

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Circuit Court Case No.: 2012-CP-23-7156
South Carolina Court of Appeals Case No.: 2013-002599

70899

RECEIVED

JAN 09 2014

SC Court of Appeals
Appellant,

Toyota of Greenville, Inc.....
v.
David Carroll.....Respondent.

MOTION TO DISMISS APPEAL

Respondent files this motion pursuant to Rule 240, SCACR, and respectfully asks the Court to dismiss the appeal. The appeal is from an order granting the Appellant's motion to compel arbitration. Per the clear and unambiguous terms of South Carolina Code Section 15-48-200 (2005), the order is not immediately appealable, and therefore, the appeal should be dismissed.

PROCEDURAL BACKGROUND

This action was commenced by four plaintiffs in 2006. The original complaint has been amended a number of times since then and the parties have changed since the action was initiated. The gravamen of the complaint is that the Appellant charged car purchasers closing fees in violation of the South Carolina Regulation of Manufacturers, Distributors and Dealers Act, S.C. Code Ann. §56-15-10 *et seq.*, and that the car purchasers were entitled to a refund of

these illegal fees and other remedies as provided by statute. In 2012, Chief Justice Toal assigned to Circuit Court Judge Early this case and all related cases. By motion filed on September 13, 2011, the Appellant moved to dismiss the action and compel arbitration, pursuant to an arbitration clause contained in the Retail Installment Sales Contract, between the Respondent and the Appellant. Judge Early heard argument on the motion on July 8, 2013, and by order filed August 9, 2013, the Circuit Court granted the Appellant's motion. Respondent later filed a motion pursuant to Rule 59(e), SCRCF, asking the court to amend the August 9 Order to remove *dicta* that had no bearing on the substantive issue decided in the Order. The court granted the Rule 59(e) motion in an order filed on October 10, 2013. The October 10 Order did not change the result of the August 9 Order, but removed the *dicta* raised in the 59(e) motion. Appellant then filed its own Rule 59(e) motion essentially asking the judge to reinsert the *dicta*. In a Form 4 Order filed on October 30, 2013, the court denied the Appellant's Rule 59(e) motion, and this appeal followed.

THE ORDER IS NOT IMMEDIATELY APPEALABLE

The sole substantive issue decided in the Order from which Appellant's now appeal was whether to dismiss the action and compel arbitration pursuant to the Retail Installment Sales Contract. The court granted the Appellant precisely the relief for which it asked: an order compelling arbitration and dismissing the action.

South Carolina Code Section 15-48-200 provides for immediate appeal of certain orders deciding issues involving arbitration agreements. The section provides that

- (a) An appeal may be taken from:
 - (1) An order denying an application to compel arbitration made under § 15-48-20;
 - (2) An order granting an application to stay arbitration made under § 15-48-20(b);
 - (3) An order confirming or denying confirmation of an award;
 - (4) An order modifying or correcting an award;
 - (5) An order vacating an award without directing a rehearing; or

- (6) A judgment or decree entered pursuant to the provisions of this chapter.
- (b) The appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action.

S.C. Code Ann. § 15-48-200. The Supreme Court has strictly interpreted the statute.

By application of the rule of statutory construction “expressio unius est exclusio alterius” (the mention of one is the exclusion of another), all other orders related to arbitration are not immediately appealable. Pennsylvania Nat. Mut. Cas. Ins. Co. v. Parker, 282 S.C. 546, 320 S.E.2d 458 (Ct.App.1984). Therefore, the order in this case, which stays this action and compels arbitration, is not immediately appealable under § 15-48-200.

Heffner v. Destiny, Inc., 321 S.C. 536, 537-38, 471 S.E.2d 135, 136 (1995). The Court cited Heffner and reaffirmed its holding in Toler’s Cove Homeowners Ass’n, Inc. v. Trident Const. Co., Inc., 355 S.C. 605, 586 S.E.2d 581 (2003). “The court’s order compelling arbitration is not immediately appealable under South Carolina law because Heffner held all orders relating to arbitration not mentioned in S.C. Code Ann. § 15-48-200(a) (Supp.2002) are not immediately appealable.” Toler’s Cove Homeowners Ass’n, Inc., at 610, 586 S.E.2d at 584. “Section 15-48-200 does not expressly permit an appeal from an order granting an application to compel arbitration or from an order to stay claims pending arbitration. Therefore, the order compelling arbitration of the claims . . . is not immediately appealable.” Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 558, 606 S.E.2d 752, 759 (2004).

The Court of Appeals has on one occasion permitted a party opposing a motion to compel arbitration to immediately appeal an adverse ruling. In Widener v. Fort Mill Ford, this Court held that an order dismissing the plaintiff’s complaint and compelling arbitration could be immediately appealed by the losing party. 381 S.C. 522, 674 S.E.2d 172 (Ct. App. 2009). The Widener court relied on S.C. Code Ann. § 14-3-330¹ to conclude the order was immediately

¹ Section 14-3-330 provides:

appealable. The court reasoned that because some of the plaintiff's claims were subject to arbitration and some were not, the trial court's order dismissing the case without prejudice was immediately appealable because it had the effect of finally determining issues without affording the plaintiff the opportunity to later appeal. The court "note[d] a potential for injustice. If a plaintiff's court action be dismissed to enforce an arbitration agreement, but, through no fault of the plaintiff's, the arbitration be not concluded or some of the plaintiff's claims be not arbitrated, a statute of limitations could bar a refiling of the unarbitrated claims in court." Id. at 525, 674 S.E.2d at 174. "Here . . . there is a potential the statute of limitations could bar refiling of any unarbitrated claims in court." Id. The court remanded with instructions to stay the case, rather than dismiss it without prejudice, pending arbitration.

The potential for such a harsh result does not exist in this case and the distinctions between Widener and this case are obvious. The appellant in Widener was the party that lost the motion to compel arbitration. Here, the Appellant won its motion to compel – in fact, Appellant received the precise relief from the trial court that it now seeks to challenge on appeal. "As a

The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

(1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; *provided*, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;

(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;

(3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and

(4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

general rule, the right of appeal is accorded only to an aggrieved party.” Courie v. Courie, 288 S.C. 163, 167, 341 S.E.2d 646, 648 (Ct. App. 1986) (citing Wilson v. Southern Ry., Carolina Division, 123 S.C. 399, 115 S.E. 764 (1923)). Appellant is not an aggrieved party: Appellant sought and received an order compelling arbitration.

Further, unlike in Widener, the Respondent’s complaint only raises issues arising out of the Retail Installment Sales Contract which contained the arbitration agreement; Respondent raises no claims that do not arise out of the contract. Therefore, Respondent has no separate claim that might later be prejudiced by the Order compelling arbitration, and the reasoning of Widener is not implicated by the facts giving rise to this action.

Furthermore, the South Carolina Supreme Court has expressly held that Section 15-48-200, the specific statute dealing with appeals from arbitration orders, trumps the more general code section 14-3-330. See Heffner, at 536, 471 S.E.2d at 136 (“Appellants’ assertion that S.C. Code Ann. § 14-3-330 should be applied to determine the appealability of this order is without merit. To apply the general appealability provisions of § 14-3-330 would conflict with the more specific provisions of § 15-48-200 regarding the appealability of orders relating to arbitration.”).

CONCLUSION

The Order Appellant now seeks to appeal is not described in Section 15-48-200, and it is not subject to immediate appeal. All of the cases on point support this conclusion. Further, Appellant was the prevailing party below and cannot appeal an Order in its favor. Because Appellant was the prevailing party and because the trial court’s Order granting Appellant’s motion to compel arbitration is not specifically mentioned in § 15-48-200, the appeal should be dismissed.

January 9, 2014.

Richard A. Harpootlian
RICHARD A. HARPOOTLIAN, PA
1410 Laurel Street
Columbia, South Carolina 29201
803-252-4848
803-252-4810

Terry E. Richardson, Jr.
Brady R. Thomas
James David Butler
RICHARDSON, PATRICK, WESTBROOK
& BRICKMAN, LLC
Post Office Box 1368
Barnwell, South Carolina 29812

A. Camden Lewis
LEWIS BABCOCK & GRIFFIN, LLP
Post Office Box 11208
Columbia, South Carolina 29221

Gedney M. Howe, III
GEDNEY M. HOWE, III, PA
Post Office Box 1034
Charleston, South Carolina 29402

Michael E. Spears
MICHAEL E. SPEARS, PA
Post Office Box 5806
Spartanburg, South Carolina 29304

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Circuit Court Case No.: 2012-CP-23-7156

Court of Appeals Case No.: cTracking NCpi

RECEIVED

JAN 09 2014

SC Court of Appeals

Toyota of Greenville, Inc.....Appellant,

v.

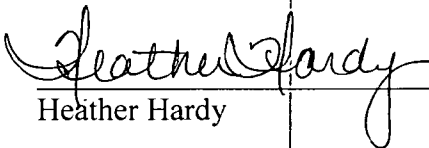
David Carroll.....Respondent.

CERTIFICATE OF SERVICE

I, Heather Hardy, Paralegal to RICHARD A. HARPOOTLIAN, P.A., attorney for the Respondent David Carroll, do hereby certify that I have served the below listed document, Via U.S. Mail and Electronic Mail, on January 9, 2014, to the individuals listed below:

Document: 1) *Motion to Dismiss Appeal.*

Served: Bradford N. Martin
Laura W. H. Teer
Brook Bristow
BRADFORD NEAL MARTIN & ASSOCIATES, PA
Post Office Box 10410
Greenville, South Carolina 29603


Heather Hardy

Richard A. Harpootlian, P.A.

ATTORNEYS AT LAW
1410 LAUREL STREET
COLUMBIA, SOUTH CAROLINA 29202

RICHARD A. HARPOOTLIAN
rah@harpootlianlaw.com

GRAHAM L. NEWMAN
gln@harpootlianlaw.com

M. DAVID SCOTT
mds@harpootlianlaw.com

CHRISTOPHER P. KENNEY
cpk@harpootlianlaw.com

JAMIE L. HARPOOTLIAN*
OF COUNSEL
*admitted in Louisiana

The Honorable Jenny Abbot Kitchings
Clerk of Court, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

In re: David Carroll v. Toyota of Greenville, Inc
SC Court of Appeals Case No.: 2013-002599

Dear Ms. Kitchings:

With regards to the above-referenced case, enclosed please find the original and eight (8) copies of Respondent's Motion to Dismiss the Appeal. If you would please file all documents and return the copies my courier, I would be most appreciative.

By copy of this correspondence and the attached Certificate of Service, I am serving opposing counsel with the same.

With warm personal regards, I am

Sincerely,



Richard A. Harpootlian

/hnh
enclosure

cc: Bradford N. Martin, Esquire
Laura W. H. Teer, Esquire
Brook Bristow, Esquire

MAILING ADDRESS
POST OFFICE BOX 1090
COLUMBIA, SOUTH CAROLINA, 29202

TELEPHONE (803) 252-4848
FACSIMILE (803) 252-4810
TOLL FREE (866) 706-3997
WWW.HARPOOTLIANLAW.COM

9
January 8, 2014
VIA HAND DELIVERY