THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
APR 20 2016
SC Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No. 2016-000662

Mattress by Appointment, LLC, a Florida limited liability company f/k/a Carolina Bedding Direct, LLC, a Florida limited liability company, ... Appellant,

v.

Retail Service Systems, Inc., Boxdrop Furniture, Inc., Carlton Scott Andrew, and Darren Conrad, ... Respondents.

MEMORANDUM

Mattress by Appointment, LLC ("MBA"), respectfully submits this memorandum in response to this Court's request that MBA address the issue of appealability. MBA appeals the Circuit Court's interlocutory order pursuant to S.C. Code § 14-3-330 because it affects three substantial rights of MBA. First, the order deprives MBA of effective assistance of counsel. Second, it establishes a rule for the case that MBA must meet a standard for presenting allegations and evidence that is higher than that required by the Rules of Civil Procedure and the Rules of Professional Conduct. Third, it requires MBA to identify itself as a party other than the one MBA chose to identify.

BACKGROUND

On September 15, 2015, MBA filed its summons and complaint in Anderson County. MBA alleges that the defendants, acting either individually or in concert, hired a former owner and director of MBA, Darren Conrad, to act as their agent for the purpose of competing against MBA. MBA alleges that the defendants are using Conrad to tortiously interfere with their contracts with third-parties, aiding and abetting Conrad's breach of his fiduciary duties to MBA, engaging in unfair trade practices, and that certain demands made by the defendants to MBA constitute civil conspiracy.

In response to MBA's complaint, the defendants moved to dismiss. Boxdrop Furniture, Inc. ("Boxdrop"), also moved for a more definite statement pursuant to Rule 12(e) because it claimed it was unclear what allegations were made as to Boxdrop. On January 25, 2016, MBA filed an amended complaint seeking to clarify its allegations in response to the defendants' motions to dismiss.

A hearing was held on the defendants' motions on January 26, 2016. On January 27, 2016, the Circuit Court entered a *sua sponte* order – the order that is the subject of this appeal - requiring MBA to provide a more definite and certain statement. The Circuit Court required, in relevant part, that (1) MBA file a second amended complaint verified by MBA's highest ranking corporate officer and MBA's attorney; (2) that all future pleadings, motions, filings, and discovery responses be verified by the parties' highest ranking corporate officer and their respective attorneys; and (3) that MBA identify all predecessors and successors.

On January 29, 2016, MBA filed a motion to reconsider, alter, or amend judgment. In its motion to reconsider, MBA asked the Circuit Court to clarify whether its requirement that all filings and discovery responses be verified referred to verification as provided for by Rule 11(c)

or to the attorney's certification as required by Rule 11(a). MBA also asked the Court to amend its order requiring verification of these documents and to amend or clarify its order requiring MBA to name predecessor and successor entities. MBA asked the Court to stay its order pending a ruling on its motion to reconsider.

On February 2, 2016, the Circuit Court entered an order holding MBA's motion to reconsider in abeyance until the second amended complaint was filed and reviewed. On February 5, 2016, MBA filed its second amended complaint as commanded by the Circuit Circuit. On February 24, 2016, the Circuit Court entered an order denying MBA's motion to reconsider.

REASONS FOR IMMEDIATE APPEAL

MBA appeals the Circuit Court's interlocutory order pursuant to S.C. Code § 14-3-330 because it affects three substantial rights of MBA and effectively discontinues the action; an immediate appeal of the order pursuant to this statute is required and MBA cannot wait until final determination of the action. See Neeltec Enterprises, Inc. v. Long, 397 S.C. 563, 566-67, 725 S.E.2d 926, 928-29 (2012).

First, the order effectively discontinues the action by creating requirements for MBA's attorneys and MBA that are inconsistent with the Rules of Professional Conduct and the Rules of Civil Procedure. MBA is a limited liability company and can only appear in circuit or appellate court through counsel, see Renaissance Enterp., Inc. v. Summit Teleservices, Inc., 334 S.C. 649, 651, 515 S.E.2d 257, 258 (1999); Travelers Ins. Co. v. Roof Doctor, Inc., 325 S.C. 614, 481 S.E.2d 451 (Ct. App. 1997), and MBA has a constitutional right to retain counsel to act on its behalf. Potashnik v. Port City Constr. Co., 609 F.2d 1101, 1117 (5th Cir.1980) ("the right to

retain counsel in civil litigation is implicit in the concept of fifth amendment due process."). Absent counsel, MBA cannot proceed. See Travelers Ins, 481 S.E.2d at 451.

Required to have counsel, MBA has the right to diligent and competent representation within the meaning of the Rules of Professional Conduct. See Rules 1.1 and 1.3, RPC, Rule 407, SCACR; Alex Sanders & John S. Nichols, *Trial Handbook for South Carolina Lawyers*, § 1.53 (5th ed. 2012) ("[E]very client has a right to competent counsel."). Diligent and competent representation means that a lawyer must be able to act within the full scope of the Rules of Professional Conduct. See Rule 3.1, RPC, Rule 407, SCACR, cmt. 1 ("The advocate has a duty to use legal procedure for the fullest benefit of the client's cause...The law, both procedural and substantive, establishes the limits within which an advocate may proceed."); see also Rule 407, SCACR, Preamble [2] ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.") and [9] ("These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests within the bounds of the law."). Diligence specifically requires that a lawyer take "whatever lawful and ethical measures are required to vindicate a client's cause or endeavor." Rule 1.3, RPC, Rule 407, SCACR, cmt. 1.

The Circuit Court's order requires MBA's lawyers to verify the amended complaint and all future pleadings, motions, filings, and discovery responses. The Circuit Court did not describe what it meant by verification. Verification under the Rules of Civil Procedure requires that a person swear "before an officer authorized to administer oaths, that the affiant knows the facts stated be true of his own knowledge, except as to those matters stated on information and belief and as to those matters that he believes them to be true." Rule 11(c), SCRCP.

Reading the verification requirements and the Circuit Court's order together, the Circuit Court has ordered that MBA's attorneys swear an oath that they know the facts contained in

MBA's pleadings, motions, filings, and discovery responses to be true on their own knowledge or that they believe them to be true.

The Circuit Court's order is directly at odds with MBA's attorneys' duties under the Rules of Professional Conduct. A lawyer is "not required to have personal knowledge of matters asserted in [pleadings and other documents], for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer." Rule 3.3, RCP, Rule 407, SCACR at cmt. 3. Instead, a lawyer is required to present evidence helpful to his client even where the lawyer may not believe the evidence so long as he does not know that the evidence is false. Id. at cmt. 8 ("The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of act."). A lawyer is required to move and act even where facts have not yet been fully substantiated, where the lawyer expects to develop evidence during discovery, or where he has relied on the veracity of his client's statements concerning a case. See Rule 3.1, RPC, Rule 407, SCACR, cmt. 2; Rule 3.3 cmt. 8.

MBA's lawyers cannot take any of these actions consistently with the Circuit Court's order because verification requires that they swear under oath that they have personal knowledge of the facts or assertions contained in MBA's pleadings, motions, filings, and discovery responses or believe them to be true. MBA's attorneys have no personal knowledge of any facts or evidence in this case. Instead, its attorneys have relied on MBA and its investigation prior to filing the summons and complaint in forming MBA's complaint and acting on its behalf, consistent with their duties under the Rules of Professional Conduct.

The Circuit Court's order leaves MBA's lawyers with an impossible choice – fulfill their duties to their client under the Rules of Professional Conduct by a) relying on MBA (Rule 3.3,

cmt. 8, RCP, SCACR); b) zealously acting within the Rules of Professional Conduct (Rule 3.1 cmt. 1, RCP, SCACR); c) acting where facts or evidence have not been fully developed or substantiated (Rule 3.1, cmt. 2, RCP, SCACR); d) preparing documents, pleadings, motions and other filings on behalf of MBA where they do not have personal knowledge of matters asserted therein (Rule 3.3 cmt. 3, RCP, SCACR); e) presenting evidence in pleadings, motions and other filings even where they may doubt that evidence (Rule 3.3, cmt. 8, RCP, SCACR); f) presenting evidence or statements on behalf of MBA that they cannot "vouch" for (Rule 3.3, cmt. 2, RCP, SCACR); or, alternatively, complying with the Circuit Court's order and failing to act except where they can provide a verification pursuant to the Rules. MBA's attorneys cannot both comply with the Circuit Court's order and provide zealous, diligent, and competent representation to MBA as defined by the Rules of Professional Conduct.

Similarly, the Circuit Court's order requiring that MBA to verify all pleadings, filings, motions, and discovery responses affects MBA's substantial right to prosecute its case consistent with the Rules of Civil Procedure. See Rule 1, SCRCP; Ross v. Med. Univ. of S. Carolina, 312 S.C. 532, 534, 435 S.E.2d 877, 878 (Ct. App. 1993), rev'd, 317 S.C. 377, 453 S.E.2d 880 (1994) ("The South Carolina Rules of Civil Procedure govern actions brought in the courts of South Carolina in all suits of a civil nature."). The Rules do not require verification by a party of its pleadings. See Rule 11, SCRCP ("Except when otherwise specifically provided by rule or statute pleadings need not be verified or accompanied by an affidavit."). Instead, South Carolina amended its Rules of Civil Procedure to make clear that pleadings need not be verified. See Rule 11, SCRCP, off. cmt. ("Important as this change is, it is not as significant as the Rule itself, which eliminates the verification of pleadings...").

While MBA is permitted to verify its pleadings if it so chooses, it cannot be required to do so. See Rule 81, SCRCP ("[t]hese rules, or any of them, shall apply to every trial court of civil jurisdiction within this state, within the limits of the jurisdiction and powers of the court provided by law, and the procedure therein shall conform to these rules insofar as practicable."). Instead, as mandated by Rule 81, the procedure in Circuit Court must conform to the Rules of Civil Procedure, which make clear that verification is not necessary. This is consistent with a party's ability to plead and allege facts that it believes will be substantiated through discovery. The Rules also do not require a party to verify motions, filings, or discovery responses.

Additionally, because MBA can act only through its attorneys, its ability to prosecute its case is co-extensive with its lawyers' ability. As discussed above, by requiring verification of facts and evidence by MBA's attorneys, MBA may only present facts and evidence within the personal knowledge of its attorneys or that they believe to be true. This requirement significantly narrows the scope of facts or evidence that can be presented by MBA in support of its case.

S.C. Code § 14-3-330 provides that the Court of Appeals may review an interlocutory order where it affects a substantial right "when such order (a) in effect determines the action and prevents judgment from which an appeal might be taken or discontinues the action." An order requiring a party to plead a more definite statement is immediately appealable where it affects a substantial right. See Mason v. S. S. Kresge Co., 247 S.C. 144, 147, 146 S.E.2d 158, 160 (1966); see also Tatnall v. Gardner, 350 S.C. 135, 138, 564 S.E.2d 377, 379 (Ct. App. 2002). "By its nature, the question of whether an order is immediately appealable is determined on a case-by-case basis." Morrow v. Fundamental Long-Term Care Holdings, LLC, 412 S.C. 534, 538, 773 S.E.2d 144, 146 (2015).

Here, the order affects MBA's substantial right to effective assistance of counsel, its substantial right to prosecute its case consistent with the Rules of Civil Procedure, and effectively discontinues the action. See Thornton v. S.C. Elec. & Gas Corp., 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct. App. 2011) ("[A]n appellate court should look to the effect of an interlocutory order to determine its appealability."); Morrow, 773 S.E.2d at 147. MBA cannot plead, move, respond to discovery requests or file documents without providing a verification on its own behalf and from its attorneys, elevating the standard for presentation of facts and evidence beyond anything contemplated in the Rules of Civil Procedure. At this stage in the proceedings, prior to beginning discovery, MBA's attorneys have no personal knowledge of any facts or evidence that may be presented in the case and MBA's knowledge of many facts is basic. The action has been effectively discontinued, even if the order does not specifically say so.

Additionally, an interlocutory order is immediately appealable where it "establishes a principle which will finally affect the merits of the case." Thornton, 705 S.E.2d at 479 (quoting Robertson v. Bingley, 6 S.C. Eq. 333, 351 (S.C. App. L. & Eq. 1826). Here, the Circuit Court has established a principle that will necessarily affect the merits as MBA will be prevented from presenting testimony, facts, and evidence that it could otherwise present consistent with Rules of Civil Procedure because it and/or its attorneys cannot verify them.

South Carolina's Supreme Court considered a similar situation and found that an interlocutory order disqualifying a party's chosen attorney affects a substantial right and is immediately appealable. See Hagood v. Sommerville, 362 S.C. 191, 196-97, 607 S.E.2d 707, 709-10 (2005). In so determining, the Supreme Court noted the importance of the party's right to counsel in an adversarial system and that appeal after final judgment would not adequately

protect "a party's interest because it would be difficult or impossible for a litigant or an appellate court to ascertain whether prejudice resulted." Id.

Here, the impact of the Circuit Court's order is more extreme than disqualification of counsel. Although the appellant in Hagood could not proceed with the counsel of his choice, he could still retain new counsel who could zealously and diligently represent him within the full scope of the Rules of Professional Conduct and the Rules of Civil Procedure. The Circuit Court has foreclosed that right for MBA, forcing it and whatever counsel it hires to act within a far narrower and more constrained sphere than the one contemplated by the Rules.

Additionally, to the extent the case proceeds it would be nearly impossible for an appellate court to determine whether MBA was prejudiced by its inability to offer facts and evidence due to the requirements of this order. Review following a final judgment would require the appellate court to review every single document submitted in the case, including all pleadings, motions, filings, and discovery responses. After reviewing all documents exchanged in the case, the appellate court would then have to consider all potential evidence that was not presented because of the Circuit Court's order. It would then have to determine whether such evidence would have been relevant to the Circuit Court or fact finder at every phase of the case. This would include a review of whether the un-presented evidence would have, for example, resulted in the grant or denial of dispositive motions, been useful for impeachment of witnesses, resulted in the inclusion or exclusion of evidence and testimony, or resulted in a different determination by the jury. Such a review is not possible. Hagood, 607 S.E.2d at 709-10 ("an appeal after final judgment and a new trial, if granted, would not adequately protect a party's interests because it would be difficult or impossible for the affected party or the appellate court to ascertain by any objective standard whether prejudice resulted from the disqualification.").

Finally, the Circuit Court's order affects a substantial right by ordering MBA to identify its predecessors and successors. In Neeltec, the South Carolina Supreme Court held that an order substituting a defendant is immediately appealable as affecting a substantial right. 725 S.E.2d 926, 928-29. According to the Supreme Court, "the right of the plaintiff to choose her defendant is a substantial right." Id. Additionally, MBA has the right to be the "architects of their own complaint," Morrow, 773 S.E.2d at 146-147, and this right is impacted where a plaintiff cannot choose the identity of the parties to the lawsuit. Id. MBA has a right to identify itself as it chooses in its complaint, just as it has a right to identify its defendants.

CONCLUSION

For the foregoing reasons, Mattress by Appointment, LLC immediately appealed the interlocutory order of the Circuit Court pursuant to S.C. Code § 14-3-330.

April 14, 2016

Adam C. Bach (SC Bar # 74885)
ELLER TONNSEN BACH, LLC
2201 Augusta Street, Suite 200
Greenville, SC 29605
Telephone: (864) 236-5013
Facsimile: (864) 312-4191
abach@etblawfirm.com
Attorneys for Appellant

Other Counsel of Record:
Paul S. Landis
L. Walter Tollison, III
Beattie B. Ashmore
Attorneys for Respondents

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

RECEIVED
APR 20 2016
SC Court of Appeals

Case No. 2016-000662

Mattress by Appointment, LLC, a Florida limited liability company f/k/a Carolina Bedding Direct, LLC, a Florida limited liability company, ... Appellant,

v.

Retail Service Systems, Inc., Boxdrop Furniture, Inc., Carlton Scott Andrew, and Darren Conrad, ... Respondents.

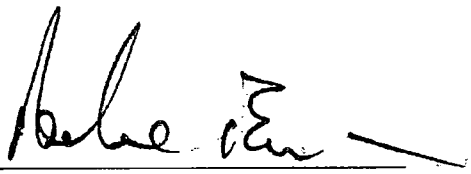
PROOF OF SERVICE

I certify that I have served this memorandum on the Respondents, Retail Service Systems, Inc., Boxdrop Furniture, Inc., Carlton Scott Andrew, and Darren Conrad by depositing a copy of same in the United States Mail, postage prepaid, on April 14, 2016, addressed to their attorneys of record as follows:

Paul S. Landis
Fayssoux Law Firm, P.A.
209 E. Washington Street
Greenville, SC 29601

Beattie B. Ashmore
Beattie B. Ashmore, P.A.
650 E. Washington St.
Greenville, SC 29601

L. Walter Tollison, III
The Tollison Law Firm
24 Vardry Street, Suite 203
Greenville, SC 29601



Adam C. Bach (SC Bar # 74885)
ELLER TONNSEN BACH, LLC
2201 Augusta Street, Suite 200
Greenville, SC 29605
Telephone: (864) 236-5013
Facsimile: (864) 312-4191
abach@etblawfirm.com
Attorneys for Appellant

April 14, 2016

Greenville, South Carolina

ELLER TONNSEN BACH
Attorneys at Law

Daniel B. Eller*
Eric R. Tonnsen
Adam C. Bach*
Walter R. Frye, III
*Licensed in both NC and SC

2201 Augusta Street, Suite 200
Greenville, South Carolina 29605
Telephone (864) 236-5013
Facsimile (864) 312-4191

J. Trey Odom
R. Patrick Martin*
Weston J. White
Donald L. Van Riper†
Frances G. Zacher†
† Of counsel

RECEIVED
APR 20 2016
SC Court of Appeals

April 14, 2016

Jenny Abbott Kitchings
Clerk, The South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

Re: Mattress by Appointment, LLC vs. Retail Service Systems, Inc., Boxdrop Furniture, Inc., Carlton Scott Andrew, and Darren Conrad
C. A. No. 2015-CP-04-02161

Dear Ms. Kitchings:

Enclosed please find a memorandum in response to this Court's letter dated April 4, 2016 requesting appellant to address the issue of appealability on the above-referenced matter, along with proof of service for the same.

If we may provide you with any additional information, please do not hesitate to call or email.

Sincerely,

ELLER TONNSEN BACH, LLC

Adam C. Bach
abach@etblawfirm.com

ACB/amp
Enclosures

cc: Attorneys for Respondents:
Beattie B. Ashmore
Paul S. Landis
L. Walter Tollison, III

RECEIVED
APR 20 2016
SC Court of Appeals

ELLER TONNSEN BACH
Attorneys at Law

Daniel B. Eller*
Eric R. Tonnsen
Adam C. Bach*
Walter R. Frye, III
*Licensed in both NC and SC

2201 Augusta Street, Suite 200
Greenville, South Carolina 29605
Telephone (864) 236-5013
Facsimile (864) 312-4191

J. Trey Odom
R. Patrick Martin*
Weston J. White
Donald L. Van Riper†
Frances G. Zacher†
† Of counsel

April 15, 2016

Jenny Abbott Kitchings
Clerk, The South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

Re: Mattress by Appointment, LLC vs. Retail Service Systems, Inc., Boxdrop Furniture, Inc., Carlton Scott Andrew, and Darren Conrad
C. A. No. 2015-CP-04-02161

Dear Ms. Kitchings:

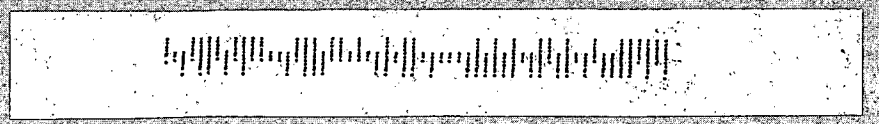
Enclosed please find a copy of a letter and memorandum that was mail to your office on April 14, 2016 for the above-referenced matter. I inadvertently forgot to enclose a copy to be clocked and returned to our office. Therefore, please clock the enclosed memorandum and return in the envelope provided.

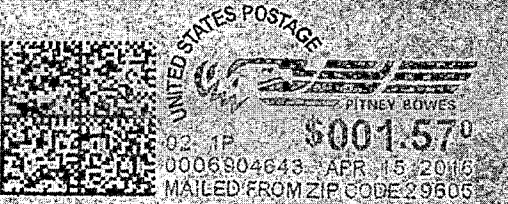
Sincerely,

ELLER TONNSEN BACH, LLC

Amy M. Price
aprice@etblawfirm.com

/amp
Enclosures





ELLER TONNSEN BACH
Attorneys at Law

2201 Augusta Street, Suite 200 • Greenville, SC 29605

RECEIVED
APR 20 2016
SC Court of Appeals

Jenny Abbott Kitchings
Clerk, The South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211