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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
In the Court of Common Pleas
Brian M. Gibbons, Circuit Court Judge

Case No. 2017-CP-42-00740

Appellate Case No. 2020-001642

Gibbs International, Inc., ... Respondent,

v.

Sarmad Harake, Eurosa, Inc., and Katherine Harake,..Defendants

Of whom Sarmad Harake and Eurosa, Inc. are the... Appellants.

REPLY IN SUPPORT OF PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

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INTRODUCTION

Respondent Gibbs International, Inc. ("Gibbs") submits this Reply in Support of its Petition for Rehearing and Suggestion for Rehearing *En Banc*. The Circuit Court correctly held that the attempted counterclaim asserted by Sarmad Harake ("Harake" or "S. Harake") and Eurosa, Inc. ("Eurosa") (collectively, the "Harake Defendants") for "tortious interference with an economic interest" failed as a matter of law given that, among other things, the Harake Defendants themselves admitted no such claim had been recognized under South Carolina law. The Circuit Court also properly denied the Harake Defendants' motion to amend. As detailed below, rehearing is appropriate because this Court's November 13, 2024 Panel Opinion No. 2024-UP-385, 2024 WL 4764201 (the "Panel Opinion") misapprehended or overlooked numerous legal defects with the Harake Defendants' re-written claim for intentional interference with contractual relations and failed to address the Harake Defendants' untimely and blatantly prejudicial attempt to amend pursuant to Rule 15(a), SCRCP. The Panel Opinion also conflicts with existing judicial precedent.

ARGUMENT

I. THE PANEL OPINION INCORRECTLY HELD THAT THE HARAKE DEFENDANTS SUFFICIENTLY PLEADED A CLAIM FOR INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONS.

In finding that the Harake Defendants' sufficiently pleaded a claim for intentional interference with contractual relations, the Panel Opinion states:

> Appellants alleged Gibbs knew Harake was appointed as a director of, and had acquired a 100% interest in, Paysend UK. The counterclaims stated Gibbs refused without justification to allow another investor to buy it out of Paysend Processing or to roll Paysend Processing into Paysend UK, and this decision damaged Appellants because it forced Harake to divest his shares in Paysend UK.

(Panel Opinion at *4). This holding overlooks that the Harake Defendants never used the words "intentional interference" or even "intentional" a single time in 16 pages of counterclaims or in 36

pages of answer and counterclaims. Moreover, a careful review of the Harake Defendants' Answer to the Third Amended Complaint and Amended Counterclaims ("Answer and Am. Countercl.") reveals that the Harake Defendants' claim relies on unsupported and conclusory allegations, which should be disregarded. *See Jones v. Gilstrap*, 288 S.C. 525, 528, 343 S.E.2d 646, 648 (Ct. App. 1986) (stating legal conclusions plead in a complaint can be disregarded on a motion to dismiss) The Harake Defendants' allegations do not state a valid claim for relief.

The Harake Defendants' claim also fails as a matter of law because, among other things, the amendment is futile.[1] Gibbs had no legal duty to agree to allow the other investor to buy Gibbs out or to agree for the shares to be rolled from Paysend Processing into Paysend UK. In fact, the Harake Defendants fail to even allege that Gibbs owed them any duty in the purported claim for intentional interference with contractual relations. The "existence and scope of [a] duty are questions of law" for the Court to determine. *Miller v. Camden*, 317 S.C. 28, 31, 451 S.E.2d 401, 40 (Ct. App. 1994). "If there is no duty, the defendant is entitled to judgment as a matter of law." *Doe v. Wal-Mart Stores, Inc.*, 393 S.C. 240, 246, 711 S.E.2d 908, 911 (2011). The Harake Defendants assert as part of their claim that Gibbs "refused for the other investor to buy [it] out of Paysend Processing or transfer its investment to Paysend UK so that the two entities could be rolled into one." (Answer and Am. Countercl., ¶ 197, Am. R. p. 347). However, Gibbs had no legal duty, by way of contract or otherwise, to agree to be bought out or to transfer its investment to Paysend UK so the two could be rolled into one. The non-existence of a duty to take this action entitles Gibbs to the affirmation of the dismissal of the claim (and denial of the motion to amend as futile).

[1] In accordance with Rule 220(c), SCACR, Gibbs respectfully requests that the Court affirm the Circuit Court's order based on the additional sustaining grounds of futility. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419–20, 526 S.E.2d 716, 723 (2000).

The claim for intentional interference with contractual relations also fails because Gibbs clearly acted within its rights in declining to agree to be bought out or to roll over its stock into Paysend UK. The Harake Defendants had no legal right to force Gibbs to agree to be bought out or to the rollover. South Carolina law is clear that the assertion of one's legal rights does not act as a basis for a claim of intentional interference. *See Santoro v. Schulthess,* 384 S.C. 250, 265, 681 S.E.2d 897, 905 (Ct. App. 2009). For example, the Court in *Webb v. Elrod* concluded:

> The exercise in good faith of a legal right by a party to a contract affords no basis for an action by the second party for intentional interference with a contract even though the consequence of the exercise of the legal right by the first party is to cause a third party not to perform another contract with the second party.

308 S.C. 445, 448, 418 S.E.2d 559, 561 (Ct. App. 1992) (emphasis added).

In addition, "[a]n action for tortious interference protects the property rights of the parties to a contract against unlawful interference by third parties." *Gecy v. S.C. Bank & Tr.*, 422 S.C. 509, 520–21, 812 S.E.2d 750, 756 (Ct. App. 2018) (quoting *Dutch Fork Dev. Grp. II, LLC v. Sel Props., LLC*, 406 S.C. 596, 604, 753 S.E.2d 840, 844 (2012)); *see also Santoro*, 384 S.C. at 262, 681 S.E.2d at 903 ("[T]o sustain a claim for intentional interference with business relations, the tortfeasor must be a 'stranger' to the business relationship at issue." (citing *Renden, Inc. v. Liberty Real Estate P'ship*, 213 Ga. App. 333, 336, 444 S.E.2d 814, 818 (1994))). A claim for intentional interference cannot be asserted against a party to the contract that was allegedly breached. Here, the Harake Defendants allege Gibbs breached a contract to which he was a party. The claim alleges: "Counterclaim Defendant Gibbs, Counterclaim Plaintiff Eurosa, and the other investors in Paysend Processing had an agreement on the capital investments needed for Paysend Processing. As part of that agreement, Counterclaim defendant Gibbs agreed to invest $1 million." (Answer and Am. Countercl., ¶ 192, Am. R. p. 346). Referencing that same alleged agreement, the claim then alleges: "Thereafter, Counterclaim Defendant Gibbs refused to make any investment over

$250,000 in Paysend Processing, even though it initially agreed to invest $1 million." (Answer and Am. Countercl., ¶ 193, Am. R. p. 346). The Harake Defendants' claim indisputably arises out of an alleged agreement to which Gibbs was a party, and therefore, fails as a matter of law.

Stating a valid claim for relief requires more than simply reciting the elements of the claim in conclusory fashion. For the reasons stated above, the Panel Opinion overlooks that, even taken as true, the Harake Defendants' allegations fail to state a valid claim for intentional interference with contractual relations.

II. THE CIRCUIT COURT PROPERLY DENIED THE HARAKE DEFENDANTS' MOTION TO AMEND ON THE BASIS OF UNDUE DELAY AND PREJUDICE.

Because the Panel Opinion erred in holding that the Harake Defendants sufficiently pleaded a claim for intentional interference with contractual relations, it likewise erred in not affirming the Circuit Court's denial of the Harake Defendants' motion to amend. In their Return, the Harake Defendants once again rely on *Skydive Myrtle Beach, Inc. v. Horry County*, 426 S.C. 175, 826 S.E.2d 585 (2019), to argue that the Circuit Court was required to grant them leave to amend. This argument fails. Under *Skydive*, "[a] circuit court does not have 'discretion' to dismiss a complaint with prejudice for failure to state a claim under Rule 12(b)(6) without at least considering whether to allow leave to amend under Rule 15(a)". *Id.* at 189, 826 S.E.2d at 592. In that case, the Supreme Court plainly stated "[t]he circuit court erred by failing even to consider allowing Skydive to amend its complaint." *Id.* at 180, 826 S.E.2d at 587. Here, the Circuit Court clearly considered whether the Harake Defendants should be given the opportunity to amend their complaint, and it properly ruled that they should not.

Notwithstanding its holding, *Skydive* acknowledges that "'a proper reason' to deny a motion to amend could be 'bad faith, undue delay, or prejudice.'" *Id.* at 182, 826 S.E.2d at 588 (quoting *Forrester v. Smith & Steele Builders, Inc.*, 295 S.C. 504, 507, 369 S.E.2d 156, 158 (Ct. App. 1988)). *Skydive* clearly does not overrule case law, like *Holland v. Morbark, Inc.*, 407 S.C.

227, 236, 754 S.E.2d 714, 719 (Ct. App. 2014), establishing that undue delay and prejudice are proper grounds to deny an amendment.

The Harake Defendants argue a Rule 12(b)(6) motion is to be treated the same at the outset of litigation as it is almost four years into the life of the case and when the case was subject to be ready for trial. That is flat wrong and why the outcome in *Skydive* and *Holland* are different. *Skydive* was at the outset of litigation when an amendment would not be prejudicial. In the case at hand, the Consent Amended Scheduling Order entered on November 4, 2020 stated the case would be subject to trial as of January 4, 2021 (Am. R. p. 19). That date was not changed by subsequent order. The claim at issue asserted a brand-new claim involving brand-new facts that will require brand-new discovery, evidence, experts and increases the amount of damages sought from $5,000,000 to $27,000,000.00. The *Holland* rule does not allow for an amendment under these circumstances. Accordingly, this case is, in fact, and should be, treated differently than *Skydive* because of the timing issues.

In this case, Harake's deposition testimony from July 2019 demonstrates that the Harake Defendants sat on the claim for no less than one year before amending. By the time the Harake Defendants sought to amend, nearly 250,000 pages of documents had been produced and 16 depositions had been taken. *Holland* is crystal clear: "[p]rejudice occurs when the amendment states a new claim or defense which would require the opposing party to introduce additional or different evidence to prevail in the amended action." 407 S.C. at 235, 754 S.E.2d at 719. The prejudice resulting from the Harake Defendants' eleventh-hour amendment is undeniable. Assertion of the claim will result in additional written discovery and depositions and require the retention of additional experts, all of which will result in significantly delaying a case that is almost eight years old. The Circuit Court considered these arguments and properly denied the motion.

(*See* Order Denying October 5, 2020 Motions by Defendants Sarmad Harake and Eurosa, Inc.; Am. R. p. 53). *Skydive* does not save the Harake Defendants' late and prejudicial amendment.

The Harake Defendants argue they are entitled to amend because of the filing of the Gibbs' amendment. That is incorrect. The two "amendments" are on entirely different tracks. On the first track, Gibbs' amendment was filed when it was because the Harake Defendants deliberately hid, and refused to produce, the evidence of Harake's, his wife's, and Eurosa's banking records that established what happened to Gibbs' money. The evidence was hidden through redactions, and when the court ordered removal of the redactions, it provided exactly what Gibbs predicted would be proven: Gibbs' money had been stolen. At the same time, during the hiding of the evidence, the Harakes threatened Gibbs with a claim under the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. § 15-36-10, *et seq*. So, the Harakes knew what the records demonstrated and refused to produce them, knowing that it would prove Gibbs was correct about the documents. Once the documents were produced pursuant to the Circuit Court's order, Gibbs confirmed it was right and moved to amend days later.

Track two is the Harake Defendants' amendment. That amendment was made three and one-half years into the litigation and *over one year* after Harake testified that he was aware of the claim and was just calculating his damages. The Harake Defendants' unwarranted delay causes extraordinary prejudice to Gibbs. Allowing an amendment by judicially re-writing the claim violates *Holland* and allows a party to go forward with a brand-new, and unrelated, claim at great prejudice to Gibbs. Should the Harake Defendants be rewarded for hiding the evidence through their own redactions? Surely not. Following the clear precedent established by *Holland*, the amendment must be disallowed.

In their Return, the Harake Defendants make a nonsensical argument that they were denied the opportunity to amend pursuant to Rule 15(a), SCRCP. In direct contradiction, the Circuit Court

denied the Harake Defendant's verbal motion to amend at the September 22, 2020 hearing. (*See* Am. R. p. 498 (requesting that the Harake Defendants "be able to [amend their counterclaim] under Rule 15")). The Circuit Court's November 30, 2020 Order plainly stated that it was denying all of the motions by the Harake Defendants, including, but not limited, to those raised at "the related hearing held September 22, 2020." (Am. R. p. 53). There is no question that the Circuit Court's Order denied both the Rule 15(a) motion made by the Harake Defendants at the September 22, 2020 hearing and the subsequent Rule 15(a), SCRCP motion made in the Harake Defendants' Motion to Alter or Amend.

CONCLUSION

For the foregoing reasons and those stated in its prior briefing, Gibbs respectfully requests that the Court rehear the matter by panel or *en banc* and affirm the Circuit Court's rulings. The Panel Opinion, seemingly relying on the Harake Defendants' recital of the elements of their claim in conclusory fashion, errs in holding that a valid claim for intentional interference with contractual relations was pled. Additionally, the Panel Opinion, by re-drafting and de-facto amending the complaint, eviscerates well-established and well-reasoned law providing that undue delay and prejudice are proper grounds to deny a motion to amend. The Panel Opinion also violates existing precedent as follows:

- Judicially redrafting a claim that the Harake Defendants admit was never recognized under South Carolina law;
- Precedent requires that the court look **solely** at allegations on the face of a complaint;
- Precedent requires prejudicial amendments not be allowed and this is a de facto amendment resulting in substantial prejudice;
- Eviscerates legal elements and distinctions between various claims;
- Violates precedent stating futile amendments should not be allowed;
- The meaning of *Skydive* and *Holland* and the interaction between the rulings in those two cases has been violated and clarification is needed that *Skydive* does not overrule *Holland.*

All of the above present issues of exceptional importance.

Respectfully submitted this the 4th day of February, 2024.

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Gibbs International, Inc.,.. Respondent,

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Of whom Sarmad Harake and Eurosa, Inc. are the... Appellants.

PROOF OF SERVICE

The undersigned hereby certifies that on February 4, 2025, he has caused to be served **Respondent's Reply in Support of Petition for Rehearing and Suggestion for Rehearing *En Banc*** upon all parties of record via e-mail. A copy of the email serving all parties of record is attached hereto.

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Good morning,

Hope you all are well. Please find attached for service Respondent's Reply in Support of Petition for Rehearing and Suggestion for Rehearing *En Banc* in the above-referenced matter.

Thank you.

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