THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2018-CP-40-01434

Southeast Payphone Group, Inc., a
South Carolina corporation, Appellant,

v.

Water Flow Business Brokers, LLC, a
South Carolina limited liability company, Defendants,

Of Whom Ryan Cannon is the, Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This matter arises out of the entry into and alleged violations of an Asset Purchase Agreement ("APA") entered into on March 17, 2016, between Appellant and Defendant Water Flow Business Brokers, LLC ("Defendant Water Flow"). (R. p. 6, ¶ 10). Respondent executed the APA as the "Owner/President" of Defendant Water Flow. (R. pp. 12-24).

Appellant filed its Complaint in this matter on December 14, 2017.[1] (R. pp. 5-24). In its Complaint, Appellant alleged causes of action against Defendant Water Flow for breach of contract and unjust enrichment. (R. pp. 7-8, ¶¶ 19-29). Appellant also alleged a cause of action against Defendant Water Flow and Respondent for fraud/intentional misrepresentation. (R. p. 5, ¶¶ 30-39).

Respondent filed his Answer and Counterclaim on January 12, 2018. (R. pp. 25-32). In the Answer and Counterclaim, Respondent specifically reserved his rights to challenge venue and being named individually as a party to this action. (R. p. 25). Appellant filed its Reply to Counterclaim on January 24, 2018. (R. pp. 33-37).

Following transfer of venue to Richland County, Respondent filed his Notice of Motion and Motion to Dismiss on March 19, 2018. (R. pp. 38-39).

The trial court heard Respondent's Motion to Dismiss on April 11, 2018. (R. pp. 40-49).

The trial court entered its Order Granting the Defendant Ryan Cannon's Motion to Dismiss on September 20, 2018. (R. pp. 1-4).

Appellant timely filed its Notice of Appeal on October 11, 2018.

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[1] Appellant filed its Complaint in Horry County, but venue was transferred by consent to Richland County. Venue is not an issue on appeal.

STANDARD OF REVIEW

"In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court." Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245-247 (2007). "In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint." Id. "A 12(b)(6) motion should not be granted if 'facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case.'" Plyler v. Burns, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007). "The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." Id. "The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action." Doe v. Marion, 373 S.C. at 395, 645 S.E.2d at 248.

FACTS

Appellant and Defendants are primarily in the business of owning and operating publicly accessible machines (such as ATMs) leased to retail and other merchant locations, such as convenience stores. (R. p. 6, ¶¶ 7-8; R. p. 12). Pursuant to the Asset Purchase Agreement ("APA") that forms the basis of this action, Appellant purchased from Defendant Water Flow "contracts, agreements, licenses, and other commitments and arrangements, oral or written, with any person or entity relating exclusively or substantially only to the Business." (R. p. 13, ¶ 1(a)). In the APA, Defendant Water Flow made numerous representations, warranties, and covenants, including, but not limited to, that Defendant Water Flow had "good and marketable title to all the Assets [Appellant was purchasing], free and clear of all liens, claims, pledges, security interests, rights of others or any other charge or encumbrance of any nature whatsoever, except for minor imperfections of title, if any, that do not materially detract from the value or impair the use of the Assets subject thereto." (R. pp. 14-15, ¶ 5(c)).

In its Complaint, Appellant alleged Respondent was, at all times relevant to its Complaint, "an officer and/or member manager of [Defendant] Water Flow." (R. p. 6, ¶ 9). Appellant further alleged that Defendants Water Flow and Respondent "warranted and promised [in entering into the APA] that [Defendant] Water Flow was the lawful, legitimate owner of certain assets, including without limitation: (a) equipment such as ATMs, and (b) contracts with vendor locations whereby Water Flow had exclusive rights to provide and service ATMs…." (R. p. 6, ¶ 11).

Further, the APA – signed by Respondent as "Owner/President" – contained a covenant not to compete, which provided that Defendant Water Flow's "officers, shareholders, and key employees covenanted and agreed not to 'directly or indirectly … own, manage, operate, or participate in the ownership, management, operation of ATM units of equipment at the current

business addresses where the twenty-two (22) ATM machines are being purchased by [Appellant]...." (R. pp. 17-18, ¶ 13(c)). Appellant alleged in its Complaint that Defendant Water Flow and Respondent violated this provision of the APA "by improperly accepting employment with [a competing ATM services company] and, without [the competitor]'s knowledge of the noncompete obligations imposed by the APA, directly and indirectly competed with [Appellant] in direct violation of the APA." (R. p. 7, ¶ 18).

Finally, in its third cause of action – for fraud/intentional misrepresentation against Defendant Water Flow and Respondent – Appellant alleged as follows:

> 31. [Respondent], individually and on behalf of Water Flow, made certain fraudulent misrepresentations to [Appellant], to wit, [Respondent] stated Water Flow was the record owner of the property to be conveyed to [Appellant] per the APA.
>
> 32. [Respondent] made such misrepresentations with actual knowledge of their falsity.
>
> 33. [Respondent]'s misrepresentations were of facts material to the parties' transaction.
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> 34. Further, [Respondent] made such misrepresentations with the intent to deceive [Appellant], and such fraudulent statement did in fact deceive [Appellant], which had no knowledge of the statement's falsity.
>
> ...
>
> 38. The acts alleged herein by [Respondent] were done willfully, intentionally, wantonly, and maliciously.

(R. p. 9, ¶¶ 31-34, 38).

ARGUMENT

Notwithstanding the litany of allegations by Appellant against Respondent, in his individual capacity, arising from the entry into and alleged violations of the APA, the trial court improperly granted Respondent's Motion to Dismiss. (R. pp. 1-4). Despite the trial court's obligation to base its ruling solely on the allegations set forth in the Complaint – and moreover, to consider the allegations in the light most favorable to Appellant, with every doubt resolved in Appellant's behalf – the trial court either: 1) ignored the allegations against Respondent individually that otherwise would not insulate him, the tortfeasor, from personal liability for his actions; or 2) erroneously failed to resolve the allegations against Respondent individually in the light most favorable to Appellant with every doubt resolved in Appellant's behalf. Further, the trial court disregarded relevant, applicable case law when it held that Respondent was shielded from personal liability for any acts he personally committed while an agent of Defendant Water Flow.

Because the trial court failed to comply with the appropriate standard of review and failed to consider applicable case law, Respondent's Motion to Dismiss was improperly granted and should be reversed by this Court.

I. BECAUSE THE COMPLAINT SET FORTH ALLEGATIONS AGAINST RESPONDENT, IN HIS INDIVIDUAL CAPACITY, FOR HIS OWN ACTS OR CONDUCT, THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S MOTION TO DISMISS.

Nothing in the law shields Respondent from direct liability in tort for his own actions. See BPS, Inc. v. Worthy, 362 S.C. 319, 328, 608 S.E.2d 155, 160 (Ct. App. 2005) ("Nothing in the law shields [an officer of a corporation] Worthy from direct liability in tort for his own actions.") (citing Rowe v. Hyatt, 321 S.C. 366, 369 468 S.E.2d 649, 650 (1996) ("An officer, director, or controlling person in a corporation is not, merely as a result of his or her status as such, personally

liable for the torts of the corporation. To incur liability, the officer, director, or controlling person must ordinarily be shown to have in some way participated in or directed the tortious act.")); R. p. 45, lines 4-25; R. p. 46, lines 1-3). In 2012, the South Carolina Supreme Court extended this general rule – limiting personal liability for corporate officers or directors from liability arising out of official actions of the corporation – to the limited liability context. See 16 Jade St., LLC v. R. Design Constr. Co., LLC, 398 S.C. 338, 342-49, 728 S.E.2d 448, 450-54 (2012) (finding the trial court did not err in finding the member of an LLC personally liable for torts he committed in furtherance of the LLC, stating "we hold [S.C. Code Ann. §] 33-44-303(a) does not limit the right of a plaintiff to sue his tortfeasor. In sum, we conclude that [S.C. Code Ann. §] 33-44-303(a) only protects non-tortfeasor members from vicarious liability and does not insulate the tortfeasor himself from personal liability for his actions.").

In granting Respondent's Motion to Dismiss, the trial court failed to recognize one of the exceptions to the general rule that a member or manager of a limited liability company cannot be personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager. See S.C. Code Ann. § 33-44-303(a) ("Except as otherwise provided in subsection (c), the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liabilities of the company. A member or manager is not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager."). Specifically, the trial court held that "[s]ection 33-44-303 shields the [Respondent] from personal liability for any acts he took as agent of the Defendant Water Flow Business Brokers, LLC. In such a situation, only the LLC may be found liable." (R. p. 3, citing Dutch Fork Dev. Grp. II, LLC v. SEL Props., LLC, 406 S.C. 596, 753 S.E.2d 840 (2012); S.C. Code Ann. § 33-44-302) (internal citations omitted).

The trial court's reliance on Dutch Fork in this case is misplaced. Initially, it is of significant importance to note that the Supreme Court, in reversing the trial court's decision that the manager of the LLC could not be held liable for tortious interference, noted its recent decision in 16 Jade St., infra. In fact, at the outset of its analysis of the facts in Dutch Fork, the Supreme Court noted that 16 Jade St. was not dispositive in that case as it involved a separate question of whether respondents could sustain a claim of tortious interference with a contract. See Dutch Fork, 406 S.C. at 604, 753 S.E.2d at 844 ("Recently, a majority of this Court rejected Appellant's contention that a manager of an LLC may not be held individually liable for torts of the LLC. Jade Street, however, is not dispositive as the instant case involves a separate question of whether Respondents could sustain a claim of tortious interference with a contract.") (internal citation omitted). There is no such separate question at issue in this case, and further analysis of Dutch Fork reveals that the facts of this case clearly are distinguishable as well.

Specifically, Dutch Fork involved an appeal from a jury trial in which the jury had found the manager of the LLC personally liable and the trial court had denied the manager's motions for a directed verdict and JNOV. See, generally, id. at 607-08, 753 S.E.2d at 846. In reversing the trial court's denial of the manager's motions, it cited the absence of any evidence regarding the scope of the manager's authority to establish a separate claim that the manager was individually liable in tort. Id.

In contrast, in this case, the standard of review on Respondent's Motion to Dismiss required that the trial court base its ruling solely on the allegations set forth in the Complaint and, if the facts alleged and inferences reasonably deducible therefrom would entitle the Appellant to any relief on any theory of the case, the motion should not have been granted. See Plyler v. Burns, infra.; (R. p. 43, lines 11-20). Essentially, as far as the trial court should have been

concerned at the time it ruled, the following allegations, among others, against Respondent were true: Respondent made fraudulent misrepresentations to Appellant; Respondent made those misrepresentations with actual knowledge of their falsity; those misrepresentations were of facts material to the parties' transaction; Respondent made those misrepresentations with the intent to deceive Appellant; the fraudulent misrepresentations did deceive Appellant; and Respondent's actions were done willfully, intentionally, wantonly, and maliciously. (R. p. 9, ¶¶ 31-34, 38; R. p. 43, lines 11-20; R. p. 44, lines 1-6, 9-22).

As such, the Complaint stated one or more valid claims for relief against Respondent, individually, and the motion to dismiss should have been denied. Therefore, the trial court committed reversible error when it entered its Order granting Respondent's Motion to Dismiss.

CONCLUSION

The Supreme Court has made clear that the provisions of the Uniform Limited Liability Company Act of 1996 – specifically S.C. Code Ann. § 33-44-303(a) – only protects non-tortfeasor members from vicarious liability and does not insulate the tortfeasor himself from personal liability for his actions. As set forth herein, Appellant alleged facts sufficient to justify personal liability against Respondent. As such, the trial court erred in dismissing Respondent, and the Order of the trial court should be reversed.

Respectfully submitted,

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