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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Maite Murphy, Circuit Court Judge

Case No. 2023-CP-07-02252
Appellate Case No.2024-001116

EK Real Estate Services of NY, LLC,..... Respondent

v.

Yvonne L. Deloach, Appellant.

MEMORANDUM AS TO APPEALABILITY

The Appellant, Yvonne L. Deloach, submits this memorandum in response to the Court of Appeals’ request dated July 9, 2024 for a “memoranda addressing the issue of appealability...”

PROCEDURAL HISTORY AND ORDERS

On October 11, 2023, E.K. Real Estate Services of N.Y. LLC (“E.K. Real Estate”) filed an Application for Eviction against Yvonne Deloach (“Deloach”) before the Beaufort County Magistrate’s Court. The case was given Civil Action No. 2023CV0710401196. (hereinafter “Eviction”) E.K. Real Estate is the only named Plaintiff to the Eviction.

On October 24, 2023, Deloach, through counsel made an appearance and responded to the Eviction by filing a Motion to Transfer to Circuit Court or Dismiss for Lack of Jurisdiction and an Answer and Counterclaim. The Counterclaims consist of eight separate causes of action: declaratory judgment; fraud; deceptive trade practices; civil conspiracy; violation of the South Carolina Consumer Protection Code; violations of the Truth in Lending Act; slander of title; and unjust enrichment. The gravamen of the Counterclaims is that the transaction formed by E.K. Real Estate is predatory in nature. The Counterclaims seek determinations as to the enforceability of documents and the title of real property, actual damages, compensatory damages, treble damages, punitive damages and injunctive relief. The amount involved is in excess of Seven Thousand Five Hundred and no/100 (\$7,500.00) Dollars.

On October 25, 2023, a hearing was held before the Beaufort County Magistrate. After oral arguments from counsel, the Magistrate took the matter under advisement.

On October 31, 2023 Proof of Service of Deloach's Answer and Counterclaim were filed with the Magistrate's Court. On November 29, 2023, the Beaufort County Magistrate issued an Order transferring the matter to the Beaufort County Court of Common Pleas along with a Certificate of Transmittal. The Certificate of Transmittal provides "all associated paper work in reference to the above civil case is being transmitted for disposition to the court listed below:" No party moved to reconsider the Magistrate's Order or appealed.

On December 19, 2023, Deloach having received no response to her Counterclaims filed a Motion for Entry of Default supported by an Affidavit of Default. On the same day E.K. Real Estate filed a Motion to Remand to Magistrate's Court for Improper Transfer and filed a Complaint. No motion to amend accompanied the Complaint. The new Complaint filed by E.K. Real Estate adds as a Plaintiff Easyknock Inc., and includes additional allegations. On January 9,

2024, Deloach filed a Motion Strike or in the Alternative to Dismiss the Complaint filed on December 19, 2023.

The Clerk of Court did not enter default. Rather, on February 9, 2024, a notice of hearing for March 5, 2024 was sent by the Clerk of Court to the parties. E. K. Real Estate filed no Answer, responsive pleading or motion to file out of time to Deloach's Counterclaims prior to the hearing on the Motion for Entry of Default.

On March 5, 2024 the hearing was held before Circuit Court Judge Matie Murphy. Following the hearing on March 28, 2024, Judge Murphy sent an email to parties advising of certain rulings and directing that proposed Orders be submitted within ten (10) days in accordance with her directives. (Ex. 1, March 28, 2024 Email) Deloach submitted through the SC Courts E-Filing Portal proposed Orders as requested by the Court.

On April 8, 2024, E.K. Real Estate filed a Notice of Dismissal. The Notice of Dismissal was filed under the Civil Action Number 2023-CP-07-002252, however the caption included as a Plaintiff, EasyKnock, Inc. The motion consisting of one sentence reads: "Plaintiffs EK REAL ESTATE SERVICES OF NY, LLC and EASYKNOCK, INC., through counsel, hereby gives notice of the dismissal of this action, without prejudice, pursuant to Rule 41(a)(1)(A), SCRCPP." On April 25, 2024, without hearing the Circuit Court entered a Form 4 which reads:

This matter came before the Court virtually on 3/5/2024 on Plaintiff's Motion to Remand, Defendant's Motion for Entry of Default, and Defendant's Motion to Dismiss. On 4/8/24, after the hearings but before Final Orders were issued, Plaintiff filed a Notice of Dismissal pursuant to Rule 41(a)(1)(A), SCRCPP. Therefore, the aforementioned outstanding Motions are now moot.

(hereinafter "Form 4 Order")

On May 2, 2024, Deloach filed a Motion to Reconsider the ruling contained in the Form 4, Order. On June 13, 2024, Judgment Murphy entered an "Order Granting Defendant's Motion to

Reconsider and Granting Plaintiff's Motion to Remand." (hereinafter "Order") The Order did not address the other pending motions and provides: "Based on these findings, the two remaining motions are not properly before this court." (Order, p. 4).

APPEALABILITY OF ORDERS

The right of appeal arises from and is controlled by statutory law. *Hagood v. Sommerville*, 362 S. C. 191, 607 S. E.2d 707 (2005); *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006); S.C. Code Ann. § 14-3-330 (2017) "The determination of whether a party may immediately appeal an order issued before or during trial is governed primarily by section 14-3-330 of the South Carolina Code (2017)." *Id.* at 195, 607 S.E.2d at 708. "An order generally must fall into one of several categories in section 14-3-330 to be immediately appealable." *Id.* Section 14-3-330 provides, in pertinent part:

- (1) Any intermediate judgment, order or decree in a law case involving the merits . . . ;
- (2) 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;

S.C. Code Ann. § 14-3-330 (2017) (emphases added). "It is well settled that an interlocutory order is not immediately appealable unless it involves the merits of the case or affects a substantial right."

Brown v. Cnty. of Berkeley, 366 S.C. 354, 361, 622 S.E. 2d 533, 537 (2005)

1. Substantial Rights are Impacted.

The subject Orders are immediately appealable under S.C. Code Ann. § 14-3-330 because they affect substantial rights of Deloach by preventing a judgment, effectively strike her claims, and alter the mode of trial.

A. Law of the Case.

EK Real Estate did not appeal the Magistrate's ruling on November 29, 2023, to transfer the case to the circuit court. Nor did EK Real Estate file a motion for reconsideration before the Magistrate. Accordingly, the finding that the matter should be transferred to the circuit court is the law of the case. *See, ML-Lee Acquisition Fund, L.P.*, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997); *Creed v. Stokes*, 285 S.C. 542, 331 S.E.2d 351 (1985)("The order became law of the case once appellant failed to timely appeal.") The determination the matter should be transferred to the circuit court was not subject to review or reconsideration by way of a Motion to Remand by the Circuit Court. *See Bakala v. Bakala*, 352 S.C. 612, 632, 576 S.E.2d 156, 166 (2003) (holding that a judge could not overrule the prior unappealed order of another judge, and it became law of the case).

E.K. Real Estate waived any objection to the Order of Magistrate transferring the case by failing to seek reconsideration or appeal. The Order addressing the challenged raised for the first time before Circuit Court, and impacting determinations render the law of the case affecting a substantial right. S.C. Code Ann. § 14-3-330(2).

B. Mode of Trial.

Pursuant to § 14-3-330(2), it has been held on numerous occasions that when a trial court's order deprives a party of a mode of trial to which it is entitled as a matter of right, such order is immediately appealable. *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 533 S.E.2d 331 (S.C. 2000); *Lester v. Dawson* 327 S.C. 263, 491 S.E.2d 240 (1997); *C & S Real Estate Services, Inc.*,

v. Massengale 290 S.C. 299, 350 S.E.2d 191 (1986); *Creed v. Stokes* 285 S.C. 542, 331 S.E.2d 351 (1985); *First Union National Bank of South Carolina v. Soden*, 333 S.C. 554, 511 S.E.2d 372 (Ct.App.1998); *Preferred Sav. Bank, Inc. v. Elkholy* 303 S.C. 95, 399 S.E.2d 19 (Ct.App.1990).

A jury trial in magistrate's court is before a jury panel of six jurors who must render a unanimous decision. See Rule 48, SCRCP. A jury trial in circuit court is before a jury panel of twelve who must render a unanimous decision. See Rule 48, SCRCP. Thus, the mode of trial between the circuit court and magistrate's court is different. The mode of trial is affected by the transfer between courts and the Order and is appealable.

C. Precludes Prosecution of Claims and Damages.

An order affects a substantial right and is immediately appealable when it "(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[.]" *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005), and *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct. App. 2011) (noting an order affects a substantial right, as the term is used in section 14-3-330(2) of the South Carolina Code (1976), "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 trial").

The Order effectively discontinues Deloach's counterclaims against E.K. Real Estate thus bringing the Order under 2(a). Deloach filed an Answer and Counterclaim and served the same on E.K. Real Estate. E.K. Real Estate did not obtain an extension and did not respond within thirty days after services as required. See *Stark Truss Co. v. Superior Const. Corp.*, 360 S.C. 503, 602

S.E. 2d 99 (Ct. App. 2004). Accordingly, Deloach filed a Motion for Entry of Default. The Clerk of Court refused to enter the default as established by affidavit. Rather, months later the Clerk of Court scheduled a hearing before the circuit court on Deloach's motion for entry of default. At no time did E.K. Real Estate file a responsive pleading to the counterclaims: not within thirty days after service of the counterclaims or during the interim approximate four months that passed between the filing of the motion for entry (December 19, 2023) and the scheduled hearing (March 5, 2024).

Under Rule 55(a), SCRPC, if a party has failed to plead or otherwise defend as provided by the South Carolina Rules of Civil Procedure and that fact is made to appear by affidavit or otherwise, the clerk of court *shall* enter default. *Stark Truss Co. v. Superior Const. Corp.*, 360 S.C. 503, 602 S.E.2d 99 (S.C. App. 2004) "Entry of default is a ministerial act which a clerk is required to perform once default is made to appear by the affidavit of the moving party." *Id.* at 509. (holding that "whether default was actually entered is of no consequence since the entry of default is a purely ministerial act which the clerk was required to perform once the default was made to appear by affidavit" of the moving party") "A party in default has three primary options: (1) do nothing pending the entry of judgment by default under Rule 55(b), SCRPC; (2) file an appearance under Rule 55(b)(2), SCRPC, in an attempt to protect its interest before the entry of judgment by default; or (3) request the entry of default be set aside pursuant to Rule 55(c), SCRPC. *Palmetto Construction Group, LLC v. Restoration Specialists LLC*, 432 S.C. 633, 856 S.E. 2d 150 (2021)

Here the Clerk of Court failed in its duty to enter default as required under the Rules. However, irrespective of the Clerk's failure to perform its duties because of E.K. Real Estate elected not to do anything, E.K. Real Estate is deemed in default. *Thymes v. Lloyd*, 294 S.C. 152,

153-54, 363 S.E. 2d 122, 123 (Ct. App. 1987). Rather than enter an order as it had requested be written, and after E.K. Real Estate's effort to avoid default by attempting to dismiss the entire action in violation of Rule 41(a), SCRCF failed, the Circuit Court's determination the Motion for Entry of Default was not properly before the court is the equivalent of striking the motion and pleadings or granting a motion to dismiss. Stated differently, the Order effectively deprives and prevents Deloach from the benefits she is entitled to due to E.K. Real Estate's election not to respond to her claims. The default by E.K. Real Estate means E.K. Real Estate admits to the allegations of Deloach's claims and Deloach has established liability on the substance of her counterclaims. *see Roche v. Young Bros., Inc., of Florence*, 332 S.C. 75, 81, 504 S.E.2d 311, 314 (1998) ("It is well settled that by suffering a default, the defaulting party is deemed to have admitted the truth of the plaintiff's allegations and to have conceded liability."); and *James F. Flanagan*, South Carolina Civil Procedure, note 1, at 436 (2d ed. 1996); *see West v. Marko*, 541 S.E 2d 226, 230 (N.C. Ct. App. 2001)(noting that the entry of default deems allegations admitted and "denies the responding party the opportunity to answer the complaint"). The establishment of liability is a merits determination.

The Order, in essence, deprives Deloach of these substantial rights and is subject to appeal under 14-3-330. In fact, the Order deprives Deloach of substantial rights because it leaves Deloach with no means of vindicating her rights. It takes from her the merits conclusion of liability. Additionally, as noted in the Order, a magistrate is without authority to award damages in excess of Seven Thousand Five Hundred and No/100 (\$7,500.00). By directing the case to a court that has no authority to grant Deloach the relief she has sought and is entitled to, it deprives her of substantial rights.

Additionally, as stated supra, "Orders affecting the mode of trial affect a substantial right as defined in section 14-3-330(2) of the South Carolina Code [(2017)] and must, therefore, be appealed immediately." *Frampton v. S.C. Dep't of Transp.*, 406 S.C. 377, 385, 752 S.E.2d 269, 274 (Ct. App. 2013). The Order changes the mode of trial by failing to recognize the consequences of default. It potentially allows for issues of liability to be tried rather than determined and for participation is a damages hearing beyond cross-examination and objection to evidence. *Limehouse v. Hulsey*, 404 S.C. 93, 744 S.E.2d 566 (2013). Again, an impact on substantial rights.

CONCLUSION

Under the circumstances of this matter, the Orders should not be considered interlocutory and appealable. The appeal should proceed.

MARY LEIGH ARNOLD, P.A.
s/MARY LEIGH ARNOLD
SC BAR ID 419
749 JOHNNIE DODDS BLVD.
MT. PLEASANT, SC 29464
P. 843.971.6053
SAMMIE@MARYARNOLDLAW.COM

ATTORNEY FOR APPELLANT