

Dismissal of an Action for Failure to State Facts Sufficient to Constitute a Cause of Action - Does That Automatically Result in the Right to Amend?

Related Professionals

Cheryl D. Shoun
843.720.1762
cshoun@nexsenpruet.com

Practices

Insurance Coverage and Bad Faith
Litigation

Industries

Insurance

03.19.2019

The South Carolina Rules of Civil Procedure, by definition, are intended to govern the procedure followed in all South Carolina courts in all civil actions, whether legal or equitable. Also by definition, the rules shall be construed to achieve the speedy and inexpensive determination of every action.

It is well established that the defense of failure to state facts sufficient to constitute a cause of action may be set forth by way of motion, pursuant to Rule 12(b)(6). Such motion may be made in any permitted pleading or even upon the trial of the case. Rule 12(a) instructs the practitioner on procedure following the denial of a Rule 12(b)(6) motion but fails to provide guidance as to applicable process if such a motion is granted.

Rule 15(a) provides that a party may amend its pleading, as a matter of course, at any time before or within 30 days after a responsive pleading. Otherwise, amendment may be upon written consent of the adverse party or by leave of court; leave shall be freely given when justice requires and amendment does not prejudice any other party.

What happens, however, when the court dismisses a claim, with prejudice, pursuant to Rule 12(b)(6) and does not consider a party's request to amend? That issue was recently addressed by the South Carolina Supreme Court in *Skydive Myrtle Beach, Inc. v. Horry County, et al*, 2019 WL 1146068 (March 13, 2019).

Briefly, without extreme attention to the facts, Skydive Myrtle Beach ("Skydive") initiated this action alleging Horry County, Horry County Department of Airports ("Department") and several of their employees improperly attempted to remove Skydive from space it leased at Grand Strand Airport. Among the recitations from the complaint were Skydive's allegations that at all relevant times the individual employees were acting

as agents of the County and the Department. Pursuant to Rule 12(b)(6), the lower court dismissed Skydive's claims against the individual employees, pursuant to the SC Tort Claims Act, without allowing Skydive to amend its complaint.¹ Skydive appealed, the Court of Appeals affirmed, and on Writ of Certiorari, the Supreme Court reversed, remanding the case to the circuit court, allowing Skydive the opportunity to file an amended complaint.

Because a Rule 12(b)(6) motion tests the sufficiency of a complaint rather than the merits of the claim, it is to be determined based solely upon the pleading. Initially looking at the court's treatment of Rule 12(b)(6), it determined if, as here, the motion to dismiss is granted, a Rule 59(e) motion is an alternative, but only if the party legitimately believes the pleading was sufficient. A motion for reconsideration is not an option if counsel has determined, through discovery, or otherwise, that the pleading is insufficient. Further, a Rule 59(e) motion is not mandatory. Thus, while the court articulated the logical time to request leave to amend to correct a Rule 12(b)(6) pleading defect is after a finding the original pleading was deficient, it also recognized that opportunity is foreclosed where, as here, the case is dismissed with prejudice. Consequently, Skydive, presumably recognizing the defect in its pleading upon which the Rule 12(b)(6) was based, did not pursue a Rule 59(e) motion, and had no alternative but to appeal the motion to dismiss.

Clearly, Rule 15(a) favors a liberal approach to the amendment of pleadings. If, however, the opposing party can establish bad faith, undue delay or prejudice, a motion to amend can be denied in the court's discretion. Otherwise, withholding leave to amend is an abuse of discretion. In analyzing this rule, the court also looked to those limited circumstances wherein a motion to amend may be justifiably denied if the amendment would be futile. Assessing futility, the court recognized the difficulty of such task in the absence of the proposed amendment.

Following its analysis of each rule, the court then addressed what occurs upon the intersection of Rule 12(b)(6) and Rule 15(a). Succinctly stated, the court found any plaintiff is entitled to accept the court's finding that its original pleading is deficient and is likewise entitled to replead in an effort to correct the deficiency. Citing previous authority, the court instructed that in the absence of a conclusion that an amendment would be clearly futile, an appellate court should determine a Rule 12(b)(6) dismissal is without prejudice when the plaintiff presents additional factual allegations or an alternate theory of recovery that, if stated in a well-pleaded complaint, would sufficiently state a claim.²

Remaining mindful that the South Carolina Rules of Civil Procedure are interpreted as are statutes, wherein the plain, unambiguous and clear meaning should be enforced³ it is the humble opinion of this writer that this opinion perhaps creates more questions than it resolves. *Skydive* clearly articulates a Rule 12(b)(6) motion to dismiss should generally be granted without prejudice, thereby allowing the party an opportunity to correct a pleading shortcoming. The motion may be granted with prejudice, however, if upon consideration, an amendment would be clearly futile. That begs the question -upon what must the court determine futility. Because a Rule 12(b)(6) is based solely upon the pleadings, does this allow the party to independently present additional factual evidence or alternative theories of recovery; if so, what is the vehicle by which that may be accomplished. Does *Skydive* establish that a determination of justice, as anticipated under Rule 15(a), implicitly demands the court's examination of futility, thereby shifting or otherwise affecting the burden of the opposing party to demonstrate prejudice that would result from an amendment.

Finally, but certainly not insignificantly, the *Skydive* court stated a circuit court does not have the discretion to dismiss a complaint with prejudice under Rule 12(b)(6) without at least considering whether to allow leave to amend pursuant to Rule 15(a). Does this relieve the party making the original pleading from the duty of initially assuring an adequate pleading. Does it, as here, relieve a party from responsibility of pursuing a motion to amend, if necessary. With many

questions, the average practitioner is probably safe in assuming an amendment is a pretty sure bet – short of establishing such an amendment would be clearly futile. What we still do not know, however, is exactly how futility is established.

¹Skydive did not make a motion to amend pursuant to Rule 15(a), but rather in letters under the cover of which proposed orders were presented, requested leave to amend if the court dismissed the subject claims in total.

²See *Spence v. Spence* 628 S.E.2d 869 (2006).

³See *Green v. Lewis Truck Lines, Inc.*, 443 S.E.2d 906 (1994)

Cheryl D. Shoun is a trial attorney and certified mediator whose experience includes construction law, insurance defense, personal injury defense, employment litigation and medical malpractice. As a frequent writer, she serves as editor for Nexsen Pruet's TIPS: Torts, Insurance and Products Blog.