

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2019-001735
Case No. 2017-CP-23-02918

Frontage Road Associates, Inc., also known as
Frontage Road, Inc., Respondent,

v.

Elephant, Inc. and Gregory Gaines also known as
Ken Wood Appellants.

INITIAL BRIEF OF APPELLANTS

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MAR 05 2020

SC Court of Appeals

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STATEMENT OF ISSUES

1. Whether the Respondent waived its right to a jury trial by failing to comply with the plain and express requirements of Rule 38, SCRCP.
2. Whether the circuit court abused its discretion in denying the Appellants' motion to transfer the case to the non-jury roster.

STATEMENT OF THE CASE

This is a commercial lease case. The Respondent (Owner) leased its commercial property to the Appellants (Tenant). Owner sued Tenant for failure to make lease payments. (Cmplnt.). Tenant answered and *inter alia* denied the failure to pay allegation. (Answ.).

Owner did not demand a jury trial as required by Rule 38, SCRCF. The case was mistakenly placed on the jury roster. Tenant filed a motion to transfer the case to the non-jury docket, because Owner had waived its right to a jury trial under Rule 38, SCRCF. (Motion to Transfer; Tr. 4-6). The trial court denied the motion. (Order). Tenant timely appealed.

INTRODUCTION & BACKGROUND FACTS

Owner commenced this action by electronic filing under South Carolina's E-Filing System. The issues in this case involve the application of the South Carolina Rules of Civil Procedure (SCRCF) and the Electronic Filing Policies and Guidelines (cited as § ____, SCEF).¹

This is a breach of contract action, and the plaintiff-Owner seeks an award of monetary damages. (Cmplnt at 3). Therefore, this is an action at law, and both parties had a right to a jury trial. *Airfare, Inc. v. Greenville Airport Comm'n*, 153 S.E.2d 846, 848 (S.C. 1967) (breach of commercial lease). Under the undisputed facts of this case, the law required Owner to do one of two things if it wanted a jury trial: (1) make a written demand in its complaint, which is the most common method; or (2) timely serve and file a written demand for a jury trial after the commencement of the action. See generally Rule 38(b), SCRCF. It is undisputed that Owner never demanded a jury trial as required by Rule 38(b), SCRCF. Therefore, Owner waived its right to a jury trial by operation of law. Rule 38(d), SCRCF ("The *failure* of a party

¹ See South Carolina Electronic Filing Policy and Guideline 11(b), stating: "These Policies and Guidelines may be cited as follows: Section ____, SCEF."

to serve a demand as required by this rule and to file it as required by Rule 5(d) *constitutes a waiver* by him of trial by jury.”) (All emphasis added).²

Rule 39(a), SCRCP provides: “*When* trial by jury has been demanded *as provided in Rule 38*, the action *shall be designated* upon the calendar and the clerk’s filebook as a jury action.”) (Emphasis added). Here, it is undisputed that Owner did not demand a jury trial “as provided in Rule 38” and, therefore, the case should not have been placed on the jury roster.³

It appears the county clerk of court relied on the “data entry screen” used by Owner to E-File its summons and complaint under the SCEF, which includes a section for the E-Filer to denote the case as jury or non-jury. (See Tr. 6). However, the E-Filing System does not serve the data entry screen or the papers that initiate a lawsuit, *e.g.*, summons and complaint. See §§ 4(e)(1) and 4(e)(2)(A), SCEF. Here, Owner personally served the summons and complaint as required by § 4(e)(1), SCEF and Rule 4, SCRCP, but it did not serve the “data entry screen” used to commence this action. (Affs. of Service on Elephant, Inc. and Gaines/Wood). In short, Owner never served and never filed any jury demand as required by Rule 38, SCRCP, and therefore, the circuit court erred in denying Tenant’s motion to transfer the case to the non-jury roster.

² Under the SCRCP, if a party does not demand a jury trial in its pleadings (*e.g.*, complaint) but desires a jury trial, it must serve a written demand on the other parties and thereafter file the written demand with the court. See Rules 38(b), (d) and 5(a), (d), SCRCP. Under the SCEF, that party would e-file the written demand with the court, and the E-Filing System would thereafter serve it by email with an NEF (Notice of Electronic Filing). See § 4(e)(2), (e)(3), (e)(6) SCEF. **Note:** Service by NEF is limited to parties that have appeared in the action at the time of the filing by counsel who is an “Authorized E-Filer.” § 4(e)(2), SCEF. Absent such an appearance, the e-filer must serve the filing by “Traditional Service,” *i.e.*, the service methods prescribed by the SCRCP. See, *e.g.*, §§ 1(a), 1(m), 1(o), and 2(b), SCEF.

³ See *South Carolina Community Bank v. Salon Proz, LLC*, 800 S.E.2d 488, 490-491 (S.C. App. 2017) (clerk did not have authority to refer foreclosure action to master for final judgment, because defendant had previously filed answer and counterclaim that included a valid demand for jury trial under Rule 38(b); clerk therefore violated Rule 39(a) by not placing the case on the jury trial docket; and master therefore erred in denying motion to transfer case to the jury docket.); Rule 40(a)(2), SCRCP (“subject to Rule 38(b),” the clerk “shall file” the case as nonjury unless caption includes jury demand or clerk informed of proper jury demand).

ARGUMENT

The circuit court found that Owner failed to demand a jury trial but nevertheless denied Tenant's motion to transfer the case to the non-jury roster. (Order at 1).⁴ As shown below, the undisputed and controlling facts demonstrate that Owner waived its right to a jury trial by operation of Rule 38, SCRPC. Therefore, the circuit court abused its discretion in refusing to transfer the case to the non-jury roster.

I. The undisputed facts in this case demonstrate that Owner waived its right to a jury trial under the express and controlling provisions of Rule 38, SCRPC.

A. Standard of Review

The application of the law to undisputed facts presents a question of law for the court, which the appellate court reviews *de novo* with no deference to the circuit court's decision. *Crossman Cmty. of N.C. v. Harleysville Mut. Ins. Co.*, 717 S.E.2d 589, 592 (S.C. 2011).

B. Owner waived its right to a jury trial.

Rule 38(d) provides that “[t]he *failure* of a party to *serve* a demand as required by this rule *and to file it* as required by Rule 5(d) *constitutes a waiver* by him of trial by jury.” (All emphasis added). Here, it is undisputed that Owner failed to do so. Thus, by operation of Rule 38, Owner waived its right to a jury trial on July 17, 2017.⁵

⁴ The order provides in full: “This matter came before the Court on Defendant's Motion to move this matter to the Non-Jury docket. Defendant argues that Plaintiff failed provide notice of its demand for a jury trial pursuant to the SCRPC. Plaintiff, contends, and the file reflects, that he did specifically file this case as a “Jury Trial” in the electronic filing system. The case has been indexed as such since that time. Although a written notice was never served on the Defendant, the record reflects that Defendant is not caught unaware of the pendency of this case as a jury trial and is, thus, not prejudiced by a technical deficiency. The motion is, therefore, respectfully denied.” (Order at 1).

⁵ The last day for demanding a jury trial is “not later than 10 days after the service of the last pleading directed to such issue.” Rule 38(b), SCRPC. Here, the “last pleading” was Tenants’ Answer, which was e-filed on July 7, 2017 (Answ at R. _) and automatically served on Owner the same day, making July 17 the last day for making a jury trial demand.

II. The circuit court erred in refusing to transfer the case to the non-jury roster.

A. Standard of Review

The question of whether to hold a jury trial when a party has failed to demand it resides in the discretion of the trial court. Rule 39(b), SCRCP. The circuit court abuses its discretion when its order is controlled by an error of law or its factual findings are without evidentiary support. *Curry v. Carolina Ins. Group of S.C., Inc.*, 832 S.E.2d 760, 768 (S.C. App. 2019).

B. The circuit court erred in denying the motion to transfer.

The circuit court correctly noted that Owner e-filed this action as a jury case on the data entry sheet, and the case was indexed as a jury trial, but these facts are not relevant. The undisputed and controlling fact is that Owner did not demand a jury trial as required by Rule 38(b), SCRCP. Owner's failure to comply with Rule 38 is not a "technical deficiency." Rather, Owner waived its right to a jury trial by operation of the plain and express terms of Rule 38(d), SCRCP. Accordingly, the appealed order was controlled by an error of law. Therefore, the circuit court erred in denying the motion to transfer this case to the non-jury docket, where it should have been from the outset of the case. *South Carolina Community Bank v. Salon Proz, LLC*, 800 S.E.2d 488 (S.C. App. 2017).⁶

⁶ *Salon Proz* was a foreclosure action. The defendant validly demanded a jury trial in his answer under Rule 38, SCRCP. 800 S.E.2d at 489-490. The clerk of court signed an order of reference upon the plaintiff's motion under Rule 53, SCRCP. *Id.* The defendant moved to transfer the case to the jury docket, and the master denied the motion. *Id.* at 490. The defendant appealed, and this Court reversed under the following analysis: (1) the facts are undisputed; (2) Rules 38, 39, and 53, SCRCP are controlling; (3) because the defendant validly demanded a jury trial in the answer, the clerk of court did not have the authority to refer the case to the master; and (4) therefore, the master erred in denying the motion to transfer the case to the jury roster. *Id.* at 490-491. Here, as in *Salon Proz*, the facts are undisputed, Rules 38 and 39, SCRCP are controlling, and the motion to transfer should have been granted under an application of the plain and express provisions of Rules 38 and 39 to the undisputed facts of this case. This court also noted the general rule that the waiver of a jury trial is "strictly construed and not lightly inferred or extended by implication." *Id.* at 491. The undisputed facts of this case satisfy this strict test, because Owner waived the right to a jury trial under the plain and express provisions of Rules 38, SCRCP. Nothing in Rule 38 needs to be "construed," strictly or otherwise, and there is no need to infer anything or extend anything by implication. Rule 38 plainly and expressly states that Owner waived the right a jury trial under the undisputed facts of this case.

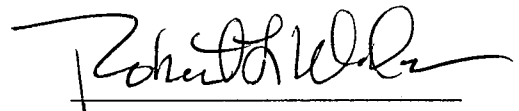
The circuit court ruled that Tenant was not prejudiced by the denial of the motion to transfer, because the court found “the record reflects that [Tenant] is not caught unaware of the pendency of this case as a jury trial.” (Order at 1). The record does not support this finding. The only evidence is that when Tenant realized the case was on the jury roster despite the absence of a valid jury demand, it moved to transfer the case to the non-jury roster. (Tr. 9). Thus, the trial court’s finding of no prejudice is without evidentiary support and, therefore, the court abused its discretion in denying the motion to transfer the case to the non-jury roster.

The undisputed and controlling fact in this case is that Owner waived its right to a jury trial by failing to comply with the requirements of Rule 38, SCRPC. Moreover, there is no evidence to support the circuit court’s ruling that Tenant was not prejudiced because it was “not unaware” that the case was on the jury roster. Therefore, the circuit court abused its discretion in refusing to transfer the case to the non-jury roster.

CONCLUSION

For all of the foregoing reasons, the Appellants respectfully submit that this Court should reverse and remand with instructions to place the case on the non-jury roster.

Respectfully Submitted,



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March 4, 2020
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The Honorable Robin B. Stilwell

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Frontage Road Associates, Inc., also known as
Frontage Road, Inc., Respondent,

v.

Elephant, Inc., and Gregory Gains,
also known as Kenwood Gaines, Appellants.

CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of Burr & Forman, LLP, hereby certify that true and correct copies of the **Appellants' Initial Brief** and **Appellants' Designation of Matter to be Included in Record on Appeal** were served upon counsel for the Respondent in the above-captioned matter, by causing a copy of same to be deposited in the United States Mail, first class postage prepaid, this 4th day of March, 2020, addressed as follows:

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SC Court of Appeals

**Re: Frontage Road Associates, Inc. v. Elephant, Inc.
Appellate Case No. 2019-CP-001735**

Dear Ms. Kitchings:

Enclosed please find the original and two copies of the Appellants' Initial Brief and the original and two copies of the Appellants' Designation of Matter to be Included in Record on Appeal. Please file both documents in your office and return the file stamped extra copies to me in the return envelope provided.

By copy of this letter, we are serving copies of both on counsel for the Respondent.

Sincerely,

Burr Forman McNair

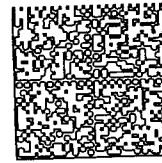


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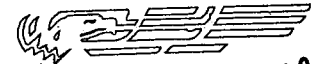
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Enclosures

cc: O. W. Bannister Esquire



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