THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable R. Lawton McIntosh, Circuit Court Judge

Case No. 2015-000647

Terry and Suzette Patton.....Appellants,

v.

American Lifestyle Homes, LLC, Rufus G. Revis d/b/a American Lifestyle Homes, and Anderson Brothers Concrete, LLC, Marcus Anderson d/b/a Anderson Brothers Concrete, LLC, and Scott Brown .....Respondents.

BRIEF OF THE RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

Whether the court erred in finding the final and effective date of the tolling period for the statute of limitations of a Consent Order Striking Case from the Docket pursuant to Rule 40(j), SCRCP was the date the executed order was filed with date stamp with the Clerk of Court resulting in the case being time barred by the statute of limitations where the motion to restore the case pursuant to Rule 40(j) was filed more than a year from the date of filing of the order?

STATEMENT OF THE CASE

Appellants filed their initial Complaint on or around December 14, 2010 containing allegations of negligent construction of a retaining wall, parking pad, and detached garage. (Complaint). Subsequently, on or around January 31, 2011, Appellants filed an Amended Complaint, attaching a report from their expert, Alan Lumpkin. (Amended Complaint). The underlying construction was completed in May of 2008. According to Appellants, they saw cracking in the construction within 10 days of the work being completed and they made subsequent repeated complaints of the alleged defects and damages to the general contractor, including a formal written complaint on April 6, 2009. Appellants also made a written complaint to the Department of Labor Licensing & Regulation (hereafter, "LLR") on April 5, 2009 of the defects and damages. An inspection was completed by the LLR on July 15, 2009. Thereafter, Appellants retained Alan Lumpkin, a licensed engineer, to inspect the alleged defects and damages relating to the construction. Mr. Lumpkin issued his written report to Appellants on October 27, 2009, which identified alleged construction defects and damages. (Motion to Reconsider).

On August 26, 2013, the case was dismissed pursuant to a Consent Order Striking Case from Docket under Rule 40(j), SCRCP, executed by Judge Alexander Macauley and filed, with date stamp, the same day with the Anderson County Clerk of Court. (Consent Order Striking Case from Docket). On September 11, 2014, Appellants filed a motion to restore the case pursuant to Rule 40(j), SCRCP. (Motion to Restore Case). On September 15, 2014, the Circuit Court granted Appellants' motion without a hearing. (Order to Restore Case). Defendant Scott Brown (hereafter "Respondent") did not receive notice of the Motion to Restore Case or the Order to Restore Case until September 19, 2014. Respondent moved to reconsider restoration of the case to allow for a hearing on the Motion to Restore under Rule 40(j), given that Respondent received the Motion to Restore seven days after it was filed, three days after the Court had executed the Order, and two days after the Order was filed, with date stamp, by the Clerk of Court. Respondent moved to reconsider or vacate restoration of the case based on the statute of limitations. (Motion to Reconsider).

A hearing was held on Respondent's motion on December 16, 2014 before the Honorable Judge Lawton McIntosh. The Order Granting Motion for Reconsideration and Vacating Restoration of Case Under Rule 40(j) was signed by Judge McIntosh on February 6, 2015. In support of the Order, the Court found that Respondent was entitled to contest the motion for restoration of the case and was granted the opportunity for a hearing. (Order Vacating Restoration, p. 2). The Court also found Appellants did not have any time remaining on the statute of limitations when the case was dismissed pursuant to Rule 40(j) on August 26, 2013, which Appellants conceded at the hearing. Further, the Court found that Appellants did not file the Motion to Restore Case to Active Roster within the period of time the statute of limitations was tolled pursuant to Rule 40(j), SCRCP, because they failed to move to restore the case within

one year after the date the case was dismissed. (Order Vacating Restoration, pgs. 2-4). The Court found that Appellants had until August 26, 2014 to move to restore the case pursuant to Rule 40(j) in order to take advantage of the tolling protection provided by the Rule. However, Appellants filed their motion on September 11, 2014, and, as a result, the motion violated the statute of limitations and the Court found the case should not be restored as a matter of law. Finally, the Court held that an order is final and takes affect after the order is signed and it is filed with the Clerk of Court, not when the filed order is received by counsel, and that Appellants had substantial and sufficient time to comply with Rule 40(j), SCRCP, for a motion to restore the case to be filed. (Order Vacating Restoration, pgs. 2-4). Appellants filed their notice of appeal on March 31, 2015.

ARGUMENT

I. Standard of Review

The interpretation of a rule or statute is reviewed de novo. Limehouse v. Hulsey, Op. No. 4805, 2011 S.C. App. LEXIS 124 (S.C. Ct. App. filed June 2, 2011). In an action at law, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings. Kuznik v. Bees Ferry Assocs., 342 S.C. 579, 538 S.E.2d 15 (Ct.App. 2000). When an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts. Nationwide Mut. Ins. Co. v. Erwood, 364 S.C. 1, 611 S.E.2d 319 (Ct.App. 2005).

II. The Court Did Not Err by Finding the Effective Date for the Consent Order Striking the Case from the Docket Pursuant to Rule 40(j) was the date the executed order was filed with the Clerk of Court and in finding Appellants Failed to Restore Their Case Within the Time Permitted by Rule 40(j), SCRCP, resulting in their case being time-barred by the Statute of Limitations.

The Court properly found that the case could not be restored pursuant to Rule 40(j), SCRCP because Appellants filed their motion to restore the case beyond the one year that the statute of limitations was tolled where there was no time remaining on the statute of limitations upon the dismissal of the case. Initially, Appellants conceded at the hearing on Respondent's Motion to Reconsider that they did not have any time remaining on the statute of limitations for the claim forming the basis of the litigation when the case was removed from the docket pursuant to Rule 40(j), SCRCP. (Order Vacating Restoration, p.2). The evidence of the history of the case, including notice to claimants, supported this concession. Rule 40(j), SCRCP, holds that a party may strike its complaint from the docket one time as a matter of right, upon the consent of adverse parties, and upon the agreement "that if the claim is restored upon motion made **within 1 year of the date stricken**, the statute of limitations shall be tolled as to all consenting parties during the time the case is stricken...." (emphasis added). The consent order striking the case from the docket was executed by Judge Macaulay on August 26, 2013. The executed order was also *clocked in and filed with* the Anderson County Clerk of Court on August 26, 2013. Therefore, Judge McIntosh properly found that Appellants had until August 26, 2014, to move to restore the case pursuant to Rule 40(j) in order to take advantage of the tolling protection afforded their case against the statute of limitations. (Order Vacating Restoration, p. 4). However, Appellants did not file their Motion until September 11, 2014. Consequently, the statute of limitations had expired and the case properly was not restored. (Order Vacating Restoration, p. 4).

The Circuit Judge properly held The Consent Order Striking Case from Docket was effective the date the order was signed and filed with the Clerk of Court, not the date a "True Copy" is made by the Clerk of Court or the date the filed order is received by Counsel.

Therefore, the one year tolling of the statute of limitations began on August 26, 2013, and not September 11, 2013 when a "True Copy" was stamped by the clerk, which was later delivered to counsel, according to Appellants, on September 18, 2013. In First Union Nat'l Bank v. Hitman, 306 S.C. 327, 411 S.E.2d 681 (Ct.App. 1991), the Court of Appeals addressed whether the trial judge erred by issuing a written order differing from his bench ruling. The Court of Appeals found that it was not error because no order is final until it is written *and entered*. In doing so, the Court cited Rule 58(a), SCRCP, which holds "[a] judgment is effective only when so set forth and entered in the record." The holding in Hitman strengthens the trial court's finding in this case. Judge Macauley's Order was executed by him and entered by date-stamped filing by the Clerk of Court on August 26, 2013. Hitman does not stand for, nor even makes mention of, the necessity for a "True Copy" to be prepared or for service of the parties with a copy prior to an order being effective. Therefore, the effective date of the Order was the date of filing with the Clerk of Court.

Similarly, in Bowman v. Richland Mem'l Hosp., 335 S.C. 88, 515 S.E.2d 259 (Ct.App. 1999), the Court of Appeals found that an order becomes final and effective on the date the order is entered by the Clerk of Court. In the case, the trial judge signed an Order on September 19th requiring the plaintiffs to amend their complaint within 10 days of the date of the order, but it was not filed with the clerk until September 23rd. The Bowman case does not stand for the proposition that an Order does not take effect until it has been delivered to the parties. Rather, Bowman holds that while the order remains in the control of the judge it is of no effect until it is delivered to the Clerk of Court:

> "[u]ntil the paper has been delivered by the judge to the clerk of court, to be filed by him as an order in the case, it is...not a final ruling on the merits nor is it binding on the parties until it has been reduced to writing, signed by the judge and delivered for recordation."

Id. at 91-92. Additionally, the Court of Appeals in Bowman makes no mention of requiring a "True Copy" or service of the order on the parties before the order becomes final and effect. In this case, the order was executed, delivered, and filed by the Clerk of Court on August 26, 2013, becoming a final and binding order on that date pursuant to Bowman.

Appellants improperly argue that an order is not final and effective until there is actual receipt of the order by the parties. However, the court in Bowman found that while the mere execution of an order by the judge is not sufficient for notice to the parties, the entering of the order into the record by the clerk does provide the parties notice. Similarly, in Upchurch v. Upchurch, 367 S.C. 16, 624 S.E.2d 643 (2006) (reversed on other grounds), the Supreme Court held that entry of an order constituted notice of the order to the parties. In the case, the Supreme Court specifically disagreed with Appellants' apparent position, citing Rosen v. Hiler, 307 S.C. 331, 415 S.E.2d 117 (Ct.App. 1992), which rejected that a party does not have notice where the party had not received the signed, dated, and filed order, and further holding that there was nothing in the applicable rule that required the filed order to be served upon a party to affect notice of the court's action. Therefore, Appellants received notice of the effective date of the Consent Order Striking Case from Docket upon the filing of the order with the Clerk of Court for Anderson County on August 26, 2013.

Finally, Bayne v. Bass, 302 S.C. 208, 394 S.E.2d 726 (Ct.App. 1990) and West v. Luck Ave. Props., 2014 S.C. App. Unpub. LEXIS 529 (Ct.App. 2014) further support the Circuit Court's findings in this case regarding the effective date of the Consent Order Striking Case from Docket. In Bayne, the Court of Appeals found that an oral ruling was not final until it had been recorded, meaning that an order is not final until executed and delivered to the clerk for recordation. Bayne, at 210. In this case, as noted, the Order Striking the Case from Docket was

signed by the judge and filed, with date stamp, on August 26, 2013. Furthermore, although West has no precedential value, in the case the Court of Appeals reversed the denial of a motion to restore a case under Rule 40(j) holding that the trial court erred in finding that the effective date of the order striking the case was the date the order was signed, and not the date it was filed. Applying the interpretation applied in that case, the Circuit Judge properly found the Order Striking the Case from Docket was effective on August 26, 2013, meaning the tolling period began on that date also. Neither West nor Bayne holds that a "True Copy" or service upon the parties is the effective date of the order striking the case, but instead holds that the date the order was filed is the effective date of the order striking the case and that the motion to restore the case must be brought within a year from that date.

Considering these cases, it is well settled law in South Carolina that an order becomes effective once signed by the judge and delivered to the clerk for recordation. Appellants have failed to present any case law or supporting evidence demonstrating that a "True Copy," or service of the parties, must be made before an order becomes effective and final. In fact, all of the precedent relied upon by Appellants supports the trial court's ruling, and Respondent's claim, that the tolling period pursuant to Rule 40(j), SCRCP, began on August 26, 2013, when the executed order was delivered to and filed by the Clerk of Court. Appellants failed to move to restore their case by August 26, 2014, and, therefore, the Circuit Court properly found the claim was barred by the statute of limitations and could not be restored.

CONCLUSION

The trial court did not err in finding that the effective date of the Consent Order Striking Case from Docket pursuant to Rule 40(j), SCRCP for tolling the statute of limitations began on August 26, 2013, in finding that Appellants failed to move to restore the case prior to the

expiration of the one year tolling period for the statute of limitations provided by the Rule, or in ruling that, as a result, the case was time-barred by the statute of limitation from being restored pursuant to Rule 40(j), SCRCP. For the reasons stated herein, and for any ground appearing in the record pursuant to Rule 220(c), SCACR, Appellants' appeal should be denied and the trial court's February 6, 2015, Order should be upheld.

Respectfully submitted,

McANGUS GOUDELOCK & COURIE, LLC

July 2, 2015

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CERTIFICATE OF SERVICE

I hereby certify that I have this 2nd day of July 2015, caused to be served a copy of Initial Brief of Respondent Scott Brown by mailing a copy of same, postage prepaid, in the United States mail, with sufficient postage affixed as follows:

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July 2, 2015

Jenny Abbott Kitchings
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Re: Terry and Suzette Patton v. American Lifestyle Homes, LLC, Rufus G. Revis d/b/a American Lifestyle Homes, and Anderson Brothers Concrete, LLC, Marcus Clinkscales aka Marcus Anderson d/b/a Anderson Brothers Concrete, LLC, and Scott Brown
Appellate Case No. 2015-000647
Claim No.: NGM MPB95386 / Mont. 604361810
Our File No.: 20362.11005

Dear Ms. Kitchings:

Enclosed for filing please find the following documents:

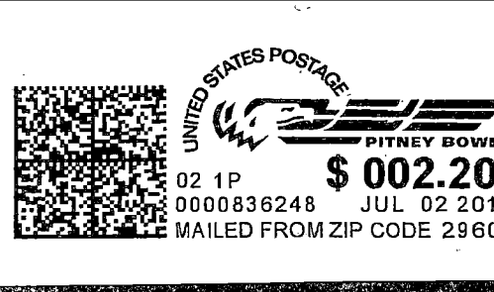
1. Original and one copy of Initial Brief of Respondent Scott Brown;
2. Original and one copy of Designation of Matter to be Included in the Record on Appeal; and
3. Original and one copy of Respondent's Proof of Service concerning items one and two.

Please file these documents and return a clocked in copy to me in the enclosed return envelope.

Very truly yours,

Jeanmarie Tankersley

JT/mbo
Enclosures
cc: Candy M. Kern-Fuller, Esquire, Upstate Law Group, LLC (w/encls.)



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