

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

Appellate Case No. 2019-002052
[Lower Court Case No. 2016-CP-10-01143]

Palmetto Construction Group, LLC Respondent

v.

Restoration Specialists, LLC, Petitioners
Reuben Mark Ward, and
Lynnette Pennington Ward

PETITIONERS' PETITION FOR REHEARING

NOW COME the Petitioners, Restoration Specialists, LLC, Reuben Mark Ward, and Lynette Pennington Ward, by and through their undersigned counsel, who respectfully petition this Court pursuant to Rule 221 of the South Carolina Appellate Court Rules to reconsider its opinion issued on March 10, 2021 due to the Court's failure to consider the legal authorities and points discussed below as they relate to this appeal.

In support of this petition, the Petitioners, Restoration Specialists, LLC, Reuben Mark Ward and Lynnette Pennington Ward submit the following:

INTRODUCTION

The Petitioners have appealed the Orders of the Honorable Mikell R. Scarborough (the “Master”), dated July 14, 2016 and October 28, 2016.

The Master’s July 14, 2016 Order orders as follows:

- (1) Defendants’ motion to be relieved from default is DENIED;
- (2) A damages hearing is set for October 4, 2016 at 2:00 pm;
- (3) Defendants’ motion to stay and compel arbitration is denied as Defendant is in Default.

The Master’s October 28, 2016 Order orders as follows:

- (1) Defendants’ Motion to [Reconsider and to Alter or] Amend [Pursuant to SCRCP 59(e)] is respectfully DENIED, insomuch as Defendants have not shown good cause to lift the default;
- (2) The affirmative defense of arbitration has been waived and Defendant’s Motion to Stay and Compel filed July 11, 2016 was not properly made.

ARGUMENTS

I. IT APPEARS THE COURT DID NOT CONSIDER THE IMMEDIATE APPEALABILITY OF THE MASTER’S ORDERS UNDER THE SUBSTANTIAL RIGHT DOCTRINE.

The Petitioners raised the substantial-right doctrine as a specific ground for the immediate appealability of the Master’s Orders. The Court’s opinion issued March 10,

2021 does not discuss nor analyze impact of the substantial-right doctrine upon the current appeal. Accordingly, it appears the Court did not consider the immediate appealability of the Master's Orders under the substantial-right doctrine.

Under South Carolina law, an order affecting a substantial right of a party is immediately appealable. S.C. Code Ann. §14-3-330(2). Pursuant to §14-3-330(2), when a trial court's order affects a party's mode of trial to which he is entitled, such order affects a substantial right and is immediately appealable. *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 533 S.E.2d 331 (2000); *Lester v. Dawson*, 327 S.C. 263, 491 S.E.2d 240 (1997); *Widdicombe v. Tucker-Cales*, 366 S.C. 75, 620 S.E.2d 333 (Ct. App. 2005). In fact, South Carolina law not only permits, but requires, immediate appeal of such orders. *Id.* As a consequence, the failure to immediately appeal an order affecting the mode of trial effects a waiver of the right to appeal that issue. *Id.* Stated differently, the failure to immediately appeal such an order renders untimely and forecloses any appeal of that issue from a final judgment. *Id.*

The right to arbitration is a substantial right. "Because [t]he right to arbitrate a claim is a substantial right which will be lost if review is delayed ...an order denying arbitration is...immediately appealable." *Pineville Forest Homeowners Ass'n v. Portrait Homes Constr. Co.*, 175 N.C. App. 380, 385, 623 S.E.2d 620, 624 (2006) (quoting *Howard v. Oakwood Homes Corp.*, 134 N.C. App. 116, 118, 516 S.E.2d 879, 881 (1999)); *Sims v. Ritter Construction, Inc.*, 62 N.C. App. 52, 302 S.E.2d 293 (1983) (holding that immediate appeal from an order withdrawing a matter from arbitration and placing it on the trial docket falls within the "substantial right" exception since the defendants' right to have the matters in controversy settled by arbitration would be lost by delaying the appeal until after

final judgment by the trial court); *see also* 9 U.S.C. §16(a)(1); S.C. Code Ann. §15-48-200(a)(1); *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 521 S.E.2d 749 (Ct. App. 1999).

Furthermore, a party's decision to forgo an immediate appeal from an order denying a motion to compel arbitration and instead engage in litigation---including, as would occur in the present case, a full damages hearing before the Master---only to later seek to enforce the right to arbitration on appeal from final judgment, would further expose that party to a claim of waiver of arbitration by its conduct prior to appeal. *See Liberty Builders*, 336 S.C. 658, 521 S.E.2d 749 (Ct. App. 1999); *Patten Grading & Paving, Inc. v. Skanska USA Building, Inc.*, 380 F.3d 200 (4th Cir. 2004).

Under the Federal Arbitration Act, an order that favors litigation over arbitration—whether it refuses to stay the litigation in deference to arbitration or refuses to compel arbitration—is immediately appealable, even if interlocutory in nature. *See* 9 U.S.C. §16(a)(1); *Stedor Enter., Ltd. v. Armtex, Inc.*, 947 F.2d 727 (4th Cir. 1991).

Under the South Carolina Uniform Arbitration Act, an order denying an application to compel arbitration is immediately appealable. S.C. Code Ann. §15-48-200(a)(1); *Cape Romain Contractors, Inc. v. Wando E, LLC*, 405 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999); *Towles v. United Healthcare Corp.*, 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999). Likewise, South Carolina case law establishes that an order finding that a party waived its rights to compel arbitration is immediately appealable. *Liberty Builders*, 336 S.C. 658, 521 S.E.2d 749 (Ct. App. 1999).

The Petitioners have appealed the Master's Orders dated July 14, 2016 and October 28, 2016. The Master's July 14, 2016 Order ruled, in part, that "Defendants' motion to stay and to compel arbitration is denied as Defendant is in Default." The Master's October

28, 2016 Order ruled that “the affirmative defense of arbitration has been waived and Defendant’s Motion to Stay and Compel filed July 11, 2016 was not properly made.” (A. pp. 0174-0176).

Both orders affect the mode of trial in this matter, preclude Petitioners’ application for arbitration under both S.C. Code Ann. §15-48-10, et. seq. (1976) and 9 U.S.C. §1, et seq. and effectively deny Petitioners’ arbitration rights in this action. As a result, and in light of the immediate appealability requirements imposed by South Carolina law, the Petitioners were faced with two options with respect to their rights to arbitration: (1) appeal the Master’s Orders and preserve their right to challenge the Master’s rulings regarding arbitration or (2): forgo an immediate appeal and untimely file an appeal of the Master’s Orders after final judgment and thereby waive their right to appeal the arbitration issue in the South Carolina appellate courts.

The Petitioners chose the first option, being the mandatory and sole remaining option left available to them to assert and preserve their rights to arbitration in this action. The Petitioners respectfully submit that their appeal constitutes a proper and mandatory immediate appeal of the Master’s interlocutory orders affecting the substantial arbitration rights of the Petitioners. Accordingly, the Petitioners respectfully request that the Court reconsider its Opinion and address the immediate appealability of the Master’s Orders under the longstanding substantial-right doctrine in South Carolina.

II. IT APPEARS THE COURT DID NOT CONSIDER THE IMMEDIATE APPEALABILITY OF THE MASTERS ORDERS UNDER ITS PENDENT APPELLATE JURISDICTION.

The Petitioners raised the pendent appellate jurisdiction of the appellate courts as a specific ground for the immediate appealability of the Master’s Orders. The Court’s

opinion issued March 10, 2021 does not discuss nor analyze impact of the pendent appellate jurisdiction upon the current appeal. Accordingly, it appears the Court did not consider the immediate appealability of the Master's Orders under the Court's pendent appellate jurisdiction.

Ordinarily, an order denying a motion to lift entry of default is interlocutory and not immediately appealable. *Thynes v. Lloyd*, 294 S.C. 152, 363 S.E.2d 122 (Ct. App. 1987). An order that is not immediately appealable, however, can be considered under the court's pendent appellate jurisdiction and should not prevent the review of another appealable issue before the court. *Cox v. Woodmen of World Ins. Co.*, 347 S.C. 460, 556 S.E.2d 397 (Ct. App. 2001).

Pendent appellate jurisdiction is the jurisdictional doctrine that allows appellate courts to "resolve those questions that are 'inextricably intertwined' with the issue over which their appellate jurisdiction directly extends." Stephen I. Vladeck *Pendent Appellate Bootstrapping*, 16 Green Bag 2D 199, 205 (2013). The doctrine of pendent appellate jurisdiction allows an appellate court to exercise plenary review when an interlocutory order contains two or more issues, one of which is immediately appealable and others that are not. Both the Supreme Court of South Carolina and the South Carolina Court of Appeals recognize and have expressly exercised pendent appellate jurisdiction in other cases before them to decide issues which would ordinarily not be immediately appealable.

Specifically, longstanding South Carolina appellate jurisprudence holds that where there is a single order that is appealable, in part, the entire order should be considered upon the appeal. *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985); *Rice Hope Plantation v. South Carolina Pub. Serv. Auth.*, 216 S.C. 500, 559 S.E.2d 132 (1950) (overruled on

other grounds); *Cox v. Woodmen of World Ins. Co.*, 347 S.C. 460, 556 S.E.2d 397 (Ct. App. 2001) (citing *Pruitt v. Bowers*, 330 S.C. 483, 499 S.E.2d 250 (Ct. App. 1998); see *Briggs v. Richardson*, 273 S.C. 376, 256 S.E.2d 544 (1979)).

In the present case, the Petitioners respectfully submit that the Master's Orders *expressly* denying Petitioners' motion to stay and compel arbitration and finding a waiver of their right to arbitration are immediately appealable. See Petitioners' Petition for Rehearing, Section I.

As a result of these immediately appealable issues, the Court could have exercised its pendent appellate jurisdiction in this instance to review the Master's denial of Petitioners' Motion to Lift Entry of Default. This Court stated in its opinion that "[i]n the context of default, the concept of waiver is bound up in the Rule 55(c) determination of good cause and Rule 60(b) determinations such as excusable neglect." South Carolina Supreme Court Opinion No. 28010 (S.C. filed March 10, 2021). The Court's statement indicates its view that the arbitration waiver issue is "inextricably intertwined" with the default issue so as to permit the exercise of pendent appellate over the Master's entire Orders, including his ruling on the entry of default. Furthermore, the Master's Orders, which contain rulings upon the immediately appealable arbitration issues rendered alongside rulings on the default issue render the entire Orders reviewable under the Court's pendent appellate jurisdiction. *McCall*, 285 S.C. 243, 329 S.E.2d 741; *Rice Hope Plantation*, 216 S.C. 500, 5559 S.E.2d 132; *Cox*, 347 S.C. 460, 556 S.E.2d 397 (and cases cited therein).

Finally, exercising pendent appellate jurisdiction would best serve the interests of judicial economy and eliminate additional appeals arising from a piecemeal appellate

review of the Master's Orders. *See Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 674 S.E.2d 154 (2009); *Southern Bell Tel. and Tel. o. v. Hamm*, 306 S.C. 70, 409 S.E.2d 775 (1991); *Widdicombe v. Tucker-Cales*, 366 S.C. 75, 620 S.E.2d 333 (Ct. App. 2005); *Pruitt v. Bowers*, 330 S.C. 483, 499 S.E.2d 250 (Ct. App. 1998).

Accordingly, the Petitioners respectfully request that the Court reconsider its Opinion and exercise pendent appellant jurisdiction over the Master's entire Orders on appeal in this case.

CONCLUSION

For the foregoing reasons, the Petitioners Restoration Specialists, LLC, Reuben Mark Ward and Lynnette Pennington Ward hereby respectfully request that this Court grant the petition for rehearing in this matter.

Respectfully submitted this 25th day of March, 2021.

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