RECEIVED
Sep 20 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE DORCHESTER COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Appellate Case No. 2024-000698

AJP Solutions, LLC Respondent,

v.

Clark Construction, Inc., of Mississippi Appellant.

RESPONDENT'S REPLY TO APPELLANT'S RETURN TO RESPONDENT'S MOTION TO DISMISS

Respondent AJP Solutions, LLC, moved to dismiss this appeal for lack of appellate jurisdiction because the underlying order is not appealable. Appellant's Return to this motion, while colorful, ventures into the weeds of what does not matter, and misses the largest and most basic point, that the effect of the Order on appeal was to deny dismissal and order the parties to arbitration—neither of which is an appealable ruling. What motion Appellant claims to have filed with the circuit court is simply irrelevant to the appealability of the Order on appeal.

The appealability of an order is determined by the substantive effect of the order. *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 539, 773 S.E.2d 144, 147 (2015) (the analysis of the appealability of an order is based on the actual relief granted and "is not

constrained by how the order is styled"); *citing Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct. App. 2011) ("[A]n appellate court should look to the effect of an interlocutory order to determine its appealability.").

Here, Appellant purports to take appeal from the circuit court's Order issued on January 10, 2024, the substantive effect of which is plain and unmistakable. That Order refused to dismiss the case and instead directed "**the parties are ordered back to arbitration** in order to resolve the claims that AJP asserted against Clark." (Appx. I, at p. 6) (emphasis added). No matter how Appellant spins or twists it, the simple fact remains that the effect of this Order is to compel the parties to arbitration. As such, the Order is not immediately appealable. *See e.g., Toler's Cove Homeowners Ass'n v. Trident Constr. Co.*, 355 S.C. 605, 610 n.3, 586 S.E.2d 581, 584 (2003) (holding "a South Carolina court's order compelling arbitration is not immediately appealable").

Appellant creatively suggests that to find this matter unappealable (which would be the correct result) "would be to grant [Respondent] a second bite at the apple." (App.'s Return p. 7). This is fundamentally wrong because Respondent never had a bite at the apple. That is precisely the point, and that is why the circuit court ordered the parties back to arbitration. Otherwise, Respondent would never have a forum in which to have its claims heard. **Finality** of the underlying order is the cornerstone of appealability. *See generally, Tillman v. Tillman*, 420 S.C. 246, 248-49, 801 S.E.2d 757, 759 (Ct. App. 2017) ("Generally only final judgments are appealable [and a]n order reserving an issue, or leaving open the possibility of further action . . . before the rights of the parties are resolved, is interlocutory."). In other words, parties should have their bite at the apple before an appeal can be taken. That is why this matter is not yet appealable.

Appellant's Return ends where it should begin. Waxing and waning upon anecdotes and metaphors—such as claiming this presents a "tale as old as time"—Appellant ends by posing a

question: "What is left to resolve by sending this matter back to arbitration?" (App.'s Return, p. 19). Presumably, this question was intended to be rhetorical, but the irony is that it precisely encapsulates the problem, because the answer is: "Everything." In other words, when the case returns to arbitration as ordered by the circuit court, *everything* is left to be decided, because there has never been a final adjudication of the matters at issue.

It should not be forgotten that it was Appellant (not Respondent) that initially requested this matter be compelled to arbitration for the resolution of Respondent's claims. Yet, the merits of those claims were never decided. Instead, the only findings resulting from the arbitration to date can be distilled to two points: (1) there is a document alleged to be a settlement agreement that was purportedly executed between Arch (who was *not* a party to the arbitration) and Appellant; and (2) whether that purported settlement agreement had any force and effect could not be determined by the arbitrator because it was beyond the arbitrator's jurisdiction to decide. Simply, and properly viewed, the arbitration decided *nothing* with regard to the merits of Respondent's claims against Appellant. In fact, it did not even decide whether the purported settlement agreement affected those claims because the arbitrator lacked jurisdiction to do so. Because there has been no final decision on Respondent's claims, this appeal is premature. *See e.g., Watson v. Underwood*, 407 S.C. 443, 456, 756 S.E.2d 155, 162 (Ct. App. 2014) (orders which do not resolve the merits of the case are not immediately appealable).

At bottom, despite all of Appellant's hemming and hawing, its Return does nothing to address the most fundamental problem with its appeal. The Order on appeal has the very limited (and non-final) effect of refusing to dismiss the case and compelling the parties to arbitrate the merits of their claims. Neither of these findings presents an appealable decision from the circuit court. *See e.g., Johnson v. Paraplane Corp.*, 321 S.C. 316, 317 n.1, 468 S.E.2d 620 (1996) (finding

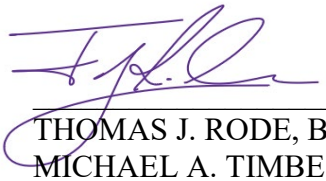
"an order compelling arbitration is not immediately appealable."); *and S.C. Lottery Comm'n v. Glassmeyer*, 428 S.C. 423, 439 n.8, 835 S.E.2d 524, 532 (Ct. App. 2019) (recognizing "the denial of a motion to dismiss is not directly appealable"); *see also, McLendon v. S.C. Dep't of Highways & Pub. Transp.,* 313 S.C. 525, 526 n.2, 443 S.E.2d 539, 540 (1994) (recognizing that "the denial of a motion to dismiss is not directly appealable for the same reasons" that denial of a motion for summary judgment is not directly appealable); *accord Watson v. Underwood*, 407 S.C. 443, 456, 756 S.E.2d 155, 162 (Ct. App. 2014) (orders which do not resolve the merits of the case are not immediately appealable)

CONCLUSION

For the reasons stated herein, this Court should dismiss because the underlying order is not immediately appealable. The parties should be permitted to proceed with arbitration as ordered by the Circuit Court.

Respectfully submitted,

THURMOND KIRCHNER & TIMBES, P.A.



THOMAS J. RODE, Bar No. 77480
MICHAEL A. TIMBES, Bar No. 69730
15 Middle Atlantic Wharf
Charleston, South Carolina 29401
Phone: 843-937-8000
Fax: 843-937-4200
Email: thomas@tktlawyers.com
Attorney for Respondents

RECEIVED
Sep 20 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE DORCHESTER COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Appellate Case No. 2024-000698

AJP Solutions, LLC Respondent,

v.

Clark Construction, Inc., of Mississippi Appellant.

PROOF OF SERVICE

I, hereby certify that the enclosed was served on the parties stated below by emailing a copy of the enclosed document(s) to opposing counsel:

Bryan Kelley, Esq
Elmore Goldsmith Kelley and DeHoll, PA
bkelley@elmoregoldsmith.com

September 20, 2024.

THURMOND KIRCHNER & TIMBES, P.A.

BY: S/ Kaitlyn Nobles
KAITLYN NOBLES, PARALEGAL TO
THOMAS J. RODE