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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Case No. 2016-CP-10-01833
Appellate Case No. 2021-001055

Andrew and Kimberly McIntire,

Appellants,

v.

Seaquest Development Company, Inc.; Red Bay Constructors Corp.; Benzenberg Custom Cabinets, Inc.; Jonathan Marshall Construction; Coastal Window & Door Center of Charleston, LLC; Carolina Window & Millwork, LLC n/k/a Carolina Window & Millwork-Omni Glass Industries, LLC; Southcoast Exteriors, Inc.; Michael Casteen d/b/a Casteen Custom Cabinets; Quality Cedar Products, Inc. of Michigan d/b/a Michigan Prestain Co.; Coastal Plumbing & Gas, LLC; Foam Insulation Co. Inc.; Jerry Comer d/b/a Jerry's Tile & Marble, LLC; Lowcountry Fireplaces, Inc.; Carolina Pest Solutions, Inc.; and New South Construction Supply, LLC,

Defendants.

and

Seaquest Development Company, Inc.,

Third-Party Plaintiff/Appellant,

v.

Architectural Products of Charleston, LLC, and Sealtight of South Carolina, LLC,

Third-Party Defendants,

Of which Red Bay Constructors Corp.; Benzenberg Custom Cabinets, Inc.; Jonathan Marshall Construction; Coastal Window & Door Center of Charleston, LLC; Carolina Window & Millwork, LLC n/k/a Carolina Window & Millwork-Omni Glass Industries, LLC; Southcoast Exteriors, Inc.; Michael Casteen d/b/a Casteen Custom Cabinets; Quality Cedar Products, Inc. of Michigan d/b/a Michigan Prestain Co.; Coastal Plumbing & Gas, LLC; Foam Insulation Co. Inc.;

Jerry Comer d/b/a Jerry's Tile & Marble, LLC; Lowcountry Fireplaces, Inc.; Carolina Pest Solutions, Inc.; New South Construction Supply, LLC, Architectural Products of Charleston, LLC; Sealtight of South Carolina, LLC; Architectural Products of Charleston, LLC, and Sealtight of South Carolina, LLC are

Respondents.

INITIAL BRIEF OF APPELLANT SEAQUEST DEVELOPMENT COMPANY, INC.

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STATEMENT OF THE ISSUE ON APPEAL

I. Did the trial court err in holding that Respondents are no longer parties to this action after the order dismissing the action was reversed on appeal?

STATEMENT OF THE CASE

A. Background Regarding the Right to Cure Act[1]

In short, the Right to Cure Act requires that, before suing a contractor for allegedly defective residential construction, a homeowner must serve the contractor with written notice of their claim and allow the contractor the opportunity to inspect the alleged defect(s) and either to make an offer to cure (i.e., an offer to remedy the alleged defect(s) or an offer to settle the claim) or to deny the claim. *See* §§ 40-59-820, -840, -850. Compliance with the requirements of the Act is a prerequisite to "proceed[ing] with a civil action or other remedy provided by contract or by law." § 40-59-850(C). If a homeowner files suit before complying with the requirements of the Act, on motion of a party to the action, the trial court must "stay the action until the [homeowner] has complied with the requirements of th[e] [Act]." § 40-59-830.

[1] 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.

B. Procedural History

Seaquest[2] was the general contractor for the construction of the McIntires'[3] house. Every respondent to this appeal (collectively, "Respondents") was involved in the construction of the home as a subcontractor or material supplier.

The McIntires filed this lawsuit against Seaquest and the Other Defendants[4] in the Charleston County Court of Common Pleas on April 8, 2016, alleging defects in the construction of their home and asserting a number of causes of action for money damages. (Summons & Compl.)

Seaquest timely answered the McIntires' complaint on June 17, 2016, denying its alleged liability, raising a number of affirmative defenses, and asserting cross-claims against the Other Defendants and third-party claims against the Third-Party Defendants[5] on the premise that "[i]f [it] is compelled to pay damages for any reason in this matter, it alleges that any liability it has for the damages would be an imputation of liability upon it as a result of wrongful acts or omissions

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[2] "Seaquest" is general contractor Seaquest Development Company, Inc., who is a defendant in this action and one of the three appellants in this appeal.

[3] The "McIntires" are homeowners Andrew and Kimberly McIntire, who are the plaintiffs in this action and the other two appellants in this appeal.

[4] The "Other Defendants" refers, collectively, to the other defendants that the McIntires sued besides Seaquest. Their individual names are stated in the above caption.

[5] The "Third-Party Defendants" refers, collectively, to Architectural Products of Charleston, LLC, and Sealtight of South Carolina, LLC. To be clear, "Respondents" refers, collectively, to the Other Defendants and the Third-Party Defendants.

committed by [the Other Defendants/Third-Party Defendants]." (Seaquest's Answer, Cross-Claims, and Third-Party Compl.)

Also on June 17, 2016, i.e., contemporaneous with its answer, Seaquest moved to dismiss or, alternatively, stay the action because of the McIntires' failure to comply with the requirements of the Right to Cure Act. (Seaquest's Mot. to Dismiss or Stay.) Because the McIntires had not given it the required pre-suit claim notice (and had thus also denied it the opportunity to exercise its rights under the Act), Seaquest contended that the action had to be "stay[ed] . . . until the [McIntires] . . . complied with the requirements of [the Act]." § 40-59-830. Moreover, because the McIntires had already hired experts and substantially completed repairing the alleged construction defects without notifying it, Seaquest contended that the McIntires could not possibly comply with the requirements of the Act.

Of the Other Defendants, only Red Bay Constructors Corp. ("Red Bay"), via motion filed June 23, 2016, followed Seaquest's lead in moving to dismiss or, alternatively, stay the action based on the McIntires' failure to comply with the requirements of the Right to Cure Act. (Red Bay's Mot. to Dismiss or Stay.)

On July 27, 2016, the McIntires moved to compel arbitration with Seaquest, contending it was required by their construction contract,[6] and shortly thereafter,

[6] (Pls.' Mot. to Stay and Compel Arbitration.)

on August 15, 2016, they made a related motion for a protective order, contending that, because the matter was subject to arbitration, they should not have to respond to the requests for admissions Seaquest had served on them. (Pls.' Mot. for Protective Order.)

By order filed May 1, 2017, the trial court, the Honorable Jean Hoefer Toal presiding, granted Seaquest's motion and dismissed the action,[7] reasoning as follows: "Because the McIntires have not complied with the Right to Cure Act, the act plainly requires a stay; because they foreclosed even the possibility of compliance with the Right to Cure Act, the stay must be permanent; as a practical matter, a permanent stay is a dismissal, which this Court now orders." (5/1/17 Order of Dismissal p. 7.) Additionally, the order of dismissal denied the McIntires' motion to compel arbitration and declared both the McIntires' motion for a protective order and Red Bay's motion moot. (Order of Dismissal filed May 1, 2017.)

The McIntires timely appealed, naming Seaquest as the only respondent. (McIntires' Notice of Appeal dated 5/30/2017.) By opinion filed December 31, 2019, this Court reversed the trial court, finding that the trial court should have simply granted the McIntires' motion to compel arbitration and should not have

[7] (Form 4 filed May 1, 2017; Order of Dismissal filed May 1, 2017.)

proceeded further to address Seaquest's motion regarding the Right to Cure Act.[8] (12/31/19 Opinion.) Following the Court's denial of Seaquest's petition for rehearing on March 27, 2020,[9] and the Supreme Court's denial of Seaquest's petition for a writ of certiorari on December 11, 2020,[10] the (prior) appeal ended with the issuance of the remittitur on December 14, 2020. (Remittitur issued December 14, 2020.)

On remand, Respondents contended they were no longer parties to the case, arguing they had been dismissed from the case and their dismissal had never been appealed.

During a status conference on February 16, 2021, the trial court, the Honorable Roger M. Young, Sr., presiding, suggested the filing of a motion for clarification, and the McIntires and Seaquest jointly filed such a motion that day. (Joint Motion for Clarification). Shortly thereafter, via email to counsel on February 19, 2021, Judge Young indicated that Respondents remained parties to the case:

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[8] To be clear, the Court did not find that the trial court's analysis of the Right to Cure Act was erroneous. (12/31/19 Opinion p. 6 ("The McIntires argue the trial court erred in addressing the issues of statute of limitations, Right to Cure Act, and waiver when the court's sole jurisdiction was to decide the question of arbitrability. The McIntires also argue the trial court erred in dismissing the case for failure to comply with the Right to Cure Act. Because we already determined the trial court erred in finding the McIntires waived their arbitration right and remand for arbitration, we need not address these issues.").)

[9] (Court of Appeals Order Denying Rehearing filed March 27, 2020.)

[10] (Supreme Court Order Denying Certiorari filed December 11, 2020.)

> [A]fter the Court of Appeal's decision, [Justice Toal's] order became of no effect and is no longer in existence. In my opinion, that leaves any claims against the [Respondents] alive.

(2/19/2021 Email from Judge Young.)

After requesting and receiving from Judge Young an opportunity to present further argument, a majority of Respondents filed a joint return to the motion for clarification on March 3, 2021, and Sealtight of South Carolina, LLC, filed its own memorandum in opposition on March 4, 2021. (3/3/2021 Joint Memorandum in Opp'n; 3/4/2021 Sealtight Memorandum in Opp'n.) The McIntires and Seaquest then filed a joint reply in support of the motion for clarification on March 12, 2021. (Joint Reply in Supp.)

The trial court heard the motion for clarification on April 22, 2021, the Honorable Jennifer B. McCoy presiding,[11] and thereafter denied it by formal order filed August 23, 2021. (Order filed 8/23/21.)[12]

This appeal timely follows. (McIntire Notice of Appeal; Seaquest Notice of Appeal).

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[11] (4/22/21 Hr'g Tr.)

[12] The trial court's formal order filed August 23, 2021, was preceded by a Form 4 order filed August 19, 2021, which stated the court's decision to deny the motion for clarification and requested the submission of a proposed formal order to that effect within ten days. (Form 4 Order filed 8/19/21.)

STANDARD OF REVIEW

This appeal presents a pure matter of law for determination by the Court de novo,[13] "without any deference to the tribunal below." *Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016); *see also Bain v. Self Mem'l Hosp.*, 281 S.C. 138, 152, 314 S.E.2d 603, 611 (Ct. App. 1984) (explaining that, 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).

ARGUMENT

I. The trial court erred in holding that Respondents are no longer parties to this action after the order dismissing the action was reversed on appeal.

A. Seaquest adopts the McIntires' arguments by reference.

Pursuant to Rule 208(b)(6), SCACR (providing that "[i]n cases involving more than one appellant . . . any party may adopt by reference all or any part of the brief of another"), except insofar as they are inconsistent with or otherwise

[13] *See Perry v. Bullock*, 409 S.C. 137, 140, 761 S.E.2d 251, 252–53 (2014) ("Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo.") (citation omitted); *Fairchild v. S.C. Dep't of Transp.*, 398 S.C. 90, 107, 727 S.E.2d 407, 416 (2012) ("'In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes.'") (quoting *Maxwell v. Genez*, 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003)).

prejudicial to its position or interests, Seaquest hereby adopts all of the McIntires' arguments by reference.

B. No claims were "litigated" previously, and Seaquest had nothing to appeal.

Viewing Chief Justice Toal's order of dismissal as having dismissed Seaquest's "claims," the trial court faults Seaquest for "fail[ing] to appeal" the order, declaring that "this unappealed ruling [is] the law of the case" and Seaquest is "barred from *relitigating* these extinct claims." (8/23/21 Order p. 8 (emphasis added).) This is error.

First off, no claims were *litigated* to begin with. Based solely on her finding that the McIntires could not possibly comply with the requirements of the Right to Cure Act, Chief Justice Toal dismissed the action (her order speaking not of the dismissal of any claim but of the action itself) for the sole reason that, by its express terms, § 40-59-830 of the Right to Cure Act left her no choice ("*the court shall stay the action until* the claimant *has complied* with the requirements of th[e] [Act]"[14]) but to stay the action pending the occurrence of something that would never occur, in other words, to stay the action in perpetuity, i.e., permanently, which, in practical terms, she equated with a dismissal of the action. (5/1/17 Order.)

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[14] (emphasis added).

In discussing the doctrine of collateral estoppel, our case law speaks in terms of barring "*relitigation* of the same facts or issues *necessarily determined* in [a] former proceeding." *Pye v. Aycock*, 325 S.C. 426, 436, 480 S.E.2d 455, 460 (Ct. App. 1997) (emphasis added); *see also Beall v. Doe*, 281 S.C. 363, 371, 315 S.E.2d 186, 191 (Ct. App. 1984) ("In order, however, to assert collateral estoppel successfully, the party seeking issue preclusion still must show that the issue was *actually litigated* and *directly determined* in the prior action and that the matter or fact directly in issue was necessary to support the first judgment.") (emphasis added). Seaquest brings this up here simply to segue into this obvious point: Chief Justice Toal's dismissal of the action had nothing whatsoever to do with the merits of any claim, and just as no claim was actually *litigated* before, no claim can be barred from being *re*-litigated now.

In this same vein, Seaquest also notes that nowhere in Chief Justice Toal's order of dismissal is the dismissal of the action said to be with prejudice; nor would it even make sense for the dismissal to be with prejudice, given that, again, the basis of the dismissal has nothing whatsoever to do with the merits of any claim. *See Collins v. Sigmon*, 299 S.C. 464, 467, 385 S.E.2d 835, 837 (1989) ("A dismissal of a case 'without prejudice means that the plaintiff can reassert the same cause(s) of action by curing the defects that led to dismissal. By contrast,

dismissals with prejudice are intended to bar relitigation of the same claim.'") (citing Friedenthal, Kane & Miller, *Civil Procedure* 651 (1985)).

Additionally, Seaquest did not "fail" to appeal Chief Justice Toal's order of dismissal. Again, as explained, the order did not adjudicate the merits of any claim asserted in the action; nor procedurally could it have done so. Faced not only with the McIntires' failure to comply with the Right to Cure Act before filing suit but also their inability to do so ever after, Chief Justice Toal dismissed *the action* for the sole reason that, literally, per the plain and mandatory language of § 40-59-830, *the action* could *never* proceed. (5/1/17 Order.) Besides this, Chief Justice Toal's order denied the McIntires' motion to compel arbitration and deemed both the McIntires' motion for a protective order and Red Bay's motion moot. (5/1/17 Order.)

Seaquest was not aggrieved by Chief Justice Toal's order of dismissal. Not only did it have no reason to appeal the order, it could not have appealed it. Rule 201, SCACR ("*Only* a party *aggrieved* by an order, judgment, sentence or decision may appeal.") (emphasis added); *see also Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 25, 602 S.E.2d 772, 780 (2004) ("[C]ivil procedure and appellate rules should not be written or interpreted to create a trap for the unwary lawyer or party . . . .").

C. The motion for clarification was proper.

The trial court's finding that the motion for clarification was improper is based on the erroneous premise that the motion asked for clarification of Chief Justice Toal's order of dismissal. (*See* 8/23/21 Order p. 8 ("As an additional ground for denial, this Court finds that there is no procedural mechanism which affords [the McIntires] and Seaquest the right to request clarification of an order almost four years after it was issued.").) The motion for clarification did not seek any relief with respect to Chief Justice Toal's order of dismissal. It asked the trial court to advise, in the wake of the McIntires' appeal of Chief Justice Toal's order and this Court's reversal of the same, whether Respondents remained parties to the action. (Joint Mot.) The idea that the trial court is procedurally incapable of answering such a question is absurd. *Cf. Branham v. Ford Motor Co.*, 390 S.C. 203, 242–43, 701 S.E.2d 5, 26 (2010) (recognizing that trial judges in South Carolina have the inherent authority to manage and conduct a trial and may realign the parties at any stage of the action[15]); *Williams v. Bordon's, Inc.*, 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980) ("Th[e] adjudicative power of the court carries with it the inherent power to control the order of its business to safeguard the rights of litigants."); *Ex parte Dibble*, 279 S.C. 592, 595, 310 S.E.2d 440, 442 (Ct. App. 1983) ("Courts have the inherent power to do all things reasonably necessary to

[15] In this regard, Seaquest submits that logic dictates that the authority to realign the parties presupposes the authority to determine who they are.

insure that just results are reached to the fullest extent possible."); *Elam*, 361 S.C. at 25, 602 S.E.2d at 780 ("[C]ivil procedure and appellate rules should not be written or interpreted to create a trap for the unwary lawyer or party . . . ."); Rule 1, SCRCP ("These rules . . . shall be construed to secure the just, speedy, and inexpensive determination of every action."); Rule 16(a), SCRCP ("In any action after the issues are joined by the actual filing and service of all pleadings, the court may in its discretion or upon motion of any party direct the attorneys for the parties to appear before it for a hearing to consider: (1) The simplification of the issues; . . . [or] (8) Such other matters as may aid in the disposition of the action."); Rule 16(b), SCRCP ("The court shall make a written order which recites the action, if any, taken at the hearing . . . ."); Rule 16(c), SCRCP ("Whether or not a formal pre-trial hearing has been held in an action, the trial judge may hold an informal conference before trial to dispose of any remaining matters . . . ."); *compare* Rule 7(a), SCRCP (expressly limiting the types of pleadings that are allowed) *with* Rule 7(b), SCRCP (containing no language limiting the types of motions allowed) *and* the Official Note to Rule 7(b) ("'Petitions' for special relief are simply stated as motions.").

CONCLUSION

For the foregoing reasons, Seaquest asks this Honorable Court to reverse the trial court's ruling on the motion for clarification and confirm that Seaquest's claims remain pending against Respondents.

Respectfully submitted,

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