

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

SEP 25 2015
SC Court of Appeals

Marvin H. Dukes, III, Master-In-Equity and
Special Circuit Court Judge

Appellate Case No. 2015-001041
Lower Court Case No. 2014CP0701811

Daniel T. Bryan, Lisa D. Bryan and Beach Deli
Enterprises d/b/a Munchies, Plaintiffs

Of Whom Daniel T. Bryan and Lisa D. Bryan are
Appellants

v.

Dr. Marix Snijder, USA Limited Partnership V, L. P.,
Merrelyn Rogers, Renita Bryant and Dimara Atlanta
Investment Corp. and Superior Heating and Air, Inc. are
Respondents

FINAL REPLY BRIEF OF APPELLANTS

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Argument

- 1. Appellants disagree with Respondents that Appellants failed to present any arguments against the merits of Judge Dukes order in their brief and that additionally the Appellants Complaint does not state any personal claims.**

The Appellants complaint clearly states allegations whereby Appellants feel that they have been discriminated against by being treated differently than all other tenants by stating in their complaint “ Only Plaintiff, woman owned business has been turned away. It is by information and belief that not all of the improvements made to these locations were approved prior to the changes and some were major. These discriminatory practices by Defendants have prevented Plaintiffs from growing their business and the ability for them to service their customers. These practices have caused both financial and emotional harm.” (R.p. 36 lines 1 – 13)

The Appellants complaint also clearly states that the Appellants feel they have been continually harassed by Respondents. (R. p. 34 lines 11-33 - p. 35 lines 13-23 – p. 36 lines 1 -5)

The Appellants brought these issues to Judge Marvin Dukes at the March 13, 2015. In Judge Marvin Dukes Order he clearly expresses:

“The Complaint alleges that the “discriminatory practices by Defendants have prevented Plaintiffs from growing their business and the ability for them to service their customers.” As a result of these alleged acts, the Complaint seeks damages as a result of financial and emotional harm (Complaint page 30) Secondly, the Appellants submitted a memorandum in opposition to Defendants’ Motions in which they argued there were two components to this case: (1) the claims asserted by Munchies, and (2) alleged discrimination and harassment against the Bryans individually. As to the second purported component, the Bryans argued that employees of Defendants were constantly harassing them and that one or more of Defendants were talking to other tenants about the Bryans, causing them to be outcasts from the Main Street Village Community.” (R. p. 126 lines 3 -8)

At the hearing, the Bryans argued that the Complaint alleged a defamation claim against Defendants. The Appellants requested that Judge Dukes allow them to amend

their complaint to include defamation. The decision was denied. (R. p. 127 lines 16 - 22)

The Appellants did address the substitutive ruling by Judge Dukes as the meritorious claims by Appellants are more aligned with one of defamation but the Appellants were not allowed to amend their complaint to include a defamation cause of action. (R.p. 127 lines 16 -22)

The Appellants feel that Judge Marvin Dukes erred in multiple procedural issues where the Appellants were deprived of their constitutional rights under due process.

2. Appellants disagree with Respondents that the Court properly addressed Appellants request for continuance.

Rule 40 of the South Carolina Rules of Civil Procedure provides "[i]f good and sufficient cause for continuance is shown, the continuance may be granted by the court." The Appellants feel that waiting for the order from Judge Maite Murphy on a previously held motions hearing on November 7, 2014 allowing them due process of law to file their motion for reconsideration and potential appeal is *worthy and sufficient* cause for a continuance. Respondents state under item II of their response brief quoting State v Colden, 372 S.C. 428, 435, 641 S.E2d 912, 916 (Ct. App. 2007): "The granting of a motion for continuance is within the sound discretion of the trial court and will not be disturbed absent a clear showing of an abuse of discretion. In State v Colden, the Defendant continually asked for continuance after continuance. Appellants were not trying delay the case, they were just trying to follow the laws of due process giving them every opportunity under the law to fulfill their opportunities with their case. NEVER did Judge Marvin Dukes state any law in making his decision. He gave no reason. He just denied the Appellants request. Therefore, it is the Appellants believe that Judge Marvin

Dukes DID abuse his discretion in denying the Appellants request for a continuance AND Judge Marvin Duke's decision DID *result in prejudice* to the Appellants. An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. State v. Irick, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001); State v. Funderburk, 367 S.C. 236, 239, 625 S.E.2d 248, 249-50 (Ct.App.2006). “[i]n order for an error to warrant reversal, the error must result in prejudice to the appellant.” State v. Preslar, 364 S.C. 466, 473, 613 S.E.2d 381, 385 (Ct.App.2005); see also State v. Beck, 342 S.C. 129, 536 S.E.2d 679 (2000); State v. Wyatt, 317 S.C. 370, 453 S.E.2d 890 (1995)

The Respondents go on to state that the Appellants ability to pursue relief under Rule 59€ as to Judge Maite Murphy's previous rulings as the Appellants did file a motion to reconsider on March 23, 2015. What the Respondents fail to state is that the motion was filed by Appellants who are individuals in this case. Since Judge Marvin Dukes ordered that the Appellants be dismissed as Plaintiffs in this case, there is no way that the motion would be decided for Plaintiffs who no longer exist in the eyes of the court once Appellants were removed as Plaintiffs in this matter (R. p. 136 lines 16 – 18) – p. 137 lines 6)

Appellants filed a motion for reconsideration from Judge Maite Murphys order on March 23, 2015. To date, almost six months later, no response has been received nor filed by Judge Maite Murphy.

Respondents also claim that Judge Marvin Dukes decision to rendered moot any reconsideration of the issues addressed in the first hearing. Appellants do not believe that Judge Marvin Dukes could make that decision as he was not present at the hearing. For

Judge Dukes to render Appellants Motion to Reconsider Judge Maite Murphy's rulings "POINTLESS" is just not impartial to Appellants as again he was not present at the previous motions hearing. That is why the appeal would have been warranted as the Appellants are due "FAIRNESS" in determining this case.

Respondents state that the Appellants did not have any issues from the first hearing to appeal. They are WRONG. The Appellants would have had the opportunity to appeal Judge Maite Murphy's decision on the Appellants Motion to Dismiss the Respondents Counterclaims. Appellants filed the following "APPEALABLE" Issue before Judge Maite Murphy which Respondents feel that Judge Marvin Dukes had within his purview to decide. Appellants disagree.

MOTION FOR DISMISSAL OF COUNTERCLAIMS

Plaintiff Daniel Bryan hereby moves this Honorable Court to reconsider the Order Denying the Plaintiff Daniel Bryan Motion for an Order dismissing the counterclaims of Defendants Dr. Marnix Snijder, USA Limited Partnership V, L.P., Merrelyn Rogers, Renita Bryant and Dimara Atlanta Investment Corp in the above action pursuant to ***Rules 12(b)(5) insufficiency of service of process and 12(b)(6) failure to state facts sufficient to constitute a cause of action pursuant to the South Carolina Rules of Civil Procedure*** The grounds for this Motion are that Defendants have failed to state ANY facts sufficient to constitute a cause of action from their counterclaims as well as the Defendants have failed to serve Plaintiff Daniel Bryan in this matter and the subject of all the Defendants Counterclaims relate only to Plaintiff Beach Deli Enterprises, Inc who is the Tenant Plaintiff in this case. (R. p. 108 lines 17 – 28 – p. 109)

The order from Judge Maite Murphy was hand delivered by Respondents Attorney, Mr. Jeffery Stover for entry into the Beaufort County Public Index the day of the March 18th, 2015 hearing .(R. p. 137 line 6). Appellants were then handed a copy of Judge Maite Murphys order once the hearing began in Judge Marvin Dukes Conference Room. Appellants immediately asked that Judge Marvin Dukes reconsider his decision to continue the hearing on the Respondents Motions to Dismiss, but again Judge Marvin Dukes denied their request.

3. Appellants disagree with Respondents that the Court properly declined to treat the Respondents motion as one for summary judgement and applied the correct legal standard in deciding the motion.

The Respondents focus on the portion of Rule 12 (b) in their brief which states “matters outside the pleadings” stating that the motion will be considered for one for summary judgment and that there were no matters outside the pleadings.

The Respondents filed their FIRST Motion to Dismiss on October 23, 2014 stating Rule 12 b(6). The SC Rule 12 (b) specifically states:

b) How Presented. Every defense, in law or fact, to a cause of action in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state facts sufficient to constitute a cause of action, (7) failure to join a party under Rule 19, (8) another action is pending between the same parties for the same claim. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a cause of action or defense to which an adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that cause of action or defense. 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.

The Appellants focus is on the later portion which states that:

A motion making any of these defenses shall be made before pleading if a further pleading is permitted.

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.

The Respondents, in their own motion Pursuant to Rule 12(b)(6) dated October 23, 2014, filed well after their answer was submitted to the clerk of court, specifically states the reason for the motion as “The Bryan Plaintiffs do not have any cognizable claims against these Defendants”. (R. p. 52 line 10) Since the claims by the Respondents stating 1. There was no claim by Appellants and 2. that the motion was filed after pleading as there was a further pleading permitted, the motion should have been considered for one of summary judgment under Rule 56. Pursuant to the plain language of Federal Rule of Civil Procedure 12(b), it is beyond dispute that a motion to dismiss brought pursuant to Rule 12(b)(6) is to be presented prior to the filing of an answer and must be as one for summary judgment under Rule 56. See Fed. R. Civ. P. 12(b) (noting that a 12(b)(6): A motion “must be made before pleading if a responsive pleading is allowed”) (emphasis added). Therefore, the motion to dismiss filed on October 23, 2014 should have been converted to one of summary judgment and since the case was in the throws of discovery the motion should have been denied.

Statement of Case Disputes

Appellants disagree with Respondents Statement of the case. Respondents in this case want this honorable court to believe that the allegations in the Appellants complaint ***“are, and have always been, the entire subject matter of the case.”***

The Appellants complaint clearly states allegations whereby Appellants feel that they have been discriminated against by being treated differently than all other owners at Main Street Village. “ Only Plaintiff, woman owned business has been turned away. It is by information and belief that not all of the improvements made to these locations were approved prior to the changes and some were major. These discriminatory practices by

Defendants have prevented Plaintiffs from growing their business and the ability for them to service their customers. These practices have caused both financial and emotional harm.” (R.p. 36 lines 1 – 13)

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Conclusion

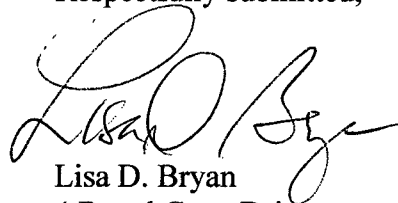
Appellants ask that this court grant their Appeal as the decisions by the lower court clearly contain serious errors of law denying the Appellants due process under the law.

September 23, 2015

Respectfully submitted,



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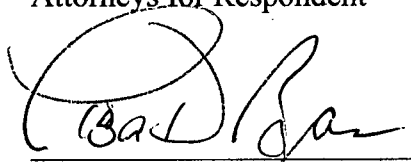
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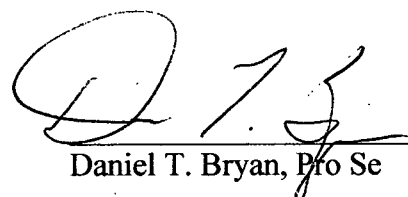
PROOF OF SERVICE

I certify that on September 23, 2015 we mailed a copy of this FINAL Brief and FINAL Reply Brief in it's entirety to Dr. Marix Snijder, USA Limited Partnership V, L. P., Merrelyn Rogers, Renita Bryant, Dimara Atlanta Investment Corp. Respondents and Beach Deli Enterprises Inc. d/b/a Munchies, Plaintiff, addressed as shown below, via US. Mail Postage Prepaid:

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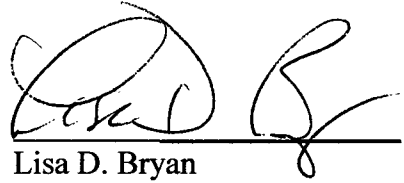
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Certificate of Counsel

The undersigned hereby certifies that the Final Briefs complies with Rule 211(b).

September 23, 2015



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