

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. 2013-000959

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SEP 06 2013

SC Court of Appeals

Carolyn Torman,

Respondent,

v.

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

Appellants.

APPELLANTS RESPONSE TO RESPONDENT'S MOTION TO DISMISS
AND MEMORANDUM OF LAW and APPELLANT'S MOTION TO DISMISS
RESPONDENT'S MOTION TO DISMISS

Appellants submit this Response to Respondent's Motion to Dismiss and Memorandum of Law pursuant to Rule 240, SCACR as well as seek a Dismissal of Respondent's Motion to Dismiss for Failing to Comply with Rule 240, SCACR.

SUMMARY

1. Appellant's appeal is not an improper appeal of an interlocutory order.
2. S.C. Code Ann §14-3-330 affords this Court appellate jurisdiction under the facts and circumstances of this case.
3. This is not a precipitous appeal nor was it made on the eve of trial.
4. This appeal by the Appellants was not a legal maneuver but rather an attempt to protect their legal rights in light of the Trial Court's Order denying their Motion to Stay.
5. The Appellants did not fail to request a stay within a reasonable time and in no way attempting to avoid this litigation.
6. The Respondent has failed to comply with Rule 240, SCACR and thus her Motion should be deemed abandoned.

STATEMENT OF FACTS BEFORE THIS COURT

The Appellants filed their Initial Brief on or about July 24, 2013. The Respondent filed a Motion to Dismiss this Appeal on August 22, 2013. The Appellant feels compelled to respond to the information contained in the Respondent's STATEMENT OF ISSUES BEFORE THIS COURT, as a majority of the facts are completely misleading, false, conclusory and do not accurately reflect the facts of this case.

The Appellants appeal derives from an Order Denying Defendants Motion to Stay dated April 25, 2013. The original motion to stay the proceeding was filed on March 13, 2013. A hearing on this matter was held on April 23, 2013. The Order denying the Motion to Stay was issued on April 25, 2013. On or about May 2, 2013, Appellant filed their Notice of Appeal with this Court. The Respondent has repeatedly alleged that the Appellants filed this appeal to delay the litigation process. However, the Appellants acted diligently and promptly upon receipt of the Order Denying their Motion. In fact, not including weekends, the Notice was filed within five (5) days of receipt of the Order. This appeal was not filed on the eve of trial in an attempt to delay the trial; rather it was filed in an effort to correct an error of law that substantially affected the rights of the Appellants.

Although the Appellants do not believe some of the facts set forth by the Respondent are relevant to this Interlocutory Appeal but rather are being alleged throughout her brief, in an attempt to place the Appellants in a negative light before this Court, the Appellants feel compelled to address several statements and allegations the Respondent makes. The Appellants take great exception to Respondent's statements to this Court that they "have not made any attempt to cure or make a rudimentary settlement offer". Appellants were prohibited from entering the premises of the Respondent, at Respondent's

request, to even assess what the problems allegedly were. In fact, the Appellants have repeatedly advised the Respondent that their main goal was to obtain a certificate of occupancy on her property which essentially would mean that the house had passed all inspections and was complete. The Respondent failed to allow this to occur.

Additionally, the Respondent has attempted to mislead this Court as to the circumstances surrounding the mediation. Appellants submitted their Mediation Brief and were absolutely prepared to participate in the mediation. However, the mediator indicated that mediation would not be beneficial at that time because discovery had not been completed. The Respondent's had provided discovery requests but the majority of the answers contained objections or privilege. Therefore, the Appellants did not have the information they needed to adequately assess Appellants complaints. Despite Respondent's contention, the Appellants are unaware of any requests from the Respondent to reschedule the mediation. The Appellants have attempted to resolve this case with the Respondent by repeatedly indicating that they will complete any work and obtain a certificate of occupancy for her. This has been unacceptable to her.

The Appellant's filed this appeal to protect their legal rights and exercise the options afforded to it under §40-59-830 not to delay the litigation process.

The Respondent has failed to comply with §§40-59-830. Although the Respondent sent letters to the Appellant, neither letter conformed to the statute. The initial letter dated December 18, 2009, failed to be properly served on the Appellant and failed to allege any defects as required by the statute. The letter referred to some items that were outside of the contract, items that needed to be selected and things that needed to be completed. The letter did not indicate there were any defects. The second letter dated March 4, 2010 also failed to comply with the statute as it failed to state any construction defects in accordance with the statute, but rather contained a list of items that needed to be completed. The first

time the Appellants became aware of the Respondent's actual alleged defects were upon receipt of the initial Complaint.

The facts of this case are relatively simple. The Appellant entered into a contract with the Respondent to construct her residence. Throughout the course of the construction process, numerous issues arose between the parties which caused a breakdown in their relationship and all work stopped on the Respondent's home. During this time, there was extensive email communications between the parties: the Respondent wanted items completed and the Appellants were desirous of completing her home and obtaining a certificate of occupancy for her. Despite what appears to be similar positions, the parties were unable to reach a resolution without the assistance of counsel and ultimately litigation. The Appellant's do not dispute that two letters were sent and received by them. However, it is their contention that the letters do not comply with the §40-59-840. This issue was never decided by the trial court. The Appellants filed a Motion to Stay the Proceeding pursuant to 40-59-830, which was denied. The Appellants filed an appeal of this Order Denying the Motion to Stay the Proceeding.

LEGAL ARGUMENTS AND AUTHORITIES

The Appellants have previously filed with this Court an Initial Brief setting forth their position as to why this Court has jurisdiction over this appeal, why the trial court erred in denying their Motion to Stay the Proceeding and how the trial judge erred in *sua sponte* raising the issue of waiver. However, the Appellants, in response to Respondent's Motion to Dismiss further set forth the following as well as set forth the grounds seeking a dismissal of Respondent's Motion to Dismiss:

I. The South Carolina Court of Appeals has Jurisdiction over this Issue

The Respondent, throughout her entire brief, continually alleges that the purpose of this appeal is to delay the litigation process. The Appellants are not attempting to delay the litigation process as they

have actively and diligently participated in the litigation. This appeal results from the denial of their Motion for which they believe affects a substantial right, determines the action and prevents a judgment for which an appeal can be taken.

The Respondent asserts that the Appellants have failed to set forth all three elements in accordance with §14-3-330(2)(a). In the Appellants initial brief, they set forth the following:

(a) The Order Affects a Substantial Right: The legislature believed that a method needed to be codified that would allow an alternative dispute resolution without the need for litigation. *2003 South Carolina Laws Act 82 (S.B.433)*. This alternative dispute resolution was codified in S.C. Code Ann. §40-59-810 *et seq.* which afforded would-be defendants the right to resolve or fix the problem without the necessity of litigation. *Id.* The denial of the Motion denied the Appellants the substantial right of being allowed to utilize the right to resolve or fix any problems without the need for litigation. Allowing a stay would afford them of these rights as the legislature intended.

At the conclusion of this trial, the Appellant would be denied their right of being able to resolve, fix or remedy any of the problems alleged by the Respondent. The error in denying the Motion to Stay would not be able to be remedied or appealed at the conclusion of the trial. Consequently, there would be no appellate review to correct this error. *Breland v Love Chevrolet Olds, Inc.* 339 S.C 89, 529 S.E.2d 11(2000). This is not the intent of our jurisprudence.

(b) The Order in affect determines the Action: The failure to grant a stay has the effect of finally determining the causes of actions against the Appellants because they will face exposure for potential faulty workmanship or incomplete work that could have been resolved, thereby limiting exposure, if the Respondent had complied with the statute. In the event of a verdict in favor of the Respondent, the denial of the Motion to Stay determined that there will be a monetary verdict against the Appellants for faulty workmanship or incomplete work that the

statute afforded them the right to correct.

The Respondent alleges that “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”. This is untrue. The denial of the Motion to Stay places the Appellants in the unfair position of being denied the ability to cure any construction defects or incomplete work that may exist at Respondents residence which ultimately translates into the potential for excessive monetary exposure.

(c) Prevent a Judgment from which an Appeal Might be taken or Discontinue the Action:

The Respondent alleges that the Appellant will have an adequate opportunity to raise any claim of error related to the trial court’s decision after the case proceeds to the final judgment.

(Respondent’s Motion, p. 7). Upon the conclusion of the trial, the Appellant will have the opportunity to appeal any error of law that may arise during the trial of this case. The Respondent also states that the Appellant, at the conclusion of trial, could attempt to persuade this Court that denial of the Motion was harmful error. (Respondent’s Motion, p. 8). This does not change the fact that the denial of this Motion meets the criteria of an interlocutory order which is immediately appealable. The issue involved is the denial of rights afforded by the legislature. The appeal of this Order, at this time, is not a piecemeal appeal. Rather it is an appeal that is permitted under 14-3-330(2)(a).

II. The Respondent failed to Comply with the Notice Provision of §40-59-840

The trial judge failed to address whether the Respondent’s letters failed to comply with the Notice Requirement although the Appellants argued in their motion before the Court that they did not. The letter was attached as an exhibit to Appellant’s Motion. The Respondent’s letter set forth seventeen items, none of which actually appeared in Respondent’s complaint. However,

these seventeen items do not meet the definition of “construction defect” as set forth in §40-59-820(3). Rather, they appear to be items that are typically classified in the industry as a “punch list”. The Appellant did respond to this letter and requested clarification of Respondent’s alleged issues. The Respondent never advised the Appellant that his letter was incoherent as she alleges in her Memorandum (Respondent’s Memorandum, p. 9). Respondent never responded directly to the request for clarification although the parties continuously corresponded through email regarding numerous issues. Appellant was denied reasonable access to the property and was actually advised by Respondent that they were not allowed to enter her premises. On at least one occasion, the sheriff’s office was contacted. Throughout the entire relationship between the parties, Appellants have consistently indicated they were desirous of completing the job and obtaining a Certificate of Occupancy for her. Respondent never directly responded to this. Respondent is misleading this Court in her recitation of the facts surrounding the Appellants attempt to cure this matter without the need for litigation.

In conclusion, Appellant’s position that the Motion to Stay should have been granted is supported by Respondent’s argument. If Respondent’s letter satisfied the elements of the Act, then in accordance with the statute, the stay provision is NOT discretionary it is mandatory. S.C. Code Ann. §40-59-830. Therefore, the stay is required under the Act.

III. Appellants did not waive their Right to Stay

The Appellants argue in their Initial Brief that the trial court erred in *sua sponte* raising the affirmative defense of waiver. The affirmative defense of waiver was a defense the Respondent had the opportunity to raise but failed to do so upon being served with the Appellants’ Motion to Stay. The Respondent indicates in her brief that the Appellant poses the question of what is a reasonable time in her Initial Brief. (Respondent’s Memorandum, p. 10).

Appellants did not raise the question of what is a reasonable time. Rather, the Appellants contend and set forth in their Initial Brief that there is no time requirement for filing a Motion to Stay in the statute. (Appellants Initial Brief, p. 12). The statute requires that upon a motion a stay shall be granted. S.C Code Ann. §40-59-830.

The Respondent sets forth various times when a stay would have been reasonable. However, the statute does not address the reasonableness of the request, rather it requires that a stay be granted in the event that the homeowner fails to comply with the statute. S.C. Code Ann. §40-59-830.

IV. Appellants seek Dismissal of Respondent's Motion and Memorandum

Pursuant to Rule 240(c)(2), SCACR, when a Record on Appeal or Appendix has not been filed, or where the facts relied upon in support of the Motion are not contained in the Record on Appeal or Appendix , the parties shall file affidavits and other documents in support of their positions. Pursuant to Rule 240(g), SCACR, failure of the moving party to perform any act required by this Rule may be deemed an abandonment of the Petition or Motion. The Respondent has relied upon many facts that are not found in a Record on Appeal or an Appendix to support her position. The Respondent has failed to file any affidavits or other documents in support of her position. Therefore, in accordance with Rule 240(g), Appellants seek a dismissal of Respondent's Motion to Dismiss.

CONCLUSION

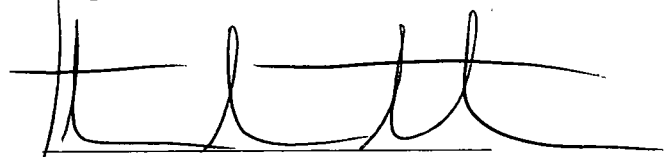
As set forth in their Initial Brief and this Response, due to the unique nature of the Act, the Order denying the Motion is immediately appealable as it involves the merits of the case and affects a substantial right. Furthermore, the Appellants will be unable to appeal the order at the conclusion of 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 it in her pleadings 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. Additionally, the Respondent's Motion to Dismiss should be denied based upon the arguments set forth in the Initial Brief as well as this Response.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Stephen D. Schusterman', written over a horizontal line.

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Attorney for Appellants

September 4, 2013

THE STATE OF SOUTH CAROLINA
In The Appellate Court

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John C. Hayes, III, Circuit Court Judge

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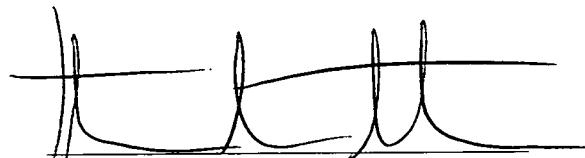
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CERTIFICATE OF SERVICE

I certify that I have served the APPELLANTS RESPONSE TO RESPONDENT'S MOTION TO DISMISS AND MEMORANDUM OF LAW and APPELLANT'S MOTION TO DISMISS RESPONDENT'S MOTION TO DISMISS on the Respondent by depositing one (1) copy of it in the United States Mail, postage prepaid, on September 4, 2013 addressed as follows: Seth Hudson, Esq. CLEMENTS BERNARD PLLC, 1901 Roxborough Road, Suite 250, Charlotte, NC 28211

September 4, 2013



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STEPHEN D. SCHUSTERMAN

September 4, 2013

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SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re: Carolyn Torman, Respondent v. The Handyman, Co., LLC, SEEE Properties, Inc,
Stacey M. Pinson, Marcus E. Pinson and Edith H. Pinson, Appellants.
Case No.: 2011-CP-46-01383

Dear Ms. Kitchings:

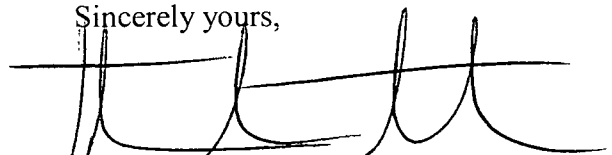
Enclosed please find an Original and Six (6) copies of Appellant's Response to Respondent's Motion to Dismiss and Memorandum of Law and Appellant's Motion to Dismiss Respondent's Motion to Dismiss along with a Certificate of Service.

By way of this letter, I am serving Respondent's attorney, Seth Hudson, Esq., Clements Bernard, PLLC, 1901 Roxborough Road, Suite 250, Charlotte, North Carolina 28211.

If you should have any questions, do not hesitate to contact my office.

With best regards, I am

Sincerely yours,



Stephen D. Schusterman

SDS/as

cc: Mr. Seth Hudson, Esq.
CLEMENTS BERNARD PLLC
1901 Roxborough Road, Suite 250
Charlotte, North Carolina 28211

Mr & Mrs Marcus Pinson
Ms. Edith Pinson