

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Maite Murphy, Circuit Court Judge

Appellate Case No. 2020-000405

Case No. 2019-CP-38-00655

Jacquita Funchess

..... Appellant,

v.

Glenfield Apartments

..... Respondent,

FINAL BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

1. Did the Trial Court abuse its discretion in granting Respondent's Motion to Dismiss?
2. Did the Appellant properly preserve the issues of the underlying Order of Ejectment?

STATEMENT OF THE CASE

On September 21, 2018, Appellant entered into a residential lease with Respondent for an apartment in Glenfield Apartments in Orangeburg, SC. On March 15, 2019, Respondent filed an Application for Ejectment against Appellant in the Orangeburg Magistrate's Court alleging a breach of the residential lease. The grounds of the Application for Ejectment revolved around three criminal incident reports involving Appellant, each of which was a violation of the Lease.

On April 16, 2019, the Application for Ejectment was heard before Magistrate Judge S. A. Daily in Magistrate's Court in Orangeburg County. Appellant and Respondent were both represented by counsel. At the conclusion of the hearing, the Magistrate granted the Application for Ejectment and ordered the eviction of Ms. Funchess.

On May 15, 2019, a Notice of Civil Appeal of the eviction of Ms. Funchess was filed with the Court of Common Pleas in Orangeburg County. (R. pp. 22-23) On October 8, 2019, having received no Return from the Magistrate in six months, Respondent filed a Motion to Dismiss based on Appellant's failure to obtain a return from the Magistrate as required by S.C. Code Ann. § 18-7-60. (R. p. 21) The Motion to Dismiss was amended on October 11, 2019. (R. pp. 24-25)

On December 20, 2019, shortly before the hearing on the Motion to Dismiss, counsel for Appellant filed a Motion to Compel the Return, approximately seven (7) months after the Notice of Appeal was filed and two months after the Motion to Dismiss was filed. (R. p. 26-28)

On January 16, 2020, a hearing on Respondent's Motion to Dismiss was held before Judge Maite Murphy, at which both parties were represented by counsel. By Order filed February 7, 2020, Judge Maite Murphy granted the Motion to Dismiss. (R. p. 4)

A Notice of Appeal of Judge Murphy's Order dismissing the appeal was filed with the South Carolina Court of Appeals on March 3, 2020. (R. pp. 29-30) On March 6, 2020, an Order

was filed denying Appellant's request to stay execution on appeal under the agreement "to pay rent in the amount of \$0.00 per month" and relieving Matthew Billingsley as counsel for Appellant.

Transcripts were received on June 4, 2020 and Appellant's Initial Brief was filed on October 14, 2020.

STATEMENT OF FACTS

On September 21, 2018, Jacquita Funchess entered into a residential lease agreement with Glenfield Apartments ("Glenfield") for an apartment at Glenfield Apartments in Orangeburg, SC. The term of the Lease ran from September 21, 2018 through August 31, 2019. On February 12, 2019, Glenfield sent Jacquita Funchess a thirty (30) day Notice of Lease Termination. The grounds for the lease termination were four (4) criminal incident reports filed with the Orangeburg Department of Public Safety that had occurred at Appellant's apartment. The incidents violated the terms of Ms. Funchess' Lease and constituted grounds for termination of the Lease.

On March 15, 2019, after thirty (30) days had passed from the service of the Notice of Lease Termination and Jacquita Funchess had not vacated the premises, Glenfield filed an Application for Ejectment with the Magistrate's Court in Orangeburg County, which was served upon Ms. Funchess on March 19, 2019. Ms. Funchess filed a pro se answer on March 20, 2019. A Notice of Appearance by Mathew Billingsly of SC Legal Services was filed on April 3, 2019. The eviction hearing was held on April 16, 2019. Both parties were represented by counsel. At the conclusion of the eviction hearing, the Magistrate ruled for the Plaintiff Landlord Glenfield Apartments and ordered the eviction.

On May 15, 2019, a Notice of Civil Appeal of the Order of Eviction was filed with the Court of Common Pleas in Orangeburg. On October 7, 2019, after six (6) months from the filing

of the Notice of Appeal with no Return being filed, Respondent filed its Motion to Dismiss the appeal for failure to obtain a timely Return as required by S.C. Code Ann. § 18-7-60. (R. p. 21) On December 20, 2019, two (2) months after the filing of the Motion to Dismiss, Counsel for Jacquita Funchess filed a Motion to Compel Magistrate to file Adequate Return. (R. p. 26-28) A hearing on the Motion to Dismiss was held before the Honorable Maite Murphy on January 16, 2020. (R. pp. 6-20) After considering the arguments, Judge Maite Murphy granted Glenfield's Motion to Dismiss by Order filed February 7, 2020. (R. p. 4) Appellant filed her Notice of Appeal of Judge Murphy's Order on March 3, 2020. (R. pp. 29-30) This appeal followed.

STANDARD OF REVIEW

The Court of Appeals should only reverse a discretionary action by the trial court if there is a manifest injustice resulting from that decision. *Small v. Mungo*, 254 S.C. 438, 442, 175 S.E.2d 802, 804 (1970). Where an argument was not raised to a trial judge, the issue is not preserved for appellate review. *State v. Sheppard*, 391 S.C. 415, 706 S.E.2d 16 (2011).

ARGUMENT

I. The Trial Court did not abuse its discretion in granting Respondent's Motion to Dismiss.

1. The Appellant had a duty of due diligence in obtaining the Return from the Magistrate, and Appellant's lack of due diligence was sufficient to give the Trial Court the discretion to grant Respondent's Motion to Dismiss.

Dismissal by the circuit court based upon a failure to prosecute an appeal is a discretionary action. *Small v. Mungo*, 254 S.C. 438, 442, 175 S.E.2d 802, 804 (1970) cited in *Joyner v. Glimecher Props.* 356 S.C. 460, 589 S.E.2d 762 (Ct. App. 2002). The burden is upon the party appealing from the order to demonstrate the court abused its discretion. *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 489 S.E.2d 679 (Ct. App. 1997). An abuse of discretion may be found when the appellant shows that the conclusion reached by the court was without

reasonable factual support and resulted in prejudice to the rights of appellant, thereby amounting to an error of law. *Id.* Specifically, the reversal of dismissal of an appeal based on a failure to prosecute should only occur if there is a manifest injustice resulting from that decision. *Joyner v. Glimcher Props.*, 356 S.C. 460, 589 S.E.2d 762 (Ct. App. 2002).

In the seven months immediately following the filing of the Notice of Appeal, no Return from the Magistrate was ever produced by the Magistrate or requested by counsel for the Appellant. (R. p. 21; pp 24-25) When there is no Return, the Appellant must act with due diligence and seek a writ of mandamus if necessary to compel the return. *Joyner v. Glimcher Props.*, 356 S.C. 460, 589 S.E.2d 762 (Ct. App. 2002). “The burden was on . . . the party appealing below to obtain the magistrate’s compliance by mandamus if necessary.” *State v. Adams*, 244 S.C. 323, 137 S.E.2d 100 (1964).

At the hearing on Respondent’s Motion to Dismiss, Appellants counsel offered no satisfactory explanation for the lack of due diligence in seeking the Return. Counsel for Appellant argued that there is no timeframe in which Appellant is to compel the Return. (R. p. 13, lines 20-25). Appellant’s counsel also argued that the filing of the request for the Return is essentially the filing of the Notice of Appeal. (R. p. 15 lines 16-22). These arguments, however, ignored the clear language of the statute and applicable case law. As stated by the Supreme Court in *State v. Adams*, “when it becomes apparent to Respondent that the Magistrate had failed to perform the ministerial duty of transmitting the record of the trial court to the appellate court, it became incumbent upon Respondent to proceed by way of mandamus to enforce performance of his duty.” *State v. Adams*, 244 S.C. 323, 326, 137 S.E.2d 110, 104 (1964). Appellant’s delay in taking any action for seven (7) months after the filing of the Notice of Appeal is evidence of

unreasonable neglect. See *Joyner v. Glimcher Props.*, 356 S.C. 460, 589 S.E.2d 762 (Ct. App. 2002) (Howard dissenting).

At the hearing on the Motion to Dismiss, Appellant's counsel offered no evidence of any exercise of due diligence to ensure the Return from the Magistrate was produced. Shortly before the scheduled hearing on Glenfield's Motion to Dismiss, Appellant filed the Motion to Compel the Return. (R. pp. 26-28) The Motion was filed some seven (7) months after the filing of the Notice of Appeal and two (2) months after the filing of the Motion to Dismiss.

As the Court of Appeals made clear in the *Joyner* case, counsel is on notice that a Return has not been timely filed when they do not receive a notice in writing from the clerk of the proper circuit court. When counsel has received no such notice, counsel should presume no Return has been filed and act accordingly. *Joyner v. Glimecher Props.* 356 S.C. 460, 589 S.E.2d 762 (Ct. App. 2002). The law is clear that "when there is no Return, the Appellant from the Magistrate's Court must act with due diligence and seek a Writ of Mandamus if necessary to compel the Return." *Joyner v. Glimecher Props.* 356 S.C. 460, 589 S.E.2d 762 (Ct. App. 2002).

The only matter presently before this court is determining if the trial court abused its discretion by granting the Motion to Dismiss. The Court of Appeals should only reverse a discretionary action by the trial court if there is a manifest injustice resulting from that decision. *Small v. Mungo*, 254 S.C. 438, 442, 175 S.E.2d 802, 804 (1970). No argument has been presented that there was a manifest injustice from the decision of the trial court. There is no precise definition of "manifest injustice," although it has been held to be a standard which presents the plaintiff with a high hurdle. *Westerfield v. United States*, 366 F.App'x 614, 620 (6th Cir. 2010). In general, "manifest injustice" relates to some fundamental flaw in the proceedings which result in a miscarriage of justice or is inconsistent with the demands of due process. *State*

v. Walsh, 5th Dist. Licking No. 14-CA-110, 2015 Ohio-4135. The present case does not meet that test. There has been no miscarriage of justice or inconsistency with the demands of due process. Appellant offered no valid excuse for failure to exercise due diligence and the court properly exercised its discretion. With no manifest injustice being shown, this Court should affirm the trial court's decision as a proper exercise of judicial discretion.

II. The issues raised by Appellant regarding the eviction have not been properly preserved by Appellant and are therefore barred from consideration of this court.

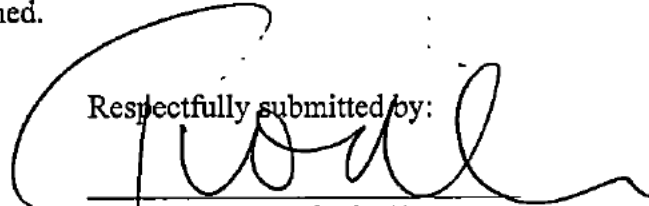
In her brief, Appellant seeks to attack the underlying eviction. That matter, however, is not before this Court. The issues raised by the Appellant regarding the eviction were not properly raised before the circuit court and have not been properly preserved for appellate review.

“Because an issue must be properly raised below before we may address it on appeal, we find this issue is not properly preserved for appellate review.” *Colonna v. Marlboro Park Hosp.* 404 S.C. 537, 745 S.E.2d 128 (Ct. App. 2013) citing *Pratt v. Morris Roofing, Inc.*, 357 S.C. 619, 594 S.E.2d 272 (2004). The only issue argued before the trial court was the Motion to Dismiss. The one properly preserved issue was the failure to produce or request the Return from the Magistrate. Because the issues surrounding the underlying eviction have not been properly preserved, those issues may not be addressed on appeal. *Republic Centr Corp. v. South Carolina Dep't of Highways & Pub. Transp.*, 332 S.C. 197, 503 S.E.2d 761 (Ct. App. 1998).

CONCLUSION

The trial court did not err in granting the Motion to Dismiss, and the underlying Order dismissing the appeal should be affirmed.

Respectfully submitted by:



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