medical incident on April 22, 2019. While the City is definitely sensitive to, and would have accommodated an extension for, a medical emergency, that underlying reason does not justify the relief sought here.

First, Taboo did in fact serve a return to the City's April 16 objections on the very next day, April 17, 2019. Apparently, that return was never actually filed in this Court. Nevertheless, the City addressed the arguments in that return when it filed its own return to Taboo's motion to supplement the record—which motion was also served on April 17, 2019. The medical incident that Taboo's counsel raises occurred five days later, on April 22, 2019.

Second, Taboo provides no explanation why it could not have filed its (previously-served) return to the City's objections before the Court issued its July 18, 2019 Order. In fact, counsel for Taboo, Mr. Goldstein, appeared in person and presented oral argument in this Court in the other appeal between the parties (No. 2017-561) on May 16, 2019. So there is no reason why Taboo could not have filed its return either: (a) when it served the return on the City on April 17, 2019, or (b) before the Court ultimately issued an order resolving the City's objections and Taboo's motion to supplement on July 18, 2019.

Thus, not only is the motion seeking rehearing of the July 18, 2019 Order untimely, the reason given for not filing a return to the City's objections before that Order issue is unsound.

II. Taboo's motion to reconsider is meritless.

The City is disinclined to address the substance of a motion that: (1) is not permitted under Rule 240(i), SCACR, (2) is untimely under Rule 221(a), SCACR, and (3) it has previously addressed in its April 16, 2019 objections (motion to strike) and its April 29, 2019 return to Taboo's motion to supplement the record. The City stands on its prior briefing as to all of the items which Taboo continues, against the Rules, to seek to include in the record on appeal.

With that being said, Taboo's motion recent motion contains irrelevant arguments and misrepresentations that ought to be addressed.

First, Taboo's reference to Rule 7(c), SCRCP, concerning "demurrers, pleas, and exceptions for insufficiency of a pleading" is irrelevant to the matter at hand. The City sought injunctive relief, and the trial court held an evidentiary hearing on that motion.

Second, when Taboo arrived at the hearing, and sought to rely upon the contents of Taboo's owner's (Jeff White's) affidavit while cross-examining the City's witness, the City objected on hearsay grounds. The trial court sustained the hearsay objection. (2/9/2018 Tr. at 38:17-24 (THE COURT: Who's affidavit is it? MR. BERGTHOLD: It's his client. For some reason decided not to show up today to testify about what his store is doing and he's relying on the affidavit --- THE COURT: Okay. MR. BERGTHOLD: --- that we can't cross-examine. THE COURT: All right. That objection is sustained. He's not gonna testify about some else's affidavit."). So contrary to footnote 2 of Taboo's motion, the trial court did *not* accept the affidavit.

Third, footnote 2 also states that "Judge Newman specifically allowed supplemental affidavits." That is also untrue. Judge Newman, with the agreement of the City, allowed (ultimately irrelevant) photographs brought to the hearing to be authenticated by a single post-hearing affidavit that merely authenticated the photos. The trial judge did not permit anything, beyond that single authentication affidavit, to expand the hearing evidentiary record.

Fourth, the ordinances that Taboo now seeks to include in the record were *not* presented to the trial court at the evidentiary hearing. What was in the trial court's record (as City's Exhibit 1) was the relevant ordinance under which the City was seeking injunctive relief. The City, of course, has many ordinances, but the ones that Taboo seeks to include now were not presented, and played no role, at the evidentiary hearing below.

Fifth, Taboo seeks to include letters from the BZA record that were not presented to the trial court during the hearing on the injunction. Rather, the BZA record, and all of Taboo's arguments from the BZA proceedings have already been resolved by this Court in Appeal No. 2017-561. On August 7, 2019, this Court issue an opinion affirming the trial court decision that affirmed the BZA's determinations and rejecting Taboo's arguments.

Finally, Taboo's motion devolves into an unsupported diatribe against the City (alleging "sharp practice" and employment of "every technical trick in its unlimited quiver"), when in fact the City has communicated with Taboo in a timely manner for nearly six years of litigation in both federal and state court. Taboo lost its challenges to the City's zoning ordinance and related decisions in federal district court, the Fourth Circuit, the BZA, the trial court below, and in this Court in the prior appeal. Its recalcitrance has unnecessarily prolonged this appeal, and its most recent motion to reconsider should not be countenanced.

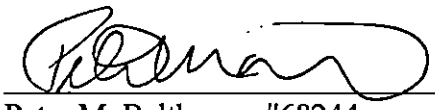
III. Conclusion

For the reasons stated above, the City respectfully requests that the Court:

1. Deny appellant's motion to reconsider; and

2. Issue an order requiring the appellant to serve the record on appeal no later than October 13, 2019, and the parties to serve final briefs—which must conform to this Court's July 18, 2019 Order—no later than November 4, 2019.

Respectfully submitted,



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Board of Zoning Appeals and City of
Columbia Zoning Administrator

Columbia, South Carolina
August 26, 2019

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PROOF OF SERVICE

I certify that on August 26, 2019, I have served all counsel in this action with a copy of Respondent's Return Opposing Appellant's Motion to Reconsider and Motion to Hold Briefing in Abeyance by mailing a copy of the same by United States Mail, postage prepaid, to the following address:

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August 26, 2019

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

Re: Cricket Store 17, LLC d/b/a Taboo v. City of Columbia Board of Zoning Appeals AND City of Columbia Zoning Administrator v. Cricket Store 17, LLC d/b/a Taboo
Civil Action No.: 2016-CP-40-03478
Appellate Case No.: 2018-001062
Our File No.: 5253.00114

Dear Ms. Kitchings:

Please find enclosed the original and six copies of *Respondent's Return Opposing Appellant's Motion to Reconsider and Motion to Hold Briefing in Abeyance*, with *Proof of Service* in the above-referenced matter. Please file the enclosed documents and return a clocked copy with my runner.

Thank you for your kind assistance in this matter.

Sincerely,

KBickford

Kimberly R. Bickford
Paralegal

/krb

Enclosures

Cc: Thomas R. Goldstein, Esquire
Trevor P. Eddy, Esquire