THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Fifteenth Judicial Circuit

69553

The Honorable John C. Hayes, III Circuit Court Judge
Appellate Case No. 2013-000959

Carolyn Torman.....Respondent

v.

The Handyman Company, LLC, SEEE Properties, Inc., Stacey M. Pinson, Marcus E. Pinson, and Edith Harper Pinson..... Appellants

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MOTION TO DISMISS AND MEMORANDUM ON APPEALABILITY

Respondent Carolyn Torman ("Mrs. Torman") submits the following Motion to Dismiss and Memorandum pursuant to Rule 240, SCACR.

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SUMMARY

- Appellants' appeal is an improper appeal of an interlocutory order.
- S.C. Code Ann. § 14-3-330 does not afford this Court appellate jurisdiction under the circumstances.
- The precipitous appeal, on the very eve of trial, increases the suspicion that the appeal was made as a litigation maneuver to delay an adverse finding against Appellants.
- Mrs. Torman provided the requisite notice to Appellants under § 40-59-830.
- Appellants failed to request a stay within a reasonable time to avoid litigation.

STATEMENT OF ISSUES BEFORE THE COURT

On April 25, 2013, Judge Hayes entered an Order denying Defendants' Motion to Stay the present case. This is a residential construction defect case where Appellants failed to

complete a large amount of construction work pursuant to a written contract. The work that was completed was riddled with construction defects and deficiencies. Defendants were placed on notice of these construction defects and deficiencies by Mrs. Torman's former counsel and Mrs. Torman herself. Mrs. Torman filed the initial complaint on April 14, 2011 alleging breach of contract and various causes of action related to failure to perform under the contract and residential construction defects and deficiencies. The Complaint alleged a breach of contract action and breach of warranties against The Handyman Company, LLC and negligence against SEEE Properties, Inc. The individual defendants were included based upon the equitable remedy of piercing the corporate veil. The construction services and materials provided by Appellants were termed "substandard" by the York County Building Department. As a result of the substandard services and materials provided, South Carolina LLR revoked the contractor's license of Defendant Marcus E. Pinson.

On December 18, 2009, Mrs. Torman's former counsel, Brian C. Wilson, emailed a demand to Appellants providing an opportunity to cure and citing § 40-59-840. Thereafter on February 16, 2010, Mrs. Torman sent a letter pursuant to § 40-59-840, providing Appellants, Stacey M. Pinson, Marcus E. Pinson, The Handyman's Company, LLC, and SEEE Properties, Inc. a right to cure the defects. This letter set forth the items Mrs. Torman was aware of that needed to be corrected and was served by certified mail. Appellants Stacey M. Pinson, Marcus E. Pinson, The Handyman's Company, LLC, and SEEE Properties, Inc. executed the return receipt for Mrs. Torman's February 16, 2010 letter on March 4, 2010, which was thirteen months prior to the filing of the present lawsuit.

Throughout the pendency of this litigation, Defendants have been provided ample opportunity to cure the construction defects and deficiencies and settle the present case.

Unfortunately, Defendants have not made any attempt to cure or make a rudimentary settlement offer. Appellants' counsel has viewed the residence and their expert has inspected the residence three times, including performing destructive testing.

A mediated settlement conference was scheduled on December 5, 2012. Mrs. Torman and her counsel appeared at the mediated settlement conference in good faith and attempted to mediate the case. Unfortunately, Appellants were totally unprepared to mediate in good faith and the mediation was cancelled by the mediator. The parties were not even able to provide an opening statement at mediation, because the mediator believed this would be unproductive because the Defendants were totally unprepared. An order was forwarded to the trial court that the parties have 30-days to reschedule mediation. Appellants refused to respond to repeated attempts to reschedule the mediation. As evidenced by Appellants' actions at mediation and subsequent refusal to reconvene the mediation in good faith, Appellants have no desire to remedy the present case. Instead, the present appeal is a transparent ploy to further delay the inevitable judgment against Appellants based upon their breach of the construction contract and substandard work.

Trial in this case was scheduled for May 13, 2013. On or about March 13, 2013, two years after the initial Complaint was filed, Appellants filed a Motion to Stay the case. A hearing was held on April 23, 2013. Just seven days prior to trial, Mrs. Torman's counsel received the Notice of Appeal.

This matter has been pending for nearly three years with discovery ongoing. Appellants' improper attempt to appeal the Order will have the practical and inequitable effect of further delaying the discovery progress and the progress of the action in general, as it has already done.

Accordingly, Mrs. Torman respectfully moves this Court to dismiss Appellants' improper appeal.

LEGAL ARGUMENT AND AUTHORITIES

As discussed in more detail below, this Court should dismiss the appeal, because it does not have jurisdiction over it under South Carolina Code Section 14-3-330. "An order generally must fall into one of several categories set forth in [section 14-3-330] in order to be immediately appealable." *Hagood v. Sommerville*, 362 S.C. 191, 195, 607 S.E.2d 707, 708 (2005). As discussed below, the Order falls into none of the categories in Section 14-3-330 and is not immediately appealable. Defendants' improper Notice of Appeal, therefore, does not stay the proceedings in this matter, including the disposition of this case at trial.

I. The South Carolina Court of Appeals does not have appellate jurisdiction over the appeal under section 14-3-330(1), because the order is not a final judgment.

Under South Carolina Code Section 14-3-330, appellate jurisdiction generally exists only over actions at law in which a final judgment has been entered, subject to specified exceptions that are inapplicable under the present circumstances. *See* S.C. Code Ann. § 14-3-330(1); *see also* S.C.R. Civ. P. 72 ("Appeal may be taken, as provided by law, from any final judgment or appealable order."); S.C. App. Ct. R. 201(a) ("Appeal may be taken, as provided by law, from any final judgment, appealable order or decision.") Section 14-3-330 codifies the "final judgment rule," which prevents "fragmentary and premature appeals that unnecessarily delay the administration of justice and [ensures] that the trial courts fully and finally dispose of the case before an appeal can be heard." 4 Am. Jur. 2d Appellate Review § 81.

Judge Hayes' Order is not a final judgment, because "it leaves some further act to be done by the court before the rights of the parties... are determined." *Ex parte Wilson*, 367 S.C.

7, 13, 625 S.E.2d 205, 208 (2005). As such, this Court does not have interlocutory appellate jurisdiction over Appellants' purported appeal of Judge Hayes' Order unless the limited exception to the final judgment rule in Section 14-3-330(2)(a) applies.[1]

Appellants appear to argue § 14-3-330(2)(a) confers appellant jurisdiction over Judge Hayes' order. Section 14-3-330(2)(a) confers appellate jurisdiction over interlocutory orders that:

1. affect a substantial right;
2. in effect determine the action; *and*
3. prevent a judgment from which an appeal might be taken or discontinue the action.

See S.C. Code Ann. § 14-3-330(2)(a) (emphasis added). Importantly, for an interlocutory appeal to be proper under this Section, all three of the elements noted above must be satisfied. Appellants have failed to argue in their brief that all three elements have been satisfied. Moreover, "[t]he provisions of Section 14-3-330, including subsection (2), have been narrowly construed and immediate appeal of various orders issued before or during trial generally has not been allowed. Piecemeal appeals should be avoided and most errors can be corrected by the remedy of a new trial." *Hagood*, 362 S.C. at 196, 607 S.E.2d at 709.

A. Judge Hayes' Order Does Not Affect a Substantial Right

Only interlocutory orders affecting the most rudimental rights have been allowed to be immediately appealable under § 14-3-330(2). *See, e.g.*, *Bateman v. Rouse*, 358 S.C. 667, 596 S.E.2d 386 (Ct. App. 2004) (holding that denial of jury trial was immediately appealable); *Hagood*, 362 S.C. 191, 607 S.E.2d 707 (holding that disqualification of a party's attorney is

[11] The other subsections of Section 14-3-330 are inapplicable to the present situation: Section 14-3-330(2)(b) and (c) pertain to orders that grant or refuse a new trial and orders striking pleadings, respectively; Section 14-3-330(3) applies to an order made in a "special proceeding or upon a summary application in any action after judgment;" and Section 14-3-330(4) applies to orders related to injunctions or the appointment of a receiver. It is thus unnecessary to address these subsections in detail.

immediately appealable because the right to be represented by attorney of one's choosing is a substantial right); *McLaughlin v. Strickland*, 279 S.C. 513, 309 S.E.2d 787 (Ct. App. 1983) (holding that interlocutory order denying leave for father to withdraw consent to the adoption of the father's minor child was immediately appealable).

An order affects a substantial right "when such order would discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense." *Mid-State Distrib., Inc. v. Century Importers, Inc.*, 310 S.C. 330, 334 n.4, 426 S.E.2d 777, 780 n.4 (1993). Immediate appeals under § 14-3-330(2) have been allowed in situations where the substantial right could not be vindicated on appeal after the case. *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 529 S.E.2d 11 (2000). Generally, this subsection has only been used when the trial order affected a "mode of trial" because if those orders are not immediately appealed, no appellate review is available to correct any error. *Id.* (*citing Creed v. Stokes*, 285 S.C. 542, 331 S.E.2d 351 (1985)). Appellants have not alleged Judge Hayes' order affected a mode of trial.

On order that effectively forecloses a party from contesting the case on the merits affects a substantial right and is immediately appealable. *McLaughlin v. Strickland*, 279 S.C. 513, 309 S.E.2d 787 (Ct. App. 1983). However, avoidance of trial is not a substantial right entitling a party to immediate appeal of an interlocutory order. *Shields v. Martin Marietta Corp.*, 303 S.C. 469, 402, S.E.2d 482 (1991). Appellant has not alleged Judge Hayes' order forecloses them from contesting the case on the merits, nor could they. The sole purpose of Appellants appeal is merely to avoid trial in this matter.

Throughout Appellants' brief, Appellants argue they have been prohibited from exercising their rights under § 40-59-840, and that Judge Hayes' order affected a substantial right because "Appellant (sic) should have been afforded the right to examine, repair, or settle" and

[Appellants should be] allowed to utilize the opportunity to repair, remedy, inspect or settle any construction issue with the Plaintiff." (Appellants Brief, pages 8-9). Appellants' arguments are not supported by this Court's jurisprudence. Judge Hayes' Order does not foreclose Appellants from contesting the case on the merits. Appellants' argument that they have not been afforded the opportunity to examine, repair, or settle, while not true, would certainly not foreclose Appellants from contesting the case on the merits.

B. Judge Hayes' Order Does Not In Effect Determine the Action

Judge Hayes' Order does not determine the action. Judge Hayes merely ruled that Defendants waived their right to a stay. Judge Hayes' determination in this regard represents a common and routine resolution of a dispute in a civil action.

Neither Appellants' Motion to Stay nor Judge Hayes' Order in any way, shape, or form, implicated or affected the merits of any of the claims or defenses asserted in the case. The Order did not make a determination on the merits. As noted above, not until a final judgment is rendered can it be alleged that Judge Hayes' Order even affected the outcome of the action, much less determined at the present time. Indeed, if Appellants are successful in defending the case on the merits, the Court of Appeals will never need to address the proprietary of Judge Hayes' Order (or any other interlocutory order in the case which Appellants' may disagree and rely upon to avoid trial of the merits in this matter).

C. Judge Hayes' Order Does Not Prevent a Judgment From Which an Appeal Might Be Taken or Discontinue The Action

Appellants will have an adequate opportunity to raise any claim of error related to the trial court's decision after the case proceeds to final judgment. Judge Hayes' Order is simply not

"one of those rare orders which, in effect, could determine the action and prevent a judgment from which an appeal might be taken." *Hagood*, 362 S.C. at 197-98, 607 S.E.2d at 710.

If Appellants believe the denial of the Motion to Stay is legal error, and if Appellants lose the case, they have the same remedy as any other party who loses a case at trial: they can appeal from the final judgment and attempt to persuade this Court that the denial of the stay was harmful error, the remedy for which could be a new trial. There is simply no justification for a piecemeal appeal in this case, and Appellants have not provided any compelling reason or legal basis for such an approach.

II. Mrs. Torman Complied with the Notice Provision of § 40-59-840.

Section 40-59-840 requires that a notice of claim must contain the following:

> (1) a statement that the claimant asserts a construction defect;
> (2) a description of the claim or claims in reasonable detail sufficient to determine the general nature of the construction defect; and
> (3) a description of any results of the defect, if known.

See S.C. Code Ann. § 40-59-840. Mrs. Torman provided notice dated February 16, 2010 under § 40-59-840 that was served on Appellants by certified mail on March 4, 2010. In this notice, Mrs. Torman personally notified Appellants of the construction defects. The Appellants were notified that the work performed to date was not in accordance with the "satisfactory construction" provision of the contract and the work was not "satisfactorily complete." Mrs. Torman also provided a number of items that she was aware of in reasonable detail so that the Appellants could determine the general nature of the construction defect. For example, Mrs. Torman requested, among other things, to replace front windows per the building code, install garage roof ridge cap, complete breezeway roof, and complete all electrical wiring and hookups. Mrs. Torman also requested that the construction defects and the construction be completed.

Appellants responded by sending an incoherent letter stating they will complete the house, requesting clarification, and alleged Mrs. Torman is in material breach of the construction contract. Unfortunately, Appellants refused to repair the construction defects and complete the construction items that Mrs. Torman contracted and paid for. Defendants have had adequate notice as required under § 40-59-840, but have failed to take any steps to correct and repair the construction defects and deficiencies after the notice or while the present lawsuit is pending. Interestingly, Defendants in this appeal now allege their rights have been violated because they "have not been afforded the right to examine, repair, or settle." Appellants have been given the "right" to "examine, repair, or settle" by Mrs. Torman on February 16, 2010 and throughout this litigation, but Appellants have simply not made an effort to remedy this situation, even during a mediated settlement conference.

As cited by Appellants, the court in *Grazia v. South Carolina State Plasterning, LLC*, 390 S.C. 562, 572, 703 S.E.2d 197, 202 (S.C. 2010) recited the legislative intent of enacting § 40-59-840 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."

Mrs. Torman's February 16, 2010 letter satisfied the statutory requirements in accordance with the legislative intent as cited in *Grazia*. In an effort to avoid litigation and to finish her residence, Mrs. Torman provided proper notice to Appellants in an attempt to settle this issue and provided Appellants with ample opportunity to resolve the claim short of litigation. Unfortunately, it was the Appellants that didn't take this opportunity to cure these construction defects and deficiencies. Appellants refused to finish the work contractually agreed upon and

failed to correct the construction defects and deficiencies. Appellants had thirteen months to cure these construction defects and deficiencies prior to the filing of the present lawsuit, but Appellants did not comply with Mrs. Torman's request.

III. Appellants Waived Their Right to a Stay

Under *Ex Parte Dibble*, 279 S.C. 592, 310 S.E.2d 440 (Ct.App. 1983), the courts have the inherent power to do all things reasonably necessary to ensure that just results are reached to the fullest extent possible. Judge Hayes properly found Appellants waived their right to a stay by not affirmatively raising this affirmative defense within a reasonable time. In the present case, Appellants answered the complaint, counterclaimed, served discovery, served subpoenas, participated in depositions, agreed to a continuation of trial, selected a mediator, showed up at the designated mediation date, argued against a Motion to Compel, and argued against a Motion for Leave. The present lawsuit had been pending for over two years prior to Appellants filing their Motion to Stay. Appellants agreed to have the present case tried during the May 2013 term of court and filed its Motion to Stay two years after the initial complaint was filed. Appellants affirmatively consented to trial of the present case within the May 2013 term.

If Appellants believed a stay was appropriate, Appellants should have raised this issue at the commencement of this case rather than two years afterwards and two months before a consented trial date. Appellants pose the question of what is a reasonable time within their brief. Certainly, a reasonable time is a period of time well before the eve of trial. A reasonable time would be prior to consenting to a trial on a specific court date. Additionally, a reasonable time to request a stay under a statute that was enacted by the legislature to provide a contractor with an opportunity to resolve the claim without litigation would be prior to engaging in the discovery process by serving discovery and subpoenas and preparing for trial. As such, Judge Hayes' order

denying Appellants motion to stay was proper, appropriate, and legally supported by the controlling precedent.

CONCLUSION

Pursuant to Section 14-3-330 and well-established South Carolina precedent, Judge Hayes' Order is neither a final judgment nor an immediately appealable, interlocutory order. Judge Hayes' Order is interlocutory and it does not: (1) affect a substantial right; (2) in effect determine the action; and (3) prevent a judgment from which an appeal might be taken or discontinue the action. Judge Hayes' Order does not satisfy any of these three elements where all three must be satisfied in order to vest this Court with jurisdiction over an interlocutory appeal. This Court does not have jurisdiction over Appellants improper, interlocutory appeal that was precipitously filed on the eve of trial to avoid a trial on the merits. Accordingly, this Court should dismiss Appellants' appeal for lack of jurisdiction.

Respectfully submitted this 22nd day of August, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing **MOTION TO DISMISS AND MEMORANDUM ON APPEALABILITY** was served upon Defendants/Appellants by depositing a copy of the same in an official depository of the United States mail in a postage-paid envelope addressed to:

Stephen D. Schusterman
Schusterman Law Firm, P.A.
P.O. Box 4211
Rock Hill, SC 29732

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This the 22nd day of August, 2013

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INTELLECTUAL PROPERTY

August 22, 2013

VIA U.S. MAIL
The Honorable Jenny Abbott Kitchings
Clerk of Court for the S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Carolyn Torman v. The Handyman Co., LLC et al.
Appellate Case No. 2013-000959

Dear Ms. Kitchings:

Please find enclosed (1) original and (1) copy of the Motion To Dismiss And Memorandum On Appealability to be filed with the court in the above-referenced case. In addition is a check in the amount of $25.00 for the motion filing fee.

Please file the original and return the file-stamped copy in the enclosed self-addressed stamped envelope.

Please do not hesitate to contact me should you have any questions or require any additional information.

Very truly yours,

Maya M. Coffield
North Carolina Certified Paralegal

Enclosures

cc: Stephen D. Shusterman

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