ORIGINAL

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2013-CP-40-7842

Thomas Free, Appellant,

v.

Natena Buff, Respondent.

FINAL BRIEF OF THE RESPONDENT

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STATEMENT OF CASE

Appellant filed this lawsuit on November 27, 2012, seeking damages for injuries sustained in an automobile accident on December 1, 2009. (R. pp. 6-7) Respondent 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. (R. pp. 8-12)

Respondent filed a Motion to Dismiss on May 29, 2013, seeking dismissal of the lawsuit on the same grounds as her affirmative defenses. (R. pp. 13-14) A hearing was held on the Motion to Dismiss on August 8, 2013, before Judge G. Thomas Cooper, Jr. (R. pp. 1 and 36-58) At the hearing, Judge Cooper gave Appellant ten (10) days to submit a memorandum on the legal issues arising out of the Motion to Dismiss. (R. p. 56, line 18 – p. 57, line 5; p. 58, lines 1-11) No

testimony was taken nor exhibits marked during the hearing. (R. p. 37; p. 58, lines 12-13)

On August 19, 2013, Appellant submitted to Judge Cooper a Memorandum of Plaintiff. (R. pp. 23-35) Plaintiff attached to the Memorandum an Affidavit of Kristy Corley of the South Carolina Department of Motor Vehicles ("SCDMV"), filed with the Clerk of Court on August 9, 2013. (R. p. 26)

On August 29, 2013, the Court issued an Order of Dismissal dismissing the lawsuit pursuant to *S.C. R. Civ. Proc.* 12(b)(2) and 12(b)(5). (R. pp. 1-5) Appellant filed a Notice of Appeal on October 2, 2013.

STATEMENT OF THE FACTS

On December 1, 2009, Appellant and Respondent were in an automobile accident on Lykes Lane in Columbia, South Carolina, while in a vehicle owned by Respondent. (R. p. 6-7; p. 20 at ¶ 2) Respondent has no recollection of the accident due to the severity of her injuries which included a fracture of the C2 vertebra. (R. p. 20 at ¶ 2) Appellant claims that he was a passenger in the vehicle at the time of the accident although the accident report shows him as the driver. (R. p. 20 at ¶ 2) The issue of who was driving the vehicle is thus disputed.

At the time of the accident, Respondent was a resident of the State of South Carolina and friends with Appellant. (R. p. 21 at ¶5) She moved to the Charlotte, North Carolina area around April 1, 2010, and resided in three different places in the area. (R. p. 21 at ¶¶ 6-7) She and Appellant remained in contact after her move to North Carolina, including visits by Appellant to at least two of the

residences, including the last one at 9711 Rose Commons Drive, Apt. 312, Huntersville, NC 28078. (R. p. 21 at ¶¶ 6-7)

After filing this lawsuit on November 27, 2012, and having visited Respondent at her residence in February of 2012, Appellant waited until late March 2013, to attempt to serve Respondent with the Summons and Complaint. Appellant sent the Summons and Complaint to the South Carolina Department of Motor Vehicles ("SCDMV") on March 26, 2013, for service on Respondent as a non-resident pursuant S.C. Code Ann. § 15-9-370. (R. p. 31) The SCDMV sent the Summons and Complaint to Respondent on April 9, 2013 via certified mail. (R. pp. 22, 26, and 29) The documents were returned to the SCDMV marked "Unclaimed." (R. pp. 26-29) Respondent received notice that she had a certified letter being held at the post office but when she went to the post office, the letter had been returned as unclaimed. (R. p. 20 at ¶ 3)

On May 7, 2013, the SCDMV sent the Summons and Complaint to Respondent via open mail. (R. pp. 26-29) This time, Respondent received the Summons and Complaint in the open mail somewhere near the beginning of June 2013. (R. pp. 20-21 at ¶ 4)

ARGUMENT

Appellant raises three issues on appeal: (1) whether the circuit court erred in concluding that delivery of the Summons and Complaint to the Director of the SCDMV was not effective service on Respondent to toll the statute of limitations; (2) whether the circuit court erred in concluding that the statute of limitations was not tolled pursuant to S.C. Code Ann. § 15-3-30 when the Respondent moved to

North Carolina; and (3) whether the circuit court erred in determining that the action should be dismissed because there was no proof of service on Defendant within the statute of limitations.

I. THE CIRCUIT COURT CORRECTLY CONCLUDED THAT RESPONDENT WAS NOT SERVED BY DELIVERING A COPY OF THE SUMMONS AND COMPLAINT TO THE DIRECTOR OF THE SCDMV.

S.C. Code Ann. § 15-9-370 allows service of process upon the SCDMV as an agent of a resident driver who subsequently becomes a nonresident if either the plaintiff or the Director of the SCDMV sends notice of the service and a copy of the pleadings by certified mail to the defendant and obtain the defendant's return receipt. In this case, the letter from the SCDMV enclosing the Summons and Complaint to Respondent was returned unclaimed. (R. pp. 26-29)

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 and original unclaimed envelope are filed with the clerk, service is effected on the defendant. Section 15-9-380 specifically provides that this documentation must be filed with the clerk of court in which such action is pending and "*upon the filing thereof shall have the same force and legal effect as if such process has been personally served upon such defendant.*" [Emphasis added] Such documentation was filed in this case a day after the hearing on Defendant's Motion to Dismiss, i.e. August 9, 2013.

Nevertheless, Appellant argues that the service was made upon Respondent on March 26, 2013, when he delivered the pleadings to the SCDMV. Respondent cites to the case of *Holman v. Warwick Furnace Co.*, 318 S.C. 201; 456 S.E.2d 894 (1995), which addresses service of process on an unregistered foreign corporation pursuant to S.C. Code Ann. § 15-9-245. Section 15-9-245(a) provides that "[e]very foreign business or nonprofit corporation which is not authorized to do business in this State, . . . is considered to have designated the Secretary of State as its agent upon whom process against it may be served." Subsection (b) states that "[s]ervice of process is made by delivering to and leaving with the Secretary of State . . . duplicate copies of the process, notice or demand." Subsection (c) provides that if the statute is complied with, "the refusal to accept delivery of the certified mail or sign the return receipt shall not affect the validity of the service . . . ." Construing this statute, the court in *Holman* held that service on a foreign corporation is effected when the Summons and Complaint are delivered to the Secretary of State.

The procedure under S.C. Code Ann. § 15-9-370 for service on a resident driver who subsequently becomes a nonresident is different from the procedure outlined under § 15-9-245 for a foreign corporation not authorized to do business in this State. Service of process is not made simply upon leaving it with the Director of the SCDMV. Section 15-9-370 provides that such service on the Director of the SCDMV shall be sufficient service "***if*** notice of the service and a copy of the process are forewith sent by certified mail . . . ***and*** the defendant's return receipt and the plaintiff's affidavit of compliance . . . are filed . . . ."

[emphasis added] Under the mandates of the statute, the plaintiff or the Director must obtain the defendant's return receipt. If the defendant fails to sign for or refuses the certified mail, then § 15-9-380 provides that "the original envelope as returned shall be retained and the notice and copy of the summons shall be sent by open mail and the envelope and affidavit of mailing with sufficient postage of such open letter shall be filed with the clerk of court in which such action is pending and upon the filing thereof shall have the same force and legal effect as if such process has been personally served upon such defendant."

Under § 15-9-380, service occurs when the SCDMV sends the copy of the summons by open mail, which in this case was May 7, 2013. At the same time, the original unclaimed envelope with an affidavit of mailing should be filed with the clerk of court although, in this case, the final step of filing was not taken until August 9, 2013. The statute, however, clearly envisions the open mailing and the filing of documentation to occur simultaneously.

Despite the requirements of the statute, Appellant asserts that the day of delivery to the SCDMV, March 26, 2013, is the proper day of service. However, neither § 15-9-370 nor § 15-9-380 specify this as the date of service of process as explicitly provided by § 15-9-245,[1] or by § 15-9-270[2] and § 15-9-280[3], which address service of process on insurance companies through the Director of the

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[1] Section 15-9-245 provides, "Service of process is made by delivering to and leaving with the Secretary of State, or with any person designated by him to receive such service, duplicate copies of the process, notice, or demand."

[2] Section 15-9-270 provides for service on the Director of the Department of Insurance and specifically states, "This service is considered sufficient service upon the company."

[3] Section 15-9-280(b) provides, "Service upon the Secretary of State as attorney is service upon the principal."

Department of Insurance. All three statutes provide that service upon the statutory agent is service upon the company. In contrast, the nonresident driver statutes provide for service through the SCDMV but with additional requirements before service is actually effected on the defendant.

S.C. Code Ann. § 15-9-370 and § 15-9-380 are more similar to the North Carolina statute, G.S. § 1-105, addressing service of process on non-resident motorists in that state, then § 15-9-245 as asserted by Plaintiff. The language of the North Carolina statute is not identical to the language of the South Carolina statutes but the procedure is very similar and the interpretation by North Carolina courts as to when service is actually effected is helpful. Under North Carolina law, service is deemed complete as of the date shown on the defendant's return receipt. G.S. § 1-105(2); *see Byrd v. Pawlick*, 362 F.2d 390 (4th Cir. 1966). If the defendant refuses to accept the certified mailing, service is deemed complete on the date such refusal occurs or when the letter is returned unclaimed. G.S. § 1-105; *see also* 1-4 *North Carolina Civil Procedure* § 4-27. Unlike South Carolina, North Carolina has no requirement that a refused or unclaimed certified letter be sent by open mail.

Statutes permitting substitute service are in derogation of the common law and therefore require strict compliance. *Carolina Plywood Distributors, Inc. v. McAndrews*, 270 N.C. 91; 153 S.E.2d 770 (N.C. 1967). Further, substitute service is valid only if the procedure is reasonably directed at affording the defendant sufficient notice. *Hammond v. Honda Motor Co., LTD*, 128 F.R.D. 638 (D.S.C. 1989). In this case, Respondent would be denied due process if she

were deemed served on the same day as the SCDMV. The SCDMV waited fourteen (14) days before it ever sent the pleadings to Respondent. (R. pp. 26-31) The certified letter was returned "unclaimed" on April 26, 2013, and received by the SCDMV on May 3, 2013. (R. p. 28) Using Appellant's proposed service date of March 26, 2013, Respondent had only a few weeks to respond to the Complaint, if she had received it, which she did not. Under Appellant's interpretation, she was in default by the time that it was returned to the SCDMV and re-sent by open mail.

According to the plain language of S.C. Code Ann. § 15-9-380, once "the notice and copy of the summons shall be sent by open mail" and "the original envelope as returned" and an "affidavit of mailing with sufficient postage of such open letter" is filed with the clerk of court, then the filing "shall have the same force and legal effect as if such process has been personally served upon the defendant." Under the language of the statute, the Respondent was served on May 7, 2013, when notice was sent by open mail, although the record of service was not perfected until August 9, 2013, when the Affidavit of Kristy Corley was filed with the Clerk of Court.

II. THE CIRCUIT COURT CORRECTLY CONCLUDED THAT THE STATUTE OF LIMITATIONS WAS NOT TOLLED PURSUANT TO S.C. CODE ANN. § 15-3-30 WHERE APPELLANT KNEW THE LOCATION OF RESPONDENT.

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

moved to another state. Appellant asserts that "[w]ithout clear evidence from Respondent showing the Appellant was aware of her address prior to February of 2012," the statute of limitations is tolled from April of 2010 through January of 2012.

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).

The only evidence submitted on this issue was submitted by Respondent. (R. pp. 21-21) Appellant did not present any evidence at the hearing to counter Respondent's affidavit despite the fact that it is Appellant's burden to establish that the tolling statute applies. (R. p. 37 and p. 58, lines 12-13) The only evidence in the record is that Appellant and Respondent were friends at the time of the accident and "stayed in touch" since her move out of state. (R. p. 21 at ¶ 6) Appellant knew where Respondent lived and visited Respondent at the apartment where service of process was sent as well as at a previous residence. (R. p. 21 at ¶¶ 6-7) Thus, Appellant knew the location of Respondent and the tolling statute does not apply.

The purpose of the tolling statute is "to prevent a cause of action arising in this State from becoming unenforceable by virtue of the running of the statute of

limitations in cases where personal jurisdiction over a defendant cannot be obtained because the defendant is not within the State." *Meyer* at 330 S.C. 183; 498 S.E.2d at 639. However, the purpose of the tolling statute is served when a substitute service statute brings the defendant within the personal jurisdiction of the court. *Id.* Appellant remained in contact with Respondent since she left South Carolina and knew where she resided, long before expiration of the statute of limitations.

III. THE CIRCUIT COURT CORRECTLY CONCLUDED THAT APPELLANT FAILED TO EFFECT TIMELY SERVICE ON RESPONDENT.

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 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.

The affidavit of service was not filed by Appellant until the day after the hearing on Defendant's Motion to Dismiss. Based on § 15-9-380, the earliest that

service was effected on Defendant was on May 7, 2013, when the Summons and Complaint were sent to her in open mail.

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 Appellant's negligence cause of action against Respondent expired on February 27, 2013, three years after the accident. In order to have properly commenced the action before the statute of limitations ran, Appellant was required to serve the Summons and Complaint on Respondent either by February 27, 2013, 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). Appellant waited until the last minute to attempt to serve Respondent for the first time through the SCDMV and did not effect service until May 7, 2013. Appellant thus failed to commence the action within the statute of limitations period.

Failure to file proof of service pursuant to Rule 5(d) may not affect the validity of service, as alleged by Appellant, but service was not made in this case until after the statute of limitations expired, thereby requiring dismissal of the lawsuit. Appellant and Respondent were friends at the time of the accident and thereafter. (R. p. 21 at ¶¶ 5-6) Appellant knew where Respondent lived and had

visited Respondent at the apartment where service by mail was attempted and finally effected. (R. pp. 20-21) Even though Appellant knew where Respondent lived, he still failed to serve her in a timely manner. The statute of limitations on his claim has expired and as a result, this action was properly dismissed by the Circuit Court.

CONCLUSION

Respondent requests that the Court of Appeals affirm the Order of the Honorable G. Thomas Cooper, Jr. filed on August 29, 2013.

Respectfully submitted,

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March 7, 2014

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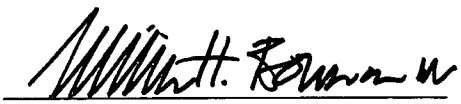
PROOF OF SERVICE

I certify that I have served the Final Brief of Respondent in this case on Frank A. Barton and H. Wayne Floyd, attorneys for the Appellant, by depositing a copy of it in the United States Mail, postage prepaid, on March 7, 2014, addressed to each of them at P.O. Box 3972, West Columbia, South Carolina 29170



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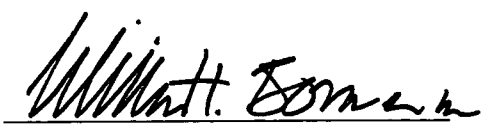
CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule 211(b), SCRCR.



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