

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

ORIGINAL

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No.: 2013-002138

Thomas Free.....Appellant,

v.

Natena Buff.....Respondent.

BRIEF OF APPELLANT

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

1. Did the lower court err in concluding the Defendant was not personally served pursuant to S.C. Code Section 15-9-370?
2. Did the lower court err in concluding the Defendant was not served on March 26, 2013, the date of service of the Summons and Complaint to the Director of the South Carolina Department of Motor Vehicles?
3. Did the lower court err in concluding service of Defendant through the Director of the South Carolina Department of Motor Vehicles on March 26, 2013, did not toll the applicable statute of limitations?
4. Did the lower court err in finding proof of service of the Summons and Complaint was not filed with the Clerk of Court?
5. Did the lower court err in dismissing the action pursuant to S.C. Rule 12(b)(2)?
6. Did the lower court err in dismissing the action pursuant to S.C. Rule 12(b)(5)?
7. Did the lower court err in concluding the statute of limitations was not tolled when the Defendant moved out of state?
8. Did the lower court err in dismissing the action pursuant to S.C. Rule 5(d)?

STATEMENT OF THE CASE

This personal injury action arising out of an automobile accident was filed by the Plaintiff on November 27, 2012. Plaintiff alleged he was the passenger in an automobile driven by the Defendant which ran off the road in Columbia, South Carolina, on December 1, 2009. By Answer dated May 20, 2013, Defendant denied she was responsible or liable for any injuries Plaintiff received as a result of the accident. Thereafter, Defendant filed a Motion to Dismiss dated May 29, 2013. Defendant contended the Complaint should be dismissed because the Defendant had not been properly served. Defendant further alleged the Defendant had not been served within the applicable statute of limitations.

Defendant's Motion to Dismiss was granted by the lower court's Order of Dismissal filed August 29, 2013. The lower court concluded the Defendant, who moved out of South Carolina a few months after the accident, was not properly served despite Plaintiff's compliance with S.C. Code Section 15-9-370 and delivery of the Summons and Complaint to the Director of the South Carolina Department of Motor Vehicles. Plaintiff received a copy of the Order on September 6, 2013, and Notice of Appeal was filed on October 2, 2013. Plaintiff/Appellant respectfully submits the lower court erred in concluding the Defendant was entitled to dismissal of the action.

STATEMENT OF FACTS

Appellant filed this action against the Respondent arising out of an automobile accident which occurred on December 1, 2009. Although Defendant was a resident of South Carolina at the time of the accident, she moved to North Carolina in approximately April of 2010, and remained a resident of North Carolina from that time. (p. 20). She moved to different residences at least three times while in North Carolina. Although she kept in touch with the Appellant, her Affidavit does not state at all times Appellant was aware of her actual residence addresses.

On March 26, 2013, service was made upon the Respondent by delivery of the Summons and Complaint to the Director of the South Carolina Department of Motor Vehicles as the statutory agent for the Respondent pursuant to S.C. Code Section 15-9-370. The Summons and Complaint were filed before the expiration of the three year statute of limitations for personal injury suffered in a motor vehicle accident and service was made upon the Director of the Department of Motor Vehicles on March 26, 2013, which was less than 120 days after the filing of the Summons and Complaint.

Kristy Corley, an Administrative Specialist of the SC Department of Motor Vehicles, completed an affidavit showing the Summons and Complaint in this action were received at the Department of Motor Vehicles on March 26, 2013. Thereafter on April 9, 2013, a copy of the Summons and Complaint were sent to the Respondent by certified mail. The mailed Summons and Complaint were returned to the Department of Motor Vehicles unclaimed. Thereafter a copy of the Summons and Complaint was mailed to the Respondent by open mail. (p.26).

The Defendant filed an Answer dated May 20, 2013. Thereafter the Respondent filed a Motion to Dismiss asserting the Respondent had not been properly served and the applicable three year statute of limitations had expired. Respondent's Motion to Dismiss was heard on August 13, 2013. At the hearing the lower court was provided a copy of the Affidavit of Kristy Corley showing service upon the Director of the Department of Motor Vehicles on March 26, 2013. Corley's Affidavit also showed the Department of Motor Vehicles forwarded copies of the Summons and Complaint to Respondent initially by certified mail, and subsequently by open mail. (Transcript of Hearing, p.41). Counsel for Appellant was allowed to file a memorandum after the hearing and thereafter counsel's Memorandum and the aforementioned Affidavit of Kristy Corley were filed with the Clerk of Court on August 19, 2013.

Despite the showing by the Appellant/Plaintiff of service upon the Director of the Department of Motor Vehicles on March 26, 2013, the lower court ruled the Respondent/Defendant had not been served, the statute of limitations had run, and granted the Motion to Dismiss. Appellant respectfully submits the lower court erred in dismissing the action.

ARGUMENT I

IN DISMISSING THE ACTION THE LOWER COURT ERRED IN CONCLUDING SERVICE OF THE SUMMONS AND COMPLAINT ON THE DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES WAS NOT EFFECTIVE SERVICE TO TOLL THE STATUTE OF LIMITATIONS. (ISSUES 1, 2, 3, 4, 5 AND 6)

The automobile accident which is the subject of this appeal occurred on December 1, 2009. Thereafter, the Respondent moved to North Carolina in April of 2010, and remained in North Carolina. According to her affidavit she changed residences three times after moving to North Carolina. There is no argument the applicable statute of limitations for an automobile accident is three years. S.C. Code Section 15-3-20. The Summons and Complaint were filed within the applicable statute of limitations on November 27, 2012. (Summons and Complaint, dated November 1, 2012, p.6). The Summons and Complaint were then served on the Director of the South Carolina Department of Motor Vehicles on March 26, 2013. Service upon the Director was made within 120 days of the filing of the Summons and Complaint.

Appellant served the Director of the Department of Motor Vehicles as the statutory agent of the Respondent as she was a resident driver who subsequently became a non-resident as referred to in S.C. Code Section 15-9-370. After service upon the Director, as shown by the Affidavit of Kristy Corley, (Affidavit, p.26), the Department of Motor Vehicles complied with all requirements of Section 15-9-370. The Summons and Complaint were forwarded to the Respondent by certified mail; but the certified mail was returned to the Department marked "unclaimed". Thereafter the Department complied with S.C. Code Section 15-9-380 which specifies that upon the return of the certified

mailing to the Department, the Department shall forward a copy of the process by regular mail.

In her affidavit Respondent admits she was a resident of South Carolina at the time of the automobile accident but moved to North Carolina approximately four months later in April of 2010. Despite being furnished uncontroverted evidence of service of the Summons and Complaint on the Director of the Department of Motor Vehicles, the lower court determined the Respondent was not properly served and the three year statute of limitations had run. Appellant respectfully submits the lower court was in error in arriving at this conclusion.

The evidence shows the Appellant timely served the Summons and Complaint in this action on the Director as the statutory agent for the non-resident Respondent. Subsequently, the Department of Motor Vehicles complied with the requirements of S.C. Code 15-9-370 and 15-9-380. The South Carolina Supreme Court has previously held service of a Summons and Complaint on a statutory agent for a non-resident tolls the statute of limitations upon delivery to the statutory agent. In Holman v. Warwick Furnace Company, 318 S.C. 201, 456 SE 2d 894 (1995), the Court reviewed the effect of service of process on the S.C. Secretary of State for an unregistered foreign corporation pursuant to S.C. Code Section 15-9-245. In Holman, supra, the Supreme Court unequivocally stated the statute of limitations was tolled upon the delivery of the summons and complaint to the Secretary of State.

Appellant respectfully submits the holding of the Holman Court is controlling in the current action. Just like the current statute for service the statute in Holman required additional steps to be taken by the State agency after receipt of the service of process.

Despite the requirement of additional steps to be taken by the State agency after service of the summons and complaint upon the head of the agency, the Court unequivocally ruled service was effective and the running of the statute of limitations was tolled upon delivery of the process to the agency.

The current automobile accident occurred on December 1, 2009. The Summons and Complaint were filed on November 27, 2012, within the applicable three year statute of limitations. Thereafter service upon the Director of the Department of Motor Vehicles was completed before the expiration of 120 days as specified in S.C. Rule of Civil Procedure Rule 3(a). Appellant respectfully submits the lower court was in error in concluding service of process was not effected prior to the expiration of the applicable statute of limitations. Therefore, the decision of the lower court should be reversed.

ARGUMENT II

THE LOWER COURT ERRED IN CONCLUDING THE STATUTE OF LIMITATIONS WAS NOT TOLLED PURSUANT TO S.C. CODE SECTION 15-3-30 WHEN THE DEFENDANT MOVED TO NORTH CAROLINA. (ISSUE 7)

S.C. Code Section 15-3-30 provides for the tolling of the statute of limitations when an action accrues against any person and that person subsequently departs the State of South Carolina and remains absent for the space of one year or more. The tolling provisions do not apply, however, when a defendant who is out of state is amenable to personal service and the defendant's location are known to the plaintiff. Tiralango v. Balfry, 335 S.C. 359, 517 SE 2d 430(1999). Section 15-3-30 does toll the statute of

limitations, however, when a plaintiff does not know the location of the out of state Defendant. Rafsanjoni v. Doe, 348 S.C. 251 559 SE 2d 841 (2002).

The Affidavit of the Respondent submitted in support of her Motion to Dismiss, shows the Respondent moved to North Carolina a few months after the accident, and had three different residence addresses from the time she moved to North Carolina until she received notice of the current action. She moved to her last residence, the residence address which was provided to the Department of Motor Vehicles, in February of 2012, and alleges Appellant visited her shortly after she moved to that location. The Affidavit of Respondent, however, does not provide any clarification as to whether or not the Appellant knew her specific residence addresses prior to February of 2012.

Without clear evidence from the Respondent showing the Appellant was aware of her address prior to February of 2012, Appellant respectfully submits the statute of limitations was tolled from April of 2010 through January of 2012, a period of approximately 22 months. Under the Rafsanjoni rational the statute of limitations should have been tolled for that period of 22 months. Under those circumstances the statute of limitations would not have run at the time of the hearing in August 2013. For these reasons it is respectfully submitted the lower court erred in determining the statute of limitations had run prior to the service of the Summons and Complaint.

ARGUMENT III

THE LOWER COURT ERRED IN DETERMINING THE ACTION SHOULD BE DISMISSED BECAUSE PROOF OF SERVICE WAS NOT FILED WITH THE CLERK OF COURT WITHIN TEN DAYS PURSUANT TO RULE 5(D) OF THE S.C. RULES OF CIVIL PROCEDURE. (ISSUE 8)

During the hearing of the Motion to Dismiss the lower court was provided with the Affidavit of Kristy Corley, showing the service of the Summons and Complaint upon the Director of the South Carolina Department of Motor Vehicles. (Transcript of Hearing, p:11). Thereafter, Corley's Affidavit showing proof of service upon the Respondent was filed on August 19, 2013. The lower court was further advised of the filing of the Affidavit in the Memorandum of Plaintiff which the lower court allowed subsequent to the hearing.

Appellant respectfully submits failure to file proof of service pursuant to Rule 5(d) is insufficient grounds to dismiss the action. The Court of Appeals held in Beckham v. Durant, 300 S.C. 329, 387 SE 2d 701 (Ct.App. 1989), failure to file proof of service pursuant to Rule 5(d) of the Rules of Civil Procedure had no effect upon the sufficiency of service of process even in a situation in which entry of default had been entered. Although proof of service was not timely filed pursuant to Rule 5(d) that Defendant's motion for relief from default was denied. Appellant respectfully submits failure to comply with Rule 5(d) in the current action is insufficient to dismiss the action when Appellant provided proof of compliance with all requirements for service upon the Director of Department of Motor Vehicles as the statutory agent for the Respondent.

CONCLUSION

At the hearing of the Respondent's Motion to Dismiss, the lower court was furnished with evidence the defendant was properly served through the Department of Motor Vehicles. The Affidavit furnished by the Department provided evidence the Department of Motor Vehicles complied with all statutory mailing requirements subsequent to receipt of the Summons and Complaint. The lower court was in error in concluding the Respondent had not been properly served. The lower court was further in error in concluding Respondent was not served within the applicable statute of limitations. Finally, the lower court was in error in concluding the action should be dismissed for failure to file proof of service. For all of these reasons the decision of the lower court should be reversed and the action remanded for trial.

Respectfully submitted,

March 10, 2014
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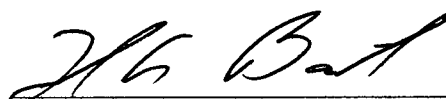
v.

Natena Buff.....Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that the **BRIEF OF APPELLANT** dated March 10, 2014, and filed on March 12, 2014, complies with Rule 211(b) of the South Carolina Appellate Court rules.

Respectfully submitted,



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