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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

Hon. R. Keith Kelly, Circuit Court Judge

Case No. 2022-CP-27-00524

Appellate Case No. 2023-001003

Eats & Sweets Bakery & Café, Leon Smith,
Leon Smith DBA “Eats & Sweets Bakery &
Café,” and Albert Kleckley, Jr.....Respondent,

v.

Nicole Burnham.....Appellant.

INITIAL BRIEF OF APPELLANT

August 18, 2023

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TABLE OF CONTENTS

TABLE OF AUTHORITIES3

STATEMENT OF ISSUES ON APPEAL4

STATEMENT OF THE CASE.....4

STANDARD OF REVIEW5

SUMMARY OF THE ARGUMENT5

ARGUMENT5

 I. Appellant’s Amended Complaint is not time-barred as the civil action was commenced within the statute of limitations was properly filed and served upon Defendants in accordance with Rules 3(a) and 15(a), SCRPC.

 II. The amendment(s) to the original Complaint to properly identify the Respondents relates back to the date of the original pleading, in accordance with Rule 15(c), SCRPC.

 III. Eats & Sweets Bakery & Café is capable of being sued pursuant to S.C. Code Ann. § 15-5-160.

CONCLUSION.....11

TABLE OF AUTHORITIES

CASES

Gause v. Smithers,
384 S.C. 130, 681 S.E.2d 607 (2009) 8-9

Goodman v. PraxAir, Inc.,
494 F.3d 458, 471 (4th Cir. 2007)8

Graham v. Lloyd’s of London,
296 S.C. 249, 371 S.E.2d 801 (1988)11

Jackson v. Doe,
342 S.C. 552 (Ct. App. 2000)8

Lewis v. Lewis,
392 S.C. 381, 709 S.E.2d 650 (2011)5

McKnight v. Iceberg Enters. LLC,
2012 U.S. Dist. LEXIS 87816, WL 24188709

Mims v. Babcock Ctr., Inc.,
399 S.C. 341, 732 S.E.2d 395 (2012)6

Wilson v. Gandis,
430 S.C. 282, 306 (2020)5

STATUTES

Rule 3, SCRCP..... 4, 6-7

Rule 15, SCRCP..... 5-8, 10

Rule 15, Fed. Rules of Civ. P.8

S.C. Code Ann. § 15-3-20.....6

S.C. Code Ann. § 15-3-530.....5

S.C. Code Ann. § 15-5-160.....5, 11

STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court erred in dismissing Plaintiff's Amended Complaint.
2. Whether the Amended Complaint relates back to the original pleading.

STATEMENT OF THE CASE

This matter arises out of an incident that occurred in Jasper County on November 7, 2019. Plaintiff/Appellant Nicole Burnham was injured when she slipped and fell at "Eats & Sweets Bakery & Café" while leaving its premises as a customer.

On November 2, 2022, Plaintiff filed a Summons and Complaint naming "Eats & Sweets Bakery & Café" as a Defendant. On November 7, 2022, the three-year statute of limitations governing Plaintiff's claims ran. On December 22, 2022, Plaintiff filed her first Amended Complaint naming Eats & Sweets Bakery & Café, Leon Smith, Leon Smith DBA "Eats & Sweets Bakery & Café" and Albert Kleckley Jr. The Amended Complaint did not assert any additional causes of action. Thereafter, on January 31, 2023, all Defendants were served pursuant to Rule 3(b)(2), SCRCF, with a true copy of the Summons and Complaint and a true copy of the Amended Summons and Complaint. An Affidavit of Service for all Defendants was filed on April 14, 2023.

On February 24, 2023, Defendants filed a Motion to Dismiss on the grounds Plaintiff's Amended Complaint was barred by the statute of limitations. Plaintiff filed her Response to Defendants' Motion to Dismiss on March 31, 2023. Defendants' Motion to Dismiss Plaintiff's Amended Complaint was heard on April 20, 2023. Thereafter, on May 16, 2023, the Honorable R. Keith Kelly issued an Order dismissing Plaintiff's Amended Complaint with prejudice.

On June 15, 2023, Plaintiff electronically filed her proof of service of a Notice of Appeal on Defendants (Respondents) and served her Notice of Appeal on Respondents. Appellant now submits this Initial Brief to this Court and Respondents.

STANDARD OF REVIEW

Appellant requests this Court review the trial court's dismissal de novo. The essence of the de novo standard of review is that the appellate court must not simply accept the factual findings of the trial court but instead must diligently review the record to make findings of fact based upon its own review of the preponderance of the evidence. *Wilson v. Gandis*, 430 S.C. 282, 306 (2020). A review de novo permits appellate court fact-finding, notwithstanding the presence of evidence supporting the trial court's findings. *Lewis v. Lewis*, 392 S.C. 381, 390, 709 S.E.2d 650, 654-55 (2011).

SUMMARY OF THE ARGUMENT

The trial court erred in dismissing Appellant's Amended Complaint because it is not time-barred, as the civil action was commenced within the statute of limitations was properly filed and served upon Defendants in accordance with Rules 3(a) and 15(a), SCRPC. In addition, the Appellant's amendment(s) to the original Complaint to properly identify the Respondents relates back to the date of the original pleading, in accordance with Rule 15(c), SCRPC. Lastly, Respondent Eats & Sweets Bakery & Café is capable of being sued pursuant to S.C. Code Ann. § 15-5-160, even as a non-legal entity. Therefore, Appellant should have her claim decided on the merits.

ARGUMENT

I. Appellant's Amended Complaint is not time-barred as the civil action was commenced within the statute of limitations was properly filed and served upon Defendants in accordance with Rules 3(a) and 15(a), SCRPC.

Pursuant to S.C. Code § 15-3-530, an action for liability must be brought within three (3) years of the date of the incident. "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 one hundred twenty days after filing.”

Rule 3(a), SCRCPP; *See also* S.C. Code Ann. § 15-3-20(b).

After the commencement of a civil action, “a party may amend her pleading once as a matter of course at any time before or within thirty (30) days after a responsive pleading is served or, if the pleading is one to which no responsive pleading is required and the action has not been placed upon the trial roster, she may so amend it at any time within thirty (30) days after it is served.” SCRCPP Rule 15(a); *See Mims v. Babcock Ctr., Inc.*, 399 S.C. 341, 347, 732 S.E. 2d 395, 398 (2012).

In *Mims*, the plaintiff filed a summons and complaint, and no service of process was achieved after one (1) year passed. *Id.* at 343. Thereafter, the plaintiff filed an amended summons and complaint, naming at least one party that was not previously identified in the original summons and complaint. *Id.* The named defendants were then served with the amended summons and complaint a few days later. *Id.* The Supreme Court noted the amendment to Rule 3(a), SCRCPP, of provides a safeguard to claimants when the filing of the summons and complaint occurs near the end of the statute of limitations and where service is made after the limitations period has run. *Id.* The Court in *Mims* concluded, in light of the legislative intent in amending S.C. Code Ann. § 15-3-20(b) and Rule 3(a), SCRCPP, Rule 15(a) allows the filing and service of an amended complaint without leave of court, even if the original complaint has not been served.

This premises liability matter arises out of a slip and fall incident that occurred in Jasper County on November 7, 2019. Appellant suffered injuries when she slipped and fell at/on the Eats & Sweets Bakery & Café premises. To date, liability has been disputed.

Thereafter, on November 2, 2022, Plaintiff filed a Summons and Complaint naming “Eats & Sweets Bakery & Café” as the Defendant, properly commencing a civil action. On November 7, 2022, the three-year statute of limitations governing Plaintiff’s claims ran. On December 22, 2022, Plaintiff filed her first Amended Complaint naming Eats & Sweets Bakery & Café, Leon Smith, Leon Smith DBA “Eats & Sweets Bakery & Café” and Albert Kleckley Jr. The Amended Complaint did not assert any additional causes of action. Thereafter, on January 31, 2023, all Defendants were timely served within the one hundred twenty (120) days after filing with a true copy of the Summons and Complaint, as permitted by Rule 3(a)(2), SCRCPP. In addition Defendants were also served with a true copy of the Amended Summons and Complaint. An Affidavit of Service for all Defendants was filed on April 14, 2023.

Here, Appellant’s filing of her Amended Complaint is permitted pursuant to Rule 15(a) as the original Complaint had not yet been served. Thus, if no responsive pleading has been filed, one has the right to file one amended pleading at any time until the case is placed on the trial roster. In this case, no responsive pleading had been filed, thus Plaintiff was permitted to file an Amended Complaint.

II. The amendment(s) to the original Complaint to properly identify the Respondents relates back to the date of the original pleading, in accordance with Rule 15(c), SCRCPP.

Rule 15(c), SCRCPP states:

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 foregoing 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.

Rule 15(c), SCRPC.

In *Gause v. Smithers*, this court distinguished the difference between adding and changing parties. *Gause v. Smithers*, 384 S.C. 130, 681 S.E.2d 607 (2009), citing *Jackson v. Doe*, 342 S.C. 552 (Ct. App. 2000). Specifically, this court did not allow the addition of a defendant to a negligence action because it determined “the second paragraph of Rule 15(c) only applied to a substitution or change in party, not the addition of a defendant.” *Id.* at 132.

South Carolina’s Civil Rules of Procedure are substantially similar to the Federal Rules of Civil Procedure, and, in many circumstances, are interpreted similarly. Under Rule 15(c) of the Federal Rules of Civil Procedure, a defendant added via an amended pleading must receive notice of the lawsuit between the filing of the original complaint and the end of the 120-day period prescribed by Rule 4(m), FRCP.

Instructively, the Fourth Circuit has similarly addressed the addition and/or changing of parties pursuant to Rule 15, FRCP.

[A]n amendment that changes the party against whom a claim is asserted relates back to the date of the original pleading if (1) the claim in the amended complaint arose out of the same transaction that formed the basis of the claim in the original complaint; (2) the party to be brought in by the amendment received notice of the action such that it will not be prejudiced in maintaining a defense to the claim; and (3) it should have known that it would have originally been named a defendant "but for a mistake concerning the identity of the proper party.

Goodman v. PraxAir, Inc., 494 F.3d 458, 471 (4th Cir. 2007); Fed. R. Civ. P. 15(c)(2), (3). “The limitations of Rule 15(c)(3) thus only apply when the policies underlying limitations rules may be trampled.” *Goodman*, 494 F.3d 458, 471 (4th Cir. 2007). Arguments to the contrary may be made, but “when a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist, and we are of opinion that a liberal rule should be applied.” *Id.*

In addition, the South Carolina District Court has explored this very issue of purportedly “adding” parties to an amended complaint. In *McKnight v. Iceberg Enters. LLC*, the court looked to whether an additional defendant received appropriate notice of the action and whether it would be unfairly prejudiced if the plaintiff’s claims were allowed to be decided on the merits. *McKnight v. Iceberg Enters. LLC*, 2012 U.S. Dist. LEXIS 87816, WL 2418870. The court further indicated it could “discern no policy that would be served by the...defendants' restrictive reading of 'changes,' which would force the amending party to drop a defendant for each defendant he adds.” *Id.*

Here, this matter differs from that in *Gause* as the Amended Complaint merely corrects for the original misidentification of Eats & Sweets Bakery & Café. The trade name by which it operates, while not itself a registered business entity, consists of multiple people and/or other entities, all of whom were identified by Appellant in her Amended Complaint. Furthermore, Respondent has and will likely continue to claim that Eats & Sweets Bakery & Café is an unregistered business/non-legal entity, and it will likely further claim that it cannot be sued. If we assume that to be true, the Defendants named in the Amended Complaint would functionally serve as a change in parties rather than an addition to a party claimed to be a non-existent legal entity.

In congruence with the federal rule permitting the addition of new parties to an amended pleading, all of the Respondents who had been served with the original Summons and Complaint and the Amended Summons and Complaint were given fair notice of the claim within the limitations period. As such, when none of the Respondents would suffer an improper prejudice in defending the merits of Appellants cause of action, the liberal amendment policies influencing our procedural rules favor relation-back in this matter.

Whereas the original Summons and Complaint only identifies Eats & Sweets Bakery & Café as the sole Defendant, Appellant misidentified the necessary parties against whom she intended to bring her cause of action. It was not until after her filing of the original Summons and Complaint and the expiration of the applicable statute of limitations that Defendant Eats & Sweets Bakery and Café was properly identified as Defendant Leon Smith, Defendant Leon Smith DBA Eats & Sweets Bakery and Café, and/or Albert Kleckley, Jr—all of whom are affiliated with the trade name and/or business name “Eats & Sweets Bakery and Café.” As Appellant became aware of this fact that she had mistakenly identified these Defendants as one unregistered business entity, she corrected her pleading, pursuant to Rule 15(c), SCRPC.

By this measure, Appellant contends Respondents received such notice of the institution of the action brought against them when they were actually served via process server with a copy of the original Summons and Complaint. One or more Respondents knew or should have known that the original Summons and Complaint, identifying each of them via the business trade name, was being brought against them, regardless of their mistaken identity. Appellant further contends this does not prejudice any of the Respondents, neither collectively nor individually, as they were aware of the lawsuit the moment they were served.

Regardless, should this Court find that Defendants Leon Smith in his individual capacity and Albert Kleckley, Jr. as the land owner too far from the scope to be considered to fall under the umbrella of “Eats & Sweets Bakery & Café”, Leon Smith DBA “Eats & Sweets Bakery & Café” should still be considered a Defendant in this case. Even opposing counsel has admitted on the record that Leon Smith DBA “Eats & Sweets Bakery & Café” would be a proper defendant pursuant to Rule 15 of the South Carolina Rules of Civil Procedure. During the hearing for the

Motion to Dismiss, Mr. Stoney, attorney for Respondents, stated “I think that certainly the --- the restaurant itself, would be proper within the statute.”

III. Eats & Sweets Bakery & Café is capable of being sued pursuant to S.C. Code Ann. § 15-5-160.

Pursuant to S.C. Code Ann. § 15-5-160, all unincorporated associations may be sued and proceeded against under the name and style by which they are usually known without naming the individual members of the association. S.C. Code Ann. § 15-5-160; *See* *Graham v. Lloyd’s of London*, 296 S.C. 249, 255-56 371 S.E. 2d 801, 804 (1988).

In *Graham*, the South Carolina Court of Appeals addressed the issue where an unincorporated association was named as a defendant in the lawsuit. The court held that S.C. Code Ann. § 15-5-160 provided a plaintiff with a procedure by which they can bring the members of an association before the court without naming and serving process upon them individually. *Id.* at 255-56. The court concluded that the statute does not destroy or create substantive liability and that once the members are before the court, the liability of each member will be determined by the applicable substantive law. *Id.* at 256.

The statute operates as a procedural placeholder when the business is carried on within the scope of the terms “company,” “association,” or “individuals”. Here, “Eats & Sweets Bakery & Café” is the business and/or trade name under which a particular group (specifically, Defendants Leon Smith, Leon Smith DBA “Eats & Sweets Bakery & Café”, and Albert Kleckley, Jr. all together) conduct their/its business.

CONCLUSION

For the foregoing reasons, Appellant requests that this Court reverse the trial court’s Order Dismissing Plaintiff’s Amended Complaint and remand to the trial court for this matter to be decided on the merits.

Respectfully submitted,

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This the 18th Day of August 2023.

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Nicole Burnham.....Appellant.

PROOF OF SERVICE

I hereby certify that on this 18th day of August 2023, I electronically filed the foregoing *Initial Brief of Appellants* with the South Carolina Court of Appeals via E-Mail, and I served a copy of the same via E-Mail on the following counsel for Respondents:

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