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Dec 16 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Case No. 2022-CP-10-02694

The Eaglewood Retreat Homeowners Association, Inc.,.....Respondent,

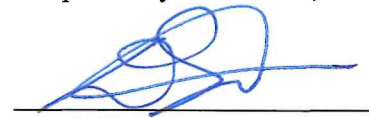
v.

Jason R. Patno,Appellant.

RESPONDENT’S MOTION TO DISMISS

Pursuant to the South Carolina Appellate Court Rules (“SCACR”), Rule 222, Respondent respectfully moves for an Order dismissing Appellant’s appeal of the circuit court’s denial of Appellant’s motion to dismiss.

Respectfully submitted,



Derek F. Dean
S.C. Bar No. 65279
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(843) 762-9132
dfdean@charlestonattorneys.net
Attorneys for Respondent

December 16, 2022
Charleston, SC

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The Eaglewood Retreat Homeowners Association, Inc.,.....Respondent,

v.

Jason R. Patno,.....Appellant.

RESPONDENT’S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Pursuant to the Notice of Appeal filed by Appellant on November 28, 2022, with the Court of Appeals, Appellant is appealing four orders issued by the circuit court on October 13, 2022. Two of those orders have the same effect and denied Appellant’s motion to dismiss the below action. The denial of a motion to dismiss is interlocutory and not immediately appealable, and Appellant’s appeal of such denial should be dismissed.

STATEMENT OF THE CASE

Respondent is the homeowner’s association for the community known as Eaglewood Retreat in Charleston County. Appellant is, and has been at all relevant times hereto, the owner of real property located in Eaglewood Retreat (“Home”), which is part of Respondent. On or about

January 2022, Patno began operating a twenty-four (24) hour professional towing service, CAP Towing, from the Home. To that end, in addition to his four (4) cars, Appellant parked his large, diesel, commercial tow truck marked with a logo on the Home and/or the streets of Eaglewood Retreat, and answered/dispatched tow and service calls from the Home. Around March 29, 2022, Appellant added a second large, diesel, commercial flatbed, rollback tow truck to his fleet. The operation of Appellant's twenty-four (24) hour towing business out of his Home requires the frequent driving of these tow trucks through the neighborhood to and from the Home at all times of the day and night. Both of the tow trucks are in excess of twenty (20) feet in length, and make significantly more noise than a regular car or truck.

On or about June 14, 2022, Respondent filed its complaint and motion seeking the circuit court's assistance in enforcing against Appellant the provisions of its Declaration of Covenants, Conditions, Restrictions and Easements for Eaglewood Retreat ("Declaration") and By-Laws of Eaglewood Retreat Homeowners Association, Inc. ("Bylaws"), each as may be amended, recorded in Book L565 at Page 492 on December 9, 2005, and re-recorded in Book H591 at Page 400 on July 17, 2006, with the Charleston County Register of Deeds, South Carolina, as well as its Policy Resolution No. 02-2009 Rules and Regulations ("Rules") recorded January 14, 2019, in Book 0772 at Page 208 with the Charleston County Register of Deeds, South Carolina (Declaration, Bylaws, Rules, and any promulgated rules, regulations, guidelines, policies and the like hereinafter collectively referred to as the "Governing Documents", and are or may be public records filed with the Charleston County Register of Deeds Office).

On August 25, 2022, a hearing was held for Appellant's motion to dismiss the action on the ground that Respondent's complaint failed to allege cognizable damages or irreparable harm,

and Respondent's motion for a preliminary injunction. The circuit court issued orders October 13, 2022, denying Appellant's motion to dismiss the case and granting Respondent's motion for a preliminary injunction against Appellant. Appellant timely filed a Motion to Reconsider or to Clarify, which motion was denied November 2, 2022. Appellant's notice of appeal for all orders followed.

LAW/ANALYSIS

S.C. Code Ann. § 14-3-330 (Supp.2003) limits the appellate court's ability to hear appeals. Only final judgments and certain interlocutory orders are appealable. *Burkey v. Noce*, 398 S.C. 35, 37, 726 S.E.2d 229, 230 (S.C. App. 2012). It is well settled that an interlocutory order is not immediately appealable unless it involves the merits of the case or affects a substantial right. *Brown v. County of Berkeley*, 622 S.E.2d 533, 537, 366 S.C. 354, ___ (S.C. 2005)(citing S.C. Code Ann. § 14-3-330 (Supp.2003)). Generally, the denial of a motion to dismiss under Rule 12(b)(6), SCRCP, is not immediately appealable." *Id.* See also, *Weaver v. Brookdale Senior Living, Inc.*, 431 S.C. 223, 847 S.E.2d 268 (S.C. App. 2020)(denial of appellants' motion to dismiss for failure to state a cause of action was not immediately appealable and the Court of Appeals declined to exercise its discretion to address it as it believe the issues raised would benefit from further factual development); *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 93, 529 S.E.2d 11, 13 (2000)("Currently, this Court does not allow immediate appellate review of the denial of any Rule 12(b), SCRCP motion."); *Moyd v. Johnson*, 289 S.C. 482, 347 S.E.2d 97 (1986) (ruling the denial of a Rule 12(b)(6), SCRCP motion was not immediately appealable); Jean Hoefler Toal et al., Appellate Practice in South Carolina 149 (3d ed. 2016)(the appellate courts generally do not allow immediate appellate review of the denial of Rule 12(b) motions).

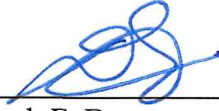
To involve the merits of a case, the order must finally determine some substantial matter, in whole or in part, of a cause of action or defense, and to affect a substantial right, the order must decide the action and prevent a judgment from which an appeal might be taken or discontinue the action. *Brown v. County of Berkeley*, 622 S.E.2d 533, 537, 366 S.C. 354, ____ (S.C. 2005)(internal citations omitted).

In *Ballenger v. Bowen*, 443 S.E.2d 379, 380, 313 S.C. 476, 477-8 (S.C. 1994), ____, the Supreme Court held that a denial of a motion for summary judgment decides nothing about the merits or law of the case, only that the case should proceed to trial, and the issues raised in the motion may be raised again later. Therefore, an order denying a motion for summary judgment is not appealable. For the same reasons given in *Ballenger*, the Supreme Court explained in a footnote in *McLendon v. South Carolina Dept. of Highways and Public Transp.*, 443 S.E.2d 539, 540, 313 S.C. 525, ____ (S.C. 1994), that the denial of a motion to dismiss does not establish the law of the case and the issue raised by the motion can be raised again at a later stage of the proceedings, and therefore, the denial of a motion to dismiss is not directly appealable. By not allowing the immediate appeal of pretrial motions where the rights of a party have not been substantially impacted, piecemeal litigation is avoided. *Breland*, 339 S.C. at 94, 529 S.E.2d at ____.

The circuit court's denial of Appellant's motion to dismiss did not determine any substantial matter nor affect a substantial right, it merely allows the matter to proceed. Further, the denial does not preclude Appellant from raising the issues presented in his motion at a later point in the case, or after trial.

Based upon the foregoing, Appellant's appeal of the circuit court's denial of his motion to dismiss should be dismissed.

Respectfully submitted,



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Attorneys for Respondent

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v.

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PROOF OF SERVICE

I certify that I have served Respondent’s Motion to Dismiss and Respondent’s Memorandum in Support of Motion to Dismiss by emailing it to counsel for the Appellant to their email addresses, as provided in AIS.

Respectfully submitted,



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Attorneys for Respondent

December 16, 2022
Charleston, SC

Brenda Casey

From: Brenda Casey
Sent: Friday, December 16, 2022 10:54 AM
To: 'drew@harrisonfirm.com'; 'sarah@harrisonfirm.com'
Cc: Derek F. Dean
Subject: The Eaglewood Retreat Homeowners Association, Inc. v. Patno (2022-001673)
Attachments: Counsel 12-16-22.pdf; Respondent's Motion to Dismiss & Memo in Support.pdf

Good morning,

Attached is Respondent's Motion to Dismiss and Respondent's Memorandum in Support of Motion of Dismiss in connection with the above-referenced matter that will be emailed to the Court of Appeals today for filing.

Thanks,
Brenda

Brenda Casey
Paralegal

SIMONS & DEAN
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843-762-9132/843-406-9913 *facsimile*
brenda@simonsanddean.com

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I. Sonja Taylor istaylor@simonsanddean.com

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SC Court of Appeals

December 16, 2022

VIA EMAIL ONLY: ctappfilings@sccourts.org

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

Re: *The Eaglewood Retreat Homeowners Association, Inc. v. Jason Patno*
Appellate Case No.: 2022-001673

Dear Ms. Kitchings:

Enclosed is Respondent's Motion to Dismiss, Respondent's Memorandum in Support of Motion of Dismiss and Proof of Service on behalf of The Eaglewood Retreat Homeowners Association, Inc.

Additionally, I have mailed our check in the amount of \$50.00 for the filing fee.

With kind regards,

Sincerely,



Derek F. Dean

DFD/bdc

Enclosures

cc: Mr. Mike Marcovich (via e-mail w/o enc.)
Andrew S. Radeker, Esquire (via email w/enc.)
Sarah M. Larabee, Esquire (via email w/enc.)