

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

RECEIVED

Maité Murphy, Circuit Court Judge

FEB 29 2016

SC Court of Appeals

Case No. 2015-001718

Wanda Mack.....Appellant,

v.

Carmen Gates..... Respondent.

RESPONDENT'S INITIAL BRIEF

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STATEMENT OF ISSUE ON APPEAL

- I. DID THE TRIAL COURT PROPERLY DENY APPELLANT'S MOTION TO RESTORE THE CASE WHEN SHE FAILED TO MOVE TO RESTORE THE CASE WITHIN THE ONE YEAR PERIOD PURSUANT TO RULE 40(J), SCRCP?

STATEMENT OF THE CASE

This action arises from an automobile accident involving Appellant and Respondent, which occurred on March 10, 2009. Appellant filed her Complaint on May 12, 2010. Respondent filed a timely Answer. Discovery in the case was conducted and the case was mediated unsuccessfully. On September 29, 2011, Appellant sent Respondent a letter and a signed Consent Order (consent signed by Appellant's counsel striking the case under Rule 40(j) SCRPC. Upon receipt, Respondent signed the Consent Order and on October 6, 2011, Respondent mailed the original Order signed by all counsel to Judge Edgar W. Dickson for signing and filing. Respondent sent a copy of his October 6, 2011, letter to Judge Dickson to Appellant's counsel. On October 23, 2011, Judge Dickson signed the Order striking the case under Rule 40(j). The Order was filed on October 28, 2011. Respondent received a clocked copy of the filed Order from the Orangeburg Clerk's office a few days later.

On or about February 21, 2013, Appellant filed her motion to restore this case pursuant to Rule 40(j). Appellant sent Respondent a letter and proposed Consent Order to Restore. By letter, of February 26, 2013, Respondent advised Appellant that he could not consent to restoring the case since the motion to restore had not been filed within the one (1) year time period provided in Rule 40(j), SCRPC, so as to allow the statute of limitations to be tolled.

On October 6, 2014, a hearing on Appellant's motion to restore the action was argued before the Honorable Maité Murphy. On December 3, 2014, Judge Murphy issued her Order denying Appellant's motion to restore. Thereafter, Appellant timely filed a motion to reconsider, alter or amend the Order. On June 1, 2015, a hearing on Appellant's motion to reconsider was held by Judge Murphy.

On June 8, 2015, Judge Murphy issued an Order denying Appellant's motion to reconsider, alter or amend. It is from these Orders that Appellant timely filed her notice of appeal.

ARGUMENT

I. THE CORRESPONDENCE BETWEEN APPELLANT AND RESPONDENT AS REFLECTED IN THE RECORD WAS SUFFICIENT TO GIVE APPELLANT NOTICE OF THE ENTRY OF THE ORDER STRIKING THE CASE FROM THE DOCKET PURSUANT TO RULE 40(j), SCRPC

Appellant asserts that while the trial court's order addressed the issue of the tolling of the statute of limitations under Rule 40(j), Judge Murphy's Order on December 3, 2014, failed to address the Appellant's argument that the time limit to restore the case to the active docket does not begin to run until Appellant receives written notice that the order has been entered into the record by the Clerk of Court.

On October 6, 2011, Respondent mailed Judge Edgar W. Dickson an Order to Strike Case From Docket Pursuant to Rule 40(j), SCRPC. This Order was consented to and signed by all counsel. Rule 40 of the South Carolina Rules of Civil Procedure addresses procedures related to the general docket, trial rosters, and call of cases for trial. Subsection (j) of Rule 40, SCRPC, governs striking a case from the general docket by agreement of all parties. Rule 40(j) states:

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.

Appellant points out Rule 40(j), SCRPC, does not specifically define the meaning of the phrase “date the case was stricken.” In determining when the case was stricken from the docket, Appellant turns to Rule 77(d) SCRPC, which addresses Notice of Orders or Judgments. Rule 77(d) states in part:

(d) Notice of Orders or Judgments. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by first class mail upon every party affected thereby who is not in default for failure to appear, and shall make a note in the case file or docket sheet of the mailing.

...

Rule 77(d) states the Clerk of Court **shall** service a notice of entry upon every party. Appellant asserts that although her counsel signed the Consent Order and was copied on the letter forwarding the consent order to the Court, this does not excuse the Court’s failure to comply with the unambiguous language of Rule 77(d).

Respondent concedes Rule 77(d) states in part that the Clerk of Court shall service notice of entry of an order or judgment upon every party. However, Appellant’s argument neglects to take into consideration the remaining language of Rule 77(d). Rule 77(d), SCRPC (2014 ed.)¹, goes on to state in part:

....

Such mailing shall not be necessary to parties who have already received notice.

....

¹ Later editions of the South Carolina Rules of Civil Procedure edited Rule 77(d) to include language regarding the SCE-File electronic filing system and notice by electronic transmission of Notice of Electronic Filing. This language is inapplicable here, as the facts and circumstances of this case occurred prior to the implementation of electronic filing

Assuming *arguendo* Appellant was never mailed a clocked copy of Order by the Clerk of Court, Respondent submits this fact is immaterial as no mailing was required since Appellant already received notice that the Order had been sent for filing.

The issue of what constituted having “already received notice” was addressed by South Carolina courts in *Rosen, Rosen & Hagood v. Hiller*, 307 S.C. 331, 415 S.E.2d 117 (Ct.App.1992). There, the respondent had filed a motion with the trial court for an order of default as the appellants had failed to respond to the complaint within fifteen days after service of the court’s order denying a previously filed motion for change of venue. It was undisputed that, prior to the entry of the order by the Clerk of Court, respondent mailed a letter to appellants enclosing an unsigned, undated, and unfiled copy of the order. *Id* at 332-33, 415 S.E.2d at 117. Appellants opposed the default motion arguing they “. . . had made motion for change of venue and no signed, dated, and filed copy of an order denying their motions had been received by them.” *Id* at 333, 415 S.E.2d at 118. The Court of Appeals affirmed the trial judge’s finding that “. . . it was not necessary for respondent to serve appellants with signed, dated, and filed copy . . .” of the order denying appellant’s change of venue motion. *Id*. The Court stated as follows:

While we think it is poor practice for attorneys to forward to opposing counsel unsigned, undated, copies of orders we think the letter and unsigned copy of the April 11 order provided sufficient notice to appellants of its filing. The letter does not specifically say the order has been filed, but it is implicit in the letter that it has been filed. Otherwise, respondent would not have indicated the appellants could have already received a copy of the order from the clerk. We hold Rule 77(d) was minimally complied with in this case.

Id at 335, 415 S.E.2d at 119.

Appellant's argument is identical to the appellants' argument in *Rosen*. Here, as in *Rosen*, the Appellant argues that because the Clerk of Court failed to mail her a signed, clocked copy of the Order, the Court failed to comply with Rule 77(d), SCRCF. Appellant further asserts that since the Court failed to comply with Rule 77(d), the case was not properly stricken from the original docket and should have been restored. In her Order denying Appellant's Motion to Restore, Judge Murphy found Appellant's argument to be without merit. Respondent agrees. Appellant received a copy of Respondent's letter forwarding the Consent Order to Judge Dickson for signing and filing. Enclosed with Respondent's letter was a copy of the Consent Order to be signed and filed by Judge Dickson. As in *Rosen*, it was implicit in Respondent's October 6, 2011, letter that the Consent Order would be filed. In this case, Appellant was given additional notice compared to the appellants in *Rosen*. Here, the Order was a consent order, which required Appellant to consent to the case being removed from the docket pursuant to Rule 40(j) SCRCF, and sign the Order before Respondent could forward the Order to Judge Dickson for signing and filing. Under *Rosen*, Appellant was given more than sufficient notice as to comply with the requirements set forth under Rule 77(d). Since Appellant had already received notice prior to the actual entry of the Consent Order, the Clerk of Court was not required to take any further action.

Respondent would further point out that between October 2011 and January/February 2013, there were numerous terms of court held in Orangeburg County. Those terms did not have this action on the docket. Thus, Appellant had further notice that the case was inactive because it was not being placed for trial on any jury docket during this time.

Appellant additionally cites Rule 203(b)(1) of the South Carolina Appellate Court Rules in support of her argument. As the name suggests, these South Carolina Appellate Court Rules

govern procedures in appellate courts. Appellant's arguments are founded on assertions of error committed by the trial court. Her appeal from the Court of Common Pleas had yet to occur.

Therefore, Appellant's reliance on Rule 203(b)(1), SCACR, is inapplicable.

II. BECAUSE APPELLANT FAILED TO TIMELY MOVE TO RESTORE HER CASE AFTER IT WAS STRICKEN FROM THE DOCKET UNDER RULE 40(j), APPELLANT IS NOT ENTITLED TO TAKE ADVANTAGE OF THE TOLLING PERIOD AND IS BARRED FROM RESTORING HER CASE.

Appellant further asserts that assuming, *arguendo*, Judge Dickson's Order was effective as to Appellant's case, the case should have been restored to the docket because Appellant previously filed her Complaint within the statute of limitation.

The statute of limitations for this case is set forth by Section 15-5-530 of the South Carolina Code. Section 15-5-530 requires that civil actions, such as this one, be commenced within three years from the date the action has accrued. "A civil action is commenced when the summons and complaint are filed with the clerk of court if: (1) the summons and complaint are served within the statute of limitation . . . " Rule 3(a) SCRCRCP. It is undisputed the Appellant filed her original action on May 12, 2010, which was within the three year period prescribed by Section 15-5-530 of the South Carolina Code. The trial court relied on the language of Rule 40(j) in its decision to deny Appellant's motion to restore. While Rule 40(j) does not require that cases be restored within one year, it does require the case be restored within a year in order for a party to take advantage of the tolling feature of the statute of limitation provided by the rule. *Goodwin v. Landquest Development, LLC*, 414 S.C. 623, 779 S.E.2d 826 (Ct.App.2015) (rehearing granted); *Maxwell v. Genez*, 356 S.C. 617, 591 S.E.2d 26 (2003) (rehearing denied). If a case is restored within one year, "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." Rule 40(j),

SCRCP. A party is not precluded under Rule 40(j) from moving to restore a case to the docket more than one year after the case was stricken. However, if a party moves to restore the case more than a year after it was stricken from the docket, there is no tolling of the statute of limitations. A party can move to restore a case to the docket more than one year after the claim was stricken without running afoul of the rule of civil procedure governing cases stricken from the docket by agreement; the party simply cannot take advantage of the one year tolling period provided by the rule. *Maxwell v. Genez* 356 S.C. 617, 591 S.E.2d 26 (2003) (rehearing denied). Citing *Goodwin v. Landquest Development, LLC*, 414 S.C. 623, 779 S.E.2d 826 (Ct.App.2015) (rehearing granted), Appellant argues because her complaint was filed within the statute of limitations, the tolling provisions under Rule 40(j), SCRCP, are irrelevant. This argument lacks merit.

In *Goodwin*, the Court allowed the original action to be restored to the general docket well beyond the statute of limitations, stating the tolling provision provided by Rule 40(j) was not applicable “[b]ecause the Goodwins and Owens commenced the lawsuit within the statute of limitations.” 414 S.C. at 630, 779 S.E.2d at 830 Therefore, “there was nothing to toll.” *Id.* Appellant argues just as in *Goodwin*, she commenced her action within the statute of limitations and therefore, the tolling provision, as addressed in Judge Murphy’s order, is irrelevant to this case. Respondent submits Appellant misunderstands the holding in *Goodwin*, and that the tolling provision of Rule 40(j) is applicable to this case.

The Court explicitly stated in its opinion that the underlying action in *Goodwin* was not stricken from the docket pursuant to Rule 40(j), SCRCP. “[T]he lot owners' action was stricken due to bankruptcy, not pursuant to Rule 40(j).” *Goodwin* at 630, 779 S.E.2d at 831. Therefore,

restoration of the case in *Goodwin* was not governed by the language of Rule 40(j). The Court goes on to address the effect on the statute of limitations when a case is stricken from the docket under Rule 40(j). "Under Rule 40(j), therefore, the applicable deadline remains the statute of limitations. The effect of the rule is not to set a new deadline, but to extend the statute of limitations' deadline by applying the rule's tolling provision when the motion to restore is made within a year." *Id.* Since the case in *Goodwin* was removed from the docket due to bankruptcy, not Rule 40(j), inapplicable.

The fact that the case in *Goodwin* was allowed to be restored to the docket because the action was commenced within the statute of limitations has no bearing on this case. It is uncontroverted that here the case was stricken from the docket solely under Rule 40(j). Relying on the opinion in *Goodwin*, when a case is removed from the docket under Rule 40(j), the applicable deadline for restoration of the case is the statute of limitations. This deadline can only be extended **if the party moves to restore the case within one year**. The accident leading to Appellant's action occurred on March 10, 2009. If the case had not been removed from the docket under Rule 40(j), SCRCF, the statute of limitations would have expired on March 10, 2012. At the time the case was stricken by Judge Dickson in October 2011, there was approximately five months remaining on the running of the statute of limitations. Had Appellant filed her motion to restore within one year, she would have been able to take advantage of this five month period under the tolling feature. Since the Appellant did not seek restoration until February 21, 2013, well after the expiration of the one year period, the statute of limitations had run.

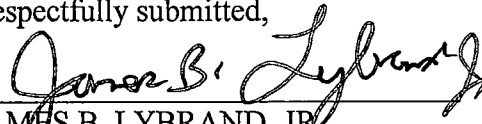
Appellant also attempts to persuade this court that since the rule was constructed using the word “stricken,” any case stricken from the docket under Rule 40(j) is not dismissed but merely placed in an inactive status. This argument is also without merit.

“While our rules do not clearly provide that striking a case pursuant to Rule 40(j) is a dismissal, there is a basis in our law for considering a case stricken pursuant to the rule as the equivalent of dismissed.” *Goodwin* at 631, 779 S.E.2d at 830. The current language of Rule 40(j) is a “substantial revision for dismissing a case previously found in Rule 40(c)(3).” Rule 40, SCRCP Notes, Notes to 1994 Amendments. The court in *Goodwin* also points out “. . . the tolling period would not be necessary if striking the case pursuant to Rule 40(j) were not the equivalent of a dismissal.” *Goodwin* at 631, 779 S.E.2d at 831. See *Maxwell*, 356 S.C. at 620, 591 S.E.2d at 27 (“In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes.”); *State v. Sweat*, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010) (“A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.”). The only logical conclusion for the inclusion of a tolling feature in the construction of Rule 40(j), SCRCP, is that striking a case under Rule 40(j) is the procedural equivalent of a dismissal. Therefore, Appellant’s argument that the case was not dismissed, but merely place in an inactive status, is without merit.

CONCLUSION

For the reasons set forth above, the Respondent respectfully requests that Order denying Appellant’s motion to restore be affirmed.

Respectfully submitted,



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PROOF OF AND CERTIFICATE OF SERVICE

I hereby certify that a copy of Respondent's Initial Brief and Respondent's Designation of Matter to be included on the record on Appeal was served upon the following via US Mail on the 29th day of February to the address below:

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Re: Mack v. Gates
Appellate Case No.: 2015-001718

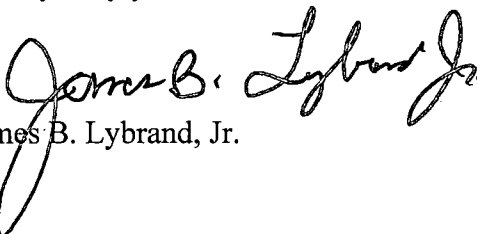
Dear Ms. Kitchings:

Enclosed please find for filing one copy of Respondent's Initial Brief in connection with the captioned case. I am also enclosing for filing one copy of Respondent's Designation of Matter to be included in the record on appeal. I have also enclosed a proof of service of this document upon counsel for Appellant.

Thank you for your attention to this matter. If you have any questions or need any additional information, please feel free to contact me.

With kind regards,

Very truly yours,


James B. Lybrand, Jr.

JBLjr/bg
Enclosures
cc: Steven Murdaugh
R. Alexander Murdaugh