

STATE OF SOUTH CAROLINA
In the Court of Common Pleas

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

HON. MAITE M. MURPHY, CIRCUIT COURT JUDGE
Civil Action No.: 2017-CP-02-00283
Appellate Case No.: 2019-001142

Appellant's Initial Brief

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STATEMENT OF ISSUES ON APPEAL

- I. THE LOWER COURT'S DECISION CONTAINED NUMEROUS ERRORS OF FACT THAT WERE WHOLLY UNSUPPORTED BY THE RECORD
- II. THE LOWER COURT ERRED IN FINDING THAT RESPONDENT'S DELAY IN FILING ITS MOTION TO DISMISS WAS NOT UNREASONABLE DELAY UNDER *MAYBANK V. BB&T CORP.*
- III. THE LOWER COURT'S DECISION WAS CONTROLLED BY TWO SUBSTANTIVE ERRORS OF LAW AND MUST BE REVERSED

STATEMENT OF THE CASE

Appellant filed a complaint in Aiken County alleging conversion of certain vault contents belonging to Appellant on February 8, 2017. On January 19, 2018, the parties received notice that this matter was scheduled for trial during the week of February 26, 2018. Respondent made a motion to dismiss based on lack of jurisdiction two weeks after that notice, little more than three weeks before it was scheduled for trial. A hearing was held on April 2, 2018. The motion was granted on May 11, 2018. Appellant filed a motion for reconsideration on May 21, 2018. Judge Murphy denied the motion for reconsideration on June 13, 2019. This appeal was timely filed and served on July 12, 2019.

STATEMENT OF THE FACTS

Appellant has been a citizen and resident of South Carolina since 2010. In 2007, Respondent filed a proof of claim in the Chapter 11 Bankruptcy of Appellant's business.

Original Proof of Claim. In that proof of claim, Respondent asserted under oath that it held certain jewelry and other valuables owned by Appellant in its vault as collateral on the business loan.

In 2010, while a citizen of South Carolina, Appellant requested all documents related to his property, loans, and personal guarantees be provided by Respondent. Respondent provided no information about the personal items it claimed it held in the vault. ***Appellant Affidavit.***

In 2016, Appellant again requested an accounting of the items in the vault. It was at this point, for the first time, that Respondent claimed the items were "removed" from the vault in 2004. This assertion directly contradicted the sworn Proof of Claim filed in Bankruptcy. Appellant subsequently filed a lawsuit on February 8, 2017. Plaintiff alleged that sometime between 2007 and 2016, the contents of the vault were converted by Respondent. The Complaint did not allege that the filing of a proof of bankruptcy claim was a tortious act of any kind. The basis for jurisdiction was the South Carolina Long Arm Statute, S.C. Code § 36-2-803.

While Respondent did claim that this Court lacked personal jurisdiction over it in its Answer, Respondent filed a counterclaim in this Court, engaged in written discovery, deposed Appellant, and waited approximately one year before seeking dismissal based on lack of jurisdiction. The motion was not filed until after this case appeared on a trial roster in Aiken County. On February 2, 2018, Respondent filed its motion to dismiss. A hearing was held on April 2, 2018 at which Appellant clearly explained the legal arguments of Appellant to the lower

court. Counsel for Appellant clearly stated in that hearing that: (1) the basis of the tort was not the filing of any proof of claim but the conversion of the property while Appellant was a citizen of South Carolina; and (2) the basis for long arm jurisdiction was the commitment of tort against a citizen of South Carolina. **T., p.13, l.9 through p.15, l.18.** Despite these specific, unambiguous arguments, the lower court made findings of fact and law that are wholly unsupported by the record.

The lower court eventually granted the motion to dismiss on May 11, 2018. There were numerous errors in the Order dismissing the case, including the baseless finding that Appellant's primary claim was that the filing of a bankruptcy proof of claim was a "tort." Appellant filed a motion to reconsider directing the Court's attention to those obvious errors. Respondent filed a response actually admitting to several of the errors. ***Response to Motion to Reconsider.*** Regardless, the lower court denied the motion to reconsider with a Form 4, correcting none of the errors.

ARGUMENTS

Standard of Review

The question of personal jurisdiction over a nonresident Respondent is one which must be resolved upon the facts of each particular case. *Engineered Prods. v. Cleveland Crane & Eng'g*, 262 S.C. 1, 201 S.E.2d 921 (1974). The decision of the trial court should be affirmed unless unsupported by the evidence or influenced by an error of law. *Engineered Prods.*, 262 S.C. at 4, 201 S.E.2d at 922; *see also Hammond v. Cummins Engine Co.*, 287 S.C. 200, 336 S.E.2d 867 (1985) (stating that this Court is bound by Circuit Court's finding that nonresident Defendant is subject to its jurisdiction absent determination that Circuit Court's ruling is without evidentiary support or controlled by error of law); *Industrial Equip. Co. v. Frank G. Hough Co.*, 218 S.C. 169, 173, 61 S.E.2d 884, 885 (1950) ("This Court has adhered to the rule that a finding by the Circuit Court as to jurisdiction or lack of jurisdiction will not be disturbed on appeal unless wholly unsupported by the evidence or manifestly influenced or controlled by error of law.").

It is well-settled that the party seeking to invoke personal jurisdiction over a non-resident Defendant via our long-arm statute bears the burden of proving the existence of personal jurisdiction. *Southern Plastics Co. v. Southern Commerce Bank*, 310 S.C. 256, 423 S.E.2d 128 (1992); *Aviation Assocs. & Consultants, Inc. v. Jet Time, Inc.*, 303 S.C. 502, 402 S.E.2d 177 (1991); *South Carolina Dep't of Soc. Servs. v. Basnight*, 346 S.C. 241, 551 S.E.2d 274 (Ct. App. 2001). At the pretrial stage, the burden of proving personal jurisdiction over a nonresident is met by a prima facie showing of jurisdiction either in the complaint or in affidavits. *Mid-State Distribs., Inc. v. Century Importers, Inc.*, 310 S.C. 330, 426 S.E.2d 777 (1993); *White v. Stephens*, 300 S.C. 241, 387 S.E.2d 260 (1990); *International Mariculture Res. v. Grant*, 336 S.C. 434, 520 S.E.2d 160 (Ct. App. 1999).

I. THE LOWER COURT'S DECISION CONTAINED NUMEROUS ERRORS OF FACT THAT WERE WHOLLY UNSUPPORTED BY THE RECORD

Appellant's motion to reconsider made 12 specific arguments with regards to errors in the lower court's Order dismissing the case. Respondent admitted at least 4 of these errors in its response to Appellant's motion. While some of the errors were harmless with regard to the ultimate issue decided, several of the errors were substantive and all of them are wholly unsupported by the record. For purposes of efficiency, only the substantive factual errors will be addressed herein.

Appellant never claimed that the filing of a bankruptcy proof of claim constituted a tort

This is a foundational fact upon which the lower court relied in reaching its decision and it is absolutely false. There are no documents submitted by Appellant that led any support to this finding and counsel for Appellant specifically rejected such an argument at the hearing. Moreover, any judicial filing or act is protected in South Carolina under the theory of judicial immunity and/or absolute immunity. Yet, the very first sentence of the "Argument" section of the Order states that the entirety of the lower court's ruling is premised on this false finding of fact. It is clear that this factual finding is (1) false and (2) necessarily controlled the decision of the lower court. Therefore, the Order must be reversed on this error alone.

Appellant did present a viable theory of personal jurisdiction in the Complaint

The Order found that "it is clear from the evidence presented that Plaintiff's underlying theory of long arm jurisdiction was lacking in the original Complaint, and further, was not rectified by any subsequent Affidavit of the Plaintiff." *Order*, p.4. This finding is without any support anywhere in the record. The theory of jurisdiction was clearly laid out in the Complaint and further supported by the Affidavit of Plaintiff. More importantly, it was specifically argued to the lower court at the hearing. The entirety of Appellant's jurisdictional argument is based on a single,

uncomplicated theory based on the long-arm statute: Respondent converted the property of Appellant while he was a citizen of South Carolina. This was pled in the Complaint, reiterated to the lower court during the oral arguments at the hearing, and reiterated again in the motion to reconsider. Yet the lower court refused to acknowledge this indisputable fact without any explanation of justification. Once again. It is a material finding of fact that controlled the decision of the lower court, requiring a reversal of the lower court order.

II. THE LOWER COURT ERRED IN FINDING THAT RESPONDENT'S DELAY IN FILING ITS MOTION TO DISMISS WAS NOT UNREASONABLE DELAY UNDER *MAYBANK V. BB&T CORP*

Defendant waived any defense based on lack of *in personam* jurisdiction. The controlling case is *Maybank v. BB&T Corp.*, 416 S.C. 541, 787 S.E.2d 498 (2016). The Court in *Maybank* held that a Rule 12(h)(1), SCRCR, defense must be acted upon in a timely manner to be preserved. "A delay in challenging personal jurisdiction by motion to dismiss may result in waiver, even where the defense was asserted in a timely answer. ... Rule 12(h), FRCP, sets only the outer limits of waiver; it does not preclude waiver by implication." *Maybank v. BB&T Corp.*, 416 S.C. 541, 787 S.E.2d 498 (2016). In *Maybank*, the defendant raised the defense of lack of jurisdiction in its Answer, but failed to make a motion to dismiss until one month before trial. In addition, the defendant engaged in written discovery during the pendency of the action. Based on these facts, the Court found the defendant waived its defense based on lack of *in personam* jurisdiction.

The facts in this case are nearly identical to those in *Maybank*. On January 19, 2018, the parties received notice that this matter was scheduled for trial during the week of February 26, 2018. Defendant made this motion to dismiss two weeks after that notice, little more than three weeks before it was scheduled for trial. Also in this case, Defendant engaged in written discovery

and took the deposition of Plaintiff. Respondent inexplicably and unreasonably delayed in seeking a dismissal, resulting in a waiver of that defense under *Maybank*.

The lower court made argued that *Maybank* was distinguishable from this case because of the length of the delay was longer in *Maybank*. But this was fundamentally flawed. The defendant in *Maybank* removed the action to federal court, resulting in a motion to remand. Under federal law, the federal court could not make any decision with regards to personal jurisdiction prior to deciding the motion to remand. A federal court must remand for lack of subject matter jurisdiction notwithstanding the presence of other motions pending before the court. *See, e. g., Marathon Oil v. Ruhrgas*, 145 F.3d 211 (5th Cir. 1998) (holding that district court should have considered motion to remand for lack of subject matter jurisdiction before it addressed motion to dismiss for want of personal jurisdiction); *Toumajian v. Frailey*, 135 F.3d 648, 655 (9th Cir. 1998) (holding that district court should have remanded for lack of subject matter jurisdiction and should not have dismissed on grounds of ERISA preemption); *Avitts v. Amoco Prod. Co.*, 53 F.3d 690, 693 (5th Cir.1995) (per curiam) (holding that district court had no jurisdiction to order interim costs and attorneys' fees where action should have been immediately remanded for lack of subject matter jurisdiction); *In re Bear River Drainage Dist.*, 267 F.2d 849, 851 (10th Cir. 1959) (holding that motion to remand for lack of subject matter jurisdiction necessarily precedes motion to dismiss). Thus, the defendant in *Maybank* could not have obtained a ruling on any motion to dismiss filed in federal court before remand to state court.

The actual ruling in *Maybank* was based on two primary factors. First, the defendant waited more than a year after remand to state court before making its motion to dismiss. Second, the motion was not made until the trial date was approximately one month away. *See Maybank*,

at 565-566. The South Carolina Supreme Court specifically stated its reasoning in determining that the defendant waived its defense of personal jurisdiction:

In our opinion, BB&T Corporation gambled that it could argue personal jurisdiction on the eve of trial after actively participating in litigation over the course of two and a half years. *Maybank*, at 566.

This is exactly what Respondent did in this case. *Maybank* controls and this matter should be remanded for trial.

III. THE LOWER COURT'S DECISION WAS CONTROLLED BY TWO SUBSTANTIVE ERRORS OF LAW AND MUST BE REVERSED

At the pretrial stage, the burden of proving personal jurisdiction over a nonresident is met by a *prima facie* showing of jurisdiction either in the complaint or in affidavits. *Mid-State Distribs., Inc. v. Century Importers, Inc.*, 310 S.C. 330, 426 S.E.2d 777 (1993); *White v. Stephens*, 300 S.C. 241, 387 S.E.2d 260 (1990); *International Mariculture Res. v. Grant*, 336 S.C. 434, 520 S.E.2d 160 (Ct. App. 1999). However, the lower Court erred in finding that Appellant failed to establish a *prima facie* case for jurisdiction. Appellant's affidavit clearly establishes a *prima facie* case that Respondent committed a tort (conversion) while Appellant was a citizen and resident of South Carolina. He asked for all records pertaining to the collateral in 2010 and was given nothing. He asked again in 2016 and was told, for the first time, that the contents of the vault were removed prior to the bankruptcy. As specifically argued to the lower court, Appellant's *prima facie* claim is established through the (1) original bankruptcy claim filed by Respondent in 2007 which asserted under oath that it held the collateral in its vault; (2) the 2010 request for all records pertaining to his loans, his bank accounts, and any other dealings with Respondent that was never responded to; (3) the subsequent amended proof of claim that made no mention of the collateral or its disposition; (4) Appellant's affidavit that he has been a citizen of South Carolina since 2010; and (5) the first notice Appellant received that his collateral was no longer in the vault in 2016.

This establishes that between 2007 and 2016, the collateral was converted, and that Appellant was a citizen of South Carolina in 2010. Appellant recognizes that if the collateral was converted in 2007, 2008, or 2009, Respondent's argument gains validity. However, due to the conflicting representations of Respondent with regards to the vault contents, the issue of when the conversion happened is for the jury to determine. Even so, the dismissal by the lower court was an error and must be reversed.

The only "proof" offered by Defendant is an unverified, unsigned, sheet of paper they claim indicates the items were removed. The vice-president of Respondent admitted in his deposition that he never authorized the release of the collateral from the vault and the bank conducted no investigation of the removal of the collateral from the vault. More importantly, there is no affidavit or other legally admissible evidence from any person stating that they released the vault contents to the rightful owner, Appellant. Plaintiff specifically denies he received the items from the vault. *Appellant Affidavit.*

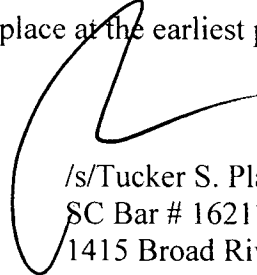
The lower court's failure to recognize that Appellant met its prima facie burden is a critical error of law that requires reversal. Once this error was made, it necessarily controlled the remaining analysis and findings of the lower court as there is no explanation of how a single, unverified sheet of paper with nothing but initials on it (which is directly contradicted by a sworn statement to a federal bankruptcy court) can overcome the prima facie case established by Appellant and justify a dismissal with prejudice. Therefore, the lower court must be reversed.

CONCLUSION

The lower court made numerous errors of law and fact that are completely unsupported by the record. This amounts to an abuse of discretion requiring reversal of the Order and remanding

for further proceedings. Therefore, Appellant respectfully requests that this Court reverse the Order dismissing this case and remand for trial to take place at the earliest possible convenience.

December 4, 2019



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Proof of Service

This is to certify that I, Tucker Player, served a copy of Appellant's Initial Brief and Designation of Matter to be Included on Appeal via U.S. Mail with sufficient postage affixed on December 5, 2019, addressed as follows:

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December 5, 2019
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