

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

SC Court of Appeals

Stephanie P. McDonald, Circuit Judge for The Ninth Judicial Circuit

Case No. 2013-000407

Alan Sheppard.....Appellants

v.

William O. Higgins, Lynn McCants, Ronald C. Owens, Russell Bennett,
Charles P. Darby, Kiawah Resort Associates LP..... Respondents

APPELLANT'S INITIAL BRIEF

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II. The Trial Court Erred in Finding that the Appellant’s Claims Are Barred by the Statue of Limitations, Since the Appellant’s Claims of Respondents’ Wrongdoing Arise from a Closing that Accured on July 28, 2008, and the Lawsuit was Filed on July 27, 2011.

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STATEMENT OF ISSUES ON APPEAL

- I. **The Trial Court Erred in Finding that the Appellant's Claims are Barred by Res Judicata and Release, Since the Appellant's Claims Arise Out of a Closing, Which Accured on July 28, 2008, After the Settlement and Release Ending the Prior Lawsuit.**

- II. **The Trial Court Erred in Finding that the Appellant's Claims Are Barred by the Statue of Limitations, Since the Appellant's Claims of Respondents' Wrongdoing Arise from a Closing that Accured on July 28, 2008, and the Lawsuit was Filed on July 27, 2011.**

STATEMENT OF THE CASE

The Appellant filed a *Pro se* Complaint on July 27, 2011. [Complaint] The Respondents¹ Answered [Answer] and filed a Motion to Dismiss on February 5, 2013. [Motion to Dismiss] A hearing was held on April 25, 2012, in front of the Honorable Stephanie P. McDonald. Respondent McCants was dismissed by consent, at that time. The Judge accepted additional material from the Appellant to “know what happened” and to tell whether what [he] said here “lets [him] go forward”. [Memo Affidavit with Attachments; TR 48-52] Trial Court issued an Order dismissing the Respondents Ronald Owens, Russell Bennett, Charles Darby, and Kiawah Resort Associates LP on January 18, 2013, and issued an Order dismissing Respondents Higgins on January 18, 2013. The Appellant filed a Notice of Appeal *Pro Se* against both Orders. The Appellant has dismissed the Appeal as to Respondent, and Higgins proceeds with this Appeal as to Respondents Ronald Owens, Russell Bennett, and Charles Darby and Kiawah Resort Associates LP only.

2.

¹ The Appeal of the Order as to original Respondent Higgins has been withdrawn, therefore, from this point forward, Respondents shall apply to Respondents Owens, Bennett, Darby and Kiawah Resort Associates LP only.

Facts

The Appellant controlled an entity Wando River LLC which held a contract on valuable property in Charleston County. (Wando Property) The Respondants Russell Bennett, Ronald Owens, and Charles Darby through their entity Kiawah Resorts Associates. LP entered in a joint venture with Appellant to develop or sell the property. [Berkley complaint; memo aff. with attachments] The Appellant's group Wando River LLC. held the controlling interest in the project. The Respondents began taking actions that breached their fiduciary duty to the joint venture and the Appellant, and eventually the Respondents filed a lawsuit in Berkley County, to enforce a contract of sale of the Wando property to a third party relating to the Wando property. [Berkley Complaint; Memo Aff. with attachments] The Appellant asserted Counter Claims for Interference with Contractual Relationship, Breach of Duty, Interference with the Contract, and Breach of Implied Duty of Good Fair and Dealing. [Berkley Answer] That case was settled and memorialized in the terms of a Settlement and Release Agreement, dated July 26, 2011, which allowed for the Appellant's group Wando River LLC. to sell the Wando property to a third party. [Settlement and Release] A Stipulation of Dismissal with Prejudice was filed with the Berkley County

Clerk of Court. [Berkley Dismissal] Importantly, the closing between the Appellant's entity and the third party regarding the Wando River property took place on July 28, 2008. [Settlement and Release; Memo and Aff. with Attachments] At that closing, the Respondents again breached their duties to the Appellant and took actions, knowing that they had economic advantage over the Appellant, forcing the Appellant to take far less from the closing than what was contemplated by the prior settlement. [Memo Aff. with Attachments] The Appellant was forced to close on the property, under economic duress and in an effort to mitigate his damages, on July 28, 2008. [Memo Aff. with Attachments] This was after both the Stipulation of Dismissal and Settlement Agreement in the prior action. The Appellant commenced this lawsuit on July 27, 2011, within the three statute of limitation period.

ARGUMENT

- I. The Trial Court Erred in Finding that the Appellant's Claims are Barred by Res Judicata and Release, Since the Appellant's Claims Arise Out of a Closing, Which Accured on July 28, 2008, After the Settlement and Release Ending the Prior Lawsuit.**

The Respondents moved for Judgment on the Pleadings pursuant to Rule 12(c) SCRPC. [Motion] During the hearing on that Motion, the trial court allowed additional material to be considered including, a submission by the Appellant with attachments. [Memo Aff. with Attachments; TR 48-52] Even though the trial court accepted and reviewed material outside of the pleadings, its Order of January 18, 2012 does not convert the motion as one for Summary Judgment pursuant to Rule 56 SCRPC. It appears from the transcript of the hearing that the Court considered the submission by the Appellant to be an Amendment to his Complaint, which had been filed *pro se*, and was not artfully drafted, so she could “know what happened” and to “look at whether... what you said lets you go forward”. [TR p.48-52] If the Appellant’s submission is to be treated as part of the Complaint in this matter, than all facts alleged in the submission are considered true, and are admitted as far as Motion to Dismiss is concerned. *Rosenthal v. Unarco Indus, Inc.* 278 S.C. 420, 297 S.E.2d 638(1982). *Baker Hosp. v. Firemans Fund ins. Co.* 314 S.C. 98, 441 S.E.2d 822(1994). [Memo Affidavit with Attachments; Order]

Nowhere in the Trial Courts Order dismissing the Appellants Complaint, does it mention the July 28, 2008 closing on the Wando Property

to a third party, and the activities complained of by the Appellant in this case. [Memo Affidavit with Attachments; Settlement and Release]

Obviously, actions by the Respondents on July 28, 2008 could not be the subject of either *Res Judicata*, or subject to the Settlement and Release, as both the Settlement and Release of the prior action, and the Stipulation of Dismissal with Prejudice were signed prior to the alleged misconduct.

[Settlement and Release; Dismissal] These allegations of misconduct must be assumed as admitted and true at this stage of the proceedings. *Baker Hosp. v. Firemans Fund Ins. Co.* 314 S.C. 98, 441 S.E.2d 822(1994).

Therefore, the trial court was in error in finding that the Appellant's claims were barred by *Res Judicata* and by Release. The Appellant stated in his Reply to Motion to Dismiss and Supporting Memorandum Affidavit:

"The closing that took place on July 28, 2008 was the final act under duress that Wando River had to deal with. It was at this point that [Respondents] accumulated their acts of fraud" It is clear that at least part of the activities complained of by the Appellant, accrued after the Dismissal of the prior proceedings, and subsequent to the Settlement and Release.

Therefore, the activities of the Respondents could have not have been

considered, and or adjudicated in the prior action. *See Nunnery v. Brantley Constr. Co. Inc.* 289 S.C. 205, 209, 345 S.E.2d 740, 743(Ct. App.1986) *Nelson v. QHG of SC Inc.* 354 S.C. 290, 311 580 S.E.2d 171,182(Ct. App. 2003)

The Appellant states in his submission to the Trial Court:

Closing finally occurred on June 28, 2008 at a price of 5.57 million after numerous attempts. All the terms that I as Managing Member for Wando River LLC agreed to and signed for are simple thrown aside by Mr. Bennett, Mr. Darby. They simply take 110%of proceeds and leave all the documents to be taken care of when I get back. The laws according to Bennett and Darby. He who has the cash rules. [Memo Aff. with Attachments]

Since the Appellant has alleged misconduct by the Respondent subsequent to the Stipulation of Dismissal, this case does not fall under the second and third prong of the *Res Judicata* test; the identity of the subject matter could not have been adjudicated in the prior suit, as that issue did not exist at that time. *See Plum Creek Dev. Co. v. City of Conway* 334 S.C. 30, 34 512 S.E.2d 106, 109(1999)

I. The Trial Court Erred in Finding that the Appellant's Claims Are barred by the Statue of Limitations, Since the Appellant's Claims of Respondents' Wrongdoing Arise from a Closing that Accured on July 28, 2008, and the Lawsuit was Filed on July 27, 2011.

As stated above, the Appellant has complained of activities by the Respondent that accrued at the closing of the Wando property, which was being sold to a third party, with the proceeds to be divided between the Respondents and the Appellant. [Settlement and Release; Memo Aff. with Attachments] The Appellant has alleged that the Respondents, during the June 25, 2008 closing, wrongfully took advantage of the Appellant's economic disadvantage at the time, forcing him to close on the property and accept less proceeds than he was entitled, due to the Appellant's economic disadvantage, and in an effort to mitigate damages. [Settlement and Release; Memo Aff. with Attachments] The Summons and Complaint was filed by the Appellant on July 27, 2011, within the three year Statute of Limitation period. *SC Code section 15-3-530*. Therefore, the Court erred in finding that "Appellant has not made any allegations relating to causes of

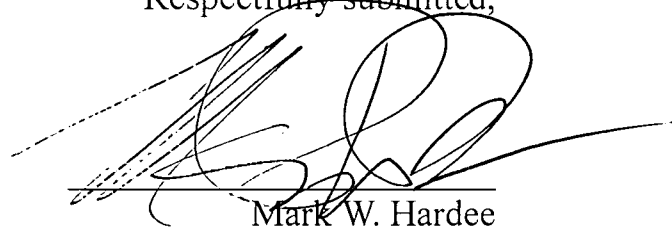
action arising on or after July 27, 2008, and therefore the Complaint is barred under the Statute of Limitations". [Order] In fact, the Appellant has made allegations that the Respondent acted wrongfully on July 28, 2008, therefore the Complaint was filed within the Statute of Limitations.

[Settlement and Release; Memo Aff. with Attachments]

CONCLUSION

Based on the above, the Appellant acerts that the trial court erred in issuing its Order of Dismissal, and this case should be remanded to trial court for further proceedings.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'M. Hardee', written over a horizontal line.

September 27, 2013

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CERTIFICATE OF SERVICE

I, Vicky McCarter, an employee with the law firm of The Hardee Firm., do hereby certify that I have this date served a copy of the following pleading upon the individual named below, by placing a copy in the United States Mail, postage prepaid and return address clearly indicated to the address below:

COUNSEL SERVED:

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Mt. Pleasant, SC 29464

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PLEADING:

Appellant's Initial Brief and Designation of Matter to be included in the Record on Appeal



Vicky McCarter

Columbia, South Carolina
September 27, 2013