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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
The Honorable Jennifer B. McCoy, Circuit Court Judge

Case No. 2016-CP-10-1833
Appellate Case No. 2021001055

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-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, 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-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 are the .....*Respondents*.

FINAL REPLY BRIEF OF APPELLANTS ANDREW AND KIMBERLY McINTIRE

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Appellants Andrew and Kimberly McIntire ("the McIntires") submit this brief reply.

I. The Subcontractors Were Not Proper Respondents to the Prior Appeal

The trial court's May 1, 2017 order (**R. p. 000003**) granted the motion to dismiss filed by Appellant Seaquest Development Company, Inc. ("Seaquest") (**R. p. 000085**), a motion not joined by any Subcontractor.[1] The one motion filed by a Subcontractor[2] — also not joined by any other Subcontractor — was denied as moot. Because the McIntires were not aggrieved by the ruling on the Subcontractor's motion, the McIntires could not have appealed that order. Rule 201, SCACR ("Only a party aggrieved by an order, judgment, sentence or decision may appeal."); *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 . . . ."). Nor was there a separate ground for the dismissal applicable only to the Subcontractors that the McIntires could have appealed.

Indeed, the trial court viewed the arbitration and right to cure issues before it as issues between the McIntires and Seaquest in which the Subcontractors played no part:

> THE COURT: Let's say this. I will give both sides until next -- **subs, you don't need to worry about it since we got a battle going on between the principals right now**. But each side will have until next Wednesday to submit any further written material you would like to submit about the matter.

R. p. 000404 – Hearing Tr. (Oct. 13, 2016) 51:11–17 (emphasis added). Further, the Court indicated that, whatever it ruled, the claims against the Subcontractors would be stayed:

> THE COURT: I think for all of the subcontractors one thing that ought to be done is to stay matters regarding your liability until this first battle is adjudicated which is A, what the forum is and B, what

[1] Referring to Respondents to this appeal.

[2] Red Bay Constructors Corp. ("Red Bay").

> kind of rights are had under the statute to begin the proceedings with the right to cure.
>
> So I can assure you that in the midst of all this we will do something that suits all of the subs in that way. Do I hear any objection to proceeding in that way?
>
> MR. LACOUR [for Subcontractor Lowcountry Fireplaces, Inc.]: No.

R. p. 000397 – Hearing Tr. (Oct. 13, 2016) 44:5–15. In other words, the trial court never reached Red Bay's motion. As such, there was no ruling in its favor and to the McIntire's (or Seaquest's) detriment that could have been appealed and that could have made Red Bay or any other Subcontractor a proper respondent. Because no Subcontractor was a party to the motion that led to the entire case being dismissed, none was "the adverse party" contemplated by Rule 202(a), SCACR.[3]

The McIntires *were* however aggrieved as to the granting of Seaquest's motion and the dismissal of the case. The order was timely appealed (which stayed the effect of the dismissal of the case[4]) and was vacated by this Court (which restored the case to the posture in which it existed prior to the order's entry[5]); *i.e.*, with all parties still in the case.

II. Respondents' Contentions

1. Jurisdiction

Respondents contend that the prior appeal did not "transfer jurisdiction of the entire case to this Court . . . ." **Respondents' Brief** at 7. This contention is uneven, as Respondents

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[3] Respondents have provided no authority from this State to the contrary.

[4] Rule 241(a), S.C.A.C.R.

[5] *Moore v. N. Am. Van Lines*, 319 S.C. 446, 448, 462 S.E.2d 275, 276 (1995) (Generally, reversal of a judgment on appeal has the effect of vacating the judgment and leaving the case standing as if no judgment had been rendered.").

concede that the appealed-from order "dismissed the entire case." *Id.* at 6.[6]

Respondents' contention is that, as no separate appeal was filed as to the Subcontractors, this Court lacked jurisdiction to bind them. This is error, as the dismissal of the entire case was appealed, and this Court's ruling reversing the trial court became law of the case,[7] and restored the case to its posture prior to the entry of the vacated order.[8] This posture included pending claims by both the McIntires and Seaquest against the Subcontractors and a request by the McIntires to stay the claims against the Subcontractors pending arbitration.

2. Two-Issue Rule

Respondents argue that the two-issue rule supports their position, contending that the effect of the trial court's order on the Subcontractors was not appealed. As an initial matter, this misstates the two-issue rule, which does not concern the *effects* of an order; rather, it provides that when there are multiple *grounds* for an order, any unappealed ground becomes an independent basis for affirming the order.[9] That has nothing to do with the posture of the prior appeal in this case, in which all grounds for the order were appealed, and the order was reversed. There was no separate, unappealed ground for dismissal applicable only to the Subcontractors.

Moreover, there was simply no question of the trial court order's effect on the Subcontractors, or on any party — it dismissed and ended the case as to all parties. The

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[6] And appealed in its entirety: "This Court should vacate *the trial court's order*" and "reverse *the judgment* of the circuit court . . . ." **(R. p. 000471, 480 -** McIntire Brief (prior appeal) at 4, 13.

[7] *Lifschultz Fast Freight, Inc. v. Haynsworth, Marion, McKay & Guérard*, 334 S.C. 244, 245, 513 S.E.2d 96, 96–97 (1999).

[8] *Moore v. N. Am. Van Lines*, 319 S.C. 446, 448 462 S.E.2d 275, 276 (1995).

[9] *See, e.g.*, *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case.")

dismissal of the case was appealed, and the order was reversed, reinstating the case as to all parties.

3. Red Bay

Respondents suggest that the trial court's order actually *granted* Red Bay's motion to dismiss. The express language of the trial court's order reveals otherwise:

> NOW, THEREFORE, for the foregoing reasons, it is hereby
>
> ORDERED, ADJUDGED AND DECREED that Seaquest's Motion to Dismiss is GRANTED; it is
>
> ORDERED, ADJUDGED AND DECREED that the Motion to Compel Arbitration is DENIED; it is
>
> ***FURTHER ORDERED AND DECREED that all remaining motions in this case are MOOT***; and it is
>
> FURTHER ORDERED that this case shall be and is hereby DISMISSED.

R. p. 000014 (emphasis added). When a motion is deemed moot, it means the relief it seeks cannot be granted because there is no active case or controversy before the court that would permit the court to grant the requested relief:

> Generally, this Court only considers cases presenting a justiciable controversy. . . . A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court. If there is no actual controversy, this Court will not decide moot or academic questions.

Sloan v. Friends of Hunley, Inc., 369 S.C. 20, 25–26, 630 S.E.2d 474, 477 (2006) (internal citations omitted)). Motions that are moot must therefore be denied. *Id.*

The trial court *could* have granted both Seaquest's and Red Bay's motions to dismiss, in which case Red Bay *would* have been a proper respondent. But it did not. Because the trial court viewed the arbitration and right to cure issues as concerning only the McIntires and

Seaquest (*supra* Part I), it denied Red Bay's motion as moot. Neither the McIntires nor Seaquest was aggrieved with regard to the ruling on Red Bay's motion, and neither could have appealed its denial.

4. Respondents' Remaining Contentions

1. As to the Trial Court's Order

Regarding the trial court's dismissal of the case on the basis of the Right to Cure Act, Respondents state "her [Former Chief Justice Toal's] ruling is now law of the case." **Respondents' Brief** at 20. This is a remarkable and untenable claim, because the trial court's order and the case's dismissal was reversed on appeal. That ruling by *this* Court is the law of the case. *Virginia Elec. & Power Co. v. N.L.R.B.*, 132 F.2d 390 (4th Cir. 1942), *aff'd*, 319 U.S. 533, 63 S. Ct. 1214, 87 L. Ed. 1568 (1943) ("[A]s to the effect of the evidence passed upon by the appellate court, the decision of that court is final and the lower court may not again grant a non-suit or direct a verdict upon the same or substantially similar evidence. To that extent the decision of the appellate court becomes the law of the case."); *see also TFWS, Inc. v. Franchot*, 572 F.3d 186, 191 (4th Cir. 2009) ("once the decision of an appellate court establishes the law of the case, it must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal" (internal quotation marks omitted)). And this Court reinstated the case and remanded in favor of arbitration.[10]

Regarding the *effect* of the trial court's order, Respondents contend that dismissal of the case "finally determined the fate of the claims against the Subcontractor Defendants." **Respondents' Brief** at 11. If so, the reversal of that dismissal on appeal therefore necessarily had the effect of reinstating the claims against the Subcontractor Defendants. Respondents

[10] Pursuant to the Motion to Stay and Compel Arbitration filed by the McIntires. **R. p. 000098**.

argue, though, that the Subcontractors were differently situated than Seaquest with regard to arbitrability, and so the dismissal of the case as to them is different as to the dismissal as to Seaquest. *Id.* If so, and if the trial court had wanted to establish a specific dismissal of the Subcontractors (rather than of the entire case), it would have granted Red Bay's motion rather than denying it as moot.

2. As to This Court's Order

Respondents contend that the trial court's ruling dismissing the case for failure to comply with the Right to Cure Act "has not been overturned." **Respondents' Brief** at 8. Respondents further state that, pursuant to this Court's order, "the trial court's sole mandate upon remand was to refer the case to arbitration." *Id.* at 20.

This Court need not be told by the parties what it ruled or intended. Suffice it to say that the McIntires have relied on the language of this Court's order, which states "the decision of the trial court is REVERSED and REMANDED." The McIntires understood this to mean the case was sent back to the trial court with instructions to grant the McIntire's Motion to Stay and to Compel Arbitration. The effect of the trial court granting that motion would be to stay the matter as to the Subcontractors, as the McIntires' motion requested (**R. p. 000098**) and as was acknowledged during the October 13, 2016 hearing on the parties' motions:

> THE COURT: [The Subcontractors'] contention is that you are not involved in any arbitration battle. And whatever battle you have will be a battle fought at a later time either by cross-claims against you by the general contractor as well as claims in what I call contort negligence claims against you by the Plaintiff; is that right, Mr. Lacour?
>
> MR. LACOUR: Yes, ma'am. I would think Your Honor could stay those claims pending whatever happens, however the other parts of this case go forward.
>
> THE COURT: That's what I would be inclined to do.

MR. EPTING [for the McIntires]: That's the motion I filed, Judge.

R. p. 000396 – Hearing Tr. (Oct. 13, 2016) 43:8–22.

III. Adoption of Part C of Seaquest's Initial Brief

Pursuant to Rule 208(b)(6), SCACR ("[i]n cases involving more than one appellant . . . any party may adopt by reference all or any part of the brief of another"), the McIntires adopt the argument advanced by Seaquest in Part C of its initial brief (entitled "C. The motion for clarification was proper."). **Seaquest Brief** at 11–12.

IV. Conclusion

For the foregoing reasons, the McIntires request that this Court reverse the trial court's ruling on the motion for clarification and confirm that the Subcontractors remain parties to this dispute.

Respectfully submitted:

EPTING & RANNIK, LLC

This 26th day of May, 2022
Charleston, South Carolina

*/s/ Jaan Rannik*_____
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