



STATE OF SOUTH CAROLINA )  
COUNTY OF LEXINGTON )

IN THE COURT OF COMMON PLEAS  
ELEVENTH JUDICIAL CIRCUIT

Emily P. Smith et al, )

C/A No.: 2022-CP-32-01419

Plaintiff )

**AMENDED ORDER GRANTING  
DEFENDANTS' MOTION TO  
DISMISS**

vs. )

Robert T. Smith et al, )

**RECEIVED**  
**Jul 29 2022**  
**SC Court of Appeals**

Defendant. )

**INTRODUCTION**

This matter arises out of Defendants Southern Collection, LLC, Southern Collection Brokerage, LLC, and Terence Smith and Associates, LLC, Robert T. Smith, Robert B. Smith, and Sherry C. Smith's Motion to Dismiss the Complaint of Plaintiffs Emily P. Smith and Emily P. Smith and Associates, LLC, pursuant to Rule 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure. <sup>1</sup>

**FACTUAL BACKGROUND**

On August 18, 2021, Plaintiff, Emily P. Smith, filed an action for Divorce in the Lexington County Family Court, seeking to dissolve her marriage with Defendant, Robert T. Smith. The divorce action is still pending in Family Court. Plaintiff, filed this civil action alleging that Defendant is denying her of her rightfully owed income from their jointly owned real estate brokerage, Southern Collection Brokerage LLC. Defendant South Collection was formed by Emily P. Smith and Robert T. Smith for purposes of operating as a real estate company. Emily and Robert

<sup>1</sup> The Court inadvertently excluded Defendants Robert T. Smith, Robert B. Smith and Sherry C. Smith from the dismissal order. This amended order reflects the parties involved.

were the sole members of Southern Collection and each owned 50% of the distributional interest in the company. On April 27, 2022, the day before this civil action was filed, Plaintiff Emily Smith, filed a Statement of Dissociation with the South Carolina Secretary of State's office from Southern Collection. Pursuant to S.C. Code Ann §33-44-603(3), Emily has formally dissociated herself from the business and she is no longer a member of the Company. On April 29, the day after this civil action was filed, Plaintiff Emily P. Smith, filed a Notice of Motion and Motion to Supplement Complaint in the Family Court action, requesting that the Family Court exclude the parties' businesses from the equitable division of the marital assets. The Motion to Supplement Complaint has to be adjudicated by the Family Court.

On April 28, 2022, the Plaintiff also filed an Emergency Motion for Appointment of Receiver in the Circuit Court. The Court denied this motion on May 6, 2022. On May 12, 2022, Defendants, Robert T. Smith and Terence Smith And Associates, LLC, filed Motions to Dismiss the civil action pursuant to Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure.

A hearing was convened on June 3, 2022 where Desa Ballard, Esq., appeared on behalf of the plaintiff, Emily P. Smith and Mark Goddard, Esq., and Ashby Jones, Esq. appeared on behalf of the Defendants.

### **STANDARD OF REVIEW**

Rule 12(b) of the South Carolina Rules of Civil Procedure provides:

Every defense, in law or fact, to a cause of action in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state facts sufficient to constitute a cause of action, (7) failure to join a party under Rule 19, (8) another action is pending between the same parties for the same claim. A motion making any of these defenses shall be made before pleading

if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a cause of action or defense to which an adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that cause of action or defense. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state facts sufficient to constitute a cause of action, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Under Rule 12(b)(6), SCRCP, a defendant may move to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action. In considering such a motion, the trial court must base its ruling solely on allegations set forth in the complaint. If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999). In deciding whether the trial court properly granted the motion to dismiss, the appellate court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. *Gentry v. Yonce*, 337 S.C. 1, 522 S.E.2d 137 (1999). A motion to dismiss under Rule 12(b)(6) should not be granted if facts alleged and inferences reasonably deducible therefrom entitle the plaintiff to relief under any theory. *Id.* Furthermore, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. *Toussaint v. Ham*, 292 S.C. 415, 357 S.E.2d 8 (1987).

Pursuant to Rule 12(b)(1), SCRCP, where the movant challenges the power of the court over the subject matter, “[t]he question of subject matter jurisdiction is a question of law for the court.” *Chew v. Newsome Chevrolet, Inc.*, 315 S.C. 102, 104, 431 S.E.2d 631, 631 (Ct. App. 1993). “A defendant may seek dismissal of an action pursuant to Rule 12(b)(8) when another action is pending between the same parties for the same claim.” *Cricket Cove Ventures, LLC v.*

*Gilland*, 390 S.C. 312, 320, 701 S.E.2d 39, 44 (Ct. App. 2010). In considering a motion to dismiss based on lack of jurisdiction, the court may consider evidence outside of the pleadings. *Baird v. Charleston County*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999).

### ANALYSIS

#### **A. Motion to Dismiss Pursuant to 12(b)(1)**

Defendants allege that the complaint should be dismissed pursuant to rule 12(b)(1). The family court has exclusive jurisdiction to hear and determine actions involving all types of “marital litigation.” S.C. Code Ann. § 63-3-530(A)(2) grants the family court exclusive jurisdiction to hear and determine actions for “divorce a vinculo matrimonii, separate support and maintenance, legal separation and in other marital litigation between the parties, and for settlement of all legal and equitable rights of the parties in the actions in and to the real and personal property of the marriage...” In addition to marital litigation, the family court also has specific legislative authority to hear and determine additional types of disputes between spouses and former spouses, even if they are presented outside the context of marital litigation. For the family court to properly include property within the marital estate, two factors must coincide. First, the property must be acquired during the marriage” and “[s]econd, the property must be owned on the date of filing or commencement of marital litigation.” *Brown v. Odom*, 425 S.C. 420, 437, 823 S.E.2d 183, 191 (Ct. App. 2019) Marital property is defined as “all real and personal property which has been acquired by the parties during the marriage and which is owned as of the date of filing or commencement of marital litigation.” S.C. Code Ann. § 20-3-630 (2014).

The allegations contained in Plaintiffs’ Complaint pertain directly to ownership and financial interest in Southern Collection Brokerage, LLC. The Defendants argue that membership interests are personal property squarely within the jurisdiction of the Family Court. The Plaintiffs

argue that Southern Collection LLC has not been found to be marital property and argues the Family court does not have jurisdiction to distribute nonmarital property contained in a Limited Liability Company (LLC). Put another way, Plaintiff asserts the LLC is not, and cannot be, marital property. The Court disagrees with the Plaintiffs contention.

Southern Collection was established by both parties during their marriage and on August 18, 2022, when the divorce action was filed in family court, the parties were the sole owners of the limited liability corporation. The South Carolina Supreme Court held in *Levy v. Carolinian, LLC*, that a “distributional interest in an LLC is personal property and may be transferred in whole or in part.” 410 S.C. 140, 146, 763 S.E.2d 594, 597 (2014) (citing S.C. Code Ann §33-44-510(b)). Further, our courts have held that distributional interest in property not inherited and obtained during marriages, are considered marital property and subject to equitable distribution in Family Court. *Jackson v. Jackson*, 432 S.C. 415, 434, 853 S.E.2d 344, 354 (Ct. App. 2020). Because the property was owned by both parties at the time the divorce action was filed, jurisdiction has been vested in the family court. The personal property in question in the instant civil action falls squarely within the exclusive jurisdiction of the family court to apportion.

Plaintiff cites to S.C. Code Ann § 33-44-803, which grants the Circuit Court the right to supervise the winding up of a company after dissolution, as the basis for why it should be in Circuit Court. On August 27, 2022, the Plaintiff Emily P. Smith, filed a Statement of Dissociation from Southern Collection, while the Plaintiff is no longer a member, the corporation has not yet been dissolved, thus the application of S.C. Code Ann § 33-44-803 is premature and does not apply to the facts currently at hand.

Based on the foregoing, the court finds that the Family Court is the proper forum for this action and the relief sought therein. It is important to note, that Plaintiff Emily P. Smith requested

marital assets be apportioned in family court. There have been several Family Court hearings in the domestic action and several hearings are scheduled in the future, all highly indicative of the Family Court establishing jurisdiction in the matter. Plaintiff has not provided the Court with any indication that the Family Court has divested itself of jurisdiction in this matter. Furthermore, in the filing of Plaintiffs pending Motion to Supplement Complaint, Plaintiff essentially concedes that Family Court has jurisdiction over the division of marital assets in requesting such relief from the Family Court.

At the hearing on June 3, 2022, Plaintiff indicated that they have not received any answers from the family court regarding whether Southern Collection LLC is marital property, however, the issue is presently before the family court and ongoing.<sup>2</sup> At this time, the Family Court has subject matter jurisdiction of the matters asserted and relief sought in Plaintiff's Complaint. Therefore, Defendants' Motion to Dismiss pursuant to Rule 12(b)(1), SCRCR is granted.

#### **B. Motion to Dismiss Pursuant to Rule 12(b)(6)**

Even assuming arguendo, the Court had the requisite subject matter jurisdiction in this action, the Court finds this action would also fail on meritorious grounds. In the Complaint, Plaintiff is seeking a judicial dissolution and winding up of Southern Collection, appointment of a receiver, and an accounting of assets of the business. Plaintiff has also brought a cause of action for conversion, the imposition of a constructive trust, and a request for attorneys' fees and costs resulting from this action. "Viewing the evidence in favor of the plaintiff, the motion must be granted if facts alleged in the complaint and inferences reasonably deducible therefrom do not

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<sup>2</sup> This Court recognizes that the Family Courts may determine some assets not to be marital property. Such a determination on certain assets could make the Circuit Court the appropriate forum under the appropriate circumstances, however, that is not the case at this time.

entitle the plaintiff to relief on any theory of the case.” *Jarrell v. Petoseed Co.*, 331 S.C. 207, 209, 500 S.E.2d 793, 794 (Ct. App. 1998). “The question is whether in the light most favorable to plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief.” *Toussaint v. Ham*, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987). The Court finds that the Plaintiff has not set forth sufficient facts to support the multiple causes of action against the Defendants.

As previously held, the Court finds that the family court has the necessary and proper tools to prevent the dissipation or other improper conduct involving contested marital assets.

#### **Conclusion**

For the foregoing reasons, Defendants’ Motions to Dismiss pursuant to Rule 12(b)(1), and in the alternative Rule 12(b)(6) are **GRANTED without prejudice**. The Court instructs parties to continue seeking relief from the Family Court directly. If upon conclusion of the family court action, further proceedings become necessary in Circuit Court, parties may seek further adjudication.

**IT IS SO ORDERED.**

[JUDICIAL E-SIGNATURE ON THE FOLLOWING PAGE]



Lexington Common Pleas

**Case Caption:** Emily P. Smith , plaintiff, et al VS Robert T. Smith , defendant, et al  
**Case Number:** 2022CP3201419  
**Type:** Order/Amend

It Is So Ordered

s/ Walton J. McLeod

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