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WHEN IT'S WORTH FIGHTING FOR

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SERVING S.C. AND N.C.

June 26, 2019

Jenny Abbott Kitchings, Clerk
SC Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: *5 Star Life Insurance Co. v. Peek Performance, Inc.*
Appellate Case No. 2018-002114

Dear Ms. Kitchings:

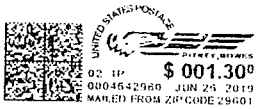
Respondent Peek Performance, Inc. writes pursuant to SCACR 208(b)(7) to advise the Court of a "pertinent and significant authorit[y]:" *Palmetto Construction Group, LLC v. Restoration Specialists, LLC, et al.*, Appellate Case No. 2016-002308 (Ct. App. June 26, 2019) (copy enclosed). In *Palmetto Construction*, the trial court had denied Defendant's Motion for Relief from Entry of Default and Defendant's Rule 59(e) motion, but had not awarded damages. This Court ruled both orders were "interlocutory and not immediately appealable." Slip Op. p. 4. Accordingly, this Court dismissed the appeal.

This authority pertains to Respondent's Brief, pp. 8-12, arguing, "THE ORDERS ARE NOT IMMEDIATELY APPEALABLE."

Respectfully submitted,

James G. Carpenter

CC w/o enclosure: Wm. S. Brown V
Amanda Scott



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(5)

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Palmetto Construction Group, LLC, Respondent,

v.

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

Appellate Case No. 2016-002308

Appeal From Charleston County
Mikell R. Scarborough, Master in Equity

Opinion No. 5661
Heard April 2, 2019 – Filed June 26, 2019

APPEAL DISMISSED

A. Bright Ariail, of Law Office of A. Bright Ariail, LLC, of Charleston, for Appellants.

Andrew K. Epting, Jr. and Jaan Gunnar Rannik, both of Andrew K. Epting, Jr., LLC, of Charleston, and Michelle Nicole Endemann, of Clarkson, Walsh & Coulter, P.A., of Mt. Pleasant, for Respondent.

LOCKEMY, C.J.: Restoration Specialists, LLC (Restoration) and its owners, Ruben Mark Ward and Lynnette Pennington Ward (collectively Appellants), appeal a master-in-equity's order denying their motion for relief from an entry of default and motion to stay and compel arbitration. We dismiss the appeal as interlocutory.

FACTS

In 2011, Restoration, a Georgia company, and Palmetto Construction Group LLC, (PCG), a South Carolina LLC, entered into an agreement to work together on multiple construction projects. In 2012, the Veteran's Administration (the VA) awarded Restoration a contract to serve as the general contractor on the completion of a parking garage at the VA facility in Augusta, Georgia (the VA Project) for $1.8 million. On September 10, 2014, Restoration and PCG entered into a subcontract agreement under which Restoration would act as the general contractor and would be responsible for hiring the other subcontractors. The subcontract provided that PCG would perform the concrete work and act in a supervisory capacity. The subcontract stated Restoration would pay PCG for the subcontract work. The subcontract also contained a provision requiring mandatory mediation or in the alternative, binding arbitration, of claims arising out of the subcontract.

PCG claims in addition to the subcontract, Mark Ward asked PCG for help in obtaining a bond from PCG's surety to cover the VA Project. Restoration and PCG entered into a surety bond agreement with Hanover Insurance Company to provide a surety bond for the VA Project. Hanover required PCG, Restoration, and their respective principals and their spouses to sign an indemnity agreement requiring them to indemnify Hanover for any claims made on the bond. As the VA Project neared completion, several subcontractors filed claims under the bond asserting they did not receive payment. PCG claims Hanover paid $1,425,144.00 to subcontractors in accordance with the bond.

On February 12, 2016, PCG filed a summons and complaint against Appellants. PCG alleged breach of contract against Restoration for failure to pay amounts owed under the subcontract. In addition, PCG alleged actual and constructive fraud and negligent misrepresentation against the Appellants. On the same day, PCG filed a motion to stay and compel arbitration as provided in the subcontract agreement.

PCG personally served the summons and complaint as well as the motion to compel on Appellants on March 14, 2016. After Appellants did not answer, PCG filed an affidavit of default on April 18, 2016, and withdrew its motion to stay and compel arbitration. The circuit court granted PCG's motion for entry of default and referred the case to the master-in-equity for final judgment against Appellants on April 20, 2016.

On June 5, 2016, the day before the damages hearing, Appellants filed a motion for a continuance and a motion to be relieved from default. At the damages hearing

before the master, Appellants submitted an affidavit from Mark Ward to support their motion to be relieved from the entry of default. The master granted Appellants' motion for a continuance and held the motion for relief from default in abeyance. On July 11, 2016, Appellants filed a motion to stay and compel arbitration. At a hearing on July 14, 2016, the master found Appellants in default and declined to address Appellants' motion to stay and compel arbitration because of their default status. The master issued an order on the same day denying Appellants' request for relief from default, ordering a damages hearing on October 4, 2016, and denying Appellants' motion to stay and compel arbitration "as [Appellants are] in [d]efault." Appellants filed a Rule 59(e), SCRCP, motion to alter or amend on July 27, 2016. Appellants asked the master to schedule a hearing on this motion prior to the damages hearing. However, the master decided to keep the damages hearing on October 4, 2016, and scheduled a hearing on the Rule 59(e) motion for October 11, 2016.

On September 30, 2016, Appellants served a notice of appeal on PCG and notified the master of their appeal of the master's July 14, 2016 order, but did not file the notice with this court until November 18, 2016. In the meantime, the master held a third hearing on October 4, 2016. The master allowed PCG to proffer evidence on damages and Appellants to argue their Rule 59(e) motion. On October 28, 2016, the master issued an order denying Appellants' Rule 59(e) motion. In his order, the master states: "After a review of the file and memoranda submitted by counsel, the court finds as follows: 1) [Appellants'] Motion to Amend is respectfully DENIED, insomuch as [Appellants] have not shown good cause to lift the default; and 2) the affirmative defense of arbitration has been waived and [Appellants'] Motion to Stay and Compel filed July 11, 216 was not properly made."

Appellants appeal both the master's July 14, 2016 order and the October 28, 2016 order denying their Rule 59(e) motion.

LAW/ANALYSIS

A. Appealablity

The denial of a motion to set aside a default judgment is immediately appealable as it is a final judgment on the merits. *See Ateyeh v. United of Omaha Life Ins. Co.*, 293 S.C. 436, 437, 361 S.E.2d 340, 340 (Ct. App. 1987). However, the denial of a motion to set aside an entry of default is not appealable until after final judgment. *Thynes v. Lloyd*, 294 S.C. 152, 154, 363 S.E.2d 122, 123 (Ct. App. 1987). Appellants appeal from a motion to set aside an entry of default. Furthermore, the parties have not participated in a damages hearing and the master has not entered a

default judgment against Appellants. Accordingly, both the master's July 14, 2016 order and October 28, 2016 order are interlocutory and not immediately appealable.

Appellants argue that because the master's order also denied their motion to stay and compel arbitration, the entire order is appealable. In his July 14, 2016 order, the master concluded Appellants' "motion to stay and compel arbitration is denied as [Restoration] is in [d]efault." Section 15-48-200 of the South Carolina Code (2005) provides an appeal may be taken from "[a]n order denying an application to compel arbitration." Appellants cite *Cox v. Woodmen of World Ins. Co.*, 347 S.C. 460, 469, 556 S.E.2d 397, 402 (Ct. App. 2001), for the proposition that "an order that is not directly appealable will be considered if there is an appealable issue before the court." Accordingly, Appellants assert that although the master's order denying them relief from an entry of default is not appealable, it became appealable when coupled with the denial of their motion to compel arbitration. However, given the procedural posture of this case, we do not find an appealable issue before this court.

Appellants failed to answer PCG's complaint in time. Accordingly, Appellants' default status is not in question. "By defaulting, a defendant forfeits his right to answer or otherwise plead to the complaint. In essence, the defaulting defendant has conceded liability." *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 242, 246 S.E.2d 880, 882 (1978) (citations omitted) (internal quotations omitted). Other than damages, the issues the parties would have decided through arbitration are settled leaving little to arbitrate. Granting a motion to compel arbitration after an entry of default would allow the party seeking arbitration to revisit liability after it has been determined. As Appellants emphasize in their brief, "'The policy of the United States and this State is to favor arbitration of disputes.'" *Tritech Elec., Inc. v. Frank M. Hall & Co.*, 343 S.C. 396, 399, 540 S.E.2d 864, 865 (Ct. App. 2000) (quoting *Heffner v. Destiny, Inc.*, 321 S.C. 536, 537, 471 S.E.2d 135,136 (1995)). However, if we allow the reexamination of liability after default, we are defeating the purpose of arbitration: "to achieve streamlined proceedings and expeditious results." *Preston v. Ferrer*, 552 U.S. 346, 357 (2008) (citations omitted) (internal quotations omitted).

Our supreme court analyzed the legal status of defaulting parties in *Roche v. Young Bros., of Florence*, 332 S.C. 75, 504 S.E.2d 311 (1998). In that case, the supreme court determined a defaulting party's consent was not required to refer the case to a special referee. The supreme court explained:

> Young Brothers clearly defaulted by failing to answer Roche's complaint within the prescribed time. Young Brothers' status as a defaulting party was not vitiated simply because it later chose to challenge the default judgment rendered against it.

Id. at 82-83, 504 S.E.2d at 315. Similarly, Appellants' default should not be excused because they chose to file a claim for arbitration when they found themselves in default. If we were to allow such, then any defaulting party would simply file a motion to compel arbitration to remove their default status. Therefore, the master correctly found Appellants' motion to stay and compel arbitration was not proper due to Appellants' default status. Appellants cannot bootstrap the master's denial of their motion for relief from default to the master's refusal to consider Appellants' request for arbitration in order to create an appealable issue.

B. Waiver

In addition, we find Appellants waived their right to arbitration. "It is generally held that the right to enforce an arbitration clause may be waived." *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999). "In order to establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration. There is no set rule as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case." *Id.* at 665, 521 S.E.2d at 753 (citations omitted) (internal quotations omitted).

While not specifically addressing the issue at hand, in *Wham v. Shearson Lehman Brothers, Inc.*, 298 S.C. 462, 381 S.E.2d 499 (Ct. App. 1989), the defendants sought to set aside an entry of default or in the alternative, to stay the proceedings and compel arbitration. *Id.* We determined the master did not use the "good cause" standard, but rather applied an "excusable neglect" standard to determine whether he should grant relief and thus, we remanded the case on the issue of the entry of default. *Id.* at 465, 381 S.E.2d at 501. Concerning the motion to stay and compel arbitration, we stated:

> Because we vacate the order denying the motion by Shearson Lehman for relief from the entry of default and remand the issue raised by the motion, we need not address the master's denial of its alternative motion to stay the proceedings and compel arbitration. *See,*

> *however, Miller v. British America Assurance Co.*, 238 S.C. 94, 119 S.E.2d 527 (1961) (referring to an arbitration agreement set up in the answer as a "special defense"); 5 Am.Jur.2d *Arbitration and Award* § 51 at 556–57 (1962) (one's right to arbitrate given by contract may be waived by failing to raise the right in an answer).

Id. at 466, 381 S.E.2d at 502.

Other jurisdictions have found arbitration waived when a defaulting party seeks to compel it. In *Tri-State Delta Chemicals, Inc. v. Crow*, 61 S.W.3d 172, 173 (Ark. 2001), the Supreme Court of Arkansas considered whether a defendant's default on a suit filed in circuit court effectively waives any right to compel arbitration. Similar to our case, the trial court did not consider the defendant's motion to compel arbitration because it determined the defendant was in default. *Id.* at 173. The Supreme Court of Arkansas initially determined because the issue of damages had not been decided, the default judgment was not a final decision and accordingly, was not appealable. *Id.* at 174. Further, the court stated, "While we agree that, generally, a denial of a motion to compel arbitration is an immediately appealable order, we do not believe that an interlocutory appeal will lie under the circumstances of this case." *Id.* Instead, the court determined the defendant "waived any right it may have had to compel arbitration when it failed to timely assert arbitration as a defense to the suit." *Id.* The court cited to a New York trial court decision finding:

> Though arbitration clauses are generally enforceable, they cannot be used to bypass the statutory provisions requiring that pleadings be answered or to thwart a proper motion for a default judgment. The Defendant effectively waived its right to enforce the arbitration clause when it failed to answer or appear in response to the summons and complaint under circumstances where there was no reasonable excuse for such default.

Id. (quoting *Charming Shoppes, Inc. v. Overland Constr., Inc.*, 717 N.Y.S.2d 860 (N.Y. Sup. Ct. 2000)). Determining the plaintiffs properly served the defendant and the defendant failed to timely assert its right to arbitrate, the Supreme Court of Arkansas opined the defendant waived this right. *Id.* "The right to seek arbitration is a defense to civil litigation. Like any other defense, it may be waived by failing to timely assert it under the rules of civil procedure." *Id.* at 175.

Other jurisdictions have made similar determinations. *See Interconex, Inc. v. Ugarov*, 224 S.W.3d 523, 535–36 (Tex. Ct. App. 2007) (finding Interconex waived any right to arbitration that it may have had when it failed to file a timely answer); *LaFrance Architect v. Point Five Dev. S. Burlington, LLC*, 91 A.3d 364, 372 (Vt. 2013) ("The presumption in favor of arbitration, however, must be viewed within the context of its underlying purpose: to provide speedy, cost-effective resolution of disputes. To allow a party to 'cry arbitration' in order to undo the consequences of its own errors would turn the rationale of arbitration on its head."); *Woodruff v. Spence*, 883 P.2d 936, 938 (Wash. Ct. App. 1994), *as amended* (Jan. 30, 1995) ("Whether Mr. Spence knowingly waived his right to arbitration depends on whether he had notice of the action against him prior to entry of the default judgment."); *State ex rel. Barden & Robeson Corp. v. Hill*, 539 S.E.2d 106, 112 (W. Va. 2000) ("In this case, unless it is able to show good cause for its default, Robeson has waived its right to assert arbitration as an affirmative defense against continued litigation in the circuit court.").

PCG properly served Appellants with notice of its claims. Appellants failed to timely answer or respond to those claims. Thus, Appellants effectively waived their right to assert enforcement of the arbitration provision.

CONCLUSION

We find the master's July 14, 2016 and October 28, 2016 orders are not appealable. Moreover, because Appellants were in default, they waived their right to assert arbitration as a defense. Accordingly, Appellants' appeal is

DISMISSED.

SHORT and MCDONALD, JJ., concur.