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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM YORK COUNTY
—————

Daniel D. Hall, Circuit Court Judge
—————

Appellate Case No. 2023-001959
—————

Lester Van Epps, III,

Appellant,

v.

Dana Michelle Faulkenberry,

Respondent.

—————
RECORD OF APPEAL
—————

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STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

Lester Van Epps, III,)
)
Plaintiff,)
)
v.)
)
Dana Michelle Faulkenberry,)
)
Defendant.)
_____)

C/A No. 2023-CP-46-02713

ORDER OF DISMISSAL

This matter came before the court on November 16, 2023, upon Defendant’s motion to dismiss Plaintiff’s complaint, pursuant to Rule 12(b)(6) S.C. R. Civ. P. and based upon the expiration of the applicable statute of limitations. For the reasons set forth herein, the court finds and concludes that Defendant’s motion should be GRANTED.

Rule 12(b)(6) Standard

A motion to dismiss under Rule 12(b)(6) challenges the sufficiency of a plaintiff’s complaint. A Rule 12(b)(6) motion should only be granted “when the defendant demonstrates that the plaintiff has failed to allege facts sufficient to establish a cause of action.” Disabato v. South Carolina Ass’n of School Adm’rs, 404 S.C. 433, 441, 746 S.E.2d 329, 333 (2013). A ruling on a motion to dismiss must be based solely on the factual allegations set forth in the complaint, and the court must consider all well-pled facts as true. Id. A statute of limitations defense may be raised by Rule 12(b)(6) motion “where facts sufficient to rule on [that] affirmative defense are alleged in the complaint.” Goodman v. Praxair, Inc., 494 F.3d 458, 464 (4th Cir. 2007); *see also* Berry v. McLeod, 328 S.C. 435, 441, 492 S.E.2d 794, 797 (1997) *cert. denied* (1998).

Plaintiff's Complaint and Factual Allegations

Plaintiff commenced this lawsuit on August 29, 2023. Plaintiff's complaint alleges:

- 1) Plaintiff and Defendant organized a limited liability company, Palmetto Contracting Services of York County, LLC ("Palmetto"), in January 2005. Complaint ¶ 4;
- 2) Palmetto's business and operations were governed by a written operating agreement which, among other provisions, required "written consent of all members" to dissolve the company. Id. ¶ 7;
- 3) Defendant "voluntarily dissolved Palmetto on January 15, 2015" without Plaintiff's knowledge or consent. Id. ¶ 9;
- 4) Palmetto's Articles of Termination were filed by the South Carolina Secretary of State on April 23, 2018. Id.;
- 5) Plaintiff "was unaware that the Defendant terminated Palmetto on January 15, 2015 and officially on April 23, 2018." Id. ¶ 11.

Based upon those factual allegations, Plaintiff asserts three causes of action: (1) breach of contract; (2) breach of the duty of loyalty and care under the South Carolina Limited Liability Company Act; and (3) an unspecified claim for treble damages and attorney's fees¹ based upon Defendant's alleged "fraudulent intent and fraudulent act of misrepresenting to the State of South Carolina that Palmetto was properly dissolved."

Analysis

At the hearing on Defendant's motion to dismiss, Defense Counsel argued – and Plaintiff's Counsel did not contest – that each of Plaintiff's causes of action is governed by the three-year statute of limitations set forth in S.C. Code § 15-3-530 (Law. Co-op. 2005). The court also finds

¹ While Plaintiff's complaint does not mention the UTPA, his third cause of action appears to be an attempt to assert a claim under that statute.

and concludes that each of Plaintiff's claims is subject to a three-year statute of limitations. Thus, the issue before this court is whether the facts alleged by Plaintiff – accepted as true - establish that his claims accrued more than three years before he filed this lawsuit. If so, Plaintiff's claims are time-barred, and dismissal is appropriate.

Accepting the factual allegations of Plaintiff's complaint as true, the court finds and concludes that each of Plaintiff's claims is barred by the statute of limitations. "[T]he three-year statute of limitations found in §15-3-530 begins to run when the underlying cause of action reasonably ought to have been discovered. Thus, the three-year clock starts ticking on the 'date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct.'" Martin v. Companion Healthcare, 357 S.C. 570, 575, 593 S.E.2d 624, 627 (Ct. App. 2004)(internal citations omitted). The determination of when a claim accrues for purposes of the statute of limitations is objective, rather than subjective.

As such, the question is not whether the particular plaintiff in this case actually knew he had a claim. Instead, [the question] is "whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist."

Id. at 576, 593 S.E.2d at 627 (quoting Young v. S.C. Dept' of Corr., 333 S.C. 714, 719, 511 S.E.2d 413, 416 (Ct. App. 1999)).

Plaintiff alleges that Defendant "voluntarily dissolved" Palmetto on January 15, 2015 and that the South Carolina Secretary of State then "officially" filed Palmetto's Articles of Termination on April 23, 2018. Complaint ¶¶ 9 & 11. By filing the Articles of Termination, the Secretary of State provided "public disclosure" that Palmetto's existence as a South Carolina limited liability had terminated. *See Berry v. McLeod*, 328 S.C. 435, 445, 492 S.E.2d 794, 800 (Ct. App. 1997) *cert. denied* (1998) (filing of record by Aiken County Clerk of Court constituted "public

disclosure” of document’s contents, and placed plaintiffs on inquiry or constructive notice for purposes statute of limitations); *see also* S.C. Code § 33-44-805 (Law. Co-op. 2006). Therefore, even if Plaintiff did not have actual notice² that Defendant “voluntarily dissolved Palmetto on January 15, 2015,” he was placed on “inquiry or constructive notice” of that fact when the Secretary of State filed the Articles of Termination. Berry at 445, 492 S.E.2d at 800. The “three-year clock” for Plaintiff to investigate and, if appropriate, to file suit “start[ed] ticking” no later than April 23, 2018. *See id.* (“[T]he statute of limitations began to run, at the latest, when the . . . documents [at issue] were filed with the clerk of court . . .”). Plaintiff’s complaint was not filed until August 29, 2023 -- more than five years after the Secretary of State “officially filed” Palmetto’s Articles of Termination and more than two years after the statute of limitations applicable to Plaintiff’s claims had expired.

Because Plaintiff’s claims are barred by the statute of limitations, he has “failed to allege facts sufficient to establish a cause of action.” Disabato v. South Carolina Ass’n of School Adm’rs., 404 S.C. 433, 441, 746 S.E.2d 329, 333 (2013); Goodman v. Praxair, Inc., 494 F.3d 458, 464 (4th Cir. 2007). Defendant is entitled to dismissal under Rule 12(b)(6) S.C. R. Civ. P.

Order

Defendant’s motion to dismiss pursuant to Rule 12(b)(6) S.C. R. Civ. P. is GRANTED. This action is DISMISSED WITH PREJUDICE.

² Plaintiff alleges that he only “recently discovered” that Palmetto was dissolved in April 2018. Complaint ¶ 15. For purposes of this motion, the court accepts that allegation as true. Despite that fact, Plaintiff’s claims are time-barred because a “person of common knowledge and experience” would have been on notice “that some right of his was invaded” once the Articles of Termination were filed by the South Carolina Secretary of State. Plaintiff cannot avoid the statute of limitations by claiming that he (subjectively) was unaware of the existence of a publicly-filed record. Martin v. Companion Healthcare, 357 S.C. 570, 576, 593 S.E.2d 624, 627 (Ct. App. 2004); Berry v. McLeod, 328 S.C. 435, 445, 492 S.E.2d 794, 800 (Ct. App. 1997) *cert. denied* (1998).



York Common Pleas

Case Caption: Lester Van Epps III VS Dana Michelle Faulkenberry
Case Number: 2023CP4602713
Type: Order/Dismissal

So Ordered

s/Daniel D. Hall 2753

Electronically signed on 2023-11-22 09:29:38 page 6 of 6

ELECTRONICALLY FILED - 2023 Nov 22 9:55 AM - YORK - COMMON PLEAS - CASE#2023CP4602713

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)
)
Lester Van Epps, III)
)
Plaintiff)
vs.)
)
)
Dana Michelle Faulkenberry.)
)
Defendant.)
_____)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

CASE NO: 2023-CP-46-_____

COMPLAINT
(Jury trial Requested)

The Plaintiff Lester Van Epps, III, complaining of the Defendant, Dana Michelle Faulkenberry alleges as follows:

1. The Plaintiff is a resident of Beaufort County, North Carolina.
2. The Defendant is a resident of Hancock County, Tennessee..
3. Palmetto Contracting Services of York County, LLC (hereinafter "Palmetto") was a limited liability company organized under the laws of the State of South Carolina. Palmetto is the subject of this action.
4. The Plaintiff and the Defendant organized Palmetto on January 14, 2005, as evidenced by the Articles of Incorporation filed with the State of South Carolina.
5. On or about January 14, 2005, the parties entered into an Operating Agreement (hereinafter "Agreement") that set forth the rights, responsibilities, obligations and procedures of each party.
6. Section 7 of the Operating Agreement sets forth the applicable procedures in order to dissolve Palmetto.

7. Pursuant to the Agreement, a voluntary election to dissolve the company needs written consent of all the Members.
8. The Plaintiff has never consented to the dissolution of Palmetto nor has any other enumerated event occurred that would be deemed a trigger event that would dissolve Palmetto.
9. The Defendant, without the written consent or even knowledge of the Plaintiff voluntarily dissolved Palmetto on January 15, 2015, based upon information contained in the Articles of Termination and filed the Articles of Termination on April 23, 2018.
10. Section 7.2 sets forth Procedures Upon Dissolution of the Company including, but not limited to
 - a. The sale of the property and liquidation of the business.
 - b. The handling of profits and losses during the dissolution.
 - c. The manner the proceeds from the liquidation would be applied and distributed.
11. The Plaintiff was unaware that the Defendant terminated Palmetto on January 15, 2015 and officially on April 23, 2018.
12. The Plaintiff never gave his written consent to the Defendant.
13. The Plaintiff was not made aware nor did he participate in any sale of Palmetto's property nor liquidation of the business.
14. The Plaintiff is unaware of the manner in which the proceeds were distributed nor did he receive any distributions he may be owed from the liquidation.
15. The Plaintiff recently discovered that Palmetto had been dissolved by the Defendant.

FOR A FIRST CAUSE OF ACTION

16. The allegations of Paragraph 1 through 14, are incorporated herein to the extent they are not inconsistent herewith.

17. The parties entered into a valid and binding operating Agreement for Palmetto on or about January 14, 2005.
18. This Agreement set forth the procedures necessary to terminate Palmetto.
19. The Defendant did not obtain the consent of the Plaintiff to terminate Palmetto as required by Section. 7.1.1. of the Agreement.
20. Based upon Section 7.1.2 through 7.1.4 of the Agreement, no triggering event occurred that would dissolve Palmetto under these Sections.
21. The Defendant has breached the Agreement by dissolving the Company.
22. The Defendant has further breached the Agreement by failing to distribute any proceeds in accordance with Section 7.2 et seq.
23. Based upon information and belief, the Defendant has taken the proceeds of the dissolution for her own benefit.
24. As a result of Defendant's breach, the Plaintiff has suffered damages and continues to suffer damages.

FOR A SECOND CAUSE OF ACTION

25. The allegations of Paragraph 1 through 23, are incorporated herein to the extent they are not inconsistent herewith.
26. As a Member of Palmetto, the Defendant had a duty of care to the business as well as a duty of loyalty.
27. The Defendant breached this duty by being negligent in dissolving the Company without telling the other Member, knowing that the Company was still being operated as an LLC to the public.
28. The Defendant breached this duty by failing to comply with the terms set forth in the Agreement.

29. Based upon information and belief, the Defendant breached this duty by using the proceeds from the dissolution for her own benefit.
30. As a result, the Plaintiff has suffered damages and will continue to suffer damages in the future as a result of the Defendant's action.

FOR A THIRD CAUSE OF ACTION

31. The allegations of Paragraph 1 through 30, are incorporated herein to the extent they are not inconsistent herewith.
32. The Plaintiff and the Defendant have a tumultuous relationship.
33. Based upon information and belief, the Defendant's actions of breaching the Agreement and dissolving Palmetto and not obtaining the consent of the Plaintiff was done with fraudulent intent and a fraudulent act of misrepresenting to the State of South Carolina that Palmetto was properly dissolved.
34. The Defendant was aware of the Operating Agreement and was further aware that the Plaintiff was still operating Palmetto under the mistaken belief that the LLC was still valid.
35. Based upon information and belief, the Defendant's action of dissolving Palmetto, without the knowledge or consent of the Plaintiff, was done to "get back at the Plaintiff" and "out of hate" for him.
36. As a result of the fraudulent act, the Plaintiff is entitled to treble damages from the Defendant.
37. The Plaintiff also seeks an Order requiring the Defendant to pay his attorney's fees and costs for having to bring this action.

Having fully plead, the Plaintiff seeks a judgment against the Defendant for breach of contract, in

an amount to be determined at trial, attorney's fees and costs and treble damages.

s/Stephen D. Schusterman
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ATTORNEY FOR PLAINTIFF

August 24, 2023

ELECTRONICALLY FILED - 2023 Aug 29 9:22 AM - YORK - COMMON PLEAS - CASE#2023CP4602713

STATE OF SOUTH CAROLINA)) COUNTY OF YORK)) Lester Van Epps, III,)) Plaintiff,)) v.)) Dana Michelle Faulkenberry,)) Defendant.) _____)	IN THE COURT OF COMMON PLEAS SIXTEENTH JUDICIAL CIRCUIT)) C/A No. 2023-CP-46-02713)) MOTION TO DISMISS))))))
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Defendant, Dana Michelle Faulkenberry (“Faulkenberry”) moves to dismiss this action pursuant to Rule 12(b)(6) S.C.R. Civ. P. This motion is based upon the fact that each cause of action alleged in Plaintiff’s complaint is barred by the applicable statute of limitations. In support of this motion, Faulkenberry asserts the following:

1. Plaintiff’s entire lawsuit is premised upon the following factual allegations which, for purposes of this motion, must be accepted as true:¹
 - a. Plaintiff and Faulkenberry were members of a South Carolina limited liability company, Palmetto Contracting Services of York County, LLC (“Palmetto”)(Complaint ¶¶ 3-4);
 - b. Palmetto was governed by a written operating agreement that, among other provisions, required “written consent of all members” to dissolve the company (Id. ¶ 7);
 - c. Faulkenberry dissolved the company on January 15, 2015, without first obtaining Plaintiff’s written consent (Id. ¶ 9);
 - d. On April 23, 2018, Faulkenberry filed articles of termination with the South Carolina Secretary of State (Id.);

¹ “A ruling on a motion to dismiss pursuant to Rule 12(b)(6) must be based solely upon the factual allegations set forth in the complaint, and the court must consider all well-pled allegations as true.” Fabian v. Lindsay, 410 S.C. 475, 481, 765 S.E.2d 132, 136 (2014).

e. Plaintiff has continued to operate Palmetto “as an LLC to the public,” but recently discovered that Palmetto was dissolved by Faulkenberry. (Id. ¶¶ 15 & 27).

2. Plaintiff asserts three causes of action: (1) breach of contract; (2) breach of the duties of care and loyalty that Faulkenberry allegedly owed as a member of Palmetto; and (3) a claim seeking treble damages (presumably under the South Carolina UTPA).

3. Each of Plaintiff’s causes of action is governed by the three-year statute of limitations codified at S.C. Code Ann. §15-3-530 (Law. Co-op. 2005). Under that statute of limitations, the “three-year clock [to file suit] starts ticking on the ‘date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the [alleged] wrongful conduct.’” Martin v. Companion Healthcare Corp., 357 S.C. 570, 575, 593 S.E.2d 624, 627 (Ct. App. 2004). The determination of when a claim accrues is objective, rather than subjective.

As such, the question is not whether the particular plaintiff in this case actually knew he had a claim. Instead, [the question] is “whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist.”

Id. at 576, 593 S.E.2d at 627 (quoting Young v. S.C. Dept’ of Corr., 333 S.C. 714, 719, 511 S.E.2d 413, 416 (Ct. App. 1999)).

4. Plaintiff alleges that the “Articles of Termination” for Palmetto were filed by the South Carolina Secretary of State on April 23, 2018.

5. Section 33-44-206 governs the filing of “articles of organization or any other record authorized to be filed under [the LLC Act]” and provides:

SECTION 33-44-206. Filing in Office of Secretary of State

a) Articles of organization or any other record authorized to be filed under this chapter must be in a medium permitted by the Secretary of State and must be delivered to the office of the Secretary of State. Unless the Secretary of State determines that a record fails to comply as to form with the filing requirements of this chapter, and if all filing fees have been paid, the Secretary of State shall file the record and send a receipt for the record and the fees to the limited liability company or its representative.

b) Upon request and payment of a fee, the Secretary of State shall send to the requester a certified copy of the requested record.

c) Except as otherwise provided in subsection (d) and Section 33-44-207(c), a record accepted for filing by the Secretary of State is effective:

(1) at the time of filing on the date it is filed, as evidenced by the Secretary of State's date and time endorsement on the original record; or

(2) at the time specified in the record as its effective time on the date it is filed.

d) A record may specify a delayed effective time and date, and if it does so the record becomes effective at the time and date specified. If a delayed effective date but no time is specified, the record is effective at the close of business on that date. If a delayed effective date is later than the nineteenth day after the record is filed, the record is effective on the nineteenth day.

HISTORY: 1999 Act No. 343, Section 2

6. Plaintiff is the registered agent of Palmetto, and has been since September 12, 2008.

See Exhibit A. Thus, under § 33-44-206, South Carolina's Secretary of State would have sent Plaintiff "a receipt for the record and the fees" of Palmetto's "Articles of Termination" in or about April 2018.

7. In addition, the "Articles of Termination" for Palmetto have been publicly filed and readily accessible to the public, including via the South Carolina Secretary of State's website, since April 23, 2018. *See Id.*

8. As a matter of law, Plaintiff has been on inquiry notice – if not actual notice – of the alleged facts giving rise to his claims since, at latest, April 23, 2018. *See Berry v. McLeod*, 328 S.C. 435, 445, 492 S.E.2d 794, 799 (Ct. App. 1997), *cert. denied*, 1998 (holding that statute of limitations began to run "at the time of public disclosure by the filing of the true terms of the bond").

9. Plaintiff did not file this action until August 29, 2023 – more than five (5) years after the date that Plaintiff knew, or in the exercise of reasonable diligence ought to have known, that he had cognizable claims against Faulkenberry.

10. Even accepting the factual allegations of Plaintiff's complaint as true, Plaintiff's claims are barred by the statute of limitations. Faulkenberry is entitled to dismissal, pursuant to Rule 12(b)(6) S.C. R. Civ. P.

This motion will be based upon the pleadings of record, the appropriate statutory and case law, and the South Carolina Rules of Civil Procedure. Counsel certifies, pursuant to Rule 11 S.C. R. Civ. P., that he had no obligation to consult with opposing counsel prior to filing this motion.

September 26, 2023

s/W. Keith Martens
W. Keith Martens
HAMILTON MARTENS, LLC
P.O. Box 10940
Rock Hill, SC 29731
(803) 329-7672
ATTORNEYS FOR DEFENDANT

6. The Defendant has provided no Exhibits or submitted in their Motion how the Articles of Termination were filed, only that they were filed on or about April 2018, however, the Article of Termination indicates it was actually dissolved in 2015 by the Defendant.
7. As the party who filed the Articles of Termination, as well as a representative of the limited liability company, the Defendant chose the method of receiving the receipt and provided the information as to where the receipt would be sent.
8. Without receiving the receipt, the Plaintiff would have no notice that his Company was voluntarily dissolved as their Operating Agreement provides that the parties must have written consent to dissolve the Company.
9. Furthermore, the Operating Agreement, sets forth procedures upon dissolution that were never complied with, including the sale of the property and liquidation of the business, the handling of profits and losses, and the manner the proceeds would be distributed.
10. The Defendant unilaterally dissolved the Company, without the consent of the Plaintiff, failed to follow the requirements of the Operating Agreement for proper dissolution of the Company and took steps to ensure the Plaintiff would not know of her actions.
11. The issue of notice to the Plaintiff is the essential issue in this matter at this time. The Plaintiff should be afforded the opportunity to engage in discovery to determine in what form the notice was sent, where the notice was sent and to whom. Without this information, this Court cannot determine when the statute of limitations began to run.
12. The Defendant also argues inquiry notice. Inquiry (or constructive) notice is “notice imputed to a person whose knowledge of facts is sufficient to put him on inquiry; if these facts were pursued with due diligence, they would lead to other undisclosed facts...a person is presumed to have actual knowledge of the undisclosed facts”. Spence v. Spence 628 S.E.2d 869, 369 S.C. 106 (S.C. 2006) citing, Strother v. Lexington County Recreation Commn., 332 S.C. 54, 504 S.E.2d 117 (1998) . There are no facts that were presented to the Plaintiff that would have caused him to inquire into the status of the

Company. The Plaintiff had the protection of the Operating Agreement regarding the termination of the Company and believed that both parties were legally bound by the contents and requirements therein.

Based upon the arguments contained in this Memorandum and arguments to this Court, the Plaintiff respectfully requests that the Defendant's Motion to Dismiss be denied.

s/Stephen D. Schusterman
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PO Box 4211
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Telephone: 803-325-7788

November 14, 2023

STATE OF SOUTH CAROLINA)
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COUNTY OF YORK)
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Lester Van Epps, III)
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Plaintiff)
vs.)
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Dana Michelle Faulkenberry.)
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Defendant.)
)
_____)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

CASE NO: 2023-CP-46-02713
**PLAINTIFF'S AMENDED
MEMORANDUM
IN OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS**

The Plaintiff responds to Defendant's Motion to Dismiss as follows:

1. The Defendant argues that the Plaintiff's action is barred by the statute of limitations due to "inquiry notice – if not factual notice – of the alleged facts giving rise to his claim since, at the latest, April 23, 2018".
2. Pursuant to Section 33-44-206(a), upon receipt of a record, if properly filed, the Secretary of State shall file the record and send a receipt for the record and the fees to the limited liability company or its representative.
3. Section 33-44-206 does not state the manner in which a receipt for the record and the fees will be sent, only that it will be sent to the limited liability company or its representatives.
4. The statutory scheme does not require that the receipt be sent to the registered agent as stated by the Defendant in her motion; only that it is sent to a representative or the limited liability company.
5. Upon information and belief, the Plaintiff believes that the Articles of Termination were filed online by the Defendant, as that is the preferred way of filing with the Secretary of State.

6. The Defendant has provided no Exhibits or submitted in their Motion how the Articles of Termination were filed, only that they were filed on or about April 2018, however, the Article of Termination indicates it was actually dissolved in 2015 by the Defendant.
7. As the party who filed the Articles of Termination, as well as a representative of the limited liability company, the Defendant chose the method of receiving the receipt and provided the information as to where the receipt would be sent.
8. If a document is filed online with the Secretary of State, all documents are sent by email. (See Exhibit A) In this case, the Defendant filed the Articles of Termination and would have provided the email address to the Secretary of State.
9. Without receiving the receipt, the Plaintiff would have no notice that his Company was voluntarily dissolved as their Operating Agreement provides that the parties must have written consent to dissolve the Company.
10. Furthermore, the Operating Agreement, sets forth procedures upon dissolution that were never complied with, including the sale of the property and liquidation of the business, the handling of profits and losses, and the manner the proceeds would be distributed.
11. The Defendant unilaterally dissolved the Company, without the consent of the Plaintiff, failed to follow the requirements of the Operating Agreement for proper dissolution of the Company and took steps to ensure the Plaintiff would not know of her actions.
12. The issue of notice to the Plaintiff is the essential issue in this matter at this time. The Plaintiff should be afforded the opportunity to engage in discovery to determine in what form the notice was sent, where the notice was sent and to whom. Without this information, this Court cannot determine when the statute of limitations began to run.
13. The Defendant also argues inquiry notice. Inquiry (or constructive) notice is “notice imputed to a person whose knowledge of facts is sufficient to put him on inquiry; if these facts were pursued with due diligence, they would lead to other undisclosed facts...a person is presumed to have actual knowledge of the undisclosed facts”. Spence v. Spence 628 S.E.2d 869, 369 S.C. 106 (S.C. 2006) citing, Strother v.

Lexington County Recreation Commn., 332 S.C. 54, 504 S.E.2d 117 (1998) . There are no facts that were presented to the Plaintiff that would have caused him to inquire into the status of the Company. The Plaintiff had the protection of the Operating Agreement regarding the termination of the Company and believed that both parties were legally bound by the contents and requirements therein.

Based upon the arguments contained in this Memorandum and arguments to this Court, the Plaintiff respectfully requests that the Defendant's Motion to Dismiss be denied.

s/Stephen D. Schusterman
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Rock Hill, SC 29732
Telephone: 803-325-7788

November 15, 2023

11/15/23, 2:37 PM

SLF Mail - (no subject)

Steve Schusterman <sdslaw@schustermanlawfirm.com>

ELECTRONICALLY FILED - 2023 Nov 15 3:27 PM - YORK - COMMON PLEAS - CASE#2023CP4602713

(no subject)

1 message

Persephone Jones <pjones@sos.sc.gov>

Wed, Nov 15, 2023 at 11:39 AM

To: "sdslaw@schustermanlawfirm.com" <sdslaw@schustermanlawfirm.com>

Good morning,

If it is done online, documents are sent by email.

Miss Persephone Jones

Corporations Division

South Carolina Secretary of State's Office

1205 Pendleton Street, Suite 525

Columbia, SC 29201

(803)734-0389 (Direct Line)

(803)734-2158 (Corp Division)

pjones@sos.sc.gov

<https://www.sos.sc.gov>

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Stephen Schusterman

11/15/23, 2:37 PM

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sdslaw@schustermanlawfirm.com

Message

Does the Secretary of State's Office still send out copies of documents that are filed online through the mail or just to the filier's email address?

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Rock Hill

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STATE OF SOUTH CAROLINA

-----x
LESTER VAN EPPS, III,

Plaintiff,

Case No.

-against-

2023-CP-46-02713

DANA MICHELLE FAULKENBERRY,

Defendant.
-----x

November 16, 2023

York, S.C.

B E F O R E:

HONORABLE DANIEL D. HALL

A P P E A R A N C E S:

STEPHEN SCHUSTERMAN,

Attorney for the Plaintiff

KEITH ARTENS,

Attorney for the Defendant

Aileen Butler

Official Court Reporter

1 The next matter is 2023CP462713, Lester Van
2 Epps III versus Dana Faulkenberry. Representing
3 the plaintiff is Mr. Stephen Schusterman.
4 Representing the defendant is Mr. Keith Martens.

5 This appears to be a motion to dismiss
6 brought on behalf of the defendant, Dana
7 Faulkenberry and so Mr. Martens I will hear from
8 you.

9 MR. MARTENS: Thank you, Your Honor. May it
10 please the Court. Keith Martens on behalf of the
11 defendant.

12 Your Honor, this is a Rule 12(b)(6) motion to
13 dismiss. As the Court well knows 12(b)(6) motion
14 can be granted where accepting all facts that
15 have been alleged in the complaint is true, the
16 plaintiff has failed to alleged a cognizable
17 claim under South Carolina Law. The Court's have
18 held that one's grounds for granting a 12(b)(6)
19 motion is where the complaint on its face shows
20 that the plaintiff's claims are barred by the
21 applicable statute of limitations. We believe
22 that's the case here.

23 The plaintiff's allegations in this complaint
24 are that the plaintiff and the defendant were
25 once husband and wife and they were also members

1 of South Carolina limited liability company
2 called Palmetto Contracting Services of York
3 County, LLC. They alleged the LLC was governed
4 by a written operating agreement that required
5 the consent of all members to dissolve the
6 company. They allege that my client dissolved
7 the company on January 15, 2015 without first
8 obtaining the plaintiff's consent. They allege
9 on April 23, 2018 the South Carolina Secretary of
10 State filed those articles of termination in the
11 public record. They allege that the plaintiff
12 has continued to operate as if the LLC was
13 enforce but he recently discovered that the
14 company was dissolved several years ago.

15 Based on those factual allegations they
16 brought three causes of action; breach of
17 contract claim, a breach of the duty of care and
18 loyalty by the member of an LLC and then there is
19 a claim for treble damages which we assume is
20 essentially an unfair trade practice claim. Each
21 of those causes of action is governed by a three
22 year statute of limitations. In other words, the
23 lawsuit must be filed within three years of the
24 date the plaintiff knew or reasonably should have
25 known that a violation of his rights had

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occurred. That standard, Your Honor, is objective. Not subjective. Our Court's have held, the question is not whether the particular plaintiff knew -- he actually knew he had a claim. Instead the question is whether the circumstances of the case would have put a person of common knowledge and experience of some right of his had been evaded or some claim against another party might exist.

Now we know based on the allegations of the plaintiff's complaint that the articles of termination were filed by the South Carolina Secretary of State on April 23, 2018. This lawsuit was brought on September -- I'm sorry -- lawsuit was brought on August 29, 2023. Over five years after the articles of termination were in the public record filed with the Secretary of State.

We have two arguments. The first is this. We believe that the filing of the articles was actual notice. We've have cited in our motion the statute that deals with filing of corporate records by the South Carolina Secretary of State and the statute clearly provides that when the Secretary of State files records they send a

1 receipt of the filing. A receipt for the record
2 and the fees to the LLC or to its representative.
3 The corporate records, the LLC records reflect
4 that the registered agent for this company is
5 Lester Van Epps III. So we believe based on the
6 allegations of the complaint, based upon this
7 statute Mr. Epps would have received a notice of
8 this filing in April of 2018.

9 Now, they've argued it could have gone to my
10 client as opposed to Mr. Epps and therefore we
11 haven't proven or haven't established that there
12 was actual notice of the filing provided to Mr.
13 Epps. We don't think that matters. The filing
14 is constructive notice. I've cited in my motion
15 a case called Berry versus McLeod which is a
16 Court of Appeals decision from 1998, 328 S.C.
17 435, 492 S.E. 2d 794. That is a case where
18 residents of a particular town filed a lawsuit
19 against their former town's general counsel and
20 bond counsel based upon issuance of bonds that
21 had occurred five years or so before they filed
22 the lawsuit. Their allegation was that the bond
23 counsel and the in-house counsel conspired with a
24 local contractor to profit his business at the
25 expense of tax payers. The defendants in that

1 case moved to dismiss. One of the arguments they
2 made was their claims are barred by the statute
3 of limitations and there were two statute of
4 limitations at issue in that case. One was a
5 twenty-day statute of limitations to contest the
6 issuance of a bond and the other was the general
7 three-year statute of limitations that governs
8 the same claims that the plaintiffs have brought
9 here. So three year limitation period.

10 Trial court found claims were barred under
11 the statute of limitations and they said, at
12 latest, the statute began to run when notice of
13 the bonds were filed in the public record because
14 that put the plaintiffs on notice that these
15 bonds had been filed and if there was a problem
16 with the bonds they were on inquiry notice to
17 find out what was going on and whether they had a
18 claim related to that. We believe that is
19 equally applicable here.

20 The South Carolina Secretary of State is the
21 repository for records that deal with the life of
22 a LLC. When LLCs are formed they're filed with
23 the Secretary of State. When registered agents
24 are changed it is filed with the Secretary of
25 State. When a company is dissolved it's filed

1 with the Secretary of State. That is where you
2 go to look to see what has happened in the life
3 of a LLC. From April 23, 2018 until today the
4 record of the South Carolina Secretary of State
5 reflect that this company has been dissolved. So
6 we believe even if he didn't get actual notice of
7 the receipt of filing, he is on constructive
8 notice from the date that it was filed in the
9 public record.

10 This action was filed over five years after
11 the articles of dissolution were filed in the
12 public record and we believe the claim is time
13 barred.

14 THE COURT: Thank you Mr. Martens. Mr.
15 Schusterman, I'll be glad to hear from you.

16 MR. SCHUSTERMAN: Thank you, Your Honor. May
17 it please the Court. Let me say that I think
18 that Mr. Martens's presentation he makes a number
19 of assumptions that while if true he may have a
20 very good argument, but there's no proof that it
21 is true. We have a situation here, Your Honor,
22 where the -- the -- Dana Michelle Faulkenberry is
23 the former Dana Michelle Van Epps. There is an
24 operating agreement of this corporation. These
25 parties are divorced and estranged. The

1 operating agreement provides very clearly what it
2 takes to dissolve the corporation. It is not
3 merely the whim of one of the partners, but it
4 requires consent of the other partners. There
5 are procedures for -- upon that happening.
6 Determining assets, liabilities, division. So my
7 client never had reason to believe what
8 essentially Mr. Martens is arguing is that the
9 inappropriate hand of Michelle Faulkenberry
10 dissolving this company because she clearly did
11 it in violation of the procedures laid out in the
12 operating agreement, the mere fact that it was
13 done in violation of the agreement and my client
14 didn't pick up on that should be reason that I am
15 time barred.

16 My client found out about this this year
17 somewhat arbitrarily in a family court hearing
18 when the issue came about and he at that point
19 inquired about it.

20 Your Honor, the assumption that Mr. Martens
21 makes that my client would be on notice. My
22 client would not have any reason to go to the
23 Secretary of the State to check on the status of
24 the corporation because his protection was the
25 operating agreement and what would be needed to

1 do this. I think that her devious hand saying
2 that she terminated the corporation in '15, in
3 2015. Didn't file the paperwork until 2018. I
4 think also what's incredibly important for the
5 Court to consider that is once again might appear
6 to the Court to be logical statement, but I don't
7 think it's supported by any facts or -- and I
8 don't believe it's true, but I don't think that
9 Mr. Martens can show any facts and that is in
10 paragraph six of his motion on page three. Where
11 in paragraph six he says that plaintiff is the
12 registered agent of Palmetto and has been since
13 September the 12th, 2008. Thus, under 33-44-206
14 South Carolina Secretary of State would have sent
15 plaintiff a receipt for the record and the fees
16 of Palmetto articles of termination on or about
17 April 2018. It sounds logical, but that's not a
18 correct statement. The Secretary of State does
19 not and there's no evidence that they do that.
20 That they send it to the registered agent. If
21 fact when one speaks -- when one will see the
22 exhibit that I have provided to the Court the
23 Secretary of State sends the receipt for the
24 articles of termination to the same e-mail
25 designated by the person who filed the articles

1 of termination. So, if I file the articles of
2 termination and I ask to send it to my email
3 that's where the receipt is going. The law
4 doesn't require it to be sent to the registered
5 agent and in this case it wasn't sent to the
6 register agent. My client had no knowledge of it
7 and this concept of inquiry notice might have
8 some logic to it if there wasn't an underlying
9 operating agreement. Under Mr. Martens's theory
10 it would be my client's obligation on a daily,
11 weekly, monthly, yearly concept to constantly go
12 to make sure that his wife or a business partner
13 didn't violate the agreement and let us just call
14 the Secretary of State to make sure it didn't
15 happen yesterday. It leads to an absurd result.
16 There is nothing that they can show that my
17 client knew, should have known. I don't
18 understand. I respect the argument. I just
19 think in order to have any validity there are
20 leaps of logical faith that they're asking the
21 Court to take that in this case neither logical
22 nor backed by any facts that Mr. Martens can
23 present and as such I submit to you that Mr. Epps
24 should not be time barred by this and Miss Epps
25 -- Faukenberry should not be rewarded for

1 violating an operating agreement and getting away
2 with it for three -- more than three years and
3 one day.

4 Thank you, sir.

5 THE COURT: Thank you. I will take under
6 consideration what has been filed and the
7 arguments. I'll issue my ruling by the end of
8 next week.

9 MR. SCHUSTERMAN: Thank you.

10 (END OF TRANSCRIPT).

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C E R T I F I C A T E

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3 I, the undersigned Aileen Butler, Official Court
4 Reporter for the 16th Judicial Circuit of the State of
5 South Carolina, do hereby certify that the foregoing is
6 a true, accurate, and complete transcript of record of
7 all the proceedings in the captioned case, in the
8 Circuit Court for York County, South Carolina, on the
9 16th day of November, 2023.

10 I do further certify that I am neither of kin, counsel,
11 nor interest to any party hereto.

12 December 28, 2023

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14 *Aileen Butler*
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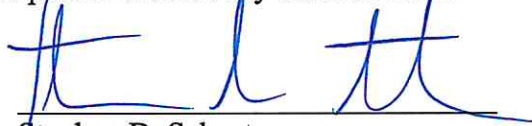
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SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



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March 14, 2024