

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Carl E. Pierce, II, Special Referee

APPELLATE CASE NO. 2019-000927

Christopher and Ann Marie May, Respondents

v.

Ferrara Buist LLC, John Does 1-50 and Jane Does 1-50, Appellants,

Ferrara Buist, LLC, Third Party Plaintiff,

v.

MDJ Construction, Inc. Third-Party Defendant

APPELLANT'S INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

- I. THE TRIAL COURT IMPROPERLY FORECLOSED APPELLANT'S SUBSTANTIAL RIGHTS BY ISSUING AN ERRONEOUS DEFAULT ORDER.
 - a. The Trial Court impaired Appellant's substantial right to a trial by jury by issuing an order of default based upon the affidavit of Tyler Cloud.
 - b. The Trial Court impaired Appellant's substantial due process rights and right to a trial by jury by issuing an order of default based upon the improper finding that Appellant failed to answer or otherwise plead.

STATEMENT OF THE CASE

This case involves a claim for negligence, gross negligence, breach of warranty, unfair trade practice, and breach of contract associated with a contract for the construction of a residential home and alleged construction defects.

Respondents filed a complaint on December 15, 2017 in the Court of Common Pleas of York County, South Carolina and demanded a jury trial. Respondents allowed Appellants until February 14, 2018 to answer or otherwise plead to the allegations of the complaint. On February 14, 2018, Defendant/Third-Party Plaintiff timely filed and served a motion to stay the case pursuant to South Carolina Code §40-59-840. On April 13, 2018, Appellant filed and served an answer and counterclaims to Respondent's complaint and demanded a jury trial. On April 16, 2018, Plaintiff electronically filed an Affidavit of Default against Defendant/Third-Party Plaintiff. Importantly Tyler Cloud Esq. stated that in an affidavit of default that "no answer, motion. . . had been made therein and that said Defendant is in default." Appellant's answer which was sent via U.S. mail from Charleston to York county was clocked in on April 17, 2018 at 9:51 a.m. However, based upon Mr. Cloud's affidavit, Judge Daniel D. Hall electronically filed an Order of Default the next day on April 17, 2018 at 3:05 pm. See Order dated April 17, 2018.

Judge Kimball heard the filed Motion to Stay on April 19, 2018. The Court ruled that Appellant timely filed the motion to stay and issued an Order staying the case on May 21, 2018 for failure to comply with the right to cure statute. Order dated May 21, 2018. The Order stated that the Plaintiff's claims would be stayed for 90 days so that the parties could comply with the statutory requirements.

On October 4, 2018, Appellant's filed a motion to vacate the April 17, 2018 default judgment of April. See Motion filed October 4, 2018. On December 14, 2018 Special Referee Pierce heard the motion to vacate the default judgment. On March 29, 2019, Special Referee Pierce issue his ruling upholding the default order. See filed Order April 22, 2019. On April 9, 2019, Appellant filed a motion to reconsider per South Carolina Rules 59(e). Special Pierce denied to motion to reconsider by Order on April 30, 3019 and it was filed May 21, 2019. This appealed followed.

STANDARD OF REVIEW

An appeal from an order denying the mode of trial will be reviewed by the appellate court for errors of law. This Honorable Court reviews questions of law de novo. *N. Am. Rescue Prods., Inc. Richardson*, 396 S.C.124, 720 S.E.2d 53, 58 (S.C. Ct. App. 2011). Furthermore, appellate courts owe trial courts no particular deference when reviewing legal rulings over questions of law. *Moriarity v. Garden Sanctuary Church of God*, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000).

ARGUMENT

I. THE TRIAL COURT IMPROPERLY FORECLOSED APPELLANT'S SUBSTANTIAL RIGHTS BY ISSUING AN ERRONEOUS DEFAULT ORDER.

A. The Trial Court impaired Appellant's substantial right to a trial by jury by issuing an order of default based upon the affidavit of Tyler Cloud.

S.C. Code Ann. 14-3-330 governs the appealability of an order. S.C. Code Ann. 14-3-330 provides that an interlocutory order may be appealed if the substantial constitutional right to a jury trial is forever lost. Moreover, if a party's right to a jury trial is impaired, he must immediately seek review of the Order affecting the mode of trial or it is forever waived. See *Bateman v. Rouse*, 358 S.C. 667, 675, 596 S.E.2d 386, 390 (Ct. App. 2004).

Here, the Trial Court issued the erroneous default based upon the false affidavit of Tyler Cloud. Judge Hall stated that the order of default was based upon the affidavit of Tyler Cloud. The April 16, 2018 affidavit of Tyler Cloud was false in that it stated that Appellant failed to answer or other plead by stating "no Answer, Motion, or Notice of Appearance has been made therein." Clearly, there was a pending motion to stay filed with the clerk as of February 26, 2018. Despite the false representations of Tyler Cloud, Judge Hall failed to review the clerk's file prior to the issuance of the default order. This was plain error. A simple one-minute review

of the clerk's electronic file would have evidenced that a motion was pending and an answer had been filed. Judge Hall's actions effectively denied the Appellant his substantial right to a jury trial. *See Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000).

B. The Trial Court impaired Appellant's right to a trial by jury by issuing an order of default based upon the improper finding that Appellant failed to answer or otherwise plead.

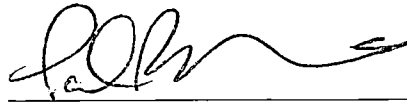
S.C. Code Ann. 14-3-330(2)(c) provides an additional sustaining ground to vacate the default order. S. C. Code Ann. 14-3-330 provides an appeal of an interlocutory order if the order affects a substantial right and" (c) **strikes out an answer or any part thereof or any pleading in any action.**" (Emphasis added) Here, Judge Hall's default order failed to find that Appellant had filed a motion to stay and an answer. All of which should have been determined by a review of the clerk's electronic file prior to entry of the default order. Clearly, Appellant's due process rights and right to a jury trial were improperly violated by the default order. Further, this Court has held on numerous occasions that a right to a jury trial is a substantial right and immediately appealable. *See Creed v. Stokes*, 285 S.C. 542, 331 S.E.2d 351 (1985) (order referring case to master in equity affects the mode of trial, a substantial right, and party waived his objection to the reference and his right to jury trial by failing to immediately appeal the order); *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.)

CONCLUSION

For the foregoing reasons, Appellants respectfully request this Court reverse the circuit court's order dated April 17, 2018, vacate the judgment, and order the trial court to restore the

matter to the jury trial roster.

July 1, 2019



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PROOF OF SERVICE OF APPELLANT'S DESIGNATION OF MATTER

THE STATE OF SOUTH CAROLINA
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COURT OF COMMON PLEAS

Carl E. Pierce, II, Special Referee

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v.

MDJ Construction, Inc. Third-Party Defendant

PROOF OF SERVICE

I, the undersigned counsel, hereby certify that I have served the Appellant's Designation of Matters to be Included in the Record on Appeal upon the Respondents, Christopher May and Ann Marie May, by depositing a copy of the same in the United States Mail, postage prepaid, on July 1, 2019, addressed to their attorney of record John C. Hayes, IV, Hayes Law Firm, LLC, 180 Meeting Street, Suite 330, Charleston, SC 29401; to MDJ Construction, Inc. by depositing a copy of it in the United States Mail, postage prepaid on July 1, 2019 addressed to their attorney of record, S. Markey Stubbs, Baker Ravenel Bender, P.O. Box 8057, Columbia, SC 29202 and to Special Referee Carl E. Pierce, II, by depositing a copy of it in the United States Mail, postage prepaid on July 1, 2019 to Pierce Sloan Wilson Kennedy & Early LLC, The Blake-Grimke House, P.O. Box 22437, Charleston, SC 29413-2437.

Respectfully submitted this 1st day of July 2019.



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V. Claire Allen,
Deputy Clerk
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: Christopher and Ann Marie May v. Ferrara Buist LLC, John Does 1-50
And Jane Does 1-50, Appellants
Ferrara Buist, LLC, Third Party Plaintiff, v. MDJ Construction, Inc. Third-Party
Defendent
Appellate Case No.: 2019-000927

Dear Ms. Allen:

Please find enclosed the appellant's initial brief, designation of matter, certification by counsel and proof of service for the above referenced case. Please send signed copy back in the enclosed self-addresses stamped envelope.

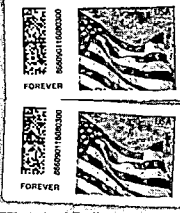
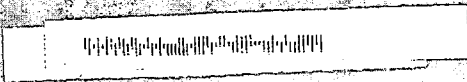
Thank you for your assistance in this matter.

Sincerely,
Ferrara Law Firm, PLLC

Tina Markferding

Tina Markferding, paralegal

Enclosures



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