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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM CHARLESTON COUNTY
Maite Murphy, Circuit Court Judge

Appellate Case No.: 2021-000501
Case No.: 2017-CP-10-5493

Shem Creek Development Group, LLC,Respondent,

v.

The Town of Mount Pleasant, South Carolina.....Appellant.

INITIAL BRIEF OF RESPONDENT

E. Brandon Gaskins (S.C. Bar No. 73274)
Moore & Van Allen PLLC
78 Wentworth Street
Charleston, SC 29401
Telephone: (843) 579-7000
Facsimile: (843) 579-7099
brandongaskins@mvalaw.com

*Attorney for Respondent
Shem Creek Development Group, LLC*

TABLE OF CONTENTS

Table of Authorities.....ii

Statement of Issue on Appeal1

Statement of the Case2

Argument5

The Trial Court Retained Jurisdiction to Award SCDG Attorneys’ Fees
and Costs After The Town Filed Its Notice of Appeal.....5

I. The trial court’s order issuing a money judgment is an exception
to the automatic stay provisions under Rule 241(a).....5

II. The determination of attorneys’ fees and costs is not a matter
affected by the Town’s appeal.....6

III. The Court has jurisdiction to award fees and costs under
Rule 54(d), SCRCP, after a notice of appeal is served.....8

IV. The Town’s attempt to avoid post-judgment interest does
not promote the interests of fairness and justness.....11

Conclusion12

TABLE OF AUTHORITIES

CASES

Black v. Roche Biomedical Lab., Div. of Hoffman-Laroche,
315 S.C. 223, 433 S.E.2d 21 (1993).....9

Garcia v. Burlington N. R.R. Co., 818 F.2d 713 (10th Cir. 1989)10

Gardner v. Newsome Chevrolet-Buick, 304 S.C. 328, 404 S.E.2d 200 (1991).....9

Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997).....6-8

Masalosalo by Masalosalo v. Stonewall Ins. Co., 718 F.2d 955 (9th Cir. 1983).....10

Tancredi v. Metro. Life Ins. Co., 378 F.3d 220 (2d Cir. 2004).....10

Venen v. Sweet, 758 F.2d 117, 120 fn.2 (3d Cir. 1985).....10

Yenidunya Invs., Ltd. v. Magnum Seeds, Inc., No. Civ. 2:11-1787 WBS,
2012 U.S. Dist. LEXIS 20421, *12-13 (E.D. Cal. Feb. 17, 2012).....10-11

STATUTES

S.C. Code Ann. § 56-15-110 to -130.....7

OTHER AUTHORITIES

Rule 54(d), SCRPC.....8-9

Rule 54(d), FRCP.....9, 10

Rule 204, SCACR (former).....7

Rule 205, SCACR.....7

Rule 241, SCACR..... 5-6, 7

STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court retain jurisdiction to award Respondent attorneys' fees and costs after Appellant filed a notice of appeal challenging the trial court's judgment in favor of Respondent?

STATEMENT OF THE CASE

On October 23, 2017, Respondent Shem Creek Development Group, LLC (“SCDG”) commenced this action in the Court of Common Pleas for Charleston County against Appellant Town of Mount Pleasant (the “Town”) for breach of a parking license agreement (“PLA”). Under the PLA, SCDG agreed to construct a parking garage and office complex and rent 132 parking spaces to the Town for public use for a period of 30 years in exchange for the Town’s payment of \$185,000 in annual rent for a 15-year rental term. (Pl.’s Compl.) SCDG alleged that the Town anticipatorily repudiated the PLA in response to public opposition to the project and interfered with SCDG’s performance under the PLA by (1) enacting zoning amendments that reduced the buildable area on the project site; (2) rejecting reasonable interpretations of the Town’s zoning ordinances that would have allowed SCDG to deliver all 132 public parking spaces; (3) refusing to pay rent into escrow upon commencement of construction; and (4) refusing to provide an estoppel certificate. (*Id.*)

As part of its action against the Town, SCDG sought attorneys’ fees and litigation costs under Section 6.01 of the PLA. (*Id.* at ¶44.) This provision provides that in the event of a dispute, “[b]oth parties . . . agree that the prevailing party in any dispute shall be entitled to an award of costs and attorney’s fees, including the cost of trial and any appeals.” (Pl.’s Ex. 7.)

The action was assigned to the Business Court on March 7, 2018. (Order Granting Case Assignment to Business Ct.) The Honorable Judge Maite Murphy was assigned as the presiding judge. (*Id.*)

The case was tried non-jury by Judge Murphy from February 3-6, 2020. On July 13, 2020, the trial court issued a final order entering judgment in favor of SCDG in the amount of \$2,604,316.00. (Final Order.) In the final order, the trial court concluded that SCDG was the prevailing party under Section 6.01 of the PLA. (*Id.* at ¶ 104.) As a result, the final order instructed SCDG to submit an affidavit of all costs and attorneys' fees it was seeking within fifteen days of the final order, and it provided the Town with an opportunity to object to any such costs and fees. (*Id.* at p. 42.)

On July 20, 2020, the Town filed Motions for New Trial and To Reconsider, Alter or Amend Order under Rule 52(b) and Rule 59(a) and (e), SCRCF. (Def.'s Mot. New Trial.) To account for the additional legal work required by the Town's post-trial motions, the trial court issued a consent post-trial scheduling order that extended the deadlines for SCDG to submit its affidavit of costs and attorneys' fees and for the Town to submit its objections. (Consent Post-Trial Scheduling Order.)

SCDG submitted its affidavit in support of costs and attorneys' fees on August 11, 2020, and on August 24, 2020, the Town submitted its opposition to the attorneys' fees award and objections to SCDG's attorneys' fee affidavit. (Pl.'s Aff. Atty's Fees & Costs; Def.'s Opp. Attorney Fee Award & Objections Pl.'s Attorney Fee Aff.) In response to the Town's objections and upon the trial court's request, SCDG

supplemented its request for fees and costs with additional affidavits on September 17, 2021. (Pl.'s Supp. Aff. Attorneys' Fees & Costs; Notice Filing Aff. Attorneys' Fees & Costs w/ G. Hamlin O'Kelley, III's Aff. Attorneys' Fees & Costs.)

The trial court denied the Town's post-trial motions for new trial and reconsideration on September 17, 2020. (Order Denying Def.'s Mot. New Trial.) Prior to the trial court issuing an order determining the amount of costs and attorneys' fees awarded to SCDG, the Town filed its notice of appeal on October 16, 2020 challenging the trial court's judgment on the merits. (Not. Appeal, Oct. 16, 2020.)

The trial court subsequently awarded attorneys' fees and costs to SCDG under the PLA by order issued on January 11, 2021. (Order Awarding Atty. Fees.) On January 21, 2021, the Town filed a motion to vacate or otherwise alter or amend the trial court's order awarding attorneys' fees and costs, and on January 29, 2021, SCDG responded with its opposition to the motion to vacate the award of fees and costs. (Def.'s Mot. Vacate, Alter or Amend Order Awarding Pl. Attorney's Fees and Costs; Pl.'s Resp. Opp. Def.'s Mot. Vacate, Alter or Amend.) On April 12, 2021, the trial court issued a Form 4 order deferring ruling on the Town's motion to vacate "until the appeal of this case is complete." (Form 4 Order, Apr. 12, 2021.) On May 12, 2021, the Town filed its notice of appeal on the trial court's deferment of the Town's motion to vacate the order awarding attorneys' fees and cost. (Not. Appeal, May 12, 2021.)

ARGUMENT

THE TRIAL COURT RETAINED JURISDICTION TO AWARD SCDG ATTORNEYS' FEES AND COSTS AFTER THE TOWN FILED ITS NOTICE OF APPEAL.

To avoid paying post-judgment interest on the award of attorneys' fees and costs, the Town mistakenly argues that the trial court lacked jurisdiction under Rule 241(a), SCACR, to award SCDG fees and costs after the Town filed its first notice of appeal. Although the Town correctly states that Rule 241(a) creates a "general rule" that service of a notice of appeal divests the trial court of jurisdiction over matters affected by an appeal, the determination of attorneys' fees and costs in connection with a money judgment is not a matter affected or stayed by an appeal according to the South Carolina Appellate Court Rules, the South Carolina Supreme Court, the South Carolina Rules of Civil Procedure, and other persuasive authority. As a result, the trial court was not divested of jurisdiction to determine SCDG's request for attorneys' fees and costs during the pendency of the appeal.

I. The trial court's order issuing a money judgment is an exception to the automatic stay provisions under Rule 241(a).

The automatic stay provision under Rule 241(a), SCACR, is a "general rule" subject to several exceptions identified in Rule 241(b). In cases involving a recognized exception to the general automatic stay rule, an appellant must move for an order imposing a supersedeas of matters decided in the order, judgment, decree or decision on appeal after service of the notice of appeal to suspend or stay the matters that are the subject of appeal. Rule 241(c)(1), SCACR.

In this case, the Town’s notice of appeal did not operate to stay the matter under Rule 241(a) because the trial court’s decision on appeal is a money judgment, which is subject to the automatic stay exception recognized in Rule 241(b)(1). Rule 241(b)(1) expressly provides that “money judgments” are an exception to the general automatic stay rule. And the trial court’s order subject to the Town’s appeal clearly constitutes a “money judgment” because it specifically orders that “judgment be entered in favor of Plaintiff Shem Creek Development Group, LLC on its cause of action for breach of contract in the amount of \$2,604,316.” (Order p. 42.)

Because the order subject to the Town’s first appeal is exempted from the general automatic stay rule, the Town was required to seek a supersedeas to effectuate a stay and thereby deprive the trial court of continuing jurisdiction over the determination of the attorneys’ fees and costs during the appeal. It did not do so. As a result, the Town’s argument that the trial court lacked jurisdiction to award attorneys’ fees and costs fails, and this appeal should be denied.

II. The determination of attorneys’ fees and costs is not a matter affected by the Town’s appeal.

Regardless of whether the general automatic stay rule applies, the determination of an award of attorneys’ fees and costs to a prevailing party in litigation is not a matter affected by the Town’s appeal under controlling authority decided by the South Carolina Supreme Court.

In *Jackson v. Speed*, 326 S.C. 289, 486 S.E.2d 750 (1997), the Supreme Court directly rejected the argument that the Town makes here. In that case, the jury entered its verdict against the appellants for a violation of the Regulation of

Manufacturers, Distributors, and Dealers Act (the “Dealers Act”)¹ on May 12, 1994. *Id.* at 299, 486 S.E.2d at 755. After the verdict, the trial court gave the respondents five days to gather documentation concerning the amount of attorneys’ fees to be granted under the Dealers Act, and the respondents filed their motion for attorneys’ fees on May 17, 1994. *Id.* The appellants then filed their notice of appeal in June of 1994. *Id.* While the appeal was pending, the trial court held a hearing on the respondents’ motion for attorneys’ fees several months later in February of 1995 and awarded the respondents’ attorneys’ fees. *Id.* at 300, 486 S.E.2d at 755.

On appeal, the appellants in *Jackson* argued that the trial court lacked jurisdiction to award the respondents attorneys’ fees because appellants timely appealed the jury verdict before the court awarded fees. *Id.* at 311, 486 S.E.2d at 761.² The appellants’ appeal challenged the merits of the jury verdict on liability under the Dealers Act. Thus, if appellants had prevailed on their appeal challenging their liability under the Dealers Act, the appellants would not have been liable for the respondents’ attorneys’ fees under S.C. Code Ann. § 56-15-110. Nevertheless, the Supreme Court ruled that the award of attorneys’ fees and costs was not affected by

¹ S.C. Code Ann. §§ 56-15-10 to -130.

² In *Jackson*, the appellant relied on former Rule 204, SCACR, to argue that the trial court lacked jurisdiction. Since *Jackson*, former Rule 204 has been renumbered as Rule 205. Rule 205 provides that “[u]pon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal . . . Nothing in these Rules shall prohibit the lower court . . . from proceeding with matters not affected by the appeal.” Thus, for purposes of the Town’s motion, Rules 205 and 241 are entirely consistent and applicable, and the fact that the appellant in *Jackson* relied on former Rule 204 makes no material difference with respect to *Jackson*’s applicability to the Town’s appeal.

the appeal and thereby rejected the same argument that the Town makes in this appeal. *Id.*

Although the Town attempts to distinguish *Jackson* by arguing that the Supreme Court's ruling in that case was based on the fact that the appellant had not appealed the propriety of awarding attorney's fees, there are no differences between *Jackson* and this case that are material to the issues involved in this appeal. As the trial court did in *Jackson*, the trial court allowed the prevailing party to provide evidence supporting the award of fees and costs after judgment was issued. And like the appellant did in *Jackson*, the Town filed a notice of appeal challenging the merits of the underlying judgment before the court awarded fees and then contested the trial court's jurisdiction to award fees during the pendency of the appeal. So just as the attorneys' fee award in this case may be reversed if the Town prevails on its appeal, the attorneys' fee award in *Jackson* would have been reversed if the appellants in that case prevailed on their appeal under the Dealers Act.

The similarity of the procedural postures and arguments in this case and *Jackson* demonstrate that there is no material distinction between the two cases that would justify the Court disregarding *Jackson's* holding. Therefore, *Jackson* is controlling, and it dictates that the trial court retained jurisdiction to award fees to SCDG after the Town filed its notice of appeal.

III. The Court has jurisdiction to award fees and costs under Rule 54(d), SCRPC, after a notice of appeal is served.

The trial court also retained jurisdiction to award SCDG fees and costs pursuant to Rule 54(d), SCRPC, which governs the award of fees and costs to the

prevailing party in litigation. Rule 54(d) provides that, upon notice that the matter has been appealed, taxation of costs “may” be delayed until the appeal is completed. The rule’s use of the term “may” indicates that delaying taxation of costs until after the appeal is complete is permissive and discretionary, which necessarily means that the trial court also has discretion to award fees and costs before the appeal is complete.

Significantly, the state “Rule 54(d) is substantially the same as the Federal Rule.” *Black v. Roche Biomedical Lab., Div. of Hoffman-Laroche*, 315 S.C. 223, 228, 433 S.E.2d 21, 24 (1993). As a result, it is appropriate to look to the federal courts’ construction of Rule 54(d) for guidance on the issue presented by the Town’s motion to vacate. *See Gardner v. Newsome Chevrolet-Buick*, 304 S.C. 328, 331, 404 S.E.2d 200 (1991) (“Since our Rules of Procedure are based on the Federal Rules, where there is no South Carolina law, we look to the construction placed on the Federal Rules of Civil Procedure.”).

Like the state Rule 54(d), the federal Rule 54(d) provides the trial court with discretion to rule on a claim for fees while the appeal is pending or defer ruling until the appeal is resolved. Rule 54(d), Fed.R.Civ.P., advisory committee notes (1993 Amendments) (“If an appeal on the merits . . . is taken, the court may rule on the claim for fees, may defer its ruling on the motion, or may deny the motion without prejudice, directing . . . a new period for filing after the appeal has been resolved.”). And federal courts have consistently held that a trial court retains jurisdiction to determine an application for attorneys’ fees after a notice of appeal has been served.

See, e.g., Tancredi v. Metro. Life Ins. Co., 378 F.3d 220, 225 (2d Cir. 2004) (“[N]otwithstanding a pending appeal, a district court retains residual jurisdiction over collateral matters, including claims for attorneys’ fees.”); *Garcia v. Burlington N. R.R. Co.*, 818 F.2d 713, 721 (10th Cir. 1989) (“Even after a timely notice of appeal is filed, a district court may retain jurisdiction to determine the propriety and amount of attorney’s fees.”); *Venen v. Sweet*, 758 F.2d 117, 120 fn.2 (3d Cir. 1985) (“A district court, during the pendency of an appeal is not divested of jurisdiction to determine an application for attorney’s fees.”); *Masalosalo by Masalosalo v. Stonewall Ins. Co.*, 718 F.2d 955, 957 (9th Cir. 1983) (“The district court retain[s] the power to award attorneys’ fees after the notice of appeal from the decision on the merits ha[s] been filed.”).

Not only is affirming the trial court’s jurisdiction over an award for attorneys’ fees and costs in this case consistent with precedent and the plain language of Rule 54(d), it also serves judicial economy. As one court stated in denying a motion to stay determination of attorneys’ fees pending an appeal under federal Rule 54(d):

Although an award of attorneys’ fees would have to be vacated if the judgment is reversed, this is no different than any other case in which judgment is appealed and the prevailing party is awarded attorneys’ fees. The court is in a much better position at the present time, when the details of the proceedings are fresh in its mind, to judge the expertise and time required by defense counsel to prevail in the case than it would be when the appeal has been decided. Judicial economy would not be served by requiring the court to revisit cases years after they were initially decided for the sole purpose of awarding attorneys’ fees.

Yenidunya Invs., Ltd. v. Magnum Seeds, Inc., No. Civ. 2:11-1787 WBS, 2012 U.S. Dist. LEXIS 20421, *12-13 (E.D. Cal. Feb. 17, 2012).

The same rationale applies here. If the Town is completely successful on its appeal and SCDG is not the prevailing party, then the award of attorneys' fees will be vacated. However, if SCDG succeeds in the appeal, then the trial court and the parties will be better served by having the attorneys' fee award stand because the trial court will not have to revisit the issue years after legal services were rendered. Therefore, the interest of judicial economy also favors denial of the Town's appeal.

IV. The Town's attempt to avoid post-judgment interest does not promote the interests of fairness and justness.

The Town's appeal is admittedly an attempt to avoid the payment of post-judgment interest on the attorneys' fees and costs awarded to SCDG if its appeal is ultimately unsuccessful. While the Town's desire to avoid additional liability is understandable, the result it seeks in this appeal does not promote the interests of fairness and justice as it contends.

Here, the trial court found that the Town breached the PLA and its implied covenant of good faith in a manner that caused significant economic damage to SCDG. To enforce its contractual rights, SCDG was forced to incur \$298,965 in attorneys' fees and litigation costs through trial, and that amount continues to grow as the Town pursues its appeal. Under the PLA, SCDG is entitled to reimbursement for those costs and fees as the trial court awarded, and the imposition of post-judgment interest on that award is fair and equitable until the Town satisfies its payment. The Town should not be relieved of its obligation to pay post-judgment interest simply because

it filed its notice of appeal prior to the trial court making the final award of attorneys' fees and costs. Therefore, any decision vacating the award of attorneys' fees and costs will be unfair and unjust to SCDG – not to the Town.

CONCLUSION

Based on the foregoing discussion and analysis, the trial court retained jurisdiction to award attorneys' fees and costs to SCDG, and SCDG respectfully requests that the Town's appeal be denied.

s/E. Brandon Gaskins

E. Brandon Gaskins (S.C. Bar No. 73274)

Moore & Van Allen PLLC

78 Wentworth Street

Charleston, SC 29401

Telephone: (843) 579-7000

Facsimile: (843) 579-7099

brandongaskins@mvalaw.com

Attorney for Respondent

Shem Creek Development Group, LLC

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APPEAL FROM CHARLESTON COUNTY
Maite Murphy, Circuit Court Judge

Appellate Case No.: 2021-000501
Case No.: 2017-CP-10-5493

Shem Creek Development Group, LLC.....Respondent,

v.

The Town of Mount Pleasant, South CarolinaAppellant.

PROOF OF SERVICE

This is to certify that I have this day served counsel for the Appellant in the foregoing matter with a copy of the *Initial Brief of Respondent* and *Designation of Matter to be Included in the Record on Appeal* via electronic mail only, addressed as follows:

Andrew F. Lindemann
Lindemann & Davis, P.A.
5 Calendar Court, Suite 202
P.O. Box 6923
Columbia, SC 29260
andrew@ldlawsc.com

and

Claudius O. Tackett, II
Claude Tackett Law Firm, LLC
P.O. Box 429
Mount Pleasant, SC 29465
claudetackett@claudetackettllc.com

and

David Pagliarini
Corporation Counsel
Town of Mount Pleasant
100 Ann Edwards Lane
Mount Pleasant, SC 29465
dpagliarini@tompnc.com

*Attorneys for Appellant
Town of Mount Pleasant, South Carolina*

s/E. Brandon Gaskins
E. Brandon Gaskins (S.C. Bar No. 73274)
Moore & Van Allen PLLC
78 Wentworth Street
Charleston, SC 29401
Telephone: (843) 579-7000
Facsimile: (843) 579-7099
brandongaskins@mvalaw.com

*Attorney for Respondent
Shem Creek Development Group, LLC*

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Moore & Van Allen

VIA EMAIL ONLY

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Email: ctappfilings@sccourts.org

E. Brandon Gaskins
Attorney at Law

T 843 579 7038
F 843 579 8738
brandongaskins@mvalaw.com

Moore & Van Allen PLLC

78 Wentworth Street
Charleston, SC 29401-1428

Mailing Address:
Post Office Box 22828
Charleston, SC 29413-2828

Re: Shem Creek Development Group, LLC v. The Town of Mount Pleasant, South Carolina
Appellate Case No.: 2021-000501
Civil Action No.: 2017-CP-10-05493
MVA File No.: 043920.000001

Dear Ms. Kitchings:

With regard to the above-referenced matter, please accept the enclosed for filing:

1. Initial Brief of Respondent;
2. Designation of Matter to be Included in the Record on Appeal; and
3. Proof of Service.

By copy of this letter, I am serving Appellant's attorneys with a copy of the Initial Brief of Respondent and Designation of Matter to be Included in the Record on Appeal.

Thank you for your assistance with this matter. If you have any questions or concerns, please don't hesitate to contact me.

Sincerely,



E. Brandon Gaskins

EBG/lp

Enclosure: As stated.

cc: **VIA EMAIL ONLY**
Andrew F. Lindemann, Esquire
David G. Pagliarini, Esquire
Claudius O. Tackett, II, Esquire

Charlotte, NC
Charleston, SC