

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

Maite Murphy, Circuit Court Judge

Docket No.: 2010-CP-27-252

Jasper County.....Respondent

v.

The Settings of Mackey Point, LLC and
Bond Safeguard Insurance Company,.....Defendants,

Of which Bond Safeguard Insurance Company isAppellant.

Motion to Dismiss Appeal

December 11, 2014

David S. Cobb
Turner Padgett Graham & Laney P.A.
Post Office Box 22129
Charleston, South Carolina 29413
(843) 576-2803

Attorney for Respondent

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MOTION

Respondent moves for an order dismissing this appeal for lack of jurisdiction. Respondent respectfully asserts that the order denying Bond Safeguard Insurance Company's motion to stay the December 10, 2014 trial is interlocutory and not appealable under the requirements of S.C. Code Ann. § 14-3-330. Therefore, no "final judgment, appealable order or decision" giving rise to a right to appeal exists, and this Court should dismiss Appellant's appeal pursuant to Rule 201, SCACR.

Pursuant to Rule 240(c)(2), SCACR, Respondent sets forth its supporting arguments and authorities.

STATEMENT OF THE CASE

This lawsuit involves an unpaid bond concerning infrastructure at a project in Jasper County, South Carolina. Respondent is a political body organized pursuant to the South Carolina Constitution and the South Carolina Code of Laws and is charged with, among other things, the duty to ensure compliance with all applicable zoning ordinances for Jasper County, South Carolina. Defendant The Settings of Mackay Point, LLC was the developer of a property development of homes and certain amenities commonly known as "The Settings of Mackay Point" located in Jasper County. On June 19, 2006, Jasper County and The Settings of Mackay Point, LLC entered into a Development Agreement (pursuant to Jasper County Ordinance 06-18) concerning the project. The then-existing Jasper County Development Standards Ordinance and S.C. Code Ann. § 6-29-1180 addressed the development of the project, and the developer was required to complete the infrastructure construction or bond the infrastructure construction as a prerequisite to the recording of subdivision plats. The

developer needed recorded subdivision plats to sell lots. Accordingly, The Settings of Mackay Point, LLC posted five Bonds issued by Defendant Bond Safeguard Insurance Company concerning the infrastructure and, subsequently, recorded three subdivision plats. Ultimately, the developer sold and conveyed more than 120 residential lots at project, but did not complete construction of the infrastructure and has not shown any indication or interest in completing the infrastructure.

On March 15, 2010, Jasper County Council called the Bonds by adopting Resolution 10-06, which declared that the developer had not completed the work covered by the five Bonds. Plaintiff notified Defendant Bond Safeguard Insurance Company about the Resolution and that the developer had not completed the infrastructure improvements by a March 25, 2010 letter that included a copy of Resolution 10-06.

On April 19, 2010, Respondent filed this lawsuit. Defendant Bond Safeguard Insurance Company paid four of the five bonds in February 2014, and the remaining litigation involves the bond for Phase II-West of the project. The non-jury trial was set for December 10, 2014 before Appellant filed the Notice of Appeal after Judge Murphy denied its motion to stay the trial.

ARGUMENT

Absent some specialized statute, the immediate appealability of an interlocutory order depends on whether the order falls within one of the categories listed in S.C. Code Ann. § 14-3-330. See Woodard v. Westvaco Corp., 319 S.C. 240, 460 S.E.2d

392 (1995). In relevant part, section 14-3-330 states that appellate courts have jurisdiction to review:

(1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas;

(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

S.C. Code Ann. § 14-3-330.¹ For the challenged order to be immediately appealable, it must fall squarely into one of the categories set forth in section 14-3-330. Otherwise, the Court must dismiss the appeal for lack of subject matter jurisdiction. See State v. Castleman, 219 S.C. 136, 139, 64 S.E.2d 250, 252 (1951).

A review of the case law interpreting section 14-3-330 demonstrates the limited nature of its scope. To “involve the merits” for purposes of Section 14-3-330(1), an order “must finally determine some substantial matter forming the whole or part of some cause of action or defense.” Mid-State Distributors, Inc. v. Century Importers, Inc., 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993). Similarly, the provisions of section 14-3-330(2) only apply “when [the] order would discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense.” Id. at 334-35, 426 S.E.2d at 780. When an order can be reviewed following a trial on the merits, the order does not affect a “substantial right,” and, thus, does not fall within the scope of section 14-3-330. Breland v. Love Chevrolet Olds., Inc., 339 S.C. 89, 93, 529 S.E.2d 11, 13 (2000).

¹ Subsections (3) and (4) deal with, respectively, final orders and orders dealing with injunctions or the appointment of a receiver. The present appeal does not concern either of those categories.

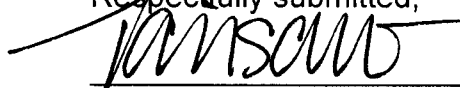
Clearly, these standards are intended to be restrictive because judicial policy favors waiting until the end of a case to pursue an appeal. As Chief Justice Toal and her co-authors have explained, “It is only in exceptional cases that the appellate court views with approval an appeal from an interlocutory order; it is usually far better for the party to await the final decree or judgment.” Toal, et al., *Appellate Practice in South Carolina* 88 (2d ed. 2002).

Applying these principles, the South Carolina Supreme Court has held that an order granting a stay is not immediately appealable. Edwards v. SunCom, 369 S.C. 91, 631 S.E.2d 529 (2006). In *Edwards*, the Court defined an order “affecting a substantial right” as an order that “discontinued an action [or] prevent[ed] an appeal.” *Id.* Similar logic applies to a motion to deny a stay because Judge Murphy’s order did not involve the merits, affect a substantial right, or prevent a judgment from which an appeal may later be taken. Judge Murphy’s order denying the stay did not discontinue any pending lawsuit and did not prevent any appeal over any issues raised by Appellant at the eve of trial. Accordingly, the Court lacks jurisdiction to hear Appellant’s challenges to this interlocutory order, and the Court should dismiss the appeal of the order staying the case.

CONCLUSION

For these reasons, the Court lacks jurisdiction and should dismiss this appeal as interlocutory pursuant to Rule 240, SCACR.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "DAVID S. COBB", is written over a horizontal line.

David S. Cobb

Turner Padgett Graham & Laney P.A.

Post Office Box 22129

Charleston, South Carolina 29413

(843) 576-2803

ATTORNEY FOR RESPONDENT

December ^k, 2014

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Of which Bond Safeguard Insurance Company isAppellant.

CERTIFICATE OF SERVICE

I certify that on December 12, 2014, I served copies of the Motion to Dismiss Appeal upon the following persons by depositing the copies in the United States Mail, postage prepaid:

F. Cordes Ford, IV
Post Office Box 999
Charleston, SC 29402

The Honorable Maité Murphy
Post Office Box 802
Saint George, South Carolina 29477-0802


Heather Hagen

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TURNER PADGET

TURNER PADGET GRAHAM & LANEY P.A.

CHARLESTON
COLUMBIA
FLORENCE
GREENVILLE
MYRTLE BEACH

DAVID S. COBB

Direct Dial: (843) 576-2803

Direct Fax: (843) 577-1629

dcobb@turnerpadget.com


December 12, 2014

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

Re: **Jasper County v. The Settings of Mackay Point, LLC and Bond**
Safeguard Insurance Company
Docket No.: 2010-CP-27-252
TP File No.: 10535.101

Dear Ms. Kitchings:

We enclose the original and one copy of the Motion to Dismiss Appeal in this case. Please file the original and return a filed copy to me in the enclosed envelope. If you have any questions or need additional information, please call me at your convenience. With kind regards,

TURNER PADGET

David S. Cobb

DSC/hah
enclosure

cc: F. Cordes Ford, IV (with enclosures)
The Honorable Maité Murphy (with enclosures)

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BUSINESS • LITIGATION • SOLUTIONS

Gateway Center • Suite 200 • 40 Calhoun Street (29401) • PO Box 22129 • Charleston, SC 29413

Phone (843) 576-2800 • Fax (843) 577-3369 • turnerpadget.com

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TURNER PADGET

TURNER PADGET GRAHAM & LANEY P.A.

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PO Box 22129 • Charleston, SC 29413

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

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