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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Hon. Alex Kinlaw, Jr., Circuit Court Judge

C.A. No.: 2019-CP-23-06576
Appellate Case No. 2020-001075

Jefferson Davis, Jr.Appellant,

v.

Nate Leupp, Facebook, Inc., & John Doe(s) 1–40,Respondent.

FINAL BRIEF OF APPELLANT

Jefferson Davis, Jr.
403 McCarter Avenue
Greenville, SC 29615
843-901-8036 (cell)
jeff@apogeetax.com

Appellant

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL COURT PROPERLY APPLY RULE 12(B)(8), SCRPC, TO THE PRESENT ACTION?
 - a. IS “**ANOTHER ACTION PENDING**” AGAINST A DEFENDANT WHEN THE DEFENDANT WAS NEVER SERVED, NOR VOLUNTARILY APPEARED, IN THE FIRST ACTION?
 - b. IS AN ACTION “**BETWEEN THE SAME PARTIES**” WHEN THE NAMED PARTIES IN THE TWO ACTIONS ARE SUBSTANTIALLY DIFFERENT?
 - c. IS AN ACTION “**FOR THE SAME CLAIM**” WHEN THE FACTS IN THE SECOND ACTION ARE SUBSTANTIALLY DIFFERENT, AND EVEN OCCURRED AFTER THE FILING OF THE FIRST ACTION?

- II. DID THE TRIAL COURT ERR IN DENYING APPELLANTS MOTION TO AMEND HIS COMPLAINT IN ORDER TO DELETE THE 6TH, 7TH AND 8TH CAUSES OF ACTION?

STATEMENT OF THE CASE

This is an appeal from an order dismissing a Greenville County case based on Rule 12(b)(8), SCRPC, finding the underlying matter to be duplicative of a case in Richland County. Nothing however could be further from the truth.

SC caselaw tells us that there are three required elements for dismissal under Rule 12(b)(8): (1) another action pending, (2) between the same parties, (3) for the same claim. All three must exist for a 12(b)(8) dismissal to be appropriate. In the current matter, none of the three exist.

Furthermore, our SC appellate courts have ruled that these three elements are to be interpreted very narrowly. Basically, the three elements must “**be precisely or substantially the same**” in both actions for a 12(b)(8) dismissal to be appropriate.

Finally, a Rule 12(b)(8) dismissal is a draconian and final measure. Our South Carolina appellate courts have made it clear that Rule 12(b)(8) should only be used, *if ever*, in the narrowest and most limited of circumstances. Such unique circumstances do not exist in the case at hand.

In common parlances, Appellant / Plaintiff was (figuratively) “run over by a car” in which Respondent was cheering on from the sidelines (the Richland Action), and later, in a totally different location, Appellant / Plaintiff was (figuratively) “run over by yet a different car” which this time the Respondent was actually driving, with a whole set of different passengers and circumstances at hand (the Greenville Action). And now the Respondent is claiming an unlimited (and continuing) immunity from liability to continue running over Appellant anytime and anywhere ... because he was named (yet did not even appear) in a lawsuit from years ago?

No, this fact situation is most certainly not the intent of Rule 12(b)(8), SCRPC.

STANDARD OF REVIEW

“The appellate court applies the same standard of review as the circuit court in scrutinizing the application of Rule 12(b)(8), SCRPC. *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct.App.2009).” *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 320, 701 S.E.2d 39, 44 (S.C. App. 2010)

In the case at hand, the Court of Appeals reviews the trial court’s findings of fact and legal conclusions, *de nova*.

FACTS

The “Richland Action”

On May 3rd, 2018, Appellant filed an action in Richland County. (R. pp. 144-157; Richland Action - Complaint) (**hereinafter the “Richland Action”**). Respondent was ***NOT*** named as a Defendant in the original complaint in the Richland Action. (R. pp. 146 & 147; Richland Action - Complaint.)

On November 19th, 2018, Appellant filed a FIRST AMENDED COMPLAINT in the Richland Action. (R. pp. 167-213; Richland Action – First Amended Complaint.) Respondent was named as a defendant in the FIRST AMENDED COMPLAINT. (R. pp. 167, 169 & 176; Richland Action – First Amended Complaint.) However, Respondent ***was never served nor did he make an appearance*** in the Richland Action. (R. pp. 218-249, Richland Action - Docket)

On February 19th, 2019, the FIRST AMENDED COMPLAINT in the Richland Action was stricken in its entirety for a procedural issue, and all newly named defendants were dismissed with prejudice (bizarrely enough). This order is currently on appeal and the trial court case is stayed pending an outcome of said appeal. See *Davis, Appellant v. Ellen Weaver, Palmetto Promise Institute, et al., Respondents*. Appellate Case No.: 2019-000648.

The “Greenville Action”

(The Case Subject to This Appeal)

On November 12th, 2019, Appellant filed his Summons and Complaint against Respondent in Greenville County. (R. pp. 12-45; Complaint) (**hereinafter the “Greenville Action”**). The Complaint named Respondent and two additional defendants that were never named in or parties to the Richland Action. *Id.* The Greenville Action included numerous factual

allegations that were not included in the Richland Action, some of which even occurred after the filing of the FIRST AMENDED COMPLAINT in the Richland Action.

On December 20th, 2019, Respondent filed a Motion to Dismiss the Greenville Action based on, among other things, Rule 12(b)(8) because Respondent had been “named” in the Richland Action (*although Respondent was never served nor did he appear in said action*). (R. pp. 46-47.)

On June 16th, 2020, at 12:21AM, Respondent, in violation of Judge Kinlaw’s “**At least 72 hours prior to the hearing**” time requirement, filed a Memorandum in Support of Respondent’s Motion to Dismiss. (R. pp. 48-72.)

On June 16th, 2020, at 9:30AM, a hearing was held in Greenville on Respondent’s Motion to Dismiss. (R. pp 81-143, Transcript.)

On June 17th, 2020, the trial Court issued a Form 4 Order granting Respondent’s Motion to Dismiss based on Rule 12(b)(8), SCRCF, finding the action was duplicative. Order to follow. (R. pp 1-3.)

On June 29th, 2020, the trial Court issued its Order of Dismissal, as completely drafted by Respondents legal counsel (without any changes), based solely on Rule 12(b)(8), SCRCF. (R. pp. 4-7.)

On July 10th, 2020, Appellant timely filed his Motion (with Memorandum) to Reconsider. (R. pp. 73-80.)

On July 27th, 2020, the trial Court denied Appellant’s Motion to Reconsider. (R. pp. 8-11.)

On August 4th, 2020, Appellant timely filed his Notice of Appeal.

ARGUMENTS

I. **THE TRIAL COURT ERRED IN ITS APPLICATION OF RULE 12(B)(8), SCRPC, TO THE PRESENT ACTION.**

Avoidance of "duplicative litigation" is the underlying principle of Rule 12(b)(8) *State ex rel. Wilson v. Condon*, 410 S.C. 331, 333, 764 S.E.2d 247, 248 (2014)

There are three elements necessary for dismissal under Rule 12(b)(8), SCRPC. "In South Carolina, dismissal under Rule 12(b)(8) may be proper when there is **(1) another action pending, (2) between the same parties, (3) for the same claim.**" *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 105, 674 S.E.2d 524, 531 (S.C. App. 2009) (bold emphasis added).

Although each of the three elements are required, the present appeal fails under not just one, but all three requirements of *Capital City Ins. Co v. BP Staff, Inc.* As such the trial court erred in its application of Rule 12(b)(8), SCRPC, and thus must be reversed.

a. **THERE IS NOT "ANOTHER ACTION PENDING" AGAINST THE RESPONDENT / DEFENDANT WHEN THE DEFENDANT WAS NEVER SERVED, NOR VOLUNTARILY APPEARED, IN THE FIRST ACTION.**

There is in fact no other action pending against Respondent / Defendant Leupp as he has never been a party, nor voluntarily appeared, in the Richland Action. (R. pp.218-249, Richland Action Docket - *Davis v. Ellen Weaver, Palmetto Promise Institute, et al.* 2018-CP-40-02425.) Neither has Respondent / Defendant Leupp been a party or voluntarily appeared in the ongoing

interlocutory appeal. (*Davis, Appellant v. Ellen Weaver, Palmetto Promise Institute, et al., Respondents*. Appellate Case No.: 2019-000648.)

Respondent / Defendant Leupp was “named” in the Richland Action as a potential John Doe, in an abundance of caution as ordered by the Court, but he was never served, nor did he appear, and as such he is not a party to that case.

Having not been served or appeared, and simply being named in the title of a case is not sufficient ... alone ... for Rule 12(b)(8). Jeopardy does not attach, nor is there *res judicata*, when a party has never been served or even appeared in a case.

b. AN ACTION IS NOT “BETWEEN THE SAME PARTIES” WHEN THE NAMED PARTIES IN THE TWO ACTIONS ARE SUBSTANTIALLY DIFFERENT.

The parties in the two cases do include both Appellant / Plaintiff Davis and Respondent / Defendant Leupp, but that is where the identity of “same parties” ends.

In the current Greenville Action, the named Defendants Facebook, Inc. and Automattic, Inc. are not in the Richland Action.

Furthermore, the “John Doe(s)” in the Greenville Action are believed to be substantially different than the “John Doe(s)” in the Richland Action. The Richland Action has over 30 named defendants that are not named parties in the Greenville Action. The necessary “same parties” is non-existent.

c. AN ACTION IS NOT “FOR THE SAME CLAIM” WHEN THE FACTS IN THE SECOND ACTION ARE SUBSTANTIALLY DIFFERENT, AND EVEN OCCURRED AFTER THE FILING OF THE FIRST ACTION.

And here is where it really gets good. Respondent / Defendant Leupp is named in the Richland Action’s **First Amended Complaint only three (3) times**. (R. p. 198, Richland Action – First Amended Complaint.) Although the Richland Action’s First Amended Complaint was 45 pages long and over 30 defendants, this is the entire extent of any reference to Respondent Leupp.

159. Upon information and belief, Defendant Leupp and other John Doe(s) are responsible for the public website about Plaintiff Davis

160. Defendant Leupp has upon information and belief done similar things to other parties in the past.

161. Defendant Leupp is a pawn of Defendant Weaver and Defendant DeMint.

(Richland Action – First Amended Complaint, page, 30.)

Respondent / Defendant Leupp is specifically named in the **Greenville Action’s Complaint a grand total of 136 times in a Summons & Complaint that is 32 pages long**. (R. pp.12-45, Greenville Action Complaint.)

The First Amended Complaint in the Richland Action was filed on November 19th, 2018. The bulk of the actions complained about in the Greenville case occurred in **February, March & April of 2019** and involves matters and accusations completely unrelated and nonexistent in the First Amended Complaint in the Richland Action. (R. pp. 21-33, etc., Greenville Action Complaint.) Respondent wants to make it appear the two cases are the same, but they are not by any means duplicative.

“SAME CLAIM” NARROWLY INTERPRETED REQUIREMENT: Respondent cites as support for dismissal under Rule 12(b)(8) the three (3) part test in the *Capital City Ins. Co. v. BP Staff, Inc* case. Interestingly enough however, *Capital City* (S.C. App. 2009) REVERSED AND REMANDED the trial court’s 12(b)(8) dismissal finding that, as in this case, the three elements did not exist.

Additionally, the analysis in the 2009 *Capital City* appeal was discussed further by the S.C. Court of Appeals the following year in *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 701 S.E.2d 39 (S.C. App. 2010) as follows:

“This Court revisited the "same claim" component of Rule 12(b)(8) in *Capital City*, and interpreted the rule narrowly:

The rule has historic ties to a former statute providing a defendant a similar opportunity to demur; our supreme court traditionally interpreted that statute narrowly, stating that it only applied when there was identity of parties, causes of action and relief. We find this approach consistent with modern day practice under rules similar to our Rule 12(b)(8). Accordingly, we interpret the rule narrowly such that ***the claim must be precisely or substantially the same in both proceedings*** in order for the drastic remedy of dismissal to be appropriate under Rule 12(b)(8).

382 S.C. at 105-06, 674 S.E.2d at 531-32 (citations omitted) (emphasis added).”

Our South Carolina appellate courts have made it clear that Rule 12(b)(8) should only be used, ***if ever***, in the narrowest and most limited of circumstances. Such unique circumstances do not exist in the case at hand.

II. THE TRIAL COURT ERRED IN DENYING APPELLANT’S MOTION TO AMEND HIS COMPLAINT IN ORDER TO DELETE THE 6TH, 7TH AND 8TH CAUSES OF ACTION.

Respondent further asked the trial court for leave to Amend his Original Complaint so that he may, delete his 6th (Tortuous Interference with Prospective Contractual Relations), 7th (Unfair Trade Practices), and 8th (Piercing the Corporate Veil) causes of action against Respondent. (R. pp.73-80.) This amendment would have further differentiated the two cases.

Rule 15 (a) of the SCRCPP, states that “a party may amend his pleading...by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party.” Our Courts have interpreted this rule liberally. “Leave to amend pleadings pursuant to Rule 15 SCRCPP, shall be liberally and freely given when justice so requires and does not prejudice any other party.” *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 493 S.E.2d 826 (1997); *Pruitt v. Bowers*, 330 S.C. 483, 499 S.E.2d 250 (S.C. App. 1998). “This rule strongly favors amendments and the Court is encouraged to freely grant leave to amend.” *Jarrell v. Seaboard Sys. R.R.*, 294 S.C. 183, 363 S.E.2d 398 (S.C. App. 1987). Rule 15 SCRCPP, which governs the amendment of pleadings, strongly favors amendments and the court is encouraged to freely grant leave to amend. *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 607 S.E.2d 711 (Ct. App. 2005). It is well established that a motion to amend a pleading is addressed to the sound discretion of the trial judge. *Duncan v. CRS Serrine Eng’rs*, 337 S.C. 537, 524 S.E.2d 115 (C. App. 1999); see *Berry v. McLeod*, 328 S.C. 435, 492 S.E.2d 794 (Ct. App. 1997) (Courts have wide latitude in amending pleadings).

The trial court erred in denying Appellants request to amend his original complaint deleting said causes of action and any other changes to further differentiate the two cases.

CONCLUSION

For the foregoing reasons, Appellant asks this Honorable Court to reverse the judgment of the circuit court order dismissing this case under Rule 12(b)(8) and grant Plaintiff Davis leave to Amend his Complaint deleting the 6th, 7th and 8th causes of action against Respondent and making any further amendments Appellant deems necessary.

Respectfully submitted,



Date: February 16th, 2022

Jefferson Davis, Jr.
403 McCarter Avenue
Greenville, SC 29615
843-901-8036 (cell)
jeff@apogeetax.com

Appellant

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Jefferson Davis, Jr.Appellant,

v.

Nate Leupp, Facebook, Inc., & John Doe(s) 1-40,Respondent.

CERTIFICATE OF COMPLIANCE

I certify that **APPELLANT'S FINAL BRIEF & FINAL REPLY BRIEF** comply with
Rule 211(b), SCACR.



Jefferson Davis, Jr.
403 McCarter Avenue
Greenville, SC 29615
843-901-8036 (cell)
jeff@apogeetax.com

Appellant