THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
In the Court of Common Pleas

The Honorable L. Casey Manning, Circuit Court Judge

Case No. 2016-000094

Moore Beauston & Woodham, L.L.P.....Respondent,

v.

Marc A. Quigley.....Appellant.

RESPONDENT'S MEMORANDUM IN RESPONSE TO APPELLANT'S MEMORANDUM IN SUPPORT OF IMMEDIATE APPEALABILITY

THE RESPONDENT, Moore Beauston & Woodham, L.L.P., respectfully submits this Memorandum in response to Appellant's Memorandum in Opposition to Motion to Dismiss and Appellant's Memorandum in Support Of Immediate Appealability.

INTRODUCTION

On March 14, 2013, Respondent, Moore Beauston & Woodham, L.L.P., filed suit against Appellant, Marc A. Quigley, for Breach of Partnership Agreement and Breach of Fiduciary Duty. On May 10, 2013, before any hearings on the merits of the case, Respondent filed a Motion to Compel Arbitration due to Appellant's refusal to consent to arbitration despite the fact the parties agreed to arbitration pursuant to the terms of the Partnership Agreement and all amendments thereto. The Partnership Agreement contained the following provision, "**THIS**

AGREEMENT IS SUBJECT TO ARBITRATION PURSUANT TO CHAPTER 48 OF THE CODE OF LAWS OF SOUTH CAROLINA (1976)" which the trial court found to be in compliance with § 15-48-20 of the S.C. Code Ann. Following a hearing on October 14, 2013, the trial court issued an Order dated December 1, 2015, granting Respondent's Motion to Compel Arbitration. Appellant filed a Notice of Appeal on January 19, 2016. Respondent filed a Motion to Dismiss and Memorandum of Appealability as requested by the Court, to which Appellant has responded, and we now respond in kind. The Motion to Dismiss should be granted and the Appeal dismissed for the following reasons.

ARGUMENT

I. APPELLANT'S ARGUMENT REGARDING THE MODE OF ADJUDICATION IS NOT PROPERLY BEFORE THE COURT.

Appellant argues that the Order to Compel Arbitration "effectively alters the mode of adjudication chosen by the cross-claimant where that mode is one to which the party is entitled by statute." (App. Memo 3). Appellant further argues that "issues regarding the mode of adjudication must be in raised in the trial court at the first opportunity" and "the failure to raise and pursue entitlement to such adjudication might be considered a waiver." (App. Memo 4). However, this argument is not properly before the Court because Appellant did not allege in his Answer and Counterclaims that he is entitled to a certain mode of adjudication pursuant to the South Carolina Payment of Wages Act (the "SCPWA"). There is no mention of this issue in any pleading filed by the Appellant. Additionally, this issue was not properly raised during the hearing on the Motion to Compel Arbitration in the trial court nor did Judge Manning's Order to Compel Arbitration make a ruling specifically addressing this issue. "If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review. *I'On, L.L.C. v.*

Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). Appellant failed to file a Rule 59(e) motion to alter or amend a judgment, and therefore, has not properly preserved this issue for appeal. Accordingly, this Appeal should be dismissed.

II. THE ORDER TO COMPEL ARBITRATION IS NOT IMMEDIATELY APPEALABLE PURSUANT TO § 14-3-330, S.C. CODE ANN.

Even if the Court determines that Appellant has not waived the issue regarding the mode of adjudication, the Order to Compel Arbitration is not immediately appealable pursuant to § 14-3-330. Appellant focuses only on Subsection (3) of § 14-3-330 which provides that appellate courts have jurisdiction to immediately review "a final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment". S.C. Code Ann. § 14-3-330(3). Appellant argues that the Order to Compel Arbitration affects a substantial right because "the underlying ruling here effectively alters the mode of adjudication" and likens mode of adjudication to mode of trial. (App. Memo. 3-4). The South Carolina Supreme Court has held that "an order denying a jury trial is not immediately appealable unless it deprives him a mode of trial to which he is entitled as a matter of right." *C&S Real Estate Servs., Inc. v. Massengale,* 290 S.C. 299, 300 350 S.E.2d 191, 192 (1986). In *C&S Real Estate Servs.*, the Court found that "when a defendant asserts ... permissive counterclaims which are legal in nature, he waives the right to a jury trial on these issues". *Id.* at 193. As a result of that waiver, the Court found that the order in question did not deprive the appellant of a mode of trial to which she was entitled as a matter of law and the appeal was dismissed.

By continuation of Appellant's own argument, under these facts Appellant has waived his entitlement to a "civil action" pursuant to the SCPWA. With the exception of § 41-10-80(C), each and every remedial subsection of the SCPWA is couched in mandatory terms. *See* S.C. Code Ann. § 41-10-70 and § 41-10(80)(A)-(B). By contrast, § 41-10-80(C) provides that "the

employee ***may*** recover in a civil action." S.C. Code Ann. § 41-10-80(C) (emphasis added). Although Appellant may recover in a civil action, such right was waived when he signed all three amendments of the Partnership Agreement made while he was a Partner, each of which contained an arbitration provision. Like the appellant in *C&S Real Estate Servs.*, the Appellant in the present appeal has waived his right to a civil action and the Order to Compel Arbitration did not deprive him of a mode of adjudication to which he was entitled as a matter of right. Therefore, this Appeal should be dismissed per *C&S Real Estate Servs.*.

Even if this Court were to find that Appellant did not waive his right to the chosen mode of adjudication, the Order to Compel Arbitration does not deprive Appellant of a mode of adjudication to which he is entitled as a matter of right. A civil action is any action properly before a court and is commenced upon the filing and service of a summons and complaint. *McDowell v. South Carolina Dept. of Social Services,* 304 S.C. 539, 543, 405 S.E.2d 830, 833 (1991); SCRCP 3(a).

The Summons and Complaint were filed by Respondent on March 14, 2013 and Appellant's counsel accepted service on March 19, 2013. Thus, a civil action was commenced and the Order to Compel Arbitration was issued as a part of this action. The fact that arbitration was ordered as a part of a civil action does not deprive Appellant of a civil action – it is merely one component of a civil action. There is nothing to indicate that arbitration is incompatible with a civil action and an arbitrator has the ability and authority to award treble damages pursuant to the SCPWA, if they are deemed applicable. *See Munoz v. Green Tree Fin. Corp.,* 343 S.C. 531, 542, 542 S.E.2d 360, 365 (2001). ("An agreement providing for arbitration does not determine the *remedy* for a breach of contract but only the *forum* in which the remedy for the breach is determined.") (emphasis in original); *cf. Carolina Care Plan, Inc. v. United HealthCare*

Services, Inc., 361 S.C. 544, 557, 606 S.E.2d 752, 759 (2004) ("It is clear an arbitrator may or may not choose to award treble damages in accordance with the SCUTPA, depending upon whether an arbitrator finds the SCUTPA was violated...").

Furthermore, Appellant's argument in support of immediate appealability is incomplete as it only addresses the substantial right component of § 14-3-330(3). In order to succeed on this argument, it must be shown that not only does the order in question affect a substantial right but also that the order is a "final order" and that such order was made "in a special proceeding or upon summary application in any action after judgment." S.C. Code Ann. § 14-3-330(3). Appellant fails to discuss or even mention the issues of whether the Order to Compel Arbitration is a final order or whether such order was made in a special proceeding or upon summary application in any action after judgment. Because Appellant has failed to establish each of these elements, the Order to Compel Arbitration is not immediately appealable pursuant to § 14-3-330(3) and this Appeal should be dismissed.

III. THE ORDER TO COMPEL ARBRITRATION DOES NOT FALL WITHIN § 15-48-200, S.C. CODE ANN., WHICH PROVIDES FOR WHEN APPEALS MAY BE HAD IN ARBITRATION ACTIONS.

The South Carolina Uniform Arbitration Act ("SCUAA") provides when an appeal may be taken in an arbitration action. *See* S.C. Code Ann. § 15-48-200(a) (Supp. 2002). An order compelling arbitration is not included in the SCUAA's list of permissible appeals and the South Carolina Supreme Court has held that all orders relating to arbitration not mentioned in § 15-48-200(a) are not immediately appealable. *Heffner v. Destiny, Inc.*, 321 S.C. 536, 471 S.E.2d 135 (1995). In his Memorandum in Support of Appealability, Appellant asserts that the "provisions of the Uniform Act do not ... expressly prohibit the appeal of certain orders – such as an order compelling arbitration; thus, the Heffner court relied upon the inferred preference for

arbitration." (App. Memo, p. 3) However, Appellant fails to cite any authority supporting such assertion. The *Heffner* court expressly stated in its opinion that its conclusion was based on the application of the rule of statutory construction, *Expressio unius*, which states the rule that the inclusion of one thing implies the exclusion of another. *Id.* at 537-538. Furthermore, the Supreme Court has made it clear that the **only** appeals allowed in arbitration actions are those enumerated in § 15-48-200. *See, e.g. Steinmetz v. American Media Services, LLC*, 393 S.C. 72, 709 S.E.2d 708 (2011) (holding that in an arbitration case, the only appeals that may be taken are from an order of the circuit court enumerated in § 15-48-200(a)) (emphasis added); *see also Main Corp. v. Black*, 357, S.C. 179, 181-82, 592 S.E.2d 300, 302 (2004). Thus, Appellant's argument should fail and this Appeal should be dismissed.

Appellant also points out that *Heffner* did not expressly deal with a claim pursuant to the SCPWA. This distinction, however, is not meaningful for the case at hand. As discussed above, § 15-48-200(a) is an exclusive list of arbitration actions that may be immediately appealed. The fact that the present case deals with a SCPWA claim does not otherwise bring the order compelling arbitration into the purview of § 15-48-200(a). As such, Appellant is not entitled to an immediate appeal of the order compelling arbitration and this Appeal should be dismissed.

IV. APPELANT'S ARGUMENTS REGARDING THE MERITS OF THE CASE ARE NOT PROPERLY BEFORE THE COURT.

Appellant's Memorandum in Support of Appealability contains facts and arguments relating to the merits of the case although this Court did not request a memorandum directed at such. Because this Court requested memoranda addressing only the issue of immediate appealability, Respondent finds it not appropriate to respond to such arguments. However, Respondent shall respectfully supplement this memorandum and respond to Appellant's arguments relating to the merits of the case should the Court require a response.

CONCLUSION

Because Appellant has waived the issue of entitlement to a certain mode of adjudication and because the Order to Compel Arbitration is not immediately appealable pursuant to either § 14-3-330 or § 15-48-200(a), S.C. Code Ann., this Appeal should be dismissed.

Respectfully submitted,

Charleston, South Carolina
4/12, 2016

DUGGAN LAW FIRM, LLC

By: _____

J. James Duggan, Esquire
S.C. Bar No. 11908
44 Markfield Drive, Suite E
Charleston, South Carolina 29407
(843) 414-7730
(843) 414-7738 (fax)
Email: duggan@dugganlawgroup.net

ATTORNEY FOR RESPONDENT

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PROOF OF SERVICE

I certify that I have served a copy of Respondent's Memorandum in Response to Appellant's Memorandum in Support of Immediate Appealability on Appellant by depositing a copy of it in the United States Mail, postage prepaid, on April 12, 2016, addressed to his attorney of record at the following address:

Jeffrey L. Payne, Esquire
319 S. Irby Street
Post Office Box 5478 (29502)
Florence, South Carolina 29501

J. James Duggan, Esquire
S.C. Bar No. 11908
44 Markfield Drive, Suite E
Charleston, South Carolina 29407
(843) 414-7730
(843) 414-7738 (fax)
Email: duggan@dugganlawgroup.net

ATTORNEY FOR RESPONDENT

Duggan Law Firm, LLC
Attorneys and Counselors at Law

J. James Duggan
Owner/Member
Taxation Law
Admitted in SC

April 12, 2016

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

Re: Marc A. Quigley v. Moore Beauston & Woodham, L.L.P.
Appellate Case Number: 2016-000094
Civil Action No.: 2013-CP-28-727

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of Respondent's Memorandum in Response to Appellant's Memorandum in Support of Immediate Appealability.

Kindly file the original in the Court file and return a date-stamped copy to the undersigned. A self-addressed, postage prepaid envelope is provided herein for your convenience.

By copy of this letter to counsel for Appellant, I am simultaneously serving Respondent's Memorandum in Response to Appellant's Memorandum in Support of Immediate Appealability. Thank you for your kind assistance in this matter.

Sincerely,

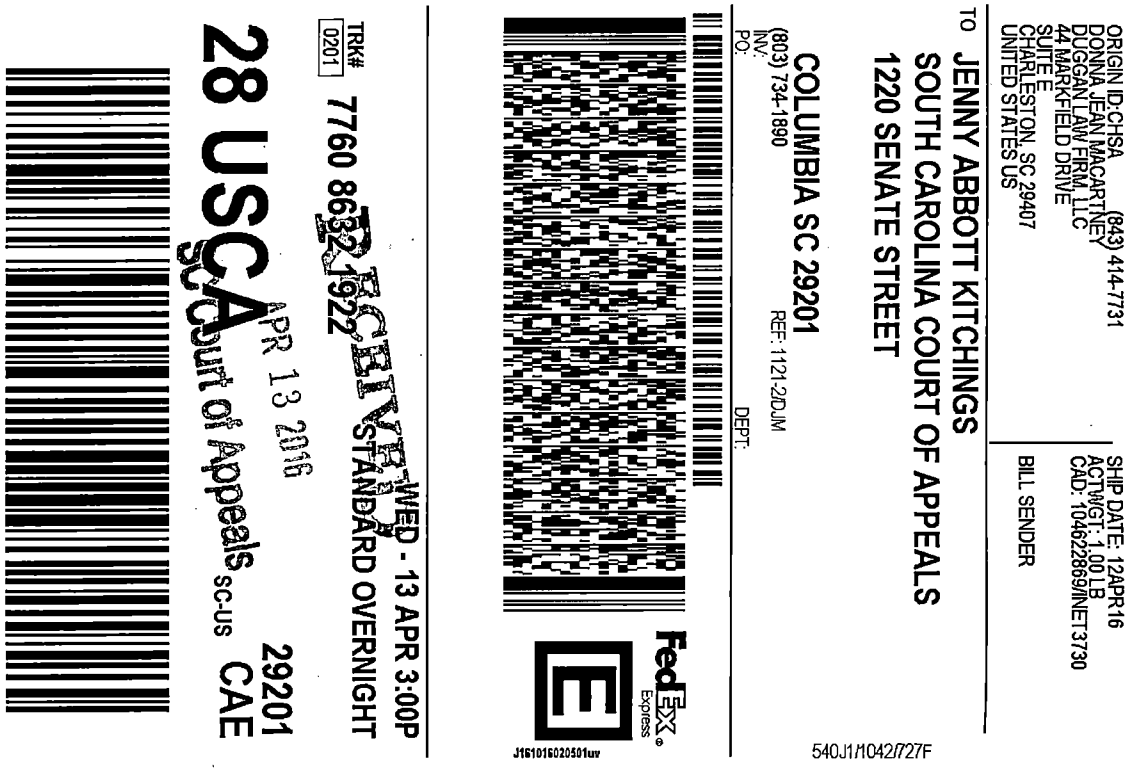
J. James Duggan, Esquire

JJD/jtp

Cc: Jeffrey L. Payne, Esquire (w/enclosures)

44 Markfield Drive, Suite E
Charleston, SC 29407

www.DugganLawGroup.com
Direct Dial: 843-343-0303
Staff: 843-414-7730
Fax: 843-414-7738



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