

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

Alfred Jenkins and Mary Jenkins, Respondents

v.

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

APPELLANT'S FINAL REPLY BRIEF

Paul B. Ferrara, III
SC Bar No. 70511
2300 Otranto Road
North Charleston, SC 29406
(843) 569-5511/ (843) 569-5411 fax
paul@ferraralawfirm.net
Attorney for Appellant

RECEIVED

NOV 14 2017

SC Court of Appeals

TABLE OF CONTENTS

Table of Cases and Authorities ii
Argument in Reply1

TABLE OF CASES AND AUTHORITIES

Cases

Bateman v. Rouse, 358 S.C. 667, 596 S.E.2d 386 (Ct. App. 2004) 3

Ex parte Capital U–Drive–It, Inc., 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006) 1

Hagood v. Sommerville, 362 S.C. 191, 607 S.E.2d 707 (2005) 3

ARGUMENT IN REPLY

The Respondents' initial brief argues that this matter is interlocutory, and therefore not immediately appealable. It further states that the Order on appeal to this Court does not involve the underlying merits of the case and that "every aspect of the case after the pleadings remains to be determined." Respondents' Initial Brief, p. 7.

Without restating the issues or making redundant arguments which have been thoroughly set forth in Appellant's Response to Respondent's Motion to Dismiss and Appellant's Initial Brief, the Appellant offers the following points of clarification and rebuttal to the arguments raised by Respondents.

I. **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, SCRCR; 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). See November 28, 2016 Order. (R. p. 6). 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 and provided Respondents with all relief sought in their complaint. 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 refers this Court to a letter from Respondents’ attorney dated December 8,

2016. This letter demonstrates that following the receipt of the \$663,395.37 the Respondents' claims were essentially resolved, except for attorney's fees and costs. See Letter dated December 8, 2016. (R. p. 128).

Respondents, in their initial brief, state that the Order of the trial judge did not reach the merits of the case, but that is simply false. As stated previously, the Order being appealed in this matter effectively granted Respondents all relief sought in their complaint. The Order found that as a matter of equity, Respondents were entitled to the funds on deposit with the court, these funds were the exact damages sought in the Complaint. This effectively finds that Respondents are owed the money from Appellant and that Appellant breached the contract, and therefore, has not legal or equitable right to the money on deposit. There is little to no reason that Respondents would continue with the action, as they have already recovered all the damages sought in their action.

Additionally, this appeal is not interlocutory as the order being appealed affects the mode of trial. 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'" 1." 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

Appellant's 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 remains as is, 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 in its November 28, 2016 Order 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 their claims.

Therefore, Respondents assertion that this Order is not appealable at this time is incorrect, because the November 28, 2016 Order entered by the lower court has made it impossible for Appellant to litigate and defend this action.

II. The trial court's order improperly grant summary judgment by ordering the release of funds that were deposited with the court despite the existence of disputed material questions of fact.


Respondents' initial brief cites Judge Kimball's Order: "By ruling in the manner described, the Court is not ruling upon or granting judgment of any kind as to the claims of either party and makes no determination as to any entitlement to damages due either party." See November 28, 2016 Order. (R. p. 7). However, by making the ruling that Respondents were entitled to \$663,395.37, the trial court improperly resolved disputed material questions of fact concerning

breach and damages. Respondents attempt to persuade the Court that the order was proper because the trial court has equitable power is incorrect. Moreover, 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. These factual determinations are for the tier of fact to decide only after a trial on the merits, not as a result of being ambushed at an alleged partial motion for summary judgment.

CONCLUSION

For the foregoing reasons, Appellants respectfully request this Court reverse the circuit court's order dated November 28, 2016.

November 6, 2017



Paul B. Ferrara, III
SC Bar No. 70511 &
Kassandra Garan
SC Bar No. 102032
2300 Otranto Road
North Charleston, SC 29406
(843) 569-5511/ (843) 569-5411 fax
paul@ferraralawfirm.net
Attorney for Appellant

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

Alfred Jenkins and Mary Jenkins, Respondents

v.

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

CERTIFICATION BY COUNSEL

I, the undersigned counsel, do hereby certify that the Appellant's Final Reply Brief complies with Rule 211(b) of the South Carolina Appellate Court Rules.

Respectfully submitted this 14th day of November, 2017.


Paul B. Ferrara, III
SC Bar No. 70511
2300 Otranto Road
North Charleston, SC 29406
(843) 569-5511/ (843) 569-5411 fax
paul@ferraralawfirm.net
Attorney for Appellant

RECEIVED
NOV 14 2017
SC Court of Appeals