

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2014-CP-26-0008
Appellate Case No. 2014-001033

Bigford Enterprises, Inc., Bishop & Associates, Inc., d/b/a "Bishop Brick and
Construction", and McBride Building Supplies and
Hardware, Inc., Appellants.

v.

D.C. Development, Inc. n/k/a D.C. Development & Construction, LLC By Way of
Articles of Conversion and David Cox, Respondents.

INITIAL BRIEF OF RESPONDENTS

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE CIRCUIT COURT ERR IN GRANTING RESPONDENTS' MOTION TO DISMISS APPELLANTS' COMPLAINT TO PIERCE THE CORPORATE VEIL ON THE BASIS OF THE THREE (3) YEAR STATUTE OF LIMITATIONS AS SET FORTH IN S.C. CODE ANN. §15-2-530 (1976)?

ARGUMENT

I. The Circuit Court did not err in granting Respondents' Motion to Dismiss Appellants' Complaint to pierce the corporate veil on the basis of the three (3) year Statute of Limitations as set forth in S.C. Code Ann. § 15-3-520 (1976).

Plaintiffs in this action seek to hold Cox personally liable on the Judgments referred to in Paragraph 2 of the Complaint (Bigford Judgment), in Paragraph 4 of the Complaint (Bishop Judgment), and in Paragraph 6 of the Complaint (McBride Judgment). (Complaint dated Dec. 31, 2013). For each Judgment, the date obtained is more than three years from the date of the filing of the instant action.

As background, all the judgments were obtained against D.C. Development, Inc., and the following chart shows the dates each judgment was obtained:

JUDGMENT HOLDER	AMOUNT OF ORIGINAL JUDGMENT	DATE JUDGMENT OBTAINED
Bigford	\$79,060	August 8, 2005
Bishop	\$152,372	June 9, 2005
McBride	\$253,906	May 11, 2005

(Complaint dated Dec. 31, 2013).

The underlying debt for each judgment was the failure to pay an open account arrangement with D.C. Development as the general contractor for the purchase of supplies and materials sold by each judgment holder in connection with a construction project. The construction project was an apartment complex

known as Glenwood Falls located in the Fort Mill area of York County. (Transcript p. 6 lines 1-8).

But the instant action is a new action on the same debt that is separate and distinct from the underlying action in which the judgment was obtained. An action to pierce the corporate veil is deemed an independent action separate and distinct from the action against the corporate entity for an obligation entered into with the corporate entity for which a judgment is sought. Drury Development Corp. v. Foundation Ins. Co., 380 S.C. 97, 668 S.E.2d 798 (2008) (“ . . . [w]e set forth the general rule that a judgment against a corporation is not a prerequisite to an alter ego claim.”)

The procedure by which the owner of a judgment may obtain a new judgment for the amount owing thereon is by an independent action on the prior judgment, which independent civil action must be commenced and prosecuted as in the case of any other civil action brought to recover judgment on a debt. The main purpose of any action on a judgment is to obtain a new judgment which would facilitate the ultimate goal of securing the satisfaction of the original cause of action. The time period for enforcing the original judgment found in S.C. Code § 15-39-30 cannot be used to extend the applicable statute of limitations for the original debt. The applicable statute of limitations is set forth in S.C. Code §15-3-530, and provides that [a]n action upon a contract, obligation, or liability, express or implied,” must be filed within three years. As stated by the Supreme Court:

Section 15-39-30 is not a statute of limitation, but it is clearly a statute of repose. There is a significant difference between the two. A statute of limitation is an affirmative defense that allows a party to avoid suit. A statute of limitation has no effect on the validity of the

claim; it only effects the claim's enforcement. In contrast, a statute of repose is not a claim-avoidance mechanism. Instead, a statute of repose extinguishes the claim, in this case the judgment.

Linda Mc Co., Inc. v. Shore, 390 S.C. 543, 703 S.E.2d 499 (2010)

Where the Statute of Limitations is properly pleaded, and all the facts with reference to it are admitted, the question of whether it constitutes a bar becomes a matter of law. In determining whether a cause of action is barred by the Statute of Limitations, courts must determine the applicable limitations period and the date of the accrual of the action. The applicable Statute of Limitations for breach of contract actions is three years. The limitations period begins to run when the claim occurs, and in a breach of contract action, the claim generally accrues upon breach. While the date of the breach is not pled or known at this time, the date of the judgment would logically be after such breach. In this case, the judgment dates are more than three years before the filing of this action.

Appellants make one argument saying the Statute of Limitations never applies if the underlying action is an equitable action. But none of the cases relied upon by Appellants involve an action to pierce the corporate veil. In Parrott v. Dickson, 151 S.C. 114, 148 S.E.704 (1929), the case involved a partition sale and the issuance of a rule to show cause for the purchaser at the sale to pay the balance of the bid. In Fanning v. Bogacki, 111 S.C. 376, 98 S.E. 137 (1919), the action involved enforcement of an oral agreement for the reconveyance of property purchased at a partition sale. In DuPont v. DuBos, 52 S.C. 244, 29 S.E. 665 (1898), the action was based upon fraud in the conveyance of property by a deed. In McKinnon v. Summers, 224 S.C. 331, 79 S.E.2d 146 (1953), the action

involved setting aside certain deeds on the ground of forgery and to recover possession of the property.

But there is a South Carolina case that implies that the Statute of Limitations does apply in a piercing the corporate veil action. In Carolina Marine Handling, Inc. vs Lasch, et al., 363 S.C. 169, 609 S.E.2d 548 (Ct.App. 2005), a third-party action was filed in connection with the lease of property on the former Charleston Naval Base Shipyard. The third-party complaint was filed against a sub-lessee and its sole owner – Herbert R. Stender. While the original action by the landlord against the original lessee was filed within three years from the date of the breach or failure to pay under the lease, the third-party claim against the sub-lessee and Stender were filed more than three years after the breach.

The third-party plaintiff did not argue that the cross-claim was timely, but the third-party plaintiff argued that the subject lease was a sealed document and that the Statute of Limitations was twenty years instead of three years. Both the Circuit Court and the Court of Appeals found that the parties to the lease did not intend the lease to be under seal. The Court of Appeals affirmed the Circuit Court's decision to dismiss the third-party claim under the general three year Statute of Limitations.

The third-party claim against Stender was also dismissed based on the general three-year statute of limitations. The Court stated:

"Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs." Moates v. Bobb, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct.App.1996). The cornerstone policy consideration underlying statutes of limitations is the laudable goal of law to promote and

achieve finality in litigation. See Webb v. Greenwood County, 229 S.C. 267, 276, 92 S.E.2d 688, 691 (1956); City of North Myrtle Beach v. Lewis-Davis, 360 S.C. 225, 231, 599 S.E.2d 462, 464 (Ct.App.2004). Significantly, "[s]tatutes of limitations provide potential defendants with [363 S.C. 176] certainty that after a set period of time, they will not be hailed [sic] into court to defend time-barred claims." In re Elkay Indus., Inc., 167 B.R. 404, 408 (D.S.C.1994). "Moreover, limitations periods discourage plaintiffs from sitting on their rights." Id. at 408-09. Statutes of limitations are, indeed, fundamental to our judicial system.

Id. at 552.

While not directly on point, the Court of Appeals decision states that an attempt to pierce the corporate veil is often post-judgment, and implies that the general statute of limitations would apply to prevent an action beyond three years.

In footnote 6, the Court discusses the discovery rule in relation to the Statute of Limitations and says that the way this case came up, the dismissal was affirmed for both parties, both the sublessee and against Stender, as being barred by the Statutes of Limitation.

The basis for a piercing the corporate veil action should be the time period the debtor was operating and the creditor was providing materials or labor in a construction contract. The focus should be the time period during which the debt arose up to the breach of contract caused by nonperformance. A creditor should be barred under the Statute of Limitations after three years from the date of breach and nonpayment.

CONCLUSION

In conclusion, this Court should affirm the lower court's granting of the Motion to Dismiss.

Respectfully submitted,



November 14, 2014

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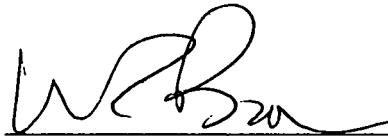
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CERTIFICATE OF COUNSEL

The undersigned certifies that the Brief of Respondents complies with Rule 211(b), SCACR.

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