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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas
Lancaster County Civil Action Number 2018-CP-29-01191

The Honorable Kristi F. Curtis, Circuit Court Judge,

Appellate No. 2019-001143

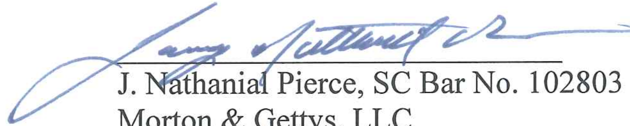
J.A. Seagraves d/b/a J.A. Seagraves City Wide Paving, ...Appellant,

v.

North Regional III, LLC, ...Respondent.

APPELLANT'S FINAL REPLY BRIEF

October 15, 2020



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ARGUMENT

I. The trial court erred in considering evidence outside the four corners of the complaint during a hearing on a motion to dismiss under South Carolina Rule of Civil Procedure 12(b)(6).

In deciding a motion to dismiss pursuant to 12(b)(6), SCRCP, the trial court should consider only the allegations set forth on the fact of the plaintiff's complaint. *Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007) (citing *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995)). The question on a motion to dismiss pursuant to 12(b)(6), SCRCP, is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. *Id* (citing *Toussaint v. Ham*, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987)). The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. *Id* (citing *Toussaint v. Ham*, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987)).

Statutory prohibition is in the nature of an affirmative defense precluding enforcement of a contract and should be pled. *Earthscapes Unlimited, Inc. v. Ulbrich*, 390 S.C. 609, 615, 703 S.E.2d 221, 224 (2010); *Madren v. Bradford*, 378 S.C. 187, 193, 661 S.E.2d 390, 393 (Ct. App. 2008) (citing *Costa and Sons Const. Co. v. Long*, 306 S.C. 465, 469, 412 S.E.2d 450, 453 (Ct. App. 1991)). An affirmative defense ordinarily may not be asserted in a motion to dismiss under Rule 12(b)(6) unless the allegations of the complaint demonstrate the existence of the affirmative defense. *Spence v. Spence*, 368 S.C. 106, 123, 628 S.E.2d 869, 878 (2006). Because the factual analysis of a Rule 12(b)(6) motion is confined to the four corners of the complaint, an affirmative defense usually must be pled in an answer and either resolved in later motions such as a summary judgment or directed verdict or at trial. *Id* (citing 5 Wright and Miller, *Federal Practice and Procedure Civil 3d*, § 1277 (2004)).

In its Motion to Dismiss, Defendant relied solely statutory defenses. Because these statutory defenses are in the nature of affirmative defenses and necessarily require examination of facts outside the four corners of the complaint, they were not properly before the court on a Rule 12(b)(6) Motion to Dismiss. Appellant objected to the introduction of this evidence at the March 4, 2019 hearing and again in his Motion to Alter or Amend. Disregarding Appellant's objection, the trial court directly relied upon evidence outside the four corners of the Complaint, asking Appellant's counsel "[a]re we just prolonging the agony here?" Tr. of Hr'g on Mot. to Dismiss, at 8:6-7. In taking a position on the ultimate outcome of the case based on improper evidence, the court committed reversible error.

II. The statutory defenses raised by Respondent in its Motion to Dismiss are not, without factual support, sufficient to warrant dismissal.

Respondent argues S.C. Code sections 40-11-370(c) and 29-5-15(A) are sufficient, in and of themselves, to confirm Appellant cannot prevail under any theory. However, while the statutes provide a bar to recovery under some scenarios, the bar is not absolute or automatic. S.C. Code § 40-11-370(c) provides "[a]n entity which does not have a valid license *as required by this chapter* may not bring an action either at law or in equity to enforce the provisions of a contract." (emphasis added). S.C. Code § 29-5-15(A) provides "[t]o file a mechanics lien, a contractor must provide the count clerk of court or register of deeds proof that he is licensed or registered *if he is required by law to be licensed or registered*." (emphasis added).

Both statutes require as a threshold issue that the individual or entity in question be actually required to have a license. This would necessitate a development of the facts; Respondent would have to prove Appellant was required to be licensed under the statutes and was not so licensed. Appellant's counsel raised this issue at the Motion to Dismiss hearing. (R. p. 17, ll. 17-23). At no point did Respondent present any evidence regarding the requirement Appellant, specifically, be

licensed. Respondent's counsel, instead, asserted a blanket licensure requirement not supported by the language of the statutes pled as affirmative defenses. In fact, Respondent's counsel noted at the hearing that the license need only be listed "if required by law" and that the Lien had to "have a license number on it to be valid *if a license is required for that work.*" (R. p. 13, ll. 22-24).

Should parties be allowed to raise sections 40-11-370(c) and 29-5-15(A) without being required to provide a factual basis for their application, claimants will be placed in the untenable position of choosing between reliance on the established standard of review on motions to dismiss or opening themselves to conversion of the Motion to Dismiss into a Motion for Summary Judgment before the facts are fully developed. Ostensibly, this is the principle put forth in *Spence* where the Court explained the general rule barring the application of affirmative defenses at the 12(b)(6) stage were relaxed where "there is no disputed issue of fact raised by an affirmative defense, or the facts are completely disclosed on the fact of the pleadings. . . ." *Spence*, 368 S.C. at 123, 628 S.E.2d at 878. Here, the plain language of the statues at issue create a factual issue and, therefore, their application at the 12(b)(6) stage is not proper, even under the relaxed rule espoused in *Spence*.

CONCLUSION

Based on the above, the trial court erred in considering evidence outside the four corners of the Complaint, in the nature of a statutory defense, and Appellant is entitled to relief in the form of remand for further proceedings.

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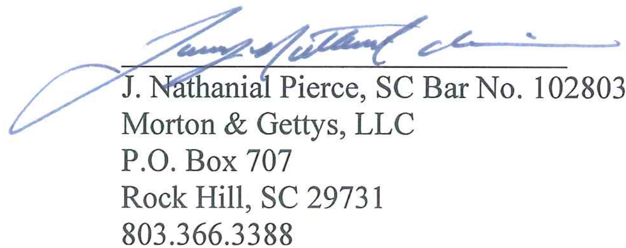

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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Reply Brief complies with Rule 211(b), SCACR.

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