

THE STATE OF SOUTH CAROLINA
In The Appellate Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Case No. 2013-CP-46-01383

Carolyn Torman,

Respondent,

v.

The Handyman Co., LLC,
SEEE Properties, Inc, Stacey
M. Pinson, Marcus E Pinson
and Edith H. Pinson

Appellants.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Does this Court have jurisdiction over the Order denying Defendant's Motion to Stay pursuant to §14-3-330, South Carolina Code of Laws, 1976, as amended.

2. Did the trial judge err in failing to grant Defendants Motion to Stay the Proceedings due to Plaintiff's failure to comply with §40-59-830, South Carolina Code of Laws, 1976, as amended?

3. Did the trial judge err in *sua sponte* raising the affirmative defense of waiver when not pled by the Plaintiff?

STATEMENT OF CASE

The Defendant, The Handyman Co., contracted with the Plaintiff to perform construction work at the Plaintiff's residence on June 5, 2009. During the course of construction, issues arose between the parties. Plaintiff sent a letter, through counsel, purporting to be in compliance with the Notice and Opportunity to Cure Residential Dwelling Defect Act. On February 16, 2010, Plaintiff sent another letter, via certified mail, to Plaintiff, purporting to be in compliance with the Notice and Opportunity to Cure Residential Dwelling Defect Act. The Defendant, The Handyman Co., LLC, sought clarification of the Plaintiff's letters pursuant to the Act.

The Plaintiff filed suit against The Handyman Co., LLC., Marcus E. Pinson, Stacey E. Pinson, SEEE Properties, Inc. alleging negligence, breach of contract, Breach of Express Warranty, Breach of Implied Warranty, and Pierce of Corporate Veil.¹ An amended complaint was filed on March 16, 2012. The Defendants timely answered the Plaintiff's complaint. The Handyman Co., LLC filed a counterclaim against Respondent for Breach of Contract.

The Defendants filed a Motion to Stay the Plaintiff's Cause of Action alleging that Plaintiff failed to comply with the Notice an Opportunity to Cure Residential Dwelling Defect Act. The Plaintiff did not file any return to Defendants motion. The matter was heard on April 23, 2013 before the Honorable John C. Hayes, III. On April 25, 2013 an Order was issued by the Honorable John C. Hayes, III, denying Defendant's Motion to Stay the Cause of Action. This Order, dated April 25, 2013 is the subject of this appeal.

The Notice of Appeal was served on May 2, 2013.

¹ Edith Harper Pinson was subsequently named as a party to the action.

ARGUMENT

1. Does this Court have jurisdiction over the Order denying Defendant's Motion to Stay pursuant to §14-3-330, South Carolina Code of Laws, 1976, as amended.

The right to appeal arises from and is controlled by statutory law. *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707, 708 (S.C. 2005). Ordinarily, an appeal may only be pursued after a party has obtained a final judgment. *Id.* However, S.C. Code §14-3-330, establishes categories that allow orders to be immediately appealable. *Id.* Pursuant to S.C. Code §14-3-330, the Supreme Court shall have appellate jurisdiction for corrections of law in law cases, and shall review upon appeal: (1) an intermediate...order...in a law case involving the merits in actions commenced in the Court of Common Pleas... (2) [a]n 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 an action. The phrase "involve the merits" means that "it finally determines 'some substantial matter forming the whole or a part of some cause of action or defense'". *Edwards v. SunCom*, 396 S.C. 91, 94, 631 S.E.2d 529, 530. *See also: Link v. School Dist. of Pickens County*, 302 S.C. 1, 6, 393 S.E.2d 176, 179 (S.C. 1990). An order affects a substantial right...if the order removes a material issue from the case, thereby preventing the issue from being litigated on the merits and preventing the party from seeking to correct any errors in the order during or after the trial. *Thorton v. South Carolina Elec. & Gas Corp.*, 391 S.C. 297, 305, 705 S.E.2d 475, 479 (S.C. App. 2011). The Court has also stated "[o]rders affecting a substantial right "discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense." *Edwards v. SunCom*, 369 S.C. 91, 631 S.E.2d 529, (S.C. 2006).

This statute has been narrowly construed and the immediate ability to appeal various orders issued before or during trial generally has not been allowed. *Hagood* at 191, 607 S.E.2d at 709. “Piecemeal appeals should be avoided and most errors can be corrected by the remedy of a new trial. *Id.* The appellate court should look to the effect of an interlocutory order to determine its appealability under §14-3-330. *Thorton* at 305, 705 S.E.2d at 479.

In *Edwards v. SunCom*, the Court held that for an order to be immediately appealable it must involve the merits, affect a substantial right or prevent a judgment from which an appeal can be taken. In *Edwards*, the appellant was appealing an interlocutory order granting a stay to the Respondent in order to allow SunCom (the Appellant) to seek a declaratory ruling with the FCC. The Court held that based upon these facts, the granting of the stay was not immediately appealable because it did not involve the merits, affect a substantial right, or prevent a judgment from which an appeal may later be taken. *Id.*, 631 S.E.2d at 531. Rather the Court found that the “order here does not discontinue the proceeding. It merely temporarily stays the matter pending a ruling by the FCC.” *Id.* at 530.

In the case before this Court, the lower court denied Appellant’s Motion to Stay the Proceedings under the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act. Pursuant to S.C. Code §40-59-840, a claimant must, no later than ninety days before the filing the action, serve a written notice of claim on the contractor. S.C. Code §40-59-840(1)-(3), also sets forth the information that must be contained in the written notice of claim. In the event the claimant fails to meet this condition precedent upon motion of a party, the Court *must* stay the proceeding. S.C. Code § 40-59-830. (*emphasis added*). Upon receipt of a proper notice, the contractor has the ability to elect to remedy, inspect, deny or settle the matter. S.C. Code §40-59-850. The statute provides the contractor with pre-litigation rights that are

diminished once litigation commences. If a claimant fails to comply with the Act, and a stay is not granted upon motion, a contractor is deprived of the substantial right of exercising his options provided to him through the statute. The intent of the legislature, in enacting this statute, was to “(1) address the need for an alternative dispute resolution method to promote settlement of construction disputes without litigation, while adequately protecting the rights of homeowners and (2) requiring a would-be plaintiff...to file a notice of claim...and to provide the contractor with an opportunity to resolve the claim without litigation. *Grazia v. South Carolina State Plastering, LLC*, 390 S.C. 562, 572, 703 S.E.2d 197, 202 (S.C. 2010).

The denial of the motion to stay, in this case, must be examined to determine whether the order falls into one of the categories set forth in §14-3-330 and thus is immediately appealable. In accordance with S.C. Code §14-3-330(1), the intermediate order must be in a law case, involve the merits and commence in the court of common pleas. The order at issue in this case is a case in law and was commenced in the court of common pleas. Therefore, it must be determined if the order involves the merits and/or affects a substantial right. As previously stated, an order involves the merits when it finally determines some substantial matter forming the whole or part of some cause of action or defense. *Link v. School Dist. of Pickens County*, 302 S.C. 2, 6, 393 S.E.2d 176, 179 (S.C. 1990); *See also: Edwards v. Suncom*, 369 S.C. 91, 93, 631 S.E.2d 529. Additionally, the order can discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense in order to satisfy this element as well. *Edwards*, 631 S.E. 2d at 530.

The Order denying the motion to stay in this case involves the merits of the case. The merits of this case are whether the Appellant-Contractor performed substandard work on the Respondent-Homeowner's property and if so, to what extent. The Appellant has been prohibited

from entering the property to assess any defects, repair any defects or make a good-faith effort to settle the matter as the statute allows. As a result, the Respondent may be awarded monetary damages for faulty workmanship that the Appellant should have been afforded the right to examine, repair or settle.² The denial of the motion to stay to afford the Appellant the opportunity to exercise his rights pursuant to the statute has stripped the Appellant of the ability limit or reduces any potential monetary exposure. The Respondent's claims of faulty workmanship or incomplete work are the primary basis of all the causes of actions against the Appellant. The failure to grant a stay has the effect of finally determining the causes of actions against the Appellant because he will face exposure to potential faulty workmanship or incomplete work that could have been resolved, thereby limiting exposure, if the Respondent had complied with the statute.

The Order in this case also affects a substantial right of the Appellants. If this Order is not allowed to be appealed at this time, the Appellants will be unable to correct any errors in the order after the trial. Our legislature enacted a statute³ to promote the public policy of (1) addressing the need for an alternative dispute resolution method without litigation while still properly protecting the rights of homeowners and (2) requiring a would-be plaintiff in certain construction defect disputes to file a notice of claim with the would-be defendant and thereby resolve the opportunity to fix the problem without the necessity of litigation. *2003 South Carolina Laws Act 82 (S.B.433)*. The Appellants, in the case before this Court, has been denied the substantial right of being allowed to utilize the opportunity to repair, remedy, inspect or settle

² Appellant is not alleging that Respondent would have to accept any repair proposal or settlement only that Appellant was prohibited from exercising these rights..

³The Notice and Opportunity to Cure Construction Dwelling Defect Act, S.C. Code 40-59-810 *et seq*

any construction issue with the Plaintiff, prior to litigation, which is the express intent of our legislature. The trial judge erred when he denied the Defendants this opportunity.

Once trial has been concluded, the Plaintiff no longer has any incentive to allow the Defendants to utilize the remedies he would have been entitled to under S.C. Code §40-59-850. Therefore, the error in denying the motion to stay would not be able to be corrected after the trial has been concluded. An appeal of this Order, after the trial, would be illogical. The lower court, at that time, could not then give the Appellants the opportunity to utilize the rights set forth in the statute. The matter could not be stayed, after the conclusion of the trial. Lastly, the Appellants could not mitigate any potential exposure because that right has been taken away. Unlike *Edwards*, the Order in this case does discontinue a major component of this case, and failing to grant the Appellants a stay to take advantage of their statutory rights is permanent and has an effect on the entire proceeding.

2. Did the trial judge err in failing to grant Defendants Motion to Stay the Proceedings due to Plaintiff's failure to comply with §40-59-830, South Carolina Code of Laws, 1976, as amended?

In *Grazia v. South Carolina Plastering, LLC*, 390 S.C. 562, 703 S.E.2d 197 (S.C. 2010), the Supreme Court harmonized the Right to Cure Act's stay provision and notice requirements. The Court went into great detail regarding the legislature's intent as the primary consideration in interpreting statutes. *Id.* Although initially the notice provision found in §40-59-830 and the stay provision found in §40-59-840 appear to be at odds with each other, after reviewing the legislative intent and the plain meaning of the statute the Court found that when the two sections are construed together each one can be given its due effect, within the parameters of the Act's public policy. *Grazia*, at 574, 703 S.E.2d at 203. The public policy of this Act is to address the need for alternative resolution method in order to promote settlement without litigation while

still protecting the rights of the homeowners and also to require a homeowner to file a notice of claim and the contractor the opportunity to resolve the matter without litigation. *Id.* at 574, 703 S.E.2d at 202. The Court found that the “stated public policy is not abridged when a court, on motion, is required to stay a proceeding in order to *require compliance* with the Right to Cure Act’s Notice provisions” *Id.* (*emphasis in original*). The Court further stated that the “predominant concern should be on the contractors... actual exercise of the rights to notice and the opportunity to cure, not *when* those rights are received.”(*emphasis in original*). *Grazia*, at 573, 703 S.E.2d at 202. Additionally, the Court failed “to discern how the rights to a pre-litigation opportunity to inspect and remedy/settle are substantially abridged when a court stays the proceeding thereby granting the contractor... the ability to explore those rights in full.” *Id.* at 574, 703 S.E.2d at 203.

The Supreme Court acknowledged the importance of the contractor’s right to notice and the opportunity to cure. Each requirement of the Act is mandatory as evidenced by the language of the statute. Section 40-59-840 requires mandatory compliance with the notice provisions prior to filing an action by stating that a claimant must file a notice within ninety days prior to the commencement of an action. Section 40-59-830 requires a court to stay an action if the claimant files an action before complying with the notice requirement. The statute states that a court shall stay an action upon motion of a party. It is not discretionary.

In the case before this Court, the trial judge expressed concern about the timeliness of the Appellant’s motion. (TR. p. 11, ll. 17-20). The statute does not place a time requirement on the Appellant to raise the issue of failure of the Respondent to comply with the statute. The statute states that a court *shall* stay the proceeding upon motion of a party. The Appellant in this action filed the motion to stay and contrary to the statute, the motion was denied. The trial court

erroneously failed to examine whether the letters sent by the Respondent had met the requirements of the statute. However, it may be inferred that they were not in compliance because if they were in compliance the Appellants would not be entitled to a stay because the Respondent complied with the statute rather than being denied on a waiver issue. As in *Gracie*, the trial court should only have been concerned with whether the Appellant received the rights afforded to them by statute as opposed to when the rights are received. The Appellant was deprived of the rights given to him pursuant to the Act due to the denial of the motion to stay.

3. Did the trial judge err in *sua sponte* raising the affirmative defense of waiver when not pled by the Plaintiff?

In *Ex parte Dibble*, 279 S.C. 592, 310 S.E.2d 440 (S.C.App. 1983), the court applied the equitable maxim that courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible. In *Ex parte Dibble*, the court held that this inherent power must necessarily include the power to appoint lawyers to serve without compensation where it appears reasonably necessary to do justice. *Id.* at 595, 310 S.E.2d 442. The court opined that lawyers are an integral and necessary part of our justice system and a civilization is not possible without a competent system to administer justice. *Id.* Courts should also take into consideration that it is well settled that ordinarily a party may not receive relief not contemplated in his pleadings. *Heins v. Heins*, 344 S.C. 146, 152, 543 S.E.2d 224, 227(Ct. App. 2001) *citing*, *Loftis v. Loftis*, 286 S.C. 12, 331 S.E.2d 372 (Ct.App.1985).

Waiver is the “intentional or voluntary relinquishment of a known right or such conduct as to warrant an inference of the relinquishment of such right...” *Black’s Law Dictionary*, 6th Edition. Waiver is an affirmative defense which must be pled. SCRCP Rule 8(c). Failure to plead an affirmative defense is deemed a waiver of the right to assert it. *Heins*, 286 at 152, 543, S.E.2d 244. Due process requires that a litigant be placed on notice of the issues to which a

court is to consider. *Heins*, 286 at 152, 543 S.E.2d at 224, *citing*, *Bass v. Bass*, 272 SC 177, 180, 249 S.E.2d 905, 906 (1978).

In the case before this Court, the Respondent was properly served with a Motion to Stay the Plaintiff's cause of action for failure to comply with the Notice and Opportunity to Cure Residential Construction Defect Act. The Respondent failed to assert the affirmative defense of waiver. The Respondent never filed a return to Appellant's motion to stay. Additionally, even giving the Respondent the benefit of the doubt, the Respondent failed to argue or allege the affirmative defense at the motion hearing. As a result, the Respondent is barred from asserting waiver as an affirmative defense to Appellant's motion. The court has the inherent power to do all things *reasonably* necessary to insure that just results are reached. (*emphasis added*). *Ex parte Dibble* at 595, 310 S.E.2d 442. However, it is not reasonable or reasonably necessary for a court to assert a defense, *sua sponte*, which the Respondent himself would be unable to assert. The trial judge opined that he did not believe it was fair for the Appellant to file this motion so late in the proceedings; however, the statute does not set forth a time requirement when a motion needs to be filed. In fact, the statute does not even address a time period. The Court in *Grazia*, indicated that the stay portion of the statute found in §40-59-840, requires compliance. As a result, the trial judge erred in *sua sponte* raising the affirmative defense of waiver, and also in not granting the stay as required by the statute.

CONCLUSION

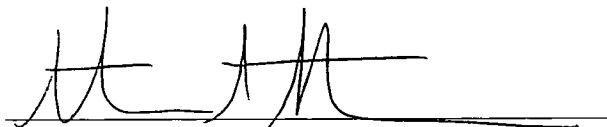
As a result of the unique nature of the this Act, the Order denying the motion is immediately appealable as it involves the merits of the case and affects a substantial right. Furthermore, the Appellants will be unable to appeal the order the conclusion of the trial because they will no longer be able to utilize the rights afforded to it by the statute.

The trial judge erred in denying the Appellant's Motion to Stay the Proceeding pursuant to the Notice and Opportunity to Cure Construction Dwelling Defect. The statute does not make the stay provision of the Act discretionary; rather it is mandatory upon motion of a party. Therefore, the trial judge committed error when he denied the Appellant's motion pursuant to statutory and case law.

Lastly, the trial judge erred when he *sua sponte* asserted the affirmative defense of waiver. Despite its inherent authority to do things reasonably necessary to ensure just results, asserting a defense that is not available to the Respondent due to her failure to raise in her pleading or at the motion hearing is not reasonable.

In conclusion, this Court should reverse the trial court's decision in denying the Appellant's motion to stay the proceeding.

Respectfully submitted,



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