THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Master in Equity for York County

Opinion No. 2019-UP-311 (S.C. Ct. App. Filed August 28, 2019)

Alfred and Mary Jenkins..... Petitioners

v.

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

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PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioners certifies that the Petition for Rehearing was filed on September 12, 2019, and finally ruled on by the Court of Appeals on October 24, 2019.

QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS ERR BY FAILING EVEN TO ADDRESS THE FACT THAT THE APPEAL IS INTERLOCUTORY AND NOT APPEALABLE?

II. DID THE COURT OF APPEALS ERR BY REVERSING IN PART THE LOWER COURT'S DECISION THAT APPELLANT WAS NOT ENTITLED TO A FUND TO SECURE ITS DISPUTED COUNTERCLAIMS?

INTRODUCTION

The Court of Appeals' failure to determine its jurisdiction over this interlocutory appeal that does not satisfy any provision of S.C. Code §14-3-330 is in conflict with prior decisions of the South Carolina Supreme Court, and raises serious constitutional issues by assuming jurisdiction over an appeal not authorized by the legislature. In addition, the partial reversal by the Court of Appeals in effect entitled Appellant to a portion of Respondents' money as security for a disputed counterclaim asserted by Appellant. This is contrary to South Carolina law.

STATEMENT OF THE CASE

Respondents Alfred Jenkins and Mary Jenkins filed a Complaint on April 1, 2016, in the York County Court of Common Pleas asserting claims against their homebuilder, Appellant Ferrara Buist Company, LLC, for breach of contract, equitable lien, and restitution. [Appendix ("Appx") pp. 011-015; R. 10-14]. Appellant answered, and asserted counterclaims for breach of contract, slander of title, cloud on title, and injunction. [Appx pp. 016-022; R. 15-21]. The

underlying case has not yet commenced, other than the filing of the motion and entry of the Order described below.

At the time that the Respondents cancelled the contract for Appellant to build their house, Respondents had paid nearly $650,000 to Appellant and the house was nearly complete. [Appx p. 006]. Unfortunately for Respondents, they did not own the lot upon which the house was built, and they had no security for the monies they had paid to Appellant. [Appx p. 006; R. 5].

Fortunately, a third party was interested in purchasing the home, and to facilitate the sale, the parties consented to an Order, entered on July 25, 2016, requiring Appellant to deposit funds with the Clerk of Court "pending agreement by the Parties or further order of the court." [Appx pp. 003-004; R. 2-3]. The funds deposited were equal to the payments made by Respondents to Appellant over the course of the construction. [Appx p. 007; R. 6]. The Respondents agreed to remove the lis pendens, which allowed the sale to the third party to be closed for a sale price of $850,000. [Appx pp. 003-004, 006-007; R. 2-3, 5-6]. Because Appellant retained all of the proceeds of the sale, Respondents filed a motion seeking the release of the funds held in trust by the clerk. [Appx. 049-050; R. 48-49].

On November 28, 2016, the Honorable S. Jackson Kimball issued an Order granting the motion and releasing to Respondents the total amount of the funds held by the clerk. [Appx pp. 006-008]. As stated in the Order, all other issues, including the underlying claims and counterclaims, were reserved for trial. [Appx p. 008; R. 7].

Although the underlying case had not yet commenced, Appellant filed a Notice of Appeal of Judge Kimball's Order on March 8, 2017, after denial of a motion to reconsider. [Appx pp. 009-010; R. 8-9]. On April 3, 2017, Respondents filed a motion to dismiss the appeal on the ground that the Order is interlocutory and did not finally decide any issue raised by the pleadings. [Appx pp. 183-185].

On May 4, 2017, the Court of Appeals denied the motion to dismiss the appeal, but added "[n]othing precludes the parties from raising appealability in their briefs." [Appx. pp. 187].

Appealability was raised in the Respondents' brief [Appx. pp. 151 (Statement of Issues on Appeal); and Appx pp. 156-157 (Argument)], and was argued at oral argument. Inexplicably, in Opinion No. 2019-UP-311 ("Opinion"), the Court of Appeals failed to address the appealability of the interlocutory order and its jurisdiction over the appeal [Appx. pp. 172-175 *passim*]. Therefore, Respondents raised the issue of appealability again in the Petition for Rehearing. [Appx pp. 176-179]. Again, the Court of Appeals denied the Petition, but failed to address appealability [Appx p. 182].

On the merits of the appeal, the Court of Appeals posited arguments not raised by the Appellant to determine that the Appellant is somehow entitled to a fund of Respondents' money to secure Appellant's disputed counterclaims in the underlying case, and affirmed in part and reversed in part. [Appx pp. 172-175].

ARGUMENT

I. THE COURT OF APPEALS FAILED EVEN TO ADDRESS THE FACT THAT THE APPEAL IS INTERLOCUTORY AND NOT APPEALABLE

The jurisdiction of the Court of Appeals is limited by statute to those cases enumerated in S.C. Code §14-3-330. *Ex Parte Capital U–Drive–It, Inc.*, 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006). This interlocutory appeal does not satisfy any provision of the statute, and therefore is not immediately appealable.

As set forth in the Statement of Facts, Respondents raised the issue of appealability in a Motion to Dismiss, in its Brief, at oral argument, and in its Petition for Rehearing. Despite the repeated arguments by Respondents, the Court of Appeals failed to address its jurisdiction over the interlocutory appeal in its Opinion or its Order denying the Petition for Rehearing.

Plainly, the Order appealed is interlocutory. *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.E2d 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 provisions 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"). A review of each provision of S.C. Code §14-3-330 reveals that no subsection of the statute applies to this appeal. Subsection (1) does not apply because the Order does not involve the merits and is not a final judgment. Subsection (2) does not apply because the Order does not "in effect determine[] the action," grant or refuse a new trial, or strike an answer or pleading. Subsection (3) does not apply because the order appealed is not a "final order" affecting a substantial right or made after judgment. Subsection (4) does not apply because the interlocutory Order does not affect an injunction or receiver.

Because no provision of S.C. Code §14-3-330 applies, the Court of Appeals lacked jurisdiction, and the appeal must be dismissed. After trial, Appellant will be free to advance its contentions on appeal. *See Breland v. Love Chevrolet,* 339 S.C. 89, 529 S.E.2d 11 (2000) (immediate appeals under § 14-3-330 are permitted only where the alleged error cannot be

corrected by post-trial review). *See also*, *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 73, 533 S.E.2d 331 (S.C., 2000) (same).

Accordingly, the Opinion of the Court of Appeals should be reversed to the extent it reversed the trial court in part, and the case should be remanded to the court of common pleas for the case to proceed with the underlying claims and counterclaims.

II. THE COURT OF APPEALS ERRED BY REVERSING IN PART THE LOWER COURT'S DECISION THAT APPELLANT WAS NOT ENTITLED TO A FUND TO SECURE ITS DISPUTED COUNTERCLAIMS.

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 [Appx p. 174] 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, which are addressed in more detail below. However, the arguments for the two flaws were not made to the court below or in the briefing to the court of appeals, 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"). In any event, the unpreserved arguments raised by the Court of Appeals have no merit.

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." [Appx p. 174]. However, this statement misses the point, which is *why* would the Appellant be entitled to security for its unproven claim for consequential damages any more than Respondents

would be entitled to security for their unproven claim? Each party is seeking additional damages in the underlying lawsuit. [*see* Appx pp. 011-014 (Complaint); *see also,* Appx 129 (letter of counsel)]. The Opinion also inappropriately gets into the underlying merits of the breach of contract claims. [Appx pp. 174-175]. Those underlying merits were not at issue in any way in the motion that resulted in the appealed interlocutory order. The Opinion should not have delved into the underlying breach of contract case wherein Respondents seek damages from Appellant, and Appellant seeks damages from Respondents.

Second, the Opinion correctly states that "the parties agreed to deposit the funds with the Clerk of Court." [Appx p.174]. 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. [Appx pp. 3-4; R. 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.*" [Appx p. 3 (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 Appellant is not entitled to such a fund. Accordingly, the Court of Appeals erred by reversing in part.

The Court of Appeals' Opinion also errs in applying the summary judgment standard of "genuine issues of material fact" to the appealed Order [Appx pp. 174-175]. 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." [Appx p. 007; R. 6]. 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." [Appx p. 008; R. 7]. Even during oral argument of the motion below, the master repeatedly stated that he was not deciding summary judgment. [Appx pp. 115, 117-118, 125].

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.

For these reasons, even if the merits of the appeal are reached, the Court of Appeals Opinion should be reversed to the extent that it reversed the ruling of the lower court in part.

CONCLUSION

The court of appeals failed to determine its jurisdiction over the appeal. The order certainly is interlocutory and not immediately appealable. In addition, if the merits were to be reached, the appealed order should be affirmed in whole because the Appellant is not entitled to a fund of Respondents' money to secure its disputed counterclaims.

Respectfully submitted,

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November 25, 2019

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CERTIFICATE OF SERVICE

I certify that I have served a copy of the Petition for a Writ of Certiorari to the counsel of record for Appellant as indicated below on the date indicated by First Class United States Mail, postage prepaid, addressed as follows:

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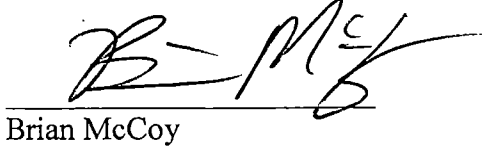

Brian McCoy

November 25, 2019
Rock Hill, South Carolina