

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

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SC Court of Appeals

Case No. 2014-CP-26-7264
Appellate Case No. 2017-000471

Gregory Duerk, Donald L. Duerk, Jr. and Deborah Duerk Tiller,.....Appellants,

v.

Geoffrey Duerk, Kristen Duerk and James M. Stewart,Respondents.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- 1. DID THE CIRCUIT COURT ERR IN RULING THAT THERE WAS NO PERSONAL JURISDICTION OVER THE PROPOSED DEFENDANT JAMES M. STEWART?**

STATEMENT OF THE CASE

All of the named Duerks, Gregory Duerk, Donald Duerk, Deborah Duerk-Tiller, Geoffrey Duerk and Kristen Duerk are related; Gregory, Donald, Deborah and Geoffrey are siblings and Kristen is the daughter of Geoffrey and niece to Gregory, Donald and Deborah.

Eileen Ryan, a cousin of the Duerks and second cousin to Kristen made a point to leave her home in Florida to the four Duerk siblings.

The siblings had a strong connection to the place and through the years there were many conversations regarding this house and that it was to be given to the Duerk siblings in her Will.

As Eileen Ryan's health failed, it fell on Gregory Duerk to assume responsibility as power of attorney for her. Eventually, based on her failing health Gregory made the decision to move her to South Carolina where her needs were attended to by the Duerks (Gregory, Donald and Deborah) in their homes until she failed to such an extent that she was placed in a nursing home.

At some point in time it became clear that Eileen Ryan was never going to return to her home in Florida and because costs were rising the Duerk siblings began to discuss what to do with that vacant home. Eventually, it was determined to put it on the market for sale, which was done, and a lawyer by the name of James Stewart, who resides in Florida, contacted Gregory Duerk on behalf of his potential purchasers, Jason Paruta and Mindi Paruta.

James Stewart began to discuss this matter with Gregory Duerk (power of attorney for Eileen Ryan). Many discussions ensued culminating in the purchase and sale of said home in April 2012 with the Parutas being the mortgagors and Eileen Ryan being the mortgagee. The Parutas were to send monthly payments of \$1,000.00 to Eileen Ryan by and through her power of attorney, Gregory Duerk, each month until June 1, 2014 at which time the remaining balance of \$286,200.00 would become due and payable (R. p. 23). On August 23, 2013, Eileen Ryan passed away. Shortly

thereafter Gregory Duerk was contacted by attorney James Stewart on behalf of his clients, the Parutas (R. p. 65, lines 3-8). During that conversation, James Stewart suggested to Gregory Duerk that he handle the probate matters of Eileen Ryan (R. p. 68, line 25-p. 69, line 18). Gregory Duerk, believing at that time that Mr. Stewart would handle this matter in a fair way, keeping him advised of the circumstances surrounding the probate of the estate of Ms. Ryan in Florida, agreed (R. p. 23).

This home was essentially all that Ms. Ryan left of any value.

Many discussions took place. Gregory Duerk expected James Stewart to keep him apprised of the circumstances surrounding the matter and advise him as to what course of action he should take. Further, at the request of Mr. Stewart, Gregory Duerk mailed to him important estate documents including the Last Will and Testament of Eileen Ryan.

Thereafter, Mr. Stewart advised Gregory Duerk that, in accordance with Ms. Ryan's Will, Geoffrey Duerk would need to be appointed as the Personal Representative of the estate, not Gregory. Thereafter, James Stewart continued to handle the probate of the estate in Florida and filed documents listing Geoffrey Duerk and Kristen Duerk as the only beneficiaries to the estate when he knew or should have known this to be false and in contradiction to Ms. Ryan's Last Will and Testament which left any interest in her Florida property to the four Duerk siblings. Based upon the inaccurate information provided to the probate court in Florida, Gregory Duerk, Donald Duerk and Deborah Duerk-Tiller never received any of the Florida probate court filings and were never made aware that Geoffrey Duerk, with the assistance of James Stewart, planned to disburse the estate assets to himself and his daughter Kristen Duerk all in violation of the Last Will and Testament of Eileen Ryan.

Contrary to the probate documents filed in Florida, Gregory Duerk was led to believe by Mr. Stewart and Geoffrey Duerk that he and his siblings would receive their portion of the proceeds once the matter had been resolved.

It was not until the estate of Eileen Ryan had been closed and the estate assets had been disbursed that Geoffrey Duerk informed his brothers and sister that he would be keeping the money and giving some to his daughter, Kristen.

Thereafter, Gregory Duerk, Donald Duerk and Deborah Duerk-Tiller filed an action in Horry County, South Carolina seeking to recover their proportionate share of the proceeds from the sale of the home based on an agreement between the parties and the clear intention of their deceased cousin. (R. pp. 14-19)

Jay Bultz of the Horry County Bar represents Geoffrey Duerk and Kristen Duerk.

After the filing of the Complaint, attorneys for Gregory Duerk, Donald Duerk and Deborah Duerk-Tiller filed a motion to enjoin Geoffrey Duerk from dispensing any of the assets provided to him by James Stewart as a result of the improper probate court filings in Florida until such time as the underlying lawsuit could be resolved. (R. p. 76)

There were written communications between the office of Jay Bultz and Thomas C. Brittain, while that motion was pending, and in those communications the office of Jay Bultz agreed to withhold and protect those funds and not disburse those funds until this matter was concluded, advising there was no reason for the motion to go forward in circuit court (R. pp. 132-139). Thomas C. Brittain on behalf of Gregory Duerk, Donald Duerk and Deborah Duerk-Tiller accepted this promise and withdrew the motion with the lawsuit proceeding. Thereafter, Jay Bultz advised Thomas C. Brittain that the money had been spent, at least a large portion of it, and later would indicate to the court that all of the money had been spent in direct violation of the agreement.

Attorneys for Gregory Duerk, Donald Duerk and Deborah Duerk-Tiller filed a motion with the court for sanctions and to require that the money be returned to an account until the matter was resolved through court process. (R. pp. 79-80).

Judge Steven John ruled that until Gregory Duerk, Donald Duerk and Deborah Duerk-Tiller prevailed in the underlying suit that motion was premature and so no money has been returned to a trust account (R. pp. 6-7). Based on the circumstances surrounding this matter, Gregory Duerk, Donald Duerk and Deborah Duerk-Tiller filed a motion to amend the complaint in order to add James Stewart as a party to this action based on his complicity in this matter (R. pp. 77-78). The motion was heard by The Honorable Donald B. Hocker at which time he ordered that Plaintiff's motion be denied without prejudice until such time as counsel for Gregory Duerk, Donald Duerk and Deborah Duerk-Tiller deposed Mr. Stewart without restriction as to attorney-client privilege. (R. p. 5)

On December 1, 2015, counsel for Gregory Duerk, Donald Duerk and Deborah Duerk-Tiller conducted the telephone deposition of James Stewart and, thereafter, refiled their Motion to Join James Stewart as a party to this action with Memorandum in Support (R. pp. 81-90). On February 22, 2016, Plaintiff's motion was heard before The Honorable William H. Seals, Jr. who, upon considering Plaintiffs' motion and supporting documents (including the deposition testimony of James Stewart) granted the motion to join Defendant James Stewart as a party to this action (R. pp. 8-9).

Upon being served as a defendant with the amended pleadings James Stewart filed, by and through his attorney, William A. Bryan, Jr., a Motion to Dismiss with supporting Memorandum alleging a lack of personal jurisdiction (R. pp. 91-108). In response, Gregory Duerk, Donald Duerk

and Deborah Duerk-Tiller filed a Memorandum in Opposition (R. pp. 109-115) along with an Affidavit of Plaintiff's expert witness, Clifford H. Tall (R. pp. 122-131).

James Stewart's Motion to Dismiss was heard before The Honorable Benjamin H. Culbertson on November 8, 2016 who granted the motion (R. pp. 10-11). Plaintiffs then filed a Motion to Reconsider (R. pp. 116-117), which was denied (R. pp. 12-13). This appeal followed.

ARGUMENT AND DISCUSSION

1. DID THE CIRCUIT COURT ERR IN RULING THAT THERE WAS NO PERSONAL JURISDICTION OVER THE PROPOSED DEFENDANT JAMES M. STEWART?

A ruling on a motion to dismiss must be based solely on the allegations set forth on the face of the Complaint. The motion cannot be sustained if the facts alleged and the inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case. *Dye v. Gainey*, 320 S.C. 65, 463 S.E.2d 97 (Ct.App.1995). The question is whether in the light most favorable to the plaintiff, and with every reasonable doubt resolved in his behalf, the Complaint states any valid claim for relief. The cause of action should not be struck merely because the court doubts the plaintiff will prevail in the action. *Id.* at 68, 463 S.E.2d at 99.

Further, at the pretrial stage of an action, the plaintiff must only make a prima facie showing by pleadings and affidavits in order to withstand a motion to dismiss for lack of personal jurisdiction. *Askins v. Firedoor Corporation of Florida*, 316 S.E.2d 713 (Ct. App. 1984).

Here, the allegations contained in Plaintiffs' Amended Complaint together with the Affidavit of expert witness Clifford Tall meet these requirements.

In postmodern American jurisprudence the concept of "personal jurisdiction" is one that is changing.

In the postmodern world of email, snapchat, twitter, texting and telemarketing, the state lines involving some barrier to citizens from various states participating one with the other and providing services one to the other and relying on one another has become a concept of the past. Courts throughout the nation are granting jurisdiction in much broader circumstances and expanding the reach of the various long-arm statutes of the states to their logical conclusion.

In South Carolina there is a two-prong test in determining whether a court may exercise personal jurisdiction over a nonresident. First, the court must determine whether the non-resident's

conduct meets the requirements of the long-arm statute. *Hume v. Durwood Medical Clinic, Inc.*, 318 S.E.2d 119. South Carolina's long-arm statute S.C. Code Ann. §36-2-803 (1976) states, in pertinent part:

- (1) A court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person's:
 - (a) transacting any business in this State;
 - (c) commission of a tortious act in whole or in part in this State;

Secondly, the court must determine if the nonresident has established minimum contacts that comport with "traditional notions of fair play and substantial justice." *Hume*. There are four criteria that must be considered in this second part of the test:

1. The duration of the activity of the non-resident within the state;
2. The character and circumstances of the commission of the non-resident's act;
3. The inconvenience resulting to the parties by conferring or refusing to confer jurisdiction over the non-resident; and
4. The state's interest in exercising jurisdiction.

Colite Industries v. G.W. Murphy Const., 377 S.E.2d 321 (1989).

In applying this two-prong test to the current case before the Court, James Stewart meets both criteria. First, in applying sections 1(a) of the long-arm statute, James Stewart clearly transacted business in South Carolina by contacting Gregory Duerk, a resident of South Carolina, and offering to represent the estate of Eileen Ryan and, further, contacting Gregory Duerk several times by phone and corresponding with him by mail regarding these matters and leading Gregory Duerk to believe that he would be representing all of the Duerk siblings in this matter.

In applying section 1(c) of the long-arm statute, James Stewart clearly commissioned a tortious act in South Carolina by offering to represent the estate of Eileen Ryan when he knew this would be a conflict of interest since he already represented the Parutas who purchased Ms. Ryan's home and were still paying on that mortgage at the time of her death. By misrepresenting to Gregory Duerk that he would be representing all of the Duerk siblings in this matter he breached his fiduciary duty. Further, he led Gregory Duerk to believe Florida was the correct venue to open the estate when he knew or should have known that Ms. Ryan was domiciled in South Carolina at the time of her death and therefore was the proper venue for the estate (R. 75, lines 4-19). Further, James Stewart filed with the probate court in Florida documents containing false information as to where the decedent was domiciled at the time of her death and who were the beneficiaries of her estate in accordance with her Will. These tortious acts took place in both Florida and South Carolina.

With respect to the second prong James Stewart established minimum contacts by initiating contact with Gregory Duerk both when trying to negotiate the sale of Eileen Ryan's home in Florida and upon Ms. Ryan's passing, both times on behalf of his clients the Parutas (R. p. 64, line 22-p. 65, line 8; p. 70 line 25-p. 71, line 8). In addition, Mr. Stewart had additional conversations with Gregory Duerk and also communicated with him by mail on these matters further establishing minimum contacts. The second step in the second prong requires that the state's exercise of jurisdiction not offend traditional notions of fair play and substantial justice and is based on four considerations. With respect to the first consideration (The duration of the activity of the non-resident within the state) Mr. Stewart's contact with Gregory Duerk continued for a period of years and therefore is of a long duration. With respect to the second consideration (the character and circumstances of the commission of the non-resident's act), Mr. Stewart initiated the contact with

Gregory Duerk for the benefit of his clients, the Parutas and himself; further, he misrepresented to Gregory Duerk that he would be looking out for the interest of the Duerk siblings with regards to the estate of Eileen Ryan and did so for an ulterior purpose and with ill intent. With respect to the third consideration (The inconvenience resulting to the parties by conferring or refusing to confer jurisdiction over the non-resident), all parties to this action with the exception of Mr. Stewart are residents of the State of South Carolina County of Horry and therefore conferring jurisdiction upon South Carolina would pose no unusual inconvenience since all parties to this action, other than Mr. Stewart, are South Carolina Residents. *Hammond v. Butler, Means, Evins & Brown*, 388 S.E.2d 796, (S.C. Sup. Ct.1990). With respect to the fourth consideration (The state's interest in exercising jurisdiction), the State of South Carolina has an interest in protecting its citizens against inappropriate and unethical/fraudulent business transactions. To refuse jurisdiction in this State based upon James Stewart's actions would be an inconvenience to Gregory Duerk, Donald Duerk and Deborah Duerk-Tiller and, further, would be a miscarriage of justice.

Hammond is a very pertinent Supreme Court decision regarding this matter. In *Hammond*, Justice Finney decided that it was proper for a South Carolina Court to exercise personal jurisdiction over a nonresident who resided and practiced law in New York City. The trial court held that the long-arm statute minimum contact requirements, pursuant to S.C. Code Ann. §36-2-803, had been satisfied and that South Carolina could exercise personal jurisdiction. The facts and circumstances in this case are most clearly on point with the issue before the Court. The attorney was providing services and was clearly intended to be captured by South Carolina's long-arm statute and under the particular circumstances there were minimum contacts which comported with the traditional notions of fair play and substantial justice.

In the case at hand we have the following: initiation of conversation by James Stewart with Gregory Duerk (R. p. 65, lines 3-8); specific involvement in the original transaction leading to the circumstances that are set forth in the Amended Complaint (R. pp. 70-71); representation of multiple parties throughout the process; the use of communication systems, letters, emails, telephone conversations with the various parties; the providing of a service; the creation of a fiduciary relationship and personal involvement with Gregory Duerk both individually and as a representative of his siblings in this regard; a failure throughout to notify and keep abreast one who was either his client (a determination to be made after all the evidence and testimony is taken in the case) or simply one who had a fiduciary obligation based on the circumstances to at least notify and apprise Gregory Duerk of the necessity for Gregory Duerk to find separate counsel to protect his rights and those of his two siblings.

Failure to grant personal jurisdiction in this regard would strip the long-arm statute of its intention and its expansive reach. Notions of fair play could hardly be at stake here and, in fact, the opposite is true; for one not schooled in matters of probate and real estate transactions (Gregory Duerk), counting on an attorney to guide him in this regard a ruling against jurisdiction is unfair. Where a hearing proceeds that divests a citizen of his rights and those of his siblings, especially the right to be heard, a significant failure is at hand. A finding of no personal jurisdiction would violate traditional notions of fair play and substantial justice. One who participates professionally and personally in the middle of specific transactions and should expect to be included when those matters are litigated, those contacts with the citizens, both deceased and her relatives, are essentially a consensual submission to jurisdiction of the court resolving those issues.

The fact that James Stewart never entered South Carolina does not absolve him from being subject to personal jurisdiction in this State. In *Burger King Corp. v. Rudzewicz*, 471 U.S. 462,

105 S.Ct. 2174, it was determined that jurisdiction may not be avoided merely because the defendant did not physically enter the state in question; the constitutional touchstone remains whether or not the defendant purposefully established minimum contacts in that particular state. Here James Stewart who resides and practices in Florida initiated contact with Gregory Duerk who resides in South Carolina and offered to be the attorney of record for the estate of Eileen Ryan (R. p. 68, line 25-p. 69, line 18). He also had additional communications with Gregory Duerk both by phone and mail thereby meeting the requirement for minimum contacts in South Carolina. These phone conversations and written communications are sufficient evidence to overcome a motion to dismiss for lack of personal jurisdiction *Kimball v. Schwartz*, 580 F. Supp. 582 (W.D. Pa. 1984).

CONCLUSION

For the foregoing reasons, Appellants request this Court reverse the grant of the dismissal of Respondent James Stewart as a party to this action and remand to the lower court.

Respectfully submitted,



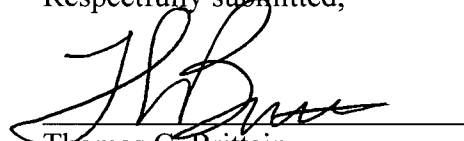
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Dated: January 23, 2018

CERTIFICATE OF COUNSEL

I hereby certify that Appellant's Final Brief complies with Rule 211(b), SCACR.

Respectfully submitted,



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