

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2012-209587

Chris Phillips and Chris Phillips Builders, Inc.....Appellants,

v.

Frank Ferez and Suzie Ferez,.....Respondents.

FINAL BRIEF OF APPELLANTS

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I. Did Judge Early err in finding the Appellants were barred under the statute of limitations when the Appellant timely filed the action pursuant to the discovery rule for breach of contract causes of action?
- II. Did Judge Early err in finding the Respondents were not estopped from raising a defense of statute of limitations when the Respondents induced the Appellant to withhold filing a lawsuit?
- III. Did Judge Early err in finding Appellants' cause of action was barred pursuant to the statute of limitations when there was evidence the statute should be tolled based on the doctrine of equitable tolling?

STATEMENT OF THE CASE

This appeal is procedural in nature but relies heavily on the facts of this case. The Honorable Doyet A. Early, III, ordered the present case dismissed on the grounds the Appellants' cause of action for breach of contract was barred under the statute of limitations. Judge Early gave this order from the bench and it was never reduced to a separate written order. This appeal arises from that order. (R. at 280).

The present action was commenced by the filing of a Summons and Complaint in the Court of Common Pleas for Lexington County on August 24, 2009. The Respondents/Defendants timely answered and counterclaimed. The Appellants/Plaintiffs timely replied to the counterclaim. Prior to trial, Respondents raised a statute of limitations defense as a bar to recovery and moved for judgment as a matter of law four separate times.

The Respondents first moved for summary judgment on November 15, 2010. (R. at 31). The Honorable William P. Keesley denied this motion on January 19, 2011, and allowed the lawsuit to proceed for discovery. (R. at 1).

Subsequent to the first motion for summary judgment, the parties engaged in paper discovery. Respondents' counsel deposed Mr. Phillips and Appellants' counsel deposed Mr. and Mrs. Ferez.

On February 4, 2011, the Respondents moved to alter or amend Judge Keesley's order on essentially the same grounds as the prior motion. (R. at 33). Again, this order was denied on February 25, 2011. (R. at 6).

On May 16, 2011, the Respondents moved to strike Appellant Chris Phillips and punitive damages. (R. at 37). The Honorable R. Knox McMahon denied this motion in a Form 4 order entered June 15, 2011. (R. at 15).

On July 15, 2011, the Respondents again moved for summary judgment and recited essentially the same matters which had been brought before the court several times. (R. at 39). Again, this motion was denied and the parties were instructed to proceed with trial.

The case was called for a jury trial on March 12, 2012, before Judge Early in the Lexington County Judicial Center. On March 13, 2012, at the close of Appellants' evidence, Respondent moved for directed verdict on the grounds the action was untimely pursuant to the statute of limitations. (R. at 271). The court agreed, and the present appeal followed. (R. at 280).

Notice of appeal was served on Respondents on March 15, 2012. On April 5, 2012, Respondents filed and served a Motion to Dismiss the appeal on the basis the appeal was ~~improvidently filed because the order dismissing the case had not been reduced to writing.~~ The Appellants timely filed a Return to the Motion to Dismiss.

STATEMENT OF FACTS

Appellant Chris Phillips Builders, Inc., (hereinafter “Phillips Builders”) is a residential construction company owned by Appellant Chris Phillips. (R. at 197). Mr. Phillips has been in the construction business his entire life. (R. at 197). Phillips Builders is a small company consisting of Mr. Phillips and three employees. (R. at 198).

In early 2005, the Respondents Frank and Suzie Ferez contacted Mr. Phillips to build a house on a lot they owned at 325 Bent Oak Drive, Chapin, South Carolina. (R. at 200). The Respondents were referred to Mr. Phillips because he was one of the approved residential builders allowed to build in that subdivision by the home owners’ association. (R. at 119).

On March 10, 2005, Mr. Phillips met with the Respondents and agreed to build their home. (R. at 205). The home was custom made to the Respondents’ specifications. (R. at 204). Based on the blueprints and Mr. Phillips experience as a builder, Mr. Phillips quoted the Respondents a building cost of \$550,000.00. (R. at 55).

The parties memorialized this agreement in a written contract. (R. at 55). Part of the written contract included allowances for certain items on the house. (R. at 207). An allowance is essentially an amount of money budgeted for a particular line item of the contract. (R. at 131). If the cost of a particular item exceeded the allowance, the Respondents would be obligated to pay the cost of the excess. (R. at 131). If the allowance was over budget, the Phillips Builders would be obligated to refund the difference to the Respondents. (R. at 131).

Construction on the new home began in mid-March 2005. (R. at 207). Shortly after construction began, Respondent Suzie Ferez informed Mr. Phillips there would be some changes to the original construction plans. These changes would ultimately result in a number of items exceeding their allowances. (R. at 210). For instance, the allowance for “clearing and

excavating” was \$2,300.00. (R. at 211). Because the actual cost of “clearing and excavating was \$5,220.00, the Respondents exceeded their allowance by \$2,920.00. (R. at 211).

Mr. Phillips was also asked to do additional work to the house which was not contemplated when the contract was entered. (R. at 219). For instance, the Respondents asked Mr. Phillips to add a set of circular stairs to the rear deck. (R. at 219, 220). These stairs were not part of the blueprints or the original estimate. (R. at 219, 220). Mr. Phillips agreed to build these stairs and the Respondents agreed to reimburse him for the cost of their construction. (R. at 137). In addition to the circular stairs, a number of other fixtures were also added to the home after construction began. (R. at 137-141).

In all, the Respondents exceeded their allowances by \$13,048.66. (R. at 218). The Respondents also asked Mr. Phillips to perform other additional work totaling \$9,883.39. (R. at 222). To date, Mr. Phillips has not been paid for the Respondents’ exceeding allowances and additional work in the amount of \$22,932.05. (R. at 218).

The construction progressed in a timely manner with Mr. Phillips making regular draws on the construction loan pursuant to the original \$550,000.00 contract price. (R. at 231, 232). On February 1, 2006, the Respondents closed the transaction on their home. (R. at 229). To assist in closing the loan and helping the Respondents move into their new home, Mr. Phillips signed an affidavit saying no more money was owed to him. (R. at 233). Mr. Phillips understood the affidavit to mean the note from the bank was paid in full. (R. at 233). Following the closing, Mr. Phillips returned to the home a number of times to wrap up the construction. (R. at 150. On one instance shortly after they moved in, Respondent Frank Ferez stated he owed Mr. Phillips extra money for the overages and extra work performed. (R. at 235).

On March 2, 2007, Mr. Phillips returned to the house to repair a dark spot on the side of the house. (R. at 226). The Respondents were not charged as a result of this repair work because it was performed pursuant to the original contract. (R. at 228).

On or around August 13, 2008, Mr. Phillips gave Respondent Suzie Ferez an invoice for the overages and additional work. (R. at 237). The thought that the Respondents would refuse to pay for the overages and additional work never crossed Mr. Phillips's mind. (R. at 239). Mr. Phillips relied on the Respondents' reaffirmations that they would pay. (R. at 241). Mr. Phillips testified at trial that had the Respondents not made the later promises to pay, he would have filed his lawsuit sooner. (R. at 242).

After giving Mrs. Ferez the final invoice in August of 2008, Mr. Phillips made numerous attempts to contact the Respondents for payment. (R. at 241). By August of 2009, Mr. Phillips realized the Respondents were simply not going to pay for the additional work they asked him to perform on their home. Mr. Phillips then contacted Appellants' counsel and the present action was filed on August 24, 2009. (R. at 16).

ARGUMENT

I. JUDGE EARLY ERRED IN HOLDING THE ACTION WAS BARRED UNDER THE STATUTE OF LIMITATIONS BECAUSE THE APPELLANT TIMELY FILED THE ACTION PURSUANT TO THE DISCOVERY RULE FOR BREACH OF CONTRACT

Under South Carolina law, applicable statute of limitations for contract actions is three years. S.C. Code Ann. § 15-3-530. South Carolina follows the discovery rule when determining the triggering event for the statute of limitations to being running. *Garner v. Houck*, 312 S.C. 481, 485, 435 S.E.2d 847, 850 (1993).

“If there is conflicting evidence as to whether a claimant knew or should have known he or she had a cause of action, the question is one for the jury.” *Id.* (citing *Santee Portland Cement Co. v. Daniel Int’l Corp.*, 299 S.C. 269, 384 S.E.2d 693 (1989)).

There has been a great deal of conflicting evidence presented thus far as to which event properly triggered the statute of limitations. The contract itself is silent as to a specific date on which nonpayment becomes a breach. Further, the contract was orally modified and the debts were acknowledged which would change the time frame for payment from the original contract’s terms.

The Respondents claim the closing date in February of 2006 triggers the statute of limitations. Because work was still being performed on the house under the original contract in March of 2007, the statute of limitations was not triggered until this time. In addition, the Respondents made several reaffirmations of the debt after the February 2006 closing. Therefore, the statute of limitations began to run on March of 2007 and the action was timely filed in August of 2009.

In any event, whether the statute of limitations began to run in 2006 or 2007 is a question of fact. Questions of fact are to be determined by the jury and are not appropriate at the directed

verdict stage. Pursuant to South Carolina law, the jury is to determine issues of conflicting evidence in matters where the triggering event of the statute of limitation is in question. With this in mind, Appellants respectfully request the Court hold the lawsuit was filed within the statute of limitations, reverse the decision of the lower court and remand the matter to be determined by a jury.

II. JUDGE EARLY ERRED IN FINDING THE RESPONDENTS WERE NOT ESTOPPED FROM ASSERTING A DEFENSE OF STATUTE OF LIMITATIONS BECAUSE THE RESPONDENTS INDUCED THE APPELLANT INTO WITHHOLDING THE FILING OF THE LAWSUIT

“A defendant will be estopped to assert the statute of limitations in bar of a plaintiff’s claim when the delay that otherwise would give operation to the statute has been *induced by the defendant’s conduct.*” *Magnolia North Property Owners’ Ass’n, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 373, 725 S.E.2d 112, 125 (Ct. App. 2012) (emphasis in original). “The doctrine is, of course, most clearly applicable where the aggrieved party’s delay in bringing suit was caused by his opponent’s *intentional* misrepresentation; *but deceit is not an essential element of estoppel.*” *Id.* at 373 (emphasis in original) “It is sufficient that the aggrieved party *reasonably relied* on the words and conduct of the person to be estopped in allowing the limitations period to expire.” *Id.* (emphasis in original).

By the Respondents’ own admissions, they made a number of assurances to Mr. Phillips that they would pay for the overages and additional work. In sworn testimony, the Respondents acknowledged the outstanding debt on a number of occasions. According to Respondent Suzie Ferez, she repeatedly asked Mr. Phillips to provide her with invoices regarding this debt. Mrs. Ferez’s only reason for not paying the debt is she was “shocked” by the amount of debt she and Mr. Ferez incurred on building their house.

Based on the Respondents' assurances they would pay the debt, Mr. Phillips withheld filing his lawsuit until it became apparent the Respondents intended to renege on their assurances. Mr. Phillips testified that his business is attached to his reputation. The Respondents both testified they heard of his business through word of mouth. It is certainly not good for business to go around suing every client that has fallen behind in payment. This is even more true when the clients themselves, who have managed to pay all but the final installment, make assurances that payment will be forthcoming.

Mr. Phillips's reliance on the Respondents' promises was reasonable under these circumstances. The Respondents made a number of reaffirmations they would pay. Until the final payment, the Respondents had never missed a payment. Mr. Phillips had no indication he would have to bring a claim to assert his rights. Mr. Phillips had no indication he would be forced to sue the Respondents to get paid for the extra work they asked him to perform. To the contrary, based on the history between the parties and his business's reputation, the reliance on the Respondents' assurances of payment was the only reasonable position for Mr. Phillips to take.

Unfortunately, because Mr. Phillips relied on the Respondents' assurances, they now argue Mr. Phillips' otherwise legitimate claims for reimbursement must be barred as a technicality under the statute of limitations. Based on the applicable law regarding equitable estoppel, Appellants respectfully request this Court reverse the lower court's decision to dismiss this matter because the Respondents induced the Appellant to withhold filing suit and should be estopped from asserting the statute of limitations.

III. JUDGE EARLY ERRED IN FINDING APPELLANTS' CAUSE OF ACTION WAS BARRED PURSUANT TO THE STATUTE OF LIMITATIONS BECAUSE THE STATUTE SHOULD BE TOLLED BASED ON THE DOCTRINE OF EQUITABLE TOLLING

“Equitable tolling is judicially created; it stems from the judiciary’s inherent power to formulate rules of procedure where justice demands it. Where a statute sets a limitation period for an action, courts have invoked the equitable tolling doctrine to suspend or extend the statutory period to ensure fundamental practicality and fairness.” *Magnolia North Property Owners’ Ass’n, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 372, 725 S.E.2d 112, 125 (citing *Hooper v. Ebenezer Senior Services and Rehabilitation Center*, 386 S.C. 108, 115-117, 687 S.E.2d 29, 32-33 (2009)). “The equitable power of the court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of another. Equitable tolling may be applied where it is justified under all circumstances.” *Id.* (emphasis in original).

Mr. Phillips has maintained throughout this lawsuit that the reason he did not file his action sooner was because of the Respondents’ representation they would pay him. The Respondents admit they were aware of the extra work Mr. Phillips did. Respondent Suzie Ferez admitted she was aware of the ongoing debt to Mr. Phillips and that she acknowledged the existence of the debt on numerous occasions following the closing of the house. Again, the only reason the Respondents have refused to pay is they claim “shock” at discovering how far they exceeded the budget on the house.

In any event, now the Respondents are attempting to renege on their debt owed to Mr. Phillips. They are asking the Court to dismiss Mr. Phillips’s claim based on a statute of limitations. Assuming Mr. Phillips filed outside the statute of limitations, this Court should

equitably toll the statute because the Respondents' assurances have placed Mr. Phillips in this position. To allow Mr. Phillips to bear the cost of approximately \$23,000 on construction to the Respondents home and to deny relief because he reasonably relied on the Respondents' assurance would allow a gross wrong. The Court has the inherent power to right this wrong and allow the case to go to the jury in the interests of fairness and equity.

Based on the foregoing, the Appellants respectfully request the Court hold the statute of limitations has been equitably tolled and reverse the lower court's dismissal of this action and remand the case for a jury trial on the merits.

CONCLUSION

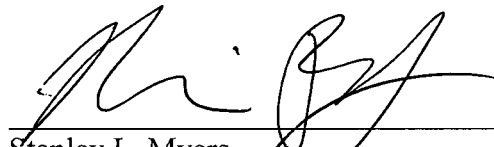
Appellants respectfully ask this Court to reverse Judge Early's order finding they were barred from recovery pursuant to the statute of limitations and remand the case for a jury trial on the merits because:

- Appellants timely filed this action pursuant to the discovery rule for breach of contract actions.

- Even if the Appellants failed to file within the statute of limitations, the Respondents should be equitably estopped from raising the defense of statute of limitations because their reaffirmations of the debt induced the Appellants to withhold filing a lawsuit.

- Even if the Appellants failed to file within the statute of limitations, the statute should have been tolled based on the Respondents' reaffirmations they would pay the money owed.

Respectfully submitted,



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January 31, 2013.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2009-CP-32-3870

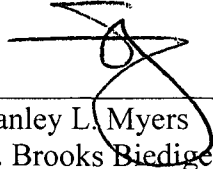
Chris Phillips and Chris Phillips Builders, Inc.....Appellants,

v.

Frank Ferez and Suzie Ferez,.....Respondents.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Appellants Chris Phillips and Chris Phillips Builders, Inc., complies with Rule 211(b) of the South Carolina Rules of Appellate Procedure.


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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

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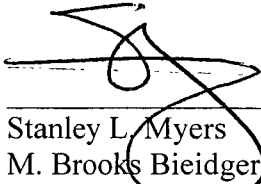
v.

Frank Ferez and Suzie Ferez,.....Respondents.

PROOF OF SERVICE

I certify that I served the Certificate of Counsel, by mail, postage prepaid, to
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In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable Doyet A. Early, III, Circuit Court Judge

Case Tracking No. 2012209587
Civil Action No. 2009-CP-32-3870

Chris Phillips and Chris
Phillips Builders, Inc.,

Appellants,

v.

Frank Ferez and Suzie Ferez,

Respondents.

CERTIFICATE OF HAND SERVICE

I, Don Baker, an employee with the law firm of Moore, Taylor & Thomas, P.A., certify that I have on this day had service of the foregoing **FINAL BRIEF OF APPELLANTS**, upon all counsel of record in this action by having a copy of same hand delivered and addressed as follows:

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