

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 The City of Isle of Palms,)
)
 Plaintiff/Respondent,)
 vs.)
)
 Watertoys, L.L.C. d/b/a)
 Tidalwave Watersports,)
)
 Defendant/Appellant.)
 _____)

IN THE COURT OF COMMON PLEAS

Case No.: 2021-CP-10-03024

RECEIVED

Dec 15 2021

SC Court of Appeals

ORDER ON RECONSIDERATION

MAGISTRATE'S COURT CASE NO.:
2020-CV-10-11100342

This matter came before the Court on October 27, 2021, via Cisco WebEx. The same day Judge McCoy filed an Order continuing the Appellant's June 30, 2021, initial appeal and emergency motion for stay of the jury trial. On June 29, 2021, the Magistrate entered an Order dismissing the defendants' counterclaims without prejudice. The Appellants immediately appealed on June 30, 2021, and after the Magistrate indicated the trial would go forward, the Appellants filed on July 1, 2021, a motion for emergency stay. The Clerk's office assigned that motion to Judge McCoy, and on October 27, 2021, Judge McCoy entered an Order stating:

Appellant Watertoys LLC filed a Motion for Appeal on June 30, 2021 and a Motion for Emergency Stay on July 2, 2021 and was scheduled to be decided by this Court on the briefs the week of September 27, 2021. These Motions are hereby CONTINUED to the next term of court to allow all ending motions to be heard together.

On November 3, 2021, the Court issued a written Order remanding this case to the Magistrate Court for re-trial for the reasons stated therein. The same day, November 3, 2021, the Isle of Palms ("Respondent") filed a motion for reconsideration asserting that this Court lacks subject matter jurisdiction to take up the appeal because the Appellant failed to file an appeal bond in the Magistrate Court. Two days later on November 5, 2021, the Appellant filed a motion for

reconsideration/consolidation asking that the issue raised in the initial June 30, 2021, appeal before Judge McCoy be consolidated and decided. Both parties filed memoranda of law, and after carefully considering both motions based on the extensive briefing, the Court cannot discover a principle of law or issue of fact overlooked in the November 3rd Order of Remand but agrees that that the first June 30th appeal should be consolidated to prevent the same case proceeding on parallel tracks, which does not promote judicial economy. Based on the foregoing the Court will address each motion separately.

1.

The Isle of Palms' Motion for Reconsideration

The Court denies the Isle of Palms' motion for reconsideration. In its well-written and well-argued briefs, the Isle of Palms asserts that this Court lacks subject matter jurisdiction to entertain **any** aspect of the appeal because the Appellant failed to file an appeal bond in accordance with § 27-37-130, S. C. Code, Ann. The Isle of Palms also cites a line of cases standing for the proposition that a trial judge can change his or her mind because an Order denying summary judgment decides nothing about a case. As to the first assertion, this Court derives its jurisdiction from the State Constitution and the General Assembly, not the Magistrate's Court. The Isle of Palms is free to argue that this Court should not permit the Appellant to remain in possession during the appeal because of its failure to post an appeal bond, but it cannot divest this Court of its subject matter jurisdiction and authority to hear cases before it. "In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court." *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803) As set forth in the Court's November 3rd Order under review, the Magistrate erred in granting summary judgment without either a timely filed Motion for Reconsideration before it or upon a renewed application raised by a motion renewing the Respondent's claim for summary judgment on some new or additional fact

or theory. As the Court of Appeals said in *Ness v. Eckerd Corp.*, 566 S.E.2d 193, 350 S.C. 399 (S.C. App. 2002):

“In *Heins v. Heins*, 344 S.C. 146, 543 S.E.2d 224 (Ct.App.2001), this court held that a family court judge lacked jurisdiction to *sua sponte* alter a judgment more than ten days after it was issued. Although trial judges retain jurisdiction to alter judgments on their own initiative for ten days if a Rule 59(e), SCRCP, motion is filed, after ten days that jurisdiction is lost. *Id.* at 157, 543 S.E.2d at 229-30.” It is undisputed here that the Isle of Palms neither filed a motion for reconsideration nor a second motion for summary judgment, which would have triggered the notice provisions of the *Rules of Civil Procedure*.

Without either a timely Motion for Reconsideration or a renewed Motion for Summary Judgment asserting some additional basis for summary judgment, there was nothing pending before the Magistrate Court to allow it to enter an Order granting summary judgment. Moreover, this record demonstrates that the trial judge denied Respondent’s motion for directed verdict after a full trial, so this record does not contain anything demonstrating that there was ever a pending motion before the Magistrate for either reconsideration or a successive request for summary judgment, and the trial judge’s decision that the Respondent was not entitled to directed verdict indicates that there were no new theories or facts developed at trial. Courts only speak when spoken to; otherwise courts would no longer be “neutral and detached” magistrates but participants in the litigation. “More simply put, appellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.” *Langley v. Boyter*, 284 S.C. 162, 181 325 S.E.2d 550 (Ct. App. 1984) rev’d on other grounds at 286 S.C. 85, 332 S.E.2d 100 (1985).

Therefore, the lower court never reached the issue of an appeal bond because it improperly granted summary judgment, and as for this Court setting an appeal bond here, the Respondent

acknowledges that circuit courts possess concurrent jurisdiction with the Magistrate's Court on ejectment proceedings. Moreover calling the plaintiff's representative, the Mayor of the Isle of Palms, as the plaintiff's "expert witness" in its own trial is troubling. Therefore the Court declines to amend or alter its November 3rd Order remanding the case for trial.

2.

Watertoys' Motion for Reconsideration/Consolidation

It is undisputed that the parties and the Court benefit from consolidation of the issues raised because the various appeals involve the same parties and the same dispute over the same transaction. Watertoys filed its initial appeal on June 30, 2021 and immediately asked for an emergency stay when the Magistrate refused to recognize that an appeal striking defenses must be appealed or waived. See § 14-3-330, S. C. Code, ann.: An intermediate Order is immediately appealable if it is "involving the merits" or if such intermediate Order is "affecting substantial right made in an action when such order in effect determines the action and prevents judgement from which an appeal might be taken or discontinues the action . . . or strikes out an answer or any part thereof of any pleading in any action." See also: *Tillman v. Tillman*, 420 S.C. 246, 801 S.E.2d 757 (Ct. App. 2017). The Magistrate insisted on going forward with trial on July 7, 2021 in the face of that pending appeal when the appeal should have stayed the case. In *Tillman*, the plaintiff filed a writ of ejectment against her brother and his wife for nonpayment of rent, and the brother counterclaimed. The plaintiff moved to dismiss the counterclaims, and at the hearing, the brother asked the Court for leave to amend. The trial court granted the plaintiff's motion to dismiss the counterclaims, and the Court of Appeals found the appeal interlocutory and dismissed it, but it did so taking pains to point out that the reason the appeal was interlocutory was because the brother failed to avail himself of the trial court's invitation to file a "formal" motion to amend:

The trial court denied the motion to reconsider, but in its order wrote:
The Court takes this opportunity to clarify its Order dismissing the defendants' counterclaims. The oral motion to amend counterclaims was denied but the defendants may make a formal motion to amend their counterclaims.
Tillman at page 758.

The *Tillman* court noted that “our Supreme Court has used the same section [§ 14-3-330(2)] to find that granting a motion to dismiss may be immediately appealable because it ‘strikes’ a pleading.” *Lebovitz v. Mudd*, 289 S.C. 476, 479, 347 S.E.2d 94, 96 (1986).”

Here, Watertoys interposed in its amended, specifically, its Motion to Amend Answer and Amended Answer filed December 4, 2021, a qualified general denial, two affirmative defenses (promissory estoppel and equitable estoppel) and four counterclaims (abuse of process, tortious interference with contract, civil conspiracy, breach of contract accompanied by a fraudulent act), and a separate allegation of attorney’s fees. (Motion to Amend Answer and Amended Answer filed December 4, 2020.) The Magistrate treated all of these as an allegation of breach of quiet enjoyment. The Magistrate struck the defenses/counterclaims without prejudice, finding that the application for attorney’s fees was premature and that Watertoys could not make a claim for breach of quiet enjoyment “*until there has been disturbance of possession by actual or constructive eviction.*” Magistrate’s June 29, 2021 Order at page 2, Exhibit 1 to Appellant’s Notice of Appeal, emphasis in original.

As to the Magistrate’s decision to strike the Appellant’s claim for attorney’s fees because it is “premature,” this decision is not legal error, but it creates an unnecessary procedural requirement that Watertoys re-file if, and only if, a favorable result Appellant a “prevailing party,” which makes the issue ripe. The Magistrate is correct, of course. Neither party can claim attorney’s fees until it becomes a “prevailing party.” The Isle of Palms’ writ of ejectment prays for attorney’s fees because ¶ 16 of the lease provides that the prevailing party in any dispute is

entitled to ask for fees. The Magistrate is correct that the issue of attorney's fees does not arise until the Court determines who is the "prevailing party," but the *Rules of Civil Procedure* make clear the purpose of pleading rules is "to secure the just, speedy, and inexpensive determination of every action." Rule 1, *South Carolina Rules of Civil Procedure*. The Isle of Palms is not prejudiced by the inclusion in defendants' Answer an allegation for the same prayer for relief as contained in the Plaintiff's application for ejectment. Just as the defendants are not prejudiced by the inclusion of the Isle of Palms' application of attorney's fees in its pleadings, neither is the Isle of Palms prejudiced by the inclusion of the reciprocal claim in the defendants' pleadings. The issue of who is entitled to fees as a prevailing party is a question to be answered at the proper time.

Defendants also raised counterclaims alleging the Landlord breached the Tenant's right to quiet enjoyment of the rented dock space. The Magistrate dismissed the counterclaims on what amounts to a motion to dismiss, and the standard of review on a motion to dismiss is well known:

In deciding a motion to dismiss pursuant to 12(b)(6), SCRPC, the trial court should consider only the allegations set forth on the face of the [defendants' counterclaims]. *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995). A 12(b)(6) motion should not be granted if "facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case." *Id.* 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. *Toussaint v. Ham*, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987). Further, the [counterclaims] should not be dismissed merely because the court doubts the plaintiff will prevail in the action. *Id.* *Plyer v. Burns*, 373 S.C. 637, 647 S.E.2d 188 (2007)

The Magistrate dismissed these counterclaims on the ground that Landlord had not yet prevailed on its ejectment, finding that is the only basis for such a claim. See June 29, 2021, Order at page 2, Exhibit 1 to June 30, 2021 Appeal. There are other ways that a Landlord can interfere in a Tenant's right of quiet enjoyment, a principle of law the Magistrate recognized in the Order under review: *disturbance of possession by actual or constructive eviction*.

The covenant of quiet enjoyment is breached when the landlord obstructs, interferes with, or takes away from the tenant in a substantial degree the beneficial use of the leasehold. Any

wrongful act of the lessor that interferes with the lessee's possession, in whole or in part, is a breach of the covenant of quiet enjoyment.

49 Am.Jur.2d, Landlord and Tenant § 481

Whether the defendants can prove a constructive eviction or “wrongful act of the lessor that interferes with the lessee's possession” has not been determined, but whether they can or cannot prove it is not a question that can be answered on a motion to dismiss, or at least without an opportunity to correct any pleading deficiencies the Court identifies.

Under *Spence v. Spence*, if the Magistrate determines that the pleadings are insufficient to bring such claims before the Court, it is required to give Watertoys an opportunity to cure any deficiency in the pleadings. See *Spence v. Spence* 368 S.C. 106, 628 S.E. 869 (2006):

When a complaint is dismissed under Rule 12(b)(6) for failure to state facts sufficient to constitute a cause of action, the dismissal generally is without prejudice. The plaintiff in most cases should be given an opportunity to file and serve an amended complaint. See *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962) (rules of civil procedure should be liberally construed to do substantial justice and lower court erred in denying motion to amend complaint where amendment would have stated alternative theory of recovery); *Small v. Mungo*, 254 S.C. 438, 442-44, 175 S.E.2d 802, 804 (1970) (affirming dismissal of complaint for failure to proceed, but finding it should have been dismissed without prejudice); *Dockside Assn., Inc. v. Detyens, Simmons & Carlisle*, 297 S.C. 91, 374 S.E.2d 907 (Ct. App. 1988) (citing Rule 15(a), SCRCPP, that plaintiff generally is allowed to amend a complaint to correct deficiencies which resulted in dismissal under provisions of Rule 12(b)); *Davis v. Lunceford*, 279 S.C. 503, 507, 309 S.E.2d 791, 793 (Ct. App. 1983) (trial court properly dismissed action in which plaintiff served summons but failed to timely serve complaint, but dismissal with prejudice was improper because such a dismissal is in nature of discontinuance of action and is not an adjudication on the merits; action should have been dismissed without prejudice); accord *Arkansas Dept. of Environ. Quality v. Brighton*, 352 Ark. 396, 102 S.W.3d 458, 468 (2003) (complaint dismissed for failure to state facts upon which relief can be granted should be dismissed without prejudice in order for plaintiff to decide whether to serve amended complaint or appeal); *Thacker v. Bartlett*, 785 N.E.2d 621, 624 (Ind. App. 2003) (dismissal for failure to state a claim is without prejudice because the complaining party may either file an amended complaint or stand upon complaint and appeal); *Giuliani v. Chuck*, 1 Haw. App. 739, 620 P.2d 733, 737 (1980) (complaint is not subject to dismissal with prejudice unless it appears to a certainty that no relief can be granted under any set of facts that can be proved in support of its allegations); James F. Flanagan, *South Carolina Civil Procedure* 95 (2d ed. 1996) (party who loses a motion to dismiss normally is given the right to amend the complaint to cure the defect).

Here, the Magistrate did not identify which pleading deficiencies, if any, prevent the claims from being asserted or allow the defendants to amend their pleadings to correct any deficiency. The June 29, 2021 Order under review simply concludes that the defendants cannot allege interference until the Isle of Palms ejects them. This is a too narrow reading of the allegations of the counterclaims. Moreover, the counterclaims raised by the defendants arise out of the same transaction and involve the same parties, and for that reason a litigant must be afforded an opportunity to plead and prove any defense he or she believes is applicable. “A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the same transaction or occurrence that is the subject matter of the opposing party’s claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.” Rule 13(a) *Compulsory Counterclaims, South Carolina Rules of Civil Procedure*.

For the foregoing reasons, after careful review of the filed briefs, it is hereby

ORDERED that the Respondent’s, Isle of Palms,’ Motion for Reconsideration is respectfully denied, and it is further

ORDERED that the June 29, 2021, Order dismissing the defendants’ counterclaims is reversed and remanded.

AND IT IS SO ORDERED.

November ____, 2021

Roger M. Young, Sr.
Presiding Judge, Ninth Judicial Circuit



Charleston Common Pleas

Case Caption: Watertoys Llc , plaintiff, et al VS Isle Of Palms City Of

Case Number: 2021CP1003024

Type: Order/Amend

It is so ordered.

/s Roger M. Young, Sr. S.C. Circuit Judge 2134