THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Beaufort County
Court of Common Pleas
Carmen T. Mullen, Circuit Court Judge

Case No. 2019-CP-07-00223
Appellate Case No. 2020-001659

Tracey Lee Lunenburg, Respondent,

v.

Vincent J. Aiello, Jr.,
Atlantic Heritage Builders, Inc.,
Yuko Construction, Inc., d/b/a Advanced Roofing, Inc.,
Bismark Lara, Premium Stucco, and
Shaw Manufacturing's Wrought Iron Works, Inc., Defendants.

Vincent J. Aiello, Jr., and
Atlantic Heritage Builders, Inc., Third-Party Plaintiffs,

Palatial Homes, Inc., Palatial Homes, LLC,
Palatial Homes Design, LLC, and
Palatial Building Group, LLC, Third-Party Defendants,

Of whom Vincent J. Aiello, Jr., and
Atlantic Heritage Builders, Inc., are the Appellants.

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF THE ISSUE ON APPEAL

I. Where Plaintiff[1] filed this residential construction defect lawsuit before first complying with the requirements of the Right to Cure Act[2] and, on Appellants'[3] motion, the circuit court rightly stayed the action as mandated by § 40-59-830,[4] did the court err in granting Plaintiff's subsequent motion to lift the stay when Plaintiff still had not complied with the requirements of the Act?

STATEMENT OF THE CASE

This is a residential construction defect lawsuit by Plaintiff, the homeowner, against, among others, Appellants, both of whom Plaintiff identifies as the general contractor for the construction of the subject residence. (Summons; Compl.) Without question, Plaintiff is a "claimant"[5] and this lawsuit is an "action"[6] under, and thus subject to, the Right to Cure Act.

The Right to Cure Act requires that, no later than 90 days before filing an action against a contractor arising out of the construction of a dwelling, the claimant must serve a written notice of claim on the contractor. S.C. Code Ann. §

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[1] "Plaintiff" is Plaintiff-Respondent, Tracey Lee Lunenburg.

[2] The "Right to Cure Act," or simply the "Act," is the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act, S.C. Code Ann. §§ 40-59-810 to -860.

[3] "Appellants" are Defendants-Appellants, Vincent J. Aiello, Jr. ("Aiello"), and Atlantic Heritage Builders, Inc., collectively.

[4] Section 40-59-830 provides, "If the claimant files an action in court before first complying with the requirements of [the Act], on motion of a party to the action, the court *shall* stay the action until the claimant has complied with the requirements of [the Act]" (emphasis added).

[5] *See* S.C. Code Ann. § 40-59-820(2) (defining "Claimant").

[6] *See* S.C. Code Ann. § 40-59-820(1) (defining "Action").

40-59-840(A). The contractor has 30 days from service of the notice "to inspect, offer to remedy, offer to settle with the claimant, or deny the claim regarding the defects." S.C. Code Ann. § 40-59-850(A). At the contractor's election, the claimant must give the contractor reasonable access to the dwelling and allow the contractor to inspect the alleged defect at a mutually agreeable time. *See Id.* If the contractor timely responds to the notice of claim with an offer to remedy the alleged defect or settle,[7] the claimant has 10 days to serve a response. § 40-59-850(B).

Compliance with the Act's requirements is a prerequisite for the claimant to "proceed with a civil action or other remedy provided by contract or by law." § 40-59-850(C). Again, "[i]f the claimant files an action in court before first complying with the requirements of [the Act], on motion of a party to the action, the court *shall* stay the action until the claimant has complied with the requirements of [the Act]." § 40-59-830 (emphasis added).

Construction on the subject residence began in 2008, and the certificate of occupancy was issued November 18, 2009. (Complaint ¶ 7.) Again, Plaintiff alleges Appellants both acted as the general contractor during original construction. (*See* Complaint ¶¶ 11, 15.) Plaintiff purchased the subject residence from Aiello in 2012, and at Plaintiff's behest, Appellants made certain repairs and

[7] If the contractor does not respond within 30 days it is deemed a denial of the claim. § 40-59-850(A).

modifications to the subject residence between 2014 and 2017. In June of 2018, however, Plaintiff began making significant repairs to the subject residence, specifically, to the roof and flashing. Appellants did not perform that work; nor were they informed of the work or given the opportunity to inspect the purported defective areas.

Plaintiff filed this lawsuit on February 4, 2019, in the Beaufort County Court of Common Pleas, alleging negligence against Appellants in their capacities as general contractors of the subject residence,[8] and Appellants timely answered. (Appellants' Answers.)

On May 8, 2019, Appellants were permitted to inspect the subject residence pursuant to Rule 34(a)(2), SCRCP. Appellants' liability expert, Robert Kenney, was present at the inspection. It was clear that Plaintiff had been effecting repairs and modifications to the subject residence for months. Almost all of Appellants' work which Plaintiff alleges was negligent had been removed and destroyed. (*See* Affidavit of Robert N. Kenney.) Appellants were not given notice of these alleged defects and subsequent repairs or the opportunity to inspect or offer to cure them prior to Plaintiff effecting the repairs and destroying Appellants' work. (*See Id.*; *see also* Daigle letter to Finn dated 6/28/19; Finn email to Daigle and Igdal dated 9/16/19; Daigle letter to Finn dated 10/10/19.)

[8] (Summons and Complaint.)

Upon discovering the state of the subject residence, Appellants' counsel sent Plaintiff's counsel a letter on June 28, 2019, requesting that Plaintiff not alter or destroy any alleged defective conditions at the subject residence and asking for Plaintiff to comply with the Right to Cure Act. (*See* Daigle letter to Finn dated 6/28/19.) Plaintiff did not cease repairs and continued to actively destroy the alleged construction defects. On September 16, 2019, more than four months after the initial inspection and almost three months Appellants' counsel's letter of June 28, 2019, Plaintiff's counsel informed defense counsel that a small area of the turret section of the subject residence would be repaired and that counsel were invited to inspect the turret prior to the work being scheduled. (*See* Finn email to Daigle and Igdal dated 9/16/19.) There was no opportunity to cure the alleged defects to the turret. Believing it to be clear that Plaintiff had no intention of complying with the Right to Cure Act, Appellants' counsel sent Plaintiff's counsel a letter on October 10, 2019, complaining that Plaintiff had destroyed all the evidence against his clients, thereby denying them their rights under the Right to Cure Act, as well as the ability to effectively defend the case against them. (*See* Daigle letter to Finn dated 10/10/19.)

On January 9, 2020, Appellants moved to stay the action pursuant to § 40-59-830. (Appellants' Mot. to Stay.) By order filed May 20, 2020, the circuit court, the Honorable D. L. Jefferson presiding, found that Plaintiff had filed suit without

first complying with the requirements of the Right to Cure Act and, pursuant to § 40-59-830, stayed the action pending Plaintiff's compliance with the requirements of the Act. (Order Granting Appellants' Motion to Stay.)

Section 40-59-840(A) of the Right to Cure Act requires the claimant to "serve a written notice of claim on the contractor." Section 40-59-820(5) defines "serve" or "service" to mean "personal service or delivery by certified mail to the last known address of the addressee."

According to Plaintiff, in an effort to comply with the Right to Cure Act, Plaintiff's counsel sent "Right to Cure" letters dated June 18, 2020, to Appellants via certified mail on June 19, 2020. (*See* Plaintiff's Memo in Supp. of Mot. to Lift Stay p. 2; *id.* at Exhibit 2.) Plaintiff provided no proof of service for the same showing "personal service or delivery by certified mail to the last known address of the addressee." (*See* Plaintiff's Memo in Supp. of Mot. to Lift Stay at Exhibit 2.) Indeed, Plaintiff admits the letters were never actually signed for by Appellants. (Pl.'s Mot. to Lift Stay p. 3 ("Atlantic Heritage Builders, Inc. and Vincent J. Aiello, Jr., were sent a letter to their last known address, which is also the address listed with the South Carolina Secretary of State, and never signed for the same.").) Appellants' counsel was not made aware of the letters until receiving copies of them via email form Plaintiff's counsel on June 25, 2020. (*See* Plaintiff's

Memo in Supp. of Mot. to Lift Stay at Exhibit 3; Appellants' Mem. in Opp'n to Mot. to Lift Stay at Exhibit F.)

Plaintiff's counsel's June 18, 2020, letter generally lists certain alleged construction defects. (*See* Plaintiff's Memo in Supp. of Mot. to Lift Stay at Exhibit 2.) More importantly, the letter admits that "some repairs have already been made" and that "[t]he completion of these repairs might affect your ability to examine the evidence of original construction." (*Id.*)

Despite Appellants having never actually received the letters, and their counsel only receiving courtesy copies via email, Appellants erred on the side of caution and opted to request clarifications pursuant to § 40-59-840 of the Act. The clarification letter was sent to Plaintiff's counsel on July 14, 2020. (Daigle letter to Finn dated 7/14/20.) That letter requested both clarification of the alleged construction defects and to schedule a time to inspect the alleged defects. (*Id.*) Plaintiff's counsel responded to the clarification letter on September 15, 2020, simply stating that he had not received the clarification letter within 15 days of issuing his Right to Cure letter[9] and that he was moving to lift the stay. (*See* Finn

[9] In pertinent part, § 40-59-840 provides, "The contractor . . . shall advise the claimant within fifteen days of *receipt* of the claim if the construction defect is not sufficiently stated and shall request clarification" (emphasis added). Again, Plaintiff provided no proof of service for the Right to Cure Letters showing their receipt by Appellants via "personal service or delivery by certified mail to the last known address of the addressee," *see* Plaintiff's Memo in Supp. of Mot. to Lift

letter to Daigle dated 9/15/20.) The letter specifically declines to clarify the alleged defects and does not allow or invite any inspection of the alleged defects as requested by Appellants' counsel pursuant to the Act some two months prior. (*Id.*)

On September 28, 2020, Plaintiff moved to lift the stay. (Pl.'s Mot. to Lift Stay.) Over Appellants' objection,[10] the circuit court, the Honorable Carmen T. Mullen presiding, granted Plaintiff's motion to lift the stay by order filed November 20, 2020. (Order Granting Plaintiff's Motion to Lift Stay.)

This appeal timely follows. (Notice of Appeal with Proof of Service.)

STANDARD OF REVIEW

The issue of interpretation of a statute is a question of law for the court. *Univ. of S. California v. Moran*, 365 S.C. 270, 275, 617 S.E.2d 135, 137 (Ct. App. 2005); *see also Bain v. Self Mem'l Hosp.*, 281 S.C. 138, 152, 314 S.E.2d 603, 611 (Ct. App. 1984) (even where a ruling is on a matter within trial court's discretion, if the ruling is based on a misunderstanding of the law, rather than upon the exercise of discretion, the question presented on appeal is one of law). Issues of law are reviewed without any particular deference to the lower court. *See, e.g., Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 782 S.E.2d 590 (2016).

Stay at Exhibit 2, and indeed admits the letters were never actually signed for by Appellants. (Pl.'s Mot. to Lift Stay p. 3.)

[10] (*See* Appellants' Memo in Opposition to Motion to Lift Stay with Exhibits.)

ARGUMENT

I. The circuit court erred in granting Plaintiff's motion to lift the stay mandated by § 40-59-830 of the Right to Cure Act when Plaintiff had not complied with the requirements of the Act.

Our Supreme Court has recognized that the Right to Cure Act affords substantial rights to the builder. In *Grazia v. South Carolina State Plastering, LLC*, 390 S.C. 562, 571, 703 S.E.2d 197, 200–01 (2010), the Court held that § 40-59-840 "imposes an absolute condition precedent to the filing of lawsuits that qualify under the Right to Cure Act," that it "encompasses civil lawsuits filed against a contractor or subcontractor," and that it "*requires* the claimant to serve written notice no later than ninety days before filing the action." (emphasis in original). In fact, the express public intent of the Right to Cure Act is: (1) addressing the need for an alternative dispute resolution method to promote settlement of construction disputes without litigation, while adequately protecting the rights of homeowners; and (2) requiring a would-be plaintiff in certain construction defect matters to file a notice of claim with the would-be defendant and provide an opportunity to resolve the claim without litigation. *Grazia*, at 572 (citing 2003 South Carolina Laws Act 82 (S.B. 433)). "The stated public policy, therefore, is not abridged when a court, on motion, is required to stay a proceeding in order to *require compliance* with the Right to Cure Act's notice provisions." *Id.* (emphasis in original).

These rights under the Act are not new substantive rights, but instead represent an effort by the General Assembly to provide contractors a new procedural timeline for asserting existing litigation rights. In other words, the right of entry onto and inspection of the claimant's dwelling is now permitted to occur prior to the filing of the action under the notice provisions of §§ 40-59-840 and -850, as opposed to during an action's normal discovery period. *Id.* at 573. More specifically, the rights afforded to the builder include: the right to request clarification of the alleged defects (§ 40-59-840); the right to inspect the alleged defects (§ 40-59-850); the right to offer to remedy the alleged defect (§ 40-59-850); the right to offer to settle the claims related to the alleged defects (§ 40-59-850), and; the right to deny the claim (§ 40-59-850).

As Judge Jefferson ruled, Plaintiff categorically failed to comply with the Right to Cure Act. Plaintiff had not served Appellants with written notice of the alleged construction defects as required by §§ 40-59-820(5) and -840. Plaintiff's failure to comply denied Appellants their rights to request clarification of the alleged defects, to inspect the alleged defects, to offer to remedy the alleged defect, to offer to settle the claims related to the alleged defects, and/or to deny the claim.

A stay pursuant to the Right to Cure Act is not discretionary, it is mandatory as § 40-59-830 directs that "on motion of a party to the action, the court *shall* stay the action until the claimant has complied with the requirements of this article"

(emphasis added). Plaintiff never complied with the Right to Cure Act and the stay Judge Jefferson entered should have been left in place pursuant to § 40-59-830. Specifically, Plaintiff has not:

(a) shown proof that the Right to Cure letters were received by Appellants via the required service;

(b) clarified the vague and general allegations of construction defects;

(c) allowed for inspection of the alleged defects; or

(d) stated which alleged defects have been repaired, destroyed, and/or altered and which alleged defects are no longer available for inspection.

Without clarification of the alleged defects and without the ability to inspect the alleged defects, Appellants continued to have their rights under the Right to Cure Act denied, and Plaintiff continued to fail to comply with the Act, mandating the continued stay of the action pursuant to § 40-59-830.

And, of course, it is no longer possible for Plaintiff to comply with the requirements of the Act; nor, in turn, is it possible for Appellants to be afforded their rights thereunder. Plaintiff has knowingly and intentionally destroyed and repaired virtually all of the original construction for which she is suing Appellants. In fact, Plaintiff's counsel has conceded that "some repairs have already been made," and "[t]he completion of these repairs might affect your ability to examine

the evidence of original construction." (*See* Plaintiff's Memo in Supp. of Mot. to Lift Stay at Exhibit 3; Appellants' Mem. in Opp'n to Mot. to Lift Stay at Exhibit F.)

While, as referenced above, the Right to Cure Act expressly calls for a "stay" when a claimant files an action before compliance, it also expressly calls for the stay to remain in effect "*until* the claimant *has complied* . . . ." § 40-59-830 (emphasis added). Moreover, the language of the Act makes plain the legislature's intent that no "civil action or other remedy provided by contract or by law" proceed until there has been compliance. *See* § 40-59-850(C) ("*If* the parties cannot settle the dispute pursuant to [the Right to Cure Act], the claimant *may* proceed with a civil action or other remedy provided by contract or by law.") (emphasis added).[11] Here, Plaintiff has made compliance with the Right to Cure

[11] "The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature." *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007); *see also id.* ("When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning."); id. at 499, 640 S.E.2d at 459 (In interpreting a statute, "[w]ords must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation."); *S.C. State Ports Auth. v. Jasper Cnty.*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006) ("[T]he statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect."); *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011) (citation omitted) ("If the statute is ambiguous . . . courts must construe the terms of the statute."); *id.* (statutory language must be construed in light of the intended purpose of the statute); *id.* (a statute should not be construed in a way which leads to an absurd result or renders it meaningless).

Act impossible. Plaintiff substantially repaired and remodeled the home and, in the process, destroyed the alleged construction defects without giving Appellants the *required* notice of those alleged defects and an opportunity to inspect and/or offer to cure them. Because Plaintiff has plainly not complied with the Right to Cure Act, the act plainly required the stay to remain in place, and the circuit court erred in granting Plaintiff's motion to lift it.

CONCLUSION

For the foregoing reasons, Appellants ask this Honorable Court to reverse the circuit court and, as mandated by § 40-59-830, stay this action unless and until Plaintiff complies with the Right to Cure Act (or, alternatively, remand the case to the circuit court with instructions that it do so).

<SIGNED ON THE FOLLOWING PAGE>

Respectfully Submitted,

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