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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Courtney Clyburn Pope, Circuit Judge

App. Case No. 2024-001206

Janice Meusel and Adam Meusel,..…….....…...Appellants,

v.

Woodside Plantation Property Owners' Association, Inc., Woodside Plantation Country Club, Inc. d/b/a Woodside Country Club, and Invited,……...……Defendants,

Of whom Woodside Plantation Country Club, Inc. d/b/a Woodside Country Club and Invited are the……..……..……..……. Respondents.

FINAL REPLY BRIEF OF APPELLANTS

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ARGUMENT IN REPLY

Appellants Janice and Adam Meusel ("the Meusels") submit this brief in reply to Respondents Woodside Plantation Country Club, Inc. d/b/a Woodside Country Club and Invited (collectively "the country club")'s brief in this appeal. The country club – the dismissal movant below – insists that this court construe the record in a way that is favorable to the country club, urging that inferences in its favor are the only way the record may be seen. An examination of the country club's arguments reveals that, at the very least, the circuit court should have followed precedent, allowed amendment of the complaint, and refrained from dismissal with prejudice.

I. No more "formal" motion to amend, proposed amended pleading, nor proffer of how amendment would look was required.

The country club says that the Meusels "never submitted a motion to amend their pleadings, and never provided the circuit court with a proposed amended complaint." (Respondents' brief p. 19.) When it comes to pointing out that the circuit court was obliged to give them a chance to amend their complaint rather than dismiss with prejudice, the Meusels did all they needed to and a little more.

An examination of the record in this case and the Supreme Court's opinion in Skydive Myrtle Beach, Inc. v. Horry Cnty., 426 S.C. 175, 826 S.E.2d 585 (2019), illustrates that there was not something else the Meusels needed to have done to prevail now on their argument that the circuit court should have allowed them an opportunity to amend. From the Skydive opinion:

> [Respondents] filed a motion to dismiss pursuant to Rule 12(b)(6). Following a hearing on Respondents' motion, the circuit court requested proposed orders from Skydive and Respondents. Skydive submitted two proposed orders to the court. Each time, Skydive requested in writing it be allowed to

amend its complaint to cure any pleading defects in the event the court decided to grant Respondents' motion. Nevertheless, the court granted Respondents' motion and dismissed Skydive's claims against Respondents without considering Skydive's request to amend its complaint. The order specifically provided the dismissal was "with prejudice."

When a trial court finds a complaint fails "to state facts sufficient to constitute a cause of action" under Rule 12(b)(6), the court should give the plaintiff an opportunity to amend the complaint pursuant to Rule 15(a) before filing the final order of dismissal.

. . .

The circuit court erred by failing even to consider allowing Skydive to amend its complaint.

. . .

Ordinarily, therefore, the time for requesting leave to amend to correct a Rule 12(b)(6) pleading defect is after the trial court has determined the original pleading was deficient. In this case, because Skydive twice asked for leave to amend before its complaint was dismissed, it had the option of renewing its requests in a formal Rule 15(a) motion. However, the circuit court's "with prejudice" order put Skydive in a difficult position because it made Skydive practically unable to litigate a motion to amend before it must file the appeal.

. . .

A court's decision to deny a motion to amend should not be based on the court's perception of the merits of an amended complaint. In rare cases, however, a trial court may deny a motion to amend if the amendment would be clearly futile.

. . .

Here, the circuit court did not conduct an analysis to determine whether any amendment would be futile. The court of appeals, however—without articulating any such analysis—found the "amendment would be futile." We have attempted to conduct the analysis to determine whether, in fact, any amendment would be futile. Even on the limited record before us, as we will explain, it is clear to us that allowing Skydive to amend its complaint would not be "clearly futile."

> We begin by stressing the difficulty of determining whether allowing an amendment to a pleading would be futile without examining the proposed amendment. In this case, the circuit court dismissed Skydive's claims against Respondents without having seen any attempt at amending the complaint. We cannot imagine a circumstance in which a trial court should refuse to allow an amendment on the ground of futility without seeing what the amendment would look like.
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> . . .
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> . . . we must remand unless we find any amendment would be clearly futile.
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> . . .
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> 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). Under Rules 12(b)(6) and 15(a), the circuit court may not dismiss a claim with prejudice unless the plaintiff is given a meaningful chance to amend the complaint, and after considering the amended pleading, the court is certain there is no set of facts upon which relief can be granted.
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> . . .
>
> In this case, we cannot definitively say it would be impossible for Skydive to succeed with an amended pleading. Allowing leave to amend the complaint, therefore, was not clearly futile. The circuit court should not have denied—and we will not deny—Skydive the opportunity to amend its complaint.

Skydive Myrtle Beach, 426 S.C. at 179-92 (some internal citations omitted).

The Meusels made their conditional request to amend (to amend if the court found the complaint insufficient) more robustly than the plaintiff in Skydive did. Id. at 179. The Skydive plaintiff made this request only in the cover correspondence sending in proposed orders. Id. In the instant case, the Meusels submitted a memorandum before the hearing noting that, "[i]n the event that the court disagrees with the Plaintiffs about whether their complaint states facts sufficient to constitute any of the causes of action at issue, the remedy is amendment, not dismissal." (R. p. 59.) At the hearing, the Meusels argued that they had pled facts supportive

of each element of their claims and that, if the court disagreed, they should be permitted to amend their complaint. (R. p. 43 ln. 5-8.)

The circuit court's order granting the motion to dismiss with prejudice as to all causes of action did not discuss the Meusels' request for leave to amend their complaint if the circuit court found it deficient. (R. pp. 1-8.) The circuit court undertook no analysis of whether such an amendment would be futile. (R. pp. 1-8.)

The Meusels' motion to reconsider again asked the court to give the Meusels the same opportunity to amend their complaint. (R. p. 22.) The court denied that motion without, again, discussing the Meusels' now repeated requests to amend their complaint if the court found it lacking. (R. pp. 9-11.)

This same refusal to go through the amendment analysis mandated reversal in Skydive. To obtain reversal, the Skydive plaintiff did not have to state the way it would cure deficiencies in its complaint. Skydive Myrtle Beach, 426 S.C. at 179. The Meusels also are not required to have done that. Id. The Skydive plaintiff did not have to submit a proposed amended complaint to obtain reversal, and neither was there any onus on the Meusels to do so. Id.

In contending that the Meusels did not do enough to get an opportunity to amend their complaint, the country club makes arguments strikingly similar to the reasoning Justice Hearn used in her dissenting opinion in Skydive. Skydive Myrtle Beach, 426 S.C. at 193-94 (Hearn, J., dissenting). Dissenting Justice Hearn argued that reversal to allow amendment should be denied in Skydive because the appellant did not make a "formal" motion to amend and did not submit a proposed amended pleading. Id. As the Supreme Court's opinion declined to agree with that reasoning, we know it is *not* the law. See id.

As in Skydive, it is virtually impossible here to determine whether an amendment would be futile without first examining an actual or proposed amended complaint. Skydive Myrtle Beach, 426 S.C. at 183. As in Skydive, the circuit court's dismissal with prejudice made further proceedings down the amendment road impossible, and, thus, no actual or proposed amended complaint was presented.[1] Id. at 181. As illustrated by the examples below, it is not possible to know on the existing record whether an amended complaint would have supplied allegations that would cure the perceived deficiencies. As "we cannot definitively say it would be impossible for [the Meusels] to succeed with an amended pleading[,]" the futility of amendment has not been established on the existing record and, just as in Skydive, the Meusels are entitled to reversal of the dismissal with prejudice and a remand for, at the very least, the opportunity to amend their complaint. Skydive Myrtle Beach, 426 S.C. at 192.

The Meusels remind this court that they do not appeal a poor application of the law the Supreme Court set out in Skydive. The Meusels appeal a dismissal with prejudice that was made in the complete absence of any of the Skydive analysis. That is reversible error. Id. Skydive shows us that the remedy for that error is reversal of the with prejudice dismissal and remand to allow amendment of the complaint and assessment of the amended pleading. Id.

II. Like the circuit court, the country club views the allegations relating to Invited's role in the light most favorable to the wrong party.

The country club claims that the Meusels claim Respondent Invited is responsible to them simply because it is the local club's parent company. A look at the complaint shows that is not what the Meusels say.

[1] No proposed amended pleading is required to be presented on a motion to amend, Rule 15, SCRCP, but proposed amended pleadings can be helpful in evaluating such motions.

Simply because an entity owns another entity does not make it liable for the other's torts; rather, the owning, controlling, or parent entity "must ordinarily be shown to have in some way participated in or directed the tortious act" to be liable. Rowe v. Hyatt, 321 S.C. 366, 369, 468 S.E.2d 649, 650 (1996). The complaint says Invited:

> . . . owns, *operates*, and controls the country club.
>
> . . .
>
> The country club . . . *expressly* undertook a duty to *stop* the offending behavior and *control* the actions of those who have been doing it.
>
> The harassment has not stopped.
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> . . .
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> The country club has not taken reasonable action to stop the harassment.
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> . . .
>
> The Defendants owed and undertook duties to the Plaintiffs to take and reasonably perform reasonable measures to address past the harassment and stop the ongoing harassment of the Plaintiffs.
>
> The Defendants failed to exercise reasonable care in this regard and, through their negligence, gross negligence, or recklessness, have breached those duties to the Plaintiffs.
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> The Defendants' breaches of duty have proximately caused the Plaintiffs to sustain damages.
>
> . . .
>
> Acts committed by the Defendants in this matter, including, but not necessarily limited to, *the Defendants' repeated failures to take reasonable measures to stop ongoing, repeated behavior by their members after acknowledging their duties to stop it*, constitute violations of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*, and are and were unfair and deceptive actions in trade or commerce.
>
> . . .

> Each of the Defendants, separately, has taken responsibility for the conduct of the offending golfers involved in this case.

(R. pp. 14, 15, 16, 17 (emphasis added).)

The complaint does not just alleged Invited owns or controls the local club; the complaint says Invited *operates* the local club. (R. p. 14.) If the allegations of the complaint are proven, including the allegation that Invited operates the local club it owns, it will have been proven that Invited "in some way participated in or directed the tortious act" involved in this case. Rowe, 321 S.C. at 369. It will have been proven that Invited undertook an obligation to stop some third-party behavior and then was at least negligent in its failure to take reasonable steps to fulfill that obligation. (R. pp. 14, 15, 16, 17.) Just as it got the circuit court to do, the country club is refusing to acknowledge that the allegations in the Meusels' complaint are susceptible of a reasonable interpretation that has Invited participating in the alleged wrongful conduct.

That refusal bucks the standard. Under the standard the circuit court was obligated to apply, "the circuit court must view the facts alleged in the complaint and any reasonable inferences to be drawn therefrom in the light most favorable to the plaintiff" on a motion to dismiss. Benedict Coll. v. Natl. Credit Systems, Inc., 400 S.C. 538, 544, 735 S.E.2d 518, 521 (Ct. App. 2012).

Is there *evidence* that supports Invited's status as a proper defendant in this case? At the pleadings stage, the record does not tell us – and the Meusels do not have to make a showing that such evidence exists. "[A]ny plaintiff" – including the Meusels here – is "entitled to litigate the validity of its original pleading without having to convince the trial court of the merits of its underlying claim." Skydive Myrtle Beach, 426 S.C. at 180. One of the purposes of the requirement that "the circuit court must view the facts alleged in the complaint and any

reasonable inferences to be drawn therefrom in the light most favorable to the plaintiff" is to prevent dismissal of claims that may seem unlikely but are possible – without first exploring, through vehicles like summary judgment proceedings, whether the possible facts that back up the allegations actually exist. Benedict Coll., 400 S.C. at 544. It is of course proper to have proceedings that explore whether those facts exist – but a motion to dismiss a complaint is not such a proceeding. Id. That is not what such a motion is designed to test. See id.

The Meusels' complaint is just fine; however, if this court disagrees, reversal to allow for amendment is what the law requires. Skydive Myrtle Beach, 426 S.C. at 189. The country club did not meet the very high burden it bore to make the circuit court "certain there is no set of facts upon which relief can be granted." Id. Indeed, that cannot be determined from the record that is before the court, and the circuit court did not assess whether this certainty level was met. (R. pp. 1-8.) As such futility was never established, the Meusels are entitled to have the opportunity to plead more facts that may bear upon whether Invited is liable to them. Id. How involved in the club's operations is Invited? How much say did it have in the decision to undertake to stop the harassment? As an evidentiary matter, the court does not know. As it would be with most pleadings, it is not possible to look at the complaint and determine whether the facts about what Invited did and did not do mean that it committed a tort or not. Only in the rare instances when that certainty is present and no cause of action will lie does our Supreme Court permit dismissal without first giving an opportunity to amend. Skydive Myrtle Beach, 426 S.C. at 189.

III. Even if the law on undertaking of duty is closer to what the country club says, the record did not permit the circuit court to refuse amendment and dismiss the complaint with prejudice.

The Meusels will not repeat here the argument laid out in their brief for why the circuit court erred in its conception of the law of voluntary undertaking. Instead, the Meusels point out that, even if the law on that subject is closer to what the country club says than what the Meusels say, the Meusels stated a cause of action and the country club has certainly not shown there is no reasonably conceivable set of facts under which the country club could have undertaken a duty to the Meusels. The country club has not shown futility. See id. The circuit court never made such a determination. (R. pp. 1-8.)

It is no stretch to see that, if the country club had done what it undertook to do, the harassment of the Meusels would have ended. In failing to take reasonable steps to do what it said it would, the country club increased the risk of harm to the Meusels well beyond what it would have been if the country club had exercised due care in that regard. Moreover, it is certainly not *impossible* that this is so.

The Meusels were entitled to have the circuit court meet its obligation on this motion to dismiss to "view the facts alleged in the complaint and any reasonable inferences to be drawn therefrom in the light most favorable to the plaintiff." Benedict Coll., 400 S.C. at 544. In the absence of *certainty* that no set of facts exist under which the Meusels could show a voluntary undertaking by the country club and its breach, the Meusels were entitled to have the circuit court give them an opportunity to amend rather than dismiss their complaint with prejudice. Skydive Myrtle Beach, 426 S.C. at 189. The record here does not establish that certainty.

The circuit court erred reversibly, and the law calls for reversal and remand. See Skydive Myrtle Beach, 426 S.C. at 189; Benedict Coll., 400 S.C. at 544.

IV. An unfair trade practice claim does not require privity between the plaintiff and the defendant. The Meusels do not have to have been buying from or selling to the country club to have an unfair trade practice claim against them.

The country club beats a drum that the country club's conduct did not occur in the context of a business transaction it had with the Meusels. This is a red herring.

One can certainly commit an unfair trade practice against a party with whom one is directly doing business, but that is not a limitation on who may sue for an unfair trade practice. No privity of contract or anything similar is required to do that. A person just has to suffer an ascertainable loss of money or property as the result of the unfair trade practice. S.C. Code Ann. § 39-5-140(a). Our Supreme Court has already spoken to this, saying that "to hold privity is required before a party may maintain a UTPA action would lead to an absurd result. Such a finding would prohibit UTPA actions by all remote buyers and competitors, who have traditionally been allowed to proceed under the Act, because there could be no privity." Colleton Preparatory Academy, Inc. v. Hoover Universal, Inc., 379 S.C. 181, 196, 666 S.E.2d 247, 255 (2008). The Meusels might not be remote buyers or competitors here, but, per what they allege, which must be taken as true, they have been damaged as the result of the country club unfairly and deceptively saying it would stop its members from harassing the Meusels and then repeatedly failing to do that. (R. pp. 14-17.)

Were the country club's acts performed in the course of its business? They were, or at least it is reasonable to infer that they were. They were performed in the course of its activities in the management of the golf course it operates as a business, in the course of providing services for golfers and things of value – rounds of golf, a golf course – to its members. (R. pp. 14-17.) That is in "trade or commerce." S.C. Code Ann. § 39-5-10(b). It matters not that the Meusels were not on the other side of a financial transaction with the country club.

In the light most favorable to the Meusels, with all doubts resolved in their behalf and with all reasonable inferences also so drawn, the complaint states an unfair trade practice cause of action against the country club. Benedict Coll., 400 S.C. at 544. Based on the sparse record here at the pleadings stage, neither the circuit court, nor this court, nor any other court could "definitively say it would be impossible for [the Meusels] to succeed with an amended pleading. Allowing leave to amend the complaint, therefore, was not clearly futile." Skydive Myrtle Beach, 426 S.C. at 192.

The circuit court erred reversibly in dismissing the Meusel's complaint, including their unfair trade practices cause of action, with prejudice and with no opportunity to amend. Id.; see Benedict Coll., 400 S.C. at 544.

CONCLUSION

The circuit court's dismissal of the Meusels' complaint with prejudice should be reversed, and this case should be remanded, either with a straight reversal or with the opportunity for the Meusels to amend their complaint.

Respectfully submitted,

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CERTIFICATE OF COUNSEL
REGARDING COMPLIANCE WITH RULE 211(b), SCACR

I certify that the foregoing final brief complies with Rule 211(b), SCACR.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served the foregoing final brief on the date given below by emailing it to the other counsel of record in this appeal at the address(es) noted below.

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