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THE STATE OF SOUTH CAROLINA **Jun 09 2021**

In the Court of Appeals

SC Court of Appeals

APPEAL FROM BERKELEY COUNTY

Roger M. Young, Sr., Circuit Court Judge

Bethany Aloha Rich,
Appellant,

v.

New Heights Property Management,
Respondent.

APPELLATE CASE NO. 2020-001684

RESPONDENT’S MOTION TO DISMISS APPEAL FOR FAILURE TO SERVE
AND FILE INITIAL BRIEF AND FOR FAILURE TO PAY BOND

Scott Riddell, Esquire

SC Bar No. 102809

P.O. Box 15432

Asheville, NC 28813

(843) 735-9702

Attorney for Respondent

INTRODUCTION and FACTS

In this eviction matter, the parties had a residential lease that ran from December of 2018 to December of 2019. The parties then executed a lease renewal through the end of January, and, at the same time, the owners were listing their home for sale, and Appellant was one such prospective buyer. The deal between the owners and Appellant fizzled in January of 2020. The owners refused further rent payment from Appellant and filed the eviction in early February. On March 11, 2020, the Goose Creek magistrate upheld the eviction after a hearing. On November 16, 2020 the Court of Common Pleas affirmed the decision on appeal. During this litigation, one of the owners (a couple) has become terminally ill; the owners have accordingly changed their intentions with the home and await this litigation's completion to return to the home as a final residence together.

During all events described in this paragraph, Appellant has had counsel. Appellant received the transcript on February 12, 2021. Ex. A at 1 (email from court reporter to Appellant's counsel, attaching transcript, dated February 12, 2021). Appellant's original deadline for filing the initial brief was thirty days from that date. When Appellant missed that deadline, Appellant filed a motion for an extension, and Respondent filed two motions to dismiss the appeal, one due to Appellant missing said deadline, the other due to Appellant's failure to pay bond on time. The Court, by order dated May 4, 2021, directed Appellant to file the

initial brief within thirty days of May 4, 2021, which is June 3, 2021. As of this motion's filing date, Appellant has not served or filed the initial brief. Appellant also had previously failed to obtain the hearing transcript timely (such was the subject of Appellant's first motion for an extension).

Appellant has also failed to pay bond for the month of May (though she has paid for June). That amount is \$1,600 per the last bond-setting decision of the courts, which was by the Circuit Court via oral order during the hearing on the merits of the first appeal. That payment was due by May 5, 2021. Appellant had previously failed to pay March bond (such was the subject of Respondent's previous motion to dismiss).

LAW

“Within thirty (30) days after receiving the transcript . . . appellant shall serve one copy of his brief on all parties to the appeal, and file with the clerk of the appellate court one copy of the brief with proof of service.” Rule 208(a)(1), SCACR. “Unless otherwise provided by these Rules, or ordered by the appellate court, the time limits imposed by these Rules shall not be stayed by the filing of a motion or petition. A motion to dismiss an appeal or a motion to relieve counsel shall, however, automatically stay the time limits for perfecting the appeal until the motion is decided.” Rule 240(b), SCACR. “Upon the failure of the appellant to file and serve his brief within the time prescribed, the clerk of the appellate court shall

sign an order dismissing the appeal, and the appeal shall not be reinstated except as provided by Rule 260.” Rule 208(a)(4), SCACR.

“Whenever it appears that an appellant or a petitioner has failed to comply with the requirements of these Rules, the clerk shall issue an order of dismissal, which shall have the same force and effect as an order of the appellate court. A case shall not be reinstated except by leave of the court, upon good cause shown, after notice to all parties.” Rule 260(a), SCACR. The Court has enforced this rule where appellants have failed to serve and file initial briefs within Rule 208’s deadline. See, e.g., Turner v. Santee Cement Carriers, Inc., 277 S.C. 91, 96, 282 S.E.2d 858, 860 (S.C. 1981) (“Respondent . . . did not file a brief with this Court. Her failure to do so allows this Court to take such action upon the appeal as it deems proper. This failure alone would justify reversal; however, we simply consider it as an additional ground.”); State v. Serrette, 375 S.C. 650, 651, 654 S.E.2d 554, 555 (Ct. App. 2007) (“Though South Carolina affords criminal defendants the opportunity to appeal, the right to an appeal may be lost through a variety of actions by an appellant, such as: (1) . . . ; (2) failure to serve and file an initial brief and designation of matter under Rule 208(a)(4), SCACR;”).

The Supreme Court’s order 2020-05-29-02, “Operation of the Appellate Courts During the Coronavirus Emergency (As Amended May 29, 2020),” forgave procedural defaults in two contexts, neither of which applies here, since the first

ended on June 8, 2020, and the second ended on April 9, 2020. Order 2020-05-29-02 at (1)(2)-(3). The sparing nature of any residual forgiveness of procedural defaults allowed under said order is demonstrated by the Supreme Court’s footnote to the first context just described: “As explained by the order of March 20, 2020, this automatic extension was intended to give ‘lawyers and self-represented litigants appearing before the Appellate Courts ... time to take actions to protect themselves and their families.’ Since sufficient time has been provided for this to occur, and most lawyers and litigants have been able to adjust to working remotely, this automatic extension is no longer warranted.” Order 2020-05-29-02 at (1)(2) n.4.

The South Carolina Residential Landlord Tenant Act, in Section 27-40-800, further governs the dismissal of evictions’ appeals. It has separate provisions on a first appeal to the Circuit Court, and on subsequent appeals. Regarding a first appeal, “[i]t is sufficient to stay execution of a judgment for ejectment that the tenant sign an undertaking that he will pay to the landlord the amount of rent, determined by the magistrate . . . , as it becomes due periodically after the judgment was entered. Any magistrate, clerk, or circuit court judge shall order a stay of execution upon the undertaking.” S.C. Code Ann. Sec. 27-40-800(b). Regarding subsequent appeals, “[u]pon appeal to the . . . court of appeals, it is sufficient to stay execution of a judgment for ejectment that the tenant sign an

undertaking that he will pay to the landlord the amount of rent, determined by order of the judge of the circuit court, as it becomes due periodically after judgment was entered. The judge of the court having jurisdiction shall order stay of execution upon the undertaking.” Id. at (f)(1). “The tenant’s failure to comply with the terms of the undertaking *entitles* the landlord to execution of the judgment for possession in accordance with the provisions of subsection (e) of this section.” Id. at (f)(2) (emphasis added). “If the tenant fails to make a payment within five days of the due date according to the undertaking and order staying execution, the clerk, upon application of the landlord, *shall issue* a warrant of ejectment to be executed pursuant to Section 27-37-40 of the 1976 Code.”¹ Id. at (e) (emphasis added).

There are no reported cases involving application of Section 27-40-800.

ARGUMENT

Appellant’s deadline to serve and file her initial brief was originally March 15, 2021; it became June 3 by the Court’s order dated May 4, 2021. The language of Rules 208, 240, and 260, SCACR, is mandatory regarding a clerk’s entry of an order of dismissal. Such would conform with the precedents of Turner v. Santee Cement Carriers, Inc. and State v. Serrette.

¹ Section 27-37-40 states in full, “[i]f the tenant fails to appear and show cause within the aforesaid ten days then the magistrate shall issue a warrant of ejectment and the tenant shall be ejected by his regular or special constable or by the sheriff of the county.” S.C. Code Ann. Sec. 27-37-40.

Respondent has now demonstrated a pattern of failures to pay bond on time, which of course puts the property owners at risk of missing their mortgage payments and facing foreclosure. Respondent has also shown a pattern of failures to meet appellate procedural deadlines: first to obtain a transcript, then to file the initial brief, then again to file the initial brief under direct, clear order by this Court. The terminally ill owners from whom Appellant has withheld rent/bond payments should not be made to continue to suffer. Appellant has been afforded enough time to submit her brief: she should be afforded no more, and her appeal should be dismissed. Alternatively, this Court should order Appellant to execute an undertaking to pay bond in the amount of \$1,600 by the 1st of each month, deemed late if not paid within five days of said due date, with the explicit proviso that her appeal will be dismissed if not paid on time again.

CONCLUSION

Appellant's appeal should be dismissed, and Respondent's costs and fees should be awarded to Appellant (Respondent intends, should dismissal occur, to file a Rule 222(d) motion upon this Court's remittitur).

Respectfully submitted,

s/Scott Riddell

Scott Riddell, Esquire

SC Bar No. 102809

P.O. Box 15432

Asheville, NC 28813

(843) 735-9702

Attorney for Respondent