STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge
Trial Court Case No. 2009-CP-22-1045

APPELLATE CASE NO. 2013-001644

John Steven Goodwin, Louise C. Goodwin, Thomas L. Puckett and Brenda C. Puckett, Robert Nahama and Jeanne E. Nahama, Thomas Holland and Sharon Louise Holland, Joyce K. Sobel, Robert W. Waruszewski, Richard N. Taylor, Robert K. Spillers (a/k/a Robert Spillers), and Deborah T. Spillers (a/k/a Deborah Spillers, Patrick A. DiAngelo and Deborah A. DiAngelo, Gary E. Owens and Joyce M. Owens, Fount L. Shults and Lynda M. Shults, and Dennis Ridgeway and Teresa Lynn Ridgeway, ...Appellants

v.

Landquest Development, LLC, Kyle V. Corkum, South Bay Properties, LLC, C. R. Thompson and Sons, LLC, Ronald L. Charlton, Bonnie N. Charlton, James R. Charlton and Bayside Property, Inc., the City of Georgetown, Hartford Casualty Insurance Company, Hartford Fire Insurance Company, and National Land Sales, Inc., f/k/a Source One Communities, LLC, a/k/a Source One Signature Communities.....Respondents

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II. Appellants' constitutional arguments were preserved for Appellate review, and do not lack merit.

III. Appellants' claims against both the Respondent City and Respondent Hartford are not moot, by virtue of a settlement agreement concluded between these Respondents on August 20, 2013, and this Court is therefore, not deprived of Appellate jurisdiction.

(a) The Appellants are not precluded from asserting claims for relief as third party beneficiaries of the subject Bond.

BRIEF STATEMENT IN REPLY

Appellants affirm and reiterate all arguments asserted with regard to these issues in their Initial Brief, in reply and contravention to the Respondents' arguments. Appellants submit the following additional argument in reply.

REPLY ARGUMENTS

I.

The applicable statute of limitations had not expired prior to the filing of Appellants' Motion to Restore, and Appellants were not required to file their Motion to Restore within the thirty (30) day window provided by the United States Bankruptcy Code, 11 U.S.C. §108(c)

As argued in their Initial Brief, Appellants contend that the effect of the Circuit Court Order striking Appellants' case (sua sponte order: *"Case stricken due to Bankruptcy.")* (Appellants' Initial Brief, p. 4), was to leave Appellants' action on the court's docket, but in a dormant status (Appellants' Initial Brief, p. 7.) This is corroborated by the Circuit Court Orders restoring the other fourteen (14) cases which had been "Stricken due to [South Bay's] bankruptcy", all of which were titled "Order to Restore Case to Active Status," and ruled that: *"For the reasons stated above, it is hereby ordered that the foregoing matter be moved to an active status and placed back on the trial roster."* (Id.) Appellants' position is also supported by the law cited in this section of their Initial Brief. *"[A]n action which has been removed from the docket pursuant to S.C.R.Civ.P. 40(c)(3) [the precursor to Rule 40(j)] is pending while it is off the docket."* Robinson v. Cleckley and Co., Inc., 751 Fed. Supp. 100, 105 (D.S.C. 1990). See also Rule 40, SCRCP, and other cases cited.

In the unpublished case of Byrd v. Byrd, 2005-UP-141 (filed March 1, 2005), this Court found that a five (5) year delay by both parties in moving to have that case restored to the active docket, was not *per se* unreasonable. Commenting upon the Supreme Court Administrative Order requiring that lawsuits pending in the family court

for more than 270 days without a final hearing or other disposition be "struck from the docket," this Court noted that:

> *"No mention is made as to how much time a litigant has to request this relief, let alone that an extended lapse of time before moving to restore, without more, is tantamount to lack of good cause. Moreover, the family court made no specific findings as to why it would be 'unjust' to hold a hearing on the merits. We therefore hold the family court's refusal to restore the 1997 case to the docket under these circumstances amounted to an error of law."*

As with the Supreme Court's Administrative Order requiring final hearings or dispositions within 270 days for pending family court actions, the Order striking Appellants' action made no mention of any time limits for Appellants to file a motion to restore their action to the active docket.

Similarly, in Stribling v. Fretwell, 157 S.C. 297, 154 S.E.2d 415 (1930), the Supreme Court found that a delay of 23 years from commencement of the action, when the case had been stricken eleven (11) years prior to Plaintiff's moving to "re-docket" the case, was too long. This breach of contract action was commenced by the Plaintiff/Appellant on December 24, 1904. In June of 1916, when the case had still not been tried, the presiding Circuit Judge "struck off" the case from the docket. The Plaintiff did not move to restore the case until 1927. Numerous similar cases were cited by the Stribling Court, all of which affirmed the denial of Motions to restore actions to the active docket, based upon the doctrine of laches. None of the cases cited in Stribling mentioned or referred to the applicable statute of limitations. In the present case, the Respondents have not raised or argued the doctrine of laches, and Appellants submit that it would not bar their motion to restore this action in any event.

It is not disputed that Appellants commenced their action well before the expiration of the applicable statute of limitations. The Respondents acknowledge that the Appellants' action was not stricken pursuant to Rule 40(j)[1] (City's Initial Brief, p. 6: *"...Appellants insist that their action was not stricken under Rule 40(j). They are correct. By Order filed July 22, 2011, Circuit Court Judge Larry Hyman, struck the case 'due to bankruptcy.' (R.____). The Form 4 Order shows that the case was not stricken under Rule 40(j)."* As argued in their Initial Brief, Appellants contend that Rule 40(j) simply has no relevance to this case. Since Appellants' action was "still pending," after being stricken by Judge Hyman, there was no need for the applicable statute of limitations to be tolled by any further action or undertaking by the Appellants. Therefore, as argued in Appellants' Initial Brief, the provisions of 11 U.S.C. §108(c) also have no application to this case.

While contending that "*South Carolina law provides that a case when stricken is required to be restored within a particular time frame which is established by the applicable statute of limitations*" (City's Initial Brief, p. 4), the Respondents provide no legal citations or support for this argument. Instead, the Respondents rely upon Rule 40(j) and §108(c), by apparent analogy. The cases cited by Respondents are similarly unsupportive. Appellants have not argued that they were not required to file a motion to restore in order to have their action restored to the active docket. Appellants do contend that the only relevant issues at such motion hearing would have been: (1) had

[1] Respondent Hartford adopted and endorsed all arguments of Respondent City's Initial Brief on this and all other issues, with the exception of "mootness."

South Bay's bankruptcy filing been dismissed or otherwise concluded; and (2) would the doctrine of laches serve to bar Appellants' Motion to Restore? As previously noted, the Respondents have not raised or argued the doctrine of laches at any time during these proceedings.

Respondents cite the cases of McNaughton-McKay Electric Co. of N.C., Inc. vs. Andrich, 324 S.C. 275, 482 S.E.2d 564 (Ct. App. 1997); and Jones v. Equicredit Corp. of S.C., 347 S.C. 535, 556 S.E.2d 713 (Ct. App. 2001), to support their argument that cases stricken due to a pending bankruptcy are not restored without the filing and adjudication of a motion to restore. In Andrich, this Court merely mentions that McNaughton-McKay's action was stayed due to the filing of Andrich's bankruptcy, and that after the bankruptcy case was dismissed, "McNaughton-McKay *restored this case against* Andrich *to the Court of Common Pleas docket.*" In Jones, this Court merely noted that the Respondents' foreclosure action was stayed by three (3) different bankruptcy filings, after which the Master in Equity entered successive Orders to Restore and Proceed with Foreclosure. Neither case involved or relied upon Rule 40(j) or §108(c). Neither case discusses the necessity of filing a motion to restore, which is not disputed, in any event.

Respondents cite the case of U.S. Bank Trust National Assn. v. Bell, 385 S.C. 364, 684 S.E.2d 199 (Ct. App. 2009), for the proposition that: *"In at least one reported decision, a case stricken due to bankruptcy was restored under Rule 40(j), SCRCP."* (Respondents' Brief, p. 4 fn. 1) The Bell decision, however, merely mentions that the

bank filed a Rule 40(j) Motion to Restore its foreclosure action, after the Respondents' Bankruptcy case was closed. This was not an adjudicated issue before the Court, leaving one to assume that this case was initially dismissed pursuant to Rule 40(j), or that the Respondent Bank merely elected to proceed with the filing of a Rule 40(j) Motion – which would have been procedurally incorrect if the case was not dismissed pursuant to Rule 40(j). In an apparent attempt to corroborate the necessity of a Rule 40(j) Motion to restore, following dismissal of an intervening bankruptcy, Respondents cite the case of In Re Gorski, 370 S.C. 357, 635 S.E.2d 95, 96 (2006). In that disciplinary action, the Respondent attorney failed to timely restore his client's medical malpractice claim, which **had been** previously dismissed pursuant to Rule 40(j). There is no question that, if Appellants' action had been dismissed pursuant to Rule 40(j), Appellants would have been required to file a motion to reinstate within one (1) year, in order to preserve the statute of limitations tolling provision of Rule 40(j). And, as argued in the due process segment of their Initial Brief, Appellants would have been on notice of this one (1) year filing requirement. Those are simply not the facts of this case.

II.

Appellants' constitutional arguments were preserved for Appellate review, and do not lack merit.

As discussed hereinabove, Appellants contend that Rule 40(j) and §108(c) have no bearing on the Appellants' Motion to reinstate/restore their original Complaint. These constitutional issues were raised in Appellants' Motion to Alter or Amend the Order denying their Motion to Restore/Reinstate, in paragraph 5(A)(C), and (D)(3). (R. ____.)

These issues were argued before the Court at the hearing on June 6, 2013 (Tr. 6/6/13; p. 8, ll. 19-25; p. 10, ll. 3-5, 5-8; and, p. 14, l. 25 – p.15, l.5).

In denying Appellants' Motion to Alter or Amend, based on the provision of 11 U.S.C. §108(c), the trial court effectively denied the Appellants' due process and equal protection arguments. As Respondents argue, "*Everyone is presumed to have knowledge of the law and must exercise reasonable care to protect its interest.*" Smothers v. U.S. Fidelity and Guaranty Co., 322 S.C. 207, 477 S.E.2d 858, 860 (Ct. App. 1996). (City's Initial Brief, p. 11) That assumes, however, that 11 U.S.C. §108(c) **is** the controlling law, and that the relevant statute of limitations expired while Appellants' Complaint was still pending before the Court. These constitutional issues are properly preserved for review by this Court.

III.

Appellants' claims against both the Respondent City and Respondent Hartford are not moot, by virtue of a settlement agreement concluded between these Respondents on August 20, 2013, and this Court is therefore, not deprived of Appellate jurisdiction.

Appellants would first note that this issue has not been presented to the trial court for review or determination, and there is therefore no record on this issue for the Court to review. This identical issue was raised by both Respondents City of Georgetown and Hartford in Motions to Dismiss this Appeal, previously filed herein. Appellants would respectfully refer this Court to their Return to Motion to Dismiss Appeal of Respondents, City of Georgetown, The Hartford Casualty Insurance Company, and Hartford Fire Insurance Company, filed herein on February 21, 2014,

and incorporate such Return argument in its entirety herein, as fully as if repeated verbatim.

III(a).

The Appellants are not precluded from asserting claims for relief as third party beneficiaries of the subject Bond.

Once again, this is an issue which has not been raised or adjudicated by the trial court. Sloan Construction Company, Inc. v. Southco Grassing, Inc., 377 S.C. 108, 659 S.E.2d 158 (2008) establishes that, in South Carolina, a statutory bond requirement is *"...a contractual term incorporated by the Legislature, and therefore, the 'relevant intentions' in determining whether a third party [can] enforce the contract pursuant to the third party beneficiary doctrine [are] no longer those of the parties but those of the Legislature."* Citing: A.E.I. Music Network, Inc. v. Business Computers, Inc., 290 Fed. 3rd 952, 956 (7th Cir. 2002). In Sloan, the Supreme Court found that the Subcontractors and Suppliers Payment Protection Act (SPPA) includes an implied private cause of action for breach of a governmental entity's duty to assure placement of required payment and performance bonds. The Court found that the SPPA was enacted for the special benefit of such subcontractors, and that they are *"...the only parties with a financial interest in enforcing the bond requirements of the SPPA."* (Id. 377 S.C. 115, 117, 659 S.E.2d 162, 163.) As noted above, the Sloan Court further found that such subcontractors are entitled to pursue actions for breach of the bond contracts as third party beneficiaries, again citing A.E.I.

Appellants contend that the bond requirement in the present case was enacted specifically for their benefit. As more fully recited in Appellants' Initial Brief, a very substantial portion of the appraised value of Appellants' individual lots, was based upon the completion of infrastructure and amenities which were guaranteed by the Hartford Bond. These improvements were to have been completed, by the terms of the purchase agreements and representations made by the developer and joint venture respondents, by August, 2008. The fact that the City and the Hartford have now concluded an agreement to **commence** construction of the infrastructure, six (6) years after it was to have been completed, does not constitute full or timely performance. Moreover, as more fully argued in Appellants' Return to these Respondents' motions to dismiss this appeal, it appears that the City and Hartford have agreed to provide materially less infrastructure and/or amenities than were assured by the Bond. Without the Bond, the developer would not have been allowed to close any of the Appellants' lots. These closings, which occurred between September 17, 2007, and January 4, 2008, produced gross sales revenues of $14,737,600.00. (Appellants' Complaint, paragraphs 39 and 41, R._____.) Appellants respectfully submit that this issue should be remanded to the trial court, along with all other issues, for further evidentiary development and adjudication.

Respondent Hartford argues that: *"In South Carolina, it is beyond question that a surety's obligation on a performance bond is contractual, and such obligation cannot be extended beyond the terms of the Bond and the intent of the parties expressed therein."*

(Hartford's Initial Brief, p. 6, FN 1.) Asserting that this precludes Appellants' third party beneficiary claims, Respondent cites South Carolina Public Service Commission v. Colonial Construction Co., 274 S.C. 581, 266 S.E.2d 76 (1980); and, SOCAR, Inc. v. St. Paul Fire and Marine Ins., 288 S.C. 287, 341 S.E.2d 822 (Ct. App. 1986). In South Carolina Public Service Commission, the Supreme Court merely found that a surety's liability could not be enlarged beyond the express terms of its undertaking in the Bond. There was no issue concerning a third party beneficiary in this case. Similarly, in SOCAR, the sole issue was whether steel suppliers, who had provided material to a construction site, were covered by the provisions of a payment Bond which guaranteed payment for persons who "worked at the site." No third party beneficiary claim was involved. Similarly, Employer's Insurance of Wausau v. Construction Management Engineering, 297 S.C. 354, 377 S.E.2d 199 (Ct. App. 1989), also cited by Respondent Hartford on this point, does not address the issue of a third party beneficiary claim in any way.

The two (2) cases cited by Respondent Hartford which do include discussion and Appellate adjudication of third party beneficiary claims, are from Virginia and New York. Richmond Shopping Center, Inc. v. Wiley N. Jackson, Co., 220 Va. 135, 255 S.E.2d 518 (Va. 1979) involved the construction of a performance bond issued between a general contractor and the Commonwealth of Virginia, for a highway construction project. Although the Court's discussion regarding the law of contract construction appears to closely resemble that of South Carolina, there is no mention of a Subcontractor's Payment Protection Act, or any similar legislation, as discussed in Sloan supra. The

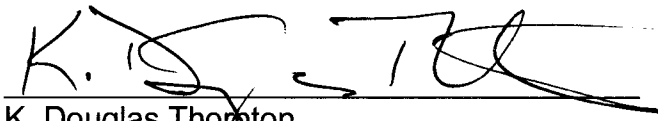
same is true of NoVAK & Company, Inc. v. The Travelers Indemnity Company, 56 A.D.2d 418, 392 N.Y.S.2d 901 (1977).

CONCLUSION

In reliance upon the arguments set forth in their Initial Brief, and herein, Appellants request that this Court reverse the decision of the Circuit Court, denying Appellants' Motion to Restore/Reinstate their Complaint to the active jury trial docket, and remand this case for such purpose, to be consolidated with the foreclosure action filed and currently pending therein by the Charlton Respondents. Appellants respectfully submit that the Circuit Court committed reversible errors of law in finding that the relevant statute of limitations had expired, and that Appellants failed to timely file their Motion to Restore under 11 U.S.C. §108(c). There is no clear rule of law fixing or establishing a time limitation for the filing of such motion to restore, such motions being governed by the equitable doctrine of laches. To hold otherwise would be a denial of Appellants' procedural due process rights, as well as their entitlement to equal protection of the laws. And, as argued more fully above, the record is insufficient for this Court to determine whether the settlement agreement concluded between the Respondents City of Georgetown and Hartford has rendered Appellants' claims against those Respondents moot.

Respectfully submitted:

THORNTON LAW FIRM, LLC



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June 19, 2014

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STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge
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APPELLATE CASE NO. 2013-001644

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CERTIFICATE OF SERVICE

I, Regina R. Cagle, as an employee of the Thornton Law Firm, LLC, certify that a copy of Appellants' Reply Brief to Respondents, City of Georgetown, The Hartford Casualty Insurance Company, and Hartford Fire Insurance Company, in the above captioned action was served upon the following counsel of record on the 19th day of June, 2014, by mailing same to the following addresses:

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June 19, 2014

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June 19, 2014

Honorable Jenny Abbott Kitchings
Clerk of Court
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Re: John Steven Goodwin, et al. vs. Landquest Development, LLC, et al.
Appellate case No.: 2013-001644

Dear Ms. Kitchings:

Enclosed herewith please find an original and one (1) copy of Appellants' Reply Brief and a Certificate of Service regarding the City of Georgetown, Hartford Casualty Insurance Company and Hartford Fire Insurance Company, in the above captioned matter. Upon filing, please forward a clocked copy to our office in the self-addressed, stamped envelope provided for your convenience.

With kind regards, I am

Yours very truly,

THORNTON LAW FIRM, LLC

Regina R. Cagle

Regina R. Cagle
Paralegal to K. Douglas Thornton

Enclosures as stated
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