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SC Court of Appeals

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**APPEAL FROM LEXINGTON COUNTY
WALTON J. MCLEOD, CIRCUIT COURT JUDGE**

Appellate Case No. 2022-001060

Emily P. Smith and Emily P. Smith and Associates, LLC, Appellant,

v.

**Robert T. Smith; Southern Collection, LLC;
Southern Collection Brokerage, LLC;
Terrance Smith and Associates, LLC; Robert B. Smith,
And Sherry C. Smith, Respondents.**

FINAL REPLY BRIEF

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STATEMENT OF ISSUES ON APPEAL

- I. The Court should reverse the Order dismissing the case pursuant to Rule 12(b)(1) because none of the property at issue has been declared to be marital property within the exclusive jurisdiction of the Family Court, including the distributional interests of Southern Collection.
- II. This Court should reverse because the South Carolina LLC Act does not grant the Circuit Court exclusive jurisdiction to hear judicial dissolution actions.
- III. This Court should reverse dismissal pursuant to Rule 12(b)(6), SCRCF because this issue is preserved for appellate review, and the complaint alleged sufficient facts to support the causes of action in the complaint.
- IV. The Family Court does not have jurisdiction to determine the causes of action against Terence Smith & Associates, LLC, Southern Collection Brokerage, LLC, Sherry C. Smith, and Robert T. Smith.
- V. This court should reverse the trial court's order denying the motion for appointment of a receiver.
- VI. The trial court's dismissal of the circuit court action ultimately deprived Emily of her constitutional right to a jury trial on the issues raised in her complaint.

ARGUMENT

- I. **This Court should reverse the Order dismissing the case pursuant to 12(b)(1) because none of the property at issue has been declared to be marital property within exclusive jurisdiction of the Family Court, including the distributional interests of Southern Collection.**

Emily agrees that the Family Court has exclusive jurisdiction to hear matters involving marital property, however that is not the present case. As explained in the pleadings before the trial court and in Emily's Initial Brief of Appellant, Southern Collection LLC is a legal entity distinct from Emily and Terence, and as a wholly separate entity, cannot be presumed to be marital property.

While Emily did request the equitable distribution of assets by the Family Court when the domestic action was filed, none of the businesses or corporate entities were parties to the domestic action, nor had the Family Court asserted jurisdiction over them. At the time Emily filed this action in Circuit Court, there had been no finding, no order, and no determination that any of the parties' interest in Southern Collection LLC or any other businesses were marital assets. (R. p. 542). Emily does not deny that she did attempt to obtain temporary relief from the Family Court as it related to the assets Terence diverted from Southern Collection LLC. Specifically, Emily requested that the Family Court order an accounting of Southern Collection, however the Family Court declined the request and took no further action as it related to the business. Additionally, none of the issues related to any of the corporate entities involved in this matter had been litigated in Family Court for jurisdiction to attach. Therefore, the trial court's Order dismissing the case pursuant to Rule 12(b)(1), SCRCP should be reversed.

II. This Court should reverse because the South Carolina LLC Act does grant the Circuit Court exclusive jurisdiction to hear judicial dissolution actions.

“The Uniform Limited Liability Company Act (LLC Act) grants broad judicial discretion in fashioning remedies in action by a member of an LLC against the LLC and/or other members.” *Historic Charleston Holdings v. Mallon*, 381 S.C 417, 673 S.E.2d 448 (S.C. 2009). As a member of an LLC established under South Carolina law, Emily asserted her statutory rights available to her which enabled her to seek dissolution of Southern Collection. The Family Court is a court of limited jurisdiction, and lacks jurisdiction over the LLC or its corporate affairs, all of which are governed by the LLC Act.

While the underlying factual scenario in *Palmetto Wildlife Extractors, LLC v. Ludy*, 435 S.C. 690, 869 S.E.2d 859 (Ct. App. 2022), addresses with whether claims for judicial dissolution, and accounting, or the appointment of receiver can be determined by an arbitrator, Respondents fail to grasp the Court’s reasoning in its decision. The Court specifically looked at and focused on the language used in S.C. Code Ann. § 33-44-803(a) within the LLC Act which provide, “*the circuit court...may order judicial supervision of the winding up,*” and S.C. Code Ann. § 15-65-10 which provides “A receiver may be appointed by a *judge of the circuit court.*” (Emphasis added). Emily maintains that these remedies are exclusive to the LLC Act and fall within the exclusive jurisdiction of the Circuit Court. Therefore, the trial court’s decision on this issue should be reversed.

III. This Court should reverse dismissal pursuant to Rule 12(b)(6), SCRPC because this issue is preserved for appellate review, and the Complaint alleged sufficient facts to support the causes of action in the Complaint.

Respondents argue that Emily failed to preserve the issues raised in this appeal as it pertains to the trial court’s dismissal of the Circuit Court action pursuant to Rule 12(b)(6), SCRPC.

Specifically, Respondents contend that Emily’s motions pursuant to Rule 59(e), SCRPC were merely conclusory and insufficiently particular to preserve the 12(b)(6) issues on appeal. (RIB, p. 14).

“It is well-settled that an 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.” *Staubes v. City of Folly Beach*, 529 S.E.2d 543, 339 S.C. 406 (2000). Generally, a party “cannot raise an issue for the first time in a Rule 59(e), SCRPC motion which could have been raised at trial.” *MailSource, LLC v. M.A. Bailey & Associates, Inc.*, 356 S.C. 370, 374, 588 S.E.2d 639, 641 (Ct. App. 2003). However, error preservation rules are not inflexible and rigid, but serve an efficiency purpose. The Supreme Court “has cautioned that issue preservation ‘is not a gotcha game aimed at embarrassing attorneys or harming litigants.’” *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012).

The issues raised by Emily in this appeal were ruled upon by the trial court and are therefore preserved for appeal. Emily filed two Motions for Reconsideration in which she asserted that the trial court erred in “finding that the Plaintiff did not set forth sufficient facts to support the multiple causes of action against the Defendants,” and “ruling on the merits of the claims raised in the circuit court action after determining it lacked jurisdiction to address any issue before it.” (R. p. 415; R. p. 419). Both Motions were considered and denied by the trial court and formed the basis for the instant appeal. Emily disagrees with Respondents’ assertion that the 12(b)(6) issues were not raised or ruled upon by the trial court. Even assuming that Respondents’ argument has merit, Emily’s “statement of issues on appeal is broad enough to encompass the argument presented to this Court.” *Johnson v. Roberts*, 422 S.C. 406, 812 S.E.2d 207 (S.C. App. 2018) (Finding that

Appellant preserved her arguments for appellate review where it could not be said that the issues were clearly preserved).

A. Judicial Dissolution and Winding Up

The Circuit Court action sought the judicial dissolution and winding up of Respondent Southern Collection LLC pursuant to S.C. Code Ann. § 33-44-801(4), which provides in relevant part that a

“limited liability company is dissolved, and its business must be wound up, upon the occurrence of any of the following events...on application by a member or a dissociated member, upon entry of a judicial decree that:

- (a) the economic purpose of the company is likely to be unreasonably frustrated;
- (b) another member has engaged in conduct relating to the company's business that makes it not reasonably practicable to carry on the company's business with that member;
- (c) it is not otherwise reasonably practicable to carry on the company's business in conformity with the articles of organization and the operating agreement
- (e) the managers or members in control of the company have acted, are acting, or will act in a manner that is unlawful, oppressive, fraudulent, or unfairly prejudicial to the petitioner;”

Emily, who was a dissociated member of the LLC when the Complaint was filed, set forth sufficient facts to support the occurrence of events listed in subsections (a) – (e). (R. pp. 104-108, ¶¶ 9-28). The Complaint sought only the dissolution of Southern Collection LLC, not Southern Collection Brokerage or Terence Smith & Associates LLC (hereafter “Terence LLC”) as asserted by Respondents. (RIB, p. 17). Additionally, the proper real parties in interest for an action for judicial dissolution, Terence and Southern Collection LLC, were named as defendants to this cause of action.

Therefore, the trial court’s Order dismissing the cause of action for judicial dissolution and winding up was improper and should be reversed.

B. Conversion

As explained in Emily's Initial Brief of Appellant, the pleadings before the trial court clearly established that Respondents Terence, Brokerage LLC, and Terence LLC assumed possession of property belonging to Emily without her authorization, and when viewed in a light most favorable to Emily, the facts alleged entitle her to relief under a theory of conversion. Respondents' assertion that Emily's claim for conversion against Brokerage LLC and Terence LLC is without merit. For those reasons, the trial court erred in dismissing the action for conversion under 12(b)(6), SCRCF.

C. Imposition of Constructive Trust

Respondents argue that Emily's Complaint failed to allege sufficient facts to show that the income and assets were paid to Respondents Robert B. Smith and Sherry C. Smith by accident, mistake, or fraud. (RIB, p. 19). This argument is also without merit as the Complaint specifically alleges that "the business funds were paid to Defendants Robert B. Smith and Sherry C. Smith in an effort to secrete them from an accounting of assets and income." (R. p. 112, ¶54). This was done without Emily's knowledge or consent. (*Id.* at ¶52). It is alleged that Terence paid at least \$40,000 in office profits belonging to Southern Collection and Emily, without Emily's knowledge or consent, to Respondents Robert and Sherry in order to "secrete" or hide these assets from being discovered through an accounting, which is inherently fraudulent. Therefore, the trial court's Order dismissing this cause of action pursuant to Rule 12(b)(6), SCRCF should be reversed.

IV. The Family Court does not have jurisdiction to determine the causes of action against Terence Smith & Associates, LLC, Southern Collection Brokerage, LLC, Sherry C. Smith, and Robert T. Smith.

At the time that the circuit court action was filed, neither Robert or Sherry were parties to the domestic action, nor was the LLC adjudged to be marital property. Defendants argued that the family court had the authority to add Robert and Sherry to the domestic action to accomplish

equitable division of the property in their possession pursuant to S.C. Code Ann. § 20-3-660. (R. p. 319). The trial court dismissed the circuit court action as it related to Respondents Robert and Sherry, finding that the “Family Court has subject matter jurisdiction of [sic] the matter asserted and relief sought in Plaintiff’s Complaint.” (R. p. 28).

While the family court may have the authority to join third parties to a domestic action, this authority is limited to situations in which property is alleged to be marital property and is owned by a third party. *See* S.C. Code Ann. § 20-3-660. In this case, the LLC had not been found to be marital property falling within the jurisdiction of the family court. Therefore, the office profits of the LLC which were in were wrongfully in possession of Respondents Robert and Sherry were not marital property to be apportioned by the family court. The circuit court action as it related to Respondents Robert and Sherry, involved non-marital property and was properly before the circuit court. Therefore, the trial court erred in dismissing the complaint and specific cause of action against Respondents Robert and Sherry.

V. This Court should reverse the trial court’s Order denying the Motion for Appointment of a Receiver.

Emily filed an Emergency Motion for Appointment of a Receiver pursuant to S.C. Code Ann. §16-65-10(1) which was ultimately denied by the trial court. (R. p. 15). As required by § 16-65-10(1), Emily set forth sufficient facts to show that (1) she had an apparent right to the property; which was (2) subject to the action (3) in possession of Terence the adverse party; and (4) was in danger of being lost, materially injured, or impaired. (R. p. 58). However, the trial court denied her Motion finding that the “relief sought by Plaintiff could be fully addressed by the Family Court.” (R. p. 15). For the reasons set forth above in Issue II and in her Initial Brief of Appellant,

Emily maintains that the trial court erred in denying her Motion as the appointment of a receiver is a remedy that can only be provided by the Circuit Court.

VI. The trial court’s dismissal of the Circuit Court action ultimately deprived Emily of her Constitutional right to a jury trial on the issues raised in her Complaint.

The circuit court action asserted multiple causes of action seeking the recovery of money and assets belonging to Emily and the LLC, which “*must* be tried by a jury.” Rule 38(a), SCRCF. (Emphasis added). Additionally, on June 3, 2022, Emily filed a formal demand for jury trial, pursuant to Rule 38(b), SCRCF, requesting a trial by jury on all factual disputes arising out of each cause of action. (R. p. 318). By dismissing the circuit court action and instructing the parties to litigate the matter in family court, the trial court effectively denied Emily her constitutional right to have a trial by jury.

Respondents assert that Emily waived her right to a trial by jury by filing a divorce action in Family Court, however this argument is without merit. The divorce action did not seek any of the relief or assert any causes of action set forth in the circuit court action. It is irrational to say that Emily waived her right to a trial by jury when she filed a formal demand for a jury trial for causes of action that can only be tried by a jury in the Circuit Court. Therefore, this Court should reverse the trial court’s decision on the jury trial issue.

CONCLUSION

For the reasons set forth above, this Court should reverse the judgment of the trial court and allow this case to proceed on its merits.

Respectfully submitted,

s/ Haley Hubbard

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

Respectfully submitted,

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