

RECEIVED

Jul 01 2020

SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

---

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas for the Ninth Circuit

The Honorable Bentley Price, Circuit Court Judge

---

Case No. 2019-CP-10-00178

---

J. Daniel Mahoney.....Plaintiff/Respondent,

v.

The Muhler Company, Inc., and Henry Hay III..... Defendants/Appellants.

---

RESPONDENT’S MOTION TO DISMISS

---

Respondent J. Daniel Mahoney (“Mahoney” or “Respondent”) hereby responds to the Notice of Appeal filed June 22, 2020 in the South Carolina Court of Appeals by filing this Motion to Dismiss. By way of background and to outline the procedural history of this case, please see the following timeline:

1. On January 14, 2019 Mahoney filed a Summons and Complaint with the Charleston County Court of Common Pleas *Case No.: 2019-CP-10-178*. This lawsuit focuses on a series of minority shareholder claims Mahoney has against Appellants.

2. On February 15, 2019, The Muhler Company, Inc and Henry Hay, III, in his individual capacity (“Appellants”) filed an Answer and Demand for Arbitration as well as a Motion to Stay the Case and Compel Arbitration.

3. The parties went before the Honorable Bentley Price on May 31, 2019 with regard to Appellants' Motions to Stay the Case and Compel Arbitration and to Quash Subpoenas.

4. On June 24, 2019 (the Order was originally filed June 5, 2019 but because of a clerical error it was filed in a separate case, that Order was vacated on June 14, 2019 and a new Order was issued) Judge Price signed an Order granting Defendants'/Appellants' Motion to Compel arbitration. However, he found that Article XIII, Section 2 of the Amended bylaws to the Muhler Company, Inc. regarding the selection of the arbitrators to be inequitable and therefore unenforceable.

5. On June 18, 2019 Appellants filed a Motion for Reconsideration of the above Order. This Motion was denied.

6. On July 22, 2019 Appellants filed a Notice of Appeal to appeal Judge Price's Order dated June 24, 2019.

7. On August 6, 2019 Respondent's filed a Motion to Dismiss with the Court of Appeals.

8. On October 25, 2019, an Order was issued by the Court of Appeals and Respondent's Motion to Dismiss the appeal was granted.

9. On November 8, 2019 Appellants' filed a Petition for Rehearing with the Court of Appeals.

10. On February 5, 2020, the Court of Appeals issued an Order denying Appellants' Petition for Rehearing.

11. On February 28, 2020 Appellants' filed a Petition for a Writ of Certiorari with the Supreme Court. This Petition is still pending.

Unrelated to this minority stockholder litigation, Mahoney and Muhler were also involved in a previously filed employment lawsuit. The employment lawsuit was filed in Charleston Court of Common Pleas Case No: 2018-CP-10-5077. Muhler moved to compel arbitration in the

employment case and that motion was granted. The employment claim proceeded to arbitration and an Arbitration Award was entered on December 12, 2019. This award (in Case No 2018-CP-10-5077) was confirmed by the Honorable Bentley Price on March 27, 2020.

Now, turning back to the above-titled litigation (Case No: 2019-CP-10-178), Defendants / Appellants tried to use the employment arbitration award to end run Mahoney by seeking to enter the award in THIS case. The timeline of these efforts is as follows:

1. On May 11, 2020 Appellants' filed a Motion to Confirm the Arbitration Award from case No: 2018-CP-10-5077 in *Case No.: 2019-CP-10-178*, a completely separate lawsuit with separate claims, separate legal issues, separate facts, different arbitrators, different witnesses, and a different attorney for Mahoney.

2. On June 16, 2020, a hearing was held before Judge Price on Appellants' Motion to Confirm Arbitration Award.

3. On June 17, 2020 Judge Price signed an Order denying Appellants' Motion to Confirm Arbitration Award.

4. On June 24, 2020 Defendants /Appellants filed another Notice of Appeal.

5. On June 24, 2020 Defendants / Appellants / Petitioners filed a Motion for Taking Judicial Notice with the South Carolina Supreme Court asking it take notice of the findings in the employment litigation arbitration.

It is clear based on the history of this matter since the original lawsuit was filed that Defendants/Appellants, The Muhler Company, Inc., and Henry M. Hay, III, have engaged in a systematic and protracted plan to delay Mahoney's day in court at any cost. They have moved to reconsider and/or appeal at every possible opportunity from the filing of this suit. Mahoney asks

this Honorable Court to dismiss the latest appeal and instruct Appellants to refrain from further delay of the underlying arbitration.

### **Background**

Respondent incorporates the information contained in its original Motion to Dismiss filed before this Honorable Court on August 6, 2019. For the sake of efficiency, we will rely on that prior background as nothing has changed since its filing.

### **Applicable Law**

S.C. Code Ann. § 15-48-200(a) (1978) determines which arbitration matters can be appealed. Specifically,

(a) An appeal may be taken from:

- (1) An order denying an application to compel arbitration made under S.C. Code Ann. § 15-48-20 (1978);
- (2) An order granting an application to stay arbitration made under S.C. Code Ann. § 15-48-20(b) (1978);
- (3) An order confirming or denying confirmation of an award;
- (4) An order modifying or correcting an award;
- (5) An order vacating an award without directing a rehearing; or
- (6) A judgment or decree entered pursuant to the provisions of this chapter.

(b) The appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action

An interlocutory order not governed by a specialized appealability statute is not immediately appealable unless it fits into one of the categories listed in S.C. Code Ann. § 14-3-330 (1978) of the South Carolina Code. *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 300, 705 S.E.2d 477 (Ct. App. 2011) (quoting *Ex Parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006)). An order refusing to stay an action pending arbitration or compel arbitration is immediately appealable. *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 661, 521 S.E.2d 749, 771 (1999). This is because the order is considered “final” and disposes of the party’s

rights. The South Carolina Supreme Court ruled that an order that “stayed an action and compelled arbitration could not be appealed because it was not expressly included in S.C. Code Ann. § 15-48-200 (1978).” *Heffner v. Destiny, Inc.*, 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995). The *Heffner* court stated that “by application of the rule of statutory construction "*expressio unius est exclusio alterius*" (the mention of one is the exclusion of another), all other orders related to arbitration are not immediately appealable.” (Citing *Pennsylvania Nat. Mut. Cas. Ins. Co. v. Parker*, 282 S.C. 546, 320 S.E.2d 458 (Ct. App. 1984).

### **Final Orders and Judgements**

Appeals from arbitration matters follow the same rules as other civil orders and judgements; the Court of Appeals and S.C. Supreme Court shall have appellate jurisdiction for final judgements. According to *Good v. Hartford Acc. & Indem. Co.*, 201 S.C. 32, 42, 21 S.E.2d 209, 212 (1942), “a final judgment is one which operates to divest some right in such a manner as to put it beyond the power of the Court making the order to place the parties in their original condition after the expiration of the term; that is, it must put the case out of Court, and must be final in all matters within the pleadings.”

### **Interlocutory Orders**

Interlocutory orders are typically not immediately appealable because some further act must be done by the court to determine the rights of the parties. However, there are several exceptions within S.C. Code Ann § 14-3-330 (1991) that permit appeals from interlocutory orders, including orders “on the merits” and “orders affecting a substantial right”. An avoidance of trial is not considered a substantial right. *McLaughlin v. Strickland*, 279 S.C. 513, 309 S.E.2d 787 (Ct. App. 1983).

- a. Orders on the merits:** According to *Mid-State Distribs. v. Century Imps.*, 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993), the precise meaning of the words “involving the merits” . . . has never been distinctly determined. An order which "involves the merits," is now defined as an order which "must finally determine some substantial matter forming the whole or a part of some cause of action or defense..." *Jefferson v. Gene's Used Cars, Inc.*, 295 S.C. 317, 318, 368 S.E.2d 456, 456 (1988). If a substantial right could not be vindicated after the appeal of a case, it is considered immediately appealable.” *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 529 S.E.2d 11 (2000).
- b. Orders effecting a substantial right:** The *Mid-State Distribs.* case also states that an order affecting a substantial right is an order that “would discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense. The denial of a motion to dismiss for lack of jurisdiction does not impair a substantial right. Similarly, an avoidance of trial was not held as constituting a substantial right. *Shields v. Martin Marietta Corp.*, 303 S.C. 469, 402 S.E.2d 482 (1991).

### **Analysis**

Judge Price’s Order is not a final decision, does not fall within one of the classifications of S.C. Code Ann. §15-48-200 (1978) nor does it meet one of the interlocutory appeal exceptions. As stated in the timeline, the arbitration award they seek to confirm was from an entirely separate civil action. Defendants / Appellants could appeal a denial of the motion to confirm had it be denied in the employment case [No: 2018-CP-10-5077]. However, there was no need to since Judge Price confirmed the award on March 27, 2020. What they are seeking to appeal is the denial to confirm the award in THIS case [2019-CP-10-178]. They had no basis to seek the confirmation of the

award from a different case in this matter – much less the basis to appeal the denial of such a request. This request and the effort to appeal its denial are both improper.

Additionally, Judge Price’s Order is interlocutory. To determine an interlocutory order involves the merits of a case, it "must finally determine some substantial matter forming the whole or a part of some cause of action or defense..." *Jefferson v. Gene's Used Cars, Inc.*, 295 S.C. 317, 318, 368 S.E.2d 456 (1988).

An order affecting a substantial right is one that “made in an action [and] . . . in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action. . . ." S.C. Code Ann. § 14-3-330(2)(a) (1991). Here no substantial right was impacted. Judge Price simply and correctly refused to confirm an arbitration award from an entirely separate suit with different claims, facts, legal issues, attorneys, and arbitrators.

Under these circumstances, this decision was interlocutory. As such, this appeal should be dismissed, and the matter referred to arbitration as described in the Court’s Order.

Respectfully Submitted,

**McCULLOUGH KHAN, LLC**

s/Clayton B. McCullough  
Clayton B. McCullough, Esq. (SC Bar #13722)  
359 King Street, Suite 200  
Charleston, SC 29401  
(843) 937-0400  
(843) 937-0706 (fax)  
[Clay@mklawsc.com](mailto:Clay@mklawsc.com)

**ATTORNEY FOR RESPONDENT**

July 1, 2020