

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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DEC 21 2015

APPEAL FROM HORRY COUNTY
Court of Common Pleas

S.C. Supreme Court

Benjamin H. Culbertson, Circuit Court Judge

Unpublished Opinion No. 2015-UP-330 (S.C.Ct.App. filed July 1, 2015)

Bigford Enterprises, Inc., Bishop & Associates, Inc., d/b/a "Bishop Brick and
Construction", and McBride Building Supplies and
Hardware, Inc.,..... Respondents,

v.

D.C. Development, Inc. n/k/a D.C. Development & Construction, LLC By Way of
Articles of Conversion and David Cox, Petitioners.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioners certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on November 19, 2015.

QUESTION PRESENTED

The Court of Appeals erred in reversing the Circuit Court's Order granting Petitioners' Motion to Dismiss Respondents' Complaint to pierce the corporate veil on the basis of the three-year Statute of Limitations as set forth in S.C. Code Ann. §15-2-530 (1976).

STATEMENT OF THE CASE

Respondents in this action seek to hold Petitioner David Cox ("Cox") personally liable on the Judgments referred to in Paragraph 2 of the Complaint (Bigford Judgment), in Paragraph 4 of the Complaint (Bishop Judgment), and in Paragraph 6 of the Complaint (McBride Judgment). (R. p. 10; R. p. 11). For each Judgment, the date obtained is more than three years from the date of the filing of the instant action.

As background, all the judgments were obtained against Petitioner D.C. Development, Inc. n/k/a D.C. Development & Construction, LLC By Way of Articles of Conversion ("D.C. Development"), and the following chart shows the dates each judgment was obtained:

| JUDGMENT HOLDER | AMOUNT OF ORIGINAL JUDGMENT | DATE JUDGMENT OBTAINED |
|------------------------|------------------------------------|-------------------------------|
| Bigford | \$79,060 | August 8, 2005 |
| Bishop | \$152,372 | June 9, 2005 |
| McBride | \$253,906 | May 11, 2005 |

(R. pp. 9-17).

The underlying debt for each judgment was the failure to pay an open account arrangement with Petitioner D.C. Development as the general contractor for the purchase of supplies and materials sold by each judgment holder in connection with a construction project. The construction project was an apartment complex known as Glenwood Falls located in the Fort Mill area of York County. (R. p. 23 lines 1-8).

The Complaint was filed on January 2, 2014. Petitioner D.C. Development filed an Answer, and Petitioner Cox filed a Motion to Dismiss Respondents' Complaint for lack of subject matter jurisdiction (SCRCP 12(b)(1) and (6)), and for failure to state facts sufficient to constitute a cause of action. A hearing on the Motion to Dismiss was held before the Trial Court on April 21, 2014. After oral arguments were presented by the parties, the trial judge granted Petitioner Cox's Motion to Dismiss stating that the action is barred by the three-year Statute of Limitations. The Motion to Dismiss on the grounds of failure to state facts sufficient to constitute a cause of action was denied.

The Notice of Appeal was filed by Respondents on May 6, 2014. The Court of Appeals reversed the Order of the Circuit Court by Unpublished Opinion No. 2015-UP-330 (S.C.Ct.App. filed July 1, 2015), and the Petition for Rehearing was denied by Order dated November 19, 2015. The decision of the Court of Appeals in reversing the Circuit Court states that an action to pierce the corporate veil is an action in equity and that the statute of limitations does not apply to actions in equity.

ARGUMENT

As to the statement made in the Opinion that the general rule is that the Statute of Limitations does not apply to an action to pierce the corporate veil, the Court of Appeals misapprehended or overlooked the fact that there is no South Carolina case directly on point. This is an issue of first impression and this Court should consider in this case that the judgments sought to be imposed upon the individual stockholder (David Cox) resulted from the failure to pay an open account arrangement with Petitioner D.C. Development as the general contractor. The time period during which Petitioner D.C. Development purchased materials from these judgment holders for the construction of an apartment complex should be the time period to determine if the elements of a piercing case are proven. The action to pierce the corporate veil was filed more than three years after the default and the obtaining of the judgements distinguishing this case from the case of Dixon v. Dixon, 362 S.C. 388, 608 S.E.2d 849 (2005). Thus, the judgment holder is actually suing a second time for the failure to pay on the open account. The Statute of Limitations for an action on a contract is three years and this limitation must be applicable to an action to pierce the corporate veil.

Respondents made one argument saying the Statute of Limitations never applies if the underlying action is an equitable action. But none of the cases relied upon by Respondents involve an action to pierce the corporate veil. In Parrott v. Dickson, 151 S.C. 114, 148 S.E.704 (1929), the case involved a partition sale and the issuance of a rule to show cause for the purchaser at the

sale to pay the balance of the bid. In Fanning v. Bogacki, 111 S.C. 376, 98 S.E. 137 (1919), the action involved enforcement of an oral agreement for the reconveyance of property purchased at a partition sale. In DuPont v. DuBos, 52 S.C. 244, 29 S.E. 665 (1898), the action was based upon fraud in the conveyance of property by a deed. In McKinnon v. Summers, 224 S.C. 331, 79 S.E.2d 146 (1953), the action involved setting aside certain deeds on the ground of forgery and to recover possession of the property.

But, there is a South Carolina case that implies that the Statute of Limitations does apply in a piercing the corporate veil action. In Carolina Marine Handling, Inc. vs Lasch, et al., 363 S.C. 169, 609 S.E.2d 548 (Ct.App. 2005), a third-party action was filed in connection with the lease of property on the former Charleston Naval Base Shipyard. The third-party complaint was filed against a sub-lessee and its sole owner – Herbert R. Stender. While the original action by the landlord against the original lessee was filed within three years from the date of the breach or failure to pay under the lease, the third-party claim against the sub-lessee and Stender were filed more than three years after the breach.

The third-party plaintiff did not argue that the cross-claim was timely, but the third-party plaintiff argued that the subject lease was a sealed document and that the Statute of Limitations was twenty years instead of three years. Both the Circuit Court and the Court of Appeals in that case found that the parties to the lease did not intend the lease to be under seal. The Court of Appeals affirmed the Circuit Court's decision to dismiss the third-party claim under the general three-year Statute of Limitations.

The third-party claim against Stender was also dismissed based on the general three-year statute of limitations. The Court stated:

"Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs." Moates v. Bobb, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct.App.1996). The cornerstone policy consideration underlying statutes of limitations is the laudable goal of law to promote and achieve finality in litigation. See Webb v. Greenwood County, 229 S.C. 267, 276, 92 S.E.2d 688, 691 (1956); City of North Myrtle Beach v. Lewis-Davis, 360 S.C. 225, 231, 599 S.E.2d 462, 464 (Ct.App.2004). Significantly, "[s]tatutes of limitations provide potential defendants with [363 S.C. 176] certainty that after a set period of time, they will not be hailed [sic] into court to defend time-barred claims." In re Elkay Indus., Inc., 167 B.R. 404, 408 (D.S.C.1994). "Moreover, limitations periods discourage plaintiffs from sitting on their rights." Id. at 408-09. Statutes of limitations are, indeed, fundamental to our judicial system. Id. at 552.

While not directly on point, the Court of Appeals decision states that an attempt to pierce the corporate veil is often post-judgment, and implies that the general statute of limitations would apply to prevent an action beyond three years.

In footnote 6, the Court discusses the discovery rule in relation to the Statute of Limitations and says that the way this case came up, the dismissal was affirmed for both parties, both the sublessee and against Stender, as being barred by the Statutes of Limitation.

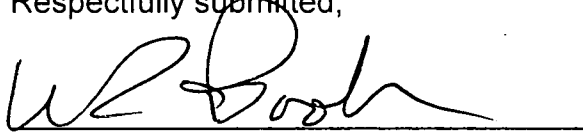
The basis for a piercing the corporate veil action should be the time period the debtor was operating and the creditor was providing materials or labor in a construction contract. The focus should be the time period during which the debt arose up to the breach of contract caused by nonperformance. A creditor should

be barred under the Statute of Limitations after three years from the date of breach and nonpayment.

CONCLUSION

This Court should reverse the decision of the Court of Appeals and affirm the decision of the Circuit Court dismissing the action based upon the three-year Statute of Limitations.

Respectfully submitted,

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

December 21, 2015

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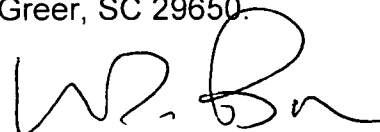
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PROOF OF SERVICE

I certify that I have served the Petition for Writ of Certiorari by causing to be mailed via first class mail with sufficient postage affixed thereto to Respondents' attorney of record Wendell L. Hawkins, Esquire, Wendell L. Hawkins, P.A., 103-C Regency Commons Dr., Greer, SC 29650.

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