

STATE OF NORTH CAROLINA
NEW HANOVER COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
21 CVS 4611
23 CVS 0062

HE CHI; BIAN YIDE; CAO YONGJIE;
CHEN MINZHI; CHENG TAO; HU KUN;
LIANG JINGQUAN; LUO PENG; MA
QIHONG; MA WEIGUO; SONG YING;
WANG JIAN; WANG LING; WANG
XUEHAI; XIE QIN; YE XIAFEN; and
ZHANG YUNLONG,

Plaintiffs,

v.

NORTHERN RIVERFRONT MARINA
AND HOTEL LLLP; NRMH HOLDINGS
LLC; NRMH HOTEL HOLDINGS LLC;
USA INVESTCO LLC; PAC RIM
VENTURE LTD.; RIVERFRONT
HOLDINGS II LLC; WILMINGTON
RIVERFRONT DEVELOPMENT LLC;
GOLDEN MARINA LLC; CIRCLE
MARINA CARWASH, INC.; CHARLES J.
SCHONINGER; JOHN C. WANG;
JIANGKAI WU; CHRISTOPHER
ARDALAN; and GONGZHAN WU,

Defendants.

WANG FENG and ZHANG SHIXIONG,

Plaintiffs,

v.

NORTHERN RIVERFRONT MARINA
AND HOTEL LLLP; NRMH HOLDINGS
LLC; NRMH HOTEL HOLDINGS LLC;
USA INVESTCO LLC; RIVERFRONT
HOLDINGS II LLC; WILMINGTON
RIVERFRONT DEVELOPMENT LLC;
GOLDEN MARINA LLC; CIRCLE
MARINA CARWASH, INC.; CHARLES
J. SCHONINGER; JOHN C. WANG;
JIANGKAI WU; and CHRISTOPHER
ARDALAN,

Defendants.

**ORDER DISMISSING
INTERLOCUTORY APPEALS**

1. **THIS MATTER** is before the Court on both Defendant Jiangkai Wu's Motion to Dismiss Plaintiffs' Unperfected Appeals (Chi ECF No. 141, Feng ECF No. 78) and the NRMH Defendants' Motion to Dismiss Unperfected Appeals (Chi ECF No. 142, Feng ECF No. 79), (collectively, the "Motions").

2. Because the Plaintiffs have failed to satisfy the requirements of North Carolina Rule of Appellate Procedure 3 (the "Appellate Rule(s)"), the Court **GRANTS** the Motions and **DISMISSES** the Plaintiffs' interlocutory appeals.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

3. These actions were filed in New Hanover County Superior Court and then designated to the North Carolina Business Court as mandatory complex business cases. (Design. Order, Chi ECF No 1; Feng ECF No. 1.) Plaintiffs are Chinese citizens who invested in the development of real estate on the riverfront in downtown Wilmington, North Carolina, pursuant to the USICS Employment-based Fifth Preference Visa Program. The allegations are recounted at length in the Court's Order and Opinion partially granting Defendants' Motions to Dismiss pursuant to North Carolina Rule of Civil Procedure 12(b)(6). *See Chi v. N. Riverfront Marina & Hotel LLLP*, 2023 NCBC LEXIS 89 (N.C. Super. Ct. July 27, 2023) (the "27 July Order").

4. In its 27 July 2023 Order, the Court dismissed:

- a. Plaintiffs' claims for fraud, negligent misrepresentation, violation of Chapter 78A, and breach of fiduciary duty against Defendants

Northern Riverfront Marina and Hotel LLLP, NRMH Holdings LLC, NRMH Hotel Holdings, LLC, USA InvestCo LLC, Riverfront Holdings DII LLC, Wilmington Riverfront Development LLC, Golden Marina LLC, Circle Marina Carwash, Inc., Charles J. Schoninger, John C. Wang, Christopher Ardalan, and Jiangkai “Samson” Wu;

- b. Plaintiffs’ claim for conversion against Defendants Northern Riverfront Marina and Hotel LLLP, NRMH Holdings LLC, NRMH Hotel Holdings LLC, USA InvestCo LLC, Riverfront Holdings DII LLC, Golden Marina LLC, Circle Marina Carwash, Inc., John C. Wang, Christopher Ardalan, and Jiangkai “Samson” Wu;
- c. Plaintiffs’ claims for breach of contract against Defendants Northern Riverfront Marina and Hotel LLLP, USA InvestCo LLC, and Charles J. Schoninger;
- d. Plaintiffs’ claims for unjust enrichment against Defendants NRMH Holdings LLC, NRMH Hotel Holdings LLC, Riverfront Holdings DII LLC, Golden Marina LLC, and Circle Marina Carwash, Inc.;
- e. Plaintiffs’ claims for gross mismanagement against Defendant Charles J. Schoninger; and
- f. Plaintiffs’ claim for equitable accounting against Defendants Riverfront Marina and Hotel LLLP, Wilmington Riverfront Development LLC, and InvestCo LLC.

5. The Court's 27 July Order was electronically filed on this Court's docket on 27 July 2023, and a Notice of Filing was issued at the time of filing. Subsequently, the 27 July Order was sent by United States mail to the Clerk of Superior Court, New Hanover County, where it was file-stamped and filed in the official court file on 14 August 2023. *See* 27 July Order (file stamped), (Chi ECF No. 146; Feng ECF No. 82.)

6. On 25 August 2023, certain of the Chi and Feng Plaintiffs¹ electronically filed on this Court's docket separate notices of appeal of the 27 July Order (the "Interlocutory Appeals"). (Not. of Appeal, Chi ECF No. 138; Feng ECF No. 75.) However, to date, none of the Chi or Feng Plaintiffs has filed a notice of appeal with the Clerk of Superior Court of New Hanover County.

7. On 30 August 2023, the Court ordered the parties to provide briefing on the appropriate scope of any stay in light of the purported Interlocutory Appeals. (Brief. Order Stay of Appeal, Chi ECF No. 139; Feng ECF No. 76.)

8. Defendants' responses to the briefing order included the filing of the Motions. Defendants argue that the Interlocutory Appeals should be dismissed because notices of appeal were not timely filed with the New Hanover County Clerk of Superior Court within thirty days after entry of 27 July Order in violation of Appellate Rule 3. (NRMH Defs.' Br. Supp. Mot. Dismiss Unperf. Appeals ["NRMH Defs.' Response"], Chi ECF No. 143.1, Feng ECF No. 80.1; Def. Wu Response Order

¹ Only Plaintiffs He Chi, Cao Yongjie, Chen Minzhi, Hu Kun, Liang Jingquan, Ma Qihong, Ma Weiguo, Wang Jian, Wang Ling, Xie Qin, and Ye Xiafen filed a notice of appeal in the Chi action. Plaintiffs Wang Feng and Zhang Shixiong filed a notice of appeal in the Feng action.

Stay & Mot. Dismiss Appeal [“Def. Wu Response”], Chi ECF No. 141.1, Feng ECF No. 78.1.)

9. The Court, in the exercise of its discretion and as permitted under BCR 7.4, elects not to hold a hearing and decides the Motions based on the briefs submitted and the record before it.

II. ANALYSIS

10. Appellate Rule 25 affords the trial court jurisdiction, upon motion and “prior to the filing of an appeal in an appellate court,” to dismiss an appeal if a party “after giving notice of appeal . . . shall fail within the times allowed by these rules or by order of court to take any action required to present the appeal for decision.” N.C. R. App. P. 25(a). “Filing of an appeal in an appellate court’ means docketing the appeal, which occurs when the appellant files the record on appeal with the clerk of the appellate court and pays the docket fees or proceeds *in forma pauperis*.” *Plasman v. Decca Furniture (USA), Inc.*, 2016 NCBC LEXIS 51, at *4 (N. C. Super. Ct. July 7, 2016). *See also Carter v. Clements Walker, PLLC*, 2014 NCBC LEXIS 12, at **7-8 (N.C. Super. Ct. Apr. 30, 2014) (collecting cases). Our Court of Appeals has construed Rule 25 to allow the trial court to dismiss an appeal when the appellant fails to give notice of appeal within the time allowed by the Appellate Rules. *See Herring v. Branch Banking & Trust Co.*, 108 N.C. App. 780, 781 (1993) (citing *Landingham Plumbing & Heating, Inc. v. Funnell*, 102 N.C. App. 814, 815 (1991)).

11. Appellate Rule 3, which governs the filing of notices of appeal, provides that an appellant “may take [an] appeal by filing notice of appeal with the clerk of superior court within . . . thirty days after entry of judgment if the party has been served with a copy of the judgment[.]” N.C. R. App. P. 3(a), 3(c)(1). Therefore, to satisfy Appellate Rule 3, a party appealing an order of the Business Court is required to timely file a notice of appeal with the Clerk of Superior Court in the county of venue. *Am. Mechanical, Inc. v. Bostic*, 245 N.C. App. 133, 139 (2016).

12. The provisions of Appellate Rule 3 are jurisdictional. Consequently, failure to file a notice of appeal with the Clerk of Superior Court of the county of venue within the time prescribed in the Rule is fatal to the appeal. *See, e.g., Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., Inc.*, 362 N.C. 191, 194 (2008) (“Compliance with the [appellate] rules, therefore is mandatory. As a natural corollary, parties who default under the rules ordinarily forfeit their right to review on the merits.” (citations omitted)); *Bailey v. State*, 353 N.C. 142, 156 (2000) (“The provisions of Rule 3 are jurisdictional, and failure to follow the rule’s prerequisites mandates dismissal of an appeal.”); *Currin-Dillehay Bldg. Supply, Inc., v. Frazier*, 100 N.C. App. 188, 189 (1990) (“[I]f the requirements of [Rule 3] are not complied with, the appeal must be dismissed.”).²

² Furthermore, as the Business Court Rules (“BCRs”) make clear, all filings submitted to the Business Court are required to be filed both “electronically through the Court’s electronic-filing system beginning immediately upon designation of the action as a mandatory complex business case” (BCR 3.1), as well as with “the Clerk of Superior Court in the county of venue, either before service or within five days after service” (BCR 3.11). The Court’s Case Management Orders entered in both cases repeat this requirement: “The parties are reminded that ‘material listed in Rule 5(d) of the Rules of Civil Procedure must be filed with

13. When filing a notice of appeal, the thirty-day clock begins to run when the judgment is entered. Rule 58 of the Rules of Civil Procedure provides that “a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court pursuant to Rule 5.” N.C.G.S. § 1A-1, Rule 58.

14. In applying Rule 58 to appeals of Business Court decisions, BCR 3.8 states that “[t]he issuance by the electronic-filing system of a Notice of Filing for any order, decree, or judgment constitutes entry and service of the order, decree, or judgment for purposes of Rule 58 of the Rules of Civil Procedure.”

15. Here, the Court entered its 27 July Order by filing the order on the Business Court’s electronic filing system in accordance with BCR 3.8 on 27 July 2023. As a result, under Appellate Rule 3, Plaintiffs had until 26 August 2023 to file their notices of appeal with the Clerk of Superior Court of New Hanover County.³

16. Although the Plaintiffs electronically filed their notices of appeal with the Business Court on 25 August 2023, (Chi ECF No. 138; Feng ECF No. 75), it is undisputed that Plaintiffs have never filed their notices of appeal with the Clerk of the Superior Court of New Hanover County. (Def. Wu’s Response, Ex. A, Chi ECF No. 141.1, Feng ECF No. 78.1; NRMH Defs.’ Response, Ex. A, Chi ECF No. 143.1,

the Clerk of Superior Court in the county of venue, either before service or within five days after service.’ BCR 3.11.” (Case Mgmt. Order ¶ II.F, Chi ECF No. 61; Feng ECF No. 48.)

³³ The 27 July Order was manually entered by the Clerk of Superior Court of New Hanover County on 14 August 2023. Even if Rule 58 and BCR 3.8 are read together to permit the filing of a notice of appeal of a Business Court decision within thirty days after the order was filed with the Clerk of Superior Court in the county of venue, Plaintiffs would have had, at most, until 13 September 2023 to file their notices of appeal with the New Hanover County Clerk of Superior Court.

Feng ECF No. 80.1.) Their failure to file with the Clerk of Superior Court is dispositive and requires dismissal of their appeals.

17. This Court cannot waive or excuse a party's failure to comply with the requirements of Appellate Rule 3. *See* N.C. R. App. 2, 21; *see also* *ALC Mfg. v. J. Streicher & Co., LLC*, 2020 NCBC LEXIS 91, at *9 (N.C. Super. Ct. July 30, 2020) (“Binding precedent prevents the [Business] Court from waiving or otherwise excusing . . . [a] failure to comply with Appellate Rule 3.”). Plaintiffs’ failure to file their notices of appeal with the Clerk of Superior Court of New Hanover County pursuant to Appellate Rule 3 mandates dismissal of the appeals. *See* *Carter*, 2014 NCBC LEXIS 12, at *18 (“Appellate decisions make clear that Appellate Rule 3’s time requirements are to be strictly construed so that there is here a fatal jurisdictional failure which requires dismissal of the appeal.”).

18. Plaintiffs’ argument that they were not served with a copy of the Order by mail and, therefore, that the time for filing their notices of appeal has not begun, lacks merit. This Court served its Order and Opinion on all parties, Plaintiffs included, when it filed the Order and Opinion on its electronic filing system. *See* BCR 3.9 (“After an action has been designated as a mandatory complex business case . . . the issuance of a Notice of Filing is service under Rule 5(b) of the Rules of Civil Procedure.”). *See also* *Am. Mech., Inc.*, 245 N.C. App. at 143 n.2 (rejecting plaintiffs’ argument that the time for filing their appeal was tolled by the defendant’s failure to serve the order at issue when it had been served by the Court); *E. Brooks*

Wilkins Family Med., P.A. v. WakeMed, 244 N.C. App. 567, 573 (2016) (recognizing trial courts' inherent authority to file and serve its orders).

19. Moreover, Plaintiffs were plainly aware of the Court's 27 July Order by 25 August 2023, when their notices of appeal were filed. (Not. of Appeal, Chi ECF No. 138; Feng ECF No. 75.) A party's actual notice of a final order within three days of its entry triggers the deadlines of Appellate Rule 3 and requires notice of appeal to be filed within thirty days of the date of the final order's entry. *See E. Brooks Wilkins Family Med., P.A.*, 244 N.C. App. at 574. Despite Plaintiffs' actual notice of the 27 July Order no later than 25 August 2023, to date no notice of appeal has been filed with the Clerk of Superior Court of New Hanover County.

20. **THEREFORE**, for the reasons stated herein, the Motions are **GRANTED**, and Plaintiffs' Interlocutory Appeals are hereby **DISMISSED**.

IT IS SO ORDERED, this the 4th day of October, 2023.

/s/ Julianna Theall Earp

Julianna Theall Earp
Special Superior Court Judge
for Complex Business Cases