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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Honorable Judge Bentley D. Price, Circuit Court Judge

Appellate Case No. 2020-001030

Maybank 2754, LLCAppellant,

v.

Eugene Zurlo, Individually and as co-trustee of the Eugene J. Zurlo Living Trust Dated December 11, 1997; 1776, LLC; Beach Fenwick, LLC; The Beach Company; Seamon Whiteside & Associates, Inc.; Penny Creek Associates, LLC; John Doe and Mary Roe.....Respondent.

**FINAL BRIEF OF RESPONDENT SEAMON
WHITESIDE & ASSOCIATES, INC.**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF ISSUES ON APPEAL1

STATEMENT OF THE CASE2

STATEMENT OF THE FACTS4

ARGUMENT6

 I. SUBJECT MATTER JURISDICTION EXISTED WHEN THE TRIAL COURT GRANTED RESPONDENTS’ MOTIONS FOR SUMMARY JUDGMENT AND SWA’S MOTION TO DISMISS.....6

 II. THE TRIAL COURT’S AWARD OF SUMMARY JUDGMENT IN RESPONDENTS’ FAVOR WAS NOT IN ERROR6

 III. THE DECISION THAT APPELLANT SHOULD NOT BE ALLOWED TO AMEND ITS COMPLAINT SHOULD BE UPHeld6

 IV. THE TRIAL COURT’S DECISION TO GRANT SWA’S MOTION TO DISMISS MUST STAND BECAUSE APPELLANT HAS FAILED TO RAISE GROUNDS TO REVERSE THUS ABANDONED THE ISSUE.....6

CONCLUSION9

TABLE OF AUTHORITIES

Cases:

Bell v. Bennett,
307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992)8

Carnival Corp. v. Historic Ansonborough Neighborhood Association,
407 S.C. 67, 753 S.E.2d 846 (2014)8

Carolina Park Association, LLC v. Marino,
400 S.C. 1, 732 S.E.2d 876 (2012)7

Doe v. Marion,
373 S.C. 390, 645 S.E.2d 245 (2007)8

Fields v. Melrose Ltd. Partnership,
312 S.C. 102, 439 S.E.2d 283 (Ct. App. 1993)8

Germain v. Nichol,
278 S.C. 508, 299 S.E.2d 335 (1983)8

Goode v. St. Stephens United Methodist Church,
329 S.C. 433, 494 S.E.2d 827 (Ct. App. 1997)8

Medlock v. One 1985 Jeep Cherokee,
322 S.C. 127, 470 S.E.2d 373 (1996)8

Vespazianni v. McAlister,
307 S.C. 411, 415 S.E.2d 427 (Ct. App. 1992)8

Wright v. Craft,
372 S.C. 1, 640 S.E.2d 486 (Ct. App. 2006)8, 9

Court Rules:

Rule 8, SCRCF7

Rule 12(b)(6), SCRCF7, 8

Rule 208(b)(6), SCACR6

STATEMENT OF ISSUES ON APPEAL

1. Did the Trial Court have jurisdiction over Respondents' Motions for Summary Judgment where the motions were not a matter affected by Appellant's appeal regarding the mode of trial, and where Appellant did not preserve, affirmatively waived, and is estopped from making its jurisdictional argument?
2. Did the Trial Court properly grant Respondents' Motions for Summary Judgment where it is undisputed that the first-in-time mortgage on the property was never subordinated to Appellant's alleged unrecorded easement and where Appellant's alleged easement was extinguished by a foreclosure of the mortgage?
3. Did the Trial Court abuse its discretion in denying Appellant's Motion to Amend its Complaint where the proposed amendments were futile in view of the legal grounds for granting summary judgment?
4. Did the Trial Court properly grant Respondent Seaman Whiteside & Associate's Motion to Dismiss and has Appellant abandoned its right to challenge such dismissal on appeal?

STATEMENT OF THE CASE

Pursuant to Rule 208(b)(6), SCACR, Respondent Seamon Whiteside & Associates, Inc. (hereinafter “SWA”) adopts the Statement of the Case presented by its co-Respondents, Eugene Zurlo, Individually and as co-trustee of the Eugene J. Zurlo Living Trust Dated December 11, 1997 (hereinafter collectively “Zurlo Entities”); 1776, LLC; and Beach Fenwick, LLC and The Beach Company (hereinafter collectively “Beach Entities”) as their Statements likewise apply to SWA.

SWA also requests this Court take notice of a misconception in Appellant’s procedural history related to the “effective” denial of its Motion to Amend its Complaint. *See Pl. ’s Mot. to Am. Compl. – August 24, 2020*, R. pp. 1147-1346; *Order of Hon. Judge Bentley D. Price – October 7, 2020*, R. pp. 191-93. Appellant states that SWA and 1776, LLC filed motions for summary judgment *after* Appellant filed its Motion to Amend Complaint, which was filed by Appellant on August 24, 2020.¹ Appellant Br. at p. 49. As a result, Appellant posits that the Trial Court erred in “deciding to deny Appellant’s motion to amend complaint and grant the Defendants’ motions for summary judgment, ... [without ruling] on any issues raised by the Appellant.” Appellant Br. at p. 49.

On the contrary, SWA filed a Motion to Dismiss with supporting memorandum contemporaneously with its Answer on February 20, 2020. *See Seamon Whiteside & Assoc., Inc. ’s Mot. to Dismiss Civil Conspiracy and Initial Mem. in Supp.*, R. pp. 581-91. Within that motion, SWA addressed the reasons why the one and only claim ever brought by Appellant against SWA — civil conspiracy — should be summarily dismissed. Thereafter, on August 26, 2020, SWA supplemented its motion to dismiss by seeking dismissal of Appellant’s claims against SWA

¹ The date of Plaintiff’s filing of its Motion to Amend Complaint has been corrected to reflect the record on appeal.

pursuant to Rule 12(b)(6), *or, in the alternative*, pursuant to Rule 56, SCRCP. *See Def. Seamon Whiteside & Assoc., Inc.'s Supp. to Mot. to Dismiss and/or Mot. for S. Judgment*, R. pp. 1347-48. The grounds supporting SWA's Rule 12(b)(6) dismissal between the February and August 2020 motions remained unchanged, and were merely supplemented with the arguments presented by the Zurlo Entities and the Beach Entities in their respective motions for summary judgment. There was no argument which would have surprised Appellant in SWA's second motion adopting its co-Defendants' arguments, nor was there any necessity for the Trial Court to rule on new issues raised by Appellant in its motion or proposed amended complaint prior to granting the relief SWA had sought since February 20, 2020. Moreover, the Trial Court granted SWA's original Motion to Dismiss *in addition to* granting summary judgment to all Respondents. Appellant's brief does not address SWA's dismissal pursuant to South Carolina Rule of Civil Procedure 12(b)(6), which means that Appellant has abandoned that issue.

Additionally, Appellant argues on appeal that the Trial Court did not have jurisdiction to issue the orders Appellant seeks to overturn because the matter had been referred to the Master-in-Equity and then back to the Trial Court while Appellant's appeal regarding the mode of trial was pending. SWA did not oppose its co-Defendants' Motions to Refer to the Master-in-Equity, but SWA did not, itself, file a Motion to Refer to the Master-in-Equity; thus, Appellant's argument related to the Trial Court's jurisdiction, or alleged lack thereof, has no bearing on SWA.

STATEMENT OF THE FACTS

The facts of this case have already been set forth by Respondents Zurlo Entities, 1776, LLC, and the Beach Entities, and recasting them here would simply force this Court to review an unnecessary regurgitation of the bounteous support for the Trial Court's Orders and denial of this Appeal. Consequently, SWA incorporates by reference, as if set forth fully herein, the Statement of Facts as contained in its co-Respondents' Initial Briefs.

In addition to the Statement of Facts as set forth by co-Respondents (which provide all necessary support for Respondents' positions), SWA further identifies for this Court an additional fact that will sustain SWA's position — Appellant's failure to record the alleged thirty (30) foot private right of way easement. SWA, a civil engineering firm, was tasked with preparing planned unit development ("PUD") guidelines for the property in question. SWA could not have included any specific provisions for Appellant's alleged easement within those PUD guidelines because SWA did not have actual notice of any such easement recorded in public property records. Accordingly, with no knowledge of any recorded easement, SWA simply could not have "surreptitiously concealed" the easement as alleged by Appellant.

Appellant alleges that "upon information and belief" SWA acquired actual knowledge of the alleged easement due its "involvement with the development process and in working with Penny Creek, and later also with 1776 and Zurlo for the development of the Property." Appellant Br. at p. 8. However, Appellant fails to demonstrate a scintilla of evidence supporting that contention. Notably, Appellant's discussion of its pending legal malpractice lawsuit against Buist, Byars & Taylor, LLC actually supports the fact that SWA *could not have* had notice of the alleged easement. According to Appellant, Buist, Byars & Taylor, LLC failed to record the easement in the public record. Appellant claims "it has suffered and continues to suffer damages as a result of

the . . . legal malpractice and breach of fiduciary duty in failing to properly record a document in the official records to put all future buyers and lenders on notice that the subject property is subject to an easement as would an attorney exercising proper judgment and oversight.” Appellant Br. at p. 42-43. Appellant goes on to concede that a “document was not recorded to put all future buyers and lenders on notice that the subject property is subject to an easement.” Appellant Br. at p. 42.

Indeed, Appellant presents very little argument related to SWA’s actions or inactions in relationship to this matter, particularly as such may relate to a civil conspiracy to purposefully conceal the alleged easement. Moreover, in its brief, Appellant completely fails to address the merits of SWA’s Rule 12(b)(6) arguments or the corresponding dismissal of SWA.

ARGUMENT

I. SUBJECT MATTER JURISDICTION EXISTED WHEN THE TRIAL COURT GRANTED RESPONDENTS' MOTIONS FOR SUMMARY JUDGMENT AND SWA'S MOTION TO DISMISS.

Pursuant to Rule 208(b)(6), SCACR, Respondent SWA adopts the Argument presented by its co-Respondents Zurlo Entities, 1776, LLC and Beach Entities pertaining to Appellant's appeal that the Trial Court lacked jurisdiction when it decided Respondents' motions at issue herein.

II. THE TRIAL COURT'S AWARD OF SUMMARY JUDGMENT IN RESPONDENTS' FAVOR WAS NOT IN ERROR.

Pursuant to Rule 208(b)(6), SCACR, Respondent SWA adopts the Argument presented by its co-Respondents Zurlo Entities, 1776, LLC and Beach Entities pertaining to Appellant's appeal that the Circuit Court erred in granting summary judgment on Respondents' motions because the alleged easement did not survive Wells Fargo's foreclosure on the property and no conspiracy exists which deprived Appellant of the alleged easement.

III. THE DECISION THAT APPELLANT SHOULD NOT BE ALLOWED TO AMEND ITS COMPLAINT SHOULD BE UPHELD.

Pursuant to Rule 208(b)(6), SCACR, Respondent SWA adopts the Argument presented by its co-Respondents Zurlo Entities, 1776, LLC and Beach Entities pertaining to Appellant's appeal that it was an error by the Circuit Court to not allow Appellant to amend its Complaint.

IV. THE TRIAL COURT'S DECISION TO GRANT SWA'S MOTION TO DISMISS MUST STAND BECAUSE APPELLANT HAS FAILED TO RAISE GROUNDS TO REVERSE AND THUS ABANDONED THE ISSUE.

The arguments set forth by the co-Respondents (and incorporated herein by SWA) are all sufficient sustaining grounds for this Court to affirm the Trial Court's rulings. However, SWA has an additional sustaining ground for this Court to affirm its dismissal — Appellant's complete

omission of any arguments whatsoever addressing the specific grounds for SWA’s Rule 12(b)(6) dismissal. Accordingly, SWA presents this Court with yet another ground to affirm SWA’s dismissal.

The only claim filed against SWA is for civil conspiracy. *See Pl. ’s Summons, Compl., and Verification with Ex. – Resolution of the Sole Shareholder of Penny Creek Associates, LLC - January 13, 2020*, R. pp. 475-90. In response, SWA filed a Motion to Dismiss with supporting memorandum contemporaneously with its Answer on February 20, 2020. *See Seamon Whiteside & Assoc., Inc. ’s Mot. to Dismiss Civil Conspiracy and Initial Mem. in Supp.*, R. pp. 581-91. SWA argued that Appellant’s claim for civil conspiracy against SWA failed as a matter of law because Appellant failed to properly plead all elements to allege a claim for conspiracy under South Carolina law. First, Appellant failed to allege that any relationship existed between SWA and Appellant to support a finding that SWA acted with specific intent to harm. Second, Appellant did not allege that SWA entered into any agreement with another party to purposely harm Appellant. Third, Appellant did not allege or plead sufficient facts to support the claim under Rule 8, SCRPC or otherwise per South Carolina law. Fourth, Appellant did not allege any additional overt act in furtherance of the alleged conspiracy. Thus, SWA sought dismissal of Appellant’s civil conspiracy claim against SWA pursuant to Rule 12(b)(6), SCRPC — which the Trial Court granted. *See Order of Hon. Judge Bentley D. Price – October 7, 2020*, R. pp. 191-193.

When reviewing motions to dismiss, the appellate court applies the same standard of review as the trial court. *See Carolina Park Assoc., LLC v. Marino*, 400 S.C. 1, 732 S.E.2d 876, 878 (2012). “Under Rule 12(b)(6), a defendant may move to dismiss a complaint due to its ‘failure to state facts sufficient to constitute a cause of action.’” *Carnival Corp. v. Historic Ansonborough Neighborhood Ass’n*, 407 S.C. 67, 753 S.E.2d 846, 850 (2014). “In considering

a motion to dismiss under Rule 12(b)(6), a court must base its ruling solely on the allegations set forth in the complaint.” *Id.* at 850; *Doe v. Marion*, 373 S.C. 390, 645 S.E.2d 245, 247 (2007). “If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, dismissal under Rule 12(b)(6) is improper.” *Carnival Corp.*, 753 S.E.2d at 850; *Doe*, 645 S.E.2d at 247.

Via Order dated October 7, 2020, the Trial Court granted SWA’s Motion to Dismiss. *See Order of Hon. Judge Bentley D. Price – October 7, 2020*, R. pp. 191-93. Appellant has not addressed in its appeal SWA’s grounds for its Motion to Dismiss or the Trial Court’s grounds for granting that motion; therefore, the issue has been abandoned by Appellant and the Order should be affirmed. Appellant has the burden to present a sufficient record for this Court to make a decision. *See Goode v. St. Stephens United Methodist Church*, 329 S.C. 433, 494 S.E.2d 827, 834 (Ct. App. 1997); *Medlock v. One 1985 Jeep Cherokee*, 322 S.C. 127, 470 S.E.2d 373 (1996); *Germain v. Nichol*, 278 S.C. 508, 299 S.E.2d 335 (1983); *Vespazianni v. McAlister*, 307 S.C. 411, 415 S.E.2d 427 (Ct. App. 1992). “An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court.” *Wright v. Craft*, 372 S.C. 1, 640 S.E.2d 486, 497 (Ct. App. 2006); *Fields v. Melrose Ltd. P’ship*, 312 S.C. 102, 439 S.E.2d 283 (Ct. App. 1993); *Bell v. Bennett*, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992).

In *Wright*, the appellee Craft was deemed to have abandoned two issues because he failed to address them in his appellate brief. First, while he mentioned the denial of a motion to strike damages in his statement of issues on appeal, he did not address the merits of the denial in his brief. *See Wright*, 640 S.E.2d at 497. Second, the appellee cited that the jury’s verdict was the result of undue passion and prejudice in his statement of issues on appeal, but the appellee failed

to include anything further on that point in his brief. *See id.* As such, the issues were not properly before the appellate court for consideration. *See id.*

Here, Appellant failed to address SWA's grounds for its Rule 12(b)(6) dismissal. Accordingly, as in *Wright*, that issue has been abandoned by Appellant, and this Court must affirm the Trial Court's order granting SWA's Rule 12(b)(6) motion to dismiss.

CONCLUSION

For the foregoing reasons, Respondent Seamon Whiteside & Associates, Inc. respectfully requests that this Court affirm the Orders of the Trial Court and deny Appellant Maybank 2754, LLC's appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE RULE 211(b), SCACR

I certify that I complied with Rule 211(b) of the South Carolina Appellate Court Rules. *Seamon Whiteside & Associates, Inc.'s Final Brief* has been edited to include References to the Record as filed by Appellant, including document titles and record page numbers. Additionally, undersigned counsel corrected seven typographical errors in the *Initial Brief*, including a date change which is noted in the *Final Brief* on page 2.