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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas
The Honorable Daniel D. Hall
Circuit Court Judge

Appellate Case No.: 2023-001959
Case No.: 2023-CP-46-02713

Lester Van Epps, III.....Appellant,

v.

Dana Michelle Faulkenberry,..... Respondent.

FINAL BRIEF OF RESPONDENT

March 22, 2024

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[1] In his complaint, Van Epps describes the Secretary of State's April 23, 2018 filing as the "official" termination of his LLC's existence. Complaint ¶ 11.

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial court properly dismiss an action for wrongful dissolution of an LLC, where the allegations of the complaint established that plaintiff's claims were time-barred because the plaintiff filed suit more than five years after the date that the South Carolina Secretary of State filed articles of termination for the LLC?

II. On appeal from an order of dismissal pursuant to Rule 12(b)(6), should this court refuse to consider arguments and issues that were not actually decided by the trial court, when the appellant made no attempt to seek reconsideration of those arguments and issues before filing this appeal?

STATEMENT OF THE CASE

Appellant, Lester Van Epps, III ("Van Epps") filed this action on August 29, 2023, alleging that his former business partner, Dana Faulkenberry ("Faulkenberry"),[1] surreptitiously dissolved an LLC that the two had formed in 2005. R. pp. 8-9, ¶¶ 4-14. According to Van Epps' complaint, Faulkenberry sent Articles of Termination ("Articles") to the South Carolina Secretary of State on January 15, 2015, without Van Epps' knowledge or consent and in breach of the LLC's operating agreement. Id. ¶¶ 11-12. Those Articles were then "officially" filed by the Secretary of State on April 23, 2018. Id. ¶ 9. Van Epps alleged that he only "recently discovered" the existence of the filed Articles, prompting him to file suit. Id. ¶ 15. Van Epps' asserted causes of action for breach of contract, breach of the duties of loyalty and care, and (presumably) a claim under the UTPA.[2] Id. ¶¶ 16-20, 25-30, 31-37.

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[1] In his appellate brief, Van Epps recites great detail concerning the parties' purported "tumultuous relationship over the years," including that Van Epps and Faulkenberry were married when they formed the LLC. Appellant's Initial Brief at 7. Though it is true that Van Epps and Faulkenberry were once married, that fact was not alleged in Van Epps' complaint. Nor is that fact relevant to the issues on appeal.

[2] Van Epps' third cause of action seeks treble damages and attorney's fees, but does not appear to state a cognizable UTPA claim. *See* R. p. 11, ¶¶ 31-37.

Rather than answer Van Epps' complaint, Faulkenberry filed a motion to dismiss pursuant to Rule 12(b)(6). R. p. 13. Faulkenberry argued the allegations of Van Epps' complaint, accepted as true, established that each of his claims was barred by the statute of limitations set forth in S.C. Code § 15-3-530. Id.

Van Epps filed a memorandum in opposition to Faulkenberry's motion, which largely focused on a single issue – whether or not the Secretary of State sent Van Epps, the LLC's registered agent, "a receipt for the record and the fees" of filing the Articles in April 2018. *See* R. p. 20. Van Epps attached to his memorandum an apparent email exchange between Van Epps' attorney and "Miss Persephone Jones" who, presumably, was employed in the Secretary of State's Corporation's Division.[3] In that email exchange, Van Epps' counsel asked, and Miss Jones answered, a single question: "Does the Secretary of State's Office still send out copies of documents that are filed online through the mail or just to the filer's email address?"

The parties appeared before the trial court on November 16, 2023 to argue Faulkenberry's motion to dismiss. On November 22, 2023, the trial court issued a written order, granting the motion and dismissing Van Epps' complaint. *See* R. p. 1. (hereafter, "Order"). In its Order, the trial court found and concluded that each of Van Epps' claims was barred by S.C. Code § 15-3-530 because Van Epps did not file suit within three years following the Secretary of State's "public disclosure" of the LLC's dissolution. R. pp. 3-4 (citing Berry v. McLeod, 328 S.C. 435, 445, 492 S.E.2d 794, 800 (Ct. App. 1997)). The trial court based its Order solely upon the factual allegations of Van Epps' complaint, which the court "accepted as true." Id. at 3. The trial court did not

[3] Van Epps made no attempt to establish Ms. Jones' competency as a witness or to authenticate the email exchange. *See* Rules 601 and 602 S.C. R. Evid. (Competency); Rule 901 S.C. R. Evid. (Requirement of Authentication or Identification). Furthermore, the content of the email was inadmissible hearsay. *See* Rules 801 and 802 S.C. R. Evid.

address – one way or the other – Faulkenberry's argument that Van Epps would have received actual notice of the LLC's dissolution from the Secretary of State in April 2018. Nor did the trial court discuss the email exchange between Van Epps' Counsel and "Miss Persephone Jones," or consider the admissibility or relevance, if any, of that email exchange.

Van Epps did not move for reconsideration of the trial court's order. He filed this appeal on December 20, 2023. Notice of Intent to Appeal, filed 12/20/2023.

STANDARD OF REVIEW

"'On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court.'" Santos v. Harris Inv. Holdings, LLC, 439 S.C. 214, 218, 886 S.E.2d 483, 485 (Ct. App. 2023)(quoting Rydde v. Morris, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009)). A motion to dismiss under Rule 12(b)(6) challenges the sufficiency of a plaintiff's complaint, and may be granted only "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). Ordinarily, an affirmative defense like the statute of limitations may not be raised by Rule 12(b)(6) motion. However, "in the relatively rare circumstances where facts sufficient to rule on [the] affirmative defense are alleged in the complaint, the defense may be reached by a motion to dismiss filed under Rule 12(b)(6)." Goodman v. Praxair, Inc., 494 S.E.2d 458, 464 (4th Cir. 2007); *see also* Crocker v. Barr, 295 S.C. 195, 197, 367 S.E.2d 471, 472 (Ct. App. 1988), *overruled on other grounds*, 305 S.C. 406, 409 S.E.2d 368 (1991)("A defendant cannot assert an affirmative defense on a Rule 12(b)(6) motion *unless the allegations of the complaint demonstrate the existence of the affirmative defense.*")(italics added); 24 S.C. JURIS., RULES OF CIVIL PROCEDURE § 12.2 ("A Rule 12(b)(6) motion may be used to raise an affirmative defense if the complaint contains facts supporting the affirmative defense.").

ARGUMENT

The trial court properly dismissed Van Epps' complaint pursuant to Rule 12(b)(6) S.C.R. Civ. P., because the factual allegations of the complaint – accepted as true - established that each cause of action was barred by the statute of limitations. In granting the motion to dismiss, the trial court reenforced two well-established legal principles:

> 1. Statutes of limitations are not "simply technicalities," but important procedural devices that "stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs;"[4] and
>
> 2. Litigants cannot circumvent statutes of limitations through self-proclaimed ignorance of readily discoverable facts that "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."

Martin v. Companion Healthcare, 357 S.C. 570, 575, 593 S.E.2d 624, 627 (Ct. App. 2004).

For each of those reasons, and for the additional reasons set forth below, the trial court's order of dismissal should be affirmed.

I. The trial court properly dismissed Van Epps' complaint for "wrongful dissolution" of an LLC, because the well-pleaded allegations of the complaint established that Van Epps filed suit more than five years after the South Carolina Secretary of State "officially[5] filed" the LLC's Articles of Termination as a public record.

The principal question before this court is whether a plaintiff may avoid the statute of limitations by alleging that he only "recently discovered" the existence of information that, by the plaintiff's own admission, had long existed in the public domain as an "official" record of the

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[4] Moates v. Bobb, 322 S.C. 172, 174, 470 S.E.2d 402, 404 (Ct. App. 1996).

[5] In his complaint, Van Epps describes the Secretary of State's April 23, 2018 filing as the "official" termination of his LLC's existence. R. p. 9 ¶ 11.

South Carolina Secretary of State. *See* R. p. 9 ¶ 9. The trial court properly held that a plaintiff could not circumvent the statute of limitations through self-proclaimed, and self-serving, inattention to matters contained within a publicly-filed, official record.

Van Epps' principal argument – first in the trial court and, now, on appeal – is that his claims for wrongful dissolution did not accrue until he "recently discovered" that Articles of Termination for his LLC had been filed by the Secretary of State. According to Van Epps, the fact that those records existed in the Secretary's official filings for more than five years before Van Epps "discovered" them is of no consequence. As Van Epps' argument goes – as long as he chose not to pay attention to the public record, he could claim no knowledge of the filing; as long as he could claim no knowledge of the filing, the statute of limitations never began to run on his claims. For at least two reasons, Van Epps' argument is fundamentally flawed.

First, as the trial court recognized, the determination of "when a claim accrues for purpose of the statute of limitations is objective, rather than subjective." R. p. 3 (citing Martin v. Companion Healthcare, 357 S.C. 570, 575, 593 S.E.2d 624, 627 (Ct. App. 2004)).

> 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."

Martin at 576, 593 S.E.2d at 627 (quoting Young v. S.C. Dep't. of Corr., 333 S.C. 714, 719, 511 S.E.2d 413, 416 (Ct. App. 1999)). Therefore, Van Epps' actual knowledge (or lack thereof) is not determinative. Instead, as the trial court recognized, the relevant inquiry is whether the Secretary of State's "official" filing of the LLC's Articles would have "put [an LLC member] of common knowledge and experience on notice that some right of his had been invaded." R. pp. 3-4 n.2. Martin v. Companion Healthcare, 357 S.C. 570, 575, 593 S.E.2d 624, 627 (Ct. App. 2004)(italics added). Van Epps could not rely upon his individual (subjective) ignorance of a fact that he

objectively could have, and would have, known simply by paying a modicum of attention to the public filings of his company.

The second flaw in Van Epps' argument is that he fails to recognize the legal import of the Secretary of State's official filings. The filed Articles were not some "secret" business record, buried in a vault awaiting discovery. They were "public records, open to the inspection of the public. . . ." Sternberger v. McSween, 14 S.C. 35, 39 (1880). "An individual on inquiry or constructive notice is held to be on notice of documents filed in conformity with applicable statutory law, which an inquiry would have revealed." Berry, 328 S.C. at 445, 492 S.E.2d at 799 (citing Fuller-Ahrens v. South Carolina Dept. of Highways and Pub. Transp., 311 S.C. 177, 427 S.E.2d 920 (Ct. App. 1993)). Van Epps could not ignore the "official" public record concerning his *own* LLC for five-plus years and then rely upon that self-proclaimed ignorance to evade the statute of limitations. *See* Moates v. Bobb, 322 S.C. 172, 175, 470 S.E.2d 402, 403 ("One purpose of a statute of limitations is 'to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his rights.'" (internal citations omitted). Had Van Epps exercised even slight diligence, he would have long ago known what he now claims to have only "recently discovered"- that his LLC "officially" ceased to exist in April 2018.

As the trial court recognized, the temporal posture of this case is similar to Berry v. McLeod, 328 S.C. 435, 492 S.E.2d 794 (Ct. App. 1997). *See* R. pp. 3-4. In Berry, a group of Aiken County residents ("Residents") filed suit in July 1995, alleging that their former town attorney and others (together "Attorneys") committed malpractice "in [the Attorneys'] handling of a . . . revenue bond issued to fund construction of a sewer system." Id. at 440, 492 S.E.2d at 797. The revenue bond upon which Residents' claims were based had been filed by the Aiken County Clerk of Court over five years before Residents filed suit - on June 28, 1990.

Attorneys moved to dismiss pursuant to Rule 12(b)(6), asserting (among other arguments) that Residents' claims were facially time-barred because Residents did not file suit within three years following "public disclosure" (i.e. – filing) of the bond. The trial court granted Attorneys' motion, and dismissed. The Court of Appeals affirmed, reasoning:

> The trial judge determined the statute of limitations began to run, at the latest, when the bond documents were publicly filed with the clerk of court in Aiken County on June 28, 1990. He concluded Residents had inquiry or constructive notice at the time of public disclosure by the filing of the true terms of the bond and any possible cause of action began to run at that time. Accordingly, he concluded the three-year statute of limitations expired before Residents filed suit in July 1995. **We agree**.

Berry, 328 S.C. at 445, 492 S.E.2d at 800 (emphasis added).

As in Berry, Van Epps' causes of action for "wrongful dissolution" of his LLC began to run when the South Carolina Secretary of State filed the LLC's Articles of Termination on April 23, 2018. On that date, the Secretary of State provided "public disclosure" of the LLC's dissolution and placed Van Epps on "inquiry or constructive notice" of his potential claims against Faulkenberry. Id. Because Van Epps did not file suit within the applicable limitations period after "public disclosure" of the LLC's dissolution, his claims are time-barred. The trial court properly dismissed.

II. The court should disregard Van Epps' remaining arguments, because those arguments were not properly preserved.

Van Epps devotes a significant portion of his appellate brief toward countering an argument that Faulkenberry made in her motion to dismiss - that, as registered agent of the LLC, Van Epps would have received actual notice of the LLC's dissolution in April 2018. *See* R. p. 15, ¶ 6. Interestingly, though, the trial court did not actually rule upon that argument – one way or the other – when it dismissed Van Epps' complaint. *See* R. p. 1. If Van Epps believed that the trial court failed to fully consider his argument on that issue, then he should have moved for reconsideration.

I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)("If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend in order to preserve the issue for appellate review."). Van Epps did not move for reconsideration and, thereby, failed to preserve the argument for appeal.

Van Epps also attempts to distinguish his case from Berry by arguing that the trial court "failed to consider whether the actions [of Faulkenberry] tolled the statute" of limitations on Van Epps' claims. Appellant's Initial Brief at 9. However, Van Epps never *asked* the trial court to consider whether equitable tolling might apply in this case. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must be raised to and ruled upon by the trial judge to be preserved for appellate review." Miller v. Dillon, 432 S.C. 197, 207, 851 S.E.2d 462, 467 (Ct. App. 2020)(quoting Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)). Van Epps "equitable tolling" argument was never raised in the trial court, and it is not properly before this court.

CONCLUSION

The trial court properly dismissed Van Epps' complaint for "wrongful dissolution" of an LLC, pursuant to Rule 12(b)(6). The factual allegations of Van Epps' complaint established that Van Epps waited more than five years after the South Carolina Secretary of State filed Articles of Termination for the LLC to file suit. The trial court properly held and concluded that Van Epps' self-induced inattention regarding a matter of public record – an "official" filing of the Secretary of State concerning *his* LLC - did not enable him to circumvent the statute of limitations. Van Epps's remaining appellate arguments have no merit and, in any event, they were not properly preserved for appeal. This court should refuse to consider those arguments. The trial court's order of dismissal should be affirmed.

March 22, 2024.

Respectfully Submitted,

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Respondent complies with Rule 211(b), SCACR.

This the 27th day of March, 2024.

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