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Feb 04 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas for the Ninth Circuit

The Honorable Mikell Scarborough, Master in Equity

Case No.: 2016-CP-10-06265
App. Case No. 2022-000078

TONY A. BILLIPS, individually and as a derivative shareholder of Alex’s Restaurants, Inc.,.....*Plaintiff /Respondent,*

v.

CAROLYN A. BILLIPS, individually and as Trustee of the benefit of Anthony Billips, William Casey Ivey, and Alex Billips, and as controlling person of Alex’s Restaurants, Inc. and ALEX’S RESTAURANTS, INC.,.....*Defendants/Appellants.*

APPELLANTS’ MEMORANDUM REGARDING APPEALABILITY

The Appellate Courts of South Carolina shall entertain appeals of orders that are either final, “involve the merits,” or “affect a substantial right.” S.C. Code § 14-3-330. The Master in Equity’s orders appealed by Appellants involve the merits of the dispute — as defined in this State’s appellate jurisprudence — and are immediately appealable. Appellant Carolyn Billips responds to this Court’s inquiry regarding appealability as follows.

I. The Orders Involve the Merits

By statute, South Carolina’s appellate courts shall entertain appeals of intermediate orders “involving the merits” of the dispute:

The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

(1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction

S.C. Code Ann. § 14-3-330. “An order involves the merits if it finally determines some substantial matter forming the whole or part of some cause of action or defense in the case.”

Long v. Sealed Air Corp., 391 S.C. 483, 489, 706 S.E.2d 34, 37 (Ct. App. 2011) (citing *Hunt v. Whitt*, 366 S.C. 379, 387 (Ct. App. 2005)).

A. The Orders Fully and Finally Resolve the Accounting Cause of Action

In this matter, which concerns disputes regarding the running of a small family business, Plaintiff’s accounting cause of action was referred to the Master in Equity by consent order filed May 3, 2017 and was tried before the Master on August 24 and 25, 2021. The Master’s November 22, 2021 order fully disposed of Plaintiff’s accounting cause of action. Accordingly, the order (in conjunction with the December 21, 2021 order on Plaintiff’s motion for reconsideration) “involves the merits” because it “finally determined some substantial matter forming the whole or part of some cause of action.” It is therefore immediately appealable pursuant to S.C. Code § 14-3-330.

B. The Orders Resolve Substantial Matters Relating to the Remaining Causes of Action

Significantly however, the Master’s orders also determined “substantial matters forming the whole or part” of Plaintiff’s remaining causes of action. At trial, Plaintiff contended that a determination of the factual allegations underlying his other causes of action were essential to any decision as to the accounting cause of action:

[O]f course, the malfeasance goes into the value of Mr. Billips' share, of the value of the business.

[. . .]

Your Honor, we believe that the malfeasance does directly go to the value of the business.

Trial Tr. (Aug. 24, 2021) at 18:1–2, 18:14–16. Further, Plaintiff's counsel stated:

THE COURT: Y'all still think that there's a value that's owed for those five [units] that have been sold?

MR. ELLIS: Well, and that gets into why it's hard to do without going into the malfeasance, which – of the defendants in this case because we do think that these multiple units were grossly undervalued because they were liquidated for paying for Ms. Billips' individual liabilities and for her other companies' liabilities.

Trial Tr. (Aug. 25, 2021) at 232:6–16. Plaintiff introduced evidence of alleged malfeasance and sought to prove the same at trial.

The Master considered the factual allegations and the evidence adduced related thereto in resolving the accounting cause of action:

The Court finds that the Plaintiff has failed to prove any conduct on the part of Defendants or any other reason that would justify this Court valuing Mr. Billips' interest of Alex's Restaurants, Inc. based on its value in 2014 rather than as of today.

Order (Nov. 22, 2021) at 3. Indeed, the Court stated on the record — in contravention of Plaintiff's contentions of malfeasance — that Defendant is responsible for keeping the business afloat:

This is an ongoing business, and it's largely dependent on the efforts of Ms. Billips over there. I don't think if it was [*sic*] for her, that the business would still be open is what it sounds like to me.

Trial Tr. (Aug. 25, 2021) at 241:13–17.

Accordingly, the Master's order dealt with those factual contentions, and his rulings bind Plaintiff as to his remaining causes of action, as the South Carolina Supreme Court noted in

Lawson v. Rogers:

Lawson and Houck raise a final issue, which is that the order below went beyond the scope of the accounting by making conclusions of fact and law which should be left for the tort claims. We disagree. The pleadings reflect all the claims arise out of the same set of facts and wrongdoing. Lawson and Houck, having chosen to proceed in an accounting action, have made an election of remedies, and may not now proceed with alternative remedies for the same wrong.

312 S.C.492, 501, 435 S.C. 853, 858–59 (1993). The Supreme Court reached this conclusion citing the following language from *Corpus Juris Secundum*:

[A] decree in a suit for an accounting is conclusive on the defendants on the question of their liability to the plaintiff as to all matters dealt with in the decree, and is equally conclusive on the plaintiff as determining that he has no other claim against the defendant growing out of the subject matter involved.

1A C.J.S. *Accounting* § 55(a) at 61 (1985). Plaintiff is bound by the Master's determinations regarding his factual allegations, and Plaintiff's remaining causes of action are founded on those same contentions. Accordingly, the Master's orders "involve the merits" of the remaining causes of action too and are immediately appealable on that basis too pursuant to S.C. Code § 14-3-330(1).

II. Appellants Are an Aggrieved Party

The Master's order ascribed a value to Plaintiff's interest in a family business based on the trial testimony despite Plaintiff failing to adduce any competent evidence as to the present value of that interest. Appellants therefore argued that the value of Plaintiff's interest could only be found to be \$0. The Master disagreed and found the value was approximately \$40,000;

Appellants are aggrieved, preserved the issue, and are entitled to appeal. Rule 201(b), S.C.A.C.R.

III. Interlocutory Orders May Be Reviewed in Conjunction With Immediately Appealable Orders

Appellants also appeal the substance of the Master’s Ruling on Plaintiff’s Motion to Reconsider as it relates to the Plaintiff’s choice of remedies and the denial of relief requested by Appellants. While these limited rulings would not normally be immediately appealable, “an order that is not directly appealable will be considered if there is an appealable issue before the court.” *Cox v. Woodmen of the World Ins. Co.*, 347 S.C. 460, 469, 556 S.E.2d 402 (Ct. App. 2001).

Because the Master’s orders involve the merits and are immediately appealable as discussed above, these rulings in the December 21, 2021 order following Plaintiff’s Motion to Reconsider are also properly before this Court.

IV. Conclusion

The Master’s orders are immediately appealable. Appellants request that the briefing deadlines be held in abeyance pending the Court’s determination.

Respectfully submitted:

EPTING & RANNIK, LLC

February 4, 2022
Charleston, South Carolina

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PROOF OF SERVICE

I certify that I have served Appellants' Memorandum as to Appealability dated February 4, 2022 on opposing counsel via e-mail, on February 4, 2022, addressed to Respondent's counsel of record.

Michael W. Sautter, Esq. – mikewsautter147@aol.com

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A copy of the e-mail is attached to this Proof of Service as Exhibit A.

February 4, 2022
Charleston, South Carolina

EPTING & RANNIK, LLC

/s/ Angela Gross_____

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EXHIBIT A

Angela Gross

From: Angela Gross
Sent: Friday, February 4, 2022 2:11 PM
To: Mike Ellis; mikewsautter147@aol.com; Grady Query
Cc: Jaan Rannik; Tracey O'Brien
Subject: RE: Billips vs Billips (2022-000078)
Attachments: 2022 02 04 - Memorandum as to Appealability by APPELLANTS (22-000078).pdf

Counselors:

Attached for filing please find Appellants' Memorandum as to Appealability in the above-referenced appeal which is being submitting to the AIS e-filing system today.

With kindest regards,

Angela

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