

STATE OF SOUTH CAROLINA)

COUNTY OF CHESTER)

Heidi Gersten and Ivanka Ayoub,)

Plaintiffs,)

vs.)

Kevin Carter; Richard Davis; Joseph)
Tirbovich, Nationwide Mutual Insurance)
Company; Interinsurance Exchange of the)
Automobile Club; John Ammendola;)
Trustgard Insurance Company, *et al.*)

Defendants.)

IN THE COURT OF COMMON PLEAS

Case No. 2018-CP-12-000074

and

Case No. 2018-CP-12-000117

**ORDER ON
MOTION TO DISMISS**

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SC Court of Appeals

These matters come before the Court pursuant to Defendants' Trustgard Insurance Company ("Trustgard") and John Ammendola's Motions to Dismiss, and Trustgard's Motion to Quash Discovery. The Court held a hearing on these and other Defendants' motions on September 5, 2018. Trustgard and John Ammendola appeared by and through their attorneys. Plaintiffs Gersten and Ayoub appeared *pro se*. Plaintiff Hubbard did not appear. For the reasons set forth below, the Motions to dismiss of Trustgard and John Ammendola are granted. Trustgard's Motion to Quash is dismissed, without prejudice, as moot.

I. STATEMENT OF THE CASE

These two actions arise out of an automobile collision that took place on March 19, 2015. Plaintiff Heidi Gersten, was driving on I-77 in Chester County when she was involved in a motor vehicle accident with Kevin Carter. Carter was operating a vehicle insured by Nationwide Insurance. Gersten was driving a van owned by her mother, Plaintiff Ivanka Ayoub, which was insured by Trustgard.

Gersten filed a property damage arbitration claim on February 21, 2018, Case No. 2018-CP-12-000074, (hereinafter "Arbitration Action"). The claim also named as defendants Kevin Carter, Richard Davis, Nationwide Mutual Insurance Company, Interinsurance of the Automobile Club, and Trustgard.

Gersten later prepared a "First Amended Claim for Property Damage Verified" (hereinafter "Amended Arbitration Complaint") dated March 2, 2018. The Amended Arbitration Complaint added Gersten's mother, Ayoub, as a claimant, and added Joseph Tirbovich and John Ammendola as additional defendants. Gersten and Ayoub never obtained an Amended Summons listing Ayoub as a claimant. The Amended Arbitration Complaint was filed March 27, 2018.

On March 16, 2018, Gersten, Ayoub, and Daniel Hubbard filed a civil lawsuit, 2018-CP-12-000117, ("Circuit Court Action") in this court, seeking, *inter alia*, recovery for injuries arising out of the collision. In addition to the Defendants named in the Amended Arbitration Complaint, the Plaintiffs named the South Carolina Department of Public Safety, Blackwell (sic), Chevrolet, GMC, and unknown John Doe defendants.

On April 26, 2018, Judge Gibbons, acting as the Chief Administrative Judge, for Chester County Circuit Court, entered an Order finding the claims asserted in the Arbitration Action were outside the scope of arbitration. He transferred the Arbitration Action to the Common Pleas docket and consolidated the case with the Circuit Court action. (April 26, 2018, Form 4 Order). Gersten and Ayoub filed a Motion to Alter or Amend that order.

Just before the hearing on the motions under consideration, Plaintiff served, via mail, an Amended Complaint dated August 29, 2018

The Court has reviewed the original Arbitration Action, the Amended Arbitration Action, the Complaint in the Circuit Court Action, and the Amended Complaint the Circuit Court Action;

the ruling is the same regardless of whether the cases have been consolidated or not, and regardless of which Complaint in the Circuit Court Action is operable.

This case was set for a hearing on the various pending motions for September 5, 2018. The case was placed on the non-jury roster for a merits hearing for the same week. Plaintiff Gersten filed a motion for continuance. At the hearing, the defendants all consented to continuing the merits hearing of the case, but they requested that the motions be heard. Gersten consented to the Court proceeding with hearing the various motions.

II. STANDARD OF REVIEW AND DISCUSSION

A. SCRCP 12(b)(6) Failure to State Facts Sufficient to Constitute a cause of Action as to both Trustgard and John Ammendola

SCRCP 12(b)(6) allows a party to move to dismiss an action for "failure to state a claim upon which relief can be granted." A decision on a 12(b)(6) motion "must be bottomed and premised solely upon the allegations set forth by the plaintiff." Williams v. Condon, 347 S.C. 227, 233 (Ct. App. 2001). "The question to be considered is whether, in the light most favorable to the plaintiff, the pleadings articulate any valid claim for relief." Id. "If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then dismissal under Rule 12(b)(6) is improper." Doe v. Marion, 373 S.C. 390 (2007). See Skywaves I Corp. v. Branch Banking & Tr. Co., 814 S.E.2d 643, 656 (S.C. Ct. App. 2018), reh'g denied (June 21, 2018). "[A] mere conclusory allegation, unsupported by any particularized allegations of fact, is insufficient" to withstand a 12(b)(6) motion to dismiss. Jones v. Gilstrap, 288 S.C. 525, 528, 343 S.E.2d 646, 648 (Ct. App. 1986)).

1. The Circuit Court Action

The only reference to Trustgard in the original Complaint in the Circuit Court Action is that it is "a company maintaining and operating and doing business in the State of North Carolina"

and that it insured Gersten and Ayoub. See Complaint at ¶ 7, 17, 19. The Complaint includes causes of action for Negligence against Kevin Carter, and against all Defendants for Fraud, Fraudulent Inducement, Intentional Inflection of Emotional Distress, Loss of Consortium, Product Liability, Breach of Contract, Invasion of Privacy, Strict Liability, Conspiracy, Misrepresentation, Deceit, Duress and Undue Influence, Slander, Libel, Defamation, Malicious Prosecution, and prayers for damages, all asserted against all defendants. However, there are no facts alleged which support any of the causes of action. The Complaint merely pleads some of the legal elements of the causes of action. The Court notes that Trustgard states that it is based on Ohio and that Gersten was not personally insured with Trustgard (only the vehicle she was driving), but regardless of the validity of these statements, absent any further allegations Plaintiffs have not alleged facts under which they would be entitled to relief under any legal theory.

John Ammendola's name does not appear anywhere in the body of the original Complaint in the Circuit Court Action, although he is listed in the caption. With no allegations made against Mr. Ammendola whatsoever, this action is factually insufficient on its face without the necessity of any further analysis. Potter v. Clark, 497 F.2d 1206, 1207 (7th Cir.1974) (per curiam)(dismissing complaint that was silent as to defendant except for his name appearing in caption).

This Court notes that a short time prior to the hearing in which the Motions to Dismiss were heard, Plaintiffs served an Amended Complaint in the Common Pleas Action. The Amended Complaint also includes causes of action for Negligence against Kevin Carter, and against all Defendants for Fraud, Fraudulent Inducement, Intentional Inflection of Emotional Distress, Negligent Inflection of Emotional Distress, Loss of Consortium, Product Liability, Breach of Contract, Invasion of Privacy, Strict Liability, Conspiracy, Misrepresentation, Deceit, Duress and

Undue Influence, Slander, Libel, Defamation, Malicious Prosecution, and prayers for damages, all asserted against all defendants. This Amended Complaint does not allege any material additional facts as to Trustgard or John Ammendola. The Amended Complaint alleges that both Ayoub and Gersten were insured with Trustgard. (¶. 46, 48.) Paragraph 65 alleges that Trustgard and John Ammendola (and other defendants) are all, "...in breach of contract, among other things." There is no allegation as to the terms of the contract, or how it was breached. Paragraph 71 alleges Trustgard, among other defendants, "...made a representation of false statements of material fact." There is no allegation of any representation made by Trustgard or John Ammendola. Paragraph 98 alleges Ayoub and Gersten had a contract with Trustgard, without any other detail. Paragraph 99 alleges the "Defendants breached their duty." Otherwise, the Amended Complaint merely attempts to set forth legal requirements of causes of action. It does not include any facts supporting any cause of action as to Trustgard or John Ammendola. Accordingly, the Circuit Court Action is dismissed as to Trustgard and John Ammendola pursuant to Rule 12(b)(6), SCRCP.

2. The Arbitration Action

In the Arbitration Action, the only references to John Ammendola are conclusory allegations that he violated the law without any specific facts to support such a violation. See First Amended Claim ¶ 168, 173, 174, 183, 188, 193, 198 (alleging Ammendola is in violation of S.C. Code Section 38-59-20); ¶ 203 and 208 (seeking damages for Ammendola's violation of S.C. Code Section 38-59-20). Without any specific facts that would support the violations, these legal conclusions are simply insufficient to withstand a Motion to Dismiss. Moreover, there is no private cause of action under S.C. Code Section 38-59-20.

Beyond these conclusory allegations and the undisputed fact that Trustgard issued an insurance policy involved in the accident, the only specific allegations in the Arbitration Claim

against Trustgard relate to certain communications between representatives of Trustgard and Gersten about a claims or claims regarding the accident. First Amended Claim at ¶ 229, 230, 232, 233. These allegations reference a payment from Trustgard to Gersten for Medpay and an offer of payment for a property damage claim. Setting aside that Trustgard has objected to Plaintiffs' characterization of these exchanges, and assuming they are true for the purpose of this Motion, Plaintiffs make no specific allegations made as to how Trustgard's handling of any claim regarding this accident violates either a statute or the term of any insurance policy. Neither these allegations nor any other allegations in the Arbitration Claim against Trustgard support Plaintiffs' claim for legal relief under any theory.

The same or similar unsupported conclusory allegations are made against Trustgard in the Amended Arbitration Claim. See First Amended Claim ¶ 215 (alleging Trustgard breached a contractual duty, was negligent, and acted in bad faith); ¶ 167, 172, 177, 182, 187, 192, 197 (alleging Trustgard is in violation of S.C. Code Section 38-59-20); ¶ 202 and 207 (seeking damages for Trustgard's violation of S.C. Code Section 38-59-20).¹

Further, the legal basis for the arbitration claim, S. C. Code § 38-77-710, provides solely for the arbitration of "property damage liability claims arising out of motor vehicle collisions...." It is not a mechanism for bringing any other type of claim.

Finally, S. C. Code § 38-59-20 does not create a private cause of action. Gaskins v. Southern Farm Bureau Cas. Ins. Co., 343 S.C. 666, 541 S.E.2d 269 (Ct.App.2000). Therefore,

¹ A number of allegations in both the Common Pleas Action and the Arbitration Claim broadly assert legal violations against all "Defendants," sometimes with formulaic recitations of the elements of causes of action. These allegations which do not distinguish in any way between the various Defendants in these actions are not creditable because they are both "conclusory" and "unsupported by any particularized allegations of fact." Skywaves I Corp. 814 S.E.2d at 656.

even if the conclusory allegation that Trustgard or John Ammendola were "...in violation of the South Carolina Code of Laws, Title 38, CHAPTER 59, ARTICLE 1, SECTION 38-59-20 Improper claim practices." stated facts which were otherwise sufficient constitute a cause of action (it does not), there is no private cause of action for violation of that code section. It provides only for an administrative remedy before the Department of Insurance.

B. SCRCP 12(b)(2) Lack of Jurisdiction over John Ammendola

SCRCP 12(b)(6) allows a party to move to dismiss an action for "lack of jurisdiction over the person." The burden of showing personal jurisdiction is on Plaintiffs. "At the pretrial stage, the burden of proving personal jurisdiction over a nonresident is met by a prima facie showing of jurisdiction." Coggeshall v. Reprod. Endocrine Assocs. of Charlotte, 376 S.C. 12, 16, 655 S.E.2d 476, 478 (2007)(internal citation omitted)). To determine the propriety of personal jurisdiction over a nonresident defendant, the relevant analysis is whether "there exist minimum contacts between the defendant and the forum state such that maintenance of the suit does not offend traditional notions of fair play and substantial justice." Cockrell v. Hillerich & Bradsby Co., 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005). Plaintiffs have not pled any facts as to Mr. Ammendola. They have not referred to his state of residency, the identity of his employer, or any other fact, and they have failed to make this prima facie showing by demonstrating the "minimum contacts" necessary for this court to have jurisdiction over him. To the extent it is argued that any minimum contacts that exist as to Trustgard be imputed to Mr. Ammendola, this argument fails because "the focus must center on the contacts generated by [Mr. Ammendola], and not on the unilateral actions of some other entity." *Id.* at 492. As there are no allegations as to "minimum contacts" or that Mr. Ammendola took any action with respect to the accident or resulting claims, there is not even a starting point for a court to analyze the fundamental fairness of making him defend this lawsuit in

South Carolina. Plaintiffs have failed to meet their burden as to personal jurisdiction of Mr. Ammendola and the case against him must be dismissed pursuant to SCRPC 12(b)(2).

C. 12(b)(5) Insufficiency of Service of Process as to John Ammendola

Because John Ammendola was never served in either the Arbitration Action or the Circuit Court Action, dismissal is appropriate under SCRPC 12(b)(5). See Brown v. Evatt, 322 S.C. 189, 194, 470 S.E.2d 848, 850 (1996) (“A summons is not a mere notice, but a means for giving jurisdiction to the court, and unless it is waived, the court cannot otherwise obtain personal jurisdiction.”)(internal citation omitted). Service of the summons within the parameters of the rules of procedure is more than a mere formality, as without it a court has no power to render a personal judgment against a defendant. Louden v. Moragne, 327 S.C. 465, 468, 486 S.E.2d 525, 526 (Cl. App. 1997).

D. Dismissal of Loss Of Consortium Claims

Plaintiff Ayoub, the mother of Plaintiff Gersten, was not involved in the accident but the Complaint alleges that she “suffers, among other things, loss of consortium.” Plaintiff Hubbard, Gersten’s brother, alleges he “was unable to work for a period and, accordingly, loss (sic) wages...” He was not involved in the accident. Our Supreme Court has refused to recognize a cause of action for maternal or filial loss of consortium. South Carolina does recognize loss of spousal consortium, but that cause of action was expressly created: SC Code Ann. 15-75-20. The Supreme Court has held that the absence of a similar statutory cause of action for other loss of consortia is persuasive evidence that the General Assembly did not intend to recognize any such causes of action:

In Taylor v. Medenica, this Court held that the determination of which relationships may give rise to a loss of consortium claim in South Carolina is one best left to the discretion of the legislature, 479 S.E.2d 35, 47 (S.C. 1996) (declining to recognize a cause of action for loss of parental consortium). The United States District Court

for the District of South Carolina adopted the *Taylor* analysis in finding that South Carolina law did not provide a cause of action for loss of consortium of a child or for filial consortium. *Kirkland v. Sam's East, Inc.*, 411 F.Supp. 2d 639, 641 (D.S.C. 2005). Today, we extend our *Taylor* analysis in holding that South Carolina law does not recognize claims for loss of filial consortium. Such rights did not exist under the common law, and the legislature has not provided such a right by statute.

Doe v. Greenville Cty. School District 651 S.E.2d 305, 308 (S.C. 2007).

Moreover, Daniel Hubbard did not appear at the hearing. Ivanka Ayoub appeared at the hearing, but did not offer any argument. The claims by Ayoub and Hubbard are therefore dismissed.

ORDER

For all of the above-stated reasons, this Court hereby GRANTS Trustgard Insurance Company and John Ammendola's Motion to Dismiss the Complaints and Amended Complaints in both 2018-CP-12-000074 and 2018-CP-12-000117, with prejudice. Because the Motion to Dismiss is granted as to Trustgard, its pending Motion to Quash is hereby dismissed without prejudice as moot.

AND IT IS SO ORDERED!

John C. Hayes, III
Circuit Court Judge



Chester Common Pleas

Case Caption: Heidi Gersten , plaintiff, et al VS Kevin Carter , defendant, et al

Case Number: 2018CP1200117

Type: Order/Dismissal

So Ordered

s/John C. Hayes III 2049

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