

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY COURT OF COMMON PLEAS

Bentley D. Price, Circuit Court Judge

Appellate Case No. 2023-001853
Case No. 2021-CP-10-03090

Jared S. O'Connell and Harmony A. O'Connell,

Respondents,

v.

House Therapy Holdings, LLC; Amanda F. Dempsey; William T. Phillips;
Matthew B. Swain; Daniel Ravenel Company Sotheby's International Realty; Artis
Construction, LLC; Oceanaire, LLC; Hero Heating & Air, LLC; Custom Climate Heating
& Air, Inc.; P.J. Sanchez Masonry, LLC; Donnix Construction, LLC; Guillen Carpentry,
LLC; Charleston Exteriors, LLC; Ashley Oak Contracting, LLC; H2O Pro, LLC; La Roca
Masonry, LLC; Apex Contractors, LLC; South Point Hardwood Floor, LLC; Bluetape
Solutions, LLC; Carolina Climate Control, LLC; Movar, LLC; ECL Design, LLC; and
Affordable Sprayfoam Insulation of the Carolinas, LLC; Defendants,

and

Artis Construction, LLC, Third-Party Plaintiff,

Appellant,

v.

Brian R. Wells, PE, LLC; Perryman Engineering, LLC; P.J. Sanchez Masonry, LLC;
Donnix Construction, LLC; Guillen Carpentry, LLC; Charleston Exteriors, LLC; Ashley
Oak Contracting, LLC; H2O Pro, LLC; La Roca Masonry, LLC; Apex Contractors, LLC;
and South Point Hardwood Floor, LLC; Third-Party Defendants,

and

House Therapy Holdings, LLC; Amanda F. Dempsey; William T. Phillips;
and Matthew B. Swain;

Respondents,

v.

Carolina Climate Control, LLC; and Bluetape Solutions, LLC; Third Party Defendants.

**MOTION AND MEMORANDUM OF RESPONDENTS JARED S. O'CONNELL
AND HAROMNY A. O'CONNELL TO DISMISS APPEAL**

COMES NOW the above-named Respondents Jared S. O'Connell and Harmony A. O'Connell (hereinafter "O'Connells"), by and through its undersigned counsel, and herewith moves this Court for an Order dismissing the appeal filed by Appellant Artis Construction, LLC (hereinafter "Artis").

BACKGROUND

This appeal arises from a construction defect case commenced by the O'Connells against various defendants, including Artis. On May 5, 2023, Artis filed a Notice of Motion and Motion for Summary Judgment as to Artis Construction, LLC's Cross-Claims Against House Therapy Holdings, LLC, Amanda F. Dempsey, William T. Phillips, and Matthew B. Swain (hereinafter collectively "HTH"). The same day, Artis filed an *Amended* Notice of Motion and Motion for Summary Judgment as to Artis Construction, LLC's Cross-Claims Against HTH. The basis of Artis' Motion was that there was no genuine issue of material fact that exists as to Artis' Indemnity, Breach of Contract, and Fraud Claims against HTH. HTH filed a Memorandum in Opposition to Artis' Motion for Summary Judgment on August 14, 2023.

Similarly, on June 23, 2023, Artis filed a Notice of Motion and Motion for Summary Judgment as to Plaintiffs' Claims Against Artis Construction, LLC for South Carolina Unfair Trade Practices Act. The basis of Artis' Motion was that there is no

genuine issue of material fact that exists as to the O'Connells' claims for violation of the South Carolina Unfair Trade Practices Act against Artis. The O'Connells filed a Memorandum in Opposition to Defendant Artis Construction, LLC's Motion for Summary Judgment on August 11, 2023.

Both Artis' Motions for Summary Judgment against HTH and the O'Connells were heard by the Honorable Bentley D. Price on August 15, 2023, at the Charleston County Courthouse. Judge Price denied both motions and requested counsel for the O'Connells and HTH to submit proposed orders. Both parties submitted their orders, at which time Artis' counsel stated that they did not agree with both parties' orders and electronically filed two orders both titled Order Denying Artis Construction, LLC's Motion for Summary Judgment as to Plaintiffs. Due to a clerical error, Judge Price signed the following four orders:

- Order Denying Motion for Summary Judgment, filed September 1, 2023, at 10:54 A.M.;
- Order Denying Artis Construction, LLC's Motion for Summary Judgment as to Plaintiffs, filed September 1, 2023, at 10:58 A.M.;
- Order Denying Artis Construction, LLC's Motion for Summary Judgment as to Plaintiffs, filed September 1, 2023, at 11:00 A.M.; and
- Order Denying Artis Construction, LLC's Motion for Summary Judgment as to Plaintiffs, filed on September 1, 2023, at 11:02 A.M.

The order signed at 11:00 A.M titled "Order Denying Artis Construction, LLC's Motion for Summary Judgment as to Plaintiffs" pertained to Artis' Motion for Summary Judgment against HTH and not Plaintiffs. It was brought to Judge Price's attention that

four orders were signed, at which time Judge Price requested all parties send the orders that were submitted via electronic filing to him via electronic mail. At this time counsel for Artis corrected the names of the orders to include an Order titled “Order Denying Artis Construction, LLC’s Motion for Summary Judgment as to Defendants House Therapy Holdings, LLC; Amanda F. Dempsey; William T. Phillips; And Matthew B. Swain.”

On September 19, 2023, a Form 4 Order was signed by Judge Price stating “Both Orders titled “ORDER DENYING ARTIS CONSTRUCTION, LLC’S MOTION FOR SUMMARY JUDGMENT AS TO DEFENDANTS HOUSE THERAPY HOLDINGS, LLC; AMANDA F. DEMPSEY; WILLIAM T. PHILLIPS; AND MATTHEW B. SWAIN” were signed in error due to a clerical error and are therefore vacated.” It was brought to Judge Price’s attention that none of the four orders electronically filed contained this title but that the one of the orders submitted by Artis via electronic mail was corrected to contain this title. On September 27, 2023, a second Form 4 Order was signed by Judge Price stating:

The following three orders were signed and filed due to clerical errors and are therefore vacated:

- ORDER DENYING ARTIS CONSTRUCTION, LLC’S MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFFS Filed 9/1/23 at 11:00am

- ORDER DENYING ARTIS CONSTRUCTION, LLC’S MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFFS Filed 9/1/23 at 11:02am

- Form 4 Order vacating ORDER DENYING ARTIS CONSTRUCTION, LLC’S MOTION FOR SUMMARY JUDGMENT AS TO DEFENDANTS HOUSE THERAPY HOLDINGS, LLC; AMANDA F. DEMPSEY; WILLIAM T. PHILLIPS; AND MATTHEW B. SWAIN" Filed 9/19/23 at 4:00pm.

Therefore, the orders signed by Judge Price that remain in effect are: the Order Denying Motion for Summary Judgment, filed September 1, 2023, at 10:54 A.M. and the

Order Denying Artis Construction, LLC's Motion for Summary Judgment as to Plaintiffs, filed September 1, 2023, at 10:58 A.M (hereinafter the "Orders").

Subsequently, Artis filed a Motion for Reconsideration on October 9, 2023. The trial court provided notice that Artis' Motion for Reconsideration was denied on November 8, 2023. Artis filed its Notice of Appeal on November 30, 2023. On December 12, 2023, the Court of Appeals advised all counsel that upon a preliminary review of the order(s) challenged on appeal the order(s) indicate that they may not be appealable and requested memoranda addressing the issue of appealability be served and filed within ten (10) days.

LAW AND ANALYSIS

The Orders denying both of Artis' motions for summary judgment are not immediately appealable. The South Carolina Supreme Court has repeatedly held that "the denial of summary judgment is not directly appealable." Ballenger v. Bowen, 313 S.C. 476, 476, 443 S.E.2d 379, 380 (1994) (affirmed Olson v. Faculty House of Carolina, Inc. 354 S.C. 161, 166, 4580 S.E.2d 440, 444 (2003)). The denial of summary judgment is not reviewable even in an appeal from final judgment. Raino v. Goodyear Tire & Rubber Co., 309 S.C. 255, 259, 422 S.E.2d 98, 100 (1992). The denial of summary judgment decides nothing about the merits of the case, but simply decides the case should proceed to trial. Ballenger, 313 S.C. at 411. (citing Parker Oil Co. v. Smith, 34 N.C.App 324, 237 S.E.2d 882 (1997)). A ruling which does not determine the rights of the parties in a matter is interlocutory and not immediately appealable. Ashenfelder v. City of Georgetown, 389 S.C. 568, 573-73, 698 S.E.2d 856, 859-60 (Ct.App. 2010). The South Carolina Supreme Court in Olson v. Faculty House of Carolina, Inc., 354 S.C. 161, 167, 580 S.E.2d 440, 444

(2003) held that the denial of a motion for summary judgment is not appealable, even after final judgment, and that any cases inconsistent with this holding are expressly overruled.

The determination of whether a party may immediately appeal an order issued before or during trial is governed primarily by S.C. Code Ann. § 14-3-330, which states four different instances in which an order is immediately appealable. Artis contends two of these instances are present in this case. First, that the Orders involve the merits of the case and falls under S.C. Code Ann. § 14-3-330(1), which states that that an order shall review upon appeal if:

Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from.

Second, Artis contends that the Orders at issue in this case also falls under S.C. Code Ann. § 14-3-330(2), which states that an order shall review upon appeal if:

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.

In Ballenger, Appellants argued that an order denying summary judgment was immediately appealable because statements made in the order have the effect of striking their defenses of *res judicata*/ collateral estoppel. Id. at 476. The court found that 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. Id. at 477. The Court held that the order denying a motion for summary judgment is not appealable and dismissed Appellants appeal. Id. at 477-478.

Artis contends that the Orders denying summary judgment involve the merits of the case. However, the South Carolina Supreme Court clearly stated in Ballenger, and affirmed in Olson, a denial of a motion for summary judgment decides nothing about the merits of the case; therefore, Artis' argument that the Orders at issue in this case involve the merits of the case fails. The Orders decide nothing about the merits of the case at hand and Artis' Appeal should be dismissed.

Artis also asserts that the Orders denying summary judgment affect a substantial right. An order can only affect a substantial right when the order (1) determines the action and prevents a judgment (2) grants or refuses a new trial or (c) strikes out an answer or any party thereof or any pleading in the action. S.C. Code Ann. § 14-3-330(2). The Orders in this case do not prevent a judgment as the issues raised in a motion for summary judgment which has been denied can be raised again in the proceedings by a motion for a directed verdict. Ballenger, 313 SC. at 477. Furthermore, the Order does not have any bearing on granting or refusing a new trial as the trial in this matter has not occurred. Moreover, the Orders do not strike out any answer, party, or pleading in the pending action. Similar to how the denial of summary judgment in Ballenger did not have the effect of striking the defenses of *res judicata*/ collateral estoppel, the Orders in the present action do not strike any defenses Artis may have in the present case nor does the Order make any findings as to the Plaintiffs' claims pursuant to the South Carolina Unfair Trade Practices Act.

The Order Denying Artis Construction, LLC's Motion for Summary Judgment as to Plaintiffs, filed September 1, 2023, at 10:58 A.M states that "the Court finds that there

is *evidence* that Artis engaged in an unfair or deceptive act in the conduct of trade or commerce; the unfair or deceptive act affected public interest; and the Plaintiffs suffered monetary or property loss as a result of the defendant's unfair or deceptive acts." (emphasis added). The claim simply survived Artis' motion for summary judgment and remains a claim in the matter to be determined by the Court or a jury at a later date. The Orders do not affect a substantial right and Artis' Appeal should be dismissed.

Artis' cites various cases in their Memorandum for their contention that the Orders are immediately appealable; however, these cases do not have the binding effect on the case at hand in the same manner in which Ballenger and Olson do. The cases cited by Artis are clearly differentiated from the case at hand and have been cited by Artis not because the facts in these cases are the same or even similar to the case at hand but cited simply as an attempt at cherry picking certain segments of these cases in an attempt to persuade this Court that the cases cited substantiate Artis' opinion when in fact they do not.

In Tillman, the trial court granted plaintiffs' motion to dismiss while denying defendant's oral motion to amend. Tillman v. Tillman, 420 SC 246, 248, 801 S.E.2D 757, 758 (2017). The trial court's order stated that the "oral motion to amend counterclaims was denied but defendants may make a formal motion to amend their counterclaim." Id. at 248. The Court found that the "fate" of defendant's counterclaim was not finally determined as the trial court allowed defendant to file a formal motion to amend; thus, the defendant's right had yet to be finally determined and the order was not immediately appealable. Id. at 249.

In Stone, the trial court bifurcated a family court case at which time a two-week trial was held deciding that the parties were common law married. Stone v. Thompson, 426

S.C. 291, 293-94, 826 S.E.2d 868, 869 (2019). The South Carolina Supreme Court held that the family court's bifurcated common-law marriage order was appealable under section 14-3-330(1) because it involved the merits of the case. Id. at 296.

In Wetzel, plaintiff filed a motion for judgment by default against defendant at which time defendant move to quash plaintiff's affidavit of default on the ground of insufficient service of the complaint. Wetzel v. Woodside Dev., Ltd. P'ship, 364 S.C. 589, 592, 615 S.E.2d 437,438 (2005). The circuit court granted defendant's motion and found defendant had not been properly served. Id. The South Carolina Supreme Court found that the effect of granting the motion and holding that the defendant had not been properly served is equivalent to granting a motion to dismiss since it ends the action as to the defendant. Id.

Artis also cited to two Georgia Court of Appeals cases which have no binding effect on this court. The three main cases which Artis cited deal with a dual motion to dismiss and motion to amend, a family court judgement regarding the merits of the case, and a grant of a motion for summary judgment. None of these cases substantiate Artis' contentions that a trial court's denial of a motion for summary judgment is immediately appealable. On the other hand, both Ballenger and Olson are analogous to this case and deal directly with the South Carolina Supreme Courts holding that a denial of a motion for summary judgment is not appealable. As applied to this case, the foregoing authorities are clear and unambiguous in their message: The Court of Appeals does not have jurisdiction to hear this appeal.

As such, Artis' appeal must be dismissed.

CONCLUSION

In light of the arguments and authorities set forth herein, Respondents Jared S. O'Connell and Harmony A. O'Connell respectfully requests an Order of this Honorable Court dismissing Appellant Artis Construction, LLC's appeal in its entirety.

Respectfully submitted,

s/Amanda M. Blundy

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