THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr. Master-in-Equity

Appellate Case No.: 2022-000897
Lower Court Case Nos.: 2019-CP-23-05954 & 2020-CP-23-04351

Crescent Homes SC, LLC…….....Appellant,

v.

CJN, LLC…….Respondent.

RESPONDENT'S MEMORANDUM REGARDING APPEALABILITY

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Respondent CJN, LLC ("CJN") submits this memorandum regarding appealability in response to the Court's request for such memorandum made via letter to counsel dated June 30, 2022. As set forth hereinbelow, the order entered on May 27, 2022 ("Order") from which Appellant Crescent Homes SC, LLC's ("Crescent") appeals is not appealable because it is not a final judgment and is not "involving the merits" or "affecting a substantial right" as required to allow appeal of an interlocutory order under S.C. Code Ann. § 14-3-330.

BACKGROUND RELEVANT TO APPEALABILITY

In October of 2018, CJN and Crescent entered into an agreement ("Agreement") related to the development of "Phase 1" of the River Springs Subdivision, pursuant to which CJN was to develop a large parcel of land it owned into buildable subdivision lots, and Crescent was to purchase those lots from CJN, after which point Crescent planned to build and sell homes in the subdivision.

Performance of this Agreement is the subject of *Crescent Homes SC, LLC v. C J N, LLC*, CA No.: 2019-CP-23-05954 ("2019 Action"), wherein each party claims[1] that the other party failed to perform under the Agreement in various ways. Some of these claims, or portions thereof, have become moot as a result of the parties continuing to perform the Agreement.[2] Nevertheless, all claims in the 2019 Action remain pending before the Master-in-Equity and have not been tried or otherwise finally decided.

[1] Crescent pled the following causes of action in their Complaint: (1) Breach of Contract – Specific Performance, (2) Declaratory Judgment, and (3) Breach of Contract/Breach of the Covenant of Good Faith and Fair Dealing. CJN pled the following causes of action in their Counterclaim: (1) Breach of Contract/Breach of the Covenant of Good Faith and Fair Dealing, (2) Quantum Meruit/Unjust Enrichment, and (3) Breach of Contract – Specific Performance.-

[2] As of July 20, 2022, Crescent has closed on the purchase of 28 of the 32 lots contemplated for buy/sell under the Agreement.

The same Agreement contained a clause purporting to give Crescent a right of first refusal on "lots" in "Phase 2" of the River Springs Subdivision. The Phase 2 parcel is adjacent to Phase 1, is owned by CJN, and, to date, remains as a single parcel of undeveloped land. This right of first refusal is the focus of *CJN, LLC v. Crescent Homes SC, LLC v.* CA No.: 2020-CP-23-04351 ("2020 Action"), in which CJN pled the following causes of action: (1) Declaratory Judgment, (2) Abuse of Legal Process, (3) Tortious Interference with Contractual Relationship, (4) Unfair and Deceptive Trade Practices, [3] and (5) Punitive Damages.

Both of the above cases were referred, by consent of the parties, to the Master-in-Equity for purposes of discovery and trial pursuant to Rule 53, SCRCP. Upon the motion of Crescent, the Court consolidated the two actions. Upon the motion of CJN, the Court bifurcated the issue of enforceability of the right of first refusal (Declaratory Judgment claim in the 2020 Action) for trial. The Order being appealed grants CJN's claim for Declaratory Judgment in 2020 Action finding that "under the language and facts involved herein, the right of first refusal in paragraph 19 is not enforceable." (Order at 8.)

CJN's claims in the 2020 Action for Abuse of Legal Process, Tortious Interference with Contractual Relationship, and Punitive Damages remain pending and have not been tried or otherwise finally decided. Although the findings in the Order are relevant to the remaining claims, additional factual and legal issues must be decided before the parties' rights can be finally determined.

[3] Crescent obtained dismissal, via motion for summary judgment, of CJN's claim for Unfair and Deceptive Trade Practices.

ARGUMENT

"[A]n appeal from an order or judgment of the master or referee must be to the Supreme Court or the court of appeals as provided by the South Carolina Appellate Court Rules." S.C. Ann. Code §14-11-82. "Appeal may be taken, as provided by law, from any final judgment, appealable order or decision." Rule 201(a), SCACR. An appeal ordinarily may be pursued only after a party has obtained a final judgment. Mid-State Distributors, Inc. v. Century Importers, Inc., 310 S.C. 330, 335, 426 S.E.2d 777, 781 (1993). Here, the Order is not a final judgment because it does not resolve all claims in the actions. Multiple claims in the consolidated action have not proceeded to trial; the Order itself notes that the "remaining issues between the parties shall move to trial as soon as possible." Order at 8.

"An order not governed by a specialized appealability statute is not immediately appealable unless it fits into one of the categories listed in section 14-3-330 of the South Carolina Code (1976 & Supp.2009)." Ex Parte Capital U–Drive–It, Inc., 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006). These categories include when the order is "involving the merits" or "affecting a substantial right." S.C. Code Ann. § 14-3-330. The Courts have "narrowly construe[d] section 14-3-330 because immediate appeals of various orders generally have not been allowed." Stone v. Thompson, 418 S.C. 599, 604, 795 S.E.2d 49, 53 (2016) (citing Hagood v. Sommerville, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005)). "[O]ur supreme court has cautioned that '[p]iecemeal appeals should be avoided and most errors can be corrected by the remedy of a new trial.'" Id.

I. THE ORDER MAY NOT BE APPEALED UNDER SECTION 14-3-330(1), BECAUSE IT DOES NOT INVOLVE THE MERITS.

An "intermediate judgment, order or decree in a law case *involving the merits*…." may be immediately appealed under subsection (1) of Section 14-3-330. S.C. Ann. Code 14-3-330(1) (emphasis added). "Our supreme court has narrowly defined an order 'involving the merits' as an

order that 'must finally determine some substantial matter forming the whole or a part of some cause of action or defense.'" Stone, 418 S.C. at 604, 795 S.E.2d at 53 (2016) (citing Mid-State Distribs., Inc., 310 S.C. at 334, 426 S.E.2d at 780). An order usually will be deemed interlocutory and not immediately appealable when there is some further act that must be done by the trial court prior to a determination of the parties' rights. Mid-State Distributors, 310 S.C. at 334-335, 426 S.E.2d at 780; see also Peterkin v. Brigman, 319 S.C. 367, 368, 461 S.E.2d 809, 810 (1995)(denial of motion to enforce settlement agreement was not immediately appealable); cf. Cooke v. Palmetto Health Alliance, 367 S.C. 167, 171-172, 624 S.E.2d 439, 414 (2005) (allowing appeal of order rejecting hospital's defense that injured party was employee subject to exclusive remedy of Worker's Compensation Act; order found to be on the merits because it "finally determined a substantial matter forming a part of the Hospital's defense.").[4]

In Stone, the Court held that the issue of whether a common law marriage existed was a preliminary matter for the family court to determine before reaching claims for divorce and division of the marital estate. Stone, 418 S.C. 599, 604, 795 S.E.2d 49, 53 (2016). Although the family court could have addressed all the issues in one trial, it opted to bifurcate the common law marriage determination to avoid possibly wasting "time and resources on the remaining issues if it found that a common law marriage did not exist." Id. The Court concluded "because the order in this case does not bring the litigants to the end of the road and requires further action by the family court, we find the order is not immediately appealable under subsection 14-3-330(1)." Id. at 605 (internal citations omitted).

[4] Cooke appears to be inconsistent with Stone on similar facts. The nature of the orders appealed from in both cases was an intermediate ruling that rejected defenses that, if successfully maintained by defendants, would have been dispositive of plaintiffs' claims. Counsel for CJN has not been able to distinguish these cases in any way that would resolve the inconsistency. Accordingly, while CJN urges the Court to follow Stone, CJN concedes that an appeal would likely be allowed under Cooke.

Here, the issue of right of first refusal was a bifurcated by the master-in-equity. As in Stone, this issue could have been tried with all other issues, but the master-in-equity opted to bifurcate to save time and resources on the remaining issues. The Order does not bring the parties to the end of the road and further action is required to determine all causes of action and defenses. Therefore, as in *Stone*, the Order cannot be immediately appealed.

II. THE ORDER MAY NOT BE APPEALED UNDER SECTION 14-3-330(2).

Additionally, an order may be immediately appealed under subsection (2), if it is:

> An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action.

S.C. Ann. Code 14-3-330(2) (emphasis added).

"Immediate appeals under subsection (2) have been allowed in situations whe[n] the substantial right could not be vindicated on appeal after the case." Breland v. Love Chevrolet Olds, Inc., 339 S.C. 89, 93, 529 S.E.2d 11, 13 (2000). "Generally [subsection (2)] has only been used when the trial order affected the 'mode of trial' because if those orders are not immediately appealed, no appellate review is available to correct any error." Id. When a trial court's order deprives a party of a mode of trial to which it is entitled as a matter of right, the order is immediately appealable. Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000). There is no appeal under subsection (2) when the order "does not prevent a judgment from being rendered in the action, and appellant can seek review of the current order in any appeal from final judgment." Peterkin, 319 S.C. at 368, 461 S.E.2d at 810.

Here, there is no appeal under subsection (2) the Order does not prevent a final judgment from being rendered in the action, and Crescent can seek review of the Order in any appeal from final judgment.

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PROOF OF SERVICE

I certify that I have served the Respondent's Memorandum Regarding Appealability dated July 20, 2022, on all counsel of record as set forth below via email on July 20, 2022. A copy of the email is attached to this Proof of Service as Exhibit A.

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EXHIBIT A

Email to counsel enclosing Respondent's Memorandum Regarding Appealability

Cara Smith

From: Cara Smith
Sent: Wednesday, July 20, 2022 4:04 PM
To: erl@lalawsc.com; Benjamin Joyce
Cc: James Warmoth; Nina M. Thomas
Subject: Respondent's Memorandum Regarding Appealability; Crescent Homes SC, LLC v. CJN, LLC (Appellate Case No.: 2022-000897)
Attachments: 22.07.20 Respondent's Memorandum Regarding Appealability.pdf

Good Afternoon Mr. Lesemann and Mr. Joyce,

Please find attached Respondent's Memorandum Regarding Appealability in the above-referenced matter. We will be filing the same with the South Carolina Court of Appeals this afternoon. Should you have any questions, please contact our office at 864-242-4899.

With kindest regards,

KDC

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