

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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MAR 25 2019

SC Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable Doyet A. Early, III, Circuit Court Judge

Case No. 2018-CP-02-00675

Ex Parte:

Daniel Geitner, Appellant,

In Re:

Kelly Sims, Respondent,

v.

Sharon Enteen-Prusso a/k/a Sharon Enteen and Falcon Ridge, Inc., Defendants.

RESPONDENT SIMS'S MEMORANDUM REGARDING APPEALABILITY

M. Baron Stanton
STANTON LAW OFFICES, P.A.
1728 Main Street
P. O. Box 245
Columbia, SC 29202
803-929-1484

ATTORNEY FOR RESPONDENT
KELLY SIMS

STATEMENT OF ISSUE

1. Whether the order appealed was immediately appealable.

STATEMENT OF PERTINENT BACKGROUND

A lawsuit was pending in Georgia between Respondent Sims and Defendants Sharon Enteen-Prusso and Falcon Ridge, Inc. The action included allegations of fraud arising from an agent's involvement with the purchase and sale of various horses. Sims, plaintiff in the suit, sought to depose Appellant Geitner, then a nonparty¹ to the suit, in Aiken County, South Carolina, where he resided.

At Sims' request, a subpoena was issued by the Aiken County Court of Common Pleas pursuant to the South Carolina Interstate Depositions and Discovery Act, S.C. Code Ann. §15-47-100 et seq. (the "Act")², commanding Geitner to appear for deposition in Aiken County.

The subpoena was served. Geitner appeared with counsel.³ Geitner refused to answer certain questions at his deposition. Geitner thereafter made no motion for protective order.

On June 28, 2018, Sims filed a combined motion and memorandum in support of motion in the Aiken County Court of Common Pleas to compel resumption of the deposition and answers to the questions. In the June 28 motion, Sims also sought an award of her reasonable

¹After the pertinent proceedings herein, Geitner was made a party in the Georgia action.

²The Act requires an application to the South Carolina court, along with a filing fee commensurate with that for filing a lawsuit. The proceeding is given a case number of the South Carolina court, resembling the case number for a lawsuit filed in the court, but is not an action commenced by the filing and service of a summons and complaint. The court then issues a subpoena under that case number. Under the Act, the deposition proceeds under the South Carolina Rules of Civil Procedure.

³His counsel was from Atlanta, and was not his counsel appearing in the instant appeal.

expenses incurred in obtaining the order, including attorneys' fees.

After a November 5, 2018 hearing and post-hearing submissions, the court granted the motion to compel, and directed Sims to submit an affidavit of fees and expenses.⁴ Sims's counsel filed affidavits of fees and expenses as directed.

Geitner's counsel filed an opposing affidavit and a memorandum opposing any award of fees at all. Geitner did not request another hearing and did not request reconsideration of the order compelling discovery. Sims filed a reply brief.

On January 16, 2019, the court ruled:

I therefore conclude that pursuant to Rule 37(a)(4), SCRCP, Plaintiff Sims shall be awarded the expenses of this motion and that the \$14,486.69 she incurred was reasonably charged and incurred and shall be the award. The clerk of court is directed to tax these costs to the nonparty deponent, Mr. Geitner within ten days of entry of this order, referencing the subpoena in the case for any necessary information. The nonparty deponent, Mr. Geitner, is directed to pay them.

Geitner appealed. Geitner did so without moving for reconsideration, without paying, without being held in contempt, and before the clerk taxed the award and entered judgment. The clerk has not yet entered the Form 4C judgment taxing the award. By letter dated March 12, 2019, the Clerk of this Court requested the parties to file memoranda on the issue above.

ARGUMENT OR DISCUSSION

S.C. Code Ann. §14-3-330 sets forth the appellate jurisdiction of this Court⁵ in law cases

⁴In doing so, the court stated, "The fact that Mr. Geitner offered no defense whatsoever to this motion or legal justification for his refusal to answer the questions posed, strongly support the award of such costs."

⁵The appellate jurisdiction of the Court of Appeals, with the exception of some orders reserved for appeal only to the Supreme Court, is determined by S.C. Code Ann. §14-3-330. See Pocisk v. Sea Coast Const. of Beaufort, 380 S.C. 584, 671 Se.E.2d 98 (Ct. App. 2008).

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 in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;

(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;

(3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and

(4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

Id.

S.C. Code Ann. §§14-3-330(1), (2) and (4) clearly do not apply.⁶ Thus, the question is whether the order is a final order affecting a “substantial right” made in any special proceeding or upon a summary application in any action after judgment, as described in subsection (3). The

⁶The order is does not involve the merits as in subsection (1), nor is it in an action commenced in the court of common pleas, brought there by original process or removed there from any inferior court or jurisdiction; the order may not be an order affecting a “substantial right” as that term has been interpreted, as in subsection (2), and in any event does not in effect determine the action or prevent a judgment from which an appeal might be taken nor discontinue the action, and it does not grant or refuse a new trial or strike out an answer or any part thereof or any pleading in an action; and the order is not interlocutory in the sense of pendente lite relief, nor one granting, continuing, modifying, or refusing an injunction as in subsection (4), or granting, continuing, modifying, or refusing the appointment of a receiver, unless the court’s in personam command that Geitner “is directed to pay,” is an injunction within the meaning of the statute.

order was not made upon summary application in an action after judgment. It is not immediately clear that the order affects a “substantial right,” as that term has been interpreted,⁷ or that a motion to compel discovery under the South Carolina Rules of Civil Procedure, albeit under the Act, is a special proceeding.

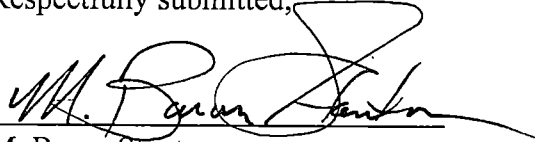
Furthermore, the order is not final in that the clerk of court did not enter the award in the form of a judgment. Rule 58 (a), SCRCP. A judgment is effective only when so set forth in a separate document and entered in the record. Rule 58 (a), SCRCP. Form SCRCP Form 4C (bearing a revision date of October 2011) is the mandatory form. Administrative Order 2011-09-22-02 (S.C.Sup.Ct. filed Sept. 22, 2011).

Since the clerk never took the final step of entering a Form 4C, the order was not final and this Court could dismiss the appeal. In the alternative to dismissal, Respondent would not object to the present appeal simply being held in abeyance, and this Court clarifying either that there is no supersedeas preventing the Circuit Court from entering the judgment, or that if there

⁷Discovery orders, for example, even when affecting rights of privilege, do not affect substantial rights. See, e.g., Weiters v. Bon-Secours-St. Francis Xavier, 381 S.C. 332, 673 S.E.2d 417 (2009), and Ex Parte Whetstone, 289 S.C. 580, 347 S.E.2d 881 (1986)(order requiring nonparty to submit to deposition is not immediately appealable). Not until the ordered party has refused to comply and been held in contempt is there an appealable order. Weiters.

were a supersedeas, it is lifted under Rule 241(c)(1), SCACR. Upon entry of the final judgment by the clerk of the Circuit Court, Appellant Geitner could then serve an additional notice of appeal (perfecting appellate jurisdiction) and all further deadlines could be established based on the second notice of appeal. See Rule 263(b), SCACR (excepting only the time for serving the notice of appeal from the ability of the Court to extend time).

Respectfully submitted,



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ATTORNEY FOR APPELLANT
KELLY SIMS

Date: 3-22-19

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CERTIFICATE OF SERVICE

I, M. Baron Stanton, do hereby certify that I have, on March 22, 2019, served the foregoing RESPONDENT SIMS'S MEMORANDUM RE APPEALABILITY upon the Appellant by causing a copy thereof to be mailed with proper postage to the address indicated below:

Karl S, Bowers, Jr., Esquire
P. O. Box 505049
Columbia, SC 29250


M. Baron Stanton

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SC Court of Appeals

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March 22, 2019

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M. BARON STANTON
ATTORNEY AT LAW

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

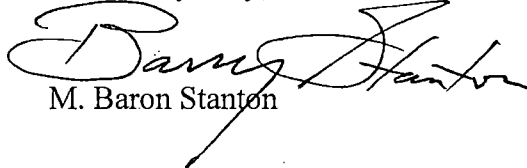
Re: Ex parte: Daniel Geitner in re: **Kelly Sims** v. Sharon Enteen-Prusso, et al.,
Appeal from Aiken County Court of Common Pleas, Case No. 2018-CP-02-
00675
Appellate Case No. 2019-000288

Dear Ms. Kitchings:

In response to your letter of March 12, we enclose Respondent Sims's Memorandum
Regarding Appealability, with proof of service.

With kind regards,

Yours very truly,



M. Baron Stanton

MBS:dmy
Enclosure
cc w/encl.:

Karl S. Bowers, Jr., Esquire
Cary Ichter, Esquire
and W. Daniel Davis, Esquire

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