

THE STATE OF SOUTH CAROLINA
In the Court of Appeals
No. 2016-001105

RECEIVED

AUG 08 2016

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Letitia H. Verdin, Circuit Court Judge

SC Court of Appeals

EMDI, LLC and FLASR, Inc.Appellants,

v.

InMotion Consulting Group, Inc.Respondent.

RESPONDENT'S MOTION TO DISMISS APPEAL

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NOW COMES Plaintiff-Respondent InMotion Consulting Group, LLC ("Respondent") and moves this Honorable Court, pursuant to Rules 201 and 240 of the South Carolina Appellate Court Rules and S.C.Code § 14-3-330, to dismiss the appeal in the above-referenced case, on the grounds that the appeal seeks review of interlocutory orders which are not immediately appealable. In support of this Motion, Respondent concurrently files and serves the attached Memorandum in Support of Respondent's Motion to Dismiss Appeal.

Respectfully submitted, this the 3rd day of August, 2016.

HAMILTON STEPHENS
STEELE + MARTIN, PLLC

By: 

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**MEMORANDUM IN SUPPORT OF
RESPONDENT'S MOTION TO DISMISS APPEAL**

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NOW COMES Plaintiff-Respondent InMotion Consulting Group, LLC (“Respondent”), pursuant to Rules 201 and 240 of the South Carolina Appellate Court Rules (“SCACR”) and S.C.Code § 14-3-330, and submits the following Memorandum in Support of Respondent’s Motion to Dismiss Appeal (the “Motion”):

STATEMENT OF THE CASE

The Complaint in this matter was originally filed on November 24, 2015, and arises from monies owed Respondent by Appellants pursuant to an engagement and consulting services agreement entered into on or about December 12, 2012 (the “Agreement”), which provided for payment to Respondent in exchange for various services performed by Respondent. Complaint ¶¶ 6; 9.

On January 7, 2016, Appellants filed their original Motions to Dismiss. Appellant EMDI, LLC (“Appellant EMDI”) moved to dismiss the Complaint for lack of subject matter jurisdiction and improper venue, pursuant to South Carolina Rules of Civil Procedure 12(b)(1) and 12(b)(3). Appellant FLASR, Inc. (“Appellant FLASR”) moved to dismiss for lack of personal jurisdiction, lack of subject matter jurisdiction, improper venue and failure to state a claim, pursuant to South Carolina Rules of Civil Procedure 12(b)(1), 12(b)(2), 12(b)(3) and 12(b)(6). A hearing was held on the Motions to Dismiss on February 10, 2016.

On March 8, 2016, Judge Letitia H. Verdin entered an Order denying all of Appellants’ Motions to Dismiss. On March 31, 2016, Appellants filed a Motion for Clarification and Reconsideration. On May 6, 2016, Judge Verdin entered an Order denying the Appellants’ Motion for Clarification and Reconsideration.

Appellants filed their Notice of Appeal on May 18, 2016. On June 2, 2016, in response to inquiry by the South Carolina Court of Appeals Clerk of Court, Appellants filed the Form 4 Judgments that they are challenging in this appeal. This appeal concerns Judge Verdin's denial of Appellants' 12(b) Motions to Dismiss and subsequent denial of Appellants' Motion for Clarification and Reconsideration.

ARGUMENT

S.C. Code § 14-3-330 sets forth those orders for which appellate jurisdiction exists. Generally, S.C. Code § 14-3-330 limits the appellate court's ability to hear appeals: "Only final judgments and certain interlocutory orders are appealable." Burkey v. Noce, 398 S.C. 35, 37, 726 S.E.2d 229, 230 (Ct.App.2012). "The provisions of Section 14-3-330 ... have been narrowly construed and immediate appeal of various orders issued before or during trial generally has not been allowed." Hagood v. Sommerville, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005). "Currently, this Court does not allow immediate appellate review of the denial of any Rule 12(b), SCRPC motion." Breland v. Love Chevrolet Olds, Inc., 339 S.C. 89, 93, 529 S.E.2d 11, 13 (2000). "The basic policy behind denying immediate review of pretrial motions is avoidance of piecemeal litigation where the rights of the parties have not been substantially impacted." Id. at 94, 529 S.E.2d at 13.

In their appellate brief, Appellants, too, acknowledge the interlocutory nature of their 12(b) Motions to Dismiss: "Although venue, personal jurisdiction, and a 12(b)(6) challenge are not traditionally subject to interlocutory appeal, they may nonetheless become appealable." Brief of the Appellant p. 2.

Appellants attempt to argue that, because there is at least one appealable issue before this Court, this Court may also consider the remaining (interlocutory) issues of

venue, personal jurisdiction, and failure to state a claim. See Brief of the Appellant p. 2 (“In South Carolina, “[a]n order that is not directly appealable will be considered if there is an appealable issue before the court.” (citations omitted)). In support of this argument, Appellants claim that “[s]ubject matter jurisdiction is immediately appealable.” Brief of the Appellant p. 2.

Appellants’ argument, however, is based on outdated law which has since been overruled and/or vacated. The sole case Appellants provide in support of their proposition that subject matter jurisdiction is immediately appealable is Chew v. Newsome Chevrolet, Inc., 315 S.C. 102, 104 (Ct.App.1993). While Chew does provide that “[a]n interlocutory order denying a motion to dismiss for lack of subject matter jurisdiction is immediately appealable,” this statement is based on bad law. The Chew court cites two cases in support of this position: (a) Carter v. Florentine Corp, Inc., 310 S.C. 228, 423 S.E.2d 112 (1992) and (b) Woodard v. Westvaco Corp., 315 S.C. 329, 433 S.E.2d 890 (Ct.App.1993).

Both Carter and Woodard have been overruled and/or vacated by Woodard v. Westvaco Corp., 319 S.C. 240, 460 S.E.2d 393 (1995), which specifically holds and states that the denial of a Rule 12(b)(1) motion to dismiss based on subject matter jurisdiction is an interlocutory order which is not immediately appealable. See Woodard v. Westvaco Corp., 319 S.C. 240, 242-43, 460 S.E.2d 393, 393-94 (1995), overruled in part on other grounds; Sabb v. South Carolina State University, 350 S.C. 416, 567 S.E.2d 231 (2002). The 2011 case of Allison v. W.L. Gore & Associates, 394 S.C. 185, 714 S.E.2d 547 (2011) reaches the same holding: the denial of a Rule 12(b)(1) motion to

dismiss based on subject matter jurisdiction is an interlocutory order which is not immediately appealable. Id. at 188, 714 S.E.2d at 549.

As for the remaining 12(b) motions at issue in Appellants' Motions to Dismiss, South Carolina courts have clearly held that the denial of such motions are interlocutory and not immediately or directly appealable. See Huntley v. Young, 319 S.C. 559, 560, 462 S.E.2d 860, 861 (1995) (denial of a Rule 12(b)(6) motion to dismiss is an interlocutory order which is not immediately appealable); Moyd v. Johnson, 289 S.C. 482, 482, 347 S.E.2d 97, 98 (1986) (same); OZO, Inc. v. Moyer, 358 S.C. 246, 252, 594 S.E.2d 541, 545 (Ct.App.2004) (denial of a motion to dismiss based on personal jurisdiction is not usually immediately appealable); Breland v. Love Chevrolet Olds, Inc., 339 S.C. 89, 94, 529 S.E.2d 11, 14 (2000) ("Even though proper venue is a substantial right, we have previously found the avoidance of a trial is not a sufficient reason to justify immediate appellate review. [. . .] [W]e find the right of proper venue has not been affected such that the order would be immediately appealable.").

Therefore, because the two orders challenged by the Appellants concern only interlocutory 12(b) issues which are not immediately appealable, Appellants' appeal is untimely and should be dismissed.

CONCLUSION

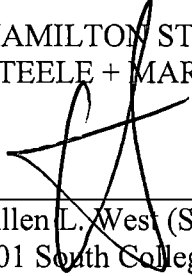
WHEREFORE, Respondent respectfully requests that this Court dismiss Appellants' appeal in its entirety.

[Signature on Following Page]

Respectfully submitted, this the 3rd day of August, 2016.

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By:



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Respondent's Motion to Dismiss Appeal and Memorandum in Support of Respondent's Motion to Dismiss Appeal* was served upon all parties and/or counsel of record by depositing a copy, enclosed in a first-class postage-paid, properly addressed wrapper, into a depository under the exclusive custody of the United States Postal Service on the date hereof, addressed as follows:

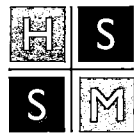
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This the 3rd day of August, 2016.

By:



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August 3, 2016

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AUG 08 2016

SC Court of Appeals

VIA U.S. MAIL

Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: EMDI, LLC and FLASR, Inc. v. InMotion Consulting Group, LLC
Appeal from Greenville County Court of Common Pleas
Appellate Case No. 2016-001105

Dear Ms. Kitchings:

Pursuant to Appellate Court Rule 240, please find enclosed for filing an original and six (6) copies of the following: (1) *Respondent's Motion to Dismiss Appeal*; (2) *Memorandum in Support of Respondent's Motion to Dismiss Appeal*; and (3) *Certificate of Service*. I am also enclosing a seventh copy of these documents so that you may return a file-stamped copy to us in the enclosed stamped, self-addressed envelope.

By copy of this letter to Michael S. Cashman, we are serving him a copy of the same.

If you have any questions or need anything further, please do not hesitate to contact me. Thank you for your help.


Sincerely,


Allen L. West

Enclosures

cc: Michael S. Cashman

Hamilton Stephens Steele & Martin, PLLC
201 South College Street, Suite 2020
Charlotte, NC 28244

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