

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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Nov 16 2020

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas
The Honorable J. Cordell Maddox, Jr., Circuit Court Judge

SC Court of Appeals

Civil Action No. 2017-CP-04-02099
Appellate Case No.: 2020-000421

John Harbin

Appellant,

v.

April Blair, Tracy Dunn, HUB Enterprises,
Inc., Shawn Conway, Gallivan White &
Boyd, Sam Nikopoulos, and John Doe

Respondents.

INITIAL BRIEF OF RESPONDENT APRIL BLAIR

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- I. STATEMENT OF THE ISSUES ON APPEAL
- 1) DID THE CIRCUIT COURT CORRECTLY GRANT RESPONDENT BLAIR'S MOTION TO DISMISS THE APPELLANT'S COMPLAINT?
 - 2) DID THE CIRCUIT COURT CORRECTLY IMPOSE SANCTIONS AGAINST APPELLANT PURSUANT TO SOUTH CAROLINA FRIVOLOUS CIVIL PROCEEDINGS SANCTION ACT?

II. STATEMENT OF THE CASE

The allegations of Mr. Harbin's Amended Complaint arise from an underlying dispute that Mr. Harbin had with Respondents, Ms. Blair and Mr. Dunn. [See Amended Complaint]. In the underlying action, Mr. Harbin was shot by Mr. Dunn in the leg while he was at Ms. Blair's home. [Id. at ¶2]. During the course of that litigation, Respondent Gallivan White & Boyd ("GWB") represented Ms. Blair, who had homeowner's coverage through State Farm Insurance Company ("State Farm"). [Id. at ¶6 and ¶8]. Respondent Sam Nikopoulos served as an operation assistant and provided courier services at GWB during the time of the underlying action. [Id. at ¶6]. Prior to trial, GWB made a settlement offer for \$100,000.00 on behalf of Ms. Blair and State Farm to Mr. Harbin and his attorney, Donald L. Smith, who ultimately rejected that offer. [Id. at ¶64]. After making a conscious decision to reject the Offer of Judgement and to try his luck with the jury, the jury returned a defense verdict in favor of Ms. Blair. [Id. at ¶44]. Upon the outcome of the trial, counsel for Mr. Harbin filed a Motion to Vacate and submitted an Affidavit of Willie Clarence Tillman, which he advised the Court constituted "newly discovered evidence" to support his argument to vacate the underlying judgement. [See Memorandum in support of Motion to Vacate]. In his Memorandum in support of his Motion to Vacate, Mr. Harbin argued, amongst other things, "Defendants' acts taken together show that they conspired to deny Plaintiff's claims, thereby interfering in Plaintiff's attorney-client relation/contract." [Id. at p. 3-4]. Finding the affidavit not credible, the requirements for vacating a judgement unsatisfied, and the motion wholly without merit, the Court denied and dismissed Mr. Harbin's Motion to Vacate. [See March 30, 2018 Order]. Mr. Harbin filed a Motion to Reconsider that Order, which was denied on April 12, 2018. [See April 12, 2018 Order]. Counsel for Mr. Harbin did not appeal the Courts Orders of March 30, 2018 or April 12, 2018.

In the present matter, Mr. Harbin filed his Amended Complaint on November 13, 2017, stating one cause of action, whereby he alleged that Ms. Blair tortiously interfered with his contractual relationship with his attorney, Mr. Smith. [Id. at ¶¶69-¶81]. The basis for Mr. Harbin's allegations is an alleged conversation between Ms. Blair's attorney's private investigator and Mr. Dunn, that allegedly impacted his testimony in the underlying lawsuit. [See Amended Complaint; see also Motion to Vacate]. It appears that the exact same facts, claims, and issues that had been previously raised and ruled upon in the underlying action, are now alleged in Mr. Harbin's Amended Complaint. Id.

On November 22, 2017, counsel for GWB and Mr. Nikopoulos filed their Motion to Dismiss. [See GWB Motion to Dismiss]. On December 6, 2017, counsel for HUB enterprises, Inc. and Shawn Conway (collectively "HUB") filed their Motion to Dismiss. [See HUB Motion to Dismiss]. Two days later, on December 8, 2017, counsel for Ms. Blair filed her Motion to Dismiss. [See Blair Motion to Dismiss]. Counsel for Mr. Harbin filed memorandums in opposition to all of the motions to dismiss. [See Mr. Harbin's Memo. In Opp. to GWB Motion to Dismiss; See Mr. Harbin's Memo. in Opp. to Blair's Motion to Dismiss; See Mr. Harbin's Memo. In Opp. to HUB's Motion to Dismiss].

Ms. Blair's Motion to Dismiss came before Judge Maddox on February 28, 2018. [See April 7, 2020 Order]. Having heard the arguments and reviewed the submissions of the parties, Ms. Blair's Motion to Dismiss the Amended Complaint was granted from the bench. Id. However, due to a scrivener error, a written order was not immediately submitted. Id. The written order was submitted on April 7, 2020. Id. Following Judge Maddox's Order, counsel for Mr. Harbin filed his Motion to Reconsider on April 27, 2020. [See Motion to Reconsider April 7, 2020 Order]. On July 20, 2020, by way of Order, Mr. Harbin's Motion to Reconsider was denied. [See July 20, 2020

Order]. On August 11, 2020, counsel for Mr. Harbin filed his Second Notice of Appeal. [See Notice of Appeal].¹

III. STANDARD OF REVIEW

Rule 12(b)(6) of the South Carolina Rules of Civil Procedure allows a defendant to move to dismiss a claim based on a failure to state facts sufficient to constitute a cause of action. Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999). The court may dismiss a claim when the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court. Williams v. Condon, 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001). Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint. Stiles v. Onorato, 318 S.C. 297, 457 S.E.2d 601 (1991). The trial court's grant of a motion to dismiss will be sustained if the facts alleged in the complaint do not support a theory of law. Tatum v. Medical Univ. of South Carolina, 346 S.C. 194, 552 S.E.2d 18 (2001). Upon review of a dismissal of an action pursuant to Rule 12(b)(6), the appellate court applies the same standard of review implemented by the trial court. Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007).

A respondent may argue any additional reasons why an appellant court should affirm the appealed ruling, "regardless of whether those reasons have been presented to or ruled on by the lower court." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000). A reviewing court may, in its discretion, review the additional reasons presented by the respondent

¹ Prior to the submission of Judge Maddox's Order granting Ms. Blair's Motion to Dismiss, counsel for Mr. Harbin filed a previous Notice of Appeal on March 6, 2020 challenging Judge Maddox's previous Orders granting HUB's Motion to Dismiss, GWB's Motion to Dismiss, Judge Maddox's Order granting GWB's Motion for Sanctions, and Orders denying Mr. Harbin's Motions for Reconsiderations. [See Notice of Appeal]. Upon the subsequent Notice of Appeal filed by Mr. Harbin, the Court consolidated the appeals for consideration of the Court under the South Carolina Appellate Court Rules (SCACR). [See August 20, 2020 letter].

and “if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment.” Id. at 420, 526 S.E.2d at 723. See also Rule 220(c), SCACR.

IV. ARGUMENT

A. Harbin Cannot Rely Upon Arguments That Were Not Properly Preserved.

As an initial matter, the arguments presented in Mr. Harbin’s Initial Brief regarding “extrinsic fraud” were not raised in his Memorandum in Opposition to Ms. Blair’s Motion to Dismiss. Rather, the arguments were raised for the first time in Mr. Harbin’s Motion to Reconsider and reiterated verbatim in his Initial Brief. [See Motion to Reconsider April 7, 2020 Order p. 4; see also App.’s Initial Brief, p. 12]. The South Carolina Supreme Court has explained that “[a]n issue may not be raised for the first time in a motion to reconsider.” Johnson v. Sonoco Prods. Co., 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009) (citing Commercial Credit Loans, Inc. v. Riddle, 334 S.C. 276, 186, 512 S.E.2d 123, 129 (Ct. App. 1999)). Therefore, these arguments are not properly before this Court.

Notwithstanding the fact these arguments are not properly before this Court, even if the Court were to consider these arguments, they fail. As stated above, Mr. Harbin alludes that Respondents somehow used “extrinsic fraud to accomplish their objective.” [See Appellant’s Initial Brief, p. 12]. This argument lacks any merit. First of all, fraud, of any kind, was not alleged in Mr. Harbin’s Amended Complaint. [See Amended Complaint]. Pursuant to Rule 9(b), SCRCPP, in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally. Mr. Harbin failed to do that. Mr. Harbin’s “extrinsic fraud” argument was not asserted, presented, and/or set forth in his Amended Complaint. Additionally, Mr. Harbin does not

set forth any facts in support of this alleged use of fraud. Instead, Mr. Harbin simply indicates that “Respondent’s unethical conduct was not justified.” [See App.’s Initial Brief, p. 11-12]. If it is Mr. Harbin’s position that the “unethical conduct” allegedly committed by the Respondents was the conduct set forth in Mr. Tillman’s Affidavit, then for the reasons set forth below, that argument has no merit, Mr. Harbin’s prior Motions in the underlying action were denied and dismissed regarding that issue, and Mr. Harbin failed to otherwise file and appeal on those Orders.

B. The Motion to Dismiss Was Properly Granted Because Mr. Harbin Is Barred and Estopped From Asserting This Action Based Upon the Doctrines of Res Judicata and/or Collateral Estoppel.

Mr. Harbin’s current action against Ms. Blair is barred by the doctrines of res judicata, which precludes the relitigation of claims that were raised or could have been raised in prior litigation. Zinn v. CFI Sales & Marketing, Ltd., 415 S.C. 93, 105-06, 780 S.E.2d 611, 617-18 (Ct. App. 2015). “Res judicata ends litigation, promotes judicial economy and avoids the harassment of relitigation of the same issues.” Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 108 (1999). As an additional sustaining ground, Mr. Harbin’s action is also barred by the doctrine of collateral estoppel. Collateral estoppel, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same. Judy v. Judy, 383 S.C. 1, 677 S.E.2d 213, 217 (Ct. App. 2009). “The doctrine of collateral estoppel prevents the relitigation of issues, not claims, necessarily determined in a former proceeding regardless of whether the identity of the causes of action in successive lawsuits are the same.” Carolina Renewal, Inc. v. South Carolina Dept. of Transp., 385 S.C. at 556, 684 S.E.2d at 783 (Ct. App. 2009).

To establish res judicata, the moving party must prove three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. Sealy

v. Dodge, 289 S.C. 543, 347 S.E.2d 504 (1986); Owenby v. Owens Corning Fiberglas, 313 S.C. 181, 437 S.E.2d 130 (Ct. App. 1993). The factors to consider in determining whether the defense of collateral estoppel exists and whether the issues were actually litigated in the first suit include: whether privity exists, whether the doctrine is used offensively or defensively, and whether the party adversely affected had a full and fair opportunity to litigate the relevant issue effectively in the prior action. Pye v. Aycock, 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997).

On November 30, 2017, upon a defense verdict in favor of Ms. Blair, Mr. Harbin, unsatisfied by the results, filed a Notice to Vacate the underlying judgement. [See Notice and Motion to Vacate]. In support of his motion, on January 30, 2018, Mr. Harbin filed a Memorandum in Support of the Motion to Vacate. [See Memorandum in Support of Motion to Vacate]. Set forth in that Memorandum, Mr. Harbin submitted the Affidavit of Willie Clarence Tillman, which he advised the Court constituted “newly discovered evidence.” [See Memorandum of Support of Motion to vacate; see also Affidavit of Willie Clarence Tillman]. Mr. Harbin asserted the exact same allegations in his Motion to Vacate as he does in the present matter, which is the allegation that Ms. Blair and Mr. Dunn “conspired” to defeat Mr. Harbin’s claims. [See Amended Complaint; See also Appellant’s Brief, p.3-4; see also Motion to Vacate]. In his Motion to Vacate, Mr. Harbin specifically argued, “Defendants’ acts taken together show that they conspired to deny Plaintiff’s claim, thereby interfering in Plaintiff’s attorney-client relation. Contract.” [See Memorandum in Supp. Of Motion to Vacate, p. 3]. This is the exact issue and claim brought in the present action against the same parties. [See Amended Complaint, ¶81]. The issue of whether or not Ms. Blair allegedly impaired Mr. Smith’s performance of his legal duties, the issue that Mr. Harbin was allegedly denied due process, and the issue of the alleged tortious interference with the contract between Mr. Smith and Mr. Harbin were previously raised and ruled upon in the underlying action.

[See Memorandum in Support of Motion to Vacate; See also March 30, 2018 Order; See Also Motion to Reconsider Motion to Vacate]. When these issues and facts were presented to the lower court in the underlying action, the court held, “the contentions made by Plaintiff in the current motion are not supported by credible facts or evidence. Rather they appear to be nothing more than unfounded conspiracy theories based upon speculation, misrepresentations of the known facts, and the untrustworthy hearsay statements made through the affidavit executed by Tillman.” [See March 30, 2018 Order, p.15]. The Court further found, “the record leaves this Court firmly convinced there was no such “collusion” or “conspiracy” amongst the defendants prior to the trial of this case...” [See March 30, 2018 Order, p. 15]. Upon ultimately finding that the motion and the allegations set forth within were wholly without merit, the Court denied Mr. Harbin’s Motion to Vacate on all grounds and dismissed the action. [See March 30, 2018 Order]. Mr. Harbin filed a Motion to Reconsider, which was also denied. [See April 12, 2018].

As briefly stated above, Mr. Harbin did not appeal the Court’s Orders of March 30, 2018 or April 12, 2018. The parties, facts, arguments, positions and/or claims, and demands for relief set forth in Mr. Harbin’s previous Motion to Vacate in the underlying action and the present litigation are mirror images of one another. It appears that counsel for Mr. Harbin has essentially “copied” his previous claims set forth in the underlying Motion to Vacate and “pasted” them into the Amended Complaint verbatim. [See Motion to Vacate; see also Amended Complaint; see also Motion to Reconsider April 7, 2020 Order]. Mr. Harbin had the opportunity to fully and fairly litigate the issues in the first action. Unsatisfied by the results, Mr. Harbin has attempted to circumvent proper court policy and procedure by filing the present matter.

Therefore, as a matter of law, Mr. Harbin is barred and estopped from asserting this action pursuant to the doctrines of res judicata and/or collateral estoppel and his Complaint against Ms. Blair must be dismissed.

C. Even if it Could Be Found That Mr. Harbin is Not Barred and Estopped From Asserting This Action, His Complaint Against Ms. Blair Fails to Establish the Requisite Elements For an Action For Wrongful Interference With an Attorney-Client Relationship And Therefore, the Motion to Dismiss Was Properly Granted.

It appears that Mr. Harbin argues the issue on appeal regarding the motion to dismiss in his second issue on appeal regarding sanctions. For efficiency purposes, Respondent Blair will discuss all issues related to the Order granting Ms. Blair's Motion to Dismiss in this section of her brief. Finally, Respondent Blair will not address the issue on appeal regarding Respondent GWB's Motion for Sanctions as she was not involved with nor does she take a position regarding those motions.

An action for wrongful interference with an attorney-client relationship has been recognized in South Carolina. DeBerry v. McCain, 275 S.C. 569, 574, 274 S.E.2d 293, 296 (1981); citing Keels v. Powell, 207 S.C. 97, 34 S.E.2d 482 (1945). The elements of a cause of action for a tortious interference with a contract are: (1) existence of a valid contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages. Camp v. Springs Mortgage Corp., 310 S.C. 514,517, 426 S.E.2d 304, 305 (1993). An essential element to the cause of action for tortious interference requires the intentional procurement of the contract's breach. Kinard v. Crosby, 315 S.C. 237, 240, 433 S.E.2d 835, 837 (1993). Where there is no breach of contract, there can be no recovery. First Union Mortg. Corp. v. Thomas, 317 S.C. 63, 73, 451 S.E.2d 97, 913 (Ct. App. 1994). If the Complaint lacks any one of these elements, it must be dismissed. Keels, 207 S.C. 97, 34 S.E.2d 482 (1945).

In the instant case, Mr. Harbin has failed to plead any facts or circumstances evidencing a breach of contract between Mr. Harbin and his attorney, Mr. Smith. In pertinent part, Mr. Harbin's Amended Complaint alleges the following: Mr. Harbin entered into a contract with his attorney to pursue litigation against Blair and Dunn. [See Amended Complaint, ¶70]. Respondents were aware that a contract existed based on the fact that they were all participants in the litigation in some capacity. [Id. at ¶71]. Ms. Blair utilized the charge against Mr. Dunn, and his subsequent incarceration, to convince him to testify that not only did he mean to shoot Mr. Harbin, but also Ms. Blair had nothing to do with the shooting. [Id. at ¶75]. As a result of the intentional interference with Mr. Harbin's contract, all Respondents prevented Mr. Harbin from getting the damages for which he was entitled due to the shooting. [Id. at ¶80].

These allegations, even if taken as true, fail to establish that the contract between Mr. Harbin and Mr. Smith was breached. Mr. Harbin has failed to include any allegations of any acts or omissions by Ms. Blair warranting the interference that her alleged intentional actions procured the breach of the contract. The Amended Complaint here contains no independent allegations of any acts or omissions by Ms. Blair warranting the interference that she intentionally procured Mr. Harbin's attorney's discharge. In fact, the attorney-client relationship between Mr. Harbin and Mr. Smith was not interfered with in any way. [See the Amended Complaint]. Mr. Harbin fails to allege any actions taken by Ms. Blair directly against Mr. Harbin and/or Mr. Smith that in any way had anything to do with their attorney-client relationship/contract. Moreover, Mr. Harbin has failed to allege any breach of the attorney-client relationship/contract, any actions of Ms. Blair that contributed to any alleged breach of that contract, and/or any damages resulting from the alleged breach.

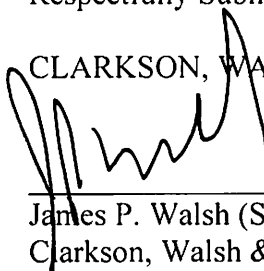
Therefore, because Mr. Harbin has failed to establish the requisite elements to support his claim, his Complaint must be dismissed and the Circuit Court's Orders should be affirmed. See Keels, supra.

V. CONCLUSION

The circuit court properly granted Respondent Blair's Motion to Dismiss. The claims raised in this action were previously raised, ruled upon, and dismissed in the underlying litigation. Mr. Harbin's has failed to plead any facts or circumstances evidencing a breach of contract between Mr. Harbin and Mr. Smith. Therefore, Respondent respectfully requests the circuit court's April 7, 2020 Order and the July 20, 2020 Order both be affirmed.

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PROOF OF SERVICE

The undersigned attorney hereby certifies that a true copy of *Initial Brief of Respondent and Designation of Matter to be Included in the Record on Appeal* in the above-referenced case has been served upon counsel of record via AIS email [pursuant to the Court's May 29, 2020 Operation of the Appellate Courts During the Coronavirus Emergency Order] on November 16, 2020 to the following:

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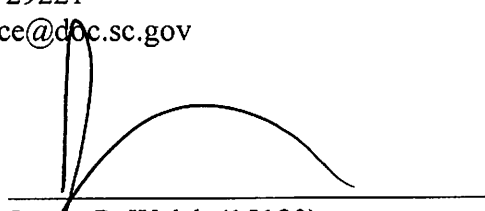
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