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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from Marion County
Court of Common Pleas

The Honorable W. Haigh Porter, Special Referee

Case Number 2019-CP-33-00853
Appellate Case No. 2021-00340

Avatar Partners CT, LLC,Respondent,

-v-

HSGCHG Investments, LLC f/k/a Carolina
Entertainment Complex, LLC, Partners 95
LLC, Oil Barons, Inc., and Robert D.
Hartmann, Sr., Appellants.

APPELLANTS' FINAL REPLY BRIEF

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TABLE OF CASES AND OTHER AUTHORITIES

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ARGUMENT IN REPLY

I.

The Circuit Court erred in denying Appellants’ Motion to Dismiss under Rule 12(b)(8), SCRCF, because the issues in this case are identical to a foreclosure action pending in Connecticut involving the same debt and the same foreclosure claim.¹

Citing *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 674 S.E.2d 524 (Ct. App. 2009), also cited by Appellants, Respondent, Avatar Partners, CT, LLC (Avatar) asserts the Circuit Court did not err in denying Appellants’ Rule 12(b)(8), SCRCF, motion to dismiss because the rule only applies “when there [is] identity of the parties, causes of action and relief.”

That is, however, precisely the case here.

The parties to this action and the Connecticut Lawsuit are identical. This action and the Connecticut Lawsuit seek enforcement of the payment provisions of the same note and guaranty. To enforce either, Avatar must establish the amount owed under the note and guaranty. Both actions seek a deficiency judgment against the makers of the note and a judgment against the guarantor.

Accordingly, as between this action and the Connecticut Lawsuit, there is an identity of the parties, claims, and relief sought.

The only difference between the two lawsuits is collateral – property in South Carolina and Connecticut. However, the relief sought regarding both sets of collateral is identical – foreclosure.

In citing *Capital City Ins. Co.*, Avatar neglects to refer to an Indiana case the *Capital City Ins. Co.* Court of Appeals panel cited with approval, *Beatty v. Liberty Mut. Ins. Group*, 893 N.E.2d 1079, 1084 (Ind. App. Ct. 2008). In *Beatty*, the Indiana Court of Appeals said that the Indiana

¹ Appellants respectfully stand on their opening brief regarding their other Issues on Appeal.

version of “[Rule 12(b)(8)²] applies where the parties, subject matter and remedies are precisely the same, and ... *also where they are only substantially the same.*” (Emphasis added).

Appellants respectfully submit the parties, subject matter and remedies involved in this case, and the Connecticut Lawsuit are identical. If not, they are so substantially similar that Rule 12(b)(8) applies, and the Circuit Court erred in failing to dismiss this lawsuit.

A second Indiana case cited by the *Beatty* court is instructive. In *Brightpoint, Inc., v. Pedersen*, 930 N.E. 2d 34 (Ind. App. Ct. 2010), the Indiana Court of Appeals affirmed the lower court’s dismissal of Brightpoint, Inc.’s Indiana lawsuit because there was pending at the same time a Danish arbitration court proceeding regarding similar subject matter. Though the *Brightpoint, Inc.*, decision was based on the concept of comity, the Indiana Court of Appeals looked to its jurisprudence regarding Indiana’s version of Rule 12(b)(8), finding that even though the Indiana lawsuit and the Danish arbitration court proceedings involved somewhat different parties and only related, but not identical subject matter, nevertheless, the Indiana lawsuit should be dismissed. *Id.* at 40 – 41.

Here, the parties are identical, the claims are identical, and the relief sought is identical.

Finally, citing *Poston v. Homes Ins. Co. of N.Y.*, 191 S.C. 314, 4 S.E. 2d 261 (1939), Avatar argues the Circuit Court was correct in denying Appellants’ Rule 12(b)(8) motion because the rule only applies to suits involving the same parties, in the same jurisdiction, with the same object. Avatar Brief at 5.

Poston, however, is inapposite. *Poston*’s attorney moved for a continuance, which was denied, because when his client’s civil case was called for trial, the client was under federal

² Rule 12(b)(8), SCRCF, and Ind. R. Trial P. 12(b)(8) are identical with one, important exception. South Carolina’s Rule 12(b)(8) calls for dismissal of “another action pending between the same parties for the same claim.” Indiana’s Rule 12(b)(8) calls for dismissal of the “same action pending in another state court of this state.”

indictment for stealing the car which was the subject of his insurance claim against the defendant, as well as mail fraud for having filed the claim – the subject matter of Poston’s claim against the defendant, Homes Insurance Company of New York.

Poston’s attorney argued that “the public interest would suffer if the civil case [was] tried....” before Poston’s federal charges were disposed of, suggesting that forcing his client to go to trial in the face of those pending criminal charges, would “thereby [disclose] the testimony [to be] relied upon by the government to convict.” *Id.* at 316, 4 S.E. 2d at 262, The South Carolina Supreme Court rejected this argument, without mention of any predecessor rule to our modern 12(b)(8).

For the reasons set forth above, and in Appellants’ opening brief, Appellants respectfully submit the Circuit Court erred in denying their Rule 12(b)(8) motion, and that denial should be reversed.

CONCLUSION

As set out in their opening brief, Appellants respectfully request the following relief:

As to Issue on Appeal I, reverse the Circuit Court and dismiss this case or, alternatively reverse the Circuit Court and remand the case with instructions to stay the case pending disposition of the Connecticut Lawsuit.

As to Issue on Appeal II, reverse the Order and Judgment of Foreclosure and Sale in part, and remand with instructions to direct Avatar to marshal the encumbered assets and to sell only such assets as are sufficient to satisfy Avatar’s debt.

As to Issue on Appeal III, reverse the Order and Judgment of Foreclosure and Sale, and dismiss Avatar’s Complaint.

As to Issue on Appeal IV, reverse the Order and Judgment of Foreclosure and Sale, and dismiss Avatar’s complaint.

As to Issue on Appeal V, reverse the Order and Judgment of Foreclosure and Sale in part,
and remand the case with instructions to sell the property by lots or parcels.

Respectfully submitted,

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