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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appellate Case No. 2021-000460

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,

**REPLY TO RESPONSE TO MOTION TO DISMISS APPEAL**

Respondent Kenneth R. Davenport II, Personal Representative of the Estate of Kenneth R. Davenport submits this reply to Appellant Quality Fresca I, LLC’s response to the motion to dismiss this appeal.

**1. Appellant’s response fails to challenge the legal and factual grounds for dismissal set forth in the motion.**

As set forth in the instant motion, 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 provision, mandating dismissal, is a “jurisdictional,” “condition precedent” to the right of appeal by a tenant from an order of ejectment.

In its response to the instant motion, Appellant does not address the above statutory provision at issue, S.C. Code Ann. § 27-37-130, or the two South Carolina Supreme Court cases discussing it, *Wheeler* and *Horn*. Appellant abandons the arguments it made against these controlling legal authorities, previously, in its motion for reconsideration to the Circuit Court. (Appx. 145). And Appellant does not refute the dispositive, procedural fact that it did not timely, within 5 days, file for a bond when appealing the Magistrate Court’s order of ejectment to the Circuit Court. Accordingly, Appellant’s response fails to challenge the legal and factual grounds for dismissal set forth in the motion.

**2. Appellant’s response is otherwise misguided and without merit.**

Disregarding the language of the ejectment statute at issue, S.C. Code Ann. § 27-37-130, and the cases discussing it, *Wheeler* and *Horn*, Appellant’s leading argument is that the instant motion should be denied in view of *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E.2d 278 (2011). That case is an inapposite criminal case, involving a different statute, containing no language requiring dismissal based on a temporal restriction regarding a bond. *Id.*, 393 S.C. 332, 713 S.E.2d at 284 (“These two provisions of section 14–25–95 do not implicate jurisdiction as there is no temporal restriction in that sentence of the statute.”).

Another argument Appellant makes is that the Magistrate Court had the authority and discretion to decline to dismiss the appeal and issue a bond when it did, *sua sponte*, late, and over Respondent's objection. That argument contravenes the language of the statute at issue that Appellant disregards, S.C. Code Ann. § 27-37-130, which mandatorily (as opposed to permissively) requires: "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." (emphasis added). Appellant's argument likewise contravenes the controlling cases that Appellant disregards, *Wheeler* and *Horn*, which hold that the above statutory provision, mandating dismissal, is a "jurisdictional," "condition precedent" to the right of appeal by a tenant from an order of ejectment. Further, as explained in *Horn*, the legislature imposed this strict statutory requirement for the right to appeal an order of ejectment, which the Magistrate Court did not have the power to question or decline to follow:

It is well settled that the right of appeal is not an inherent or vested right, but is a matter of grace . . . It follows that in the absence of a constitutional restriction, the legislature in its discretion may abridge or regulate the right of appeal . . . We conclude that the General Assembly may lawfully require the filing of a bond as provided for by Section 30 of the Act under consideration as a condition precedent to the right to appeal from an order of ejectment. We are not unaware of the fact that such a requirement may impose a hardship upon some tenants, but we are here dealing with the power of the General Assembly and not with the question of whether such power was wisely exercised. The Court below did not pass upon the merits of the appeal and it is unnecessary for us to do so. We have no hesitancy in saying, however, that the exceptions relating to the merits are untenable.

*Horn*, 212 S.C. 480, 48 S.E.2d at 323.

In the order presently on appeal, the Circuit Court recognized the above express statutory language of S.C. Code Ann. § 27-37-130, as well as the case law discussing it,

*Wheeler* and *Horn*, and dismissed the appeal accordingly. (Appx. 131-34). Respondent was not required, as Appellant suggests, to take his own, separate, independent appeal from the Magistrate Court in order for the Circuit Court to recognize that it was not vested with appellate jurisdiction and that the appeal taken by Appellant should be dismissed. The fact that, here, the Magistrate Court, itself, did not dismiss the appeal, as it should have done by statute, is immaterial to the question of whether there is ongoing appellate jurisdiction, as *Wheeler* explains:

Under it [the statute now known as S.C. Code Ann. § 27-37-130], the dismissal of the appeal by the ‘trial magistrate’ is merely the means of establishing the absence of this condition precedent. Here the failure to file the bond is conceded in the agreed case. Because of appellants’ non-compliance with this mandatory provision of the statute, the appeal is not properly before us. It is, therefore, unnecessary to decide whether the order of dismissal should have been signed by Judge Moss, before whom the case was tried, instead of by Judge Bellinger, who was presiding in the eleventh circuit when the order was filed. We, therefore, do not reach the question of whether the judgment of the lower court is void for lack of jurisdiction of the issues raised by the pleadings and intimate no opinion thereabout. An objection to jurisdiction of the subject matter may be raised at any time during the progress of an action. However, the conclusion that this appeal is not properly pending before this court exhausts our jurisdiction and precludes consideration of it.

*Wheeler*, 228 S.C. 584, 91 S.E.2d at 266.

The remainder of Appellant’s response attempts to re-try the underlying facts, which both the Magistrate Court and the Circuit Court found supported the ejection of Appellant from the premises. The record certainly contains evidence substantiating the correct findings of fact by both courts below – highlighted by Appellant’s failure to pay a \$30,496.00 security deposit and to timely cure that breach, and Appellant’s own e-mails representing 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). Notwithstanding, Appellant's attempt to raise arguments about the underlying facts should not help it avoid the dismissal of this appeal based on the statutory, jurisdictional grounds set forth in the instant motion, which Appellant fails to challenge.

WHEREFORE, respectfully, the instant motion to dismiss this appeal should be granted.

Dated: June 3, 2021

Respectfully submitted,

/s/ Brian A. Hellman  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this date, June 3, 2021, I have served the foregoing on Appellant's counsel of record by e-mail.

*/Jason S. Smith/*  
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