STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Circuit Court Judge

Case No. 2008-CP-10-6947

Pinepoint Associates, LP, Respondent.

vs.

Vanevery Enterprises, Inc., Sandy Vanevery, GTH Enterprises, Inc., and Timothy R. Sebold, Defendants,

Of Whom

Vanevery Enterprises, Inc. and Sandy Vanevery are Appellants.

APPELLANTS' INITIAL BRIEF

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June 25, 2013

Charleston, South Carolina

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STATEMENT OF THE CASE

This is an action to enforce a purported commercial lease in Charleston County. Appellant Vanevery Enterprises, Inc. is the alleged tenant under a lease to rent space in a shopping center for a gym. Appellant Sandy Vanevery is a personal guarantor under the lease. GTH Enterprises, Inc. and Timothy R. Sebold, not parties to the appeal, are also claimed to be personal guarantors.[1]

Respondent Pinepoint Associates, LP filed this action on December 8, 2008. Appellants were served July 14, 2009. Appellants filed a Motion to Dismiss for Lack of Personal Jurisdiction and/or for Summary Judgment on August 4, 2009. The motion asserted the complaint was not served within the statute of limitations. The Honorable J.C. Nicholson, Jr. heard the motion on March 10, 2010 and denied by Order dated March 30, 2010. Appellants timely moved to alter or amend the order, which Judge Nicholson heard on January 28, 2011. Judge Nicholson denied the motion to alter or amend by written Order dated March 22, 2011.

Appellants filed a motion for summary judgment. Respondent filed a motion for summary judgment against all of the defendants. Judge Nicholson heard those motions on October 24, 2011. He entered judgment for the Respondent on May 22, 2012. Appellants filed a timely motion to alter or amend

[1] Sebold and GTH Enterprises filed a *pro se* answer; however, they had no further involvement in the case and failed to appear for any hearings, including the hearing on the motions for summary judgment.

the judgment, which Judge Nicholson heard November 26, 2012 and denied February 4, 2013.

Appellants filed this appeal February 27, 2013.

FACTUAL BACKGROUND

Appellant Sandy Vanevery is a 28-year-old physical therapy student residing in the Charlotte, North Carolina area.[2] In or about 2005, when Vanevery lived in Charleston, Vanevery created Vanevery Enterprises, Inc. for the purpose of operating a Lifequest gym franchise in Charleston. Timothy Sebold, through GTH Enterprises, owned the Lifequest gym company.

On or about June 21, 2005, Vanevery Enterprises signed a lease with Pinepoint Associates to rent a former grocery store space in Charleston for his franchise. Vanevery, Sebold, and GTH were personal guarantors under the lease. The lease, as subsequently amended, provided a "rent free" period for tenant required upfit of the space. The first rent payment was due March 15, 2006.

On or about December 15, 2005, Vanevery Enterprises and Vanevery, through counsel, informed Pinepoint that it would not be abiding by the lease and requested to be released from it. Pinepoint told Vanevery that it would not agree to a release; however, it would agree to an assignment. To that end, Pinepoint presented a written assignment to Vanevery by which Sebold and/or GTH would

[2] At the time of the incidents alleged in the complaint, Mr. Vanevery was 20-21 years of age.

become the tenant under the lease. Apparently, the assignment was never executed.[3]

Nevertheless, although Vanevery Enterprises was the tenant under the lease, Pinepoint began working exclusively with Sebold and GTH on the upfit of the space. GTH engaged the architect and contractor for the upfit and all of the contact between Pinepoint and the "tenant" was with GTH. Vanevery had no involvement with the property from the date of his lawyer's letter.

Nevertheless, March 15, 2006 arrived, and rent was not paid. Pinepoint notified the tenants that rent was due and late. In April of 2006, Pinepoint sent Vanevery Enterprises, Vanevery, GTH Enterprises, and Sebold a Notice of Default letter. On or about May 12, 2006, Pinepoint filed an action to evict the defendants. In or about July of 2006, another tenant leased the premises, and Pinepoint had fully mitigated its damages. Accordingly, as of July 2006, all of Pinepoint's claims were ripe.

Pinepoint took no further action in relation to whatever rights it claimed against the defendants. Two years and eight months after rent was first late, Pinepoint filed, on December 8, 2008, suit against the Appellants, Sebold, and

[3] At approximately the same time, Vanevery sued Sebold for breach of fiduciary duty, among other things. See Case Number 2006-CP-10-00454. Sebold, GTH, and the Lifequest outfits eventually went out of business. Accordingly to the Charleston County Clerk of Court website, there are more than 30 judgments against Lifequest and GTH Enterprises and countless other suits on record.

GTH. Sebold and GTH were served at an address in Maryland and shortly thereafter filed a *pro se* answer denying any liability.

Pinepoint then attempted to serve Vanevery. In the time between Vanevery's decision to not follow through with the lease and suit being filed, Vanevery had enrolled in physical therapy school in Charlotte and moved from the Charleston area. Vanevery Enterprises, which was created for the sole purpose of operating the Lifequest franchise, was defunct, though not formally dissolved.

Respondent's claim making the following efforts to serve Vanevery. First, on December 19, 2008, it mailed the Summons and Complaint by certified mail, returned receipt to Mr. Vanevery at an address in Mount Pleasant and to Vanevery Enterprises at the address for its registered agent. Both of these mailings were returned. Respondent then attempted to serve both Appellants by personal service at the same address. These efforts continued, apparently, off-and-on until May of 2009, but were also unsuccessful.

In January of 2009, respondent learned that Mr. Vanevery had moved to Charlotte, North Carolina.[4] It then hired a process server in Mecklenberg County, North Carolina to serve the Appellants. The last of these attempts was on February 14, 2009 and was also unsuccessful.

[4] A complicating factor for service for by the Respondent, no doubt, is that it had Appellant's name spelled incorrectly. As shown in the lease, the Appellant spells his name, 'Van Every,' not 'Vanevery' as is listed in the complaint. Nevertheless, according to the affidavit regarding service, no one would answer the door at the prior address of Mr. Vanevery.

In June of 2009, Mr. Vanevery learned the Respondent and another process server were trying to find him. Mr. Vanevery was contacted by Respondent's counsel's office. Appellant provided his address, then met a process server to accept service of the papers. Respondent did not serve Appellants until July 14, 2009.

Respondent's filed an action to evict Appellants on May 12, 2006.[5] The complaint was filed December 8, 2008. The 120th day after filing of the complaint was April 7, 2009. The complaint was served July 14, 2009.

ISSUES ON APPEAL

1. Is the Respondent's case barred by the statute of limitations?
2. Whether Pinepoint agreed to GTH and Sebold becoming the tenant, and relieving Vanevery Enterprises and Vanevery from any contractual duties.

[5] Appellants assert the statute of limitations ran in December of 2008, three years after they informed Pinepoint they would not be abiding by the lease. Nevertheless, taking the situation in a light most favorable to Pinepoint, the Appellants will assume (without agreeing and for this argument only), the statute ran May 12, 2006, the day on which Pinepoint filed to evict appellants. In any event, the complaint was not served until July14, 2006, well beyond the statute's expiration.

ARGUMENT

1. BECAUSE THE COMPLAINT WAS SERVED MORE THAN 120 DAYS AFTER THE STATUTE OF LIMITATIONS, PINEPOINT'S CLAIMS AGAINST VANEVERY AND VANEVERY ENTERPRISES ARE BARRED.

Below, Judge Nicholson ruled that although Vanevery and Vanevery Enterprises were served more than 120 days after filing and beyond the statute of limitations, the statute of limitations was tolled by S.C. Code Ann. §15-3-30 because the Appellants were out of state. However, because the long-arm statute, as interpreted, allowed for service of process on the Appellants by publication, the statute of limitations was not stayed and the time lapsed. S.C. Code Ann. §15-9-710(3) and (4). The Supreme Court has addressed similar situations in *Meyer v. Paschal*, 330 S.C. 175, 498 S.E.2d 635 (1998) and *Tiralango v. Balfry*, 335 S.C. 359, 517 S.E.2d 430 (1999). The holdings of these cases require reversal of the trial court's decision.

The *Meyer* case addressed this exact situation: whether the statute of limitations was tolled against an out-of-state resident where service of process could be obtained by publication. *Meyer* at 177, 636. The Court held that since

the long-arm statute[6] extended to the full reaches of due process, service by publication was proper when the name and location of a defendant was known or could reasonably be found:

> The purpose of the long-arm statute, substitute service statutes and the statute of limitations is to allow parties to expeditiously adjudicate their rights. The purpose of the tolling statute is to prevent a cause of action arising in this State from becoming unenforceable by virtue of the running of the statute of limitations in cases where personal jurisdiction over a defendant cannot be obtained because the defendant is not within the State. The purpose of the tolling statute is served when the long-arm statute or substitute service statute brings the defendant within the personal jurisdiction of the court. Under these circumstances, the tolling statute is inapplicable because the need to delay the running of the statute of limitations no longer exists. Under this construction, the purposes of all the provisions are served. To construe the tolling statute in the manner urged by the plaintiff would allow suits to be postponed indefinitely, for no good purpose, and to be brought in some cases at the virtually unlimited pleasure of the plaintiff.

Meyers at 183, 639 (internal citations omitted). Applying this reasoning, the Court held that when a plaintiff knows the name and location of the defendant, the tolling statute may not be used to extend the statute of limitations and the plaintiff is required to accomplish service by means allowed by law, including publication. *Id.*

A year later, the Court was asked to determine the plaintiff's degree of knowledge of a defendant's location needed for the tolling statute to apply. *Tiralango v. Balfry*, 335 S.C. 359, 517 S.E.2d 430 (1999). In *Tiralango*, the plaintiff argued that because the defendant in an automobile accident case was a

[6] S.C. Code Ann. § 36-2-803 (1976); *Atlantic Soft Drink Co. v. S.C. National Bank*, 287 S.C. 228, 336 S.E.2d 876 (1985).

resident of Quebec, the statute of limitations was tolled. The defendant's address was listed on the police report. The Court held that the, "statute is tolled when the plaintiff did not, and could not reasonably have known the whereabouts of the defendant." *Id.* 362, 432. The Court found the statute was not tolled and barred the claim because the plaintiff could have learned the defendant's addressed from the readily available police report. *Id.*[7]

Although the trial court relied heavily on *Tiralango* (extending the holding to require actual knowledge of the address), its use here is questionable. First, it is patently clear the Appellants could have been served by publication in Charleston as early as January of 2009. At that point, service by mail had been returned and attempts to serve the Appellants at their last known address were also

[7] Another similarity between *Tiralango* and the instant case is the timing of filing. The Court noted that the action was filed within the statute of limitation; it was simply not served on Balfry within it. Here, Pinepoint filed timely and served the other two defendants within the statute of limitations. It simply failed to serve the appellants. Although the complaint sent by certified mail return receipt was returned and a private process server was unable to locate the defendants in Charleston no later than January of 2009 (at least five months before the statute of limitations ran), the plaintiff did little to effectuate service. Both defendants could have been served by publication in a Charleston area newspaper then. S.C. Code Ann. §15-9-710(3)("when the defendant is a resident of this State and after a diligent search cannot be found") and §15-9-710(4)("when the defendant is not a resident of this State but has property therein and the court has jurisdiction of the subject of the action."). In fairness, the plaintiff did try to personally serve the appellants in North Carolina; however, those efforts ended on or about February 14, 2009. From mid-February, 2009 until early July, Pinepoint took little to no steps to perfect service. In footnote 6 of *Tiralango*, the court notes that a consideration in applying the tolling statute is the degree of impact the defendant's absence has on the plaintiff's ability to serve the defendant. Here, because publication was available in January, the absence had no impact.

unsuccessful.[8] Second, by its own admission, Pinepoint learned Mr. Vanevery lived in Mecklenberg County, North Carolina in January 2009. Since Pinepoint knew the Appellants' location, the tolling statute is inapplicable.

The statute of limitations ran May 12, 2009. The action was filed December 8, 2008; however, it was not served until July 14, 2009. Pursuant to SCRCP Rule 3(a)(2), plaintiff was required to accomplish service no later than April 7, 2009. Accordingly, the statute of limitations bars the plaintiff's claims and the judgment against the Appellants should be reversed.[9]

2. PINEPOINT AGREED TO GTH AND SEBOLD BECOMING THE TENANT, AND VANEVERY ENTERPRISES AND VANEVERY HAVE NO FURTHER LIABILITY TO IT.

Vanevery Enterprises notified Pinepoint on December 16, 2005, that it wanted out of the lease. Pinepoint responded by preparing an assignment of the lease from Vanevery Enterprises to Sebold. Although this was never executed, Sebold began exercising all rights under the lease. Among other things, he, through GTH, contracted for $80,000.00 in upfit for the space. This is a duty

[8] Vanevery Enterprises, as a South Carolina corporation always lived in South Carolina and was always amenable to service of process in South Carolina by publication.

[9] The claim is barred even under the Appellants' asserted statute of limitations, December 16, 2008, or the anniversary of the first date on which Pinepoint did not pay rent, March 15, 2009. Per Rule 3(a)(2), Pinepoint was required to accomplish service 120 days after filing of the summons and complaint. The 120th day was April 7, 2009. Service was not accomplished until July 14, 2009. The case is barred.

Pinepoint had (to the tune of $262,000), which it no longer had now that Vanevery was out of the picture.

Quite clearly, whether Vanevery assigned the lease to GTH, or Pinepoint mitigated its damages by allowing GTH to undertake responsibility for the lease, or GTH became, in essence, a subtenant of Vanevery, Vanevery was substituted and excused as the tenant by Pinepoint. The agreement includes all of the necessary elements for a contract: and offer and acceptance (as shown in the assignment and subsequent conduct of Pinepoint and GTH) and consideration (GTH undertaking the upfit obligation together with Pinepoint's fulfilling its duties to mitigate). When an agreement is reached between a lessor and a third-party and the same is supported by valuable consideration, the third party becomes liable under the contract/lease. *Diminich v. 2001 Enterprises, Inc.*, 292 S.C. 141, 144, 355 S.E.2d 275, 277 (1987)(holding that where a landlord accepts consideration from a third party/assignor to the lease, a new contract is created with the incidents of a landlord/tenant relationship attached).

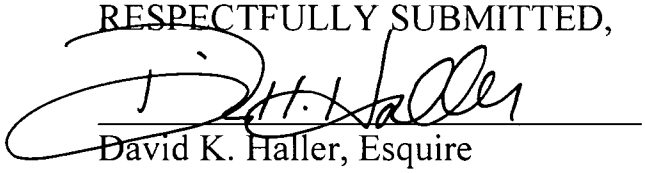
Because Pinepoint and GTH reached a meeting of the minds between them on use of the premises that was supported by valuable consideration, the Appellants were relieved from further duty under the lease. The trial court's entry of judgment against them was is error and should be reversed.

CONCLUSION

Respondent could have served Appellants under the long arm statute and the statute of limitations bars plaintiff's claims. In any event, GTH replaced Vanevery Enterprises as tenant and it alone is liable for any damages Pinepoint claims. The circuit court erred in entering judgment against the Appellants and should be reversed.

Accordingly, Appellants pray the Court of Appeals reverse the trial court, vacate the judgment against them, and for such other relief as the court deems just, prudent, and proper.

RESPECTFULLY SUBMITTED,



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PROOF OF SERVICE

I certify that I have served the APPELLANT'S INITIAL BRIEF on Respondent's counsel at the following address:

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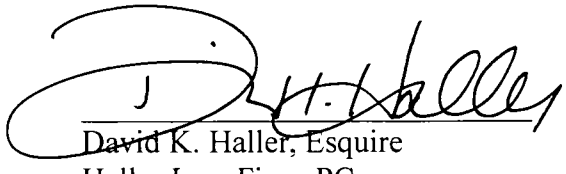

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APPELLANT'S DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

Appellants' designate the following matter to be included in the Record of Appeal:

1. Complaint;
2. Answer of Van Every Enterprises, Inc. and Sandy Van Every;
3. Defendants' Van Every Enterprises, Inc. and Sandy Van Every's Motion to Dismiss for Lack of Personal Jurisdiction and/or Summary Judgment;
4. Transcript of Record dated March 2, 2010;
5. Affidavit of David J. Parrish;
6. Order dated March 30, 2010;
7. Defendants' Van Every Enterprises, Inc. and Sandy Van Every's Motion to Alter or Amend dated March 15, 2010;
8. Transcript of Record dated January 28, 2011;
9. Order dated March 22, 2011;
10. Defendant Vanevery Enterprises, Inc. and Sandy Vanevery's Motion for Summary Judgment dated September 2, 2011;
11. Plaintiff's Motion for Summary Judgment dated October 13, 2011;

12. Defendant's Sandy Van Every and Van Every Enterprises, Inc.'s Record for and Against Summary Judgment dated October 24, 2011;
13. Transcript of Record dated October 24, 2011;
14. Order and Judgment dated May 22, 2012;
15. Defendants Vanevery Enterprises and Sandy Vanevery's Motion to Alter or Amend dated June 8, 2012;
16. Transcript of Record dated November 26, 2012;
17. Order dated February 4, 2013.

Pursuant to SCRAP Rule 209(c), I certify that no irrelevant matter has been designated above.

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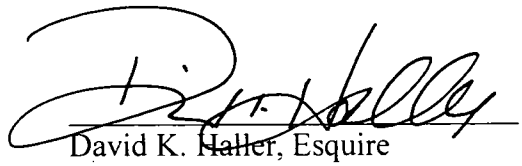

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