

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No. 2017-CP-32-02349
Appellate Case No. 2019-000189

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APR 24 2019

SC Court of Appeals

Melvin Bannister and Virginia Ricker.....Appellants
Delta Air Lines, Inc.....Respondent

INITIAL APPELLANTS' BRIEF

Melvin D. Bannister
Post Office Box 6833
Columbia, South Carolina 29260
(803) 782-8688; (803) 782-8677-fax
Attorney for the Appellants

Other Counsel of Record:

Kelsey J. Brudvig, Esq.
PO Box 12487
Columbia, SC 29211
(803) 256-2660; (803) 771-4484-fax
Attorney for the Respondent

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STATEMENT OF CASE

The Plaintiffs, while traveling together, departed the Columbia Metropolitan Airport *en route* to Las Vegas Nevada on July 7, 2014. The Plaintiff's checked luggage with the Defendant to be transported on the flight. A bag, which belonged to Plaintiff Melvin Bannister, was tagged with the name of Plaintiff Virginia Ricker. The said bag did not arrive at Plaintiffs' destination. The Plaintiffs reported to the agents of the Defendant that the said bag had arrived and the agents presented to the Plaintiffs Delta Baggage Information/Contract form. The Defendant's agents further informed the Plaintiffs that the said bag would arrive on the next flight departing from the Atlanta International Airport and would be delivered to the Plaintiffs at their hotel in Las Vegas. When the bag did not arrive, Plaintiffs contacted Defendant's agents and were told by the agents, on more than one occasion, to purchase replacement items. The Defendant's agents further told the Plaintiffs that there would not be a cap on the amount of the replacement costs. The Plaintiffs purchased replacement items; the cost of the replacement items was in the amount of \$8,377.02. The said bag never arrived at either the hotel in Las Vegas nor at the home of either of the Plaintiffs.

On July 3, 2017 Plaintiffs initiated a civil action against Defendant in the Lexington County Court of Common Pleas, asserting claims for breach of contract and negligence. On April 6, 2018 Defendant moved for summary judgment. The Defendant argued that the contract of carriage had a cap on damages in the amount of \$3,400. By order filed June 20, 2018 the Court granted Defendant's motion with regard to the negligence cause of action.

On August 21, 2018 Defendant subsequently filed a motion to compel or enforce settlement in the amount of \$3,400.

Plaintiffs filed a motion to amend their complaint on September 7, 2018.

A hearing was held before the Honorable Clifton Newman on September 10, 2018 on the motions. On January 9, 2019 Judge Newman issued an Order denying Plaintiffs' motion to amend the complaint and entered a final judgment in favor of Plaintiffs for \$3,400 as to all Plaintiffs' claims.

Appellants filed the Notice of Intent to Appeal on February 5, 2019.

Appellants received the transcript of hearing before the Honorable Clifton Newman by electronic delivery on March 27, 2019.

STATEMENT OF ISSUES ON APPEAL

- I. DID THE COURT ERR IN FAILING TO ALLOW PLAINTIFFS TO AMEND THE COMPLAINT?
- II. DID THE COURT ERR IN GRANTING A JUDGMENT, WITHOUT HAVING A TRIAL ON THE CONTESTED MATTER?

ARGUMENT I

THE COURT ERRED IN FAILING TO ALLOW THE PLAINTIFFS TO AMEND THE COMPLAINT.

In the original Complaint, Plaintiffs Melvin Bannister and Virginia Ricker ("Plaintiffs") allege that on July 7, 2014 they departed from the Columbia

Metropolitan Airport *en route* to Las Vegas, Nevada. Plaintiffs checked luggage with Defendant to be transported on the flight to Las Vegas, Nevada. Plaintiffs allege that a piece of luggage did not arrive at their destination. The Plaintiffs further allege that the Defendant informed the Plaintiffs that their bag had been located and would be forwarded to them. This communication by the Defendant to the Plaintiffs was repeated on numerous occasions. Upon the Plaintiffs' return to Columbia, South Carolina, the Defendant informed the Plaintiffs that the bag would be returned to the Plaintiff Melvin Bannister by noon on July 14, 2014. The bag, which was in control and possession of the Defendant, was never returned to the Plaintiffs. ¶¶ 3-18. The Plaintiffs further allege that the said baggage was misappropriated. ¶ 6. **(Complaint)**

Rule 15(a) of the South Carolina Rules of Civil Procedure provides in part: "A party may amend his pleadings...by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party...". In *Patton v. Miller*, 420 S.C. 471, 804 S.E.2d 252 (2017) the Supreme Court stated Rule 15(a) "strongly favors amendments and the court is encouraged to freely grant leave to amend." In *Skydive Myrtle Beach, Inc. v. Horry County, Horry County Department of Airports, H. Randolph Haldi, Pat Apone, Tim Jackson, and Jack Teal* (App. Case No. 2017-001382, Opinion No. 27867, March 13, 2019) the Supreme Court found that when a trial court finds a complaint fails to state facts sufficient to constitute a cause of action, the court should give the plaintiff an opportunity to amend the complaint pursuant to Rule 15(a) before filing a final order of dismissal. In a breach of

contract case, the circuit court held and the Supreme Court affirmed that the amendment is in furtherance of justice. *Wilson v. Gregory*, 189 S.C. 62, 200 S.E. 358 (1938)

In *Tanner v. Florence County Treasurer*, 336 S.C. 552, 521 S.E.2d 153 (1999) the Supreme Court held: "In the current case, the County failed to argue that allowing the supplemental pleading would be prejudicial. The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it. *Pool v. Pool*, 329 S.C. 324 494 S.E.2d 820 (1998). It is the responsibility of the party opposing an amendment or supplemental complaint to establish prejudice. *Forrester v. Smith & Steele Builders, Inc.*, 295 S.C. 504, 369 S.E.2d 156 (Ct.App. 1988)

In the current case, the Defendant did not argue any prejudice to the Defendant. (emphasis added) Further the factual allegations to support an amended complaint to allege a cause of action for conversion were made in the original complaint. (Complaint, ¶¶ 3-18) In particular, the allegation of misappropriation of Plaintiffs' baggage was made in the original complaint. (Complaint, ¶ 6), **(Transcript of Record, May 7th, 2018)**

In *Industrial Welding Supplies, Inc., v. Atlas Vending Co., Inc.*, 276 S.C. 196, 277 S.E.2d 885, 886-887 (1981) the Court held: "The amendment sought in this case did not change the cause of action, but merely affected the extent of relief. Respondent was apprised of the nature of the amendment before trial and was able to present testimony on the issue of damages sought to be raised.

While a considerable amount of time elapsed between the filing of the complaint and the request for amendment...The record fails to show neglectful or dilatory tactics on the part of appellant. Neither is there any basis for a claim by respondent of prejudice by surprise. We therefore hold that, under these facts, appellant should have been allowed to amend its complaint so as to pursue its full claim for damages.”

In the current case, the Defendant was made aware of the factual allegations to support the cause of action for conversion in an amended complaint. (Complaint, ¶¶ 3-18, specifically Complaint, ¶ 6).

In *Soil & Material Engineers, Inc. v. Folly Associates*, 293 S.C. 498, 361 S.E.2d 779 (Ct.App. 1987) the Supreme Court held: “As our new rule (Rule 15, SCRC) makes manifest, amendments to conform to proof should be liberally allowed when no prejudice to the opposing party will result therefrom. H. LIGHTSEY & J. FLANAGAN, SOUTH CAROLINA CIVIL PROCEDURE at 291 (1985); see *Campana v. Eller*, 755 F.2d 212 (1st Cir. 1985) (construing F.R.Civ. P. 15). In considering potential prejudice to the opposing party, the court should consider whether the opposing party “has had the opportunity to prepare for the issue now being raised formally.” H. LIGHTSEY & J. FLANAGAN, supra at 291.”

In the present case, Defendant was made aware of the factual allegations in the original complaint. Further, at the hearing on the Motion to Amend the Complaint, the Defendant did not claim any prejudice. Further the court should grant a continuance, if prejudice can be eliminated or substantially minimized by

a continuance so that the opposing party can be eliminated or substantially minimized by a continuance so that the opposing party can meet the evidence. *Soil & Material Engineers, Inc. v. Folly Associates*, 293 S.C. 498, 361 S.E.2d 779 (Ct.App. 1987).

In *Moore v. Southern Coatings & Chemical Co.*, 221 S.C. 522, 71 S.E.2d 311 (1952) the Supreme Court held where a nonsuit was granted by the trial court, the Defendant has not shown any legal prejudice to it by reason of the nonsuit. The mere fact that it may have to defend another similar action is not prejudicial.

The circuit court is to freely grant leave to amend when justice requires, and there is no prejudice to any other party. The party opposing the motion has the burden of establishing prejudice. The prejudice that would warrant denial of a motion to amend the pleadings is a lack of notice that a new issue is to be tried and a lack of opportunity to refute it. *Stanley v. Kirkpatrick*, 357 S.C. 169, 592 S.E.2d 296 (2004); *Lee v. Bunch*, 373 S.C. 654, 647 S.E.2d 197 (2007). In *Stanley v. Kirkpatrick* the court held the burden is not on the movant, but on the party opposing the motion to show how it is prejudiced. Rule 15 (c), SCRPC, states "whenever the claim ...asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading." The factual circumstances of the tort claims have already been set out in the original complaint. No new information is required to assert those tort

claims. Accordingly, the trial court erred by not allowing the amendment of the tort claims.

The Defendant at the motion hearing did not argue that the Defendant would require the Defendant to introduce additional or different evidence to prevail in the amended action. The Defendant did not allege or prove that the amended complaint would delay the trial, was bad faith on the Plaintiffs' part, was unduly prejudicial to the Defendant, the amendment was futile, or that the Plaintiffs had a repeated failure to cure defects through previous admendments. **(Motion hearing transcript, September 10, 2018)**

With the case herein, no new information is required to assert the tort claim of conversion. **(Complaint)**

The Plaintiffs have not caused any delay in the proceedings in this matter. The hearing on the Plaintiffs' motion to amend the complaint was held at the same time as Defendant's motion to compel settlement. No further delay would be incurred by granting the motion to amend, as no additional discovery would be needed.

The Plaintiffs' motion to amend the complaint would not be futile. The Plaintiffs could prove the allegations in the original and amended complaints and show that the Plaintiffs would be entitled to a verdict on the cause of action for conversion. The Plaintiffs should be allowed to prove the allegations of conversion and to prove damages that the Plaintiffs incurred.

No special relationship between the parties must be shown to allow a cause of action for conversion. Just because parties have a contract between them, it does not mean that a party could not be sued for conversion. As an example, parties have a lease agreement; landlord enters into the leased premises and converts the tenant's property to the landlord's use; the tenant would not have to prove a special relationship outside of the lease agreement, in order to allege a cause of action for conversion.

Further, in the present case herein, the Defendant was given notice of the factual allegations in the original complaint, which support a cause of action for conversion. The Defendant at a trial, which is to be held on or after December 1, 2018, would be given the opportunity to refute the alleged cause of action.

(Complaint)

In *House Healers Restorations, Inc. v. Ball*, 112 N.C.App.783, 437 S.E.2d 383 (Ct .App N.C. 1993) the Court held "If a counterclaim is omitted through 'oversight, inadvertence, or excusable neglect,' or if 'justice requires, leave of Court may be granted to add the counterclaim through amendment." The Appellants submit there should be no distinction between a complaint and counterclaim.

If Plaintiffs motion to amend the complaint was granted there would not be any delay in the trial of the case. Based upon the allegations in the original complaint, the Plaintiffs and Defendant were aware of the allegations to support the amended cause of action for conversion.

ARGUMENT II

THE COURT ERRED IN GRANTING A JUDGMENT, WITHOUT HAVING A TRIAL ON THE CONTESTED MATTER?

On June 15, 2018 the Honorable Jocelyn Newman issued a Form 4 Order with the checked box "Statement of Judgment by the Court: Defendant's Motion for Summary Judgment filed on April 6, 2018 is Granted as to Negligence. Defendant's Motion for Summary Judgment filed on April 6, 2018 is Denied as to the remaining causes of action." The Form 4 Order further had a checked box "does not end the case." The Form 4 Order did not indicate an "attached order (formal order to follow)." **(Form 4 Order, dated June 15, 2018)**

Further, upon the conclusion of the hearing, Judge Jocelyn Newman stated: "Now, the motion for Summary Judgment is granted as to the negligence cause of action. It is denied in all other aspects." Defendant's counsel then queried the Court: "Your Honor, would you like a proposed order or just a Form 4?" Judge Newman responded: "I'll do a Form 4." **(Transcript of Record, May 7th, 2018)**

It appears subsequently to the issuance of the Form 4 Order on June 15, 2018 Defendant's counsel forwarded to Judge Jocelyn Newman a proposed Order Granting in Part and Denying in Part Defendant's Motion for Summary Judgment. Without a further hearing on the motion or a trial on the merits, Judge Jocelyn Newman signed and entered the Order on June 20, 2018. **(Order of Jocelyn Newman, dated June 20, 2018)**

The Order Granting in Part and Denying in Part Defendant's Motion for Summary Judgment, which was entered on June 20, 2018 stated that the Plaintiffs' alleged damages flowing from the breach of contract cause of action are controlled by the clear and unambiguous language of the "Contract for Carriage". The Defendant argued that by purchasing the tickets the Plaintiffs entered into the "Contract for Carriage". The Plaintiffs did not allege a breach of the "Contract for Carriage".

The Defendant in its Motion to Compel Settlement included Exhibit C, which was entitled: Delta Domestic General Rules Tariff **(Last Modified: August 15, 2014). (emphasis added)** It is shown on page 2 of the Delta Domestic General Rules, Rule 1: A. Contract of Carriage. **(Defendant Delta Air Lines, Inc.'s Motion to Compel Settlement)**

It should be noted that the alleged "Contract of Carriage" was dated (August 15, 2014) after the purchase of the airline tickets, the date of travel from Columbia airport to Las Vegas airport, and the agreement to transport the baggage (July 7, 2014). (emphasis added)

Judge Jocelyn Newman ruled from the bench on May 7, 2018: "Now, the motion for Summary Judgment is granted as to the negligence cause of action. It is denied in all other aspects." **(Transcript of Record, May 7th, 2018)**

Therefore, at a trial on the merits, the Plaintiffs would be required to show a breach of contract and their damages. The Defendant could not rely upon a "Contract of Carriage", which the Defendant alleges the parties entered into on

some date on or after August 15, 2014. Clearly August 15, 2014 was subsequent to the purchase of the airline tickets, the travel by the Plaintiffs, and the transportation of the baggage or conversion of the baggage.

The Defendant could not show the terms of a contract are clear and unambiguous, if the Defendant could not show the contract existed on the date of the purchase of the airline tickets, nor the date of travel, nor the date of the transportation of the baggage. The date of the travel by the Plaintiffs and the date of the transportation of the baggage was July 7, 2014, more than one month prior to the alleged "Contract of Carriage".

There are no allegations in the Complaint that the parties entered into a written "Contract of Carriage". **(Complaint)** The Defendant denied the allegations of a breach of contract cause of action in its Answer. The Defendant did not mention any "Contract of Carriage" in its Answer. Specifically, the Defendant did not plead the existence of a "Contract of Carriage". Nor, did the Defendant admit that the Defendant had breached any "Contract of Carriage". **(Answer)**

The Defendant in its Motion for Partial Summary Judgment argued that Plaintiffs' damages for the Defendant's breach of contract would be limited to \$3,400. Judge Jocelyn Newman issued an oral Order from the bench and stated: "Now, the Motion for Summary Judgment is granted as to the negligence cause of action. It is denied in all other aspects." **(Transcript of Hearing, May 7, 2018)** Without a further hearing, the Judge issued an Order finding that the

terms of the “**Contract for Carriage**” (**emphasis added**) limited the Plaintiffs to damages in the amount of \$3,400. (**Order of Jocelyn Newman, dated June 20, 2018**)

Judge Jocelyn Newman’s Order was issued without an admission by Defendant that the Defendant had breached any contract with the Plaintiffs. (**Transcript of Hearing, May 7, 2018**); (**Answer**)

The Plaintiffs submitted to the Court Defendant’s Baggage Information form. The Defendant argues that the said Baggage Information form was parole evidence and could not be admitted because the contract language “is perfectly plain and capable of legal construction, it determines the rights and obligations of the parties.” (**Affidavit, Baggage Information Form, May 7, 2018**) The Defendant did not prove that a Contract of Carriage existed at the time of the purchase of the airline tickets, nor the travel of the Plaintiffs, nor the transportation of the baggage of the Plaintiffs. Under the parole evidence rule, extrinsic evidence offered **prior or contemporaneously to a written agreement (emphasis added)** being entered into by the parties is barred when a party seeks to introduce the evidence to “contradict, vary, or explain” the written agreement. See *Gilliland v. Elmwood Prop.*, 301 S.C. 295, 302, 391 S.E.2d 577, 581 (1990)

In the present case herein, the Delta Baggage Information form was provided by Defendant’s agents to Plaintiffs on July 7, 2014 and was subsequent to any contract of the purchase of the airline tickets and the

transportation of the baggage of the Plaintiffs. (emphasis added) The written Baggage Information Form, which was written by the Defendant, clearly and unambiguously added terms to the contract to transport the baggage of the Plaintiffs. **(Affidavit, Baggage Information Form, May 7th, 2018)**

In bold print on the said Baggage Information Form, the Defendant stated: “The guidelines for reasonable expenses are NOT daily limits or a maximum. Additional expenses may be incurred and will be handled on an individual basis.” (Affidavit, Baggage Information Form, May 7th, 2018)

CONCLUSION


It is submitted the Trial Court erred by refusing to allow Plaintiffs to amend the Complaint. The Defendant did not allege or show any prejudice to the Defendant, if the amendment of the complaint was granted. The Defendant did not argue that the amended complaint would require the Defendant to introduce additional or different evidence to prevail in the amended action. The Defendant did not allege or prove that the amended complaint would delay the trial, was bad faith on the Plaintiffs, was unduly prejudicial to the Defendant, the amendment was futile, or that the Plaintiffs had a repeated failure to cure defects through previous admendments. **(Motion hearing transcript, September 10, 2018).**

After the issuance of the Order Granting in Part and Denying in Part Defendant’s Motion for Summary Judgment the Plaintiffs were prepared to go to trial on the Breach of Contract cause of action. No trial on the merits was ever held. Judge Jocelyn Newman in her Order denied relief to the Defendant under

the cause of action for breach of contract. (**Transcript of Record, May 7th, 2018**), (**Order of Jocelyn Newman, dated June 20, 2018**), (**Form 4 Order, dated June 15, 2018**).

Therefore, the Appellants/Plaintiffs pray that the Court issue its decision reversing and remanding the case for a trial on the merits and allowing the Appellants/Plaintiffs to amend their complaint.

Respectfully submitted.



Melvin D. Bannister
Post Office Box 6833
5115 Forest Dr., Suite G-1
Columbia, South Carolina 29260
(803) 782-8688; (803) 782-8677
sctriallawyer@bellsouth.net
Attorney for the Appellants.

April 24 2019

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PROOF OF SERVICE

I certify that I have served the Initial Appellants' Brief to be Included in the Record on Appeal on Delta Air Lines, Inc. by depositing a copy of it in the United States Mail, postage prepaid, on April 24, 2019, addressed to her attorney of record, Kelsey J. Brudvig, Esq., PO Box 12487, Columbia, SC 29211



Melvin D. Bannister
Post Office Box 6833
Columbia, South Carolina 29260
(803) 782-8688; (803) 782-8677-fax
Attorney for the Appellants