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SC Court of Appeals

THE 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 REPLY BRIEF OF APPELLANT

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Cases

Black v. Roche Biomedical Laboratories,
315 S.C. 223, 433 S.E.2d 21 (Ct. App. 1993).

Stokes-Craven Holding Corp. v. Robinson,
416 S.C. 517, 787 S.E.2d 485 (2016).

Statutes and Rules

Rule 54(d), SCRCP.

Rule 205, SCACR.

Rule 241(a), SCACR.

Rule 241(b)(1), SCACR.

Rule 54(d), FRCP.

ARGUMENTS

The Appellant Town of Mount Pleasant contends that the trial court erred in its refusal to rule that the court was divested of jurisdiction to consider or enter a judgment on the request by the Respondent Shem Creek Development Group ("SCDG") for attorney's fees and costs where an appeal was already pending in this Court.

To reiterate the procedural background, the Town had filed a timely appeal on October 16, 2020, and that appeal was pending when the trial court issued its order on January 11, 2021, awarding attorney's fees and costs in the amount of 298,965.22, which was enrolled as a judgment on that same date. On January 22, 2021, the Town filed a Motion to Vacate or Otherwise Alter or Amend Order Awarding Plaintiff Attorney's Fees and Costs which raised several issues including the fact that the trial court had been divested of jurisdiction at the time the January 11, 2021 order was issued. That motion specifically requested that the judgment in the amount of 298,965.22 be vacated. SCDG opposed that motion. Thereafter, on April 12, 2021, the trial court issued a form order citing to Rule 54(d), SCRPC, and *sua sponte* "deferring" any ruling on the Town's Motion to Vacate or Otherwise Alter or Amend Order "until the appeal of this case is complete." (Form Order). The form order did not, however, include a vacatur of the award of attorney's fees and costs in the amount of \$298,965.22, which remains enrolled as a judgment and accruing post-judgment interest despite the trial court's *sua sponte* deferral and refusal to issue a final ruling on the attorney's fees award.

The Town contends that the trial court was divested of jurisdiction when the appeal was filed on October 16, 2020. In *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 787 S.E.2d 485 (2016), the South Carolina Supreme Court, citing to Rule 205, SCACR, ruled that

"the service of a notice of appeal divests the trial court of jurisdiction over matters affected by the appeal." 787 S.E.2d at 493. Rule 205 provides:

Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal; the lower court or administrative tribunal shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241. Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal.

Rule 205, SCACR.

In its response brief, SCDG argues that the Town's notice of appeal did not divest the trial court of jurisdiction because the automatic stay provision in Rule 241(a) is inapplicable because the order on appeal is a money judgment, which is an exception to the general rule. SCDG's argument is flawed, however, because the Town is not arguing that the judgment is stayed, but rather the trial court's ruling that SCDG qualifies as a "prevailing party" under the Parking License Agreement ("PLA") is stayed while on appeal. Because that ruling is stayed, and is subject to reversal on appeal, the trial court lacked jurisdiction to proceed with an award of attorney's fees which is necessarily premised on that stayed ruling. Thus, given the absence of jurisdiction when entered, the Order Awarding Plaintiff Attorney's Fees and Costs should be vacated. Moreover, even if Rule 241(b)(1) has some applicability as SCDG insists, the rule certainly did not authorize the trial court to issue a *new judgment for the award of attorney's fees and costs during the pendency of an appeal*.

In short, Rule 241(b)(1) does not require a different result. The *Stokes-Craven* is directly on point. That case also involved a money judgment entered in the underlying action which had become the subject of a legal malpractice claim. The Supreme Court explained that "Rule 205 divests the lower court or administrative tribunal of jurisdiction over '*matters affected by the appeal*,' which necessarily would include a legal malpractice cause of action that is based on the

outcome of the appealed verdict, judgment, or ruling." *Stokes-Craven*, 787 S.E.2d at 494. (Emphasis in original). Moreover, as the Supreme Court held, "if a client appeals the matter in which the alleged malpractice occurred, any basis for the legal malpractice cause of action is stayed by Rule 241(a) while the appeal is pending." *Id.* As indicated, the Supreme Court made these rulings with respect to the underlying case where the order on appeal included a money judgment for actual and punitive damages.

It is also notable that SCDG did not even address the Town's primary issue on appeal – whether the trial court erred in *sua sponte* deferring a ruling on the Town's Motion to Vacate or Otherwise Alter or Amend Order Awarding Plaintiff Attorney's Fees and Costs without also vacating the attorney's fees judgment that was already enrolled and was accruing post-judgment interest. Instead, SCDG appears to disregard the trial court's deferral order entirely and argues instead that the trial court had jurisdiction under Rule 54(d), SCRCF, to award attorney's fees and costs after the notice of appeal was filed. However, SCDG is precluded from making that argument on appeal because SCDG did not appeal from the trial court's deferral order issued April 12, 2021.

Nonetheless, in making its argument that jurisdiction did exist, SCDG states that State Rule 54(d) is "substantially the same" as Federal Rule 54(d), and then relies on federal cases that ostensibly grant a trial court with some discretion whether to rule on or defer ruling on an attorney's fees petition filed after an appeal is filed. SCDG relies on this Court's 1993 decision in *Black v. Roche Biomedical Laboratories*, 315 S.C. 223, 433 S.E.2d 21 (Ct. App. 1993), where this Court observed that "Rule 54(d) is substantially the same as the Federal Rule." 433 S.E.2d at 24. Of course, that was an observation made in 1993. SCDG fails to recognize, however, that Rule 54(d), SCRCF, was rewritten by amendments adopted in 1993, likely in response to the

Black decision. Rule 54(d) now reads much differently than the pre-1993 version as well as much differently than the Federal Rule 54(d) that existed at the time *Black* was decided. Federal Rule 54 has also been the subject of extensive amendments since 1993. Today, the State Rule 54(d) and the Federal Rule 54(d) are substantially different, and the federal case law applying Federal Rule 54(d) is not controlling nor even informative as guidance. In short, State Rule 54(d) does not provide the trial court with "jurisdiction" or even any authority to award attorney's fees, and certainly provides no authority to defer the decision as the trial court has done in the case at bar.

As the Town explains in its opening brief, the 1993 amendments to Rule 54 did include the adoption of Rule 54(e), which addresses an award of attorney's fees as a court-ordered sanction which is inapplicable here. While the subtitle to Rule 54(e) includes the terms "costs authorized by statute," that is still no help to SCDG's argument given the attorney's fees awarded in this case were not based on any statute but rather a contract provision in the PLA. Thus, SCDG's argument that Rule 54 provides the trial court with the jurisdiction to award attorney's fees and costs during the pendency of an appeal is in error.

Finally, in the final section of its response brief, SCDG makes an equitable argument that has no bearing on the existence of jurisdiction nor on the authority of the trial court to defer the attorney's fees ruling without first vacating the award that was made prematurely. SCDG claims that vacating the award of attorney's fees and costs would be "unfair and unjust to SCDG." The true fairness inquiry, however, is one of due process or "fundamental fairness." As the Town argued in its opening brief, notions of due process and fundamental fairness dictate that the trial court's *sua sponte* "deferral" of an award of attorney's fees must at the very least require that the status quo be maintained, meaning that no judgment be entered as to the attorney's fees before or

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

v.

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

CERTIFICATE OF SERVICE

Pursuant to Section (d)(1) of the Supreme Court’s Order Re: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules, the undersigned employee of Lindemann & Davis, P.A., counsel for the Appellant, does hereby certify that service of the **Initial Reply Brief of Appellant** and **Appellant’s Designation of Matter to be Included in the Record on Appeal** was made upon all counsel of record by email only this the 4th day of October 2021:

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RECEIVED
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SC Court of Appeals

Via Email Only

The Honorable Jenny Abbott Kitchings
Clerk of Court
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RE: Shem Creek Development Group, LLC v. The Town of Mount Pleasant, South Carolina
Appellate Case Number: 2021-000501
Civil Action Number: 2017-CP-10-5493
Our File Number: 79.20381

Dear Ms. Kitchings:

In accordance with Section (b)(2) of the Supreme Court's Order RE: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules, please find enclosed for filing by email only the **Initial Reply Brief of Appellant** and **Appellant's Designation of Matter to be Included in the Record on Appeal** in the above referenced matter. In accordance with Section (d)(1) of this same order, I am hereby serving copies on all counsel of record by email only. If you have any questions, please advise.

Sincerely,

LINDEMANN & DAVIS, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosures

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