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May 08 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-in-Equity

Appellate Case No.: 2023-000649
Civil Action No.: 2023-CP-10-00665

Frank Holtham, as Trustee of the Holtham
SC Realty Trust, dated April 12, 2022,.....Appellant,

v.

Glenn F. Keyes and Glenn Keyes Architects LLC, Respondents.

MOTION TO DISMISS APPEAL

PLEASE TAKE NOTICE THAT Respondents Glenn F. Keyes and Glenn Keyes Architects LLC (“Respondents”), through undersigned counsel, will move for an order dismissing the appeal filed by Appellant Frank Holtham, as Trustee of the Holtham SC Realty Trust, dated April 12, 2022 (“Appellant”) on April 19, 2023 on the grounds that this appeal does not involve a final order of the Circuit Court and is therefore premature.

BACKGROUND

The subject of this dispute is the Petition for Rule to Show Cause filed by Appellant on February 9, 2023 regarding Respondents’ Mechanic’s Lien on the real property located at 89 Smith Street in Charleston, South Carolina (the “Property”). The Court held a hearing on the

Petition on March 2, 2023. On March 29, 2023, the Honorable Mikell R. Scarborough issued an Order denying the Petition. Specifically, the Court found significant dispute over the meaning of the “10% of construction costs” language found in Respondents’ engagement letter with Appellant, concluding that the agreement is ambiguous and denying the Petition on these grounds. The Court declined to make specific findings of fact. (“[I]t is unnecessary to make findings of fact and conclusions of law in denying motions for summary judgment. See Ballenger v. Bowen, 313 S.C. 476, 478 n.1, 443 S.E.2d 379, 380 (1994); see also Rule 52, SCRCF).

On April 7, 2023, Appellant filed a motion to reconsider, arguing the Court erred (i) in finding the payment terms in the contract ambiguous, (ii) in not constructing ambiguity in favor of the Appellant, (iii) by finding a genuine issue of fact exists about the amount of construction costs, (iv) in not dissolving the Lien based on S.C. Code Ann. 29-5-100, and (v) in finding no genuine issue of fact exists that Respondents provided services if the finding is those services constitute “labor” as required by the Mechanic’s Lien statute. The Court denied Appellant’s motion to reconsider on April 17, 2023. The Appellant filed a notice of appeal as to Judge Scarborough’s March 29 Order denying the Petition on April 19, 2023.

Appellant improperly seeks to appeal from the Order of Judge Scarborough. Under the well-settled law detailed below, this Order is not immediately appealable before a final judgment. Because the Circuit Court has not rendered a final judgment in this matter, the appeal is premature and should be dismissed as more fully set forth below.

ARGUMENT

The appeal should be dismissed as premature. In the Petition for Rule to Show Cause, Appellant asked the Court to find the Mechanic’s Lien is invalid and order the release of the cash bond Appellant posted and remit the funds to Appellant. “The authority to vacate a mechanic’s lien

may be somewhat likened to the judge's authority to grant a summary judgment if there is no genuine issue of material fact to be determined, or his authority to direct a verdict when the evidence is susceptible of only one reasonable inference. However, the judge to whom the application for relief is made may not try disputed facts. These are reserved, under Code § 45-273, for the jury.” Sea Pines Co. v. Kiawah Island Co., 268 S.C. 153, 157, 232 S.E.2d 501, 502 (1977). Summary judgment is only appropriate where there is no genuine issue of material fact and it is clear the moving party is entitled to a judgment as a matter of law. S.C.R. Civ. P. 56(c). Therefore, in evaluating a Petition for Rule to Show Cause like the one in this case, the Court applies the same standard as applied to a motion for summary judgment.

The law is clear an order denying summary judgment is “never appealable.” Kinard v. Richardson, 407 S.C. 247, 263, 754 S.E.2d 888, 897 (Ct. App. 2014). A denial of a motion for summary judgment decides nothing about the merits of the case, but simply decides the case should proceed to trial. Ballenger v. Bowen, 313 S.C. 476, 477-78, 443 S.E.2d 379, 380 (1994) (citing Parker Oil Co. v. Smith, 34 N.C. App. 324, 237 S.E.2d 882 (1977)). “In short, the denial of summary judgment does not finally determine anything about the merits of the case and does not have the effect of striking any defense since that defense may be raised again later in the proceedings. Therefore, an order denying a motion for summary judgment is not appealable.” Ballenger, 313 S.C. 476, 477-78, 443 S.E.2d 379, 380 (see also Good v. Hartford Accident & Indemnity Co., 201 S.C. 32, 21 S.E.2d 209 (1942) (an order which has not resulted in any binding adjudication of the rights of the parties is not appealable).

Here, the Order denying the petition is akin to an order denying summary judgment. In evaluating the Petition, the Court was simply required to determine whether any triable issues of fact exist and whether the Respondents’ Lien should be found invalid as a matter of law. After the

parties submitted memoranda and presented arguments at a hearing on this matter, the Court found “a significant amount of disagreement” over the meaning of “10% of construction costs” which forms the basis for payment for services performed by Respondents and therefore forms the basis for the amount claimed by Respondents in their Lien. (Order p. 2). Based upon that, the Court found that the contract was ambiguous as to how the fee is to be determined. (Order p. 2). The Court’s Order does not make any final determination about how the fee at issue is to be determined. Any such question is for the jury. See Black v. Haile, 270 S.C. 93, 95, 240 S.E.2d 646, 647 (1978) (finding it “readily apparent that there are genuine issues of material fact in dispute” where the amount owed depended upon which of the allegations of the respective parties are to be believed).

The South Carolina Court of Appeals addressed a similar matter in Cobb v. Maccaro, 310 S.C. 303, 304, 423 S.E.2d 156, 156 (Ct. App. 1992). In that case, the Respondent filed a mechanic's lien against the property of Appellants, who petitioned to vacate the lien because respondent had allegedly claimed more than his due. Id. The trial court denied the motion and the Court of Appeals dismissed the appeal. Id. The Appellants argued that the order affected a substantial right and was therefore appealable as the order affected their right to avoid a burden on their title and to avoid defending foreclosure is impinged upon by the trial judge's denial of their motion to vacate the mechanic's lien. Cobb, 310 S.C. 303, 305, 423 S.E.2d 156, 157. However, the Court explained to appeal an order effecting a substantial right, an order must not only involve a right, but it must also "prevent a judgment from which an appeal might be taken." Id. citing Ex parte Johnson, 63 S.C. 205, 208, 41 S.E. 308, 309 (1902); See also S.C. Code Ann. § 14-3-330(2)(a) (1976). The Court further reasoned that because the trial judge's order preserves the Appellants’ right to renew their claim for statutory dissolution of the lien during later proceedings,

the Appellants would not be denied a later judgment from which they can appeal the same issue. Cobb, 310 S.C. 303, 305, 423 S.E.2d 156, 157. The Appellants had no right to avoid defending against foreclosure because our Supreme Court has held that avoidance of trial is not a substantial right. Id. (citing Shields v. Martin Marietta Corp., 303 S.C. 469, 402 S.E.2d 482 (1991)).

The Court of Appeals in Cobb also highlighted the Sea Pines case at issue in the present matter: “Under South Carolina law, a court cannot dissolve a lien if the mechanic makes a prima facie showing for filing the lien or if the amount owed depends upon which of the parties’ allegations are to be believed. Sea Pines Co. v. Kiawah Island Co., 268 S.C. 153, 232 S.E.2d 501 (1977); Black v. Haile, 270 S.C. 93, 240 S.E.2d 646 (1978). In sum, statutory authority to dissolve a lien is in the nature of a summary judgment because it is only available when there is no genuine issue of material fact.” Cobb, 310 S.C. 303, 305-06, 423 S.E.2d 156, 157. The Court of Appeals explained the motion to dissolve a mechanic's lien was governed by the law relating to a summary judgment. Cobb, 310 S.C. 303, 306, 423 S.E.2d 156, 157. Because a denial from a summary judgment motion was not appealable, the motion to dissolve the mechanic's lien was not appealable. Id.

Similarly in the present case, the Court’s Order denying the Petition is not a final judgment and does not have any bearing on the merits of this case. Therefore, the current appeal is untimely and should be dismissed.

CONCLUSION

Under the Sea Pines framework, the Appellant’s Petition for Rule to Show Cause is held to the same standard as a motion for summary judgment. The Circuit Court properly denied the Petition as it found significant issues of disputed fact. South Carolina law is clear that an order denying a motion for summary judgment is not a final judgment and is not appealable. Therefore,

the undersigned respectfully requests that this Court deny the appeal as premature.

This motion is further supported by all pleadings, South Carolina law, argument of counsel at a hearing on this matter, and any other matters the Court may permit to be presented at the hearing on this motion.

May 8, 2023

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Glenn F. Keyes and Glenn Keyes Architects LLC, Respondents.

PROOF OF SERVICE

I certify that Respondents’ Motion to Dismiss Appeal was served upon Appellant via e-mail to counsel of record listed below on May 8, 2023. A copy of the service e-mail is attached hereto as Exhibit A.

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From: Charline Barrasso
Sent: Monday, May 8, 2023 4:06 PM
To: Benjamin C. Bruner, Esquire (bbruner@BrunerPowell.com)
Cc: John A. Massalon; Carissa Steichen
Subject: 2023-000649; Frank Holtham, et al. v. Glenn F. Keyes, et al.
Attachments: 20230508 Motion to Dismiss Appeal.pdf; 20230508 Clerk of Court.pdf

Mr. Bruner,

Good afternoon. Attached please find Respondents' Motion to Dismiss Appeal, along with correspondence to the Clerk of Court enclosing the filing fee. Service is being provided via email only. If you would like hard copies, please let me know and I will be happy to mail them to you.

Thank you,

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