

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Letitia Verdin, Circuit Court Judge

Case No.: 2013-CP-23-5575
(Appellate Case No. 2015-000159)

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SC Court of Appeals

HHH Ltd. of Greenville, ...Respondent,

v.

Randall S. Hiller, Robert E. Hiller and Randall S. Hiller, P.A. Appellants.

RESPONDENT'S FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE COURT ERR IN GRANTING THE RESPONDENT'S MOTION FOR REFERENCE TO THE MASTER IN EQUITY?
- II. DID THE LOWER COURT ISSUE AN APPEALABLE ORDER, JUDGMENT OR DECREE IN REGARDS TO APPELLANTS' MOTION FOR SUMMARY JUDGMENT?
- III. DID THE APPELLANTS PROPERLY PRESERVE THEIR THIRD ISSUE ON APPEAL?
- IV. DID THE LOWER COURT ERR IN FAILING TO GRANT APPELLANTS' MOTION FOR SUMMARY JUDGMENT AS A MATTER OF LAW?

STATEMENT OF THE CASE

The Respondent, HHH Ltd. ("HHH"), was put into receivership via order of the Greenville County Master in Equity, the Honorable Charles B. Simmons, Jr., on January 16, 2013 ("Receivership Order") [R. pp. 129-139]. The Receivership Order was granted pursuant to the supplemental proceedings initiated by Holly Woods Association of Residence Owners ("Holly Woods"), a judgment creditor of HHH.¹ The Receivership Order appointed Randy A. Skinner, Esq., as Receiver for HHH. In deciding to put HHH into receivership, Judge Simmons found, in pertinent part, as follows:

Based on the evidence provided to this Court, no one was able to establish who currently owns or operates HHH, or who has in the past owned and operated HHH. However, as shown from the evidence produced to this Court, several transactions have been made by HHH since the Plaintiff's Judgment was rendered. Plaintiff contends these transactions appear to have been consummated in an effort to frustrate the efforts of Plaintiff in satisfying its Judgment lien. The Plaintiff is entitled to have its Judgment carried into effect by the disposition of the Property of HHH, in addition to the ability of Plaintiff to safeguard, preserve and protect the subject Property.

[R. p. 129].

¹ Holly Woods obtained a judgment against HHH on May 14, 2007 in the principal amount of \$971,000.00. [R. pp. 140-154]

Judge Simmons further ruled in the Receivership Order that “the Court retains jurisdiction of this matter to enter such further orders as may be just and proper.”² [R. p. 137].

Appellant Robert E. Hiller was a party to the original action filed by Holly Woods. Appellant Randall S. Hiller, who is serving as counsel for Appellants, was in attendance on his own behalf (pursuant to subpoena) and in a representative capacity during the aforementioned supplemental proceedings hearing. Appellant Randall S. Hiller is, upon information and belief, the sole member and practicing attorney of Appellant law firm Randall S. Hiller, P.A. HHH was owned at some point by Joe Hiller, Sr., who died on May 6, 2012. Joe Hiller, Sr. was the father of Appellants Robert E. Hiller and Randall S. Hiller.

By virtue of the powers vested in Randy A. Skinner, as Receiver for HHH, Ltd., the underlying case was initiated against the Appellants on October 16, 2013. [R. pp. 1-41]. The case involves three claims – two of which were brought under the Statute of Elizabeth (S.C. Code § 27-23-10 (1976)) and one of which was brought for specific performance. The two claims brought under the Statute of Elizabeth alleges that the Appellants participated in the wrongful transfer of three (3) different pieces of real property with the intent to delay, hinder, and defraud a judgment creditor. The Respondent’s claim for specific performance requests the deeds with which the alleged ill-gotten interests were transferred to the Appellants in the three aforementioned properties be set aside so as to restore full title to the property back in the name of the Respondent. All three (3) of the Respondent’s claims are supported, in pertinent part, by filed public records described in detail in the Complaint, copies of which are attached as exhibits to the Complaint. The Appellants are parties to several of these documents, including more than one affidavit signed by Appellant Randall S. Hiller.

² In accordance with universally accepted legal writing standards, the capitalization of the word “Court” in the Receivership Order means the court with which the matter is currently pending, or Judge Simmons. *See Blue Book Rules B7.3.1 and 8.*

Appellants responded to the Complaint by filing a Motion to Dismiss [R. pp. 111-113] pursuant to Rules 12(b)(6) and 12(b)(7), alleging the judgment creditor (“Holly Woods”) must bring the claims asserted in the underlying case, rather than, as was done here, the Receiver on behalf of the judgment debtor/Respondent. The Appellants’ Motion to Dismiss was summarily denied upon the well-established law in South Carolina that the Statute of Elizabeth does not limit its application to judgment creditors and no judgment is needed to invoke it. [R. pp. 115-120]. In so ruling, the lower court found that the Receiver - who is charged with the responsibility of managing the assets of the judgment debtor, HHH Ltd., and disposing of those assets to satisfy the judgment - is a person who is entitled to bring an action for fraudulent conveyances under the Statute of Elizabeth.

Appellants then answered and asserted three counterclaims: fraud, breach of contract and constructive trust; the first two counterclaims being accompanied by a jury demand (the third being a claim in equity; see Lollis v. Lollis, 291 S.C. 525, 530, 354 S.E.2d 559, 561 (1987)(“An action to declare a constructive trust is in equity”)). [R. pp. 42-52]. Thereafter, Judge Simmons held a conference call on June 19, 2014 with all parties for the purpose of getting an update from the Receiver as to the Receiver’s efforts under the Receivership Order. [R. pp. 96-97; 108]. On that call, Judge Simmons was informed of the Respondent’s oversight in filing the underlying case in Circuit Court, rather than in Judge Simmons’ Court per the Receivership Order. Judge Simmons confirmed on that call to all parties that it was his intention to retain jurisdiction over this matter. Judge Simmons instructed the Respondent to file a Motion for Reference in order to have the case under his jurisdiction, per the Receivership Order.

After the Respondent filed a Motion for Reference [R. pp. 53-54] and the Appellants subsequently filed a Motion for Summary Judgment [R. pp. 66-79], a hearing was held before

the Honorable Letitia H. Verdin. On December 19, 2014, Judge Verdin issued an Order granting Plaintiff's Motion for Reference to the Master in Equity. Judge Verdin's December 19, 2014 Order did not ever address, or much less include any ruling, judgment or decree on, the Appellants' Motion for Summary Judgment. The Appellants then filed a Motion to Reconsider [R. pp. 86-91] only in regards to the lower court's ruling on the Motion for Reference, never mentioning their previously filed Motion for Summary Judgment. Judge Verdin subsequently denied the Appellants' Motion to Reconsider. [R. pp. 82-85].

On January 23, 2015 (more than thirty days from Judge Verdin's December 19, 2014 Order), the Appellants filed this appeal. [R. pp. 121-128].

ARGUMENT

I. DID THE COURT ERR IN GRANTING THE RESPONDENT'S MOTION FOR REFERENCE TO THE MASTER IN EQUITY?

It was the understanding of Respondent per the Receivership Order and per Judge Simmons' own confirmation to all parties that Judge Simmons intended for any case such as the one at issue to be filed in his court (the Master in Equity) versus the Circuit Court. By clerical oversight, the underlying case was accidentally filed by Respondent in Circuit Court. Upon recognition of the oversight, and after instruction from Judge Simmons to file a Motion for Reference, the Respondent filed the Motion for Reference at issue. [R. pp. 96-97; 53-54].

It is clear that the Respondent's claims sound in equity. It is also clear that Appellants demanded a jury trial on two of their three counterclaims.³

At the hearing before the lower court on Respondent's Motion for Reference, the Respondent argued that the case should first be referred to Judge Simmons, as Judge Simmons

³ Of note, however, the Appellants - while arguing against the Motion to Refer their claims to Judge Simmons because of the Appellants' jury demand - have argued at the same time in their Motion for Summary Judgment that no genuine issues of material fact exists, such that a jury should not hear their purported legal claims. [R. pp. 66-79]

intended; and, from there, Judge Simmons could rule on the Appellants' Motion for Summary Judgment. [R. pp. 96-97; 108]. Then, Judge Simmons, depending on his ruling on Appellant's Summary Judgment Motion, could determine whether the Appellant's counterclaims should be bifurcated for jury purposes. [Id.].

The lower court issued a form order granting the Respondent's Motion for Reference. [R. pp. 80-81]. The lower court did not rule on the Appellant's Motion for Summary Judgment. Despite the appearance of the lower court's agreement that Judge Simmons retained jurisdiction, such that the lower court's ruling would now give him the ability to determine whether to bifurcate the counterclaims for jury purposes, the Respondent is indifferent at this point as to what occurs with the counterclaims— the Respondent just wants this matter to be litigated to conclusion sooner than later.⁴ Therefore, the Respondent is willing to consent to the reference of only the Respondent's claims together with the Appellants' equitable constructive trust claim to the Master in Equity, Judge Simmons; while allowing the bifurcation of the Appellants' two counterclaims for fraud and breach of contract.

II. DID THE LOWER COURT ISSUE AN APPEALABLE ORDER, JUDGMENT OR DECREE IN REGARDS TO APPELLANTS' MOTION FOR SUMMARY JUDGMENT?

There is absolutely no evidence whatsoever in this case that the lower court issued a ruling of any kind or nature on the Appellant's Motion for Summary Judgment.

Rule 201(a), SCACR, provides, in pertinent part, that "Appeal may be taken, as provided by law, from any final judgment, appealable order or decision." *Rule 201(a), SCACR.*

As was outlined in the recent South Carolina Supreme Court opinion in the case of

⁴ Hence, the Respondent's prior Motion in this Court for a ruling partially granting the relief requested on this Motion to Refer issue, which was denied.

Enersys Delaware, Inc. v. Hopkins, 401 S.C. 615, 738 S.E.2d 478 (2013):

The right of appeal arises from and is controlled by statutory law. Hagood v. Sommerville, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005). Generally, a party may only appeal from a final judgment, and piecemeal appeals should be avoided because most errors can be corrected through a new trial. Id. at 194–195, 607 S.E.2d at 708. Whether an order issued prior to or during trial is immediately appealable is governed primarily by Section 14–3–330 of the South Carolina Code (1979 & Supp.2012). Id. at 195, 607 S.E.2d at 708.

Section 14–3–330 provides this Court with appellate jurisdiction over:

- (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.

Accordingly, an order must fall within one of the enumerated subsections to be immediately appealable. State v. Wilson, 387 S.C. 597, 600, 693 S.E.2d 923, 924 (2010).

Enersys at 616-617, 738 S.E.2d at 479 (emphasis supplied).

Notably, in the above cited Enersys case, the issue of appellate jurisdiction was related solely to the lower court's *dispositive ruling* on a motion. The glaring difference between the Enersys case and this case is that the lower court in Enersys actually issued a dispositive order on the motion; whereas, here, no such order has been rendered.

Notwithstanding the fact that the lower court never issued an order on the Appellants' Motion for Summary Judgment, the well-established law in this State makes it clear that, even if the lower court were to have issued an order denying the Appellants' Motion (as Appellants merely hypothesize here), "an order denying a motion for summary judgment, being interlocutory, is not directly appealable." Quoting Gilmore v. Ivey, 290 S.C. 53, 59, 348 S.E.2d 180, 184 (Ct. App. 1986); Mitchell v. Mitchell, 276 S.C. 44, 275 S.E.2d 1 (1981).

The glaring lack of appellate jurisdiction on this issue, should form the basis of this Court's dismissal/rejection of the issue as proffered – based on mere speculation - by Appellant.

III. DID THE APPELLANTS PROPERLY PRESERVE THEIR THIRD ISSUE ON APPEAL?

When the lower court in its order on Appellant's motion for summary judgment does not address a claim or argument made by Appellant, and where Appellant fails to raise the claim or argument in a motion to alter or amend judgment, the Appellant waives appellate review of the claim or argument. BMW of N. Am., LLC v. Complete Auto Recon Servs., Inc., 399 S.C. 444, 454-55, 731 S.E.2d 902, 908 (Ct. App. 2012); see also Elam v. S. Carolina Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004)(holding a party *must* file a Rule 59(e), SCRPC motion to preserve an issue for review that has been raised to but not ruled upon by the trial court). In other words, the issue in such a case is not preserved for appellate review. Id.

In the case *sub judice*, there is no mention whatsoever of the Appellants' Motion for Summary Judgment in the orders appealed from. Likewise, the Appellants' Motion to Reconsider was filed only in regards to the Respondent's Motion for Reference, which likewise makes no mention whatsoever of its Motion for Summary Judgment. The record is devoid of any evidence that the orders appealed from relate in any way to the Appellants' Motion for Summary Judgment,

and the record is devoid of any evidence that the Appellants ever filed a Rule 59(e), SCRCp, motion on the issue of summary judgment. Therefore, the Appellants failed to preserve any issue regarding the lower court's handling (no ruling) of Appellants' Motion for Summary Judgment. As such, the Appellants' issue III should be dismissed.

IV. DID THE LOWER COURT ERR IN FAILING TO GRANT APPELLANTS' MOTION FOR SUMMARY JUDGMENT AS A MATTER OF LAW?

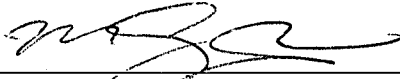
Assuming *arguendo* that the lower court actually denied, granted or otherwise ruled in any manner or fashion on the Appellants' Motion for Summary Judgment, and assuming *arguendo* that the issue of Appellants' Motion for Summary Judgment was preserved for review, the Appellants' Motion for Summary Judgment should not be granted as a matter of law. Summary judgment is not appropriate in this case.

The nature in which this action was brought by Respondent is unique. The Receiver is an independent agent of the lower court who was given the authority necessary to file this action based in part because, as Judge Simmons found, "no one [has been] able to establish who currently owns or operates HHH, or who has in the past owned and operated HHH." [R. p. 129]. As is plainly evident from the Respondent's filings, the claims are based in large part on public records – many of which included the Appellants as parties (some of which included sworn affidavits from Appellants). These public records make it absolutely clear that, at a minimum, there exists genuine issues of material fact with all of the claims at issue.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Honorable Court affirm the lower court's rulings; or, in the alternative, dismiss the Appellants' Issue III on appeal and partially grant the Appellants' request for its two (2) legal claims to remain in the circuit court.

Respectfully submitted,



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October 2, 2015
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Certificate of Counsel

The undersigned hereby certified that Appellant's Final Brief complies with Rule 211(b),
SCACR.

October 2, 2013



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PROOF OF SERVICE

The undersigned hereby certifies that a true copy of Respondent's Final Brief has been served on all parties of record by mailing a copy of same in the United States mail, postage prepaid this 5 day of October, 2015, addressed as follows:

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