

STATE OF NORTH CAROLINA  
FORSYTH COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
16 CVS 7622

AZURE DOLPHIN, LLC, et al.,  
Plaintiffs,  
v.  
JUSTIN BARTON, et al.,  
Defendants.

**ORDER ON MOTION  
TO DISMISS APPEAL**

1. On October 2, 2017, this Court granted Defendants' motion to dismiss and dismissed the complaint in its entirety. (ECF No. 116.) Some but not all Plaintiffs appealed, and Defendants now move to dismiss the appeal pursuant to Rule 25 of the North Carolina Rules of Appellate Procedure. The Court elects to decide the motion without a hearing. *See* BCR 7.4.

2. "[W]hen an appeal has not yet been docketed with the appellate court, the trial court retains jurisdiction over the case" and may entertain motions to dismiss an appeal for violations of the Rules of Appellate Procedure. *Carter v. Clements Walker PLLC*, 2014 NCBC LEXIS 12, at \*10 (N.C. Super. Ct. Apr. 30, 2014); *see also Ehrenhaus v. Baker*, 2014 NCBC LEXIS 30, at \*3 (N.C. Super. Ct. July 16, 2014) (citing N.C. R. App. P. 25(a)). This appeal has not yet been docketed, and Defendants' motion is therefore properly before this Court.

3. Defendants' motion rests on four separate grounds. The Court addresses each argument in turn. (In the following discussion, the parties who joined in the notice of appeal are referred to as "Appellants.")

4. First, a party entitled to appeal from an order of this Court must file a notice of appeal with the clerk of superior court in the county of venue “within . . . thirty days after entry of judgment.” N.C. R. App. P. 3(a), (c). Here, the parties agree that the Plaintiffs intending to appeal were required to file their notice of appeal with the Forsyth County Clerk of Superior Court on or before November 1, 2017.

5. Defendants contend that Appellants failed to do so. They attach as an exhibit a file-stamped copy of the notice of appeal, which indicates it was filed on November 2, 2017. (*See* Defs.’ Br. in Supp. Mot. Dismiss App. 5–7 [“Defs.’ Br.”], ECF No. 122; *Aff. Freeman Ex. B*, ECF No. 123.)

6. Appellants respond that the file-stamped date is incorrect. They offer the affidavit of Kimberly Calloway, an employee in the Forsyth County Clerk’s office. Ms. Calloway testifies that she received the notice of appeal for filing on November 1, 2017 and file-stamped it on that date. She further testifies that the date stamp is incorrect due to an equipment error. (*Aff. Calloway*, ECF No. 127.)

7. The Court finds this evidence compelling. Appellants have carried their burden to show that the file-stamped date is incorrect and that “the [n]otice of [a]ppel was filed prior to that date.” *Hefner v. Mission Hosp., Inc.*, 2016 NCBC LEXIS 21, at \*3–5 (N.C. Super. Ct. Feb. 29, 2016). Accordingly, the Court concludes that the notice of appeal was timely filed under Rule 3.

8. Second, Defendants contend that Appellants failed to prepare and serve the proposed record within the time periods set forth in Rules 7 and 11. Specifically, Defendants contend that Appellants failed to contract with the court reporter for a

transcript within 14 days of filing the notice of appeal. *See* N.C. R. App. P. 7(a). As a result, they contend, the 35-day period to serve the proposed record began running from the time the notice of appeal was filed rather than from the time the court reporter certified delivery of the transcript. *See* N.C. R. App. P. 11(a), (b).

9. The evidence on this point is undisputed. On November 13, 2017, Appellants contacted the court reporter by e-mail. Appellants' counsel explained the "need to confirm that there is a complete transcript to comply with N.C. App. Rule 7" and asked the court reporter to confirm "that a transcript of the hearing was prepared." (Aff. Freeman Ex. C.) The court reporter responded that she had prepared a transcript for this case. (*See* Aff. Freeman Ex. C.) Appellants then filed a document entitled "Transcript Documentation," which attached this correspondence, identified the court reporter's name and address, and stated that "Appellant has requested the entire proceedings from July 20, 2017 to be transcribed." (ECF No. 120.)

10. On December 29, 2017, the court reporter provided a certificate of delivery to Appellants. (Aff. Richardson Ex. A, ECF No. 126.) The certificate states that the transcript "was requested" on the same date, not on November 13. (Aff. Richardson Ex. A.) On February 2, 2018, Appellants served their proposed record on appeal. (*See* Br. in Opp'n to Mot. Dismiss App. 6 ["Opp'n"], ECF No. 124; Suppl. Aff. Freeman ¶ 4, ECF No. 129.)

11. Our Supreme Court has "stress[ed] that a party's failure to comply with nonjurisdictional rule requirements normally should not lead to dismissal of the appeal." *Dogwood Development & Mgmt. Co., LLC v. White Oak Transp. Co., Inc.*,

362 N.C. 191, 200, 657 S.E.2d 361, 366 (2008); *see also Lawrence v. Sullivan*, 192 N.C. App. 608, 618, 666 S.E.2d 175, 180–81 (2008). In fact, courts “may not consider sanctions of any sort when a party’s noncompliance with nonjurisdictional requirements of the rules does not rise to the level of a ‘substantial failure’ or ‘gross violation.’” *Dogwood Development*, 362 N.C. at 199, 657 S.E.2d at 366.

12. It does appear that Appellants failed to contract with the court reporter within the 14-day period required by Rule 7. The e-mail attached to Appellants’ “Transcript Documentation” does not request the transcript and is not a contract. In fact, Appellants appear to concede that they actually requested the transcript on December 29, 2017, the date reflected on the court reporter’s certificate of delivery. (*See Opp’n 5.*)

13. Nevertheless, even assuming Appellants violated Rules 7 and 11, the Court concludes that these nonjurisdictional failures are not so egregious that they warrant dismissal. There is no evidence that Appellants wholly disregarded the rules or acted in bad faith. Rather, Appellants contacted the court reporter within the 14-day period and specifically referred to Rule 7 in their correspondence. They also filed a document identifying the court reporter and giving notice to Defendants that the full transcript would be requested. The failure to request the transcript at that time is puzzling, but not a gross violation of the rules. Furthermore, Appellants obtained the transcript within 60 days of filing the “Transcript Documentation” (*see N.C. R. App. P. 7(b)(1)*), and they acted promptly to serve the proposed record less than 35 days after delivery of the transcript (*see N.C. R. App. P. 11(a)*). Accordingly, the Court

declines to dismiss the appeal for any violations of Rules 7 and 11. *See, e.g., N.C. State Bar v. Sossomon*, 197 N.C. App. 261, 270–73, 676 S.E.2d 910, 917–18 (2009) (“Rule 7 is a nonjurisdictional defect.”) (citing *Lawrence*, 192 N.C. App. at 617, 666 S.E.2d at 181); *Yorke v. Novant Health, Inc.*, 192 N.C. App. 340, 346–47, 666 S.E.2d 127, 132–33 (2008) (“Rule 11[] is a nonjurisdictional requirement”) (citing *Dogwood Development*, 362 N.C. at 198, 657 S.E.2d at 365).

14. Third, Defendants contend that Plaintiff JPB Holdings, Inc. did not join in the appeal and was not properly served with a copy of the notice of appeal. (*See* Defs.’ Br. 12.) According to Defendants, the failure to serve the notice of appeal on a non-appealing plaintiff requires dismissal of the appeal. (*See* Defs.’ Br. 11–13.)

15. This argument is not well taken. Service may be made “upon a party or its attorney of record.” N.C. R. App. P. 26(c). In this action, all Plaintiffs, including JPB Holdings, Inc., are represented by the same counsel—the very counsel who prepared and filed the notice of appeal. This is not a situation in which one plaintiff, having appealed, failed to serve other plaintiffs represented by separate counsel, leaving them unaware of the appeal and unable to exercise their rights. *See, e.g., Lee v. Winget Rd., LLC*, 204 N.C. App. 96, 99, 693 S.E.2d 684, 687 (2010).

16. Furthermore, the requirement of service of the notice of appeal may be waived. *See id.* at 100, 693 S.E.2d at 688 (citation omitted). Through its counsel, JPB Holdings states that it is a mere alter ego of Plaintiff Jean-Pierre Boespflug and that additional service is unnecessary. (*See* Opp’n 6.) Accordingly, to the extent the

Rules of Appellate Procedure require service on JPB Holdings, it has waived that requirement.

17. Fourth, and finally, Defendants correctly observe that Edward Hall Holdings, Inc. is not a party to this action and therefore not a “party entitled by law to appeal.” N.C. R. App. 3(a). Appellants concede the point and agree that the purported appeal by Edward Hall Holdings, Inc. should be dismissed.

18. Accordingly, the Court **GRANTS** the motion to dismiss the purported appeal by Edward Hall Holdings, Inc. In all other respects, the motion is **DENIED**.

This the 28th day of March, 2018.

/s/ Adam M. Conrad  
Adam M. Conrad  
Special Superior Court Judge  
for Complex Business Cases