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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No. 2017-CP-42-00219
Appellate Case No. 2020-001613

Jo Ann Blackwell, Michelene Brooks, and Samuel H. Owens, Jr., individually and on behalf of all others similarly situated,

Respondents,

v.

Mary Black Health System, LLC, d/b/a Mary Black Memorial Hospital; CHSPSC, LLC; Professional Account Services, Inc.,

Appellants,

RETURN TO APPELLANTS' MOTION TO FILE DOCUMENTS UNDER SEAL

Pursuant to Rule 240(e), SCACR, Respondents JoAnn Blackwell, Samuel Owens, and Michelene Brooks (collectively "Respondents" or "Plaintiffs") respectfully submit this Return in opposition to Appellants' Motion to Seal the hospital services agreement entered into between MedCost and Mary Black Memorial Hospital (hereafter "the MedCost Agreement").[1]

[1] Respondents have no objection to the motion to seal as it pertains to the CIGNA agreement. However, as noted in their Initial Brief, Respondents have continuously objected to Mary Black's attempt to introduce the MedCost agreement (along with other evidence outside the four corners of the complaint) and have further objected to the inclusion of the MedCost Agreement in the Appellants' Designation of Matter. *See, e.g.*, Pl. Resp. In Opp. To Mot. to Dismiss; Pl. Resp. in Opp. To Mot. to Alter or Amend; Resp. Init. Br. at 5 n.6.

Rule 210(c), SCACR, provides that the Record on Appeal shall not include matter which was not presented to the lower court or tribunal. The rules further provide that "[a] party shall not include any matter in his Designation which is not relevant to the appeal." Rule 209(b), SCACR. Because the lower court properly refused, pursuant to Rule 12(b)(6), SCRCP, to consider the MedCost Agreement in its review of Mary Black's motion to dismiss Plaintiff Blackwell's claims, this Court should deny the motion to seal and refuse to consider the MedCost agreement on appeal.[2]

The lower court properly adhered to the longstanding principal that, at the Rule 12 stage, a court may look only to the four corners of the complaint to determine the sufficiency of the allegations therein, and this Court should decline to usurp the role of the trial judge at the Rule 12 stage by considering a contract which was not before the lower court. *See, e.g., Cobb v. Benjamin*, 325 S.C. 573, 579 n.1, 581 n.2, 482 S.E.2d 589, 592 n.1, 593 n.2 (Ct. App. 1997) (holding that where the appellate court granted plaintiff's motion to strike an insurance policy from the record on appeal, the court could not thereafter consider a fact (i.e. the policy language) that did not appear in the record under Rule 209, SCACR, reasoning that while the insurer's counsel may have argued the policy's language at the lower court hearing, there was never a stipulation and a representation of fact by counsel in written briefs, memoranda, or made during oral argument may not be considered by the court where it is unsupported by the record) (citing *Gilmore v. Ivey*, 290 S.C. 53, 58, 348 S.E.2d 180, 183 (Ct. App. 1986)). *See also Norris v. Ferre*, 315 S.C. 179, 183, 432

[2] The lower court expressly ruled on this issue when it stated that its review of Mary Black's hospital service agreements with insurers "was limited to the arbitration issue. Any other consideration of the agreements goes beyond a SCRCP Rule 12(b)(6) analysis." Form 4 Order dated Sept. 4, 2020, at 3.

S.E.2d 491, 493 (Ct. App. 1993) (denying motion to supplement the record with deposition transcripts since the matters were not presented to the trial judge.)

Despite Mary Black's conclusory statement that this lawsuit asserts "*claims implicating the confidential contract*" between Mary Black and MedCost, Mot. at 2, the MedCost agreement was never attached to the complaint or incorporated by reference thereto and the lower court correctly refused to consider the MedCost agreement when considering Mary Black's multiple motions to dismiss Ms. Blackwell's claims. Accordingly, this Court should reject Mary Black's attempt to inappropriately enlarge the record on appeal and improperly expand the scope of review at the Rule 12 stage.

Background[3]

This lawsuit arises out of appellant Mary Black's refusal to submit bills for treatment rendered to their patients' health insurers; instead, Mary Black (along with its related billing and collection entities, CHSPSC, LLC and Professional Account Services, Inc., all of which are appellants herein and collectively referred to as "Mary Black") seeks to recover its charges from patients directly by either asserting a lien against any potential third-party tort recovery or by seeking payment directly from the patient or from an auto insurer. By obtaining payment from a source other than the patient's health insurer, Mary Black presumably recovers more money for services rendered than it would otherwise receive if it submitted claims to the insurer under its hospital services agreements.

[3] Respondents do not wish to burden the Court with a restatement of the entirety of the facts and argument contained in their Initial Brief; thus, they incorporate by reference all argument contained therein and only briefly lay out such background and facts as they consider necessary for purposes of responding to the instant Motion.

Jo Ann Blackwell, a MedCost insured, originally filed this case as a class action on January 20, 2017, asserting claims against Mary Black on behalf of herself and hundreds (or possibly thousands) of potential class members.[4] Ms. Blackwell was injured on December 19, 2013, when she was struck by a vehicle and transported to the trauma department of Spartanburg Regional Medical Center. She was subsequently transferred to Mary Black Hospital for treatment. (*See* Am. Compl. ¶ 12). At the time of her admission to Mary Black, Ms. Blackwell had employer-based health insurance coverage through MedCost. She alleges that Mary Black had a contract with MedCost, which required that bills for medical services provided to Ms. Blackwell be sent directly to MedCost and that the contract provided for discounted rates for the services.[5] (Am. Compl. ¶¶ 9, 28–31, 36.) However, instead of submitting its bills to MedCost, Mary Black asserted a lien against Blackwell's third-party automobile accident claim. (Am. Compl. ¶¶ 39–40). Mary Black contends that it is a party to the MedCost Agreement. (Def. Mot. to Dismiss)

Blackwell subsequently moved to amend the complaint on October 18, 2019, to assert identical claims by additional individuals who were harmed by Mary Black's practices. The lower court granted the motion and on April 24, 2020, Plaintiffs filed an Amended Class Action Complaint, which included two additional individuals: respondent Samuel H. Owens, Jr., a CIGNA insured, and respondent Michelene Brooks, a Medicare beneficiary, as named plaintiffs

[4] While Ms. Blackwell was insured by MedCost, and the other named plaintiffs were CIGNA and Medicare insureds, it can be presumed that the putative class members could be insured by a variety of health insurance companies, as reflected in the class definition. (Am. Compl. ¶ 53.)

[5] Ms. Blackwell does not allege she is a party to Mary Black's contract with MedCost.

and putative class representatives.[6] The MedCost agreement was not attached to the Amended Complaint, nor was it incorporated by reference into such pleadings.

After Plaintiffs filed the amended complaint, Mary Black filed a motion to compel arbitration against Samuel Owens, asserting that his claims should be compelled to arbitration pursuant to an arbitration provision contained in Mary Black's hospital services agreement with CIGNA under a "direct benefits estoppel" theory. The CIGNA agreement was filed under seal with the trial court in support of Mary Black's motion to compel arbitration. Mr. Owens, a non-signatory to the CIGNA agreement, was the only plaintiff against whom Mary Black sought to compel arbitration. Mary Black also moved to dismiss the amended complaint in its entirety as to all plaintiffs pursuant to Rule 12(b)(6), SCRCP, and filed the MedCost agreement under seal in support of its motion to dismiss Ms. Blackwell's claims. By way of a Form 4 order filed September 4, 2020, the lower court refused to compel Mr. Owens to arbitration, declined to consider the MedCost agreement as outside the proper scope of review at the Rule 12 stage, and denied the Rule 12(b)(6) motions as against all of the plaintiffs.[7]

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[6] Plaintiffs assert claims against Mary Black for tortious interference with contractual relationship, unjust enrichment, and injunctive relief individually and on behalf of the class members. The class, which is not yet certified, is currently defined as follows: "*All individuals who, since January 20, 2014, received any type of healthcare treatment from any entity located in South Carolina that is owned or affiliated with Defendants, while being covered by valid health insurance, and whose medical bills resulting from that treatment were not submitted to their health insurance carrier for potential payment.*" (Am. Compl. ¶ 53.)

[7] Because no appealable order exists as to either Ms. Blackwell or Ms. Brooks under section 14-3-330 of the South Carolina Code, Respondents have requested that the appeal of the interlocutory order denying dismissal of their claims should be dismissed. Resp. Init. Br. at 20 (citing *McLendon v. S.C. Dep't of Highway,* 313 S.C. 525, 443 S.E.3d 539 (1994) (dismissing appeal without prejudice where sole issue raised on appeal was denial of a Rule 12(b)(6) motion); *Huntley v. Young*, 319 S.C. 559, 462 S.E.2d 860 (1995) ("Since the order denying the Rule12(b)(6) motion does not finally decide any issue, it is not directly appealable.")).

ARGUMENT

This case was determined at the Rule 12(b)(6) stage—*i.e.* according to the four corners of the complaint—and the lower court correctly declined to consider the MedCost Agreement in its review of Ms. Blackwell's claims, despite Mary Black's argument to the contrary. *See* Form 4 Order dated Sept. 4, 2020. In both its Designation of Matter and Initial Brief, Mary Black urges this Court to ignore the required standard of review at the Rule 12 stage, even going so far as to directly quote language from the MedCost agreement in its recitation of the "factual background" of the case. App. Init. Br. at 8. Plaintiffs respectfully submit that this Court should refuse to participate in this impermissible fact-finding mission, decline to seal the MedCost Agreement and exclude the contract from the Record on Appeal. Arguments of counsel are not evidence, and the appellate court cannot base a factual review upon them. *See, e.g., Trivelas v. S.C. Dep't of Transp.*, 348 S.C. 125, 141, 558 S.E.2d 271, 279 (Ct. App. 2001) (Howard, J., concurring); *See also Beaufort Realty Co. v. Beaufort Cty.*, 346 S.C. 298, 302, 551 S.E.2d 588, 590 (Ct. App. 2001) (noting that statements of fact appearing only in argument of counsel will not be considered on appeal).[8]

Despite the Rule 12 standard and clear law to the contrary, Mary Black asks this Court to find that the MedCost Agreement is proper for consideration by the Court and inclusion in the record under seal.[9] By doing so, Mary Black asks that this Court disregard the plain language of the South Carolina Appellate Court Rules. *See* Rule 209(b), SCACR ("the Designation may only

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[8] As reflected in its recently filed Reply Brief, Mary Black urges this Court to consider the MedCost Agreement on the grounds that the contract "***should** be considered by a court when reviewing a Rule 12(b)(6) motion to dismiss*" because it "*is integral to the amended complaint.*" (App. Reply Br. 15-16 (emphasis added).) Again, Mary Black ignores the plain language of Rule 12.

[9] For instance, Mary Black goes so far as to directly quote language from the MedCost agreement in its recitation of the factual background of the case. (App. Init. Br. 8.)

propose to include portions of the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal [See Rule 210(c)]. A party shall not include any matter in his Designation which is not relevant to the appeal."); *See also* Rule 210(c), SCACR ("The Record shall not, however, include matter which was not presented to the lower court or tribunal."). Because the lower court correctly declined to consider the MedCost agreement as outside the four corners of the complaint, and therefore beyond the its analysis at the Rule 12 stage, the MedCost Agreement is irrelevant to this appeal and, respectfully, this Court should decline to participate in this impermissible fact-finding mission and disregard any argument thereto.

As this Court is well aware, in evaluating a motion to dismiss under Rule 12(b)(6), the trial court must consider only materials within the four corners of the pleadings. *See Charleston Cty. Sch. Dist. v. Harrell*, 393 S.C. 552, 559, 713 S.E.2d 604, 608 (2011) ("[I]t is a well-settled principle that in resolving a Rule 12(b)(6) motion to dismiss, the court is limited to a consideration of the allegations contained within the four corners of the complaint."). In the instant case, it is undisputed that no documents were incorporated into the amended complaint by reference or attached to the complaint itself, nor was the MedCost contract a "matter" of which the trial court could take "judicial notice" (such as prior orders or transcripts in the case, or publicly available records such as deeds). *See, e.g., Doe v. Bishop of Charleston*, 407 S.C. 128, 754 S.E.2d 494, 498 (2014) (noting that "[t]he trial court's reliance on transcripts and court orders in the underlying class action did not covert the [Rule 12] motion to one for summary judgment").

Mary Black's sole basis for its argument that the lower court can consider documents outside the pleadings appears to be its belief that the trial court can rely upon documents submitted by a party moving to dismiss the complaint "*so long as the documents are integral to the complaint.*" App. Init. Br. at 11 (citing *Carolina First Corp. v. Whittle,* 343 S.C. 176, 539 S.E.2d

402 (Ct. App. 2000); *Brazell v. Windsor*, 384 S.C. 512, 682 S.E.2d 824 (2009); *HHHunt Corp. v. Town of Lexington*, 389 S.C. 623, 699 S.E.2d 699 (Ct. App. 2010); *Patterson v. Witter*, 425 S.C. 213, 821 S.E.2d 677 (2018)). However, none of these cases are persuasive or replace the standard of review at the Rule 12 stage. For instance, in *Patterson v. Whitter*, the parties consented to consideration of documents outside the four corners of the complaint when they submitted affidavits and other documents for the Court's consideration. Here, the Plaintiffs have continuously objected to Mary Black's attempt to introduce contracts and other evidence outside the four corners of the complaint. *See, e.g.*, Pl. Resp. In Opp. To Mot. to Dismiss; Pl. Resp. in Opp. To Mot. to Alter or Amend.

Carolina First v. Whittle is likewise inapposite, as there the Court of Appeals found no error and affirmed the trial court's refusal to consider documents outside the complaint, because any reference contained within the pleading was insufficient to comply with Rule 23 requirements for a shareholder derivative suit. Finally, *Brazell v. Windsor* presents a set of facts wholly distinct from those in the instant litigation. In *Brazell*, the trial court allowed consideration of an exhibit in a motion to dismiss based on the fact that the complaint expressly referred to the exhibit and purported to "attach and incorporate by reference" the specific exhibit. *Brazell*, 384 S.C. at 516, 682 S.E.2d at 826 (emphasis added). No such "incorporation by reference" or "express reference" is present in the amended complaint here.

Conclusion

As the MedCost Agreement is not properly designated for inclusion in the record on appeal, the motion to seal should be denied.

-Signature Page to Follow-

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