

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2016-002459

South Carolina Human Affairs Commission,

Appellant,

v.

Zeyi Chen & Zhirong Yang,

Respondents.

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MAY 12 2017

SC Court of Appeals

RETURN TO RESPONDENTS' MOTION TO DISMISS APPEAL

The South Carolina Human Affairs Commission ("SCHAC" or "Appellant") submits this return to the Respondents motion to dismiss the appeal pursuant to Rule 240, SCACR.

I. STATEMENT OF THE CASE¹

On November 14, 2014, Appellant brought an action in the Charleston County Court of Common Pleas alleging illegal discrimination in violation of the South Carolina Fair Housing Law against Chen and Yang (Respondents). On March 24, 2016, Appellant and Respondents participated in mediation resulting in a settlement agreement. The settlement agreement included

¹ The Statement of the Case for purposes of this return have been limited to only the facts relevant to this motion. Appellant's Initial Brief contains a full discussion of the facts and procedural background.

definite terms regarding duties of the parties as well as a requirement that the agreement be distilled into the form of a consent order for filing with the court. The settlement agreement was signed by the parties and by Appellant's attorney; Respondents' attorney failed to sign the document, although he was present for the entirety of mediation and witnessed the signing. The mediator filed a Proof of ADR noting the case had been settled, and the court dismissed the case. After Respondents withdrew their assent to the settlement agreement, Appellant filed a motion to enforce the settlement agreement on April 15, 2016. A hearing was held on July 14, 2016 and the circuit court denied Appellant's motion to enforce on the grounds that Rule 43(k), SCRPC had not been satisfied.

II. ARGUMENT

A. Enforcement of Obligations is a Substantial Right of a Party, Denial of Which is Appealable

In South Carolina, specific performance has been recognized as a matter of right for well over a century; in *Sumner v. Bankhead*, the dissent makes survey of various authorities holding that specific performance is a matter of right:

[I]t is held that in the absence of fraud, concealment, misrepresentation, undue influence, violation of confidence reposed or of any inequitable conduct on the part of the plaintiff, the latter is entitled, as a matter or right, to the remedy of specific performance.

Sumner v. Bankhead, 119 S.C. 78, 94 (1922) (J. Cothran, dissenting) (citing *Lumber Co. v.*

Matheson, 69 S. C. 87, 48 S. E. 111).

A decree for the specific performance of a contract is a matter of right, when a proper case is presented, although said to rest entirely in the discretion of the court. That discretion is not arbitrary but governed by fixed rules.

Id at 94. (citing *accord Howard v. Moore*, 36 Tenn. (4 Sneed) 317)

“Though specific performance cannot be demanded as a matter of absolute right, and it rests in sound judicial discretion, yet, where all the necessary incidents and conditions are proven by satisfactory evidence, the relief should be decreed as a matter of right, and not as a matter of favor.”

Id at 96 (quoting *accord Turn Verein Eiche v. Kionka*, 255 Ill. 392, 99 N. E. 684, 43 L. R. A. (N. S.) 44.

Additionally, “[i]n South Carolina jurisprudence, settlement agreements are viewed as contracts.” *Nichols Holding, LLC v. Divine Capital Grp.*, 416 S.C. 327, 335, 785 S.E.2d 613, 615 (Ct. App. 2016) (quoting *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009)). Enforcement of obligations in contracts, too, has a long history in South Carolina as an important right under a contract; our Supreme Court going so far as to hold that: “[o]bviously, the obligation of a contract includes no element more important than the means of enforcement. This is the breath of its vital existence.” *Kirk v. Douglass*, 190 S.C. 495, 498, 3 S.E.2d 536, 538 (1939) (internal citations and quotations omitted).

The right of appeal is controlled by statute. S.C. Code Ann. § 14-3-330 (1976 and Supp. 2003). Section 14-3-330(2) states that “[a]n order affecting a substantial right made in an action when such order ... in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action” is appealable. *Id.*

In the instant matter, Appellants sought an order from the court requiring specific performance of the settlement agreement entered into by the parties. This is an entirely separate cause of action from the suit filed by the Commission; the original suit had been dismissed by the time that motion (and this appeal) had been filed. The denial of the motion to enforce the settlement agreement determines the enforcement action and discontinues that action altogether.

By way of comparison, had the Appellant instead filed an action for breach of contract² that was dismissed, there would certainly be no question of the jurisdiction for an appeal as the cause of action for breach of contract is obviously distinct from a cause of action alleging illegal discrimination. Just as an action at law for breach of contract would be independent of the original suit, so too is an action in equity for specific performance an action independent of the discrimination causes of action. South Carolina law has long recognized enforcement of a contract as an essential right and specific performance in particular as a matter of right. In the instant matter, the circuit court's order denying Appellant's motion to enforce the settlement agreement affects a substantial right recognized by our Supreme Court and determines with finality the action to exercise those rights, placing it within this Court's purview for appeal.

B. *Peterkin* is Distinguishable From the Case at Bar as it Required Further Acts by the Court

Respondent relies on *Peterkin*, a case involving a wrongful death and survival action. *Peterkin v. Brigman*, 319 S.C. 367, 461 S.E.2d 809 (1995). However, as Respondent notes in their motion to dismiss, citing *Ex parte Wilson*, “[a]ny judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory...” *Ex parte Wilson*, 367 S.C. 7, 12, 625 S.E.2d 205 (2005); Respondents’ Motion to Dismiss Appeal and Incorporated Memorandum in Support, p2. In *Peterkin*, the order declining to approve the settlement was the order being appealed. “As noted by the circuit judge, any settlement agreement in a wrongful death or survival action is not enforceable unless it is approved by an appropriate court.” *Peterkin*, 319 S.C. 367. Respondents’ reliance on *Peterkin* is misplaced as the settlement in that matter required further court approval.

²Appellant instead sought specific performance of the settlement terms as many of those terms require specific acts of Respondents to further the public interest in eliminating and preventing illegal discrimination in housing.

Generally, consent orders do not require further approval from the court: “[a] consent order is the mere agreement of the parties under the sanction of the Court, and is to be interpreted as an agreement.” *Jones & Parker v. Webb*, 8 S.C. 202, 206, 1876 WL 5996, 8 Richardson 202 (1876) (citing *Allen vs. Richardson*, 9 Rich. Eq., 56). In looking through the South Carolina Code and court rules, Appellant could only find five instances of consent orders that require court approval: settlement of claims involving minors or incapacitated persons³; family court settlements⁴; wrongful death or survival actions⁵; class action settlements⁶; and probate mediations⁷.

Even though the settlement agreement at bar requires that “[t]hese terms will be reduced to a formal Consent Order to be executed by all of the parties,” it does not require any further action from the court to determine rights under the settlement agreement. As such, the matter at bar is easily distinguishable from *Peterkin*; the settlement in *Peterkin* required further approval from the court and, by statute, did not determine the rights of the parties. In the instant matter, the settlement did not require any further action from the court and, in fact, the case had been dismissed at the time Respondents refused to comply with the agreement. As Respondents note in citing *Wilson*, where there is “some further act to be done by the court before the rights of the parties are determined” an order is interlocutory. As the order denying Appellant’s motion to enforce requires no further act by the court in determining the parties’ rights under the settlement agreement, the appeal before this Court is appropriate.

³ S.C. Code Ann. §65-5-433, *et seq.*

⁴ S.C. Code Ann. § 63-17-40, *et seq.*

⁵ S.C. Code Ann. §15-51-41, *et seq.*

⁶ Rule 23, SCRCP.

⁷ Rule 5, SCRCP.

Appellant notes that other cases involving denials of motions to enforce settlement agreements have been reviewed on appeal. *See, e.g., Ashfort Corp. v. Palmetto Const. Grp., Inc.*, 318 S.C. 492, 493, 458 S.E.2d 533, 534 (1995).

C. Disallowing Immediate Review of All Orders Denying Enforcement of Settlement Agreements Would Result in Inefficient Use of Judicial Resources

If Respondents' argument is correct, the only avenue for appeal of the circuit court's order would be for the parties to proceed to a final judgment in the original suit and only then for an appeal of the order to proceed. At that point, should Appellant prevail on appeal, an order vacating the judgment from the trial court would need to be issued and the order remanded for the settlement terms to be enforced. The same reasoning applies if the parties' roles were reversed; if Appellant had reneged on the settlement agreement and Respondents sought and were denied an enforcement order, applying *Peterkin* to the enforcement action would result in the parties needing to revive the original lawsuit, take it to a final judgment, and then Respondents/Defendants could appeal the order denying enforcement, again seeking to vacate a jury verdict. Either case results in a staggering waste of judicial resources, overriding a jury verdict, and additional delay in correcting an error of law.

Further, a holding applying *Peterkin* to all settlement agreements, not just those settlements subject to judicial approval, would result in absurd situations. Were Respondents' arguments to hold, an order denying enforcement of a settlement agreement reneged on years after signing could not be appealed until after the original lawsuit was reinstated and taken to judgment. Such a result cannot be what was intended in creating the rules governing the scope of appellate review.

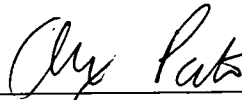
III. CONCLUSION

This appeal involves substantial rights in contract long recognized by the courts of South Carolina. The order denying enforcement by the circuit court is determinative of the parties' rights under the settlement agreement and requiring that the parties litigate the original lawsuit will do nothing to address the merits of the enforcement action.

WHEREFORE, Appellant respectfully requests this Court deny Respondents' motion to dismiss the appeal.

May 12, 2017

Respectfully submitted,



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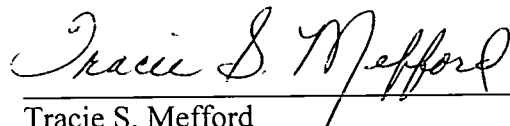
Zeyi Chen & Zhirong Yang,

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of May, 2017, in Columbia, South Carolina, I served a copy of the foregoing **Return to Respondents' Motion to Dismiss Appeal** upon Counsel for Respondents by depositing the same in the United States Mail, postage prepaid, and addressed as follows:

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May 12, 2017

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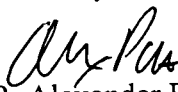
Re: South Carolina Human Affairs Commission v. Zeyi Chen & Zhirong Yang
Civil Action No.: 14-CP-10-7037
Appellate Case No. 2016-002459

Dear Ms. Kitchings:

Enclosed for filing are the original and six (6) copies of Appellant's Return to Respondents' Motion to Dismiss Appeal in connection with the above referenced matter. By copy of this letter I am this date serving a copy of this document upon Counsel for the Respondents.

Thank you for your assistance in this matter.

Sincerely,


R. Alexander Pate, II

/tsm

enclosures

c.c. Ian O'Shea, Esquire