

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

) COURT OF COMMON PLEAS
) C.A. No.: 2014-CP-23-04432
)

RICHARD A. GORMAN

)

PLAINTIFF,

) [PROPOSED]
) ORDER ON

v.

) MOTION TO RECONSIDER
)

JOHN C. MONARCH; DIRECT OUTBOUND
SERVICES, LLC; AND SHIPCHAIN, INC.

)

RECEIVED

DEFENDANTS.

)

JAN 17 2019

SC Court of Appeals

By Order dated December 7, 2018 (the “Order”), this Court granted in part and denied in part motions by defendants John C. Monarch (“Mr. Monarch”), Direct Outbound Services, LLC (“Direct Outbound”), and ShipChain, Inc. (“ShipChain”), with respect to certain causes of action alleged in the Second Amended Complaint (the “S.A.C.”). The plaintiff has since made his motion under SCRCivP Rules 52 and 59 (the “Pending Motion”), asking this Court to reconsider insofar as the Order granted any of the motions considered, and has alleged in the Pending Motion several deficiencies in the Order.¹ For the reasons stated below, the plaintiff’s Pending Motion to reconsider is denied. The alleged deficiencies that it asserts are set forth (in numbered, italicized paragraphs) and discussed sequentially below.

1. *The court did not view the allegations of the second amended complaint in the light most favorable to the Plaintiff, as the standard applicable to these motions required.*

Without some identification by the plaintiff of where, specifically, he believes the Order has miscomprehended the applicable standard, it is difficult to respond to this amorphous

¹ The plaintiff has captioned the Pending Motion as “Motion to Reconsider Dismissal of Defendants Kelly, Rusani, and Evans.” That caption apparently refers to an earlier order in this case and not to the Order of December 7, 2018. It is clear from the content of the Pending Motion, however, that it addresses the Order of December 7, 2018.

accusation. The relief granted by the Order in partial grant of Mr. Monarch's, Direct Outbound's, and ShipChain's motions as to which the plaintiff complains are limiting claims against ShipChain to the action taken after its corporate formation; denying the claim for civil conspiracy; and denying the claim for violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10 *et seq.* ("SCUTPA"). The key factual elements upon which the Order relies in granting the motions in those particulars are matters of which the Court may take judicial notice (public records); matters attested to by affidavit and conceded by the plaintiff at hearing (the date of formation of ShipChain); and matters alleged in the S.A.C. (the identities and relationships of the defendants, and the character of the claims made and the damages alleged in the S.A.C.). Such reliance is entirely consistent with the applicable standard of review of motions such as those considered by the Order. In particular with respect to motions for summary judgment, a court is not limited in its review to the allegations of the complaint, but may (indeed, must, as the language of the Rule says "[t]he judgment sought shall be rendered") consider pleadings, depositions, answers to interrogatories, admissions, and affidavits (SCRCivP Rule 56(c); and when the court does so, the "adverse party may not rest upon the mere allegations or denials of his pleading . . . but must set forth specific facts" (SCRCivP Rule 56(e)). The plaintiff has failed to meet that burden of specificity both at the hearing and now in the Pending Motion.

2. *The court erred in characterizing the second amended complaint as though all that is involved is "a very personal dispute" that is, "in essential character, between two individuals." The second amended complaint is not limited to that.*

The characterization complained of appears first in the Order in the HISTORY section. It was there a description of the background of the dispute, not a basis for any particular holding. The accuracy of the characterization is attested by the litany of litigation set forth in the Order's HISTORY, especially in footnote 3. The string of lawsuits described there had multiple parties, but the common elements to the thread were consistently the plaintiff Richard Gorman and Mr.

Monarch. The plaintiff has stated (as quoted by a website that he claims to be under his control (S.A.C. ¶ 45)), that his intended outcome of the litigation is “the forfeiture of all of Monarch’s assets to me.” See p. 14 of Attachment to Affidavit of Brad Smith, submitted with motion of ShipChain (<https://usaherald.com/john-monarch-ceo-shipchain-sued-alleged-bitcoin-cryptocurrency-scheme/>). Moreover, the origin and gravamen of the claims in the litigation (defamation and blackmail related to alleged criminal records of sexual misconduct) are intensely personal in their nature.

The second appearance of the characterization is in the discussion of the claim for violation of SCUTPA. The important distinction being made there is that the dispute is personal and private as opposed to “affecting the people of this State,” as required for that Act to have any purchase on the situation. The Order notes the extraordinary similarity of the facts alleged here to those in *Sunshine Sportswear & Electronics, Inc., et al. v. WSOC Television, Inc., et al.*, 738 F. Supp. 1499, 1503-05 (D.S.C. 1989), which also found the matter to be one related to a private tort and not to a matter of public interest.

3. *The court erred in giving any consideration whatsoever to settlement negotiations or result in another case. See Rule 408, SCRE.*

Presumably, the Pending Motion here refers to the following statement from the Order:

The third of the other three [*lawsuits*] ended in a settlement by which, in the words of the U.S. Magistrate Judge, “[Mr. Monarch] recovered a substantial amount of money” from Mr. Gorman. See p. 6 of Dkt. No. 180, in E.D.Pa. Case 2:14-cv-05980-GAM.

The Pending Motion mis-states SCRE Rule 408. What the Court may not do under that Rule is to admit statements or conduct made or done in pursuance of settlement of a claim as evidence of validity or amount of that claim. On that, two points are important. First, the claim being settled in the quoted language was a claim by Mr. Monarch against the plaintiff. That claim was, in fact, settled. There is currently no claim by Mr. Monarch against the plaintiff in the present litigation.

Second, the prohibition is against admission of statements or conduct in pursuance of a settlement. There is no prohibition in SCRE Rule 408 on “a result in another case.” As noted in the quoted section from the Order, the information was quoted from a publicly-available order in the other case, not from any testimony or documentation regarding the course or conduct of negotiations. SCRE Rule 408 specifically permits the admission of evidence “otherwise discoverable.”

Most important, however, is the fact that the quoted statement appears in the Order’s HISTORY. It provides additional context of the long and laborious dispute between the two primary combatants here. It was not relied upon for any decision within the Order.

4. *To be clear, no conversion to summary judgment occurred here. No notice of any such conversion was ever given.*

To be clear, ShipChain’s motion, filed and served on October 19, 2018 (twelve days before the motions hearing on October 31, 2018), contained a motion to dismiss under SCRCivP Rule 12(b)(6). It concluded, however, with the following paragraph:

In the alternative, Defendant ShipChain, Inc., will move at that time and place for judgment on the pleadings under SCRCivP Rule 12(c), based on the above and on the publicly-available facts set forth in the Answer, or for summary judgment under SCRCivP Rule 56, based on the above, on the publicly-available facts set forth in the Answer, and on the Affidavit and Verification of ShipChain, Inc.’s chief executive officer John C. Monarch and the Affidavit of Brad A. Smith attached hereto. [*Emphasis supplied.*]

Moreover, with regard to both a motion to dismiss under SCRCivP Rule 12(b)(6) (including the motion of Mr. Monarch and Direct Outbound), and with regard to a motion for judgment on the pleadings under SCRCivP Rule 12(c), this Court is directed by those Rules to treat the motion as one for summary judgment under SCRCivP Rule 56 if matters outside the pleadings are to be considered (although, as explained in the Order at p. 5, matters of which a court may take judicial notice do not require such conversion). The plaintiff had adequate notice, both by the Rules and by the motion of ShipChain and its submitted affidavits, that such treatment was possible. The

plaintiff had adequate opportunity under SCRCivP Rule 56 (c), (e), and (f), and at the lengthy October 31, 2018 hearing on motions to provide additional contrary factual response but chose not to do so.

5. *The court erred in concluding that “ShipChain cannot have become a part of any existing conspiracy here.” That conclusion lacks legal support, and it is not a logically sound statement, nor is it one that assumes the truth of the facts pled in the second amended complaint.*

The legal support for the Court’s conclusion is set forth explicitly at p. 10 of the Order: *McMillan v. Oconee Mem’l Hosp., Inc.*, 367 S.C. 559, 565, 626 S.E.2d 884, 887 (2006); *Pridgen v. Ward*, 391 S.C. 238, 244, 705 S.E.2d 58, 62 (Ct. App. 2010). Neither at the hearing nor in the Pending Motion has the plaintiff offered any rationale as to why the proposition reiterated in those cases – that a civil conspiracy cannot be found to exist when the acts alleged are those of employees or directors, in their official capacity, conspiring with the corporation – is not sound or not binding on this Court. With regard to the factual reference, the Order not only assumes the truth of facts pled in the S.A.C., it explicitly relies on the S.A.C.’s allegations. As stated by the Order at pp. 9-10:

First, ShipChain is a corporation organized under the laws of Delaware. S.A.C., ¶ 5; Answer, ¶ 2. Second, the alleged co-conspirators with ShipChain (Mr. Monarch and now-dismissed defendants Messrs. Evans, Kelly, and Rusani) are officers and directors of ShipChain. S.A.C., ¶ 10; Answer, ¶ 5. The remaining defendant/co-conspirator, Direct Outbound, is conceded by Mr. Gorman to be owned and operated by Mr. Monarch. S.A.C. ¶ 15.

6. *The court erred in concluding that the second amended complaint seeks to impose on ShipChain “corporate liability for acts and events that pre-date the creation of the corporation.” That conclusion lacks legal support, and it is not a logically sound statement, nor is it one that assumes the truth of the facts pled in the second amended complaint. A corporation can tortiously perpetuate and further wrongs that were done before the corporation came into existence, and that is one of the things that the second amended complaint alleges that ShipChain did.*

The only fact or theory alleged in the S.A.C. that ShipChain has “tortiously perpetuate[d] and further[ed] wrongs that were done before the corporation came into existence” is the claim

that it entered a civil conspiracy with those who (by the allegations of the S.A.C.) are its own directors and officers. Because that claim fails as a matter of law (see Item 5 above), there is no basis for extending to ShipChain liability for events before its creation.

7. *Similarly, the court erred in its decision that “to the extent that [Plaintiff’s intentional infliction of emotional distress] cause of action is stated against ShipChain based on acts other than the March 19, 2018, email, it has been dismissed.” In addition to the reasoning noted above, Plaintiff notes that the second amended complaint does not limit this cause of action as against ShipChain to this one act.*

The only act alleged in the S.A.C. with regard to ShipChain that occurred after the date of its formation was the March 19, 2018 email. Absent a civil conspiracy that would impose liability for pre-formation acts (see Item 5 above), that is the only act on which liability against ShipChain can be premised.

8. *The court erred in dismissing the civil conspiracy cause of action. The second amended complaint did not allege a wholly intra-corporate conspiracy. Also, Rule 18, SCRCP, allows the pleading of alternative causes of action.*

The S.A.C., ¶ 48, includes one person outside of the corporate group – “the now-deceased Karl Steinborn.” The plaintiff’s website – indeed, the story that at the heart of the key allegation against ShipChain – notes that Mr. Steinborn died in 2016, and graciously provides a copy of a public record of that fact. See pp. 1 and 4 of Attachment to Affidavit of Brad Smith, submitted with motion of ShipChain (<https://usaherald.com/john-monarch-ceo-shipchain-sued-alleged-bitcoin-cryptocurrency-scheme/>). In other words, the other alleged co-conspirator died eighteen months before ShipChain was formed in November 2017 (the formation date conceded by the plaintiff at the motions hearing, see Tr., p. 37). Whatever may have been the case while Mr. Steinborn was alive, there was no longer any conspiracy of which he was a part at the time of ShipChain’s formation. Without him, there was no alleged conspirator outside the corporate circle. Consequently, as discussed above, there was as a matter of law, no conspiracy involving

ShipChain.² The ability to plead alternative causes of action is not relevant to the question of whether a corporation can be involved in a conspiracy with its officers and directors.

9. *The court erred in concluding that “[a] corporation and its agents, including its officers and employees, are considered to be juridically one entity[.]” The opposite is [sic] true. “A corporation is not a natural person and maintains a separate and distinct identity apart from its shareholders.” Mangum v. Maryland Cas. Co., 330 S.C. 573, 576, 500 S.E.2d 125 (Ct. App. 1998).*

The Pending Motion here ignores the context of the complained of language, which was in the discussion of whether a corporation can conspire with its officers and directors. The Order’s sentence, in full, under the heading THE CIVIL CONSPIRACY CHARGE reads:

A corporation and its agents, including its officers and employees, are considered to be juridically one entity; and that entity cannot conspire with itself. *McMillan v. Oconee Mem’l Hosp., Inc.*, 367 S.C. 559, 565, 626 S.E.2d 884, 887 (2006); *Pridgen v. Ward*, 391 S.C. 238, 244, 705 S.E.2d 58, 62 (Ct. App. 2010). Consequently, the purported cause of action against ShipChain for civil conspiracy must be dismissed. ShipChain’s motion with respect to the civil conspiracy cause of action is therefore granted.

In that context and for the limited purpose for which it was made, the statement of the Order is correct, as explained by the cases cited.

10. *The court erred in concluding that the second amended complaint alleged only the same damages and no special damages connected with the civil conspiracy cause of action.*

The Pending Motion on this point is inadequate, and must be denied. As explained in the Order, the S.A.C. does not plead any special damages, as that term is construed in case law. The Pending Motion does not specify any proper special damages that the S.A.C. has adequately pled, or any case law that has been misconstrued by the Order in this regard.

² To reiterate a point of the Order: the civil conspiracy cause of action is denied as against ShipChain as a matter of law. With respect to Mr. Monarch and Direct Outbound, the civil conspiracy cause is dismissed for failure to state facts sufficient to constitute a cause of action, in that the S.A.C. did not adequately allege additional acts in furtherance or special damages. With respect to Mr. Monarch and Direct Outbound, the Order allows the plaintiff to amend his S.A.C. at the conclusion of evidence in trial, if there is evidence to support those missing elements.

11. *The court erred in dismissing Plaintiff cause of action under the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, et seq. A claim that one set out to ruin a business competitor addresses conduct at the very core of that for which the Unfair Trade Practices Act provides liability.*

This issue has been fully addressed in the Order. The Pending Motion is inadequate on this point and must be denied, as it is conclusory and does not present any discussion in contravention of the statutory language and case law set forth in the Order. In particular, as stated above, the Order notes the extraordinary similarity of the facts alleged here to those in *Sunshine Sportswear & Electronics, Inc., et al. v. WSOC Television, Inc., et al.*, 738 F. Supp. 1499, 1503-05 (D.S.C. 1989), which also held SCUTPA to be inapplicable, despite the fact that there (as here) the defendant was allegedly attempting to ruin its business competitor plaintiff by defamation. Neither at the hearing nor in the Pending Motion has the plaintiff offered any rationale as to why the ruling in that case, or similar rulings in other cases cited in the Order is not sound.

12. *No South Carolina cases [sic] has ever limited liability under the Unfair Trade Practices Act solely to situations in which there is capability of repetition; however, the second amended complaint alleges such capability, as it notes that the Defendants had engaged in similar conduct previously.*

The observations in this Item 12 are not relevant to the Order. The Order does not hold, or suggest, that capability for repetition is necessary. It holds, instead, in accordance with the language of the statute and cited case law on the statute, that an act must “affect the people of this state” in order to be within the SCUTPA ambit. It further notes, also in accordance with cited case law, that one way of showing such public impact is by showing capability for repetition. In looking at the S.A.C. to see whether the acts complained of “affect the people of this state,” the Order observes that the S.A.C. alleges only that “[t]hese [complained-of] actions are capable of repetition. Defendants in this case have engaged in similar blackmail schemes and attacks in the past.” S.A.C. ¶ 67.” The Order then determines, based on cited case law, that such a non-specific, conclusory, and unsupported allegation is insufficient to withstand a motion to dismiss, even under

liberal rules of pleading. The problem of the S.A.C. in this regard is that its complained-of acts, in order to invoke SCUTPA relief, must affect the people of this state; but the S.A.C. does not adequately allege that they do so – either by capability of repetition or in any other way.

13. *The Plaintiff hereby incorporates by reference all of his arguments made at the October 31, 2018, hearing in this case.*

As noted in passing throughout this order on reconsideration, neither the arguments at the motions hearing nor the content of the Pending Motion undermine the holdings of the Order.

14. *The court should rule on all of the Plaintiff's arguments.*

The Order and this order on reconsideration have addressed all arguments put before the Court on these matters.

15. *The showing required of the Plaintiff was minimal, and the Plaintiff has more than made it.*

It is not possible to tell what showing the Pending Motion refers to in this Item 15. The deficiencies of the S.A.C., insofar as they affect the disposition of the prior motions made by Mr. Monarch, Direct Outbound, and/or ShipChain, have been described in the Order and in this order on reconsideration.

16. *This motion is also based upon all applicable statutory law, case law, common law, and the record in this action.*

It is upon the applicable statutory law, case law, common law, the record in this action, and the South Carolina Rules of Court that the Order is reaffirmed and the Pending Motion denied in its entirety.

CONCLUSION

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Pending Motion of the plaintiff to reconsider its Order of December 7, 2018, in which it granted in part and denied in part

the prior motions of Mr. Monarch, Direct Outbound, and ShipChain is hereby denied for the reasons stated above.

SO ORDERED THIS ___ DAY OF JANUARY, 2019.

**JUDGE ROBIN B. STILWELL
THIRTEENTH CIRCUIT**



Greenville Common Pleas

Case Caption: Richard A Gorman vs. John C Monarch , defendant, et al

Case Number: 2014CP2304432

Type: Order/Other

So Ordered

s/ Robin B. Stilwell 2158

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