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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM DILLON COUNTY
Court of Common Pleas

Roger E. Henderson, Circuit Court Judge

Case Number: 2013-CP-17-00335

Tammy Taylor,.....Appellant,

vs.

April Springs, Angela Berry, A B Country Kitchen a/k/a A & B Country
Kitchen,.....Respondents.

APPELLANT'S FINAL BRIEF

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TABLE OF AUTHORITIES

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McCullar vs. Estate of Campbell, 381 S.C. 205, 672 S.E.2d 784 (2009)

OTHER AUTHORITIES

Rule 8(d) South Carolina Rules of Civil Procedure

Rule 9(a), South Carolina Rules of Civil Procedure

STATEMENT OF ISSUES ON APPEAL

1. Is the Defendant bound by the admission in their Answer?
2. Is *McCullar vs. Estate of Campbell* applicable to the facts of this case?

STATEMENT OF THE CASE

The action was initiated by the filing of a Summons and Complaint in the office of the Clerk of Court for Dillon County on August 27, 2013 (R.p. 11 – 13). This is a personal injury case. The Plaintiff alleges that she was in the A & B Country Kitchen restaurant in Dillon County, South Carolina on October 25, 2012. She went into the restroom where she fell in a puddle of water. The water came from a leaking air conditioner. The Defendant filed a one page three paragraph Answer on September 25, 2013 (R.p. 14). In the Answer the Defendant admits to being a business.

On or about March 9, 2016 the Defendant filed a Motion to Dismiss the case pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure (R.p. 9). The motion was argued on May 23, 2016. Per an e-mail from Judge Henderson and a Form 4 Order, the Defendant's motion was denied and the Plaintiff was Ordered to Amend the pleadings (Rp. 4). The Plaintiff filed an Amended Complaint on June 3, 2016. (R.p. 15). The Defendant filed an Amended Answer on July 18, 2016 (R.p. 18).

The Defendant filed a Motion to Reconsider on June 28, 2016 (R.p. 7). The Defendant's motion was argued on December 14, 2016.

The Court reversed its May decision and dismissed the Plaintiff's claims (R.p. 1). This appeal followed.

ARGUMENT

I. IS THE RESPONDENT BOUND BY THE ADMISSION IN THEIR ANSWER?

Paragraph 2 of the Complaint filed on August 27, 2013 states:

2. A & B Country Kitchen is a business which owns property and transacts business in Dillon County. (R.p. 11)

The Defendant filed an Answer on September 25, 2013 stating:

2. That the Defendant admits the allegations contained in Paragraphs One (1) through Three (3), of the Complaint. (R.p. 14)

The Defendant admitted in their Answer that A & B Country Kitchen is a business. The parties conducted discovery. The bank accounts of the business are in the name A & B Country Kitchen (R.p. 28). At no point during the three year litigation did the Defendant ever dispute that it was a legal entity.

On or about March 9, 2016 the Defendant filed a Motion to Dismiss indicating that A & B Country Kitchen was not a legal entity (R.p. 9). The Court initially denied the Defendant's motion (R.p. 4). The Defendant filed a Motion to Reconsider (R.p. 7) and the Court

reversed its original ruling (R.p. 1). The Plaintiff's claims were dismissed.

The Defendant never raised any issue about the capacity to be sued as required by Rule 9(a) of the South Carolina Rules of Civil Procedure. Pursuant to that Rule 9(a) "When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he **shall** do so by **specific negative averment**, which shall include such supporting particulars as are within the pleaders' knowledge" [Emphasis added]. The Defendant never raised the issue as a defense in their pleadings or made any specific negative averment as required by the Rule.

The Defendant filed an Amended Answer in 2016 and indicated in paragraph 3 of the Amended Answer that "business is transacted under that trade name." (R.p. 18)

Pursuant to Rule 8(d) of the South Carolina Rules of Civil Procedure "Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading." See also *Citizens and Southern National Bank of SC vs. Construction Enterprises, Inc. of TN*, 309 S.C. 500, 425 S.E.2d 530 (1992). The admissions of the

pleadings are the law of the case. The Defendant's allegations that they are not a legal entity are contrary to their admissions in the pleadings and discovery. The Court erred in granting the Defendant's Motion to Dismiss.

II. IS MCCULLAR VS. ESTATE OF CAMPBELL APPLICABLE TO THE FACTS OF THIS CASE?

The Respondent relies primarily on the South Carolina Supreme Court's ruling in *McCullar vs. Estate of Campbell*, 381 S.C. 205, 672 S.E.2d 784 (2009). (R.p. 21) The facts of *McCullar* are readily distinguishable from this case. In *McCullar* the Court found that "it is undisputed that Dr. Campbell's Estate was closed months before this action was allegedly commenced." In the case at hand it is undisputed that the Defendant is an entity. All the pleadings and discovery responses point to the fact that A & B Country Kitchen is a business and owns bank accounts in that name. The Defendant's Amended Answer indicates the business is still operational and transacts business under that name (R.p. 18).

The Court in *McCullar* found that "the Estate raised this issue promptly." In this case the Defendant raised the issue over two and a half years after the filing of the initial Complaint. The motion was filed March 9, 2016 and case was set for trial in June 2016. (R.p. 7)

McCullar involved an Estate that no longer existed. This case involves a business that still exists.

CONCLUSION

The Court granted the Defendant's Motion to Dismiss despite their multiple admissions that they were a legal entity and transacted business under the name A & B Country Kitchen. In light of the evidence of record and applicable rules and case law, this Court should reverse the judgment issued by the Honorable Roger E. Henderson.

Respectfully submitted,

By: 

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September 22, 2017