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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2024-001510

Elizabeth M. Ferraro, James T. Ferraro, Edward J. Przybyl, Marcella Gleie, John E. Gleie, Jr., Thomas Bowes, Connie Bowes, Moataz Alasadi, Virginia Kirkwood, Bob Kirkwood, Paul Vichroski, Nydza Vichroski, James Montellese, and Roxann Montellese, Individually, Derivatively, and on Behalf of All the Mount Vintage Homeowners Association Members . . . . Respondents,

v.

LL of SC, LLC, Raiford Topsail Island Investments, LLC, TR Sales Plantation, LLC, and Mount Vintage Plantation Homeowners Association, Inc. *a/k/a* Mount Vintage Homeowners Association, Inc. . . . . . . Defendants,

Of which LL of SC, LLC, Raiford Topsail Island Investments, LLC, and TR Sales Plantation, LLC are the . . . . . . Appellants / Petitioners.

APPELLANTS' RETURN TO RESPONDENTS' MOTION TO DISMISS AND REPLY IN SUPPORT OF THE PETITION FOR SUPERSEDEAS

On Monday, September 23, Respondents submitted a return to Appellants' Petition for a Stay of Underlying Proceedings and/or Writ of Supersedeas, and joined a Cross-Motion to Dismiss therewith. The arguments advanced by Respondents in support of the Motion to Dismiss are the same as those raised in opposition to the request for stay or supersedeas, which was granted by order of this Court dated September 13.

Appellants will be brief. To a certain extent, Appellants' brevity is the consequence of the undersigned having been displaced from his office by the continuing effects of Hurricane Helene. In any event, it would seem that Respondents' arguments are as follows:

(1) That the September 10 decision is interlocutory and therefore not immediately appealable;

(2) That interlocutory decisions resolving disputed questions of law are not immediately appealable;

(3) That the September 10 decision does not involve the merits of the underlying action, in the sense that it finally determines some substantial matter forming the whole or part of some cause of action or defense;

(4) That Appellants' Petition is procedurally defective because Appellants did not first file a motion for stay or supersedeas with the trial court; and,

(5) That the scope of the stay imposed by the Court of Appeals is overly broad.

Each of these will be considered in turn.

The contention that the September 10 decision is interlocutory and therefore not immediately appealable is without merit. The plain text of S.C. Code § 14-3-330(1)

expressly contemplates the immediate appealability of "[a]ny intermediate judgment, order or decree in a law case." There is simply no authority in South Carolina for the proposition that an order is not immediately appealable merely because it is interlocutory.

Nor is there any authority for the proposition that an interlocutory decision as to a disputed question of law cannot be immediately appealed. See, e.g., Link v. Sch. Dist. of Pickens County, 302 S.C. 1, 393 S.E.2d 176 (1990) (observing that the trial court's grant of partial summary judgment against plaintiff's action for breach of contract was appealable under S.C. Code § 14-3-330(1) both at the time summary judgment was granted and after trial); Lebovitz v. Mudd, 289 S.C. 476, 347 S.E.2d 94 (1986) (holding that a trial court's order dissolving a lis pendens (in connection with the Rule 12(b)(6) dismissal of an action for fraudulent conveyance) was immediately appealable under S.C. Code § 14-3-330(1)).

Respondents further contend that the September 10 decision is not immediately appealable because it does not "finally determine[] some substantial matter forming the whole or part of some cause of action or defense." Mid-State Distribs., Inc. v. Century Importers, Inc., 310 S.C. 330, 426 S.E.2d 777 (1993). This argument is untenable.

Respondents have brought suit over the alleged abuse and neglect of developer rights and obligations in the Mount Vintage community, going back to at least 2013. The chain of ownership of those rights is, therefore, of central importance to the case. After all, when Respondents complain that they have sustained damage as a result of a breach of common law fiduciary duties, the foundational question they must answer is *who owed those duties*, followed closely by the related question of *what conduct (and whose) violated those duties*.

Since 2013, everyone associated with the Mount Vintage community has regarded the holder of developer rights to be LL of SC, LLC.[1] This is by virtue of LL of SC, LLC having taken a deed-in-lieu of foreclosure in satisfaction of a pre-existing debt. Accordingly, over the past 11 years, LL of SC, LLC has exercised developer rights, which led Respondents to sue LL of SC, LLC over the sufficiency of its performance of responsibilities ostensibly owed to both homeowners and the homeowners' association.

That, now, has changed with the September 10 decision. The order from which this appeal is taken has injected Raiford Topsail Island Investments, LLC ("**RTI**") into the chain of those who have held developer rights. In fact, if the transcript of the hearing on Respondents' motion for partial summary judgment were presently available (and not just on order), it would further reveal the totality of the position that Respondents have advanced, which is: (1) that, after RTI acquired developer rights through a foreclosure sale, such rights were never conveyed to LL of SC, LLC; and, therefore (2) that RTI continues to hold developer rights. Accordingly, in the absence of an appeal of the September 10 decision, Respondents would be arguing at trial that RTI—not LL of SC, LLC—is the party who owed common law and fiduciary duties to the Mount Vintage community by virtue of its past (and present) possession of developer rights, and that whatever actions were taken by LL of SC, LLC in furtherance of the interests of the

[1] This is why Appellants characterized Respondents' question of "who holds developer rights" at the summary judgment stage as "much ado about absolutely nothing." For more than a decade, everyone—including Respondents and the HOA whose interests they claim to represent—has regarded LL of SC, LLC as the holder of developer rights to the Mount Vintage community. It is not "ado about nothing" because the question of who holds developer rights is unimportant. It is "ado about nothing" because the ownership, and exercise, of developer rights had not been thrust into question until the issuance of the order from which this appeal is taken.

community are immaterial, precisely because LL of SC, LLC did not hold developer rights.

In short, the September 10 decision answers the *who* questions that are foundational to this dispute. *Who owed Mount Vintage common law and fiduciary duties because of developer rights?* RTI. *Whose conduct breached those duties?* RTI. The conclusion is inescapable: the September 10 decision—holding that a foreclosure sale subsequent to a deed-in-lieu of foreclosure given to the same party who prevailed at a foreclosure sale trumps and nullifies the deed-in-lieu—constitutes a final decision on a contested issue involving the merits of the claims and defenses in the case. It is therefore immediately appealable under S.C. Code § 14-3-330(1).

With respect to their argument that this appeal is procedurally defective, Respondents are mistaken. Rules 205 and 241 explain that the filing of a notice of appeal divests the trial court of jurisdiction with respect to the underlying dispute in favor of the Court of Appeals, whose jurisdiction is exclusive, except to the extent that any issues remain with the trial court that are not affected by the appeal. Under the circumstances of this case, it is hard to imagine what issues are unaffected by the substance of this appeal. The question of the ownership of developer rights is fundamental to each and every claim that Respondents have brought, precisely because it affects the analyses regarding duty, breach, and causation. Accordingly, when Appellants filed the instant notice of appeal on September 10, the automatic stay established by Rule 241(a) was implicated, such that the trial court should have considered this entire matter stayed.

Initially, the trial court indicated its perception that the case was stayed by the filing of the notice of appeal.[2] However, as a result of a status conference convened by the trial court after the filing of the prior notice of appeal, the court determined that its jurisdiction was not divested by the filing of the appeal and that the case would proceed to trial as scheduled. Respondents did not file a motion to lift the stay with the trial court, as ostensibly required by Rule 241, SCACR. And, importantly, when the trial court decided that it had continuing jurisdiction to try the underlying case, it did not have the jurisdiction to do so. At that time, because of the filing of the notice of appeal, and pursuant to Rules 205 and 241(a), SCACR, the Court of Appeals had exclusive jurisdiction with regard to this dispute; with sincere respect to the trial court, it no longer had jurisdiction to decide its jurisdiction.

Therefore, if it is the case that the September 10 order is subject to immediate appeal, then the filing of the notice of appeal should have stayed the case automatically; there would be no need for Appellants to file a motion to stay or supersedeas with the trial court.

Furthermore, the Appellate Court Rules are not entirely clear as to the proper procedure to observe when a trial court incorrectly asserts the existence of its continuing jurisdiction in the face of appellate proceedings. It would seem futile to ask the trial court to impose a stay for an appeal when it has already indicated its perception that the filing of the notice of appeal has not stayed the case; nor is it clear how or why a trial court would (or could) grant a supersedeas with respect to its own assessment regarding the existence of its continuing jurisdiction, particularly when the determination was made

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[2] This was reflected in an email from the trial judge circulated after the filing of the first notice of appeal.

without the issuance of an order. And, if the right to an immediate appeal exists under S.C. Code § 14-3-330, no certification under Rule 54(b), SCRCP, is necessary. See, e.g., Lebovitz, 289 S.C. 476, 347 S.E.2d 94.

It may be the case that the unusual circumstance where a trial court continues to exercise jurisdiction over a matter where exclusive jurisdiction resides with the Court of Appeals constitutes the very type of "extraordinary circumstance" contemplated by Rule 241(d)(1), though it does not appear there is much, if any, guidance from the appellate courts in the way of reported decisions to guide the practitioner's analysis. Ultimately, there can be no question that the appellate courts have the power to protect their own jurisdiction, which is jeopardized when a trial court incorrectly determines that it continues to have jurisdiction despite the filing of a notice of appeal that ought to result in the imposition of the automatic stay.

The final of Respondents' arguments is that the scope of stay granted by this Court is overly broad. It is not. As explained above, the order from which appeal is taken pertains to the chain of ownership of developer rights in Mount Vintage, which in turn implicates the identity of the party responsible for the performance of developer rights and obligations. That touches and concerns each and every aspect of this dispute. And the Appellate Court Rules already address the proper scope of the stay; it extends to all "matters decided in the order, judgment, decree, or decision on appeal." Rule 241(a), SCACR. Accordingly, when this Court issued a stay as to all proceedings below, that scope was commensurate with the issues involved in this appeal.

CONCLUDING STATEMENT

Consistent with the foregoing discussion, the Court of Appeals is respectfully requested to extend its order imposing a stay of the underlying trial court proceedings for the duration of these appellate proceedings, and for such other and further relief as the Court deems just and proper.

Respectfully,

s/ Steven Edward Buckingham

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October 3, 2024
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PROOF OF SERVICE

The undersigned counsel for Appellants hereby certifies, subject to penalty of perjury, that the following document(s) was/were served upon the following counsel of record by the following means as of the date identified below.

Document(s): Appellants' Return to Respondents' Motion to Dismiss and Reply in Support of the Petition for Supersedeas

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Respectfully,

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