THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley D. Price

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SC Court of Appeals

Appellate Case No. 2020-000936

Skip Hoagland, …… Appellant,

v.

John Tecklenburg, in his official capacity, the City of Charleston, and the City of Charleston Police Department, ...……..... Respondents.

APPELLANT'S INITIAL BRIEF AND DESIGNATION OF MATTER TO BE INCLUDED ON APPEAL

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STATEMENT OF ISSUES

I. Where the lower court ruled that Appellant's amended complaint must be dismissed with prejudice pursuant to Rule 12(b)(6), SCRCP, and that the lower court would not reconsider this ruling, did the lower court err in dismissal of Appellant's first and third causes of action?

II. Where the lower court ruled that it would not reconsider its order of dismissal with prejudice pursuant to Rule 12(b)(6), SCRCP, did the lower court err in determining that Appellant's amended complaint should be dismissed with prejudice without first providing him leave to amend and consider an amended pleading?

III. Where the lower court ruled that Appellant's amended complaint must be dismissed with prejudice pursuant to Rule 12(b)(6), SCRCP, and that lower court would not reconsider this ruling, did the lower court err in dismissal of Appellant's fourth cause of action for declaratory judgment that was not addressed by Respondents' motion to dismiss or the lower court's order of dismissal?

STATEMENT OF THE CASE

Appellant Skip Hoagland ("Hoagland") filed this lawsuit on July 9, 2018, against Respondents John Tecklenburg, in his official capacity, the City of Charleston, and the City of Charleston Police Department. On August 13, 2018, before service of responsive pleading by Respondents, Hoagland served and filed an Amended Complaint seeking: 1) damages from the seizure and expulsion of Hoagland during public comment before the Charleston City Council where Respondent Tecklenburg was presiding; 2) a declaratory judgment that Respondent City of Charleston violated the South Carolina Freedom of Information Act, specifically S.C. Code Ann § 30-4-70, when it, through directive of Respondent Tecklenburg, removed Appellant from the premises impermissibly closing the open public meeting; 3) for damages stemming from a conspiracy between Respondents to unconstitutionally censor Hoagland during his discussion of matters of public concern; and 4) an order vacating Charleston City Ordinance 2-28 (Conduct Code) for being unconstitutionally vague. (R. pp. ___; amended summons and complaint.)

On September 20, 2018, Respondents served their answer to Appellant's amended complaint, along with their motion to dismiss at issue in this matter. Respondents' answer admitted introductory allegations of facts concerning jurisdiction, denied all others and raised fourteen defenses, including for Rules 8 and 12, SCRCP. (R. pp. ___; answer.) Respondents' motion to dismiss sought 1) dismissal of the Charleston Police Department, "as it is not a legal entity subject to suit"; 2) dismissal of John Tecklenburg as he and the City of Charleston (hereinafter "the City") "are on in the same for purposes of this litigation such that this action may not be

brought against both"; 3) dismissal of the City because it can deny "non-residents the right to speak entirely" and has "a substantial interest in conducting orderly efficient meetings"; 4) dismissal of Appellant's SCFOIA cause of action for failure to state a claim "as FOIA does not require governmental bodies to allow citizens to speak at meetings"; and 5) dismissal of Appellant's civil conspiracy cause of action "as he has not alleged special damages and because the claim is barred by the intra-corporate conspiracy doctrine." (R. pp. ___; motion to dismiss.) On April 27, 2020, Appellant served his memorandum of law in opposition to Respondents' motion to dismiss. (R. pp. ___; memorandum of law opposing motion to dismiss.) Three days later, on April 30, 2020, Respondents served their memorandum of law in support of the motion to dismiss. (R. pp. ___; memorandum of law in support motion to dismiss.) Appellant served his reply to Respondents' memorandum of law on May 1, 2020. (R. pp. ___; reply to memorandum of law in support motion to dismiss.)

On May 5, 2020, counsel for Appellant served and filed a motion to be relieved as counsel. (R. pp. ___; motion to be relieved as counsel.) Counsel for Appellant's motion requested "holding filing deadlines in abeyance for a reasonable period of time to allow the Plaintiff to obtain substitute counsel." (R. pp. ___; motion to be relieved as counsel.) On May 18, 2020, eleven days after entry of the trial court's order granting Respondents' motion to dismiss, the trial court entered its consent order substituting counsel for Appellant to the undersigned. (R. pp. ___; consent order for substitution of counsel.)

On May 7, 2020, the trial court entered its order granting Respondents' motion to dismiss. (R. pp. ___; motion to dismiss order.) First, the motion to dismiss order

provided that "[based on the facts alleged in his Complaint, Plaintiff has not stated facts sufficient to state a claim of constitutional magnitude." (R. pp. ___; motion to dismiss order.) Second, the order dismissed Appellant's South Carolina Freedom of Information Act cause of action on the basis that the City's public meeting in question remained open the public, even after Appellant's removal, so his "claim that his removal transformed the City Council meeting into a closed session or otherwise not open meeting in violation of FOAI are without merit." (R. pp. ___; motion to dismiss order.) Third, the order dismissed Appellant's claim for civil conspiracy for two reasons: 1) Appellant "failed to allege any separate and distinct acts to further the conspiracy or any separate special damages other than those that been alleged in his other causes of action" and 2) because the factual allegations of civil conspiracy concern only City employees, the Itracorporate Conspiracy Doctrine bars these claims "[a]s an agency or corporation cannot conspire with itself." (R. pp. ___; motion to dismiss order.) "THEREFORE, IT IS ORDERED that Plaintiff has not stated facts sufficient to constitute a case of action, and pursuant to Rule 12(b)(6), of the South Carolina Rules of Civil Procedure, Defendants' Motion to Dismiss is hereby granted, ending this matter and dismissing Plaintiff's claims with prejudice. AND IT IS ORDERED!" (R. pp. ___; motion to dismiss order.)

On May 18, 2020, the undersigned entered his notice of appearance and served Appellant's motion to reconsider the motion to dismiss order. (R. pp. ___; motion to reconsider motion to dismiss order.) The motion to reconsider recites verbatim allegations from the complaint concerning Appellant's arrest and removal from the City public meeting and then provided "as it related to the alleged state constitution violation

of suppression of freedom of speech and the right to petition, a reasonable inference was raised that Defendant Tecklenburg's silencing and removal of Plaintiff was to stop him speaking about 'lies' 'Hellen Hill' or any other subject of reasonable inference from the Amended Complaint." (R. pp. ___; motion to reconsider motion to dismiss order.) The motion to reconsider also pointed out that the Respondent Tecklenburg's "discretionary decision" to remove Appellant from the meeting was capable of constitutional violation and "likely caused fear int eh chose speakers after Plaintiff and may have altered their comments before council that evening." (R. pp. ___; motion to reconsider motion to dismiss order.) The motion to reconsider provided the trial court's order of dismissal also failed to provide Appellant with a reasonable inference regarding the civil conspiracy claim.

> While an inference from paragraph 12 of the Amended Complaint that "the Mayor ordered the City of Charleston Police Department to take custody of the Plaintiff and physically remove him from the public meeting and deposit him outside on a public street" may be that the Defendant Police Department was acting at the behest of the mayor, that is not necessarily the case. A reasonable inference could be that for different reasons (perhaps because they did not like the appearance of Plaintiff or wanted to protect the reputation of Helen Hill) the police department took custody of Plaintiff and removed him from the building. While the Defendant Mayor had already successfully silenced the Plaintiff by saying he was out of order, the Defendant Police Department took the separate and distinct action of removal. Essentially, Plaintiff could not have known the intentions of these distinct and separate actors, but he may be able to prove them if he is allowed this reasonable inference at this stage in the proceeding.

(R. pp. ___; motion to reconsider motion to dismiss order.)

Finally, the motion to reconsider warned the trial court that neither Respondents' motion to dismiss nor the trial court's motion to dismiss order, addressed Appellant's fourth cause of action in the amended complaint that the "decorum" Ordinance 2-28 of

Respondent City is unconstitutionally vague and thus, void as a matter of law. (R. pp. ___; motion to reconsider motion to dismiss order.)

On May 27, 2020, the parties, represented by counsel, appeared before the Honorable Bentley Price, for a hearing via Zoom, web-conference technology, on Appellant's motion to reconsider. (R. pp. ___; transcript motion to reconsider hearing.) On May 28, 2020, the trial court entered its order denying Appellant's motion to reconsider. (R. pp. ___; order denying motion to reconsider.) Appellant served and filed his notice of appeal on June 29, 2020. (R. pp. ___; notice of appeal.)

STANDARD OF REVIEW

"In reviewing a motion to dismiss, this Court applies the same standard of review as the trial court." Carolina Park Assocs., LLC v. Marino, 400 S.C. 1, 732 S.E.2d 876 (S.C. 2012)(citing Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007)). "Questions of law may be decided with no particular deference to the trial court." Id. (quoting Wiegand v. U.S. Auto. Ass'n, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011).

A court must dismiss a complaint whenever it "fail[s] to state facts sufficient to state a cause of action." Rule 12(b)(6), S.C.R.C.P. The ruling on a motion to dismiss under Rule 12(b)(6), SCRCP, for failure to state facts sufficient to constitute a cause of action must be based solely upon the allegations set forth in the pleading. Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601 (1995). "The motion cannot be sustained if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case. The question is whether in the light most

favorable to plaintiff, and with every doubt resolved in her behalf, the complaint states any valid claim for relief." Dye v. Gainey, 320 S.C. 65, 67-68, 463 S.E.2d 97, 98-99 (Ct. App. 1995). The complaint should not be dismissed even if the court doubts the plaintiff will prevail in the action. Id. A court must view the allegations and draw inferences in the light most favorable to the plaintiff, but even taking this approach, the court must dismiss the complaint if "the facts alleged in the complaint do not support relief under any theory of law." Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009).

ARGUMENT

I. The court's denial of Appellant's motion to reconsider and the court's dismissal of Appellant's first and third causes of action of his amended complaint was error

Appellant's first and third causes of action of the amended complaint are for violations of freedom of speech and civil conspiracy, respectively. (R. pp. ___; amended summons and complaint.)

Appellant's first cause of action allegations are contained in paragraphs 7-21 in pages 3-6 of the amended complaint. (R. pp. ___; amended summons and complaint.) The allegations are simply too numerous and detailed to repeat here; however, they describe the actions of Respondents on the evening of May 25, 2018, when they seized and removed Appellant from the City's public meeting for allegedly violating Ordinance 2-28 ("Rules of Decorum") when Appellant was speaking to council during the appointed time and said "Numbers don't lie; Helen Hill lies." (R. pp. ___; amended summons and complaint.) In short: the allegations state that Plaintiff was taken into

Respondents' custody and removed from the City meeting for the content of his speech. (R. pp. ___; amended summons and complaint.) The lower court's order of dismissal provides:

> This Court finds that the Mayor possesses the ordained power to maintain decorum at City Council meetings and may utilize his discretion in doing so. The police department must act at the direction of the Mayor during City Council meetings and at no time was the plaintiff under arrest. Based on the facts as alleged in his Complaint, Plaintiff has not stated facts sufficient to state a claim of constitutional magnitude. Rather, the facts as alleged by Plaintiff are that the Mayor made a discretionary decision to remove Plaintiff from a City Council and the police department followed the direction of the Mayor to remove Plaintiff. These actions are entirely within the Defendants' rights as outlined in City of Charleston Ordinances. As such, Plaintiff's claims regarding constitutional violations should be dismissed.

(R. pp. ___; motion to dismiss order.)

As Appellant argued in his motion to reconsider, there are numerous inferences that can be drawn from these numerous allegations among these 14 paragraphs in three pages of this amended summons and complaint, but one permissible, abundantly reasonable inference, is that Respondent's reaction to Appellant's statement that "Numbers don't lie; Helen Hill lies" was to address the statement and punish Appellant for it. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Police Department of City of Chicago v. Mosley, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972); Cohen v. California, 403 U.S. 15, 24, 91 S.Ct. 1780, 1787, 29 L.Ed.2d 284 (1971); Street v. New York, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969); New York Times Co. v. Sullivan, 376 U.S. 254, 269—270, 84 S.Ct. 710, 720—721, 11 L.Ed.2d 686 (1964), and cases cited; NAACP v. Button, 371 U.S. 415, 445, 83 S.Ct. 328, 344, 9 L.Ed.2d 405 (1963); Wood v. Georgia, 370 U.S. 375, 388—389, 82

S.Ct. 1364, 1371—1372, 8 L.Ed.2d 569 (1962); Terminiello v. Chicago, 337 U.S. 1, 4, 69 S.Ct. 894, 895, 93 L.Ed. 1131 (1949); De Jonge v. Oregon, 299 U.S. 353, 365, 57 S.Ct. 255, 260, 81 L.Ed. 278 (1937). As the United States Supreme Court makes clear in the cited authority above, there are limits placed on the exercise of government power against the liberties of the citizenry in this constitutional republic. It was error for trial court to conclude its inquiry into the applicable constitutional law ended at whether Respondent Tecklenburg had the discretion to act. The factual allegations of the amended complaint plainly state government action to silence Appellant while speaking about an important matter before the appropriate government body. Regardless of whether the amended complaint states the correct legal theory to get redress for this censorship, if provided an opportunity to amend the pleading, another legal theory may be used, which Appellant referenced at the hearing concerning his motion to reconsider. (R. pp. ___; transcript motion to reconsider hearing.)

Appellant's third cause of action provides in paragraph 29 that it was the "unlawful combination of the defendants to use armed force to arrest the plaintiff and censor his speech to prevent him from presenting what he reasonably believes is evidence of unlawful conversion of public funds caused the plaintiff special damage, including the suppression of legal speech for which the law presumes an irreparable harm and forced the plaintiff to incur attorney's fees and associated case costs in order to vindicate his fundamental free speech rights." (R. pp. ___; amended summons and complaint.) This cause of action provides that the censoring of appellant was an "illegal purpose" which "prevented him from presenting evidence of improper and unlawful use of public money." (R. pp. ___; amended summons and complaint.) The factual

allegations of paragraphs 12, 13, and 17 provide the facts necessary to show that each was each respondent's individual actions that combined to create the censorship of Appellant's views, which this case was brought to redress. (R. pp. ___; amended summons and complaint.) Appellant's motion to reconsider provides that, while there is only one inference the trial court afforded Appellant on these allegations (that the police officers were acting at the behest of the Respondent mayor) but there were other reasonable inferences, including whether the police officers acted at that time with separate motivations than a perceived command from Respondent mayor. Only allowing additional discovery in this action will have provided answers to which inference was correct and would be resolved by motions for summary judgment or trial. Either way, it was error for the trial court to not provide Appellant this reasonable inference, among others, from the allegations cited.

II. The lower court's denial of Appellant's motion to reconsider that it would not reconsider its order of dismissal with prejudice pursuant to Rule 12(b)(6), SCRCP, was error in determining that Appellant's amended complaint should be dismissed with prejudice without first providing him leave to amend and consider an amended pleading

The lower court order granting dismissal ends with the statement that "… Defendants' Motion to Dismiss is hereby granted, ending this matter and dismissing Plaintiff's claims with prejudice." (R. pp. ___; motion to dismiss order.) The lower court's order denying Appellant's motion to reconsider did not change this outcome. (R. pp. ___; order denying motion to reconsider.)

At separate times, with separate attorneys, Appellant requested leave to amend if the lower court was inclined to rule the amended complaint did not state facts

sufficient to constitute a cause of action and that it was being dismissed. First, in Appellant's reply to Respondents' memorandum of law, Appellant said, "[i]f the Court believes that the allegations of special damages are not set forth with sufficient specificity, the plaintiff has no objection for an amended complaint to ensure that the City is aware that the plaintiff is claiming special damages." (R. pp. ___; reply to memorandum of law in support motion to dismiss.) Next, at the motion to reconsider hearing, Appellant sought leave to amend and warned the court that not providing leave to amend to cure notice issues may considered an abuse of discretion, pursuant to Skydive Myrtle Beach, Inc. v. Horry County, 426 S.C. 175, 826 S.E.2d 585 (2019).

In Skydive, the South Carolina Supreme Court considered a case where a motion to dismiss pursuant to Rule 12(b)(6), SCRCP, was brought by the Defendants/Respondents that was granted by the Court. Id. at 179. Before the motion was granted, Skydive requested it "be allowed to amend its complaint to cure any pleading defects in the event the court decided to grant Respondents motion." Id. "Nevertheless, the court granted Respondents' motion and dismissed Skydive's claims against Respondents without considering Skydive's request to amend its complaint. The order specifically provided the dismissal was 'with prejudice.'" Id. In Skydive, the Supreme Court said the lower court "erred by failing even to consider allowing Skydive to amend its Complaint." Id. at 180.

"When a trial court finds a complaint fails 'to state facts sufficient to constitute a cause of action' under Rule 12(b)(6), the court should give the plaintiff an opportunity to amend the complaint pursuant to Rule 15(a) before filing the final order of dismissal." Id.; See Foman v. Davis, 371 U.S. 178, 179, 182, 83 S.Ct. 227, 228, 230, 9

L.Ed.2d 222, 224, 226 (1962) (where a complaint is dismissed "for failure to state a claim upon which relief might be granted," leave to amend the complaint "should, as the rules require, be 'freely given' " (quoting Rule 15(a), Fed. R. Civ. P.)).

This is not to say that leave to amend will always be provided. If the party opposing the amendment can show a valid reason for denying that motion, then "[a] trial court has discretion to deny a motion to amend." Id. at 182. Some possible "valid reasons" include, but likely are not limited to, "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, [and] undue prejudice to the opposing party[.]" Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227 (1962). Otherwise, leave to amend should be "freely given." Skydive at 179. Moreover, "outright refusal to grant leave [to amend] without any justifying reason appearing for the denial is . . . [an] abuse of . . . discretion." *Id.* Again, "[t]he burden of establishing a reason for this denial is on the party opposing the amendment. Patton v. Miller, 420 S.C. 471, 491 n.9, 804 S.E.2d 252, 262 n.9 (2017).

The record is clear in this matter that Appellant was not provided an opportunity to amend and cure perceived failures to state facts sufficient to constitute a cause of action. Furthermore, neither the transcript to the motion to reconsider hearing or the order denying Appellant's motion to reconsider provide any justifying reason for denying Appellant this opportunity. It was an abuse of discretion to dismiss Appellant's amended complaint with prejudice and error to then not reconsider that ruling and provide Appellant leave to amend.

III. The lower court err in dismissal of Appellant's fourth cause of action for declaratory judgment that was not addressed by Respondents' motion to dismiss or the lower court's order of dismissal

Appellant's fourth cause of action sought a declaratory judgment that City Ordinance 2-28 was unconstitutionally vague such that it should be voided. (R. pp. ___; amended summons and complaint.) In Appellant's memorandum of law, he warns the lower court that it would be improper to dismiss a cause of action for declaratory judgment for failure to state fact sufficient to constitute a cause of action, pursuant to Rule 12(b)(6), SCRCP. (R. pp. ___; memorandum of law opposing motion to dismiss.) In Appellant's motion to reconsider, he brought to the trial court's attention that his Fourth Cause of Action "is not addressed by Defendant's Motion to Dismiss or the Court in its order. Consequently, even if the Court does not reconsider its Order as to the other causes of action, this matter is still pending." (R. pp. ___; motion to reconsider motion to dismiss order.) The lower court refused to reconsider its order of dismissal and the matter presently appears as dismissed on the Charleston County Public Index. (R. pp. ___; screenshot of Charleston Public Index.) It was error for the lower court to end this matter without ever considering Appellant's fourth cause of action.

CONCLUSION

This court should reverse the lower court's dismissal of this action and provide Appellant leave to amend his pleading.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I served the Appellant's initial brief and designation of matter to be included in the record on appeal by attaching it to email correspondence and sending that email correspondence on October 23, 2020, addressed as follows:

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Respectfully submitted,

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