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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,

**MOTION TO DISMISS THE APPEAL,
OR IN THE ALTERNATIVE, TO DECIDE THE APPEAL
ON THE BRIEFS, WITHOUT ORAL ARGUMENT**

INTRODUCTION

In its opening brief, Appellant did not challenge one of the multiple, independent, alternative grounds supporting the order on appeal, thereby abandoning the issue and conceding the outcome of this case. Contrary to our South Carolina Appellate Court Rules, Appellant then attempted to argue the issue in its reply brief, which is not permitted. Meanwhile, the futile protraction of this appellate proceeding is prejudicing Respondent, a landlord, by preventing him from delivering occupancy of the subject property to his new tenant. Accordingly, the appeal should be dismissed or otherwise decided in an expedited manner, without oral argument, affirming the order on appeal.

BACKGROUND

A. The Order On Appeal

This is an appeal of the circuit court's decision, acting in an appellate capacity, affirming the magistrate court's order of ejectment of a commercial tenant. (Cir. Ct. Or., pp. 1-17) (R. 15-32).

The circuit court's decision was expressly based on "independent, alternative grounds." (Cir. Ct. Or., p. 1) (R. 15).

Substantively, the circuit court reviewed the magistrate court's findings of fact and conclusions of law and fully affirmed on the merits. (Cir. Ct. Or., pp. 1, 10-17) (R. 15, 24-31). The circuit court agreed with the magistrate court that the ejectment was warranted based on Appellant's misleading e-mail representations pertaining to the end of the lease (declining the option to extend, representing that it would be vacating the premises because could not afford the rent, and encouraging Respondent to find a new tenant) and its concurrent failure to timely pay a security deposit and cure that breach. (Cir. Ct. Or., pp. 1, 10-17) (R. 15, 24-31).

Procedurally, *inter alia*, the circuit court found that Appellant did not preserve the issues it attempted to raise on appeal by way of first raising them in a reconsideration motion to the magistrate court. (Cir. Ct. Or., pp. 1, 8-10) (R. 15, 22-24). In support of this ruling, the circuit court discussed Rule 19(d) of the Magistrate Court's Rules, as well as the similar Rule 59(e), SCRCF, and fundamental principles of issue preservation, as set forth in the case law, including *I'ON, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000). (Cir. Ct. Or., pp. 1, 8-10) (R. 15, 22-24).

B. The Appellate Briefs

In its opening brief to this Court, Appellant did not challenge the latter independent, alternative ground supporting the circuit court's decision. (*See generally* App. Br.).

Respondent pointed out the absence of such a challenge in its responsive brief.

(Resp. Br., pp. 18-19).

In its reply brief, Appellant conceded Respondent's point, stating: "*Landlord argues that tenant's appeal does not argue the Rule 19 ruling by the circuit court. That's true.*" (App. Reply Br., p. 6) (emphasis added).

Appellant then proceeded in its reply brief to attempt to argue the issue for the first time. (App. Rep. Br., p. 6).¹

C. The Posture Of The Appeal

Appellant filed its notice of appeal to this Court on April 29, 2021.

Appellant then filed a petition for a writ of supersedeas, seeking this Court's permission to remain in the property during the pendency of the appeal, on May 13, 2021.

Respondent opposed the supersedeas petition and separately moved to dismiss the appeal, on grounds that are different from the instant motion, on May 21, 2021. The grounds for that motion were that Appellant did not satisfy the jurisdictional, statutory, condition precedent of filing for a bond within 5 days of the magistrate court's ejectment order.

The Court granted supersedeas relief and denied the motion to dismiss on June 8, 2021. In its order, the Court stated in a footnote: "Nothing prevents the parties from arguing in their briefs that the circuit court should have dismissed the appeal." That footnote relates to the aforementioned bond issue and does not preclude the instant motion to dismiss on different grounds that manifested from Appellant's briefs.

¹ Though Appellant is not permitted to argue the issue for the first time in its reply brief, its arguments are without merit. Appellant offers no competing authority, and otherwise attempts to minimize the issue, inaccurately describing it as being "cursory," "not even an argument but a mere reference," and "gratuitous," when it was verifiably raised by Respondent and duly ruled upon by the circuit court. (*Compare* App. Reply Br., p. 6 *with* Cir. Ct. Or., pp. 1, 8-10) (R. 15, 22-24).

Appellant filed its initial opening brief on July 12, 2021, after first making a motion for a 30-day extension of time to do so.

Respondent timely filed his initial response brief on August 11, 2021.

Appellant filed its initial reply brief on September 1, 2021, after first making a motion for a 10-day extension of time to do so.

Appellant served the record on appeal on Respondent on October 1, 2021.

The parties' final briefs were filed on October 21, 2021.

No oral argument has been scheduled.

D. Current Occupancy of the Premises

It has now been over one year since the end of the lease, on September 30, 2020, and nearly one year since the magistrate court ordered Appellant to vacate the premises on or before November 18, 2020. (Mag. Ct. Or., p. 9) (R. 12). Instead of vacating the premises, Appellant chose to take appeals, first to the circuit court, and then to this Court. At present, this Court's supersedeas order, issued prior to the briefing of this appeal, enables Appellant to remain in the premises until this appeal is resolved. Meanwhile, Appellant's occupancy of the premises prejudices Respondent by preventing him from delivering occupancy of the premises to his new tenant.

LAW

A. Dismissal of the Appeal

The legal standard for dismissal of an appeal is provided by Rule 260(a), SCACR which states: "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."

B. Deciding the Appeal Without Oral Argument

The legal standard for deciding an appeal without oral argument is provided by Rule 215, SCACR, which states: “The appellate court may decide any case without oral argument if it determines that oral argument would not aid the court in resolving the issues.”

C. The Requirements For Appellate Briefs

The rules require an appellant to set forth the issues on appeal in its opening brief, ordinarily in the statement of issues, and otherwise in the argument. Rule 208(b)(1)(B), SCACR (“Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.”); *Langehans v. Smith*, 554 S.E.2d 681, 347 S.C. 348 (Ct. App. 2001) (“In order for an issue to be properly presented for appeal, the appellant’s brief must set forth the issue in the statement of issues on appeal.”); *Eubank v. Eubank*, 555 S.E.2d 413, 347 S.C. 367, 373 n.2 (Ct. App. 2001) (“We hold this statement when read in conjunction with Husband’s argument adequately raised the issue.”); JEAN HOEFER TOAL ET AL., *Appellate Practice in South Carolina* 272 (3d ed. 2016).

Issues not raised in the appellant’s opening brief, as the rules require, are abandoned. *See Video Gaming Consultants v. SC DOR*, 342 S.C. 34, 42, n. 7, 535 S.E.2d 642 (2000) (“However, the [appellant] does not make any argument on the issue. Thus, the [appellant] has abandoned this issue.”); *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (“Appellant fails to provide arguments or supporting authority for his assertion. Thus, he is deemed to have abandoned this issue.”); *First Union Nat. Bank of SC v. Soden*, 333 S.C. 554, 511 S.E.2d 372 (Ct. App. 1998) (“It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling. Failure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal. The unchallenged ruling, right or wrong, is the law

of the case and requires affirmance.”).

“An appellant may not use either oral argument or the reply brief as a vehicle to argue issues not argued in the appellant’s brief.” *Bochette v. Bochette*, 300 S.C. 109, 386 S.E.2d 475 (Ct. App. 1989); TOAL, *Appellate Practice in South Carolina* 272.

D. The Two Issue Rule

“Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case.” *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 328, 730 S.E.2d 282, 284 (2012) (quoting *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900 (2010), *abrogated on other grounds by Repko v. Cty of Georgetown*, 424 S.C. 494, 818 S.E.2d 743 (2018)); *Mibbs, Inc. v. S.C. Dep’t of Revenue*, 337 S.C. 601, 605, 524 S.E.2d 626, 628 (1999) (“Failure to appeal an alternative ground of the judgment will result in affirmance.”); *Folkens v. Hunt*, 290 S.C. 194, 205, 348 S.E.2d 839, 846 (Ct. App. 1986) (“An alternative ruling of a lower court that is not excepted to constitutes a basis for affirming the lower court and is not reviewable on appeal.”).

ANALYSIS

Applying the above described rules for appellate briefs, together with the two issue rule, it is dispositive that Appellant’s opening brief did not challenge an independent, alternative ground supporting the circuit court’s decision. Appellant was not permitted to make such a challenge in its reply brief. And Appellant would not be permitted to make such a challenge at oral argument, if one were to be held. The issue has been abandoned. The outcome of this case has been conceded. The appeal may be expeditiously resolved, by way of dismissal, or the issuance of a decision on the briefs, without oral argument.

CONCLUSION

Given that the outcome of this case has been conceded at the briefing stage, the protraction of this appeal serves only one purpose – that is, to enable Appellant to take advantage of the writ of supersedeas that this Court granted prior to briefing. Such delay prejudices Respondent and its new tenant that is being prevented from occupying the premises. Wherefore, respectfully, this motion should be granted, expeditiously resolving this appeal, affirming the result reached by both courts below.

Dated: October 22, 2021

Respectfully submitted,

/s/ Brian A. Hellman

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CERTIFICATE OF SERVICE

I hereby certify that on this date, October 22, 2021, I have served the foregoing on Appellant's counsel of record by e-mail.

/Jason S. Smith/
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October 22, 2021

Via E-Mail and U.S. Mail

Jenny Abbott Kitchings
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RE: Quality Fresca I, LLC v. Kenneth R. Davenport II
Appellate Case No. 2021-000460

Dear Ms. Kitchings:

Attached for filing in the above referenced matter, please find the Respondent's Motion To Dismiss The Appeal, Or In The Alternative, To Decide The Appeal On The Briefs, Without Oral Argument. One paper copy of the same, together with a \$50 check for the motion fee, is being sent to the Court by U.S. Mail.

With kindest regards, I am

Sincerely yours,



Jason Smith

Encls.

cc: Appellant's counsel of record (via e-mail only)

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