

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Thomas Free,

Plaintiff,

vs.

Natena Buff,

Defendant.

IN THE COURT OF COMMON PLEAS

DOCKET NUMBER: 12-CP-40-7842

ORDER OF DISMISSAL

2013 AUG 29 PM 1:50  
JEANETTE W. McBRIDE  
J.C.P. & G.S.

RICHLAND COUNTY  
FILED

This matter came before the Court on August 8, 2013, on the motion of the Defendant for dismissal of this action pursuant to Rules 12(b)(2) and 12(b)(5) of the *South Carolina Rules of Civil Procedure* on grounds that the lawsuit has not been properly commenced within the statute of limitations period and no proof of service has been filed with the Court in accordance with Rule 5(d). Frank A. Barton, Esquire, was present as counsel for Plaintiff and William H. Bowman, III, Esquire, was present as counsel for Defendant.

I. Facts

This lawsuit was filed on November 27, 2012, seeking damages for injuries sustained in an automobile accident on December 1, 2009. Plaintiff alleges he was a passenger in Defendant's motor vehicle when Defendant drove her vehicle off the roadway. Defendant denies Plaintiff's allegations and asserts that Plaintiff was driving Defendant's vehicle at the time of the accident.

Plaintiff sent the Summons and Complaint to the South Carolina Department of Motor Vehicles ("SCDMV") on March 26, 2013, to have the Defendant served with process pursuant to S.C. Code Ann. § 15-9-370. Plaintiff provided the SCDMV with Defendant's "last known address" of 9711 Rose Commons Drive, Apt. 312, Huntersville, NC 28078. On April 9, 2013, the SCDMV forwarded the Summons and Complaint to Defendant via certified mail to the address provided.

The Summons and Complaint was returned to the SCDMV marked "unclaimed." Pursuant to S.C. Code Ann. § 15-9-380, the SCDMV sent the pleadings to Defendant by open mail. It appears that Defendant received the certified mail slip but did not get to the post office in time to claim it. She acknowledged getting the Summons and Complaint from the SCDMV in open mail but thought she received it in June 2013. A letter from the SCDMV indicates that it sent the Summons and Complaint by open mail on May 7, 2013.

Defendant filed an Answer on May 23, 2013, denying the allegations of Plaintiff's Complaint and alleging affirmative defenses for lack of personal jurisdiction, failure to timely commence the action as required by S.C. Code Ann. § 15-3-20, and failure to commence the action within the statute of limitations as required by S.C. Code Ann. § 15-3-530. Defendant filed this Motion to Dismiss on the same grounds on May 29, 2013.

## II. Discussion

S.C. R. Civ. Proc. 3(a) provides that a civil action is commenced when the summons and complaint are filed with the clerk of court if (1) the summons and complaint are served within the statute of limitations prescribed by law; or (2) if not served within the statute of limitations, actual service must be accomplished not later than one hundred

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twenty days after filing. See also *Mims v. Babcock Center, Inc.*, 399 S.C. 341; 732 S.E.2d 395 (2012). S.C. Code Ann. § 15-3-20(B) likewise provides that “[a] civil action is commenced when the summons and complaint are filed with the clerk of court if actual service is accomplished within one hundred twenty days after filing.” Finally, *S.C. R. Civ. Proc.* 5(d) provides that proof of service must be filed within ten (10) days after service of the summons and complaint and that failure to do so may result in dismissal of the lawsuit by the court on its own initiative or upon the application of any party.

No affidavit of service has been filed in this case by Plaintiff although the Complaint was filed over eight (8) months ago. The SCMDV first attempted service on Defendant on April 9, 2013, pursuant to S.C. Code Ann. § 15-9-370, which allows service of process upon the SCDMV as an agent of a nonresident driver. The statute provides that it “shall be sufficient service upon the nonresident if notice of the service and a copy of the process are forthwith sent by certified mail by the plaintiff or the Director of the Department of Motor Vehicles to the defendant and the defendant’s return receipt and the plaintiff’s affidavit of compliance herewith are appended to the summons . . . .”

The letter from the SCDMV enclosing the Summons and Complaint to Defendant was returned unclaimed. Where a defendant fails to accept and sign the receipt for certified mail from the SCDMV, as occurred in this case, S.C. Code Ann. § 15-9-380 provides that the pleadings shall be sent by open mail and an affidavit of mailing with the original unclaimed envelope shall be filed with the clerk of court. Once the affidavit of mailing is filed with the clerk, service is effected on the defendant.



Service has not been effected on Defendant in this case because no affidavit of mailing with the original unclaimed envelope has been filed with the Clerk of Court as required by the statute.

S.C. Code Ann. § 15-3-530(5) provides a three (3) year statute of limitations for injury to a person. While the Summons and Complaint were filed on November 27, 2012, the statute of limitations on Plaintiff's negligence cause of action against Defendant expired on December 1, 2012, three years after the accident. In order to have properly commenced the action before the statute of limitations ran, Plaintiff was required to serve the Summons and Complaint on Defendant either by December 1, 2012, or 120 days after filing the Summons and Complaint, i.e. March 27, 2013. See *Mims v. Babcock Center, Inc.* at 346; 732 S.E.2d at 397-398 (an action is commenced upon filing the summons and complaint, if service is made within the statute of limitations, or if filing but not service is accomplished within the statute of limitations, then service must be made within 120 days of filing); *Hooper v. Ebenezer Senior Services and Rehabilitation Center*, 377 S.C. 217, 659 S.E.2d 213 (Ct. App. 2008).

Plaintiff did not even send the Summons and Complaint to the SCDVM for service on Defendant until March 26, 2013, one day before the 120 day period from filing. Furthermore, according to S.C. Code Ann. § 15-9-380, service still has not been effected because the appropriate documentation has not been filed with the Clerk of Court.

To counter the statute of limitations, Plaintiff contends that his cause of action against Defendant is tolled by S.C. Code Ann. § 15-3-30 because Defendant left her residence in South Carolina on or about April 1, 2010, and moved to another state. The




party claiming the statute of limitations is tolled bears the burden of establishing sufficient facts to justify its use. *Lail v. Hartness*, 2012 U.S. Dist. Lexis 115926 (filed August 17, 2012). For the tolling statute to apply, the defendant must reside outside of the state and his or her location must not be known or could not be reasonably discovered by the plaintiff. *Lail; Rafsanjoni v. Doe*, 348 S.C. 251; 559 S.E.2d 841 (2002); *Tiralango v. Balfry*, 335 S.C. 359; 517 S.E.2d 430 (1999); *Myer v. Paschal*, 330 S.C. 175; 498 S.E.2d 635 (1998).

Plaintiff and Defendant were friends at the time of the accident and thereafter. Plaintiff knew where Defendant lived and visited Defendant at the apartment where service of process was sent. In fact, Plaintiff's counsel provided the SCDMV with Defendant's correct address for service. Thus, Plaintiff knew the location of Defendant and the tolling statute does not apply.

#### CONCLUSION

For the reasons set forth above, this lawsuit is dismissed pursuant to S.C. R. Civ.

Proc. 12(b)(2), 12(b)(5) and 5(d).

  
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G. Thomas Cooper, Jr, Judge  
Fifth Judicial Circuit

Columbia, South Carolina

August 29, 2013

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2012CP4007842

Thomas Free

Natena Buff

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: \_\_\_\_\_

Attorney for :  Plaintiff  Defendant or  Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (*CHECK REASON*):  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol Nonsuit);  Rule 43(k), SCRPC (Settled);  Other \_\_\_\_\_
- ACTION STRICKEN (*CHECK REASON*):  Rule 40(j), SCRPC;  Bankruptcy;  Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (*CHECK APPLICABLE BOX*):  Affirmed;  Reversed;  Remanded;  Other \_\_\_\_\_

FILED  
2013 SEP 3  
PH 4:17  
RICHLAND COUNTY

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order (formal order to follow)  Statement of Judgment by the Court:

ORDER INFORMATION

This order  ends  does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge \_\_\_\_\_ Judge Code \_\_\_\_\_ Date \_\_\_\_\_

For Clerk of Court Office Use Only

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ and a copy mailed first class or placed in the appropriate attorney's box on this 3 September 2013 to attorneys of record or to parties (when appearing pro se) as follows:

Frank Anthony Barton

William H. Bowman III

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter \_\_\_\_\_

Clerk of Court

*Jeanette W McBride*