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May 17 2022

SC Court of Appeals

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2021-000325

Evarista Juan Lorenzo, Appellant,

v.

Port City Elevator, Inc.; Alan Topper d/b/a All Construction; 2020 Custom Contractors a/k/a 2020 Custom Contractors, LLC; Citadel Site Management, LLC; DVBT Construction a/k/a DVBT Construction, LLC; DVBT Multiservices, LLC; Beverly Construction Group, LLC; Beverly Homes, LLC; Beverly Homebuilders, LLC; Strand Paint Contractors, LLC; Depaz Painting, LLC; Enhanced Heating & Air Conditioning, LLC; Carlton Pender, and Joan Pender, Defendants,

Of Which,

Alan Topper d/b/a All Construction; Citadel Site Management, LLC; DVBT Construction a/k/a DVBT Construction, LLC; DVBT Multiservices, LLC; Beverly Construction Group, LLC; Beverly Homes, LLC; Beverly Homebuilders, LLC; Strand Paint Contractors, LLC; Depaz Painting, LLC and Enhanced Heating & Air Conditioning, LLC are the Respondents.

Appellant's Return to Respondent's May 12, 2022, Motion to File Out of Time

On April 8, 2022, Evarista Juan Lorenzo, ("Appellant") filed a Motion to Strike two items from Respondent's Designation of Matter—to wit a portion of Item No. 5 (deposition of Forrest Beverly) and the entirety of Item No. 9 (payroll records for Jonathan Martin). Respondent filed a return to this motion on May 9, 2022—more than 21 days after this return was required under Rule 240(e), SCACR. On May 11, 2022, this Court issued notice that Respondent's return was untimely.

On May 12, 2022, Respondent filed a Motion to file its return out of time.¹ COMES NOW, now the Appellant, pursuant to Rule 240(e), SCACR, and in return to Respondent’s Motion to file out of time.

This Court is permitted to consider Respondent’s failure to timely reply as consent to Appellant’s Motion to Strike. *See* Rule 240(e), SCACR (“Any party opposing a motion or petition shall have ten (10) days from the date of service thereof to file . . . his return[,]” and “[f]ailure of a party to timely file a return may be deemed a consent by that party to the relief sought in the motion.”) (emphasis added).

While Appellant takes no position on whether this Court should (or should not) permit Respondent to file its return out of time, Appellant would point out that Respondent’s proposed return provides no colorable basis that Items No. 5 and 9, as designated, were ever filed with or presented to the trial court.

To the contrary, as to Item No. 5 (deposition of Forrest Beverly) Respondent agrees that of the more than 200 pages of this transcript, only 24 pages were presented to the trial court. Instead of opposing Appellant’s Motion to Strike the remaining pages, Respondent uses its return to ask this Court to permit it to include additional pages of this transcript that were never presented to the trial court in the record on appeal. *See* (Respondent’s untimely return seeking to include pages 147-149). Appellant does not concede that such a request is properly contained in a return, nor does Appellant concede that such a request has any legal merit. Similarly, as to Item No. 9, Respondent again offers no argument that this material was presented to the trial court. Instead, Respondent argues it should be included in the record on appeal because it was alluded to in the

¹ On May 16, 2022, this Court issued notice that Respondent’s Motion was deficient for failure of proper filing fee. This return is submitted in the event that Respondent cures this deficiency. If this deficiency is not cured, Appellant objects to the consideration of Respondent’s Motion.

trial court's order that is on appeal—an order Respondent drafted. However, the record contains no basis to assume that the information alluded to in the order is, in fact, the same documents Respondent's purport to include in the Record at Item No. 9. If Respondent believed these matters were germane to the trial court's ruling it must be presumed, they would have been filed with the circuit court. They were not. Thus, whether this Court permits Respondent to file its return out of time should be of no consequence, and Appellant's Motion to Strike should be granted either way.

Therefore, while Appellant takes no position on Respondent's instant Motion to file its return out of time, Appellant reserves the right to file a reply to that return (under Rule 240(f), SCACR) in the event this Court permits Respondent's late filing.

Respectfully submitted,

THURMOND KIRCHNER & TIMBES, P.A.



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THE STATE OF SOUTH CAROLINA
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APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Common Pleas Case No. 2018-CP-22-00824
Appellate Case No. 2021-000325

Evarista Juan Lorenzo, Appellant,

v.

Port City Elevator, Inc.; Alan Topper d/b/a All Construction; 2020 Custom Contractors a/k/a 2020 Custom Contractors, LLC; Citadel Site Management, LLC; DVBT Construction a/k/a DVBT Construction, LLC; DVBT Multiservices, LLC; Beverly Construction Group, LLC; Beverly Homes, LLC; Beverly Homebuilders, LLC; Strand Paint Contractors, LLC; Depaz Painting, LLC; Enhanced Heating & Air Conditioning, LLC; Carlton Pender, and Joan Pender, Defendants,

Of Which, Alan Topper d/b/a All Construction; Citadel Site Management, LLC; Beverly Homes, LLC; Beverly Homebuilders, LLC; Strand Paint Contractors, LLC; Depaz Painting, LLC and Enhanced Heating & Air Conditioning, LLC are the Respondents.

PROOF OF SERVICE

The undersigned certifies that the foregoing **Appellant's Return to Respondent's Motion to File Out of Time** was served on all counsel of record on May 17, 2022, by mailing a copy of same, electronically or with proper postage affixed thereto, as follows:

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