

STATE OF SOUTH CAROLINA)
)
 COUNTY OF ORANGEBURG)
)
 Wanda Mack)
 Plaintiff)
)
 v.)
)
 Carmen Gates)
 Defendant)

IN THE COURT OF COMMON PLEAS

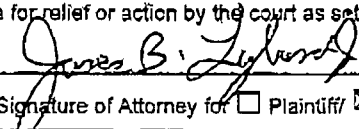
RECEIVED

AUG 10 2015

CASE NO. 2010-CP-38-00670

SC Court of Appeals

ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney: Steven D. Murdaugh Peters, Murdaugh, Parker, Eltzroth & Depick P.O. Box 1164 Walterboro, SC 29488 phone: fax: other:	Defendant's Attorney: JAMES B. LYBRAND, JR. P. O. Box 58 Columbia, SC 29202 phone: 252-0500 fax: 929-3530 e-mail: other:
<input type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I AND II) <input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II AND III) <input type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete Sections II and III)	
SECTION I: Hearing Information	
Nature of Motion: Estimated Time Needed: Court Reporter Needed: <input type="checkbox"/> YES / <input checked="" type="checkbox"/> NO	
SECTION II: Motion Type	
<input type="checkbox"/> Written motion attached <input checked="" type="checkbox"/> Order / Order Denying Plaintiff's Motion to Restore I hereby move for relief or action by the court as set forth in the attached proposed order. <div style="display: flex; justify-content: space-between;"> <div style="text-align: center;">  Signature of Attorney for <input type="checkbox"/> Plaintiff / <input checked="" type="checkbox"/> Defendant </div> <div style="text-align: center;"> 12/1/2014 Date submitted </div> </div>	
SECTION III: Motion Fee	
<input checked="" type="checkbox"/> PAID - AMOUNT: \$25.00 <input type="checkbox"/> Other:	
JUDGE'S SECTION	
<input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other:	JUDGE _____ CODE: _____ Date: _____
CLERK'S VERIFICATION	
Collected by: <u>Shante Zene</u> Date Filed: <u>12-3-14</u> <input checked="" type="checkbox"/> MOTION FEE COLLECTED: <u>\$ 25.00</u> <input type="checkbox"/> CONTESTED - AMOUNT DUE: _____	

SCCA/233 (11-03)

ATTEST: TRUE COPY

Winnifred B. Clark
 CLERK OF COURT
 ORANGEBURG COUNTY, SC

MAILED

12/10/14 Shanki

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF ORANGEBURG

CASE NO.: 2010-CP-38-00670

Wanda Mack,

Plaintiff(s),

ORDER

v.

Carmen Gates

Defendant(s).

ATTEST: TRUE COPY

Winniford B. Clark

CLERK OF COURT

ORANGEBURG COUNTY, SC

FILED FOR RECORD
2014 DEC -3 PM 1:11

This matter came before me on October 6, 2014 for argument of Plaintiff's Motion to Restore this action to the active general docket pursuant to Rule 40 (j) SCRCF. The motion was filed on February 19, 2013. Present at the hearing was Steven O. Murdaugh, counsel for Plaintiff, and James B. Lybrand, Jr., counsel for Defendant.

This action arises from an automobile accident occurring on March 10, 2009. Plaintiff filed her Complaint on May 12, 2010. Defendant filed her Answer on June 3, 2010. Discovery in the case was conducted and the case was mediated unsuccessfully. On September 29, 2011, Plaintiff sent Defendant a signed Consent Order striking the case under Rule 40(j) SCRCF. Defendant signed the consent and mailed the original Order on October 6, 2011 to Judge Edgar W. Dickson for filing. Defense counsel copied Plaintiff's counsel with his October 6 letter to Judge Dickson. On October 23, 2011, Judge Dickson signed the Order striking the case under Rule 40(j). The Order was filed on October 28, 2011. Defense counsel received a clocked copy of the filed Order from the Orangeburg Clerk's office a few days later.

On or about February 19, 2013, Plaintiff filed her motion to restore this case pursuant to Rule 40(j). Plaintiff sent defense counsel a letter and proposed Consent Order to Restore. On

February 26, 2013 defense counsel advised Plaintiff that he could not consent to restoring the case since the motion to restore had not been filed within one (1) year as provided in Rule 40(j). Counsel for Plaintiff submitted an Affidavit stating that he had never received a copy of the filed Order. The parties submitted documents (attached hereto) for the court's consideration.

Rule 40 (j) SCRPC governs the restoration of cases and provides as follows:

"A party may strike its complaint, counterclaim, cross-claim or third party claim from any docket one time as a matter of right, provided that all parties adverse to that claim, counterclaim, cross-claim or third party claim agree in writing that it may be stricken, and all further agree 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, and any unexpired portion of the statute of limitations on the date the case was stricken shall remain and begin to run on the date that the claim is restored. A party moving to restore a case stricken from the docket shall provide all parties notice of the motion to restore at least 10 days before it is heard. Upon being restored, the case shall be placed on the General Docket and proceed from that date as provided in this rule." (emphasis added)

Here, it is undisputed that Plaintiff did not file her Motion to Restore within one (1) year from the date her case was stricken which was October 28, 2011. Her motion was not filed until or about February 19, 2013. Rule 40 (j) SCRPC does not require a plaintiff in all cases to file a motion to restore within one year of the case being stricken; however, the rule clearly provides that a Plaintiff must move to restore the case within the one (1) year period if Plaintiff seeks to take advantage of the statute of limitations tolling feature provided in the rule. Maxwell v. Genez, 356 S.C. 617, 591 S.E.2d 26 (2003); Graham v. Dorchester County School Dist., 339 S.C. 121, 125, 528 S.E.2d 80, 82 (SCAPP 2000). The striking of a case under Rule 40 (j) does not stop the running of the applicable statute of limitations. The statute of limitations ran on

The Affidavit of Plaintiff's counsel (paragraph 15) notes that neither Plaintiff nor her counsel were given a copy of the Order striking the case. Presumably, Plaintiff argues that her

failure to receive a copy excuses her failure to timely move to restore the case. This argument lacks merit. Plaintiff consented to the Order striking the case and Plaintiff was copied with the October 6, 2011 letter to Judge Dickson submitting the Order for filing. Accordingly, Plaintiff was on notice in early October 2011 that the case was being stricken and thereafter had ample time and opportunity to inquire from the court as to the status of the case. Prior to January or February 2013, Plaintiff apparently did not inquire about or request a copy of the Order from the Clerk of Court or Defense counsel. Plaintiff was certainly aware, before receiving a filed copy, that she would need to restore the case. Nonetheless, it was not until approximately February 2013, sixteen (16) months after the Order had been filed, that Plaintiff sought a copy of the Order.

Our Supreme Court has held that the time limits outlined in Rule 40(j) may not be extended under any "good cause" theory outlined in Rule 6(b) SCRCP. See, Maxwell, 591 S.E.2d at 28 (2003). The Court in Maxwell held as follows:

"Rule 40(j) does not require that a party move to restore the case to the docket within one year after it was stricken. Instead, the unambiguous language provides that, if the claim is restored within one year after it is stricken, the statute of limitations is rolled for that period.

. . .

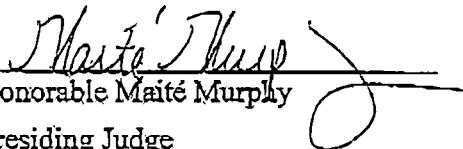
A party can move to restore a case to the docket more than one year after the claim was stricken without running afoul of Rule 40(j); the party simply cannot take advantage of the one year tolling period provided by the rule.

. . .

Rule 6(b) is not applicable to Rule 40(j). The language of Rule 6(b) specifies it applies when there is a deadline . . . Rule 40(j) does not have a deadline during which a motion to restore must be filed. Accordingly, Rule 6(b) is inapplicable." Maxwell, 591 S.E. 2d at 28.

The one year period of time to file a motion to restore applies only when a party seeks to take advantage of the tolling of a statute of limitations. Here, Plaintiff failed to move to restore within the one (1) year period after Judge Dickson's Order striking the case. As such, Plaintiff cannot take advantage of the tolling period thereby making restoration of the case improper. Accordingly, Plaintiff's Motion to Restore must be denied.

AND IT IS SO ORDERED.



Honorable Maité Murphy
Presiding Judge
First Judicial Court

Orangeburg, South Carolina

November 15, 2014

ATTACHMENTS

2014 DEC -3 PM 11:11
FILED
WINDYBROOK
CLERK
MASS.

McDONALD, McKENZIE, RUBIN, MILLER AND LYBRAND, L.L.P.

ATTORNEYS AT LAW

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HYMAN S. RUBIN, JR.
BEN N. MILLER III
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RONALD E. ALEXANDER
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AMANDA N. PITTMAN

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CERTIFIED MEDIATOR AND ARBITRATOR
*ALSO ADMITTED IN TEXAS

October 6, 2011

The Honorable Edgar W. Dickson
190 Gibson Street, Suite 207
Orangeburg, SC 29115

2011 DEC -3 PM 1:12
FILED IN COURT
CLERK OF COURT
ORANGEBURG, SC

Re: Wanda Mack -vs- Carmen Gates
Case Number: 2010-CP-38-00670

Dear Judge Dickson:

Following up my conversation with you at the roster meeting on October 3, enclosed you will find the original and copies of an Order striking this case under Rule 40(j). I would be most appreciative if you could sign the Order and have it filed with the Orangeburg Clerk of Court. I am attaching a return envelope which the Clerk's office may use to return filed and clocked copies to me. If anything further is needed, please let me know.

With Kind Regards,

McDonald, McKenzie, Rubin,
Miller and Lybrand, L.L.P.

James B. Lybrand, Jr.

JBLjr/pa
Enc.

cc: Steven D. Murdaugh, Esquire

C

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STATE OF SOUTH CAROLINA)
)
 COUNTY OF ORANGEBURG)
)
 Wanda Mack,)
)
 Plaintiff,)
)
 -vs-)
)
 Carmen Gates,)
)
 Defendant.)

IN THE COURT OF COMMON PLEAS
 CIVIL ACTION NO: 2010-CP-38-00670
 ORDER STRIKING CASE UNDER
 RULE 40(J)

FILED
 WIRE
 CLERK
 ORANGEBURG COUNTY, SC
 OCT 28 AM 11:10

FILED
 WIRE
 CLERK
 ORANGEBURG COUNTY, SC

Upon motion of the undersigned counsel for Plaintiff by and with the consent of the undersigned counsel for Defendant.

IT IS HEREBY ORDERED that this action shall be stricken from the active docket with leave to restore pursuant to Rule 40(j) SCRCP.

IT IS FURTHER ORDERED that while the case remains in an inactive status, the parties are allowed to continue with all forms of discovery provided for and authorized under the South Carolina Rules of Civil Procedure and to pursue mediation.

AND IT IS SO ORDERED.

K.E.W. Dickson
 Chief Administrative Judge

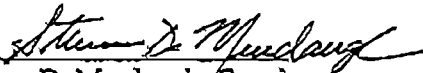
Orangeburg, South Carolina

OC
 September 23, 2011

ATTEST: TRUE COPY
W. B. Clark
 CLERK OF COURT
 ORANGEBURG COUNTY, SC

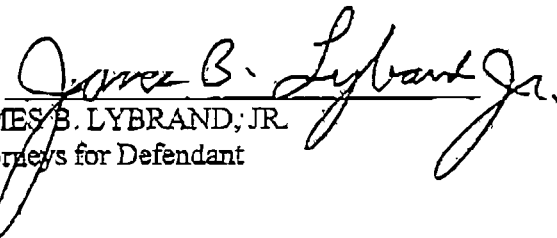
I SO MOVE:

Peters, Murdaugh, Parker, Eltzroth, & Detrick, PA
P. O. Box 1164
Walterboro, SC 29488

By: 
Steven D. Murdaugh, Esquire
Attorney for Plaintiff

I CONSENT:

McDONALD, McKENZIE, RUBIN,
MILLER AND LYBRAND, L.L.P.
POST OFFICE BOX 58
1704 MAIN STREET, 2nd FLOOR
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(803) 252-0500

BY: 
JAMES B. LYBRAND, JR.
Attorneys for Defendant

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BERT G. UTSEY, III
RANDOLPH MURDAUGH, III
GRAHAME B. HOLMES
LEE D. COPE
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February 19, 2013

RANDOLPH MURDAUGH, SR.
(1887-1940)
RANDOLPH MURDAUGH, JR.
(1913-1999)
J. ROBERT PETERS, JR.
(1927-2008)

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VIA FACSIMILE (803) 929-3530 & U.S. MAIL

Mr. James B. Lybrand, Jr.
McDonald, McKenzie, Rubin,
Miller and Lybrand, L.L.P.
Post Office Box 58
Columbia, SC 29202

Re: *Wanda Mack v. Carmen Gates*
Civil Action No.: 2010-CP-38-00670

Dear Mr. Lybrand:

Enclosed herewith for your review and consideration is a proposed Consent Order to Restore Pursuant to Rule 40(j) with regard to the above referenced matter. If you are in agreement, please sign and return in the addressed, stamped envelope provided for your convenience. Upon receipt of the filed Order, I will provide you with a copy of same.

With kind regards, I am

Sincerely,



Tamika D. Simmons
Legal Assistant to Steven D. Murdaugh

/tds
Enclosures As Stated

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IN OFFICE OF CLERK
OF COURT
COLUMBIA, SOUTH CAROLINA

2011 DEC -3 PM 1:12

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF ORANGEBURG)	CIVIL ACTION NO.: 2010-CP-38-00670
)	
WANDA MACK,)	
)	
PLAINTIFF,)	
)	
v.)	CONSENT ORDER TO RESTORE
)	PURSUANT TO RULE 40(j)
)	
CARMEN GATES,)	
)	
)	
DEFENDANT.)	

IT APPEARING that the Plaintiff has requested that this matter be restored to the trial roster pursuant to Rule 40(j) S.C.R.C.P. with the consent of opposing counsel, it is therefore ORDERED that this case be restored to the trial roster pursuant to Rule 40(j).

IT IS SO ORDERED.

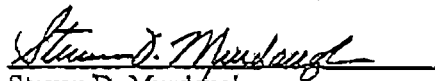
Honorable Perry M. Buckner

_____, 2013

Walterboro, South Carolina

I SO MOVE:

PETERS, MURDAUGH, PARKER,
ELTZROTH & DETRICK, P.A.



Steven D. Murdaugh
Post Office Box 1146
Walterboro, SC 29488
(843) 549-9544

Attorneys for Plaintiff

I SO CONSENT:

MCDONALD, MCKENZIE, RUBIN,
MILLER AND LYBRAND, L.L.P.

James. B. Lybrand, Jr.
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Attorneys for Defendant

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CERTIFIED MEDIATOR AND ARBITRATOR
ALSO ADMITTED IN TEXAS

February 26, 2013

VIA FAX (843) 549-9546

Steven D. Murdaugh, Esquire
Peters, Murdaugh, Parker, Eltzroth, & Detrick, PA
P. O. Box 1164
Walterboro, SC 29488

Re: Wanda Mack v. Carmen Gates
Civil Action No: 2010-CP-38-00670

Dear Steve:

I will need to discuss with you the restoration issue on this case. After getting your motion and your request for our consent (which I called you about a few weeks ago) I pulled the file and saw where the case had been stricken under Rule 40(j) on October 28, 2011. Under the rule the case must be restored within one year and in looking through the file, I can't find any motion or request from your office about restoring the case until early 2013. Please check your file and let me know if I have overlooked something. I certainly have authority to consent to restoring cases when the request is timely made but if the request is beyond the time limits called for in the rules, that is something that I have to discuss with my client.

Please check your file and get back with me as soon as possible.

With kind regards,

McDonald, McKenzie, Rubin,
Miller and Lybrand, LLP

James B. Lybrand, Jr.

JBLjr/pa

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OFFICE
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CERTIFIED MEDIATOR AND ARBITRATOR
*ALSO ADMITTED IN TEXAS

December 1, 2014

Lisa W. Mizell
Orangeburg County Clerk of Court
Post Office Drawer 9000
Orangeburg, SC 29116

Re: Wanda Mack -vs- Carmen Gates
Case Number: 2010-CP-38-00670

Dear Ms. Mizell:

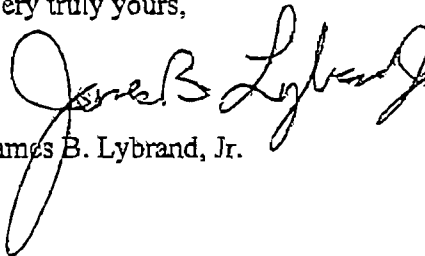
I am enclosing an original and copies of an Order from Judge Murphy denying Plaintiff's Motion to Restore this action. I am also enclosing a cover sheet and a check in the amount of \$25.00 for filing costs. I would ask that you file the original Order and return clocked copies to me in the envelope provided.

By copy of this letter to Steve Murdaugh, I am sending him an unclocked but signed copy of the Order. Please have your office send Mr. Murdaugh a clocked copy once it is filed.

If you require anything further, please let me know.

With kind regards, I am

Very truly yours,



James B. Lybrand, Jr.

JBLjr/bg
Enclosures
cc: Steven D. Murdaugh, Esquire

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ORANGEBURG COUNTY
SOUTH CAROLINA

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