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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Honorable Marvin H. Dukes, III, Presiding Judge

Case No. 2013 - CP - 07 - 1186

Charles R. Mikals and Donna Mikals.....Appellants,

v.

Debra House.....Respondent.

APPELLANTS' INITIAL REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....i

ARGUMENT.....1

*Respondent failed to preserve for review the issue of the.....1
power of the Circuit Court to assert jurisdiction over her.*

*Respondent has failed to articulate any legally cognizable.....3
“unfairness” arising from the exercise of jurisdiction in
this case.*

*Respondent’s initial filing went to the merits of the claims10
and asked for affirmative relief, thereby submitting herself
to the jurisdiction of the Court.*

*Respondent’s brief contains irrelevant statements and11
accusations unsupported by the record.*

CONCLUSION.....12

TABLE OF AUTHORITIES

Cases

<i>Allen v. Columbia Financial Management, LTD.</i> , 297 S.C. 481, 377 S.E. 2d 352, (1988)	5, 11
<i>Askins v. Firedoor Corporation of Florida</i> , 281 S.C. 611, 316 S.E. 2d 713 (Ct. App. 1984)	8
<i>Aviation Associates and Consultants, Inc. v. Jet Time, Inc.</i> , 303 S.C. 502, 402 S.E. 2d 177(1991)	8
<i>Campbell v. Johnson & Towers, Inc.</i> , 123 F. Supp. 2d 329 (1999)	7
<i>Charleston Lumber Co., Inc. v. Miller Housing Corp.</i> , 338 S.C. 171, 525 S.E.2d 869, (2000)	3
<i>Clark v. Key</i> , 304 S.C. 497, 405 S.E. 2d 599 (1991)	11
<i>Colite Indus., Inc. v. G.W. Murphy Const. Co., Inc.</i> , 297 S.C. 426, 377 S.E. 2d 321 (1989)	7, 8
<i>Commercial Credit Loans, Inc., v. Riddle</i> , 334 S. C. 176, 512 S.E. 2d 123 (Ct. App. 1999)	3
<i>Crib v. Spatholt</i> , 382 S.C. 475, 676 S.E. 2d 706 (Ct. App. 2009)	7
<i>Hammond v. Butler</i> , 300 S.C. 458, 388 S.E.2d 796 (1990)	6, 11
<i>In re Estate of Rider</i> , 756 S.E. 2d 136, FN 3 (2014)	3
<i>Leggett v. Smith</i> , 336 S.C. 63, 686 S.E. 2d 699 (Ct. App. 2009)	8
<i>Moosally v. W.W. Norton & Co.</i> , 358 S.C. 320, 594 S.E.2d 878 (Ct. App. 2004)	10
<i>M.B. Kahn Construction Company v. Three Rivers Bank and Trust Company</i> , 354 S.C. 412, 581 S. E. 2d 481 (2003)	3
<i>QZO, inc. v. Moyer</i> , 358 S.C. 246, 594 S.E. 2d 541 (Ct. App. 2004)	5
<i>Sanders v. S.C. Dept. of Corrections</i> , 379 S.C. 411, 665 S.E. 2d 231 (Ct. App. 2008)	3
<i>Winters v. Fiddle</i> , 394 S.C. 629, 648, 716 S.E. 2d 316, 326, (Ct. App. 2011)	3

I.

RESPONDENT FAILED TO PRESERVE FOR REVIEW THE ISSUE OF THE POWER OF THE CIRCUIT COURT TO ASSERT JURISDICTION OVER HER.

In order to decide the jurisdictional challenge made by the Respondent (“House”), the Circuit Court was to analyze whether it had the power to exercise jurisdiction over her and, if it had the power, whether exercising that power would offend traditional notions of fairness.

In her briefing, House devotes a significant part of her arguments to rehashing the conflicting evidence with respect to whether House had conducted any activities within the state, travelled to the state, or directed any purposeful activities related to the alleged fraud within the state. This Court need not consider those arguments for two reasons.

First, and most significantly, House did not preserve the issue for review. In its January 23, 2013, Order, the Circuit Court found in favor of the Appellants (“Mikals”) on that point. The Circuit Court found and ruled that “While these allegations, on their face, may satisfy the “power prong” of a jurisdictional analysis, they fail the fairness test.” The Circuit Court clarified in its footnote that “To satisfy the power prong, the court must find the defendant directed his activities to residents of South Carolina and that the cause of action arises out of or relates to those activities”.

The finding of the Circuit Court that the allegations satisfied the “power prong” of the jurisdictional analysis establishes that the court had the power to assert jurisdiction over House, that the defendant directed her activities to residents of South Carolina, and that the cause of action arises out of or relates

to those activities. House did not challenge the Circuit Court's finding in a Rule 59(e) Motion nor did House pursue a cross appeal with respect to that finding.

An unchallenged finding of the lower court becomes of the law of the case. *Commercial Credit Loans, Inc., v. Riddle*, 334 S. C. 176, 187, 512 S.E. 2d 123, 129 (Ct. App. 1999); *Charleston Lumber Co., Inc. v. Miller Housing Corp.*, 338 S.C. 171, 175, 525 S.E.2d 869, 871 (2000).

The Circuit Court's finding that it had the power to exercise jurisdiction over House was adverse to House and, in order to preserve the issue for review, House had to raise it in a cross appeal in this Court. *In re Estate of Rider*, 756 S.E. 2d 136, FN 3 (2014); *Winters v. Fiddle*, 394 S.C. 629, 648, 716 S.E. 2d 316, 326, (Ct. App. 2011); *Sanders v. S.C. Dept. of Corrections*, 379 S.C. 411, 418, 665 S.E. 2d 231, 234 (Ct. App. 2008). Because it was not properly preserved, this Court may not consider the issue.

Second, on a jurisdictional question, the Circuit Court was required to resolve all issues of disputed fact in favor of Mikals. In *M.B. Kahn Construction Company v. Three Rivers Bank and Trust Company*, 354 S.C. 412, 415, 581 S. E. 2d 481, 482 (2003), the Supreme Court held that "only a prima facie showing is required to support jurisdiction", that "On a motion to dismiss for lack of personal jurisdiction, factual disputes arising by affidavit will be resolved in favor of the non-moving party", and that "Where the non-moving party submits facts sufficient to make a prima facie showing...supporting long-arm jurisdiction..., the motion to dismiss should be denied". 581 S. E. 2d at 482. Despite House's position to the contrary, Mikals did not argue that the Circuit Court should not have considered the affidavits submitted by the parties. In fact, in their Brief,

they discuss all of the affidavits, referencing only the rule that all factual disputes are to be resolved in their favor. (Appellants' Brief, p. 6).

Pursuant to *M.B. Kahn*, Mikals' allegations, both in their Complaint and the evidence submitted by way of affidavits, which enumerate the various contacts of House with the state in connection with the alleged fraud, even if denied by House, were to be considered established for the purposes of the jurisdictional analysis. In the procedural posture of this case, the Circuit Court was not, as suggested by House, to weigh the evidence. It was to review the allegations of the Complaint and the affidavits of the parties, resolve all disputed factual issues in favor of Mikals, and then determine whether jurisdiction was proper.

Since the Circuit Court found against her on this issue¹ and House did not challenge that finding in the Circuit Court or cross appeal in this Court, all of House's discussion of factual disputes bearing upon the power prong of the jurisdictional analysis is irrelevant in this appeal, both because they relate to an issue that has not been preserved for review and because it is improper for the Circuit Court to have adjudicated disputed facts to resolve a jurisdictional challenge.

II.

HOUSE HAS FAILED TO ARTICULATE ANY LEGALLY COGNIZABLE "UNFAIRNESS" ARISING FROM THE EXERCISE OF JURISDICTION IN THIS CASE.

Because House purposefully conducted her activities in South Carolina, and committed tortious acts in the state damaging South Carolina residents, in order to defeat jurisdiction on fairness considerations, she must:

¹ House incorrectly asserts on page 17 of her Brief that the Circuit Court found that House's contacts with the state were *not* sufficient to exercise jurisdiction over her. (Respondent's Brief, p. 17)

. . . present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.

Allen v. Columbia Financial Management, LTD., 297 S.C. 481, 491, 377 S.E. 2d 352, 358 (1988). House presented no evidence of “other considerations” that would “compel” the conclusion that the exercise jurisdiction over her was so unfair as to be tantamount to a denial of due process.

As set forth in House’s Brief, the Circuit Court was to analyze the “fairness” of the exercise of jurisdiction based upon the duration of the activity within the State, the character and circumstances of House’s acts, the inconvenience resulting to the parties, and the State’s interest in exercising jurisdiction. *QZO, inc. v. Moyer*, 358 S.C. 246, 254, 594 S.E. 2d 541, 546 (Ct. App. 2004) *reh. denied, cert. denied*.

In its Order, the Circuit Court merely stated in conclusory fashion that South Carolina was not a “convenient forum” and that South Carolina had no interest in the dispute. (Order, January 22, 2014). Those conclusions were erroneous as a matter of fact and law for the reasons set forth in Mikals Brief.

A. Convenience.

In her Brief, House attempts to support the Circuit Court’s conclusion by asserting that South Carolina is an “inconvenient forum” because House is a Canadian citizen, relevant documents are located in Canada, and that the corporations involved in this matter are Canadian. (Respondent’s Brief, p. 18).

First, the issue is not whether Canada is a more convenient forum than South Carolina. The issue is whether the exercise of jurisdiction in South Carolina is so unfair as to “offend traditional notions of fair play and substantial justice”. *Hammond v. Butler*, 300 S.C. 458, 388 S.E.2d 796, at 798.

Second, the involvement of Canadian banks and Canadian corporations are wholly tangential to this dispute, the crux of which is the fraudulent and material misrepresentations made by House in South Carolina to induce residents of South Carolina to lend money to House's employer. At best, the Canadian institutions are non-party witnesses that may or may not have relevant evidence. As pointed out in Mikals' Brief, the relevant consideration is the convenience of the parties, themselves, not the location or citizenship of documents or non-party witnesses. From a convenience standpoint, it is only the Mikals who would be inconvenienced by having to secure documents from Canada. House need only go down the street of her hometown to obtain any such evidence.

Third, the argument that this state is an inconvenient forum because only the Mikals are residents of and citizens of South Carolina is facetious. Every defendant sued under the long-arm statute could assert the same argument, essentially emasculating the clear right of a South Carolina resident to sue a non-resident in this state.

Fourth, the fact that Donna Mikals has travelled to Canada, as argued at page 19 of House's Brief, has absolutely no bearing on whether she is entitled to sue in South Carolina. There is no case authority for the proposition that, if a litigant has travelled to a jurisdiction other than the state of her residence, she has forgone her right to sue in her home state.²

² The Mikals have not alleged that they are dual citizens of the United States and Canada, because they are not. The allegation of the Complaint as to their citizenship must be taken as true. Nor has House advanced any argument that any such alleged dual citizenship should deprive the Mikals of the right to sue in the country and state in which they reside.

Neither of the case authorities cited by House are on point. In *Crib v. Spatholt*, 382 S.C. 475, 489, 676 S.E. 2d 706, 713, (Ct. App. 2009) jurisdiction was declined, not on the issue of inconvenience, but because the nature, duration, and circumstances of the defendant's activities in South Carolina were too attenuated.

In *Colite Indus., Inc. v. G.W. Murphy Const. Co., Inc.*, 297 S.C. 426, 429, 377 S.E. 2d 321, 322 (1989), the Court overturned the lower court and found that there was no inconvenience associated with exercising jurisdiction in a contract dispute over a Hawaiian company when representatives of the company had twice visited the state and the contract had been performed over a ten month period.

The case that is on point is *Campbell v. Johnson & Towers, Inc.*, 123 F. Supp. 2d 329 (1999), in which the U.S. District Court, applying South Carolina law, found that the burden on the defendants was not so severe as to preclude the exercise of jurisdiction where the defendant did not find it burdensome to travel to South Carolina to do business with the Plaintiff. 123 F. Supp. at 337.

House has presented no case law authority or compelling argument that would suggest that that it would be a denial of due process to require House to litigate here when she is a highly compensated business person who has travelled to this state on business on several occasions and who travelled to South Carolina to perpetrate the fraud alleged in the Complaint.

B. The Interest of South Carolina.

For the purposes of this analysis, the Court must consider as true that the Mikals are residents of South Carolina and that the alleged fraud was perpetrated on them in this state. Under *Leggett v. Smith*, 336 S.C. 63, 686 S.E. 2d 699 (Ct.

App. 2009), those facts give South Carolina a legitimate interest in providing a remedy for the Mikals. See, also: *Colite Indus., Inc. v. G.W. Murphy Const. Co., Inc.*, 297 S.C. 426, 429, 377 S.E. 2d 321, 322 (1989). Only if none of the litigants are citizens of the state or none of the complained of acts occurred here is that interest diminished. *Aviation Associates and Consultants, Inc. v. Jet Time, Inc.*, 303 S.C. 502, 508, 402 S.E. 2d 177, 180 (1991).

The ruling of the trial court was that “I can imagine almost no South Carolina interest in exercising jurisdiction”. (Order, p. 2). That finding is incorrect as a matter of law and contrary to binding precedent. In *Campbell, supra*, the Court held that “South Carolina has an adjudicative interest in this dispute because it affects South Carolina residents and their personal property”. 123 F. Supp., at 337. Similarly, in *Askins v. Firedoor Corporation of Florida*, 281 S.C. 611, 617, 316 S.E. 2d 713 (Ct. App. 1984), the Court stated that “South Carolina has a legitimate interest in providing the means for its citizens to seek redress...”.

This Court should not affirm a finding that declines to find that this State has an interest in providing a forum to redress a fraud perpetrated in South Carolina upon residents of South Carolina. The fact that, as House admits, Mikals would have no remedy in Canada as the result of the shorter statute of limitations makes the fairness of the exercise of jurisdiction in this forum more compelling, not less. Refusal to exercise jurisdiction in this case would result in Mikals having no remedy in any jurisdiction for the fraud perpetrated on them in South Carolina.

House has offered no support, either factual or legal, for the Circuit Court's erroneous conclusion that South Carolina has an inadequate interest in provided its citizens with a remedy for torts committed against them in this State.

C. Duration, Nature, and Circumstances of House's Acts.

In her Brief, House did not even address why the duration, circumstances, and nature of her acts within the State would not subject her to jurisdiction her for claims arising from those acts. As pointed out in Mikals' Brief, the allegations of the Complaint and the supporting evidence before the Circuit Court established that House travelled to South Carolina on multiple occasions in order to solicit the use of Mikals' line of credit and initiated telephone calls to Charles Mikals in South Carolina for the same purpose. The Donna Mikals Affidavit attaches written communications from House directed to Mikals in South Carolina in which false statements are made. (Donna Mikals Affidavit in Opposition to Motion to Dismiss, ¶ 2, Exhibit B; ¶ 3, Exhibit C).

The Complaint alleges that, by perpetrating the fraud, House benefitted financially by using Mikals' line of credit to "prop up" her employer, thereby continuing the existence of her lucrative position. (Complaint, ¶ 18). House assured Mikals that they would receive a security interest in all of her employer's assets, that her employer was able to repay the advances on demand, and that her employer was operating profitably. (Complaint, ¶ 17). House made these representations knowing that they were false. (Complaint, ¶ 18).

House knew when she made these misrepresentations in South Carolina that the financial requirements of her employer's primary lender precluded any ability to repay the advances on demand and that her employer was incurring financial losses. (Complaint, ¶ 17). House did not record any liability to Mikals on the books of her employer. Upon meeting Mikals in South Carolina and obtaining their agreement that House could access their personal line of credit, House withdrew funds from Mikals' line of credit in excess of the limitation

imposed by them, and without having her employer grant the promised security interest on all of its assets. (Complaint, ¶ 17). House then assured Mikals that they had been fully secured when that was known to be untrue. (Complaint, ¶ 17). Mikals were not the owners of her employer's business at the time that any of these misrepresentations were made (Complaint, ¶ 5) and Chuck Mikals was fully retired. (Complaint, ¶ 6).

Finally, a sworn Statement of Claim filed by House asserts that she was the Chief Financial Officer of a South Carolina corporation, Greenline Industries, Inc., and allegedly affiliated for more than ten years at a salary of nearly \$100,000. (Donna Mikals Affidavit in Opposition to Motion to Dismiss, ¶ 1, Exhibit A, ¶ 2 Exhibit B; ¶ 3, Exhibit C). House's connection to South Carolina is both specific to the fraud alleged and to the state in general through her alleged employment here. These contacts are hardly "random, fortuitous, or attenuated" and she has purposefully directed her activities to this forum. Accordingly, it is not unfair to require her to defend a claim in a forum to which she has regularly directed her activities. See: *Moosally v. W.W. Norton & Co.*, 358 S.C. 320, 594 S.E.2d 878 (Ct. App. 2004).

In her papers, House based her due process argument on the fact that she is a Canadian citizen, had only travelled to South Carolina twice, and had no other contacts with the state. Not only were those assertions demonstrated to be factually incorrect, they are not dispositive.

Even in cases in which the defendant had not actually entered the state, the fact that he had derived a financial benefit from his tortious conduct within the state was sufficient to satisfy the "fairness" prong of the jurisdictional analysis.

See: *Clark v. Key*, 304 S.C. 497, 405 S.E. 2d 599 (1991) [jurisdiction fairly

asserted over stockbroker who had solicited allegedly fraudulent investment from a South Carolina resident]; *Hammond v. Butler, Means, Evins & Brown*, 300 S.C. 458, 388 S.E. 2d 796 (1990) [correspondence and telecommunications sufficient to confer jurisdiction over attorney for fraudulent activities directed at South Carolina resident].

House has failed to provide any facts that demonstrate a “compelling case” that, in the face of her numerous and varied contacts with the state, due process would preclude the exercise of jurisdiction over her. *Allen v. Columbia Financial Management, LTD.*, 297 S.C. 481, 491, 377 S. E. 2d 352, 358 (1988).

This Court should reverse the Circuit Court and find that there is no constitutional impairment to expecting House to defend in South Carolina the claims arising from her tortious acts committed here against residents of the state.

III.

HOUSE'S INITIAL FILING WENT TO THE MERITS OF THE CLAIMS AND ASKED FOR AFFIRMATIVE RELIEF, THEREBY SUBMITTING HERSELF TO THE JURISDICTION OF THE COURT.

There is no question that House's initial filings, including a document entitled “Motion to Dismiss” and a supporting affidavit, went to the merits of the case and asked for affirmative relief.³ The law is clear that, if a litigant pursues active relief on the merits, rather than only on the basis of jurisdiction, the litigant has subjected herself to the jurisdiction of the court. A litigant cannot both object

³ Despite House's argument, Mikals did not argue that the response was a “counterclaim”, but that the pleading went to the merits, asked for affirmative relief, and was supported by extraneous factual material that also went to the merits.

to jurisdiction and ask the court to award affirmative relief. By doing so, the House waived her right to pursue a jurisdictional challenge.

IV.

HOUSE'S BRIEF CONTAINS IRRELEVANT STATEMENTS AND ACCUSATIONS UNSUPPORTED BY THE RECORD.

Without belaboring the point, Mikals would like the Court to note that House's Brief contains numerous statements and accusations that are both unsupported by the record and irrelevant to the issues. The purpose appears to be to unfairly cast both Mikals and their counsel in a bad light. Although Mikals chooses not engage in a lengthy articulation and rebuttal of each and every one, several must be addressed.

First, Mikals' Initial Brief was timely filed and accepted for filing by the Clerk of this Court. The relevant rule considers the Brief "filed" on the date it is deposited in the mail with sufficient first class postage. The fact that the post office did not postmark it until one day later does not establish that Mikals were misleading the Court as to when it was "filed" and served.

Second, the lengthy discussion beginning at page 7 of the House's Brief concerning Mikals' purported motives in pursuing their claim against House and the purported "underlying lawsuit" is irrelevant to whether jurisdiction over her is proper and is nothing more than statements of counsel that are unsubstantiated by any evidence.

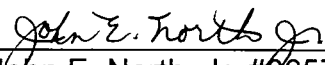
Third, there is no evidence in the record that Mikals have or have ever had dual citizenship, other than the unsubstantiated assertion of House.

CONCLUSION

The finding that the Circuit Court had the power to exercise jurisdiction over Respondent is the law of the case. There is nothing in the record to support the Circuit Court's conclusion that exercising jurisdiction over the Respondent is so unfair as to be constitutionally impermissible and the Respondent has demonstrated no "compelling case" that it would be. Due process is not violated by requiring House to defend a damage claim arising from her fraudulent misrepresentations made in South Carolina to residents of this state. The Circuit Court's Order declining to exercise jurisdiction was erroneous.

For all of the foregoing reasons, as well as the authorities and arguments contained in their Brief, the Appellants respectfully request that the Court reverse the Circuit Court and find that the exercise of jurisdiction over House is constitutionally permissible and proper under the facts of this case.

Dated this 9th day of May, 2014.



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