

State of New Hampshire
Supreme Court

NO. 2014-0498

2015 TERM

JUNE SESSION

Jayakumar Patil & Purnima Patil

v.

Thomas J. Roy & Kelly Construction Co., Inc.

RULE 7 APPEAL OF FINAL DECISION OF THE
HILLSBOROUGH COUNTY (NORTH) SUPERIOR COURT

REPLY BRIEF

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ARGUMENT

I. Purported “Complaint” Not in the Record

In the appendix to their brief in this Court, and referenced in their brief, the Patils include a document entitled “Complaint,” formatted in accord with both the post-adoption rules and with the court’s oral instructions. *PAD Compliance Trn.* (Mar. 25, 2013) at 6-7. The purported pleading includes numbered paragraphs and individual allegations, is signed by the Patils’ lawyer, and is dated April 24, 2013. “COMPLAINT (April 24, 2013),”¹ *Patil’s Appx.* at 1-9.

This document, however, is not in the record. A review of the court’s index reveals a hearing on March 25, 2013, and next a motion filed on June 4, 2013. There is no entry between March 25 and June 4, and no filing of any kind on or near April 24. DOCKET CARD, *Appx.* at 2. A review of the index also shows the original writ of summons filed on October 17, 2012, the faulty complaint about which the Patil’s lawyer was admonished filed on October 25, 2012, and then no further complaint filed at any time. DOCKET CARD, *Appx.* at 1-5.

Notably, moreover, the document as included in the Patil’s appellate appendix does not include a certification it was furnished to all other parties, SUPER.CT. R. 3(a), nor any formal proof of service. “COMPLAINT,” *Patil’s Appx.* at 9.

Twice in the record the Patil’s lawyer insisted a PAD-compliant complaint had been filed. OBJECTION TO THOMAS ROY’S POST HEARING MOTION ¶ 5 (June 30, 2014), *Appx.* at 293 (“By cover letter dated April 24, 2014, the undersigned counsel caused to be filed with the court the requested expanded complaint.”); *Show Cause Hearing Trn.* (July 10, 2013) at 3 (“And on April 24th I believe it was, I reformatted to comply with PAD rules and filed that with the court.”). But without making any allegations as to fault or explanation, the document somehow

¹The document is placed in quotations herein to indicate its lack of authenticity.

was never filed.²

At the March 25 hearing, the court helpfully instructed: “So he’s going to break down his elongated paragraphs. . . . You, sir, will have 30 days to answer.” *PAD Compliance Trn.* (Mar. 25, 2013) at 7. However, neither the court, *see* DOCKET CARD, *Appx.* at 1-5, nor Mr. Roy, *see* “COMPLAINT,” *Patil’s Appx.* at 9 (lacking certification), ever received such a complaint.

Because by both court pronouncement and court rules, the defendants’ answers were due after the Patils’ never-filed PAD-compliant complaint, the 30-day clock never began to run, and Mr. Roy was never due to file a PAD-compliant answer.

It thus appears that the lack of the (alleged) complaint in the record, coupled with the Patils’ insistence it had been filed, coupled with the change in judicial officers, coupled with Mr. Roy’s inability to perceive or articulate the procedural snafu to which he had been subjected, led to the errors described in his opening brief.

In any event, the “Complaint” included in the Patils’ Appendix must be disregarded, or at least have its lack of authenticity recognized. Moreover, because the never-filed “Complaint” is central to the existence of the entire action, this Court should dismiss this case as never properly commenced.

²This is the second document in this case which the Patils claimed to have filed but never did. As noted in Mr. Roy’s opening brief, the Patils’ lawyer claimed he filed a motion for default at the clerk’s office following the July 10, 2013 hearing, MOTION TO RECONSIDER AND/OR MOTION FOR DEFAULT ¶¶ 1-2 (Nov. 12, 2013), *Appx.* at 94; *Motions Hearing Trn.* (Feb. 19, 2014) at 5, and months later produced a copy of the purported pleading. MOTION TO RECONSIDER AND/OR MOTION FOR DEFAULT ¶ 2 (Nov. 12, 2013), *Appx.* at 94; (referencing attached “Proposed Order”). But there is no mention in the court record of any such motion, and the court twice found there was no such document in its files. DOCKET CARD, *Appx.* at 1; ORDER ON STATUS CONFERENCE (Oct. 31, 2013) at 1, *Appx.* at 91 (“The court’s file does not show that a motion for default has been filed.”); *Status Conference Trn.* (Oct. 31, 2013) at 4, 8; *Motions Hearing Trn.* (Feb. 19, 2014) at 6-7 (“So apparently from what I understood of the reporting [sic], you were to file a motion and there was to be a paper trail. That’s what they were waiting for”).

II. No Reliance on a Pleading Never Filed

Most of the arguments the Patils make in their brief rely on the purported “Complaint” that was never filed, which they repeatedly cite in their brief. This includes their erroneous claim that Mr. Roy was defaulted for failing to show up, PATIL’S BRF. at 7, their mistaken assumption that Mr. Roy was sued personally, PATIL’S BRF. at 8, and their inaccurate assertion that damages had been alleged. PATIL’S BRF. at 9.

Again, without making allegations as to fault or explanation for the non-filing, it is apparent that no rules-compliant complaint was ever filed, and that no reliance should have been nor can now be placed on it. Its existence is central to the Patils’ argument that they had a valid suit against Mr. Roy, however. Thus this court should dismiss on the grounds that Mr. Roy is still awaiting the Patils’ complaint if they wish to file one.

III. Preservation

The Patils suggest that Mr. Roy did not preserve the issues he argues in his brief because they were raised in a post-decision motion.

First, Mr. Roy attempted to explain the situation to the court *during* the damages hearing, before the post-decision motion.

Second, as noted in his opening brief, Mr. Roy's post-hearing motion was timely filed.

Third, the law provides that "issues which could not have been presented to the trial court prior to its decision must be presented to it in a motion for reconsideration." *Dukette v. Brazas*, 166 N.H. 252, 255 (2014); *see also In re Hampers*, 154 N.H. 275, 290-91 (2006) ("The court did not award the respondent attorney's fees until the final decree. The petitioner's motion for reconsideration filed after the final decree therefore was sufficient to preserve his ... argument for our review.").

As noted in his opening brief, Mr. Roy was blind-sided. He tried to explain the situation to the court during the damages hearing, and asked for additional time. But he did not know the extent to which the court's procedural errors prejudiced him until the final award. His post-hearing motion attempted to present to the court the full extent of its errors, and timely gave the court another opportunity to remedy them.

IV. No Corporate Veil-Piercing

In their brief the Patils suggest they can hold Mr. Roy personally liable, rather than only the corporation Kelly Construction, by claiming they “produced copies of payment certificates and mechanic’s lien waivers upon which Roy fraudulently represented that certain incomplete work had been completed and that subcontractors and material suppliers had been paid in full.” PATIL’S BRF. at 8.

Mr. Roy did no such thing. But even if he did, to pierce the entity, the claimant must show not merely that there was a fraud, but “that the corporate entity was used to promote” it. *Village Press, Inc. v. Stephen Edward Co.*, 120 N.H. 469, 471 (1980). This can take a variety of forms, including undercapitalization, “using the corporation to further [the stockholder’s] own private business rather than that of the corporation,” *id.*, “suppress[ing] the fact of incorporation,” or “mislead[ing] ... creditors as to ... corporate assets. *Druding v. Allen*, 122 N.H. 823, 827 (1982).

There is no suggestion in the record, nor in the Patil’s brief, that Mr. Roy ever used Kelly Construction as a front for personal misconduct, hid behind the entity, or mislead anyone using the corporate form. The bare allegation that Mr. Roy paid someone he didn’t, or vice versa, says nothing about misusing the corporation. Accordingly, there is no corporate veil-piercing here, and Mr. Roy cannot be held personally liable.

CONCLUSION

For the foregoing reasons, this Court should disregard the Patil’s brief for its central reliance on a document never filed and dismiss the case; or in the alternative, reverse the finding of liability and the award of damages against Mr. Roy, or grant a new proceeding on both.

Respectfully submitted,

Thomas J. Roy
By his Attorney,

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Dated: June 14, 2015

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CERTIFICATION

I hereby certify that on June 14, 2015, copies of the foregoing will be forwarded to Bruce J. Marshall, Esq.

Dated: June 14, 2015

Joshua L. Gordon, Esq.