

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Allison Renee Lee, Circuit Court Judge

Case No: 2012-CP-40-02906
Appellate Case No. 2013-000209

V.E. Amick & Associates, LLC Respondent,

v.

James L. Cooper, Jr., Pamela C. Cooper, Palmetto Environmental Group, Inc.,
and Ecological Resources, Inc., ... Appellants

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STATEMENT OF ISSUES ON APPEAL

- I. *Whether the trial court used the incorrect standard in evaluating the Plaintiff's Motion to Strike by adopting the Plaintiff's allegations and not the Defendants' allegations?*
- II. *Whether the trial court erred in finding that the Defendants affirmative for unclean hands, which could not have been raised as a defense in the earlier brought action for breach of contract was barred by the judgment in the earlier action?*

STATEMENT OF THE CASE

V E. Amick & Associates, LLC ("Amick") sued Palmetto Environmental Group, Inc. ("Palmetto" and/or "Prior Litigant"), James L. Cooper, Jr. ("Mr. Cooper"), Pamela C. Cooper ("Mrs. Cooper") and Ecological Resources, Inc. ("ERI") (Mr. Cooper, Mrs. Cooper and ERI will be collectively referred to as the "Not Involved Litigants") (all of the Defendants will be jointly referred to as "Defendants" or "Respondents") seeking to pierce the corporate veil of Palmetto and make the Not Involved Litigants responsible for a judgment that Amick received against Palmetto in a breach of contract case. In response, the Defendants raised two affirmative defenses (a) failure to obtain a condition precedent and (b) unclean hands and raised two counterclaims (a) international interference with contractual relations and prospective business relationships and (b) abuse of process. The Plaintiff then moved to strike the affirmative defenses and the counterclaim for intentional interference with contractual and prospective business relations. The abuse of process claim was not part of the motion to strike. See Record p. 59-61.

After a hearing, the Trial Court granted the motion to strike by Order dated November 20, 2012 (the "Trial Court Order"). The Defendants then requested that the Trial Court reconsider its ruling, pointing out the failure to use the correct standard and the failure to consider that unclean hands could not have been raised as a defense to the earlier contract action. The Trial Court than

denied the motion to reconsider, without a hearing in an order dated January 8, 2013 (the “Reconsideration Order”). This appeal timely followed.

STANDARD OF REVIEW

The proper standard to apply to a motion to strike under Rule 12(f) is the same as the standard for a motion to dismiss under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. See *Robinson v Code*, 384 S.C. 582, 682 S.E.2d 495 (2009); *McCormick v England*, 328 S.C. 627, 632, 494 S.E.2d 431, 433 (Ct.App.1997). Where a pleading is attacked, “the pleading must be liberally construed in favor of the pleader and sustained if the facts and reasonable inferences to be drawn therefrom entitle the pleader to relief on any theory of the case.” *Robinson*, 384 S.C. at 585, 682 S.E.2d at 496, *Burns v Wannamaker*, 286 S.C. 336, 339, 333 S.E.2d 358, 360 (Ct.App.1985). A court should not strike a cause of action merely because the court doubts the plaintiff will prevail in the action. *McCormick*, at 633, 494 S.E.2d at 434.

Further, “[t]he question [on a motion to dismiss a counterclaim] is whether in the light most favorable to the complainant, and with every doubt resolved on his behalf, the counterclaim states any valid claim for relief.” *Menezes v WL Ross & Co LLC*, 392 S.C. 584, 709 S.E.2d 114 (2011); *Charleston Cnty Sch Dist v Laidlaw Transit, Inc*, 348 S.C. 420, 424, 559 S.E.2d 362, 364 (Ct.App.2001).

FACTS

The Plaintiff entered into a series of contracts with the South Carolina Department of Health and Environmental Control (“DHEC”) to repair damage to soil and groundwater by the leaking of petroleum products from certain Underground Storage Tanks in South Carolina (the “USTs”). See Record p. 21-23. The five (5) USTs were located at projects commonly referred to as Lakeside

Market, Summerton, SC, SA Guerry & Sons, Charleston County General Services, Huse Property, and Cromer's Store (the "DHEC sites"). See Record, p. 22 at ¶13.

Several of the DHEC sites were contracted while James Cooper was an employee of Amick. See Amended Answer and Counterclaim ("Amended Answer") Record, p. 50 at ¶11. During there completion and prior to entering into contracts for the other DHEC sites, Amick lost its professional engineer. See Record p. 51-52. At that time Jimmy Cooper formed Palmetto, the Prior Litigant, in order to enter into joint ventures with Amick to continue contracting for DHEC sites. See Record p. 51-52. For several reasons, Palmetto, the Prior Litigant, and Amick were unable to finish the DHEC sites. As alleged in the Amended Answer, Palmetto entered into a sub-contract with L-J, Inc., an entity belonging to David Jordan, who also owns Amick and was the Plaintiff in the Amick I. This subcontract related to work for the City of Goose Creek (the "Goose Creek Job"). See Record p. 51-52. The Goose Creek Job is not one of the DHEC sites, but it is the reason for PEG becoming insolvent. Record p. 53 at ¶37.

Amick filed a lawsuit in the Court of Common Pleas for Richland County on November 14, 2005 against Palmetto ("Amick I"). See Record p. 24. In Amick I, Amick sought recovery against Palmetto relative to an alleged breach of contracts for work to be performed on the DHEC sites. See Record p. 24. Two of the five sites were not involved in the Amick I because Cooper was an employee of Amick when these sites were contracted. See Record p. 51 at ¶25. See also, Order of Court of Appeals, Record p. 75-79, included as Exhibit 2 to Brief In Opposition to Motion to Strike ("CT App. Order"). Nevertheless, Amick has included all five in its complaint. See Record p. 22 at ¶13. Amick I was tried on May 11-12, 2009 in Richland County before a jury, who found for Amick in the amount of \$391,209.21 in actual damages. Judge J.E. Kinard issued a written

Judgment on May 14, 2009. The judgment was appealed to the South Carolina Court of Appeals and affirmed in Opinion No 4860 on August 10, 2011. See Record p. 75-79.

Amick then filed this action against the Defendants alleging facts, some of which are different than the facts determined in the previous action. For example, the Plaintiff makes claim to damages for five UST sites, instead of three UST sites. Further, the three Not Involved Litigants from whom Plaintiff seeks relief were not parties to any previous litigation.

LEGAL ARGUMENT

- I. *The Trial Court used the incorrect standard in evaluating the Plaintiff's Motion to Strike by adopting the Plaintiff's allegations and not the Defendants' allegations*

As previously stated, the correct standard is “the pleading must be liberally construed in favor of the pleader and sustained if the facts and reasonable inferences to be drawn therefrom entitle the pleader to relief on any theory of the case.” *Robinson*, 384 S.C. at 585, 682 S.Ed.2d at 496; *Burns v Wannamaker*, 286 S.C. 336, 339, 333 S.E.2d 358, 360 (Ct.App.1985). In this case, the court was dealing with three (3) contracts involving the DHEC Sites and a completely separate contract involving the Goose Creek Job. Yet, the Trial Court never recognized the distinction. Instead, the Trial Court accepted the allegations of the Plaintiff that the all of the Defendants' allegations related to the litigation involving the DHEC Sites. The Trial Court found that court in the prior litigation “considered the allegations that Plaintiff committed fraud in taking over the project and failing to pay Palmetto what it was due under the subcontract.” See Record p. 5. This same discussion occurs in the Order on the Motion to Reconsider. See Record p. 15. But, the Goose Creek Job was not involved in the Prior Litigation. Simply, the Trial Court accepted the allegations of the Plaintiff, instead of using the correct standard which would have accepted the allegations of the Defendants.

Further, the Trial Court accepted the Plaintiff's allegation that the defense of Unclean Hands was a collateral attack on the prior judgment and discussed this issue as to whether the allegations, as defined by the Plaintiff, were intrinsic or extrinsic fraud. First, the allegations relating to the Goose Creek Job were from a completely different set of operative facts, not at issue in the prior litigation. So, those allegations could not be either intrinsic or extrinsic fraud. They were simply not at issue in the prior litigation.

Further, in discussing res judicata, the Trial Court finds that ERI is in privity with PEG because it is its "successor in interest." See Record p. 8. That is a allegation denied by the Defendants. The trial court goes further in stating that Mr. Cooper and Mrs. Cooper formed Palmetto in 2000. See Record p. 8; See Record 25 at ¶32. Again, that is an allegation denied by the Defendants. See Record p. 51 at ¶21. The trial court goes further in stated that Mrs. Cooper was an officer of Palmetto. See Record p. 8 ; Record p. 25 at ¶34. Again, that is an allegation denied by the Defendants. See Record p. 51 at ¶23. The trial court goes further in stating that Mr. Cooper and Mrs. Cooper had ownership interests in ERI. Record p. 8; Record p. 25 at ¶36. Again, this allegation is denied by the Defendants. Record p. 51 at ¶23. Simply, on numerous occasions, the Trial Court simply accepted the allegations of the Complaint and ignored the denials of the Answer.

Lastly, in ruling on the affirmative defense of failure to obtain a condition precedent, the trial court states that the "Defendants have not provided evidence to support their claim that a partnership between Plaintiff and Palmetto existed." See Record p. 10. That is the incorrect standard and the Court recognized it was incorrect when it issued its Order on the Motion to Reconsider.

II *The trial court erred in finding that the Defendants Affirmative Defense of unclean hands, which could not have been raised as a defense in the earlier action for breach of contract, was barred by the earlier action*

The Plaintiff's Motion to Strike was based upon res judicata grounds. Generally, in order to establish a plea of res judicata, three elements must be established by the Plaintiff: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit." *Renaissance Enterprises, Inc vs Ocean Resorts, Inc.*, 330 S.C. 13, 496 S.E. 2d 858 (1998). Citing *Sealy v Dodge*, 289 S.C.543, 347 S.C. 2d 504 (S.C. 1986). Stated differently, "the doctrine requires three (3) essential elements: (1) the judgment must be final, valid and on the merits; (2) the parties in the subsequent action must be identical to those in the first; and (3) the second action must involve matter properly included in the first action." *Town of Sullivan's Island v. Felger*, 457 S.E. 2d 626, 318 S.C. 340 (S.C. App. 1995).

While it is admitted that the judgment in Amick I is final, valid and on the merits, the remaining two essential elements of res judicata are not present. As it relates to the parties being identical, as previously stated, the Trial Court accepts the allegations of the Complaint as true and fails to use the proper standard at this stage in the proceedings.

As it relates to the second action involving a matter properly included in the first action, the Court simply fails to address this issue. In the first action, the Court of Appeals discusses the breach of contract action in Amick I. In that action, the affirmative defense of impossibility was raised to address certain issues involving the violation of DHEC regulations. Record p. 77. The Court held that this evidence showed that "it was merely an inconvenience, and not an impossibility." *Id.*

Unclean hands does not require a showing of impossibility. "The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of

the litigation to the prejudice of the defendant.” *First Union Nat'l Bank of S C v Soden*, 333 S.C. 554, 568, 511 S.E.2d 372, 379 (Ct.App 1998). “ The expression ‘clean hands’ means a clean record with respect to the transaction with the defendants themselves and not with respect to others.” *Arnold v City of Spartanburg*, 201 S.C. 523, 532, 23 S.E.2d 735, 738 (1943). The rule must be understood to refer to some misconduct concerning the matter in litigation of which the opposing party can, in good conscience, complain in a court of equity. *Id* Simply, inconvenience may be enough to show a lack of unclean hands.

More importantly, unclean hands is not a defense in a contract action. In dealing with an action at law where a defendant raised the defense of unclean hands, the South Carolina Supreme Court stated:

The doctrine of unclean hands “precludes a plaintiff from recovering **in equity** if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant.” *Ingram v Kasey's Assocs* , 340 S.C. 98, 107 n. 2, 531 S.E.2d 287, 292 n. 2, (2000) (emphasis added). The equitable doctrine of unclean hands, however, has no application to an action at law. *E g , Holmes v Henderson*, 274 Ga. 8, 549 S.E.2d 81 (2001); *Ellwood v Mid States Commodities, Inc* , 404 N.W.2d 174, 184 (Iowa 1987). Thus, the trial court erred in applying this particular equitable defense to the instant case because appellant was not seeking to recover in equity.

Aaron v Mahl, 381 S.C. 585, 594-95, 674 S.E.2d 482, 487 (2009). In *Amick I*, Palmetto could not properly raise the defense of unclean hands and neither Palmetto nor any of the other Defendants should be prevented from raising this defense now. Simply, as to unclean hands, the second action (unclean hands) involves a matter that could not be properly included in the first action (breach of contract action). While acknowledging this fact in its Order on the Motion to Reconsider, the Trial Court then simply ignores this essential element of res judicata to reach the same conclusion. See

Record , p. 14.

As to the allegations of unclean hands, these allegations relate to (a) Amick's actions as to the Goose Creek Job resulting in Palmetto's insolvency, (b) Amick's violations of DHEC regulations making Palmetto's ability to perform on the DHEC Sites inconvenient, and (c) claiming damages against the Not Involved Litigants that were never incurred. All of these actions could be seen as "unfair" to the Defendants and are correctly alleged and pled in the affirmative defense of unclean hands.

As it relates to the last of these three allegations of unfairness, in both its original Order and in its Order on the Motion to Reconsider, the Trial Court incorrectly states that the prior judgment was "to rectify past wrongs". Record p. 16. The decision of the Court of Appeals in Amick I provides a chart on damages. Of the \$391,509.21 damages alleged in Amick I, \$287,393 related to "estimated future payments." These are damages that did not exist at the time of Amick I. Amick I was not just about "rectifying past wrongs" but also about claiming damages in the future. According to the allegations of the Answer, these "estimated future payments" never happened or were fully reimbursed by DHEC. Thus, it would be unfair for Amick to be allowed to claim against the Not Involved Litigants damages that it never suffered.

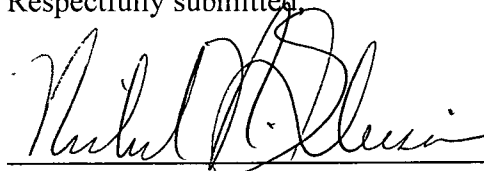
CONCLUSION

The trial court made clear legal error in using the incorrect standard in ruling on the Plaintiff's Motion to Strike. Further the trial court made clear legal error in finding the Defendants affirmative defense unclean hands would be precluded even when it recognized that unclean hands could not have been pled in the prior action. Therefore, this Court should reverse the Trial Courts findings and remand the matter for the Court to use the proper standard and to find that the defense

of unclean hands is not precluded by res judicata. Simply, the Trial Court's Orders must be reversed.

Respectfully submitted,

By:

A handwritten signature in black ink, appearing to read "Richard R. Gleissner", written over a horizontal line.

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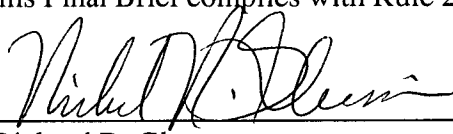
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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with Rule 211(b), SCACR.



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CERTIFICATE OF SERVICE

I certify that I have served a copy of the Final Brief of Appellants on the Respondent by depositing a copy of it in the United States Mail, postage prepaid, on October 15, 2013, addressed to its attorney of record as follows:

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DeAndrea Gist Benjamin, Circuit Court Judge

Case No: 2011-CP-40-1998
Court Of Appeals Number: 2012-212744

Jones G. Herring,..... Respondent,

v.

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PROOF OF SERVICE

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