

THE SOUTH CAROLINA COURT OF APPEALS

Appellate Case No. 2012-213351

The Honorable Roger M. Young, Sr.
Charleston County

Trial Court Case No. 2010-CP-10-09672

RECEIVED
SEP 29 2014
SC Court of Appeals

Hayden Jeffords, individually, and on behalf of all others similarly situated, Titus Gudel, Harold S. McEwan, D. Everett Walker, Paul Kane, Jeanne Debosh, Margarita Staudt, Leslie Anne O'Neal, Trivette C. Hatcher, William Scanlon, Delia Scanlon, Christy C. Parish, Joseph LaDue, Deborah LaDue, Pamela Snyder, Steven Goldberg, Brent McClaine, Brian Rasmussen, McKenzie Hutaff, Brian Kavanagh, Lynn Harris, and Kenneth A. Brown, Plaintiffs

Of whom Titus Gudel, Harold S. McEwan, William Scanlon, Delia Scanlon, Steven Goldberg, Brent McClaine, McKenzie Hutaff, Lynn Harris, and Kenneth A. Brown are the Secondary Appellants, and

Of whom Jonn Zohlen, Mary Zohlen, Leslie Anne O'Neal, and Trivette C. Hatcher are the Respondents,

v.

East Bridge Town Lofts, LLC, a/k/a East Bridge, LLC< a/k/a East Ridge Homes, LLC, a/k/a East Bridge Lofts, LLC; Central 3, LLC; Creekstone East Bridge, LLC; Creekstone SC I, LLC: Alexandra Road Investors, LLC; Creekstone Mangement, LLC; Creekstone Management, Inc.; Donald K. Henry; Everett Jackson; Steve Keller; Edward Michael Washburn; Kevin Ball; East Coast Carpentry a/k/a ECC Contracting, LLC: Fuller Drywall & Paint, Ltd.; Delta Mechanical, Inc. a/k/a Carolina Delta Mechanical; Wasson Electric Heating & Air; Bay Club Homes, LLC; Terracon Consultants, Inc.; and Salvador Rubalcaba d/b/a Rubalcala Construction, Defendants

Of whom East Bridge Town Lofts, LLC, a/k/a East Bridge, LLC< a/k/a East Ridge Homes, LLC, a/k/a East Bridge Lofts, LLC; Central 3, LLC; Creekstone East Bridge, LLC; Creekstone SC I, LLC: Alexandra Road Investors, LLC; Creekstone Mangement, LLC; Creekstone Management, Inc.; Donald K. Henry; Everett Jackson; Steve Keller; Edward Michael Washburn and Kevin Ball are the Appellants.

v.

East Bridge Town Lofts, LLC, a/k/a East Bridge, LLC< a/k/a East Ridge Homes, LLC, a/k/a East Bridge Lofts, LLC; Central 3, LLC; Creekstone East Bridge, LLC; Creekstone SC I, LLC; Alexandra Road Investors, LLC; Creekstone Mangement, LLC; Creekstone Management, Inc.; Donald K. Henry; Everett Jackson; Steve Keller; Edward Michael Washburn; Kevin Ball; and Bay Club Homes, LLC, Third Party Plaintiffs

v.

Robert Wasson and Barbara Wasson, individually and d/b/a Wasson Electric Heating & Air; and Charleston Chimney Services, Inc., Third Party Defendants.

RETURN OF APPELLANTS STEVEN GOLDBERG, WILLIAM SCANLON, DELIA SCANLON, AND BRENT MCCLAIN TO NON-PARTY EAST BRIDGE LOFTS PROPERTY OWNERS ASSOCIATION, INC.'S MOTION TO INTERVENE AND MEMORANDUM IN SUPPORT

INTRODUCTION

Appellants Goldberg, Scanlons, and McClain ask this Court to enforce a Settlement Agreement. Respectfully, this Court should deny the Motion to Intervene as it is improper and not recognized at the Appellate level. Even if the Motion to Intervene were proper, the POA is not a party to the appeal, not a party to the Settlement Agreement, and has no legally cognizable interest.

STATEMENT OF THE CASE

This case was first brought before this Court in November of 2012 as an appeal of an Order dismissing Appellants' and others' claims. The East Bridge Town Lofts Property Owners Association, Inc. (hereinafter "POA") was among the plaintiffs in a similar suit pending before the same trial court that issued the Order dismissing the

action underlying this appeal. The appeal was fully briefed, and the parties to the appeal then mediated the case and ultimately settled the appeal on or about October 1, 2013. The Parties alerted this Court of the settlement by motion on October 4, 2013, and this Court entered an Order dismissing the appeal.

On April 2, 2014, upon motion of one appellant, this Court recalled its remittitur and reinstated the appeal. On August 21, 2014, Appellant Steven Goldberg filed a Motion to Enforce the Settlement Agreement that the parties had entered into the previous October. On or about September 12, 2014, the POA filed the present Motion to Intervene and request to file a Return to Appellant Goldberg's Motion to Enforce Settlement Agreement. Subsequently, on September 17, 2014, Counsel for Appellant Goldberg informed the Court of the intention of Appellants William Scanlon, Delia Scanlon, and Brent McClaine to join in Appellant Goldberg's Motion to Enforce the Settlement Agreement.

ARGUMENT

The POA's Motion to Intervene should be denied because intervention by a non-party to an appeal is not proper and, if it were, the POA is not a proper party to intervene in this matter.

I. The POA's Motion Should be Denied Because A Non-Party to an Appeal Cannot Intervene in a Matter Before the Court of Appeals.

The South Carolina Appellate Court Rules contain no provision for intervention by a non-party. The authorities cited in the POA's Memorandum deal exclusively with intervention at the trial court level pursuant to Civil Rule 24, which the POA did not do in this case. The POA cites no rule, case, or other authority in support of its attempt to

intervene at the appellate level, either permissively or as a matter of right. Intervention is simply improper here.

In Ex Parte Condon, 354 S.C. 634, 583 S.E.2d 430 (2003), the Supreme Court rebuffed an analogous attempt by the Attorney General to appeal an attorney's fee that was part of a court-approved settlement agreement because the Attorney General was not a party to the case and had failed to properly move to intervene at the trial level. In that case, the Attorney General had filed objections to the trial court's preliminary approval of attorney's fees paid out of a class-action fund, although the only defendant parties were the State of South Carolina and the Department of Revenue. The Attorney General had failed to file a Motion to Intervene pursuant to Rule 24. Id. at 637, 583 S.E.2d at 431. After the trial court made a final award of fees, the Attorney General filed a notice of appeal, and the Supreme Court certified the case for review under Rule 204, taking up the question whether the Attorney General's appeal was "properly before this Court." Id. at 638, 583 S.E.2d at 432. "[T]he Attorney General was not a party to the action," ... "but argue[d] that his duty to protect the public interest enable[d] him to bring th[e] appeal." Id. at 640, 583 S.E.2d at 433. The Court held that even the "broad statutory and common law authority" of the Attorney General to appear in actions in which the state has an interest did not "somehow uniquely exempt him from acting in accordance with the Rules of Civil Procedure." Id. at 641-42, 583 S.E.2d at 434. Therefore the Court dismissed the appeal based on the Attorney General's failure to move for intervention at the trial level, and further noted "this holding serves the public interest in the finality of settlement agreements." Id. at 642, 583 S.E.2d at 434 (emphasis added).

Similarly, the POA failed to intervene at the trial level in this case, opting instead to bring a separate action, and it cannot attempt to appear in this matter now except as permitted by the Appellate Court Rules. This is particularly true according to Condon where, as here, the non-party is attempting to undermine an executed settlement agreement. Just as the Attorney General in Condon could have moved to intervene at the trial level but instead chose a path outside the rules of procedure, the POA could have moved to intervene in the case underlying this appeal but instead chose to bring a separate action on its own and now seeks a path to affect this case that is outside the rules of procedure. The POA's motion should therefore be denied.

II. The POA's Motion Should be Denied Because the POA Has no Interest in This Matter.

Even if intervention were proper at the appellate level, the POA cannot satisfy the requirements to intervene. The POA is a stranger to the contract at issue in this case and has no interest at stake in the matter before this Court. What is sought in the present action is sought explicitly and specifically from parties other than the POA.

Where intervention is provided at the trial court level, the POA correctly cites Berkeley Elec. Co-op. Inc., v. Town of Mt. Pleasant, 302 S.C. 186, 394 S.E.2d 712 (1990), for the burden in seeking intervention as a matter of right under Civil Rule 24(a) and the elements it would be required to show if that rule were applicable:

- (1) timely application;
- (2) an interest in the subject of the action;
- (3) an inability to protect that interest without intervention; and
- (4) that its interest is inadequately represented by other parties.

(POA Motion to Intervene at p. 4). However, three of those four elements are premised on the existence of an interest in favor of the party moving to intervene, which the POA has not shown, because it cannot show it, because it does not have it. There can be no “inability to protect” an interest where there is no interest. An interest cannot be “inadequately represented” if it does not exist.

The Settlement Agreement at issue was the final resolution of an appeal before this Court that the POA was not a party to. It was an appeal of an Order dismissing claims in a Circuit Court case that the POA was not a party to. The agreement itself is a contract that the POA is not a party to. The POA makes the bare assertion that it “is the real party in interest” (Memorandum in Support of Motion to Intervene at p. 3) but does not substantiate that assertion in any way. It offers no basis in fact or in law for this Court to conclude that it has an interest in its former counsel's contractual obligation under an agreement the POA was not and is not a party to. Appellants' Motion to Enforce does not seek anything from the POA. It specifically seeks “10% of net monetary fees” paid to the POA's former counsel. (Motion to Enforce at pp. 3 & 6). Counsel has been paid, and Appellants seek 10% of that net payment. They do not seek any portion of the POA's net recovery. It seeks only payment from the parties to the appeal and their counsel, not from the POA.

The sum total of the POA's reasoning in support of its motion is that it is “the owner of an unappealed judgment ... and construction counsel having disclaimed any interest in the funds, there is no other party to protect the interest of the POA.” (POA Motion to Intervene at p. 5). However, the pending Motion to Enforce Settlement Agreement does not seek any portion of the unappealed judgment. It seeks a

contractual debt from fees recovered by counsel and promised in the agreement that settled this appeal, not the other Circuit Court case brought by other parties including the POA. The POA has not demonstrated that it has any interest in the net fees recovered by its former counsel, and logically cannot lest they would not be “recovered” by counsel. If the POA’s counsel has disclaimed any interest in a certain portion of its fees recovered, then the only parties with any interest in those funds are Appellants.

Appellants’ interest is clear on the face of the Settlement Agreement. The POA’s purported interest is nowhere to be found there or in any other document. In fact, the POA’s motion and memorandum articulate no whiff of any basis for an interest on its behalf, only the bare assertion that there is one. The fact that the source of the funds agreed upon in the Settlement Agreement was a fee from a separate case does not grant a party to that separate case any interest in those fees after they have been paid to counsel.

The POA has failed to demonstrate any basis in fact or law for the required finding that it has an interest in need of protecting. It was not a party to the underlying action, it was not a party to the appeal, and it is not a party to the Settlement Agreement at issue before this Court. It has demonstrated only that its former counsel have disclaimed their interest in certain funds held in their former counsel’s trust account. Even if those funds belong to the POA, Appellants are not seeking the POA’s money. Appellants seek only the contractual percentage of what the POA has already paid to its attorneys as legal fees, in which the POA therefore necessarily has no remaining interest, regardless of whether that percentage is held in trust or anywhere else.

Therefore the Motion to Intervene should be denied along with the request to file a Return to Appellants' pending motion.

CONCLUSION

Respectfully, the Motion to Intervene should be denied as it is improper as a matter of procedure for the POA to intervene at the Appellate level. Furthermore, the POA has no recognizable interest the settlement agreement or the appeal.



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September ²⁹~~25~~, 2014

THE SOUTH CAROLINA COURT OF APPEALS

Appellate Case No. 2012-213351

The Honorable Roger M. Young, Sr.
Charleston County

Trial Court Case No. 2010-CP-10-09672

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Of whom Titus Gudel, Harold S. McEwan, William Scanlon, Delia Scanlon, Steven Goldberg, Brent McClaine, McKenzie Hutaff, Lynn Harris, and Kenneth A. Brown are the Secondary Appellants, and

Of whom Jonn Zohlen, Mary Zohlen, Leslie Anne O'Neal, and Trivette C. Hatcher are the Respondents,

v.

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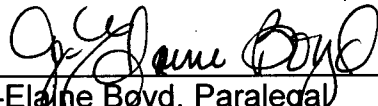
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v.

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September 29, 2014

Via Hand Delivery

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
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Columbia, SC 29201

173682

Re: Hayden Jeffords, et al. v. East Bridge Town Lofts, et al.
Circuit Court Case No: 2010-CP-10-9672
Appellate Case No: 2012-213351

Dear Ms. Kitchings:

We represent Appellants, Steven Goldberg, William Scanlon, Delia Scanlon, and Brent McClaine in reference to the Motion to Enforce Settlement Agreement filed on August 21, 2014.

Please accept this correspondence as Appellants request for a five (5) day extension of time to file and serve Appellants' Reply to the Return to Motion to Enforce Settlement filed by East Bridge Lofts Property Owners Association, Inc. a/k/a East Bridge Town Lofts Property Association, Inc. on September 22, 2012. Appellant's counsel has several significant deadlines which impede counsel's ability to properly prepare his Reply.

Appellant requests the deadline be extended from September 29, 2014 to October 2, 2014. I have enclosed my firm's check in the amount of \$25.00 representing the filing fee for this extension request.

By copy of this letter, I am notifying counsel of this extension request.

Best regards,


Peter D. Protopapas

PDP/jb
cc: See page two

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September ²⁹~~28~~, 2014

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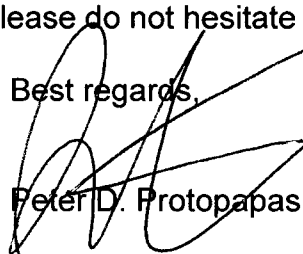
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Circuit Court Case No: 2010-CP-10-9672
Appellate Case No: 2012-213351

Dear Ms. Kitchings:

Enclosed please find the original and seven copies of **RETURN OF APPELLANTS STEVEN GOLDBERG, WILLIAM SCANLON, DELIA SCANLON, AND BRENT MCCLAIN TO NON-PARTY EAST BRIDGE LOFTSPROPERTY OWNERS ASSOCIATION, INC.'S MOTION TO INTERVENE AND MEMORANDUM IN SUPPORT** and the original and two copies of the Proof of Service.

I would appreciate your returning a clocked copy of each to my courier. If you have any questions, comments, or concerns, please do not hesitate to contact me.

Best regards,


Peter D. Protopapas

PDP/jb
encls.

cc: Justin Lucey, Esq.
Joshua Evans, Esq.
Edward D. Buckley, Jr., Esq.
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