

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Judge

Appellate Case No. 2014-001384
Common Pleas Case No. 2012-CP-32-2816

RECEIVED

JUL 18 2014

SC Court of Appeals

FV-I, Inc. in trust for Morgan Stanley Mortgage Capital Holdings LLC,...Respondent,

v.

Bryon J. Dolan; Lisa S. Dolan; First Citizens Bank and Trust Company, Inc.; Wells Fargo Bank, N.A.; Branch Banking and Trust Company, Defendants,

Of Bryon J. Dolan and Lisa S. Dolan are the.....Appellants.

APPELLANTS' RETURN TO MOTION TO DISMISS APPEAL

Appellants hereby submit this return to the Respondent's motion to dismiss this appeal. Because this is a proper appeal of an immediately appealable order, the Respondent's motion must be denied.

The Respondent takes the position that because this case was bifurcated and the trial on some claims has not already occurred, the order denying the Appellants' motion for a new trial as to the claims that have been tried to a directed verdict and a jury verdict in this case is not appealable. The Respondent appears to take the position that the directed verdict and jury verdict were not final judgments in this

case, seeming to argue that only after the equitable claims have been tried would any appeal lie in this case. The Respondent's position is contrary to South Carolina law.

It has been well settled since at least 1976 that "[a]n order that grants or refuses a new trial affects a substantial right and is immediately appealable" pursuant to S.C. Code Ann. § 14-3-330(2)(b). Jean Hoefer Toal, Shahin Vafai & Robert A. Muckenfuss, Appellate Practice in South Carolina 97 (2d ed. 2002) (citing S.C. Code Ann. § 14-3-330(2)(b) and S.C. State Hwy. Dept. v. Clarkson, 267 S.C. 121, 126-27, 226 S.E.2d 696, 697 (1976)). Clarkson clarified previous jurisprudence about the appealability of an order granting or refusing a new trial and held that such an order is appealable and the trial court's basis for rendering such an order goes to whether its appeal will be successful, not to whether it may be appealed at all. 267 S.C. at 126-27. Indeed, S.C. Code Ann. § 14-3-330(2)(b) specifically lists an order that "grants or refuses a new trial" as appealable. The order denying the Appellants' motion for a new trial that is subject of this appeal is immediately appealable because it is an order that refuses a new trial. S.C. Code Ann. § 14-3-330(2)(b).

The directed verdict at the jury trial as to one of the Appellants' causes of action tried in that trial and the jury verdict as to the other cause of action tried in that trial are final judgments, as they finally determined the rights of the parties with respect to those claims. Rule 54(a), SCRCP. Accordingly, the denial of the Appellant's motion for a new trial under Rule 59, SCRCP, with respect to them is also immediately appealable under S.C. Code Ann. § 14-3-330(1). "An order 'involves the merits,' as that term is used in Section 14-3-330(1) and is immediately appealable when it finally determines some substantial matter forming the whole or part of some cause of action or defense." Ex parte Capital U-Drive-It, Inc., 369 S.C.

1, 7, 630 S.E.2d 464, 467 (2006). The directed verdict and jury verdict here finally determined the causes of action tried in the jury trial.

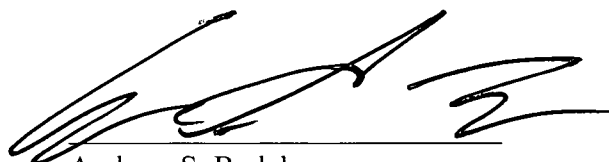
The Respondent's argument that Appellants must wait until all the causes of action have been finally determined in order to appeal has already been rejected by our Supreme Court, which has held that a judgment that ends a claim but leaves other claims pending is immediately appealable. Link v. Sch. Dist. of Pickens County, 302 S.C. 1, 4 fn. 2, 393 S.E.2d 176, 178 fn. 2 (1990) (overruling Plaza Dev. Services v. Joe Harden Builder, Inc., 296 S.C. 115, 370 S.E.2d 893 (Ct. App. 1988), "to the extent that it holds that one may not appeal the granting of a 12(b)(6) motion under § 14-3-330 if the ruling affects some but not all of a party's causes of action"); Lebovitz v. Mudd, 289 S.C. 476, 479, 347 S.E.2d 94, 96 (1986) ("order granting a Rule 12(b) motion as to one of multiple claims is directly appealable under § 14-3-330(2) because it affects a substantial right and strikes out part of a pleading"; rejecting notion that circuit court had to make Rule 54(b) certification to make an order appealable where it is already appealable under S.C. Code Ann. § 14-3-330). In other words, South Carolina law in this regard is the opposite of what the Respondent argues. Id.

Simply because a case is bifurcated into a jury trial on at-law claims and a bench trial on equitable claims does not mean that the result of the jury trial is somehow not a final judgment. Rule 54(a), SCRPC. Indeed, the verdict in the jury trial is the final judgment as to the at-law claims subject of that trial; otherwise, it would not be true that "the jury's determination of common factual issues shall be *binding* upon the court" in the bench trial. Wachovia Bank, N.A. v. Blackburn, Op. No. 27359 (S.C. Sup. Ct. filed Feb. 26, 2014) (Shearouse Adv. Sh. No. 11 at 53, 60)

(emphasis added). The fact that the equitable claims remain pending does not affect the finality of the at-law claims' verdict, nor does it affect appealability with regard to post-trial motions directed at that verdict. S.C. Code Ann. § 14-3-330(1)&(2)(b); Rule 54(a), SCRPC; Capital U-Drive-It, 369 S.C. at 7; Link, 302 S.C. at 4 fn. 2; Lebovitz, 289 S.C. at 479. If the law is different in this regard in North Carolina, as suggested by the Respondent, that is of no moment to the disposition of this motion under South Carolina law in this South Carolina court.

The Appellant's appeal is proper. The Respondent's motion should be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Andrew S. Radeker', written over a horizontal line.

Andrew S. Radeker
Harrison & Radeker, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Appellants

July 18, 2014

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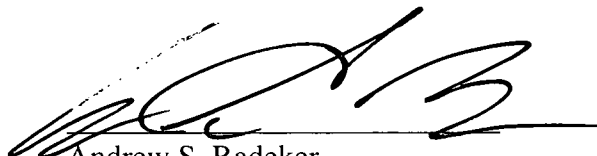
Of Bryon J. Dolan and Lisa S. Dolan are the.....Appellants.

PROOF OF SERVICE

I certify that I served the foregoing return to motion to dismiss by depositing a
copy of it on the date shown below in the United States Mail, postage prepaid,
addressed as follows:

Charles S. Gwynne, Jr., Esq.
Jason D. Wyman, Esq.
Rogers Townsend & Thomas, PC
P.O. Box 100200
Columbia, SC 29202

July 18, 2014



Andrew S. Radeker
Harrison & Radeker, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Appellants

LAW OFFICES
HARRISON & RADEKER, P.A.
923 CALHOUN STREET
COLUMBIA, SOUTH CAROLINA 29201

James C. Harrison, Jr.*
Andrew S. Radeker
Taylor M. Smith IV

P.O. Box 50143
Columbia, SC 29250

(803) 779-2211
(803) 779-6700 (FAX)

* Mediator/Arbitrator

July 18, 2014

VIA HAND DELIVERY

The Hon. Jenny Abbott Kitchings
Clerk of Court, Court of Appeals of South Carolina
Edgar Brown Building
1205 Pendleton Street
Columbia, South Carolina 29201

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SC Court of Appeals

Re: FV-I, Inc., etc. v. Bryon J. Dolan, et al.
Common Pleas Case No.: 2012-CP-32-2816
Appellate Case No.: 2014-0001384

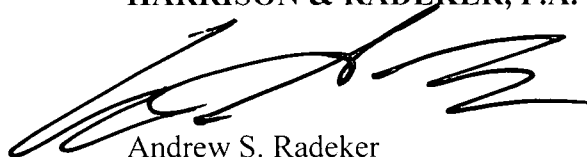
Dear Ms. Kitchings:

Enclosed herewith for filing are an original and seven copies of the appellants' return to the respondent's motion to dismiss the appeal in the above-referenced case.

Kindly file these documents and return a file-stamped copy thereof to the bearer of this letter. Thank you for your attention to this matter. Of course, if you or your staff have any questions or concerns, please do not hesitate to contact me.

With kind regards, I am,

Very truly yours,
HARRISON & RADEKER, P.A.



Andrew S. Radeker

ASR/

Enclosure

cc: Charles S. Gwynne, Jr., Esq.
Jason D. Wyman, Esq.