THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

HONORABLE W. YOUNG, Circuit Court Judge

Case No. 2019-000148

Tymika Jones Alston and Harold Alston individually
And as Parents and Guardians on behalf of their minor child,
J.A., ... Appellants

v.

Donald Richard Torres d/b/a DMT Construction Co., Inc.,
L&L Electric, Inc. and Eduardo Moreno d/b/a E.S. Moreno
Construction, Defendants,
Of which Donald Richard Torres d/b/a DMT Construction Co.,
Is the Respondent ..... Respondent

FINAL BRIEF OF APPELLANTS

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2. WHETHER THE LOWER COURT ERRED BY FAILING TO FIND THAT RESPONDENT WAIVED THE RIGHT TO RAISE THE STATUTE OF LIMITATIONS DEFENSE.

3. WHETHER THE LOWER COURT ERRED BY FINDING THAT THE DOCTRINE OF LACHES PREVENTS THE RESPONDENT FROM ASSERTING THE STATUTE OF LIMITATIONS DEFENSE.

STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine issue of material fact and it is clear the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Koester v. Carolina Rental Ctr.,* 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994) *Hancock v. Mid-South Management Co., Inc.*, 673 S.E.2d 801, 381 S.C. 326 (S.C., 2009)

STATEMENT OF THE CASE

On June 24, 2010, Appellants' filed a Complaint against Willow Creek Construction, Inc and Oscar Torres. In the Complaint, Appellants' stated that they engaged Willow Creek Construction and Oscar Torres to construct their house with due care, in a workmanlike manner, and in accordance with the plans and specifications. (ROA: 25 Appellants' Summons and Complaint). Appellants' moved in the house on April 3, 2007, however, on April 5, 2007

Appellants' noticed that the bedroom wall was wet inside and out from the neighbor's sprinkler, and Appellants' contacted Willow Creek Construction regarding the problem. (ROA: 25Appellants' Summons and Complaint). Oscar Torres, of Willow Creek Construction, had the wall sanded and painted, however after a heavy rain, in July 2007, the master bedroom became soaked with water, both inside and outside, and they had to contact the builder again, who then, after he sanded the wall and repainted it, assured the Appellants' that everything was fine. (ROA: 25: Appellants' Summons and Complaint).

However, in the summer of 2007, Appellants' began experiencing medical problems to include: swollen eyes, eye infections, bronchitis, and allergies, and as a result, in November 2008, they sought a Mold Specialist to inspect the home. (ROA: 25 Appellants' Summons and Complaint). The Mold Specialist found, after the inspection had concluded, that mold was airborne throughout the house, and as a result of this inspection on February 27, 2009, Appellants' had the home inspected by Pinpoint Home and Commercial Inspections, which revealed that the bedroom window was not the correct window, it was a vinyl replacement window, and was dissimilar from all other windows in the home. (ROA: 25 Appellants' Summons and Complaint). Appellants' notified the builder, in writing, of the mold problem and the issue of the window not being the correct fit, the builder responded on March 29, 2009, and the window was replaced on April 16, 2009. Due to ongoing medical problems, Appellants' ordered another inspection, in August 2009, which found that there were numerous deficiencies, code violations, unsatisfactory work on the house, and interior areas of the home showing more than thirty (30%) percent moisture readings, and, as a result, the Inspector strongly suggested Appellants' move out of the house for health reasons. (ROA: 25 Appellants' Summons and Complaint). On September 1, 2009, Appellants' followed the Inspector's advice and moved out of the house (which has been vacant since that time). Appellants' then filed their Summons and Complaint on June 24, 2010.

On or about March 29, 2011 Willow Creek Construction, Inc. served its Third-Party Complaint to the Respondent, and served a copy to the Appellant, as shown in the Certificate of Service. (ROA: 35 Willow Creek Construction, Inc.'s Third Party Complaint). On or about June 24, 2011, Respondent served a copy of its Answer to Willow Creek Construction, Inc. and Appellants'. (ROA: 63 Answer to Third Party Complaint). Willow Creek Construction, Inc. Amended its Complaint and served it (to Respondent and Appellants') on or about June 29, 2011 (ROA 53), and Respondent Answered the Amended Complaint and served it, on or about, July 8, 2011 (ROA 63). (ROA: 53) Willow Creek Construction Inc.'s Amended Third Party Complaint) (ROA: 63 Respondent's Answer to Amended Third Party Complaint). Appellants' state that Respondent was an active participant in the lawsuit by doing the following:

(1) answering both Third Party Complaints,

(2) attending all Depositions conducted by Willow Creek Construction, Inc. and Appellants',

(3) serving Appellants' with Third Party Respondent's Requests for Production of Documents (ROA: 6 Respondent's Certificate of Service for the Respondent's Interrogatories Request to the Appellant),

(4) Executing Authorization for Release of Medical Records (ROA: 7 Respondent's Request for Appellant Harold Alston's Medical Records,

(5) Consenting to Order to Strike Case from the Docket Pursuant to Rule 40(J) SCRCP (ROA: 8 Consent Order to Strike Case from the Docket Pursuant to Rule 40(J) SCRCP), and

(6) Answering Appellants' Amended Complaint (ROA:9 Respondent's Answer to Amended Complaint).

Appellants' filed a Consent Order to Strike Case from the Docket Pursuant to Rule 40(J) on November 1, 2011, which Respondent consented to when he signed the document. (ROA: 4 Consent Order to Strike Case from the Docket Pursuant to Rule 40(J) SCRCP). On October 11, 2012 Appellants' filed a motion to Restore the Case to the active trial roster, and the Court ordered that the case be restored to the roster on the same day. (ROA: 150 Appellants' Motion to Restore

Case to Active Trial Roster) (ROA:8 Order to Restore Case to Active Trial Roster). Appellants', on May 22, 2014 filed a Motion for Leave to file an Amended Complaint adding parties. (ROA: 153 Appellants' Motion for Leave to File Amended Complaint Adding Parties). On August 11, 2014 Appellants' filed an Amended Complaint. (ROA: 84: Appellant's Amended Complaint). Appellants' state that the Amended Complaint is not a new Complaint because the Amended Complaint arose under the same facts and controversy as the original Complaint, and the Respondent was properly placed on notice of the lawsuit, when it was served with the Third Party Complaint, therefore Respondent has had, and in fact was, participating in discovery concerning this case. (ROA: 35 Willow Creek Construction, Inc.'s Third Party Complaint). Respondent answered the Amended Complaint and served it to the Appellants', on or about September 2, 2014. (ROA: 74 Respondent's Answer to Amended Complaint).

On January 2, 2015 Respondent filed a Motion for Summary Judgment upon which a hearing was held on March 8, 2015. (Ex. 105: Transcript of Record).

At the hearing the Court indicated that Respondent's Motion for Summary Judgment must be denied as it relates to the claims of the Appellant's minor child based upon the applicability of SC. Code Ann. Sec. 15-3-40 to such claims.

At the hearing, the parties were in agreement that Appellants Harold and Tymika Alston, knew or should have known, of potential claims against Respondent as of December 2008. Defense Counsel, during the hearing, submitted excerpts from Appellants Harold and Tymika Alston's Depositions which were taken during the course of July 2011 in support of his contentions that the Statute of Limitations against Appellant, as it pertains to Respondent, would have therefore expired in December 2011.

The Court declined to issue a ruling on Respondent's Motion for Summary Judgment as it relates to Harold and Tymika Alston's claims and, instead, directed counsel for both parties to

submit Supplemental Memorandums regarding the issue of whether Respondent waived the Statute of Limitations as a defense in this case with regard to such claims.

The parties' complied with this Order. On November 2, 2015, the Court entered an Order for Summary Judgment in favor of the Respondent dismissing the Appellant's claims. Appellant timely filed a Motion for Reconsideration. Subsequently, the court ordered a Motion to Stay the case pending the Court's ruling on this Motion. During the pendency, Judge Young left the bench or retired from the bench prior to ruling on the Motion for Reconsideration. This motion was ultimately ruled upon by Judge Jocelyn Newman on January 15, 2019 upholding the dismissal of Appellant's case on Summary Judgment. The instant appeal is a result of such dismissal.

ARGUMENTS

1. The lower court erred by dismissing Appellant's individual claims against Respondent Donald Torres as the Statute of Limitations was tolled by Respondent

Equitable estoppel occurs where a party is denied the right to plead or prove an otherwise important fact because of something which he has done or failed to do. *Lee v. Southern Railway Co.,* 228 S.C. 240, 89 S.E.2d 431 (1955); *see Janasik v. Fairway Oaks V,* 307 S.C. at 344. It may arise even though there was no intention by the party to relinquish or change any existing rights. *Janasik, supra.* The essential element of estoppel is prejudice to the party raising the defense. *Id.* As we noted in *Janasik,* "the distinction between waiver and estoppel is close, and sometimes the doctrines merge into each other with almost imperceptible gradations." *Id.* 307 S.C. at 344, 415 S.E.2d at 388.

Tolling' refers to suspending or stopping the running of a statute of limitations; it is analogous to a clock stopping, then restarting." 51 Am. Jur. 2d *Limitation of Actions* § 169 (2000). "Tolling may either temporarily suspend the running of the limitations period or delay the start of the limitations period." *Id.*

South Carolina law provides for tolling of the applicable limitations period by statute in certain circumstances. *See* S.C. Code Ann. § 15–3–30 (2005) (stating exceptions to the running of the statute of limitations when the defendant is out of the state); *id.* § 15–3–40 (providing exceptions for persons under a disability, including being underage or insane).

In addition to these statutory tolling mechanisms, however, "[i]n order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits, the doctrine of equitable tolling may be applied to toll the running of the statute of limitations." 54 C.J.S. *Limitations of Actions* § 115 (2005). "Equitable tolling is a nonstatutory tolling theory which suspends a limitations period." *Ocana v. Am. Furniture Co.,* 135 N.M. 539, 91 P.3d 58, 66 (2004).

Equitable tolling is judicially created; it stems from the judiciary's inherent power to formulate rules of procedure where justice demands it. *Rodriguez v. Superior Court,* 176 Cal.App.4th 1461, 98 Cal.Rptr.3d 728 (2009). "Where a statute sets a limitation period for action, courts have invoked the equitable tolling doctrine to suspend or extend the statutory period 'to ensure fundamental practicality and fairness." *Id.* at 736 (citation omitted).

The party claiming the statute of limitations should be tolled bears the burden of establishing sufficient facts to justify its use. *Ocana,* 91 P.3d at 65; *see also* 54 C.J.S. *Limitations of Actions* § 115 ("The party who seeks to invoke equitable tolling bears the devoir of persuasion and must, therefore, establish a compelling basis for awarding such relief."). *Hooper v. Ebenezer Sr. Services and Rehabilitation Center*, Supreme Court of South Carolina, December 14, 2009, 386 S.C. 108687 S.E.2d 29.

The Court addressed the issue of Equitable Tolling in the context of a construction defect case in *Magnolia North Property Owners' Association, Inc. v. Heritage Communities, Inc., e. al.*, 397 S.C. 348, 725 S.E.2d 112 (2012), holding that the trial court could equitably toll the three-year statute of limitations for association of property owners to bring claims against a vendor, general contractor, and the corporate parent of the vendor and general contractor.

Specifically, the Plaintiff's were property owners who brought suit due to construction defects caused by the defendants in the construction of the plaintiff's condominium complex. The court, relying on *Hooper*, found that equitable tolling of the statute of limitations was justified and "stems for the judiciary's inherent power to formulate rules of procedure where justice demands it." (id). As the property owners were unable to bring suit regarding the construction defects until assuming control of the Homeowner's Board from defendants, the Court was justified in tolling the statute of limitations to allow them to bring suit.

In the instant case, the Respondent's actions in failing to raise the statute of limitations as a defense, and participating fully in discovery for the course of a five-month period after the Complaint had been amended clearly is not behavior which should be rewarded through the technical dismissal of Plaintiff's case resulting in forfeiture.

The rules of justice necessitate that this case proceed on the merits as Respondent has participated in this case over the past four years. What is even more compelling is the fact that the Respondent has continued to participate in this case without asserting the Statute of Limitations through a Motion even subsequent to the Complaint being amended in August 2014 to name Respondent as a direct party.

Prior to Willow Creek being dismissed from the lawsuit, Respondent was subject to potential liability as it relates to the allegations in Appellant's Complaint. Respondent should not now be able to escape liability on the sole basis of Appellants having partially settled with Willow Creek.

Respondent's involvement in this case was undisputed and pervasive to include: (1) answering both Third Party Complaints, (2) attending all Depositions conducted by Willow Creek Construction, Inc. and Respondent, (3) serving Appellants with Third Party Requests for Production of Documents, (4) executing Authorization for Release of Medical Records, (5) consenting to Order to Strike Case from the Docket Pursuant to Rule 40(J) SCRCP and (6)

answering Appellants' Amended Complaint. **The Respondent is not prejudiced in this case as a result of Appellant's claims.** Despite being on direct notice of such claims since June 2011 when Respondent received both Appellant's Complaint and Willow Creek's Third-Party Complaint, Respondent has attempted to assert the statute of limitations for the sole purpose of avoiding a trial on the merits. The Court has the power to equitably toll the statute of limitations to prevent such injustice from occurring. This did not occur at the lower court despite the clear weight of law being on the side of the Appellant.

The interests of justice and equity clearly weigh in favor of the Appellant in this case as Respondent's actions have resulted in costs to Appellant. As is indicated, Respondent will suffer no prejudice from a trial on the merits as Defendant has had a full and fair opportunity to participate in discovery in this case over the past four years.

2. The lower court erred by failing to find that Respondent waived the right to raise the statute of limitations defense

The Appellants' state that because the Amended Complaint relates back to the original Complaint under Rule 15(c), Respondent should have argued the Statute of Limitations defense before the discovery process began. Instead, Respondent participated in all stages of the discovery process (to include requesting Interrogatories and Production of Documents from Appellants', participating in all depositions, attending mediation, attending the walk through of the Appellants'. house to inspect it, and further Respondent failed to object to the Appellants' Consent Order to Strike Case from the Docket Pursuant to Rule 40(J) SCRCP, filed on November 1, 2011, and Respondent failed to object when the Appellants' filed a Motion to Restore the Case to the Active Trial Roster, on October 11, 2012). The Appellants' contend that at any time, during the above-mentioned stages of the discovery process, Respondent could have asserted his right to the Statute of Limitations defense, and because he failed to do so, he waived his right to argue the Statute of Limitations defense.

"A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Generally, the party claiming waiver must show that the party against whom waiver is asserted possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they depended. The doctrine of waiver does not necessarily imply that the party asserting waiver has been misled to his prejudice or into an altered position." *Janasik v. Fairway Oaks Villas Horizontal Property Regime*, 415 S.E.2d 384, 387-388 (S.C. 1991).

Here, the Respondent clearly had both actual and constructive knowledge of his right to argue the Statute of Limitations, before the discovery stage, and the fact that Respondent failed to argue the defense of Statute of Limitations, within a reasonable time frame, shows a voluntary and intentional abandonment or relinquishment of his right to argue the Statute of Limitations. In the alternative, Appellants' filed on May 22, 2014, a Motion for Leave to file an Amended Complaint Adding parties, which placed the Respondent on notice that Appellants' were Amending their Complaint, however, the Respondent did not object to the motion, and he failed to argue the statute of limitations defense at that time (it took approximately eight months before Respondent filed his Motion for Summary Judgment). (ROA: 153 Appellants' Motion for Leave to File Amended Complaint Adding Parties). Further, Appellants' state that the Respondent was served with the Amended Complaint, on or about August 11, 2014, and even using the Amended Complaint date, Respondent still waived his right to assert the Statute of Limitations because of his lack of arguing the defense in a timely manner. The Respondent's decision to consent to strike the case from the docket under Rule 40(J), and his failure to object when the Appellants' filed a Motion to Restore the Case to the Active Trial Roster, on October 11, 2012, proves that the Respondent waived his right to argue the Statute of Limitations as a defense.

In *Anonymous Taxpayer v. Dept. of Revenue*, 661 S.E.2d 73, 80 (S.C. 2008), the Court stated that, "a party can waive a statute of limitations defense, but the waiver must be shown by words or conduct, including an express agreement, failure to claim the defense, or any action or

inaction inconsistent with an intention to use the statute of limitations defense." Here, the Respondent's actions, as mentioned above, are inconsistent with his intent to use the statute of limitations defense. Similar to the *Rwe Nukem Corporation v. Ensr Corporation*, 644 S.E.2d 730, 734 (S.C. 2007) case where the Appellant continued to comply with the Respondent's request, the Respondent, in this case, continued to comply with the Appellants' request, and sent requests out to the Appellants' to which the Appellants' responded. The Respondent, in this case, went further than the Appellant in the *Rwe Nukem Corporation* case by actively participating in the discovery process, attending the walk through of Appellants' house when it was inspected, and consenting to the Rule 40(J) motion, as well as answering the Appellants' Amended Complaint, which Appellants' received on or about September 2, 2014. "Waiver is a question of fact for the finder of fact." *City of North Myrtle v. Lewis-Davis*, 599 S.E.2d 462 (S.C.App.2004). The Appellants' have pled sufficient facts to argue that the Respondent's actions have been inconsistent with the intention to insist upon the statute of limitations. There is also a genuine issue as to whether or not the Respondent waived his right to argue the statute of limitations, and because waiver is a genuine issue of material fact, the lower court should have properly denied the Respondent's Motion for Summary Judgment as the case should be heard in front of a jury.

3. The lower court erred by finding that the doctrine of laches doesn't prevent the Respondent from asserting the statute of limitations defense.

Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights." *Rwe Nukem Corporation*, 644 S.E.2d 730, 734 (S.C.2007). "Laches connotes not only an undue lapse of time, but also negligence and opportunity to have acted sooner. The party seeking to establish laches must show (1) delay, (2) unreasonable delay, and (3) prejudice." Id.

Unreasonable delay is defined, in the Find/aw Legal Dictionary, as "beyond what can be accepted, and clearly inappropriate, excessive, or harmful in degree or kind."

Here, the Respondent's should have acted sooner in arguing its statute of limitations defense. As mentioned above, the Respondent has had ample opportunities to argue the defense of statute of limitations, but failed to do so. Instead, the Respondent delayed filing the Motion for Summary Judgment until January 2, 2015 when the following had occurred months and years beforehand:

1. Appellants' Original Complaint- filed on June 29, 2010
2. Respondent's were served with the Third Party Complaint- on or about March 29, 2011
3. Respondent's were served with Amended Third Party Complaint- on or about June 29, 2011
4. Respondent Answered the Amended Complaint- on or about July 8, 2011
5. Appellants' filed the Consent Order to Strike the Case from the Docket Pursuant to Rule 40(J)-November 1, 2011
6. Appellants' filed the motion to restore the case to the active trial roster- October 11, 2012
7. Appellants' Motion for Leave to File Amended Complaint Adding Parties- May 22, 2014
8. Appellants' filed the Amended Complaint-August 11, 2014
9. Respondent's served his Answer to the Amended Complaint-September 2, 2014

The Respondent may have argued the statute of limitations in its defense to the Answer to the Amended Complaint, however, as mentioned above, it waived the defense through its actions in actively participating in the discovery process (noting that the relation back theory carries the date the lawsuit was filed to the original Complaint and not the Amended Complaint), and in failing to make his argument in an earlier stage of the lawsuit, the Respondent should not be allowed to argue the defense, of statute of limitations, this late into the lawsuit.

The Respondent's delay in arguing the statute of limitations defense is unreasonable. The Appellants' state that the Respondent only asserted this defense after Willow Creek Construction, Inc. was dropped from the lawsuit, and but for Willow Creek Construction, Inc. being dropped from the lawsuit, the Respondent would not have filed a Summary Judgment motion. The Respondent has had, in his possession, the same knowledge and material he had during, and after the discovery phase, to include the dates when the original lawsuit, Third Party lawsuit, and the Amended Third-Party lawsuit were filed. The Respondent participated in all stages of discovery, attended depositions, a mediation, and a walk through of the Appellants' house, and at no time, did the Respondent find it necessary to bring up the defense of the statute of limitations.

The SCRCP, under Rule 15(a) states that, "a party may amend his pleading only by leave of court or by written consent of the adverse party, and leave shall be freely given when justice so requires and does not prejudice any other party." *Parker v. Spartanburg Sanitary Sewer Dist.*, 607 S.E.2d 711, 720 (S.C.App.2005). The Respondent had an opportunity to argue against the consent for removing the case from the roster under Rule 40(J) and he could have argued against having the case restored to the active trial roster, but he failed to make any objection. In fact, the Order to Restore the Case to Active Trial Roster states that, "all pleadings and discovery that have been filed, served, or taken up to the date of this Order shall have the same force and effect as under the previous action and that all parties WILL NOT be required to refile pleadings or discovery in this matter." The Respondent knew, that under Rule 40(J) the Appellants' would have the opportunity to place the case back on the active trial roster, and he failed to argue the statute of limitations defense. The Respondent had another opportunity to argue the defense after he was placed on notice that the order to place the case back on the active trial roster was granted. Yet, Respondent continued to participate in the discovery process of the case, until Willow Creek Construction Inc. was dropped from the lawsuit.

The fact that the Respondent waited until Willow Creek Construction Inc. was dropped from the lawsuit is unreasonable delay because it is beyond what can be accepted, inappropriate, excessive, and harmful to the Appellants' to a degree. Further, Appellants' filed the Amended Complaint on August 11·, 2014 and the Respondent did not file the Motion for Summary Judgment until January 2, 2015, approximately (5) five months after the Amended Complaint was filed with the Clerk of Court. Since that time, the Respondent filed an Answer to the Amended Complaint and served it on the Appellants', on or about September 2, 2014. Appellants' state that this time frame is also unreasonable and the Respondent's Motion for Summary Judgment should- be dismissed under the Doctrine of Laches.

Finally, the Appellants' would be prejudiced, under the Doctrine of Laches, if the Respondent were granted the Motion for Summary Judgment based on the statute of limitations, because Appellants' have engaged with the Respondent in the discovery process, they have incurred costs in preparation for trial, they hired expert witnesses to inspect the house in preparation for trial against the Respondent, and the Appellants' have incurred attorney's fees in having to respond to the Respondent's discovery requests. Appellants' state that allowing the Respondent to use the statute of limitations as a defense would be of a serious disadvantage to them based on the issues listed above and hereby indicates that the lower court erred by failing to dismiss the motion for Summary Judgment based on the Doctrine of Laches.

CONCLUSION

For the reasons stated, this Court should reverse the Order of the lower court dismissing Appellant's case on Summary Judgment and request that this ruling be overturned and the case restored to the active case roster.

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Respectfully Submitted,

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September 20, 2019