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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Jennifer B. McCoy, Circuit Court Judge

Case No. 2016-CP-10-1833
Appellate Case No. 2021001055

Andrew and Kimberly McIntire……. *Appellants*,

v.

Seaquest Development Company, Inc.; Red Bay Constructors Corp.; Benzenberg Custom Cabinets, Inc.; Jonathan Marshall Construction; Coastal Window & Door Center of Charleston, LLC; Carolina Window & Millwork-Omni Glass Industries, LLC; Southcoast Exteriors, Inc.; Michael Casteen d/b/a Casteen Custom Cabinets; Quality Cedar Products, Inc. of Michigan d/b/a/ Michigan Prestain Co.; Coastal Plumbing & Gas, LLC; Foam Insulation Co. Inc.; Jerry Comer d/b/a/ Jerry's Tile & Marble, LLC; Lowcountry Fireplaces, Inc.; Carolina Pest Solutions, Inc.; New South Construction Supply, LLC, Defendants,

AND

Seaquest Development Company, Inc. ..... Third-Party Plaintiff/*Appellant*,

v.

Architectural Products of Charleston, LLC, and Sealtight of South Carolina, LLC, Third-Party Defendants,

of which Red Bay Constructors Corp.; Benzenberg Custom Cabinets, Inc.; Jonathan Marshall Construction; Coastal Window & Door Center of Charleston, LLC; Carolina Window & Millwork-Omni Glass Industries, LLC; Southcoast Exteriors, Inc.; Michael Casteen d/b/a Casteen Custom Cabinets; Quality Cedar Products, Inc. of Michigan d/b/a/ Michigan Prestain Co.; Coastal Plumbing & Gas, LLC; Foam Insulation Co. Inc.; Jerry Comer d/b/a/ Jerry's Tile & Marble, LLC; Lowcountry Fireplaces, Inc.; Carolina Pest Solutions, Inc.; and New South Construction Supply, LLC are the .....*Respondents*.

FINAL BRIEF OF APPELLANTS ANDREW AND KIMBERLY McINTIRE

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INTRODUCTION

An appeal of an order stays the effect of that order.[1] Rule 241(a), S.C.A.C.R. The vacating of an order leaves the case in the posture in which it existed prior to the entry of that order. *Moore v. N. Am. Van Lines*, 319 S.C. 446, 462 S.E.2d 275 (1995).

Here, two homeowners filed suit against the general contractor and subcontractors who built their home. The general contractor moved to dismiss, and an order was entered granting the motion and dismissing the case in its entirety. That order was appealed and vacated.

On remand, the subcontractors contended they had been dismissed from the case and that their dismissal had never been appealed, meaning they were no longer parties to the case. However, there was no separate, unappealed order dismissing the subcontractors. There was only an order dismissing the entire case, the effect of which was stayed by the filing of a notice of appeal and vitiated entirely by the reversal of the order by this Court.

The trial court erred in holding otherwise, and this appeal follows.

STATEMENT OF ISSUE ON APPEAL

1. Whether the trial court erred in holding that subcontractors are no longer party to this case after the order dismissing the case was appealed and reversed.

STATEMENT OF THE CASE

Andrew and Kimberly McIntire ("Appellants" or "the McIntires") filed suit against the Respondents on April 8, 2016, bringing claims relating to significant construction defects in their home. **R. p.000042**. The last defendant was served on July 20, 2016 (**R. p.000353)**, and the McIntires filed a motion to compel arbitration on July 27, 2016. **R. p.000098**.

[1] Unless certain exceptions, not applicable here, apply. *See* Rule 241(b), S.C.A.C.R.

Respondent Seaquest Development Company, Inc. ("Seaquest") moved to dismiss or stay proceedings on June 17, 2016 (**R. p. 000085**), alleging that Appellants had failed to comply with the notice requirements of the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act. S.C. Code Ann. § 40-59-810 *et seq.* (hereinafter the "Right to Cure Act"). The subcontractor parties ("the Subcontractors") did not join in Seaquest's motion. One Subcontractor, Red Bay Constructors Corp. ("Red Bay"), filed a motion parallel to Seaquest's, and no other Subcontractor joined in that motion either. **R. p. 000009**). A hearing was held on October 13, 2016 encompassing Seaquest's motion, Red Bay's motion, and the McIntires' motion to stay and compel arbitration. **R. p. 000354**.

On May 1, 2017, Justice Toal entered an order granting Seaquest's motion and dismissing the case, denying the McIntires' motion to compel arbitration, and denying all remaining motions as moot. **R. p. 000003**. On May 30, 2017, the McIntires timely appealed the granting of Seaquest's motion, with the movant Seaquest designated as the sole respondent. **R. p.000445**. On December 31, 2019, this Court reversed Justice Toal's May 1, 2017 order and remanded the case. **R. p.000021**. The Supreme Court denied Seaquest's petition for certiorari on December 11, 2020.

On remand, the Subcontractors contended they were no longer parties to the case arguing that they had been dismissed from the case and that their dismissal had never been appealed. A status conference was held February 16, 2021 before Judge Roger Young, at which Judge Young suggested a Motion for Clarification be filed, which the McIntires and Seaquest filed jointly on February 16. **R. p. 000247**. Thereafter, on February 19, 2021 Judge Young entered an informal ruling via email and opined that the effect of this Court's December 31, 2019 ruling was to leave the Subcontractors in the suit, stating:

> [A]fter the Court of Appeal's decision, her [Justice Toal's] order became of no effect and is no longer in existence. In my opinion, that leaves any claims against the subcontractors alive.

R. p. 000532. The Subcontractors requested an opportunity to present further argument, which Judge Young allowed, and the majority of the Subcontractors filed a joint return to the Motion for Clarification on March 3, 2021 (**R. p. 000292**), with Respondent Sealtight of South Carolina, LLC filing its own Memorandum on March 4, 2021. **R. p. 000305**. The McIntires and Seaquest filed a joint reply in support of the Motion for Clarification on March 12, 2021. **R. p. 000330**.

A further hearing on the motion was scheduled before Judge Jennifer McCoy and was heard on April 22, 2021. **R. p. 000407**. Thereafter on May 3, 2021, *Judge Young's* chambers sent an email to the parties with Judge McCoy in copy, stating only "Judge Young denies Plaintiff's and Seaquest Development Company, Inc.'s Motion for Clarification" and requesting a proposed order. **R. p. 000544**. The following day, Judge Young's chambers withdrew his May 3, 2021 proposed ruling, recognizing that the motion was pending before Judge McCoy. **R. p. 000543**. Judge McCoy ultimately ruled in favor of the Subcontractors on August 19, 2021 via a Form 4 order and requested Subcontractors provide a proposed order (**R. p. 000026**), which was entered on August 23, 2021. **R. p.000029**. This appeal timely followed. **R. p.000546**.

STATEMENT OF THE FACTS

In 2007, the McIntires contracted with Seaquest for the construction of a residence in Mount Pleasant, South Carolina. Seaquest was the general contractor for the project, and a certificate of occupancy issued in September 2008.

In September 2013, the McIntires' residence was struck by lightning, blasting a hole in the roof and causing substantial fire damage. In the course of inspecting the damage caused by the lightning strike, the McIntires discovered—for the first time—numerous and significant

construction defects. The McIntires notified Seaquest and at least one Subcontractor of the defects they had discovered, but received no response. Accordingly, the McIntires hired another contractor to repair the roof, which was a matter of some urgency to prevent further damage to the structure.

In the course of the repairs, construction defects were discovered and addressed by the second contractor, including water intrusion and plumbing problems and major termite infestations. The McIntires filed suit against Seaquest and the Subcontractors in April 2016 — within the statutes of limitations and repose.

ARGUMENT

I. Standard of Review

The application of Rule 241(a), S.C.A.C.R. to the appeal and reversal of a trial court's order is a question of law, and this Court reviews questions of law *de novo*. *See, e.g.*, *Doe v. Bishop of Charleston*, 407 S.C. 128, 134, 754 S.E.2d 494, 498 (2014) ("Questions of law are reviewed *de novo*."); *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008) ("Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo.").

II. Appeal of the Order Stayed Its Effect

The order dismissing this action was appealed, automatically staying the effect of that order pursuant to Rule 241(a), S.C.A.C.R. That rule states:

> As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision. This automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court.

Rule 241(a), S.C.A.C.R. No exception to a stay pending appeal (*see* Rule 241(b), S.C.A.C.R.) is applicable or was argued to the trial court. Accordingly, the dismissal of the action was stayed pending the outcome of the appeal.

III. The Reversal of the Order on Appeal Restored the Case to its Posture Prior to the Filing of the Motion to Dismiss

This State's Supreme Court has stated:

> Generally, reversal of a judgment on appeal has the effect of vacating the judgment and leaving the case standing as if no judgment had been rendered.

Moore v. N. Am. Van Lines, 319 S.C. 446, 448, 462 S.E.2d 275, 276 (1995) (citing *Brown v. Brown,* 286 S.C. 56, 57, 331 S.E.2d 793, 793–94 (Ct. App. 1985)). As Judge Young properly held in his informal ruling:

> Applying that principle to this case, after the Court of Appeal's decision, her order became of no effect and is no longer in existence. In my opinion, that leaves any claims against the subcontractors alive.

R. p. 000532. This was a proper interpretation of the law and the procedural posture of this action. The Subcontractors remain parties to the action.

IV. Appeal Was of Entire Order

Moreover, there can be no contention that the dismissal of the Subcontractors[2] was unappealed, because that order was appealed in its entirety.

The Notice of Appeal states "Plaintiffs Andrew and Kimberly McIntire appeal the order of the Honorable Jean Hoefer Toal, dated January 17, 2017." **R. p. 000445**. The McIntire's appellate brief stated "[t]his Court should vacate *the trial court's order* and direct the parties to engage in

[2] Even assuming *arguendo* that there was a dismissal *of the Subcontractors* in Justice Toal's May 2017 order, which there was not. That Order simply dismissed the entire case. *See infra* Part V.

arbitration" and "reverse *the judgment* of the circuit court . . . ." **R. p. 000471 - McIntire Initial Brief** (prior appeal) at 4, 13. Therefore, the portion of the order which dismisses the case entire case was necessarily and expressly appealed.

The Court of Appeals ordered that "*the decision* of the trial court is reversed and remanded." **R. p. 000020 -** Ct. App. Order at 6). This decision by the Court of Appeals had the effect restoring the case to its pre-dismissal posture, namely with the Subcontractors as parties and the McIntires seeking to stay the claims against them while it arbitrates with Seaquest. *Supra*.

V. There Was No Separate Holding Dismissing the Subcontractors From the Case

The trial court's August 23, 2021 order, drafted by Subcontractors, states that there was distinct holding in Justice Toal's May 2017 order dismissing them from the case. **R. p. 000036** ("The Order . . . clearly dismissed all Subcontractor Defendants from the case."). This is inaccurate. The order dismissed *the case*; it did not dismiss any particular parties from the case:

> NOW THEREFORE, and for the foregoing reasons, it is hereby
>
> ORDERED, ADJUDGED AND DECREED that Seaquest's Motion to Dismiss is GRANTED; it is
>
> ORDERED, ADJUDGED AND DECREED that the Motion to Compel Arbitration is DENIED; it is
>
> ORDERED, ADJUDGED AND DECREED that that all remaining motions in this case are MOOT; and it is
>
> FURTHER ORDERED ***that this case*** shall be and is hereby DISMISSED.
>
> AND IT IS SO ORDERED.

R. p. 000014 (emphasis added).

There was no separate holding to be appealed regarding the Subcontractors' status in the case. There was only an order dismissing the entire case on the grounds asserted by Seaquest, and that order was appealed and reversed.

VI. Seaquest Was the Proper Respondent to the Prior Appeal

The Subcontractors argued to the trial court that they should have been respondents to the prior appeal, and that their omission as respondents supports their contention that they are no longer parties to the action. This is also erroneous.

Justice Toal's granted Seaquest's motion and dismissed the case on that basis alone. The Subcontractors did not join in that motion. The one Subcontractor motion that *was* filed (asserting the same grounds as asserted in Seaquest's motion) was *denied* as moot by virtue of the Court's ruling on Seaquest's motion and dismissal of the entire action. Accordingly, there was no motion or ruling as to the Subcontractors that the McIntires could have appealed that would make any Subcontractor a proper respondent.

The McIntires properly appealed the order granting of Seaquest's motion and dismissing the case. Accordingly, the proper respondent to that appeal—the *only* proper respondent—was Seaquest.

VII. Subcontractors Were Served With Notice of Appeal

The Subcontractors also contend that they were not served with the prior appeal. **R. p. 000296–97**. This is inaccurate; though not required because the Subcontractors were not proper respondents to the prior appeal (*supra* Part VI); they were served with notice of the same on June 2, 2017. **R. p. 000348–52**.

VIII. The Motion for Clarification Was Proper

The trial court's order states that the Motion for Clarification filed by Appellants was seeking clarification of the Order filed May 2017 and thus is an improper Rule 59(e), S.C.R.C.P. or Rule 60(b), S.C.R.C.P. motion. This is inaccurate. The reversal of the May 2017 Order meant there was no order to reconsider. *Moore v. N. Am. Van Lines*, 319 S.C. 446, 448, 462

S.E.2d 275, 276 (1995).

Instead, the motion sought clarification—in light of Subcontractors' position—of the status of Subcontractors as parties to the suit following the *reversal* of the May 2017 Order. Further, it was filed at the direction of the trial court in keeping with Rule 7(b)(1), S.C.R.C.P. The motion was proper.

IX. The Trial Court Recovered Jurisdiction Following Remittitur

The trial court order also states that the trial court solely had jurisdiction to "require arbitration between Plaintiffs and Seaquest" and that it therefore lacked jurisdiction to decide the status of the subcontractors. **R. p. 000029**. This misstates this Court's December 31, 2019 ruling and its effect.

This Court found the trial court had erred in failing to grant the McIntire's Motion to Stay and Compel Arbitration, and on that basis, it "reversed and remanded" the trial court's decision. **R. p. 000020**. The trial court's entire order was therefore reversed, including its denial of the McIntire's Motion to Stay and Compel Arbitration, and remanded. It did not provide instructions or limitations on the trial court's jurisdiction upon remand, other than stating the Court "remand[ed] the case for arbitration" between the McIntires and Seaquest. **R. p. 000019**.

In other words, this Court found that the McIntire's Motion to Stay and Compel Arbitration should have been granted. The granting of the McIntire's motion for arbitration would have the effect of staying the case as to the Subcontractors while the McIntires arbitrate with Seaquest. As part of this undertaking, the trial court would be well within its jurisdiction to determine that the Subcontractors remain parties to the suit.

CONCLUSION

There was no holding dismissing the Subcontractors from the case. The only motion by a

subcontractor to be dismissed was denied and therefore could not have been appealed by the McIntires. No Subcontractor joined in Seaquest's motion to dismiss, the motion granted by the trial court in May 2017 and the basis for the dismissal of the case.

Because the order granting Seaquest's motion was appealed in its entirety and reversed in its entirety, the effect was to vacate the judgment and leave "the case standing as if no judgment had been rendered." *Moore v. N. Am. Van Lines*, 319 S.C. 446, 462 S.E.2d 275 (1995). Prior to the rendering of that judgment, the subcontractors were parties to the case.

Accordingly, the McIntires request this Court hold that the claims against the subcontractors remain, reverse the trial court's holding to the contrary, and remand with instructions that the claims against the Subcontractors be stayed during the pendency of the arbitration between the McIntires and Seaquest.

Respectfully submitted:

EPTING & RANNIK, LLC

This 26th day of May, 2022
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