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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
The Honorable Alex Kinlaw Jr., Circuit Court Judge

Appellate Case No: 2024-000245

ANGELEE MEDVE..... Respondent,

v.

MICHAEL'S WHOLESALE FLOORING ..... Appellant.

REPLY BRIEF OF APPELLANT

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Columbia, SC
June 24, 2024

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ARGUMENT

I. This Matter was Dismissed in 2021 and all motions to revive are outside the statute of limitations.

> "[The S.C. Court of Appeals] has held that trial judges possess the inherent power to dismiss actions *sua sponte* for a party's failure to prosecute the relevant claims. *See*, e.g., *Small v. Mungo*, 254 S.C. 438, 442, 175 S.E.2d 802, 803 (1970) (noting that "it is within the inherent power of the court to dismiss an action for failure to prosecute."); see also 24 Am.Jur.2d Dismissal, Discontinuance, and Nonsuit 48 (1983) ("Provision is made in federal and state statutes or rules of practice for dismissal of civil actions for failure of prosecution by the plaintiff. However, the power of trial courts to dismiss a case for failure to prosecute with due diligence is generally considered inherent and independent of any statute or rule of court. Such power is deemed to be necessarily vested in trial courts to manage their own affairs so as to achieve orderly and expeditious disposition of cases.")[.]"
>
> *Crestwood Golf Club, Inc. v. Potter,* 328 S.C. 201, 493 S.E.2d 826 (1997).

"A review of the South Carolina precedent addressing dismissal for failure to prosecute demonstrates a trial judge is vested with the discretion to dismiss a case without prejudice when a plaintiff fails to appear to prosecute her case." *McComas v. Ross*, 626 S.E.2d 902, 907, 368 S.C. 59 (S.C. App. 2006). The Magistrate closed this case on March 10, 2021. Civil Answer, 2 (Sept. 29, 2023) (R. p. 12).

At the closing of the case, Respondent had one year from closing to file a motion under SCRCP Rule 60(b)(1) to open the case, or three years from the original statute of limitations to file a new case. S.C. Code Ann. § 15-3-300. As the case was originally filed in 2018, the statute of limitations expired sometime in 2021. The one year time to file a motion expired in 2022. Respondent was outside of both time limits when she attempted to reopen the case in 2023. If a case is not filed within the statute

of limitations, it may not be commenced. S.C. Code Ann. § 15-3-20 ("Civil actions may only be commenced within the periods prescribed in this title after the cause of action has accrued.").

Because this case was dismissed in 2021, and the statute of limitations expired before Respondent did refile, the claims are barred by statute. The appeal should be granted and the Circuit Court's order granting a new hearing vacated.

II. The bare statements of counsel are not evidence.

In *Chambers v. Anderson County Dept. of Social Services*, 311 S.E.2d 746, 280 S.C. 209 (S.C. App. 1984), this Court upheld a refusal for a continuance observing that "in this case there was no offer of proof of the facts alleged. The record reflects only the bare statement of counsel." *Id.* 280 S.C. at 212. "No expert testimony or other evidence was offered in support of this statement." *Id. citing Cf. Purex Corporation v. Walker*, 278 S.C. 388, 296 S.E.2d 868 (1982); *Edens v. Cole*, 261 S.C. 556, 201 S.E.2d 382 (1973) *Lerner v. Bluestein*, 175 S.C. 59, 178 S.E. 265 (1935).

The instant case is the same. Counsel has offered no evidence of the facts alleged, rather only her bare statement to the Court has been offered. Without any evidence, the appeal should be granted and the order of the Circuit Court reversed.

III. The Circuit Court Order granting Respondent a new hearing is appealable under S.C. Code Ann. § 14-3-330(2).

S.C. Code Ann. § 14-3-330 explicitly allows the appeal from any case granting a new trial. The instant case was decided at a hearing to dismiss in front of the

magistrate court, and the order appealed from has the effect of granting a new hearing on this matter. Thus this appeal is allowed.

The Respondent cites *Pioneer Associates, Inc. v. Ticor Title Ins. Co.*, 387 S.E.2d 711, 300 S.C. 346 (S.C. App. 1989) and *Pocisk v. Sea Coast Const. of Beaufort*, 671 S.E.2d 98, 380 S.C. 584 (S.C. App. 2008) for the position that an Order setting aside judgment cannot be appealed as an interlocutory order. However, these cases are readily distinguishable from the instant case.

In *Pioneer Associates, Inc.* the Court addressed an appeal of a motion to set aside a *default judgment*. *Pioneer Associates, Inc. v. Ticor Title Ins. Co.*, 387 S.E.2d 711, 300 S.C. 346, 348 (S.C. App. 1989). There the court observed that "orders setting aside default judgments [] are neither final orders nor orders granting a new trial, the reasoning being that they are interlocutory in nature and since there has never been a trial in the first instance they cannot be considered orders granting a "new" trial or "rehearing." *Id.* Similarly, in *Posick* the Court considered a motion to set aside a settlement agreement. *Pocisk v. Sea Coast Const. of Beaufort*, 671 S.E.2d 98, 99, 380 S.C. 584 (S.C. App. 2008). Neither *Pioneer Associates, Inc.* nor *Posick* were decided after a hearing before the court.

Both a default judgment and a settlement agreement decide a case without a trial or a hearing. However, the effect in the instant case is different. "Our courts have previously looked beyond the labels on motions and orders to discern their actual effect for purposes of appealability." *Thornton v. South Carolina Electric & Gas Corp.*, 391 S.C. 297, 705 S.E.2d 475, FN 6 (S.C. App. 2011) (*citing Wetzel v. Woodside Dev. Ltd. P'ship*, 364 S.C. 589, 592, 615 S.E.2d 437, 438 (2005)). Here, Appellant brought a

motion to dismiss, the magistrate court heard that motion, and ruled upon it. Ergo, there was a hearing on the merits. Respondent did not appear at that hearing and explicitly filed its motion to reinstate "the case for the motions to be **re-heard**." Pls. Mot. For Relief From J., 2 (Aug. 14, 2023) (emphasis added) (R. p. 17). Labels aside, this matter was decided at a hearing, and Respondent is seeking to have a re-hearing.

Posick flows from *Pioneer Associates, Inc.*, and *Pioneer Associates, Inc.* critically observes that orders setting aside a "default judgment" are not granting a "rehearing" because no hearing has occurred. *Pioneer Associates, Inc. v. Ticor Title Ins. Co.*, 387 S.E.2d 711, 300 S.C. 346, 348. Here, a hearing did occur and the Circuit Court's Order is the equivalent of granting a new trial by forcing a re-hearing on Appellant's motion to dismiss.

Because a hearing was held and decided, this order grants a new hearing, and the statutory law of South Carolina allows an appeal where a new trial is ordered: this appeal should be heard.

CONCLUSION

Respondent's original filing was dismissed by the Magistrate Court in 2021. Any attempt to revive said filing in 2023 is outside of the statute of limitations and the time to file a Rule 60(b)(1) motion. Thus this matter is barred by S.C. Code Ann. § 15-3-20 and the appeal of the Circuit Court Order reviving the matter should be granted.

This appeal is timely because the Circuit Court's Order grants the Respondent a re-hearing in front of the Magistrate and thus comes within the purview of S.C. Code Ann. § 14-3-330.

The Respondent had the opportunity not only to file a motion for re-hearing with the Magistrate, but also to appeal the Magistrate's order. Respondent chose not to exhaust her right of appeal, and is therefore bound by the order of the Magistrate. Rule 60(b) is not available to the Respondent because "[a] party may not invoke [SCRCP Rule 60(b)] where it could have pursued the issue on appeal." *Tench v. South Carolina Dept. of Educ*., 347 S.C. 117, 553 S.E.2d 451 (S.C. 2001) (citing *Smith Companies of Greenville v. Hayes*, 311 S.C. 358, 428 S.E.2d 900 (Ct.App.1993) (finding relief from judgment is not a substitute for appeal from final judgment, particularly when it is clear party seeking relief could have litigated at trial and on appeal claims he now makes by motion).

Respondent knew all relevant facts and had a clear path forward for a re-hearing and an appeal. She chose not to follow that path, and her Rule 60(b) motion is thus barred. This appeal should be granted and the Circuit Court Order granting a new hearing reversed.

Respectfully,

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RULE 211(B) CERTIFICATE

I certify, as counsel for Michael's Wholesale Flooring in this matter, that the Brief of Appellant was filed and served according to South Carolina Appellate Court Rules and that, to the extent it applies, this brief complies with the Rule 211(b).

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CERTIFICATE OF FILING AND SERVICE

I certify that, on June 24, 2024, the Reply Brief of Appellant was filed and served on Respondent's counsel, by mailing a copy via first class mail in the US Mail, in envelopes addressed as follows:

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