

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Honorable S. Jackson Kimball, Master-in-Equity

CASE NO. 2016-CP-46-1001
APPELLATE CASE NO. 2017-000600

RECEIVED

APR 13 2017

SC Court of Appeals

Alfred Jenkins and Mary Jenkins. Respondents

v.

Ferrara-Buist Company, LLC d/b/b Custom Crafted Homes Appellant

**APPELLANT'S RESPONSE TO RESPONDENTS'
MOTION TO DISMISS APPEAL**

Appellant hereby responds to the Motion to Dismiss filed by Respondents, Alfred Jenkins and Mary Jenkins. Respondents' motion is based "on the grounds that the Order from which this appeal is taken is interlocutory and does not finally determine any substantial matter forming the whole or part of the cause of action." Respondents' Motion to Dismiss Appeal, p. 1. A complete review of the factual and procedural history in this case will establish that the Order being appealed falls within the exceptions enumerated in South Carolina Code of Laws §14-3-330. The actions of Judge Kimball effectively granted summary judgment on Respondents' claims under the guise of an order granting equitable relief. All of the Plaintiffs'/Respondents' claims were

resolved by the Order being appealed and provided Respondents with all the relief sought by their Complaint, i.e. refund of all payments made to Appellant under the contract including the costs of appliances and a ceiling fan. The Order resolved all of Respondents' claims, thereby ending their causes of action and making said Order appealable under §14-3-330 of the South Carolina Code of Laws. The Order being appealed also affects the mode of trial by Respondents, making the Order immediately appealable under §14-3-330 (2) of the South Carolina Code of Laws.

I. Factual/Procedural History Relevant to Respondents' Motion to Dismiss & Appellant's Response

The record indicates that the parties entered into a contract for the construction and sale of land and a home with a final contract price, after change orders, of \$881,868.63, and that Plaintiffs/Respondents paid a total of \$643,760.70 to Defendant/Appellant.

Respondents filed a complaint in the Court of Common Pleas of York County, South Carolina, alleging causes of action under both theories of equity and law for: 1) equitable lien, 2) restitution, and 3) breach of contract. Respondents claimed damages in the amount of \$665,423.23, plus attorney's fees and costs. Respondents also filed a lis pendens and mechanics lien on the subject property. Respondent requested a jury trial. The Clerk of Court transferred the case to the Master-in Equity sitting as Circuit Judge for York County.

Appellant filed an answer and counterclaim for: 1) breach of contract, 2) slander of title, and 3) cloud on title. The answer and counterclaim also included a motion for injunctive relief, seeking the release of the lis pendens to allow Appellant to sell the subject property in order to mitigate damages. Appellant sold the property for \$850,000.00 in order to mitigate its damages and received \$804,349.66 in proceeds after closing costs. Respondent and Appellant agreed, by consent, to resolve the injunctive relief/lis pendens claims by depositing \$663,395.37 of the

proceeds, representing the maximum amount in dispute by either party, with the Clerk of Court pending a trial on the above claims. Thereafter, Respondents filed a motion for partial summary judgment, not a motion for release of funds held by the Clerk of Court, as stated in Respondents' Motion to Dismiss with this Court. An affidavit of counsel, Herbert Hamilton, Esq., was filed in support of Respondents' motion for partial summary judgment. Appellant's filed a counter affidavit that established material questions of fact regarding the above causes. Upon hearing Respondents' motion for summary judgment, the master-in-equity ordered the release of funds to Respondents for the full amount of \$663,395.37. Appellant timely filed a motion to reconsider the order releasing funds, which was denied, and, as a result, this appeal followed.

II. S.C. Code §14-3-330 (1) allows Appellant to have this Court review the Order of Judge Kimball as the Order finally determined Respondents' claims.

“The right of appeal arises from and is controlled by statutory law.” Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006). “An appeal ordinarily may be pursued only after a party has obtained a final judgment.” Id. (citing S.C. Code Ann. § 14-3-330(1) (1977); Rule 72, SCRCPP; Rule 201(a), SCACR). “The determination of whether a party may immediately appeal an order issued before or during trial is governed primarily by [section 14-3-330 of the South Carolina Code (1977 & Supp.2013)].” Id. “Absent a specialized statute, an order must fall into one of several categories set forth in [s]ection 14-3-330 in order to be immediately appealable.” Id. “An order ‘involves the merits,’ as that term is used in [s]ection 14-3-330(1)[,] and is immediately appealable when it **finally determines some substantial matter forming the whole or part of some cause of action or defense.**” Id. at 7, 630 S.E.2d at 467(footnote omitted, emphasis added).

Here, the trial court, in its order, finally determined all the claims of the Respondents. The

Judge in the Order stated: "I find and conclude that, as a result of the sale of the house, Defendant has been paid in full the contract price based on the parties' contract, except for \$31,861.13." (footnote omitted). Citing Order entered November 28, 2016. Despite finding that Appellant had been paid in full, except for \$31,861.13; that Respondents only paid \$643,760.70 to Appellant; that the basis of the agreement to deposit the funds with the court was that said funds would remain with a neutral party until a final outcome in the case; and that Respondents may be owed more than \$31,861.13 in consequential damages; the trial court released the full amount of funds on deposit with the court to the Respondents. The release of said money was "in essence" a ruling on Respondents' claims for equitable relief in their complaint and/or a ruling on damages, and therefore the order affects a substantial right and is immediately appealable. By making the ruling that Respondents were entitled to \$663,395.37, the trial court granted Respondents' equitable lien on the property. Further, the trial court ruled that Respondents were entitled to the entirety of the funds on deposit with the court, thereby determining that Appellant was not entitled to the money held by the Clerk of Court.

The trial court finally determined the "substantial matter" of the claims by the Respondents in its Order. In this action, the substance of the Order appealed granted Respondents' claims for breach of contract and denied Appellant the right to litigate its breach of contract claim. The order entered by the court releasing the funds to Respondents "in essence" provided Respondents with the relief sought in their complaint. The parties were before the court on a motion for summary judgment filed by Respondents; however, said motion was treated as a motion for release of funds whereby the trial court made findings of fact and conclusions of law determining the parties' rights and damages, resulting in the release of funds to Respondents. The above actions were a final

determination of Respondents' claims, albeit allowing Respondents a second chance for consequential damages at a later date.

To further demonstrate that the trial court's order "in effect" determined a cause of action in this matter, Appellant submits a letter from Respondents' attorney as Exhibit A attached hereto. Exhibit A demonstrates that following the receipt of the \$663,395.37 the Respondents' claims were essentially resolved, except for attorney's fees and costs.

III. S.C. Code §14-3-330 (2) allows Appellant to have this Court review the Order of Judge Kimball as it affects the mode of Appellant's right to a jury trial.

Furthermore, "[a]n order affects a substantial right and is immediately appealable when it '(a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action'" Hagood v. Sommerville, 362 S.C. 191, 195, 607 S.E.2d 707, 709 (2005)(brackets omitted) (quoting § 14-3-330(2)). It is clear that the mode of trial is a substantial right that falls within S.C Code 14-3-330(2). See Bateman v. Rouse, 358 S.C. 667, 675, 596 S.E.2d 386, 390 (Ct. App. 2004) (purpose of immediate appeal on right to particular mode of trial is to preserve party's constitutional right to trial by jury which would otherwise be lost.)

In this appeal, Judge Kimball effectively denied the Appellant the right to a trial by jury on Respondents' breach of contract claim. The Judge determined the questions of fact and damages on behalf of Respondents himself without a jury. If the Order being appealed is left in place, Appellant will be estopped from asserting that Respondents breached the sale of home contract, as the lower court has already ruled that Respondents are entitled to damages from the Appellant. There is no logical way that a jury can find that Respondents breached the contract if the trial court has already ruled that the Appellant must pay Respondents \$663,395.37. The Circuit Court ruled

that the Appellants breached the contract and/or Appellants must return all proceeds under the contract plus the value of the appliances. Although the Circuit Court asserts that it did not grant summary judgment on the breach of contract, the Order does end the Respondents case and makes it impossible to reconcile how the Appellant can now claim Respondents breached a contract considering the Circuit Court has already ruled in favor of Respondents on all of the their claims.

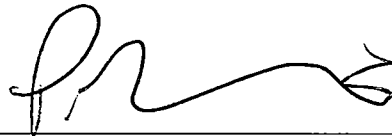
The Order being appealed must be allowed to be reviewed as the trial judge either: 1) made final findings of fact that were for the jury to determine or 2) improperly granted equitable relief where there was an adequate remedy at law for breach of contract. Clearly, equitable relief is generally only available when a party is without an adequate remedy at law. EllisDon Constr., Inc. v. Clemson Univ., 391 S.C. 552, 555, 707 S.E.2d 399, 401 (2011). In this case, the relief being appealed, if equitable in nature, was unavailable to Respondents as a matter of law as Respondents have an adequate breach of contract remedy at law. See Van Robinson Ins. Agency, Inc. v. Harleystville Mut. Ins. Co., 272 S.C. 127, 128-29, 249 S.E.2d 744, 745 (1978) (holding that equity will not intervene if appellant has an adequate remedy at law.)

IV. Conclusion

The trial court's order on appeal with this Honorable Court, affected a substantial right of Appellant because the order provided Respondents with the relief sought in their complaint, thereby essentially granting their claims. Because the trial court's order affected the substantial right – mode of trial and, in effect, determined an action or prevented a judgment from which an appeal might be taken, Respondents' Motion to Dismiss Appeal should be denied.

Signature Page Follows

April 10, 2017



Paul B. Ferrara, III
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paul@ferraralawfirm.net
Attorney for Appellant

EXHIBIT A



Herbert W. Hamilton
Of Counsel
herb.hamilton@hamiltonmartens.com
Dial: 803-329-7607

December 8, 2016

Via U.S. Mail and Email [paul@ferraralawfirm.net]

Paul Ferrara, III
FERRARA LAW FIRM, PLLC
2300 Otranto Road
North Charleston, South Carolina 29406

RE: Alfred and Mary Jenkins
Our File No.: 11848-001

Dear Paul:

Now that the house has been sold, we need to consider whether it makes sense for either party to continue this litigation. Both parties contend that the contract was breached by the other party. From my review of the file material, including emails and other communication from the contractor, I believe we will be able to show that Dr. and Mrs. Jenkins did everything that was required of them and that the contractor failed to build the home as required by the plans and specifications, building codes and accepted industry practice.

Now that Dr. and Mrs. Jenkins have received reimbursement of the payments to the contractor, they will be able to show consequential damages exceeding \$30,000, not including attorneys' fees. The successful party is entitled to recover attorneys' fees which will surely exceed \$50,000 if the litigation continues.

While Dr. and Mrs. Jenkins are confident in their legal position, they understand the time and effort involved in pursuing their claim. In order to put this behind them and in the spirit of cooperation and compromise, they are prepared to drop their claim against Ferrara Buist if Ferrara Buist will drop any claim they may have against them.

Please let me know as soon as possible if Ferrara Buist is willing to drop their claim. While we are considering this proposal, I would like to request a 30-day extension of time to respond to discovery.

Yours very truly,

A handwritten signature in black ink, appearing to read 'Herb'.

Herbert W. Hamilton

HWH/dh

Hamilton Martens, LLC

130 East Main Street (29730) • Post Office Box 10940 (29731) • Rock Hill, South Carolina
Phone: 803.329.7672 • Facsimile: 803.329.7678 • www.hamiltonmartens.com

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Honorable S. Jackson Kimball, Master-in-Equity

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PROOF OF SERVICE

I certify that I have served Appellant's Response to Respondents' Motion to Dismiss Appeal on Alfred Jenkins and Mary Jenkins by depositing one (1) copy of it in the United States Mail, postage prepaid, on April 10, 2017, addressed to their attorney of record, Herbert Hamilton, P.O. Box 10940, Rock Hill, SC 29731.

April 10, 2017



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Paul B. Ferrara, III*
Janel K. Ferrara*
Kassandra J. Garan

*(also Admitted in N.C.)

April 10, 2017

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SC Court of Appeals

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

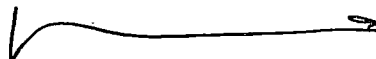
Re: Alfred Jenkins and Mary Jenkins v. Ferrara Buist Company, LLC d/b/b Custom
Crafted Homes
Common Pleas Case No.: 2016-CP-46-1001
Appellate Case No.: 2017-000600
Our File No.: 16-605

Dear Ms. Kitchings:

Enclosed for filing is the original and six (6) copies of Appellant's Response to Respondents' Motion to Dismiss Appeal and Certificate of Service in the above referenced case.

Sincerely,

FERRARA LAW FIRM, PLLC

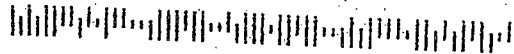
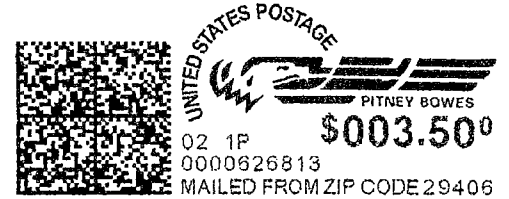


Paul B. Ferrara, III

Enclosures

cc: Herb Hamilton
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803-329-7607
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The Honorable Jenny Abbott Kitchings
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