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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
The Honorable Clifton Newman, Circuit Court Judge

Appellate Case No.: 2022-000556

JBCM Holdings d/b/a Goodfellas Cabaret,
Cheetah Charleston Gentlemen's Club &
Generation X Cabaret,

Appellants,

v.

Carolina Coin Amusement, LLC and
Ronald J. Davis,

Respondents.

INITIAL BRIEF OF RESPONDENTS

Edward L. Phipps, Esq.
Mark R.H. Huber, Esq.
Phipps Law Firm, LLC
571 Savannah Highway
Charleston, SC 29407
843-300-4444
Attorneys for Respondents

Jarrel L. Wigger, Esq.
Wigger Law Firm, Inc.
8086 Rivers Avenue, Suite A
North Charleston, SC 29406
Attorney for Appellant

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II. The Court did not err in dismissing the Appellants’ case pursuant to the Statute of Limitations (S.C. Code § 15-3-530) because the Complaint was devoid of any facts, terms or allegations that the filing of the Complaint was within the limitations, and the Court’s denial of Appellants’ request for leave to amend their Complaint was not improper.

III. The Court did not err in dismissing the Appellants’ case pursuant to discovery not being completed, nor was there an abuse of discretion on the part of the Court in dismissing Appellants’ Complaint, because the Complaint was devoid of any facts, terms or allegations that there was no alternative but to dismiss.

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STATEMENT OF ISSUES ON APPEAL

- I. The Court did not err in dismissing the Appellants' case pursuant to the Statute of Frauds (S.C. Code § 32-3-10) because the Complaint was devoid of any facts, terms or allegations that the agreement could have been performed within one year.
- II. The Court did not err in dismissing the Appellants' case pursuant to the Statute of Limitations (S.C. Code § 15-3-530) because the Complaint was devoid of any facts, terms or allegations that the filing of the Complaint was within the limitations, and the Court's denial of Appellants' request for leave to amend their Complaint was not improper.
- III. The Court did not err in dismissing the Appellants' case pursuant to discovery not being completed, nor was there an abuse of discretion on the part of the Court in dismissing Appellants' Complaint, because the Complaint was devoid of any facts, terms or allegations that there was no alternative but to dismiss the case.

STATEMENT OF THE CASE

Appellants filed their initial Complaint in the Charleston County Court of Common Pleas on August 24, 2021, Civil Action No. 2021-CP-10-03905 (the "Complaint"). The Appellants alleged breach of contract, fraudulent inducement and conversion as the causes of actions in their Complaint. The Respondents filed a Motion to Dismiss pursuant to SCRPC Rule 12(b)(6) on January 11, 2022 (the "Motion to Dismiss"). The hearing on the Motion to Dismiss occurred on March 21, 2022. After hearing arguments from both parties, the Honorable Judge Clifton Newman dismissed the case. This appeal results from that dismissal, wherein the Appellants allege that the Honorable Judge Newman erred in granting Respondents' Motion to Dismiss and in not allowing Appellants to amend their Complaint and further abused his discretion in dismissing the case.

FACTS

The Appellants and Respondents entered into an oral agreement on or around 2014 wherein the Respondents' ATM machines would be used at Appellants' businesses located in North Charleston, South Carolina. The agreement was that the Respondents would pay Appellants a

percentage of the portion of the funds processed through said ATM machines. At some point in early to mid-2018 there became a dispute between the parties about usage and payment percentages, which ultimately ended the relationship and any agreement.

ARGUMENTS

I. The Court did not err in dismissing the Appellants’ case pursuant to the Statute of Frauds (S.C. Code § 32-3-10) because the Complaint was devoid of any facts, terms or allegations that the agreement could have been performed within one year.

“In considering [a Motion to Dismiss], the trial court must base its ruling solely on allegations set forth in the complaint.” *Spence v. Spence*, 386 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). “Conclusory statements and facts ‘merely consistent with a defendant’s liability’ do not suffice to carry a complaint over ‘the line between possibility and plausibility.’” *Id.*

A complaint is not sufficient “if it tenders naked assertions devoid of further factual enhancement.” *Id.* Likewise, “threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* “Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not shown – that the pleader is entitled to relief.” *Iqbal*, 556 U.S. at 679.

At the March 21, 2022 Motion to Dismiss Hearing, the Respondents argued that Appellants’ failed to meet the requirements of S.C. Code § 32-3-10 (Statute of Frauds), which bars recovery for any agreement not in writing that cannot be performed within one year from the making thereof. In the Complaint, Appellants stated that “the parties entered into an agreement in

2015 whereby the Defendants' ATM machines would be used at Plaintiff's business ... and that the Defendants would pay Plaintiff a percentage of the portion of the processed funds through said ATM machines at Plaintiff's business location.' (See Complaint, P. 5). This is the only paragraph in the Complaint that attempts to provide any factual matter as to the terms of any agreement between the parties. The Appellants fail to allege any facts as to whether or not the agreement could have been performed within one year. Further, Appellants state in their Complaint that the Respondents owed the Appellants under the agreement a certain amount of money over a four (4) year period, thereby factually demonstrating that the agreement in fact was not/could not be performed within one year, nor was it expected to be.

The Court did not err in dismissing the Appellants' case pursuant to the Statute of Frauds because the Complaint was completely devoid of any factual matters, terms or allegations of the agreement that would support Appellants' argument that the agreement could have been performed within one (1) year.

II. The Court did not err in dismissing the Appellants' case pursuant to the Statute of Limitations (S.C. Code § 15-3-530) because the Complaint was devoid of any facts, terms or allegations that the filing of the Complaint was within the limitations, and the Court's denial of Appellants' request for leave to amend their Complaint was not improper.

"On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court." *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009) (see also *Fairfax v. CBS Corp.*, 2 F.4th 286, 291 (4th Cir. 2021) ("We review de novo the grant of a motion to dismiss for failure to state a claim, applying the same standards as the district court."). "In evaluating a complaint at this stage, a court also may consider documents integral to and relied upon in the complaint ... so long as the plaintiff does not question their authenticity." *Phillips v. LCI Int'l, Inc.*, 190 F.3d 609, 618 (4th Cir. 1999). To quote the *Iqbal*

Court again, “a complaint is not sufficient ‘if it tenders naked assertions devoid of further factual enhancement.’” *Iqbal*, 556 U.S. at 678. Likewise, “threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* “Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not shown – that the pleader is entitled to relief.” *Iqbal*, 556 U.S. at 679.

District courts are encouraged to grant leave freely “when justice so requires.” *Deasy v. Hill*, 833 F.2d 38, 40 (4th Cir. 1987). However, the decision to grant or deny a motion to amend is vested in the sound discretion of the trial court judge. *Id.* “Accordingly, this Court may disturb a trial judge’s decision regarding a Rule 15 motion only upon finding an abuse of discretion.” *Gladhill v. General Motors Corp.*, 743 F.2d 1049, 1052 (4th Cir. 1984). Although Rule 15 encompasses a preference for liberal leave to amend pleadings, a motion to amend should not be granted if it will cause undue prejudice to the opposing party or if the party seeking to amend acted in bad faith. *Harding v. Kellam*, 155 F.3d 559 (4th Cir. 1998) (1998 WL 406866, at 2*). Leave to amend also should not be granted if the amendment will cause undue delay or if the party seeking to amend acted with a dilatory motive. *Id.*

The law is clear on what must be pled in a complaint to properly state a claim for which relief may be granted. The Appellants not only failed to meet this standard, but Appellants’ Complaint was devoid of factual matter capable of giving the court even a scintilla of informative or evidentiary facts that could sufficiently support the causes of action Appellants alleged or make the Complaint plausible on its face. The Appellants fail to provide any specificity as to the dates or timing of any of the allegations in the Complaint other than, “the parties entered into an agreement in 2015.” (See Complaint, P. 5). The Statute of Limitations for a breach of contract is three (3) years. (See SC Code § 15-3-530). The Appellant’s Summons and Complaint was filed

August 24, 2021, nearly six (6) years later. However, such specificity of timing is necessary to sufficiently plead the causes of action Appellants allege in their Complaint. The Appellants argue extrinsic facts that they attempted to introduce at the Hearing on the Motion to Dismiss in the form of an Affidavit speaking to the timing of the alleged breach. Said Affidavit was correctly found to be invalid, as such document was not integral to or relied on in Appellants' Complaint.

In addition, Appellants admitted to the lack of factual matter sufficient to support Appellants claims during the March 21, 2022 hearing. "I'll agree with Mr. Phipps our Complaint is silent¹ about when our person found out about it," referring to the timing of the alleged breach by Respondents for Statute of Limitations purposes. (See Transcript of Hearing, P. 6, 12-13). "Your Honor, we got involved in the case right as the statute [of limitations] was coming up and we filed our complaint to meet the statute." (See Transcript of Hearing, P. 6, 6-8). Appellants were aware of the Statute of Limitations language needed for their alleged causes of action in their Complaint. Appellants further stated, "And to the extent that our Complaint is deficient I would ask leave from the Court to amend the Complaint to incorporate any or correct any deficiencies with it. ... I would ask the Court for leave to amend to ... *kind of fill in some of the blanks* that Mr. Phipps is talking about." (See Transcript of Hearing, P. 7, 1-2)(*emphasis added*). These quotes are admissions as to the level of insufficiency of the allegations in the Complaint and the Appellants acknowledgement of how devoid the Complaint was of any factual matter to support their causes of action.

As stated above, before filing the Complaint the Appellants were fully aware of a Statute of Limitation issue and still filed a Complaint omitting sufficient factual/subject matter to properly

¹ The Transcript of Hearing has Appellants' counsel saying "solid" instead of the word "silent" but is an error/mistype of the Court Reporter, and Respondents' counsel has reached out to the Court Reporter to have the Transcript of Hearing corrected/amended to represent the correct quote of Appellants' Counsel.

allege their listed causes of action. It is indisputable how clearly the Appellants failed to properly and sufficiently plead their Complaint and any factual matter that could state a claim to relief that is plausible on its face. Appellants solely made conclusory statements and naked assertions without any further factual enhancement, as the *Iqbal* Court emphasized, that could make their Complaint sufficient or show that the pleader is entitled to relief. Further, the Court's denial of Appellants request for leave to amend their Complaint was proper because Appellants were fully aware of the Complaint's pleading deficiencies prior to filing.

III. The Court did not err in dismissing the Appellants' case pursuant to discovery not being completed, nor was there an abuse of discretion on the part of the Court in dismissing Appellants' Complaint, because the Complaint was devoid of any facts, terms or allegations that there was no alternative but to dismiss.

“On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court.” *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). “In considering such a motion, the trial court must base its ruling solely on allegations set forth in the complaint.” *Spence v. Spence*, 386 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). *Deasy v. Hill*, 833 F.2d 38, 40 (4th Cir. 1987). The decision to grant or deny a motion to amend is vested in the sound discretion of the trial court judge. *Deasy v. Hill*, 833 F.2d 38, 40 (4th Cir. 1987). “Accordingly, this Court may disturb a trial judge's decision regarding a Rule 15 motion only upon finding an abuse of discretion.” *Gladhill v. General Motors Corp.*, 743 F.2d 1049, 1052 (4th Cir. 1984).

Post the Summons and Complaint filing Appellants' have engaging in ambiguous logrolling of facts, terms, and allegations that do not/does not exist in the Complaint, nor in fact. The Court did not abuse its discretion because it used sound judgment to review the Complaint, the Motion to Dismiss, the Appellants' Memo and heard arguments from both parties' regarding

same. The Court decided that the Complaint failed to state a claim upon which relief may be granted because the Complaint was not sufficiently pled to state a claim that could overcome fatal matters involving Statute of Frauds and Statute of Limitations on its face. The Court clearly found that Appellants' admissions precluded them to be able to amend their Complaint, and deference to that sound decision cannot be challenged. The Appellants are not allowed to rely on the discovery process to meet their burden of a well-pleaded complaint rule. The Court did not abuse its discretion in denying Appellants' request to amend their Complaint and dismissing the action.

CONCLUSION

The trial court did not err in granting Respondents' Motion to Dismiss under Rule 12(b)(6) for failure to state a claim upon which relief may be granted because Appellants' Complaint was grossly devoid of any factual matter sufficient to state a claim plausible on its face. The action on its face as pled violated the Statute of Frauds and the Statute of Limitations. The trial court did not abuse its discretion in dismissing the case and denying Appellants' request for leave to amend their Complaint because the Court used sound discretion and consideration in making these judgments and the dismissal of the case should not be reversed.

Respectfully Submitted,

Phipps Law Firm, LLC

Edward L. Phipps, Esq. (Bar No. 70252)
Mark R.H. Huber, Esq. (Bar No. 102738)
571 Savannah Highway
Charleston, SC 29407
843-300-4444
edward@phippfirm.com
mark@phippfirm.com

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APPEAL FROM CHARLESTON COUNTY
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Cheetah Charleston Gentlemen's Club &
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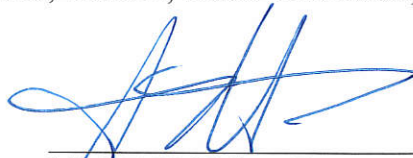
v.

Carolina Coin Amusement, LLC and
Ronald J. Davis,

Respondents.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondents and Respondents' Designation of Matter to be included in the record on Appeal on JBCM Holdings d/b/a Goodfellas Cabaret, Cheetah Charleston Gentlemen's Club & Generation X Cabaret in the United States Mail, postage prepaid, on September 2, 2022, addressed to Appellants' Attorney of record, Jarrel L. Wigger, Esquire, Wigger Law Firm, Inc., 8086 Rivers Ave., Suite A, North Charleston, South Carolina 29406.



Mark R.H. Huber, Esq.
Edward L. Phipps, Esq.
Phipps Law Firm, LLC
571 Savannah Highway
Charleston, SC 29407
843-300-4444
Attorneys for Respondents



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SC Court of Appeals

September 2, 2022

VIA US CERTIFIED MAIL AND EMAIL

Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: JBCM Holdings d/b/a Goodfellas Cabaret, Cheetah Charleston Gentlemen's Club & Generation X Cabaret, Appellant v. Carolina Coin Amusement, LLC and Ronald J. Davis, Respondents.
Appellate Case No. 2022-000556

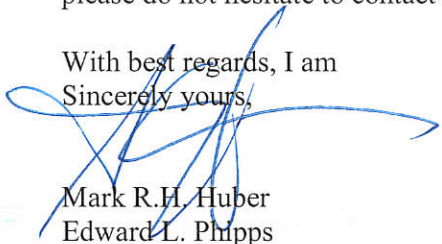
Dear Ms. Kitchings:

Please find enclosed one original and one copy of the Respondents' Initial Brief and Designation of Matter, along with Proof of Service of same upon Counsel for the Appellants.

By copy of this letter, I am serving the same upon Jarrel Wigger, Esq.

Thank you for your time and consideration in this matter. If you should require anything further, please do not hesitate to contact me at any time.

With best regards, I am
Sincerely yours,



Mark R.H. Huber
Edward L. Phipps
Attorneys at Law

ELP/MRHH

cc:
Jarrel Wigger, Esquire
Wigger Law Firm, Inc.
8086 Rivers Ave., Suite A
North Charleston, SC 29406
Attorney for Appellants