

COPY

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON

Case No. 2012-CP-32-2816

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

Plaintiff,

ORDER ON PLAINTIFF'S MOTION
TO PROCEED WITH TRIAL AND ON
APPEAL BOND ISSUES

vs.

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

Defendants.

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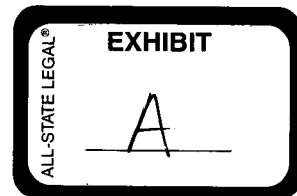
SC Court of Appeals

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SOUTH CAROLINA
COURT OF COMMON PLEAS
LEXINGTON

This matter comes before me upon the Plaintiff's motion that the trial of the equitable claims in this case proceed while an appeal of the denial of Defendants Bryon J. Dolan and Lisa S. Dolan (hereinafter "the Defendants")'s motion for a new trial as to their at-law counterclaims is pending. For the reasons discussed below, the court denies the motion and declines to set any bond conditions for the Defendants to meet in order for the appellate stay to remain in effect.

PROCEDURAL HISTORY

This is a case in which the Plaintiff seeks mortgage foreclosure and the Defendant asserted both legal and equitable counterclaims. This case was bifurcated by consent order on the cusp of trial, with the Defendants' at-law counterclaims tried to a jury on April 17, 2014, and the foreclosure claim and the Defendants' claim for an accounting referred to the undersigned master-in-equity to be tried later. The jury returned a verdict for the Plaintiff on the at-law counterclaims, and the Defendants moved for an order granting them a new trial as to the claims subject of the jury trial (the Defendants' counterclaims for breach of contract and violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*).



The Defendants moved for reconsideration of the order denying their motion for a new trial. That motion was denied, and the Defendants appealed the orders denying the motion for a new trial and motion to reconsider. The Plaintiff moved the Court of Appeals to dismiss the appeal, arguing that the orders were not immediately appealable. The Court of Appeals denied that motion to dismiss, but did grant leave to the parties to address the appealability of the legal counterclaims in their respective briefs.

APPEALABILITY OF APPEALED ORDERS

The Plaintiff takes the position that because this case was bifurcated and the trial on some claims has not already occurred, the order denying the Defendants' 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 Plaintiff takes the position that the directed verdict and jury verdict were not final judgments in this case, arguing that only after the equitable claims have been tried would any appeal lie in this case. Accordingly, the Plaintiff argues, the Defendants' appeal does not stay anything, since it is an improper appeal of an unappealable order.

South Carolina law states 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 Hoefler 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)). The statute that speaks generally to the appealability of orders, S.C. Code Ann. § 14-3-330, specifically lists an order that “grants or refuses a new trial” as appealable. S.C. Code Ann. § 14-3-330(2)(b). The order denying the Defendants' motion for a new trial that is subject of this appeal is immediately appealable because it is an order that refuses a new trial. Id.

Rule 54(a), SCRCF, provides that the definition of “judgment” under the Rules of Civil Procedure “includes any decree or order which dismisses the action as to any party or finally determines the rights of any party.” The directed verdict at the jury trial as to one of the Defendants’ 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, for appealability purposes, as they finally determined the rights of the parties with respect to those claims. Rule 54(a), SCRCF. The directed verdict ruling and jury verdict finally determined the rights of the parties as to the breach of contract and unfair trade practices claims.

The Supreme Court of South Carolina has held that an order that ends one of several claims in a case but leaves the other claims pending is an immediately appealable order, ruling against the argument that an aggrieved party must wait until all the causes of action have been finally determined in order to appeal. 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 argument 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). The Plaintiff’s argument that the Defendants’ appeal is improper because there has been no final judgment in this case is against this precedent and fails.

The denial of the Defendants' motion for a new trial under Rule 59, SCRPC, with respect to the claims tried in the jury trial is, accordingly, immediately appealable under S.C. Code Ann. § 14-3-330(1), which provides for appeals from orders "involving the merits[,]” as well as under S.C. Code Ann. § 14-3-330(2)(b). "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, and the Defendants' new trial motion was a post-trial motion directed at those final judgments.

If a case is bifurcated into a jury trial on at-law claims and a bench trial on equitable claims, that does not mean that the result of the jury trial is not a final judgment. See Rule 54(a), SCRPC. The jury trial is no less a trial simply because it occurs before the bench trial. 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 in a bifurcated case "the jury's determination of common factual issues shall be *binding* upon the court" in the following bench trial. Wachovia Bank, N.A. v. Blackburn, 407 S.C. 321, 330, 755 S.E.2d 437, 442 (2014) (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.

The Plaintiff cannot prevail on its argument that, because the appealed orders are not appealable, there is no appellate stay in effect. While it appears that the Plaintiff would be

correct if the orders at issue were indeed not appealable, that is not the situation that this case presents.

EFFECT OF THE APPELLATE STAY

Rule 205, SCACR, states as follows:

Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal; the lower court or administrative tribunal shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241. Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal.

Rule 241, SCACR (formerly numbered as Rule 225), entitled "Stay and Supersedeas in Civil Actions," provides in pertinent part as follows:

(a) General Rule. As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, decree or decision. This automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court. The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal.

(b) Exceptions. The exceptions to the general rule are found in statutes, court rules, and case law. Where specific conditions must be met before the exception applies, those conditions must be strictly complied with. A list of some, but not all, of the exceptions to the general rule is:

- (1) Money judgments as provided in S.C. Code Ann. § 18-9-130.
- (2) Judgments directing the assignment or delivery of documents or personal property as provided in S.C. Code Ann. § 18-9-150.
- (3) Judgments directing the execution of conveyances or other instruments as provided in S.C. Code Ann. § 18-9-160.

- (4) Judgments directing the sale or delivery of possession of real property as provided in S.C. Code Ann. § 18-9-170.
- (5) Judgments directing the sale of perishable property as provided in S.C. Code Ann. § 18-9-220.
- (6) Family court orders regarding a child or requiring payment of support for a spouse or child as provided in S.C. Code Ann. § 63-3-630.
- (7) Worker's compensation awards as provided in S.C. Code Ann. § 42-17-60.
- (8) An appeal from an order granting an injunction or temporary restraining order.
- (9) Family court orders awarding temporary suit costs or attorney's fees as provided in S.C. Code Ann. § 63-3-530(A)(2).
- (10) Ejectment orders as provided in S.C. Code Ann. § 27-37-130 and S.C. Code Ann. § 27-40-800.
- (11) Appeals from administrative tribunals as provided in S.C. Code Ann. § 1-23-380(A)(2) and § 1-23-600(G)(5).

Discussing the appellate stay, S.C. Code Ann. § 18-9-220 provides that:

In cases not provided for in Sections 18-9-130 and 18-9-150 to 18-9-180, the notice of appeal shall stay proceedings in the court below upon the judgment appealed from, except that when it directs the sale of perishable property, the court below may order the property to be sold and the proceeds of the property to be deposited or invested in bonds of this State or of the United States, to abide the judgment of the appellate court.

The appeal at issue here does not fall within any of the exceptions to the general rule that service of a notice of appeal stays further proceedings at the trial level as to matters that are affected by the appeal (as the parties appear to agree). No perishable property is at issue here. Therefore, the stay is in effect. What the court must determine is whether trial of the equitable claims in this case falls within the scope of what is affected by the appeal. As discussed below, the court determines that it does.

As noted above, in a bifurcated case involving equitable claims and at-law claims to be tried in different trials, with the at-law claims to be tried to a jury, “[i]f there are factual issues common to both claims, absent the most imperative circumstances, the at law claim must be tried first.” Blackburn, 407 S.C. at 330. That is because, in a case in which a jury tries the at-law claims and the court tries the equitable claims, “the jury’s determination of common factual issues shall be binding upon the court.” Id.

Here, there are factual issues common to the Defendants’ breach of contract claim and the Plaintiff’s foreclosure claim. In a previous order in this case that denied the Plaintiff’s motion to strike the Defendants’ jury demand, which the Plaintiff did not appeal¹, the Honorable Edgar W. Dickson, in deciding that the Defendants’ breach of contract counterclaim is compulsory, ruled that “[i]f what the Defendants allege is true, then they are not in default of the note and mortgage, and the Plaintiff thus cannot enforce the note or be granted foreclosure of the mortgage.” (Order filed Oct. 10, 2013.) That ruling is the law of the case. Ulmer v. Ulmer, 369 S.C. 486, 490, 632 S.E.2d 858, 861 (2006); Cherry v. Myers Timber Co., Inc., 404 S.C. 596, 598 n. 3, 745 S.E.2d 405, 406 n. 3 (Ct. App. 2013).

An examination of the analysis used in Wayne Smith Const. Co., Inc. v. Wolman, Duberstein, and Thompson, 294 S.C. 140, 363 S.E.2d 115 (Ct. App. 1987), is instructive. In that case, there were multiple appeals. Id. The defendant partnership in Smith Construction initially appealed an order denying its motion to quash notices of deposition, and that appeal was dismissed, as the order was not immediately appealable. Id. at 148. The defendant partnership lost at the trial of the case and appealed that order. Id. The trial court then awarded the plaintiff attorney’s fees concerning the first, then-dismissed appeal of the order denying the motion to

¹ The *Defendants* appealed a different aspect of this order, but the parties resolved that issue, and that appeal was dismissed.

quash the deposition notices. Id. The defendant then appealed the order awarding attorney's fees, arguing that the court lacked jurisdiction because of the appeal from the order that rendered judgment for the plaintiff on the substantive case. Id. The Court of Appeals noted the rule that service of a notice of appeal does not prevent the lower court from proceeding with matters that are not affected by the appeal and stated that "Smith Construction's right to be awarded an attorney's fee as costs did not depend upon the success of the partnership's appeal of the trial court's order awarding Smith Construction judgment." Id. at 149. The Court of Appeals held that the lower court had jurisdiction to issue the order awarding attorney's fees. Id.

Here, unlike in Smith Construction, what the Plaintiff seeks to have happen during the pendency of the Defendants' appeal – the trial of the plaintiff's foreclosure claim and the issuance of a judgment on that claim – *does* depend on the success of the Defendants' appeal. If the Defendants succeed on appeal, the jury trial at which the Defendants lost on their at-law counterclaims will be of no effect, there will be no verdict finding against them on those claims, and the parties will be headed to a new jury trial, the result of which will be binding upon the master-in-equity as fact-finder with respect to the foreclosure claim. See Blackburn, 407 S.C. at 330. Whether it has been finally determined in this case that the facts underlying the counterclaims do not provide the Defendants with a defense to the foreclosure claim is very much a "matter[] decided in the order, judgment, decree or decision on appeal[.]" Rule 241(a), SCACR.

Because the trial of the equitable claims in this case would necessarily entail trial of the Plaintiff's foreclosure claim, trial of the equitable claims is a matter affected by the appeal. The appellate stay, accordingly, prevents the occurrence of that trial as long as the stay remains in effect.

ISSUES REGARDING BOND

At the hearing of the instant motion, the court requested that the parties submit memoranda on the issue of whether the court should require the Defendants to meet bond conditions to prevent the trial of the equitable claims while the appeal is pending and, if so, what those bond conditions should be. For the reasons discussed below, the court declines to impose any bond conditions on the Defendants.

“After service of notice of appeal, any party may move for an order lifting the automatic stay in cases which involve the general rule.” Rule 241(c)(1), SCACR. The Appellate Court Rules appear to provide that the court’s primary consideration in determining whether to lift the appellate stay is “whether such an order is necessary to preserve jurisdiction of the appeal” – which is more likely to be a consideration in determining whether to impose a supersedeas where one would otherwise not exist – “or to prevent a contested issue from becoming moot.” Rule 241(c)(2), SCACR.

Rule 241(c)(3), SCACR, provides as follows:

The granting of supersedeas or the lifting of the automatic stay under this Rule may be conditioned upon such terms, including but not limited to the filing of a bond or undertaking, as the lower court, administrative tribunal, appellate court, or judge or justice of the appellate court may deem appropriate. Further, where it appears that the granting or lifting of a stay, or the issuance of a writ of supersedeas is insufficient to afford complete relief, the lower court, administrative tribunal, appellate court, or judge or justice of the appellate court may order other affirmative relief upon such terms as are deemed appropriate.

Where a judgment in a mortgage foreclosure action directs the sale of real estate, the sale pursuant to that judgment is not automatically stayed while appellate proceedings are pending, unless the appellant (usually the mortgagor defendant) gives an undertaking as set forth in S.C. Code Ann. § 18-9-170 or a cash deposit as provided in S.C. Code Ann. § 15-1-250.

The Code section that sets out the undertaking conditions prescribes two slightly different undertakings, one given to stay the sale of real property to a specific party or delivery of possession of real property to a specific party while an appeal is pending, and one given to stay “the sale of land to satisfy a mortgage thereon or other lien[.]” S.C. Code Ann. § 18-9-170. The purpose of the former is to provide the party entitled to ownership of the property with compensation for the loss of the land’s possession during the time of the appeal, while the purpose of the undertaking in a mortgage foreclosure appeal is to protect the foreclosure plaintiff from impairment of the full payment of the adjudged debt caused by the property lessening in value during the pendency of the appeal. See id.; Gerald v. Gerald, 30 S.C. 348, 9 S.E. 274, 275 (1889).

The requirements of the undertaking to stay a mortgage foreclosure sale of improved land on appeal are as follows:

- 1) The undertaking must be in writing;
- 2) The undertaking must be executed by the appellant;
- 3) Two sureties must agree to be liable on the undertaking by sufficient affidavit (the sureties so doing on the undertaking document itself or in separate instruments);
- 4) The undertaking must provide that the appellant shall pay to the respondent money per the undertaking if:
 - a. The judgment is affirmed; and
 - b. The land is finally sold for less than the judgment debt and costs.
- 5) The undertaking must state that the appellant shall pay the amount payable to the respondent thereunder if the sale is affirmed and there is a deficiency, which amount is measured as follows:

- a. The appellant shall pay for any waste he commits or suffers to be committed on the premises from the time of the execution of the undertaking to the time of the sale;
- b. The appellant shall pay a reasonable rental value for the use and occupation of the land from the time of the execution of the undertaking to the time of the sale; and
- c. The amount payable per the undertaking shall not exceed the amount of the deficiency in the sale proceeds to satisfy the debt and costs.

S.C. Code Ann. § 18-9-170; Gerald, 30 S.C. 348, 9 S.E. at 275-77; see generally S.C. Code Ann. Title 18, Ch. 9. As an alternative to giving the undertaking, the appellant may make a cash deposit in lieu thereof. S.C. Code Ann. § 15-1-250.

The “manifest object of the undertaking required for the purpose of staying a sale pending an appeal is to protect the respondent, as far as practicable, from any damage which may ensue from the delay caused by the appeal, in enforcing his claim[,]” because the respondent, the foreclosure judgment creditor in that situation, has already been determined by a court to be entitled to the sale directed by the judgment. Gerald, 30 S.C. 348, 9 S.E. at 275. As it appears that Plaintiff’s counsel agreed at the hearing on this motion, S.C. Code Ann. § 18-9-170 would be applicable in this case only if there had already been a foreclosure judgment rendered. None has been.

Since the justification for imposing such conditions in order to stay the operation of the judgment directing the sale is that the court has already determined that the Plaintiff is *entitled* to the sale, the instant situation is materially different from that subject of S.C. Code Ann. § 18-9-170. The Plaintiff has never been determined by any court to be entitled to the relief it seeks in

this case, and it is by no means a foregone conclusion that the Plaintiff will be determined to be entitled to that relief, whether the Defendants succeed on appeal or not. This situation is not one which the Defendants have anything to bond off, nor is it analogous to such a situation. Nothing before the court indicates that an order lifting the appellate stay “is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot.” Rule 241(c)(2), SCACR.

The court declines to impose any bond conditions on the Defendants in order for the appellate stay to remain in effect. If Plaintiff has legitimate concerns that waste is occurring on the property, Plaintiff may petition the court under the mortgage loan documents and/or applicable waste case law.

TO PROCEED WITH THE FORECLOSURE TRIAL POSES POTENTIAL PROBLEMS

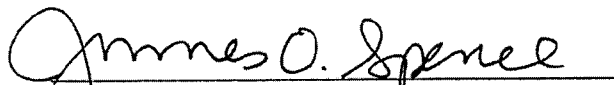
If the appellate stay were lifted, the court would be faced with the specter of this scenario: While the appeal is pending, the court goes forward with the trial of the foreclosure claim. That trial is held with the court being bound to the jury’s verdict that decided the Defendants are not entitled to relief on their breach of contract counterclaim. The court finds for the Plaintiff on the foreclosure claim, a judgment of foreclosure is rendered, and the property subject of this case is sold. Afterward, the Defendants prevail on their appeal, and the Court of Appeals directs that a new jury trial be held. At that trial, the Defendants prevail on their breach of contract counterclaim, which necessarily decides, as Judge Dickson ruled, that the Defendants “are not in default of the note and mortgage, and the Plaintiff thus cannot enforce the note or be granted foreclosure of the mortgage.” (Order filed Oct. 10, 2013.) This would result in judgments that are irreconcilable with one another. It is safer and more efficient to leave the stay

in effect and have the trial of the foreclosure claim only if and when it is appropriate following the conclusion of the appeal.

CONCLUSION

For the reasons discussed above, IT IS THEREFORE HEREBY ORDERED that the Plaintiff's motion to proceed with the trial of the equitable claims during the pendency of the appeal is hereby denied, and the court declines to impose any bond conditions on the Defendants in order for the appellate stay to remain in effect.

And IT IS SO ORDERED.


The Honorable James O. Spence
Master-in-Equity for Lexington County

Lexington, South Carolina

October 31, 2014

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