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The State of South Carolina
In The Court of Appeals

SC Court of Appeals

Appeal from Spartanburg County
Hon. J. Derham Cole, Circuit Court Judge
2008-CP-42-0475

Case No. 2012-213499

John Doe, Appellant

v.

City of Duncan Respondent

Final Brief of Appellant

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Statement of Issue on Appeal

When the trial court dismissed this action under state law time limits, did the trial court err in failing to apply the Servicemembers Civil Relief Act?

Standard of Review

On appeal from an order granting a motion to dismiss, the facts must be viewed in the light most favorable to plaintiff, and with all doubts resolved in his behalf. *Flateau v. Harrelson*, 355 S.C. 197, 202, 584 S.E.2d 413, 415 (Ct. App. 2003).

An abuse of discretion occurs if the court's ruling is controlled by an error of law or if the ruling is based upon findings of fact that are without evidentiary support. *Sharps v. Sharps*, 342 S.C. 71, 79, 535 S.E.2d 913, 917 (2000).

Statement of the Case

An action related to childhood sexual abuse was referred to counsel and filed in 2008 (R. App. pp. 9 - 11, 2008 Complaint) but, when counsel was told that the Plaintiff had been deployed to Afghanistan (R. App. 43, Transcript at p. 10), that action was not served. (R. App. 1, Order 1). After the Plaintiff's period of military service ended (R. App. 12, Amended Complaint), in 2012 counsel prepared and filed an amended summons and complaint that recounted the Plaintiff's military service and the applicable provision of the Servicemember's Civil Relief Act as to timing of the filing. R. App. 12, Amended Complaint ¶¶ 2 - 4. The amended pleading was filed and served, and an affidavit of service for the amended complaint was filed with the court. R. App. pp. 15 and 25, Affidavits of service.

The defendant moved to dismiss contending that it was not properly served with the 2008 pleading, that a motion was necessary before the 2008 complaint could be served, and that the case should be dismissed in its entirety. R. App. pp. 16 to 17.

By order of November 1, 2012, the trial court dismissed the action finding that the 2008 complaint had not been served within 120 days of filing (R. App. 2, Order at 2), which is undisputed, but the trial court ruled “the Plaintiff is estopped” from filing an Amended Complaint (R. App. p. 3, Order at 3), “because, at the time Plaintiff sought to file and serve his purported Amended Complaint there was no action to amend.” (R. App. p. 3, Order at 3). Applying time limits from state law and procedure, the trial court then dismissed the action, with prejudice, which also prevented the servicemember from simply re-filing the complaint in 2012. R. App. p. 3, Order at 3.

This appeal followed by Notice of November 23, 2012.

Argument

The trial court erred when it dismissed this action under state law time limits without applying the Servicemembers Civil Relief Act?

The Servicemember’s Civil Relief Act (SCRA) “is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation.” *Boone v. Lightner*, 319 U.S. 561, 575, 63 S.Ct. 1223, 1231 (1943).

The trial court’s ruling was unduly harsh to the servicemember, and an abuse of discretion, because it failed to apply in any way the SCRA, let alone apply it liberally to protect the servicemember. Under 50 App. U.S.C. §§ 512(a)(2) and 512(b), the Servicemember’s Civil Relief Act applies each state’s judicial proceedings “commenced in any court or agency in any

jurisdiction.” 50 App. U.S.C. § 512(b). Under 50 App. U.S.C. § 526, “the period of a servicemember’s military service may not be included in computing *any* period limited by law, regulation, or order” for bringing an action. Emphasis added.

Obviously, the action by the SCRA to suspend state law time limits necessarily includes the time provisions under SCRCP 3. Even more fundamentally, the 120 day limitation period for service of a complaint under SCRCP 3(a)(2) applies only if the complaint has been served outside of the statute of limitations. Compare SCRCP 3(a)(2) with SCRCP 3(a)(1). No argument was even made that the Plaintiff was out of time to file. (R. App. p. 45, Transcript at 12, “this is not a statute-of-limitations argument.”) Thus the trial court erred even in applying SCRCP 3.

On the face of the amended complaint (R. App. 12 to 14),¹ when the trial court dismissed the action with prejudice the servicemember was not even out of time to bring his complaint under S.C. Code § 15-3-555. Had the trial court not improperly applied state time limits and dismissed the action with prejudice, a complaint could have been newly filed in 2012.²

More fundamentally, under the SCRA state law time limits cannot be applied to terminate the servicemember’s right to bring his action. Despite the SCRA, and despite efforts to call the

¹ R. App. p. 12, Amended Complaint at ¶¶ 3 and 4. The Plaintiff was born in February, 1986 (R. App. 12, ¶ 3), and acts of abuse occurred after August 31, 2001 (R. App. 12 ¶4), so under S.C. Code § 15-3-555, the servicemember had until his 27th birthday in February, 2013, to bring his complaint. He could readily have done so but for the trial court dismissing the action with prejudice. R. App. 3. His military service began four days after his 17th birthday in February, 2003, and ended in August, 2011 (R. App. 66), none of which time under the SCRA can be counted against his time to file.

² The defendant appeared, but contended that no summons was served with the amended complaint, which at the hearing was news to plaintiff’s counsel. R. App. 48, Transcript at 15. Absent the trial court’s unduly harsh treatment for the servicemember, dismissing the action with

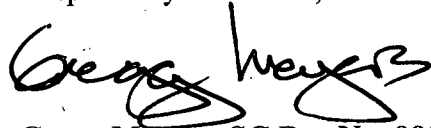
Court's attention to the federal statute (e.g., R. App. 43, Transcript at 10: "his time to perfect that service extends under the federal statute"), the Court applied the 120 day limit of SCRCP 3 and dismissed the action, R. App. 3, Order at 3, then committed a second violation of the SCRA by applying SCRCP 15 to "estop" the servicemember from amending his pleading, *Id.*, and a third violation by applying time limits to dismiss his case with prejudice, *Id.*, preventing a new filing as of 2012.

The trial court erred in dismissing the action with prejudice, necessitating this appeal to restore the action.

Conclusion

The trial court erred and this action should be reinstated and remanded for additional proceedings.

Respectfully submitted,



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prejudice, this claimed omission could have been readily rectified by a 2012 filing.

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Final Brief of Appellant

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Done December 23, 2013



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