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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

William A. McKinnon, Circuit Court Judge

Case No. 2017-CP-26-03008

Douglas Kelsey, ...Plaintiff,

v.

House of Blues Myrtle Beach Restaurant Corporation; HOB Entertainment, Inc.; and Travis Scott Wagoner, ...Defendants,

AND

House of Blues Myrtle Beach Restaurant Corporation, ...Third-Party Plaintiff/**Appellant**,

v.

Throttlefest, LLC; American Outlaw Spirits Incorporated; Full Throttle LLC; and Full Throttle Sloon Shine, LLC.....Third-Party Defendants, of whom American Outlaw Spirits Incorporated; Full Throttle LLC; and Full Throttle Sloon Shine, LLC, are the **Respondents**.

NOTICE OF APPEAL

Third-Party Plaintiff House of Blues Myrtle Beach Restaurant Corporation appeals the following orders of the Honorable William A. McKinnon, Circuit Court Judge:

- Order Granting Motions to Dismiss (filed on March 26, 2020) **(Exhibit A)**; and

- Order Granting Motion to Reconsider in Part and Denying it in Part (filed on July 31, 2020) **(Exhibit B)**; and

Counsel for Third-Party Plaintiff received written notice of the entry of the Order Granting Motion to Reconsider in Part and Denying it in Part on July 31, 2020, which was the triggering date for the instant appeal.

Respectfully submitted,

COLLINS & LACY, P.C.

By: _____

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NOTICE OF APPEAL

Columbia, South Carolina
August 31, 2020

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PROOF OF SERVICE

Counsel for Appellant House of Blues Myrtle Beach Restaurant Corporation certifies they have served Appellant House of Blues Myrtle Beach Restaurant Corporation's Notice of Appeal on all parties by depositing a copy of the same in the United States Mail, postage prepaid, on August 31, 2020, addressed to the following attorneys of record:

COUNSEL SERVED:

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OTHERS SERVED:
The Honorable Renee Elvis
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[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

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Columbia, South Carolina
August 31, 2020

Collins Lacy
ATTORNEYS AT LAW

Christian Stegmaier | D: 803.255.0454 | E: cstegmaier@collinsandlacy.com

August 31, 2020

VIA U.S. MAIL AND EMAIL
The Honorable Jenny A. Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211
ctappfilings@sccourts.org

Re: Douglas Kelsey v. House of Blues Myrtle Beach Restaurant Corporation, HOB Entertainment, Inc., and Travis Scott Wagoner; House of Blues Myrtle Beach Restaurant Corporation v. Throttlefest LLC, American Outlaw Spirits Incorporated, Full Throttle, L.L.C., and Full Throttle Sloon Shine, LLC
Civil Action No. 2017-CP-26-03008
Claim No. 188372477-001-GL
C&L File No. 001133-00111

Dear Ms. Kitchings:

Please find enclosed for filing the unbound original and one (1) copy of the Notice of Appeal in the above-referenced matter. I am also enclosing copies of the Orders that are the basis for the appeal and a check in the amount of $250.00 for the required filing fee. Please return a filed, stamped copy of the Notice of Appeal to my office in the envelope provided for your convenience.

Pursuant to the Supreme Court's Amended Order "re: Operation of the Appellate Courts During the Coronavirus Emergency" (2020-05-29-02, Appellate Case No. 2020-000447), we have not included any additional copies of the Notice. If any additional copies are required, please let us know.

By copy of this letter, a copy of same is being served upon counsel of record and the Honorable Renee Elvis, Horry County Clerk of Court.

Thank you for your time and attention. Should you have any questions, please do not hesitate to contact me.

Respectfully,

Christian Stegmaier

CS/net
Encl.

cc (via U.S. Mail and email):
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James Rainsford, Esquire
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The Honorable Renee Elvis
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The Honorable Jenny A. Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

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EXHIBIT A

STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT C/A No.: 2017-CP-26-03008
Douglas Kelsey, Plaintiff, vs. House of Blues Myrtle Beach Restaurant Corporation; HOB Entertainment, Inc.; and Travis Scott Wagoner, Defendants.	)	**ORDER GRANTING MOTIONS TO DISMISS**
House of Blues Myrtle Beach Restaurant Corporation, Third-Party Plaintiff, vs. Throttlefest, LLC; American Outlaw Spirits Incorporated; Full Throttle LLC; and Full Throttle Sloon Shine, LLC, Third-Party Defendants.	)	

This matter is before the Court on Motions to Dismiss filed pursuant to Rules 12(b)(2) and 12(b)(6) by Third-Party Defendants American Outlaw Spirits, Inc. ("AOS"); Full Throttle Sloon Shine, LLC ("Sloon Shine"); and Full Throttle, LLC. The motions seek to dismiss the claims filed against them by Third-Party Plaintiff House of Blues Myrtle Beach Restaurant Corporation's ("House of Blues"). The parties fully briefed the motions and submitted oral argument to the Court in a hearing held on February 5, 2020. After considering all materials of

record and for the reasons set forth below, the Court hereby GRANTS these Third-Party Defendants' Motions to Dismiss.

FACTS

Full Throttle is a South Dakota real estate holding company that holds real estate only in South Dakota. Michael Ballard is its sole member. AOS is a Georgia corporation that manufactures a brand of liquor. Jesse James Dupree is its sole owner. Sloon Shine is a Tennessee company that manufactures spirits in Tennessee. Michael Ballard is its sole member. Neither of these manufacturers has an office or facility in South Carolina; neither directly sells its products in South Carolina; and neither derives a substantial portion of its revenue from its respective regional distributors' sales here. The liquor allegedly at issue was purchased wholesale, not from any of these entities. (House of Blues Answer, ¶ 13.)

The facts giving rise to this litigation concern an event that a different Third-Party Defendant, Throttlefest, put on with the Defendant House of Blues in 2014. Ballard and Dupree are the two members of Throttlefest. Throttlefest and House of Blues entered into a Co-Promotion Agreement (hereinafter the "Co-Promotion Agreement") with an effective date of March 19, 2014 "concerning the functions and acts necessary for promoting and conducting" an event called the Full Throttle Festival (hereinafter the "Event") which was held at the House of Blues in Myrtle Beach from May 9 until May 17, 2014. (Third-Party Complaint ¶¶ 93-97.) AOS, Sloon Shine, and Full Throttle were not parties to this contract.

Plaintiff alleges that Defendant Travis Wagoner was present at the House of Blues on May 16, 2014 and that House of Blues' employee Michael Garner gave Wagoner two shots of liquor despite Wagoner showing signs of intoxication. (Third-Party Complaint ¶¶ 108-09; Plaintiff's Second Am. Compl. ¶¶ 8, 16, 29, 40, 41, 42, 68, 74, 93.) Plaintiff then alleges that

Wagoner left the House of Blues in an intoxicated state and caused an accident that injured the Plaintiff. (Third-Party Compl. ¶¶ 110-11.) Plaintiff alleges Garner was an employee of House of Blues. (Plaintiff's Second Am. Compl. ¶¶ 8, 16, 29, 40, 41, 42, 68, 74, 93.) House of Blues has alleged Garner was acting as the employee or agent of Throttlefest, American Outlaw Spirits, Full Throttle, and Sloon Shine. (Third-Party Compl. ¶¶ 114-115.)

PROCEDURAL HISTORY

Plaintiff filed his initial Complaint on May 12, 2017 and an Amended Complaint on July 7, 2017. Plaintiff originally alleged that Garner was acting as an employee or agent of the Third-Party Defendants and House of Blues, and that he was selling alcohol under House of Blues' alcohol license. House of Blues did not file any crossclaims against American Outlaw Spirits, Full Throttle, or Sloon Shine.

Full Throttle, Sloon Shine, and AOS moved to dismiss on August 31, 2017 pursuant to Rules 12(b)(2) and 12(b)(6), SCRCP. On January 2, 2018, Plaintiff dismissed AOS. Full Throttle and Sloon Shine settled with Plaintiff and received a full and final release of all liability and damages of any kind relating to the injuries Plaintiff sustained from the accident. Despite obtaining the Release from Plaintiff, House of Blues refused to consent to Sloon Shine's and Full Throttle's dismissal from the case, even though House of Blues did not have any claims pending against them. On June 25, 2019, Full Throttle and Sloon Shine again moved to dismiss the claims against them. The Court granted Full Throttle's and Sloon Shine's Motion to Dismiss on August 13, 2019.

On October 15, 2019, Plaintiff filed a Second Amended Complaint, which did not include AOS, Full Throttle, or Sloon Shine as Defendants. Plaintiff's Second Amended Complaint alleges that it was only House of Blues' employees and agents that served Wagoner alcohol to

the point of intoxication and caused the accident. (Second Am. Compl. ¶¶ 8, 16, 29, 39, 40, 41, 42, 68, 74, 91, 93, 97.) Plaintiff's Second Amended Complaint alleges that Garner was solely House of Blues' employee and cites to House of Blues' testimony admitting the same. (*Id.* at ¶¶ 40-41.) Plaintiff alleges that when he filed his first Amended Complaint he had not yet discovered that Garner was a House of Blues employee. (*Id.* at ¶ 68.)

On October 18, 2019, House of Blues filed its Answer to the Second Amended Complaint and its Third-Party Complaint. House of Blues asserted the following, third-party claims against all Third-Party Defendants: (1) breach of contract; (2) negligent misrepresentation; (3) negligence; (4) equitable indemnification; (5) contractual indemnification; and (6) contribution. On December 5, 2019, Throttlefest filed a Motion to Dismiss. On December 17, 2019, these Third-Party Defendants moved to dismiss House of Blues' claims. The Court, Judge Culbertson presiding, granted Throttlefest's Motion to Dismiss on February 4, 2020. Arguments on the remaining Third-Party Defendants' motions were heard on February 5, 2020.

LAW/ANALYSIS

"The party invoking personal jurisdiction over a nonresident bears the burden of proving the existence of personal jurisdiction." *Int'l Mariculture Res. v. Grant*, 336 S.C. 434, 437, 520 S.E.2d 160, 161 (Ct. App. 1999) (*citing Southern Plastics Co. v. Southern Commerce Bank*, 310 S.C. 256, 259, 423 S.E.2d 128, 130 (1992)). To meet its burden at this pre-trial stage, House of Blues must make a prima-facie showing of jurisdiction by pleadings and affidavits. *See Coggeshall v. Reprod. Endocrine Assocs. of Charlotte*, 376 S.C. 12, 16, 655 S.E.2d 476, 478 (2007). The showing of personal jurisdiction "must be based upon specific facts set forth in the record in order to defeat defendants' motion to dismiss." *Magic Toyota, Inc. v. Southeast Toyota*

Distributors, Inc., 784 F. Supp. 306, 310 (D.S.C. 1992). "When a motion to dismiss attacks the allegations of the complaint on the issue of jurisdiction, the court is not confined to the allegations of the complaint but may resort to affidavits or other evidence to determine jurisdiction." *Coggeshall*, 376 S.C. at 16, 655 S.E.2d at 478. Unless unsupported by the evidence or influenced by an error of law, the decision of the trial court will be affirmed. *Id.*

Under Rule 12(b)(6), the Court must dismiss a complaint if fails to state facts sufficient to constitute a cause of action. "Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon the allegations set forth on the face of the complaint." *Doe v. Marion*, 361 S.C. 463, 469, 605 S.E.2d 556, 559 (Ct. App. 2004). However, the Court may consider documents outside the pleadings in determining whether to dismiss a complaint where the documents are integral to the complaint, explicitly relied on in the complaint and where the plaintiff does not challenge their authenticity. *Brown v. Leverette*, 291 S.C. 364, 367, 353 S.E.2d 697, 698–99 (1987); *see also Martin v. Companion Healthcare Corp.*, No. 99-CP-40-4698, 2001 WL 36222011 (S.C. Com Pl. June 6, 2001) (citing *Phillips v. LCI Int'l, Inc.*, 190 F.3d 609 (4th Cir. 1999)); *Goines v. Valley Cmt'y Servs. Bd.*, 822 F.3d 159, 166 (4th Cir. 2016) (on a motion to dismiss, the court "may consider a document submitted by the movant that was not attached to or expressly incorporated in a complaint, so long as the document was integral to the complaint and there is no dispute about the document's authenticity.").[1]

I. The Court Lacks Jurisdiction Over These Third-Party Defendants.

The invocation of personal jurisdiction over a nonresident traditionally had involved a two-step analysis. In light of the interpretation that South Carolina's long-arm statute extends as

[1] "In the absence of prior state law on the issue in question, federal cases interpreting the rule are persuasive." *Unisum Ins. v. Hawkins*, 342 S.C. 537, 542, 537 S.E.2d 559, 561-62 (Ct. App. 2000).

far as the due process clause, courts now focus on whether the nonresident's contacts in South Carolina are sufficient to satisfy due process requirements. *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005). Due process requires that there exist minimum contacts between the nonresident and the forum state such that the maintenance of the suit does not offend traditional notions of fair play and justice. *Aviation Assocs. & Consultants, Inc. v. Jet Time, Inc.*, 402 S.E.2d 177, 180 (S.C. 1991). The allegations here concern a claim of "specific jurisdiction," that is, the right to exercise personal jurisdiction because the cause of action arises specifically from a defendant's contacts with the state.[2] *See Coggeshall*, 376 S.C. at 16, 655 S.E.2d at 478. The focus of the court's inquiry must be the contacts generated *by the defendant*, and not on the unilateral actions of some other person or entity. *Id.*

The primary allegations at issue involve the actions Michael Garner. House of Blues acknowledges in its Answer that it issued Garner a W-2 for his work during the Event. Seeking to distance itself from Garner's actions, House of Blues then says Garner was "part of the Throttlefest festival talent." (House of Blues Answer ¶ 8.) House of Blues admits that it and Throttlefest undertook the duties for promoting and conducting the Throttle Fest event and asserts that Throttlefest was responsible for "festival talent/personalities." (Third-Party Compl. ¶¶ 97-98.) House of Blues nevertheless seeks to reach through the Throttlefest LLC to its two individual members and even further beyond that, tracing duties through those members to each of their other businesses. It seeks to pin those non-resident, non-contracting parties with the duties of the contract party, as discussed more fully in Section II.A below, and to hold them responsible for acts or omissions in the performance of the contract. It seeks to hold a South Dakota real estate holding company, for example, responsible for the alleged actions of "festival

[2] General jurisdiction, which arises from continuous and systematic contacts with the state, clearly is not present here. *See Coggeshall*, 376 S.C. at 17, 655 S.E.2d at 479.

talent" that another entity purportedly obtained—and who House of Blues presumably paid for his work and reported to the IRS to have been an employee.

In light of the materials submitted to address the lack of contacts of these Third-Party Defendants and other matters of record, House of Blues cannot establish that the three non-resident companies themselves had sufficient contacts to have purposefully availed themselves of the privilege of conducting activities within South Carolina. *See generally Cockrell v. Hillerich & Bradsby Co., 363 S.C. 485, 492, 611 S.E.2d 505, 509 (2005)* ("The foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum state. Rather, it is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there."); *Aviation Assocs.*, 402 S.E.2d at 180 (nonresident seller's limited contact insufficient); *Power Prod. & Servs. Co. v. Kozma*, 379 S.C. 423, 433, 665 S.E.2d 660, 666 (Ct. App. 2008) (finding conclusory assertions unavailing).

II. House of Blues' Claims Are Dismissed Under Rule 12(b)(6), SCRCP.

While dismissal is warranted under Rule 12(b)(2) of the South Carolina Rules of Civil Procedure, dismissal of House of Blues' third-party claims is also appropriate under Rule 12(b)(6), SCRCP. House of Blues has failed to state third-party claims for which relief can be granted against these Third-Party Defendants. Each cause of action will be addressed in turn.

A. House of Blues' Contract-Based Claims Fail.

House of Blues has asserted breach of contract and contractual indemnification claims against Full Throttle, American Outlaw Spirits, and Sloon Shine based upon their alleged obligations under the Co-Promotion Agreement. House of Blues has not alleged in the Third-Party Complaint that these Third-Party Defendants were parties to the Co-Promotion Agreement.

Further, the Third-Party Complaint contains no allegations that these entities were intended, third party beneficiaries of the Co-Promotion Agreement. Instead, House of Blues alleges that Throttlefest, LLC only was party to the Co-Promotion Agreement but asserts it was acting as an agent of the remaining Third-Party Defendants. (Third-Party Compl. ¶ 97, 124.)

Under South Carolina law, "one not in privity of contract with another cannot maintain an action against [another] in breach of contract, and any damage resulting from the breach of a contract between the defendant and a third-party is not, as such, recoverable[.]" *Windsor Green Owners Ass'n v. Allied Signal, Inc.*, 362 S.C. 12, 16, 605 S.E.2d 750, 752 (Ct. App. 2004). It is undisputed that American Outlaw Spirits, Full Throttle, and Sloon Shine were not parties to the Co-Promotion Agreement. Throttlefest only was a party to this agreement, and this Court dismissed it from this action on February 4, 2020.

Additionally, House of Blues has not alleged any of the elements establishing that Throttlefest, LLC had either actual or apparent authority as an agent to bind each of these Third-Party Defendants such that they would be bound by this contract. *See Graves v. Serbin Farms, Inc.*, 306 S.C. 60, 63, 409 S.E.2d 769, 771 (1991) ("The elements which must be proven to establish apparent agency are: (1) that the purported principal consciously or impliedly represented another to be his agent; (2) that there was a reliance upon the representation; and (3) that there was a change of position to the relying party's detriment."). House of Blues' breach of contract and contractual indemnification claims against Full Throttle, American Outlaw Spirits, and Sloon Shine, therefore, are dismissed.

B. House of Blues' Contribution Cause of Action is Barred by S.C. Code § 15-38-50.

South Carolina Code § 15-38-50 provides that "[w]hen a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for

the same injury or the same wrongful death: . . . (2) it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor." In *Smith v. Tiffany*, 419 S.C. 548, 560-61, 799 S.E.2d 479, 486 (2017), the South Carolina Supreme Court confirmed that when the injured party releases one potential joint tortfeasor from liability, the released tortfeasor "is also immune from *any liability* to non-settling alleged tortfeasors . . . by virtue of section 15-38-50." (emphasis added). There, Smith was injured in a motor vehicle accident and settled with Mizell and gave Mizell a covenant not to execute, making Mizell immune from liability to Smith. *Id.* at 554, 799 S.E.2d at 482. Smith then sued Tiffany for causing the accident. *Id.* Tiffany responded and asserted a third-party complaint against Mizell under Rule 14, SCRCP, claiming that Mizell was responsible for part of Smith's damages. *Id.*

The supreme court found that Tiffany could not bring Mizell into the case as a third-party defendant because doing so would "require (1) a plaintiff to maintain a suit against someone with whom he has already settled; (2) a settling defendant to defend a lawsuit he has already settled . . . ." *Id.* at 569, 799 S.E.2d at 485. The supreme court recognized that Rule 14, SCRCP, provides "a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action *who is or may be liable to him* for all or part of the plaintiff's claim against him." *Id.* at 560, 799 S.E.2d at 486 (emphasis in original). The *Tiffany* Court held that Tiffany could not bring a third-party complaint against Mizell because Mizell was "not subject to liability for any part of Smith's claims based on the covenant not to execute he obtained from Smith." *Id.* at 560-61, 799 S.E.2d at 486.

A similar factual scenario presents itself in this action. Full Throttle and Sloon Shine are not subject to liability for any part of Plaintiff's claims based on the Release they obtained from Plaintiff in October 2018. Thus, according to *Tiffany* and S.C. Code § 15-38-50, House of Blues

does not have a contribution claim against Full Throttle and Sloon Shine because Plaintiff released them from all liability to him. House of Blues cannot use Rule 14, SCRCP, to bring Full Throttle and Sloon Shine into this case as third-party defendants under a contribution theory. Accordingly, House of Blues' contribution cause of action against Full Throttle and Sloon Shine is dismissed.

House of Blues argues that S.C. Code Ann. § 15-38-50 does not apply here because the settlement between the Plaintiff, Full Throttle, and Sloon Shine was not in "good faith," as is required by the statute. However, House of Blues did not allege in its Third-Party Complaint that the settlement was not in good faith. House of Blues did not present anything else that the Court could consider in support of this argument. Accordingly, the Court rejects it.

House of Blues next argues that *Smith v. Tiffany* did not decide whether due process and equal protection would allow a non-settling defendant to bring a settling party back into a case. While it is true that *Smith v. Tiffany* did not decide this issue, the Court declines to rule that House of Blues' due process or equal protection rights would be violated by not allowing it to bring Full Throttle and Sloon Shine back into this case. Full Throttle and Sloon Shine have already settled with the Plaintiff. House of Blues had ample opportunity to assert crossclaims against them when they were parties to this case, and further has had opportunities to file a separate action against them. House of Blues further argues that its ability to use the "empty-chair defense" at trial is insufficient to protect its rights. However, the empty-chair defense was adopted by the legislature and discussed in *Smith v. Tiffany* as a non-settling defendant's remedy in place of being able to bring settling entities in as parties to a case. House of Blues' constitutional rights are not violated by its inability to bring Full Throttle and Sloon Shine back into this case.

As it pertains to American Outlaw Spirits, House of Blues has failed to allege any facts that would support relief under a contribution theory. In the Third-Party Complaint, House of Blues inconsistently asserts that the damages incurred by the Plaintiff were due to the primary fault of the Third-Party Defendants or their authorized agents, servants, or employees but also that House of Blues and these Third-Party Defendants are joint tortfeasors. *Compare* Third-Party Compl. ¶ 147 *with* ¶ 156-157. However, House of Blues has not alleged that Garner served Wagoner shots of AOS's liquor, nor has it alleged anything else to suggest this Third-Party Defendant may share common liability for the damages suffered by Plaintiff. *See Charleston Elec. Servs., Inc. v. Rahall*, 427 S.C. 317, 322, 831 S.E.2d 122, 124 (Ct. App. 2019) (defining contribution defined as "tortfeasor's right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share, the shares being determined as a percentage of fault."). House of Blues' contribution claim against American Outlaw Spirits is dismissed.

C. House of Blues' Negligence and Negligent Misrepresentation Claims Are Barred by the Statute of Limitations.

In South Carolina, the statute of limitations for negligence actions is three years. S.C. Code § 15-3-530 (2018). An action upon a contract also must be commenced within three years of the breach. S.C. Code § 15-3-530(1). The South Carolina Supreme Court has "repeatedly held that a statute of limitations begins to run when the party either knew or should have known that some legal right had been invaded." *City of Newberry v. Newberry Elec. Co-op., Inc.*, 387 S.C. 254, 260, 692 S.E.2d 510, 513 (2010); *Dean v. Ruscon Corp.*, 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996) ("The statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct."); *Johnston v. Bowen*, 313 S.C. 61, 64, 437 S.E.2d 45, 47 (1993) ("[T]he injured party must act with some

promptness where facts and circumstances of the injury would put a person of common knowledge and experience on notice that some right of his had been invaded or that some claim against another party might exist."). "The date on which discovery should have been made is an objective, not subjective, question." *Stokes–Craven Holding Corp. v. Robinson*, 416 S.C. 517, 526, 787 S.E.2d 485, 489 (2016). A statute of limitations begins to run at the time the cause of action accrues. *King v. James*, 388 S.C. 16, 26, 694 S.E.2d 35, 40 (Ct. App. 2010). The question of when a cause of action accrues is a question of law for the court to decide. *Menezes v. WL Ross & Co., LLC*, 403 S.C. 522, 530, 744 S.E.2d 178, 182 (2013). A cause of action accrues when defendant breaches a duty owed to the plaintiff, even though substantial damages either were not discovered or did not even occur until sometime later. *Grooms v. Med. Soc. of S.C.*, 298 S.C. 399, 402, 380 S.E.2d 855, 857 (Ct. App. 1989); *see also Bergstrom v. Palmetto Health All.*, 358 S.C. 388, 397, 596 S.E.2d 42, 46 (2004) ("The fact that substantial damages did not occur until later is immaterial to determining when the action accrued or arose.").

In its negligence cause of action, House of Blues alleges that "the Third-Party Defendants undertook to perform under the Agreement." Third-Party Compl. ¶ 139. House of Blues next alleges they had "an obligation to exercise due care in their performance." *Id.* at ¶ 140. Accordingly, House of Blues' claims sound in contract, not tort. *See Seebaldt v. First Fed. Sav. & Loan Ass'n,* 269 S.C. 691, 692-93, 239 S.E.2d 726, 727 (1977) ("The character of an action is primarily determined by the allegations contained in the complaint. . . . Bare allegations of negligence cannot convert a breach of contract action into an action in tort."). As held above, these Third-Party Defendants were not parties to the Co-Promotion Agreement. Noticeably absent from the Third-Party Complaint is any duty owed by these Third-Party Defendants apart

from their alleged obligations under the Co-Promotion Agreement. The Third-Party Complaint is fatally defective on this element.

House of Blues argues that these Third-Party Defendants voluntarily undertook a duty to procure and supervise Garner, to promote and distribute their alcohol, and to obtain insurance coverage. House of Blues, however, failed to plead a voluntarily assumed duty. Even had House of Blues properly pled a negligence claim against these Third-Party Defendants, the Court still finds that the negligence claim arose in 2014 and is time-barred.

House of Blues claims that these Third-Party Defendants were negligent, careless, and reckless by:

a. "Failing to comply with all laws related to the sale and service of alcohol, including any and all prohibitions on the service of free alcohol";
b. "Engaging in promotion of their own alcohol brands, including but not limited to, S'loon Shine and American Outlaw liquor";
c. "Failing to use due case [sic] in providing festival talent and personalities for the Throttle Fest event";
d. "Failing to properly train and supervise Michael Garner";
e. "Such other and further deficiencies or failures as discovery will reveal"; and
f. "Being otherwise negligent."

Third-Party Compl. ¶ 141. House of Blues was or should have been on notice of its negligence claim at the end of the Throttle Fest, on or about May 17, 2014. House of Blues did not file its Third-Party Complaint until October 18, 2019, which is outside of the three-year window.

House of Blues' cause of action for negligent misrepresentation fails for the same reason. House of Blues asserts that the Third-Party Defendants made false representations to it regarding the following:

a. "That Third-Party Defendants were experienced in putting on a Full Throttle festival";

b. "That Third-Party Defendants would act in a commercially reasonable manner";

c. "That Third-Party Defendants would comply with all laws related to the sale and service of alcohol, inclusion [sic] any and all prohibitions on the service of free alcohol"; and

d. "That Third-Party Defendants would properly train and supervise Michael Garner."

Third-Party Compl. ¶ 131. House of Blues also alleges they made false representations regarding the procurement and maintenance of insurance coverage in advance of the Event that took place in May 2014. *Id.* at ¶ 130. The Event took place between May 9 and May 17, 2014 and the incident giving rise to the Plaintiff's lawsuit occurred on May 16, 2014. *Id.* at ¶¶ 93, 97, 108-110. House of Blues either knew or should have known of at least some of these Third-Party Defendants' alleged misrepresentations prior to and during the Event. Since the Event occurred on House of Blues' premises and House of Blues employed Garner, it either knew or should have known in May 2014 that these Third-Party Defendants had allegedly misrepresented their ability to train and supervise Garner.

Accordingly, House of Blues' negligent misrepresentation cause of action accrued in May 2014. House of Blues did not file its Third-Party Complaint until October 18, 2019, which

is, again, outside of the three-year window. House of Blues' negligence and negligent misrepresentation claims are time-barred and are dismissed.

House of Blues argues that these causes of action did not accrue until October 20, 2016, when it learned of Plaintiff's injuries. However, House of Blues' claims are not based solely on Plaintiff's injuries. Some are based on the Third-Party Defendants' alleged misrepresentations which occurred prior to the Event and alleged actions during the Event, which House of Blues either knew of or should have known of during the Event (*e.g.*, these Third-Party Defendants' alleged impermissible participation in alcohol sponsorships during the Event). House of Blues either knew or should have known enough at the time of the Event for its causes of action to accrue.

Equitable tolling also does not assist House of Blues here. House of Blues' claims would still be barred even if the Court would find the statute of limitations tolled prior to these Third-Party Defendants' respective dismissals from this action. As noted above, the claims accrued during the Event, which occurred in May 2014. If the statute of limitations was stopped when Plaintiff filed this action in May 2017, there would have been less than a month left until it expired. If the clock restarted on January 2, 2018 and August 13, 2019, the dismissals of American Outlaw Spirits and then Full Throttle and Sloon Shine, respectively, that remaining month would have passed before House of Blues filed its Third-Party Complaint in October 2019.

Finally, the Court rejects House of Blues' argument that these Third-Party Defendants should be equitably estopped from arguing the statute of limitations because they defended themselves in this case when they were involved as first-party defendants. These parties had no other option than to defend themselves. A review of this case's procedural history reveals that

these parties filed Motions to Dismiss and only Sloon Shine filed an Answer but asserted the statute of limitations as an affirmative defense therein.

D. House of Blues' equitable indemnification claim fails.

South Carolina law recognizes the principle of equitable indemnification. *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 60, 518 S.E.2d 301, 305 (Ct. App. 1999). "Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party. A right to indemnity may arise by contract (express or implied) or by operation of law as a matter of equity between the first and second party." *Town of Winnsboro v. Wiedeman–Singleton, Inc. (Winnsboro I)*, 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990), *aff'd*, 307 S.C. 128, 414 S.E.2d 118 (1992) *(Winnsboro II)* (citation omitted).

Courts have allowed equitable indemnity in cases of imputed fault or where some special relationship exists between the first and second parties. *Vermeer Carolina's, Inc.*, 336 S.C. at 60, 518 S.E.2d at 305. Traditionally, equitable indemnity cases involve a fact pattern in which the first party is at fault, but the second party is not. *Id.* at 63, 518 S.E.2d at 307. If the second party is also at fault, it comes to court without equity and has no right to indemnity. *Id.* The most important requirement for the finding of equitable indemnity is that the party seeking to be indemnified is adjudged without fault and the indemnifying party is the one at fault. *Id.*; *see also Scott v. Fruehauf Corp.*, 302 S.C. 364, 370, 396 S.E.2d 354, 357-58 (1990) ("Under South Carolina law, there can be no indemnity among mere joint tortfeasors."). Thus, for a party to recover under a theory of equitable indemnification, three things must be proven: (1) that the party from whom indemnity is sought (the indemnitor) was liable for causing the damages which are the subject of the claim for indemnity; (2) the party seeking indemnity (the indemnitee) was

without fault for those damages; and (3) the indemnitee paid for claims against it which were eventually proven to be the fault of the indemnitor. *Vermeer Carolina's Inc.*, 336 S.C. at 63, 518 S.E. 2d at 307.

Even assuming the truth of the matters alleged, House of Blues has failed to state a claim for equitable indemnity against Full Throttle, American Outlaw Spirits, and Sloon Shine. House of Blues asserts that the damages alleged by the Plaintiff were due to the primary fault of the Third-Party Defendants and/or its authorized agents, servants, or employees. There is no allegation that House of Blues has been forced to pay damages for the negligence of these Third-Party Defendants. And House of Blues has pled no special relationship exists between it and Full Throttle, American Outlaw Spirits, and Sloon Shine. Here, House of Blues fails to articulate a basis for which these Third-Party Defendants can be held to indemnify House of Blues. This claim is dismissed.

CONCLUSION

Accordingly, it is adjudged, and decreed: (1) Full Throttle, LLC's Motion to Dismiss is granted and the third-party claims asserted against it by House of Blues are dismissed with prejudice; (2) American Outlaw Spirits, Incorporated's Motion to Dismiss is granted and the third-party claims asserted against it by House of Blues are dismissed with prejudice; and (3) Full Throttle Sloon Shine, LLC's Motion to Dismiss is granted and the third-party claims asserted against it by House of Blues are dismissed with prejudice.

IT IS SO ORDERED.

The Honorable William A. McKinnon
Presiding Judge

Horry Common Pleas

Case Caption: Douglas Kelsey , plaintiff, et al VS House Of Blues Myrtle Beach Restaurant Corporation , defendant, et al

Case Number: 2017CP2603008

Type: Order/Dismissal

So Ordered

/s William A. McKinnon, #2761, Circuit Judge

EXHIBIT B

STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT C/A No.: 2017-CP-26-03008
Douglas Kelsey, Plaintiff, vs. House of Blues Myrtle Beach Restaurant Corporation; HOB Entertainment, Inc.; and Travis Scott Wagoner, Defendants.	)	**ORDER GRANTING MOTION TO RECONSIDER IN PART AND DENYING IT IN PART**
House of Blues Myrtle Beach Restaurant Corporation, Third-Party Plaintiff, vs. Throttlefest, LLC; American Outlaw Spirits Incorporated; Full Throttle LLC; and Full Throttle Sloon Shine, LLC, Third-Party Defendants.	)	

This matter is before the Court on Motions to Reconsider, Alter, and Amend filed by Third-Party Plaintiff House of Blues Myrtle Beach Restaurant Corporation ("House of Blues"). . After considering all materials of record and for the reasons set forth below, the Court hereby GRANTS IN PART AND DENIES IN PART Third-Party Plaintiff's Motion to Reconsider.

This Order is substituted in the place of the Court's March 26, 2020 Order.

FACTS

Full Throttle, LLC is a South Dakota real estate holding company that holds real estate only in South Dakota. Michael Ballard is its sole member. American Outlaw Spirits, Inc. ("AOC") is a Georgia corporation that manufactures a brand of liquor. Jesse James Dupree is its sole owner. Sloon Shine, LLC is a Tennessee company that manufactures spirits in Tennessee. Michael Ballard is its sole member. Neither of these manufacturers has an office or facility in South Carolina; neither directly sells its products in South Carolina; and neither derives a substantial portion of its revenue from its respective regional distributors' sales here. The liquor allegedly at issue was purchased wholesale, not from any of these entities.

The facts giving rise to this litigation concern an event that a different Third-Party Defendant, Throttlefest, put on with the Defendant House of Blues in 2014. Ballard and Dupree are the two members of Throttlefest. Throttlefest and House of Blues entered into a Co-Promotion Agreement (hereinafter the "Co-Promotion Agreement") with an effective date of March 19, 2014 "concerning the functions and acts necessary for promoting and conducting" an event called the Full Throttle Festival (hereinafter the "Event") which was held at the House of Blues in Myrtle Beach from May 9 until May 17, 2014. AOS, Sloon Shine, and Full Throttle were not parties to this contract.

Plaintiff alleges that Defendant Travis Wagoner was present at the House of Blues on May 16, 2014 and that House of Blues' employee Michael Garner gave Wagoner two shots of liquor despite Wagoner showing signs of intoxication. Plaintiff then alleges that Wagoner left the House of Blues in an intoxicated state and caused an accident that injured the Plaintiff. Plaintiff alleges Garner was an employee of House of Blues. House of Blues has alleged Garner was acting as the employee or agent of Throttlefest, American Outlaw Spirits, Full Throttle, and Sloon Shine.

Additionally, House of Blues argues that Dupre and Ballard were acting not only as the hosts of ThrottleFest, but also as agents of American Outlaw Spirits, Full Throttle, and Sloon Shine.

PROCEDURAL HISTORY

Plaintiff filed his initial Complaint on May 12, 2017 and an Amended Complaint on July 7, 2017. Plaintiff originally alleged that Garner was acting as an employee or agent of the Third-Party Defendants and House of Blues, and that he was selling alcohol under House of Blues' alcohol license. House of Blues did not file any crossclaims against American Outlaw Spirits, Full Throttle, or Sloon Shine.

Full Throttle, Sloon Shine, and AOS moved to dismiss on August 31, 2017 pursuant to Rules 12(b)(2) and 12(b)(6), SCRCP. On January 2, 2018, Plaintiff dismissed AOS. Full Throttle and Sloon Shine settled with Plaintiff and received a full and final release of all liability and damages of any kind relating to the injuries Plaintiff sustained from the accident. Despite obtaining the Release from Plaintiff, House of Blues refused to consent to Sloon Shine's and Full Throttle's dismissal from the case, even though House of Blues did not have any claims pending against them. On June 25, 2019, Full Throttle and Sloon Shine again moved to dismiss the claims against them. The Court granted Full Throttle's and Sloon Shine's Motion to Dismiss on August 13, 2019.

On October 15, 2019, Plaintiff filed a Second Amended Complaint, which did not include AOS, Full Throttle, or Sloon Shine as Defendants. Plaintiff's Second Amended Complaint alleges that it was only House of Blues' employees and agents that served Wagoner alcohol to the point of intoxication and caused the accident. (Second Am. Compl. ¶¶ 8, 16, 29, 39, 40, 41, 42, 68, 74, 91, 93, 97.) Plaintiff's Second Amended Complaint alleges that Garner was solely House of Blues' employee and cites to House of Blues' testimony admitting the same. (*Id.* at ¶¶ 40-41.) Plaintiff

alleges that when he filed his first Amended Complaint he had not yet discovered that Garner was a House of Blues employee. (*Id.* at ¶ 68.)

On October 18, 2019, House of Blues filed its Answer to the Second Amended Complaint and its Third-Party Complaint. House of Blues asserted the following, third-party claims against all Third-Party Defendants: (1) breach of contract; (2) negligent misrepresentation; (3) negligence; (4) equitable indemnification; (5) contractual indemnification; and (6) contribution. On December 5, 2019, Throttlefest filed a Motion to Dismiss. On December 17, 2019, these Third-Party Defendants moved to dismiss House of Blues' claims. The Court, Judge Culbertson presiding, granted Throttlefest's Motion to Dismiss on February 4, 2020. Arguments on the remaining Third-Party Defendants' motions were heard on February 5, 2020.

LAW/ANALYSIS

"The party invoking personal jurisdiction over a nonresident bears the burden of proving the existence of personal jurisdiction." *Int'l Mariculture Res. v. Grant*, 336 S.C. 434, 437, 520 S.E.2d 160, 161 (Ct. App. 1999) (*citing Southern Plastics Co. v. Southern Commerce Bank*, 310 S.C. 256, 259, 423 S.E.2d 128, 130 (1992)). To meet its burden at this pre-trial stage, House of Blues must make a prima-facie showing of jurisdiction by pleadings and affidavits. *See Coggeshall v. Reprod. Endocrine Assocs. of Charlotte*, 376 S.C. 12, 16, 655 S.E.2d 476, 478 (2007). The showing of personal jurisdiction "must be based upon specific facts set forth in the record in order to defeat defendants' motion to dismiss." *Magic Toyota, Inc. v. Southeast Toyota Distributors, Inc.*, 784 F. Supp. 306, 310 (D.S.C. 1992). "When a motion to dismiss attacks the allegations of the complaint on the issue of jurisdiction, the court is not confined to the allegations

of the complaint but may resort to affidavits or other evidence to determine jurisdiction." *Coggeshall*, 376 S.C. at 16, 655 S.E.2d at 478.

I. The Court Lacks Jurisdiction Over These Third-Party Defendants.

The invocation of personal jurisdiction over a nonresident traditionally had involved a two-step analysis involving both the South Carolina long-arm statute and the relevant constitutional protections. In light of the interpretation that South Carolina's long-arm statute extends as far as the due process clause, courts now focus on whether the nonresident's contacts in South Carolina are sufficient to satisfy due process requirements. *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005). Due process requires that there exist "minimum contacts" between the nonresident and the forum state such that the maintenance of the suit does not offend traditional notions of fair play and justice. *Aviation Assocs. & Consultants, Inc. v. Jet Time, Inc.*, 402 S.E.2d 177, 180 (S.C. 1991). Without minimum contacts, the court does not have the "power" to adjudicate the action. *Southern Plastics Co. v. Southern Commerce Bank*, 310 S.C. 256, 260, 423 S.E.2d 128, 131(1992).

The allegations here concern a claim of "specific jurisdiction," that is, the right to exercise personal jurisdiction because the cause of action arises specifically from a defendant's contacts with the state.[1] *See Coggeshall*, 376 S.C. at 16, 655 S.E.2d at 478. The focus of the court's inquiry must be the contacts generated *by the defendant*, and not on the unilateral actions of some other person or entity. *Id.*

The primary allegations at issue involve the actions Michael Garner. House of Blues acknowledges in its Answer that it issued Garner a W-2 for his work during the Event. Seeking to

[1] General jurisdiction, which arises from continuous and systematic contacts with the state, clearly is not present here. *See Coggeshall*, 376 S.C. at 17, 655 S.E.2d at 479.

distance itself from Garner's actions, House of Blues then says Garner was "part of the Throttlefest festival talent." House of Blues admits that it and Throttlefest undertook the duties for promoting and conducting the Throttle Fest event and asserts that Throttlefest was responsible for "festival talent/personalities." House of Blues nevertheless seeks to reach through the Throttlefest LLC to its two individual members and even further beyond that, tracing duties through those members to each of their other businesses. It seeks to hold responsible those non-resident, non-contracting parties with the duties of the contracting party, and to hold them responsible for acts or omissions in the performance of the contract. It seeks to hold a South Dakota real estate holding company, for example, responsible for the alleged actions of "festival talent" that another entity purportedly obtained—and whom House of Blues reported to the IRS was their employee.

In light of the materials submitted to address the lack of contacts of these Third-Party Defendants and other matters of record, House of Blues cannot establish that the three non-resident companies themselves had sufficient contacts to have purposefully availed themselves of the privilege of conducting activities within South Carolina. *See generally Cockrell v. Hillerich & Bradsby Co., 363 S.C. 485, 492, 611 S.E.2d 505, 509 (2005)* ("The foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum state. Rather, it is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there."); *Aviation Assocs.*, 402 S.E.2d at 180 (nonresident seller's limited contact insufficient); *Power Prod. & Servs. Co. v. Kozma*, 379 S.C. 423, 433, 665 S.E.2d 660, 666 (Ct. App. 2008) (finding conclusory assertions unavailing). The only contact that these entities could be argued to have made here was the requirement by ThrottleFest that House of Blues buy liquor from the Third-Party Defendants to serve at the ThrottleFest event. This singular contact, which was directed by ThrottleFest rather than the Third-

Party Defendants themselves, is not enough to create jurisdiction. These Defendants did not conduct the requisite activity to have purposefully availed *themselves* of the laws of South Carolina. In other words, the actions of Throttlefest in South Carolina can subject itself to the jurisdiction to the courts of South Carolina, but not additional parties.

Additionally, House of Blues alleges that Ballard and Dupree, in conducting their duties as the hosts of ThrottleFest, were also serving as agents of the Third-Party Defendants, by nature of their positions within those companies. House of Blues therefore argues that the contacts made by Ballard and Dupree should be imputed to the Third-Party Defendants. The Court disagrees. House of Blues has not provided sufficient evidence that Dupree and Ballard were serving as agents for the Third-Party Defendants. Mere conclusory statements or allegations in pleadings concerning Dupree and Ballard serving as agents for these Third-Party Defendants are not enough to base the exercise of jurisdiction upon. As a result, the Court cannot exercise jurisdiction over these parties on this, or any other basis as alleged by House of Blues.

Because the Court finds it lacks the "power" to hear this matter with regard to these Defendants, the Court need not address the "fairness" prong of personal jurisdiction.

The Court declines to address Third-Party Defendants' other defenses and arguments, as the Court has found it does not have personal jurisdiction over these parties.

CONCLUSION

Accordingly, House of Blues' Motion to Reconsider is GRANTED IN PART AND DENIED IN PART. Additionally, (1) Full Throttle, LLC's Motion to Dismiss is **GRANTED** and the third-party claims asserted against it by House of Blues are **dismissed for lack of personal jurisdiction**; (2) American Outlaw Spirits, Incorporated's Motion to Dismiss is GRANTED and the third-party claims asserted against it by House of Blues are **dismissed for lack of personal**

jurisdiction;; and (3) Full Throttle Sloon Shine, LLC's Motion to Dismiss is GRANTED and the third-party claims asserted against it by House of Blues are **dismissed for lack of personal jurisdiction**. The Court declines to reach Third-Party Defendants' other defenses and arguments.

IT IS SO ORDERED.

The Honorable William A. McKinnon
Presiding Judge

Horry Common Pleas

Case Caption: Douglas Kelsey , plaintiff, et al VS House Of Blues Myrtle Beach Restaurant Corporation , defendant, et al

Case Number: 2017CP2603008

Type: Order/Other

So Ordered

/s William A. McKinnon, #2761, Circuit Judge