

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM Horry County Court of Common Pleas

The Honorable Larry B. Hyman, Circuit Court Judge

Case No. 2011-CP-26-4800

Appellate Case No. 2013-002602

Becky Lynette West.Appellant.

v.

Luck Avenue Properties, Inc.....Respondent.

INITIAL BRIEF OF RESPONDENT

RECEIVED

APR 08 2014

SC Court of Appeals

Other Counsel of Record:

Kevin M. Hughes, Esquire
Post Office Box 3940
North Myrtle Beach, South Carolina 29582
Phone (843) 249-7932
Fax (843) 249-4694
Khugheslaw@aol.com
Attorney for Appellant

Christopher H. Pearce, Esquire
South Carolina Bar No. 71083
cpearce@pearcelawgroup.com
Abbey G. Cain, Esquire
South Carolina Bar No. 100037
acain@pearcelawgroup.com
1309 Professional Drive, Suite 202
Myrtle Beach, South Carolina 29577
Phone (843) 839-3210
Fax (843) 839-3214
Attorneys for Respondent

TABLE OF CONTENTS

Table of Authoritiesii
Statement of the Issue 1
Rule of Civil Procedure Involved 1
Statement of the Case 1
Argument.....2

I. THE COURT SHOULD AFFIRM THE TRIAL COURT’S HOLDING BECAUSE
THE APPELLANT’S STATUE OF LIMITATIONS EXPIRED PRIOR TO THE
UNDERLYING ACTION BEING RESTORED UNDER SCRCP, 40(J).....2

Conclusion.....3

TABLE OF AUTHORITIES

South Carolina Supreme Court Cases

Bowman v. Richland Memorial Hosp., 335 S.C. 88, 91-92 (1999).....3
Maxwell v. Genez, 356 S.C. 617, 621 (2003).....3

Rules of Civil Procedure

South Carolina Code Annotated Section 15-3-530.....1,2
South Carolina Rule of Civil Procedure 40(j).....1,2,3

STATEMENT OF ISSUE

Whether Rule 40(j) of the South Carolina Rules of Civil Procedure allows a Plaintiff to restore her case where (1) the Motion to Restore was filed with the Clerk of Court's office one (1) year after the Order Striking the Case Pursuant to Rule 40(j) was filed; (2) where Plaintiff's statute of limitation continued to run from the date the Motion to Restore was filed with the Clerk of Court until an Order to Restore is filed with the Clerk of Court; and (3) where Plaintiff's statute of limitations ran one hundred twenty nine (129) days prior to an Order on Plaintiff's Motion being filed with the Clerk of Court's office.

RULE OF CIVIL PROCEDURE INVOLVED

South Carolina Rule of Civil Procedure 40(j) provides:

“A party may strike its complaint, counterclaim, cross-claim or third party claim from any docket one time as a matter of right, provided that all parties adverse to that claim, counterclaim, cross-claim or third party claim agree in writing that it may be stricken, and all further agree that if the claim is restored upon motion made within 1 year of the date stricken, the statute of limitations shall be tolled as to all consenting parties during the time the case is stricken, and any unexpired portion of the statute of limitations on the date the case was stricken shall remain and begin to run on the date that the claim is restored. A party moving to restore a case stricken from the docket shall provide all parties notice of the motion to restore at least 10 days before it is heard. Upon being restored, the case shall be placed on the General Docket and proceed from that date as provided in this rule.”

South Carolina Code Annotated Section 15-3-530 provides that the statute of limitations in the underlying civil matter is 3 years.

STATEMENT OF THE CASE

The underlying matter arose out of a personal injury that allegedly occurred on June 8, 2008 when the Appellant tripped on uneven pavement on the Respondent's property. Complaint, p.1. The underlying Complaint was filed on June 6, 2011, 2 days prior to the expiration of Appellant's statute of limitations. Id. On July 13, 2012, the Honorable Steven H. John signed a

Consent Order on Defendant's Motion for Sanctions and Striking Case Pursuant to Rule 40(j) (hereinafter "40(j) Order"). 40(j) Order p.1. Three days later, on July 16, 2012, the 40(j) Order was filed with the Clerk of Court's office. Id. On July 16, 2013, exactly one year later, Appellant filed a Notice of Motion and Motion to Restore the matter to the current roster. Motion p.1.

October 1, 2013, Appellant's Motion to Restore was heard by the Honorable Larry B. Hyman. At that time, Respondent's counsel, Christopher H. Pearce, Esquire explained to Judge Hyman that the Appellant is allowed to file a motion to restore a matter at any time pursuant to SCRPC 40(j), however, if the case is not restored within one year from the date the matter was stricken, Appellant would lose her right to the tolling provisions within the statute and any remaining statute of limitation time remaining on the Appellant's claim would begin to run. Transcript p.3, lines 14 – 21; p.6, lines 9 – 22. Thereafter, Judge Hyman denied Appellant's Motion, ruling that the "Plaintiff did not seek restoration of the matter until one year and three (3) days after the matter was stricken from the docket by The Honorable Steven H. John." Order, p.1.

ARGUMENT

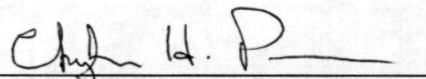
I. THE COURT SHOULD AFFIRM THE TRIAL COURT'S HOLDING BECAUSE THE APPELLANT'S STATUTE OF LIMITATIONS EXPIRED PRIOR TO THE UNDERLYING ACTION BEING RESTORED UNDER SCRPC, 40(J).

SCRPC 40(j) permits a party to remove a matter from the current court docket for one (1) year, but it requires that the Plaintiff file a Motion to Restore the case within that one year. See SCRPC 40 (j). However, an Order restoring the case is not final until it has been "reduced to writing, signed by the Judge and delivered for recordation." Bowman v. Richland Memorial Hosp., 335 S.C. 88, 91-92 (1999). "If [a] claim is restored within one year after it is stricken, the statute of limitations is tolled for that period." Maxwell v. Genez, 356 S.C. 617, 621 (2003). The statute of limitations governing this matter is three (3) years. S.C. Code Ann. § 15-3-530.

Appellant failed to restore the underlying case within the one year statutory provision provided in SCRCP, 40(j). Therefore, after the matter was stricken for one year without restoration, the remaining statute of limitations time began to run when the one year 40(j) deadline approached, on July 16, 2013. At Plaintiff's Motion to Restore hearing on October 1, 2013, Attorney Pearce explained to Judge Hyman that the Appellant filed its Complaint in the underlying action 2 days prior to the expiration of the statute of limitations and thus the statute of limitation ran prior to the hearing. Transcript p.3, lines 14 – 21; p.6, lines 9 – 22. As a result, Judge Hyman's denial of Plaintiff's Motion was proper pursuant to governing South Carolina statutory and case law.

CONCLUSION

For the reasons stated, this Honorable Court should affirm the Order Denying Plaintiff's Motion to Restore.



Christopher H. Pearce, Esquire
South Carolina Bar No. 71083
cpearce@pearcelawgroup.com

Abbey G. Cain, Esquire
South Carolina Bar No. 100037
acain@pearcelawgroup.com

1309 Professional Drive, Suite 202
Myrtle Beach, South Carolina 29572
Phone (843) 839-3210
Fax (843) 839-3214
Attorneys for Respondent

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS

Civil Action No. 2011-CP-26-04800

Becki Lynette West,

Plaintiff,

vs.

Luck Avenue Properties, Inc. a/k/a Luck
Avenue Properties, LLC,

Defendant.

**CONSENT ORDER ON
DEFENDANT'S
MOTION FOR SANCTIONS AND
STRIKING CASE PURSUANT TO RULE
40(j)**

FILED
HONORABLE COURT
12 JUL 16 AM 4:12
MELANIE HUGHES-WARD
CLERK OF COURT

COMES NOW, counsel for Defendant Luck Avenue Properties, Inc. a/k/a Luck Avenue Properties, LLC ("Defendant Luck"), Christopher H. Pearce, Esq., of The Pearce Law Group, P.C. ("Pearce"), and counsel for the Plaintiff Becki Lynette West ("Plaintiff West"), Kevin M. Hughes, Esq. of the Hughes Law Firm ("Hughes"), whom hereby consents and agrees to this Consent Order on Defendant Luck's Motion for Sanctions and otherwise represent the following to the Court:

1. Counsel for Plaintiff West, hereby agreed to provide the required Answers to Defendant Luck's Interrogatories and Responses to Defendant Luck's Request for Production no more than thirty (30) days from the date of a Consent Order which was filed in this matter on March 8, 2012;
2. Thereafter, Counsel for Plaintiff West failed to provide the required written discovery responses as agreed to;

15/3
[Handwritten signature]

3. As such, Counsel for Defendant Luck subsequently filed a Motion for Sanctions against Plaintiff West for the continuing failure to provide responses to Defendant Luck's written discovery.

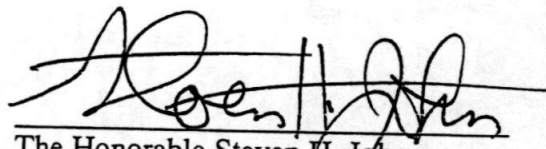
4. Said Motion for Sanctions was scheduled for hearing on June 26, 2012. However, prior thereto, Counsel for Defendant Luck agreed the following in order to resolve the pending Motion for Sanctions:

(a). Counsel for Plaintiff West shall pay to Counsel for Defendant Luck \$573.00 in fees, costs, and expenses related to the reasonable pursuit of the Motion to Compel and Motion for Sanctions relating to the substantially outstanding written discovery that remains due and owing from the Plaintiff; and

(b). Counsel for Plaintiff West and Defendant Luck hereby consent to the dismissal of this action from the active trial docket pursuant to Rule 40(j), SCRCP;

(c). The Parties may continue to conduct discovery during the Rule 40(j), SCRCP, dismissal period prior to restoration of the case to the trial docket as otherwise agreed to be the parties.

AND IT IS SO ORDERED.


The Honorable Steven H. John
Chief Administrative Judge
Fifteenth Judicial Circuit

July 13, 2012
Conway, South Carolina

2/13
2012

I SO MOVE AND CONSENT:

Christopher H. Pearce
Christopher H. Pearce, Esquire
Attorney for Defendant Luck Avenue
Properties, Inc. a/k/a Luck Avenue Properties,
LLC

I CONSENT:

K. M. Hughes
Kevin M. Hughes, Esquire
Attorney for Plaintiff Becki Lynette West

3
[Signature]

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT
 COUNTY OF HORRY) CIVIL ACTION NO. 2011-CP-26-4800

Becki Lynette West.)
)
 Plaintiff.)
)
 vs.)
)
 Luck Avenue Properties, Inc. a/k/a)
 Luck Avenue Properties, LLC.)
)
 Defendant.)

COMPLAINT
 (Jury Trial Demanded)

2011 OCT -5 PM 4:58
 CLERK OF COURT
 ANNE RICHMOND-WHITE

The Plaintiff, complaining of the Defendant, alleges the following:

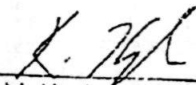
1. Plaintiff is a resident and citizen Horry County, South Carolina. Defendant is Corporation duly organized pursuant to the laws of South Carolina, and doing business in Horry County South Carolina. The incident which is the subject matter of this cause of action occurred in Horry County, South Carolina.
2. This Honorable Court has jurisdiction over the parties and subject matter hereto.
3. Plaintiff will show that on or about June 8, 2008, she was a guest at Unit 11, in an apartment building owned and operated by the Defendant located at Luck Avenue in Little River, South Carolina. Plaintiff was walking down the stairs outside the unit and tripped on an uneven piece of pavement located at the bottom of the stairs. Plaintiff will show that the uneven pavement was a hazardous condition.
4. Plaintiff will show that Defendant had a duty to the Plaintiff to make sure that the pavement outside its units is reasonably safe.
5. Plaintiff will show that Defendant negligently, recklessly, willfully, wantonly, intentionally, and in a gross negligent manner breached its duty to the Plaintiff on the premises in the following particulars, to wit:

- a. In failing to routinely inspect the condition of the Pavement outside of the units;
- b. In failing to repair damaged or unsafe portions of the pavement,
- c. In failing to maintain the pavement in a reasonably safe condition;

6. Plaintiff will show that as a direct and proximate result of Defendant's negligent, reckless, willful, wanton, intentional and gross negligent breach of its duty, Plaintiff has suffered serious physical injury and has incurred medical expenses and has experienced pain and suffering. Plaintiff therefore requests judgment against Defendant for actual damages in a sum to be determined by a Court and Jury.

WHEREFORE, Plaintiff prays as follows:

- a. For judgment against Defendant for actual damages;
- b. For the costs and disbursements incurred in the pursuit of this matter; and
- c. For such other and further relief as this Honorable Court may deem just and proper.



Kevin M. Hughes
Attorney for Plaintiff
P.O. Box 3940
North Myrtle Beach, SC 29582
(843) 249-7932

Date 6/6/11

North Myrtle Beach, South Carolina

STATE OF SOUTH CAROLINA)

COUNTY OF Horry)

BECKI LYNETTE WEST)
Plaintiff(s))

vs.)

LUCK AVENUE PROPERTIES, INC. a/k/a)
LUCK AVENUE PROPERTIES, LLC Defendant(s))

(Please Print)

Submitted By: Kevin M. Hughes
Address: P.O. Box 3940
North Myrtle Beach, SC 29582

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2011 CP 26 - 4800

SC Bar #: 15974
Telephone #: (843) 249-7932
Fax #: (843) 249-4694
Other:
E-mail: khugheslaw@aol.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment Settlement do not complete

- JURY TRIAL demanded in complaint. NON-JURY TRIAL demanded in complaint.
- This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- This case is exempt from ADR (Proof of ADR Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- | | | | |
|---|--|--|---|
| <p>Contracts</p> <ul style="list-style-type: none"> <input type="checkbox"/> Construction (190) <input type="checkbox"/> Debt Collection (110) <input type="checkbox"/> Employment (130) <input type="checkbox"/> General (130) <input type="checkbox"/> Breach of Contract (140) <input type="checkbox"/> Other (150) | <p>Torts - Professional Malpractice</p> <ul style="list-style-type: none"> <input type="checkbox"/> Dental Malpractice (200) <input type="checkbox"/> Legal Malpractice (210) <input type="checkbox"/> Medical Malpractice (230) Previous Notice of Intent Case # _____ CP _____ <input type="checkbox"/> Notice File Med Mal (240) <input type="checkbox"/> Other (250) | <p>Torts - Personal Injury</p> <ul style="list-style-type: none"> <input type="checkbox"/> Assault/Battery (300) <input type="checkbox"/> Conversion (310) <input type="checkbox"/> Motor Vehicle Accident (320) <input checked="" type="checkbox"/> Premises Liability (330) <input type="checkbox"/> Products Liability (340) <input type="checkbox"/> Personal Injury (350) <input type="checkbox"/> Wrongful Death (360) <input type="checkbox"/> Other (370) | <p>Real Property</p> <ul style="list-style-type: none"> <input type="checkbox"/> Ejectment (400) <input type="checkbox"/> Contamination (410) <input type="checkbox"/> Encroachment (420) <input type="checkbox"/> Mechanic's Lien (430) <input type="checkbox"/> Partition (440) <input type="checkbox"/> Possession (450) <input type="checkbox"/> Building Code Violation (460) <input type="checkbox"/> Other (470) |
| <p>Inmate Petitions</p> <ul style="list-style-type: none"> <input type="checkbox"/> PCR (500) <input type="checkbox"/> Mandamus (510) <input type="checkbox"/> Habeas Corpus (520) <input type="checkbox"/> Other (599) | <p>Judgments/Settlements</p> <ul style="list-style-type: none"> <input type="checkbox"/> Death Settlement (610) <input type="checkbox"/> Foreign Judgment (620) <input type="checkbox"/> Magistrate's Judgment (630) <input type="checkbox"/> Minor Settlement (640) <input type="checkbox"/> Transcript Judgment (650) <input type="checkbox"/> In Rem Proceeding (660) <input type="checkbox"/> Transfer of Structured Settlement Payment Rights Application (670) <input type="checkbox"/> Other (699) | <p>Administrative Law Relief</p> <ul style="list-style-type: none"> <input type="checkbox"/> Reinstated Driver's License (800) <input type="checkbox"/> Judicial Review (810) <input type="checkbox"/> Relief (820) <input type="checkbox"/> Permanent Injunction (830) <input type="checkbox"/> Forfeiture-Petition (840) <input type="checkbox"/> Forfeiture-Consent Order (850) <input type="checkbox"/> Other (899) | <p>Appeals</p> <ul style="list-style-type: none"> <input type="checkbox"/> Appellate (900) <input type="checkbox"/> Magistrate Civil (910) <input type="checkbox"/> Magistrate-Criminal (920) <input type="checkbox"/> Municipal (930) <input type="checkbox"/> Probate Court (940) <input type="checkbox"/> SCDOT (950) <input type="checkbox"/> Workers Comp (960) <input type="checkbox"/> zoning Board (970) <input type="checkbox"/> Public Service Commission (980) <input type="checkbox"/> Employment Security (990) <input type="checkbox"/> Other (999) |
| <p>Special & Complex</p> <ul style="list-style-type: none"> <input type="checkbox"/> Environmental (000) <input type="checkbox"/> Automobile Arb (010) <input type="checkbox"/> Medical (020) <input type="checkbox"/> Other (099) | <p>Other</p> <ul style="list-style-type: none"> <input type="checkbox"/> Pharmaceuticals (050) <input type="checkbox"/> Fair Trade Practices (040) <input type="checkbox"/> Out-of-State Depositions (050) <input type="checkbox"/> Motion to Quash Subpoena in Out-of-County Action (060) <input type="checkbox"/> Senior Dispute (070) | | |

Submitting Party Signature: [Signature]

Date: 6/6/11

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SC Rule 11 and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-26-10 et seq.

FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Clarendon, Colleton, Florence, Greenville, Hampton, Horry, Jasper, Lee, Lexington, Pickens (Family Court Only), Richland, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF HORRY) IN THE COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT
) CIVIL ACTION NO. 2011-CP-26- 4800

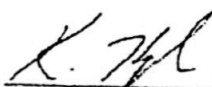
Becki Lynette West,)
)
 Plaintiff.)
)
 vs.)
)
 Luck Avenue Properties, Inc. a/k/a)
 Luck Avenue Properties, LLC.)
)
 Defendant.)

SUMMONS
 (Jury Trial Demanded)

CLARE HUGHES-WARD
 CLERK OF COURT
 JUN 6 2011 4:55 PM
 COUNTY

TO: THE DEFENDANT ABOVE NAMED

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, which is being served upon you, and to serve a copy of your Answer to the said Complaint on the subscriber at his office at 1087-2 Redj Mix Road, Little River, SC 29566. (mailing address: P.O. Box 3940, North Myrtle Beach, South Carolina 29582) within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint.


 KEVIN M. HUGHES
 Attorney for Plaintiff
 P.O. Box 3940
 North Myrtle Beach, SC 29582
 (843) 399-7932

June 6, 2011

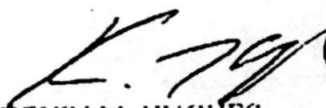
North Myrtle Beach, South Carolina

STATE OF SOUTH CAROLINA)
)
 COUNTY OF HORRY) IN THE COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT
) CIVIL ACTION NO. 2011-CP-26-4800

Becki Lynette West,)
)
 Plaintiff.)
)
 vs.)
)
 Luck Avenue Properties, Inc. a/k/a)
 Luck Avenue Properties, LLC.)
)
 Defendant.)

Notice of Motion and Motion to Restore

YOU WILL PLEASE TAKE NOTICE that the Plaintiff will move before the Presiding Judge of the Fifteenth Judicial Circuit at the Horry County Courthouse in Conway, South Carolina on the tenth (10th) day after service hereof or as soon thereafter as the parties might be heard for an order restoring the above captioned case to the docket. This Motion is made pursuant to Rule 40(j) South Carolina Rules of Civil Procedure.


 KEVIN M. HUGHES
 Attorney for Plaintiff
 P.O. Box 3940
 North Myrtle Beach, SC 29582
 (843) 249-7932

KEVIN M. HUGHES
 CLERK OF COURT

2013 JUL 16 PM 4:43

FILED
 HORRY COUNTY

Date: 7/16/13

North Myrtle Beach, South Carolina

1 STATE OF SOUTH CAROLINA) **TRANSCRIPT OF RECORD**

2 COUNTY OF Horry) CASE NO: 2011-DR-26-0484

3

4

B E F O R E: The Honorable Larry B. Hyman
October 1, 2013

6

7 BECKI LYNETTE WEST,

8

Plaintiff,

9

vs.

10

LUCK AVENUE PROPERTIES, INC., a/k/a LUCK AVENUE
PROPERTIES, LLC,

11

12

Defendant.

13

14 APPEARANCES:

15

Kevin M. Hughes, Esq.
For the Plaintiff.

16

17

Christopher H. Pearce, Esq.
For the Defendant.

18

19

20

21

22

23

24

25

P R O C E E D I N G S

1
2 THE COURT: Is this your motion, Mr. Hughes?

3 MR. HUGHES: This is my motion. This matter
4 was stricken pursuant to a consent order of the parties,
5 and the order to strike it was filed on July 16, 2012.

6 THE COURT: Was it a 40(j)?

7 MR. HUGHES: Yeah, it was 40(j).

8 THE COURT: And now you've moved to restore,
9 and Mr. Pearce won't agree? You are the most
10 cantankerous fellow I've ever seen, Mr. Pearce
11 (laughing).

12 MR. PEARCE: Your Honor, I represent Luck
13 Avenue Properties, the defendant. The issue is this
14 case was originally filed in 2011 on the eve of the
15 statute, and it was an incident that occurred on June 8,
16 2008. The order entered by Judge John on July 16, 2012
17 was a consent order on our motion to sanction and
18 striking the case pursuant to Rule 40(j). There is more
19 history than a standard 40(j).

20 On July 16th of this year, Mr. Hughes moved
21 to restore. Clearly, that is not within the one year
22 that he had to restore the case and protect --

23 THE COURT: Tell me about that, Mr. Hughes.
24 Under what circumstances may you move after the passage
25 of a year?

1 MR. HUGHES: My understanding is that the
2 case was stricken on July 16th.

3 THE COURT: It says here July 13th, signing
4 of the order.

5 MR. HUGHES: I was going off of the date it
6 was filed with the court.

7 THE COURT: The day it was recorded? I don't
8 know.

9 MR. HUGHES: Since -- if it was filed on the
10 16th, I filed it on the 16th of July, and I believe
11 it is one year from the date of filing.

12 THE COURT: What does the rule say? Bring up
13 Rule 40(j) for me, if you can.

14 MR. PEARCE: The rule basically says, if you
15 look at Maxwell versus Deniz, 356 S.C. 617, the Court
16 has said that a party may move after a year to restore
17 the case. They can do that, but they lose their right
18 to the -- the tolling provisions of the statute at that
19 point, and the opposing party or other party has an
20 absolute statute of limitations defense.

21 THE COURT: Here is the language, that if a
22 claim is restored -- I'm reading from the rule itself --
23 that if the claim is restored upon motion made within
24 one year of date stricken -- not date recorded, date
25 stricken -- the statute of limitations shall be tolled

1 as to all consenting parties during the time the case is
2 stricken, and any unexpired portion of the statute of
3 limitations on the date the case was stricken shall
4 remain and begin to run on the date that the claim is
5 restored.

6 Now, what does that mean? In my mind, it
7 means that if you have it restored, you still have some
8 statute time, do you not?

9 MR. PEARCE: This case was originally filed
10 on the eve of the statute. Your Honor, let me be clear.
11 This case today is five years, three months and 23 days
12 old as of today.

13 THE COURT: You should have been an
14 accountant, Mr. Pearce.

15 MR. PEARCE: Well, our position is that if
16 the Court elects to restore the case, which in its
17 discretion it may, I guess, under its --

18 THE COURT: You would have the right to amend
19 and allege the affirmative defense of statute of
20 limitations.

21 MR. PEARCE: We're going to move to dismiss
22 the case, is what we're going to do.

23 THE COURT: Okay. Tell me about that,
24 Mr. Hughes.

25 MR. HUGHES: Judge, about the deed stricken,

1 or deed filed?

2 THE COURT: Well, I believe that the rule
3 allows for me to restore the case after the year, but
4 that the statute is only tolled as to consenting parties
5 during the time the case was stricken, and any unexpired
6 portion of the statute of limitations on the date the
7 case was stricken shall remain and begin to run on the
8 date the claim was restored.

9 Now, if Mr. Pearce tells me that your action
10 was filed on the eve of the statute, the statute has
11 clearly run. Is that your position?

12 MR. PEARCE: That's correct.

13 THE COURT: And unless I restore it within
14 one year of the date that it was stricken, you have a
15 problem with the statute of limitations. Doesn't that
16 seem to be the rule? Can you point me to something that
17 would indicate that the rule is otherwise? I'll be
18 happy to look at it.

19 MR. HUGHES: Judge, I can. I don't know
20 about -- if the case is restored upon motion made within
21 one year to be stricken, not restored within one year.

22 THE COURT: I agree with you there. If you
23 filed your motion within one year of the date it was
24 stricken. But I think the day it was stricken is the
25 day that Judge John signed his order, the consent order,

1 and it is July 13, 2012. That is the date that it was
2 stricken, the date that the judge signed the order, not
3 the date it was filed.

4 My understanding, and I may be wrong, but
5 what I picked up from Mr. Pearce is that by the time
6 that was done, the action was, in fact, time barred or
7 -- let me change that. The statute had run. I would
8 assume that some time had passed from the time it was
9 filed, right? You said it was filed on the eve of the
10 statute, right?

11 MR. PEARCE: The filing of the actual
12 complaint was filed -- my copy is hard to read, but the
13 incident occurred on June 8, 2006, and I think the
14 actual complaint was filed on June 6, 2011, so two days
15 before the statute ran originally on the complaint.

16 THE COURT: So from what I understand of
17 that, at the time that the action was struck, there was
18 no time left on the statute, and it was tolled during
19 the year. If you had refiled -- or made a motion to
20 have it restored any time during that year, there would
21 have been no statute of limitations problem. After a
22 year, you can only use that portion of the statute that
23 was not tolled, and to hold otherwise would make this
24 part of the rule that says the statute of limitations
25 shall be tolled as to all consenting parties during the

1 time the case is stricken, and any unexpired portion of
2 the statute of limitations on the date the case was
3 stricken shall remain and begin to run on the date that
4 the claim is restored.

5 So there was none left on the date that it
6 was stricken, is that correct, no time left on that
7 date? To hold otherwise would just make that portion of
8 the rule meaningless. I think Mr. Hughes, he is
9 entitled -- I think you can file it, but he certainly is
10 going to have a defense of the statute of limitations.

11 I'm going to deny the motion to restore. Mr.
12 Pearce, you do an order.

13 MR. PEARCE: I will. Thank you.

14 THE COURT: Mr. Pearce, set out findings and
15 conclusions of law in your order citing the rule and the
16 language we've been discussing.

17 MR. PEARCE: I will do that. Thank you.

18 (Whereupon, the proceedings concluded.)

19
20
21
22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

I, Natalie Dahl, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true and accurate Transcript of Record of the proceedings captioned on the 1st day of October, 2013.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

December 14, 2013

Natalie Dahl, RPR
Court Reporter

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

)
)
)

IN THE COURT OF COMMON PLEAS
Civil Action No. 2011-CP-26-04800

Becki Lynette West,

Plaintiff,

vs.

Luck Avenue Properties, Inc. a/k/a Luck
Avenue Properties, LLC,

Defendant.

ORDER ON
PLAINTIFF'S MOTION TO RESTORE

13 OCT 25 PM 2:55
CLEMSON COUNTY COURT

This matter was before the Court on Tuesday, October 1, 2013 pursuant to Plaintiff's Motion to Restore, under Rule 40(j), SCRCP. Christopher H. Pearce, counsel for Defendant Luck Avenue Properties, Inc. a/k/a Luck Avenue Properties, LLC ("Defendant") and Kevin M. Hughes, attorney for Plaintiff Becki Lynette West ("Plaintiff") were present. For the reasons set forth below, the Motion to Restore by Plaintiff is hereby **DENIED**.

FACTS

The facts, viewed in the light most favorable to Plaintiffs, are as follows:

1. This matter arises out of an alleged trip and fall by Plaintiff at Defendant's property on June 8, 2008.
2. The Summons and Complaint in this action were filed by Attorney Hughes on June 6, 2011.
3. On July 13, 2013, The Honorable Steven H. John signed a Consent Order on Defendant's Motion for Sanctions and Striking case Pursuant to Rule 40(j) causing the matter to be stricken from the docket.

4. On July 16, 2013, counsel for Plaintiff moved for an Order to restore the matter pursuant to Rule (j), SCRCP.

CONCLUSION

For the reasons set forth above, this Court concludes it considered the arguments of counsel and as a matter of law, the Court finds that Counsel for Plaintiff did not seek restoration of the matter until one year and three (3) days after the matter was stricken from the docket by The Honorable Steven H. John.

NOW, THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiff's Motion to Restore is denied.

AND IT IS SO ORDERED.



The Honorable Larry B. Hyman
Fifteenth Judicial Circuit

This 11 day of Dec, 2013.
Conway, South Carolina

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM HORRY COUNTY COURT OF COMMON PLEAS

The Honorable Larry B. Hyman, Circuit Court Judge

Case No. 2011-CP-26-4800

Appellate Case No. 2013-002602

Becky Lynette West.Appellant.

v.

Luck Avenue Properties, Inc.Respondent.

DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

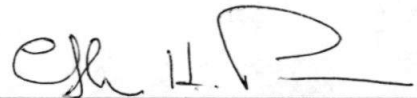
Respondent proposes the following be included in the Record on Appeal:

- (1) Plaintiff's Complaint filed June 6, 2011
- (2) Consent Order for Sanctions and Striking the Case filed July 16, 2012
- (3) Plaintiff's Motion to Restore filed July 16, 2013
- (4) Transcript of Proceedings for October 1, 2013.
- (5) Order on Plaintiff's Motion to Restore filed October 25, 2013

I certify that this designation contains no matter which is irrelevant to this appeal.

Other Counsel of Record:

Kevin M. Hughes, Esquire
Post Office Box 3940
North Myrtle Beach, South Carolina 29582
Phone (843) 249-7932
Fax (843) 249-4694
Khugheslaw@aol.com
Attorney for Appellant



Christopher H. Pearce, Esquire
South Carolina Bar No. 71083
cpearce@pearcelawgroup.com

Abbey G. Cain, Esquire
South Carolina Bar No. 100037
acain@pearcelawgroup.com
1309 Professional Drive, Suite 202
Myrtle Beach, South Carolina 29577
Phone (843) 839-3210
Fax (843) 839-3214
Attorneys for Respondent

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM HORRY COUNTY COURT OF COMMON PLEAS

The Honorable Larry B. Hyman, Circuit Court Judge

Case No. 2011-CP-26-4800

Appellate Case No. 2013-002602

Becky Lynette West.Appellant.

v.

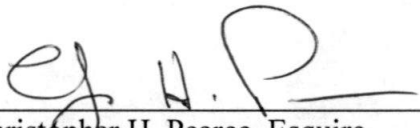
Luck Avenue Properties, Inc.....Respondent.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondent on Kevin M. Hughes, Attorney for Appellant, by depositing a copy of it in the United States Mail, postage prepaid, on April 4, 2014 addressed as follows:

Kevin M. Hughes, Esquire
Post Office Box 3940
North Myrtle Beach, South Carolina 29582

RECEIVED
APR 08 2014
SC Court of Appeals



Christopher H. Pearce, Esquire
South Carolina Bar No. 71083
cpearce@pearcelawgroup.com
Abbey G. Cain, Esquire
South Carolina Bar No. 100037
acain@pearcelawgroup.com
1309 Professional Drive, Suite 202
Myrtle Beach, South Carolina 29577
Phone (843) 839-3210
Fax (843) 839-3214
Attorneys for Respondent

April 4, 2014

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

Re: Becki Lynette West v. Luck Avenue Properties, Inc. a/k/a Luck Avenue
Properties, LLC
Appellate Case No.: 2013-002602
Our File No.: 0133-11-1109
Claim No.: 72-4068-11

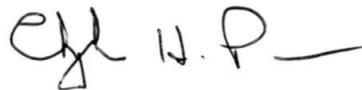
Dear Ms. Kitchings:

Enclosed please find an original and one (1) copy of Initial Brief of Respondent in the above matter. Please note that the filing fee was paid at the time the Motion to Restore was filed.

Please file the original and return a clocked copy to me in the envelope provided. Thank you in advance for your kind assistance in this regard.

Sincerely,

THE PEARCE LAW GROUP, P.C.



Christopher H. Pearce, Esquire

CHP:ehc
Enclosures

cc: Kevin M. Hughes, Esq.

RECEIVED

APR 08 2014

SC Court of Appeals