

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 -1186

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

v.

Debra House.....Respondent

BRIEF OF THE APPELLANTS

John E. North, Jr., # 06570
North & Black, P.C.
916 Bay Street, Suite 100
Beaufort, SC 29902
(843) 379-0800 (tel)
(843) 379-0900 (fax)
Attorney for Appellants

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STATEMENT OF THE ISSUES

I. Did the lower court err by weighing the evidence instead of resolving disputed jurisdictional facts in favor of the Plaintiffs at the pre-trial stage of the proceeding?

II. Having already found that the Plaintiffs had satisfied the "power prong" of the Due Process analysis, did the lower court err by improperly applying the legal standards by which Defendant had the burden to demonstrate a compelling case that other considerations render the exercise of personal jurisdiction "unfair and unreasonable"?

III. Did the lower court err when it found a factual basis that the exercise of personal jurisdiction over Defendant would be "unfair and unreasonable"?

IV. Did the lower court err in failing to find that Defendant had made a general appearance when she addressed the case on the merits and requested affirmative relief from the court?

STATEMENT OF THE CASE

This is an action for damages for fraud and breach of fiduciary duty commenced on May 7, 2013, by the Appellants, Charles R. and Donna Mikals, hereinafter referred to as Charles Mikals and Donna Mikals, respectively, or Mikals, collectively, who are residents and citizens of South Carolina. (R. pp. 00010 - 00019).

On July 13, 2013, Debra House, the Defendant and the Respondent herein, a resident and citizen of Canada, hereinafter referred to as House, filed a *pro se* Motion to Dismiss and supporting Affidavit. (R. pp. 00020 - 00029; R. pp. 00030 - 00032) The basis of the Motion was, among other things, lack of personal jurisdiction.

On July 23, 2013, the Mikals filed their opposition to the Motion to Dismiss and supporting memorandum supported by the Affidavit of Donna Mikals. (R. pp. 00034; R. pp. 00047 - 00060).

After the Motion to Dismiss was set for hearing, House filed a Motion for Continuance of Hearing to indefinitely postpone a hearing on her Motion. (R. pp. 00045 - 00046).

On August 12, 2013, House's current attorney made his appearance on her behalf and, one day prior to the hearing on the Motion to Dismiss, filed a second Affidavit of House. (R. pp. 00061 - 00062; R. pp. 00065 - 00087). On the day of the hearing, House's attorney submitted a memorandum in support of the Motion to Dismiss. (R. pp. 00088 - 00097).

The Court received the Affidavit on the condition that the Mikals were given an opportunity to respond, which they did with three additional Affidavits and a Supplemental Memorandum. (R. p. 00178, line 20 – p. 00179, R. p. 00180, line 5; R. pp. 0098 - 00112; R. p. 00113; R. p. 00116 - 00128; R. pp. 00128 - 00129).

On October 7, 2013, the Court entered an Order granting the Motion to Dismiss on the basis of lack of personal jurisdiction over House. (R. pp. 00003 - 00009).

The Mikals timely filed their Motion to Alter or Amend on October 16, 2013. (R. pp. 00150 – 00170).

On January 23, 2013, the Court entered its Order, on reconsideration, which was substituted for its Order of October 7, 2013. The Order again dismissed the Complaint on jurisdictional grounds, but revised its findings of fact, conclusions of law, and rationale. (R. pp. 00001 - 00002).

This appeal followed.

STATEMENT OF FACTS

The Complaint alleges the following facts:

1. The Mikals are residents of South Carolina and citizens of the United States. House is a citizen and resident of Canada. (R. p. 00010)
2. The Mikals were owners of a particular Canadian company, Greenline Forest Products, Limited (“Forest Products”), the business of which was terminated in 2008, at which time Charles Mikals retired. (R. p. 00011).

3. House was hired as the Chief Financial Officer of Forest Products in 2000. When its business closed, she became the Chief Financial Officer of another Canadian entity owned by the children of the Mikals, Greenline Plywood Products, Limited ("Plywood"). (R. p. 00011).
4. House handled all of the financial affairs of Forest Products and Plywood, which were closely held companies for which the family members placed great trust and confidence in her. (R. pp. 00011 - 00012).
5. At the time that the business of Forest Products was terminated, the balance of the obligation on its line of credit with Bank of Montreal was transferred to Plywood. (R. p. 00012).
6. Prior to the transfer of Forest Product's debt to Plywood, House made multiple telephone calls to Charles Mikals soliciting his agreement to allow Plywood to access his personal line of credit with the Bank of Montreal for the benefit of Plywood, giving him assurances that such a loan would be secured by all the assets of Plywood, second only to the Bank of Montreal, that any advances would be repaid in installments, and that Plywood had the financial capacity to repay any advances, on his demand. The solicitations were made also made by House, in person, in Beaufort County, South Carolina. (R. pp. 00013 - 00014).
7. All of the representations made by House were false and fraudulent. (R. pp. 00015 - 00017).

ARGUMENT

I.

STANDARD OF REVIEW

In accordance with *Moosally v. W. W. Norton & Co., Inc.*, 358 S.C. 320, 327, 328, 594 S.E. 2d 878, 882 (Ct. App. 2004), this Court reviews the dismissal of the Mikals' Complaint to determine whether the Order was based upon an error of law or was not founded on fact. Questions of the proper exercise of personal jurisdiction must be adjudicated on a case-by-case basis.

II.

IN THIS JURISDICTIONAL ANALYSIS, THE ALLEGATIONS OF THE COMPLAINT ARE TAKEN AS TRUE AND ALL FACTUAL DISPUTES RAISED BY AFFIDAVITS ARE RESOLVED IN MIKALS' FAVOR.

The Complaint alleges that House made numerous misrepresentations to Charles Mikals, through telephone calls to him in South Carolina and in person, within the state and that these tortious acts caused damage within the state.¹ (R. pp. 00010 - 00019). The Complaint further asserts that this conduct was sufficient to permit the exercise of personal jurisdiction over House pursuant to the long arm statute, S.C. Code § 36-2-803. House responded by moving to dismiss the Complaint on the grounds that South Carolina could not exercise jurisdiction over her.²

In deciding House's jurisdictional challenge, the lower court was required to accept the allegations of the Complaint as true and to resolve all factual

¹ The Complaint further alleged that House was doing business within the state of South Carolina.

² As discussed hereinafter, House also made requests for affirmative relief at the time she filed her motion to dismiss.

disputes in favor of the Mikals. *M. B. Kahn Construction Company v. Three Rivers Bank and Trust Company*, 354, S.C. 412, 415, 581 S. E. 2d 481, 482 (2003).

In support of her position, House submitted two Affidavits. In the first, she denied that she had ever travelled to South Carolina “for the purposes of soliciting the Plaintiffs” (R. p. 00030). Subsequently, she asserted that she had been in South Carolina only twice, in 2006, but provided no information about the purpose of those trips in 2006. (R. p. 00066). Her initial Affidavit also went to the merits of the Complaint, generally denying the allegations against her.

At no point in her Affidavits did House deny making telephone contact with the Mikals to solicit the use of their line of credit as alleged in the Complaint. Accordingly, for the purposes of this analysis, this Court must consider those allegations established as fact.

The evidence submitted by the Mikals, in the form of the Affidavit of Donna Mikals, attached an affidavit of House filed in a separate proceeding in which House states that, in 2007, she travelled to Beaufort, South Carolina, to participate in the same financial transaction that gives rise to the Mikals’ Complaint.³ (R. pp. 00120 - 00127). Donna Mikals further affirmed in her own Affidavit that, in October, 2007, House, along with the Mikals’ accountant,⁴ stayed at the Mikals’ South Carolina residence for three days to discuss “business, banking and financial issues” and that House was also in South Carolina in February, 2008. (R. p. 0017).

³ That transaction was to acquire financing for the business of Plywood.

⁴ The accountant filed an Affidavit consistent with that of Donna Mikals. (R. pp. 00128 - 00129).

Resolving all factual disputes in favor of the Mikals, for the purposes of the Motion to Dismiss, it is established that House did fraudulently solicit Charles Mikals by telephone calls placed to his South Carolina residence to make his line of credit available to House's employer, and did travel to South Carolina in 2007 to solicit the Mikals, personally, with respect to the use of their line of credit.

The evidence further establishes that House filed a sworn statement affirming that she had been employed for more than ten years by Greenline Industries, Inc., a South Carolina corporation, as its Chief Financial Officer, and earned slightly less than \$100,000 in that position. (R. p. 00048; R. pp. 00052 - 00054).

Assuming these facts, the lower court was required to determine whether House's conduct was within the scope of the long arm statute, giving the lower court the "power" to exercise jurisdiction over her and, if so, whether the exercise of that power would be fair and reasonable under the circumstances. *Hammond v. Butler, Means, Evinds and Brown*, 300 S.C. 458, 462, 388 S.E. 2d 796, 798 (1990).

III.

THE LOWER COURT IMPROPERLY CONCLUDED THAT ASSERTING PERSONAL JURISDICTION OVER HOUSE OFFENDED "TRADITIONAL NOTIONS OF FAIR PLAY AND SUBSTANTIAL JUSTICE".

In its Order, the lower court correctly concludes that the long arm statute applied and that House's contacts with South Carolina were sufficient to give the lower court the power to exercise jurisdiction over her. However, it further found that to exercise that power would offend "traditional notions of fair play and

substantial justice". (R. pp. 0001 - 0002). In that conclusion, it erred as a matter of fact and law.

Under South Carolina law, jurisdiction under the long arm statute can be exercised to the "outer limits" of the Federal due process clause. *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 491, 611 S.E. 2d 505, 508 (2005); *S. Plastics Co. v. S. Commerce Bank*, 310 S.C. 256, 260, 423 S. E. 2d 128, 131 (1992).

The lower court was required to evaluate whether those "outer limits" had been exceeded by considering the facts and circumstances of this case as to each of four factors: 1) the duration of House's activity in this state; 2) the nature and circumstances of House's acts; 3) the inconvenience to the parties resulting from the exercise or refusal to exercise jurisdiction; 4) the interest of South Carolina in exercising jurisdiction over the matter. *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 lower court does not articulate any of the four factors other than by stating, without analysis, that South Carolina is not a "convenient forum" and that South Carolina has "no interest in exercising jurisdiction". (R. pp. 0001 - 0002). Not only did the lower court err as a matter of law by failing to consider the required factors, but the record demonstrates that its conclusion is without basis in fact and certainly did not give Mikals the benefit of the inferences relating to disputed facts.

1. The duration of House's activities in South Carolina and the nature and circumstances of her acts.

In making its analysis, the lower court was required to consider the nature, circumstances, and duration of House's acts in South Carolina. As set forth above, the allegations of the Complaint and the supporting evidence before the lower court established that House travelled to South Carolina on multiple occasions in order to solicit the use of the Mikals' line of credit and initiated telephone calls to Charles Mikals for the same purpose. The Donna Mikals Affidavit attaches written communications from House directed to the Mikals in South Carolina in which allegedly false statements are made. (R. p. 00058; R. p. 0059).

The Complaint alleges that by perpetrating the fraud, House benefitted financially by using the Mikals' line of credit to "prop up" her employer, thereby continuing the existence of her lucrative position. (R. p. 00017). House assured the 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. (R. pp. 00016 - 00017). House made these representations knowing that they were false. (R. p. 00017).

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 huge financial losses. (R. pp. 00015 - 00017). House did not record any liability to Mikals on the books of her employer nor did she record any liability to Mikals on the books of her employer. Upon obtaining in South Carolina the agreement of the Mikals that House could access their personal line of credit, House

withdrew funds from the 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. (R. pp. 00015 - 00017). House then assured Mikals that they had been fully secured, when that was known to be untrue. (R. pp. 00015 - 00017). The Mikals were not the owners of her employer's business at the time that any of these misrepresentations were made (R. p. 00011) and Chuck Mikals was fully retired. (R. p. 00011).

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 with the Mikals for more than ten years at a salary of nearly \$100,000. (R. pp. 00050 – 00059). 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).

It cannot be unexpected that when House fraudulently solicits the use of a line of credit for the benefit of her employer, and misrepresents the safety and security of any advances, both in person in South Carolina, and by telephonic and written communications, and purports to be an employee of a South Carolina corporation from whom she earns nearly \$100,000, that she could be sued in that jurisdiction.

In her papers, House based her due process argument only on the fact that she was 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 and benefitted financially from the transaction];

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 receiving financial benefit from fraudulent activities directed at South Carolina resident].

When the Mikals have presented facts that constitute prima facie proof of fairness, and when the same types of claims have been previously found by this Court to be sufficient, it cannot be said that House has carried her burden to demonstrate that the exercise of personal jurisdiction over her is “unfair and unreasonable”.

2. Convenience of the parties.

In its conclusion that South Carolina should not exercise jurisdiction over House, the lower court erroneously focused on the location of evidence and did not consider the convenience of the **parties**, as it is required to do. The

“inconvenience”, which the lower court relied upon to find that jurisdiction in South Carolina was unfair, was the location of what it considered to be relevant evidence, ie: “Canadian records, Canadian reports, Canadian budgets, Canadian accountants and the like”⁵. (R. pp. 0001 - 0002) It is clear that, under South Carolina law, the relevant factor in this analysis is not where the evidence might be found, but the “inconvenience to the parties” resulting from the acceptance or decline of jurisdiction.

In any case in which a non-resident is sued under the South Carolina long arm statute, the forum will not be as “convenient” as their home state or country. The question before the lower court was whether this inconvenience rose to the level of a denial of due process.

As of the filing of the Complaint, Charles Mikals was 72 years old and retired. He and his wife Donna Mikals are United States citizens and residents of South Carolina, and no longer active in any of the business described in the Complaint. Ms. House was born in 1971, making her approximately 43 year of age. (R. p. 00030) As set forth above, House asserts that she has been the Chief Financial Officer of various related entities for more than 10 years and managed all of their business and affairs. Her own affidavit given in a separate proceeding fully demonstrates the intimate knowledge of the financial affairs of the related businesses and her responsibilities. (R. pp. 00120 - 00127). As further set forth above, House travelled to South Carolina on multiple occasions in connection with her business activities as a Chief Financial Officer and is

⁵ Merely because relevant evidence may potentially be found in Canada, does not justify declining to exercise personal jurisdiction over House. There are readily available procedures to obtain evidence in foreign jurisdictions.

clearly comfortable with travel. One defendant, at a relatively young age, is certainly more able to travel than two relatively elderly plaintiffs. House is not an unsophisticated person of limited means and she intentionally directed her activities and conduct to this forum. She is represented by South Carolina counsel. There is nothing unfair about responding in south Carolina to the claims of fraudulent activity that she undertook in this State.

There is absolutely no factual basis in the record for the lower court have concluded that the inconvenience to House of litigating in South Carolina is so significantly burdensome to House that the lower court should have declined to exercise jurisdiction over her.

Even if the location of "Canadian records, Canadian reports, Canadian budgets, Canadian accountants and the like" was a relevant consideration in determining whether to exercise jurisdiction, it is the Mikals and not House who would be inconvenienced. House is a resident of Canada and, accordingly, would have far easier access to evidence located there than the Mikals. There is no logical basis for the lower court to find that there is unreasonable inconvenience to House based on the location of such materials and evidence when those things are located in the House's home town.

In fact, as the Chief Financial Officer of the business for which she was employed and which benefitted from the Mikals letter of credit, as the person in charge of all of negotiating the financial arrangements for the business, as the one who drew upon the Mikals letter of credit and purportedly secured the

advances, the evidence about which the lower court was concerned is essentially that created by or within the exclusive purview of House, herself.

Any inconvenience to House arising from litigating in South Carolina is nothing more than the ordinary inconvenience arising from the exercise of long arm jurisdiction and certainly does not deprive her of her due process rights.

3. The interest of South Carolina in exercising jurisdiction.

This case involves two South Carolina residents who have been defrauded by material representations made to them within the state. South Carolina law will apply. As such, South Carolina has a direct and “substantial” interest in ensuring that its citizens have a redress for their grievances. *Leggett v. Smith*, 386 S.C. 63, 686 S.E.2d 699 (Ct. App. 2009).

It is only when there is essentially no contact with the state by the defendant and none of the complained of acts were committed in the state, is South Carolina’s interest so minimal as to not afford a basis for the exercise of jurisdiction.

Finally, while South Carolina has an interest in providing redress for its citizens, that interest is diminished when no business was transacted in this State and any contract formed was not to be performed in this State.

Aviation Associates and Consultants, Inc. v. Jet Time, Inc., 303 S.C. 502, 508, 509, 402 S.E.2d 177, 180, 181 (1991).

Further, in this case, if the lower court’s dismissal is upheld, as House concedes, the Mikals will be without a remedy since the Canadian statute of limitations on their claim has expired. (R. p. 00176, line 17 – 20; R. p. 00178, line 11 -17; R. p. 00090; R. p. 00097). If there is any unfairness shown in the

context of the Motion to Dismiss, it would be the deprivation of a remedy for the Mikals for acts committed within this State.

South Carolina has a direct and significant interest in providing a forum for its residents to seek damages for tortious conduct occurring in this state. A remedy for damages to its citizens is precisely the objective that the long arm statute seeks to achieve.

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:

... 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 or argument that would “compel” the conclusion that to exercise jurisdiction over her was unconstitutionally unfair. By dismissing the case on fairness grounds, the lower court erred as a matter of law and fact.

IV.

HOUSE MADE A GENERAL APPEARANCE THEREBY
WAIVING HER OBJECTIONS TO THE EXERCISE OF JURISDICTION
BY THE LOWER COURT.

Because House requested affirmative relief from the lower court, she subjected herself to its jurisdiction and any further objection thereto is waived.

Ciulli v. Irvani, 625 F. Supp. 2d 276, 290 (E.D. Penn. 2009).

For purposes of determining waiver, “affirmative relief” is involved when the lower court was asked to consider the actual merits or the quasi-merits of the controversy. *Wyrough & Loser v. Pelmore labsl, Inc.*, 376 F. 2d 543, 547 (3d Cir. 1967).

There is no question that House asked the lower court to consider the merits of the controversy. Though her filing is styled a “Motion to Dismiss”, it is in the nature of a response on the merits, not a Rule 12(b)(6) Motion.⁶ Her supporting Affidavit, as well, deals with the merits of the claim, and not solely jurisdictional facts.⁷

Instead of an analysis of whether the Complaint, on its face, states a cause of action, and whether the requirements of the South Carolina long arm statute permit the exercise of jurisdiction, the Motion is a lengthy articulation of House’s view of the facts, her denials of the Mikals’ claims, and a fact intensive discussion of the financial affairs of the parties, their relationships, their business rationales, and speculation about their motives and concerns.

She concludes by stating that the Complaint is “libelous and fraudulent”, and requests a “judgment” for punitive damages, attorney fees and expenses, and other proper relief. (R. p. 00029).

Clearly, by asking the lower to adjudicate the facts and to award her a judgment for punitive damages, House went far beyond whether jurisdiction is proper and waived any objection thereto.


⁶ A 12(b)(6) Motion deals only with the legal sufficiency of the claim based only upon the allegations of the Complaint and not extraneous matter.

⁷ Her Affidavit as well delves into facts relating to the merits of the claims against her.

CONCLUSION

While the lower court correctly concluded that it had the power to exercise jurisdiction over House, its conclusion that to do so was "unfair" was without a rational basis in law or a proper showing of fact. House purposefully directed her activities into this state in connection with the fraud alleged by the Mikals. Accordingly, unless she could present a "compelling" case that the exercise of jurisdiction over her was constitutionally unfair, the Motion to Dismiss should have been granted. She did not do so.

When the lower court simply stated in a conclusory fashion that South Carolina was both inconvenient and had no state interest in adjudicating the controversy, it erred as a matter of law and fact. The Order of Dismissal should be reversed.



John E. North, Jr., #06570
North & Black, P.C.
916 Bay Street, Suite 100
Beaufort, SC 29902
(843) 379-0800 (tel)
(843) 379-0900 (fax)
Attorney for Appellants