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STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF SPARTANBURG )  
 )  
 John Doe, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 City of Duncan, )  
 )  
 Defendant. )

IN THE COURT OF COMMON PLEAS

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

Civil Action Number 2008-CP-42-0475

THIS MATTER CAME BEFORE THE COURT upon Defendant Town of Duncan's ("Duncan") Motion to Dismiss in the instant case pursuant to Rules 12(b)(1), 12(b)(2), and Rule 3 of the South Carolina Rules of Civil Procedure. On May 16, 2012, the parties appeared before the Court for oral argument on Defendant's Motion. Gregg Meyers appeared on behalf of the Plaintiff, and Charles F. Turner, Jr. and William H. Foster appeared on behalf of the Defendant. In support of its Motion, Defendant also submitted a Memorandum of Law with supporting documentation. After considering all of the arguments of the attorneys for the parties, as well as after due consideration of the pleadings, the Memorandum of Law submitted by defense counsel, as well as the documentation submitted by the parties, the Court hereby grants Defendant's Motion and dismisses this action, with prejudice.

Plaintiff filed this action on January 28, 2008. Plaintiff then made no attempt to serve the Complaint for more than four years and, apparently, intended that the Complaint be dismissed. In an email of February 3, 2009, Plaintiff's counsel advised the Spartanburg County Clerk's office that the Complaint was not served during the prescribed 120-day period and that he would submit a voluntary dismissal. Plaintiff, however, failed to submit the promised dismissal.

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EXAMINED

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On February 21, 2012, over four years after the original Complaint was filed, Plaintiff filed an "Amended Complaint," that simply restates the allegations of the original pleading. The Plaintiff did not file a Motion to Amend the original Complaint or otherwise seek leave to amend his pleading. On or about February 27, 2012, the Plaintiff purported to serve the Amended Complaint on the Defendant; however, no Summons was served upon the Defendant. The Defendant filed this Motion to Dismiss on March 15, 2012.

This Court concludes that the Plaintiff failed to commence this action pursuant to Rule 3 of the South Carolina Rules of Civil Procedure. Rule 3 of the South Carolina Rules of Civil Procedure provides that a civil action is commenced when the Summons and Complaint are filed with the Clerk of Court if: (1) the Summons and Complaint are served within the statute of limitations in any manner prescribed by law; or (2) if not served within the statute of limitations, actual service must be accomplished not later than 120 days after filing. South Carolina case law is clear that a civil action is commenced by the filing and service of a Summons and Complaint. *Brown v. Evatt*, 322 S.C. 189, 470 S.E.2d 848 (1996). If a plaintiff files a Complaint but fails to make actual service upon the defendant as required, the action is not yet commenced. *Blyth v. Marcus*, 322 S.C. 150, 470 S.E.2d 389 (Ct. App. 1996). Subject matter jurisdiction only vests in the Circuit Court upon commencement of the action, that is, when the Summons and Complaint was served, and not when filed. *First Palmetto State Bank v. Boyles*, 302 S.C. 136, 394 S.E.2d 313 (1990).

In this matter, the Plaintiff filed his Complaint on January 28, 2008. Pursuant to Rule 3 of the South Carolina Rules of Civil Procedure, the Plaintiff was required to serve the Defendant with the Complaint within 120 days of filing. Instead, over four years passed since the filing of the action. Thus, Plaintiff failed to commence this action within the requirements stated in Rule

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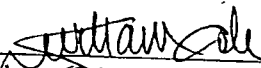
3 of the South Carolina Rules of Civil Procedure. Furthermore, because this action has not been commenced, the Court lacks jurisdiction over the Defendant. Accordingly, the Court dismisses this matter pursuant to Rules 3, 12(b)(1) and 12(b)(2) of the South Carolina Rules of Civil Procedure.

The Court also concludes that the Plaintiff did not seek leave from the Court to amend his Complaint pursuant to Rule 15 of the South Carolina Rules of Civil Procedure. The Plaintiff is estopped from asserting that he can file an Amended Complaint in this matter because, at the time Plaintiff sought to file and serve his purported Amended Complaint there was no action to amend.

Accordingly, the Court hereby grants the Defendant's Motion to Dismiss and orders the Clerk of Court to dismiss this action with prejudice.

IT IS SO ORDERED.

Date: October 29, 2012  
\_\_\_\_\_, S.C.

  
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J. Deham Cole, Circuit Court Judge

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