

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
COURT OF COMMON PLEAS

R. Lawton McIntosh, Circuit Court Judge

Case No.: 2020-CP-04-02439

U.S. Foods, Inc., Respondent.

v.

Carlees Restaurant LLC and Ghassan Ashy, Defendants,

Of whom Carlees Restaurant, LLC is the Appellant.

APPELLANT'S INITIAL BRIEF

William Norman Epps III, #73158
Post Office Box 2167
Anderson, South Carolina 29622
(864) 224-2111
(864) 224-3536, fax
Attorney for Appellant

February 28, 2022

Other Counsel of Record:

Cynthia M. Lover, Esq.
PO Box 1452
North Myrtle Beach, SC 29598
843-626-2029 (phone)
Attorney for Respondent

RECEIVED
MAR 04 2022
SC Court of Appeals

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIESii

STATEMENT OF ISSUES ON APPEAL1

STATEMENT OF THE CASE2

STATEMENT OF THE FACTS.....3

ARGUMENTS

 I. STANDARD OF REVIEW6

 II. THE TRIAL COURT ERRED IN GRANTING RESPONDENT’S MOTION TO STRIKE AND FOR JUDGMENT AGAINST APPELLANT AND ERRED IN FAILING TO GRANT APPELLANT’S MOTION TO AMEND ITS ANSWER.....6

CONCLUSION8

TABLE OF AUTHORITIES

I. CASES:

Brown v. Coastal States Life Ins. Co., 264 S.C. 190, 194, 213 S.E.2d 726, 728 (1975)...6

Burns v. Wannamaker, 286 S.C. 336, 339, 333 S.E.2d 358, 360 (Ct.App.1985).....6

Curry v. Carolina Ins. Grp. of SC, Inc., 428 S.C. 60, 75, 832 S.E.2d 760, 767–68 (Ct. App. 2019).....7

McCormick v. England, 328 S.C. 627, 632, 494 S.E.2d 431, 433 (Ct.App.1997).....6

Robinson v. Code, 384 S.C. 582, 585, 682 S.E.2d 495, 496 (Ct. App. 2009).....6

Skydive Myrtle Beach, Inc. v. Horry County, 426 S.C. 175, 189, 826 S.E.2d 585, 592 (2019)6

II. SOUTH CAROLINA RULES OF CIVIL PROCEDURE:

Rule 12(b)(6), SCRCP.....6

Rule 12 (f) SCRCP.....6

Rule 15(a), SCRCP.....7

STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN GRANTING RESPONDENT'S MOTION TO STRIKE AND FOR JUDGMENT AGAINST APPELLANT AND ERR IN FAILING TO GRANT APPELLANT'S MOTION TO AMEND IT'S ANSWER?

STATEMENT OF THE CASE

On December 11, 2020, the Respondent filed a Summons and Complaint, Case No. 2020-CP-04-2439, in the Court of Common Pleas for Anderson County, State of South Carolina against the Defendants, Carlees Restaurant, LLC and Ghassan Ashy. The Defendant, Ghassan Ashy and Appellant, Carlees Restaurant, LLC filed an Answer on May 4, 2021. The Plaintiff filed a Motion to Strike Defendant, Carlees Restaurant, LLC's Answer and for Default and Default Judgment on July 2, 2021. Both the Defendant, Ghassan Ashy and Appellant, Carlees Restaurant, LLC filed Return to Plaintiff's Motion and Motion to Amend Defendants Answers on August 17, 2021. A motion hearing was held before the Honorable R. Lawton McIntosh on August 25, 2021. A Form 4 Order granting Plaintiff's Motion to Strike the Defendant, Corporation's Answer was filed August 27, 2021. An Order Striking Answer of Carlees Restaurant, LLC and for Judgment was filed September 1, 2021 along with a Form 4 Order granting judgment of \$21,501.26. The Appellant, Carlees Restaurant, LLC filed it's Motion to Alter or Amend the Order Striking Answer of Carlees Restaurant, LLC on September 13, 2021. Judge McIntosh denied the Appellant's Motion to Alter or Amend in an Form 4 Order filed September 15, 2021. Appellant filed it's Notice of Appeal on October 15, 2021.

STATEMENT OF FACTS

The Respondent, U.S. Foods, Inc., (hereinafter referred to as "U.S. Foods") filed a Summons and Complaint, Case No. 2020-CP-04-2439, in the Court of Common Pleas for Anderson County, State of South Carolina against the Appellant, Carlees Restaurant, LLC (hereinafter referred to as "Carlees Restaurant") and Defendant, Ghassan Ashy. (Summons and Complaint filed December 11, 2020). U.S. Foods alleges that Carlees Restaurant owes the sum of \$15,000.00, plus interest and attorney fees on a credit application executed on or about April 26, 2017 and that Ghassan Ashy is liable by virtue of his execution of a Personal Guaranty to U.S. Foods. (*Id.*)

While the Complaint alleges that Carlees Restaurant is a South Carolina limited liability company in good standing with the Secretary of State and doing business in Anderson County, the reality is that Carlees Restaurant is a non-entity, as it was dissolved with the Secretary of State on September 30, 2020 in File ID: 201001-1304539 prior to this action being filed on December 11, 2020. (*Id.* at ¶ 3). (Order Striking Answer of Carlees Restaurant, LLC and for Judgment filed September 1, 2021). Ghassan Ashy was served with the Summons and Complaint on March 18, 2021. He then consulted with Attorney Chuck Anderson, who requested of U.S. Foods and was granted, a fifteen day extension of time to answer. Ultimately, Mr. Ashy did not retain Attorney Chuck Anderson, and on May 4, 2021, Mr. Ashy filed an Answer on behalf of Carlees Restaurant. (*Id.*). (Answer of Carlees Restaurant, LLC filed on May 4, 2021). Mr. Ashy also on May 4, 2021 filed an Answer, individually on his own behalf. (Answer of Ghassan Ashy filed on May 4, 2021).

On May 10, 2021, Counsel for U.S. Foods mailed a letter to Ghassan Ashy advising him that he cannot file an Answer on behalf of Carlees Restaurant. (Plaintiff's Motion to Strike Defendant Carlees Restaurant, LLC's answer and for Judgment filed on July 2, 2021). This letter advised Mr.

Ashy that he had an additional fifteen days to retain an attorney to file an Answer or notice of appearance on behalf of Carlees Restaurant. (*Id.*). U.S. Foods filed a Motion to Strike Defendant, Carlees Restaurant's Answer and for Default and Default Judgment on July 2, 2021. (*Id.*). A copy was mailed to Mr. Ashy on July 9, 2021. (Order Striking Answer of Carlees Restaurant, LLC and for Judgment filed September 1, 2021). On July 29, 2021, U.S. Foods notified Ghassan Ashy via certified mail that its motion was scheduled for a hearing on August 25, 2021. On August 10, 2021, a Notice of Appearance was filed by the undersigned on behalf of Ghassan Ashy and Carlees Restaurant. A Return to Plaintiff's Motion to Strike and for Default and Default Judgment and Motion to Amend Defendants Answers was filed on August 17, 2021. (Defendants Return to Plaintiff's Motion and Motion to Amend Defendants Answers filed August 17, 2021).

A WebEx hearing was held on August 25, 2021, before the Honorable R. Lawton McIntosh. (Transcript of Record of Motion hearing on August 25, 2021 pp. 1-8). The trial court granted the motion to strike Carlees Restaurant's Answer. (Transcript of Record of Motion hearing on August 25, 2021 p. 7). The trial court did not make any finding or ruling as to entry of default or default judgment and did not rule on the motion to amend Defendants answers. (*Id.* at pp. 1-8). Counsel for U.S. Foods on August 26, 2021 emailed a proposed order to the Honorable R. Lawton McIntosh that not only contained findings striking Carlees Restaurant's Answer but granting a default and default judgment in the amount of \$21,501.26. A Form 4 Order was attached to the proposed order listing the judgment amount to be enrolled against Carlees Restaurant in the amount of \$21,501.26. (Proposed Order Striking Answer of Carlees Restaurant, LLC and for Judgment). Counsel for Carlees Restaurant objected to this proposed order in that the trial court did not make any finding or ruling as to entry of default or default judgment as set forth in U.S. Foods proposed order. (Email

to trial court dated August 27, 2021). A Form 4 Order was filed August 27, 2021 that held: Plaintiff's Motion to Strike as to Corporate Defendant based on Non-Attorney Filing an Answer on behalf of the Corporation is Granted. As such, there is nothing to Amend. (Form 4 Order granting Plaintiff's Motion to Strike the Defendant, Corporation's Answer filed August 27, 2021).

The trial court modified U.S. Foods proposed order in that the court removed all findings of facts and conclusions of law granting judgment against Carlees Restaurant in the amount of \$21,501.26. The Order was filed September 1, 2021, however, the Form 4 Order enrolling the judgment against Carlees Restaurant was filed as well, resulting in judgment being entered against Carlees Restaurant. Carlees Restaurant filed its Motion to Alter or Amend the Order Striking Answer of Carlees Restaurant on September 13, 2021. The trial court denied the Motion to Alter or Amend in an Form 4 Order filed September 15, 2021.

ARGUMENTS

STANDARD OF REVIEW

A motion to strike, challenging a theory of recovery in the complaint, is comparable to a motion to dismiss under Rule 12(b)(6), SCRPC. *McCormick v. England*, 328 S.C. 627, 632, 494 S.E.2d 431, 433 (Ct.App.1997). “Where a pleading is attacked for an alleged failure to state a cause of action, the pleading must be liberally construed in favor of the pleader and sustained if the facts and reasonable inferences to be drawn therefrom entitle the pleader to relief on any theory of the case.” *Burns v. Wannamaker*, 286 S.C. 336, 339, 333 S.E.2d 358, 360 (Ct.App.1985). A court should not strike a cause of action merely because the court doubts the plaintiff will prevail in the action. *McCormick*, at 633, 494 S.E.2d at 434. However, the matter of striking from a pleading is largely within the discretion of the trial judge. *Brown v. Coastal States Life Ins. Co.*, 264 S.C. 190, 194, 213 S.E.2d 726, 728 (1975). Thus, the grant of a motion to strike will not be reversed except for an abuse of discretion or error of law. *Id.* at 194–95, 213 S.E.2d at 728. *See Robinson v. Code*, 384 S.C. 582, 585, 682 S.E.2d 495, 496 (Ct. App. 2009).

II. THE TRIAL COURT ERRED IN GRANTING RESPONDENT’S MOTION TO STRIKE AND FOR JUDGMENT AGAINST APPELLANT AND ERRED IN FAILING TO GRANT APPELLANT’S MOTION TO AMEND ITS ANSWER

The trial court’s order striking Carlees Restaurant’s answer and granting judgment respectfully, was akin to a dismissal with prejudice and the Appellant should be allowed to fix the deficiency. While U.S. Food’s motion to strike was pursuant to Rule 12 (f) of the South Carolina Rules of Civil Procedure, the same analysis should apply as to a dismissal under 12(b)(6).

Under *Skydive Myrtle Beach, Inc. v. Horry County*, our supreme court instructed:

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. 426 S.C. 175, 189, 826 S.E.2d 585, 592 (2019).

In this case, Carlees Restaurant’s attorney filed a notice of appearance. It also filed a motion to amend its answer to fix the deficiency and respectfully should be allowed to fix it. *See id.* at 181, 826 S.E.2d at 588 (“[T]he time for requesting leave to amend to correct a Rule 12(b)(6) pleading defect is after the trial court has determined the original pleading was deficient.”). *See id.* (recognizing a plaintiff is “entitled to accept the court’s ruling the original complaint was deficient, and replead in an attempt to fix the deficiency”).

Rule 15(a), SCRPC, provides:

A party may amend his pleading once as a matter of course at any time before or within [thirty] days after a responsive pleading is served or, if the pleading is one to which no responsive pleading is required and the action has not been placed upon the trial roster, he may so amend it at any time within [thirty] days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; ... leave shall be freely given when justice so requires and does not prejudice any other party. *See Curry v. Carolina Ins. Grp. of SC, Inc.*, 428 S.C. 60, 75, 832 S.E.2d 760, 767–68 (Ct. App. 2019)

The Respondent would suffer no prejudice if the relief were granted nor did Respondent argue prejudice, however the Defendant, Ghassan Ashy would suffer prejudice as he did timely answer the complaint.

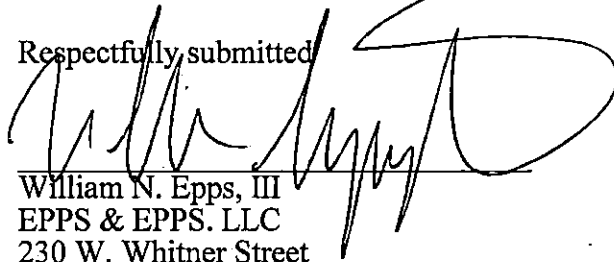
That further the trial court amended the Respondent’s proposed order striking Carlees Restaurant’s answer and did not make any findings or ruling as to entry of default or default judgment as set forth in the proposed order, and did remove said language. (Proposed Order

Striking Answer of Carlees Restaurant, LLC and for Judgment and Order Striking Answer of Carlees Restaurant, LLC and for Judgment filed September 1, 2021). (Transcript of Record of Motion hearing on August 25, 2021 pp. 1-8). However, the Form 4 attached to the proposed order may have inadvertently been filed granting judgment to the Respondent in the amount of \$21,501.26.

CONCLUSION

Based on the above, Carlees Restaurant respectfully asks that the trial court's order striking its answer and granting judgment be reversed and that Carlees Restaurant be allowed to amend its answer.

Respectfully submitted



William N. Epps, III
EPPS & EPPS, LLC
230 W. Whitner Street
Post Office Box 2167
Anderson, South Carolina 29622
(864) 224-2111
ATTORNEY FOR THE APPELLANT

February 28, 2022

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

MAR 04 2022

SC Court of Appeals

APPEAL FROM ANDERSON COUNTY
COURT OF COMMON PLEAS

R. Lawton McIntosh, Circuit Court Judge

Case No.: 2020-CP-04-02439

U.S. Foods, Inc., Respondent.

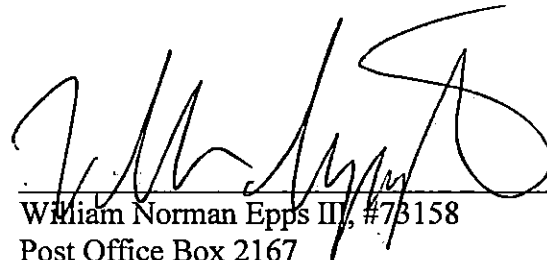
v.

Carlees Restaurant LLC and Ghassan Ashy, Defendants,

Of whom Carlees Restaurant, LLC is the Appellant.

PROOF OF SERVICE

I certify that I have served the Initial Brief of the Appellant and Appellant's Designation of Matter on U.S. Foods, Inc., by depositing a copy of it in the United States Mail, postage prepaid, on February 28, 2022, addressed to its attorneys of record, Cynthia M. Lover, Esq., Post Office Box 1452, North Myrtle Beach, South Carolina, 29598.



William Norman Epps III, #73158

Post Office Box 2167

Anderson, South Carolina 29622

(864) 224-2111

(864) 224-3536, fax

Attorney for Appellant

February 28, 2022



The Law Offices of
EPPS & EPPS, LLC
ATTORNEYS AND COUNSELORS AT LAW

Telephone: (864) 224-2111
Facsimile: (864) 224-3536

P.O. Box 2167
230 West Whitner St.
Anderson, SC 29622

William N. Epps, III
William N. Epps, Jr.

February 28, 2022

RECEIVED
MAR 04 2022
SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: U.S. Foods, Inc. v. Carlees Restaurant LLC and Ghassan Ashy
Case No.: 2020-CP-04-02439
My File No.: CP21-5966

Dear Ms. Kitchings:

Enclosed for filing, please find the original and one (1) copy of each of the **Initial Brief of the Appellant and Appellant's Designation of Matter** to be included in the Record on Appeal, and our **Proof of Service** for these documents referenced herein and in regards to the above-referenced matter.

Please return a file stamped copy of these documents to us in the enclosed self-addressed envelope which I have provided for your convenience.

By copy of this letter, we are serving opposing counsel with the same.

If you should have any questions or concerns, please do not hesitate to contact me at your earliest convenience. Thank you.

With kind regards, I am

Sincerely yours,

EPPS & EPPS, LLC

William N. Epps, III

WNEIII:bam

Enclosures

Other Counsel of Record:

Cynthia M. Lover, Esq.
PO Box 1452
North Myrtle Beach, SC 29598
843-626-2029 (phone)
Attorney for Respondent

1

\$1.98 US POSTAGE
1 OF FIRST CLASS MAIL FLAT RATE

09730008200751
FROM 29624



Stamp
on 3/22
03/01/2022

USPS FIRST CLASS MAIL®

The Law Office of Epps & Epps, LLC
PO Box 2167
Anderson SC 29622

B012

SHIP TO: THE HONORABLE JENNY ABBOTT KITCHINGS
Clark, South Carolina Court of Appeals
PO BOX 11829
COLUMBIA SC 29211-1829



RECEIVED

MAR 04 2022
SC Court of Appeals