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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Master in Equity for York County

Appellate Case No. 2017-000600

Alfred Jenkins and Mary Jenkins, Respondents,

v.

Ferrara-Buist Company, LLC, d/b/a Custom Crafted Homes, Appellant.

PETITION FOR REHEARING

RECEIVED

SEP 12 2019

SC Court of Appeals

Pursuant to Rule 221, SCACR, Respondents Alfred and Mary Jenkins (“Jenkins” or “Respondents”) hereby petition for rehearing of this Court's August 28, 2019 Unpublished Opinion No. 2019-UP-311 (“the Opinion”) in the above-captioned appeal to the extent it reversed and vacated in part. The Court should grant rehearing and issue a revised opinion dismissing the appeal for lack of jurisdiction because the appeal is interlocutory and does not fall into any exception of S.C. Code §14-3-330. Moreover, in the alternative, the opinion should be revised to affirm in whole the trial court’s order regarding the funds on deposit with the clerk of court.

Introduction

In the Opinion, this Court did not address the decisive jurisdictional issue of whether the order appealed from is an appealable interlocutory order. Here, the order appealed addresses only

the non-merits issue of the disposition of funds on deposit with the clerk of court. *See*, Order filed November 28, 2016 [R.pp. 5-7] (the “Order”). The Order did not in any way address the merits of the underlying breach of contract case, which remains pending and waiting to be litigated. The Order appealed certainly does not fall into one of the exceptions listed in S.C. Code §14-3-330 relating to interlocutory appeals, and therefore the appeal must be dismissed. Moreover, although the merits of the appeal should not be reached, this Court erred in its analysis of the Order relating to the disposition of funds on deposit. If the merits of the interlocutory appeal were to be reached, the decision below should be affirmed in whole.

Law/Analysis

I. The appeal is interlocutory and not immediately appealable, Respondents raised the issue, but the Opinion does not address the issue in any way.

A. The Respondents Argued for Dismissal Because the Appeal is Interlocutory.

The Respondents filed a Motion to Dismiss Appeal on April 3, 2017 with this Court (“Motion to Dismiss”). The Motion to Dismiss sought to dismiss the appeal “on the grounds that the Order from which this appeal is taken is interlocutory and does not finally determine any substantial matter forming the whole or part of a cause of action.” [Motion to Dismiss p. 1]. It set forth the underlying facts, and cited *Watson v. Underwood*, 407 S.C. 443, 756 S.E. 2d 155 (2014) as follows: “An order usually will be deemed interlocutory and not immediately appealable when there is some other act that must be done by the trial court prior to a determination of the parties’ rights.” *Id.* at 163. [Motion to Dismiss at pp. 1-3]. The Motion to Dismiss further explained that the underlying case is a breach of contract case with both sides asserting a breach by the opposing side and each side claiming entitlement to direct and consequential damages, and that the order appealed does not affect any of the underlying claims or determine any substantial matter. [Motion to Dismiss at p. 3]. By Order filed May 4, 2017, this Court denied

the motion, but expressly stated “Nothing precludes the parties from raising appealability in their briefs.”

Respondents also argued appealability in their brief. Statement of Issues on Appeal I in Respondents’ Final Brief states: “Should the appeal be dismissed as interlocutory because the order appealed did not address the merits of the case, which will be litigated?” [Respondents Br. at 1]. The brief includes legal argument and numerous citations to authority as well. [Respondents Br. at 6-7]. Further, at oral argument of this appeal, counsel for Respondents argued for dismissal on the basis that the appeal is interlocutory and not immediately appealable.

B. This Court Lacks Jurisdiction Over This Appeal.

Although the appealability issue was repeatedly argued by Respondents, the Opinion does not address it in any way. However, the appeal is interlocutory, does not fall into any exception of S.C. Code §14-3-330, and therefore this Court lacks jurisdiction and the appeal must be dismissed. *See, Stone v. Thompson*, 418 S.C. 599, 605, 795 S.E.2d 49, 52 (Ct. App. 2016) (“because the order in this case does not bring the litigants to ‘the end of the road’ and requires further action by the court, [we find] the order is not immediately appealable”); *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 426 S.E.2d 777, 780 (1993) (“If there is some further act which must be done by the court prior to a determination of the rights of the parties, then the order is interlocutory”); *Tillman v. Tillman*, case no. 2015-001291, opinion no. 5493, p.2 (Ct. App. 2017) (“A final judgment is one that ends the action and leaves the court with nothing to do but enforce the judgment by execution”).

If, as here, an appealed order is not final, an immediate appeal is available *only* if the order falls into one of the exceptions of §14-3-330, and this case plainly does not. *See, e.g., Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 426 S.E.2d 777 (1993) (“the

order must finally determine some substantial matter forming the whole or a part of some cause of action or defense”). Accordingly, a rehearing should be granted because this Court lacks jurisdiction over the appeal.

II. If the merits of the appeals were to be reached, the decision below should be affirmed in whole.

If the merits of the appeal were to be reached, the Opinion incorrectly addressed the issues, and the Opinion should be revised to affirm the decision below in whole. The Opinion states on page 3 that the rationale of the master’s holding that “Builder was not entitled to a fund to secure its contractual claims against Buyers” suffers from two flaws, addressed in more detail below. However, the arguments for the two flaws were not made to the court below (or on this appeal), and were not ruled on by the lower court. Therefore they are not preserved for appellate review. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (“It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial [court] to be preserved for appellate review”)

First, the Opinion states that the conclusion of the master “discounts the possibility Builder suffered consequential damages if in fact it can prove the Buyers breached the contract.” However, this statement misses the point, which is *why* would the Appellant be entitled to security for its unproven claim any more than Respondents would be entitled to security for their unproven claim? Each party is seeking additional damages in the underlying lawsuit. [*see* Complaint, R. p. 10-14; *see also*, letter of counsel, R. p. 128 (stating that Respondents “will be able to show consequential damages exceeding \$30,000, not including attorneys’ fees . . . which will surely exceed \$50,000 in the litigation continues”)]. The Opinion also inappropriately gets into the underlying merits of the breach of contract claims. Those underlying merits were not at

issue in any way in the motion that resulted in the appealed interlocutory order. The Opinion of this Court should not have delved into the underlying breach of contract case wherein Respondents seek additional damages from Appellant, and Appellant seeks additional damages from Respondents.

Second, the Opinion correctly states that “the parties agreed to deposit the funds with the Clerk of Court.” [Opinion p.3]. However, the Opinion adds “Buyers are the parties whose claims were secured by the deposit of the funds with the Clerk of Court.” [Id.]. This is not accurate. The funds were deposited with the Clerk of Court pursuant to an Order consented to by *both* parties. [Order filed July 25, 2016, R. pp. 2-3]. That Order, which was not appealed and is law of the case, expressly held that funds were “to be held in trust pending agreement by the Parties or *further order of the Court.*” [Id. R. p. 2 (emphasis added)]. Thus, the parties fully expected that a further order of the Court would address the disposition of the funds on deposit. The funds were not held for the benefit of either party, but were to be dealt with by further order, which is what occurred.

The fundamental question set forth in the Order appealed – why would the Appellant be entitled to a fund to secure its counterclaims against Respondents? – is not addressed by the Opinion, and in fact can only be answered that it is not entitled to such a fund. Accordingly, the Order appealed should be affirmed in whole.

The Opinion also errs in applying the summary judgment standard of “genuine issues of material fact” to the appealed Order [Opinion at p. 3-4]. The Order appealed states: “Although Plaintiffs’ motion is titled as a motion for partial summary judgment, it is in essence simply a motion seeking the exercise of the equitable powers of the Court to place the parties in the position they would have been in as a result of a sale of the house by Plaintiffs, without affecting any party’s claim for breach of contract.” [Order, R.p. 5]. Later in the Order, the master stated:

“By ruling in the manner described, the Court is not ruling upon, or granting judgment of any kind, as to the claims of either party, and makes no determination as to any entitlement to damages due either party.” [Order, R. p. 7]. Even during oral argument of the motion below, the master repeatedly stated that he was not deciding summary judgment. [R. pp. 114, 116-117, 124].

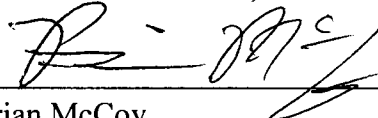
Thus, the Order appealed was not based on summary judgment, and the application of the summary judgment standard in the Opinion should be corrected. An application of the appropriate standard would result in the appealed Order being affirmed in whole.

Conclusion

Rehearing is required in this matter. The jurisdiction of this Court to review interlocutory orders is limited by statute. This appeal did not satisfy the statute to make the interlocutory order immediately appealable, so this Court lacks jurisdiction. In addition, if the merits were to be reached, the appealed order should be affirmed in whole as set forth above.

Respectfully submitted,

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Attorney for Respondent

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SC Court of Appeals

September 11, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2017-CP-46-1001
Appellate Case No.: 2017-000600

Alfred and Mary Jenkins Respondents

v.

Ferrara-Buist Company, LLC d/b/a Custom Crafted Homes.....Appellant

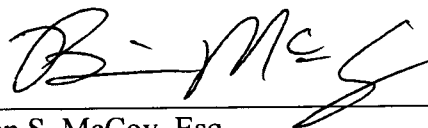
CERTIFICATE OF SERVICE

The undersigned certifies that Respondents' Petition for Rehearing was served upon the Appellant by depositing same in the United States Mail, with sufficient postage affixed and addressed as follows:

Paul B. Ferrara, III, Esq.
8887 Old University Blvd. Ste. 201
North Charleston, SC 29406-9603

September 12, 2019.

McCOY LAW FIRM. LLC



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September 12, 2019

VIA HAND DELIVERY BY COURIER

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

RE: *Alfred and Mary Jenkins vs. Ferrara-Buist Company, LLC*
Case No.: 2017-000600

Dear Ms. Kitchings:

Enclosed please find:

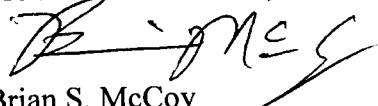
- (1) An original and 7 copies of Respondents' Petition for Rehearing;
- (2) A Certificate of Service; and
- (3) A check that includes \$50 for the filing fee for the Petition.

Please file the originals and return the filed, stamped copy with the courier.

By copy hereof, we are serving counsel of record for Appellant. Thank you.

Very Truly Yours,

MCCOY LAW FIRM, LLC


Brian S. McCoy

BSM:cjm
Enclosures

CC: Paul B. Ferrara, III, Esq.