THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

J. Cordell Maddox, Jr, Circuit Court Judge

Case No. 2015-000593

Ronald J. Ferguson

Appellant,

v.

Mill Creek Estates, LP,

Respondents.

REPLY BRIEF OF APPELLANT

Ronald J. Ferguson
103 Mill Creek Rd
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(864) 509-0169
Appellant pro-se

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SCRCP RULE 210

Appellant, Ronald J. Ferguson, takes issue with the Statement of the Case, Arguments and Designation of Matters to be Included in the Record on Appeal as proferred by counsel in the Initial Brief of Respondent. SCRCP, Rule 210(c) provides, in part, "The Record shall not, however, include matter which was not presented to the lower court or tribunal."

The record would duly reflect that the Respondents have introduced a statement of the case which is not supported by the transcript or exhibits available during the hearing which led to the Order currently on appeal. Based on the Order of this Court dated December 16, 2015, it's apparently not relevant whether the appellate record is accurate.

RESPONSE TO RESPONDENTS ISSUES

Interlocutory order and appellate process

Respondents waived right to intervene

South Carolina law dictates the matter be adjudicated

Respondents Statement of the Case

Appellant duly noted in a separate filing that Respondents facts are unsupported from the records of this case or matters referenced in the formerly pending 2013CP2301810. It is indicated by Order of this Honorable Court dated December 18, 2015, denying the supplement of record to establish the facts or require the respondents to accurately reflect the events for the Court, the facts related to the appeal are of no moment.

Response to interlocutory order and appellate process

In the case at bar we have several issues to examine. "[T]here is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. American Motors Corp.*, 326 N.C. 723 725, 392 S.E. 2d 735, 736 (1990). "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E. 2d 377, 381 (1950).

S.C. Code § 14-3-330 provides, in part:

"The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

(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;"

It goes on additionally:

(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;"

That allows for appellate review of an interlocutory order upon sufficient facts and arguments showing that that challenged order "affects a substantial right." And while the definition of an interlocutory order is straightforward, the determination as to whether an order that affects a substantial right is far more complex and "is determined on a case by case basis." *McConnell v. McConnell*, 151 N.C. App. 622, 625, 566 S.E. 2d 801, 803 (2002).

We considered the meaning of a "final decision" and stated, "If there is some further act which must be done by the court prior to a determination of the rights of the parties, the order is interlocutory." Id. at 267, 692 S.E.2d at 894 *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.")

In the instant case the uncontroverted facts show that Appellant brought a cause of action against Mill Creek, LP, related to a transaction they engaged in during May and June 1974. The Honorable Judge Leticia Verdin held a public hearing which Respondents knew of and were present,but

chose not to speak, and an (ROA 1) Order of Default against the Defendant Mill Creek, LP on December 16, 2014 with a hearing to be scheduled in accordance with statute to determine damages. At that point the matter is settled. Plaintiff is entitled to damages from Defendant. (A judgment is final even though the court has not yet determined costs. ***Budinich v. Becton Dickinson & Co.***, 486 U.S. 196, 202 (1988)

There is a legally recognized and operating entity known as Mill Creek, LP (Defendant), and they pursued actions which affected Ferguson (Plaintiff), the Court has determined Ferguson is entitled to damages from Mill Creek, LP. These are specific and separate from the damages attributable to Respondents. Their own pleading states they are not Mill Creek, LP or acting in their employment and have no interest in that Defendant's well being. It is abundantly clear that allowing Respondents to intervene effectively precludes a factual determination of Mill Creek, LP activities, affects their rights, should they decide to participate, along with any and all appellate actions related thereto.

The Order was entered and Defendants have to meet a threshold requirement to seek overturning the judgment, yet Respondents, who had full knowledge of the case and attended proceedings, decide after the Entry of Default that they need to intervene and the lower court sees no issue; especially when it failed to hold a proper hearing.

Respondents Fail to Meet the Standard to Intervene

South Carolina courts have adopted a four-part test for determining timeliness: (1) the time that has passed since the applicant knew or should have known of his or her interest in the suit; (2) the reason for the delay; (3) the stage to which the litigation has progressed; and (4) the prejudice the original parties would suffer from granting intervention and the applicant would suffer from denial. Davis v. Jennings, 304 S.C. 502, 504 405 S.E.2d 601, 603 (1991). Failure to satisfy any one of the four requirements precludes intervention. Ex Parte Reichlyn, 310 S.C. 495, 427 S.E.2d 661 (1993).

Respondents were untimely and only seek to frustrate justice

The tardiness of Respondent's motion is the strongest reason supporting the underlying hearing and order are violations of due process. "[T]imely application" is required for both intervention as of right and permissive intervention. Gould, 883 F.2d at 286. When, as in this case, a request for intervention is not timely, a court is authorized, if not required, to deny it. See Houston General, 193 F.3d at 839 ("[T]imeliness is a cardinal consideration of whether to permit intervention.") (internal quotation marks omitted). The purpose of the timeliness requirement "is to prevent a tardy intervenor from derailing a lawsuit within sight of the terminal." Scardelletti v. Debarr, 265 F.3d 195, 202-03 (4th Cir. 2001) (quoting United States v. South Bend Community Sch. Corp., 710 F.2d 394, 396 (7th Cir. 1983)), rev'd on other grounds , 536 U.S. 1 (2002).

As described below, Respondents cannot satisfy this timeliness requirement. To determine whether an application for intervention is timely, courts in this Circuit examine three factors: "[1] how far the suit has progressed, [2] the prejudice that delay might cause other parties, and [3] the reason for the tardiness in moving to intervene." Scardelletti, 265 F.3d at 202-03 (citing Gould, 883 F.2d at 286). Here, an examination of all three factors weighs against Respondent's intervention and in favor of the court's denial of both intervention as of right and permissive intervention.

Service was effected through the South Carolina Secretary of State. The Court directed an additional Service by Publication during June and July of 2014 out of an abundance of caution. Respondents counsel contacted the Master-in-Equity for Greenville in October 28, 2014 via email regarding this specific action. Moreover, Respondents and/or a representative of such appeared at hearings in November and December, 2014. Despite their presence when the case was called, there was never a mention of their rights or interest in participating until *after* the Order of Default was issued with the matter set for a hearing to determine actual damages.

The record clearly demonstrates the lower court never addressed the timeliness of respondent's

motion to intervene, when they first had knowledge of the proceedings, or why their delay in seeking to intervene, as well as generally disregarded the fact the matter had been adjudicated against Defendants and was set for damages hearing. What is clear is the Plaintiff has had to invest more than a year into pursuing additional litigation to address the actions of Mill Creek, LP as the Respondents continually frustrate the legal process with outright false pleadings and lies as they seek to claim that Defendants gave them authority to act on their behalf in effort to protect their own assets.

South Carolina law dictates the matter be adjudicated

South Carolina statute provides "(3) The failure of any limited partnership formed before June 27, 1984, to file the certificate of amendment required by subsection (g)(1) does not:

(i) impair the validity of any contract or act of the limited partnership;

(ii) prevent the limited partnership from maintaining or defending any action, suit, or proceeding in any court in this State;" Quoting S.C. Code 33-42-220(3). Looking to S.C. Code §27-6-40 "Upon the petition of an interested person, a court shall reform a disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the ninety years permitted by this chapter if:

(3) a nonvested property interest that is not validated by Section 27-6-20(A)(1) can vest but not within ninety years after its creation."

SECTION 27-6-20. Nonvested property interest or power of appointment.

(A) A nonvested property interest is invalid unless:

(1) when the interest is created, it is certain to vest or terminate no later than twenty-one years after the death of an individual then alive;"

In the matter at bar a person signed a contract, in the capacity of "general partner" (of a limited partnership that was not lawfully recognized to conduct business) placing encumbrances upon land. The contract further grants the general partner - developer a say, or appoint a person in his absence, in

the future use and development of the land in perpetuity.

The lower court is vested with the authority to examine the documents filed Mill Creek, LP and have a duty pursuant to public interest to determine the legality of such. Moreover, Plaintiff has a right to a determination of damages suffered as a proximate and direct result of the actions performed by Mill Creek, LP.

CONCLUSION

Just as Defendants are required to meet a threshold to set aside the Order against them, the lower court was required to determine whether Respondents met the threshold for intervening. That clearly never happened. While the lower court record is devoid of the facts and this Court has disallowed supplementing the record to factualize such, Respondents had knowledge of the case months in advance of the hearings, to which they were present. Only after the lower court made a factual determination that Plaintiff was entitled to judgment and entered order for such did Respondents seek to participate in the matter. Why? Because they are concerned it will affect their ability to prosecute another civil action. Clearly, the order granting intervention fails to comport with the precedents and should be remanded for a developed record in accordance with such or vacated.

Respectfully submitted,

April 19, 2016

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Appellant,

v.

John D. Hatcher, Rachel Shaluly, James F. Gilbert, Molly A. Miller, and Michael Stehney, individually and as members of the Architectural Committee of Mill Creek Estates,

Respondents.

CERTIFICATE OF SERVICE

I certify, that on this date, I served a copy of the Reply Brief of Appellant, dated 4/19/2015 on Respondents' Attorney of record by

_____ delivering it to him/her personally; or,

_____ mailing it to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows; or,

__X__ mailing it to the address indicted by their counsel of record in the Summons as follows:
Rodney M. Brown
210 S Main St
Fountain Inn, SC 29644

This the _19_ day of April, 2016. *Corrected version*

Ronald J. Ferguson