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Jan 14 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

Appellate Case No.: 2022-000010

Appeal from Aiken County
Court of Common Pleas, Second Judicial Circuit
Hon. Clifton B. Newman, Circuit Court Judge

2020-CP-02-01003

Zeb Portanova,..... Respondent,

v.

GinJoint, LLC d/b/a BarVision Appellant.

**RESPONDENT'S MOTION TO DISMISS APPEAL
AND
MEMORANDUM IN SUPPORT THEREOF**

Respondent Zeb Portanova ("Respondent") respectfully moves the Court to dismiss this appeal of the trial court's Order on Damages Hearing (the "Order") entered on November 30, 2021. On January 4, 2022, Appellant served its Notice of Appeal (the "NOA") on Respondent, and it filed the NOA with the Court on the same date. In the NOA, Appellant states it "received electronic notice of entry of this Order on November 30, 2021." Pursuant to Rule 203(b)(1), SCACR, Appellant's deadline to serve the NOA

was December 30, 2021, which was neither a Saturday, Sunday, nor a state or federal holiday. Because Appellant did not serve the NOA until January 4, 2022, Appellant failed to timely perfect this appeal and the appeal should be dismissed for lack of jurisdiction.

If the Court dismisses this appeal, Respondent respectfully notes that it intends to move for fees and any costs against Appellant pursuant to Rule 222, SCACR, within the time period set forth in that Rule.

PROCEDURAL HISTORY

On May 19, 2020, Respondent filed this action against Appellant in the Aiken County Court of Common Pleas seeking a monetary judgment for Appellant's failure to make payments to Respondent under a promissory note. On September 3, 2021, the trial court entered an order (the "September 2021 Order") granting Respondent's motion for summary judgment as to Appellant's liability under the promissory note, and stating Respondent is entitled to a monetary judgment, but found that a genuine issue of material fact existed as to the total amount owed. Accordingly, in the September 2021 Order, the trial court ordered a damages hearing be held. No party appealed the September 2021 Order, and it is the law of the case.

The trial court held the damages hearing on November 4, 2021, which resulted in the trial court's execution, filing and service of the Order on November 30, 2021. In the Order, the trial court granted Respondent a judgment against Appellant in the total amount of \$139,781.17, as of November 1, 2021. No motions were filed by the parties between November 30, 2021, and the filing of the NOA.

Appellant filed and served its NOA on January 4, 2022, wherein it stated that it received electronic notice of the Order on November 30, 2021, the date the Order was

electronically filed by the trial court.

ANALYSIS

Appellant Failed to Timely File its Notice of Appeal Pursuant to Rules 203 and 264, SCACR.

Rule 203(b)(1), SCACR, states that notices of appeal from the court of common pleas “shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment.” In *Wells Fargo Bank, N.A. v. Fallon Properties of South Carolina, LLC*, the South Carolina Supreme Court answered in the affirmative the question of whether notice received electronically sufficed for “written notice” under Rule 203(b)(1). 422 S.C. 211, 217, 810 S.E.2d 856, 859 (2018) (“[W]e hold an email providing written notice of entry of an order or judgment for purposes of Rule 203(b)(1), SCACR triggers the time to appeal *as long as the email is received from the court, an attorney of record, or a party.*” (emphasis in original)).

Appellant states in the NOA that it “received electronic notice of entry of this Order on November 30, 2021.” Respondent also received electronic notice of entry of the Order on November 30, 2021, via e-mail from the Court’s electronic filing system. A true and accurate copy of that e-mail message from the Court is attached hereto as **Exhibit “A”**.¹ This electronic notice was from the court, and thus constituted “written notice” of entry of the Order, and triggered the time for service of an appeal for purposes of Rule 203(b)(1), SCACR. *Id.* at 219, 810 S.E.2d at 860.

¹ While not directly relevant to the “written notice” standard under Rule 203(b)(1), SCACR, it is also noteworthy that Rule 4(e) of the E-Filing Court Rules, states that authorized e-filers (i.e. licensed attorneys of record) are served with pleadings, motions or other papers at the time the document is e-filed and NEF notice sent, which in this case occurred by this e-mail on November 30, 2021. The E-Filing Court Rules are available at: <https://www.sccourts.org/courtReg/indexEF.cfm>.

Next, Rule 263(a), SCACR, provides the manner to compute time under the South Carolina Appellate Court Rules:

(a) Computation. In computing any period of time prescribed or allowed by these Rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a state or federal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor such holiday.

Rule 263(b), SCACR, further states that deadlines under the Rules may be extended, “except the time for serving the notice of appeal under rules 203 and 243,” highlighting the strict nature of this deadline.

Excluding November 30, 2021, the thirtieth day after written notice of entry of the Order was December 30, 2021, which was neither a Saturday, Sunday nor a state or federal holiday. Appellant did not serve the NOA until five days later, on January 4, 2022. While observance of state and federal holidays for New Year’s Day occurred shortly thereafter, there is no dispute that Thursday, December 30, 2021, was not a state or federal holiday. Accordingly, the NOA was not timely filed, Appellant failed to timely perfect its appeal, and the appeal should be dismissed for lack of jurisdiction. *Conner v. City of Forest Acres*, 348 S.C. 454, 461, 560 S.E.2d 606, 609 (2002) (“Service of the notice of intent to appeal is a jurisdictional requirement, and the Court has no authority to extend or expand the time in which the notice of intent to appeal must be served.”).

Therefore, Respondent respectfully requests the Court dismiss Appellant’s appeal for lack of jurisdiction. See *Conner*, 348 S.C. at 461, 560 S.E.2d at 609; *Wells Fargo Bank*, 422 S.C. at 219, 810 S.E.2d at 860.

CONCLUSION

Because Appellant's Notice of Appeal was not timely filed, this appeal should be dismissed.

s/Kyle A. Brannon
Kyle A. Brannon (S.C. Bar No. 100550)
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Attorneys for Zeb Portanova

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PROOF OF SERVICE

I, Kyle A. Brannon, an attorney with Nexsen Pruet, LLC, hereby certify that I served one copy of **Respondent's Motion to Dismiss Appeal and Memorandum in Support Thereof** on Appellant at the below address on January 14, 2022, via AIS email address pursuant to Supreme Court Order 2020-05-29-02, at Columbia, South Carolina.

S. Jahue Moore, Esq.
jake@mbmlawsc.com
Attorney for Appellant

[SIGNATURE ON FOLLOWING PAGE]

January 14, 2022

s/Kyle A. Brannon
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Attorneys for Zeb Portanova

EXHIBIT "A"

Brannon, Kyle A.

From: efiledonotreply@sccourts.org
Sent: Tuesday, November 30, 2021 4:46 PM
To: Brannon, Kyle A.
Cc: Rogers, Mary Miles
Subject: Courtesy NEF RE: 2020CP0201003

{EXTERNAL EMAIL}

***** IMPORTANT NOTICE - READ THIS INFORMATION *****
NOTICE OF ELECTRONIC FILING [NEF]

A filing has been submitted to the court RE: 2020CP0201003

Official File Stamp: 11-30-2021 04:45:51 PM
Court: CIRCUIT COURT
Common Pleas
Aiken
Case Caption: Zeb Portanova VS Ginjoint, Llc , defendant, et al
Document(s) Submitted: Order/Damages Order/Damages
Filed by or on behalf of: Clifton Newman

This notice was automatically generated by the Court's auto-notification system.

The following people were served electronically:

S. Jahue Moore for Ginjoint, Llc et al
Kyle Aaron Brannon for Zeb Portanova
Carl Henry Petkoff for Zeb Portanova

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:

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