

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Stephanie P. McDonald, Circuit Judge for The Ninth Judicial Circuit

Case No. 2013-000407

Alan Sheppard.....Petitioner

v.

William O. Higgins, Russell Bennett, Ronald C. Owens, Charles P. Darby,
Lynn McCants and Kiawah Resort Associates, LP.....Defendants

Of whom Russell Bennett, Ronald C. Owens, Charles P. Darby, and Kiawah
Resort Associates LP..... Respondents

PETITION FOR A WRIT OF CERTIORARI

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SC Court of Appeals

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III. The Trial Court Erred in Finding that the Petitioner’s Claims Are Barred by the Statue of Limitations, Since the Petitioner’s Claims of Respondents’ Wrongdoing Arise from a Closing that Accured on July 28, 2008, and the Lawsuit was Filed on July 27, 2011.

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CERTIFICATE OF COUNSEL

Counsel for Appellant certifies that the Petition for rehearing was made and finally ruled on by the Court of Appeals on January 23, 2015.

QUESTIONS PRESENTED

- I. The Petitioner was Denied a Fair Opportunity to Present His Claims in Violation of His Rights to Due Process.**

- II. Did the Court err in finding that the Petitioner's claims are barred by Res Judicata and Release, since the Petitioner's claims arise out of a closing, which accrued on July 28, 2008, after the Settlement and Release ending the prior lawsuit.**

- III. Did the Trial Court err in finding that the Petitioner's claims are barred by the Statue of Limitations, since the Petitioner's claims of Respondents' wrongdoing arise from a closing that accrued on July 28, 2008, and the lawsuit was filed on July 27, 2011.**

STATEMENT OF THE CASE

The Petitioner filed a *Pro se* Complaint on July 27, 2011. (R. pp. 8) The Respondents¹ Answered (R. pp. 13) and filed a Motion to Dismiss on February 5, 2013. (R. pp. 108) A hearing was held on April 25, 2012, in front of the Honorable Stephanie P. McDonald. Respondent McCants was dismissed by consent, at that time. The Judge accepted additional material from the Petitioner to “know what happened” and to tell whether what [he] said here “lets [him] go forward”. (R. pp. 64; 363, 371-373, 379, 391-392, 399-401) Trial Court issued an Order dismissing the Respondents Ronald Owens, Russell Bennett, Charles Darby, and Kiawah Resort Associates LP on January 18, 2013, and issued an Order dismissing Respondents Higgins on January 18, 2013. The Petitioner filed a Notice of Appeal *Pro Se* against both Orders. The Petitioner has dismissed the Appeal as to Respondent, Higgins and proceeded with this Appeal as to Respondents Ronald Owens, Russell Bennett, and Charles Darby and Kiawah Resort Associates LP only. The Court of Appeals denied the Appeal on November 05, 2014. The Petitioner filed a Petition for Rehearing on November 20, 2014 which was denied by the Court of Appeals on January 23, 2015.

¹ The Appeal of the Order as to original Respondent Higgins has been withdrawn, therefore, from this point forward, Respondents shall apply to Respondents Owens, Bennett, Darby and Kiawah Resort Associates LP only.

Facts

The Petitioner controlled an entity Wando River LLC which held a contract on valuable property in Charleston County. (Wando Property) The Respondants Russell Bennett, Ronald Owens, and Charles Darby through their entity Kiawah Resorts Associates. LP entered in a joint venture with Petitioner to develop or sell the property. (R. pp. 404; 64-73, 85-92) The Petitioner's group Wando River LLC. held the controlling interest in the project. The Respondents began taking actions that breached their fiduciary duty to the joint venture and the Petitioner, and eventually the Respondents filed a lawsuit in Berkeley County, to enforce a contract of sale of the Wando property to a third party relating to the Wando property. (R. pp. 404; 64-73, 85-92) The Petitioner asserted Counter Claims for Interference with Contractual Relationship, Breach of Duty, Interference with the Contract, and Breach of Implied Duty of Good Fair and Dealing. (R. pp. 435) That case was settled and memorialized in the terms of a Settlement and Release Agreement, dated July 26, 2011, which allowed for the Petitioner's group Wando River LLC. to sell the Wando property to a third party. (R. pp. 443) A Stipulation of Dismissal with Prejudice was filed with the Berkeley County

Clerk of Court. (R. pp. 441) Importantly, the closing between the Petitioner's entity and the third party regarding the Wando River property took place on July 28, 2008. (R. pp. 443; 92-94) At that closing, the Respondents again breached their duties to the Petitioner and took actions, knowing that they had economic advantage over the Petitioner, forcing the Petitioner to take far less from the closing than what was contemplated by the prior settlement. (R. pp. 92-94) The Petitioner was forced to close on the property, under economic duress and in an effort to mitigate his damages, on July 28, 2008. (R. pp. 92-94) This was after both the Stipulation of Dismissal and Settlement Agreement in the prior action. The Petitioner commenced this lawsuit on July 27, 2011, within the three statute of limitation period.

ARGUMENT

I. The Petitioner was Denied a Fair Opportunity to Present His Claims in Violation of His Rights to Due Process.

The basic purpose of a trial is the determination of truth. The Petitioner submitted to the trial court, as a *pro se* litigant, that a real estate closing occurred on June 28, 2008, within the three year Statute of

Limitations, that violated the parties' previous agreement, and that these actions by the Respondents were not subject to any prior actions, and therefore were not barred by res judicata or by release. Although the Petitioner, who was acting *pro se* at the time, did not call his submission an "Amended Complaint", clearly from reading the transcript, this is what the Petitioner was attempting to do. (R.p.363;371-373;379,391-392,399-401).

The Court erred taking an over-technical position on this filing, by a *pro se* litigant, depriving him of his due process rights to be heard under both the United States and South Carolina constitutions. *Pro se* litigants are not to be held to the same high standards of perfection in procedural matters as lawyers. *Hines v. Kerner* 404 US 520; 92 Sup.Ct. 594 (1971), *Maty v. Grasselli Chemical Co.* 303 US 197; 58 Sup.Ct.507 (1938)

II. The Trial Court Erred in Finding that the Petitioner's Claims are Barred by Res Judicata and Release, Since the Petitioner's Claims Arise Out of a Closing, Which Accured on July 28, 2008, After the Settlement and Release Ending the Prior Lawsuit.

The Respondents moved for Judgment on the Pleadings pursuant to Rule 12(c) SCRCF. During the hearing on that Motion, the trial court

allowed additional material to be considered including, a submission by the Petitioner with attachments. (R. pp. 64; 349) Even though the trial court accepted and reviewed material outside of the pleadings, its Order of January 18, 2012 does not convert the motion as one for Summary Judgment pursuant to Rule 56 SCRPC. It appears from the transcript of the hearing that the Court considered the submission by the Petitioner to be an Amendment to his Complaint, which had been filed *pro se*, and was not artfully drafted, so she could “know what happened” and to “look at whether... what you said lets you go forward”. (R. pp. 363; 371-373; 379, 391-392, 399-401) If the Petitioner’s submission is to be treated as part of the Complaint in this matter, than all facts alleged in the submission are considered true, and are admitted as far as Motion to Dismiss is concerned. *Rosenthal v. Unarco Indus, Inc.* 278 S.C. 420, 297 S.E.2d 638(1982). *Baker Hosp. v. Firemans Fund ins. Co.* 314 S.C. 98, 441 S.E.2d 822(1994). [R. pp 64; Order]

Nowhere in the Trial Courts Order dismissing the Petitioner’s Complaint, does it mention the July 28, 2008 closing on the Wando Property to a third party, and the activities complained of by the Petitioner in this case. (R. pp 64; 443) Obviously, actions by the Respondents on July 28, 2008 could not be the subject of either *Res Judicata*, or subject to the

Settlement and Release, as both the Settlement and Release of the prior action, and the Stipulation of Dismissal with Prejudice were signed prior to the alleged misconduct. (R. pp. 443; 441) These allegations of misconduct must be assumed as admitted and true at this stage of the proceedings. *Baker Hosp. v. Firemans Fund Ins. Co.* 314 S.C. 98, 441 S.E.2d 822(1994).

Therefore, the trial court was in error in finding that the Petitioner's claims were barred by *Res Judicata* and by Release. The Petitioner stated in his Reply to Motion to Dismiss and Supporting Memorandum Affidavit: "The closing that took place on July 28, 2008 was the final act under duress that Wando River had to deal with. It was at this point that [Respondents] accumulated their acts of fraud" [92-93] It is clear that at least part of the activities complained of by the Petitioner, accrued after the Dismissal of the prior proceedings, and subsequent to the Settlement and Release.

Therefore, the activities of the Respondents could have not have been considered, and or adjudicated in the prior action. *See Nunnery v. Brantley Constr. Co. Inc.* 289 S.C. 205, 209, 345 S.E.2d 740, 743(Ct. App.1986) *Nelson v. QHG of SC Inc.* 354 S.C. 290, 311 580 S.E.2d 171,182(Ct. App. 2003)

The Petitioner states in his submission to the Trial Court:

Closing finally occurred on June 28, 2008 at a price of 5.57 million after numerous attempts. All the terms that I as Managing Member for Wando River LLC agreed to and signed for are simple thrown aside by Mr. Bennett, Mr. Darby. They simply take 110%of

proceeds and leave all the documents to be taken care of when I get back. The laws according to Bennett and Darby. He who has the cash rules. (R. pp. 92-93)

Since the Petitioner has alleged misconduct by the Respondent subsequent to the Stipulation of Dismissal, this case does not fall under the second and third prong of the *Res Judicata* test; the identity of the subject matter could not have been adjudicated in the prior suit, as that issue did not exist at that time. *See Plum Creek Dev. Co. v. City of Conway* 334 S.C. 30, 34 512 S.E.2d 106, 109(1999)

III. The Trial Court Erred in Finding that the Petitioner's Claims Are barred by the Statue of Limitations, Since the Petitioner's Claims of Respondents' Wrongdoing Arise from a Closing that Accured on July 28, 2008, and the Lawsuit was Filed on July 27, 2011.

As stated above, the Petitioner has complained of activities by the Respondent that accrued at the closing of the Wando property, which was being sold to a third party, with the proceeds to be divided between the Respondents and the Petitioner. (R. pp 443; 363, 371-373, 379, 391-392, 399-401) The Petitioner has alleged that the Respondents, during the June 25, 2008 closing, wrongfully took advantage of the Petitioner's economic disadvantage at the time, forcing him to close on the property and accept less

proceeds than he was entitled, due to the Petitioner's economic disadvantage, and in an effort to mitigate damages. (R. pp 443; 92-93) The Summons and Complaint was filed by the Petitioner on July 27, 2011, within the three year Statute of Limitation period. *SC Code section 15-3-530*. Therefore, the Court erred in finding that "[Petitioner] has not made any allegations relating to causes of action arising on or after July 27, 2008, and therefore the Complaint is barred under the Statute of Limitations". In fact, the Petitioner has made allegations that the Respondent acted wrongfully on July 28, 2008, therefore the Complaint was filed within the Statute of Limitations. (R. pp 443; 64-107)

CONCLUSION

Based on the above, the Petitioner prays that his Petition for Certiorari be granted, and that the Court hear this matter.

Respectfully submitted,

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the bottom.

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Attorney for Petitioner

February 19, 2015

CERTIFICATE OF SERVICE

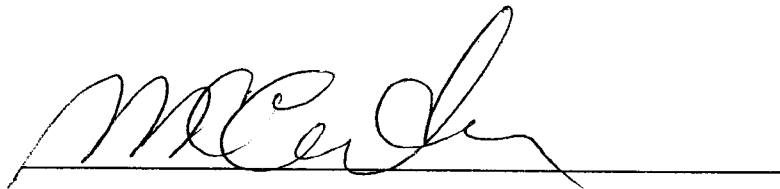
I, Vicky McCarter, an employee with the law firm of The Hardee Firm., do hereby certify that I have this date served a copy of the following pleading upon the individual named below, by placing a copy in the United States Mail, postage prepaid and return address clearly indicated to the address below:

COUNSEL SERVED:

Ellis Reed-Hill Lesemann
80 Alexandria Dr. 2nd Floor
Charleston, SC 29403

PLEADING:

Petition for a Writ of Certiorari

A handwritten signature in black ink, appearing to read 'McCarter', is written over a horizontal line.

Vicky McCarter

Columbia, South Carolina
February 23, 2015

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