

THE STATE OF SOUTH CAROLINA

ORIGINAL

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.

FINAL BRIEF OF RESPONDENT

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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. (R. p. 11) 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"). (R. p. 3) 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. (R. p. 7)

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 SCRCP 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. (R. p. 15, lines 14 – 21-p. 18, lines 11 – 15). 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." (R. p. 2)

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 SCRCP, 40(J).

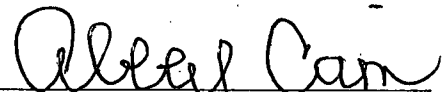
SCRCP 40(j) permits a party to remove a matter from the current court docket for one (1) year, but it requires that the Plaintiff file a Motion to Restore the case within that one year. See SCRCP 40 (j). However, an Order restoring the case is not final until it has been "reduced to writing, signed by 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. (R. p. 15, lines 14 – 21-p. 18, lines 11 – 15). 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.



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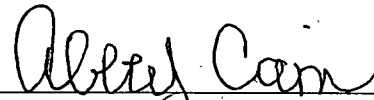
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PROOF OF SERVICE

I certify that I have served the Final Brief of Respondent on Kevin M. Hughes, Attorney for Appellant, by depositing a copy of it in the United States Mail, postage prepaid, on May 16, 2014 addressed as follows:

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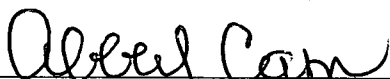
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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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