

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

APPEAL FROM ANDERSON COUNTY
COURT OF COMMON PLEAS
THE HONORABLE J. CORDELL MADDOX
CIRCUIT COURT JUDGE

APPELLATE CASE NO. 2020-000421
CIVIL ACTION NO. 2017-CP-04-02099

RECEIVED

Nov 19 2020

SC Court of Appeals

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 RESPONDENTS
HUB ENTERPRISES, INC. & SHAWN CONWAY**

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STATEMENT OF ISSUES ON APPEAL

- I. Whether, as to Conway and HUB, Harbin's appeal is timely.
- II. Whether the trial court properly dismissed Harbin's Amended Complaint where he failed to plead an essential element of the single cause of action alleged.

STATEMENT OF THE CASE

Plaintiff John Harbin (“Harbin”) filed his operative Complaint in the instant case on November 13, 2017, named as Defendants April Blair, Tracy Dunn, HUB Enterprises, Inc. (“HUB”), Shawn Conway (“Conway”), Gallivan White & Boyd, and Sam Nikopolous, and raised the same, single cause of action—Tortious Interference with Contract—against each Defendant. [R. p.₋; Am. Compl.] Conway and HUB timely filed a Motion to Dismiss pursuant to Rule 12(b)(6), SCRCP. [R. p.₋; HUB and Conway’s Mot. to Dismiss.] All other Defendants timely filed similar Motions.¹ [R. p.₋; GWB and Nikopolous’ Mot. to Dismiss; R. p.₋; Blair’s Mot. to Dismiss.]

After the Motions were fully briefed by all parties, a hearing for all Defendants’ Motions was held before the Honorable J. Cordell Maddox on February 8, 2018. Following the hearing, on February 5, 2019, the trial court issued an Order granting HUB and Conway’s Motion to Dismiss, finding that, even if taken as true, Harbin’s allegations against HUB and Conway failed to state a claim for which relief may be granted. [R. p.₋; Order Granting HUB and Conway’s Mot. to Dismiss.] On the same day, the trial court issued an Order granting GWB and Nikopolous’ Motion to Dismiss. [R. p.₋; Order Granting GWB’s Mot. to Dismiss.] On February 13, 2019, GWB and Nikopolous moved for sanctions against Harbin. [R. p.₋; GWB and Nikopolous’ Mot. for Sanctions.]

On February 15, 2018, Harbin moved for reconsideration of the trial court’s February 5, 2018 Orders. [R. p.₋; Harbin’s Mot. for Recons. of Order Granting HUB and Conway’s Mot. to Dismiss; R. p.₋; Harbin’s Mot. for Recons. of Order Granting GWB and Nikopolous’ Mot. to Dismiss.] The trial court denied Harbin’s Motions for Reconsideration on October 9, 2019 and

¹ Defendant Tracy Dunn did not file any responsive pleading to Harbin’s Amended Complaint and has not participated in the instant litigation in any way.

granted GWB and Nikopolous' Motion for Sanctions. [R. p._; Orders Denying Harbin's Mots. for Recons.; R. p._; Order Granting GWB's Mot. for Sanctions.]

Then, on October 21, 2019, Harbin moved for reconsideration of the Order granting GWB and Nikopolous' Motion for Sanctions. [R. p._; Harbin's Mot. for Recons. of Order Granting GWB's Mot. for Sanctions.] The trial court entered an Order on February 3, 2020 denying Harbin's Motion for Reconsideration. [R. p._; Order Denying Harbin's Mot. for Recons.] This appeal was filed on March 3, 2020. [R. p._; Notice of Appeal]

STATEMENT OF FACTS

The case at bar is the second action arising out of a purported 2012 shooting incident involving Harbin, Blair, and Dunn. [R. p. _; Am. Compl.] Harbin alleges that, on June 21, 2014, Dunn shot him in the leg while on Blair's property. [R. p. _; Id. at ¶¶ 22-30.] After the shooting, several related legal proceedings followed. First, Dunn was charged with a criminal offense; he later pled guilty to Assault and Battery of a High and Aggravated Nature and received a probationary sentence. [R. p. _; Id. at ¶ 34.] Second, Harbin filed a complaint naming Blair and Dunn as defendants. [R. p. _; Id. at ¶ 31.] Dunn failed to answer or otherwise respond to the complaint. [R. p. _; Id. at ¶ 32.] Blair had homeowner's insurance coverage through State Farm Insurance Company and was represented during the ensuing litigation by counsel from the law firm of GWB. Prior to trial, GWB made a settlement offer on behalf of Blair to Harbin. That offer was rejected. At trial, the jury returned a defense verdict for Blair. [R. p. _; Id. at ¶ 44.]

Thereafter, GWB moved for an order granting costs for all expenses incurred from the date the settlement offer was made. Attached to the motion was an affidavit in support, including an invoice from HUB for three (3) days of attempted surveillance on Harbin by its employee, Conway. The trial court granted that motion. Harbin moved for a new trial, arguing that GWB's failure to disclose Conway's attempted surveillance on Harbin was newly discovered evidence that entitled him to a new trial. The trial court denied that motion.

In the instant case, the second civil suit arising from the 2012 shooting incident, Harbin alleges that HUB and Conway tortuously interfered with his contractual relationship with his attorney. [R. p. _; Id. at ¶¶ 70-81.] This alleged inference, Harbin alleges, "prevented [him] from getting the damages for which he was entitled due to the shooting." [R. p. _; Id. at ¶ 80.]

The trial court granted Conway and HUB's Motion to Dismiss because Harbin's Amended Complaint did not allege a breach of the contract between Harbin and his attorney. [R. p._; Order Granting HUB and Conway's Mot. to Dismiss.]. Harbin now challenges on appeal the trial court's dismissal of his Amended Complaint. [R. p._; Notice of Appeal.].

STANDARD OF REVIEW

An appellate court applies the same standard of review as the trial court when reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRPC. Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling **solely on allegations set forth in the complaint**. Id. (emphasis added). The question 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. Plyler v. Burns, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007).

Dismissal under Rule 12(b)(6) is improper if the facts alleged and inferences reasonably deducible from them, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory. Doe, 373 S.C. at 395, 645 S.E.2d at 247. Moreover, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. Id. at 395, 645 S.E.2d at 248. The trial court's grant of a motion to dismiss will be sustained only if the facts alleged in the complaint do not support relief under any theory of law. Ashley River Props. I, LLC v. Ashley River Props. II, LLC, 374 S.C. 271, 278, 648 S.E.2d 295, 298 (Ct. App. 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 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 (“The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.”)

ARGUMENT

I. As to Conway and HUB, Harbin's appeal is not timely.

Harbin's appeal is not timely and should therefore be dismissed. See Rule 203(b)(1), SCACR (requiring that the notice of appeal be served on all respondents within thirty (30) days of written notice of the entry of the order of judgment); Stroup v. Duke Power Co., 216 S.C. 79, 56 S.E.2d 745 (1949) (noting that service of the notice of intent to appeal is a jurisdictional requirement and the appellate courts have no authority to extend or expand the time in which the notice of intent to appeal must be served).

Harbin served his Amended Complaint on November 15, 2017. [R. p._; Am. Compl.]. Conway and HUB timely filed a Motion to Dismiss. [R. p._; Conway and HUB's Motion to Dismiss.] Blair and GWB also timely filed Motions to Dismiss. [R. p._; Blair's Motion to Dismiss; R. p._; GWB's Mot. to Dismiss.] On February 5, 2019, the trial court entered an Order Granting Conway and HUB's Motion to Dismiss. [R. p._; Order Granting Conway and HUB's Mot. to Dismiss.] A separate Order Granting GWB's Motion to Dismiss was also entered that day. [R. p._; Order Granting GWB's Mot. to Dismiss.] On February 13, 2019, GWB filed a Motion for Sanctions against Plaintiff. [R. p._; GWB's Mot. for Sanctions.]

On February 15, 2019, 10 days after the Orders Granting Conway and HUB's and GWB's Motions to Dismiss were entered, Harbin moved the trial court to reconsider each February 5, 2019 Order. [R. p._; Harbin's Mot. for Recons. of Order Granting Conway and HUB's Mot. to Dismiss; R. p._; Harbin's Mot. for Recons. of Order Granting GWB's Mot. to Dismiss.] In each motion to reconsider, Harbin moved the Trial Court to alter or amend its February 5, 2019 Orders pursuant to Rule 59(e), SCRCPP. "The purpose of Rule 59(e), SCRCPP, to alter or amend the judgment[,] is to request the trial judge to 'reconsider matters properly

encompassed in a decision on the merits.’’ Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992) (quoting Budinich v. Becton Dickinson & Co., 486 U.S. 196 (1988)). A motion under Rule 59(e) is timely if it is “served not later than 10 days after receipt of written notice of the entry of the order.” If a timely motion is made pursuant to Rule 59, the time for appeal runs from the receipt of written notice of entry of the order disposing of the motion. Rule 59(f), SCRPC.

On October 9, 2019, the trial court (1) denied both Motions for Reconsideration and (2) granted GWB’s Motion for Sanctions. [R. p.__; Orders Denying Harbin’s Mots. for Recons.; R. p.__; Order Granting GWB’s Mot. for Sanctions.] On October 21, 2019, Plaintiff filed a Motion for Reconsideration of the Order Granting GWB’s Motion for Sanctions. [R. p.__; Harbin’s Mot. for Recons. of Order Granting GWB’s Mot. for Sanctions.] On February 3, 2020, the Court denied that Motion. [R. p.__; Order Denying Harbin’s Mot. for Recons. of Order Granting GWB’s Mot. for Sanctions.] Neither Harbin’s Motion for Reconsideration of the Order Granting GWB’s Motion for Sanctions nor the Court’s Order denying that motion made any mention of or reference to the October 9, 2019 Order Denying Harbin’s Motion for Reconsideration. Accordingly, as to Conway and HUB, the order of judgment for appellate purposes was the October 9, 2019 Order Denying Harbin’s Motion for Reconsideration.

Harbin filed a Notice of Appeal on March 3, 2020—more than thirty (30) days after the trial court’s October 9, 2019 Order Denying Harbin’s Motion for Reconsideration. Here, Harbin did not timely appeal the Trial Court’s October 9, 2019 Order Denying Harbin’s Motion for Reconsideration. See Otten v. Otten, 287 S.C. 166, 167, 337 S.E.2d 207, 208 (1985) (when a party makes a motion for reconsideration, “the time for appeal from the judgment begins to run from the time of the order granting or denying the motion”). As a result, this Court lacks

jurisdiction to address the issues raised in Harbin's Initial Brief as to HUB and Conway. Mears v. Mears, 287 S.C. 168, 337 S.E.2d 206 (1985) (noting that timely service of the notice of intent to appeal is a jurisdictional requirement, and this Court has no authority to extend or expand the time in which the notice of intent to appeal must be served).

II. The trial court properly dismissed Harbin's Amended Complaint

A. The arguments raised in Harbin's Initial Brief should not be considered, as they are not properly preserved for appeal.

As a threshold matter, the arguments presented in Harbin's Initial Brief regarding "extrinsic fraud" are improper. First, these arguments were not raised in Harbin's Memorandum in Opposition to HUB and Conway's Motion to Dismiss. Instead, Harbin raised these arguments for the first time when he moved the trial court to reconsider its Order Granting HUB and Conway's Motion to Dismiss and now in his Initial Brief. Because an issue may not be raised for the first time in a motion to reconsider, these arguments are not properly before this Court. See Patterson v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995) (noting that a party cannot use a motion to reconsider, alter, or amend a judgment to present an issue that could have been raised prior to the judgment but was not).

Second, even if properly preserved, Harbin's Amended Complaint contains no allegation of extrinsic fraud by HUB and/or Conway. Instead, Harbin's Amended Complaint alleges, *inter alia*, that "[Conway], a private investigator working on behalf of [HUB] was allegedly responsible for investigating Harbin"; "Conway signed an affidavit which attested to the fact that he had provided surveillance on Harbin, on behalf of Blair, but had never seen [Harbin], and, therefore, [Conway] is responsible as an individual for interfering with Plaintiff's contract"; and "[HUB] was retained by [GWB] to provide surveillance on John Harbin for the underlying tort action brought by Harbin and, therefore, [HUB] is responsible for the conduct of Conway

pursuant to respondeat superior, and, therefore, [HUB] is responsible for interfering with Plaintiff's contract." [R. p. 2; Am. Compl. ¶¶ 47, 77–78.] There is no allegation of extrinsic fraud against HUB or Conway in Harbin's Amended Complaint. In considering a motion to dismiss under Rule 12(b)(6), the court considers only the facts alleged and inferences reasonably drawn therefrom. Ashley River Props. I, LLC at 278, 648 S.E.2d at 298. Here, there are no factual allegations of fraud against HUB and/or Conway, nor can any such allegations be reasonably deduced therefrom.

Accordingly, because they were not raised in Harbin's Amended Complaint and were instead raised for the first time when Harbin asked the trial court to reconsider its Order Granting HUB and Conway's Motion to Dismiss, the arguments presented regarding "extrinsic fraud" are improper and should not be considered by this Court.

B. Even when taken in the light most favorable to Harbin, the Amended Complaint failed to plead a breach of the contract between Harbin and his attorney.

The trial court properly dismissed Harbin's Amended Complaint because, even when taken in the light most favorable to him, Harbin's Amended Complaint failed to state sufficient facts setting forth a cause of action for tortious interference with contract. The Amended Complaint contains few allegations against HUB and Conway; however, those allegations are, in pertinent part:

47. [Conway], a private investigator working on behalf of [HUB] was allegedly responsible for investigating Harbin.

52. Blair claimed that Conway had never seen Harbin in the three (3) full days of "investigation".

53. Conway attested to the fact that he never saw Harbin, despite the fact that Harbin and his girlfriend had not been away from home overnight in the prior year.

54. Harbin and his girlfriend signed affidavits indicating that they were at the home, the same residence that he offered in the aforementioned deposition, all three (3) days.

55. Conway never offered anything to substantiate that he did any work on the Harbin case, other than his conclusory statement that he didn't see him.

56. Plaintiff's counsel retained a private investigator, who spoke to Conway.

57. Conway admitted to the P.I., Michal Moske, that he could not recall that particular job.

77. Conway signed an affidavit which attested to the fact that he had provided surveillance on Harbin, on behalf of Blair, but had never seen him, and, therefore, he is responsible as an individual for interfering with Plaintiff's contract.

78. [HUB] was retained by [GWB] to provide surveillance on John Harbin for the underlying tort action brought by Harbin and, therefore, it is responsible for the conduct of Conway pursuant to respondeat superior, and, therefore, it is responsible for interfering with Plaintiff's contract.

[R. p. 47; Am. Compl., ¶¶ 47, 52-57, 77-78.]

Harbin's sole cause of action against HUB and Conway was tortious interference with contract. [R. p. 47; Am. Compl.] The elements of this cause of action are: (1) the existence of a valid contract; (2) the defendant's knowledge thereof; (3) the defendant's 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 is the defendant's 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 the contract, there can be no recovery. First Union Mortg. Corp. v. Thomas, 317 S.C. 63, 73, 451 S.E.2d 907, 913 (Ct. App. 1994). If the Complaint lacks any of these elements, it must be dismissed. Keels v. Powell, 207 S.C. 97, 34 S.E.2d 482 (1945).

Here, even if taken as true, Harbin's allegations fail to state any act or omission by HUB and/or Conway that procured the breach of the contract between Harbin and his attorney. As a result of such failure to plead a mandatory condition precedent, the Trial Court properly dismissed Harbin's Amended Complaint, and its judgment should be affirmed.

CONCLUSION

Harbin's appeal should be dismissed as untimely. Additionally, the claims raised in Harbin's Initial Brief were not previously raised and ruled upon by the trial court. Moreover, Harbin failed to plead sufficient facts alleging a breach of the contract between himself and his attorney, nor can any such deduction reasonably be made from the allegations pled in the Amended Complaint. Accordingly, Respondents Shawn Conway and HUB Enterprises, Inc. respectfully request this Court affirm the trial court's dismissal of Plaintiff's Amended Complaint.

Respectfully submitted,



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PROOF OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Respondents HUB Enterprises, Inc. and Shawn Conway, and the Designation of Matter have 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 20, 2020, to the following:

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