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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 5342 (S.C. Ct. App. refiled December 16, 2015)

John Steven Goodwin, Louise C. Goodwin, Thomas I. Puckett and Brenda C. Puckett, Robert Nahama and Jeanne E. Nahama, Thomas Holland and Sharon Louise Holland, Joyce C. Sobel, Robert W. Waruszewski, Richard N. Taylor, Robert K. Spillers (a/k/a Robert Spillers), and Deborah T. Spillers (a/k/a Deborah Spillers), Patrick A. DiAngelo and Deborah A. DiAngelo, Gary E. Owens and Joyce M. Owens, Fount L. Shults and Lynda M. Shults, and Dennis Ridgeway and Teresa Lynn Ridgeway,. . . . . Plaintiffs,

Of whom John Steven Goodwin, Louise C. Goodwin, Gary E. Owens and Joyce M. Owens are Respondents,

v.

Landquest Development, LLC, Kyle C. Corkum, South Bay Properties, LLC, C. R. Thompson and Sons, LLC, Ronald L. Charlton, Bonnie N. Charlton, James R. Charlton, and Bayside Property, Inc., The City of Georgetown, Hartford Casualty Insurance Company, Hartford Fire Insurance Company, and National Land Sales, Inc., f/k/a Source One Communities, LLC a/k/a Source One Signature Communities, ... Defendants,

Of whom Ronald L. Charlton, Bonnie N. Charlton, James R. Charlton, and Bayside Property, Inc. are Petitioners.

PETITION FOR A 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 December 16, 2015.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in stating as facts matters that are disputed allegations not supported by the record on appeal?

2. Did the Court of Appeals err in overlooking or failing to appreciate the important dates that were the basis for the circuit court's decision?

3. Did the Court of Appeals err in holding - in conflict with *Maxwell v. Genez*, 356 S.C.. 617, 591 S.E. 2d 26 (2003) - that it is not necessary to comply with the statute of limitations when restoring a case that has been stricken?

4. Did the Court of Appeals err in creating multiple conflicting rules regarding the time limit for restoring cases that have been stricken?

STATEMENT OF THE CASE

This case was commenced July 9, 2009. The case was struck because of South Bay Properties, LLC's bankruptcy by Judge Hyman's order dated July 22, 2011. South Bay Properties, LLC's bankruptcy was dismissed August 12, 2011. Four of the Plaintiffs moved to restore this case and to consolidate this case with a separate case pending in circuit court by a motion filed January 22, 2013.

Judge Culbertson found and concluded that the motion to restore this case was not timely because the statute of limitations had expired. The claims alleged in the complaint arose more than three years before the motion to restore was filed and the running of the statute of limitations had not been stayed. Judge Culbertson denied the motion to restore.

The Court of Appeals reversed the denial of the motion to restore and remanded for further proceedings. *John Steven Goodwin, et al. v. Landquest Development, LLC et al.*, Opinion No 5342 (S.C. Ct. App. filed August 12, 2015; withdrawn, substituted and refiled December 16, 2015). Petitioners seek a writ of certiorari to review the Court of Appeals decision.

ARGUMENTS

1. THE COURT OF APPEALS ERRED IN STATING AS FACTS MATTERS THAT ARE DISPUTED ALLEGATIONS NOT SUPPORTED BY THE RECORD ON APPEAL.

The Court of Appeals Opinion states that South Bay is a joint venture of Landquest Development, LLC, C.R. Thompson and Sons, LLC and Kyle C. Corkum. The statement is apparently based on allegations in paragraph 33 of Plaintiffs' complaint. The allegations in paragraph 33 of the complaint are alleged upon information and belief. (Complaint p. 12, R. p. 028) These Defendants' answer denies the allegations. (Answer p. 2, R. p. 069) "A joint enterprise exists where there are two or more persons united in the joint prosecution of a common purpose under such circumstances that each has authority, express or implied, to act for all in respect to the control of the means and the agencies employed to execute such common purpose. *Long v. Carolina Baking Co.*, 190 S.C. 367, 3 S.E.2d 46 (1939)" *Peoples Federal Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club*, 425 S.E.2d 764, 310 S.C. 132 (S.C. App. 1992). The record on appeal does not support the existence of the alleged joint venture. As stated in the complaint, South Bay Properties, LLC is a North Carolina limited liability company authorized to do business in South Carolina. (Complaint p.9, R. p. 25)

The Court of Appeals Opinion states that prior to construction, South Bay sold fifty-four lots generating $14,737,600 in proceeds. The statement is apparently based on allegations in paragraph 41 of the complaint. (Complaint p. 14, R. p. 030) These Defendants' answer states that the best evidence of the dates, number and amounts of lot

sales are the deeds and related documents that speak for themselves. (Answer p. 3-4, R. p. 070-071) The record on appeal does not support the validity of the alleged dates, number and amounts of lot sales.

The Court of Appeals Opinion states that South Bay failed to build the basic infrastructure of the subdivision in a timely manner. The statement is apparently based on the allegation in Appellants' Brief that no infrastructure or amenities have been built or installed. (Appellants' Amended Brief p.1) The City of Georgetown's Memorandum in Support of Motion to Dismiss Appeal informed the Court of Appeals that the City and Hartford Fire Insurance Company resolved the issue by Hartford Fire Insurance Company engaging a contractor, at its expense, to complete the infrastructure. (Memorandum p. 3-4, R. p. 159-160)

The Court of Appeals Opinion states that the Goodwins and Owenses - without an attorney - filed answers in a related mortgage foreclosure action. (The Goodwins and Owenses were named as defendants in the mortgage foreclosure action because of the lis pendens filed in this action.) The statement is apparently based on allegations in Appellants' Brief that the Goodwins and Owenses filed *pro se* answers in the mortgage foreclosure action and thereafter retained the services of their former attorneys who filed a motion to amend the answers. (Appellants' Amended Brief p.3) In order to be removed as counsel of record, an attorney must receive a court order pursuant to Rule 11(b), SCRCP. *Ex parte Strom*, 343 S.C. 257, 263, 539 S.E.2d 699 (2000). The Goodwins and Owenses were not without an attorney because the attorneys that filed the lis pendens,

summons and complaint in this case did not obtain a court order pursuant to Rule 11(b), SCRCP.

2. THE COURT OF APPEALS ERRED IN OVERLOOKING OR FAILING TO APPRECIATE THE IMPORTANT DATES THAT WERE THE BASIS FOR THE CIRCUIT COURT'S DECISION.

The critical dates in this action are:

September 17, 2007	The Goodwins purchased Lot 160 from South Bay Properties, LLC. (Motion to Reinstate/Restore p. 1, R. p. 101)
December 21, 2007	The Owenses purchased Lot 94 from South Bay Properties, LLC. (Motion to Reinstate/Restore p. 1, R. p. 101)
July 9, 2009	This action was commenced. (Motion to Reinstate/Restore p. 2, R. p. 102)
July 22, 2011	The Honorable Larry B. Hyman, Jr. struck this action and copies of the order were mailed to the Plaintiffs' attorneys. (Form 4, R. p. 001)
August 12, 2011	South Bay Properties, LLC's bankruptcy was dismissed. (Motion to Reinstate/Restore p. 3, R. p. 103)
January 22, 2013	The Goodwins and Owenses moved to reinstate/restore this action. (Motion to Reinstate/Restore p. 1, R. p. 101)

Judge Hyman's order does not include leave to restore this action at a latter date. Judge Hyman's order does not provide for tolling the statute of limitations. The Goodwins and Owenses did not move for relief from Judge Hyman's order on the grounds of mistake, inadvertence, surprise, excusable neglect or any of the other grounds listed in Rule 60(b), SCRCP. The Goodwins and Owenses did not move to alter or amend Judge Hyman's order pursuant to Rule 59(e), SCRCP. The Goodwins and Owenses did not appeal Judge Hyman's order.

Because the Goodwins and Owenses failed to act, Judge Hyman's order became the law of the case. "An unappealed ruling is the law of the case and requires affirmance."

Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013); *Buckner v. Preferred Mutual Ins. Co.*, 255 S.C. 159, 161, 177 S.E.2d 544, 544 (1970) (an unchallenged ruling, "right or wrong, is the law of this case and requires affirmance.")

Twenty-one days after Judge Hyman issued his order, South Bay Properties, LLC's bankruptcy was dismissed. The Goodwins and Owenses could have moved to reinstate this case within a month thereafter relying upon 11 U.S.C.A. § 108(c). Because the Goodwins and Owenses failed to timely act, the protection afforded by 11 U.S.C.A. § 108(c) expired.

If the Goodwins and the Owenses did not intend to abandon their claims they should have acted when Judge Hyman struck their case or, at the latest, within three years after their alleged claims arose. The claims necessarily arose prior to July 9, 2009, the date Plaintiffs' complaint was filed. The Goodwins and the Owenses failed to object to Judge Hyman's order striking this case or to otherwise seek to reinstate this case until January 22, 2013, more than three years after the alleged claims arose and more than seventeen months after Judge Hyman dismissed the case. By then the time for asserting these claims and the time for challenging Judge Hyman's order had long expired.

3. THE COURT OF APPEALS ERRED IN HOLDING - IN CONFLICT WITH *MAXWELL V. GENEZ*, 356 S.C. 617, 591 S.E. 2D 26 (2003) - THAT IT IS NOT NECESSARY TO COMPLY WITH THE STATUTE OF LIMITATIONS WHEN RESTORING A CASE THAT HAS BEEN STRICKEN.

On March 17, 1995, Maxwell was involved in an automobile accident. She and her husband filed suit. On April 13, 1999, a circuit court judge struck the Maxwells' case. On May 1, 2000, the Maxwells moved to restore the case.

The Supreme Court observed: "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." *Maxwell v. Genez*, 356 S.C. at 619, 591 S.E.2d at 28. Since the Maxwells' motion to restore was filed more than one year after their case was stricken, the statute of limitations was not tolled and the statute of limitations barred the Maxwells' claims.

In *Graham v. Dorchester County School District*, 339 S.C. 121, 528 S.E. 2d 80 (Ct. App. 2000) the Court of Appeals correctly applied the statute of limitations to bar restoring the case. That case had been struck with leave to restore pursuant to former Rule 40(c)(3), SCRCP. Because the statute of limitations clearly expired prior to Graham moving to restore, the decision of the trial court dismissing Graham's action with prejudice for failure to timely move to restore her case was affirmed. *Graham v. Dorchester County School District*, 339 S.C. at 125, 528 S.E.2d at 83.

Instead of following the holdings in *Maxwell, supra*, and *Graham, supra*, the Court of Appeals created a new rule stating: "We hold that because the Goodwins and Owenses complied with the statute of limitations when they initially filed and served the

summons and complaint, it was not necessary for them to comply with the statute again when they attempted to restore the case to the docket." The substance of the Court of Appeals' new rule is that if a case is timely commenced, there is no time limit on reinstating the case and cases can be reinstated or restored many years or even decades after being ended. This new rule conflicts with the hold in *Maxwell v. Genez, supra.*

4. THE COURT OF APPEALS ERRED IN CREATING MULTIPLE CONFLICTING RULES REGARDING THE TIME LIMIT FOR RESTORING CASES THAT HAVE BEEN STRICKEN.

The Court of Appeals Opinion acknowledges that claims cannot be restored after the statute of limitations has expired where,

> ... 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.

The Court of Appeals Opinion creates a new rule that claims struck due to bankruptcy can be restored without regard to the statute of limitations. The Court of Appeals Opinion creates an open issue as to whether claims struck for reasons other than bankruptcy or consent of all parties can be restored without regard to the statute of limitations.

Furthermore, the Court of Appeals Opinion specifically reserves for future determination, ". . . whether the delay in restoring the case provides the circuit court some other basis on which to dismiss the case, such as failure to prosecute or an equitable theory such as laches."

The result of the Court of Appeals Opinion is that parties will not know whether a case that has been stricken is really ended until someone tries to reinstate the case and receives a final judicial determination. Parties may discover many years after a case has been struck that a court, based upon equitable theories, is willing to reinstate the litigation.

> The Notes to the 1994 amendments to Rule 40 include the statements:
>
> Former Rule 40(c)(3) often was used to dismiss and refile many of these cases causing confusion in the docket and the status of those cases.
>
> Rule 40(j) is the final section of the rule and substantially revises the procedure for dismissing a case previously found in Rule 40(c)(3). Rule 40(j) now requires all adverse parties to consent to the dismissal in writing, but, the consent also operates to toll the statute of limitations for one year after the case is stricken from the docket as to each consenting party. Any remaining portion of the statute of limitations begins to run one year after the case was stricken unless the case has previously been restored to the General Docket.

The Court of Appeals Opinion will again cause confusion in the docket and confusion regarding the status of cases. Cases dismissed without the written consent of all parties will be beyond the reach of statutes of limitations and will form a shadow docket, invisible to court administration.

CONCLUSION

For the reasons stated herein, Petitioners ask the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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January 12, 2016

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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Benjamin H. Culbertson, Circuit Court Judge

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Of whom Ronald L. Charlton, Bonnie N. Charlton, James R. Charlton, and Bayside Property, Inc. are Petitioners.

PROOF OF SERVICE

I certify that on the 12th day of January, 2016, I served the Petition for a Writ of Certiorari, by depositing copies in the United States Mail, postage prepaid, addressed to:

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January 12, 2016

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January 12, 2016

The Honorable Daniel E. Shearouse, Clerk
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RE: John Steven Goodwin, et al. v. Landquest Development , LLC, et al.
S.C. Ct. App. Opinion No. 5342 (refiled December 16, 2015)

Dear Mr. Shearouse:

Enclosed for filing in the above case are the original and six copies of Petition for Writ of Certiorari, two copies of Appendix and Proof of Service. Also enclosed is a check in the amount of $100.00 for the filing fee.

By copy of this letter, copies of Petition for Writ of Certiorari are being served on the attorneys of record and filed with the Clerk of the Court of Appeals.

Sincerely,

Charles T. Smith

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Enclosures

cc w/enc: Jenny Abbott Kitchings ✓
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