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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

Hon. Eugene C. Griffith,
Circuit Court Judge

Appellate Case No. 2021-000973

Starbella, LLC .....Appellant

v.

Lillie Rovira and Roberto Rovira.....Respondents

FINAL BRIEF OF RESPONDENT

J. Cameron Halford, LLC
/s/ J. Cameron Halford
4609 Charlotte Highway, Suite 3
Lake Wylie, South Carolina 29710
(803) 831-2738
(803) 831-0180 (fax)
e-mail: cam@fortmilllaw.com

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I. DID THE LOWER COURT ERR IN DISMISSING CLAIMS WHICH ARISE OUT OF COMMERCIAL LEASE WHERE APPELLANT REQUESTED AND ENTERED A DISMISSAL WITH PREJUDICE IN A PRIOR CASE.

STATEMENT OF THE CASE

The case(s) discussed in this appeal arise out of a commercial lease for 3019 Jeff Page Drive, Richburg, South Carolina. Appellant is a commercial tenant. Respondent is the landlord and owner of the building. The lease is for Appellant's operation of a "*gentlemen's club, bar and restaurant*" according to the Lease. (R. p. 16 at ¶4). The term of the Commercial Lease was June 5, 2020 through May 31, 2025. (R. p. 14). Both parties have operated a sexually oriented business at the location. The facts and circumstances of the first case between the parties arise during the initial phases of the Coronavirus pandemic in South Carolina.

Appellant has now engaged in two (2) lawsuits involving the same lease; the first being case no. 2020-CP-12-00426 Respondent would described as the "rent" or "eviction" lawsuit. (R. p. 9-13). The second suit, filed March 19, 2021, is designated by Appellant as the "sewer" lawsuit. (R. p. 48-54). Appellants allege in the second lawsuit that the Respondents had committed fraud and unfair trade practices relating to alleged conduct that caused Appellant to incur substantial expense to repair an alleged damaged or inoperable sewer. The issues are allegedly discovered after Appellant engages in business operations at the property[1] post January 13, 2021.

Respondents filed a motion to dismiss before the circuit court on April 5, 2021 on the grounds that the issues raised by the second suit case number 2021-CP-12-00121 were resolved in

[1] January 13, 2021 is the date upon which Chester County issues to Starbella's a license to operate a sexually oriented business (SOB) at the establishment. At no time did Appellant require an SOB to operate a gentlemen's club, restaurant, or bar on the premises, which is the stated purpose of the appellant's occupancy per the lease.

a mediated resolution. The mediation was entered into between the parties November 19, 2020. The first suit was initiated by Respondent for unpaid rent and eviction, and Appellant filed counterclaims in this suit (R. p. 43-44).

In the case sub judice, Appellant filed a Memorandum in Opposition to the Motion to Dismiss prior to argument. (R. p. 57). The matter was heard by the Hon. Eugene C. Griffith on May 26, 2021. The circuit court granted the Motion to Dismiss by Form – 4 Order dated June 18, 2021. (R. p. 2). Appellant filed its Motion to Reconsider on June 26, 2021. (R. p. 59). Appellant requested the circuit judge to "rule on the issues raised herein and in the motion and memorandum in opposition..". The motion to reconsider was denied on August 18, 2021 (R. p. 5). Appellant now appeals to this court.

STATEMENT OF FACTS

This case involves a written Lease the parties entered into June 5, 2020. The lease is for commercial building. Appellants operate a sexually oriented business ("SOB") at the premises as a gentlemen's club. (R. p. 16). Respondents had, prior to the lease, operated a similar SOB business. Appellant is the sole entity in possession and control of the building.

The use of premises and operation of a gentlemen club business by Appellant arises during the Coronavirus pandemic. Appellant unilaterally reduced rent alleging inability to operate its business due to the pandemic. There is no evidence in the record that Appellant could not operate a gentlemen's club, restaurant or bar at the relevant time. Litigation in case no. 2020-CP-12-00426 is commenced by the owners for unpaid rent that was unilaterally lowered by Starbella's under alleged contingency, being the on-going pandemic. Suit commenced August 25, 2020 against Starbella's LLC and its owner for not fully paying rent and the complaint sought eviction. (R.p.8). The allegations in the first suit were that Appellant had failed to pay proper rent falsely claiming

the Pandemic as lawful justification. Appellant asserted the Covid-19 pandemic had prevented it from operating its gentlemen's club. By counterclaims Appellant alleged the Respodents had prevented Appellant from obtaining a sexually-oriented business ("SOB") licensure that Appellant needed to operate its business. (R.p. 31 at ¶8). Noteworthy is that a mediated resolution attended by all parties occurred November 19, 2020. A written settlement agreement and memorandum was executed by all parties. (R. p. 43-44). The settlement agreement required the Appellant to pay rent arrearages, and required Respondents to cooperate with Appellant in efforts to obtain it's own SOB permit and license. The Respondent complied. At the relevant time, Respondent had been in exclusive possession and control of the premises since June 5, 2020.

After mediated settlement, Respondent cooperated through its counsel to assist Appellant obtain the SOB licensure in appellant's name. On or about January 13, 2021 Chester County issued the SOB licensure to Starbella's. At this time, all payments and required actions of the Mediated resolution had been complied with. Appellant had ratified the lease in mediated settlement, and issued payment. Appellant counsel then files a consent dismissal with prejudice, as to case no. 2020-CP-12-00426. (R. p. 47; 82).

Once in business operation, Appellant again demands reduction in rent. The demand is, this time, predicated on sewer repair alleged to be the fault of Respondent conduct. Starbella's had held possession of the premises almost seven (7) months, irrespective of the effects of the pandemic on its business operation. On or about January 15, 2021 Appellant alleges it was finally able to open under its own SOB license. Appellant then asserts that "almost immediately', sewage backed up inside the premises, and that outside sewage was accumulating on the grounds. (R. p. 50).

The parties' Lease places upon the tenant to duties of maintenance and repair while in possession. (R. p. 17 at ¶9). Appellant called a plumbing and sewer service to investigate. (R. p. 50 ¶12). After digging occurred with a backhoe, it was alleged that the underground grinder and lift pump needed to be replaced and that, further, the septic system had unlawfully been diverted to an unauthorized septic field. (R. p. 50 ¶14). Because of the emergency nature of the situation, Appellant alleges it incurred substantial costs to repair the septic / sewer system at the establishment. (R. p. 51 ¶16). It is not disputed that at all relevant times Appellant was in occupancy, possession and control of the premises. Appellant, through counsel, requested and filed a dismissal with prejudice of lawsuit no. 2020-CP-12-00426. This occurs *after*, not before, a motion to compel and enforce settlement was filed by the owners. The motion was made necessary by failure of Appellants to comply with the mediated settlement. Appellant counsel requested consent to file the Stipulation of Dismissal with Prejudice. (R. p. 81-82). The dismissal with prejudice is filed March 12, 2021 (R. p.47). Enter the proverbial second bite at the apple.

Appellant then commenced lawsuit Case No. 2021-CP-12-00121 with Chester County on March 19, 2021. The suit sought to recover alleged damage to inspect and repair "latent" sewer defects; the same latent defects appellant discovered upon finally commencing business operations. At no time prior to entry of the Dismissal with Prejudice in case no. 2020-CP-12-00426 do these allegations of the "sewer" defect or alleged misconduct by the owners arise. Instead of withdrawing from settlement, Appellant filed duplicative litigation with the court. At no time prior to the March 19, 2021 filing does Appellant raise, mention, motion to amend, attempt to withdraw from mediated resolution. It strictly seeks to lower rent, yet again. Seven (7) months has passed since Appellant took occupancy of the building under lease.

STANDARD OF REVIEW

"A motion to dismiss under Rule 12(b)(6) should not be granted if the facts alleged and inferences reasonably deducible 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 a 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 a 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. 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). A complaint should not be dismissed merely because the court doubts the plaintiff will not 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).

ARGUMENT

The appeal is, in fact, straight forward and obvious. It involves a written lease. The lease had been ratified in mediated settlement. Under the Lease, Appellant accepted in its as-is condition the property. (R.p.16 ¶5). Appellant has sought a second bite at the apple ignoring the lease factually alleging *pre-lease* conduct, instead. Appellant had a fair opportunity to litigate these

issues in the prior suit. Counsel for respondents here alleged in the circuit court that they were "seeking to re-litigate the same matters they settled in the first case." (R. p. 63 lines 18-23). The legal justification is that Appellants had a full and fair opportunity to be heard and litigate – or even withdraw from settlement – in the first suit. They instead commenced a second lawsuit after filing a Dismissal with Prejudice. The circuit court dismissed the second case under motion to dismiss. This court need not have searched the record for reasons, for they existed in the first case. 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). The lease agreement and prior dismissal with prejudice filed by Appellants (by consent of counsel) is sound basis for the dismissal by the trial court below.

Appellant had held occupancy and possession since June 5, 2020 irrespective of the effect of the Coronavirus pandemic effect on its business operations. The commercial building had been operated, by both litigants, under a sexually oriented business ("SOB") licensure. The lease, nonetheless, states that the tenant's use is for "*gentlemen's club, restaurant and bar*". Rent from Appellant to Respondent was unilaterally reduced citing the impact of Covid-19 upon the business, which Appellants could never substantiate. Other than the bare factual allegation, no record evidence existed in the first suit to corroborate the tenant could not operate. There are no executive or administrative closures issued by the state government pertaining to the business being operated at the property.

Appellant alleges the subsequent lawsuit was predicated on completely different facts that occur *after* the first lawsuit ended by and through mediated resolution. Noteworthy is the timing. Mediated settlement occurs November 19. Dismissal with Prejudice is requested by e-mail on March 3, 2021 (R. p. 81). Appellant files the dismissal with prejudice. Here, the parties are the same. The lease had not changed, but in fact had been ratified. Appellants conveyed rent arrearages

weeks after mediated resolution. A motion to compel the mediated settlement was filed by Respondents. (R. p. 45-46). At no time prior to filing of a dismissal with prejudice did Appellant identify "sewer" issues in the record, despite having ample time to have done so.

Rather, what changes is that Appellants *finally begins* business operations. They begin operating a under their own SOB license. They do so after the owners, here Respondents, assisted Starbella's to obtain the SOB license. The trial court properly viewed all facts and inferences most favorably to Appellant as involving a written lease memorandum, ratified by Appellants. Appellants held possession over (7) months prior to commencing the case sub judice. According to Appellant, it was *finally* able to open for business on or about January 15, 2021. At the time of allegedly beginning business operations – or at the time allegations of lawsuit number two arise – Appellant had been the sole entity in occupancy, possession and control. The issues cited as cause of action arise after, *not before*, Appellant filed of a Dismissal with Prejudice. (R. p.47).

II. THE LOWER COURT DID NOT ERR IN DISMISSING CLAIMS WHICH ARISE OUT OF COMMERCIAL LEASE WHERE APPELLANT REQUESTED AND ENTERED A DISMISSAL WITH PREJUDICE.

The legal doctrine of Res Judicata would bar re-litigation of issues that were brought, mediated, and settled in prior lawsuit 2020-CP-12-00426. The parties are the same. The lease is the same. The only thing which has changed is now *active* operation of a *club*, so to speak, allegedly forced dormant by the impact of the pandemic. Nothing in the Covid-19 administrative orders in this state prohibited operation of a gentlemen's club, restaurant, or bar. No state administrative orders shut down such establishments in this state.

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 the 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)). "*The 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). The same transaction or occurrence at issue in the case at bar would arise out of the lease litigated in the first suit. Those issues were resolved by mediated resolution.

Appellant cites that subsequent litigation between the same parties is permissible if the subsequent case involves a different transaction or occurrence than the previous lawsuit. There is only one (1) *transaction* or *occurrence* between the parties, that being the lease (or ratification of lease by mediated resolution). A subsequent lawsuit between the same parties is barred only if all of the elements of Res Judicata are satisfied. Latimer v. Farmer, 360 S.C. 375, 385, 602 S.E.2d 32, 37 (2004). Appellant tacitly ignores that the issues underlying the factual allegations of case number two (Case no. 2021-CP-06-00121) occur after settlement of the first suit (case no. 2020-CP-12-00426) involving the lease. Appellant argument omits mention of the expanse of time that went by after November 19, 2020 mediated resolution. Months pass. A motion to compel and enforce settlement is filed. (R. p. 45). The settlement is finally complied with. Appellant counsel then requests dismissal – with prejudice – Appellant filed with the court. (R. p. 47). (R. p. 80). Prior to this, Appellant made no timely motion to amend in the first case. Appellant did not seek to withdraw from mediated settlement predicated on change in circumstances or alleged pre-lease conduct. Appellant made nothing other than demands for lowered rent, yet again. (R. p. 51 at ¶18). The demand is now predicated on alleged sewer failures they factually blame Respondents for. This occurs where Appellant had, at all relevant times, been in occupancy and possession – even if not operating to full capacity - under the stated purpose purposes of the lease.

Appellant made no timely motion to amend or re-open case number one, case 2020-CP-12-00426. Any "*completely different facts and circumstances*" would arise out of the same lease. The court was not in error in dismissing duplicative litigation. The owners / respondents were not (and had not been in) possession of the premises. Rather, the appellants had been in occupancy since June 5, 2020 – again, almost seven (7) months prior to filing the case at bar.

The required elements for 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. Johnson v. Greenwood Mills, Inc., 317 S.C. 248, 250-51, 452 S.E.2d 832, 833 (1994). Appellant incorrectly asserts that the subject matter of the two cases – involving a singular and ratified written lease memorandum, is completely different. Appellant asserts operational capability of the gentlemen's club effective January 15, 2021. Appellant counsel requested entry of a dismissal with prejudice, and files the same prior to filing the case now at bar before this court. Appellant seeks to relitigate issues Appellant could have timely raised prior to mediated resolution and/or entry of dismissal with prejudice.

Again, a mediated resolution occurred, with success, November 19, 2020. Respondent had to file motions to compel and enforce this settlement. Appellant subsequently requested a Dismissal with Prejudice on March 5, 2021. Appellant did not ever seek leave to amend prior to mediated resolution. Appellant confirms Respondent cooperated with helping Starbella's obtain a SOB licensure after mediation. According to Appellant, by January 13, 2021 "*all aspects*" of the settlement had been completed. Appellant filed the Dismissal with Prejudice. While true "Sewer" or "Sewage" was not expressly mentioned in the first lawsuit, the Lease was, in fact. It was attached to the complaint. The lease is not disputed. For Res Judicata to apply, the second suit must involve the same transaction and/or 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). While the court did not adjudicate the matter by Order, the Dismissal with Prejudice filed by Appellant arose out of a mediated resolution and settlement.

The lower court properly denied Appellant the proverbial second bite at the apple by dismissing duplicative litigation. Appellant had its day in court and fully and finally settled lease disputes in the first case number 2020-CP-12-00426. Prior to doing so, It did not timely move to amend. It did not withdraw from mediated settlement citing different or changed circumstance. Appellant requested dismissal. With Prejudice. Appellant filed the dismissal. At no time does Appellant contest the written lease between the parties or its terms. There is no dispute that the mediated settlement ratified the lease, including paragraph five (5) of the lease memorandum.

The lower court in this instance has not failed to fulfill any judicial duty nor has it failed to permit Appellant its day in court. Appellant was at all relevant times in possession and occupancy. A written lease exists, which was ratified by mediated settlement. Appellant's claims were correctly found to fail to state a cause of action upon which could be granted, and the lower court did not err in dismissing the case nor deny Appellant due process. Appellant had a full, fair, and extended opportunity to be heard on its claims arising before, during, or after its occupancy. Appellant had ability to withdraw from mediated settlement and be heard by the court vs. filing a dismissal with prejudice. Instead, Appellant chose to pursue duplicative litigation. Appellant sought to re-litigate matters it had a full and fair opportunity to press in the courts prior to Appellant filing an Entry of Dismissal with Prejudice in Case No. 2020-CP-12-00426. The trial court properly dismissed the case.

CONCLUSION

The trial court committed no error in dismissing Appellant's case. All causes of action sought to be litigated in suit number two arise out of the very same written lease that Appellant ratified as part of mediated resolution in the first case. The court entered a dismissal with prejudice filed by the Appellant. The Court of Appeals should affirm the trial judge.

Respectfully submitted the 17th day of March, 2022.

J. Cameron Halford, LLC
/s/ J. Cameron Halford
4609 Charlotte Highway, Suite 3
Lake Wylie, South Carolina 29710
(803) 831-2738
(803) 831-0180 (fax)
e-mail: cam@hoblaw . com