

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Cary E. Fechter, MD,
Plaintiff,

v.

Leon Martin Ortner, The Ortner Law Firm,
LLC, Gerald Rosenthal, and Rosenthal, Levy,
Simon, and Ryles,

Defendants.

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.: 2017-CP-10-04371

**ORDER DENYING MOTION TO
DISMISS**

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SC Court of Appeals

Presiding Judge:
Plaintiff's Attorney:
Defendants' Attorneys:

Hon. Deadra L. Jefferson
Melvin Bannister, Esq.
Justin P. Novak, Esq.
M. Dawes Cooke, Jr., Esq.

Date of Hearing:
Court Reporter:

January 9, 2019
Karen Andersen

2019 APR -5 AM 11:51
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

This matter came before the Court on January 9, 2019, upon Defendants Leon Martin Ortner and The Ortner Law Firm, LLC's Motion to Dismiss, filed January 8, 2018. Present at the hearing were M. Dawes Cooke, Jr., Esquire and Justin P. Novak, Esquire, as counsel for Defendants Leon Martin Ortner and The Ortner Law Firm, LLC Inc., and Melvin D. Bannister, Esquire as counsel for Plaintiff Cary E. Fechter, MD.

ALLEGATIONS

In the Complaint, filed August 25, 2017, Plaintiff alleges causes of action against Defendants Leon Martin Ortner and The Ortner Law Firm, LLC Inc. ("Ortner Defendants") and Defendants Gerald Rosenthal and Rosenthal, Levy, Simon, and Ryles ("Rosenthal Defendants") for breach of contract, fraud, breach of contract with fraudulent intent, unfair trade practices, and pre-judgment interest arising from allegations that Plaintiff should be further compensated for the

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performance of certain medical examinations and the issuance of medical reports for claimants involved in a workers' compensation case. (See Compl.) According to the Complaint, the Ortner Defendants retained Plaintiff to perform the medical examinations and provide the reports in 2002. (Compl. ¶ 5.) The Complaint also alleges that the Rosenthal Defendants paid Plaintiff the sum of Twenty-Five Thousand (\$25,000) Dollars for the examinations and reports of fifty claimants. (Compl. ¶ 12.) Plaintiff, however, alleges making initial examinations and reports for approximately 458 claimants. (Compl. ¶ 13.) The Complaint also alleges that the Ortner Defendants and Rosenthal Defendants agreed to pay for all medical treatment charges not covered by insurance and to make payment in full upon settlement or verdict. (Compl. ¶ 15-16.)

The Ortner Defendants move to dismiss Plaintiff's Complaint on the grounds that the Circuit Court has been divested of jurisdiction to hear and determine these claims because the South Carolina Workers' Compensation Commission ("Commission") previously exercised exclusive original jurisdiction over the claims asserted in the Complaint. The Ortner Defendants also move to dismiss Plaintiff's Complaint on the grounds that Plaintiff's failure to seek review of the Commission's determination constitutes a bar to further litigation of the claims, and that Plaintiff is barred from re-litigating the claims because the Commission actually and necessarily directly determined the material facts and issues of law sought to be litigated. Finally, the Ortner Defendants move to dismiss Plaintiff's Complaint on the basis of insufficient service of process because Plaintiff failed to serve the Summons and Complaint within the statute of limitations¹, and that the Complaint fails to plead facts sufficient to constitute the Unfair Trade Practices cause of action.

¹ At the call of the motion, Defense Counsel informed the Court that it was withdrawing the motion to dismiss the case based on insufficient service of process grounds. However, by doing so was not waiving the right to raise it at a later date.

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While awaiting the hearing of the Motion to Dismiss, on October 3, 2018, counsel for Plaintiff served a Notice of Deposition for Leon Martin Ortner.² In response, counsel for the Ortner Defendants served and filed the Objection to Notice of Deposition of Leon Martin Ortner and Motion for Protective Order Staying Discovery and Other Proceedings, in which the Ortner Defendants move to stay all discovery and other proceedings and strike the action from the jury trial roster until disposition of the pending Motion to Dismiss.³

FACTUAL BACKGROUND⁴

The Ortner Defendants were retained to represent claimants (“Nevamar Claimants”) in a worker’s compensation action – Sadie Adams, et al., v. International Paper Company and Nevamar Company, LLC (WCC File No. 0326995) – against employer International Paper Company and Nevamar Company, LLC (“Nevamar Defendants”). On or about October 2005, Plaintiff was retained by the Rosenthal Defendants to perform independent medical examinations and make independent reports on the Nevamar Claimants. The parties agreed that the Plaintiff was to be paid the sum of Five Hundred (\$500.00) Dollars for the initial medical examination and report for each of the Nevamar Claimants, and additional sums for subsequent examinations and reports. The Plaintiff also contends that the Ortner and Rosenthal Defendants agreed to pay the Plaintiff for pulmonary function tests, stress tests, sleep study examinations, and for medical treatment provided that was not covered by the Nevamar Claimants health insurance policies. In 2006, the Ortner Defendants associated with the Rosenthal Defendants, and the latter affirmed the contract with the Plaintiff agreeing to pay for the services rendered. The parties dispute the number of

² Although the document sent to opposing counsel is captioned as an “Acceptance of Service”, the document appears, in fact, to be an effort to notice the deposition of Leon Martin Ortner.

³ A Form 4 Order was filed on January 16, 2019 disposing of the Motion for Protective Order as Moot as the Court’s ruling on the Motion to Dismiss is dispositive.

⁴ This statement of the procedural history is drawn from the pleadings and from matters outside the pleadings which the parties introduced in challenge to the circuit court’s jurisdiction.

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Nevamar Claimants the Plaintiff was retained to evaluate. The Plaintiff contends that he met with more than 600 current and former Nevamar employees, and made initial examinations and reports to approximately 458 Nevamar Claimants. Conversely, the Rosenthal Defendants assert that they hired him to evaluate up to fifty (50) Nevamar Claimants, and that the Plaintiff unilaterally and voluntarily chose to continue treating Nevamar Claimants as regular patients separately from the worker's compensation litigation. In 2010, the Plaintiff invoiced the Rosenthal Defendants seeking payment of funds in addition to the Twenty-Five Thousand (\$25,000.00) Dollar retainer amount. The parties do not dispute the Twenty-Five Thousand (\$25,000.00) Dollars paid to the Plaintiff for 50 of the Nevamar Claimants. However, there are conflicting accounts among the parties as to whether a written contract existed between the parties. The Rosenthal Defendants assert that the only document that reflects an agreement between it and the Plaintiff is a 2010 letter from the Rosenthal Defendants to Dr. Fechter sent in response to the Plaintiff's aforementioned invoice that confirms a \$25,000 retainer was paid for up to fifty evaluations. The Plaintiff asserts that after he would forward an invoice for his fees, he would receive a letter signed by Leon Martin Ortner that stated, in part, as follows: "Please be advised that this Law Firm represents the above-named individual(s) for injuries sustained on or about the above referenced date... Please be advised that your fee will be protected in this matter and that you will be paid in full upon settlement or verdict in this case." The Plaintiff asserted a right to further compensation arising from his evaluation and treatment of the Nevamar Claimants in his deposition testimony taken in the Nevamar action on November 2, 2015. (WCC File No. 0326995 Or. Granting Mot. to Release Funds 6-7, Jan. 26, 2016; WCC File No. 0326995 Reply to Mot. to Release Funds, Dec. 2, 2015).

On April 1, 2014, the Nevamar Claimants in Sadie Adams, et al., v. International Paper Company and Nevamar Company, LLC (WCC File No. 0326995) collectively settled their

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workers' compensation claims at mediation. (WCC File No. 0326995 Consent Order ¶ 5, July 22, 2014.) Pursuant to the settlement agreement, the Nevamar Defendants deposited the settlement funds into a qualified fund to be administered by a special referee from which all attorneys' fees and costs were also to be distributed upon approval of the South Carolina Workers' Compensation Commission ("Commission"). (Id.)

On November 13, 2015, the special referee reported holding in trust Five Hundred Thousand Dollars in approved costs pending instructions from the claimants' attorneys regarding final disbursement or an order from the Commission. (WCC File No. 0326995 Initial Report of the Special Referee ¶ 1(b), Nov. 13, 2015.) On December 10, 2015, Commissioner Aisha Taylor approved the special referee's decisions regarding the settlement proceeds. (WCC File No. 0326995 Order ¶¶ 2-3, Dec. 10, 2015.)

On November 18, 2015, the Rosenthal Defendants submitted to Commissioner Taylor a motion to release the funds held on deposit for the reimbursement of approved costs incurred on behalf of the Nevamar Claimants. (WCC File No. 0326995 Mot. to Release Funds, Nov. 18, 2015.) The Rosenthal Defendants properly served Plaintiff with the motion. (WCC File No. 0326995 Or. Granting Mot. to Release Funds 3, Jan. 26, 2016.) In the motion, the Rosenthal Defendants sought the release of all of the funds held in trust to the Rosenthal Defendants. (Id. at 1.) The motion specifically asserted that Commissioner Taylor should deny any claims to the funds made by Plaintiff on the grounds that Plaintiff cannot establish any contractual right to any further payment. (Id.)

On November 30, 2015, the Ortnier Defendants submitted a reply to the motion, similarly serving Plaintiff. (WCC File No. 0326995 Reply to Mot. to Release Funds, Dec. 2, 2015; WCC File No. 0326995 Or. Granting Mot. to Release Funds 3, Jan. 26, 2016.) In the reply, the Ortnier

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Defendants requested that Commissioner Taylor inquire into Plaintiff's claims to additional payment and issue an order determining the rights of all concerned parties to the funds being held in trust. (Id. at ¶ 1.) The Ortner Defendants made no claim to the funds. (Id.) The Ortner Defendants instead sought complete adjudication of the rights and responsibilities of all parties to any monies which may be owed to Plaintiff. (Id. at ¶ 6.)

Plaintiff did not respond to the motion or to Ortner's reply. (WCC File No. 0326995 Or. Granting Mot. to Release Funds 3, Jan. 26, 2016.) On January 26, 2016, Commissioner Taylor ordered the release of the totality of the funds held in trust to the Rosenthal Defendants. (Id.) In the order, Commissioner Taylor specifically found that: (1) Plaintiff was properly served with the Motion to Release Funds and the Reply of Leon Martin Ortner to the Motion to Release Funds and failed to respond, (2) Plaintiff failed to establish entitlement to any funds in addition to those previously received, (3) Plaintiff cannot establish any contractual arrangement that would entitle Plaintiff to any additional funds, (4) no agreement exists obligating the Ortner Defendants or Rosenthal Defendants to pay for any of the additional services performed by Plaintiff, and (5) Plaintiff is not being deprived of any payment due. (Id. at 3, 5, 6-7.) Plaintiff was served with the Order Granting Motion to Release Funds on January 27, 2016. (Id. at 10.) Plaintiff did not appeal the order. Instead, Plaintiff filed the subject Summons and Complaint in this Court on August 25, 2017. Defendants Leon Martin Ortner and The Ortner Law Firm, LLC filed the subject Motion to Dismiss on January 8, 2018.

CONCLUSIONS OF LAW

I. Lack of Subject Matter Jurisdiction

"Jurisdiction is generally defined as 'the authority to decide a given case one way or the other.'" Limehouse v. Hulsey, 404 S.C. 93, 104, 744 S.E.2d 566, 572 (2013) (quoting 32A.

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Am.Jur.2d Federal Courts § 581 (2007)). “Specifically, ‘Jurisdiction is composed of three elements: (1) personal jurisdiction; (2) subject matter jurisdiction; and (3) the court’s power to render the particular judgment requested.’” Id. (quoting Indep. Sch. Dist. No. 1 of Okla. County v. Scott, 15 P.3d 1244, 1248 (Okla. Civ. App. 2000)). “Without jurisdiction, a court cannot proceed at all in any cause; jurisdiction is the power to declare law, and when it ceases to exist, the only function remaining to a court is that of announcing the fact and dismissing the cause.” Id. (quoting 32A Am.Jur.2d Federal Courts § 581 (2007)). The Constitution of the State of South Carolina provides that “[t]he Circuit Court shall be a general trial court with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts[.]” S.C. CONST Art. V, § 11. Accordingly, “[w]hile the circuit court has subject matter jurisdiction over [general classes of] claims, certain cases may be taken from the circuit court’s original jurisdiction by the General Assembly.” Poch v. Bayshore Concrete Products/South Carolina, Inc., 386 S.C. 13, 22, 686 S.E.2d 689, 694 (Ct. App. 2009). For example, “[t]he General Assembly has vested the South Carolina Workers’ Compensation Commission with exclusive original jurisdiction over employees work-related injuries.” Posey, 378 S.C. at 223, 661 S.E.2d at 402 (citing Sabb v. S.C. State Univ., 350 S.C. 416, 423, 567 S.E.2d 231, 234 (2002)). As a result, “a Workers’ Compensation action is the exclusive means to determine claims against an individual’s employer for work-related accidents and injuries.” Id. at 224, 661 S.E.2d at 403.

As part of this exclusive original jurisdiction, the Commission has the authority to determine all questions relating to workers’ compensation claims, including the approval and disbursement of costs incurred in the prosecution of a claim. S.C Code Ann. § 42-3-180 (2001) (“All questions arising under this title, if not settled by agreement of the parties interested therein with the approval of the commission, shall be determined by the commission, except as otherwise provided in this

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title.”); S.C. Code Ann. Regs. § 67-1206 (2001) (“[A]n attorney may request approval of the actual costs incurred in the prosecution of a claim [including] expenses associated with the evaluation or treatment of the client.”). The Ortner Defendants cite Labouseur to support their claim that the Commission has the power to decide questions that are ancillary to the determination of the employee’s right to compensation. Compare Labouseur v. Harleysville Mutual Insurance Company, 302 S.C. 540, 543, 397 S.E.2d 526, 528 (1990) with Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 101, 674 S.E.2d 524, 529 (Ct. App. 2009) (reversing the trial court’s dismissal of Capital City’s complaint on the grounds that a simultaneous administrative hearing regarding a modifier did not divest the circuit court of its power to hear claims of breach of contract and fraud) and Roper Hosp. v. Clemons, 326 S.C. 534, 484 S.E.2d 598 (Ct. App. 1997) (affirming the circuit court’s refusal to reopen a settled Workers’ Compensation case because the health care provider lacked standing under the Workers’ Compensation Act).

In Labouseur, the employer – Labouseur – sued its workers’ compensation insurance carrier and agent for wrongful cancellation of its 1985-86 policy. Labouseur, 302 S.C. at 541, 397 S.E.2d at 527. During the aforementioned policy year, an employee of Labouseur was injured on the job in June of 1986. Id. Thereafter, Labouseur was forced to hire counsel and defend his employee’s claims due to the contested cancellation. Id. Prior to the Commission determining whether the employee’s claims were compensable, Labouseur brought suit in circuit court against the insurance carrier and agent. Id. The Supreme Court held that “when there is a pending employee claim for compensation, the exclusive jurisdiction for the determination of questions concerning cancellation, coverage, construction, of insurance contracts, and the like, is in the Workers’ Compensation Commission. [Likewise], when there exists no pending employee claim

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for compensation, the Commission lacks the jurisdiction to decide such questions.” Id. at 543, 397 S.E.2d at 528.

Conversely, in Capital City, BP Staff sought workers’ compensation coverage and the case was assigned to Capital City through the South Carolina Department of Insurance Workers Compensation Assigned Risk Insurance Plan. Capital City Ins. Co., 382 S.C. at 96, 674 S.E.2d at 526. BP Staff was assigned an “experience modifier” that BP Staff appealed from September of 2002 to August of 2006, which ultimately culminated in the modifier being affirmed by the Administrative Law Court (“ALC”). Id. Prior to the modifier being affirmed by the ALC, Capital City commenced breach of contract and fraud claims against BP Staff that were later dismissed by the trial court on the grounds that the “modifier dispute was the linchpin regarding any and all disputes between the parties,” and the ALC was the proper forum. Id. at 98, 674 S.E.2d at 527. The Court of Appeals held that “Capital City’s breach of contract and fraud claims are part of the general class of cases which the court of common pleas has jurisdiction to hear[,] and the mere fact that Capital City was also engaged in an administrative proceeding regarding the modifier did not divest the circuit court of its power to hear and determine the claims of breach of contract and fraud.” Id. at 101, 674 S.E.2d at 529.

Similarly, in Clemons, Roper Hospital treated Wesley Clemons from November 1991 to January 1992 for back injuries he allegedly sustained while employed with John Weiland Homes. Roper Hosp. v. Clemons, 326 S.C. 534, 536, 484 S.E.2d 598, 599 (Ct. App. 1997). Zurich Insurance (“Respondent”) asserted that Mr. Clemons medical expenses in the amount \$83,172.05 were not related to a compensable injury and denied coverage. Id. Mr. Clemons and Respondent entered a lump sum settlement agreement, which was approved by the Commission, and Roper Hospital moved to reopen the case, claiming it was entitled to payment for Mr. Clemons’ medical

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bills. Id. The Court of Appeals affirmed the decision of the single commissioner that Roper Hospital was not entitled to relief or standing, and held that “[n]owhere in the [Workers’ Compensation] Act is there a provision to allow any party, *other than the employee and the employer* to participate in the Commission’s proceedings...[and] Appellant clearly has a cause of action against the patient/employee for services rendered based on common law.” Id. at 539, 484 S.E.2d at 600 (emphasis added).

The Court does not find the decision in Labouseur to be controlling in the present case. Here, the dispute is not one that arises under the Workers’ Compensation Act (“the Act”). On the contrary, this action arises out of an alleged contract between two non-parties to the underlying workers’ compensation action, which ultimately falls under South Carolina’s common law and within the purview of this Court. Though the Commission has the authority to determine the disbursement of costs incurred in prosecuting a workers compensation claim (including expenses associated with the evaluation or treatment of the client/claimant), the Commission is not empowered with exclusive jurisdiction to determine claims that do not affect the employee’s right to compensation. See Labouseur, 302 S.C. at 543, 397 S.E.2d at 528 (asserting that the Commission could not adjudicate the claims between the insured and its carrier and agent in a meaningful way absent the pending employee claim for compensation); See also Price v. Peachtree Elec. Servs., Inc., 396 S.C. 403, 721 S.E.2d 461 (Ct. App. 2011), aff’d as modified, 405 S.C. 455, 748 S.E.2d 229 (2013) (“Claims not affecting the employee’s right to compensation are within the purview of the circuit court, not of the Commission.”).

Like the Appellant in Capital City Ins. Co., the Plaintiff has asserted claims for breach of contract and fraud, which the Court of Appeals determined were in the general class of cases this Court is empowered to hear. The dispute between the Plaintiff and the Ortner Defendants here is,

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principally, not one arising under the Act, since the Act's sole purpose is to establish the rights of an employer and employee. Though the single commissioner, in her Order Granting the Motion to Release Funds, found that the Plaintiff lacked any rightful claim to the funds being held in trust, the Court finds this Order has no preclusive effect as the Plaintiff and Defendants were not parties to the underlying Workers' Compensation action and thereby, have retained their rights to pursue any claims pursuant to common law principles Contract or otherwise. The findings by the single commissioner comport with the commission's authority to determine the disbursement of costs including reasonable expenses associated with the evaluation and treatment of the claimants. However, the facts as alleged in this case contend that a separate contract for payment was entered into by and between the parties of which the commissioner would have had no jurisdiction to adjudicate. For the foregoing reasons, this Court does not lack subject matter jurisdiction and the Ortner Defendant's Motion to Dismiss pursuant to Rule 12(b)(1), SCRCF is hereby denied.

II. Exhaustion of Administrative Remedies

"The South Carolina Supreme Court has indicated that dismissal may be proper under Rule (12)(b)(6), SCRCF, for failure to state a claim where the opposing party is required to exhaust its administrative remedies as a matter of law, but failed to do so." Capital City Ins. Co., 382 S.C. at 102, 674 S.E.2d at 529. The doctrine of exhaustion of administrative remedies is applicable "when a litigant attempts to invoke the original jurisdiction of a circuit court to adjudicate a claim based on a statutory violation for which the legislature has provided an administrative remedy." Id. (citing Thomas Sand Co. v. Colonial Pipeline Co., 349 S.C. 402, 413, 563 S.E.2d 109, 115 (Ct. App. 2002)). Accordingly, litigants are required to exhaust the available administrative remedies prescribed in the Act prior to seeking review of a commissioner's determination. See Unisys Corp. v. S.C. Budget & Control Bd., 346 S.C. 158, 176, 551 S.E.2d 263, 273 (2001) (affirming that a

failure to exhaust administrative remedies precludes original resort to courts where an administrative agency is granted exclusive jurisdiction by the express terms of a statute). However, “[a] party is not required to exhaust administrative remedies if the issue is one that cannot be ruled upon by the administrative body.” Capital City Ins. Co., 382 S.C. at 102, 674 S.E.2d at 529 (citing Charleston Trident Home Builders, Inc. v. Town Council of Town of Summerville, 369 S.C. 498, 502, 632 S.E.2d 864, 867 (2006)).

As stated above, the Plaintiff’s causes of action in the present case did not affect the Nevamar Claimants’ – the employees in the underlying workers’ compensation case – right to compensation, and, thus, the Plaintiff had no meaningful ability to exhaust his claims before the Commission. By virtue of the funds held in trust specifically for the Nevamar Claimants, the Ortner Defendants have failed to show how the Plaintiff’s claims effected the right of the employees to recover from the Nevamar Defendants. Pursuant to an approved settlement agreement, the Nevamar Claimants’ injuries were clearly found to be compensable under the Act. In fact, the Special Referee, in his initial report, indicated that One Million Five Hundred Thousand (\$1,500,000.00) Dollars would be held in trust for the 304 Nevamar Claimants. Therefore, the Plaintiff’s claims for breach of contract, fraud, breach of contract with fraudulent intent, unfair trade practices, and pre-judgment interest against the Ortner Defendants in no way affected the ultimate issue determined by the Commission – the Nevamar Claimant’s right to compensation. Since the claims asserted by the Plaintiff are not of the type that can be adjudicated by the Commission, but are of the class of cases reserved for the circuit court, the Ortner Defendants Motion to Dismiss pursuant to 12(b)(3) and 12(b)(6) is hereby denied.

III. Relitigation of Plaintiff’s Claims

“Collateral estoppel prevents a party from re-litigating an issue in a subsequent suit which was actually and necessarily litigated and determined in a prior action.” Crosby v. Prysmian

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Communications Cables and Systems USA, LLC, 397 S.C. 101, 108, 723 S.E.2d 813, 816-17 (Ct. App. 2012). Accordingly, “under the doctrines of res judicata and collateral estoppel, the decision of an administrative tribunal precludes the relitigation of the issues addressed by that tribunal in a collateral action.” Bennett v. S.C. Dep’t. of Corr., 305 S.C. 310, 312, 408 S.E.2d 230, 231 (1991). In addition, “[e]quitable estoppel precludes a party from asserting rights ‘he otherwise would have had against another’ when his own conduct renders assertion of those rights contrary to equity.” Pearson v. Hilton Head Hosp., 400 S.C. 281, 290, 733 S.E.2d 597, 601 (Ct. App. 2012) (quoting Long v. Silver, 248 F.3d 309, 316 (4th Cir. 2001)). Lastly, a party may also voluntarily and intentionally relinquish or abandon a known right. Strickland v. Strickland, 375 S.C. 76, 83-86, 650 S.E.2d 465, 469-71 (2007) (discussing the doctrine of waiver and laches). “Laches is an equitable doctrine defined as ‘neglect for an unreasonable and unexplainable length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.’” Id. at 83, 650 S.E.2d at 469 (quoting Hallums v. Hallums, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988)). “In order to establish laches as a defense, a defendant must show that the complaining party unreasonably delayed its assertion of a right, resulting in prejudice to the defendant.” Id. “The equitable doctrine of laches is equivalent to the legal doctrine of waiver, which is the ‘voluntary and intentional relinquishment or abandonment of a known right[.]’” Id. at 85, 650 S.E.2d at 470.

Here, the Plaintiff had no meaningful opportunity to adjudicate his common law claims before the Commission. Moreover, the Plaintiff was not a party with standing before the Commission as the Act establishes the rights of an employer and employee dispute. As stated above, the Plaintiff had no duty to exhaust administrative remedies that were tenable at best, because the causes of action set forth in his Complaint are in the original purview and jurisdiction

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of this Court. The Commissioner was empowered to determine the actual costs incurred in the prosecution of the claims and necessarily determined those costs in ordering the disbursement of the settlement funds. However, the Commissioner could not and did not actually and necessarily determine the material facts and issues of law underlying the Plaintiff's claims for breach of contract, fraud, breach of contract with fraudulent intent, unfair trade practices, and pre-judgment interests. Therefore, the Ortner Defendants' Motion to Dismiss pursuant to Rules 12(b)(3) and 12(b)(6), SCRCF is hereby denied.

IV. Failure to State a Claim under South Carolina Unfair Trade Practices Act

"A motion to dismiss pursuant to Rule 12(b)(6) must be based solely on the allegations set forth in the complaint and we must presume all well-pled facts to be true." Gressette v. South Carolina Elec. and Gas Co., 370 S.C. 377, 378-79, 635 S.E.2d 538, 538 (2006). "The circuit court, in a civil action, may dismiss a claim when the *defendant* demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court. The motion cannot be granted if the facts set forth in the complaint and the inferences reasonably drawn therefrom would entitle the plaintiff to any relief on any theory of the case." Sloan Constr. Co., Inc. v. Southco Grassing, Inc., 368 S.C. 523, 525-26, 629 S.E.2d 372, 373 (Ct. App. 2006) (emphasis added). This remedy is considered "drastic" and the pleadings should be "construed liberally" so that "substantial justice is done between the parties." Overcash v. SCE&G, 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005). In the light most favorable to the Plaintiff based solely on the allegations set forth on the face of the complaint with every doubt resolved in his favor the Motion to Dismiss for failure to state a claim under the South Carolina Unfair Trade Practices Act is heard and respectfully denied.

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IT IS SO ORDERED!



HON. DEADRA L. JEFFERSON
Presiding Judge
Ninth Judicial Circuit

14th day of April, 2019
Charleston, South Carolina

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