

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEE COUNTY

W. Jeffery Young, Presiding Judge, Third Judicial Circuit

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DEC 11 2014

Appellate Case No.: 2014-002451

SC Court of Appeals

Ernestine N. Palmer, as Trustee of the Article IV Trust created under the Will of Mary Denman Newman, deceased, Ronald O. Palmer, Ernestine N. Palmer, as Trustee of the Article IV Trust created under the Will of James E. Newman, deceased,.....Respondents,

v.

Hatcham Grove, Inc., and David H. Lucas,.....Appellants.

MEMORANDUM OF LAW ON APPEALABILITY OF ORDER

Appellants, Hatcham Grove, Inc. and David H. Lucas, by and through their undersigned counsel, appeal the Order Granting Plaintiffs’ Motion for Summary Judgment on Defendants’ counterclaim for violation of the attorney preference provisions of the South Carolina Consumer Protection Code at S.C. Code § 37-5-102, *et seq.* The Order granting this motion also decided two other motions heard in this matter on September 12, 2014 before the Honorable W. Jeffery Young. These motions were (1) Plaintiffs’ Motion for Additional Time to Respond to Defendants’ Requests for Admission, or in the Alternative, Motion to Withdraw or Amend Under Rule 36(b); and (2) Defendants’ Motion for Summary Judgment. Appellants seek only to appeal that portion of the Order granting summary judgment as to their claim for violation of the

attorney preference statute, and not the remainder of the Order. Because this was a final order with respect to Appellants' claim for violation of S.C. Code 37-5-102, *et seq.*, the issue is directly appealable.

ARGUMENT

Appeal may be taken, as provided by law, from any final judgment, appealable order or decision. Rule 201, SCACR. As a general rule, only final judgments are appealable. Culbertson v. Clemens, 322 S.C. 20, 23, 471 S.E.2d 163, 164 (1996); Bolding v. Bolding, 283 S.C. 501, 323 S.E.2d 535 (Ct. App. 1984). "Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final." Ex parte Wilson, 367 S.C. 7, 625 S.E.2d 205 (2005). The right of appeal arises from and is controlled by statutory law. North Carolina Federal Sav. and Loan Ass'n v. Twin States Dev. Corp., 289 S.C. 480, 347 S.E.2d 97 (1986). Section 14-3-330 controls the right of appeal. Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006). 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.

S.C. Code Ann. § 14-3-330. “An appellate court has jurisdiction to review an order affecting a substantial right when the order has the effect of discontinuing the action or preventing an appealable judgment.” (citing S.C. Code Ann. § 14-3-330(2)(a) (Supp.1997). An order “involves the merits” when it finally determines a substantial matter forming the whole or a part of some cause of action or defense, and thus, if it would “*strike out an action* or defense.” Mid-State Distribs., Inc. v. Century Importers, Inc., 310 S.C. 330, 334-35, 426 S.E.2d 777, 780 (1993) (emphasis added).

The Supreme Court held that S.C. Code Ann. §§ 14-3-330(1) & (2) are not mutually exclusive and that both may be used in determining whether an order is immediately appealable. Link v. School District of Pickens County, 302 S.C. 1, 6, 393 S.E.2d 176, 179 (1990). “While we agree that the order granting summary judgment may be appealable under § 14-3-330(2)(c) because it has the effect of striking out a pleading, the order is also appealable under § 14-3-330(1) as ‘involving merits.’” Id. Furthermore, the Court later said explicitly, that [d]ismissal of an action pursuant to Rule 12(b)(6) is appealable.” Williams v. Condon, 347 S.C. 227, 233, 553 S.E.2d 496, 500 (Ct. App. 2001) citing to S.C. Code Ann. §§ 14-3-330(1) & (2)(c) (Supp. 2000). Additionally, and directly at issue in the case at hand, “an 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.” Lebovitz v. Mudd, 289 S.C. 476, 479, 347 S.E.2d 94, 96 (1986).

Respondents moved for summary judgment on Appellants' cause of action for violation of S.C. Code 37-5-102, *et seq.* on April 22, 2014, in what was captioned as a "Motion for Partial Summary Judgment." It appears that because Appellants have raised a number of causes of action and defenses in response to Respondents' foreclosure complaint, Respondents styled the motion as one for partial summary judgment because it only sought adjudication of one of Appellants' counterclaims. Concomitantly, when the trial court issued its ruling granting summary judgment in favor of Respondents on Appellants' cause of action for violation of S.C. Code 37-5-102, *et seq.*, it had the effect of determining that claim on the merits and with finality. The Order left no further act to be done by the trial court because the Order effectively strikes out part of Appellants' Answer and Counterclaim and affects the Appellants' substantial right to pursue this claim. For this reason, the Order entered by the trial court on October 15, 2014, is directly appealable with respect to Appellants' claim for violation of S.C. Code 37-5-102, *et seq.*

CONCLUSION


For the foregoing reasons, Appellants request consideration of their appeal of the Order granting summary judgment on their cause of action for violation of S.C. Code 37-5-102, *et seq.*

(SIGNATURE PAGE FOLLOWS)

Ernestine N. Palmer, as Trustee, etc.
v. Hatcham Grove, Inc., et al.
Case No. 2013-CP-31-00130
NOTICE OF APPEAL
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Respectfully submitted,

December 8, 2014


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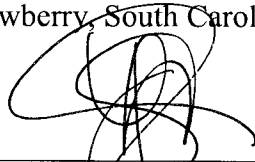
Ernestine N. Palmer, as Trustee of the Article IV Trust created under the Will of Mary Denman Newman, deceased, Ronald O. Palmer, Ernestine N. Palmer, as Trustee of the Article IV Trust created under the Will of James E. Newman, deceased,.....Respondents,

v.

Hatcham Grove, Inc., and David H. Lucas,.....Appellants.

PROOF OF SERVICE

I certify that on the 8th day of December 2014, I served the *Memorandum of Law on Appealability of Order* on Kyle B. Parker, Esq. of Pope & Hudgens, P.A., attorney of record for Respondents, Ernestine N. Palmer and Ronald O. Palmer, by depositing a copy in the U.S. Mail, postage prepaid, to his offices at Post Office Box 190, Newberry, South Carolina 29108.



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REPLY TO:
CHARLESTON LITIGATION

December 8, 2014

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

RE: *Ernestine N. Palmer, as Trustee of the Article IV Trust created under the Will of Mary Denman Newman, deceased, Ronald O. Palmer, Ernestine N. Palmer, as Trustee of the Article IV Trust created under the Will of James E. Newman, deceased v. Hatcham Grove, Inc., and David H. Lucas*
Appellate Case No.: 2014-002451
Our File No.: 58220.47137

Dear Ms. Kitchings:

Enclosed please find a *Memorandum of Law on Appealability of Order* and the related *Proof of Service* which needs to be filed on connection with the above referenced matter. We respectfully request that you please file same and return the file-stamped copies to our office in the enclosed envelope.

If you have any questions or concerns, please contact me at your convenience.

With kind personal regards, I am

Sincerely,

Jennifer L. Ellis
Litigation Paralegal

:jle
Enclosure

cc: Kyle B. Parker., Esq. (w/encl.)

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SC Court of Appeals

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