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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

The Honorable Frank R. Addy, Jr, Circuit Court Judge

Appellate Case No. 2025-001945

Lower Court Case No. 2023-CP-24-00800

The Estate of Herbert Rivers Anderson, Jr., by its Successor Personal Representative, J. Kershaw Spong.....Appellant,

v.

Anderson Family Properties of Greenwood, LLC.....Respondent.

INITIAL BRIEF OF APPELLANT

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II. Did the circuit court err in denying Appellant's motion to amend when the circuit court failed to exercise its discretion and analyze whether the proposed amendments to the complaint would be futile?

STATEMENT OF THE CASE

This is collection action brought by Appellant the Estate of Herbert R. Anderson, Jr. (the "Estate") to collect on two promissory notes from Respondent Anderson Family Properties of Greenwood, LLC ("AFP") that were executed in favor of Herbert Anderson during his lifetime.

On August 25, 2023, the personal representative of the Estate filed the original complaint, asserting a single cause of action for breach of contract of the underlying notes. *See generally* Compl. On September 29, 2023, AFP filed a motion to dismiss, arguing the statute of limitations barred the breach of contract claim. Initial Mot. to Dismiss.

While that motion to dismiss was pending, one of the Estate's creditors filed a petition to remove the Estate's personal representative. Mot. for Stay. Shortly thereafter, on November 13, 2023, the Estate moved to stay this action before the circuit court while the probate court determined the issue of removal of the personal representative. *Id.* On March 11, 2024, the probate court entered a consent order, allowing the personal representative to step down and appointing a successor personal representative. Order Appointing Successor PR.

Pursuant to the circuit court's order granting a consent motion to amend, the Successor Personal Representative filed an amended complaint, asserting causes of action for (1) breach of contract, (2) unjust enrichment, (3) constructive trust, and, in the alternative, (4) a violation of the Statute of Elizabeth, S.C. Code Ann. § 27-23-10, related to the underlying notes. Consent Order to Amend, Am. Compl. On November 4, 2025, AFP moved to dismiss, again arguing the statute of limitations barred the claims in the Amended Complaint. Mot. to Dismiss Am. Compl. On February 6, 2025, the Estate filed a response in opposition of the motion to dismiss. Resp. in Opp. On February 10, 2025, the circuit court held a hearing via WebEx on AFP's motion. *See generally* Tr.

The circuit court issued a Form 4 order granting the motion to dismiss on April 9, 2025, finding the statute of limitations for enforcing the promissory notes at issue ran in 2015 and 2017, respectively (the "Order"). Order. The Order does not address the four different causes of action brought by Estate but simply checks the box that the Order ends the case. Order.

On April 18, 2025, the Estate filed a motion to reconsider pursuant to Rule 59(e), SCRCP, or, in the alternative, for leave to amend pursuant to Rule 15(a), SCRCP, arguing that the factual findings of the Dismissal Order were not supported by the allegations of the Amended Complaint, that the circuit court misapplied the law on the statute of limitations, that the circuit court failed to address the Estate's equitable tolling argument, that the circuit court failed to address the Estate's alternate claim under the Statute of Elizabeth, and that newly discovered information justified further amendment to the Amended Complaint. Mot. to Recons.

The Estate filed a memorandum in further support of its motion on June 26, 2025, which outlined the newly discovered facts and attached a proposed Second Amended Complaint. Memo. in Supp. On July 1, 2025, AFP filed a memorandum in opposition to the motion to reconsider or, in the alternative, to amend. Memo. in Opp.

On September 16, 2025, without a hearing or further argument, the circuit court issued another Form 4 Order, denying the motion to reconsider or, in the alternative, to amend. Order on Mot. to Recons. On September 22, 2025, the Estate timely filed its Notice of Appeal. Notice of Appeal.

STATEMENT OF FACTS[1]

This case involves enforcement of promissory notes that AFP gave to Herbert Rivers Anderson, Jr. ("Anderson") in exchange for the transfer of real property worth several million dollars. Am. Compl. at ¶¶ 10-13. These promissory notes were to be repaid upon the subsequent sales of the underlying real property. Notes. Despite sales of property without payment in accordance with the promissory notes, Anderson failed to enforce the promissory notes during his lifetime, and the initial personal representative of his Estate, Charles W. Schulze—who also was the manager of AFP and a close family friend and accountant/financial advisor to the Anderson family—failed to enforce the promissory notes after Anderson's death. Am. Compl. at ¶¶ 18-21. The circumstances surrounding the transfer of this property and the failure to collect on the promissory notes raise questions about whether the transfer was part of a broader scheme to avoid a payment to a major creditor, the George B. Buchanan, Jr. Irrevocable Family Trust dated July 15, 2001 (the "Buchanan Trust"). 2nd Am. Comp. at ¶ 3.

In January 2012, the Buchanan Trust filed a foreclosure action against Springs North Augusta, LLC on a note and mortgage that Anderson personally guaranteed as a member of Springs North Augusta, LLC. 2nd Am. Comp. at ¶ 17. The Buchanan Trust later filed an action on March 5, 2013, against Anderson personally to collect a deficiency judgment resulting from

[1] Because the circuit court dismissed this case in its infancy, before any discovery could be conducted, the facts contained in this section are based on the allegations contained in the Amended Complaint and the proposed Second Amended Complaint. While no discovery has occurred in this action, the Successor Personal Representative drafted the Amended and Second Amended Complaints based on information he was able to glean from his preliminary investigation into the Estate's affairs, as the first non-interested party to the transaction. Ultimately, based on the applicable standard of review, these facts should be considered true for purposes of deciding the appeal of the grant of the motion to dismiss at issue here.

this debt and the foreclosure sale. 2nd Am. Comp. at 13. This deficiency judgment is the underlying basis of the Buchanan Trust's creditor claim in the Estate. *Id*.

AFP is a land development company formed in March 2012, less than a month after the Buchannan Trust instituted its action against Anderson personally. Am. Compl. at ¶¶ 7, 9. AFP executed its Articles of Organization on March 30, 2012, which were later filed with the Secretary of State of South Carolina on April 17, 2012. Am. Compl. at ¶ 7, 2nd Am. Compl. at ¶ 20. AFP is a member managed limited liability company. 2nd Am. Compl. at ¶ 23. Under the Articles of Organization and the Operating Agreement, Schulze is the managing member. Am. Compl. at ¶ 2, 2nd Am. Compl. at ¶ 23. The Operating Agreement of AFP gave broad powers to Schulze, including the power to open and maintain bank accounts, draw checks for payment of money, acquire and dispose of any assets, and to pay the debts and obligations of the limited liability company. 2nd Am. Compl. at ¶ 24. AFP was primarily owed by Anderson's wife, Gwen Anderson, who owned 90% of the membership interests/units. Am. Compl. at ¶ 14. Despite transferring real property worth millions of dollars into AFP, Anderson held only a .52% interest in AFP.[2] Am. Compl. at ¶ 14, 2nd Am. Compl. at ¶ 25.

On March 22, 2012, Schulze executed a Promissory Note on behalf of AFP in favor of Anderson in the amount of $1,560,000.00 ("2012 Note"). 2012 Note. On July 2, 2014, Schulze executed another Promissory Note on behalf of AFP in favor of Anderson in the amount of $1,218,375.00 ("2014 Note") (collectively, the 2012 Note and 2014 Note are referred to as the "Notes"). 2014 Note. In conjunction with the execution of each of the Notes, Anderson transferred

[2] Shulze also held a .51% interest in AFP. The remaining interest was owned by the children of Gwen and Anderson: Kenneth Anderson (2.99%), Keith Anderson (now deceased) (2.99%), and Kim Hatfield (2.99%). 2nd Am. Compl. at ¶ 25.

multiple parcels of real property to AFP through a series of deeds (hereafter, the "Deeds"). Deeds. The Notes are the only consideration for the transfer of these parcels.

The Notes do not appear to have been drafted by an attorney. 2012 & 2014 Notes. They accrue interest at 2% per annum and can be prepaid without penalty. *Id.* The Notes do not contain a maturity date but instead require repayment of 75% of the net proceeds from the sale of any of the real property that Anderson transferred to AFP. *Id.*

Despite sales of the underlying properties taking place both during Anderson's lifetime and after his death, note payments did not follow as required by the Notes. Am. Compl. at ¶ 17, 2nd Am. Compl. at ¶ 38. For each sale that took place—both before Anderson's death and during the more than four years Schulze served as the personal representative of the Estate—Schulze was also the acting manager of AFP. Am. Compl. at ¶ 2, 2nd Am. Compl. at ¶ 10. Schulze executed most of the deeds from AFP to third-party purchasers for value. Deeds. Accordingly, he was fully aware of and cannot disclaim knowledge of these sales.

Anderson died on November 2, 2018. Am. Compl. at ¶ 3, 2nd Am. Compl. at ¶ 5. After his Estate was opened, Schulze was appointed the personal representative. Am. Compl. at ¶ 1, 2nd Am. Compl. at ¶ 9. At the time of Anderson's death in 2018, the total amount owed on the Notes was more than $2,200,000.00. Am. Compl. at ¶ 19. Despite being aware of the Notes and the sales of the various parcels of underlying property that would trigger payments being due, Schulze as the manager of AFP did not cause any payments to be made to the Estate and as the personal representative did not bring any action to collect on the Notes until August 25, 2023, when he filed the original complaint here. Am. Compl. at ¶ 3, 2nd Am. Compl. at ¶¶ 44-47. The initial complaint filed by Schulze was in response to increased pressures from the Buchanan Trust to uncover this ruse and remove Schulze as personal representative of the Estate; however, it was

a halfhearted effort limited in scope, setting forth a limited recitation of the factual background and a single cause of action for breach of contract. *See generally* Compl. Based on the limited facts presented, AFP moved to dismiss the original complaint, arguing the breach of contract cause of action was barred by the statute of limitations. Mot. to Dismiss.

Shortly after the complaint was filed, the Buchanan Trust instituted proceedings in the circuit court to remove Schulze as the personal representative, based on various allegations of conflicts of interest, self-dealing, and delay in probating the Estate. Mot. for Stay. While this petition was pending, in May 2024, Schulze resigned as personal representative, and a consent order was entered appointing J. Kershaw Spong as the Successor Personal Representative. Consent Order.

Upon his appointment, Spong retained new counsel and filed the Amended Complaint, which greatly expounded on the factual background related to the Notes asserted four different causes of action: (1) breach of contract, (2) unjust enrichment, (3) constructive trust, and, in the alternative, (4) a violation of the Statute of Elizabeth, S.C. Code Ann. § 27-23-10, related to the real property transferred in exchange for the Notes. *See generally* Am. Compl. AFP again moved to dismiss the Amended Complaint. Mot. to Dismiss Am. Compl. This motion largely mirrored the original and, notably, addressed only the statute of limitations for the breach of contract cause of action. *Id.* The motion did not address any of the alternative causes of action, *id.*, and AFP did not file any additional briefing with the circuit court before the hearing. On February 6, 2025, the Estate filed a response in opposition to AFP's motion to dismiss the amended complaint. Resp. in Opp. Because the motion did so, this response focused exclusively on the statute of limitations argument for the breach of contract cause of action. *Id.*

On February 10, 2025, the circuit court held a hearing via WebEx on the motion to dismiss.[3] Tr. At the hearing, the argument focused almost entirely on AFP's position that the statute of limitations barred any collection enforcement of the Notes. *See generally* Tr.

Two months later, on April 9, 2025, the circuit court issued a Form 4 order, granting the motion to dismiss the amended complaint. The Order was two pages and contained the following substantive findings and conclusions of law:

> This case concerns two notes dated March 22, 2012 and July 2, 2014. Plaintiff transferred real estate to Defendant and took in return these notes. No payment was ever made on these notes. The March 22, 2012 note specifically states that the obligation to repay began on March 24, 2012, and the July 2, 2014 note similarly states that the repayment obligation began on August 2, 2014. Both notes contemplate that, beginning on March 24, 2012 and August 2, 2014 respectively, upon sale of lots which were transferred to Defendant in consideration of the notes, payment of 75% of the proceeds from such a sale is required. With regard to the 2012 note, lots were sold in 2012-2015, and with regard to the 2014 note, lots were sold in 2014-2016. Again, no payment was ever made on these notes, and Herbert Anderson passed away on November 2, 2018.
>
> Pursuant to the express terms of the notes, the triggering event (post March 24, 2012 and August 2, 2014) which required repayment under each note was the sale of any lot exchanged for that respective note. Clearly, an action on either note would be barred three (3) years after a sale takes place, and the earliest sale for each note occurred the same year as the notes were executed. Accordingly, with respect to the 2012 note, because sales of lots took place that same year, the statute of limitations ran on that note sometime in 2015. Similarly, with respect to the 2014 note, because lots were also sold in 2014, the statute of limitations ran on that note sometime in 2017.
>
> . . .

[3] At the hearing, the circuit court heard arguments on motions to dismiss in two separate, but related cases: this case and a sister case involving another entity created by Anderson, Southern Land Development Corporation. The Southern Land Development case involved similar facts and a note containing different payment terms. Due to the factual differences in the cases, the circuit court denied the motion to dismiss in Southern Land Development case but granted the motion to dismiss here.

> Simply stated, no factual dispute exists as to the triggering event which precipitated the requirement for repayment or as to the year for which the triggering event took place with respect to each note. Accordingly, Defendant's 12(b)(6) motion is granted.

Order. The Order indicates that it ends the case. *Id.*

On April 18, 2025, the Estate filed a motion to reconsider pursuant to Rule 59(e), SCRCP, or, in the alternative, for leave to amend pursuant to Rule 15(a), SCRCP. In this motion, the Estate argued that the factual findings of the Order were not supported by the allegations of the Amended Complaint, that the circuit court failed to address its equitable tolling argument,[4] that the circuit court failed to address the Estate's alternate claim under the Statute of Elizabeth, and that newly discovered information justified further amendment to the Amended Complaint. Mot. to Recons.

On June 26, 2025, the Estate filed a memorandum in further support of its motion to amend, which outlined the new facts that had been discovered and attached a proposed Second Amended Complaint. Memo. in Support. Specifically, the Second Amended Complaint included new allegations concerning land conveyances and payments on the underlying notes, which serve to re-start statute of limitations. 2nd Am. Compl. The Second Amended Complaint also alleges that under the plain language of the Notes, the parties intended to create a separate obligation for payment for each sale of property that subsequently took place. *Id.* Finally, the Second Amended Complaint includes an alternative cause of action as to Schulze for breach of fiduciary duty based on the direct conflict of interest between his competing duties as personal representative of the

[4] The circuit court also failed to address the unjust enrichment and constructive trust claims. Because these claims are subject to a three-year statute of limitations and would be triggered by the same events, they are also affected by the circuit court's erroneous rulings. *See* S.C. Code Ann. §§ 15-3-530(1) & (4) (stating the statute of limitations is three years for "an action upon a contract, obligation, or liability, express or implied" and "an action for taking, detaining, or injuring any goods or chattels including an action for the specific recovery of personal property").

Estate and as manager of AFP and, to the extent that claims are now barred due to his inaction as personal representative, the Estate has been harmed by such inaction. *Id.*

On July 1, 2025, AFP filed a memorandum in opposition to the motion to reconsider or, in the alternative to amend. Memo. in Opp. On September 16, 2025, the circuit court issued another Form 4 Order, denying the motion without a hearing or further discussion. Order on Mot. to Recons. The order contains no analysis and simply concludes that "having given due and careful consideration to the memoranda filed in support of and opposition to [the Estate]'s motion, and fully reconsidered the [circuit c]ourt's prior ruling, the [circuit c]ourt declines to alter or amend the order of April 8, 2025." *Id.* This appeal followed.

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." *Grimsley v. S.C. Law Enf't Div.*, 396 S.C. 276, 281, 721 S.E.2d 423, 426 (2012) (quoting *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009)). "That standard requires the [c]ourt to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case." *Kelaher, Connell & Conner, P.C. v. S.C. Workers' Comp. Comm'n*, 435 S.C. 55, 60, 863 S.E.2d 842, 844 (Ct. App. 2021) (quoting *Grimsley*, 396 S.C. at 281, 721 S.E.2d at 426). "In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint." *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 321, 701 S.E.2d 39, 44 (Ct. App. 2010). "The 12(b)(6) motion may not be sustained if the facts alleged and inferences therefrom would entitle

the plaintiff to any relief on any theory." *Baird v. Charleston Cnty.*, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999).

"Normally, a motion to amend a pleading is addressed to the sound discretion of the trial judge." *Porter Bros., Inc. v. Specialty Welding Co.*, 286 S.C. 39, 41, 331 S.E.2d 783, 784 (Ct. App. 1985) (citing *Mylin v. Allen-White Pontiac, Inc.*, 281 S.C. 174, 314 S.E.2d 354 (Ct. App. 1984)). "The trial [court's] finding will not be overturned without an abuse of discretion or unless manifest injustice has occurred." *Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 153, 723 S.E.2d 835, 840 (Ct. App. 2012) (alteration in original) (quoting *Berry v. McLeod*, 328 S.C. 435, 450, 492 S.E.2d 794, 802 (Ct. App. 1997)). "An abuse of discretion occurs when the [circuit court]'s ruling is based upon an error of law or, when based upon factual conclusions, is without evidentiary support." *Oulla v. Velazques*, 427 S.C. 428, 435, 831 S.E.2d 450, 453 (Ct. App. 2019) (alteration in original) (quoting *Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987)).

ARGUMENT

I. The circuit court erred in granting AFP's motion to dismiss.

The circuit court erred in granting the motion to dismiss for several reasons. First, the circuit court dismissed the case based on the statute of limitations, which is not a valid ground to be raised in a pre-answer motion to dismiss. Second, in granting the motion, the circuit court relied on facts that were not found in, and in fact were refuted by, the allegations of the operative complaint. Finally, the circuit court failed to consider an alternate cause of action, which is subject to a different statute of limitations, and the Estate's argument concerning equitable tolling. For these reasons, as explained more fully below, this Court should reverse the circuit court's dismissal and remand the case for further proceedings.

A. The circuit court improperly considered the statute of limitations in a pre-answer motion to dismiss and, in doing so, ignored the factual allegations in the Amended Complaint that must have been accepted as true.

At the outset, the statute of limitations "is not a defense or objection which Rule 12 permits to be raised by pre-answer motion." *Glenn v. Sch. Dist. No. Five of Anderson Cnty.*, 294 S.C. 530, 534, 366 S.E.2d 47, 50 (Ct. App. 1988). Our supreme court embraced this principle in *Gentry v. Yonce*:

> Appellants contend the circuit court erred in considering any of the grounds for respondents' pre-answer motions that were based upon a defense not listed in Rule 12(b), SCRCP. We agree. [*Glenn*] held the statute of limitations is not a defense listed under Rule 12(b) that may be raised by pre-answer motion. Similarly, here, respondents cannot raise any defense or objection that is not permitted to be raised pre-answer in a Rule 12(b) motion, for example lack of standing.

337 S.C. 1, 5 n.2, 522 S.E.2d 137, 139 n.2 (1999), *overruled on other grounds by Proctor v. Whitlark & Whitlark, Inc.*, 414 S.C. 318, 331, 778 S.E.2d 888, 895 (2015).

The circuit court considered AFP's statute of limitations argument on AFP's pre-answer motion to dismiss under Rule 12(b)(6), SCRCP, before any discovery could be conducted on timing of payments on the Notes and the Estate's discovery of its injuries. This was improper, and the Court can end its inquiry here.

In any event, because of the inherent factual nature of the statute of limitations inquiry, "[o]rdinarily, the question of when a statute of limitations began to run is one left to the jury." *Adkins v. I'On Co.*, 439 S.C. 568, 581, 889 S.E.2d 537, 543 (2023) (citing *Dunbar v. Carlson*, 341 S.C. 261, 269, 533 S.E.2d 913, 917 (Ct. App. 2000)). Here, however, in concluding the statute of limitations barred the claims in the Amended Complaint, the circuit court relied on facts that are not found in—but instead are directly refuted by—the Amended Complaint.

Specifically, the second paragraph of the Order sets forth the factual basis for the ruling, stating that "no payments were made on [the Notes]." Order. Later in that same paragraph, the circuit court found that "[w]ith regard to the 2012 note, lots were sold in 2012-2015, and with regard to the 2014 note, lots were sold in 2014-2016. Again, no payment was ever made on these notes, and Herbert Anderson passed away on November 2, 2018." *Id.* Based on these findings, the circuit court concluded that, "with respect to the 2012 note, because sales of lots took place that same year, the statute of limitations ran on that note sometime in 2015. Similarly, with respect to the 2014 note, because lots were also sold in 2014, the statute of limitations ran on that note sometime in 2017." *Id.*

But the Amended Complaint does not include any allegations about any sales that took place during Anderson's lifetime.[5] Nor does the Amended Complaint allege that AFP failed to make payments. Rather, the Amended Complaint alleges the opposite: "[u]pon information and belief, [AFP] made some payments on Notes." Am. Compl. at ¶ 17.

On a motion to dismiss, the circuit court was required to analyze the viability of the Estate's claims based on the allegations of the operative complaint (the Amended Complaint) *and* to take all inferences in the light most favorable to the Estate as the Plaintiff and non-moving party. *See Kelaher, Connell & Conner, P.C.*, 435 S.C. at 60, 863 S.E.2d at 844. Given the Amended Complaint's silence about when lots were sold and express allegation that AFP made some

[5] The circuit court may have relied on allegations contained in the original complaint filed by the Estate's former counsel on behalf of Schulze as the then-personal representative. At the time of that filing, Schulze had just resigned two days earlier as the managing member of AFP. 2nd Am. Compl. at ¶ 55. The original Complaint was filed only after intense pressure from the Buchannan Trust, which ultimately culminated in the Buchanan Trust instituting proceedings to remove Schulze as personal representative. 2nd Am. Compl. at ¶ 11. Upon reviewing the original complaint, one could reasonably conclude that it was intentionally drafted to invite a statute of limitations defense to relieve AFP from any obligations under the Notes. *See generally* Compl.

payments—when taking all inferences in the light most favorable to the Estate—it was impossible for the circuit court to find the statute of limitations expired and barred all claims based on sales in the same year as the Notes.

Moreover, even if the circuit court took judicial notice of sales that occurred during Anderson's lifetime (it did not)[6], those sales do not change the fact that the Amended Complaint alleges that, upon information and belief, payments were made. Am. Compl. at ¶ 17. It is well settled in South Carolina that if payments are made towards a note after the applicable limitations has passed, the statute of limitations begins anew. *See Wolfe v. Brannon*, 211 S.C. 282, 286, 44 S.E.2d 833, 835 (1947) ("A payment proved to have been made by the maker of a promissory note after it has become barred by the statute of limitations is equivalent to a promise in writing by the maker to pay the debt, upon which action may be brought at any time within [the applicable statute of limitations] after such payment."); *Nandwani v. Queens Inn Motel*, No. 2012-UP-385, 2012 S.C. App. Unpub. LEXIS 474, at *16–17 (Ct. App. June 20, 2012) (same). Because of this, every payment AFP made has the potential to push or reset the statute of limitations. Taking all inferences in the light most favorable to the Estate, this allegation by itself makes dismissal impossible. Until discovery determines what payments were made and when, it is unclear when the statute of limitations would run.

Further, a question remains as to whether each separate sale creates a new obligation for payment, triggering a separate statute of limitations for enforcing the Notes. South Carolina law provides that the parties' intent controls whether "separate breaches to give rise to new claims with

[6] To be clear, the Estate does not refute sales took place during Anderson's lifetime. The deeds evidencing these sales are a matter of public record and were discovered during the successor personal representative's review of the available documents evidencing AFP's affairs. Those facts, however, do not appear in the Amended Complaint.

a new statute of limitations period." *Poly-Med, Inc. v. Novus Sci. Pte. Ltd.*, 437 S.C. 343, 355, 878 S.E.2d 896, 902 (2022). Our Supreme Court recently discussed this very issue in *Poly-Med, Inc.*, where it stated:

> Fundamentally, parties are generally free to contract as they desire. It is the role of a court to give effect to the contracting parties' intentions. *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). ***In most contracts, based on the terms of the agreement and the context in which it was reached, each breach of a distinct and separate duty gives rise to a separate right of action.*** On the other hand, as we recently recognized, "the parties to a contract may set forth limitations on the remedies available to enforce the contract." *Beverly v. Grand Strand Reg'l Med. Ctr., L.L.C.*, 435 S.C. 594, 602, 869 S.E.2d 812, 817 (2022). These fundamental principles apply equally whether considering breaches of separate and distinct obligations or multiple breaches of a single obligation.

437 S.C. at 354, 878 S.E.2d at 902 (emphasis added). Here, the plain language of the contract demonstrates that the parties' intent is that each sale of a property created a separate obligation to repay 75% of those proceeds towards the balance of the loan. Notes. There is no acceleration clause that states that a failure to make a payment renders the full amount due. Rather, the plain language of the Notes demonstrates that the parties expected that each sale would result in funds being paid towards the balance of the Notes. *Id.* At a minimum, this creates a question of fact as to the parties' intent of when a breach would occur—thus when the statute of limitations would begin to run—and further discovery should be permitted to investigate this issue.

At the end of the day, Spong, as the first truly independent person to review the Estate's affairs, should be afforded the opportunity through discovery to review AFP's records relative to each sale, determine whether a payment or credit was made to the obligation owed, and provide an effective and factual rebuttal to the defense asserted by Defendant. The circuit court's grant of the motion to dismiss based on the statute of limitations at this early stage denies the Estate the

ability to conduct such a review and severely prejudices the Successor Personal Representative's ability to effectively administer and liquidate the Estate.

B. The circuit court failed to rule on the Estate's argument that the statute of limitations should have been equitably tolled.

Finally, the circuit court ignored the Estate's argument concerning equitable tolling. Because Schulze was both the personal representative of the Estate and the manager of AFP, equitable tolling could act to suspend the running of the statute of limitations for the Estate's claims.

Equitable tolling refers to suspending or stopping the running of a statute of limitations and may either temporarily suspend the running of the limitations period or delay the start of the limitations period. *Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*, 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009) (quoting 51 AM. JUR. 2D *Limitation of Actions* § 169 (2000)). South Carolina courts have tolled a statute of limitations based on equitable considerations before but have not set forth an exclusive list of circumstances that justify the application of equitable tolling. *Id*. at 116–17, 687 S.E.2d at 33. In *Hooper*, the Supreme Court mentioned "that '[e]quitable tolling typically applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control.'" *Id*. at 116, 687 S.E.2d at 33 (quoting *Ocana v. Am. Furniture Co*., 91 P.3d 58, 66 (N.M. 2004)).

Anderson died in December 2018. Am. Compl. at ¶ 3, 2nd Am. Compl. at ¶ 5. From the AFP's formation until his resignation on August 23, 2023, Schulze was the manager of AFP. Am. Compl. at ¶ 2, 2nd Am. Compl. at ¶ 23. After Anderson's death, Schulze became the personal representative of the Estate from December 5, 2018, until his forced resignation on May 21, 2024. Am. Compl. at ¶ 1, 2nd Am. Compl. at ¶ 9. Significant sales of property occurred both before and after Anderson's death, within the near eleven-year period Schulze was the manager of AFP. Am.

Compl. at ¶ 3, 2nd Am. Compl. at ¶¶ 40-41. For all sales after Anderson's death, Schulze would have been aware of them as manager of Defendant and intentionally chose not to pay 75% of the sale price to the Estate. 2nd Am. Compl. at ¶ 47. In his capacity as personal representative, Schulze waited almost five years to make any effort to enforce the Notes against Defendant and brought the original Complaint only after intense pressure from an estate creditor. 2nd Am. Compl. at ¶¶ 54-56.

In ruling on the motion to dismiss, the Court did not address the Estate's argument concerning equitable tolling. These facts surrounding Mr. Schulze's conflict of interest justify the Court equitably tolling of the statute of limitations. *Hooper*, 386 S.C. at 117, 687 S.E.2d at 33 ("Equitable tolling may be applied where it is justified under all the circumstances.").

C. The circuit court overlooked the alternate cause of action for fraudulent conveyance under the Statute of Elizabeth.

The Order dismissing the entire Amended Complaint also fails to account for the alternate cause of action for fraudulent conveyance under the Statute of Elizabeth.

Section 27-23-10(A) of the South Carolina Code, commonly known as the Statute of Elizabeth, provides that:

> Every gift, grant, alienation, bargain, transfer, and conveyance of lands . . . for any intent or purpose to delay, hinder, or defraud creditors and others of their just and lawful actions . . . must be deemed and taken . . . to be clearly and utterly void.

S.C. Code Ann. § 27-23-10(A). "The Statute of Elizabeth is concerned with the intent of the grantor who conveys an interest in land." *Oskin v. Johnson*, 400 S.C. 390, 398, 735 S.E.2d 459, 464 (2012). In interpreting this statute, South Carolina courts have "held conveyances shall be set aside under two conditions: First, where there was valuable consideration and the transfer is made by the grantor with the actual intent to defraud; and, second, where a transfer is made without

actual intent to defraud but without valuable consideration." *Id.* Claims under the statute of Elizabeth are subject to a three-year statute of limitations and the discovery rule. *See Carr v. Guerard*, 365 S.C. 151, 154 n.5, 616 S.E.2d 429, 430 n.5 (2005) ("[A] three-year limitations period and the discovery rule apply to Statute of Elizabeth claims.").

Under Section 62-3-710 of the South Carolina Probate Code, the power to recover fraudulently transferred property rests exclusively with the personal representative. *See* S.C. Code Ann. § 62-3-710 ("The property liable for the payment of unsecured debts of a decedent includes all property transferred by him by any means which is in law void or voidable as against his creditors, and subject to prior liens, ***the right to recover this property, so far as necessary for the payment of unsecured debts of the decedent, is exclusively in the personal representative***." (emphasis added)). Accordingly, after Anderson's passing, his personal representative has the sole ability to recover funds under the Statute of Elizabeth.

The Amended Complaint alleges that "[i]n the event that the Notes are deemed uncollectible, Plaintiff seeks to void the Deeds and/or to recover the proceeds from sales of the properties included in the Deeds for the benefit of the Estate." Am. Compl. at ¶ 35. The Amended Complaint further alleges that "[t]o the extent properties were conveyed by Mr. Anderson to Defendant with no intent to seek repayment, those Deeds and the transfer of properties evidenced thereby were made for a lack of valuable consideration." *Id.* at ¶ 38.

This cause of action does not share the same statute of limitations period with the breach of contract claim. Instead, under the discovery rule, the statute of limitations on this claim would not begin to run until the Successor Personal Representative knew or should have known of the claim. *Dean v. Ruscon Corp.*, 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996); *see also Carr*, 365 S.C. at 154 n.5, 616 S.E.2d at 430 n.5 ("[A] three-year limitations period and the discovery rule

apply to Statute of Elizabeth claims."). Because the Successor Personal Representative was not appointed until May 21, 2024, the statute could not have run on this claim.

II. The circuit court erred in denying the Estate's motion to amend without conducting any analysis on whether the amendment would be futile.

In addition to moving to reconsider, the Estate also sought, in the alternative, leave to further amend the Amended Complaint. Without conducting any analysis of the request or the proposed amendment, the circuit court summarily denied the Estate's motion to amend in its September 16, 2022 Order. This was error.

Under South Carolina law, "[w]hen a trial court finds a complaint fails 'to state facts sufficient to constitute a cause of action' under Rule 12(b)(6), the court should give the plaintiff an opportunity to amend the complaint pursuant to Rule 15(a) before filing the final order of dismissal." *Skydive Myrtle Beach v. Horry Cnty.*, 426 S.C. 175, 179–80, 826 S.E.2d 585, 587 (2019); *see also Foman v. Davis*, 371 U.S. 178, 179 (1962) (where a complaint is dismissed "for failure to state a claim upon which relief might be granted," leave to amend the complaint "should, as the rules require, be 'freely given'" (quoting Fed. R. Civ. P. 15(a))). Rule 15(a) "strongly favors amendments and the court is encouraged to freely grant leave to amend." *Patton v. Miller*, 420 S.C. 471, 489–90, 804 S.E.2d 252, 261 (2017) (quoting *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 286, 607 S.E.2d 711, 717 (Ct. App. 2005)).

There are occasions in which the circuit court can, in its discretion, deny a motion to amend, but those circumstances rare. In *Skydive Myrtle Beach*, our Supreme Court discussed those limited circumstances, stating:

> A trial court has discretion to deny a motion to amend if the party opposing the amendment can show a valid reason for denying the motion. *See* Rule 15(a) (stating "leave shall be freely given when justice so requires and does not prejudice any other party"); *Foman*, 371 U.S. at 182, 83 S. Ct. at 230, 9 L. Ed. 2d at 226 (listing valid

> reasons for denying a motion to amend); *Patton*, 420 S.C. at 490, 804 S.E.2d at 262 (stating "the circuit court should have considered whether the defendants were prejudiced by the amendment, or whether there was some other substantial reason to deny it"); 420 S.C. at 491 n.9, 804 S.E.2d at 262 n.9 (stating the burden of establishing a reason for denying the motion is on the party opposing the amendment); *Forrester v. Smith & Steele Builders, Inc.*, 295 S.C. 504, 507, 369 S.E.2d 156, 158 (Ct. App. 1988) (stating "a proper reason" to deny a motion to amend could be "bad faith, undue delay, or prejudice"); *Id.* ("In the absence of a proper reason, . . . a denial of leave to amend is an abuse of discretion.").
>
> A court's decision to deny a motion to amend should not be based on the court's perception of the merits of an amended complaint. *Patton*, 420 S.C. at 490–91, 804 S.E.2d at 262 (citing *Tanner v. Florence Cnty. Treasurer*, 336 S.C. 552, 558-60, 521 S.E.2d 153, 156–57 (1999). In rare cases, however, a trial court may deny a motion to amend if the amendment would be clearly futile. *See Jennings v. Jennings*, 389 S.C. 190, 209, 697 S.E.2d 671, 681 (Ct. App. 2010) ("Although leave to amend should generally be 'freely given,' . . . it may be denied where the proposed amendment would be futile."), *rev'd on other grounds*, 401 S.C. 1, 736 S.E.2d 242 (2012); 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE § 1487 (3d ed. 2010) ("If a proposed amendment is not clearly futile, then denial of leave to amend is improper.").

426 S.C. at 182–83, 826 S.E.2d at 588–89.

Here, none of these circumstances exist. AFP has not made any showing that the amendments being sought are being made with bad faith or to cause undue delay, nor has it shown any prejudice that would result from the Second Amended Complaint. Further, the amendment is not futile. The Second Amended Complaint, like the Amended Complaint, continues to allege that some payments were made towards these loans. The Estate should be permitted to conduct discovery to determine when payments were made.

In fact, through his investigation, the Successor Personal Representative has found evidence of payments on the Notes as late as December 31, 2020. AFP's general ledger shows a payment of $180,000 to Gwen Anderson on December 31, 2020, with Defendant's own ledger

note indicating this payment was to be credited the towards the balance of the Notes. Ex. A to Rule 50(e) Mot., General Ledger. This payment—which was made in 2020, less than three years before the filing of the original complaint—would serve to reset the statute of limitations. *See Wolfe*, 211 S.C. at 82, 286, 44 S.E.2d at 835 ("A payment proved to have been made by the maker of a promissory note after it has become barred by the statute of limitations is equivalent to a promise in writing by the maker to pay the debt, upon which action may be brought at any time within [the applicable statute of limitations] after such payment.").

The circuit court abused its discretion in denying the Estate's motion to amend. *See Morris v. BB&T Corp.*, 438 S.C. 582, 587, 885 S.E.2d 394, 397 (2023) ("The exercise of discretion is not to simply make a decision. [It] requires first that the trial court recognize it has the responsibility of discretion . . . [and] then to follow a thought process that begins with the trial court's clear understanding of the applicable law, continues with the court's sound analysis of the situation before it in light of the law, and ends with the trial court's ruling that follows the law and is supported by the facts and circumstances." (internal citations omitted)).

CONCLUSION

The circuit court erred in granting AFP's pre-answer motion to dismiss, ignoring the well-pled factual allegations of the Amended Complaint, the equitable tolling argument advanced by the Estate, and the additional cause of action under the Statute of Elizabeth. The circuit court also erred in summarily denying the Estate's motion to amend without any analysis on whether amendment was appropriate. For these reasons, the Estate asks this Court to reverse and remand the case with instruction to permit the Second Amended Complaint and allow this case to proceed with discovery.

Respectfully submitted,

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