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THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No.: 2016-CP-26-01048

Terrance J. McLeod, Appellant,

v.

Jarius Orel English-McMillan, Roland Shelley, Roland G. Shelley, II, Scott C. Shelley and Coastal Carolina University, Defendants,

Of whom Coastal Carolina University is the Respondent.

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. **DID THE CIRCUIT COURT ERR IN DISMISSING THE PLAINTIFF'S COMPLAINT AGAINST DEFENDANT COASTAL CAROLINA UNIVERSITY PURSUANT TO RULE 12(b)(6) OF THE SOUTH CAROLINA RULE OF CIVIL PROCEDURE?**

STATEMENT OF THE CASE

This is an appeal from Horry County Court of Common Pleas. Plaintiff in this action alleges that he was seriously injured when he was attacked at an off campus party while he was a student at Coastal Carolina University on February 16, 2014.

Appellant filed this action against Defendants Jarius Orel English-McMillan, Roland Shelley, Roland G. Shelley, II, Scott C. Shelley and Coastal Carolina University alleging Assault and Battery, Intentional Infliction of Emotional Distress and Gross Negligence.

Respondent Coastal Carolina University moved to dismiss Appellant's complaint on the basis of SCRCP 12(b)(6), failure to state a cause of action. A hearing was scheduled in this matter on June 14, 2016 before the Honorable Benjamin H. Culbertson. Respondent's Motion to Dismiss was granted and on August 5, 2016, Appellant filed a Notice of Appeal to this Court.

ARGUMENTS

STANDARD OF REVIEW

On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court." Rydde v. Morris, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). "That standard requires the Court to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case." *Id.* The Court may sustain the dismissal when "the facts alleged in the complaint do not support relief under any theory of law." Flateau v. Harrelson, 355 S.C. 197, 202, 584 S.E.2d 413, 416 (Ct.App.2003). All properly pleaded factual allegations are deemed admitted for the purposes of considering a motion for judgment on the pleadings. Russell v. Columbia, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991). FOC Lawshe Ltd. P'ship v. Int'l Paper Co., 352 S.C. 408, 413, 574 S.E.2d 228, 230 (Ct. App. 2002)

I. THE CIRCUIT COURT ERRED IN DISMISSING APPELLANT'S COMPLAINT AGAINST RESPONDENT COASTAL CAROLINA UNIVERSITY PURSUANT TO RULE 12(b)(6) SCRCP BECAUSE APPELLANT'S COMPLAINT WOULD ENTITLE APPELLANT TO RELIEF ON THE THEORY OF GROSS NEGLIGENCE.

The Circuit Court erred in dismissing Appellant's complaint against Respondent Coastal Carolina University pursuant to Rule 12(b)(6) SCRCP because Appellant's complaint would entitle Appellant to relief on the theory of gross negligence alleged by Appellant against Respondent.

Under Rule 12(b)(6), SCRCP, a defendant may move to dismiss based on a failure to state facts sufficient to constitute a cause of action. Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999); Bergstrom v. Palmetto Health Alliance, 352 S.C. 221, 573 S.E.2d 805 (Ct.App.2002). A trial judge in the civil setting may dismiss a claim when the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court. Williams v. Condon, 347 S.C. 227, 553 S.E.2d 496 (Ct.App.2001). 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); Bergstrom, 352 S.C. at 233, 573 S.E.2d at 811; see also Brown v. Leverette, 291 S.C. 364, 353 S.E.2d 697 (1987) (trial court must dispose of motion for failure to state cause of action based solely upon allegations set forth on face of complaint); Williams, 347 S.C. at 233, 553 S.E.2d at 499 (trial court's ruling on 12(b)(6) motion must be bottomed and premised solely upon allegations set forth by plaintiff).

A motion to dismiss under Rule 12(b)(6) should not be granted if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case. See Gentry v. Yonce, 337 S.C. 1, 522 S.E.2d 137 (1999); Stiles, 318 S.C. at 300, 457 S.E.2d at 602-03; see also Baird, 333 S.C. at 527, 511 S.E.2d at 73 (if the facts and inferences drawn from the facts alleged on the complaint 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); McCormick v. England, 328 S.C. 627, 494 S.E.2d 431 (Ct.App.1997) (motion to dismiss cannot be sustained if facts alleged in complaint and inferences

reasonably deducible therefrom would entitle plaintiff to relief on any theory of the case). In deciding whether the trial court properly granted the motion to dismiss, this Court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. See Gentry, 337 S.C. at 5, 522 S.E.2d at 139; see also Cowart v. Poore, 337 S.C. 359, 523 S.E.2d 182 (Ct.App.1999) (looking at facts in light most favorable to plaintiff, and with all doubts resolved in his behalf, the court must consider whether the pleadings articulate any valid claim for relief).

The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. Toussaint v. Ham, 292 S.C. 415, 357 S.E.2d 8 (1987). The trial court's grant of a motion to dismiss will be sustained if the facts alleged in the complaint do not support relief under any theory of law. Tatum v. Medical Univ. of South Carolina, 346 S.C. 194, 552 S.E.2d 18 (2001); see also Gray v. State Farm Auto Ins. Co., 327 S.C. 646, 491 S.E.2d 272 (Ct.App.1997) (motion must be granted if facts and inferences reasonably deducible from them show that plaintiff could not prevail on any theory of the case). Flateau v. Harrelson, 355 S.C. 197, 201-03, 584 S.E.2d 413, 415-16 (Ct. App. 2003)

The trial court may treat a 12(b)(6) motion as a motion for summary judgment and consider matters presented outside of the pleadings if the parties are afforded a reasonable opportunity to respond to such matters in accordance with Rule 56(c) and (e) of the South Carolina Rules of Civil Procedure. The notice provisions in Rule 56 are incorporated into Rule 12(b)(6). Our interpretation of Rule 12(b)(6) is supported by numerous federal authorities. See In re Bristol Industries Corporation, 690 F.2d 26 (2nd

Cir.1982); Prospero Associates v. Burroughs Corporation, 714 F.2d 1022 (10th Cir.1983); Garaux v. Pulley, 739 F.2d 437 (9th Cir.1984). Brown v. Leverette, 291 S.C. 364, 367, 353 S.E.2d 697, 698-99 (1987).

The South Carolina Torts Claims Act provides that a governmental entity is not liable for a loss resulting from the "responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any student ... except when the responsibility or duty is exercised in a grossly negligent manner." S.C. Code Ann. § 15-78-60(25) (Supp. 1999).

Respondent argued that "there is no duty for the university to intervene in the actions of adult students after hours engaged in non-university activities to either preclude them for doing this, nor do they have the power to preclude them for doing this or to warn the of going to parties where, as alleged in the complaint, there was excessive consumption of alcohol" and that there was no cause of action within the complaint of gross negligence. (R. p.19, line 1- 6)

Respondent did not argue that Appellant's complaint did not adequately allege gross negligence, or that Respondent would never be liable for the protection of Respondent as a student, but instead argued that Respondent would not have a duty under the facts of the case. However, as stated in Toussaint v. Ham, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987) the question is whether in the light most favorable to plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief.

The complaint should not be dismissed merely because the court doubts that plaintiff will prevail in the action.

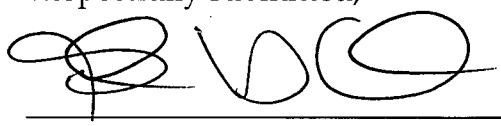
Appellant submits that gross negligence was alleged in the complaint and, the trial court erred in dismissing the complaint since Respondent could have prevailed on this theory under S.C. Code Ann. § 15-78-60(25) (Supp.1999).

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court.

January 9, 2017

Respectfully submitted,



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CERTIFICATE OF COUNSEL

The undersigned certified that this Brief of Appellant complies with Rule 211(b), SCACR.

January 9, 2017

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