

STATE OF SOUTH CAROLINA

COUNTY OF JASPER

Nicole Burnham,

Plaintiff,

v.

Eats & Sweets Bakery & Café, Leon Smith,
Leon Smith DBA "Eats & Sweets Bakery &
Café," and Albert Kleckley, Jr.,

Defendants.

IN THE COURT OF COMMON PLEAS

FOURTEENTH JUDICIAL CIRCUIT

C/A NO. 2022-CP-27-00524

ORDER DISMISSING COMPLAINTS

RECEIVED

JUN 20 2023

SC Court of Appeals

FACTUAL BACKGROUND

This lawsuit arises out of an accident which occurred in Jasper County on November 7, 2019 when Plaintiff suffered injuries from a slip and fall when leaving Chocolate Therapy as a customer.

On November 2, 2022, Plaintiff filed a Summons and Complaint naming "Eats & Sweets Bakery & Café," a non-existing legal entity, as the only named Defendant. On November 7, 2022, the three-year statute of limitations governing Plaintiff's claims expired. On December 22, 2022, over six weeks past the expiration of the statute of limitations, Plaintiff filed an Amended Complaint adding new defendants: Leon Smith, Leon Smith DBA "Eats & Sweets Bakery & Café," and Albert Kleckley Jr. This was the first time Leon Smith, Leon Smith DBA "Eats & Sweets Bakery & Café," Albert Kleckley Jr. had been named as Defendants. The Amended Complaint did not assert any additional causes of action against the original Defendant "Eats & Sweets Bakery & Café," adding the new Defendants to its existing causes of action.

LEGAL STANDARD

The Court may grant a motion to dismiss for failure to state a claim where it appears certain that the plaintiff can prove no set of facts that would support its claim and entitle it to relief. *Mylan Laboratories, Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993). “The trial court... must presume all well pled facts to be true.” *Morrow Crane Co. v. T.R. Tucker Constr. Co.*, 296 S.C. 427, 429, 373 S.E.2d 701, 702 (Ct.App.1988). “[P]leadings in a case should be construed liberally so that substantial justice is done between the parties. Further, a judgment on the pleadings is considered to be a drastic procedure by our courts.” *HHHunt Corp. v. Town of Lexington*, 389 S.C. 623, 632, 699 S.E.2d 699, 703 (Ct. App. 2010) (citing *Russell v. City of Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991) (citation omitted).

LEGAL ANALYSIS

1. **Plaintiff’s Claims Against Defendant Leon Smith, Leon Smith DBA “Eats & Sweets Bakery & Café, and Albert Kleckley, Jr. are Time-Barred and Do Not Relate Back to the Filing of the Original Complaint.**
 - a. **Plaintiff’s claims are barred by the statute of limitations because Plaintiff was on notice of the alleged injury three-years prior to the filing of the Amended Complaint.**

The statute of limitations bars the Plaintiff’s claim against newly-added Defendants Leon Smith, Leon Smith DBA “Eats & Sweets Bakery & Café, and Albert Kleckley, Jr. as filed after the statute limitations expired on November 7, 2022 (three years after the alleged accident). In negligence actions, the three-year statute of limitations begins to run at the time of the negligence, or when facts and circumstances would put a person of common knowledge on notice that he might have a claim against another. *Doe v. Bishop of Charleston*, 407 S.C. 128, 140, 754 S.E.2d 494, 500 (2014); accord *Wiggins v. Edwards*, 314 S.C. 126, 442 S.E.2d 169 (1994) (“The important date under the discovery rule is the date that a plaintiff discovers the

injury . . ."). Our courts apply what is come to be known as the "discovery rule" to determine when the statute of limitations begins to run, which is when a cause of action reasonably ought to have been discovered." *Dean v. Ruscon Corp.*, 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996).

"Failure of the injured party to comprehend the full extent of damages, however, is immaterial." *Id.* (citing *Dean*, 321 S.C. 360, 468 S.E.2d 645). "The date on which discovery should have been made is an objective, not subjective, question." *Kreutner v. David*, 320 S.C. 283, 285-86, 465 S.E.2d 88, 90 (1995). An injured party must act with promptness when she has notice that some right has been invaded or that she might have a claim against another. *Wiggins v. Edwards*, 314 S.C. 126, 128-29, 442 S.E.2d 169, 170 (1994).

Plaintiff was present for, and involved in the alleged accident underlying her Complaint, and aware at that time that she had a potential claim on November 7, 2019. She originally commenced this action on November 2, 2022, within the statutory period for bringing suit, she did not at that time join Leon Smith, Leon Smith DBA "Eats & Sweets Bakery & Café, and Albert Kleckley, Jr. as Defendants. It was not until December 22, 2022, more than three years after the alleged accident, that Plaintiff filed her Amended Complaint to add new Defendants, at which point, she was time-barred from proceeding with any claims against Leon Smith, Leon Smith DBA "Eats & Sweets Bakery & Café, and Albert Kleckley, Jr. The statute of limitations for all claims began to run on the date of the alleged accident and expired on November 7, 2022 pursuant to S.C. Code Ann. §§ 15-3-530 and 15-3-535.

b. Plaintiff is barred from adding Leon Smith, Leon Smith DBA "Eats & Sweets Bakery & Café, and Albert Kleckley, Jr. as parties to this action under Rule 15 of the South Carolina Rules of Civil Procedure.

A plaintiff has a right to amend the Complaint but not to add additional new parties to the Complaint. "Rule 15(a) only permits an existing plaintiff to add, modify, delete, or change

claims against an existing defendant.” *Valentine v. Davis*, 319 S.C. 169, 172, 460 S.E.2d 218, 219 (Ct. App. 1995). Since Rule 15(a) does not contemplate the addition of new parties, Plaintiff’s Amended Complaint, which seeks to add three new defendants fails.

Plaintiff’s Amended Complaint does not relate back to the original Complaint under Rule 15(c). Rule 15(c), SCRCF, allows a party, in certain and specific circumstances, to relate an amended pleading back to the date of the original pleading. Rule 15(c), SCRCF, provides as follows:

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading.

An amendment changing the party against whom a claim is asserted relates back if the forgoing provision is satisfied and, within the period provided by law for commencing the action against him the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

Consistent with the Federal Rules of Civil Procedure, the South Carolina Supreme Court has adopted a four-part test to aid in interpreting Rule 15(c) This four-part test requires that the following four factors be met to allow a party to relate their amended pleading back to the date of the original pleading:

1) the basic claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; *and* (4) the second and third requirements must have been fulfilled within the prescribed limitations period.

See Hughes v. Water World Water Slide, Inc., 314 S.C. 211, 213-14, 442 S.E.2d 584, 586 (1994) (quoting *Schiavone v. Fortune*, 477 U.S. 21, 29, 106 S.Ct. 2379, 91 L.Ed.2d 18 (1986)).

Under this four-part test, South Carolina courts have consistently limited Rule 15(c)'s scope to amendments that either correct a defendant's name or substitute one defendant for another. South Carolina has differentiated the *substitution* of a party from the *addition* of a party. In the latter instance, South Carolina has rejected the application of the relation back doctrine.

For example, in *Jackson v. Doe*, the appellant filed an action against an unknown John Doe driver, pursuant to statute. Four and a half years after the accident, the plaintiff sought to amend her complaint to add Milligan as a defendant. 342 S.C. 552, 537 S.E.2d 567 (Ct. App. 2000). The court ruled in favor of Milligan, concluding that relation back provision of Rule 15(c) did not apply and that the statute of limitations had expired. *Id.* The Court of Appeals reasoned that:

Jackson did not simply correct the defendant's name or substitute one defendant for another. Rather, she *added* Milligan as a defendant because he may have been the driver. The language of Rule 15(c) clearly speaks to a *change* in party, not the *addition* of a defendant to an already existing defendant. In our view, the addition of a party is not the same as a substitution or change of a party.

342 S.C. 552, 557, 537 S.E.2d 567, 570 (Ct. App. 2000). Similarly, the Court of Appeals confirmed the above principles in *Cline v. JE Faulkner Homes, Inc.*, refusing to relate back an amendment adding a new party. 359 S.C. 367, 397, n.2., 597 S.E.2d 27, 29, n.2 (Ct. App. 2004). In *Cline*, the Court of Appeals stated:

Cline [] argues that his addition of Modular Home should relate back to his original pleading under Rule 15(c), SCRPC. However, relation back applies only when an existing party is changed, not when a new party is added to a complaint. *See Jackson v. Doe*, 342 S.C. 552, 558, 537 S.E.2d 567, 570 (Ct. App. 2000) ("The language of Rule 15(c) clearly speaks to a change in party, not the addition of a defendant to an already existing defendant." (emphasis in original)).

Id. Addressing the statute of limitations issue under Rule 15, *Cline* stated that "because three years had expired by the time Cline named Modular Home as a defendant, his negligence claim against Modular Home was barred by the statute of limitations." *Id.* at 371.

As shown above, South Carolina courts have made clear that an amended pleading only relates back to the date of the original pleading for the substitution of a party, *not* the addition of a party. The addition of a party to a pleading cannot be used for purposes of tolling the statute of limitations. *Jackson v. Doe*, 342 S.C. 552, 558, 537 S.E.2d 567, 570 (Ct. App. 2000). Applying the above principles, Plaintiff's Amended Complaint does not relate back to the date of her original Complaint. On November 2, 2022, Plaintiff filed her Complaint naming Eats & Sweets Bakery & Café as the *only* Defendant. On November 7, 2022, the three-year statute of limitations lapsed. On December 22, 2022, over six weeks after the statute of limitations expired, Plaintiff filed her first amended complaint adding multiple new defendants: Leon Smith, Leon Smith DBA "Eats & Sweets Bakery & Café," and Albert Kleckley Jr., which was the first time Leon Smith, Leon Smith DBA "Eats & Sweets Bakery & Café," or Albert Kleckley Jr. had been named as party Defendants. The addition of those new parties does not relate back to the original commencement of this lawsuit. *See Jackson v. Doe*, 342 S.C. 522, 537 S.E.2d 567 (Ct. App. 2000) for the proposition that "[t]he language of Rule 15(c) clearly speaks to a change in party, not the addition of a defendant to an already existing defendant," concluding that the "addition of a party is not contemplated by Rule 15(c)" (emphasis in original).

Considering the facts as pled in the Plaintiff's Amended Complaint, the S. C. Rules of Civil Procedure, and relevant case laws, it is clear that the three-year time for Plaintiff to sue Leon Smith, Leon Smith DBA "Eats & Sweets Bakery & Café," and Albert Kleckley Jr. had expired. Accordingly, the Court **GRANTS** Defendants' motion to dismiss Defendants Leon Smith, Leon Smith DBA "Eats & Sweets Bakery & Café," and Albert Kleckley Jr.

2. Defendant Eats & Sweets Bakery & Café is not a Legal Entity and therefore, is not Capable of Being Sued.

Rule 17(a), SCRPC states that “[e]very action shall be prosecuted in the name of the real party in interest.” It is well settled that an action against a nonexistent legal entity is a nullity. *See McCullar v. Estate of Campbell*, 381 S.C. 205, 207, 672 S.E.2d 784, 785 (2009). In *McCullar*, an action brought against the estate of a deceased physician, the South Carolina Supreme Court reinforced the “general rule” that “[i]f there is a lack of legal entity, the whole action fails.” The Supreme Court explained:

What is at issue here, however, is not capacity, standing, or party in interest, but something much more fundamental: whether, at the time the suit was purportedly commenced, there existed a juridical entity known as Estate of Dr. William Cox Campbell. Since it is undisputed that Dr. Campbell's Estate was closed months before this action was allegedly commenced by the then *pro se* respondents, the answer is no.

381 S.C. at 207, 672 S.E.2d at 784-85.

Here, Defendant Eats & Sweets Bakery & Café was named in the original Complaint and Amended Complaint despite not being an existing legal entity. A certificate of formation was never filed for such a corporate entity with the Secretary of State. Because Defendant Eats & Sweets Bakery & Café is a nonexistent corporate entity, it is not capable of being sued. Thus, the Court does not have subject matter jurisdiction or personal jurisdiction over a nonexistent corporate entity, and Plaintiff cannot, and has not, validly stated a claim, and Plaintiff's initial complaint filed November 2, 2022 therefore fails.

HOLDING

Based on the foregoing rational and authorities cited in (1)(a) and (b), the Plaintiff's Amended Complaint filed Decenter 22, 2022 is hereby **DISMISSED** with prejudice;

Based on the foregoing rational and authorities cited in (2), Plaintiff's Complaint filed November 2, 2022 is hereby **DISMISSED** with prejudice

and It is so **ORDERED!**

Hon. R. Keith Kelly

_____, 2023
Charleston, South Carolina



Jasper Common Pleas

Case Caption: Nicole Burnham VS Eats & Sweets Bakery & Cafe , defendant, et al
Case Number: 2022CP2700524
Type: Order/Dismissal

It is so Ordered.

s/ R. Keith Kelly - 2165