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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Doyet A. Early, Circuit Court Judge

Appellate Case No. 2019-000648
Civil Action No. 2018-CP-40-02425

Jefferson Davis, Jr. Appellant,

v.

Ellen Weaver, Chad Connelly, Oran P. Smith, Neil J. Mellen, Howard S. Rich, Rick Reams, Stephen D. Kirkland, Palmetto Promise Institute, Palmetto Family Council, Palmetto Family Action, South Carolinians for Responsible Government, SCRG Foundation, Access Opportunity South Carolina, Friedman Foundation for Educational Choice, Inc., Cato Institute, South Carolina Educational Credit for Exceptional Needs Children Fund, South Carolina Education Oversight Committee, South Carolina Dept. of Revenue, South Carolina Dept. of Labor, Licensing and Regulation, First Impressions, Inc. d/b/a/ Richard Quinn & Associates, First Tuesday Strategies, LLC, Bill Wilson, Jason Bedrick, Jim DeMint, Randy Page, Tony Denny, Phillip Cease, Melanie Barton, Doris Cubitt, Susan Thomas, John McCormick, Nate Leupp, Institute of Management Consultants USA & John Doe(s) 1-40 Respondents.

FINAL BRIEF OF RESPONDENT

SOUTH CAROLINA EDUCATIONAL CREDIT FOR EXCEPTIONAL NEEDS CHILDREN FUND

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June 17, 2020

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COUNTER-STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court properly dismissed Appellant Jefferson J. Davis' ("Plaintiff") claims against South Carolina Educational Credit for Exceptional Needs Children Fund ("ECENCF") where Plaintiff violated the trial court's Amended Order by failing to file and serve the Amended Complaint in accordance with the Amended Order.
2. Whether the trial court also properly dismissed Plaintiff's claims against ECENCF where the Amended Complaint fails to assert claims upon which relief can be granted because the Amended Complaint fails to make any factual allegations in support of any such claims against ECENCF.
3. Whether the trial court also properly dismissed Plaintiff's claims against ECENCF where another action is currently pending between the same parties for the same claim.

STATEMENT OF THE CASE¹

Respondent ECENCF is a domestic nonprofit entity created by a legislative budget proviso and incorporated in South Carolina on June 16, 2016. ECENCF grants scholarships to special needs students who may be better assisted by the services of private institutions. These scholarships are funded by private donations for which donors receive a state tax credit. On July 31, 2017, Plaintiff filed a Summons and Complaint for FOIA Enforcement in the Court of Common Pleas for the County of Greenville, Civil Action No. 2017-CP-23-04748, (“FOIA Action”) through which Plaintiff sought remedies and damages for ECENCF’s alleged failure to respond to Plaintiff’s requests for documents and information pursuant to the South Carolina Freedom of Information Act (“FOIA”). After venue for the FOIA Action was transferred to the Court of Common Pleas for Richland County, Civil Action No. 2017-CP-40-06976, on December 21, 2018, the Honorable DeAndrea Benjamin granted ECENCF’s motions for judgment on the pleadings and for summary judgment after determining that FOIA does not apply to ECENCF because it is not a “public body” as defined by FOIA. On January 7, 2019, Plaintiff moved for reconsideration of the order dismissing the action. Judge Benjamin denied Plaintiff’s Motion for Reconsideration. Plaintiff then served and filed a Notice of Appeal of the December 21, 2018 Order. Plaintiff’s appeal of the December 21, 2018 Order is currently pending in the South Carolina Court of Appeals as Appellate Case No. 2019-001231.

Plaintiff originally filed this action on May 3, 2018, against Ellen Weaver, Palmetto Promise Institute, and twenty unnamed parties referred to as John Does 1-20. In the original Complaint, Plaintiff asserted causes of action sounding in (1) defamation, (2) false light publicity,

¹ In the interest of economy, ECENC incorporates by reference the Statement of the Case found in the brief of co-Respondents Cato Institute and Howard S. Rich to supplement the included Statement of the Case.

(3) invasion of privacy, (4) negligence, (5) intentional infliction of emotional distress, (6) tortious interference with prospective contractual relations, (7) unfair trade practices, (8) pierce the corporate veil, and (9) conspiracy. The original Complaint did not name ECENCF as a party defendant.

On October 30, 2018, Judge Benjamin entered an Amended Order (“Amended Order”) dismissing the causes of action for false light publicity, tortious interference with prospective contractual relations, and unfair trade practices. The Amended Order also provided Plaintiff 15 days to amend the original Complaint to include additional facts to support the causes of action for invasion of privacy and civil conspiracy and commanded that “each John Doe referenced in the complaint shall be specifically named and served. This court allows the plaintiff 15 days to appropriately amend the pleadings.” (R. p. 8; October 30, 2018 Am. Order, at 3.)

In response to the Amended Order, on November 19, 2019, and four days after the trial court’s deadline in the Amended Order, Plaintiff filed a First Amended Complaint (“Amended Complaint”), which joined ECENCF as a named defendant along with numerous others. Plaintiff did not serve the Amended Complaint within the 15-day period set forth in the Amended Order. To the contrary, Plaintiff served the Amended Complaint on or about December 4, 2015. (R. p. 166; Dec. 10, 2018 Proof of Service – ECENCF.)

The Amended Complaint similarly alleges causes of action for (1) defamation, (2) defamation by innuendo, (3) invasion of privacy, (4) negligence, (5) intentional infliction of emotional distress, (6) tortious interference with prospective contractual relations, (7) unfair trade practices, (8) pierce the corporate veil, and (9) conspiracy. The Amended Complaint, however, fails even to mention ECENCF other than to: (a) identify it and its executive director; and (b) allege that another named defendant provides services to it, assisted it with fundraising and

once employed a current ECENCF employee. (*See* R. p. 32, ¶ 3; p. 35, ¶ 17; p. 63, ¶¶ 180, 185, 186; Am. Compl. ¶¶ 3, 17, 180, 185, 186.) The Amended Complaint does not otherwise reference ECENCF or specifically assert any cause of action against it. (*See generally* R. pp. 31-75; Am. Compl.)

On December 14, 2018, ECENCF served and filed a Motion to Dismiss the Amended Complaint, pursuant to South Carolina Rules of Civil Procedure 8(a), 12(b)(6) and 12(b)(8).² (*See* R. p. 168; Dec. 14, 2018 Mot. to Dismiss, at 1.) ECENCF supported this Motion with a Memorandum in Support of Motion to Dismiss on February 10, 2019. ECENCF argued, *inter alia*, that Plaintiff did not amend the original Complaint to include facts supporting its causes of action. Additionally, ECENCF argued that Plaintiff failed to properly amend within the 15 days permitted by the Amended Order. (*See* R. p. 342 n.2; ECENCF Mem. Supp. Mot. to Dismiss, at 3 n.2) (“Plaintiff failed to comply with the Amended Order by amending the pleadings on or before November 14, 2018.”).

On February 12, 2019, the Honorable Doyet A. Early heard oral arguments on ECENCF’s Motion to Dismiss. Subsequently, on February 19, 2019, Judge Early entered an Order dismissing Plaintiff’s claims against ECENCF (and others), stating:

The following day Judge Benjamin filed an Amended Order that, among other things, ordered plaintiff to amend his Complaint to name and serve each of the pseudonymous “John Doe” defendants, and gave him 15 days to do so. Plaintiff did not move to alter or amend that ruling, nor did he request any extension of the time period ordered by Judge Benjamin. . . . At the hearing, the Court noted the requirement in Judge Benjamin’s Amended Order that plaintiff serve the newly-added defendants within 15 days of the Amended Order, and inquired whether plaintiff had done so. Plaintiff acknowledged none of the new defendants had been served within the time period set by Judge Benjamin’s Amended Order.

² On December 14, 2018, ECENCF also served and filed a Motion for Protective Order seeking protection from Appellant’s “First Request for Production of Documents and Things To Defendant” dated December 7, 2018. (R. pp. 172-74; ECENCF Mot. Protective Order.)

The timely service of a Summons and Complaint is a prerequisite to the commencement of a civil action. *See generally* Rule 3, SCRCP. In the absence of service within the time period ordered by Judge Benjamin, no civil action was commenced against the new defendants. . . .

At the hearing on the instant motions, plaintiff acknowledged he had not complied with Judge Benjamin's Amended Order, but he argued the time limits imposed by that order were insufficient for the task at hand. His argument that more time was needed, however, falls short. Plaintiff did not seek to alter or amend Judge Benjamin's Amended Order, nor did he move for an extension of time to comply with it. Accordingly, the time limit imposed by the Amended Order is the law of the case, and it is well established that a judge of this Court cannot reverse or overrule a prior order of another judge of this Court.

(*See R.* pp. 11-12; Feb. 19, 2019 Order, at 2-3). In other words, Judge Early concluded that Plaintiff's failure to timely file *and serve* the Amended Complaint upon ECENCF required dismissal of the claims against ECENCF. As a result, Judge Early dismissed all claims against ECENCF with prejudice. After denial of Plaintiff's Motion for Reconsideration on March 27, 2019, Plaintiff filed this Notice of Appeal on April 13, 2019.

STANDARDS OF REVIEW

The trial court dismissed Plaintiff's claims against ECENCF for failing to comply with Judge Benjamin's October 30, 2018 Amended Order. The interpretation of an order is a question of law that is reviewed *de novo*. *Doe v. Bishop of Charleston*, 407 S.C. 128, 134, 754 S.E.2d 494, 498 (2014); *Ex parte TLC Laser Eye Centers, LLC*, 404 S.C. 385, 392, 745 S.E.2d 105, 109 (2013); *Town of Summerville v. City of North Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

The dismissal of Plaintiff's claims is also supported by the additional sustaining grounds that (1) the Amended Complaint fails to assert claims against ECENCF upon which relief can be granted because the Amended Complaint fails to make any factual allegations in support of any such claims and (2) another action is currently pending between the same parties for the same claim. In reviewing a trial court's dismissal for failure to state a claim pursuant to Rule 12(b)(6), SCRCF, an appellate court applies the same standard as the trial court—the pleadings must be construed liberally and all well-pled facts must be presumed true. *See Doe*, 407 S.C. at 134, 754 S.E.2d at 498-99. A claim should be dismissed when the facts alleged in the complaint do not support relief. *Brouwer v. Sisters of Charity Providence Hospital*, 409 S.C. 514, 519, 763 S.E.2d 200, 202 (2014). The prejudicial effect of a dismissal is determined by the trial court's exercise of its discretion, which will be reversed only for an abuse of discretion. *See Berry v. McLeod*, 328 S.C. 435, 449-50, 492 S.E.2d 794, 802 (Ct. App. 1997); *Newman v. Old West, Inc.*, 286 S.C. 394, 334 S.E.2d 275 (1985). An appellate court also employs the same standard of review as the trial court in reviewing the dismissal of a claim pursuant to Rule 12(b)(8), SCRCF. *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009). “[E]ach of the components of the rule are determined as a matter of law and thus [the appellate court applies] a *de novo* standard of review[.]” *Id.*

ARGUMENT³

I. The trial court properly dismissed Plaintiff's claims against ECENCF because Plaintiff failed to file and serve an Amended Complaint within the time permitted by the Amended Order.

A trial court may impose conditions, limitations, and deadlines upon a party seeking leave to amend a pleading. *See, e.g., Stokes v. Murray*, 99 S.C. 221, 221, 83 S.E. 33, 34 (1914); *Georganne Apparel, Inc. v. Todd*, 303 S.C. 87, 399 S.E.2d 16 (Ct. App. 1990); *King v. King*, No. 2007–UP–132, 2007 WL 8327374 (S.C. Ct. App. March 28, 2007). Amendment of a pleading to include a new party requires naming and serving the pleading. *See Bowman v. Richland Memorial Hospital*, 335 S.C. 88, 92-93, 515 S.E.2d 259, 261 (Ct. App. 1999) (“[A]ppellants had ten days from the effective date to amend their complaint. Therefore, appellants properly filed and served their amended complaint within ten days of the order.”); *see also* Rules 3, 15, SCRCF. A party's failure to amend a pleading in accordance with a trial court's order constitutes a final dismissal of the claims. *Harvin v. Commercial Credit Corporation*, 275 S.C. 14, 15-16, 266 S.E.2d 789, 789-90 (1980).

“As a general rule, judgments are to be construed like other written instruments . . . it should be examined and considered in its entirety.” *Doe v. Bishop of Charleston*, 407 S.C. 128, 134, 754 S.E.2d 494, 498 (2014) (quoting *Weil v. Weil*, 299 S.C. 84, 90, 382 S.E.2d 471, 474 (Ct. App. 1989). “If the language employed is plain and unambiguous, there is no room for construction or interpretation, and the effect thereof must be declared in the light of the literal meaning of the language used.” *Id.* (quoting *Weil*, 299 S.C. at 90, 382 S.E.2d at 474).

³ In the interest of economy, ECENCF incorporates by reference the Arguments found in the brief of co-Respondents Cato Institute and Howard S. Rich in supplement to the included Arguments to the extent that those arguments are applicable to ECENCF, as well as any other applicable arguments asserted by other co-Respondents.

The Amended Order provides in pertinent part as follows:⁴

IT IS THEREFORE ORDERED each John Doe referenced in the complaint shall be specifically named and served. This court allows the plaintiff 15 days to appropriately amend the pleadings.

(R. p. 8; October 30, 2018 Am. Order, at 3.)

Plaintiff, however, argues that the Amended Order only required the *filing* of the Amended Complaint within 15 days. This argument runs contrary to the plain language of the Amended Order. The language of the Amended Order is plain and unambiguous with regard to the naming and joinder of the pseudonymous defendants. Plaintiff had 15 days to appropriately *amend* the pleadings, which included specifically naming *and serving* each John Doe referenced in the original Complaint. (R. p. 8; October 30, 2018 Am. Order, at 3.) The Amended Order does not state that the Amended Complaint joining ECENCF need only be *filed* in 15 days. In order to successfully “amend” the original Complaint, Plaintiff needed to serve those new defendants. Otherwise, Plaintiff could amend the original Complaint, but wait to serve the amended pleading at his leisure.

The plain and unambiguous meaning of the Amended Order is bolstered by the transcript of the hearing during which Judge Benjamin discussed the intent of the Amended Order. Specifically, Judge Benjamin made clear that Plaintiff needed to name *and* serve the new

⁴ Although the Amended Order allowed Appellant 15 days to amend the original complaint to include additional facts to support the causes of action for invasion of privacy and civil conspiracy, the Amended Order did not grant such leave to include additional facts to support the causes of actions for tortious interference with prospective contractual relations and unfair trade practices causes of action. (*See* R. pp. 6-9; October 30, 2018 Am. Order.) Appellant did not challenge this ruling. As a result, this Court should affirm dismissal of these causes of action on the additional sustaining ground that any such claims are barred by the doctrines of res judicata and estoppel by record. *Strickland v. Strickland*, 375 S.C. 76, 83-86, 650 S.E.2d 465, 469-71 (2007) (discussing the doctrines of waiver and laches); *Beall v. Doe*, 281 S.C. 363, 369 n.1, 315 S.E.2d 186, 189 n.1 (1984) (discussing res judicata); *Watson v. Goldsmith*, 205 S.C. 215, 215, 31 S.E.2d 317, 320 (1944) (discussing estoppel by record).

defendants within 15 days. (*See* R. pp. 403-04; Hearing Tr. at 26-27) (“[T]he only things that I am granting you leave to amend the complaint on is the invasion of privacy, conspiracy, and the John Does, I think you need to name them *and serve them* . . . [i]t will be 15 days to amend.”) (emphasis added)).

The language of the Amended Order is clear and unambiguous and consistent with Judge Benjamin’s stated intentions. Accordingly, this Court should affirm the trial court’s determination that Plaintiff’s failure to file and serve the Amended Complaint within the time period provided in the Amended Order constituted a final dismissal of the claims against ECENCF.

II. Dismissal of Plaintiff’s claims against ECENCF is further supported by the additional sustaining ground that the Amended Complaint fails to make any factual allegations in support of any claims against ECENCF.

“The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.” Rule 220(c), SCACR; *I’on, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) (“Under the present rules, a respondent—the ‘winner’ in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court’s ruling, regardless of whether those reasons have been presented to or ruled on by the lower court.”). Even if the Court finds that Plaintiff complied with the Amended Order’s requirements, this Court should affirm the trial court’s dismissal of Plaintiff’s claims against ECENCF because the Amended Complaint does not allege any facts to support even a single claim against ECENCF.

“Rule [of Civil Procedure] 12(b)(6) requires the plaintiff to allege *facts*.” *Paradis v. Charleston County School District*, 424 S.C. 603, 615, 819 S.E.2d 147, 153 (Ct. App. 2018) (emphasis added). Rule 8(a)(2) further requires that those facts be sufficient to show that “the pleader is entitled to relief.” Rule 8(a)(2), SCRCF. “In deciding a motion to dismiss pursuant to 12(b)(6), SCRCF, the trial court should consider only the allegations set forth on the face of the

plaintiff's complaint.” *Paradis*, at 609, 819 S.E.2d at 150 (quoting *Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007)). “In deciding whether a claim should be dismissed pursuant to Rule 12(b)(6), SCRCF, th[e] court should consider whether [the plaintiff] has ‘state[d] facts sufficient to constitute a cause of action.’” *Id.* at 609, 819 S.E.2d at 150 (quoting *Gaskins v. S. Farm Bureau Cas. Ins.*, 343 S.C. 666, 671, 541 S.E.2d 269, 271 (Ct. App. 2000)). “Rule 12(b)(6), SCRCF, ‘retains the Code Pleading standard . . . rather than the more lenient notice pleading standard found in the federal rules.’” *Id.* (quoting *Gaskins*, 343 S.C. at 671, 541 S.E.2d at 271. “When a plaintiff states nothing more than legal conclusions, a claim should fail.” *Id.* (citing *Talbott v. Padgett*, 30 S.C. 167, 171, 8 S.E. 845, 847 (1889)).

The Amended Complaint fails to allege even a single fact to support any causes of action against ECENCF. The Amended Complaint does not include any allegations that ECENCF made any defamatory statements about Appellant nor any allegations of the content of any such statements or to whom any such statements were published, *see Paradis*, at 609-14, 819 S.E.2d at 150-53, nor any public disclosure by ECENCF of any private facts about Appellant, *see McCormick v. England*, 328 S.C. 627, 640, 494 S.E.2d 431, 438 (Ct. App. 1997). In addition, the Amended Complaint does not contain any allegations of any overt act by ECENCF in furtherance of any conspiracy that proximately caused damage to Appellant—let alone any special damage beyond those alleged to have resulted from the other causes of action. *See Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 115-16, 682 S.E.2d 871, 874-75 (Ct. App. 2009). Furthermore, the Amended Complaint does not allege that ECENCF owed any duty of care to Plaintiff, that ECENCF breached any such duty, or that Appellant suffered any injury or damages arising from any such breach. *See Doe v. Marion*, 361 S.C. 463, 470, 605 S.E.2d 556, 560 (Ct. App. 2004). The Amended Complaint also does not allege any conduct on behalf of ECENCF, let alone any conduct

so extreme and outrageous as to give rise to a cause of action for intentional infliction of emotional distress. *See Dye v. Gainey*, 320 S.C. 65, 69, 463 S.E.2d 97, 99 (Ct. App. 1995). Moreover, the Amended Complaint does not allege anything to apply the doctrine of piercing the corporate veil to ECENCF. *Jones ex rel. Jones v. Enterprise Leasing Company-Southeast*, 383 S.C. 259, 678 S.E.2d 819 (Ct. App. 2009). The Amended Complaint simply fails to state a single fact sufficient to constitute any cause of action against ECENCF or that supports any assertion that Plaintiff is entitled to any relief from ECENCF. (*See generally* R. pp. 31-75; Am. Compl.)

At most, Plaintiff makes vague allegations that the “Defendants” engaged in some sort of misconduct. Even under the more lenient federal notice pleading standards, such indefinite collective allegations are insufficient to withstand the scrutiny of a motion to dismiss:

The claims alleged by Plaintiffs under North Carolina General Statute 58-70 *et seq.*, 75-50 *et seq.*, and 45-90 *et seq.*, all of which pertain to debt collection, state that “Defendants” attempted to collect a debt through various prohibited means, *id.* ¶¶ 131-143, but fail to specify any particular conduct with respect to HSB. Simply alleging causes of action against collective “Defendants” without any factual allegations of wrongful conduct with respect to HSB is insufficient to meet the pleading standard of Rule 8

See Bryant v. Wells Fargo Bank, N.A., 2012 WL 642524, at *3 (E.D.N.C. Jan. 5, 2012, *report and recommendation adopted in*, 2012 WL 641028 (E.D.N.C. Feb 28, 2012); *accord Boykin Anchor Co. v. AT&T Corp.*, 2011 WL 1456388, at *4 (E.D.N.C. April 14, 2011) (“The collective use of the phrase ‘all defendants’ is insufficient to give notice of a particular claim for relief against AT & T Corp., as required by Rule 8.”); *Kester v. Zimmer Holdings, Inc.*, 2010 WL 2696467, at *6 (W.D. Pa. June 16, 2010) (“The Court finds and rules that the speculative and collective identification of the Defendants fails to adequately identify which Defendant caused Plaintiff’s alleged injury and the Complaint, therefore, is insufficient and speculative under *Twombly* and *Iqbal*.”).

For the foregoing reasons, this Court should affirm the dismissal of the claims against ECENCF because the Amended Complaint is utterly devoid of any allegations that could even possibly support any claims against ECENCF as required by Rules 8(a)(2) and 12(b)(6), SCRCF.

III. Dismissal of Plaintiff's claims against ECENCF is further supported by the additional sustaining ground that another action is currently pending between the same parties for the same claim.

“In South Carolina, dismissal under Rule 12(b)(8) may be proper when there is (1) another action pending, (2) between the same parties, (3) for the same claim.” *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 105-06, 674 S.E.2d 524, 531-32 (Ct. App. 2009). Dismissal is appropriate where the claim is “precisely or substantially the same in both proceedings.” *Id.* at 106, 674 S.E.2d 524, 532.

Another action is currently pending between the same parties in the FOIA Action. In that action, Plaintiff similarly appeals the dismissal of an action against ECENCF through which Plaintiff sought remedies and damages for ECENCF's failure to respond to requests for documents and information pursuant to the Freedom of Information Act. Although Plaintiff may argue that the causes of action in the FOIA Action are not substantially similar to the causes of action in the instant action, the claims arise from the same facts and circumstances. Moreover, the Amended Complaint fails to allege any facts supporting of any causes of action against ECENCF. Instead, Plaintiff's joinder of ECENCF is a thinly disguised attempt to force ECENCF to produce through discovery the documents and information sought by Plaintiff in the dismissed FOIA Action. As a result, this Court should also affirm dismissal of the claims against ECENCF pursuant to Rule 12(b)(8), SCRCF.

CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's Order dismissing Plaintiff's claims against Respondent South Carolina Educational Credit for Exceptional Needs Children Fund.

Respectfully submitted,

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