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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas
G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2016-CP-19-00168

Appellate Case No. 2019-001689

Bettis C. Rainsford,Appellant,

v.

Apex Bank, Jim Clayton, Matt Daniels, and Brad Hailey,Defendants,

Of whom, Matt Daniels and Brad Hailey are theRespondents.

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT

In Respondents' Brief, they argue Appellant's counsel did not preserve the due process issue, in part, because he agreed with Respondents that the issue of personal jurisdiction was a "threshold issue" to determining whether Appellant should be allowed to conduct jurisdictional discovery. (Resp. Br. 7). In support of this contention, Respondents cite to a small excerpt from the hearing transcript where Appellant's counsel said "[b]ut more importantly, I believe that we have before us a threshold issue, particularly as addressed by the defendants Hailey and Daniel and, I think, to some extent, also by-by Mr. Clayton." (R. p. 52, lines 12–16). However, a full review of the hearing transcript shows Appellant's counsel, in mentioning a threshold issue, was not referring to Respondents' motions to dismiss. Instead, the transcript shows Appellant's counsel indicated Appellant would be willing to move forward on limited jurisdictional discovery first before seeking an order compelling Respondents to respond to all outstanding discovery requests. At all times, Appellant's counsel argued limited jurisdictional discovery was necessary prior to the Court making a determination on whether there was personal jurisdiction.

MR. WILKERSON: Your Honor, these are two motions to compel – actually, a motion to compel addressed to all of the defendants. And I was trying to figure out a way to . . . shorten this so we don't have to go through each individual discovery request, which I'm sure the Court does not want to do.

THE COURT: Does not want to do, but will do.

MR. WILKERSON: I – I understand. And . . . I believe that there is a threshold issue here that we can resolve. The . . . objections that they've posed to our request for production basically are that they're overbroad and burdensome and that we've asked for too – too long a period of time and too many documents and they can't possibly answer the questions.

And they're probably right on some of those, Your Honor. And we are more than willing to sit down and carefully tailor those to a point where I think everybody can agree is a reasonable period of time. But more importantly, I believe that we have before us a

threshold issue, particularly as addressed by the defendants Hailey and Daniels, and, I think, to some extent, also by – by Mr. Clayton.
...

MR. WILKERSON: ... [A]ll the parties except Apex ... have moved to dismiss on the grounds of personal jurisdiction. ... And we proposed that we engage in some limited jurisdictional discovery by taking jurisdiction-only depositions of Hailey, Daniels, and Clayton. ... Primarily, we want to take those depositions. And we'd like to get some documents that we have requested that we think are critical to our proof of jurisdiction, or personal jurisdiction.

(R. pp. 51–54). Therefore, although Appellant's counsel indicated the Court may wish to determine the issue of personal jurisdiction prior to compelling Respondents to fully respond to all discovery in the case, Appellant's counsel maintained the threshold issue before the Court at the August 13, 2019 hearing was to allow Appellant the opportunity to conduct necessary discovery on the jurisdictional issues prior to a determination on the question of personal jurisdiction. Appellant's counsel clearly argued jurisdictional discovery was necessary to meet Respondents' challenges to personal jurisdiction and because Appellant's claims were not clearly frivolous. (R. p. 54, lines 2–6).

Throughout the hearing, Appellant's counsel maintained Appellant made “more than ... reasonable allegations against them to support at least [his] ability to go and ask them some questions that may be relevant to the question of jurisdiction” and Appellant's request was to “find out what evidence there is to support [his] claim for personal jurisdiction against these individuals.” (R. p. 60, lines 21–25; R. p. 62, lines 10–15). A determination on the question of whether Appellant was entitled to jurisdictional discovery necessarily included discussions of the allegations he made in his complaint to support his theory of personal jurisdiction against Respondents. *Graham Law Firm, P.A. v. Makawi*, 396 S.C. 290, 299, 721 S.E.2d 430, 435 (2012) (“When the plaintiff can show that discovery is necessary in order to meet [a] defendant's

challenge to personal jurisdiction, a court should ordinarily permit discovery on that issue unless [the] plaintiff's claim appears to be clearly frivolous.”). However, just because Appellant made arguments related to why he contended there was personal jurisdiction, it does not follow that he conceded that the Court should skip the threshold question of jurisdictional discovery and rule on Respondents' motion to dismiss. In fact, Appellant's counsel argued, in response to questioning from the Court, that the Court was “get[ting] too deeply into the merits” and jurisdictional discovery was necessary “before we can get to the question of whether or not we can look behind the curtain . . . to see if there's any personal jurisdiction.” (R. p. 63, lines 17–25).

It is clear from the transcript that throughout the hearing Appellant's counsel believed the Court was considering the issue of whether to allow jurisdictional discovery and grant Appellant's motion to compel. As discussed above, this necessarily included arguments regarding the basis of personal jurisdiction in the Complaint to determine whether the jurisdictional discovery was necessary. Therefore, although Appellant's counsel made arguments related to personal jurisdiction, his focus at the hearing was on showing the claims made against Respondents were not clearly frivolous and entitled Appellant to jurisdictional discovery. Appellant did not have a full and fair opportunity to address the merits of the personal jurisdiction argument and did not have adequate time to present arguments to the Court related to the prima facie case of personal jurisdiction. It was not until the end of the hearing that the Court informed counsel it was granting Respondents' motion to dismiss based on lack of personal jurisdiction, and, at that time, Appellant's counsel objected to the Court's decision and indicated his surprise that the Court was reaching the merits of the personal jurisdiction argument. (R. p. 75, lines 2–12).

As shown by the context of the transcript, Appellant's counsel was surprised the Court was reaching the merits of the personal jurisdiction argument because the hearing was only noticed as

a hearing on Appellant’s motions to compel and Appellant did not have notice the Court would take up Respondents’ motion to dismiss. “When supported by context, ‘[a] party need not use the exact name of a legal doctrine . . . , but it must be clear the argument has been presented on that ground.’” *State v. Byers*, 392 S.C. 438, 442, 710 S.E.2d 55, 59 (2011); *see also State v. Gamble*, 405 S.C. 409, 416, 747 S.E.2d 784, 787 (2013) (“While defense counsel could have articulated his objection more clearly, his objection adequately preserved the issue for this Court’s review.”). However, once Appellant’s counsel noted his surprise, the Court stood by its ruling and insistence that the order dismiss Respondents’ due to lack of personal jurisdiction, thereby rejecting Appellant’s objection that the Court should not rule on the merits of the jurisdictional argument. (R. p. 75, line 17). In fact, when Appellant’s counsel noted his objection that the circuit court was reaching the merits of the personal jurisdiction argument, the circuit court interrupted and reasserted its ruling on the merits of the personal jurisdiction grounds.

MR. WILKERSON: If – if – if – if I may, Your Honor, I – I – I – don’t want to argue against your order. But I was – I – I – I’m – I’m – I’m a – a – a bit surprised that we’re – that we’re reaching the merits at this level. You’ve –

THE COURT: I don’t think so. I don’t think – I don’t think your amended – second amended complaint Paragraphs 74 and 75 are sufficient to bring him in. That’s all – bring them in.

(R. p. 74, lines 22–25 to R. p. 75, lines 1–5). Further, our Supreme Court has indicated appellate courts should reach the merits of an issue unless an error is clearly not preserved. *See Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012) (noting it is “good practice for [appellate courts] to reach the merits of an issue when error preservation is doubtful”); *see also id.* at 333, 730 S.E.2d at 287 (Toal, C.J., concurring in part and dissenting in part) (“[W]here the question of preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation.”).

Respondents further argue Appellant had sufficient notice of the hearing because (1) Respondents filed their motion to dismiss on September 26, 2018, (2) Respondents filed affidavits on June 28, 2019, and (3) Respondents filed a memorandum the day of the hearing that discussed the merits of the jurisdictional issue. (Resp. Br. 6). However, as discussed in Appellant’s brief, the notice requirement in the South Carolina Rules of Civil Procedure requires “specific notice of the day certain fixed for the hearing . . . not later than ten days prior to such hearing.” *Dedes v. Strickland*, 307 S.C. 152, 154, 414 S.E.2d 132, 134 (1992). The facts that Respondents had a motion pending and they filed a memorandum the day of the hearing addressing the personal jurisdiction argument, which the Court had not even had a chance to review, is not adequate notice that Respondents’ motion to dismiss would be heard on August 13, 2019. (R. p. 55, lines 7–25). The Rules do not simply state the party must have notice the other party will request a ruling on a pending motion. Instead, the Rules require ten days’ notice of the date of the hearing in order to allow parties the opportunity to prepare arguments and file any supporting or opposing memoranda. Appellant did not receive this notice and did not have a chance to adequately prepare his arguments in opposition to Respondents’ motion to dismiss. As such, the circuit court improperly granted Respondents’ motion to dismiss without allowing Appellant a full and fair opportunity to respond to Respondents’ motion.

CONCLUSION

For the foregoing reasons, as well as those set out in Appellant’s previous brief, this Court should reverse the circuit court’s order dismissing Respondents.

(Signature page follows)

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that this brief complies with the provisions of Rule 211(b), SCACR.

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