

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2011-CP-10-1739

David M. Graham, Jr.,

Appellant,

v.

Welch, Roberts and Amburn,
LLP and Russell Patrick Welch,

Respondents.

FINAL REPLY BRIEF OF APPELLANT

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QUESTION PRESENTED

1. When construing all inferences in the favor of the Appellant, and considering the parties' course of dealing and the discovery necessary to illuminate the same, should the trial court have granted summary judgment to the Respondent?

STATEMENT OF THE CASE

The central facts giving rise to the Complaint involve the alleged misapplication of funds sent from David M. Graham (hereinafter "Graham") to his accountant and tax adviser, Welch Roberts and Amburn, LLP and Russell Patrick Welch, individually, (hereinafter collectively referred to as "Welch"), to pay certain taxes owed by Graham to the New York Tax Commission.

On October 13, 2005, Graham issued a check made payable to Welch in the amount of \$4,296.49, the exact amount owed to the New York Tax Commission at the time, (R. p. 68) with the specific belief that the funds would be used by Welch to satisfy Graham's tax liability to New York. (R. p. 65, lines 13-15).

On November 28, 2005, Welch invoiced Graham in the total amount of \$6,656.00, but displayed a credit to Graham of \$4,296.49, thus leaving a balance owed from Graham to Welch of \$2,359.51, which Graham promptly paid on December 30, 2005. (R. pp. 1-2). Following this payment, Graham assumed that all tax liabilities had been resolved and that Welch had been paid in full, so no further payments occurred. (R. pp. 65-67).

However, on April 29, 2008, Graham received a notice from his bank that the State of New York had placed a levy against his account due to the failure to satisfy his tax liability. (R. p. 72). After receiving this notice, Graham had his new accountant, Michael Goldson, contact Welch to verify that payment had been made to the New York Tax Commission. (R. p. 66, lines 14-22). However, Welch refused to provide any information regarding the payment received, and did not provide any information. (R. p. 66, lines 19-22). Thereafter, on April 20, 2010 with considerable effort, Graham finally confirmed with certainty that the payment was deposited into Welch's account and that the tax

liability had gone unpaid. (R. pp. 66-67).

On March 9, 2011, commenced an action against Welch alleging professional negligence, breach of fiduciary duty, fraud, negligent misrepresentation, conversion, and unjust enrichment. (R. pp. 3-19). Attached to the Plaintiff's Complaint was the affidavit of Michael Goldson, which addressed the issue of Welch's alleged professional negligence. (R. pp. 20-22). In his affidavit, Goldson stated that Welch had violated the professional standard of care by (1) "failing to pay taxes on behalf of David Graham in a timely manner after collecting such funds for this purpose" (R. p. 21, lines 19-20); (2) "failing to disclose to David Graham that they failed to make the payment" (R. p. 21, line 21); (3) "failing to refund the money David Graham provided Defendants to pay his tax payment" (R. p. 21, lines 22-23); and (4) "failing to provide an accounting to the client of the client's funds" (R. p. 21, line 24).

On May 24, 2011, Welch filed and served his Answer, denying the allegations and counterclaimed, alleging a frivolous proceeding. (R. pp. 36-43). Graham filed and served his Reply on June 23, 2012. (R. pp. 49-50).

On June 14, 2011, Welch moved for summary judgment on the grounds that the statute of limitations time-barred Graham from the receipt of any relief against Welch. (R. pp. 52-64).

On October 28, 2011, The Honorable R. Markley Dennis, Jr. sat in a non-jury term and heard Welch's motion for summary judgment. Welch presented an affidavit in support of summary judgment detailing his position as to when Graham should have been aware of the non-payment of the tax liability (R. pp. 56-57) which conflicted with Graham's affidavit, stating that he was not aware the taxes had not been paid until he received the notice of levy on April 29, 2008. (R. pp. 65-67). Additionally, the affidavit of Michael Goldson, which was attached to the Complaint was part of the record considered. (R. pp. 20-22).

After reviewing the pleadings, the affidavits submitted by the parties, the court then heard argument of counsel. (R. pp. 75-86). At the conclusion of the hearing, the Court issued an order

granting Welch's motion for summary judgment, finding Graham's position to be unpersuasive, and that Graham either knew or should have known that he had a cause of action on or around November 28, 2005, and thus the entirety of Graham's claims were held to be barred by the statute of limitations. (R. pp.1-2)

On February 1, 2011, Graham received notice of written entry of the Order Granting Summary Judgment to Welch, and served his Notice of Appeal on March 1, 2012.

ARGUMENT

I. Due to the parties' course of dealing, a reasonable mind could find that Graham should not have been on reasonable notice to discover that his tax liability had not been satisfied by Welch until his receipt of the levy notice. Further discovery will demonstrate the parties' course of dealing on this issue.

When considering a motion for summary judgment and determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301 (Ct. App.1999). If triable issues exist, those issues must be submitted to the jury. *Young v. South Carolina Dept. of Corrections*, 511 S.E.2d 413, 333 S.C. 714 (Ct. App. 1999).

In this matter, the parties both assert the "discovery rule" is applicable to the statute of limitations question before the court. According to the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered. *Dean v. Ruscon Corp.*, 321 S.C. 360, 468 S.E.2d 645 (1996); *Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 542 S.E.2d 736 (Ct. App.2001), cert. denied.

In his brief, Welch concedes that Graham did not know the tax liability had not been paid. (Respondent's Brief, p. 7, lines 24-25). However, Welch asserts that it cannot be disputed that Graham failed to act "with reasonable diligence" (Respondent's Brief, p. 8, line 1). In supporting this assertion,

Welch rests upon the face of the invoices submitted to Graham and the corresponding payments. When then asserts that only one reasonable inference and conclusion exists, despite the fact that all inferences and conclusions must be construed in the light most favorable to Graham, and that further, no reasonable mind could differ.

Graham would reply and note that, “even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied”. *Wilson v. Style Crest Products, Inc.*, 627 S.E.2d 733, 367 S.C. 653 (2006) (citing *Hamilton v. Miller*, 301 S.C. 45, 47, 389 S.E.2d 652, 653 (1990)). Further, in weighing these competing inferences, the court “must construe all ambiguities and inferences most strongly against the non-moving party”. *Hatchell v. Jackson*, 290 S.E.2d 407, 408 (Ct. App. 1986). Specifically supporting Graham’s inference and conclusion is the course of dealing between the parties. This course of dealing will allow a reasonable mind to conclude that Graham had no reason to investigate his tax liability until Graham’s receipt of the levy notice on April 29, 2008.

Graham and Welch had a course of dealing over a relationship over many years in which Welch would handle all tax matters for Graham. (R. p. 65, lines 7-9). During these years, and during the relevant time period, it was a common practice for Welch to satisfy certain tax liabilities of Graham with funds provided by Graham, which would then be built into Welch’s bill to Graham. (R. p. 65, lines 17-18).

At the time Graham sent the initial funds of \$4,296.49 to Welch, Graham had no reason to believe that this course of dealing would be discontinued. This course of dealing led Graham to believe that his tax liability would be paid with these funds, and that Welch would incorporate this cost into a subsequent invoice. Specifically in accordance with the parties’ course of dealing, satisfaction of the tax

liability is exactly what Graham intended, and believed for these funds to be used for. (R. p. 66, lines 5-8). In hindsight, it is clear that Welch unilaterally, altered the parties' course of dealing and applied Graham's \$4,296.49 payment to Welch's fees and costs. Graham would note the record is devoid of any notice to Graham that Welch had made a decision to unilaterally alter the parties' course of dealing. When Graham received Welch's subsequent invoice, the parties agree that Graham promptly remitted payment in full for the total amount shown. Accordingly, at the time the subsequent invoice was paid, Graham believed that the tax liability had been satisfied, and that all funds due to Welch had been remitted. (R. p. 66, line 14).

Ultimately, Graham believes that this course of dealing would lead a reasonable person to believe that the tax liability had been paid by Welch, and it would not be until April 29, 2008 that a person of reasonable knowledge would conclude that the tax liability had not been satisfied, and therefore that a cause of action may exist.

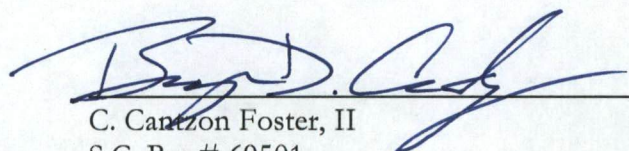
Further discovery will illuminate the parties' course of dealing over their many years together in support of Graham's position on this matter. Accordingly, the Court's decision to grant summary judgment should be reversed in order to allow further discovery to be conducted on this issue and for this issue to be ultimately submitted to a jury to decide the dispute between the parties' competing conclusions. "Summary judgment is inappropriate where further inquiry into the facts of the case is desirable to clarify the application of the law". *Smith v. S.C. Dept. Highways*, 370 S.E.2d 101, 102 (Ct. App. 1988); Summary judgment "must not be granted until the opposing party has had a full and fair opportunity to complete discovery". *Baughman v. American Telephone & Telegraph Co.*, 410 S.E.2d 537, 543 (1991). In reversing the grant of summary judgment, Graham will be able to conduct discovery and obtain evidence of the parties' course of dealing. This course of dealing will be proven at trial and could

lead a reasonable person to conclude that it would not have been until April 29, 2008, that any inquiry or diligence would be necessary.

CONCLUSION

Based upon the foregoing, the order granting summary judgment to Welch on January 20, 2012, by the Honorable R. Markley Dennis, Jr. should be reversed, and the case should be restored to the active jury-trial roster.

Respectfully Submitted,

A handwritten signature in blue ink, appearing to read "Bryan D. Caskey", is written over a horizontal line.

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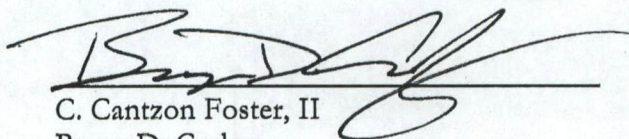
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CERTIFICATE OF COMPLIANCE

The undersigned certified that the Final Brief and the Final Reply Brief complies with
Rule 211(b), SCACR.



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