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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SUMTER COUNTY
R. FERRELL COTHRAN, JR., CIRCUIT COURT JUDGE

Appellate Case No. 2023-000246

James E. Fender,Appellant,

v.

Larry R. Hoffman and Allen Jackson Barnes, Defendants,
Of Whom Allen Jackson Barnes is theRespondent.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. Did the Court err in finding that Fender failed to plead sufficient facts to support a cause of action for civil conspiracy when that pleading properly included allegations regarding unlawful acts or a lawful act by unlawful means that resulted in damages to Fender?

- II. Did the Court err when it considered material outside of the pleadings in reaching its decision to dismiss the claim against Barnes pursuant to Rule 12(b)(6), SCRCP?

STATEMENT OF THE CASE

This matter was initiated by Appellant Ed Fender’s filing of a Summons and Complaint against Larry Hoffman and Respondent Allen Jackson Barnes (hereinafter “Barnes”) on March 22, 2022. The Complaint alleged, in pertinent part, that Hoffman and Barnes participated together in a civil conspiracy against Mr. Fender to deprive him of funds due to him pursuant to a settlement agreement between Hoffman and Mr. Fender. (Complaint). The Complaint also asserted a cause of action for breach of contract against both Hoffman and Barnes. (*Id.*). Barnes filed a Motion to Dismiss the action pursuant to Rule 12(b)(6), SCRCP on April 11, 2022. (Barnes Motion to Dismiss). Because Hoffman was unable to be located for purposes of serving the Complaint, Mr. Fender filed a Motion for Service by Publication as to Hoffman on April 29, 2022. (Motion for Service by Publication).¹

After accepting service of the Complaint on May 3, 2022, Hoffman filed his Answer on June 8, 2022. (Hoffman Answer). Counsel for Mr. Fender served subpoenas and discovery requests upon Hoffman and his attorney, to which they filed a Motion to Quash on July 18, 2022. (Motion to Quash). On August 10, 2022, Mr. Fender filed a Motion to Compel Discovery and a Motion to Compel Response to Subpoena. (Motion to Compel Discovery; Motion to Compel Response). A hearing on the discovery motions and Barnes’s Motion to Dismiss was held before the Honorable Judge Culbertson on September 7, 2022. Following the hearing, Judge Culbertson issued an order denying Barnes’s Motion to Dismiss as it related to the cause of action for civil conspiracy, allowing Mr. Fender to file an amended complaint to clarify the allegations against Barnes. (Order filed September 8, 2022).

¹ While Hoffman is not a Respondent in this appeal, Appellant provides this information and other relevant procedural history to provide full context to the Court regarding the underlying lawsuit which is the subject of this appeal.

Mr. Fender filed his amended complaint on September 22, 2022, specifically clarifying the allegations supporting the cause of action for civil conspiracy against Barnes. (Amended Complaint). On October 4, 2022, Barnes filed a motion to dismiss the amended complaint pursuant to Rule 12(b)(6), SCRCF, again asserting that Mr. Fender failed to state facts sufficient to constitute a cause of action for civil conspiracy. (Motion to Dismiss Amended Complaint). The Honorable R. Ferrell Cothran, Jr. heard oral arguments on Barnes's motion to dismiss on November 7, 2022.

Following the hearing, the parties received an email from Judge Cothran's law clerk requesting a copy of the confidential settlement agreement which was discussed during the hearing. (Nov. 8, 2022 Email from Law Clerk James Land). Counsel for Mr. Fender provided a copy of the settlement agreement to Judge Cothran via email the same day. (Nov. 8, 2022 Email from Haley Hubbard). On November 21, 2022, Judge Cothran's law clerk emailed the parties per Judge Cothran's request, seeking specific information from Barnes about his knowledge of the settlement agreement and the status of his representation of Hoffman at the time the settlement agreement was entered into. (Nov. 21, 2022 Email from Law Clerk James Land). Barnes responded to this email the same day providing a detailed explanation in response to Judge Cothran's inquiry. (Nov. 21, 2022 Email from Barnes).

On January 3, 2023, Judge Cothran issued an order granting Barnes's motion to dismiss the amended complaint, finding that Barnes had no knowledge of the settlement agreement, or the confidentiality provision contained within. (Order Granting Barnes MTD). On January 13, 2023, counsel for Mr. Fender filed a timely motion to reconsider Judge Cothran's order granting Barnes's motion to dismiss. (Motion to Reconsider). Mr. Fender's motion to reconsider was denied by order dated January 18, 2023. (Order Denying MTR). Mr. Fender timely served his Notice of Appeal on February 20, 2023. This appeal follows.

FACTUAL BACKGROUND

This case arises out of a dispute between Mr. Fender and Hoffman, who were previously engaged in business together. Mr. Fender and Hoffman worked together on numerous projects under several corporate structures, to include Power Construction Services, Inc. (Amended Complaint). In 2014, Hoffman retained Barnes as counsel for Power Construction Services, Inc. (*Id.*). Mr. Fender ended his business relationship with Hoffman after Hoffman refused to pay Fender for his work on multiple projects. (*Id.*). As a result, Fender sued Hoffman and Power Construction Services to collect the funds owed to him in Case No. 2018-CP-43-1703 (hereafter “the prior lawsuit”). (*Id.*). Hoffman and Barnes continued doing business together, and Barnes initially represented Hoffman in defending the prior lawsuit. (*Id.*).²

The prior lawsuit was resolved by a settlement agreement between Fender and Hoffman in which Hoffman agreed to pay Fender. (Amended Complaint). The parties agreed that the terms of the settlement agreement would be confidential, which was a material term of the settlement agreement. (*Id.*). The confidentiality provision of the agreement contained the following language:

The terms and conditions of this Agreement are confidential and the Parties shall not disclose the terms or conditions of this Agreement to *any person* or entity other than their spouses, partners, accountants and tax professionals, who also should be advised of and bound by the terms of confidentiality.

(Amended Complaint, ¶ 2) (Emphasis added).

The confidentiality provision of the settlement agreement was breached in late October 2021 when Barnes, allegedly as an agent of Hoffman, revealed certain terms of the settlement agreement to an unrelated third party. (Amended Complaint). On November 1, 2021, Fender’s counsel at the time received a letter from William Johnson, attorney for the Bank of Greeleyville,

² Barnes later withdrew as counsel for Hoffman in the prior lawsuit due to being a fact witness to some of the business dealings between Fender and Hoffman which led to the dispute.

seeking to attach Fender's expected settlement proceeds on behalf of the Bank of Greeleyville.³ (Amended Complaint, Exhibit B). Fender later discovered that Barnes, who was not a party to the agreement, revealed the confidential settlement to William Johnson, who had no knowledge of the prior litigation between Fender and Hoffman until Barnes contacted him. (Id.). Specifically, Barnes disclosed information regarding certain funds that were being paid by Hoffman to Fender as a result of the settlement agreement to resolve the prior lawsuit. (Id.). As a result of Barnes's actions, Fender's settlement proceeds were diverted to the Bank of Greeleyville, ultimately depriving Fender of the benefit of the settlement made with Hoffman to conclude the prior lawsuit.

On March 22, 2022, Fender filed the instant lawsuit against both Hoffman and Barnes for breach of contract and civil conspiracy, alleging that Hoffman breached the agreement of confidentiality and intentionally revealed the terms of the settlement agreement to Barnes who then disclosed to an interested third party the terms of the settlement agreement, causing substantial financial harm to Fender. (Complaint).

A hearing was held before Judge Cothran on November 7, 2022 on Barnes's motion to dismiss the amended complaint in this matter. After the hearing, and before a ruling was issued, Judge Cothran, through his law clerk, requested additional information from Barnes regarding the settlement agreement in considering the motion to dismiss. (Nov. 21 Email from James Land). As set forth above, the trial court ultimately granted Barnes's motion to dismiss the amended complaint pursuant to Rule 12(b)(6), SCRPC and denied Mr. Fender's motion to reconsider its order, and Mr. Fender filed this appeal.

³ Fender was previously involved in litigation with Bank of Greeleyville which resulted in a judgment being issued against Fender.

STANDARD OF REVIEW

“An appellate court applies the same standard of review as the trial court when reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCF.” *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). “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 pleading would entitle the plaintiff to relief on any theory of the case.’” *Hager v. McCabe, Trotter & Beverly, P.C.*, 435 S.C. 740, 746, 869 S.E.2d 886, 889 (Ct. App. 2022) (quoting *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009)). “If the facts and inferences drawn from the facts alleged in complaint, viewed in the light most favorable to the plaintiff would entitle the plaintiff to relief on any theory, 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 considering such a motion, the trial court must base its ruling solely on allegations set forth in the complaint.” *Spence v. Spence*, 368 S.C. 106, 628 S.E.2d 869 (S.C. 2006). In deciding a motion to dismiss pursuant to Rule 12(b)(6), SCRCF, “the trial court’s ruling...must be bottomed and premised solely upon the allegations set forth by the plaintiff.” *Williams v. Condon*, 347 S.C. 227, 233, 533 S.E.2d 496, 499 (Ct. App. 2001); citing *Holy Loch Distribs. v. Hitchcock*, 332 S.C. 247, 503 S.E.2d 787 (Ct. App. 1998), *rev’d on other grounds*, 340 S.C. 20, 531 S.E.2d 282 (2000); *Berry v. McLeod*, 328 S.C. 435, 492 S.E.2d 794 (Ct. App. 1997).

When a court is considering a motion to dismiss and matters outside the pleadings 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.” Rule 12(b), SCRPC. *See also Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999).

ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING THAT FENDER DID NOT SET FORTH SUFFICIENT FACTS TO SUPPORT A CAUSE OF ACTION FOR CIVIL CONSPIRACY AGAINST BARNES.

The elements of a civil conspiracy in South Carolina are “(1) the combination or agreement of two or more persons, (2) to commit an unlawful act or a lawful act by unlawful means, (3) together with the commission of an overt act in furtherance of the agreement, and (4) damages proximately resulting to the plaintiff.” *Paradis v. Charleston Cnty. Sch. Dist.*, 433 S.C. 562, 861 S.E. 2d 744 (S.C. 2021). In its order granting Barnes’s motion to dismiss the Amended Complaint, the trial court below found that Fender failed to establish (1) the commission of an unlawful act or a lawful act by unlawful means, and (2) damages proximately resulting to the plaintiff.

When the pleadings are properly considered in a light most favorable to Fender, however, the facts alleged in the amended complaint and the inferences drawn therefrom entitle Fender to relief under a theory of civil conspiracy. For those reasons, the trial court erred in dismissing the action for civil conspiracy against Barnes under Rule 12(b)(6), SCRPC.

A. Fender sufficiently alleged the commission of an unlawful act or a lawful act by unlawful means to support his claim for conspiracy.

The second element of a viable civil conspiracy claim requires the plaintiff to demonstrate that the co-conspirators committed an unlawful act or a lawful act by unlawful means, which the trial court erroneously found lacking in Fender’s pleading against Barnes. (Order Granting Barnes MTD). That ruling was erroneous given the inclusion of key paragraphs within the Amended Complaint, including the following:

33. On information and belief, Hoffman revealed to Barnes the details of the confidential settlement agreement between himself and Fender in violation of the confidentiality agreement. Plaintiff is informed and believes that Hoffman intentionally disclosed the settlement agreement to Barnes with the expectation that Barnes would inform an interested third party, which Barnes did.

34. On information and belief, on or about late October 2021, Barnes, acting for his own purposes and as an agent of Hoffman, intentionally contacted William Johnson, attorney for Bank of Greeleyville, to inform Mr. Johnson of the settlement agreement between Fender and Hoffman and Fender's expected compensation. It was the intention of Barnes and Hoffman to prevent Fender from collecting the funds Hoffman had agreed to pay Fender in the settlement of the 2018 case. It had been the intent of Barnes and Hoffman to prevent Fender from collecting on the settlement of the 2018 case at the time the settlement of the 2018 case was made.

35. On information and belief, when Barnes and Hoffman settled the 2018 case with Fender, it was their specific intention to reveal the private settlement to the unrelated third party so that Fender would not receive some or all of the funds due to Fender under the 2018 settlement agreement. But for the revelation by Hoffman, by and through his agent Barnes, of the existence of the 2018 private settlement, the unrelated third party would have had no knowledge of the private settlement and no way to divert the proceeds from Fender to itself.

38. The result of the conspiracy between Hoffman and Barnes were [sic] *unlawful conspiracy to commit fraud against Fender*, which did in fact damage Fender and defraud him. Fender had been damaged as a result of the conspiracy between Barnes and Hoffman.

(Amended Complaint ¶¶ 33-35, 38) (Emphasis added).

As set forth in the highlighted paragraphs above and in the Amended Complaint more generally, Fender set forth sufficient factual allegations to support an inference that Barnes and Hoffman committed an unlawful act against him, specifically fraud, by entering into the settlement agreement with a plan to divert some or all of the funds that Fender was due to receive for the purposes of denying him the benefit thereof. (*Id.* at ¶ 40). Hoffman furthered this scheme by breaching the confidentiality provision in the settlement agreement when he revealed the terms of the settlement agreement to Barnes, who then disclosed that information to a third party. (*Id.*).

While Barnes disclosing the settlement agreement to counsel for the Bank of Greeleyville is not an unlawful act in and of itself, the means by which he accomplished it were unlawful. It is alleged and well established within the amended complaint that Barnes received information about the terms of the settlement due to Hoffman's intentional breach of the confidentiality provision, which was unlawful. (Amended Complaint). When viewed in a light most favorable to Fender and with every doubt resolved in his behalf, the facts alleged in the amended complaint sufficiently demonstrate that Barnes and Hoffman committed an unlawful act and a lawful act by unlawful means. *Cowart v. Poore*, 337 S.C. 359, 523 S.E.2d 182 (Ct. App. 1999) (citing *Toussaint v. Ham*, 292 S.C. 415, 357 S.E.2d 8 (1987)). Accordingly, the trial court erred in finding that Fender failed to set forth sufficient facts to present a viable claim that Barnes, together with Hoffman, committed an unlawful act or a lawful act by unlawful means in furtherance of a conspiracy.

B. Fender sufficiently alleged that he suffered damages as a result of the conspiracy between Barnes and Hoffman.

The trial court found that Fender failed to plead damages as a proximate result of the conspiracy between Barnes and Hoffman. In actions for civil conspiracy, "the gravamen of the tort is the damage resulting to the plaintiff from an overt act done pursuant to a common design." *Vaught v. Waites*, 300 S.C. 201, 208, 387 S.E.2d 91,95 (Ct. App. 1989). In his Amended Complaint, Fender specifically alleged that as a result of the conspiracy between Barnes and Hoffman, Fender suffered substantial financial harm by way of diverting his expected settlement proceeds to the Bank of Greeleyville. (Amended Complaint, ¶ 39). The financial harm Fender suffered was a direct a proximate cause of the conspiracy and scheme between Barnes and Hoffman to deprive Fender of some or all of the funds he was entitled to receive under the settlement agreement. (*Id.* at ¶41).

Barnes asserts, however, that Fender was not damaged because he received all the money from the settlement of the prior lawsuit. (MTD Amended Complaint). This argument fails because Fender could not have, and did not, receive all the money due to him under the settlement since the Bank of Greeleyville successfully attached its judgment to Fender's expected settlement proceeds, which as alleged was solely the result of actions taken by Hoffman and Barnes. As such, Fender was deprived of the monetary benefit of settlement from the prior lawsuit and sustained substantial financial loss, which was set forth in the amended complaint. Therefore, the trial court's finding that Fender failed to plead damages is clearly in violation of the standards for evaluation pursuant to Rule 12(b)(6).

II. THE TRIAL COURT ERRED WHEN IT CONSIDERED MATERIAL OUTSIDE OF THE PLEADINGS IN REACHING ITS DECISION TO DISMISS THE CONSPIRACY CLAIM PURSUANT TO RULE 12(B)(6), SCRPC.

Proper consideration of a motion to dismiss pursuant to Rule 12(b)(6) precludes consideration of material and information outside of the pleadings. *See Stiles v. Onorato*, 318 S.C. 297, 457 S.E.2d 601 (S.C. 1995) ("The ruling on a Rule 12(b)(6) motion to dismiss must be based solely upon the allegations set forth on the face of the complaint."); *State Board of Medical Examiners v. Fenwick Hall, Inc.*, 300 S.C. 274, 387 S.E.2d 458 (1990); *Brazell v. Windsor*, 376 S.C. 83, 655 S.E.2d 736 (Ct. App. 2007) ("[A] 12(b)(6) motion is converted into a motion for summary judgment when the court goes outside the face of the complaint to rule on the motion."). Yet the trial court considered additional information provided by Barnes via email, and did so *after* the hearing on the motion to dismiss, before it issued its order granting the motion.

On November 21, 2022, the parties received an email from Judge Cothran's law clerk who advised that Judge Cothran had requested additional information from Barnes regarding the status of Barnes's representation of Hoffman at the time the settlement agreement was entered into, and

the origin of Barnes's knowledge of the settlement and its terms. (Nov. 21, 2022 Email from James Land). That same day, Barnes provided a detailed response via email explaining how he came to learn of the settlement, which was through Mr. Hoffman's attorney. (Nov. 21, 2022 Email from Barnes). In his email, Barnes also stated that he "never talked to Mr. Hoffman about [the settlement agreement]," and that he "passed Mr. Mercer in the hall in the courthouse one day in 2021, and he told [Barnes] that the case had settled but no details." (*Id.*). None of the information Barnes provided in his email is contained in any of the pleadings, and it was improper for the trial court to consider in ruling on the motion to dismiss the amended complaint. *Spence v. Spence*, 368 S.C. 106, 628 S.E.2d 869 (S.C. 2006) ("In considering such a motion, the trial court must base its ruling solely on allegations set forth in the complaint.").

In fact, Barnes's motion to dismiss contains no explanation of how he learned of the settlement agreement, and he also offered no explanation during the hearing on the motion. (MTD Amended Complaint; Transcript dated Nov. 11, 2022). On January 3, 2023, the trial court issued an order granting Barnes's motion to dismiss the amended complaint, finding that Barnes had no knowledge of the settlement agreement or its terms, including the confidentiality provision." (Order Granting Barnes MTD).

In *Baird v. Charleston County*, the trial court failed to give notice to the parties prior to the hearing on the defendant's motion to dismiss that it was going to consider the affidavits which were submitted by the defendant just two days before the motion hearing. 333 S.C. 519, 511 S.E.2d 69 (1999). Nor did the trial court indicate that the defendant's 12(b)(6) motions would be heard as motions for summary judgment. (*Id.*). The Supreme Court found that the trial court improperly considered material outside the pleadings in deciding the defendant's motions to dismiss and improperly converted the motions to ones for summary judgment. (*Id.*).

In the instant case, considering that the trial court requested additional information from Barnes *after* the hearing on the motion to dismiss had been held, Fender and his counsel could not have been and were not fairly apprised that the trial court would consider material outside of the pleadings in support of Barnes's motion to dismiss. As such, the trial court erred by considering material outside of the pleadings in ruling on the motion to dismiss the amended complaint under Rule 12(b)(6), SCRPC.

CONCLUSION

For the reasons set forth above, Appellant Ed Fender respectfully requests an order from this Honorable Court reversing the order of the trial court issued on January 3, 2023, and remanding this case to the Circuit Court to proceed on the merits.

Respectfully submitted,

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