THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2014-CP-23-0815

Sabrina D. Davis, ... Appellant,

v.

Bankers Life and Casualty Company, ...Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Whether the lower court's Order, which dismissed the Complaint without prejudice, is a final judgment or appealable interlocutory order?

2. Whether the lower court erred in dismissing the Complaint, without prejudice, for insufficient process and insufficient service of process upon Respondent, an insurance company?

STATEMENT OF THE CASE

On February 14, 2014, Appellant, the Plaintiff below, filed the Complaint in the Greenville County Court of Common Pleas. (R. pp. 10-15.) The Complaint generally alleges Respondent, the Defendant below, wrongfully denied Appellant's claim for benefits under a certain life insurance policy. (R. p. 11, lines 1-6.)

On February 20, 2014, Appellant purported to serve Respondent by mailing a copy of the Complaint, without a summons, by U.S. Postal Service Priority Mail (not even by registered or certified mail, return receipt requested, with delivery restricted to addressee) to Respondent's branch office in Greenville, South Carolina. (R. p. 8 ¶ 3; p. 15.) On March 24, 2014, Respondent filed a motion to dismiss based on insufficiency of process and insufficiency of service of process, pursuant to SCRCP 12(b)(4) and 12(b)(5), respectively.[1] (R. p. 7.) In an Order filed May 28, 2014, from which Appellant takes this appeal, the lower court granted the motion to dismiss, stating, "This case is dismissed without prejudice. Plaintiff may refile and reserve pursuant to S.C. Code Ann. § 15-9-270," which requires that service on insurance companies be made through the

[1] The motion to dismiss attaches and includes the Affidavit of Brandon G. Kennedy, Respondent's branch sales manager, and a copy of the Complaint as received at Respondent's branch office. (R. pp. 8-15.)

Director of the Department of Insurance. (R. pp. 1-2.)

Appellant moved for "re-examination." In an Order filed July 29, 2014 (R. pp. 3-5), the lower court stated:

> ". . . Plaintiff argues in her Motion for Re-examination filed June 20, 2014 that the case *White Oak Manor, Inc. v. Lexington Ins. Co.*, 407 S.C. 1, 753 S.E.2d 537 (2014), provides that insurance policy provisions and agreements creating alternative methods of service for the insurer are valid and binding. However at the hearing on the Motion to Dismiss on May 20, 2014, Plaintiff did not present any evidence that her insurance policy provided for an alternative method of service or that there was an agreement between the parties to alternative methods of service, and the case is therefore distinguishable. . . ."

(R. p. 5, lines 3-10.)

Accordingly, the lower court denied the motion for re-examination and concluded, "As stated in the Court's Order filed May 28, 2014, Plaintiff's case was dismissed without prejudice, and Plaintiff may refile and reserve Defendant pursuant to S.C. Code Ann. § 15-9-270." (R. p. 5, lines 12-14.) On August 12, 2014, Appellant filed this appeal.

ARGUMENTS

1. The Lower Court's Order is Not a Final Judgment or Appealable Interlocutory Order.

"An appellate court may determine the question of appealability of a decision from a lower court as a matter of law," regardless of whether any party has raised the issue. *Ashenfelder v. City of Georgetown*, 389 S.C. 568, 571, 698 S.E.2d 856, 858 (Ct. App. 2010). Pursuant to S.C. Code Ann. §14-3-330, which limits the Court's ability to hear appeals, only final judgments and certain interlocutory orders are appealable. *Burkey v. Noce*, 398 S.C. 35, 37, 726 S.E.2d 229, 230 (Ct. App. 2012).

"Generally, an order is a final judgment on one or more issues if it constitutes an ultimate decision on the merits." *Mungo v. Rental Unif. Serv. of Florence, Inc.*, 383 S.C. 270, 278, 678 S.E.2d 825, 829 (Ct. App. 2009), *citing Brown v. Greenwood Mills, Inc.*, 366 S.C. 379, 387, 622 S.E.2d 546, 551 (Ct. App. 2005). "An order involves the merits if it finally determines some substantial matter forming the whole or part of some cause of action or defense in the case." *Id.*; *see Long v. Sealed Air Corp.*, 391 S.C. 483, 487, fn. 4, 706 S.E.2d 34, 36 (2011).

"An order granting a motion to dismiss without prejudice is not an appealable final or non-final order." *Welch Resolution Trust Corp.*, 590 So.2d 1098, 1099 (Fla. Dist. Ct. App. 1991); *see generally South Carolina & Ga. R.R. Co. v. East Shore Terminal Co.*, 48 S.C. 315, 316 (1895) ("The respondent's attorneys raise the question that said order is not appealable. The order was necessarily made without prejudice to the rights of the parties upon the final hearing of the case; as much so as if the words, 'without prejudice, &c.,' had been inserted in the order. The Circuit Judge did not have the power, on the hearing of said motion, even if he had so desired, to decide the case upon its merits. The effect of said order was the same as if the Circuit Judge had stated in the order that it was only to remain in force until a decision could be made upon the merits. The cases of *Garlington v. Copeland,* 25 S.C. 41, and *Sease v. Dobson,* 34 S.C. 345, 13 S.E. 530, are conclusive of this question. Having reached the conclusion that the said order is not appealable, the other questions raised by the exceptions cannot be considered.").[2]

[2] Respondent was unable to locate any more recent or more direct binding authority on this point of law.

Such a dismissal without prejudice, which "merely tell[s] the plaintiff to patch up the complaint or take some other easily accomplished step . . . is no more reviewable than the resolution of a discovery dispute or equivalent interlocutory ruling." *Luevano v. Wal-Mart Stores, Inc.*, 722 F.3d 1014, 1026 (7th Cir. 2013).[3] Respondent searched the books across the country and located just four exceptions to the rule against appeals from dismissals without prejudice.

First, an order dismissing a complaint without prejudice may be considered final and appealable if the plaintiff's opportunity to remedy the deficiency and refile the complaint has been foreclosed by the expiration of the statute of limitations or if no amendment could reasonably be expected to save the complaint. *Brennan v. Kulick*, 407 F.3d 603, 606 (3d Cir. 2005); *see also id.* Second, an order dismissing a complaint without prejudice may be considered final and appealable if the basis for the dismissal was forum non conveniens, because, in that case, the party is necessarily finished before that court. *De Manez v. Bridgestone Fireston N. Am. Tire, LLC*, 533 F.3d 578, 583-84 (7th Cir. 2008).

Third, an order dismissing a complaint without prejudice may be considered final and appealable if the court orders the parties to attempt arbitration as a condition to reinstatement in that court. *Hill v. Rent-A-Center, Inc.*, 398 F.3d 1286, 1288 (11th Cir. 2005); *see also Widener v. Fort Mill Ford*, 381 S.C. 522, 524, 674 S.E.2d 172, 173 (Ct. App. 2009) (holding that an order dismissing an action without prejudice and allowing

[3] "It is not improper to cite cases from the federal courts as persuasive authority even on a matter litigated in a state court that does not present a federal question." *Chase Home Fin., LLC v. Risher*, 405 S.C. 202, 213, 746 S.E.2d 471, 477 (Ct. App. 2013).

the parties to pursue arbitration is immediately appealable).[4] Fourth, an order dismissing a complaint without prejudice may be considered final and appealable if the plaintiff elects to stand on her complaint and disclaim any intent to replead. *Slayton v. America Express Co.*, 460 F.3d 215, 224 (2d Cir. 2006).

Here, the Order expressly dismissed the Complaint without prejudice and with the right to refile. (R. p. 1.) Additionally, the Order did not determine any substantial matter forming a part of Appellant's case, curing the deficiency in this case (*i.e.*, insufficiency of process and service of process) is an "easily accomplished step," and none of the four potential exceptions appear to apply. Therefore, consistent with the authority cited above, the Court should find that the Order is not appealable and dismiss this appeal.

2. The Lower Court's Order of Dismissal was Not in Error, as the Court Properly Held that Process and Service of Process Upon the Respondent were Insufficient.

"The summons and any other legal process in any action or proceeding against it *must* be served on an insurance company . . . by delivering two copies of the summons or any other legal process to the Director of the Department of Insurance. . . . This service is considered sufficient service upon the company." S.C. Code Ann. § 15-9-270 (emphasis added). In *White Oak Manor, Inc. v. Lexington Ins. Co.*, the Supreme Court held that an insurance company, like any other person, may still *consent* to an alternative method of service; therefore, in such a case, § 15-9-270 is not necessarily the exclusive method of

[4] The Court supported its holding with citations to cases from the U.S. Supreme Court and the U.S. Courts of Appeals for the Second and Ninth Circuits. *Id.* at 523. The holding turned on the fact that the lower court ordered arbitration and thus appears to suggest or assume that ordinary dismissals without prejudice are not appealable, consistent with the authority cited above. *See id.*

service for insurance companies. 407 S.C. 1, 753 S.E.2d 537 (2014).[5]

Here, Appellant simply mailed a copy of the Complaint, without a summons, by U.S. Postal Service Priority Mail (not even by registered or certified mail, return receipt requested, with delivery restricted to addressee) to one of Respondent's branch offices (R. p. 8 ¶ 3; p. 15), and, a month and a half later and *after* Respondent filed the motion to dismiss, mailed a purported summons to Respondent's counsel. There is no evidence in the record or otherwise: (1) that Appellant delivered a summons or any legal process to the Director of the Department of Insurance; or (2) that Respondent consented to any alternative method of service.[6] Moreover, even ignoring § 15-9-270, a party may not effect service on *any* person by simply mailing him or it a copy of the complaint and summons. *See* SCRCP 4; *see also* S.C. Code Ann. § 15-9-15, *et seq.* Therefore, Appellant did not effect sufficient service of process, and, if the Court finds that the Order is appealable, the Court should affirm the dismissal of the Complaint.

CONCLUSION

In sum, the Order is not appealable because it merely dismissed the Complaint without prejudice and with the right to refile, and therefore, did not constitute a decision on the merits. Even if the Order is appealable, the lower court did not err in dismissing the Complaint because Appellant failed to effect sufficient service of process.

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[5] In *White Oak Manor*, the insurance policy contained a service-of-suit clause that allowed service to be made upon "Counsel, Legal Department, Lexington Insurance Company . . . or his or her representative."

[6] The Court should find Appellant's only argument on the issue of consent, that Respondent's branch manager and counsel should be deemed to have consented to service by mail because they did not return the Complaint and purported summons to Appellant or file a "rejection letter" with the lower court (App. Final Br. pp. 4-5), is without merit and not supported by any authority.

Respectfully submitted,

January ___, 2015

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