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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

Case No.: 2020-CP-10-00209
Appellate Case No.: 2020-001030

Appeal from Charleston County
Court of Common Pleas, Ninth Judicial Circuit
Hon. Bentley D. Price, Circuit Court Judge

Maybank 2754, LLC,..Appellant,

v.

Eugene Zurlo, Individually and as Co-Trustee of the Eugene J. Zurlo Living Trust Dated December 11,1997; 1776, LLC; Beach Fenwick, LLC; The Beach Company; Seamon, Whiteside & Associates, Inc.; Penny Creek Associates, LLC; John Doe and Mary Roe ....Respondents.

RESPONDENT SEAMON, WHITESIDE & ASSOCIATES, INC.'S PETITION FOR REHEARING

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Respondent Seamon, Whiteside & Associates, Inc. ("SWA"), by and through its undersigned attorneys, petitions this Court, pursuant to Rule 221 and 240, SCACR, for rehearing with respect to this Court's decision in Maybank 2754, LLC, Appellant v. Eugene Zurlo, Individually and as Co-Trustee of the Eugene J. Zurlo Living Trust Dated December 11, 1997, *et al.*, Respondents, Opinion No. 6081 filed August 7, 2024, which reversed and remanded the Circuit Court's ruling in this case. Pursuant to Rule 208(b)(6), SCACR SWA hereby adopts and otherwise incorporates by reference the arguments set forth by its co-Respondents, Eugene Zurlo, Individually and as co-trustee of the Eugene J. Zurlo Living Trust Dated December 11, 1997 (hereinafter collectively referred to as "Zurlo Entities"); 1776, LLC; and Beach Fenwick, LLC and The Beach Company (hereinafter collectively referred to as "Beach Entities") in their Petitions for Rehearing as their Arguments likewise apply to SWA. Further, SWA suggests the Court overlooked or misapprehended the following points in reversing and remanding the Circuit Court's decision.

ARGUMENT[1]

I. THE COURT OF APPEALS OVERLOOKED OR MISAPPREHENDED SWA'S APPEAL AS TO THE CIVIL CONSPIRACY CLAIM IN FAILING TO SEPARATELY CONSIDER SWA'S ARGUMENT.

The arguments set forth by the co-Respondents (and incorporated herein by SWA) are all sufficient sustaining grounds for this Court to grant Respondents' Petitions for Rehearing and affirm the Trial Court's rulings. However, SWA has an additional sustaining ground for this Court to grant SWA's Petition for Rehearing and affirm the Trial Court's decision to grant SWA's

[1] SWA hereby incorporates by reference herein all facts and arguments set forth in prior briefs before this Court. SWA expressly does not waive any argument previously presented to this Court.

Motion to Dismiss – the Court of Appeals overlooked or failed to consider the merits of SWA's appeal on its civil conspiracy claim separately.

In its Order, the Court seemingly lumped SWA's appeal on its civil conspiracy claim in with the entirety of the arguments posed by Appellant and Respondents alike, without taking the time to consider the merits of SWA's argument and provide a distinct holding as to the civil conspiracy claim separately. Instead, the Court overlooked and/or misapprehended SWA's written and oral argument as to the civil conspiracy claim and instead held that,

> the circuit court erred in referring the matter to the master because Maybank was entitled to a trial by jury and sought to invoke that right in its complaint. We also reverse the circuit court's grant of summary judgment because the parties' intention as to the character of the easement is a genuine issue of material fact. Finally, we reverse the circuit court's denial of Maybank's motion to amend its complaint.

The Court's only mention of SWA's appeal on its civil conspiracy claim appears when the Court reverses the circuit court's grant of summary judgment and remands the matter to the Circuit Court for further proceedings; the Court holds that,

> Seamon argues the grant of its motion to dismiss must stand because Maybank failed to raise grounds to reverse and, thus, abandoned the issue. Maybank did not abandon any argument related to the motion to dismiss the circuit court's order, which was appealed, granted the motions for summary judgment, including Seamon's, and effectively denied Seamon's motion to dismiss.

The Court provides no further reasoning for its reversal of the circuit court's granting of SWA's motion to dismiss as to the civil conspiracy claim, but rather lumps together all Respondents' arguments, even though the civil conspiracy claim as it involves SWA has no relationship to this Court's reasoning for the Master in Equity's involvement; but instead, should be considered distinctly on its merits.

A. THE COURT'S HOLDING THAT THE CIRCUIT COURT ERRED IN REFERRING THE MATTER TO THE MASTER HAS NO BEARING ON SWA.

The Court held that the Circuit Court erred in referring the matter to the master because Maybank was entitled to a trial by jury and sought to invoke that right in its complaint. Appellant argued on appeal that the Trial Court did not have jurisdiction to issue the orders Appellant sought to overturn because the matter had been referred to the Master-in-Equity and then back to the Trial Court while Appellant's appeal regarding the mode of trial was pending. However, as noted in the Court's Order, "[a]ll Respondents—except for Seamon—filed motions for reference to the master on the ground that the Foreclosure Order required the master to retain jurisdiction over 'all necessary acts incident to this foreclosure and to hear any post-judgment matters.'"

While SWA did not oppose its co-Respondents' Motions to Refer to the Master-in-Equity, SWA did not, itself, file a Motion to Refer to the Master-in-Equity; thus, Appellant's argument related to the Trial Court's jurisdiction, or alleged lack thereof, has no bearing on SWA.

B. EVEN PRESUMING APPELLANT DID NOT ABANDON ANY ARGUMENT RELATED TO THE MOTION TO DISMISS, THE TRIAL COURT'S ORDER GRANTING SWA'S MOTION TO DISMISS MUST BE AFFIRMED.

Even if the Court's holding is correct, that "Maybank did not abandon any argument related to the motion to dismiss . . ." SWA's Motion to Dismiss the only claim filed against SWA, civil conspiracy, must be affirmed.

When reviewing motions to dismiss, the appellate court applies the same standard of review as the trial court. *See Carolina Park Assoc., LLC v. Marino,* 400 S.C. 1, 732 S.E.2d 876, 878 (2012). "Under Rule 12(b)(6), a defendant may move to dismiss a complaint due to its 'failure to state facts sufficient to constitute a cause of action.'" *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n,* 407 S.C. 67, 753 S.E.2d 846, 850 (2014). "In considering a motion to dismiss

under Rule 12(b)(6), a court must base its ruling solely on the allegations set forth in the complaint." *Id.* at 850; *Doe v. Marion,* 373 S.C. 390, 645 S.E.2d 245, 247 (2007). "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, dismissal under Rule 12(b)(6) is improper." *Carnival Corp.,* 753 S.E.2d at 850; *Doe*, 645 S.E.2d at 247.

Appellant's claim for civil conspiracy against SWA failed, and continues to fail, as a matter of law because Appellant failed to properly plead all elements to allege a claim for conspiracy under South Carolina law.

i. Appellant failed to allege that any relationship existed between SWA and Appellant to support a finding that SWA acted with specific intent to harm, nor did Appellant allege that SWA entered into any agreement with another party to purposely harm Appellant.

"A civil conspiracy is a combination of two or more persons joining *for the purpose of* injuring and causing special damage to the plaintiff." *McMillan v. Oconee Mem'l Hosp., Inc.,* 626 S.E.2d 884, 886 (S.C. 2006) (emphasis added); *see also Todd v. S.C. Farm Bureau Mut. Ins. Co.,* 292, 278 S.E.2d 607, 611 (S.C. 1981) ("Conspiracy is the conspiring or combining together to do an unlawful act to the detriment of another or the doing of a lawful act in an unlawful way to the detriment of another."); *Vaught v. Waites*, 208, 387 S.E.2d 91, 95 (S.C. Ct. App. 1989) ("Civil conspiracy consists of three elements: (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, (3) which causes him special damage.").

The focus of the inquiry is thus on the purpose of the agreement: "the essential consideration is not whether lawful or unlawful acts or means are employed to further the conspiracy, but whether the *primary purpose* or object of the combination is to injure the plaintiff." *Lee v. Chesterfield Gen. Hosp., Inc.,* 344 S.E.2d 379, 383 (S.C. Ct. App. 1986) (emphasis added). Some evidence that the alleged conspirators "acted with malice towards" the plaintiff is required.

Waldrep Bros. Beauty Supply, Inc. v. Wynn Beauty Supply Co., Inc., 992 F.2d 59, 63 (4th Cir. 1993) (applying South Carolina law).

Importantly, when "alleged conspirators acted out of a general desire to make a profit rather than to harm the plaintiff, a claim for civil conspiracy cannot lie." *Sizemore v. Ga-Pac. Corp.,* Civ. A. No. 6:94-2894, 1996 WL 498410 (D.S.C. 11/8/96); *Bivens v. Watkins,* 437 S.E.2d 132, 136 (S.C. Ct. App. 1993); *see also Stiles v. Onorato,* 457 S.E.2d 601, 603 (S.C. 1995) (Third party complaint alleging civil conspiracy was dismissed for failure to state a claim since the complaint failed to allege in what manner defendant attorney acted outside his role as plaintiff's attorney and did not allege breach of any independent duty owed to the third party; only reasonable inference was that at all times defendant attorney was acting in his capacity as an attorney). "Thus, a claim for civil conspiracy requires at least some degree of relationship between the plaintiff and the alleged conspirators." *Sizemore,* 1996 WL 498410, at *13.

In *Sizemore,* the plaintiff alleged that defendant HPVA, a non-profit trade association supporting manufacturers of hardwood plywood and veneer products, engaged in a civil conspiracy with defendant Georgia-Pacific and other manufacturers to conceal the flammability properties of hardwood plywood paneling from disclosure to federal and state agencies, building code officials, consumer groups, and the general public. *Id.* Specifically, the plaintiff asserted that HPVA's research and advocacy activity on behalf of the industry, including Georgia-Pacific, was evidence of the conspiracy. *Id.* The *Sizemore* court held that the alleged acts by HPVA complained of did not satisfy, as a matter of law, the requirements of a South Carolina civil conspiracy claim. *Id.* There was no evidence in the record which suggested that there was any type of relationship between plaintiffs and HPVA, "let alone the type of relationship that could give rise to a claim that HPVA conspired with the specific intent to harm the plaintiffs." *Id.*; *Swartzbauer v. Lead Indus.*

Ass'n, Inc., 794 F. Supp. 142, 145 (E.D. Pa. 1992) ("court dismissed a civil conspiracy claim against an industry trade association because plaintiffs did not allege 'that the object of defendants' alleged agreement was to injure plaintiffs.'") The mere allegation made by plaintiff was "that HPVA was aware that its actions were injuring 'members of the [p]laintiffs' class, the users and consumers of plywood wall paneling products. This generalized statement is an insufficient factual predicate upon which to rest a finding that HPVA acted with the specific intent to harm the plaintiffs." *Id.*

Here, there is no relationship alleged between Appellant and SWA to support a claim for civil conspiracy. Taking the allegations of the *Verified Complaint* as true, SWA was engaged by Penny Creek to prepare planned unit development guidelines for the Servient Property sometime after the derivative and judicial dissolution action was commenced on December 16, 2013. *Verified Complaint,* at ¶¶ 22 & 32. At that time, Penny Creek had already allegedly transferred its membership interest in Appellant to the Laplante family by Resolution dated October 4, 2013. As such, there would have been no relationship—contractual or otherwise—between Appellant and SWA. Thus, no special relationship existed between Appellant and SWA to give rise to a claim that SWA conspired with the *specific intent or purpose* to harm Appellant. SWA was simply engaged by another Respondent, Penny Creek, to prepare documents on behalf of Penny Creek as a standard business transaction for profit. Because the requisite relationship does not exist—nor has it been alleged to exist—between Appellant and SWA, the cause of action for civil conspiracy against SWA must be dismissed and the Trial Court's holding as to SWA's Motion to Dismiss must be affirmed.

ii. Appellant did not allege or plead sufficient facts to support the claim under Rule 8, SCRCP or otherwise per South Carolina law.

"The Rules 'govern the procedure in all South Carolina courts in all suits of a civil nature whether cognizable as cases at law or in equity." *Justice v. Perry*, 496 S.E.2d 871, 872 (S.C. Ct. App. 1998); SCRCP, Rule 1. "The Rules clearly set forth the required contents of pleadings. Pleadings shall contain (1) a short and plain statement of the grounds including facts and statutes upon which the court's jurisdiction depends, unless the court already has jurisdiction to support it, (2) a short and plain statement of the facts showing that the pleader is entitled to relief, and (3) a prayer or demand for judgment for the relief to which he deems himself entitled.'" *Justice,* 496 S.E.2d at 872; SCRCP, Rule 8(a). "'All pleadings shall be so construed as to do substantial justice to all parties." *Id.*; SCRCP, Rule 8(f). "Therefore, in deciding whether a dismissal under Rule 12(b)(6), SCRCP, is proper, the adequacy of a plaintiff's complaint must be determined through application of the pleading rules of Rule 8, SCRCP." *Id.*

"In this state Rule 8, SCRCP, mandates that a pleading contain 'ultimate facts' rather than 'evidentiary facts' to state a cause of action." *Watts v. Metro Sec. Agency,* 550 S.E.2d 869, 871 (S.C. Ct. App. 2001); *Jeffords v. Lesesne,* 541 S.E.2d 847 (S.C. Ct. App. 2000). "'Ultimate facts fall somewhere between the verbosity of 'evidentiary facts' and the sparsity of 'legal conclusions.'" *Watts,* 550 S.E.2d at 871; *Jeffords,* 541 S.E.2d at 847.

While "Rule 12(b)(6) SCRCP, 'retains the Code Pleading standard . . . rather than the more lenient notice pleading standard found in the federal rules,'" the pertinent language of Rule 8, SCRCP is substantially similar to Rule 8, Federal Rules of Civil Procedure, and, thus, related federal case law provides guidance here. *See Gaskins v. S. Farm Bureau Cas. Ins. Co.*, 541 S.E.2d 269, 271 (S.C. Ct. App. 2000); Harry M. Lightsey, Jr. & James F. Flanagan, *S.C. Civ. Proc.* 93 (2nd Ed. 1996); *see* S.C. Rules of Civ. Proc., Rule 8(a), Fed. Rules of Civ. Pro., Rule 8(a). "In

construing the South Carolina Rules of Civil Procedure, . . . [South Carolina] courts look for guidance to cases interpreting the federal rules." *Maybank v. BB&T Corp.,* 787 S.E.2d 498, 510 (S.C. 2016); *Gardner v. Newsome Chevrolet-Buick, Inc.,* 404 S.E.2d 200, 201 (S.C. 1991). "The United States Supreme Court has made clear that, under Rule 8 of the Federal Rules of Civil Procedure, the complaint must contain sufficient factual matter, accepted as true, to state a claim that is plausible on its face." *James v. Richland Cty Recreation Comm'n,* 2016 WL 6892806, at *2 (D.S.C. 11/1/16), *see Ashcroft v. Igbal,* 556 U.S. 662, 678 (2009); *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007). "Expounding on its decision in *Twombly*, the United States Supreme Court stated in *Igbal*:

> The pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the defendant-unlawfully-harmed-me accusation. A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertions' devoid of 'further factual enhancement.'
>
> 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.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

James, 2016 WL 6892806 at *2-3; *Igbal,* 556 U.S. at 677-78 (quoting *Twombly,* 550 U.S. at 555, 556, 557, 570).

Here, it is not enough for Appellant to simply lump SWA in its general allegation that all of the Respondents "at the direction, guidance, and/or persuasion of Zurlo" concealed the easement by omitting references to the easement when seeking approval for the development of the Servient Property. *See Verified Complaint,* ¶ 61. Appellant was required to include allegations of specific facts in its Complaint to allow the Court to draw the reasonable inference of liability, and Appellant

failed to do so in its claim for civil conspiracy. Further, along those same lines, the Complaint is devoid of any allegation that an agreement was entered into by SWA with the other alleged conspirators to conspire against Appellant for the specific purpose of harming Appellant. Those key omissions are fatal to Appellant's claim for civil conspiracy, such that Appellant's general allegations of conspiracy are just a "naked assertions" devoid of "factual enhancement" that are far from being "plausible on their face."

Without sufficient factual content to support, or allegations to establish, any specific agreement by SWA to conspire with the other Respondents to purposefully harm Appellant, it is impossible for this Court to test whether the claim has facial plausibility. Accordingly, the Trial Court's holding which granted SWA's Motion to Dismiss Appellant's claim for civil conspiracy against SWA must be affirmed as Appellant failed to state facts sufficient to constitute a cause of action as required under Rule 8, SCRCP's pleading standard and otherwise per South Carolina law.

iii. Appellant did not allege any additional overt act in furtherance of the alleged conspiracy.

"A claim for civil conspiracy must allege additional acts in furtherance of a conspiracy rather than reallege other claims within the complaint. . . . Moreover, because the quiddity of a civil conspiracy claim is the special damage resulting to the plaintiff, the damages alleged must go beyond the damages alleged in other causes of action." *Hackworth v. Greywood at Hammett, LLC*, 682 S.E.2d 871, 874 (S.C. Ct. App. 2009) (internal citations omitted). "As a unique feature of the tort of civil conspiracy, 'an action for civil conspiracy will not lie if a plaintiff has obtained relief through other avenues.'" *Roddey v. Nations Waste, Inc.*, 2005 WL 7084315, at *5 (S.C. Ct. App. July 28, 2005; *Kuznik v. Bees Ferry Assocs.,* 538 S.E.3d 15, 31 (S.C. Ct. App. 2000), *cert. dismissed* (Jan. 1, 2004). This case law is consistent with the premise of Rule 8(e)(2), which

provides a party the ability "to set forth two or more statements of a cause of action or defense *alternatively or hypothetically* [not cumulatively]… regardless of consistency and whether based on legal or on equitable grounds or on both." *Roddey,* 2005 WL 7084315, at *5; SCRCP Rule 8(e)(2).

Here, Appellant has failed to allege any particular additional overt act in furtherance of the alleged conspiracy beyond what was alleged throughout the remainder of its pleading and other causes of action. The allegations of conspiracy are not plead "in the alternative," and are essentially the same allegations contained elsewhere within Appellant's Complaint—that is, the Respondents allegedly knew of the alleged easement but failed to include it in their submissions, and thus Appellant is now deprived of its easement. Because Appellant has failed to plead any additional overt act to support its civil conspiracy claim, the claim must be dismissed and the Trial Court's ruling as to SWA's Motion to Dismiss affirmed.

Thus, the Court erred in reversing the Trial Court's decision to grant SWA's request for dismissal of Appellant's civil conspiracy claim against SWA pursuant to Rule 12(b)(6), SCRCP.

II. Conclusion

For the foregoing reasons, SWA suggests the Court overlooked or misapprehended the aforementioned points in reversing and remanding the Circuit Court's decision specific to the only claim filed against SWA in the underlying matter and, therefore, the Court should amend its prior holding to account for the above overlooked and misapprehended points and grant SWA's Petition for a Rehearing.

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PROOF OF SERVICE

I certify that I have served the Respondent Seamon, Whiteside & Associates, Inc.'s Petition for Rehearing on the following parties' counsel, at the addresses listed below by depositing the same in the United States mail electronic mail on August 22, 2024.

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