

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Perry M. Buckner III, Circuit Court Judge

Appellate Case No. 2018-000853

Ryan McAvoy..... Appellant,

v.

Hilton Head Island-Bluffton Chamber of Commerce,Respondent.

APPELLANT'S INITIAL BRIEF AND
DESIGNATION OF MATTER TO BE INCLUDED ON APPEAL

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STATEMENT OF ISSUES

- I. **Where the lower court ruled that Appellant's complaint must be dismissed pursuant to Rules 12(b)(1) and (6), SCRCP, did the lower court err in determining that Appellant was not a member of Respondent when he made his request to inspect records of that organization under the Nonprofit Corporation Act of the state?**

STATEMENT OF THE CASE

Appellant Ryan McAvoy (“McAvoy”) filed this lawsuit on August 29, 2017, against Respondent Hilton Head Island – Bluffton Chamber of Commerce (“Chamber”), seeking: 1) a declaratory judgment that McAvoy was a member of the Chamber when his request was made to inspect and copy records pursuant to the S.C. Non-Profit Corporation Act of 1994, S.C. Code Ann. § 33-31-101 *et. seq.* (“Non-Profit Act”); 2) a declaratory judgment (pled in the alternative) under the Non-Profit Act that if the court determined he is not a member, then the Chamber violated the Act when it terminated McAvoy’s membership; 3) a declaratory judgment that the Chamber violated the Non-Profit Act when it denied McAvoy’s ability to inspect and copy records pursuant to this request; and 4) an order that the Chamber was negligent in denying him statutory rights under the Non-Profit Act and rights of membership within the organization and that the Chamber’s negligence caused McAvoy damages. (R. pp. ____; summons and complaint.) In his complaint, McAvoy specifically alleges that he joined the Chamber on June 15, 2016 by paying the \$365 annual dues, for which he received a receipt, attached thereto as Exhibit A. (R. pp. ____; summons and complaint.) In July 2016, McAvoy received a letter welcoming him to the Chamber, which was attached to the Complaint as Exhibit B. (R. pp. ____; summons and complaint.) Then, on August 22, 2016, McAvoy demanded to inspect the Chamber’s records, citing the Nonprofit Corporation Act. (R. pp. ____; summons and complaint.) A week after this request, McAvoy alleges that he received an email from Ray Deal, the Chamber’s controller, informing McAvoy that he was not officially a member of the Chamber because the Chamber’s Board had not yet approved his membership application, which

meant that McAvoy did not yet have the right to inspect records. (R. pp. ___; summons and complaint.) Shortly after this email, McAvoy received a letter (attached to Complaint as Exhibit C) from the Chamber informing him that the Board had not approved his membership, that his membership application was being forwarded to the Board's executive committee for review, and that the Chamber was returning the \$365 that McAvoy had submitted to pay the annual dues. (R. pp. ___; summons and complaint.) Despite, the Chamber's assertions that his membership status was under review, McAvoy was treated by the Chamber as if he were a member and he repeatedly received communications regarding his membership from the Chamber from the fall of 2016 until the time of filing his lawsuit in August 2017. (R. pp. ___; summons and complaint.) McAvoy never received any further communication from the Chamber regarding his request and demand to inspect records of the Chamber nor was he ever allowed to inspect the Chamber's records. (R. pp. ___; summons and complaint.)

The Chamber filed its Motion to Dismiss McAvoy's complaint on January 19, 2018, pursuant to Rules 12(b)(1) and 12(b)(6), SCRPC. (R. pp. ___; motion to dismiss.) The Chamber first argued that McAvoy lacked standing to pursue a claim under S.C. Code § 33-31-1604 because he is not and never was a member of the Chamber. (R. pp. ___; motion to dismiss.) The Chamber next argued that McAvoy's negligence per se claim fails both because it recasts his statutory claim as a tort claim, which is not possible, and because he lacks standing. (R. pp. ___; motion to dismiss.) Finally, the Chamber argued that McAvoy's two declaratory judgment claims about his alleged membership fail as a matter of law because the allegations in his complaint make clear that the three requirements in the Chamber's bylaws for membership were not all

satisfied. (R. pp. ___; motion to dismiss.) The Chamber also filed a memorandum in support of its motion to dismiss on January 19, 2018. (R. pp. ___; memorandum in support of motion to dismiss.) McAvoy filed a return to the Chamber's motion to dismiss on February 22, 2018. McAvoy argued in the return that the legal standard that guides a court's decision on a motion to dismiss makes Defendant's reliance on its bylaws "misplaced and irrelevant." (R. pp. ___; return to motion to dismiss.) "The bylaws cannot confer membership in Defendant's organization, only the actions can make someone a member." (R. pp. ___; return to motion to dismiss.) The return then referenced allegations in the complaint (and exhibits attached thereto) that showed the Chamber welcomed McAvoy into the organization as a member before his request for information was sent. (R. pp. ___; return to motion to dismiss.)

On February 27, 2018, the court convened and heard argument regarding the Chamber's motion to dismiss. A transcript of this motion to dismiss hearing is also a part of this record on appeal. (R. pp. ___; transcript.) The court filed its order granting the Chamber's motion to dismiss on March 9, 2018. (R. pp. ___; order granting motion to dismiss.) The order provides that all of McAvoy's claims require that he is (or was) a member of the Chamber. (R. pp. ___; order granting motion to dismiss.) "His own allegations, however, make clear that one of the three requirements for membership was never satisfied. Thus, he is not – nor was he ever – a Chamber member. His claims thus all fail as a matter of law." (R. pp. ___; order granting motion to dismiss.)

McAvoy filed his motion to reconsider the order granting motion to dismiss on March 19, 2018. (R. pp. ___; motion to reconsider order granting motion to dismiss.) McAvoy argued that the court's reliance on the Chamber's bylaws to establish he was

not a member were “not only improper ... but irrelevant, as those bylaws cannot confer membership in Defendant’s organization, only the actions of Defendant can do so.” (R. pp. ___; motion to reconsider order granting motion to dismiss.) On March 27, 2018, the Chamber filed its opposition to motion to reconsider. (R. pp. ___; opposition to motion to reconsider order granting motion to dismiss.) “Despite [McAvoy’s] repeated protestations, the Court can look to the Chamber’s bylaws to decide the motion to dismiss, see *Brazell v. Windsor*, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009), and those bylaws control how anyone, including McAvoy, can become a member of the Chamber, see S.C. Code § 33-31-1601(a).” (R. pp. ___; opposition to motion to reconsider order granting motion to dismiss.)

The court signed and filed the order denying the motion to reconsider on April 4, 2018. (R. pp. ___; order denying motion to reconsider.) The order states that the “cornerstone of McAvoy’s argument is that the ‘bylaws cannot confer membership’” in the Chamber’s organization. (R. pp. ___; order denying motion to reconsider.) The order then recites the bylaws of the Chamber and says that McAvoy “admitted” in his complaint that approval of his membership application by the board never occurred. (R. pp. ___; order denying motion to reconsider.) “Thus, McAvoy was never a member of the Chamber, his conclusory allegations to the contrary notwithstanding.” (R. pp. ___; order denying motion to reconsider.) This appeal followed on May 4, 2018. (R. pp. ___; notice of appeal.)

STANDARD OF REVIEW

The ruling on a motion to dismiss under Rule 12(b)(6), SCRCP, for failure to state facts sufficient to constitute a cause of action must be based solely upon the

allegations set forth in the pleading. *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601 (1995). “The motion cannot be sustained if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case. The question is whether in the light most favorable to plaintiff, and with every doubt resolved in her behalf, the complaint states any valid claim for relief.” *Dye v. Gainey*, 320 S.C. 65, 67-68, 463 S.E.2d 97, 98-99 (Ct. App. 1995). The complaint should not be dismissed even if the court doubts the plaintiff will prevail in the action. *Id.* However, a court may consider documents referenced by the allegations of a complaint without converting a motion to dismiss into one for summary judgment. See *Brazell v. Windsor*, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009).

ARGUMENT

I. The court’s granting of the motion to dismiss and denying of McAvoy’s motion to reconsider was in error

The Complaint states that Plaintiff “at all times material to this case has been a member of the Defendant nonprofit corporation.” (R. pp. ___; summons and complaint.) McAvoy does not quibble with the *Jones v. Gilstrap* standard cited in the court’s order which recognizes that a plaintiff cannot survive a motion to dismiss on conclusory allegations in the complaint. *See Jones*, 288 S.C. 525, 528, 343 S.E.2d 646, 648 (Ct. App. 1986). McAvoy objects to any characterization that his complaint contained only conclusory allegations regarding his membership status in the Chamber. The only facts concerning the membership status of McAvoy were those stated in the complaint. (R. pp. ___; summons and complaint.) As pled in the complaint, the Chamber welcomed Plaintiff into the organization as a member, which was evidenced

by Exhibit B to the complaint, a letter from William G. Miles, president and CEO of Defendant. Also stated in the complaint, it was only after the Chamber welcomed McAvoy into its organization as a member and McAvoy made his information request, that the Chamber said McAvoy was actually not a member yet as “the board tabled approval” of his membership. (R. pp. ___; summons and complaint.) The complaint further provides that even during the alleged board tabling process, “[p]laintiff has repeatedly received communications sent by the Defendant since fall 2016 which have explained the benefits of Plaintiff being a member of Defendant, the ongoing marketing efforts of Defendant in promoting local businesses and the area generally, and other activities of the organization.” (R. pp. ___; summons and complaint.) The complaint also alleges that McAvoy “has not received any further communication from Defendant regarding his request and demand to inspect and copy records of Defendant, pursuant to the Act.” (R. pp. ___; summons and complaint.) The court simply erred in concluding that “as McAvoy admits in his complaint, the Board never approved his membership.” (R. pp. ___; order granting motion to dismiss.) McAvoy does not admit that he never was a member of the Chamber. Paragraphs 12 and 13 of the complaint allege that McAvoy received a letter from the Chamber’s board that his application had not yet been approved so they could not consider his information request. The trial court construed these allegations as an admission from McAvoy that he had not yet met the third prong of the approval process as outlined in the Chamber bylaws. (R. pp. ___; order granting motion to dismiss.) The trial court did not afford McAvoy a reasonable inference here: these two paragraphs accurately allege a representation by Defendant (at that time) that McAvoy’s membership application had not been approved. (R. pp.

___; order granting motion to dismiss.) Taken together, the allegations actually paint the opposite picture that McAvoy was a member of the Chamber. Regardless, viewed in the light most favorable to McAvoy, and with every doubt resolved in his behalf, the Court in this matter must determine whether his complaint states any valid claim for relief. (R. pp. ___; summons and complaint.)

When the allegations are construed together under Rule 12(b)(6), SCRCP, and the allegations (and the Chamber bylaws) are “viewed in the light most favorable to plaintiff, and with every doubt resolved in [McAvoy’s] behalf,” if the complaint states any valid claim for relief then it was improper for the trial court to grant the motion to dismiss this matter and deny the motion for reconsider. *Dye v. Gainey*, 320 S.C. 65, 67-68, 463 S.E.2d 97, 98-99 (Ct. App. 1995). A reasonable construction and valid claim for relief of this complaint is that the Chamber waived the third prong of the process identified in its bylaws by welcoming McAvoy into the Chamber as a member. (R. pp. ___; summons and complaint.) A further reasonable inference from the complaint is that McAvoy was admitted into the Chamber but that after he sent his information request pursuant to The South Carolina Nonprofit Corporation Act, the board learned of the request and decided to indefinitely table McAvoy’s membership application.

CONCLUSION

This court should reverse the master on this point and remand for a hearing be set to determine the amount of the monetary relief to which Bailey and Owens are entitled under S.C. Code Ann. § 29-3-320. The master’s detailed and thoroughly analyzed order should remain the same in its other respects.

Respectfully submitted,

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November 7, 2018

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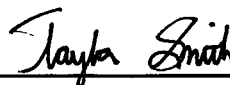
Ryan McAvoy.....Appellant.

PROOF OF SERVICE

I certify that I served the motion for an extension of time to serve and file the Appellant's Initial Brief and Designation of Matter to be Included in the Record on Appeal by depositing a copy of it on the date shown below in the United States Mail, postage prepaid, addressed as follows:

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November 7, 2018


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