

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Health Promotion Specialists, LLC,

Plaintiff,

vs.

South Carolina Department of Health and Environmental Control, The South Carolina Dental Association, Dr. Richard E. Boyd, as Personal Representative of the Estate of Rocky Napier, and one or more John Does, unidentified current or former agents of South Carolina Department of Health and Environmental Control,

Defendant.

IN THE COURT OF COMMON PLEAS

Case No.: 2019-CP-40-04567

ORDER GRANTING SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL'S MOTION TO RECONSIDER AND ORDER OF DISMISSAL OF PLAINTIFF'S REMAINING CLAIMS, PURSUANT TO RULE 12(B)(6), SCRCP¹

RECEIVED

Mar 26 2025

SC Court of Appeals

This matter comes before the Court on Defendant South Carolina Department of Health and Environmental Control's ("DHEC" or the "Department") *Motion to Reconsider*. DHEC's Motion to Reconsider, filed on September 21, 2023, requested that this Court revisit its September 11, 2023, *Order Granting in Part and Denying in Part South Carolina Department of Health and Environmental Control's Motion to Dismiss Pursuant to Rule 12(b)(6), SCRCP*. More specifically, DHEC requested that the Court re-visit the causes of action that were not dismissed in the September 11, 2023, Order. Having reviewed the pleadings, the filings and the memoranda submitted by the parties, this Court has determined that the remaining causes of action asserted by Plaintiff (Unfair Trade Practices and Breach of Contract Accompanied by a Fraudulent Act) should also be dismissed. This Court adopts and incorporates the Factual Background, Procedural History

¹ To the extent necessary, this Order of Dismissal shall also dismiss the Plaintiff's purported claims against "one or more John Does, unidentified current or former agents of South Carolina Department of Health and Environmental Control" as identified in Plaintiff's caption.

and Ruling from its *Order Granting in Part and Denying in Part South Carolina Department of Health and Environmental Control's Motion to Dismiss Pursuant to Rule 12(b)(6), SCRCF*, filed on September 11, 2023, as if set forth verbatim.

STANDARD OF REVIEW

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. *Doe v. Marion*, 373 S.C. 390, 645 S.E.2d 245 (2007); *Hambrick v. GMAC Mortg. Corp.*, 370 S.C. 118, 634 S.E.2d 5 (Ct. App. 2006), rehearing denied, certiorari dismissed; *FOC Lawshe Ltd. Partnership v. International Paper Co.*, 352 S.C. 408, 574 S.E.2d 228 (Ct. App. 2002), rehearing denied, certiorari denied; *Brown v. Theos*, 338 S.C. 305, 526 S.E.2d 232 (Ct. App. 1999), rehearing denied, certiorari granted, affirmed 345 S.C. 626, 550 S.E.2d 304; *Burns v. Gardner*, 328 S.C. 608, 493 S.E.2d 356 (Ct. App. 1997); *Dye v. Gainey*, 320 S.C. 65, 463 S.E.2d 97 (Ct. App. 1995). When deciding such a motion, the question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in its behalf, the complaint states any valid claim for relief. *Plyler v. Burns*, 373 S.C. 637, 647 S.E.2d 188 (2007); *Doe v. Marion*, 373 S.C. 390, 645 S.E.2d 245 (2007); *Overcash v. South Carolina Elec. & Gas Co.*, 364 S.C. 569, 614 S.E.2d 619 (2005), rehearing denied; *Williams v. Condon*, 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001); *Dye v. Gainey*, 320 S.C. 65, 463 S.E.2d 97 (Ct. App. 1995); *Benson v. United Guar. Residential Ins. of Iowa*, 315 S.C. 504, 445 S.E.2d 647 (Ct. App. 1994), rehearing denied, certiorari denied; *Brown v. Leverette*, 291 S.C. 364, 353 S.E.2d 697 (1987).

RULING

I. Plaintiff cannot sustain an Unfair Trade Practices Act (“SCUTPA”) claim against DHEC.

The SCUTPA is intended to prevent unfair methods of competition and unfair or deceptive acts. S.C. Code Ann. § 39-5-20 (emphasis added). “To recover in an action under the UTPA, the plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected [the] public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s).” *Wright v. Craft*, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct.App.2006). However, the Act has an express exclusion for regulatory bodies, which provides as follows:

Nothing in this article shall apply to: (a) Actions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States or actions or transactions permitted by any other South Carolina State law.

S.C. Code Ann. § 39-5-40(a).

DHEC is the regulatory body charged through Section 40-15-110 of the South Carolina Code of Laws with administering its Public Health Dental Prevention Program (“Dental Program”). All alleged actions or transactions of DHEC occurred within the context of its administration of the Dental Program. As such, this Court finds that Plaintiff is statutorily barred from sustaining a SCUTPA cause of action against DHEC.

In addition, the SCUTPA can only be applied to those persons or entities engaged in trade or commerce. S.C. Code Ann. § 39-5-10. The SCUTPA defines “Trade” and “Commerce,” as follows:

“Trade” and “commerce” shall include the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or missed, and any other article, commodity or thing of value wherever situate, and shall include any

trade or commerce directly or indirectly affecting the people of this State.

S.C. Code Ann. § 39-5-10(b). “[T]rade or commerce’ involves ‘[e]very business occupation carried on for subsistence or profit and involving the elements of bargain and sale, barter, exchange, or traffic.’” *Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 639, 743 S.E.2d 808, 816 (2013) (citing Black's Law Dictionary (9th ed.2009)); and *Bretton v. State Lottery Comm'n*, 41 Mass.App.Ct. 736, 673 N.E.2d 76, 78–79 (1996)). “By these plain terms, it is clear the General Assembly intended for the SCUTPA to apply to business or consumer transactions.” *Id.*

DHEC is a state agency. It provided no services to anyone and engaged in no business or consumer transactions. To the contrary, all services relevant to this matter were provided by PLAINTIFF, and all payments for services were administered by the Department of Health and Human Services. As a result, this Court finds that at all times relevant to these proceedings, DHEC acted under its authority as a regulatory body in administering its Dental Program and did not engage in “Trade” or “Commerce.” For this additional reason, Plaintiff’s cause of action for violation of the SCUTPA fails, as a matter of law.

This is not the first time Plaintiff has attempted and failed to sustain this same cause of action against a state agency. In *Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 639, 743 S.E.2d 808, 816 (2013), the same counsel that is representing Plaintiff HPS in the present matter filed a lawsuit on behalf of HPS against the S.C. Board of Dentistry alleging that its emergency regulation imposing restrictions on dental hygienists’ work in school settings violated the SCUTPA. The South Carolina Supreme Court found that as the Board of Dentistry’s sole action was the promulgation of an emergency regulation, even if that action was found to be unfair, it did not fall within the definition of “trade or commerce” and “did not involve

advertisement, sale, or distribution of services or property within a business context.” *Id.* The Supreme Court concluded that because the Board of Dentistry was a state agency exercising its regulatory authority, HPS could not sustain a cause of action against it for violation of the SCUTPA. 403 S.C. at 640, 743 S.E.2d at 816-817.

DHEC is a state agency, tasked with administering the Public Health Dental Prevention Program in accordance with the Dental Services Act. The subject MOAs and accompanying guidelines are created by DHEC to regulate the services performed by dental hygienists in accordance with the Dental Practices Act. DHEC is not engaged in trade or commerce. For the reasons stated above, based solely upon the allegations set forth in the pleadings, in the light most favorable to the Plaintiff, and with every doubt resolved in its behalf, Plaintiff fails to state a valid claim for relief for violation of the SCUTPA against DHEC.

II. Plaintiff cannot sustain a cause of action for Breach of Contract Accompanied by a Fraudulent Act against DHEC.

“To recover for breach of contract accompanied by a fraudulent act, a plaintiff must establish (1) the contract was breached; (2) the breach was accomplished with fraudulent intent; and (3) the breach was accompanied by a fraudulent act.” *Maro v. Lewis*, 389 S.C. 216, 223, 697 S.E. 2d 684, 688 (Ct. App. 2010) (citations omitted). First and foremost, a contract must exist between the parties.

To participate in DHEC’s Dental Program, a provider must be employed within or contracted through DHEC. S.C. Code Ann. § 40-15-110(A)(10). To fulfill this statutory requirement, DHEC enters into Memorandums of Agreement (MOAs) with providers. The MOAs, which Plaintiff attached to the pleadings, by their own terms terminate after one year, but can be renewed in writing by both parties.

Plaintiff knows and understands the process of the MOA for participating in the Dental Program because Plaintiff had been operating in the Dental Program for nearly 20 years prior to 2019. Based solely upon the pleadings, Plaintiff admits that DHEC advised all attendees at an August 2019 provider information conference, which Plaintiff attended, that a new MOA would be required for the school year 2019-2020. (See Paragraph 61 of the Plaintiff's Second Amended Complaint.) Plaintiff alleges in Paragraph 61 of its Second Amended Complaint that "[i]n connection with the August 2019 provider conference, DHEC presented a new proposed MOA to HPS." Plaintiff admits that it did not have a meeting of the minds with DHEC regarding the terms of the August 2019 MOA and that it refused to sign the 2019 MOA because it objected to certain provisions of the DHEC guidelines. (See Paragraphs 62, 63, and 64 of Plaintiff's Second Amended Complaint.)

Considering solely the allegations set forth in the pleadings, in the light most favorable to the Plaintiff, this Court finds that no contract existed between Plaintiff HPS and DHEC for the school year 2019-2020.

Despite the language in all prior MOAs terminating the agreements after one year absent a writing signed by both parties, despite Plaintiff's acknowledgment that DHEC instructed providers that signing the 2019 MOA would be required, and despite Plaintiff's refusal to sign the 2019 MOA, Plaintiff argues that for the 2019-2020 school year it operated under either the 2016 MOA or the April 2019 MOA. Plaintiff's arguments fail due to the following:

- a. By its specific terms, the April 2019 MOA:² (1) terminates on June 30, 2019, (2) is "renewable" only if both parties execute a renewal "in writing," and (3) for any renewal, the provider, HPS, has to comply with DHEC's Guidelines. Notably, the

² Attached to Plaintiff's First Amended Complaint (styled as "*Amended Complaint and Petition for Emergency and Permanent Injunctive Relief*"), filed by Plaintiff on November 22, 2019.

MOA does not “automatically renew,” indicating that additional action would have been required – a renewal “acknowledged in writing by both parties” – in order to renew the April 2019 MOA. The parties did not sign any renewal.

- b. By its specific terms, the 2016 MOA:³ (1) terminates on June 30, 2017, (2) is “renewable” and requires all amendments to be in writing, and (3) for any renewal, the provider, HPS, has to comply with DHEC’s Guidelines. Again, the MOA does not “automatically renew,” which means that additional action would have been required to renew the MOA. The parties did not sign any renewal.
- c. Plaintiff also executed an acknowledgement of receipt of the PHDPP Guidelines⁴ in connection with the 2016 MOA and the April 2019 MOA. The acknowledgments (both the 2016 and 2019 acknowledgement) state, in relevant part:

I understand pursuant to my participation as a provider in the DHEC Public Health Dental Prevention Program that I am bound by the program requirements as set forth in the DHEC PHDPP Guidelines and incorporated by reference in the Memorandum of Agreement. I also understand that any modifications to the program will be incorporated into the DHEC PHDPP Guidelines and that I will be provided a copy at the time of the modification is effective.” (emphasis by DHEC)

Under the 2016 and 2019 MOAs, Plaintiff was bound by the DHEC guidelines (and any future modifications). To reiterate, in Paragraphs 63 and 64 of the Plaintiff’s Second Amended Complaint, Plaintiff admits that it objected to DHEC’s Guidelines. To participate in the Dental Program under the prior MOAs, Plaintiff agreed to be bound by the DHEC guidelines. In light of

³ Attached to Plaintiff’s First Amended Complaint (styled as “*Amended Complaint and Petition for Emergency and Permanent Injunctive Relief*”), filed by Plaintiff on November 22, 2019.

⁴ The Acknowledgments, 2016 and 2019, are attached to Plaintiff’s First Amended Complaint (styled as “*Amended Complaint and Petition for Emergency and Permanent Injunctive Relief*”), filed by Plaintiff on November 22, 2019.

Plaintiff's objections to the DHEC Guidelines in August of 2019, Plaintiff's own admissions preclude the prior MOAs from being renewed because there was no meeting of the minds.

In summary, HPS cannot allege that it was operating under a prior MOA, while at the same time, openly admitting that it would not comply with DHEC's Guidelines in August of 2019. Both MOAs state that the MOAs are one-year terms that are "renewable" and require "compliance with . . . the DHEC PHDPP Guidelines." Plaintiff also openly admits that it refused to sign the 2019-2020 contract. Without a contract, Plaintiff cannot establish the first element – "breach of contract" – to prove Breach of Contract Accompanied by a Fraudulent Act.

For these reasons, based solely upon the allegations set forth in the pleadings, in the light most favorable to the Plaintiff, and with every doubt resolved in its behalf, Plaintiff has failed to state facts sufficient to constitute a cause of action for breach of contract accompanied by a fraudulent act against DHEC. As such Plaintiff's claim for breach of contract accompanied by a fraudulent act against DHEC fails as a matter of law.

CONCLUSION

For the reasons set forth herein, Plaintiff cannot maintain a cause of action against DHEC for an Unfair Trade Practice under the SCUPTA, nor can the Plaintiff maintain an action against DHEC for Breach of Contract Accompanied by a Fraudulent Act. Based on this Court's prior Order dated September 11, 2023, and this Order, DHEC's Motion for Reconsideration is hereby granted, and all causes of action against DHEC are now dismissed.

IT IS SO ORDERED.

~ Signature page of Judge follows ~



Richland Common Pleas

Case Caption: Health Promotion Specialists Llc vs South Carolina Department Of Health And Environmental Contro , defendant, et al
Case Number: 2019CP4004567
Type: Order/Dismissal

So Ordered

Jocelyn Newman