

IN THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

Larry B. Hyman, Jr.  
Circuit Court Judge

Case No.: 2017-002196

**RECEIVED**  
AUG 09 2018  
SC Court of Appeals

Condo-World Development, LLC  
and Heron Point Golf Club Limited Partnership. ....Plaintiffs

v.

Myrtle Beach Golf & Yacht Club  
Association, Inc. ....Appellant

AND

Myrtle Beach Golf & Yacht Club  
Association, Inc. ....Appellant

v.

South State Bank. ....Respondent

APPELLANT MYRTLE BEACH GOLF & YACHT CLUB ASSOCIATION, INC.'S  
REPLY IN FURTHER SUPPORT OF ITS MOTION TO DETERMINE THE SCOPE OF  
STAY OF PROCEEDINGS

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ATTORNEYS FOR APPELLANT,  
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ASSOCIATION, INC.

Appellant Myrtle Beach Golf & Yacht Club Association, Inc. (“Appellant”), by and through its undersigned attorneys, hereby submits its reply in further support of its Motion to Determine the Scope of Stay and/or Protective Order protecting the parties from further discovery, motion practice, or rulings at the trial court level consistent with Rule 205 and 241(a), *SCAPR*. Specifically, Appellant seeks an Order that the proceedings before the lower court are stayed as the claims, which are not on appeal, are matters affected by the appeal and involve issues sought to be litigated by the lower court.

### ARGUMENT

The facts, circumstances, and documents that form the basis of Plaintiffs’ action, Appellant’s Counterclaims and Third-Party Action, and the respective defenses thereto are issues sought to be litigated in the lower court during the appeal and are matters affected by the appeal. *See Tillman v. Oakes*, 398 S.C. 248, 728 S.E.2d 45 (Ct. App. 2012). The Court should issue an Order that this case is stayed *in toto* while the present appeal is pending.

Plaintiffs have failed to cite any case law that would support its position that the case below is not stayed. Instead, Plaintiffs used the exact red herrings that Appellant stated Plaintiffs would use and cited authority that is irrelevant to the present motion. More specifically, Plaintiffs failed to directly address Appellant’s argument that the issues sought to be litigated are matters affected by the appeal and failed to explain how the issues sought to be litigated are not matters affected by the appeal. Accordingly, this Court should stay the proceedings below.

#### **I. THE COURT OF APPEALS HAS THE ULTIMATE AUTHORITY TO RULE ON THE SCOPE OF THE STAY**

It is well established that when a dispute arises regarding the issue of the scope of the stay, the authority to resolve the scope of the stay issue resides with the Court of Appeals. *See State v. Cooper*, 342 S.C. 389, 536 S.E.2d 870 (2000). Despite Plaintiffs’ argument to the contrary, the

lower court cannot divest the Court of Appeals of its authority to resolve disputes as to the scope of the stay by issuing an order bifurcating the claims subject to appeal. Similarly, the lower court's refusal to stay the case does not divest this Court of its appellate jurisdiction to rule on the scope of the stay.

**II. THE TEST FOR WHETHER A MATTER IS UNDER APPEAL IS NOT DETERMINED BY THE TITLE OF THE CAUSE OF ACTION OR THE NATURE OF THE RELIEF SOUGHT**

Plaintiffs' continuously and erroneously equate "claim" or "cause of action" with "matter under appeal" in their effort to argue that the automatic stay does not affect the pending claims. Similarly, Plaintiffs consistently confuse the word "issue" with "claim" – Plaintiffs' confusion of those words does not change the test for whether a matter is affected by the appeal. Plaintiffs also attempt to demarcate the nature of relief sought to illustrate that the issues sought to be litigated are unaffected by the appeal. However, Plaintiffs failed to cite a single case for the proposition that the type of relief sought - legal or equitable - determines "whether an issue sought to be litigated is a matter affected by the appeal." Rather, as stated in *Tillman v. Oakes*, 398 S.C. 248, 728 S.E.2d 45 (Ct. App. 2012), and conceded by Plaintiffs, the proper test is "whether the issue sought to be litigated in the lower court during the appeal is a 'matter affected by the appeal' under Rule 205 and 241(a). *Tillman v. Oakes*, 398 S.C. 248, 728 S.E.2d 45 (Ct. App. 2012). In this case, as demonstrated in Appellant's motion, the matters sought to be litigated in the lower court are matters affected by the appeal.

Plaintiffs also attempt to characterize the First-Party Action as a title dispute and state that the third-party action has no impact on the title issues. First, that is a severe over-simplification of the First-Party Action, and the issues involved therein. It is also an obvious attempt by Plaintiff to craft the entire First-Party Action as one issue that Plaintiff argues does not affect the appeal.

However, as stated in the Motion, there are many issues sought to be litigated by the lower court that are matters affected by the appeal, including the title issues that Plaintiffs claim can be heard.

As one specific instance, the breach of contract action, which is under appeal, in the Third-Party Complaint is related to the 1988 Settlement Agreement, 1992 Indenture Deed and 2005 Waiver of Restrictions; the resolution of that cause of action indisputably affects the title issues raised in the First-Party Action. This fact is supported by Appellant's argument that Plaintiffs are successors-in-interests to the 1988 Settlement Agreement by virtue of the 1992 Indenture Deed. Any resolution of the title issues would necessarily include a lengthy discourse regarding the 1988 Settlement Agreement and its affect on the 1992 Indenture Deed. Accordingly, the title issues are matters affected by the appeal and issues sought to be litigated by the trial court.

Strikingly, Plaintiffs fail to acknowledge that their motion for summary judgment discusses the 1988 Settlement Agreement at length and that Plaintiffs have moved to amend their pleadings to add in defenses related to the 1988 Settlement Agreement. *See* Ex. J, I to Appellant's Motion. Accordingly, the 1988 Settlement Agreement is very much an issue sought to be litigated in the lower case – including its interpretations and its operative effect – despite the fact that it is a matter affected by the appeal. Accordingly, as stated in Appellant's motion, the entire case should be stayed pending appeal because the issues sought to be litigated are matters affected by the appeal.

### **III. THE ORDER OF DISMISSAL OF A DIFFERENT NOTICE OF APPEAL DOES NOT PRECLUDE THIS COURT FROM HEARING THIS MOTION**

Appellant concedes that its Notice of Appeal of the November 30, 2017 Order was dismissed on May 23, 2018 (Appellate Case No. 2017-002642). Plaintiffs filed a Motion to Dismiss the Notice of Appeal on December 21, 2017 in that appellate action. Notwithstanding the fact that Plaintiffs' Motion to Dismiss the Notice of Appeal was pending, on January 16, 2018, Plaintiffs represented to the lower court that they would brief the issue of the scope of stay to this

Court and an Order to that effect was issued on February 14, 2018. *See* Appellant's Motion, Ex F. Plaintiffs did in fact do so, in *this appeal*, on March 19, 2018, and then withdrew their motion after receipt of the dismissal in Appellate Case No. 2017-002642.

The Notice of Appeal in Appellate Case No. 2017-002642 was dismissed as "not immediately appealable." *See* Ex. G. As this Court well knows, the standard for whether an order is "immediately appealable" pursuant to S.C. Code Ann § 14-3-330 is completely different and unrelated to whether an "issue is under appeal" or "whether a matter is stayed" due to a pending appeal pursuant to Rule 205 and 241 *SCACR*. The cases cited by Plaintiffs are inapposite. The Court could not have determined the scope of the stay on Plaintiffs' motion to dismiss an appeal. Those are two separate and distinct motions, which is presumably why Plaintiffs filed their Motion to Determine the Scope of Claimed Stay in this appeal. Plaintiffs also chose to file their Motion to Determine the Scope of Claimed Stay in this appeal because they knew that Appellants have raised this pending appeal as the basis for the stay of proceedings at the trial court level.

The only matter decided in the Appellate Case No. 2017-002642 was that the November 30, 2017 Order was not immediately appealable. There were no findings regarding the scope of stay nor was the motion to determine the scope of stay before the Court in that case. There has been no ruling as to the scope of the stay. To the extent the stay was discussed in the briefs in Appellate Case No. 2017-002642, it was only in the context of a motion to dismiss a Notice of Appeal wherein Appellant argued, *inter alia*, that appellate court jurisdiction is a substantial right. Moreover, to the extent the issue of the stay was before the Court as a result of the Motion to Dismiss filed in Appellate Case No. 2017-002642, the issue of the stay was limited to the order appealed from.

In this case, in this appeal, Appellant has argued that the stay has existed since the Notice of Appeal was filed in this pending appeal. Plaintiffs filed a Motion to Determine the Scope of the Claimed Stay in this appeal. The issue of the scope of the stay predates the issues raised in Appellate Case No. 2017-002642. It cannot reasonably be argued that the dismissal the Notice of Appeal in Appellate Case No. 2017-002642 precludes this Court from determining the scope of stay. Moreover, Plaintiffs have failed to cite any case law that would preclude this Court from determining the scope of stay in this case. Indeed, without such a ruling, the lower court and parties will not know what the scope of the stay is – as Appellants have repeatedly argued the entire case is stayed and Plaintiffs have argued that the case is not stayed.

In sum, there is no law of the case in this case regarding the scope of stay and it is inarguable that there is a dispute as to the scope of stay.

#### **IV. APPELLANT NEVER AGREED TO HAVE ITS APPELLATE RIGHTS DENIED OR OTHERWISE WAIVE ITS SUBSTANTIVE LEGAL RIGHTS**

The Amended Scheduling Order, dated October 9, 2017 (the “Scheduling Order”), which Plaintiffs argue permit the trial court’s decision to proceed with this case does not waive Appellant’s appellate rights or other substantive legal rights. Appellant did not appeal the Scheduling Order and Plaintiffs’ argument to the contrary is a red herring that they have used numerous times. Accordingly, the cases<sup>1</sup> cited by Plaintiffs’ on this topic are mere surplusage and, thus, do not require a direct response or otherwise need to be distinguished.

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<sup>1</sup> Notably, Plaintiffs fail to note the entire rule enunciated in *Johnson v. Johnson*, 310 S.C. 44, 425 S.E. 2d (Ct. App. 1992). In that case, the Court also noted that “[A] consent order is an agreement of the parties ... and is to be interpreted as an agreement. It can be rescinded by mutual consent in a subsequent court action... Thus, in case like this one, where the final order in one case is the basis for the final order in a related case, the court may, if justice requires it, relieve a party of the consent order in the related case if the other consent order has been vacated.” *Id.* (Internal citations omitted). Moreover, in that case, the Court affirmed a motion to set aside a consent order. *Id.*

Presumably, Plaintiffs are relying on one portion of the Scheduling Order, which states, in relevant part,:

The non-jury trial of this matter shall be heard by Judge Hyman ... In accordance with the above, Judge Hyman shall first determine the ultimate issue in the case of whether the deed restrictions in the alleged Indenture deed between Peoples Federal Savings and Loan Association ("Peoples Federal") and Heron Point Golf Club Limited Partnership ("Heron Point") recorded on April 15, 1992 are personal or rather run with title to the golf course property...

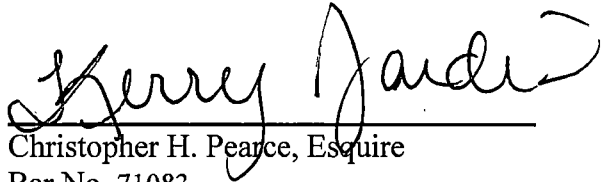
*See* Exhibit A, ¶ 4. First, this statement only pertains to the order of issues at trial. Second, the issue of the 1988 Settlement Agreement and its interpretation and operative effect is a matter under appeal that is in issue sought to be litigated in this case and that affects the title issues in this case, including the issue recited in the Scheduling Order. Third, the Notice of Appeal in this pending appeal was sent on October 18, 2017 – *after* the Scheduling Order was filed. By filing the Notice of Appeal, Appellant invoked its appellate rights and the appellate jurisdiction of this Court. There is no statement in the Scheduling Order stating that Appellant waived its appellate rights. Moreover, there is nothing in the Scheduling Order that prohibits Appellant from utilizing its appellate rights.

In sum, Appellant's argument – which has been raised at the trial court level since at least November 2017 - is that this case is stayed, in its entirety, by the pending appeal. The issue referenced in the Scheduling Order is now a matter under appeal sought to be litigated by the lower court. Quite simply, there is no caselaw - and Plaintiffs have cited none - that would support a proposition that Appellant waived its appellate rights and the appellate jurisdiction by entering into the Scheduling Order prior to filing a Notice of Appeal.

CONCLUSION

For the reasons stated above, Appellant seeks an order from this Honorable Court staying the case below *in toto* and/or determining the scope of stay and protecting it from further discovery, further motion practice, and any judgments or orders on pending motions in both the underlying case and the third-party action, pursuant to Rule 241, SCACR.

August 8, 2018



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IN THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY – 15<sup>th</sup> CIRCUIT  
Court of Common Pleas

Honorable Larry B. Hyman, Circuit Court Judge

Appellate Case No. 2017-002196

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AND

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vs.

South State Bank. ....Respondent

CERTIFICATE OF SERVICE

I certify that I have served the foregoing *Appellant's Reply to Motion to Determine Scope of Stay* by depositing a copy of it in the United States mail, postage prepaid on August 8, 2018, addressed to the following attorneys of record:

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August 8, 2018



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August 8, 2018

*Via UPS Overnight Mail*

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AUG 09 2018

**SC Court of Appeals**

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

**Re: Myrtle Beach Golf & Yacht Club Association, Inc., Appellant. v. South State Bank,  
Respondent  
Court of Appeals Case No.: 2017-2196**

Dear Madam Kitchings:

Enclosed please find an original and two (2) copies of Appellant's Reply to Motion to Determine Scope of Stay and Certificate of Service for filing in the above-referenced matter.

Thank you for your assistance, and if you require anything further, please contact me at (843) 839-3210.

Very truly yours,

THE PEARCE LAW GROUP, P.C.



Kerry K. Jardine, Esquire

KKJ/ahr

Encls.

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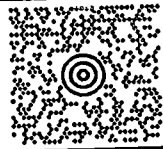
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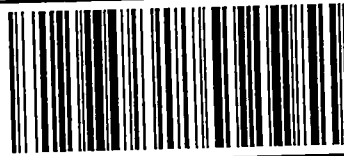
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