STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Master in Equity

The Honorable Charles B. Simmons, Jr., Master in Equity

C.A. No.: 2005-CP-23-04155

GrandSouth Bank — Appellant,

v.

Cleveland Land Company, Inc.,
Walter and Albert E. Fitzgerald, — Defendants,

Of whom Walter C. Robinson is the Respondent.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

1. DID THE TRIAL COURT PROPERLY DISMISS APPELLANT'S PETITION FOR SUPPLEMENTAL PROCEEDINGS WHEN THE PETITION WAS FILED AFTER THE "ACTIVE ENERGY" OF ITS EXECUTION AGAINST PROPERTY HAD EXPIRED?

STATEMENT OF THE CASE

On July 27, 2004, Appellant obtained a judgment in Lexington County, South Carolina against the respondent, a Greenville County resident. On July 1, 2005, Appellant transcribed the judgment to Greenville County, South Carolina, the county of Respondent's residence. There is no record any attempt to collect on this judgment until May 23, 2014, when Appellant obtained its Execution Against Property from the Greenville County Clerk of Court.

Appellant filed its execution with the Greenville County Sheriff's Office on May 27, 2014. The sheriff returned the execution on July 18, 2014, marked *nulla bona*.

At the end of the ten (10) year judgment period, Appellant had filed no petition or requested any other relief from the Court relating to its judgment. After the ten (10) year period expired, Appellant filed a Petition for Supplemental Proceedings.

On August 18, 2014, an Order and Rule to Show Cause was issued to Respondent, directing him to appear for an examination on supplemental proceedings. Respondent filed a motion to dismiss Appellant's petition on September 5, 2014. The Court heard Respondent's motion on September 16, 2014.1 On October 16, 2014, the Court entered an order granting Respondent's motion and dismissing Appellant's petition for supplemental proceedings.

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[1] Because the hearing for supplemental proceedings was already scheduled before the master in equity, the parties agreed to have the Master serve as the presiding Circuit Court judge to hear Respondent's motion to dismiss.

Appellant timely filed its notice of intent to appeal on October 31, 2014.

FACTS

This is not a case where a judgment debtor hid his whereabouts or his assets in an effort to thwart or to defraud a judgment creditor. Quite the opposite, in this case, the judgment debtor did not even know about the existence of a judgment, the Appellant obtained in another county that arose from a loan guarantee he signed on behalf of a former friend almost twenty (20) years ago. There is no record that the Respondent was served with the judgment, the transcription of that judgment in Greenville County in 2005, or the Writ of Execution Appellant obtained some nine (9) years later.

Now 73 years old, Appellant Dr. Walter Robinson III has lived and operated his veterinarian practice Greenville County for the last forty (40) years. [Affidavit of Dr. Walter C. Robinson, III, DVM, ¶ 2] He holds a Masters degree in veterinary science (surgery) and is a diplomat in the American Board of Veterinary Practitioners, specializing in companion animals. He also is currently a member of the South Carolina Board of Veterinary Medical Examiners. [*Id.*]

Almost twenty (20) years ago, Albert Fitzgerald, an acquaintance who had been helpful to Dr. Robinson when he moved to Greenville in the 70s, asked him to co-sign for a note so Mr. Fitzgerald could develop some property in Lexington County. As a favor, Dr. Robinson agreed to sign. Dr. Robinson knew nothing about the property; he had nothing to do with its management, development or re-sale. He was not a member or shareholder in Cleveland Land Company, LLC (the entity through which Respondent learned Mr. Fitzgerald had done business).

He was not involved in the business in any capacity, never received benefit from the company – nothing other than helping out a friend at the time who had asked a favor. [*Id.* at ¶ 3]

At some point around 2003, Dr. Robinson learned that Mr. Fitzgerald's business was – apparently – not meeting its obligations. Tired of receiving notices from the bank, Dr. Robinson confronted Mr. Fitzgerald and had a "come to Jesus" meeting with him about making everything right. [*Id.* at ¶ 4] Mr. Fitzgerald assured him that he would take care of everything. A few months following that meeting, Fitzgerald called Dr. Robinson to inform him that everything had gotten worked out. [*Id.* at ¶5]

From that point, up until he was served with a Rule to Show Cause in August, 2015, Dr. Robinson heard nothing about the debt or obligation. He had assumed that everything had been resolved just like his former friend, Albert Fitzgerald, had assured him years ago. [*Id.* at ¶ 6]

Dr. Robinson is now 73 years old. His veterinarian practice is largely a hobby, because he has – from time to time - contributed his personal money to make its bills. He has a few investment properties from which he earns his retirement income. [*Id.* at ¶ 11]

Since being served with the Rule to Show Cause – over 10 years from when he met with Mr. Fitzgerald and was assured everything had been taken care of, Dr. Robinson cannot even locate Mr. Fitzgerald now. He does not know if Albert Fitzgerald is even alive. [*Id.* at ¶ 9]

Based upon the documents of record, the original judgment in the amount of $111,059.21 has now ballooned into the amount currently claimed by Appellant, $233,738.41,

If forced to pay off this amount at this time, the basis of Dr. Robinson's retirement income would be liquidated, he would be forced to close a practice that has served Greenville County for almost forty (40) years, and he has no ability to seek contribution from the true

responsible party. [*Id.* at ¶ 11] In essence, Appellant's inexcusable delay of 10+ years in pursuing collection its judgment from Lexington County would now render Dr. Robinson substantially destitute in his retirement years with no real means to obtain contribution from the person who was responsible for the debt. [*Id.* at ¶ 11]

ARGUMENTS

1. BECAUSE APPELLANT FILED ITS PETITION FOR SUPPLEMENTAL PROCEEDINGS AFTER THE EXPIRATION OF THE "ACTIVE ENERGY" OF ITS EXECUTION AGAINST PROPERTY, THE CIRCUIT COURT PROPERLY DISMISSED THE SAME.

The instant action exemplifies why South Carolina courts have long recognized its "strong public policy to limit the enforcement of judgments to ten years." Commercial Credit Loans, Inc. v. Riddle, 334 S.C. 176, 512 S.E.2d 123 (Ct. App. 1999). South Carolina courts have consistently held that under the statute, a judgment becomes stale and a judgment lien is extinguished after ten years. See, e.g., Home Port Rentals, Inc. v. Moore, 369 S.C. 493, 632 S.E.2d 862 (2006), Commercial Credit Loans, Inc. v. Riddle, 334 S.C. 176, 512 S.E.2d 123 (Ct. App. 1999), and Hardee v. Lynch, 212 S.C. 6, 46 S.E.2d 179 (1948). In so holding, the Court has reasoned, "A judgment lien is purely statutory, its duration as fixed by the legislature may not be prolonged by the courts and the bringing of an action to enforce the lien will not preserve it beyond the time fixed by statute, if such time expires before the action is tried." Linda McCompany, Inc. v. Shore, 390 S.C. 543, 703 S.E.2d 499 (2010) (*quoting*, Garrison v. Owens, 258 S.C. 442, 446-47, 189 S.E.2d 31, 33 (1972). Time and time again, South Carolina courts have recognized that when the original judgment was stale or had expired, the judgment creditor loses its rights to pursue collection. *See*, e.g., Hardee v. Lynch, 212 S.C. 6, 46 S.E.2d 179

(1948); Home Port Rentals, Inc. v. Moore, 369 S.C. 493, 632 S.E.2d 862 (2006); Wells ex rel. A.C. Sutton & Sons, Inc. v. Sutton, 382 S.E.2d 14, 299 S.C. 19 (S.C. App., 1989) and Carr v. Guerard, 365 S.C. 151, 616 S.E.2d 429 (2005).

S.C. Code § 15-39-30 provides, "Executions may issue upon final judgments or decrees at any time within ten years from the date of the original entry thereof and shall have active energy **during such period**, without any renewal or renewals thereof, and this whether any return may or may not have been made during such period on such executions. (emphasis added). Appellant obtained an Execution Against Property of Dr. Robinson on May 23, 2014. By statute, its execution only had "active energy" until July 27, 2014.

Section 15-39-30 specifically provides that Appellant did not have to wait for a return from the sheriff before taking any further legal action to enforce its lien. Section 15-39-30 specifically states, "and this whether any return may or may not have been made during such period on such executions." *Id.* In instances when a return has not been made, S.C. Code of Laws § 15-39-310 provides that the judgment creditor can apply for relief from the Court if the creditor believes there are assets that have not been applied to satisfy the judgment:

> **After the issuing of an execution against property and upon proof by affidavit of a party** or otherwise, to the satisfaction of the court or a judge thereof, **that any judgment debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment such court or judge may by an order require the judgment debtor to appear at a specified time and place to answer concerning the same. And such proceedings may thereupon be had for the application of the property of the judgment debtor towards the satisfaction of the judgment as are provided upon the return of an execution.**
>
> S.C. Code of Laws §15-39-310 (1976 Ann.) (emphasis added).

Even without a return, Appellant could have sought assistance from the Court. But essential to the case at bar, South Carolina courts have clearly held that whatever legal action Appellant elected to pursue, that court action must be initiated within the ten (10) year period. The case of Linda McCompany, Inc. v. Shore best illustrates this principle.

In Linda McCompany, Inc., the judgment at issue was recorded on June 2, 1995. The judgment creditor filed its petition for supplemental proceedings on July 29, 2004 - well within the 10 year period. Thereafter, there were multiple hearings held by the special referee (October 1, 2004 and another on May 24, 2005). On June 3, 2005, the special referee issued his report back to circuit court with findings in favor of the judgment creditor – 10 years + 1 day after the original judgment was entered. The judgment debtor then sought to thwart payment by arguing that because the special referee's order was entered after the 10 year period had run, the order was void.

The South Carolina Supreme Court went through an extensive analysis of balancing the respective equities to the parties when applying the statute and established case law up to that time. The prior decisions of Garrison v. Owens, 258 S.C. 442, 189 S.E.2d 31 (1972) and LaRosa v. Johnston, 328 S.C. 293, 493 S.E.2d 100 (Ct.App.1997) had implicitly held that the 10 year limitation was *de facto* limitation of repose whereby nothing could be done once the 10 year period had run.

The Linda McCompany Inc. court found the application of this rule to be too harsh under the circumstances the case at bar, where the judgment creditor had initiated supplemental proceedings well within the 10 year period. The court recognized that "to hold otherwise would

put those trying to enforce their judgments at the mercy of the court system to conclude the matter within the ten-year period." *Id* at p. 505.

Importantly to the case at bar, the court noted, "While the order came after the ten-year period, **a petition for supplemental proceedings** was filed before the ten-year period expired. Therefore, the judgment had active energy on June 3, 2005 because that order was the result of the supplemental proceedings filed during the ten-year period." *Id.* (emphasis added). The court concluded:

> In conclusion, section 15–39–30 is not a statute of limitations but it does operate similar to one under these factual circumstances. Furthermore, **if a party takes action to enforce a judgment within the ten-year statutory period of active energy**, the resulting order will be effective even if issued after the ten-year period has expired.
>
> *Id.* (emphasis added).

Thus, under Sec. 15-39-30, Appellant's execution against property had active energy up through July 27, 2014. Although §15-39-310 entitles the appellant to a hearing for supplemental proceedings, the hearing is not mandatory. It is incumbent upon the judgment creditor to act. Under Linda McCompany Inc., Appellant was required to file its petition for supplemental proceedings before the ten-year period expired. To hold otherwise, would allow judgment creditors to unilaterally and arbitrarily extend the ten (10) year limitation on a judgment.

For example, in this case Appellant does not dispute the fact that that its petition was not filed within the ten year period. [Brief of Appellant, p. 1-2] In this case, the appellant waited more than a week [at least, *see* n.1, *supra*] to file its petition. What if the petition had been filed two (2) months, or six (6) months, or a year. Under Appellant's construction of the law, any of

those scenarios could be argued a continuation of the active energy and there would be no definitive endpoint.

The logical application of Linda McCompany's holding is to look at the date of the 10 year expiration period. If the judgment creditor has timely filed anything and is waiting for the court to act, the judgment creditor is not be punished as whatever results from the subsequent proceedings of the court. However, if on that date, nothing has been filed and there is nothing for which the court is responsible, the active energy of the execution expires with the judgment.

The latter of which is the case at bar. At the close of the ten year period, nothing had been filed with the court that would have extended the "active energy" of the execution beyond the ten (10) year limitation. Linda McCompany v. Shore reached out to protect judgment creditors who were doing everything within their means to pursue collections, but could not meet the 10 year limitation because of issues beyond their control.

This is in stark contrast to the actions of the appellant in this case, who waited nine years (9) years and ten (10) months to even attempt collections against the respondent – a judgment debtor who did not even know a judgment existed against him. Appellant's inexcusable delay allowed the judgment to more than double (from $111,059.21 to $233,738.41) and all but ensured that the Respondent would never be able to obtain contribution from the true at-fault judgment debtor.

Because there was no petition filed when the 10 year period of the judgment, the active energy of Appellant's Execution Against Property had expired.

CONCLUSION

For these reasons, the lower court's decision to dismiss Appellant's petition was proper and should be AFFIRMED.

Respectfully submitted,

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January 16, 2015

STATE OF SOUTH CAROLINA
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APPEAL FROM GREENVILLE COUNTY
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The Honorable Charles B. Simmons, Jr., Master in Equity

C.A. No.: 2005-CP-23-04155

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Of whom Walter C. Robinson is the Respondent.

CERTIFICATE OF SERVICE

I, Rodney F. Pillsbury, the undersigned, of the Pillsbury & Read, P.A., do hereby certify that I have served a true copy of the **Initial Brief of Respondent and Respondent's Designation of Matter to be Included in the Record on Appeal** upon the following person(s):

Via U.S. Mail: Wendell L. Hawkins, Esq.
Aimee V. Leary, Esq.
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Respectfully submitted,

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January 16, 2015

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January 16, 2015

The Honorable Jenny Abbott Kitchings
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Re: *GrandSouth Bank v. Cleveland Land Company, Inc., Walter C. Robinson and Albert E. Fitzgerald.* C.A. No.: 05-CP-23-04155
Appellate Case No.: 2014-002384

Dear Ms. Kitchings:

I am enclosing for filing the original and one (1) copy of the **Initial Brief of Respondent and Respondent's Designation of Matter to be Included in the Record on Appeal** along with the original and one (1) copy of the Certificate of service for same for the above referenced matter. Please return a clocked copy in the enclosed self addressed stamped envelope at your earliest convenience.

By copy of this letter to opposing counsel, I am enclosing and serving upon them a copy of the same.

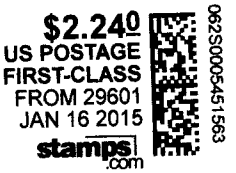
As always, please accept my regards.

Very truly yours,

Pillsbury & Read, P.A.

Rodney F. Pillsbury

RFP/tpd
Enclosures
cc: Wendell L. Hawkins, Esq.
Aimee V. Leary, Esq.



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