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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the South Carolina Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

J. Marvin H. Dukes, III, Master In Equity

Case No. 2017-CP-07-01921

Serena Green Grant,

Respondent,

v.

Palbert Inc., et al,

Appellants.

APPELLANTS' PETITION FOR REHEARING

Appellants Petition this Court for rehearing on the following grounds:

1. The Court did not address the trial court's Order denying Appellants' Motion to Reconsider that was included in the Notice of Appeal, which is immediately appealable because the subject of the Motion is properly appealable.
2. Although an Order denying a Motion to Set Aside Entry of Default is generally not directly appealable, it is under these circumstances, as mandated by S.C. Ann. § 38-31-160.
3. The lower court abused its discretion when it found that the South Carolina Property and Casualty Insurance Guaranty Association (hereinafter "Guaranty Association") failed to

timely appear, and that there was no evidence on the record of the initial insurance carrier's failure to defend.

PETITION FOR REHEARING

Pursuant to Rule 221 of the South Carolina Appellate Court Rules, Appellants hereby petition this Court for a rehearing in the above-entitled matter after an Order, Exhibit A, dated September 30, 2021, dismissed the appeal from the Court of Common Pleas, which granted the Motion to Intervene, denied the Motion to Set Aside Entry of Default, and denied the Motion for Reconsideration.

I. INTRODUCTION

In this Petition, Appellants argue the trial court overlooked or misapprehended the appealability of the underlying Order, specifically that (1) the Order, Exhibit A, dismissing the appeal overlooked the appealability of an Order Denying Motion to Reconsider; (2) that the Court misinterpreted the Motion to Set Aside Entry of Default as not immediately appealable; and (3) the trial court abused its discretion when it erroneously found the Guaranty Association's appearance was untimely, and when it found there was no evidence that Appellants' insurance carrier failed to appear or defend.

II. ARGUMENT

The Order, Exhibit A, dismissing this appeal cites two cases as the basis for dismissing the appeal. *See Duncan v. Gov't Emps. Ins. Co.*, 331 S.C. 484, 486, 449 S.E.2d 580, 580 (1994) ("We now hold that an order granting a motion to intervene is not immediately appealable."); and *Wetzel v. Woodside Dev. Ltd. P'ship*, 364 S.C. 589, 582, 615 S.E.2d 437, 438 (2005) (stating the grant or denial of a motion to set aside entry of default is not directly appealable). However, this Court did not address the trial court's failure to properly apply the law mandated by the South Carolina

Property and Casualty Insurance Guaranty Association Act, S.C. Code Ann. § 38-31-10, et seq. (hereinafter “The Act”).

A Motion for Reconsideration may be immediately appealable if it asks the court to reconsider matters that are properly appealable. In the instant case, Appellants requested the court to reconsider the ruling denying its request to set aside entry of default, as the Appellants’ insurance carrier had become insolvent, thereby invoking The Act. The trial court subsequently denied Appellants’ Motion, which Appellants sought to appeal; however, the issue was overlooked when this Court ordered dismissal of the appeal. Although entry to set aside default is typically not properly appealable until a decision on the merits is made, the Motion in the instant case is immediately appealable because The Act gives authority to the Guaranty Association to act as a last resort to defend an insured, whose insurance carrier has been deemed insolvent. Moreover, S.C. Code Ann. § 38-31-160 mandates a stay of proceedings so that the Guaranty Association may properly defend on the merits “as to any judgment decision...based on the insurer’s default or failure to defend the insured...” See *Coward Hund Const. Co., Inc. v. Ball Corp.*, 336 S.C. 1, 518 S.E.2d 56 (Ct. App. 1999) (“The purpose of Rule 59(e), SCRCPP, to alter or amend the judgment is to request the trial judge to ‘reconsider matters properly encompassed in a decision on the merits’); See also *Cox v. Woodmen of World Ins. Co.*, 347 S.C. 460, 556 S.E.2d 397 (Ct. App. 2001) (finding an order that is not directly appealable will be considered if there is an appealable issue before the court). Therefore, because the Order denying the Motion to Set Aside Entry of Default is immediately appealable in this case, the Court may consider the Order denying the Motion to Reconsider.

Appellants assert that the trial court failed to apply the plain language of S.C. Code Ann. § 38-31-10 and 160 and request this Court to rehear the erroneous application of these statutes.

Although entry of default is not ordinarily directly appealable, if there is an appealable issue, such as the insolvency of an insurance carrier, invoking the Guaranty Association as last resort to defend against the claims, the Court may consider it. *See South Carolina Prop. and Cas. Ins. Guar. Ass'n. v. Carolina s Roofing and Sheet Metal Contractor's Self Insurer's Fund*, 303 S.C. 368, 401 S.E.2d 144 (1991). The Guaranty Association's function is to provide protection for insureds in the event their insurance carriers become insolvent. The language of the statute is plain and unambiguous, in that it requires a mandatory stay to allow the Guaranty Association to properly defend the insured when their insurance carrier has become insolvent. Not only does this statute mandate a stay of proceedings, but it also gives the Court the discretion to stay the proceedings for as long as the Court deems necessary to permit a proper defense in this case; however, the trial court clearly misinterpreted the statute and failed to apply its plain meaning to this case. Therefore, based on the plain language of the S.C. Code Ann. § 38-31-160, the Order denying the Motion to Set Aside Entry of Default was an abuse of discretion that resulted in a clear error of law.

Appellants contend the trial court abused its discretion by finding that the Guaranty Association's appearance was untimely, resulting in an error of law, which would make an Order under the facts of the present case immediately appealable. *See Ex parte Gov't Emp.'s Ins. Co. v. Goethe*, 373 S.C. 132, 644 S.E.2d 699 (2007) ("holding this court will not disturb the lower court's decision on appeal unless a manifest abuse of discretion is found resulting in error of law"). The trial court abused its discretion when it decided the compulsory 90-day stay provided by S.C. Code Ann. § 38-31-160 expired before the Guaranty Association appeared on behalf of Appellants. However, the stay was set to expire on November 9, 2020, which is the day the Guaranty Association appeared and filed its Motion on behalf of Appellants. Therefore, Appellants request

this Court to rehear the trial court's erroneous finding that the Guaranty Association's appearance was untimely.

III. CONCLUSION

For the reasons stated, Petitioners/Appellants respectfully ask the Court to rehear the trial court's Order denying reconsideration of the Motion to Set Aside Entry of Default because the matter is immediately appealable under the facts of the present case. Appellants also request this Court to rehear the trial court's findings that the Guaranty Association failed to timely appear, and that there was no evidence on the record of the initial insurance carrier's failure to defend, as these findings were clear errors of law.

Respectfully submitted,

s/Brandon P. Jones

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October 14, 2021

EXHIBIT A

The South Carolina Court of Appeals

Serena Green Grant, Respondent,

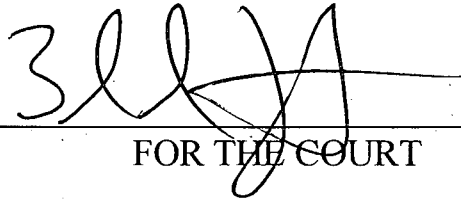
v.

Palbert, Inc., et al., Appellants.

Appellate Case No. 2021-000750

ORDER

Because the underlying order on appeal is not immediately appealable, this appeal is dismissed. *See Duncan v. Gov't Emps. Ins. Co.*, 331 S.C. 484, 486, 449 S.E.2d 580, 580 (1994) ("We now hold that an order granting a motion to intervene is not immediately appealable."); *Wetzel v. Woodside Dev. Ltd. P'ship*, 364 S.C. 589, 592, 615 S.E.2d 437, 438 (2005) (stating the grant or denial of a motion to set aside entry of default is not directly appealable). The remittitur will be sent as required by Rule 221(b), SCACR.



FOR THE COURT

Columbia, South Carolina

cc:

Brandon Paul Jones, Esquire
Alexander Paul Zuraff, Esquire
James H. Moss, Esquire

FILED
Sep 30 2021

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PROOF OF SERVICE

I certify that I have served the Petition for Rehearing on Serena Green Grant via electronic message and by depositing a copy in the United States Mail, postage prepaid with Certified Mail Tracking No. 7019070000037724351, Return Receipt Requested, on October 13, 2021, address to her attorney of record, James H. Moss, Moss Kuhn & Fleming, P.A., 1501 North Street, Beaufort, South Carolina, 29901.

s/Jenifer Prince

Jenifer Prince, Paralegal to:
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