

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Gordon G. Cooper, Master in Equity Judge

Case No. 2017-001546

**Nexstar Media Group, Inc., successor in interest to Media General, Inc.d/b/a WSPA
and WYCW, Respondent,**

v.

Davis Roofing Group, LLC and Mark Mahoney, Defendants

FINAL BRIEF OF RESPONDENT, MARK MAHONEY

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SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

I. WAS THE NOTICE OF APPEAL TIMELY FILED?

II. DID THE TRIAL COURT ABUSE ITS DISCRETION IN NOT DEEMING THE APPELLANT'S REQUESTS FOR ADMISSION AS ADMITTED?

STATEMENT OF THE CASE

Respondent, Nexstar Media Group, Inc. (hereinafter "Nexstar") commenced this action by filing its Summons and Complaint on July 22, 2014 seeking to recover an unpaid account balance due from Appellant Davis Roofing Group, LLC (hereinafter "Davis"). Davis filed its Answer and Counterclaim alleging that Respondent Mark Mahoney (hereinafter "Mahoney") lacked authority to bind Davis to the contract with Nexstar. Thereafter, Nexstar filed its Amended Complaint on February 19, 2015 to bring Mahoney as an additional Defendant. Mahoney, acting *pro se* served Nexstar with his answer by way of a letter dated March 9, 2015, denying liability and asserting his authority to bind Davis to the account. Davis filed his Answer and Counterclaims to the Amended Complaint on March 20, 2015. Davis did not assert any Cross Claims against his fellow Defendant Mahoney at this or any other time. On May 16th, 2016 Mahoney retained counsel James Stone Craven. Counsel for Mahoney sent Notice of Appearance to both Davis and Nexstar requesting that any material needed to be answered or any questions or concerns regarding the case please be directed to his attention. Mahoney then served his Answer to Nexstar's Amended Summons and Complaint, and Response to Davis' Motion for Default Judgement on May 23rd 2016.

By Consent Order, the matter was referred to the Honorable Gordon G. Cooper, Master in Equity for Spartanburg County. The matter was scheduled for trial before Judge Cooper on Monday, March 13, 2017. On Friday, March 10, 2017, Davis filed a Motion for Summary Judgment on the grounds of purported Counterclaims against his fellow Defendant Mahoney.

The matter was called for trial on March 13, 2017, Judge Cooper denied Davis' Motion for Default Judgment against Mahoney and Motion for Summary Judgment against Mahoney, as untimely and improper due to Davis' lack of any pled Cross Claims against Mahoney.

The matter proceeded to trial. Following trial, Judge Cooper issued his Order for Judgment filed April 4, 2017 finding the Mahoney had authority to to bind Davis to the contract and awarding Judgement in favor of Nexstar and awarding Nexstar judgment against Davis for the sum of Thirty Nine Thousand seven-hundred and five dollars (\$39,705.00).

On April 13, 2017 Davis filed a Motion to Reconsider pursuant to Rules 59 and 60(b). A hearing was held on the Motion on June 29, 2017. Judge Cooper issued his Order Denying the Motion to Reconsider, filed July 6, 2017. Davis then filed its Notice of Appeal on or about July 13, 2017.

STATEMENT OF FACTS

At trial evidence was presented through testimony that Mahoney was hired by Davis as Marketing Director of Davis Roofing, LLC to handle Davis' marketing and advertising.

Transcript R.p. 152, line 22-R.p.157, line 16. In his capacity as Marketing Director Mahoney entered into advertising contracts with numerous vendors. Transcript R.p. 152, line 22-R.p. 157, line 16. Each of these contracts was paid for by Davis except Nexstar's final invoice. Transcript R.p. 155, lines 7-17. Jerry Davis, the sole owner and principal of Davis Roofing Group, LLC, admitted that he had given Mahoney actual authority to enter into the contracts for Davis.

Transcript R.p. 219, line 23-R.p.220, line 19, R.p. 239, line 22-122, line 20. No objection to this testimony or evidence was made by Davis.

Davis sought as the onset of his case in chief to have Requests for Admission to Mahoney deemed admitted for failure to respond. Davis asserts that he mailed the Requests for Admission on or about December 2015. Transcript R.p. 181, lines 1-3. During this period Mahoney was pro se in this action. Transcript R.p. 251, lines 13-14. Mahoney testified that he was in the hospital during the month of December 2015. Transcript R.p. 181, line 10-R.p. 186, line 9. Mahoney denied ever having received the Request for Admissions. Transcript R.p.252, lines 2-3 In May of 2016, Mahoney retained Counsel, at which time said Counsel contacted counsel for Davis advising of his representation and requesting all questions or concerns be directed to counsel. Transcript R.p. 251, line 24-R.p. 252, line 8. No follow up or further requests were presented to Mahoney's counsel, prior to trial, some 14 months after they were represented as mailed to Mahoney.

The trial court heard arguments from all parties and determined that the Request for Admissions should not be deemed as admitted. Transcript R.p. 180, line 22- R.p. 185, line 11, R.p. 250, line 12- R.p. 253, line 8.

After a full and complete hearing the trial court awarded judgment for Plaintiff Nexstar against Defendant Davis for thirty nine thousand seven hundred and five dollars. (\$39,705.00).
Order for Judgement R.p. 407.

ARGUMENTS

I. APPELLANT FAILED TO STATE WITH PARTICULARITY THE GROUNDS FOR HIS MOTION FOR RECONSIDERATION AND THE RELIEF SOUGHT. THEREFORE, THE APPEAL WAS UNTIMELY FILED

Davis' Motion for Reconsideration was filed on April 13, 2017. Davis in this motion sought to set aside the Order for Judgment stating only:

This motion is based upon the applicable Rules of Court, South Carolina case law, and any affidavits and/or memorandum which may be filed prior to hearing. The Defendant further allege that Defendants are prompt in filing for relief, the existence of meritorious defenses, and the Plaintiff and Co-Defendant will not be adversely prejudice.

Rule 7(b) SCRCP, requires a motion to "state with particularity the grounds therefore and set forth the relief or order sought." Davis Motion failed to satisfy the requirements set forth in Rule 7(b).

No affidavits or memoranda were presented to counsel for either Respondent in support of the Motion for Reconsideration. As such, counsel had no clue as to what the substance of the request or what issues needed to be reconsidered. See Motion to Reconsider. R.p. 411

A timely motion to reconsider under Rule 59, SCRCP, would stay the time for appeal until receipt of written notice of entry of an order granting or denying that motion. Rule 203(b)(1), SCACR. If however, the Rule 59 motion is deficient and fails to satisfy the requirements of Rule 7(b), it would not toll the time for the filing the Notice of Appeal. See Camp v. Camp, 386 S.C. 571, 689 S.E. 2d 634 (2010). The Supreme Court held in Camp that the Rule 59(e) motion filed by Appellant failed to satisfy the requirement of 7(b) for failing to state with particularity the grounds for the motion. Id., at 636. In doing so the Supreme Court state the the standard for determination was:

[W]hen a motion is challenged for a lack of particularity the court should ask "whether any party is prejudiced by a lack of particularity or 'whether the court can comprehend the basis for the

motion as deal with it fairly.” Id. at 636 (quoting Registration Control Sys., Inc. v. Compusystems, Inc., 922 F.2d 805, 807 -808 (Fed Cir. 1990)).

In the case at bar there is no indication in Davis’ Motion to Reconsider what issues or rulings of the trial court in the Order for Judgment are the subject of the Motion. At no time did Appellant give any clue as to what was to be reconsidered by his Motion for Reconsideration. At the hearing Davis argued that the issue he desired to have reconsidered was whether the Request for Admission to Mahoney should have been deemed admitted un Rule 36, SCRCP. Transcript of Motion, R.p. 413. Line 8- R.p. 420 line 7.

At no time prior to the hearing did Davis notify either Respondent or the trial judge, as to the issue or issues he desired to have reconsidered, thus severely prejudiced Respondents. Because of Davis’ lack of particularity in his Motion counsel was left to prepare for the hearing by attempting to respond to all of the issues that occurred prior to and during the trial.

Both counsel for Money and Nexstar raised the issue of inadequate notice and lack of particularity at the hearing and the judge based his denial of the Motion to Reconsider in part on Davis’ failure to adequately notice the Respondents of the grounds for his motion. Transcript of the Motion, R.p. 414, lines 16-19. R.p.419 lines 17-23.

It was held by Camp that “...if a party could file a skeleton motion and later fill it in, the purpose of the time limitation would be defeated.” Camp, at 637 (quoting Martinez v. Trainor, 556 F.2d 818, 820 (7th Cir. 1977)). The dissent in Camp also furthered this point by recognizing that allowing a post trial motion that was not pled with particularity to toll the time for filing an appeal permits a party to gain an extension of time not only the motion, but the appeal, without setting forth a meritorious basis therefore, and in doing so would “neither further justice nor efficiency.” Camp at 637.

Therefore, since Davis' Motion to reconsider failed to state with particularity the grounds for the Motion as required by Rule 7(b), the motion was insufficient to toll the time to appeal the Order for Judgment. Accordingly, the Notice of Appeal was not filed within thirty days of filing and notice of the Order of Judgment. This in turn renders this court without jurisdiction in this Appeal, and the appeal should be therefor be dismissed accordingly. See Camp id.

II. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DETERMINING THE REQUESTS FOR ADMISSION SHOULD NOT BE DEEMED ADMITTED

On the Friday before the Monday trial, Davis filed an untimely Motion for Summary Judgment on its incorrectly plead "Counterclaims" against co-defendant Mahoney based on the lack of a response by Mahoney to Davis' Request For Admission, which had been purportedly served on Mahoney fourteen months earlier by mail.

The Trial Court denied Davis' Motion for Summary Judgment as both untimely, as it was filed at lunch the Friday before the Monday trial and finding that there was no "Cross claim" filed against Co defendant Mahoney by Davis at any time. Order for Judgment R.p. 403-404.

Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 493 S. E. 2d 826 (1997), dealt with the issue of the trial court's discretion in refusing to deem requests to admit as admitted for failure to respond. The trial judge's refusal to deem the request as admitted was found to be a proper exercise of his discretion. The factual situation in the case at bar is on point "particularly in light of hard proof that [sellers actually received the requests." Id., at 836. The Supreme Court also stated the rule that the trial court's ruling on discovery matters will not be overturned on appeal "absent a clear abuse of discretion." Id.

Similarly, in Collins Entertainment, Inc. v. White, 363 S.C. 546, 611 S.E.2d 262 (Ct. App. 2005), this Court affirmed the trial judge's refusal to deem requests for admission as admitted for failure to respond. Appellants in Collins waited until the start of trial to seek requests be deemed admitted for failure to respond. This Court recognized that when an admission has been deemed made solely due to failure to respond to a request, the admission can

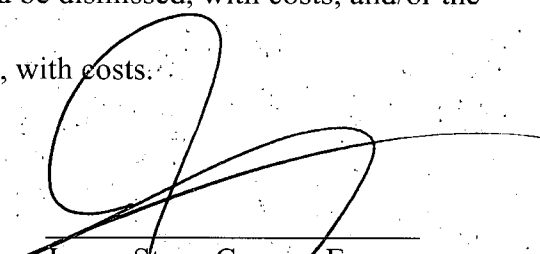
be amended through testimony. Id. Mahoney testified at length without objection from Appellant. Transcript R.p. 152-157.

Whether the Requests were deemed not admitted by Mahoney (see Order for Judgment) or whether the admission were allowed by the trial Judge to amended through testimony and oral request of Mahoney at trial, it is within the trial judge's discretion. This finding is consistent with the findings in Crestwood Golf Club and Collins Entertainment.

The trial judge carefully considered the evidence and testimony in whole and found the Request for Admission to have not been deemed admitted. The trial judge did not err in his judgment on this issue and his decision was not an abuse of discretion. See Crestwood Golf Club and Collins Entertainment.

CONCLUSION

For the reasons set forth herein the Appeal should be dismissed, with costs, and/or the Order for Judgment of the trial judge should be affirmed, with costs.



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