IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Mikell R. Scarborough, Master in Equity

2016-CP-10-1143
Appellate Case No.: 2016-002308

Palmetto Construction Group, LLC Respondent,

v.

Restoration Specialists, LLC,
Reuben Mark Ward, and
Lynnette Pennington Ward, Appellants.

RESPONDENT'S OPPOSITION TO APPELLANTS' MOTION TO STRIKE & RESPONDENT'S MOTION TO STRIKE SECTION "I. (F)" OF APPELLANTS' INITIAL BRIEF

Respondent Palmetto Construction Group, LLC ("PCG") responds to Appellants' motion to strike certain documents from PCG's Designation of Matter on Appeal as well as certain references to those documents made in PCG's initial brief as follows:

A. Background

This matter arises out of PCG's complaint against Appellants alleging, *inter alia*, that Appellants misappropriated funds from a construction project for the Department of Veterans' Affairs ("VA"), failed to pay its subcontractors and suppliers, and defaulted on its agreements with PCG and the surety, Hanover Insurance Company ("Hanover"), leaving PCG responsible to

its subcontractors and the surety in excess of $1.4 Million. Appellants were personally served with the summons and complaint, but failed to respond. Appellants were held in default and the matter was referred to the Master in Equity.

The day before the damages hearing, counsel appeared on behalf of the Appellants, seeking a continuance of the damages hearing and relief from the default judgment. Appellants later filed a motion to compel arbitration. After two hearings on the motions, the Master in Equity issued an order denying Appellants' motion to lift the default and finding that the arbitration motion was not properly before him as the Appellants were in default. (See July 14, 2016 Order). The Master succinctly stated his ruling at the hearing: "Well, Ms. Ariail, I think the first thing you have to do is get out of default before you can bring affirmative relief." (July 14, 2016 Hearing Transcript, p. 9 lines 2-4). The July 14, 2016 Order also set a new date for the damages hearing, October 4, 2016. (July 14, 2016 Order). Appellants filed a motion to reconsider on July 27, 2016.

On September 30, 2016, PCG was served with a notice of appeal. The notice was well past the deadline to appeal the July 14, 2016 Order, and no other order had been entered in the case, so PCG moved to dismiss the appeal. PCG's motion to dismiss was ultimately granted by this Court (see Order Dismissing Appeal); but the defective notice, prevented the Master from going forward with the damages hearing on October 4. The parties did appear before the Master on October 4, 2016, but in lieu of a formal damages hearing, the Master requested a proffer of PCG's damages and heard argument on Appellants' motion to reconsider. The motion was denied on the grounds that: (1) Appellants failed to show good cause to lift the default; and (2) the Appellants' motion to stay and compel arbitration was not properly made as a party in default cannot seek affirmative relief and this appeal followed. (Order Denying Motion to Reconsider).

No final judgment has been entered as this appeal was filed before the damages hearing was held.

As PCG sees this appeal as a "garden variety" attempt to appeal from a default where there is no final judgment, PCG has also asked this Court to dismiss this appeal in expedited fashion so the Master can prevent Appellants' further misuse of funds.

B. Appellants' Motion to Strike

Appellants have moved to strike certain documents from PCG's Designation of Matter on Appeal, including Appellants' document productions dated July 6, 11, and 13, 2016 (though many of these documents are attached to Appellants' various memoranda filed before the lower court and appearing on Appellants' own Designation of Matter), and PCG's exhibit notebook provided in support of its proffer of damages. (Motion to Strike and Affidavit in Support). Appellants rely on Rules 209(b) and 210(c) SCACR in support of their motion.

Rule 209(b) refers to Rule 210 (c) and states, "A party shall not include any matter in his Designation which is not relevant to the appeal." Not only are all the documents designated by PCG relevant to this appeal, they will assist this Court in its review of this case. Rule 210(c) states: "The Record shall not, however, include matter which was not presented to the lower court or tribunal." Appellants' motion further seeks to strike certain portions of PCG's initial brief, which reference these documents. Each of the portions of PCG's brief that Appellants' seek to strike are contained in either PCG's statement of the facts, or PCG's response to Appellants' alleged meritorious defenses to PCG's complaint. (See Motion to Strike, pp. 4-7).

Appellants' counsel, in her affidavit in support of the motion to strike, asserts that she has conducted a search of the clerk of court's records and a review of documents entered in the record at the hearings in this case, and PCG's exhibit notebook provided in support of its proffer

does not appear in the record. (Affidavit).[1] PCG submits that the official transcript of the October 4, 2016 hearing demonstrates that the notebook was part of the proffer of its damages requested by the Master and was indeed presented to the lower court. The morning of the scheduled damages hearing, October 4, 2016, the parties appeared before the Master. Despite Appellants' notice of appeal, PCG was prepared to go forward with the damages hearing, and appeared with Mr. John Kendle to testify to PCG's damages and exhibit notebooks which were intended to be entered into the record by way of Mr. Kendle's testimony. Copies of the notebook were prepared for the witness, the Master, and opposing counsel. The exhibit notebook was not formally entered in the record as Mr. Kendle did not testify; however, the notebooks were distributed and the exhibits were discussed with the Court as part of the proffer and objected to by Ms. Ariail – all of which appears from the transcript. The following exchange between the Court and Ms. Ariail demonstrates the Court's intent that Palmetto's damages be put in the record as well as Ms. Arial's possession of and objection to the very documents she now claims were not part of the proceeding:

> MS. ARIAIL: Your Honor, I'm going to object to any of this information being put in the record. Again, this is essentially the damages hearing as going forward. I've essentially got Counsel for the Plaintiff testifying with no --
> THE COURT: Well, I asked for a proffer and that's just what I got. That's what I was wanting.
> Okay? I want that to be on the record when you-all take that up there.

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[1] It appears the filing of the notebook with the clerk would alleviate Ms. Ariail's concern. However, in order to avoid the allegation that PCG is trying to enter something in the record that was not before Master or that PCG took any steps without the Master's approval or knowledge, PCG counsel wrote the Master, seeking leave to file the exhibit notebook that was before him on October 4, 2016. (See letter dated May 16, 2017). The Master responded that in his view the exhibit notebook was part of PCG's proffer of damages and that PCG's damage calculation was based on the exhibit notebook provided at the hearing. (See Email of Master dated May 18, 2017).

MS. ARIAIL: Well, I don't agree with anything that she said.
THE COURT: You don't have to.
MS. ARIAIL: I've got problems with a lot of the documents that are contained herein.

(October 4, 2016 Transcript, p. 31 line 2-15). Though the notebook was not filed, it was presented to the lower court and this is all Rule 210(c) requires. Appellants' motion must be denied.

Further, the exhibit notebook, and more importantly the facts contained in the notebook were discussed in detail on the record. (See, e.g., October 4, 2016 Transcript, pp. 26-28). The arguments of counsel are properly considered when necessary to an understanding of the issues on appeal. *See Gilmore v Ivey*, 290 SC 53, 348 SE2d 180 (Ct. App.1986). Accordingly, even if the exhibit notebook is stricken from the Record on Appeal, nothing should be stricken from Respondent's brief as the citations can simply be amended to make reference to the official transcript rather than the documents themselves. (See also Rule 208(b) SCACR allowing "references to the transcript" to support the salient facts alleged.)

C. Rule 208(b) – Respondent's Motion to Strike

"Rule 208(b) governs contents of the briefs, and requires 'references to the transcript, pleadings, order, exhibits, or other materials which may be properly included in the Record on Appeal to support the salient facts alleged.'" *Forner v. Butler*, 319 S.C. 275, 277, 460 S.E.2d 425, 427 (Ct. App. 1995) (quoting Rule 208(b)(4), SCACR). In their initial brief, Appellants assert the Master erred in failing to lift the default because Appellants have "meritorious defenses" to PCG's complaint and go on to list each alleged defense. (Appellants' Brief, pp.19-20). In violation of Rule 208(b), almost every defense asserted by Appellants is without citation to the record, and Appellants have sought to strike each of PCG's arguments grounded in the

record and in the proffered exhibit notebook. PCG's arguments and these documents do not support Appellants' contention of a meritorious defense. For example, at the paragraph numbered F(1), without citation to the record, Appellants state: "(1): Respondent has been paid in full under the Subcontract Agreement, including an overpayment in excess of Fourteen Thousand ($14,000.00) Dollars;" (Appellants Brief, p. 19). However, the checks provided by Restoration Specialists in discovery and the job cost billing detail show PCG is actually owed over $180,000.00. This was before the Master and was considered by him in denying Appellants' motion to reconsider. (October 4, 2016 Transcript, pp. 26-28). Appellants attempt to exclude these documents as they are part of the exhibit notebook as well as the counterargument made by PCG in its brief. (See Motion to Strike, pp. 5-6, ¶ 10).

At the paragraph numbered F(2), without citation to the Record, Appellants state: "(2): There is no agreement for profit sharing between the parties." Id. In Paragraph F(2), Appellants later cite the Teaming Agreement, which is inapplicable to the agreement between the parties concerning profit sharing except to the extent that the Teaming Agreement states profit sharing may be provided for in "resultant contractual arrangement agreed to between the Parties", which is exactly what happened here. PCG and Restoration Specialists agreed to a 50/50 profit split as appears from attachment 1 to the subcontract between these parties titled "PCG Subcontract Breakdown", which is explicitly made part of the subcontract pursuant to §1.1 and §16.1.4 of the subcontract. (See Subcontract, attached). Appellants seek to hide this fact from this Court by attempting to exclude Attachment 1 (as well as the Prime Contract between Restoration and the VA which is also expressly made part of the subcontract), even though they conceded the subcontract itself is part of the record. Both Attachment 1 and the Prime Contract appear in the exhibit notebook. Appellants further claim in their paragraph F(2): "Further, there is nothing in

the Subcontract Agreement between the parties related to the project that allows for profit sharing." Appellants seek to exclude the Prime Contract and Attachment 1 as it renders implausible the claim of "meritorious defenses." Both documents are part of Appellants' document production. Appellants attempt to exclude any reference to Attachment 1 to the subcontract made in PCG's brief. (See Motion to Strike, p. 6, ¶ 11).

The lack of citations to the record continue at paragraph F(3), where Appellants, without citation to the record, state: "Appellants dispute the claims made by many of the subcontractors which have made claims against the Payment Bond;" Id. This statement is belied by the demand letter from Hanover, directed to Appellants, *inter alia*, which states in pertinent part, "Hanover...has sought your input in the payment of these claims including whether any viable defenses to the claims exist..." (Respondent's Initial Brief, p. 16) as well as Appellant Ward's own email where Mr. Ward concedes he has no defense to the bond claims of certain subcontractors. Id. Appellants seek to exclude Hanover's demand and Mr. Ward's emails (with are both part of the exhibit notebook submitted in support of the proffer) as well as any reference to these documents in the brief. (See Motion to Strike p. 6, ¶¶ 12 and 13).

At the paragraph numbered F(4), without citation to the Record, Appellants state: "Appellant Restoration has not paid all subcontractors and vendors in full as the Department of Veterans' Affairs has not made final payment under the Contract;" (Appellants Brief, p. 20). Here Appellants attempt to exclude their answers to interrogatories (which were part of the exhibit notebook) that show Restoration Specialists was paid over $8.1 Million from the VA. This sum, based solely on the contract with the VA and the subcontracted cost ($6,929,212.00 provided by Appellants and contained in the exhibit notebook) and in house cost ($1,038,724.04 provided by Appellants and in the exhibit notebook), should have been more than enough to pay

all the subcontractors in full and produce a profit of $226,092.67. However, Appellants attempt to keep these documents out of the Record despite the fact that these documents are Appellants' own records and despite the fact that these documents were before the lower Court. (See Motion to Strike, pp. 6-7, ¶¶ 14-17).

Rather than providing facts to this Court in support of its alleged meritorious defenses, Appellants attempt to assert the "facts" without support in violation of Rule 208(b)(4) SCACR. The records they seek to exclude are in large part their own documents which were before the Master and considered by the Master in reaching his decisions and support the Master's refusal to lift the default.[2] Thus, if the documents provided to the Master in support of its proffer of damages given on October 4, 2016 and PCG's references to them in their initial brief are stricken, so too must Appellants' entire section on their alleged meritorious defenses be stricken as the exhibit notebook contains the only documents in the record relevant to the defenses. As whether the defendant has a meritorious defense is an element of relief from default,[3] if this section is stricken Appellants' argument, as to the issue of relief from default, fails.

D. Conclusion

This motion illustrates the issues inherent in filing an appeal before the entry of final judgment and lends further support for the dismissal of this interlocutory appeal. Appellants ask this Court to issue an order finding that the Master abused his discretion in failing to lift the entry of default against them in part because they allege meritorious defenses to PCG's complaint

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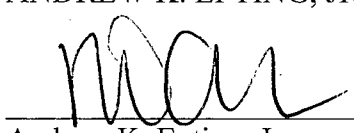
[2] The Appellants dilemma is apparent: either argue without any factual basis by excluding the records or be confronted by records that disprove Appellants' arguments and justify the Master's orders. It is not surprising Appellants have chosen to attempt to bar what was before the Master.
[3] *See Sundown Operating Co., Inc. v. Intedge Industries, Inc. Eyeglasses*, 383 S.C. 601681 S.E.2d 885 (S.C. 209).

while at the same time seeking to exclude the documents essential to the case (and dispositive of the claimed defenses) because the documents were provided to the lower court as part of a proffer of damages and not formally entered in the record. Appellants make no mention of the fact that their faulty notice of appeal, an appeal that was ultimately dismissed by this Court, was the reason the damages hearing did not go forward. In the Master's own words, he asked for the proffer to "make a record" so that this Court could undertake a meaningful review of this case. (Transcript of October 4, 2016 Hearing, pp. 9-10, 29, 31). PCG is skeptical a meaningful review can occur without the entry of final judgment, but is certain it cannot if Appellants' motion is granted.

Respectfully Submitted By:

ANDREW K. EPTING, JR., LLC

BY: 

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ATTORNEYS FOR RESPONDENT

On this 16 day of May, 2017
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas for the Ninth Circuit

Mikell R. Scarborough, Master-In-Equity

CASE NO. 2016-CP-10-1143

Appellate Case No.: 2016-002308

Palmetto Construction Group, (Respondent)

v.

Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward. (Appellants).

PROOF OF SERVICE

I certify that I have served the Respondent's Opposition to Appellants' Motion to Strike and Respondent's Motion to Strike Section "I.(F)" of Appellants' Initial Brief on all counsel of record by depositing a copy in the United States Mail, Postage prepaid, on May 18, 2017, addressed as follows:

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ATTORNEYS AT LAW

May 18, 2017

The Honorable Jenny Abbott Kitchings
Clerk of Court
1220 Senate Street
Columbia, South Carolina 29201

RE: *Palmetto Construction Group v. Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward*
Case No.: 2016-CP-10-1143
Appellate Case No.: 2016-002308

Dear Ms. Kitchings:

Enclosed for filing please find the original and seven copies of the Respondent's Opposition to Appellants' Motion to Strike and Respondent's Motion to Strike Section "I. (F)" of Appellants' Initial Brief together with a Proof of Service and our firm's check in the amount of $25.00.

I would greatly appreciate your filing the originals and returning the file-stamped copies to me in the self-addressed, stamped envelope provided.

With kind regards,

ANDREW K. EPTING, JR., LLC

Andrew K. Epting, Jr.
AKE/agg

Enclosures – as stated
cc: A.Bright Ariail, Esquire

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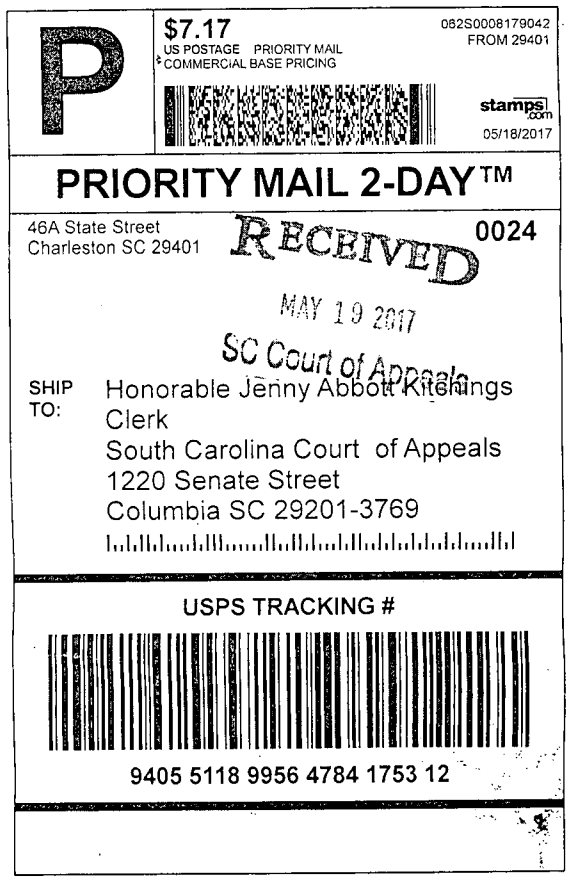

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