

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

William Henry Seals, Jr., Circuit Court Judge

Case No. 2013-CP-21-02319
Appellate Case No. 2014-001934

Carmichael T. Flowers.....Appellant,

v.

Janel Namias.....Respondent.

INITIAL BRIEF OF RESPONDENT

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

1. WHETHER THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT ON THE APPELLANT'S EQUITABLE CLAIMS SHOULD STAND BECAUSE THE APPELLANT DID NOT CHALLENGE THAT RULING AND, THEREFORE, HAS ABANDONED THAT ISSUE.
2. WHETHER THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT BASED UPON THE EXPIRATION OF THE STATUTE OF LIMITATIONS AS TO THE APPELLANT'S CLAIMS FOR BREACH OF CONTRACT AND CONVERSION.
3. WHETHER THE APPELLANT HAS FURNISHED THIS COURT A SUFFICIENT RECORD FROM WHICH IT CAN MAKE AN INTELLIGENT REVIEW GIVEN THAT HE FAILED TO ORDER A TRANSCRIPT OF THE HEARING LEADING UP TO THE TRIAL COURT'S ORDER GRANTING SUMMARY JUDGMENT.

STATEMENT OF THE CASE

The Appellant filed his Complaint in the Marlboro County Court of Common Pleas on November 29, 2012. Service was perfected on the Respondent on or about May 23, 2013. The Respondent filed and served an Answer to the Appellant's Complaint on June 7, 2013 in which she pled as affirmative defenses the statute of limitations and laches. On April 22, 2014 the Respondent filed and served a Notice of Motion and Motion for Judgment on the Pleadings and/or Summary Judgment. The trial court heard the motion on August 5, 2014 and filed the Order granting summary judgment on August 12, 2014. The Appellant filed a Rule 59(e) Motion on August 5, 2014 which was denied

by Order filed on August 19, 2014. The Appellant filed his Notice of Appeal on August 31, 2014.

STANDARD OF REVIEW

“When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c), SCRPC: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. If triable issues exist, those issues must go to the jury.” (Citations omitted.)

“Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” (Citations omitted.)

“Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted.” (Citations omitted.) *Miller v. Blumenthal Mills, Inc.*, 365 S.C. 204, 616 S.E.2d 722 (SC 2005).

ARGUMENTS

1. THE DISMISSAL OF THE APPELLANT'S EQUITABLE CLAIMS MUST STAND BECAUSE THE APPELLANT DID NOT APPEAL THE TRIAL COURT'S ORDER.

“It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling. Failure to challenge the ruling “is an abandonment of the issue and precludes consideration on appeal.” The unchallenged ruling, “right or wrong, is the law of the case and requires affirmance.” ” (Citations omitted.) *Lindsay v. Lindsay*, 328 S.C. 329, 491 S.E.2d 583 (Ct. App. 1997).

The trial court issued two separate rulings in its Order filed on August 12, 2014. First, the trial court found that “the *Respondent* is entitled to judgment as a matter of law as to the actions for breach of contract and conversion given that more than three years passed before the *Appellant* filed his Complaint.” (Order, P. 2). Second, the trial court found that “the *Appellant's* unreasonable delay has caused the *Respondent* to detrimentally change her position and that the *Appellant's* own unclean hands in causing the damage to the property at issue requires a finding that the *Appellant's* equitable claims be dismissed pursuant to the doctrine of laches.” (Order, P. 3). The Appellant states two arguments in his Initial Brief, both of which address the trial court's granting summary judgment based upon the statute of limitations for the breach of contract and conversion actions. Neither argument addresses the trial court's ruling on the equitable claims. Therefore, the trial court's grant of summary judgment as to the Appellant's equitable claims should be affirmed.

In addition to the *Lindsay* case cited above, Rule 208(b)(1)(B), SCACR states that “ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.” As indicated above, the Appellant did not address the trial court’s ruling on his equitable claims in his Initial Brief. Therefore, this court should affirm the grant of summary judgment as to those claims pursuant to the appellate court rules and case law interpreting those rules.

2. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT BASED UPON THE EXPIRATION OF THE STATUTE OF LIMITATIONS AS TO THE APPELLANT’S CLAIMS FOR BREACH OF CONTRACT AND CONVERSION.

As indicated in the Standard of Review, summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. *Miller v. Blumenthal Mills*, 365 S.C. 204, 616 S.E.2d 722 (S.C. 2005). The Appellant seeks damages for an alleged breach of contract and/or conversion arising out of the purchase by the Respondent of a home at 803 Dixie Street in Florence, South Carolina. (Complaint Paragraphs 5, 6, 7 and 8). The Appellant stated in argument before the trial court that he discovered facts sufficient to constitute a potential cause of action against the Respondent on July 22, 2009. (Appellant’s Initial Brief). The Appellant now claims that he misspoke to the trial court and has sought a reversal of the trial court’s order for that reason. Nevertheless, the trial court correctly determined that the Appellant knew

that he had a potential cause of action at the latest on November 17, 2009 when he filed his *pro se* divorce action. (Order, P. 2).

An action for breach of contract and/or conversion must be brought within three years from the date the action accrues. S.C. Code Ann. §15-3-350. Actions must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action. Binkley v. Burry, 352 S.C. 286, 573 S.E. 2d 838 (Ct. App. 2002). “The supreme court explained that reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. The statute of limitations begins to run from this point and not when advice of counsel is sought or a full blown theory of recovery developed.” Kimmer v. Wright, 396 S.C. 53, 719 S.E.2d 265 (Ct. App. 2011).

The Appellant’s *pro se* divorce action, which he filed in the Florence County Family Court on November 17, 2009, seeks essentially the same remedy as found in his current complaint with the addition of seeking a divorce from an alleged common law marriage. (Divorce Complaint). A review of the *pro se* divorce action reveals that the Appellant knew that some right of his had been invaded and that some claim against the Respondent might exist as he alleged the parties bought a house and Appellant provided agreed upon repairs to the home using his time, resources, monies, labor, and professional knowledge. (Divorce Complaint, P. 3). Further, Appellant sought judgment for damages due to “lost wages, monies, investments, personal property and community property.” (Divorce Complaint, P. 4). Unfortunately for the Appellant, he chose the

wrong forum in which to seek redress for his claims against the Respondent. Had the Appellant chosen to file the current action when the Family Court denied his divorce action on December 1, 2010, he would have been well within the applicable statute of limitations. However, the Appellant imprudently elected to appeal that decision which was dismissed by the Court of Appeals on June 27, 2011. (Appellant's Initial Brief, P. 5). Nevertheless, Appellant still had more than a year to commence his suit in Common Pleas against Respondent for his alleged damages. This he did not do.

The Appellant filed his Complaint in the Marlboro County Court of Common Pleas on November 29, 2012. (Complaint, P. 1). The Respondent was served a copy of the Summons and Complaint on or about May 23, 2013. (Complaint, Stamped Received 5/15/13 by Florence County Sheriff). Because more than one hundred twenty (120) days elapsed between the date of filing and the date of service, the cause of action did not commence until the date of service which was on or about May 23, 2013. (Rule 3, SCRCF). Therefore, the Appellant did not commence his action against the Respondent until more than three and one-half years after he knew or should have known the alleged facts sufficient to put him on notice that he may have causes of action against her. In fact, the Appellant waited too long even to file his action, let alone perfect service to commence his suit. Thus, the trial court correctly ruled that the actions for breach of contract and conversion were not timely and summary judgment should be granted. Therefore, the trial court's Order should be affirmed.

3. THE TRIAL COURT'S ORDER SHOULD BE AFFIRMED BECAUSE THE APPELLANT HAS FAILED TO FURNISH A SUFFICIENT RECORD.

“The appealing party has the burden of furnishing a sufficient record from which this court can make an intelligent review.” *Hamilton v. Greyhound Lines East*, 281 S.C. 442, 316 S.E.2d 368 (Ct. 1984). The Appellant’s two arguments on appeal are largely incoherent and incomprehensible, as are most of his filings, though they apparently take issue with the trial court’s decision to grant summary judgment as to the contract and conversion actions. The trial court’s order states “I find and conclude based upon the *Appellant’s* complaint, the arguments of counsel, and the *Appellant* himself, that no genuine issue of material fact exists with regard to when the *Appellant* knew or should have known that a potential cause of action against the *Respondent* existed. Therefore, the *Respondent* is entitled to judgment as a matter of law as to the actions for breach of contract and conversion given that more than three years passed before the *Respondent* filed his complaint.” It is clear from this passage in the Order that the trial court considered the arguments of Respondent’s counsel and the Appellant along with other evidence in reaching its conclusion. The Appellant states the trial court abused its discretion in reaching its decision; however, the Appellant failed to order the transcript of the hearing which would have permitted this court to make an intelligent review of the entire record upon which the trial court based its decision. Thus, the Appellant has failed to carry his burden of establishing a sufficient record for this court to make an intelligent review requiring that the trial court’s order be affirmed.

CONCLUSION

This court should affirm the trial court's order granting summary judgment on each of the Appellant's claims because the Appellant abandoned his equitable claims on appeal, the Appellant failed to provide this court with a sufficient record upon which to reverse the trial court's grant of summary judgment on the legal claims, and the trial court correctly determined that the Appellant filed his actions for breach of contract and conversion against the Respondent more than three years after those causes of action accrued.

Respectfully submitted,



November 21, 2014

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