

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

JAN 21 2020

Alfred Jenkins and Mary Jenkins, Petitioners,
v.

S.C. SUPREME COURT

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

Appellate Case No. 2019-001948

RETURN TO WRIT OF CERTIORARI

January 16, 2020

Paul B. Ferrara, III
SC Bar No. 70511
8887 University Blvd.
North Charleston, SC 29406
(843) 569-5511/ (843) 569-5411 fax
paul@ferraralawfirm.net
Attorney for Appellant

TABLE OF CONTENTS

Questions Presented iii

Statement of the Case 1

Standard of Review 3

Argument

 I. THE COURT OF APPEALS CORRECTLY HELD S.C. CODE ANN. 14-3-330
 PROVIDED JURISDICTION TO REVIEW THE TRIAL COURT’S ORDER.
 4

 II. THE COURT OF APPEALS PROPERLY VACATED THE MASTER-IN-
 EQUITY’S ORDER AS IT VIOLATED RESPONDENTS SUBSTANTIAL
 RIGHT TO A TRIAL BY JURY 5

Counter Argument

 I. RESPONDENT HAD TO APPEAL THE TRIAL COURT’S ORDER, WHICH
 AFFECTED RESPONDENT’S MODE OF TRIAL, OR THAT ISSUE WOULD
 HAVE BEEN FOREVER WAIVED. 5

Conclusion. 6

TABLE OF CASES AND AUTHORITIES

Cases

Lester v. Dawson, 327 S.C. 263, 491 S.E.2d 240, 242 (1997) 5

Quail Hill, LLC v. County of Richland, 387 S.C. 223, 692 S.E.2d 499 (2010) 3

First Union Nat. Bank of S.C. v. Soden, 333 S.C. 554, 565, 511 S.E.2d 372, 377 (Ct. App. 1998)
..... 5, 6

Statutes

S.C. Code Ann. § 14-3-330..... 4, 5, 6

Rules

Rule 56 of the South Carolina Rules of Civil Procedure 3

Rule 242 of South Carolina Appellate Rules 2, 6

QUESTIONS PRESENTED FOR REVIEW

- I. DID COURT OF APPEALS CORRECTLY HEAR THIS APPEAL PURSUANT TO S.C. CODE ANN. 14-3-330?
- II. DID COURT OF APPEALS CORRECTLY VACATE AND REVERSE THE MASTER-IN-EQUITY'S ORDER AS IT VIOLATED THE SUBSTANTIAL RIGHT OF TRIAL BY JURY TO THE RESPONDENT?

STATEMENT OF THE CASE

This case involves a breach of contract associated with a contract for the construction of a home and sale of land with a final contract price, after change orders, of \$881,868.13. The Respondents paid a total of \$643,760.70 to Appellant.

Petitioners filed a complaint in the Court of Common Pleas alleging causes of action under both theories of equity and law for: 1) equitable lien, 2) restitution, and 3) breach of contract. Respondents answered and counter-claimed damages in the amount of \$665,423.23, plus attorney's fees and costs. Respondents requested a jury trial.

Appellant filed an answer and counterclaim for: 1) breach of contract, 2) slander of title, and 3) cloud on title. The answer and counterclaim also included a motion for injunctive relief, seeking the release of the lis pendens to allow Appellant to sell the subject property in order to mitigate damages. Appellant sold the property for \$850,000.00 in order to mitigate its damages and received \$804,349.66 in proceeds after closing costs. Petitioner and Respondent agreed, by consent, to resolve the injunctive relief/lis pendens claims by depositing \$663,395.37 of the proceeds, representing the maximum amount in dispute by either party, with the Clerk of Court pending a trial on the above claims. Opposing Counsel sent Judge Kimball a letter, attached to the July 25, 2016 order, stating that the parties "agreed that the Lis Pendens would be released so that the property could be sold and that part of the proceeds of the sale which would be sufficient to cover Respondents' claim would be held in trust." See, July 25, 2016 Order. (R. p. 2). Judge Kimball entered the consent order on July 25, 2016, and Appellant deposited \$663,395.37 of the sale proceeds with the court. See, July 25, 2016 Order. (R. p. 2).

Thereafter, Petitioners filed a motion for partial summary judgment entered September 9, 2016. An affidavit of counsel, Herbert Hamilton, Esq., was filed in support of Respondents'

motion for partial summary judgment. Appellant filed a response to the motion for partial summary judgment with a counter affidavit that established material questions of fact regarding the above causes. Upon hearing Respondents' motion for partial summary judgment, the master-in-equity ordered the release of funds to Respondents for the full amount of \$663,395.37 that Appellant deposited with the court. See, November 28, 2016 Order. (R. pp. 5-7). Appellant timely filed a motion to reconsider the order granting partial summary judgment and releasing funds, which was denied, and, as a result, this appeal followed. Petitioner sought to have the Court of Appeals dismiss the matter as interlocutory at the outset of the appeal. The Court of Appeals denied the motion to dismiss by non-dispositional Order dated May 24, 2017. Thereafter, the Court of Appeals, after oral argument, vacated the November 28, 2016 order in so much as it contained findings of fact or conclusions of law by decision dated August 28, 2019. The Court of Appeals directed the Master-in-Equity to modify his order to direct \$499,393.36, which was not in dispute, to be returned to Petitioners. The remaining funds of \$164,002.01 are to be ordered by the Master-in-Equity to be returned to the Clerk of Court by the Petitioner. Thereafter, Petitioner filed a petition for rehearing on September 12, 2019 which was denied. Petitioner now seeks writ of certiorari.

ARGUMENT

"A Writ of Certiorari is not a matter of right, but one of sound judicial discretion." Rule 242(b), SCACR. Generally, when deciding to grant review, the Court will consider, whether there is a novel question of law; whether there is a dissent in the decision of the Court of Appeals; whether the decision is in conflict with a prior decision of the Supreme Court;

whether substantial constitutional issues are directly involved; whether a federal question is involved and the Court of Appeals' decision conflicts with a decision of the United States Supreme Court. *Id.*

At the onset, it should be noted that in this case, none of the factors generally considered by the Court when deciding to grant review are present. This matter involves a simple breach of contract and a counter claim for damages under the contract by Respondent. This matter does not involve a novel issue of law and it was decided by a per curiam the Court of Appeals. Moreover, the Court of Appeals opinion does not conflict with any decisions of the Court of the United States Supreme Court.

Notwithstanding the above, the Court of Appeals did not err in reversing the Master-in-Equity's order vacating any findings of fact or conclusions of law and directing the disputed funds be disbursed to the Petitioners.

STANDARD OF REVIEW

In reviewing a grant of summary judgment, the appellate court applies the same standard as the trial court under Rule 56(c), SCRPC. Quail Hill, LLC v. County of Richland, 387 S.C. 223 at 234, 692 S.E.2d 499 at 505 (2010). Summary judgment is proper if when viewing the evidence and inferences to be drawn therefore in a light most favorable to the nonmoving party, the pleadings, and depositions, answers to interrogatories, admissions, and affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. *Id.*, Rule 56(c), SCRPC. A mere scintilla of evidence, in the light most favorable to the non-moving party, concerning a disputed material

fact at issue is enough to defeat a motion for summary judgment. (Add scintilla law here)

I. THE COURT OF APPEALS CORRECTLY HELD S.C. CODE ANN. 14-3-330 PROVIDED JURISDICTION TO REVIEW THE TRIAL COURT'S ORDER.

Petitioners are incorrect in their argument whereby they assert the trial court's order in this matter is interlocutory and therefore not ripe for review. S.C. Code Ann. § 14-3-330 establishes that "[t]he Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

....

(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 . . . ;

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

As a result of the foregoing statute, Petitioner's argument is without merit. It is obvious that the trial court's order finally determined the rights between the Petitioner and Respondent in determining funds should be awarded to Petitioner without a jury trial on the merits. Further, without an appeal of the instant order, the findings of fact necessary to issue the order would have been the law of the case. All of the above facts and S.C. Code Ann. 14-3-330 (2) allowed the Court of Appeals jurisdiction to review the trial court's order. Furthermore, Respondent's substantial right to a jury trial in this case would have been abridged if the trial court's order was allowed to be the law of the case.

II. THE COURT OF APPEALS PROPERLY VACATED THE MASTER-INEQUITY'S ORDER AS IT VIOLATED RESPONDENTS SUBSTANTIAL RIGHT TO A TRIAL BY JURY.

Our jurisprudence in South Carolina is clear that a party's right to a jury trial is a substantial right. The right to a trial by jury shall be persevered to the parties inviolate as established by our South Carolina Constitution and South Carolina Rules of Civil Procedure 38. Moreover, issues of fact in an action for the recovery of money only or of specific real or personal property must be tried by a jury" Lester v. Dawson, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997). A trial by jury is a substantial right. "Orders affecting the mode of trial affect substantial rights under S.C. Code Ann. § 14-3-330 (2) (1977) and must, therefore, be appealed immediately." First Union Nat. Bank of S.C. v. Soden, 333 S.C. 554, 565, 511 S.E.2d 372, 377 (Ct. App. 1998). Here, the Court of Appeals was mandated to vacate and reverse the Master-in-Equity's order as it violated Respondent's right to a trial by jury in that the Master made factual determinations that were only for the jury to decide. As the order being appealed infringed upon Respondent's substantial right to a jury trial, the Court of Appeals was correct to vacate and reverse the order.

RESPONDENT'S COUNTER ARGUMENT

I. RESPONDENT HAD TO APPEAL THE TRIAL COURT'S ORDER, WHICH AFFECTED REPSONDENT'S MODE OF TRIAL, OR THAT ISSUE WOULD HAVE BEEN FOREVER WAIVED.

As stated above, our jurisprudence is that a party's right to a jury trial is a substantial right and is preserved inviolate. Moreover, "Orders affecting the mode

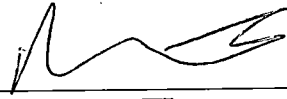
of trial affect substantial rights under S.C. Code Ann. § 14-3-330 (2) (1977) and must, therefore, be appealed immediately.” First Union Nat. Bank of S.C. v. Soden, 333 S.C. 554, 565, 511 S.E.2d 372, 377 (Ct. App. 1998). “The failure to immediately appeal an order affecting the mode of trial effects a waiver of the right to appeal that issue.” Id.

Clearly, the Court of Appeals recognized that the trial court’s order directing funds to be disbursed to the Jenkins prior to a trial on the merits was error and violated Respondent’s substantial right to a jury trial. Importantly, the order being appealed, if left unreviewed, would have been the law of the case. As such, Respondent’s would have been unable to assert, at trial, that Petitioner owed Respondent’s any funds as a result of the breach of the construction contract. If the master-in-equity’s order was left unappealed the Respondent would have been tasked with proving its case despite a prior order determining that Petitioner’s had made Respondent whole on the original contract.

CONCLUSION

The Petition for a Writ of Certiorari does not meet the general considerations used by the Court to determine whether review should be granted. See Rule 242(b), SCACR. Moreover, as discussed above, the Petitioners failed to present any material fact or principal of law that was overlooked or disregarded by the Court of Appeals. Moreover, it is clear that S.C. Code Ann. 14-3-330 gives the Court of Appeals the authority to hear this matter. As the master-in-equity’s order violated Respondent’s substantial right to a jury trial, the Court of Appeals decision to reverse and vacate was proper.

Respectfully submitted,



Paul B. Ferrara, III
SC Bar No. 70511
8887 University Blvd.
North Charleston, SC 29406
(843) 569-5511/ (843) 569-5411 fax
paul@ferraralawfirm.net
Attorney for Respondent

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

Honorable S. Jackson Kimball, III, Master-in-Equity

Appellate Case No. 2019-001948

Alfred Jenkins and Mary Jenkins....., Petitioners,

v.

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

PROOF OF SERVICE

I hereby certify that I mailed a copy of the Return to Writ of Certiorari to Brian S. McCoy by depositing in the U.S. mail to: 378 E. Main Street, Rock Hill, South Carolina 29730.

January 16, 2020


Tina Markferding