

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Benjamin H. Culbertson, Circuit Court Judge

RECEIVED

Unpublished Opinion No. 2015-UP-330 (S.C.Ct.App.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

JAN 19 2016

S.C. SUPREME COURT

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
CoxPetitioners,

RETURN TO PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Respondents received Petitioner's Petition for Writ of Certiorari Brief on December 30, 2015. Respondents timely filed this Return to the Petition for Writ of Certiorari.

QUESTION PRESENTED

Did the Court of Appeals err in reversing the Circuit Court's Order granting Petitioner's Motion to Dismiss Respondent's Complaint to pierce the corporate veil on the basis of the three-year Statute of Limitations set forth in S.C. Code Ann. § 15-2-530 (1976)?

COUNTER-STATEMENT OF THE CASE

On or about January 2, 2014, Respondents, Bigford Enterprises, Inc. ("Bigford"), Bishop & Associates, Inc. d/b/a "Bishop Brick and Construction" ("Bishop") and McBride Building Supplies and Hardware, Inc. ("McBride") (collectively hereinafter referred to as "Respondents") filed the present action in Horry County Circuit Court against Petitioners, D.C. Development, Inc. n/k/a D.C. Development & Construction, LLC By Way of Articles of Conversion ("D.C.") and David Cox ("Cox") (hereinafter collectively referred to as "Petitioners"). Each of the three Respondents hold judgments against Petitioner, D.C.. Each of the judgments are confessions of judgment dated in the year 2005 which were obtained in actions filed in York County, South Carolina in the year 2004. The face amount of total combined judgment debt with interest as of May of 2012 was as follows: \$915,645.32 (Total); \$526,476.78 (McBride); \$134,540.40 (Bigford); and \$254,628.14 (Bishop). The Bishop and McBride confessions of judgment were entered upon the indexes and records of the Clerk of Court of York County, South Carolina in 2005. The Bigford judgment was entered upon the indexes and records of the Clerk of Court of York County, South Carolina in 2011. In May

of 2012, all three (3) judgments were transcribed into Lancaster County, S.C. and entered upon the indexes and records of the Clerk of Court of Lancaster County, South Carolina. Lancaster County was the situs County of D.C.. Executions on all three (3) judgments were then filed against D.C. and returned *nulla bona*. On or about February 20, 2013, the parties engaged in a Rule to Show Cause hearing in Lancaster County, South Carolina, wherein the Defendant, David Cox, was commanded to bring documentation for examination of the business records by Respondents' counsel. Respondent's examination of the business records lead Respondents to believe there was sufficient evidence to support an action to Pierce the Corporate Veil. As a result, Respondents filed the present action to Pierce the Corporate Veil in Horry County, South Carolina, the county of residence for Petitioner, David Cox.(R. pp.4-17).

Petitioners filed an Answer and Motion to Dismiss Respondents' Complaint for Lack of Subject Matter Jurisdiction (SCRCP Rule 12(b)(1)), based on S.C. Code Ann. § 15-3-530 (1976) and for Failure to State Facts Sufficient to Constitute a Cause of Action (SCRCP, Rule 12(b)(6)) on or about February 14, 2014. A hearing on the Motion to Dismiss was held before the Honorable Benjamin H. Culbertson on or about April 21, 2014. After oral arguments were presented by the parties, Judge Culbertson granted Petitioners' Motion to Dismiss and issued a SCRCP Form 4 Order dated April 22, 2014 which was entered by the Clerk of Court on April 24, 2014 (the "Order")(R. pp2-3). The Order states,

"[t]he Motion to Dismiss Complaint by the defendant David Cox is GRANTED. The sole cause of action in this lawsuit is to pierce the corporate veil so that defendant David Cox is personally liable for the 2005 judgments against the corporate defendants. Although the plaintiffs' Complaint adequately alleges facts constituting a cause of action for piercing the corporate veil, the Summons and Complaint were not filed until 1/2/2014. The judgments were obtained by the plaintiffs in 2005. **Therefore, this action is barred by the 3-year statute of limitations.**" (emphasis added). (R. p. 3).

As such, the court's dismissal of the Respondent's Complaint was based solely on Petitioner's argument that the action was barred by S.C. Code Ann. § 15-3-530 (1976). The Order was received by Defendant on May 2, 2014 and a Notice of Appeal was filed and served 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 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. Petitioners filed their Petition for Writ of Certiorari with this Court on or about December 21, 2015.

ARGUMENTS

I. AN ACTION TO PIERCE THE CORPORATE VEIL IS AN ACTION ROOTED IN EQUITY AND THEREFORE, S.C. CODE § 15-3-530 IS NOT AN APPLICABLE DEFENSE.

Petitioners rely upon S.C. Code § 15-3-530 in their Petition for Writ of Certiorari to conclude that Respondent's action to Pierce the Corporate Veil of Petitioners is barred by the three (3) year statute of limitations provided therein. However, S.C. Code § 15-3-530 does not apply to actions in equity. S.C. Code § 15-3-530 "applies only to actions at law and has no application to suits in equity." Parrott v Dickson, 151 SC 114, 148 SE 704 (1929). Fanning v Bogacki, 111 SC 376, 98 SE 137 (1919). Du Pont v Du Bos, 52 SC 244, 29 SE 665 (1898). McKinnon v Summers, 224 SC 331, 79 SE2d 146 (1953). "An action to pierce the corporate veil under an alter-ego theory lies in *equity*." Oskin v. Johnson 400 S.C. 390, 397, 735 S.E.2d 459, 463 (S.C. 2012) (emphasis added).

II. **THE HOLDING OF CAROLINA MARINE HANDLING, INC. v. LASCH, ET AL DOES NOT INVOLVE AN EQUITABLE CAUSE OF ACTION AND HAS NO LEGAL BEARING ON THE MATTERS BEFORE THE COURT.**

Petitioner argues that the holding of Carolina Marine Handling, Inc. v. Lasch implies that the Statute of Limitations would apply in an action to pierce the corporate veil, but Respondents would argue it provides no such holding or even dicta on the matter. Id. at 363 S.C. 169, 609 S.E.2d 548 (Ct. App. 2005). Carolina Marine Handling, Inc. involves a tenant bringing a counterclaim against a subtenant for Breach of Contract for failure to pay rent as well as a third party action to Pierce the Corporate Veil of the subtenant's sole owner. The court held that the lease at issue had been executed more than three (3) years prior to the date of the filing of the subtenant's Breach of Contract counterclaim therefore the Circuit Court's ruling to dismiss the subtenant's counterclaim was affirmed. The Court's analysis solely focuses on whether the lease was a sealed or a non-sealed instrument and which Statute of Limitations to apply. Upon finding that the lease document was in fact not sealed, the Court held that S.C. Code § 15-3-530 applied to the subtenant's Breach of Contract cause of action rather than S.C. Code § 15-3-520, which allows for a twenty (20) year statute of limitations for sealed instruments. The Court held as follows:

"We find the presence of a standard attestation clause-such as, "IN WITNESS WHEREOF, the parties have hereunto set their hands and seals"-in an instrument which is neither sealed nor required to be sealed is insufficient, standing alone, to create a sealed instrument under section 19-1-160. We, therefore, find the parties to the December 1996, non-sealed contract did not intend to create a sealed instrument. Consequently, we find the claims of CSI barred by the general three-year statute of limitations under section 15-3-530." Id., 363 S.C. 169, 177, 609 S.E.2d 548, 553 (Ct. App. 2005).

The Respondent in Carolina Marine was attempting to Pierce the Corporate Veil pre-judgment. Therefore, as the underlying cause of action for Breach of Contract was dismissed by the Circuit Court, so was the action to Pierce the Corporate Veil of the subtenant's owner

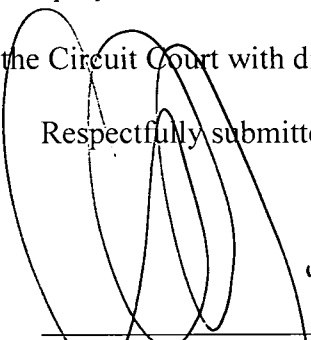
as it was based solely upon liability of the subtenant's counterclaim. As the counterclaim did not survive the three (3) year statute of limitations, the action to Pierce the Corporate Veil was meaningless.

Respondents in the present action are seeking to Pierce the Corporate Veil of Petitioners post-judgment. Therefore, Respondents assert that S.C. Code § 15-3-530 is inapplicable as an action to Pierce the Corporate Veil is an equitable action and not a Breach of Contract cause of action.

CONCLUSION

For the reasons set forth above, the Court of Appeals' ruling reversing the Circuit Court's ruling on Petitioner's Motion to Dismiss based upon a three (3) State of Limitations was proper. Therefore, Respondents pray that this Court affirm the ruling of the Court of Appeals and remand the matter to the Circuit Court with direction to proceed with the action.

Respectfully submitted,



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January 15 , 2016

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PROOF OF SERVICE

I hereby certify that a true and correct copy of the Respondent's Return to
Petitioner's Petition for Writ of Certiorari along with this Certificate of Service were
served upon counsel on January 15, 2016 by First Class Mail as follows:

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