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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
MIKELL R. SCARBOROUGH, CIRCUIT COURT JUDGE

Appellate Case No.: 2024-000947

Vicki Lynn Vergeldt, individually and as
Successor Trustee of the John Vergeldt, Jr.
Revocable living Trust dated September 27, 1978,.....Respondent,

v.
John Edward Vergeldt and
Teresa Shaw-Vergeldt, Defendants,

Of whom John Edward Vergeldt is the, ...Appellant.

REPLY BRIEF

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I. This Court can properly review and consider the trial court's denial of the Motion to Dismiss and Motion to Stay Proceedings.

Respondent asserts that the trial court's rulings on John's Motion to Dismiss and Motion to Stay Proceedings are interlocutory orders which are not immediately appealable. While an appeal of a denial of an interlocutory order is generally not immediately appealable, "an order that is not directly appealable will nonetheless be considered if there is an appealable issue before the court, and a ruling on appeal will avoid unnecessary litigation." *Watson v. Underwood*, 407 S.C.443, 459, 756 S.E. 2d 155, 163-164 (Ct. App. 2014). "Generally, this court reviews interlocutory orders when they contain other appealable issues." *Id*. Furthermore, "[c]ourts have made a practice of accepting appeals of denials of interlocutory orders not ordinarily immediately appealable when these appeals are companion to issues that are reviewable." *Brown v. County of Berkely*, 366 S.C. 354, 362 n.5, 622 S.E.2d 533, 538 n.5 (2005) (citing *Pitts v. Jackson Nat'l Life Ins. Co.*, 352 S.C. 319, 338, 574 S.E.2d 502, 512 (Ct.App. 2002)).

In this case, the trial court issued a singular order addressing three motions heard on January 8, 2024: Plaintiff's Motion for Contempt and Sanctions, Defendant's Motion to Stay Proceedings, and Defendant's Motion to Dismiss. (R. pp. 66-78). John acknowledges that the order, as it pertains to the denial of his Motion to Stay Proceedings and Motion to Dismiss, is interlocutory. However, the trial court's finding of contempt in in the same order is an immediately appealable issue. *Hooper v. Rockwell*, 334 S.C. 281, 513 S.E.2d 358 (1999) ("[A] contempt order also is a final order that is immediately appealable"). Because the trial court's order contains other appealable issues, this Court can properly consider and review the denial of the Motion to Stay Proceedings and Motion to Dismiss even though these issues are not ordinarily immediately appealable.

II. The trial court erred in denying John's Motion to Dismiss the Amended Complaint.

In her brief, Vicki asserts that Vicki's Amended Complaint alleges facts sufficient to state a cause of action for foreclosure against John, which John disputes. Vicki filed an Amended Complaint on October 13, 2023, seeking to foreclose on the property and sell it at public auction, using the proceeds to satisfy the judgment. (R. pp. 529-535). Star Flower Alley, the property which Vicki seeks to foreclose, is Mr. Vergeldt' s primary residence, as such, it is exempt from attachment, levy, and sale pursuant to S.C. Code Ann. § 15-41-30(A)(1)(a). John does not dispute the elements necessary to bring a cause of action for foreclosure, however, Vicki has failed to establish that a judgment lien is attached to John's primary residence. Moreover, at the time Vicki filed the Amended Complaint, there had been no order determining that the property was an asset that could be used to satisfy the judgment, and the property, which was John's primary residence, was exempt from attachment, levy, and sale pursuant to S.C. Code Ann. § 15-41-30(A)(1)(a). (R. p. 525).

III. The trial court erred in denying John's Motion to Stay Proceedings.

John filed the Motion to Stay Proceedings on October 25, 2023, seeking to stay the collections proceedings until a decision on the underlying appeal, Case No. 2021-000816, was rendered by this Court. (R. p. 540, ¶ 20). The timing of the Motion to Stay was necessary due to the events which occurred on the morning of the appraisal. Even though John substantially complied with the trial court's order and agreed to have his home appraised on October 24, 2023 at 9:00 am, when that appraisal fell through only due to Mr. Lowry's severe tardiness, Vicki indicated that she would be seeking sanctions against John for failing to complete the appraisal despite the fact that it was not his fault. (Id. at ¶ 17). Additionally, at the time John filed the Motion to Stay, oral argument on the underlying appeal was scheduled to occur in less than two weeks on November 8, 2023. (Id. at ¶ 4). Under the given circumstances, John's request to stay the

collections proceedings pending the outcome of the underlying appeal was reasonable and not beyond the purview of the trial court.[1] Furthermore, Vicki would not have been prejudiced by such a brief stay until this Court issued a final ruling on the underlying appeal.[2]

REPLY TO ISSUES THREE AND FOUR

IV. There is no evidence in the record demonstrating that John willfully violated the trial court's Order.

"A willful act is defined as one done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say with bad purpose either to disobey or disregard the law." *State v. Bevilacqua*, 316 S.C. 122, 129, 447 S.E.2d 213, 217 (Ct. App. 1994) (citing *Spartanburg County Dep't of Social Services v. Padgett*, 296 S.C. 79, 370 S.E.2d 872 (1988)). As thoroughly explained in John's Initial Brief, it was only due to Mr. Lowry's severe tardiness that the scheduled deposition did not proceed as planned. (Initial Brief of Appellant, pp. 14-15). Prior to the events that took place on the morning of the appraisal, John substantially complied with the trial court's order by agreeing to the appraiser suggested by Vicki and further agreeing to a time and date for the appraisal to take place. (R. p. 770, lines 3-7; R. pp. 867-868, ¶¶ 2-4). Mr. Lowry did not inform Vicki's counsel that he was stuck in traffic and would be late arriving to the property for the appraisal until forty (40) minutes after the appraisal was scheduled to begin.[3] (R. p. 873, ¶ 12).

[1] Again, John acknowledges that the filing of a notice of appeal does not automatically stay the execution for a money judgment, which is why he filed the motion to stay.

[2] This Court issued a final order denying John's Petition for Rehearing on April 11, 2024, only five (5) months after John filed the Motion to Stay.

[3] Mr. Lowry has failed to provide any explanation as to why he waited forty (40) minutes after he was supposed to arrive at John's property before contacting Vicki's counsel to advise of a delay.

Ultimately, Mr. Lowry did not arrive until 9:50 am, almost an hour after the scheduled time for the appraisal. (Id. at ¶ 13).

It is important to note that the trial court specifically found that John's failure to allow Mr. Lowry onto the property was a willful violation of the court's order. (R. p. 779, lines 2-4). In her brief, Vicki also faults John for denying Mr. Lowry access to his home for the appraisal (Respondent's Initial Brief, p. 24), however her blame and the trial court's blame is misplaced considering that the circumstances that occurred on the morning of the scheduled appraisal were out of John's control. Had Mr. Lowry only been five minutes late for the appraisal or if he had given Vicki's counsel advance notice of his purported traffic issues, there might be a fair argument that John willfully violated the court's order had he denied Mr. Lowry access to his home under those circumstances. However, that is not the case here. It is undisputed that Mr. Lowry arrived at John's property almost an hour after he was scheduled to arrive, at which time Mr. Lowry still expected to proceed with the appraisal. (R. p. 873, ¶ 12). However, due to having a doctors appointment at 10:30 am[4] that was approximately 20-25 minutes away, John could not accommodate Mr. Lowry and told him the appraisal would have to be rescheduled. (R. pp. 867-870). Cancelling or requesting to reschedule the appraisal due to a conflict that only arose due to Mr. Lowry's poorly communicated delay does not rise to the level of possessing the specific intent to fail to do something the law requires to be done. Under these circumstances, it was not unreasonable for John to deny Mr. Lowry access to his home, nor does it constitute a proper basis

[4] Vicki also appears to suggest that because John was outside walking his dogs when Mr. Lowry arrived at 9:50 am, that somehow discredits his claim that he needed to leave to make his doctors appointment at 10:30 am. (Respondent's Initial Brief, p.24). The more reasonable and likely interpretation is that John was taking his dogs out to relieve themselves prior to leaving the property for his doctors appointment.

for a finding of a willful violation of the trial court's order by a preponderance of the evidence and/or beyond a reasonable doubt.

The record before the trial court demonstrates that John attempted in good faith to comply with the with the trial court's order leading up to the date of the appraisal, and when that appraisal did not go forward, through no fault of his own, John was still willing to reschedule the appraisal in order to remain in compliance with the trial court's order. (R. pp. 867-870). Vicki argues that John having his appraisal conducted after the 45-day deadline set by the trial court is further evidence of a willful violation of the trial court's order. (Respondent's Initial Brief, pg. 25). John does not dispute that the appraisal he commissioned[5] was not completed within 45 days from the date of the trial court's order, however, Vicki's argument is inconsequential because the trial court's finding of willful violation was solely based on the fact that John denied Mr. Lowry access to his home. (R. p. 779, lines 2-4; R. p. 75).

V. The trial court applied the incorrect standard of proof in finding John to be in criminal contempt of court and there was not sufficient evidence to find that John willfully violated the trial court's order beyond a reasonable doubt.

An appellate court should reverse a decision regarding contempt "only if it is without evidentiary support or the trial judge has abused his discretion." *Durlach v. Durlach*, 359 S.C. 64, 70, 596 S.E.2d 908, 912 (2004) (quoting *Stone v. Reddix-Smalls*, 295 S.C. 514, 516, 369 S.E.2d 840 (1988)). "An abuse of discretion occurs when the ruling is based on an error of law or a factual

[5] Vicki also takes issue with the fact that John's appraisal was not disclosed until February 12, 2024, when John filed his Motion to Reconsider, however this was not done intentionally. John's counsel intended to disclose the appraisal during the hearing on January 8, 2024, but due to counsel suffering a medical emergency in route to the hearing which caused her to miss the hearing unintentionally (*see* R. p. 67, n.2), John's counsel disclosed the appraisal at the next available opportunity.

conclusion without evidentiary support." *Historic Charleston Holding, LLC v. Mallon*, 381 S.C. 417, 434, 673 S.E.2d 448, 457 (2009).

In finding that John willfully violated the trial court's order, the trial court assessed an unconditional fine against John in the amount of Five Hundred and 00/100 ($500.00) Dollars payable to the Charleston County Master of Equity, which amounts to a criminal sanction. *See Hicks v. Feiok*, 485 U.S. at 632, 108 S.Ct. at 1429, 99 L.Ed.2d at 731 (1988) ("If the sanction is a fine, it is punitive when it is paid to the court."). It is not disputed that the fine assessed against John is a criminal sanction, nor is it disputed that the proper standard of proof for a finding of criminal contempt requires evidence of a willful violation beyond a reasonable doubt. (Respondent's Initial Brief, pg. 26). However, the trial court clearly erred when it found John to be in criminal contempt by imposing a criminal sanction despite using the standard of proof required for civil contempt, clear and convincing evidence. Specifically, the trial court found that "Defendant willfully and intentionally violated the Order to Compel and the same has been shown by clear and convincing evidence…". (R. p. 75) (Emphasis added). This finding was clear error as the trial court was required to apply the standard of proof for criminal contempt before it could impose criminal sanctions against John. Furthermore, as discussed above, the record lacks sufficient evidence to support a finding of willful violation by either clear and convincing evidence or beyond a reasonable doubt.

REPLY TO ISSUE FIVE

As to Issue Five, John stands on the arguments set forth and fully briefed in the Initial Brief of Appellant. (Initial Brief of Appellant, pg. 17).

CONCLUSION

For the reasons set forth above, Appellant John Vergeldt respectfully seeks an order from this Honorable Court reversing the trial court's order on Plaintiff's Motion for Contempt and Sanctions, Defendant's Motion to Stay Proceedings and Defendant's Motion to Dismiss filed on February 2, 2024. Additionally, John seeks an order reversing the trial court's Form 4 Order issued on March 28, 2024.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

Respectfully submitted,

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