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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2022-CP-42-03123
Appellate Case No. 2023-001752

MECO, Inc. of Augusta. ....
Appellant,

v.

Alex Sayed a/k/a Arshad M. Sayed a/k/a Arshed Sayed; NEPA Ventures LLC; NEPA Trading & Investments, LLC..
Respondents.

INITIAL REPLY BRIEF OF APPELLANTS

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ARGUMENT

The outcome of this appeal turns on two issues: (1) when the statute of limitations accrued, and (2) which limitations period applies. In holding that MECO's claims accrued no later than August 8, 2019 (see Nov. 27, 2023 Order at 2-4), because MECO's President made a demand for payment of outstanding invoices by that date (see Resps.' Br. at 6-7 (citing Ex. 1 to Defs.' Sept. 11, 2023 Mot. for Summ. J.)), the trial court erred. Most importantly, conflicting evidence about when the statute of limitations began to run must be resolved by the jury. Thus, summary judgment was not appropriate.

By focusing solely on MECO's efforts to collect in August 2019—and ignoring evidence that the statute did not accrue until later—Respondents and the trial court ignore the well-settled principle that, on summary judgment, "the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party." Hedgepath v. Am. Tel. & Tel. Co., 348 S.C. 340, 354–55, 559 S.E.2d 327, 335 (Ct. App. 2001). Here, MECO was still performing under the Contract until at least September 21, 2019, so triable issues exist about when the limitations period accrued, and "those issues must be submitted to the jury." Id. at 355.

1. Disputes of fact about when the statute of limitations began to run preclude summary judgment.

The trial court's order is founded on the faulty premise that no evidence supports a finding that the limitations period accrued any later than August 8, 2019. (See Nov. 27, 2023 Order at 2-4.) This is simply incorrect; a jury could find that MECO's claims are not time-barred.

By its plain terms, the Contract provides *two* dates when invoices were due: thirty days after issuance, or upon completion of MECO's work under the Contract. (See Contract, ¶ 13.) As

Respondents acknowledge, Sayed agreed to pay MECO's invoices "within thirty (30) days of the invoice date ***or completion of the project***." (Resps.' Br. at 5 (citing Contract ¶ 13) (emphasis supplied).) Under the Contract alone, a jury could find (as Respondents urge) that the statute of limitations began to run on or before August 8, 2019, or (as Petitioner has pointed out) when MECO's performance under the Contract was complete. Evidence shows that MECO was still performing under the Contract until at least September 21, 2019. (See Pet.'s Br. at Respondents at 10-12.) Because that is less than three years before MECO sued Respondents, the jury must determine whether MECO's claims are time-barred.

In any event, "one who seeks to recover damages for breach of a contract must demonstrate that he has performed his part of the contract." Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC, 414 S.C. 635, 652, 780 S.E.2d 263, 272–73 (Ct. App. 2015). In other words, MECO's breach of contract claims could not accrue until MECO had completed its performance. Of course, this was the position Respondent Sayed took throughout the parties' course of dealing. (See Burke Dep. at 132:10-133:23 (explaining that Sayed would not authorize payment of remaining contract balance in September 2019, because "the job was not up to satisfaction"); Ex. 1 to Defs.' Sept. 11, 2023 Br. in Supp. of Mot. for Summ. J. (Sayed responding to the 8-7-19 email and spreadsheet by saying "i think u r over reacting, till date the job u had undertaken is incomplete."); see also Defs.' Answer and Counterclaim ¶¶ 55 (p. 6) (claiming that MECO breached the Contract by "failing to fully perform the work under the Contract").)

Because evidence suggests MECO was still performing under the Contract until at least September 21, 2019, there is a dispute of fact about when the statute of limitations accrued here. While Respondents may argue at trial that MECO slept on its rights, the jury—not the Court—must resolve the factual issue of when the statute of limitations accrued.

2. **Equitable tolling prevented the limitations period from expiring.**

As explained in Petitioner's principal brief, the statute of limitations was tolled while MECO's former counsel sought to properly identify and locate the Respondents, who were not South Carolina residents. (See Pet.'s Br. at 17-20.) While Respondents argue that MECO should have known how to identify and locate them, the simple fact is that MECO's former counsel set out, in detail, the facts that support tolling. (See Ex. 5 to MECO's Br. in Opp. to Defs.' Mot. for Summ. J. ("Brodie Aff.")) This includes, for example, the fact that Sayed had multiple aliases and the corporate defendants were doing business in South Carolina without proper notice to or authority from the Secretary of State. (Id.) Besides, Respondents' argument holds little weight at the summary judgment stage; whether a plaintiff should have known a defendant's true identity and location is a question of fact.[1] Meyer v. Paschal, 330 S.C. 175, 178 – 179, 498 S.E.2d 635, 637 (1998).

Respondents claim a Rule 59(e) motion was necessary to preserve this issue for appeal, because Petitioner did not seek a ruling on its equitable tolling argument. (See Resps.' Br. at 12-13.) Respondents are wrong. Though a party must raise issues in the trial court and obtain a ruling on those issues to pursue them on appeal, that principle does not apply here. First, Petitioner's summary judgment briefing raised the equitable tolling argument. (See Def.'s Sept. 8, 2023 Opp. to Mot. for Summ. J. pp. 12-16.)

The trial court necessarily rejected Petitioner's tolling argument. The trial court held that "MECO became aware of its alleged cause of action not later than August 8, 2019…as of that date,

[1] Respondents' claim that Brodie's is a "sham affidavit" misses the mark. First, the sham affidavit rule applies only when an affidavit is submitted to contradict "*that party's* own prior sworn statement." Cothran v. Brown, 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004) (emphasis supplied). Brodie was not deposed, so his affidavit is not within the ambit of Cothran. In any case, Respondents assert that MECO could communicate with Sayed during the parties' course of dealing. But the parties' ability to communicate does not equate to Petitioner's ability to properly identify and locate Respondents to effect service of process.

its cause of action had accrued. …This action commenced on August 23, 2022, after the passage of three years from the alleged breach and the plaintiff's knowledge of it." (See Nov. 27, 2023 Order at 7-8.) If tolling applied, the trial court could not have found that MECO's claims were time-barred. Thus, the trial court's order rejects MECO's tolling argument by adopting the timeline proposed by Respondents.

Second, the cases Respondents cite do not support their claim that equitable tolling is not a proper appellate issue here. In Jackson v. Speed, 326 S.C. 289, 306–07, 486 S.E.2d 750, 759 (1997), the losing party failed to preserve appellate issues when it did not make a proper objection to evidence *at trial*. Here, MECO devoted several pages to its equitable tolling argument in opposition to Respondents' Motion for Summary Judgment. In I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 417, 526 S.E.2d 716, 722 (2000), the Court addressed "additional sustaining grounds" raised by Respondents, which are not at issue here. I'On, LLC, then, does not apply to the facts here. In Summer v. Carpenter, 328 S.C. 36, 43, 492 S.E.2d 55, 58 (1997), after the Supreme Court finds (in conclusory fashion) that one of Petitioner's arguments was not preserved for appeal, the Court then discusses the argument in great depth anyway. See id.

No authority suggests that a party losing at summary judgment must ask the trial court to expressly reject each of its arguments in a written order. To the contrary, Wilder Corp. v. Wilke, 330 S.C. 71, 76–77, 497 S.E.2d 731, 733–34 (1998), cited in Respondents' brief, holds that a Rule 59(e) motion is unnecessary when the trial court adopts one side's position in reaching its conclusion. That is precisely what happened here—the trial court implicitly rejected Petitioner's tolling argument in holding that the statute of limitations accrued no later than August 8, 2019, and the statute expired before MECO filed suit on August 23, 2022. The trial court's ruling was

erroneous because there are genuine issues of material fact about whether the statute of limitations should have been tolled.

3. Either the UCC's six-year limitations period should apply, or the parties entered a construction contract under which the statute of limitations did not begin to run until the work was completed.

As explained in MECO's principal brief, a six-year limitations period applies to contracts for the sale of goods. (See Pet.'s Br. at 20-21.) When asked what MECO does, the first word its representative used to describe MECO was a "sales" company. (Burke Dep. at 19.) Most of the Contract price was for equipment, and equipment is goods. (Burke Dep. at 97:20-98:3; see also, Contract.) Thus, the UCC's six-year limitation period should apply, and MECO's suit was filed on time.

Respondents argue that the parties Contract was analogous to one between a homebuilder and a homeowner. (See Resps.' Br. at 18-19.) If that is the case, then MECO's suit is timely even under the 3-year statute. As noted in MECO's principal brief, with "construction contracts, the statute of limitations generally begins to run when the work is completed." Republic Contracting Corp. v. S.C. Dep't of Highways & Pub. Transp., 332 S.C. 197, 212, 503 S.E.2d 761, 769 (Ct. App. 1998). "Only in rare circumstances does it run against a contractor's claim for payment before completion of the contract." Id.

If the Contract is one for the sale of goods, MECO's suit was timely because it was filed within the six-year limitations period. If the Contract was for construction services, the statute could not have begun to run until MECO completed the Contract, which was less than three years before it filed this action. In either case, MECO's suit was timely and summary judgment was inappropriate.

CONCLUSION

By holding, as a matter of law, that the statute of limitations on MECO's claims accrued no later than August 8, 2019, the trial court invaded the fact-finding province of the jury. At minimum, there are factual disputes about when the limitations period began to run, and a jury must determine whether MECO's claims are time-barred. This Court should reverse the entry of summary judgment to allow the jury to perform its fundamental fact-finding function.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing "*INITIAL REPLY BRIEF OF APPELLANTS*" was served electronically via E-Mail upon the following counsel of record, this 8th day of July, 2024.

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v.

Alex Sayed a/k/a Arshad M. Sayed a/k/a Arshed Sayed; NEPA Ventures LLC; NEPA Trading & Investments, LLC.. Respondents.

PROOF OF SERVICE

The undersigned certifies that a copy of "*INITIAL REPLY BRIEF OF APPELLANTS*" was served upon counsel of record in the above-entitled action by electronic mail on July 8, 2024, as follows:

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Attachments: 240708 Petitioner's Reply.pdf; 240708 Proof of Service - Petitioner's Reply.pdf

Good afternoon,

Please find attached service copies of Appellant's Initial Reply Brief and Proof of Service. I will copy you on my email to the court of appeals for filing.

Thank you.

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