

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)
)
Gregory J. Feldman, MD, Joseph A.)
Boscia, III, MD, and Upstate Lung &)
Critical Care Specialists, PC,)
)
Plaintiffs,)
)
vs.)
)
William Mark Casey, Ray E. "Chuck")
Thompson, and Charles M. Fogarty, MD,)
)
Defendants.)

IN THE COURT OF COMMON PLEAS

C.A. No.: 2010-CP-42-05743

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

RECEIVED

DEC 08 2017

SC Court of Appeals

This action came for hearing before me on June 20, 2017, on the Motion for Summary Judgment filed by Defendants Ray E. "Chuck" Thompson ("Thompson") and Charles M. Fogarty, MD ("Fogarty") (collectively, "Defendants"). Prior to the hearing, Plaintiffs and Defendants submitted briefs and multiple exhibits, and Plaintiffs submitted affidavits, which the Court has carefully considered in addition to the parties' oral arguments and the materials the parties submitted during the hearing. For the reasons discussed below, this Court finds that Plaintiffs' abuse of process claim against Defendants is barred by the statute of limitations, and therefore grants Defendants' Motion for Summary Judgment.

Summary Judgment Standard

Rule 56(c) of the South Carolina Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Glover v. County of Charleston*, 361 S.C. 634, 606 S.E.2d 773 (2004). Since it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant

is not improperly deprived of a trial on disputed factual issues. *Helena Chemical v. Allianz Underwriters*, 357 S.C. 631, 594 S.E.2d 455 (2004). Summary judgment is improper if the parties dispute the inferences to be drawn from the facts, even if the facts themselves are not in dispute. *CEL Prods., LLC v. Rozelle*, 357 S.C. 125, 591 S.E.2d 643 (Ct. App. 2004). In determining whether summary judgment is proper, this court must view all evidence in the light most favorable to the non-moving party. *Silvester v. Spring Valley Country Club*, 344 S.C. 280, 543 S.E.2d 563 (Ct. App. 2001). Importantly, in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

Findings of Relevant Fact

1. Plaintiffs filed the instant action on October 27, 2010, asserting claims against Defendants for abuse of process and civil conspiracy arising from an underlying medical malpractice lawsuit in which Plaintiffs were named defendants, *William Mark Casey v. Gregory J. Feldman, M.D., Joseph A. Boscia, III, M.D., Devendra Shantha, M.D. and Upstate Lung and Critical Care Specialists, PC*, Spartanburg County Court of Common Pleas, Case No. 2006-CP-42-1728 (the "MMA"). On January 18, 2012, Plaintiffs voluntarily dismissed their civil conspiracy claim. At the hearing on this motion, Plaintiffs' counsel advised that Plaintiffs have dismissed with prejudice their abuse of process claim as to Casey, and will be filing a stipulation to that effect.
2. The MMA was filed by Thompson on May 24, 2006. The Complaint in the MMA alleged that Plaintiffs Feldman and Boscia, who are pulmonologists and owners of Upstate Lung and Critical Care Specialists, committed malpractice in the course of treating Casey in 2004, and that Casey suffered permanent brain injury and other damages as a result of Plaintiffs' actions.
3. On August 11, 2007, Feldman wrote Boscia an email stating his belief that Plaintiffs had causes of action against Defendants for civil conspiracy and abuse of process relating to the MMA,

stating as follows:

1. We have at least Casey plus his Lawyer and Possibly Fogarty plus Chuck Thompson's Wife.
2. As for Abuse of Process that is already fact (He had no right to speak to Press about trial matter..[sic] Violation of Civil Procedure)[.]

(Mann 1168.)

4. On August 17, 2007, Feldman emailed himself regarding the definition and proof of civil conspiracy, and sent himself another email regarding "Physician Countersuits." (Mann 1167; Mann 22484.)
5. On August 17, 2007, Feldman sent himself an emailed titled, "Statue [sic] of Limitations," excerpting legal research he had performed on the three-year limitations period applicable to one physician's suit against another doctor for defamation. (Mann 22478.)
6. On September 29, 2007, Feldman emailed himself additional research he performed on "Abuse of Process." (Mann 1183.)

Conclusions of Law

I. Plaintiffs' Claim Is Time-Barred.

Plaintiffs' abuse of process claim against Defendants is time-barred, because the indisputable evidence in this case proves that more than three years before Plaintiffs filed this lawsuit, they believed they had suffered an invasion of their legal rights and consequent damages which they might recover by asserting an abuse of process claim, and therefore had actual knowledge that they possessed a claim for abuse of process against Defendants for Defendants' alleged wrongdoing. Because Plaintiffs failed to file suit within three years of obtaining that actual knowledge, summary judgment is appropriate.

This action is governed by a three-year statute of limitations period. S.C. Code Ann. § 15-3-530 (2005); see *Whitfield Const. Co. v. Bank of Tokyo Trust Co.*, 338 S.C. 207, 525 S.E.2d 888 (Ct. App. 1999) (applying three-year statute of limitations in abuse of process action). "A statute of limitations is a procedural device that operates as a defense to limit the remedy available from an

existing cause of action.” *Capco of Summerville, Inc. v. J.H. Gayle Const. Co., Inc.*, 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006). “Statutes of limitations are not simply technicalities;” instead, they “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). Statutes of limitations relieve courts of the burden of trying stale claims of those who have slept on their rights, and “ensure litigation is brought within a reasonable time in order that evidence be reasonably available and there be some end to litigation.” *Transp. Ins. Co. and Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422, 428, 699 S.E.2d 687, 690 (2010) (citations and internal punctuation omitted).

The limitations period established by S.C. Code Ann. § 15–3–530 begins to run when the plaintiff “knew or by the exercise of reasonable diligence should have known that he had a cause of action.” S.C. Code Ann. § 15–3–535. Therefore, in determining when a cause of action arose under an applicable statute of limitations, South Carolina courts apply the “discovery rule.” *Rumpf v. Mass. Mut. Life Ins. Co.*, 357 S.C. 386, 394, 593 S.E.2d 183, 187 (Ct. App. 2004). Under the discovery rule, the statute of limitations begins to run on the date the party had actual knowledge, or by the exercise of reasonable diligence should have known, that some legal right had been invaded. *City of Newberry v. Newberry Elec. Co-op., Inc.*, 387 S.C. 254, 260, 692 S.E.2d 510, 513 (2010). The exercise of reasonable diligence means that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. *Snell v. Columbia Gun Exch., Inc.*, 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981).

The discovery rule thus focuses on when the complaining party acquired knowledge of any existing facts sufficient to put the party on inquiry which, if developed, would disclose alleged wrongdoing. *Burgess v. Am. Cancer Soc., S.C. Div., Inc.*, 300 S.C. 182, 186-87, 386 S.E.2d 798, 800 (Ct. App. 1989). “Moreover, although a party claims ignorance of existing facts and circumstances,

the same result [*i.e.*, the statute of limitation's running] follows if such facts and circumstances could have been known to the party through the exercise of ordinary care and reasonable diligence." *Id.* Likewise, "the fact that the injured party may not comprehend the full extent of the damage is immaterial. *Dean v. Ruscon Corp.*, 321 S.C. 360, 364, 468 S.E.2d 645, 647 (1996). The statute of limitations therefore begins to run on the date a plaintiff knew or should have known that he had a claim, and not when the plaintiff sought advice of counsel, or developed a full-blown theory of recovery, or discovered a witness to support or prove his case, or "obtain[ed] actual knowledge of either the potential claim or the facts giving rise thereto." *Gibson v. Bank of Am., N.A.*, 383 S.C. 399, 406, 680 S.E.2d 778, 782 (Ct. App. 2009).

This Court finds that Plaintiffs' emails in this case, which the parties agree are authentic, show without question that Plaintiffs had actual knowledge that they possessed an abuse of process claim against Defendants more than three years before Plaintiffs filed this action.

II. Equitable Estoppel Does Not Apply In This Case.

The Court also finds that equitable tolling does not apply to prevent the running of the statute of limitations on Plaintiffs' abuse of process claim.

"Equitable tolling is a doctrine rarely applied in South Carolina to stop the running of statutes of limitations." *Pelzer v. State*, 378 S.C. 516, 520–21, 662 S.E.2d 618, 620 (Ct. App. 2008). "Equitable tolling is reserved for extraordinary circumstances." *Hooper v. Ebenezer Senior Svcs. and Rehabilitation Ctr.*, 377 S.C. 217, 230, 659 S.E.2d 213, 219 (Ct. App. 2008). This doctrine, which allows a plaintiff to initiate an action beyond the statute of limitations deadline, "is typically available only if the claimant was prevented in some extraordinary way from exercising his or her rights, or, in other words, if the relevant facts present sufficiently rare and exceptional circumstances that would warrant application of the doctrine." *Pelzer*, 378 S.C. at 521, 662 S.E.2d at 620. As to the sparing application of equitable tolling, South Carolina's Court of Appeals has found "particularly illuminating" the Fourth Circuit's reasoning in *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir.

2000):

[A]ny invocation of equity to relieve the strict application of a statute of limitations must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes. To apply equity generously would loose the rule of law to whims about the adequacy of excuses, divergent responses to claims of hardship, and subjective notions of fair accommodation. We believe, therefore, that any resort to equity must be reserved for those rare instances where due to circumstances external to the party's own conduct-it would be unconscionable to enforce the limitation period against the party and gross injustice would result.

Pelzer, 378 S.C. at 522-23, 662 S.E.2d at 621.

“It is well known that equity follows the law.” *Smith v. Barr*, 375 S.C. 157, 164, 650 S.E.2d 486, 490 (Ct. App. 2007), citing *C & S Nat'l Bank v. Modern Homes Constr. Co.*, 248 S.C. 130, 133, 149 S.E.2d 326, 327 (1966). This established rule means that “wherever the rights or the situation of parties are clearly defined and established by law, equity has no power to change or unsettle those rights or that situation[.]” *Hedges v. Dixon Cty.*, 150 U.S. 182, 192, 14 S. Ct. 71, 74, 37 L. Ed. 1044 (1893). “Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law.” *Id.* “The function of equity is to supplement the law, not to displace it.” *Wigfall v. Tideland Utilities, Inc.*, 354 S.C. 100, 117, 580 S.E.2d 100, 108 (2003). Equity “does not attempt to reach all cases where a right cannot be vindicated at law, nor does it reach cases where a right has been lost by complainant's own act.” *Nutt Corp. v. Howell Rd., LLC*, 396 S.C. 323, 327, 721 S.E.2d 447, 449 (Ct. App. 2011), citing *McKittrick v. Bates*, 47 R.I. 240, 132 A. 610, 612 (1926). “When one who has a clear method of fully determining his rights at law voluntarily adopts improper procedure, or pursues proper procedure negligently or mistakenly, without any inducement from one having adversary interests, it is no function of equity to relieve him from the result of his erroneously conducted lawsuit.” *Id.*, quoting *McKittrick*, 47 R.I. at 240, 132 A. at 612.

In this case, Plaintiffs contend that the statute of limitations applicable to their abuse of process claim should be equitably tolled, because Defendants allegedly concealed from Plaintiffs facts material to that claim. This argument is not supported by the record evidence, which proves that the

information Plaintiffs did have more than three years before filing this suit caused Plaintiffs to form the actual belief that they possessed an abuse of process claim against Defendants. Thus, no facts that allegedly were concealed from Plaintiffs during the MMA prevented or delayed Plaintiffs' forming the belief that they possessed an actionable claim against Defendants.

Plaintiffs had a legal remedy available for the abuse of process claim that they believed that they possessed against Defendants in relation to the MMA. Plaintiffs failed to file suit on that claim within three years of gaining actual knowledge of that claim, as mandated by the applicable statute of limitations. The Court finds that no sufficient reason exists for this failure, and that Plaintiffs' right to vindicate the wrong they believed they suffered in relation to the MMA was lost by Plaintiffs' own acts. Accordingly, the Court declines to equitably estop the application of the statute of limitations to Plaintiffs' claim.

Conclusion

Plaintiffs failed to file their claim against Defendants for abuse of process within three years of having actual knowledge of the existence of that claim. Plaintiffs' claim is therefore barred by the applicable statute of limitations. Further, equity does not support the application of equitable tolling in this case. For these reasons, Defendants' Motion for Summary Judgment is hereby granted.

IT IS SO ORDERED.

_____, 2017

R. Keith Kelly
Presiding Judge



Spartanburg Common Pleas

Case Caption: Gregory J Feldman Md , plaintiff, et al VS William Mark Casey ,
defendant, et al
Case Number: 2010CP4205743
Type: Order/Summary Judgment

It is so Ordered.

s/ R. Keith Kelly - 2165