

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Circuit Court Judge

Case No. 2009-CP-07-6054
Appellate Case No. 2013-001407

Cynthia Griffis,		Plaintiff,
	v.	
Cherry Hill Estates, LLC, Eugene O'Neil and and Ronald Faulkner,		Defendants,
Of whom Cherry Hill Estates, LLC and Ronald Faulkner are		Appellants.
Cherry Hill Estates, LLC and Ronald Faulkner,		Third Party Plaintiffs,
	v.	
Anthony E. Griffis,		Respondent.

PETITION FOR REHEARING

Michael W. Mogil (SC Bar #11933)
Mogil Law Firm
2 Corpus Christie Place, Ste. 303
Hilton Head Island, SC 29928
Tel. (843)785-8110

Attorney for Appellants

RECEIVED
APR 16 2015
SC Court of Appeals

TABLE OF CONTENTS

Table of Authorities..... 2

Introduction.....3

Argument 3

Conclusion 6

TABLE OF AUTHORITIES

Hooper v. Ebenezer Services and Rehabilitation Center, 386 S.C. 108, (SC 2009).....3
Kimmer v. Wright, 396 S.C. 53, 719 S.E.2d 265 (SC Ct. App 2011).....4

INTRODUCTION

Pursuant to Rule 221(a) and Rule 240(i), SCACR the Appellants Cherry Hill Estates, LLC and Ronald T. Faulkner respectfully petition this Court for a rehearing of Opinion No. 2015-UP-167, dated April 1, 2015.

ARGUMENT

In its Finding enumerated as number 2, the Court affirmed the trial court's ruling that the applicable statute of limitation began to run on the date of closing. The Court found that it is undisputed that Faulkner executed a Power of Attorney authorizing the closing attorney to act on his behalf concerning the sale, including executing any guarantees. However, Appellants restate that per his deposition testimony, Faulkner could not have authorized his Power of Attorney to execute a guarantee that Faulkner did not know existed at the time he gave Power of Attorney—to wit, the guarantee of the seller financing to Cynthia Griffis. Nor could Faulkner have authorized his closing attorney, Jack Qualey, to execute loan documents and a settlement statement which failed to disclose to the lender or the parties that Seller proceeds sourced from the loan were being refunded to the Purchaser entity at closing. Faulkner testified that he did not have this knowledge, that his last meeting and conversation with Mr. Griffis, the Appellee, left him with the understanding that there would be no personal guaranty or recourse under the seller financing, and thus he could not have imputed contrary knowledge to his power of attorney. The Agreement for Cherry Hill Estates of October 10, 2010 [R. at p. 211] which allegedly bears Faulkner's signature is not controlling on this issue. Faulkner stated that it was drafted by the seller (Appellee) and contrary to his understanding of the transaction, and Qualey testified that he had never seen the October 10

Agreement and did not provide that document to the lender. These facts, which Faulkner learned of two years later and which Qualey did not know of until his deposition almost four years later, are the basis of the Appellants' claim for professional negligence. Faulkner testified that he learned of these events after receiving demand for payment, and then a lawsuit, from Cynthia Griffis in 2009 and retaining counsel for that purpose [R. at p. 177 et seq.]. Qualey testified that he was not aware of the use or refunding of Seller proceeds at or after closing, or of the lender's knowledge of these events [R. at p. 168 et seq.]. Faulkner did not know, and could not have known, that his rights had been violated or that he had been damaged on the date he gave Qualey power of attorney, or on the date that Qualey executed the closing and loan package. See Kimmer v. Wright, 396 S.C. 53, 719 S.E.2d 265 (SC Ct. App 2011) and the dissenting opinion of Judge Few within. For these reasons, Appellants request that the Court reconsider and rehear its finding that the statute of limitations began to run when Qualey executed the loan documents with power of attorney, and instruct the trial court to employ the discovery rule to determine when the statute of limitations actually commenced to run, and for further findings of fact after that matter is resolved at trial.

In its Finding enumerated as number 5, the Court finds that Appellants argument that Section 15-36-100 (C) grants the trial judge discretion to grant leave to amend a pleading to include the expert affidavit if "justice requires" was not preserved. Appellants respectfully argue that this issue was raised and ruled upon by the trial Court in both its its Order Granting Motion to Dismiss entered October 27, 2010 [R. at p. 10] and also in Appellants Memorandum in Opposition to Motion for Summary Judgment filed March 28, 2011 [R. at p. 45], which resulted initially in the Court entering its Order Denying Summary Judgment as

entered on August 6, 2012 [R. at p. 8].

In its Finding enumerated as number 6, the Court disagrees with Appellants view that equitable tolling precludes application of the statute of limitations bar to their claims. The doctrine of equitable tolling should not only focus on the conduct of the opposing party which was relied on caused the limitations period to lapse. "In our view, the situations described above do not constitute an exclusive list of circumstances that justify the application of equitable tolling." The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other." [citation omitted]. Equitable tolling may be applied where it is justified under all the circumstances. We agree, however, that equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use". Hooper v. Ebenezer Services and Rehabilitation Center, 386 S.C. 108, , 687 S.E.2d 29, (SC 2009).

In the case sub judice, the interests of justice compel application of equitable tolling. Appellants -aver that they in fact granted the Appellee an extension of time to respond to their Third Party Complaint immediately prior to the expiration of the three year statute of limitations asserted by Appellee, and then further relied on the Order from the trial court which granted Appellants until November 14, 2010 to provide the statutory affidavit. Even the trial court found that there was no real harm to the parties in applying the doctrine of equitable tolling. *See* Order Denying Summary Judgment entered August 3, 2012, [R. at p. 8]. The procedural history of this case, where Appellants argue that the resulting loan which

should not have been made, resulting in a loss suffered by the Appellants, and a loss potentially suffered by the lender as well, all as stated in the Motion to Reconsider/Amend, compel a result which remands Appellants' negligence claim to the trial court for adjudication on the merits.

In its Finding enumerated as number 7, the Court finds that the Appellants did not preserve their argument that summary judgment on their breach of fiduciary duty claim should be overturned. Appellants respectfully submit that their Motion to Reconsider brought under Rule 59, wherein they requested the trial court for leave to re-plead their claim for breach of fiduciary duty against Appellee as the seller and for public policy reasons, is akin to requesting that denial of summary judgment be reconsidered, and that this issue was properly preserved for appeal.

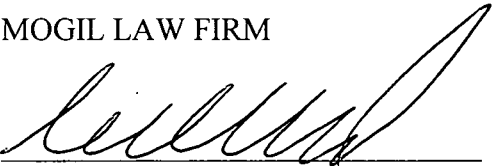
CONCLUSION

WHEREFORE, for the reasons set forth herein, the Appellant, Thaddeus F. Segars, seeks an Order granting rehearing.

Dated: April 15, 2015

Respectfully Submitted,

MOGIL LAW FIRM



Michael W. Mogil, SC Bar #11933
2 Corpus Christie Place, Ste. 303
Hilton Head Island, SC 29928
Tel. 843-785-8110

Attorney for Appellants

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Circuit Court Judge

Case No. 2009-CP-07-6054
Appellate Case No. 2013-001407

Cynthia Griffis,		Plaintiff,
	v.	
Cherry Hill Estates, LLC, Eugene O'Neil and and Ronald Faulkner,		Defendants,
Of whom Cherry Hill Estates, LLC and Ronald Faulkner are		Appellants.
Cherry Hill Estates, LLC and Ronald Faulkner,		Third Party Plaintiffs,
	v.	
Anthony E. Griffis,		Respondent.

CERTIFICATE OF SERVICE

I, Michael W. Mogil, do hereby certify that on the April 15, 2015, I served a true and accurate copy of the Appellant's Petition for Rehearing the above matter, by depositing a copy of the same in the U.S. Mail, first class postage prepaid, and addressed to:

Anthony Griffis
355 Park Avenue SW
Aiken, SC 29801

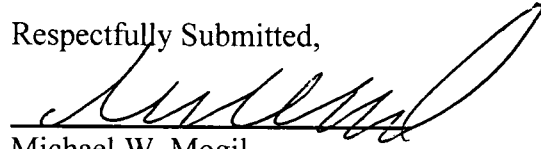
RECEIVED

APR 16 2015

SC Court of Appeals

April 15, 2015

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Michael W. Mogil", written over a horizontal line.

Michael W. Mogil

Mogil Law Firm

2 Corpus Christie Place, Ste. 303

Hilton Head Island, SC 29928

(843) 785-8110

MOGIL LAW FIRM

MICHAEL W. MOGIL
mmogil@mogillaw.com

2 Corpus Christie Place • Suite 303
Hilton Head Island, SC 29928
T 843-785-8110 F 843-785-9676
www.mogillaw.com

April 15, 2015

The Honorable Jenny Abbott Kitchings
Clerk of Court
The South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Via U.P.S. Overnight

Re: Cynthia Griffis v. Cherry Hill Estates, LLC of which Cherry Hill Estates, LLC and
Ronald Faulkner are Appellants
Appellate Case No. 2013-01407

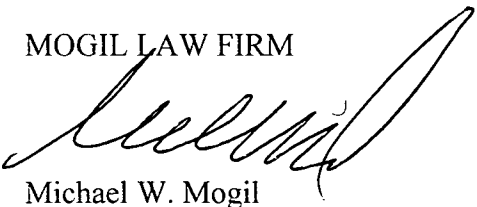
Dear Ms. Kitchings,

Enclosed for filing in the above-referenced matter, please find the original and seven (7) copies of Appellant's Petition for Rehearing, along with the original and once copy of a Certificate of Service. Also enclosed is a check for the \$25 filing fee. I am requesting that one of the enclosed copies of the Petition and the copy of the Certificate be time-stamped and returned to my office in the enclosed self-addressed envelope.

Thank you for your attention in this matter.

Very Truly Yours,

MOGIL LAW FIRM


Michael W. Mogil

Cc: Anthony Griffis
355 Park Avenue SW
Aiken, SC 29801

RECEIVED
APR 16 2015
SC Court of Appeals

