

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

RECEIVED

JAN 25 2019

SC Court of Appeals

Case No. 2017-CP-10-5140

John Daniel Meyers, Jr Respondent,

v.

Triple Star, LLC d/b/a Stars Rooftop Bar and Grill Room,
Thomas Jay Sack and Motivated Marketing, LLC d/b/a
Motivated Marketing Defendants,

Of Whom Triple Star, LLC d/b/a Stars Rooftop Bar and Grill Room is the Appellant.

APPELLANT’S RETURN TO RESPONDENT’S MOTION TO DISMISS

Respectfully submitted,

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Dated: January 22, 2019

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Attorneys for Defendant Motivated Marketing, LLC

Appellant, by and through its undersigned counsel and pursuant to Rule 240(e) of the South Carolina Appellate Court Rules ("SCACR"), files this Return¹ and respectfully requests that this Honorable Court deny Respondent's Motion to Dismiss the subject appeal.

STATEMENT OF THE CASE

John Daniel Meyers, Jr., (hereinafter "Respondent") filed a Summons and Complaint with the Charleston County Court of Common Pleas on October 9, 2017, and subsequently an Amended Complaint on March 1, 2018, alleging that while working crowd control at Appellant's bar commonly known as Stars Rooftop Bar and Grill Room (hereinafter "Stars"), Defendant Thomas Sack (hereinafter "Sack") pulled Respondent to the floor, striking and injuring his body. Respondent's Amended Complaint alleges negligence and liability under S.C. Code Ann. § 61-4-580 against Appellant. On March 8, 2018, Appellant filed its Answer to Respondent's Amended Complaint, and asserted affirmative defenses, including that Respondent was the statutory employee of Appellant in accordance with S.C. Code Ann. § 42-1-10 *et seq.*

On March 2, 2018, Appellant filed a Motion to Dismiss the subject action based on the statutory employee defense and the exclusive jurisdiction of the South Carolina Workers' Compensation Act. On May 8, 2018, Appellant filed a memorandum in support of its motion which included reference to documentary evidence, deposition excerpts and one or more affidavits.

On November 25, 2018, the trial court conducted a hearing regarding the issue of Respondent's status as a statutory employee and, essentially, the sufficiency of Respondent's affirmative defense involving same. In an Order dated December 11, 2018, the trial court ruled, as a matter of law, that Respondent was not the statutory employee of Appellant. By its express

¹ Respondent filed its Motion to Dismiss on January 9, 2019, making the deadline to respond January 22, 2019.

terms, the Order constituted a full and final disposition of Appellant's statutory employee defense, striking and dismissing the affirmative defense, and precluding Appellant from raising the defense at trial. On January 8, 2019, Appellant timely submitted its Notice of Appeal of the Order denying Respondent's status as the statutory employee of Appellant.

STATEMENT OF FACTS

This negligence and dram shop case arises from an altercation between a patron and security professional working at Stars which occurred on or about December 12, 2015. Appellant is the owner and operator of Stars and contracted with Clarmac, LLC, d/b/a Zanshin Management ("Zanshin") to provide crowd control at Stars. The incident involving Respondent and Defendant Sack occurred while Respondent was working at Stars under assignment from Zanshin. On the night in question, Respondent attempted to escort Sack from the premises, and in the course of so doing, Sack allegedly caused injury to Respondent.

ARGUMENT

The crux of Respondent's argument supporting his motion to dismiss the appeal is that a "12(b)(1) motion to dismiss under the exclusive remedy provisions of the South Carolina's Workers' Compensation Act is not immediately appealable."² To the contrary, Appellant is appealing the decision of the lower court denying Respondent's status as the statutory employee of the Appellant, which is immediately appealable. See Cooke v. Palmetto Health Alliance, 367 S.C. 167, 624 S.E.2d 439 (2005).

A. The Substance of Appellant's Motion to Dismiss was the Statutory Employer Doctrine and the Exclusivity provisions of the South Carolina Workers' Compensation Act.

² See Respondent's Motion to Dismiss, pgs. 1-2.

While Appellant's Motion to Dismiss cited SCRCP 12(b)(1), the substance of the Motion and, more importantly, the substance of the hearing before the trial court, was to determine the sufficiency of Appellant's statutory employer defense and the exclusive jurisdiction of the South Carolina Workers' Compensation Act. In its Motion, supporting Memorandum, and at the hearing, Appellant argued that Respondent was its statutory employee at the time of the incident and, therefore, Respondent's tort action would be barred by the exclusivity provisions of the South Carolina Workers Compensation Act.

On November 25, 2018, the trial court conducted an evidentiary hearing in which documentary evidence, deposition excerpts and affidavit testimony was submitted by both Appellant and Respondent regarding the issue of whether Respondent would be considered the statutory employee of Appellant. In its Order, the trial court expressly stated that all relevant evidence submitted by the parties had been considered. The trial court then concluded, as a matter of law, that Respondent was not the statutory employee of Appellant. As a result, Appellant's statutory employer defense was struck and dismissed, which now precludes the defense from being raised again at trial. The trial court's Order is immediately appealable.

B. The Order Denying Respondent's Status as a Statutory Employee is Immediately Appealable.

Pursuant to Rule 201 of the SCACR an "[a]ppeal may be taken, as provided by law, from any final judgment, appealable order or decision." Here, the trial court ruled, as a matter of law, that Respondent was not the statutory employee of Appellant at the time of the subject incident. The order constituted a full and final disposition of Appellant's statutory employee defense and, therefore, struck and dismissed the defense for good, precluding any further use of it at trial.

It is well-established the statutory employee determination is a question of law for the court. Woodard v. Westvaco Corp., 315 S.C. 329, 433 S.E.2d 890 (Ct. App. 1993). Any dispute in the facts concerning the application of the statutory employee doctrine must be resolved by the court. Riden v. Kemet Electronics Corp. 313 S.C. 261, 437 S.E.2d 156 (Ct. App. 1993). The determination of whether a worker is a statutory employee is jurisdictional and courts must “review the entire record and decide the jurisdictional facts in accord with the preponderance of the evidence.” Glass v. Dow Chem. Co., 325 S.C. 198, 202, 482 S.E.2d 49, 51 (1997).

In Glass, Dow Chemical was sued by two welders who were subcontractors alleging negligence due to toxic fume inhalation from lead paint. Id. at 118, 447 S.E.2d at 210-11. Dow Chemical alleged that it was the statutory employer of the plaintiffs and immune from tort liability and raised the defense of lack of subject matter jurisdiction based upon the statutory employer doctrine under the Workers Compensation Act. During a hearing on the matter, the plaintiffs moved to strike the statutory employer defense. Due to the factual issues involved, the court denied a motion for summary judgment but retained jurisdiction to consider the statutory employer defense in an evidentiary hearing. After the evidentiary hearing, the lower court ultimately found that plaintiffs did not qualify as statutory employers and subsequently struck and dismissed Dow Chemical’s statutory employee defense. Following denial of their motions to reconsider by the lower court, Dow Chemical immediately filed a notice of appeal on the issue, which was subsequently decided by the Court of Appeals and subsequently on a writ of certiorari to the South Carolina Supreme Court. Id. at 200-201.

Similar to Glass, the lower court here conducted a hearing on the merits of Appellant’s argument as to application of the statutory employee defense under S.C. Code Ann. § 42-1-10 *et seq.*, including consideration of documentary evidence, deposition experts and affidavit

testimony. The trial court ultimately concluded that the evidence did not support the statutory employee defense and, therefore, Respondent would not be considered the statutory employee of Appellant, as a matter of law. There is nothing left for any subsequent jury and/or judge to determine or decide with regard to the statutory employee issue. Given the complete dismissal of an absolute defense to Appellant, the trial court's Order was, and is, immediately appealable and, therefore, Respondent's Motion to Dismiss the appeal should be denied.

C. The Order is Immediately Appealable Pursuant to S.C. Code Ann. § 14-3-330 as it "Affects a Substantial Right" and "Involves the Merits."

In the alternative, the lower court's order is also immediately appealable under S.C. Code Ann. § 14-3-330.

While, ordinarily, it is true that an appeal cannot be taken until after final judgment, a party may appeal an interlocutory order where the right to do so is granted by statute. Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006). The lower court's order falls within those certain classes of interlocutory orders where the right to an immediate appeal is granted by statute. The controlling statute is S.C. Code Ann. § 14-3-330. Id. ("The determination of whether a party may immediately appeal an order issued before or during trial is governed primarily by... § 14-3-330 ... Absent a specialized statute, an order must fall into one of several categories set forth in Section 14-3-330 in order to be immediately appealable."). In pertinent part, it provides as follows:

The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

- (1) Any intermediate judgment, order or decree in a law case involving the merits...;

- (2) An order affecting a substantial right made in an action when such order
- (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;

S.C. Code Ann. § 14-3-330.

In short, S.C. Code Ann. § 14-3-330(1) provides for an immediate appeal of an interlocutory order “involving the merits,” and § 14-3-330(2) provides for an immediate appeal of certain orders affecting a “substantial right.” See Ex parte Capital U-Drive-It, Inc., 369 S.C. at 7, 630 S.E.2d at 467 (addressing subsection (1)’s allowance of immediate appeals of orders involving the merits, “An order ‘involves the merits,’ as that term is used in Section 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.”) The Supreme Court has defined an order “involving the merits” as an order that “must finally determine some substantial matter forming the whole or a part of some cause of action or defense.” See Mid-State Distributions, Inc. v. Century Imps., Inc., 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993). (quoting Jefferson v. Gene's Used Cars, Inc., 295 S.C. 317, 318, 368 S.E.2d 456, 456 (1988)). S.C. Code Ann. § 14-3-330(1), (2).

In accordance with § 14-3-330, the South Carolina Supreme Court has previously held that a lower court’s ruling on whether a plaintiff was a statutory employee during a hearing on the merits is immediately appealable on the basis that it “involves the merits.” Cooke v. Palmetto Health Alliance, 367 S.C. 167, 624 S.E.2d 439 (2005). In Cooke, the issue presented before the lower court was whether “‘the exclusive jurisdiction and exclusive remedy’ was with the

workers' compensation commission or with the circuit court." Id. 367 S.C. at 171³. The South Carolina Supreme Court held that the lower court order was immediately appealable on the basis that

Here, the circuit court weighed the evidence and concluded that the exclusivity provision did not apply because Cooke was neither a statutory employee nor a borrowed servant of the Hospital. In so holding, the circuit court "finally determined a substantial matter forming a part of the Hospital's defense," and thus, the order is appealable.

Id. at 174.

Identical to Cook, the lower court's order in this matter constitutes a full and final disposition of Appellant's statutory employee defense. This decision affirmatively strikes and dismisses the defense, precluding it from being raised again in later proceedings. Accordingly, the lower court's order has finally determined a substantial matter, and is, therefore, immediately appealable.

D. Dismissing the Appeal will Allow Appellant to Raise the Issue of Whether it was a Statutory Employee Again.

In filing his Motion to Dismiss, Respondent argues form over substance in how the issue of whether Respondent was Appellant's statutory employee came before the trial court. It is a matter of exclusive jurisdiction to be decided by the court, which is exactly what was decided, and adversely to Appellant. Cooke, supra.; Sabb v. S.C. State Univ., 350 S.C. 416, 567 S.E.2d 231 (202). Practically, if Respondent's Motion to Dismiss is granted, then Appellant's statutory employee defense would retain its viability and would then be decided by some subsequent

³ At the lower court's hearing in Cooke, there was a disagreement as to the nature of the motion (whether it was a motion to dismiss or motion for summary judgment), but it was noted that although there were no live witnesses, both parties submitted deposition testimony in support of their respective positions. In her order, the circuit court judge characterized the action as "a motion to dismiss for lack of subject matter jurisdiction." Cooke, supra. at 171.

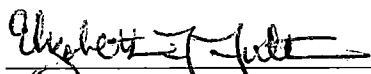
court, perhaps in complete contradiction to the Order which has been appealed to this Court.⁴ However, there is nothing in the trial court's Order here that suggests that there is anything left for determination by any subsequent judge or jury and certainly nothing to suggest that a contrary determination might be made in the future by some other hearing judge. Of course, Appellant welcomes the opportunity to relitigate the issue of the statutory employee defense should this Court determine that the issue has not yet finally been decided on the merits.

CONCLUSION

Based on the foregoing discussion, Appellant respectfully submits that Respondent's Motion to Dismiss should be denied and that the subject appeal continue in its regular course in accordance with the applicable Rules.

Respectfully submitted,

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Attorneys for Appellant Triple Star, LLC

Dated: January 22, 2019

⁴ Respondent cannot have it both ways. Either the statutory employee determination has been finally decided on the merits against Appellant and is therefore now properly before this Court or the statutory employee determination has not been finally decided on the merits leaving Appellant the ability to continue pursuit of the defense to the trial court.

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Motivated Marketing Defendants,

Of Whom Triple Star, LLC d/b/a Stars Rooftop Bar and Grill Room is the Appellant.

PROOF OF SERVICE

I certify that I have served the Appellant’s Return to Respondent’s Motion to Dismiss upon all counsel of record by depositing a copy of same in the United States Mail, First Class postage prepaid, on January 22, 2019, addressed to all attorneys of record, addressed as follows:

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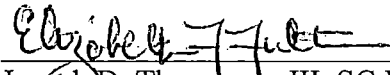
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January 22, 2019

FIRST CLASS MAIL

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
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SC Court of Appeals


RE: John Daniel Meyers, Jr. v. Triple Star, LLC, et. al
In the Charleston County Court of Common Pleas
Case No. 2017-CP-10-5140

Dear Ms. Kitchings:

With regards to the above-referenced matter, please find enclosed an original and seven (7) copies of Appellant's Return to Respondent's Motion to Dismiss in connection with the above-referenced appeal.

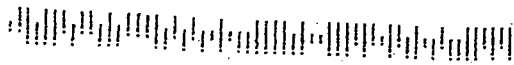
I would appreciate you returning a filed copy of the Return to our office in the enclosed self-addressed stamped envelope.


Thank you for your assistance in this matter. If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

Elizabeth F. Fulton

Enclosures

cc: Fred "Trip" W. Riesen, III, Esq.
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