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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson
The Honorable William A. McKinnon

Appellate Case No. 2020-000407

Douglas Kelsey, ... Plaintiff,

v.

House of Blues Myrtle Beach Restaurant Corporation;
HOB Entertainment, Inc.; and Travis Scott Wagoner, ... Defendants.

AND

House of Blues Myrtle Beach Restaurant Corporation,..... Appellant,

v.

Throttlefest, LLC; American Outlaw Spirits Incorporated;
Full Throttle LLC; and Full Throttle Sloon Shine, LLC,..... Respondents.

FINAL REPLY BRIEF OF APPELLANT

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Introduction

The Respondents in this matter are four related entities, each of which makes arguments aimed at immunizing itself and the others from liability in this matter. Respondent Throttlefest admits that it entered into a contractual agreement with Appellant concerning the functions and acts necessary for promoting and conducting the Throttle Fest event, held May 9-17, 2014 at the House of Blues location in Myrtle Beach, South Carolina. Michael Ballard and Jesse James Dupree are affiliated with Respondent Throttlefest, as well as Respondents American Outlaw Spirits, Full Throttle, and Sloon Shine. It is this close network of entities that necessitated the alternative pleading style contained in the Third-Party Complaint, which is expressly permitted under our Rules.

While both Briefs of Respondent cite a purported lack of proof for Appellant's claims, it is important to recognize the procedural posture of this case. Respondents filed Motions to Dismiss the Third-Party Complaint pursuant to Rule 12(b)(2) of the South Carolina Rules of Civil Procedure. None of the Respondents have answered the Third-Party Complaint and no discovery has been conducted as to any of the third-party claims.

Having briefed and argued the underlying motions to dismiss before two Circuit Court Judges, the issues raised on appeal were thoroughly briefed by Appellant. Appellant files this Reply to address particular misstatements and misapplications of facts and law contained in Respondents' briefs, and otherwise relies on the arguments set forth in Appellant's main brief.

Discussion

I. A Proper Application of the Discovery Rule Reveals that the Claims Raised in the Third-Party Complaint Were Within the Statute of Limitations Period.

With respect to the statute of limitations issue, Respondents American Outlaw Spirits, Full Throttle, and Sloon Shine adopted the arguments asserted in the brief of Respondent Throttlefest. Though inconsistent with the very statute it cited and case law discussed later its brief, Respondent Throttlefest begins its argument with the mistaken assertion that "Under South Carolina law, an action on a contract must be commenced within three years after the breach." (Resp't Throttlefest's Br., at 29).

In reality, the following standard applies to the accrual of a breach of contract action:

> Pursuant to section 15-3-530(1) of the South Carolina Code (2005), "[a]n action for breach of contract must be commenced within three years." Prince, 390 S.C. at 169, 700 S.E.2d at 282. "The discovery rule applies to breach of contract actions." Id. **"Pursuant to the discovery rule, a breach of contract action accrues not on the date of the breach, but rather on the date the aggrieved party either discovered the breach, or could or should have discovered the breach through the exercise of reasonable diligence."** Maher v. Tietex Corp., 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998). **"If there is conflicting evidence as to whether a claimant knew or should have known he or she had a cause of action, the question is one for the jury."** Garner v. Houck, 312 S.C. 481, 485, 435 S.E.2d 847, 849 (1993).

Kagan v. Simchon, 429 S.C. 516, 527–28, 839 S.E.2d 106, 112 (Ct. App. 2020), reh'g denied (Mar. 30, 2020) (emphasis added). The discovery rule likewise applies to negligence actions. See Kreutner v. David, 320 S.C. 283, 285, 465 S.E.2d 88, 90 (1995) ("The statute of limitations on a negligence claim accrues at the time of the negligence, or when facts and circumstances would put a person of common knowledge on notice that he might have a claim against another party (discovery rule).").

"The discovery rule has evolved as a means of mitigating harsh and unjust results from a rigid application of the statute of limitations where an injury or cause is not immediately evident to the plaintiff." Abba Equip., Inc. v. Thomason, 335 S.C. 477, 485, 517 S.E.2d 235, 239 (Ct. App. 1999). "The rule protects [a party's] interests in prosecuting actions and pursuing their rights where circumstances prevent them from knowing they have been harmed. In some situations, the accrual upon discovery rule represents the more equitable and rational view." Id. (internal citations and quotations omitted).

The exercise of reasonable diligence means "an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right ... has been invaded or that some claim against another party might exist." Snell v. Columbia Gun Exchange, Inc., 276 S.C. 301, 278 S.E.2d 333 (1981).

Respondents argue: "House of Blues cannot possibly contend that it had no obligation to be aware of what its contractual partner was doing in connection with the Event and/or on House Blues's property." (Resp't Throttefest's Br., p. 32). They allege that Appellant did not engage in sufficient diligence under the discovery rule, "stuck its head in the sand," and "failed to monitor its contract partner who was on its partner." (Id.).

Notably, here, the underlying first-party suit alleged overservice of a single patron during one night of the Throttle Fest event. Appellant cannot possibly be expected to be omniscient of all of the activity occurring on its large property, particularly during a busy festival event. This is precisely why it contracted with Respondents and relied upon them to properly select, train and supervise Respondents' employees, agents, and contractors, including festival talent and personalities. Moreover, the collision in which the first-party plaintiff was injured did not occur

on House of Blues' property. Thus, even had Appellant been aware of Respondent's breaches of the contract and negligent acts on May 16, 2014—which Appellant denies—the absence of any knowledge of any injury or harm was such that an entity of common knowledge and experience in Appellant's position would not have been on notice that a claim against another party might exist. Rather, Appellant's third-party claims accrued when the first-party Plaintiff made Appellant aware of his claim regarding the over-service of alcohol at House of Blues via the letter of representation dated October 20, 2016. It was only then that the clock began to run for the three-year limitations period. Accordingly, Appellant's Third-Party Complaint was timely filed on October 18, 2019.

The contractual agreement at issue in this case also required insurance coverage be procured by Respondents, with Appellant listed as an additional insured. It was not until after the first-party claim was noticed to Appellant that it learned of Respondents' lack of insurance coverage. Thus, the discovery rule similarly applies and requires a finding that this claim was filed within the limitations period.

Further, as discussed in Appellant's Brief in chief, Appellant's indemnity claims cannot possibly be time-barred, as they do not arise at the time the underlying tort plaintiff suffered the tortious damage. (Appellant's Br., at p. 24). "Rather, an indemnity claim 'accrues at the time the indemnity claimant suffers loss or damage, that is, at the time of payment of the underlying claim, payment of a judgment thereon, or payment of a settlement thereof by the party seeking indemnity.'" Columbia/CSA-HS Greater Columbia Healthcare Sys., LP v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n, 411 S.C. 557, 566, 769 S.E.2d 847, 851–52 (2015) (Toal, C.J., dissenting) (quoting and citing Maurice T. Brunner, Annotation, *When Statute Limitations Commences to Run Against Claim for Contribution or Indemnity Based on Tort,* 57 A.L.R.3d 867 (1974); accord First Gen. Servs. of Charleston, Inc. v. Miller, 314 S.C. 439, 444, 445 S.E.2d 446,

449 (1994)). Respondents provide no response to this argument in their briefing. This failure to respond can and should be construed as a concession that the trial court ruled incorrectly in its dismissal of the indemnification claims. See First Union Nat. Bank of S.C. v. FCVS Commc'ns, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996), rev'd in part, 328 S.C. 290, 494 S.E.2d 429 (1997) ("We note initially First Union's failure to respond to this argument in its brief could amount to a concession that the trial court ruled incorrectly.").

Lastly, at minimum, there is currently conflicting evidence as to whether a claimant knew or should have known he or she had a cause of action. Accordingly, the question should be one for the jury, or perhaps the subject a future motion for summary judgment once further discovery is conducted. See Garner v. Houck, 312 S.C. 481, 485, 435 S.E.2d 847, 849 (1993). In either event, dismissal of the claims at the Rule 12 stage was erroneous.

II. Appellant Properly Alleged Respondents' Settlements Were Not Entered in Good Faith in Its Responses to the Motions to Dismiss.

Respondents' briefs both make claims that their settlement agreements with the first-party plaintiff prohibit Appellant's claim for contribution, arguing that "HOB has not alleged that such settlement agreements were in bad faith," (Resp'ts Full Throtte, et al.'s Br., at p. 19), and that "it is clear that Throttlefest's indisputably good faith Settlement with Plaintiff had the effect of eliminating any potential liability to House of Blues for any third-party contribution claims." (Resp't Throttlefest Br., at p. 18). Contrary to these assertions, Appellant explicitly alleged that Respondents' settlements were not made in good faith in its' Memoranda in Opposition to the Motions to Dismiss filed in the Circuit Court. See R. pp. 359-365; R. pp. 19-23. Appellant argued the point further at the motion hearings, explaining that because of Respondents' lack of insurance coverage, House of Blues became the first-party Plaintiff's target defendant, irrespective of Respondents' culpability. The terms of the settlement agreements have not been shared with

Appellant, but Appellant's counsel understood that the consideration was minimal. See R. p. 598, line 3 – p. 599, line 21; R. p. 622, line 24 – p. 624, line 4.

Respondents seem to focus on the fact that the Third-Party Complaint did not specifically allege that Respondent's settlement agreements with the first-party Plaintiff were made in bad faith. However, Appellant was not required to preemptively plead its response to Respondents' defense. In Stephens v. Hendricks, our Supreme Court wrote: "It is a general principle that a pleading need and should not, by its averments, anticipate a defense thereto, and negative or avoid it." 226 S.C. 79, 88, 83 S.E.2d 634, 639 (1954). The Stephens Court further applied the following principle: "If matters constituting a defense are alleged in the declaration, complaint, or petition, the pleading is bad unless it also contains other averments which avoid or negative such defense; but this rule applies only where the facts stated in plaintiff's pleading would be sufficient to state a defense if specially pleaded by defendant in his answer." Id. (internal quotations omitted).

Applying this rule to the case at bar, had Appellant's Third-Party Complaint stated that Respondents entered into good faith settlements, then Respondents may have an argument that such an averment operates as a concession of such a fact absent some further indication in the complaint that would avoid or negate the good faith defense. However, the Third-Party Complaint contains no such averment. In fact, the Third-Party Complaint does not reference the settlements directly at all. Instead, Appellant merely alleged that Respondents were once defendants in the first-party action and that they were all eventually dismissed. See R. 202, ¶¶ 95-96.

Respondents' further discussion of the absence of "surprise" that Respondents raised a "good faith settlement defense" is irrelevant in light of South Carolina's well-settled pleading requirements. See Stephens, *supra*; see also Rule 8(e)(1), SCRCP ("Each averment of a pleading

shall be simple, concise, and direct. No technical forms of pleading or motions are required."); Rule 8(f), SCRCP ("All pleadings shall be so construed as to do substantial justice to all parties."). Accordingly, Appellant timely and properly raised the absence of good faith in the settlement in its response to the motions to dismiss.

Further, though Respondents acknowledge that Appellant does not have a copy of the settlement agreements entered, they fault Appellant for not having more specificity in its argument that the settlements were made in bad faith. No opportunity has been had for discovery related to this issue. This further illustrates the prematurity of the Circuit Court's dismissal.

III. Respondents Misapprehend the Scope of the *Smith v. Tiffany* Ruling in the Same Manner It was Misapprehended by the Circuit Court.

The Court was explicit in its decision in Smith v. Tiffany that the Court was not considering the appellant's issue related to whether the South Carolina Contribution Among Joint Tortfeasors Act violated due process. Smith v. Tiffany, 419 S.C. 548, 559 n. 3, 799 S.E.2d 479, 485 n. 3 (2017). Further, the opinion is void of any mention of equal protection. Accordingly, the Circuit Court erred in relying upon this case law to support its reasoning that no violation of due process or equal protection would occur from prohibiting Appellant's contribution claim.

IV. Appellant Properly Raised Alternate Theories of Liability Against All Respondents.

Each of these Respondents argues that one or more of the claims against it are improper causes of action. Respondent Throttlefest argues that because of its contractual relationship with Appellant, it cannot be held liable in tort or equity. Respondents American Outlaw Spirits, Full Throttle, and Sloon Shine argue that they are not parties to the contract and thus cannot be held liable under the contractual theories and further that they owe no legal duty to render them liable in tort or equity. Nonetheless, Respondents American Outlaw Spirits, Full Throttle, and Sloon Shine

acknowledge that concepts of agency can render one liable in contract and that there are various exceptions to the general lack of duty to control the conduct of another. (See Resp'ts Full Throtte, et al.'s Br., at pp. 12-15 and 24).

Pleading in the alternative is expressly permitted under our Rules of Civil Procedure. See Rule 8(e)(2), SCRCP ("A party may set forth two or more statements of a cause of action or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate causes of action or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.").

Respondents attempt to conflate sufficiency of the pleading with whether Appellant will ultimately be successful on the merits. Without full discovery, an analysis of the ultimate success of each claim is premature. The standard by which the Circuit Court was supposed to evaluate the Rule 12 motion was whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. See Gentry v. Yonce, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999); see also Cowart v. Poore, 337 S.C. 359, 523 S.E.2d 182 (Ct. App. 1999) (explaining that looking at facts in light most favorable to plaintiff, and with all doubts resolved in his behalf, the court must consider whether the pleadings articulate any valid claim for relief). Appellant was not required, prior to any discovery, to fully develop its arguments as to agency and the various of sources of Respondents' legal duties. Application of the proper standard reveals that the Third-Party Complaint is properly pled. Whether those claims survive summary judgment or are ultimately successful at trial are issues to be addressed much later in the life of the case.

V. Assuming *Arguendo* There Was Any Deficiency in the Third-Party Complaint, Amendment Would Not be Futile.

Appellant argued that to the extent any deficiencies existed in the Third-Party Complaint, the proper remedy was not dismissal, but rather an opportunity for Appellant to amend its pleading. (Appellant's Br., at pp. 26-27). Appellant cited the following in support of its position:

> A circuit court does not have "discretion" to dismiss a complaint with prejudice for failure to state a claim under Rule 12(b)(6) without at least considering whether to allow leave to amend under Rule 15(a). Under Rules 12(b)(6) and 15(a), the circuit court may not dismiss a claim with prejudice unless the plaintiff is given a meaningful chance to amend the complaint, and after considering the amended pleading, the court is certain there is no set of facts upon which relief can be granted.

Skydive Myrtle Beach, Inc. v. Horry Cty., 426 S.C. 175, 189, 826 S.E.2d 585, 592 (2019).

Respondents counter by suggesting that dismissal was proper because amendment would be futile. Neither of the Orders of Dismissal in this matter made any finding that amendment would be futile, illustrating that neither of the Circuit Judges failed to exercise their discretion and even consider whether to allow leave to amend. See R. p. 1; R. p. 31; Patton v. Miller, 420 S.C. 471, 490, 804 S.E.2d 252, 262 (2017) ("[A] court's failure to exercise its discretion is itself an abuse of discretion."). Had the proper analysis been conducted, the Court could not definitively say it would be impossible for Appellant to succeed with an amended pleading; therefore, allowing leave to amend the complaint, would not be clearly futile. See Skydive Myrtle Beach, 426 S.C. at 192, 826 S.E.2d at 594 (2019). Specifically, the facts and arguments articulated in the briefing and hearings below could been included within the Third-Party Complaint itself.

VI. Appellant's Third-Party Claims Against Respondents American Outlaw Spirits, Full Throttle, and Sloon Shine Arise Out of or Relate to These Respondent's Contacts with South Carolina.

Respondents American Outlaw Spirits, Full Throttle, and Sloon Shine raised lack of personal jurisdiction as one of their defenses to the Third-Party Complaint, attempting to distance and separate themselves from Respondent Throttlefest. These Respondents deny any agency relationship with Respondent Throttlefest, claiming that they had no role in and derived no benefit from the Throttle Fest event. Throttlefest, through the prior deposition testimony of Jesse James Dupree, has denied that it procured the presence of Michael "Fajita Mike" Garner, the individual alleged to have over-served Travis Wagoner, at Throttle Fest. Appellant is certain that it did not procure Fajita Mike's presence at Throttle Fest. Thus, if Respondent Throttlefest's assertion is true, it stands to reason that Fajita Mike was procured as a "personality" for Throttlefest by one of the other Respondents. As explained in more detail in the main brief, each of these Respondents benefited from Throttle Fest either through liquor sales and/or advertising. (See Appellant's Br., at pp. 30-43). There may also have been other direct monetary benefits, which Appellant would explore further through discovery.

Respondents suggest that the promotion, sale, and distribution of their liquors at the Throttle Fest event are irrelevant to the issue of the jurisdiction, claiming that the breach of contract, tort, and equity actions do not "arise out of" these contacts. "A minimum contacts analysis requires a court to find that the defendant directed its activities to a resident of this State and that the cause of action arises out of or relates to those activities. A single act that causes harm in this State may create sufficient minimum contacts where the harm **arises out of or relates to that act**." S. Plastics Co. v. S. Com. Bank, 310 S.C. 256, 260-61, 423 S.E.2d 128, 131 (1992) (emphasis added).

The United States Supreme Court recently clarified that the second prong of the specific jurisdiction inquiry—requiring that the plaintiff's suit arise from or relate to the defendant's forum-

state contacts—does not "require proof of causation." Ford Motor Co. v. Montana Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1026 (2021). In other words, a plaintiff need not show that its claim "came about because of the defendant's in-state conduct." Id. The specific jurisdiction test is more expansive (and as a result, more nebulous), supporting a court's exercise of jurisdiction over an out-of-state defendant where that defendant's in-state contacts "relate to" the claim. Id. (emphasis in original). Even so, the Supreme Court made clear in Ford that not every connection between a plaintiff's claim and defendant's contacts will do. Id. "[T]he phrase 'relate to' incorporates real limits, as it must to adequately protect defendants foreign to a forum." Id. At bottom, specific jurisdiction requires a direct, meaningful connection between the defendant's forum-state contacts and the plaintiff's claim. Bristol-Myers Squibb Co. v. Superior Ct. of California, San Francisco Cty., 137 S. Ct. 1773, 1781 (2017). In determining whether such a connection exists, the court should "direct [its] focus to the quality and nature of [the defendant's] contacts." Carefirst of Maryland, Inc. v. Carefirst Pregnancy Centers, Inc., 334 F.3d 390, 397 (4th Cir. 2003).

These Respondents attempt to downplay their contacts as "random, fortuitous, or attenuated," describing them as "the type t-shirt someone was wearing or type of alcohol a chugged onstage by a band member at the concert." (See Resp't Full Throttle, et al.'s Br., at p. 17). What they ignore is that the young woman wearing the Sloon Shine tank top was an employee or agent of one or more of these Respondents. Further, she allegedly accompanied Fajita Mike at the time he purportedly overserved one of these liquors to Wagoner. It was not a random band member who chugged Sloon Shine on stage. The "band member" was Jesse James Dupree, who possesses an ownership interest in Throttlefest and American Outlaw Spirits. Despite their efforts, these Respondents cannot successfully distance their contacts as unrelated to Appellant's third-party

claims. Accordingly, the Circuit Court erred in finding a lack of personal jurisdiction, or at minimum in failing to provide an opportunity for discovery on this issue.

CONCLUSION

Based on the Brief of Appellant and this Reply Brief of Appellant, Appellant respectfully requests that this Court (1) reverse the Order of Dismissal entered by Judge Culbertson in favor of Respondent Throttlefest, LLC; (2) reverse the Order of Dismissal entered by Judge McKinnon in favor of Respondents American Outlaw Spirits Incorporated, Full Throttle LLC, and Full Throttle Sloon Shine, LLC; and (3) remand this matter to the circuit court.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that Appellant's Final Reply Brief complies with Rule 211(b).

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

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