THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

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

APPEAL CASE No. 2011-204367
Circuit Court Case No. 2011-CP-07-02546

OLESYA MATYUSHEVSKY, CITIZENS OPPOSING DOMESTIC ABUSE, CHRISTINE VARG and LILING SUN .... **Respondents**

v.

JOSEPH C. SUN .... **Appellant**

REPLY BRIEF OF APPELLANT

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ARGUMENT

In his original complaint, Appellant alleges that all defendants used the pretense of domestic abuse and conspired in a scheme of coverup of Respondent LiLing Sun's (hereinafter LiLing) bad acts and defrauding money and property from Appellant (page 4, complaint). Defendants' fraud included, but not limited to, knowingly and intentionally employed a wrong Certified Receipt at the temporary hearing to mislead the Beaufort Family Court Judge in believing Service of the Notice of hearing was adequate when in fact Appellant was actually served only a day before the hearing in violation of Family Court Rule. Then Respondents LiLing and Matyushesky presented an out of date Warranty Deed on the marital home which deed was altered by Respondent LiLing in 2009 prior to the revelation of her adultery and filing of divorce.

Whether the temporary order issued in June 2009 was correctable at the Family Court is not an issue here, as Family Court has no jurisdiction to award damages which is what Appellant is suing these Respondents for. Subject mater jurisdiction on Appellant's claim lies solely in the Circuit Court. (See Thompson v. Ballentine, 298 S.C. 289, 379 S.E.2d 896 (1989) .) Appellant alleges damages he suffered in legal expenses he had to pay and temporary living expenses which was caused by Respondents fraud.

Circuit Court Order of November 8, 2011, Paragraphs 17 and 18, is erroneous. Not only Respondent LiLing has not shown any of her bad acts causing Appellant damages and injury "were part of the marital allegation", Respondent LiLing has not shown that "there was another action pending between these parties for the same claims". It is the burden of the movant to show why she is entitled to relief. Even assuming those claims "pre-date" the Family Court's divorce order (Paragraph 2, Page 2 of Court Order), the Family Court has no jurisdiction to award damages.

Thompson v. Ballentine, supra.

The South Carolina Supreme Court in Brazell v. Windsor, 384 S.C. 512, 682 S.E.2d 824 (2009) held that,

> "Under Rule 12(b)(6), a defendant may move to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action. If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper. Gentry v. Yonce, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999). In deciding whether the trial court properly granted the motion to dismiss, the appellate court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. Id."

All Respondents have not negated any claims made by the Appellant when Appellant's complaint and Amended Complaint are viewed in the light and construed most favorable to Appellant. By burglarizing Appellant's home in Jasper County, a separate house from the marital home, both titled in the name of Appellant's mother, during the period when Appellant was in jail caused by Respondents false and malicious charges, all defendants conspired to destroy and steal numerous valuables and documents including car titles, warranty deeds and the original prenuptial agreement, these defendants fraudulently converted the marital home in Beaufort County and the house in Jasper County from non-marital property to marital property, thereby they could "negotiate" a settlement with Appellant's mother when Appellant was in jail.

In a similar case, the South Carolina Supreme Court in Gilley v. Gilley, 327 S.C. 8, 488 S.E.2d 310 (1997) held that,

> "Family Court lacked jurisdiction over husband's action against wife for order of separate maintenance requiring parties to live separate and apart, equitable distribution of personal property, and attorney fees, where prenuptial agreement provided that neither party could claim alimony or separate maintenance, and that property acquired by parties during marriage or owned at time of marriage would not be the subject of any claims for equitable apportionment.

Code 1976, §§ 20–7–420(2), 20–7–473"

Therefore, Circuit court had subject matter jurisdiction over the terms of the prenuptial agreement a copy of which was presented to the Family Court at the temporary hearing even though the original was subsequently stolen by the Respondents in their conspired burglary of Appellant's home.

Respondent LiLing's fabrication of false charges causing Appellant to be repeatedly arrested and incarcerated in 2010 had not been tried when this case was filed on June 15, 2011, therefore, Appellant had not alleged the proceedings were terminated in his favor. However, when Appellant filed his proposed Amended Complaint on December 15, 2011, several charges were already dismissed or acquitted. Appellant has not made any claim for damages in his complaint against Respondent LiLing regarding false arrest and malicious prosecution because at the time of the filing of complaint, the cause of action had not accrued. He is entitled to file a supplement to his complaint or bring a new action to claim for recovery on his damages and injury now.

The Supreme Court of South Carolina, in Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999) held that,

> "Under Rule 12(b)(6), SCRCP, a defendant may make a motion to dismiss based on a failure to state facts sufficient to constitute a cause of action. Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint. Stiles v. Onorato, 318 S.C. 297, 457 S.E.2d 601 (1995). The 12(b)(6) motion may not be sustained if the facts alleged and inferences therefrom would entitle the plaintiff to any relief on any theory. Id.
>
> Rule 12(b) further provides:
> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state facts sufficient to constitute a cause of action, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

> Rule 12(b), SCRCP (emphasis added). We have interpreted this language as meaning "the trial court may treat a 12(b)(6) motion as a motion for summary judgment and consider matters presented outside the pleadings if the parties are afforded a reasonable opportunity to respond to such matters in accordance with Rule 56© and (e) of the South Carolina Rules of Civil Procedure. The notice provisions in Rule 56 are incorporated into Rule 12(b)(6)." Brown v. Leverette, 291 S.C. 364, 367, 353 S.E.2d 697, 698-99 (1987); see also Johnson v. Dailey, 318 S.C. 318, 457 S.E.2d 613 (1995). In Brown, we found the trial court had not given notice to the parties that it was going to consider the affidavits and hear the 12(b)(6) motion as a motion for summary judgment. Thus, the supporting affidavits in Brown were improperly considered by the trial court in ruling on the 12(b)(6) motion."

At the commencement of the hearing on October 19, 2011, Respondent LiLing presented three (3) sets of documents "outside the pleadings" and asked the circuit to take "judicial notice". Not only those documents were not well known established matters proper for Judicial Notice and they were not properly admitted into evidence pursuant to South Carolina Rules of Evidence. None of the documents were certified and Appellant was not allowed to object or even read the documents prior to the adjournment of the hearing which lasted less than 15 minutes. South Carolina Code § 19-3-150 regarding Judicial Notice requires that "to enable a party to offer evidence of the law in another jurisdiction or to ask that judicial notice be taken thereof, reasonable notice shall be given to the adverse parties either in the pleadings or otherwise."

Furthermore, § 40-47-119 regarding Judicial Notice provides that,

> " Information to be exchanged before hearing; admissibility; identification of relevant portions of information.
>
> (A) Before the hearing the parties shall exchange:
> (1) a final list of witnesses the party reasonably expects to testify at the hearing;
> (2) a final list of all exhibits expected to be offered at the hearing, including a written report or summary from each expert witness expected to testify;
> (3) a final list of all facts that the party intends to request be judicially noticed and the information supporting the judicial notice of the facts requested.

Respondent LiLing's counsel simply handed Appellant the thick stack of document at the hearing as his "Judicial Notice" is improper and in violation of the law. Therefore, Respondent

LiLing's three (3) exhibits presented at the hearing can be at best be considered as "matters outside of pleading" as allowed in SCRCP, Rule 12(b)(6). Respondents motion to dismiss should be converted to one for summary judgment by the circuit court. Appellant should be given his opportunity to respond pursuant to Rule 56(c) and (e).

Summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. Rules Civ. Proc., Rule 56. Cunningham v. Anderson County, 402 S.C. 434, 741 S.E.2d 545 (2013).

Appellant's proposed Amended Complaint alleges several causes of action against all the defendants of fraud, trespass, adultery, theft, burglary, conspiracy, wrongful arrest and malicious prosecution, libel and slander, all of which were recognized by circuit court in its order of November 8, 2011. However, the circuit court committed reversible error in finding that those claims were within the exclusive jurisdiction of the family court.

In Appellant's Amended Complaint, he alleges all the aforesaid wrongful acts committed by all the defendants in conspiracy with Respondent LiLing. As there was no evidence of any abuse as falsely alleged by Respondent LiLing in her Initial Brief, Respondents Matyushesky and CODA had to make false allegations just so they could represent LiLing. Respondent Matyushesky was using Respondent LiLing and her divorce proceeding to commit all the wrongful acts against Appellant as her personal retaliation and vendetta in return of Appellant's bar complaint against her and to further the scheme of extortion against Appellant's 90 year old mother in Canada. They had to put Appellant in jail to accomplish that. Her libel and slander outside of court room of numerous fabricated and false accusations of crimes and bad acts she claimed committed by Appellant Sun was an act not in the process of representation.

Finally, Respondent Varg claimed knowledge of LiLing's burglary and the valuables stolen in the Report written by the Jasper County Sheriff and attached in Respondent LiLing's so-called "Judicial Notice" Exhibit B at the hearing on October 19, 2011. Appellant was not allowed any discovery on Varg who simply filed an affidavit and claimed she did not participate in the burglary and obtained summary judgment. Deposition of Varg could exposed that she had made false statement in her affidavit or that she was involved in the burglary some other way.

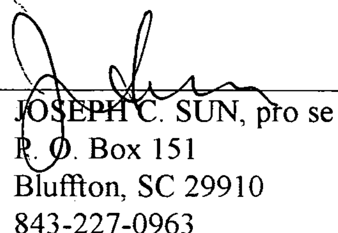
Therefore, a summary judgment in her favor without allowing discovery was a reversible error. Cunningham v. Anderson County, supra. During the hearing on March 13, 2012, Appellant presented in court his letters written to Respondent counsel Baker of his intent to take Varg's deposition. Counsel Baker responded by the delay tactic by proposing to have the deposition after ruling on the motion to dismiss. Appellant made the objection on the disallowance of discovery at the hearing. Master in Equity Marvin Dukes, III overruled Appellant and granted Respondent Varg's motion for summary judgment.

CONCLUSION

For the foregoing reasons, the Circuit Court Orders of November 9, 2011, April 6, 2012 and July 18, 2012 should all be reversed.

This 10th day of October, 2013.

Respectfully submitted,



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PROOF OF SERVICE

I certify that I have this date served the Appellant's Initial Reply Brief on all Respondents by depositing a copy of same in the U.S. Mail postage prepaid, on October 10, 2013, addressed to their attorneys on record as follows:

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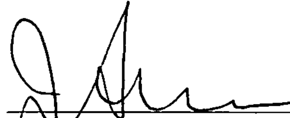

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