

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
CIRCUIT COURT

John C Hayes, III, Circuit Court Judge

Case No 2009-CP-46-01244

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APR 30 2015
SC Court of Appeals

Phil Vasey and Pamela Vasey,

Appellants,

vs

Colton Builders, LLC,

Respondent

Respondent's Supplemental Return to Motion to Reinstate Appeal

This matter is currently pending before the Court on Appellants' motion to reinstate their appeal for the second time. By Order dated April 3, 2015, the Court allowed the Appellants 10 days to file an initial brief after receipt of which the Court would rule on the motion to reinstate. The Respondent has previously submitted a Return opposing the reinstatement which recounts the history of the Appellants' failure to properly and timely prosecute this appeal under the Appellate Court Rules in multiple respects. Having been finally served with the Appellants' initial brief, the Respondent respectfully submits this supplemental return requesting that the Court deny the motion to reinstate for the additional grounds that (1) the Appellants did not preserve their appeal, and (2) the Appellants have abandoned their appeal.

1. The Appellants did not preserve their appeal.

The Appellants' Statement of the Case and the Order on appeal reveals that the Appellants waived their right to appeal on the issue presented in their Initial Brief. As recited by the Appellants, they initially entered into a consent order for binding arbitration. [See Consent Order attached.] As recited in the Arbitration Order, on the morning of the arbitration hearing on January 22, 2013, the Appellants refused to appear and instead, filed a motion to set aside the consent order based on information they had learned regarding the fact that the Respondent Corporation had been administratively dissolved. When the Appellants failed to appear for the arbitration, the Respondent moved to dismiss the Plaintiffs' case for failure to prosecute,¹ which was granted by the Arbitrator. [See Arbitration Order, attached to Amended NOA, and attached hereto for convenience.]

Several months after the Respondent filed a motion to confirm the award, Appellants made a separate motion, on July 15, 2013, for relief to vacate the arbitration award under § 15-48-130(a)(1) and (5), alleging that the award had been obtained by fraudulent means and there was no binding arbitration agreement on the same premise that the Respondent did not reveal that it had been administratively dissolved.

The motion to set aside the consent order to arbitrate was denied by Circuit Court order filed April 23, 2013. [Order attached] The motion to vacate the arbitration award was denied by Circuit Order filed September 23, 2013. [See Order, attached to Amended NOA, and attached hereto for convenience.] The Appellants filed an appeal from the September 23, 2013, Order denying the motion to vacate the arbitration order; however,

¹ The motion to dismiss was also based on the Plaintiffs' repeated failure to produce evidence as required under the consent order to arbitrate.

they have not appealed from the April 23, 2013 order denying the motion to set aside the consent order. Respondent submits that the motion to reinstate should be denied, not just because of the long history of dilatoriness and noncompliance with the Appellate Court Rules, but also because the Appellants failed to appeal from the Order denying the motion to set aside the consent order.

While an order compelling arbitration is not immediately appealable under S.C. Code § 15-48-200, it is reviewable on appeal from an order of confirmation. *See Stermer v. Modiano Constr. Co.*, 44 Cal App. 3d 264, 270, 118 Cal. Rptr. 309, 313 (Ct. App. 1975). By comparison, the consent order and the order refusing to set it aside may not have been immediately appealable, but as a matter of general policy, the Plaintiffs could, and should, have shown up and proceeded with the arbitration under the terms of the consent order subject to their objections. *Bazzle v. Green Tree Fin. Corp.*, 351 S.C. 244, 256, 569 S.E.2d 349, 355 (2002), vacated on unrelated grounds, 539 U.S. 444 (2003) (proceeding with arbitration did not waive objections raised and pursued). However, failing to appear for arbitration, and then failing to even appeal from the April 23, 2013, order amounts to a waiver of the issue. *See Palmetto Homes, Inc. v. Bradley*, 357 S.C. 485, 492, 593 S.E.2d 480, 484 n. 5 (Ct. App. 2004) (unappealed issues not preserved); *see also Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009); *see also Hudson v. Lancaster Convalescent Ctr.*, 407 S.C. 112, 119-20, 754 S.E.2d 486, 490 (2014) (a trial court decision becomes the law of the case if it is not appealed).

2. The Appellants have abandoned their appeal.

Respondent submits that even though the Appellants have finally filed and served an initial brief, it does not adequately present a viable issue for appeal. First, the

Appellants Statement of the Issue on Appeal – “The Circuit Court erred in denying the Appellant’s Motion to Vacate Arbitration Award pursuant to S.C. Code §15-48-130” -- is not adequately set forth. Jones v Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) (“The statement of each issue on appeal shall be concise and direct, and broad general statements of issues may be disregarded by this Court.”). In addition, the argument on the only issue raised on appeal consists of only three paragraphs which fail to cite any law or authority that specifically supports their argument that the consent order to arbitrate was void and there was no agreement to arbitrate because of they were unaware that the corporate entity had been administratively dissolved and the Respondent failed to notify them of the dissolution.² York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 96-97, 749 S.E.2d 139, 154 (Ct. App. 2013) (Appellants deemed to have abandoned issue where brief failed to cite any law or authority that supports the *particular* proposition and, instead, relied upon an attenuated argument and a summary conclusion).


² The Respondent would note for the Court that the Secretary of State’s easily-accessible, free and public online website --<http://www.sos.sc.gov> – shows that the Corporation was administratively dissolved on December 19, 2010, even before the Plaintiffs ever filed this action, and it has been reinstated as of August 20, 2013. The Respondent would also note for the Court that: “The phrase ‘corruption, fraud, or undue means’ has been construed by the court to proscribe affirmative misconduct by the parties, such as perjury or subornation of perjury.” Trident Technical Coll. v. Lucas & Stubbs, Ltd., 286 S.C. 98, 108, 333 S.E.2d 781, 787 (1985) (referencing federal authorities on comparable FAA statutory section). See Rule 220(b)(2), SCACR (“The Court of Appeals need not address a point which is manifestly without merit.”). Section 33-14-220(c), S.C. Code of Laws provides that once the business is reinstated, the business carries on as if the dissolution had never occurred.

CONCLUSION

WHEREFORE, based on the foregoing, in addition to those points and arguments previously presented in the Return, the Respondent respectfully requests that the Court deny the motion to reinstate the appeal.

Respectfully submitted,

April 26, 2014



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Attorney for Respondent
803-324-7200

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Phil Vasey and Pamela Vasey.Appellants,

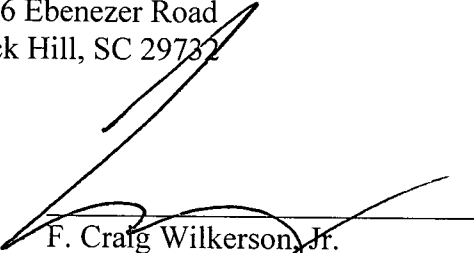
v.

Colton Builders, LLC, Respondent.

PROOF OF SERVICE

I certify that I have served the Supplemental Return to Motion to Reinstate Appeal on counsel for the Appellant by depositing a copy of same in the United States Mail, postage prepaid, on April 28, 2015, addressed as follows:

David B. Sample
Attorney at Law
1506 Ebenezer Road
Rock Hill, SC 29732



F. Craig Wilkerson, Jr.
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LAW OFFICES OF
F. CRAIG WILKERSON JR.

F. CRAIG WILKERSON JR.
Attorney at Law

BRANDON G. NOBLES
Attorney at Law

April 28, 2015

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211-1629

RE Phil Vasey and Pamela Vasey vs Colton Builders, LLC
Appellate Case No 2013-002633

Dear Ms Kitchings

Please find enclosed herewith an original and six (6) copies of Respondent's Supplemental Return to Motion to Reinstate Appeal in the above-referenced matter, together with a Proof of Service. By copy of this letter, I am serving a copy of the Supplemental Return on David Sample, attorney for Appellants.

With best regards, I am

Sincerely,


F. Craig Wilkerson, Jr.

FCWjr lgl
Enclosures as Noted
cc. David Sample (w/encl)

