

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF PICKENS)

CASE NO.: 2014-CP-39-0398

Charles Alan Grubb, et al.,)

Petitioners,)

v.)

The City of Clemson, et al.,)

Respondents.)

ORDER

2014 JUL 10 P 3:56
CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

THIS MATTER CAME BEFORE me on June 20, 2014, on Petitioners' Motion to Dismiss Respondents' Counterclaim, pursuant to Rule 12(b)(6), SCRCPP, and Respondents' Motions for Bifurcation and for a Protective Order. For the reasons stated below, Petitioners' Motion to Dismiss is GRANTED and Respondents' Motion for a Protective Order is GRANTED.

Factual Background

Respondent Tom Winkopp, a real estate developer, proposed plans and specifications for a multi-family, mixed-use development in the city of Clemson to the city's Board of Architectural Review. The Board approved the proposal, and the Petitioners appeal. Winkopp subsequently asserted a counterclaim against Petitioners for abuse of process. Petitioners filed a Motion to Dismiss the counterclaim, pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. Respondent Winkopp filed a Motion to Bifurcate the counterclaim and the appeal. Respondents Winkopp and William E. Dukes filed a Motion for a Protective Order to limit any further discovery to the issues raised in the counterclaim.

RECEIVED
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SC Court of Appeals

A. Petitioners' Motion to Dismiss Pursuant to Rule 12(b)(6), SCRPC

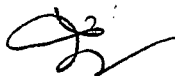
Standard of Review

In ruling on a 12(b)(6) motion to dismiss for failure to state facts sufficient to constitute a cause of action, a trial court must base its decision "solely upon the allegations set forth on the face of the complaint." *Food Lion, Inc. v. United Food & Commercial Workers Int'l Union*, 351 S.C. 65, 69, 567 S.E.2d 251, 252-53 (Ct. App. 2002) (citing *State Bd. of Med. Exam'rs v. Fenwick Hall, Inc.*, 300 S.C. 274, 387 S.E.2d 458 (1990)). The court must view the allegations in the light most favorable to the non-moving party and must resolve every doubt in his favor. *Id.* Where the defendant demonstrates the plaintiff has failed to allege facts sufficient to constitute a cause of action in the pleadings, the trial court may dismiss the claim. *See Hambrick v. GMAC Mortgage Corp.*, 370 S.C. 118, 121-22, 634 S.E.2d 5, 7 (Ct.App. 2006).

Analysis

A claim of abuse of process "is intended to compensate a party for harm resulting from another party's misuse of the legal system." *Pallares v. Seinar*, 407 S.C. 359, 370, 756 S.E.2d 128, 133 (2014) (citing *Food Lion, Inc.*, 351 S.C. 65, at 74 n. 5, 567 S.E.2d at 255 n. 5. To prevail, the claimant must show the accused (1) acted with an ulterior motive and (2) performed "a willful act in the use of the process that is not proper in the regular conduct of the proceeding." *Id.*

If one undertakes to use the judicial process to further an objective for which the process was not intended, the ulterior motive element is met. *See First Union Mortgage Corp. v. Thomas*, 317 S.C. 63, 74, 451 S.E.2d 907, 914 (Ct.App. 1994) ("An ulterior purpose exists if the process is used to gain an objective not legitimate in the use of the process.") To meet the second



element, the complaint must allege "[s]ome definite act . . . not authorized by the process or aimed at an object not legitimate in the use of the process." *Hanier v. Am. Med. Int'l, Inc.*, 328 S.C. 128, 136, 492 S.E.2d 103, 107 (1997). Our supreme court has stated the second element includes three components: (1) a "willful" or overt act which is performed (2) through the use of the process and which is (3) "improper because, it is either (a) unauthorized or (b) aimed at an illegitimate collateral objective." *Food Lion, Inc.*, 351 S.C. at 71, 567 S.E.2d at 254.

Nowhere in Respondents' complaint do they allege sufficient facts that would give rise to the alleged misuse of the legal process by Petitioners. "A complaint which neglects to allege a perversion or misuse of the process by omitting facts necessary to show an *improper* willful act in the use of the process has not stated a cause of action for abuse of process and fails as a matter of law." *Id.* at 77, 567 S.E. 2d at 257 (emphasis in original). The facts alleged are not sufficient to support an essential element of this cause of action— that Petitioners are appealing the Board's decision solely to delay, sabotage, or "kill" the project, a purpose for which the appellate process is not intended. That there is a delay in the resolution of a dispute is a natural consequence of any appeal. Respondents' complaint must set forth specific facts showing Petitioners are using the appellate process in this case primarily for a purpose for which the process was not intended. The allegations in the complaint fall short of this standard.

The only fact Respondents allege, with questionable specificity, is that Respondent Winkopp is "informed and believes" Petitioners are aware the appeal is "frivolous and without merit" and are only appealing the decision of the Board in an attempt to "kill or delay" the development project. One is not liable for abuse of process "where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions." *Hanier*, 328 S.C. at 136, 492 S.E. 2d at 107; *see also Pallares*, 407 S.C. at 371, 756



S.E.2d at 133 ("[N]o action lies where a person has an incidental or concurrent motive of spite or merely seeks to gain a collateral advantage from the process."); *Food Lion, Inc.*, 351 S.C. at 74, 567 S.E.2d at 255 ("An allegation of an ulterior purpose or 'bad motive', standing alone, is insufficient to assert a claim for abuse of process.") Respondents must allege facts sufficient to not only show Petitioners filed this appeal to further an ulterior purpose, but also that Petitioners took willful acts to abuse the legal process. The vague allegations in Respondents' complaint are insufficient to support the abuse of process claim.

Conclusion

Viewing the complaint in the light most favorable to the Respondents, this Court finds the bare allegations offered to support the claim are insufficient to sustain an abuse of process cause of action. Petitioners' Motion to Dismiss pursuant to Rule 12(b)(6), SCRCP, is granted and Respondents' counterclaim is dismissed without prejudice.

B. Motion for Protective Order

The parties agree South Carolina Code subsection §6-29-900(A) (Supp. 2013) governs appeals from the Board of Architectural Review and provides for an expedited appeal process. The circuit court must hear the appeal "on the certified record of the board proceedings" and is prohibited from taking additional evidence. S.C. Code Ann. §6-29-930(A)(Supp. 2013). The only way to expand the evidence presented to the circuit court is for the court to remand the matter to the Board for rehearing. *Id.* Petitioners seek leave to take discovery they deem "necessary to ensure that the record of the [Board of Architectural Review] is complete and accurate" on appeal. The record of the Board of Architectural Review has been certified to this Court, and no party has challenged the record. No further discovery is required or allowed in the



appeal of this matter, therefore Respondent's Motion for Protective Order from further discovery

is hereby granted.

C. Motion to Bifurcate

Respondents filed a Motion to Bifurcate the appeal and counterclaim. This Court declines to address this motion because the Motion to Dismiss is dispositive of the issue.

IT IS SO ORDERED.

7/7

2014



Letitia H. Verdin
Circuit Court Judge



Rec'd 8-7-14

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF PICKENS
IN THE COURT OF COMMON PLEAS

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2014CP39398

Charles Alan Grubb Eleanor Hare Katherine Lee Schwensen Virginia Carner	Roberta Elizabeth Vogt Derek Hodgkin Linda Gahan	The City of Clemson and the Board of Architectural Review William E. Dukes	Tom Winkopp Monica Zeilinski
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PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant
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DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON): Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
 Affirmed; Reversed; Remanded; Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

Defendant Tom Winkopp's Motion to Reconsider, Alter, and Amend this Court's Order dated July 7, 2014 is hereby respectfully denied.

ORDER INFORMATION

This order ends does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

Handwritten signature/initials

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

[Handwritten Signature]
Circuit Court Judge

2162

Judge Code

8/1/2014

Date

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on ^{8/5/14} to attorneys of record or to parties (when appearing pro se) as follows:

Robert T. Lyles, 342 East Bay Street, Charleston, SC 29401

Thomas W. Traxler, PO Box 10828, Greenville, SC 29603

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

[Handwritten Signature: Cheryl Watson - Deputy]

Harold P. Welborn, Pickens County Clerk Of Court - Clerk of Court

Court Reporter

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

[Handwritten mark]