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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

Honorable Eugene C. Griffith, Circuit Court Judge

Appellate Case Number 2021-000973

Starbella, LLC.....Appellant,

v.

Lillie Rovira and Roberto Rovira.....Respondents,

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. DID THE LOWER COURT ERR BY DISMISSING APPELLANT'S CLAIMS EVEN THOUGH THE CLAIMS WERE NOT ASSERTED IN A PREVIOUS LAWSUIT BETWEEN THE PARTIES, INVOLVED DIFFERENT FACTS AND OCCURRENCES, AND DID NOT EVEN ARISE UNTIL AFTER THE PREVIOUS CASE HAD BEEN FULLY SETTLED?

STATEMENT OF THE CASE

Appellant filed its Complaint on March 19, 2021 alleging that its landlords, the Respondents, committed fraud and unfair trade practices relating to representations and conduct that caused Appellant to incur substantial costs to repair to the sewage system on the commercial property that Appellant leases from Respondents. (R. pp. 048-054.).

On April 5, 2021, Respondents filed a Motion to Dismiss on the grounds that the issues raised were resolved in a mediated settlement agreement between the parties in a previous lawsuit involving unpaid rent. (R.pp.055-056). Appellant filed an Opposition to the Motion to Dismiss. (R.pp. 057-058).

After a hearing, the lower court granted the Motion to Dismiss without explanation by Form 4 Order dated June 18, 2021. (R.p.002_).

Appellant timely filed a Motion to Reconsider (R.pp.059-061), which specifically requested the Court to "rule on the issues raised herein and in the motion and Memorandum in Opposition. . ." The Motion to Reconsider was denied without explanation by Form 4 Order on August 18, 2021. (R.p.005).

A Notice of Appeal was timely filed on September 3, 2021.

STATEMENT OF FACTS

Appellant is a tenant in a commercial property owned by Respondents. The parties entered into a Commercial Lease on June 5, 2020 for a facility in Chester County that Respondents had previously operated as a "Gentlemen's Club." (R. pp. 014-025). Appellant intended to operate a similar business in the facility. However, because of the status of the Coronavirus pandemic at that time, it was uncertain when the Appellant would be able to operate its business. The parties' Lease attempted to address this unknown contingency, but a dispute

ensued over when the lease payments were required to begin. On August 25, 2020, Respondents, as landlords, filed a lawsuit against their tenant, Appellant, and its member, case number 2020-CP-12-00426, in the Chester County Court of Common Pleas (the "Rent Lawsuit"). (R.pp. 008-013). The allegations in the Complaint in the Rent Lawsuit were that Appellant failed to pay rent and falsely claimed the Coronavirus pandemic as a legal justification.

Appellant answered and filed counterclaims asserting that the Coronavirus pandemic prevented it from operating its business, and that the landlord prevented it from obtaining a sexually-oriented business ("SOB") license that it needed to operate the business. (R.pp. 026-037).

The Rent Lawsuit was settled at mediation on November 19, 2020 when the parties executed a Mediated Settlement Agreement. (R.pp.043-044). The Mediated Settlement Agreement required Appellant to make certain payments for rent, and required Respondents to cooperate with Appellant to obtain its SOB license so it could open its business on the premises. Appellant was unable to obtain a SOB license until the settlement was reached because Defendants retained the SOB license for the premises, and only one permit is allowed to be issued for a property. Because of this, Appellant was unable to open its business until it received the SOB license. (R. p. 049).

On or about January 13, 2021, Appellant was issued a SOB license by Chester County. At this time, all payments and required actions of the Mediated Settlement Agreement had been completed. The Rent Lawsuit was fully settled and concluded on January 13, 2021. (R.p.050 at ¶11).

On or about January 15, 2021, Appellant was able to open for business. Almost immediately, sewage backed up inside the premises, and outside sewage was accumulating on the ground near the building. Appellant promptly called plumbing and sewage services to

investigate, and after digging with a backhoe, concluded that the problem was that the underground grinder and lift pump needed to be replaced and that they septic system had unlawfully been diverted to an unauthorized septic field. (R. pp. 50-51 at ¶¶ 12-14). Because of the emergency nature of the situation and the severe consequences of the violation, Appellant incurred significant costs to repair the septic/sewage system on Respondents' property. (R.p.051 at ¶¶ 15-16.)

A dismissal with prejudice of the Rent Lawsuit was filed on March 12, 2021. (R. p.002). Appellant filed the case in issue to recover its damages to repair the latent sewage defects on March 19, 2021 (the "Sewage Lawsuit"). (R.p.048).

STANDARD OF REVIEW

"A motion to dismiss under Rule 12(b)(6) should not be granted if facts alleged and inferences reasonably deductible therefrom would entitle the plaintiff to relief on any theory of the case." *Flateau v. Harrelson*, 355 S.C. 197, 202, 584 S.E.2d 413, 415 (Ct. App. 2003); *see also Gentry v. Yonce*, 337 S.C. 1, 522 S.E.2d 137 (1999). In deciding whether the trial court properly granted a motion to dismiss, the Court of Appeals must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. *See Gentry*, 337 S.C. at 5, 522 S.E.2d at 139; *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 its behalf, the court must consider whether the pleadings articulate any valid claim for relief).

A complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. *Toussaint v. Ham*, 292 S.C. 415, 357 S.E.2d 8 (1987). The trial court's grant of a motion to dismiss will be sustained only if the facts alleged in the complaint do not

support relief under any theory of law. *Tatum v. Medical Univ. of South Carolina*, 346 S.C. 194, 552 S.E.2d 18 (2001). Upon review of a dismissal of an action pursuant to Rule 12(b)(6), the appellate court applies the same standard of review implemented by the trial court. *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 500 (Ct. App. 2001).

ARGUMENT

This appeal is straight forward and obvious. The lower court completely failed to state a legal basis for its dismissal of Appellant's complaint. Further, counsel for Respondents failed in its motion or at oral argument to articulate a legal basis for dismissal. Instead, counsel incorrectly argued that Appellants were "seeking to relitigate the same matters they settled in the first case." (R.p.063). No legal principles were even mentioned in the motion, at the hearing, or in the Form 4 Orders as to why the existence of a previous lawsuit involving the same parties would provide a basis to dismiss the subsequent lawsuit based on completely different facts that occurred *after* the previous lawsuit had settled. Because of the failure of the lower court to provide any basis for its Form 4 Orders, this Court should reverse. *See, Campbell v. Carr*, 361 S.C. 258, 603 S.E.2d 625 (Ct. App. 2004) (the court of appeals should not search the record for reasons to affirm).

I. RES JUDICATA CANNOT APPLY BECAUSE THE SEWAGE ISSUES ASSERTED IN THE SECOND LAWSUIT OCCURRED AFTER THE RENT LAWSUIT HAD SETTLED, AND THE SUBSEQUENT SEWAGE CLAIMS DID NOT ARISE OUT OF THE SAME TRANSACTION OR OCCURRENCE AS THE RENT LAWSUIT.

The legal doctrine of res judicata was not even addressed in the motion, at the hearing, or in the Form 4 Orders dismissing the complaint and denying the motion to reconsider.[1] However,

[1] Because the argument was not made by Respondents below, it is waived and cannot be made in this appeal. *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial court. Issues not raised and ruled upon in the trial court will not be considered on appeal.").

since the doctrine of res judicata is the *only* basis that could have supported a dismissal, Appellant will address it here. [2]

Under the well-known elements of the doctrine of res judicata, a simple comparison of the pleadings in the Rent Lawsuit and the complaint in the subsequent Sewage Lawsuit reveal that the requirements were not satisfied. "Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." *S.C. Pub. Interest Found. v. Greenville Cty.* , 401 S.C. 377, 385, 737 S.E.2d 502, 506 (Ct. App. 2013) (*quoting Judy v. Judy*, 393 S.C. 160, 172, 712 S.E.2d 408, 414 (2011)). "[T]he fundamental purpose of res judicata ... is to ensure that 'no one should be twice sued for the same cause of action.' " Judy , 393 S.C. at 173, 712 S.E.2d at 414 (*quoting First Nat'l Bank of Greenville v. U.S. Fid. & Guar. Co.,* 207 S.C. 15, 24, 35 S.E.2d 47, 56 (1945)).

Under South Carolina law, subsequent litigation between the same parties is permissible if the subsequent case involves a different transaction or occurrence than the previous lawsuit. *See, Id.* In fact, a subsequent lawsuit between the same parties is barred only if all of the elements of the doctrine of res judicata are satisfied. *Latimer v. Farmer*, 360 S.C. 375, 385, 602 S.E.2d 32, 37 (2004). Here, if the lower court had undertaken the required analysis it would have determined that the elements plainly were not satisfied because the events underlying the second

[2] Similarly, the doctrine of collateral estoppel was not even raised or addressed below. However, it also is not applicable. "The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." *Carolina Renewal, Inc. v. S.C. Dep't of Transp*., 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct.App.2009). "Res judicata bars relitigation of the same cause of action while collateral estoppel bars relitigation of the same facts or issues necessarily determined in the former proceeding." *Pye v. Aycock*, 325 S.C. 426, 436, 480 S.E.2d 455, 460 (Ct.App.1997).

Sewage Lawsuit (the sewage failure) occurred *after* the previous Rent Lawsuit, which had completely settled, *and* involved completely different facts and occurrences.

The required elements for the doctrine of res judicata to apply are: (1) the identities of the parties are the same as in the prior litigation, (2) the subject matter is the same as in the prior litigation, and (3) there was a prior adjudication of the issue by a court of competent jurisdiction. *Johnson v. Greenwood Mills, Inc*., 317 S.C. 248, 250–51, 452 S.E.2d 832, 833 (1994). Here, the subject matter of the two cases was completely different, the prior case settled and the settlement was complete before the events underlying the second case occurred. Clearly, in these circumstances there is nothing to bar the second lawsuit involving completely different facts that occurred after the first case had settled. *Sealy v. Dodge*, 289 S.C. 543, 347 S.E. 2d 504 (1986) (reversing summary judgment because all elements of res judicata were not satisfied).

As set forth above, the Rent Lawsuit involved unpaid rent and the SOB license, and it settled in mediation on November 19, 2020. By January 13, 2021, all aspects of the settlement had been completed. Thereafter, Appellant was able to open its business, and the sewage issues later came to light and were repaired on an emergency basis. As set forth above, the word "sewage" was not mentioned in any way in the previous Rent Lawsuit – nor could it have been because the sewage problems occurred *after* the Rent Lawsuit had settled and all aspects of the settlement had been completed. For res judicata or collateral estoppel to apply, the second case must involve the same occurrence and judgment must be final, valid, and on the merits. *See Latimer*, 360 S.C. at 385, 602 S.E.2d at 37 (2004); *Carolina Renewal, Inc., v. South Carolina Dept. of Transp.,* 385 S.C. 550, 684 S.E.2d 779 (Ct. App. 2009) (for collateral estoppel to apply the issue must have been actually litigated, directly determined and "necessary to support the prior judgment.").

Clearly, the lower court failed to fulfill its judicial duty and failed to allow Appellant its day in Court to recover damages wrongfully caused by Respondents. An application of the required legal standards reveals that Appellant's subsequent claims are not barred, and that the lower court erred in dismissing the case and denying Appellant its right to due process.[3]

CONCLUSION

The trial court committed error by dismissing Appellant's complaint. The ruling should be reversed.

This the 16th day of March, 2021.

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[3] The parties did not execute a release relating to the Rent Lawsuit. Of course, any release would not have barred *future* conduct in any event.

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CERTIFICATE OF COUNSEL – FINAL BRIEF OF APPELLANT

The undersigned certifies that the Final Brief of Appellant complies with Rule 211(b), SCACR.

Submitted March 16, 2022.

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