

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appellate Case No. 2021-000460

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May 21 2021

SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
DEBRA R. MCCASLIN, CIRCUIT COURT JUDGE
Case No. 2020-CP-10-04936

Quality Fresca I, LLC Appellant.

v.

Kenneth R. Davenport II, Personal Representative
Representative of the Estate of Kenneth R. Davenport Respondent,

MOTION TO DISMISS APPEAL

Respondent, the landlord, Kenneth R. Davenport II, Personal Representative of the Estate of Kenneth R. Davenport, pursuant to Rules 240 and 260, SCACR, hereby moves to dismiss the appeal filed by Appellant, the tenant, Quality Fresca I, LLC, of the Circuit Court’s order affirming the Magistrate Court’s order of ejectment and the Circuit Court’s order denying Appellant’s motion for reconsideration.

INTRODUCTION

The ground for dismissing this appeal is that Appellant did not satisfy the jurisdictional, statutory, condition precedent to take this appeal because it did not timely, within 5 days, file for a bond when appealing the Magistrate Court’s order of ejectment to the Circuit Court. The legal authorities that require dismissal are as follows: S.C. Code Ann. § 27-37-130; *Wheeler v. Hyler*, 91 S.E. 2d 265, 228 S.C. 584 (1956); and *Horn v. Blackwell*, 212 S.C. 480, 48 S.E. 2d 322 (1948). The Circuit Court recognized this fatal

failure to satisfy the jurisdictional, statutory condition precedent for appeal as an alternative basis to affirm the Magistrate Court's order of ejectment, which the Circuit Court also affirmed on the merits. In its reconsideration motion to the Circuit Court, Appellant did not dispute and effectively conceded that it did not timely file for a bond. Appellant otherwise preserved no arguments in its reconsideration motion that can defeat the Circuit Court's correct ruling that this was a fatal failure divesting it of appellate jurisdiction. For these reasons, as detailed below, this appeal should be dismissed.

FACTUAL BACKGROUND

This ejectment action involves a commercial tenancy in downtown Charleston on the corner of Calhoun Street and King Street. (Appx. 3, 9, 80-84, 127-132).

Appellant, the tenant, failed to pay the security deposit, \$30,496.00, and timely cure that breach. (Appx. 3, 9, 80-84, 127-132).

Appellant then represented in a series of e-mails to Respondent that it would not exercise an option to extend the lease because it would not be able to afford to pay the rent, that it would be vacating the premises at the end of the original lease term, and that Respondent should secure a new tenant. (Appx. 59-62, 80-84, 127-132). For example, in one such e-mail exchange, Respondent wrote:

Thank you for your email. These are definitely unprecedented times. We appreciate your attempts at seeking solutions to your lack of business. If we are unwilling to accept these terms or terms similar to what you are proposing and the lease terms would remain as they currently are, does that mean you are not going to exercise the option and would be vacating the property?

To which Appellant responded:

Unfortunately it does. It doesn't make sense to sign up for a situation where you know you are going to take losses with the hope that, at some point in the unknown future, you will start to turn a profit. That is why we offered a short term

situation with mutual termination rights, so if you could find someone to pay the freight, you can make the deal and until then, we both ride the wave and take what is available.

(Appx. 59).

Respondent relied on Appellant's representations by engaging a broker to re-let the premises and by entering into an agreement with a new tenant. (Appx. 3, 9, 80-84, 96-97, 127-132).

Appellant later revealed that its representations were false and made in bad faith as a negotiation tactic to attempt to get Respondent to reduce the rent. (Appx. 3, 9, 80-84, 96-97, 127-132).

Appellant has since refused to vacate the premises, past the end of the original lease term, and prevented the new tenant from occupying the premises. (Appx. 3, 9, 80-84, 96-97, 127-132).

Respondent applied for an ejectment, under the statutory authority of S.C. Code Ann. §§ 27-37-10 *et seq.*, entitled "Ejectment of Tenants," and applicable case law, principally including *Kiriakides v. United Artists Communications, Inc.*, 312 S.C. 271, 440 S.E. 2d 364 (1993) and *Ingram v. Kasey*, 340 S.C. 98, 531 S.E.2d 287 (2000). (Appx. 9).

PROCEDURAL BACKGROUND

Respondent filed its application for ejectment on October 1, 2020. (Appx. 9, 131).

The Magistrate Court held a bench trial on October 27, 2020. (Appx. 131).

The Magistrate Court issued its order of ejectment on November 4, 2020. (Appx. 80, 131).

Appellant did not file a motion for reconsideration with the Magistrate Court. (Appx. 131).

Appellant filed its notice of appeal to the Circuit Court on November 9, 2020.

(Appx. 1, 131).

Appellant did not file to pay a bond within five days of its notice of appeal to the Circuit Court. (Appx. 131).

The Magistrate Court, *sua sponte*, on November 18, 2020, scheduled a bond hearing, held on November 25, 2020, and thereafter accepted a bond from Appellant. (Appx. 98-99, 131, 181-204, 217-18).

The Circuit Court held an appellate hearing on March 16, 2021. (Appx. 132).

The Circuit Court issued its order affirming the Magistrate Court's order of ejectment on March 26, 2021, which was entered on March 29, 2021. (Appx. 127).

Respondent filed a motion for reconsideration of that order on April 8, 2021. (Appx. 145).

The Circuit Court issued its order denying that motion for reconsideration on April 27, 2021. (Appx. 220).

Appellant filed the instant notice of appeal to this Court on April 29, 2021. (Appx. 223).

LEGAL ANALYSIS

The statutory scheme at issue in this matter, entitled "Ejectment of Tenants," S.C. Code Ann. §§ 27-37-10 *et seq.*, expressly provides, pursuant to subsection S.C. Code Ann. § 27-37-130, that an appeal of an order of ejectment issued by the Magistrate Court shall be dismissed if the tenant fails to file a bond within five days after serving its notice of appeal, as follows:

An appeal in an ejectment case will not stay ejectment unless *at the time of appealing* the tenant shall give an appeal bond as in other civil cases for an amount to be fixed by the magistrate and conditioned for the payment of all costs and damages which the landlord may sustain thereby. In the event the tenant shall fail to file the bond herein required

within five days after service of the notice of appeal such appeal *shall be dismissed* by the trial magistrate.

S.C. Code Ann. § 27-37-130 (emphasis added).

Two cases decided by the South Carolina Supreme Court, *Wheeler v. Hylar*, 91 S.E. 2d 265, 228 S.C. 584 (1956) and *Horn v. Blackwell*, 212 S.C. 480, 48 S.E. 2d 322 (1948), hold that this statutory language, requiring the tenant to file a bond within five days after serving its notice of appeal of the Magistrate Court, is a “jurisdictional,” “condition precedent” to the right of appeal by a tenant from an order of ejectment.

Here, as detailed above, Appellant filed its notice of appeal from the Magistrate Court on November 9, 2020. (Appx. 1, 131). Appellant thereafter made no attempt to give or file an appeal bond within five days. (Appx. 131). That was a fatal failure. Nine days after the jurisdictional, condition precedent deadline passed, the Magistrate Court, *sua sponte*, on November 18, 2020, scheduled a bond hearing, held on November 25, 2020, and thereafter accepted a bond from Appellant. (Appx. 98-99, 131, 181-204, 217-18). But the Magistrate Court’s gracious leniency toward Appellant could not and did not cure its fatal failure.

The Circuit Court correctly recognized this fatal failure in its order affirming the Magistrate Court’s order of ejectment. (Appx. 131-34). In Appellant’s subsequent motion for reconsideration, Appellant did not dispute and effectively conceded the dispositive fact that it did not file for a bond within 5 days of its notice of appeal. (Appx. 145). Instead, Appellant attempted to challenge the result that dispositive fact mandates in the following ways. (Appx. 145).

First, Appellant attacked *Wheeler*, arguing that it is outdated because it was decided before the rules of civil procedure were adopted, that it does not construe S.C. Code Ann. § 27-37-130, and that it was incorrectly decided by our Supreme Court. (Appx.

156-57). These attacks on *Wheeler* are unfounded. *Wheeler* was cited as recently as 2020. See *In re Arrieta*, 612 B.R. 342 (Bankr. D.S.C. 2020) (citing *Wheeler*). The holding of *Wheeler* is not affected by any later adopted rule of civil procedure. Indeed, Rule 74, SCRCP, expressly makes it clear that the adoption of the rules of civil procedure did not change the fact that the “procedure on appeal to the circuit court . . . shall be in accordance with the statutes providing such appeals.” *Wheeler*, furthermore, certainly did construe the same statutory provision at issue here, known now as S.C. Code § 27-37-130 (1976), but known at that time as S.C. Code § 41-113 (1952), as explained in the annotations to the statute. See S.C. Code Ann. § 27-37-130 (“HISTORY: 1962 Code Section 41-113; 1952 Code Section 41-113; 1946 (44) 2584; 1950 (46) 2305.”). The statutory language has been virtually unchanged since 1946. Compare the statutory language from the Act of 1946:

An appeal in an ejectment case will not stay ejectment unless at the time of appealing the tenant shall give an appeal bond as in other civil cases for an amount to be fixed by the trial magistrate, and conditioned for the payment of all costs and damages which the landlord may sustain thereby. In the event the tenant shall fail to file the bond herein required within five (5) days after service of the notice of appeal such appeal shall be dismissed.

with the current statutory language from S.C. Code Ann. § 27-37-130:

An appeal in an ejectment case will not stay ejectment unless at the time of appealing the tenant shall give an appeal bond as in other civil cases for an amount to be fixed by the magistrate and conditioned for the payment of all costs and damages which the landlord may sustain thereby. In the event the tenant shall fail to file the bond herein required within five days after service of the notice of appeal such appeal shall be dismissed by the trial magistrate.

And lastly, *Wheeler* has not been overturned by our Supreme Court, so Appellant’s contention that it is “incorrect” is contrary to binding law.

Second, Appellant suggested that *Horn* is likewise outdated. (Appx. 156-57). *Horn*

involved the same, virtually unchanged statutory provision, as set forth above. It too has not been overturned by our Supreme Court and remains good law.

Third, Appellant asserted that the untimely bond issue was “not raised” by Respondent. (Appx. 157). The issue was raised by Respondent to the Magistrate Court, both before and at the untimely bond hearing (scheduled and held, *sua sponte*, by the Magistrate Court), and then again in its responsive brief to the appeal taken to the Circuit Court, and yet again at the hearing held by the Circuit Court. (Appx. 111, 131, 181-204, 217-18). Notwithstanding, it does not matter when or how the issue was raised – because it is a statutory matter of appellate jurisdiction, as will be discussed next.

Fourth, Appellant contended that the Circuit Court considered the untimely bond issue *sua sponte*, and that it did not have the authority to do so. (Appx. 157). As already explained, the Circuit Court did not raise the issue *sua sponte*, rather it was raised by Respondent, numerous times, as detailed above. (Appx. 111, 131, 181-204, 217-18). But regardless, as *Wheeler* and *Horn* explain, the failure to timely file for a bond divests an appellate court of jurisdiction, and the statute itself expressly required the appeal to be “dismissed.” S.C. Code Ann. § 27-37-130.

Fifth, Appellant suggested a need to look to the transcript of the untimely bond hearing, scheduled and held, *sua sponte*, by the Magistrate Court. (Appx. 157). The transcript of the bond hearing was not something that should have been presented to the Circuit Court by Appellant for the first time in a motion for reconsideration. But regardless, the transcript is of no help to Appellant. The dispositive fact is that Appellant did not timely file for a bond. The Magistrate Court was powerless to change that dispositive fact. And as mentioned already, the transcript only confirms that Respondent duly objected. (Appx. 181-204, 217-18).

Appellant cannot now raise any other arguments, beyond these meritless arguments that it advanced in its motion for reconsideration to the Circuit Court. *See I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716 (2000) (“The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred.”). Notwithstanding, there is no argument Appellant could possibly make to overcome its fatal failure. The controlling statute and case law construing it are clear. This appeal should be “dismissed” under S.C. Code Ann. § 27-37-130.

CONCLUSION

Appellant improperly took this appeal for the purpose of protracting this litigation, while it remains in the premises, prejudicing Respondent, and preventing the new tenant from occupying the premises. As a jurisdictional and statutory matter, respectfully, this improper appeal should be dismissed.

(Signature page to follow)

Dated: May 21, 2021

Respectfully submitted,

/s/ Brian A. Hellman

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CERTIFICATE OF SERVICE

I hereby certify that on this date, May 21, 2021, I have served the foregoing on Appellant's counsel of record by e-mail.

/Jason S. Smith/
Jason S. Smith

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