

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge
Marvin H. Dukes, III, Master-In-Equity

Case No. 2011-CP-07-2546

Appellate Case No. 2011-204367

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SC Court of Appeals

Joseph C. Sun,

Appellant,

v.

Olesya Matyushevsky, Citizens Opposing
Domestic Abuse, Christine Varg and Liling
Sun,

Respondents.

Respondent Liling Sun's Initial Brief

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Statement of Issues on Appeal

- A. Did the Trial Court err in dismissing Appellant’s cause of action for fraud against Respondent Liling when Appellant failed to allege he relied upon the misrepresentations or that such caused him damage?
- B. Did the Trial Court err in dismissing Appellant’s cause of action for civil conspiracy against Respondent Liling when he failed to allege such conspiracy caused him special damages?
- C. Did the Trial Court err in dismissing Appellant’s cause of action for malicious prosecution against Respondent Liling when he failed to allege that a proceeding had been terminated in his favor?
- D. Did the Trial Court err in dismissing Appellant’s causes of action for trespass, adultery, theft, burglary, and fraud against Respondent Liling as being within the exclusive jurisdiction of the family court?
- E. Did the Trial Court err in dismissing Appellant’s causes of action for libel and slander as to Respondent Liling when Appellant made mere conclusory allegations in support of these claims?

Statement of the Case

Pursuant to Rule 208(b)(6) SCACR, Respondent Liling adopts the Statement of the Case presented in the Initial Brief of Respondents Olesya Matyushevsky, Citizens Opposed to Domestic Abuse and Christine Varg.

Facts of the Case

Appellant and Respondent Liling Sun (now known as Liling Walsh and hereinafter referred to as “Liling”) were divorced following a difficult marriage which included a history of abuse by Appellant against Liling. Complaint, p. 4. Appellant and his mother, Ah Tsao Sun who was named as a third party defendant by virtue of Liling’s allegation that marital property was titled in her name, were represented by the same counsel in the divorce and each entered into settlement agreements with Liling to resolve the matters before the Court. Divorce Decree, p. 1. These agreements were incorporated into the Family Court’s Divorce Decree. Divorce Decree, p. 3, 9. Shortly after the divorce, Appellant ruled Liling into the Family Court claiming she wrongfully removed certain personal property from the marital residence prior to the divorce. Motion for Rule to Show Case, p. 1. At the hearing on that matter, Liling agreed she had a bicycle, loveseat and table and agreed to return them. Order on Rule to Show Case, p. 1. The Family Court ordered the parties, through their representatives, to go to Liling’s apartment and make an inventory of all property. Order on Rule to Show Case, p. 2. Though they went to her apartment and searched it, Appellant’s representatives in the matter never made an inventory. One month after the Rule to Show Cause hearing on the personal property, Appellant filed this action in the Court of Common Pleas, seeking damages totaling 3.3 million dollars against Liling, her divorce lawyer, and the agency which assisted Liling as the victim of Appellant’s

abuse, and an employee of that agency. Complaint, p. 1-11. All of Appellant's allegations in the Complaint pre-date the date of the divorce decree. Complaint, p.1-10, Divorce Decree, p. 1.

In his Complaint, Appellant accuses Liling of all sorts of bad conduct, from "adultery and involvement in pornography," to the horrific claim of having sex with her paramour and then calling their minor child to "join them in bed several times." Complaint, p. 5-6.

For his cause of action for fraud, Appellant alleges: his mother gave him a deed to a property known as Bluffton Park and Liling offered to take it to be recorded in the Register of Deeds Office. Complaint, p. 4. Someone in the County Assessor's office thereafter told him that their records indicated that this property was owned by Liling, not him. Complaint, p. 4. He confronted Liling about this and she "pretended to be a loving wife told [Appellant] that there was no difference whose name the house was titled [sic], and that she would make payment to Ah Tsao Sun on the house. Complaint, p. 4. She further agreed to apply for the 4% tax, and in addition sign a warranty deed on the house back to [Appellant's] mother Ah Tsao Sun as her collateral." Complaint, p. 4. This, he claims, served as the basis for the Family Court judge ordering Liling to have temporary possession of the marital home. Complaint, p. 5.

Appellant's mother, though a party to the divorce action and property settlement agreement which serves as the basis for most of Appellant's claims, is not a party to this action, nor was any appeal made on her behalf. Complaint, p. 1.

Though Appellant never uses the words "malicious prosecution" in his Complaint, the trial court considered that cause of action in the order dismissing the case as to Liling. Order Dismissing Complaint, p. 4-5. Appellant alleges that Respondents "fabricated lies," and "used false accusations to have [Appellant] arrested and put in jail repeatedly from March 2010 until September 2010, just so they could accomplish their fraudulent and criminal schemes."

Complaint, p. 7. Appellant alleges he “was incarcerated unjustly and suffered depression and mental pain.” Complaint, p. 7. He does not allege the criminal actions were terminated, much less terminated in his favor. Order Dismissing Complaint, p. 4-5.

Appellant alleges Liling “fabricated lies of harassment, unlawful phone calls, stalking, possession of burglary tools and burglary without any evidence or witness,” “used false accusations to have Plaintiff arrested and put in jail,” and “made false and malicious slander and libel against Plaintiff.” Complaint, p. 7, 8. He does not allege what the specific statements were.

Finally, Appellant ends his Complaint with a prayer for relief seeking 3.3 million dollars in actual and punitive damages. Complaint, p. 10-11.

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), SCRPC. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint. *Id.* “A pleading which sets forth a cause of action . . . shall contain . . . a short and plain statement of the facts showing that the pleader is entitled to relief . . .” Rule 8(a) SCRPC “Factual allegations are required and conclusionary allegations may be disregarded.” Robert Flanagan, *S.C. Civil Procedure* 102 (3rd ed. 2010). The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. *Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007).

Pursuant to Rule 12(b)(1), SCRPC, the movant challenges the power of the court over the subject matter. The question of subject matter jurisdiction is a question of law for the court.

Chew v. Newsome Chevrolet, Inc., 315 S.C. 102, 104, 431 S.E.2d 631 (Ct.App.1993). The appellate court is free to decide questions of law with no deference to the trial court. *Catawba Indian Tribe of S.C. v. State of S.C.*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007).

While the appellate court utilizes the same standard of review as the circuit court in scrutinizing the application of Rule 12(b)(8), each of the components of the rule are determined as a matter of law and thus it applies a de novo standard of review to the grant or denial of this motion. *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99-100, 674 S.E.2d 524, 528 (Ct. App. 2009)

Arguments

1. Appellant's failure to allege reliance or damages are fatal to his cause of action for fraud.

To establish a cause of action for fraud, Plaintiff must allege and prove nine elements by clear, cogent, and convincing evidence, including his reliance on the truth of a statement and the his consequent and proximate injury. *Schnellmann v. Roettger*, 373 S.C. 379, 382, 645 S.E.2d 239, 241 (2007) Failure to prove any element of fraud or misrepresentation is fatal to the claim. *Id.*

Even viewing the Complaint in the light most favorable to Appellant, he fails to plead that he detrimentally relied upon a misrepresentation. The misrepresentation he alleges is that Liling said she was going to record the deed with him as grantee and she did not do it. He claims she recorded a deed making her, not him, the grantee of the property. He does not claim to have acted upon this and suffered as a result. Rather, he claims the Family Court Judge acted upon this and granted Liling temporary possession of the marital residence. Appellant's claim of fraud thus fails. The Trial Court properly dismissed Appellant's cause of action for fraud against Liling on the grounds that Appellant stated insufficient facts to constitute a cause of action.

2. Appellant's failure to allege special damages are fatal to his claim of a civil conspiracy.

Appellant failed to plead that he suffered special damages as a result of a civil conspiracy and it was thus proper for the Trial Court to dismiss this cause of action against Liling.

"The tort of civil conspiracy has three elements: (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, and (3) causing plaintiff special damage." *Benedict Coll. v. Nat'l Credit Sys., Inc.*, 400 S.C. 538, 545, 735 S.E.2d 518, 521 (Ct. App. 2012). "While general damages are the immediate, direct, and proximate result of the tortfeasor's conduct, special damages are the natural, but not the necessary or usual, consequence of the tortfeasor's conduct." *Id.* (internal quotations omitted)

In the *Benedict Coll.* case, the Plaintiff sued the defendant for breach of contract, fraud, fraud in the inducement, and unjust enrichment, all arising out of a contractual agreement. 400 S.C. at 542-43, 735 S.E.2d at 520-21. The defendant counterclaimed alleging its own breach of contract claim and one for civil conspiracy. *Id.* The defendant claimed that Plaintiff, and a third party not authorized to act on behalf of the defendant, engaged in a conspiracy to bind the defendant to contractual terms it had not agreed to. *Id.* 400 S.C. at 542-44, 735 S.E.2d at 520-21. The S.C. Court of Appeals held the trial court's dismissal of the defendant's counterclaim of conspiracy was in error because the "special damages" the defendant claimed were "the costs and attorney's fees associated with the defense of [the College]'s allegations [for breach of contract]." *Id.*, 400 S.C. at 546, 735 S.E.2d at 522 (internal quotations omitted). The defendant was effectively arguing that the plaintiff's conspiracy had put them into a position of having to pay legal fees and costs to defendant a breach of contract action. The *Benedict Coll.* defendant thus claimed special damages, as opposed to general damages in its conspiracy claim.

The Appellant in the present case does appear to claim damages in the form of legal fees and costs related to the alleged conspiracy. He alleges general damages, however, rather than special damages. For this reason, this Court should affirm the Trial Court's dismissal of Appellant's conspiracy cause of action against Liling.

3. Appellant's failure to allege that any proceedings have been terminated in his favor is fatal to his claim for malicious prosecution.

"In order to recover in an action for malicious prosecution, 'the plaintiff must show (1) the institution or continuation of original judicial proceedings, either civil or criminal; (2) by, or at the instance of, the defendant; (3) termination of such proceeding in plaintiff's favor; (4) malice in instituting such proceedings; (5) want of probable cause, and (6) resulting injury or damage.'" *Ruff v. Eckerds Drugs, Inc.*, 265 S.C. 563, 566, 220 S.E.2d 649, 651 (1975).

Appellant does not allege that the criminal proceedings which he argues were "wrongful" were terminated in his favor. As such, it was proper for the trial court to dismiss this cause of action against Liling and this Court should affirm.

4. Appellant's claims for trespass, adultery, theft, burglary, and fraud against Liling were within the exclusive jurisdiction of the Family Court.

The South Carolina Legislature has granted the family courts exclusive jurisdiction over marital litigation and disputes over marital property between spouses. Specifically, "The family court has exclusive jurisdiction . . . to hear and determine . . . marital litigation between the parties . . . for settlement of all legal and equitable rights of the parties in the actions in and to the real and personal property of the marriage . . ." S.C. Code Ann. § 63-3-530 (1976) (as amended).

Every allegation Appellant makes in his Complaint regarding Liling occurred either before or during the divorce. He claims that while the divorce was pending, Liling "broke in" to one of the martial properties and removed personal property. His claim for fraud is based upon

the family court's decision to award temporary possession of the marital home to Liling. Adultery is a ground for divorce, not a cause of action for damages. These allegations are thus "marital litigation" between Appellant and Liling concerning their "legal and equitable rights . . . to the real and personal property of the marriage." The Trial Court correctly dismissed these causes of action against Liling and this Court should affirm that decision.

5. Appellant's failure to make specific factual allegations of libel or slander make dismissal of these against Liling appropriate.

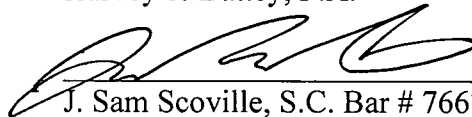
"The tort of defamation allows a plaintiff to recover for injury to her reputation as the result of the defendant's communication to others of a false message about the plaintiff." *Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 508, 506 S.E.2d 497, 501 (1998) "Slander is a spoken defamation while libel is a written defamation or one accomplished by actions or conduct." *Id.* "In order to prove defamation, the plaintiff must show (1) a false and defamatory statement was made; (2) the unprivileged publication was made to a third party; (3) the publisher was at fault; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." *Erickson v. Jones St. Publishers, L.L.C.*, 368 S.C. 444, 465, 629 S.E.2d 653, 664 (2006).

The only allegation Appellant makes in his Complaint of defamatory statements by Liling are the conclusionary allegations that she "fabricated lies of harassment, unlawful phone calls, stalking, possession of burglary tools and burglary without any evidence or witness," "used false accusations to have Plaintiff arrested and put in jail," and "made false and malicious slander and libel against Plaintiff." Nowhere does Appellant state what the specific statements or writings were which were defamatory. As such, the Trial Court properly dismissed the claims against Liling on the grounds that Appellant alleged insufficient facts to state a cause of action. This Court should affirm.

Conclusion

The Trial Court properly dismissed Appellant's Complaint as the matters he alleges are either insufficient to state a cause of action, within the exclusive jurisdiction of the family court, or both. This Court should affirm the Trial Court.

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