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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Hon. Jocelyn Newman, Circuit Court Judge

Appellate Case No. 2018-001449

Court of Common Pleas Case No. 2018-CP-32-00079

FLINT EQUIPMENT COMPANY,..... Respondent,

v.

NORTH EDISTO LOGGING, INC
and PAUL GUNTER,..... Appellants

RESPONDENT'S RETURN AND MEMORANDUM OF LAW IN OPPOSITION TO
APPELLANTS' MOTION FOR TAXATION OF COSTS

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COMES NOW FLINT EQUIPMENT COMPANY, Respondent in the above-styled appeal, and pursuant to South Carolina Appellate Court Rules 222(d) and 240, files its Return and Memorandum of Law in Opposition to Appellants’ Motion for Taxation of Costs, showing the following:

I. AN AWARD OF APPELLANTS' COSTS AND ATTORNEYS' FEES IS NOT WARRANTED.

a. Rule 222(a), SCACR, Does Not Apply.

On July 21, 2021, this Court entered its Opinion reversing and remanding the trial court's order that had dismissed with prejudice the counterclaims of Appellants North Edisto Logging, Inc. and Paul Gunter (collectively, "Appellants"). The Court did not base its Opinion upon a finding that Appellants' arguments were meritorious as presented. Rather, the Court's Opinion turned upon the trial court's failure to procedurally allow Appellants an opportunity to amend their deficient counterclaims prior to a dismissal of same with prejudice.

In South Carolina, costs are regarded as in the nature of penalties, and statutes providing for them are strictly construed. Oliver v. South Carolina Dept. of Highways and Public Transp., 309 S.C. 313 (1992). In pertinent part, Rule 222(a), SCACR, states: "When a judgment is reversed, costs shall be taxed against the respondent unless the court orders otherwise." Respondent contends that the trial court's order from which Appellants appealed was not a "judgment," but an "Order Granting Plaintiff's Motion to Dismiss Defendant's Counterclaims." Further, the terms of this Court's remittitur and remand do not constitute a reversal of judgment. As a result, Rule 222(a), SCACR is inapplicable.

b. Appellants Did Not Prevail on the Merits of Their Appeal.

Even if the provision were applicable, the merits of the appeal do not warrant the grant of costs and attorneys' fees and so Respondent respectfully contends this is an instance where the Court of Appeals may properly "order[] otherwise." Rule 222(a), SCACR. Appellants presented three issues on appeal for this Court to address: (1) whether the trial court erred in concluding that a breach of the implied duty of good faith and fair dealing is only actionable if there is also a

breach of an express term of the contract; (2) whether the trial court erred in concluding that Appellants were required to plead their readiness to perform when that performance was allegedly excused by a prior breach by Respondent; and (3) whether the trial court erred in dismissing Appellants' class action claims before discovery had been conducted. Final Brief of Appellant, p. 1.

Notably, this Court's Opinion did not endorse Appellants' position on any of the three issues. In fact, the Opinion is silent as to the enumerated issues. This Court found reversal and remittitur necessary to allow Appellants an opportunity to amend their counterclaims to state cogent causes of action, *if they can*, before those claims can be dismissed with prejudice. If the trial court erred in dismissing Appellants' claims with prejudice rather than dismissing them without, this is not a failing on Respondent's part. Respondent argues that this Court's Opinion in salvaging Appellants' ability to correct previous mistakes should not provide a basis for Appellants to now tax their costs and attorneys' fees on Respondent. Such an inequitable result runs counter to the clear intent of Rule 222, SCACR. For these reasons, Respondent respectfully requests that this Court deny Appellants' motion for costs and attorneys' fees.

c. Appellants' Motion is Procedurally Deficient.

Rule 222(d), SCACR, provides that:

A party desiring costs to be taxed shall, within fifteen (15) days of the issuance of the remittitur, serve and file a motion requesting that costs be assessed under this Rule. The motion shall comply with Rule 240.

Thus, compliance with Rule 240, SCACR, is a prerequisite to a party's recovery of costs and attorneys' fees upon a motion for same.

Rule 240(c), SCACR, mandates that all motions filed with the Court of Appeals must include a “memorandum with citation of authorities in support of the motion.” Appellants failed to include such a memorandum in support of their motion for attorneys’ fees and costs. As South Carolina strictly construes court rules and statutes providing for the award of costs, Appellants’ Motion should be denied.

II. CONCLUSION.

Respondent respectfully requests the Court to deny Appellants’ Motion for Taxation of Costs; and that the Court grant such other and further relief as this Court deems just and proper.

RESPECTFULLY SUBMITTED this 2nd day of September, 2021.

MOORE, CLARKE, DuVALL & RODGERS, P.C.

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PROOF OF SERVICE

I certify that I have served the *Respondent's Return and Memorandum of Law in Opposition to Appellants' Motion for Taxation of Costs* on the Appellants listed above by depositing a copy of it in the United States Mail, postage prepaid, on September 2, 2021, addressed to their attorney of record, D. Randolph Whitt, 344 Blossom View Ct., West Columbia, SC 29170.

RESPECTFULLY SUBMITTED this 2nd day of September, 2021.

MOORE, CLARKE, DuVALL & RODGERS, P.C.

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