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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY

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 APPELLANT

Stephen D. Schusterman
SCHUSTERMAN LAW FIRM, PA
Post Office Box 4211
Rock Hill, South Carolina 29732
(803) 325-7788
Email: sdslaw@comporium.net
Attorney for Appellant

OTHER PARTIES OF RECORD
W. Keith Martens
Hamilton Martens, LLC
Post Office Box 10940
Rock Hill, SC 29731
(803)329-7672
Keith.martens@hamiltonmartens.com
Attorneys for Respondent

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STATEMENT OF THE CASE

The Appellant filed a Summons and Complaint on August 29, 2023 alleging breach of contract and breach of duty of care and loyalty by the member of an LLC as a result of the Respondent terminating the limited liability company of the parties without his knowledge. The Respondent filed a Motion to Dismiss, under Rule 12(b)(6), SCRCP on September 26, 2023 alleging the Appellant's claims are barred by the three-year statute of limitations.

A motion hearing was held on November 16, 2023, before the Honorable Daniel D. Hall. The Respondent's Motion to Dismiss was granted and this matter was dismissed. This appeal is based upon the granting of Respondent's Motion to Dismiss.

STANDARD OF REVIEW

Under Rule 12(b)(6), a defendant may move to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action. If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper. Brazell v. Windsor, 682 S.E.2d 824, 384 S.C. 512 (S.C. 2009), citing, Gentry v. Yonce, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999). In deciding whether the trial court properly granted the motion to dismiss, the appellate court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. Id.

ARGUMENT

THE TRIAL COURT ERRED IN GRANTING THE RESPONDENT'S MOTION TO DISMISS PURSUANT TO RULE 12(B)(6), SCRCP.

The Appellant and Respondent are divorced and have had a tumultuous relationship over the years. Prior to their separation, the parties properly organized, in the State of South Carolina, Palmetto Contracting Services of York County, LLC (hereinafter "Palmetto") on January 14, 2005. On or about January 14, 2005, the Appellant and the Respondent were the Members of Palmetto. The parties entered into an Operating Agreement (hereinafter "Agreement") which set forth the rights, responsibilities, obligations and among other things procedures in the event of dissolution. Specifically, Section 7 of the Agreement set forth the procedures that must be followed in the event of a dissolution of Palmetto. (R. p. 8, 9, 10) Pursuant to the Agreement, a voluntary election to dissolve Palmetto needed to be done with the consent of all the Members. (R. p. 8, 9) Additionally, Section 7.2 of the Agreement established certain procedures were to be taken upon dissolution of Palmetto, including, but not limited to, the sale of the property and liquidation of the business, the handling of profits and losses and the way any proceeds would be distributed. (R. p. 9). The Appellant has been continuously operating Palmetto since 2005.

In 2023, the Appellant and the Respondent were engaged in a family court hearing in the State of North Carolina. (R. p. 32, ll. 16-19) It was during this hearing that a comment was made by the Respondent that Palmetto had been dissolved, and because of her comment, he began inquiring about the status of Palmetto. (R. p. 32, ll. 16-19). During his inquiry, he became aware that the Respondent terminated Palmetto on January 15, 2015 and officially on April 23, 2018. The Appellant did not consent to this termination. The Appellant was not contacted about the procedures for the dissolution of Palmetto as required by Section 7.2. In fact, not only did the

Appellant not have notice of the dissolution, but he also did not even have knowledge.

Respondent argues that since the Appellant was the "registered agent of Palmetto and has been since September 12, 2008. *See* Exhibit A", and that pursuant to §33-44-206, the "South Carolina Secretary of State would have sent Appellant 'a receipt for the records and fees' of Palmetto's 'Articles of Termination' in or about April 2018". (R. p. 14 p. 28, ll. 19-25, p. 29, ll. 1-8). Section 33-44-206, S.C. Ann. does not state that the receipt for the records or fees from the filing goes to the registered agent; rather it states "to the limited liability company or its representative". Additionally, §33-44-206(b), specifically states that "the Secretary of State shall send to the requester a certified copy of the requested record". In this case, the requester was the Respondent. She is a representative of Palmetto, and she chose the method of receiving the receipt and provided the information as to where the receipt would be sent. The Respondent's actions essentially prevented the Appellant from receiving actual notice and furthermore gave him no reason to be on constructive notice as the Agreement provided that the Company could only be terminated by consent and provided procedures for dissolution. (R. p. 32, ll. 1-15). Additionally, the Secretary of State confirmed that if a document request is made In Respondent's argument to the court, she refers to §33-44-206 and indicates that the "corporate records, the LLC records reflect that the registered agent of this company is Lester Van Epps III. So we believe based upon this statute Mr. Epps would have received a notice of this filing in April of 2018" (R. p. 29 ll. 1-8). This is an incorrect statement and does not accurately reflect the language of the statute or the practice of the Secretary of State. The Secretary of State confirmed that if a document request is made online, which it was in this case, the documents will be sent to the requester by email. (R. p. 23-24). This further solidifies the fact that the Appellant did not receive any notice of the filing and thus did not have actual notice.

The Respondent also argues in his motion that actual notice is irrelevant because the Appellant had constructive notice. (R. p. 29, ll. 9-14). The Respondent relies on the case of Berry v. McLeod, 328 S.C. 435, 492. S.E.2d 794 (S.C.App. 1997), *cert. denied,* 1998, holding that a statute of limitations begin to run

"at the time of public disclosure by the true terms of the bond" in support of this contention. However, in Berry, the Court specifically stated "that the argument that the allegations of fraud or collusion toll the short contestability period" was not addressed because it was not raised at the trial level. Id. at 444. Therefore, even though the Court held when the statute began to run, the issue of fraud or collusion tolling the statute was not considered. In the case before this Court, the Respondent acted with an inappropriate hand, violated the Agreement, and had the filing sent to her. (R. p. 32, ll. 1-15). The trial court, in relying upon Berry, failed to consider whether the actions of the Respondent tolled the statute. The Appellant submits to this Court that such action, at the hand of the Respondent, would toll the applicable statute of limitations. The Berry Court also discussed the applicability of a three year statute of limitations for legal malpractice action which stated that an action under the statute must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known he had a cause of action. Id. at 445. "Reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his had been invaded or that some claim against another party might exist." Id. "The discovery rule focuses on whether the complaining party acquired knowledge of any existing facts 'sufficient to put said party on inquiry, which, if developed will disclose alleged fraud.'." Id. A "statute starts to run upon discovery of 'such facts, as would have led to the knowledge thereof, if pursued with reasonable

diligence'." Barr v. City of Rock Hill, 360 S.C. 640, 644, 645, 500 S.E.2d 157 (S.C.App. 1998).

Soon after the comment was made by the Respondent, the Appellant began investigating her comment to determine the status of the Company. It was at that time, based upon his due diligence, that he discovered the fact that the Company had been dissolved by the Respondent and the procedures set forth in the Agreement were not followed. If we were to take the Respondent's argument to its logical conclusion, we would be asking every joint owner of a company, regardless of whether they have an operating agreement to protect them, they must, each day, look at the filings at the Secretary of State to ensure that no owner/member has dissolved the company behind their backs. This expectation is not reasonable and would encourage deceptive practices among owners/members. The Appellant did not have any notice that he may have a claim against Respondent for the improper dissolution of the Company.

CONCLUSION

Based upon the aforementioned arguments, Appellants submit to this Court that the trial court erred in granting the motion to dismiss due to the action being barred by the statute of limitations because there is a genuine issue of a material fact regarding the Respondent's conduct regarding the dissolution and Appellant notice which would start the running of the applicable statute.

Respectfully submitted,

Stephen D. Schusterman
SCHUSTERMAN LAW FIRM, PA
Attorney for Respondent
PO Box 4211
Rock Hill, SC 29732
Telephone: 803-325-7788

April 2, 2024

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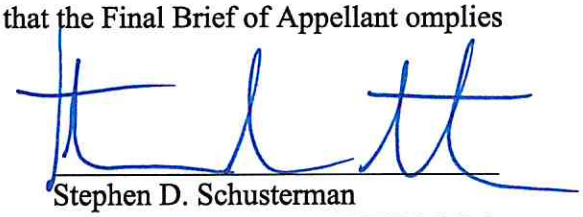
CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Appellant omplies with Rule 211 (B), SCACR.

This 2nd day of April, 2024



Stephen D. Schusterman
SCHUSTERMAN LAW FIRM, PA
Post Office Box 4211
Rock Hill, South Carolina 29732
Telephone: (803) 325-7788
Email: sdslaw@comporium.net
Attorney for Appellant

W. Keith Martens
Hamilton Martens, LLC
PO Box 10940
Rock Hill, SC 29731
Telephone: 803-329-7672