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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY

The Honorable Allison Renee Lee, Circuit Court Judge

Case No. 2020-CP-40-01980
Appellate Case No. 2021-000804

Johnnie Cordero, ... Appellant,

v.

Matthew Kisner, in his official capacity as Chair of The Richland County Democratic Party; The Richland County Democratic Party; Trav Robertson, Jr., in his official capacity as Chair of The South Carolina Democratic Party; and The South Carolina Democratic Party, ... Respondents.

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial court err in denying Appellant's Motion for Default Judgment?

   A. Did Respondents timely file a responsive pleading?

   B. Is an additional sustaining ground that Appellant failed to state a claim upon which default judgment may be taken?

II. Did the trial court err in granting Respondents' Motion to Dismiss?

   A. Does Appellant have a private right of action to pursue the statutory violations alleged in the Complaint?

   B. Does Appellant have public importance standing?

   C. Are Appellant's claims moot?

STATEMENT OF THE CASE

Pro se Appellant Johnnie Cordero commenced this action by filing a Summons and Complaint in the Richland County Court of Common Pleas on April 16, 2020. (Summ. & Compl., R. pp. 1-14.)

Respondents Matthew Kisner and the Richland County Democratic Party ("RCDP") were served with a copy of the Summons and Complaint on or about April 17, 2020.

Nekki Shutt, Esq., as counsel for Respondents, accepted service for Respondents Trav Robertson, Jr., and the South Carolina Democratic Party ("SCDP") on May 14, 2020. Upon acceptance of service by Shutt, the parties agreed to a deadline of June 17, 2020, for all Respondents to respond to the Complaint. (Extension of Time, R. p. 15.)

On May 29, 2020, Appellant filed a First Amended Complaint ("FAC"), which he served on Respondents via U.S. Mail on May 22, 2020. (FAC, R. pp. 16-32.) The FAC asserts three causes of action: (1) violation of the state statutes governing party organization, specifically S.C. Code Ann. sections 7-9-70, -80, and -100; (2) violation of the Voting Rights Act; and (3) violation of the First, Fourteenth, and Fifteenth Amendments to the U.S. Constitution, under 42 U.S.C. § 1983. Id.

On June 9, 2020, Respondents SCDP and Robertson, with the consent of Respondents RCDP and Kisner, removed the action to the U.S. District Court for the District of South Carolina, Columbia Division, based on federal question jurisdiction. (Notice of Removal, R. pp. 35-93.)

On June 16, 2020, Respondents filed a Joint Motion to Dismiss Appellant's First Amended Complaint, pursuant to Fed. R. Civ. P. 12(b)(6), for failure to state a claim upon which relief can be granted. (Resp. Fed. Mot. to Dismiss, ECF 9, R. pp. 94-95.)

On September 25, 2020, the federal district court granted Respondents' Joint Motion to Dismiss as to Appellant's Voting Rights Act and § 1983 claims and remanded Appellant's state election law claim to the Richland County Court of Common Pleas. (Fed. R&R, ECF 34, R. pp. 96-103; Fed. Order Adopting R&R, ECF 40, R. pp. 104-09.)

The Richland County Clerk of Court filed the certified copy of the remand order on September 30, 2020. (Fed. Order Adopting R&R, ECF 40, R. pp. 104-09.)

On October 26, 2020, Respondents filed a Joint Motion to Dismiss pursuant to Rule 12(b)(6), SCRCP, seeking dismissal of Appellant's only remaining claim, violation of S.C. Code Ann. sections 7-9-70, -80, and -100. (Resp. Mot. to Dismiss, R. pp. 111-12.) The basis for Respondents' motion is that there is no private right of action to enforce the state statutes Appellant seeks to enforce and that Appellant's claims for relief are moot. Id.

On November 16, 2020, Appellant filed a Motion for Default Judgment pursuant to Rule 55(b)(2), SCRCP, alleging that Respondents' Motion to Dismiss filed on October 26, 2020, was untimely. (App. Mot. for Default Jmt., R. pp. 113-18.)

On February 3, 2021, Respondents filed a Memorandum in Support of their Joint Motion to Dismiss (Resp. Mem. in Supp. MtD, R. pp.120-29) and a Memorandum in Opposition to Plaintiff's Motion for Default Judgment (Resp. Mem. in Opp. MDJ, R. pp.130-35).

On February 9, 2021, the trial court conducted a hearing on Respondents' Motion to Dismiss and Appellant's Motion for Default Judgment. (Transcript, R. pp. 136-75.) The Honorable Alison Renee Lee, Circuit Court Judge, presided.

At the hearing, both pro se Appellant and counsel for Respondents were given ample time for arguments. Id. The trial court also granted Appellant leave to file responsive memoranda after the hearing (Form 4 Order, R. p.176), and Appellant filed a Response to Memorandum in Opposition to Motion for Default Judgment (R. pp. 198-201) and a Memorandum in Opposition to Defendants' Joint Motion to Dismiss (R. pp. 179-97) on February 16, 2021.

On June 29, 2021, the trial court issued the order that is the subject of this appeal ("Order"). (Order, R. pp. 228-35.) In its Order, the trial court denied Appellant's Motion for Default Judgment, finding that Respondents' Motion to Dismiss was timely in light of the automatic thirty-day extension of trial court deadlines in effect at the time. Id. at 230-31. The trial court also granted Respondents' Motion to Dismiss, finding that Appellant has no private right of action to enforce the statutory violations alleged in the FAC, that Appellant lacked standing to bring the action, and that Appellant's claims are moot. Id. at 231-34.

Appellant did not file a motion to reconsider, alter, or amend the trial court's Order but filed a Notice of Appeal in this Court on July 26, 2021.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR DEFAULT JUDGMENT.

Standard of Review

"[A] trial court's decision as to a default judgment will not be reversed absent an abuse of discretion, which occurs when the judgment is controlled by some error of law or is without evidentiary support." Mull v. Ridgeland Realty, LLC, 387 S.C. 479, 489, 693 S.E.2d 27, 32 (Ct. App. 2010).

A. The trial court did not abuse its discretion in finding that Respondents timely filed a responsive pleading.

Rule 12(a), SCRCP, requires a defendant to serve an answer or Rule 12 motion within thirty days after service of the complaint. Rule 15(a), SCRCP, requires a party to respond to an amended pleading "within the time remaining for response to the original pleading or within fifteen days after service of the named amended pleading, whichever period may be the longer."

Once a case is removed to federal court, the state court's jurisdiction is suspended or held in abeyance until the case is properly remanded. Limehouse v. Hulsey, 404 S.C. 93, 113, 744 S.E.2d 566, 577 (2013). "When the state court resume[s] jurisdiction, it ha[s] a duty to 'proceed as though no removal had been attempted.'" Id. (citing State v. Columbia Ry., Gas & Elec. Co., 112 S.C. 528, 537, 100 S.E. 355, 257 (1919)). Therefore, removal of a state court case to federal court operates to toll the parties' state court time periods computed from an event occurring prior to removal. Id.

Significantly, section (c)(9)(A) of the Supreme Court of South Carolina's Order RE: Operation of the Trial Courts During the Coronavirus Emergency, as amended April 22,

2020, ("Coronavirus Emergency Order") automatically extended the due dates for all trial court filings by thirty days. Id. ("[T]he due dates for all trial court filings due on or after the effective date of this order are hereby extended for thirty (30) days.") This automatic extension was in effect from April 3, 2020, until January 15, 2021. See Order RE: Operation of the Trial Courts During the Coronavirus Emergency, as amended December 16, 2020.

Respondents' counsel accepted service of the Summons and Complaint on May 14, 2020. At that time, the parties agreed to a deadline of June 17, 2020, for all Respondents to answer, move, counterclaim, or otherwise respond to the Complaint. (Extension of Time, R. p. 15.)

On May 29, 2020, Respondent filed his First Amended Complaint ("FAC"). (FAC, R. pp. 16-32.) The Certificate of Service appended to Respondent's FAC, certifying service of the FAC on Respondents by U.S. Mail, is dated May 22, 2020. Id.

Appellant's service of the FAC reset Respondents' trial court filing deadline, as provided by Rule 15(a), SCRCP, and thereby implicated the automatic thirty-day extension in effect at the time. This made Respondents' deadline to answer or otherwise respond to Appellant's FAC July 17, 2020.

On June 9, 2020, Respondents removed the action to federal court (Notice of Removal, R. pp. 35-93) and filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) (Resp. Fed. Mot. to Dismiss, ECF 9, R. pp. 94-95). Respondents' removal of the action to federal court suspended the trial court's jurisdiction and tolled the parties' state court timelines. Limehouse, 404 S.C. at 113, 744 S.E.2d at 577.

On September 25, 2020, the federal district court issued an order dismissing Appellant's federal law claims and remanding Appellant's state law claim to state court. (Fed. Order Adopting R&R, ECF 40, R. pp. 104-09.) The Richland County Clerk of Court filed a certified copy of the federal court's dismissal and remand order on September 30, 2020. Id. (see state court official file stamp.)

Appellant argues that the trial court erred in finding that the date of remand was September 30, 2020, for purposes of calculating Respondents' deadline to file a responsive pleading. Appellant, citing Limehouse, contends that the proper date of remand was September 25, 2020, which he maintains, without evidence, is the date the circuit court "received" the federal court's order.

Even if the trial court erred in finding the remand date was September 30, 2020, this error did not control the trial court's judgment because Respondents timely filed their responsive pleading either way.

Upon removal, Respondents had thirty-eight days remaining to answer or otherwise respond to the FAC. If the state court's jurisdiction resumed on September 25, 2020, then Respondents' deadline to file a responsive pleading was November 2, 2020. If the state court's jurisdiction resumed on September 30, 2020, then Respondent's deadline to file a responsive pleading was November 9, 2020.[1]

Respondents filed, and served upon Appellant, their Joint Motion to Dismiss Pursuant to Rule 12(b)(6), SCRCP, on October 26, 2020. (Resp. Mot. to Dismiss, R. pp.

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[1] The trial court found that Respondents initially had "at least until July 14, 2020, to file a response" and thirty-four days remaining to respond upon remand on September 30, 2020. (Order p. 4, R. p. 231.) Accordingly, even under the most conservatively calculated deadline of November 3, 2020, Respondents timely responded to the FAC.

111-12.) Therefore, the trial court did not abuse its discretion in finding that Respondents timely filed a responsive pleading and denying Appellant's Motion for Default Judgment.

Appellant's arguments regarding the legality of the Coronavirus Emergency Order, the operation of the parties' agreement as to Respondents' deadline to respond to the original Complaint, and Respondents' "constructive notice" of the Summons and Complaint are not preserved for appellate review or are unsupported by legal authority, or both. Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("[A]n issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review."); Bryson v. Bryson, 378 S.C. 502, 510, 662 S.E.2d 611, 615 (Ct. App. 2008) ("An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority.")

B. As an additional sustaining ground, even if the trial court abused its discretion in finding Respondents timely filed a responsive pleading, Appellant is not entitled to default judgment because Appellant's FAC fails to state a claim upon which a default judgment may be taken.

Default judgment is not available on a pleading that fails to state a cause of action upon which relief can be granted. Mutual Sav. & Loans Ass'n v. McKenzie, 274 S.C. 630, 632, 266 S.E.2d 423, 424 (1980) ("It follows that if a complaint fails to state a cause of action, the rendering of a default judgment thereon is without authority of law…."). "An objection that the complaint does not state facts sufficient to constitute a cause of action is not waived by a default." Masters v. Rodgers Dev. Group, 283 S.C. 251, 254, 321 S.E.2d 194, 196 (Ct. App. 1984) (citing Gadsden v. Home Fertilizer & Chemical Co., 89 S.C. 483, 72 S.E. 15 (1911).

For the reasons set forth in the trial court's Order and below, Appellant's FAC fails to state a cause of action upon which relief can be granted. Therefore, even if Respondents failed to timely respond to Appellant's FAC, default judgment is not available to Appellant, and Respondents did not waive their objection to the sufficiency of the FAC, as raised in their Joint Motion to Dismiss Pursuant to Rule 12(b)(6), SCRCP.

III. THE TRIAL COURT DID NOT ERR IN GRANTING RESPONDENTS' MOTION TO DISMISS.

Standard of Review

"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). "That standard requires the Court to construe the complaint in a light most favorable to the nonmovant and determine if the 'facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case.'" Id. (quoting Williams v. Condon, 347 S.C. 227, 233, 553 S.E.2d 496, 500 (Ct. App. 2001)). The ruling on a motion to dismiss pursuant to Rule 12(b)(6), SCRCP, must be based solely on the allegations set forth in the complaint. Clearwater Trust v. Bunting, 367 S.C. 340, 343, 626 S.E.2d 334, 335 (2006).

A. The trial court correctly found that Appellant has no private right of action under S.C. Code Ann. sections 7-9-70, 7-9-80, and 7-9-100.

Dismissal is appropriate on a Rule 12(b)(6), SCRCP, motion where there is no private right of action to pursue the statutory violations alleged in the complaint. See Kubic v. MERSCORP Holdings, Inc., 416 S.C. 161, 785 S.E.2d 595 (2016); Dema v. Tenet Physician Servs.-Hilton Head, Inc., 383 S.C. 115, 678 S.E.2d 430 (2009); Doe v. Marion, 373 S.C. 390, 645 S.E.2d 245 (2007).

"The main factor in determining whether a statute creates a private cause of action is legislative intent." Overcash v. S.C. Elec. & Gas Co., 364 S.C. 569, 576, 614 S.E.2d 619, 622 (2005). "Legislative intent to grant or withhold a private right of action for a violation of the statute is determined primarily from the language of the statute." Georgetown Cty. League of Women Voters v. Smith Land Co., 393 S.C. 350, 353, 713 S.E.2d 287, 289 (2011).

"When a statute does not specifically create a private cause of action, one can be implied only if the legislation was enacted for the special benefit of a private party." Doe v. Marion, 373 S.C. 390, 397, 645 S.E.2d 245, 248 (2007) (citing Citizens of Lee Cty. v. Lee Cty., 308 S.C. 23, 416 S.E.2d 641 (1992)). "If the overall purpose of the statute is to aid society and the public in general, the statute is not enacted for the special benefit of a private party." Dema, 383 S.C. at 121-22, 678 S.E.2d at 433 (citing Adkins v. S.C. Dep't of Corr., 360 S.C. 413, 419, 602 S.E.2d 51, 54 (2004)).

Significantly, if a state statute does not provide for a private cause of action, express or implied, "it is not for this court to create such an action when the legislature has specifically declined to do so." Palmer v. State, 427 S.C. 36, 46, 829 S.E.2d 255, 261 (Ct. App. 2019); see also Kubic, 416 S.C. at 170, 785 S.E.2d at 600 ("It is not the province of this Court to legislate or imply remedies not specified by the legislature.").

Appellant's only remaining claim alleges that Respondents violated three provisions of the South Carolina Election Law: (1) section 7-9-70, which requires that a county party convention be held "during the twelve-month period ending March thirty-first of each general election year"; (2) section 7-9-100, which provides that any county party "failing or refusing to organize under the provision of this title may not have representation

in the state convention"; and (3) section 7-9-80, which provides that each county convention "shall be called to order by the county chairman." (FAC pp. 7-11, R. pp. 22-26.)

The three statutes in question are found in a chapter of the South Carolina Code denominated "Party Organization," which regulates the organization and certification of political parties. See S.C. Code Ann. §§ 7-9-10 to -110. Nothing in this chapter, nor specifically sections 7-9-70, -80, and -100, indicates any intent by the South Carolina Legislature to create a private right of action to enforce these statutes.

There neither is a private right of action created by the plain language of the statutes nor was the legislation enacted for the special benefit of a private party. Rather, the statutes' purpose is to provide for the organization and certification of political parties, as defined by S.C. Code Ann. section 7-1-20(7), which can nominate candidates for public office. To that end, the Party Organization statutes' sole enforcement mechanism is the State Election Commission's authority to decertify a political party, as expressly provided in section 7-9-10, and not civil liability. See Dema, 383 S.C. at 121, 678 S.E.2d at 434 (finding "the enforcement mechanism of the CON Act is DHEC's authority to impose sanctions and not civil liability").

Upon reviewing the three statutes at issue, the trial court correctly found that the statutes do not provide for a private right of action, express or implied, and that the State Election Commission possesses the sole authority to enforce them, pursuant to S.C. Code Ann. section 7-9-10. (Order pp. 4-5, R. pp. 231-32.)

Appellant now argues that the trial court erred in granting Respondents' Motion to Dismiss based on its finding that Appellant has no private right of action to enforce S.C.

Code Ann. sections 7-9-70, -80, and -100 because he brought his claim pursuant to the Uniform Declaratory Judgment Act and not the statutes reviewed by the trial court. This argument is not properly preserved for appellate review because Appellant failed to raise it in his Memorandum in Opposition to Respondents' Motion to Dismiss (R. pp. 179-97), at the hearing on Respondent's Motion to Dismiss (R. pp. 136-75), or in a Rule 59(e), SCRCP, motion. See Easterling v. Burger King Corp., 416 S.C. 437, 453, 786 S.E.2d 443, 451 (Ct. App. 2016).

B. The trial court correctly found that Appellant lacks standing.[2]

A party may acquire standing (1) by statute, (2) through the principles of constitutional standing, or (3) under the public importance exception. ATC South, Inc. v. Charleston Cty., 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008). Appellant asserts only that he has public importance standing and thereby concedes that he lacks statutory or constitutional standing to bring this action.

Under the public importance exception, standing may be conferred upon a party "when an issue is of such public importance as to require its resolution for future guidance." Baird v. Charleston Cty., 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999). "The mere fact that the issue is one of public importance does not confer upon any citizen or taxpayer the right to invoke per se a judicial determination of the issue." Sloan v. Greenville Cty., 356 S.C. 531, 549, 590 S.E.2d 338, 347 (Ct. App. 2003). "The key to the public importance analysis is whether a resolution is needed for future guidance. … For

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[2] Respondents recognize that "[w]hether a party has standing and whether a party has stated a cognizable cause of action are discrete inquiries." Kubic v. MERSCORP Holdings, Inc., 416 S.C. 161, 167 n. 2, 785 S.E.2d 595, 598 n.2 (2016). While the trial court arguably conflated the two inquiries, Respondents concur in the ultimate result.

a court to relax general standing rules, the matter of importance must, in the context of the case, be inextricably connected to the public need for court resolution for future guidance." ATC S., Inc. v. Charleston Cty., 380 S.C. 191, 199, 669 S.E.2d 337, 341 (2008).

In determining whether to confer public importance standing

> [a]n appropriate balance between the competing policy concerns underlying the issue of standing must be realized. Citizens must be afforded access to the judicial process to address alleged injustices. On the other hand, standing cannot be granted to every individual who has a grievance against a public official. Otherwise, public officials would be subject to numerous lawsuits at the expense of both judicial economy and the freedom from frivolous lawsuits.

Sloan v. Sanford, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004). Thus, "courts must take these competing policy concerns into consideration, and must also determine whether the party presents an issue of public importance and whether future guidance on that issue is needed." S.C. Pub. Interest Found. v. S.C. Dep't of Transp., 421 S.C. 110, 118, 804 S.E.2d 854, 859 (2017).

The only relevant authority Appellant relies on in support of his assertion that he has public importance standing is Sloan v. Sanford, in which the Supreme Court of South Carolina held that the plaintiff had public importance standing to challenge the governor's eligibility to serve as governor based on a provision of the South Carolina Constitution. Id. at 434, 593 S.E.2d at 471.

Unlike in Sloan and other cases in which our courts conferred public interest standing, see, e.g., Baird, S.C. Pub. Interest Found., Thompson v. S.C. Comm'n on Alcohol & Drug Abuse, 267 S.C. 463, 229 S.E.2d 718 (1976), Evins v. Richland Cty. Historic Pres. Comm'n, 341 S.C. 15, 532 S.E.2d 876 (2000), Appellant does not challenge

the actions of a public official or government entity. Nor has Appellant presented an issue of such public importance that it requires court resolution for future guidance.

Rather, Appellant challenges the actions of a state and county political party and their respective chairs—private actors—concerning the scheduling and manner of their 2020 state and county party conventions in response to unprecedented circumstances created by the COVID-19 pandemic, including the need to comply with the Governor's executive orders limiting social gatherings. As the trial court aptly noted, "there is no ruling this Court might issue that would provide future guidance on these issues." (Order p. 6, R. p. 233.)

To the extent Appellant contends that the potential for future virtual conventions warrants public importance standing, the statutes governing party organization are clear and unambiguous in vesting the state and county executive committees of a political party with full discretion on the manner in which to host their respective conventions. See S.C. Code Ann. § 7-9-70 ("The county committee shall set the date, time, and location during the month designated by the state committee for the county convention to be held."); Id. at -100 ("The state convention shall meet at a location in this state determined by the state committee to have adequate facilities…."). This discretion is consistent with the constitutional protections afforded a political party's associational activities, including party organization, membership, and internal governance. See, e.g., Cousins v. Wigoda, 419 U.S. 477 (1975); Democratic Party of U.S. v. Wisc., ex rel. LaFollette, 450 U.S. 107 (1981); Tashjian v. Republican Party of Conn., 479 U.S. 208 (1986); Eu v. San Francisco Cty. Dem. Central Comm., 489 U.S. 214, 230 (1989). Nothing in the statutes prohibits a state or county political party from hosting a virtual convention when that is the manner

selected by the duly elected entity expressly entrusted with the decision on how to conduct the convention. Because the underlying statutes are unambiguous, judicial resolution of the issue for future guidance is unnecessary and, in fact, improper. See Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("Where the statute's language is plain and unambiguous…the rules of statutory interpretation are not needed and the court has no right to impose another meaning."); Tashjian at 224 ("[A] State, or a court, may not constitutionally substitute its own judgment for that of the Party.").

Upon considering the competing public policy concerns underlying the public importance standing, whether the issue raised by Appellant is one of public importance, and whether there is a need for future guidance on the issue, the trial court correctly found that Appellant lacked public importance standing to bring this action.

C. The trial court correctly found that Appellant's claims are moot.

As an additional ground for dismissal, the trial court correctly found that Appellant's claims are moot. (Order p. 7, R. p. 234.) Appellant does not raise or argue this issue in his appellate brief and, therefore, has abandoned the issue on appeal. Rule 208(b)(1)(B), SCACR; Jinks v. Richland County, 355 S.C. 341, 344 n. 3, 585 S.E.2d 281, 283 n.3 (2003). "An unappealed ruling is the law of the case and requires affirmance." Transp. Ins. Co. v. S.C. Second Injury Fund, 389 S.C. 422, 431, 699 S.E.2d 687, 691 (2010).

CONCLUSION

Based on the foregoing, Respondents respectfully request that this Court affirm the trial court's Order and dismiss Appellant's FAC with prejudice.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Respondents has been served on the Appellant and that the Final Brief of Respondents complies with Rule 211(b), SCACR.

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Respectfully submitted,

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