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THE STATE OF SOUTH CAROLINA
In The Supreme Court

S.C. SUPREME COURT

Appeal from Charleston County
The Honorable Richard M. Gergel

Civil Action Number: 2:18-cv-1571-RMG
Appellate Case Number: 2019-000552

Johnny Thomerson, Plaintiff,

vs.

Richard DeVito and Samuel Mullinax, both individually
and as Liquidating Shareholder Trustees of Lenco
Marine, Defendants.

**BRIEF OF PLAINTIFF JOHNNY THOMERSON ON QUESTION CERTIFIED TO THE
COURT BY US DISTRICT COURT JUDGE GERGEL**

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STATEMENT OF THE ISSUE

The question certified to this Supreme Court of South Carolina by the United States District Court for the District of South Carolina is:

Does the three-year statute of limitations of S.C. Code Ann. § 15-3-350 apply to claims for promissory estoppel?

STATEMENT OF THE CASE

Factual Background:

Johnny Thomerson worked for Defendants at Lenco Marine as National Sales Manager for 10 years from 2007-2016. Defendants DeVito and Mullinax (through their company Lenco Marine) hired Johnny Thomerson and another individual (Brian Robinson) with the understanding based on specific discussions that they would be compensated in 4 ways: salary, expenses, bonus/commission, and equity ownership position in the company. DeVito promised that the specifics of the bonus/commission program as well as the equity position would be worked out after employment commenced.

DeVito later clarified that the equity ownership was to come from the Company's reacquisition of a third owner's 15% stock, which DeVito stated to Thomerson and Robinson would be divided 5 ways and distributed 3% each to Thomerson, Robinson, and 3 other individuals.

When approached several times by Thomerson and/or Robinson about the timing for delivery of their respective 3% equity positions, DeVito offered excuses about not being able to discuss the matter at the moment, but DeVito never once denied his promise of the 3% equity position.

On one occasion DeVito told Thomerson that because of a lawsuit against the Company by a competitor Bennett Marine (the "Bennett litigation"), he could not provide the 3% at that time because of the possibility that Thomerson would be liable in the event Bennett Marine won its lawsuit. (Unknown to Thomerson, this was a misrepresentation by DeVito because mere stock ownership by Thomerson would not result in his personal liability, especially when the lawsuit had already been commenced before Thomerson received his promised 3%, indeed before he was ever employed.)

Around 2009, because of the recession, the boat business like most other experienced a downturn and at DeVito's request, Thomerson agreed to a \$50,000 pay cut in the salary portion of his compensation (nearly a 1/3 cut). Thomerson agreed because he was told "that they would give it back to me at some point in time" (i.e. by the 3% equity when the Bennett Marine litigation concluded) and because "it was important for my future for the company to survive." (Thomerson Dep p45).

On another occasion when Thomerson and Robinson were grilling steaks with DeVito in his backyard, they asked when they could expect DeVito to follow through on their 3% equity promises. On this occasion, once again DeVito did not deny having made the promise, but instead said nothing, got up from the table, left them and walked into the house saying nothing.

Shortly after this occasion, Brian Robinson resigned from the Company and left to form his own business. Thomerson, however, still believing that the Company would do what was right, and that when DeVito thought the time was right, he would keep his word and give Thomerson the 3% equity position that he had promised, especially since he had never denied making that promise when the subject arose.

Knowing that he had been promised an equity position from the outset, that it had thereafter been specified to be a 3% equity, that DeVito had never once denied making the 3% promise and had even expressed concern for Thomerson's best interests in telling him that the timing of the equity interest should be delayed until after resolution of the Bennett Marine lawsuit, Thomerson relied on the Company's keeping DeVito's word, and remained employed with the Company as its National Sales Manager, and built its business up significantly, increasing its customer base, its sales, and revenues.

After the Bennett Marine lawsuit was resolved in favor of Defendants and this was announced at a trade show one evening, Thomerson again asked DeVito when he would be given the 3% stock, but DeVito again did not want to talk about it at the trade show. "Either he didn't want to talk about it or we'd talk about it later. Those were always words. He never said, no." (Dep 91-92).

Toward the last months of 2016, Defendants began negotiations to sell the Company to Power Products. In approximately December 2016, shortly before that sale was due to be closed, Thomerson called DeVito on the phone and asked "Ritchie, do you still intend to fulfill your promise to me of my 3%?" DeVito said "No, I am not. He didn't say, I have no idea what you are talking about. He said, no, I am not. That was the last conversation I had with him...." (Dep 84).

This conversation was the first time DeVito had ever told Thomerson they were not going to keep their promise to provide him with the equity which they discussed as a part of his hiring. Before that, they had confirmed that the amount of the equity ownership was to be 3%, they had told Thomerson that delivery of the 3% should be delayed in his best interest during the Bennett Marine lawsuit, and DeVito had never denied making the specific promise of the 3% equity to either Thomerson or Robinson. (Thomerson Afdvt ¶ 12).

DeVito is even reported by third party witness Tom Broy, President of Independent Boat Builders Inc. (IBBI), to have said in discussions with Defendant DeVito “on or about the times that Lenco was in discussions to sell the company” DeVito “made statements to me that Johnny Thomerson was one of the ‘owners’ – maybe not on paper yet *** but that whenever there was a sale Johnny would be taken care of as an owner. Ritchie DeVito made statements to that effect to me, not just one time, but on several occasions. Around the time of the Lenco sale to Power Products [i.e. late 2016], I spoke with DeVito about whether Johnny was sharing in the sale. And DeVito assured me to the effect that: oh yes, Johnny was being taken care of.”

Up until the time of the sale, Defendants had full power to keep their promise and provide Thomerson with the promised 3% equity. However, Defendants never kept their promise and sold the Company to Power Products without ever providing Thomerson the promised 3% equity interest.

Procedural Posture:

Johnny Thomerson filed a Complaint in the Charleston County Court of Common Pleas on April 19, 2018, which Defendants removed to Federal Court. Thomerson’s Complaint included, *inter alia*, Counts for Breach of Contract and Promissory Estoppel. Upon Defendants’ Motion for Summary Judgment, the

District Court granted Summary Judgment against the Breach of Contract claim stating “Under South Carolina law, the statute[] of limitations for Plaintiff’s claims for breach of contract ... are three years.” Having determined that when “the Bennett litigation ended in September 2013 and, at that point, Plaintiff knew or should have known that a cause of action existed for the failure to provide the allegedly promised three percent ownership share,” the District Court found the Breach of Contract claim to be time barred.¹

As to the claim of Promissory Estoppel, however, Thomerson raised *Dixon v. Dixon*, 362 SC 388 at 400, 608 S.E.2d 849, 855 (S.C. 2005) for the proposition that “This Court has held that the statute of limitations does not apply to actions in equity.” As this Court stated in *Dixon*: “the Court’s power to do equity transcends the limitations of the statute of limitations.” *Id* 362 SC at 400, *citing* two decisions in *Anderson v Purvis* 211 SC 255, 44 SE2d 611 (1947) and 220 SC 259, 67 SE2d 80 (1951). Indeed the certifying Court stated in its Order of April 2, 2019, p7: “Plaintiff

¹ Plaintiff’s position (preserved for appeal) is that the first time Defendants breached the contract was in December 2016 when Defendant DeVito for the first time, stated he did not intend to fulfill the 3% promise – in which case the April 2018 Complaint’s Count claiming Breach of Contract would be timely even under the three year limitation applicable to Breach of Contract. Prior to the December 2016 statement that the promise would not be fulfilled, Defendant had at best avoided either confirming or repudiating the promise, and at worst had led Defendant on.

is correct that, generally, South Carolina law holds that ‘the statute of limitations does not apply to actions in equity.’”

ARGUMENT AND AUTHORITIES

1. South Carolina law is clear that statutes of limitations do not apply to equitable claims.

Dixon v. Dixon, 608 S.E.2d 849, 855 (S.C. 2005) is the most recent, i.e. controlling (and non-reversed or distinguished) statement of the law on the topic from the South Carolina Supreme Court, stating:

This Court has held that the statute of limitations does not apply to actions in equity. See *Anderson v. Purvis*, 211 S.C. 255, 44 S.E.2d 611 (1947); *Anderson v. Purvis*, 220 S.C. 259, 67 S.E.2d 80 (1951) (holding that the Court's power to do equity transcends the limitations of the statute of limitations).

Previously, in *Columbia Wholesale Co. v. PLC Scudder* 440 S.E.2d 129, 312, SC ,259, 261 (S.C. 1994), the South Carolina Supreme Court stated:

This Court has recognized quantum meruit as an equitable doctrine to allow recovery for unjust enrichment. See *Player v. Chandler*, 299 S.C. 101, 382 S.E.2d 891 (1989).

Thereafter, more recently, in *Bigford Enterprises Inc. v DC Development Inc*, Appellate No. 2014-001033 (July 1, 2015), the SC Court of Appeals confirmed *Dixon*, stating:

PER CURIAM: Reversed and remanded pursuant to Rule 220(b), SCACR, and the following authorities: *Dumas v. InfoSafe Corp.*, 320 S.C. 188, 192, 463 S.E.2d 641, 643 (Ct. App. 1995) ("An action to

pierce the corporate veil is one in equity."); *Dixon v. Dixon*, 362 S.C. 388, 400, 608 S.E.2d 849, 855 (2005) ("This [c]ourt has held that the statute of limitations does not apply to actions in equity.").

Likewise, in *Mazloom v Mazloom*, 675 SE2d 746, 751-752 (SC App 2009),

the Court again confirmed:

An action for corporate dissolution is an action in equity, as is an action for an accounting. *Keane v. Lowcountry Pediatrics, P.A.*, 372 S.C. 136, 142, 641 S.E.2d 53, 57 (Ct.App.2007); see *Lee v. Lee*, 251 S.C. 533, 535, 164 S.E.2d 308, 308-09 (1968)

II. Timeliness of the Actions

Finding Iraj owned a 25% interest in AMA, we must address the timeliness of this action. The brothers claim Iraj's actions for corporate dissolution and an accounting are barred as untimely by the equitable doctrine of laches. The brothers also argue the action for breach of fiduciary duty is untimely due to the statute of limitations. *We disagree that the equitable actions are untimely*, and we will address the timeliness of the legal action in a subsequent section.

This action involves both equitable and legal causes of action. *As stated earlier, actions seeking corporate dissolution or an accounting are both actions in equity*. *Keane*, 372 S.C. at 142, 641 S.E.2d at 57; see *Lee*, 251 S.C. at 535, 164 S.E.2d at 308-09 (holding an action for an accounting is equitable). *[The South Carolina Supreme Court] has held that the statute of limitations does not apply to actions in equity.* *Dixon v. Dixon*, 362 S.C. 388, 400, 608 S.E.2d 849, 855.

Thus, South Carolina law (1947, 1951, 1994, 2005, 2009, 2015) is clear that statutes of limitations do not apply to equitable claims such as presented by Plaintiff Thomerson's Complaint.

2. Defendants' authorities, and specifically their only cited South Carolina case, are non-controlling and do not consider South Carolina Supreme Court law.

Contrary to the South Carolina Supreme Court's ruling that "*This Court has held that the statute of limitations does not apply to actions in equity,*" Defendants cite to the Federal case of *Crossroads Convenience LLC v First Cas. Ins. Grp.* 2017 US Lexis 43984 (DSC 2017), which case, however, is non-controlling and non-persuasive.

The *Crossroads* case completely fails to consider, or even to mention, the above cited South Carolina Supreme Court decisions of *Anderson*, *Dixon* or *Scudder*, or the Court of Appeals decisions of *Bigford* or *Mazloom*. By such failure to consider controlling South Carolina Supreme Court cases on the issue, *Crossroads* must be viewed as neither controlling nor persuasive authority.

To the contrary, the *Crossroads* decision relies upon two other federal court decisions and a single South Carolina Court of Appeals decision, all of which likewise fail to mention the South Carolina Supreme Court's *Dixon* decision. Neither (1) *Wells Fargo Bank v. Carter*, No. 9:14-127-SB, 2014 WL 11034776, at *2 (D.S.C. July 22, 2014), nor (2) *Magwood v. Heritage Tr. Fed. Credit Union*, No. 2:09-2751-DCN-BM, 2010 WL 4604661, at *4 (D.S.C. June 4, 2010), nor (3) *Graham v Welch*, 404 SC 235, 743 SE2d 860 (SCApp 2013) mention the South Carolina authorities of *Dixon*, *Scudder*, *Bigford*, or *Mazloom*.

In *Wells Fargo Bank v. Carter*, the Court notes that the Complaint there *did not even allege* unjust enrichment facts, but pled *only* an express contract – so that any decision regarding the applicability of statutes of limitations to equitable claims in that case would at best be *dicta* not even on point.

In *Magwood*, the Court likewise made no mention of South Carolina’s distinction between legal and equitable claims, or of the controlling South Carolina authorities cited by Plaintiff, no doubt because the *pro se* plaintiff in *Magwood* did not apprise the Court of the controlling authorities.

Likewise in the South Carolina Court of Appeals decision in *Graham v Welch*, as well as in the Summary Judgment Order appealed from in *that* case and in the briefing of the parties filed in *that* case, there is no mention of South Carolina’s distinction between legal and equitable claims, or of the controlling South Carolina authorities of *Anderson, Dixon, Scudder, Bigford, or Mazloom*. In fact, in the *Graham v Welch* decision and the record on appeal, there is no issue argued or briefed by the parties, and no issue considered or analyzed by the Court, as to whether the three year limitations period should be applicable to the equitable claim of “unjust enrichment” or any other equitable claim. Once again, as in *Magwood*, although the equitable claim of unjust enrichment was included in the complaint, there appears to have been absolutely no attempt by any party to bring to the Court’s

attention the general rule in South Carolina as stated in *Dixon v. Dixon*, 608 S.E.2d 849, 855 (S.C. 2005) that “*This Court has held that the statute of limitations does not apply to actions in equity.*”

Clearly, Defendants’ argument and authorities are incorrect and should not be followed by the Court. Indeed, the doctrine of *stare decisis* as analyzed by this Court does not require blind adherence to each and every prior opinion on a particular point of law. Quoting from the 1943 the unanimous opinion in the case of *Coleman v. Page's Estate*, 202 S.C. 486, 25 S.E.2d 559, Justin Bussey, dissenting, wrote:

Where conflicting decisions appear to have been made by inadvertence or otherwise, and the position of the Court is thereby rendered uncertain, the rule of *stare decisis* does not necessarily apply. In such event, it has been held that it is the duty of the Court to follow the decision which it conceives is based upon the sounder reasoning....

Smith v Daniel Construction Co., 253 SC 248, 771, 169 SE2d 767 (1969).

Respectfully, Plaintiff Thomerson submits that the *only* South Carolina Court authority relied upon by Defendants, i.e. *Graham v Welch*, as well as the Federal Court decisions in *Wells Fargo* and *Magwood* are just that: “*decisions appear[ing] to have been made by inadvertence or otherwise.*”

Justine Bussey continued:

A decision which is to overrule all former precedents and to establish a principle never before recognized should either contain some internal evidence that the prevailing law is to be overthrown, or else be founded

upon reasoning far stronger than that comprehended in the previous decisions which by implication it would set aside. *Id.*

Here, when there is absolutely no explication of why the three year limitation should be applied to the equitable doctrine of unjust enrichment in the opinions relied upon by Defendants, there is no rationale for applying *Graham v Welch*, *Wells Fargo*, or *Magwood* to the equitable promissory estoppel claim in this case, especially when those decisions do not even mention controlling South Carolina authorities of *Anderson (1947, 1951)*, *Scudder(1994)*, *Dixon (2005)*, *Mazloom (2009)*, or *Bigford (2015)*.

More recently in *McLeod v Starnes* 396 SC 647, 723 SE2d 198 (2012), the Supreme Court explained that “*stare decisis* is far more a respect for a body of decisions as opposed to a single case standing alone.” The principle that statutes of limitations do not apply to equitable claims such as promissory estoppel is based on just such a “body of decisions” going back more than 70 years to *Anderson v. Purvis*, 211 S.C. 255, 44 S.E.2d 611 (1947) and most recently reaffirmed in *Bigford Enterprises Inc. v DC Development Inc*, Appellate No. 2014-001033 (SC App. July 1, 2015), stating once again that “*This Court has held that the statute of limitations does not apply to actions in equity.*”

The rationale for this rule of South Carolina law is unassailable: that is, the Court's power to do equity transcends the limitations of the statute of limitations. *Anderson v. Purvis*, 220 S.C. 259, 67 S.E.2d 80 (1951). This principle remains as true today as it was then, and should not be second guessed.

Finally, because at the time Plaintiff Thomerson filed his Complaint against Defendants on April 19, 2018, there was *no* legal authority, either case law or statute, saying that the three year statute of limitations applied to equitable claims of promissory estoppel, it would be wrong and wholly inequitable to *now* determine that Thomerson's promissory estoppel claim was barred by that statute of limitations despite decades of case authorities holding that "*the statute of limitations does not apply to actions in equity.*"

Conclusion

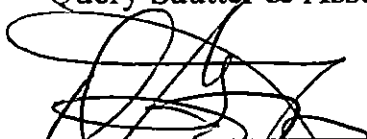
For all the foregoing reasons, Plaintiff Johnny Thomerson respectfully requests the Court to determine:

- 1) that the three year statute of limitations does not apply to Thomerson's claim of promissory estoppel, and further
- 2) that to the extent that *Graham v Welch* may be read to contravene the rule of *Anderson (1947, 1951)*, *Scudder(1994)*, *Dixon (2005)*, *Mazloom (2009)*, or *Bigford (2015)* that "*This Court has held that the statute of limitations*

does not apply to actions in equity,” then *Graham v Welch* should be either overruled or limited to being the law of *that* case.

Respectfully submitted,

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PROOF OF SERVICE

I, the undersigned, hereby certify that I served a copy of the foregoing document upon Mark W. McKnight and W. Scott Turnbull, attorneys for Defendants, by placing a copy of same in the United States mail with sufficient postage attached thereto and addressed as follows:

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Tracy O'Brien