

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2018-001716

Sabrina D. Davis,

Appellant,

v.

Bankers Life and Casualty Company,

Respondent.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Do the state courts of South Carolina have subject-matter jurisdiction over this case after it was removed to federal court and dismissed on the merits, and after such dismissal was affirmed by the U.S. Court of Appeals for the Fourth Circuit?

Suggested answer: No.

2. Was Appellant deprived of the opportunity to have 120 days to effect service of process on Respondent?

Suggested answer: No.

STATEMENT OF THE CASE

On February 14, 2014, Appellant, the Plaintiff below, filed a Complaint in the Greenville County Court of Common Pleas as Case No. 2014-CP-23-00815 (the “First Complaint”). (First Complaint dated Feb. 14, 2014.) The First Complaint generally alleged Respondent, the Defendant below, wrongfully denied Appellant’s claim for benefits under a certain life insurance policy. (*Id.*)

On February 20, 2014, Appellant purported to serve Respondent by mailing a copy of the First Complaint, without a summons, by U.S. Postal Service Priority Mail (not even by registered or certified mail, return receipt requested, with delivery restricted to addressee) to Respondent’s branch office in Greenville, South Carolina, and also attempted to serve Defendant’s counsel. On March 24, 2014, Respondent filed a motion to dismiss based on insufficiency of process and insufficiency of service of process, pursuant to SCRCP 12(b)(4) and 12(b)(5), respectively.

In an Order dated May 28, 2014, the Circuit Court granted the motion to dismiss, stating, “This case is dismissed without prejudice. Plaintiff may refile and reserve pursuant to S.C. Code Ann. § 15-9-270,” which statute requires that service on insurance companies be made through the Director of the Department of Insurance. (Circuit Court Order dated May 28, 2014, at p. 1 of 2.) On July 29, 2014, the Circuit Court denied Appellant’s motion to reconsider, again informing Appellant she could “refile and reserve.” (Circuit Court Order dated July 29, 2014.)

On August 12, 2014, Appellant appealed to this Court under Case No. 2014-001867, and, on June 29, 2016, this Court dismissed the appeal for lack of an appealable final order, stating:

After careful review, this court dismisses the appeal because the underlying order is not immediately appealable pursuant to section 14-3-330 of the South Carolina Code (1976). The court notes the underlying order is not a final adjudication of the case because the circuit court's dismissal without prejudice specifically allows Appellant to serve and file a complaint alleging the same causes of action in a new case. *See Int'l Fidelity Ins. Co. v. China Constr. America (SC) Inc.*, 375 S.C. 175, 181, 650 S.E.2d 677, 680 (Ct. App. 2007) (“[A] dismissal of a claim without prejudice is not an adjudication of the merits of the controversy and has no preclusive effect as a matter of law.”); *Collins v. Sigmon*, 299 S.C. 464, 467, 385 S.E.2d 835, 837 (1989) (recognizing when a court dismisses a case without prejudice, “the plaintiff can reassert the same cause(s) of action in another case”). This case will be remitted to the circuit court pursuant to Rule 221, SCACR.

(Court of Appeals Order dated June 29, 2016.)

On August 10, 2016, Appellant refiled in the Greenville County Court of Common Pleas under Case No. 2016-CP-23-04733, expressly demanding “\$19,660 for actual damages, \$40,000 for bad faith and \$90,000 for punitive damages” (the “Second

Complaint”). (Second Complaint dated Aug. 10, 2016.) On September 13, 2016, Defendant removed the Second Complaint to the U.S. District Court for the District of South Carolina (“D.S.C.”), where it was assigned Case No. 6:16-cv-03100-TMC-KFM.

On June 23, 2017, the federal district court granted Respondent’s motion for summary judgment and denied Appellant’s motion to remand. (D.S.C. Order dated June 23, 2017.) On July 24, 2017, Appellant filed her Notice of Appeal to the U.S. Court of Appeals for the Fourth Circuit, where it was assigned Case No. 17-1869. On October 23, 2017, the Fourth Circuit affirmed summary judgment for Respondent, stating:

We have reviewed the record and find no reversible error. Accordingly, although we grant leave to proceed in forma pauperis, we affirm for the reasons stated by the district court. *Davis v. Bankers Life & Cas. Co.*, No. 6:16-cv-03100-TMC (D.S.C. June 23, 2017).

(4th Cir. Order dated Oct. 23, 2017.)

Thereafter, and sometime before September 6, 2018, Appellant filed an “Emergency Motion to Vacate” in the Circuit Court, which the court denied by Order of that date, stating:

The Emergency Motion to Vacate is not properly before the court. The case was dismissed without prejudice on July 18, 2014. The decision was appealed and the appeal was dismissed on June 29, 2016. Plaintiff refilled the case (2016CP2304733) and that has been removed to Federal District Court under case number 6:16-CV-03100-TMC-KFM. Therefore, all matters should be resolved through the Federal Court.

(Circuit Court Order dated Sep. 6, 2018.) On September 14, 2018, Appellant initiated this appeal by filing her Notice of Appeal.

ARGUMENT

1. South Carolina State Courts Lack Subject-Matter Jurisdiction Over this Case.

Appellant refiled this action and sought damages in excess of \$75,000, thereby subjecting her claim to federal diversity jurisdiction under 28 U.S.C. § 1332. (Second Complaint.) Respondent then removed the case to federal court. 28 U.S.C. § 1446(d) states:

(d) NOTICE TO ADVERSE PARTIES AND STATE COURT.—

Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

Once a matter is properly removed to federal court, South Carolina courts cannot regain jurisdiction over the matter unless the federal courts enter an Order of Remand which is then mailed to the South Carolina court. *Limehouse v. Hulsey* 404 S.C. 93, 107-108, 744 S.E.2d 566, 575 (S.C. 2013). Here, the federal courts considered and denied Appellant's Motion to Remand, and proceeded to exercise jurisdiction. Appellant's reference to the "Rooker-Feldman doctrine" and 28 U.S.C. § 1257 in Section One of her Brief is misplaced, because the Federal Court did not sit in review of a State Court Judgment; the federal courts in this matter exercised original jurisdiction over her Second Complaint under the powers granted by 28 U.S.C. § 1332 in actions where citizenship of the parties is diverse and the amount in controversy exceeds \$75,000, and under 28 U.S.C. § 1441(a), allowing removal of such actions to federal court. Jurisdiction was never returned to the South Carolina state courts.

2. Appellant was Not Deprived of the Requisite Opportunity to Effect Service.

In Section II of her Brief, Appellant complains that she was not given 120 days to make service on Defendant in 2014. Firstly, that issue was not raised in the first appeal to this Court and is waived. *See Herron v. Century BMW* 395 S.C. 461, 719 S.E.2d 640, 645 (S.C. 2011) (“[I]ssue preservation rules “prevent[] a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case”). Relitigation of the issue of service of process in the 2014 action is also barred by the “law of the case” doctrine. *See Ross v. Medical University of South Carolina* 328 S.C. 51, 492 S.E.2d 62, 68 (S.C. 1997) *citing Warren v. Raymond*, 17 S.C. 163 (1882), (“[A]ll points decided by the Court on appeal, or necessarily involved in what was decided, are *res judicata* and cannot be considered again in the cause.”)

Also, the assertion that Appellant was deprived of her due time to effect service is untrue. Appellant made attempted service and the dismissal was based on the insufficiency and impropriety of the method of service selected by Appellant. The Circuit Court’s dismissal without prejudice specifically informed Appellant she could “refile and reserve” and even pointed her to the exact statute laying out the proper means of doing so. Appellant chose to appeal to this Court and argue that the method of service she had used was proper, and that she did not need to utilize any other form of service. Appellant was never deprived of the opportunity to correctly serve Respondent in the Circuit Court.

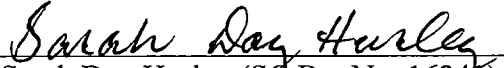
CONCLUSION

In sum, the federal courts acquired jurisdiction over this matter when Appellant’s Second Complaint was removed to federal court. The matter was resolved on the merits

in the U.S. District Court, affirmed on appeal to the Fourth Circuit, and never remanded to the State Court. Therefore, the State Courts may “proceed no further,” and this attempted appeal must be dismissed.

November 26, 2018

Respectfully submitted,


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The Honorable Allison Renee Lee, Circuit Court Judge

SC Court of Appeals

Appellate Case No. 2018-01716

Sabrina D. Davis,Appellant,

v.

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PROOF OF SERVICE

I certify that on this the 26th day of November, 2018, I have served copies of the Respondent's INITIAL BRIEF and DESIGNATION OF MATTERS TO BE INCLUDED IN RECORD ON APPEAL upon *pro se* plaintiff Sabrina D. Davis, by mailing same, postage prepaid in the United States mail, addressed to the following:

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Pro Se Appellant

November 26, 2018

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SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Columbia, South Carolina 29211

Re: Sabrina D. Davis v. Bankers Life and Casualty Company
Appellate Case No. 2018-01716

Dear Madame Clerk:

Enclosed please find the originals and one copy each of the Respondent's Initial Brief, Respondent's Designation of Matter to be Included in the Record on Appeal, and Proof of Service regarding the above-referenced matter. Please file the original documents and return clocked copies to me via the enclosed pre-addressed envelope. Thank you for your assistance with this matter, and please contact me if you have any questions.

With kind regards, I am

Yours very truly,

TURNER, PADGET, GRAHAM & LANEY, P.A.

Sarah Day Hurley
Sarah Day Hurley

Enclosures

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