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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Appellate Case No.: 2020-001332

Henry Lee Bradley.....Appellant,

v.

South Carolina Department of Correction.....Respondent.

RESPONDENT'S FINAL BRIEF

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RULES

Rule 60, SCRCP5

STATEMENT OF ISSUE ON APPEAL

- I. THE TRIAL COURT CORRECTLY GRANTED RESPONDENT'S MOTION FOR SUMMARY JUDGMENT.

STATEMENT OF THE CASE

On May 18, 2015, Appellant Henry Lee Bradley (hereinafter “Inmate”) filed a Summons and Complaint against the South Carolina Department of Corrections and three of its correctional officers related to a stabbing that occurred on May 26, 2013. A Motion to Dismiss for failure to perfect service and lack of *in personum* jurisdiction was filed, which was granted without prejudice.

On May 26, 2013, Inmate filed the present underlying Summons and Complaint against Respondent (hereinafter “SCDC”) seeking to recover money damages for the same claim raised in the 2015 action relating to the 2013 stabbing.

On January 9, 2017, SCDC filed a Motion to Dismiss arguing the case was barred by the applicable statute of limitations. The motion was denied by Order filed April 6, 2017.

On March 14, 2018, SCDC filed a Motion for Summary Judgment, which was granted by Order filed July 10, 2019. Inmate filed a Rule 59, SCRPC, Motion to Amend on August 7, 2019, which was denied by Order filed August 22, 2019.

Inmate now appeals.

STANDARD OF REVIEW

The appellate court applies the same standard as the trial court when reviewing an order granting summary judgment. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). When there is no genuine issue of material fact such that the moving party must prevail as a matter of law, summary judgment is appropriate. *Id.*

STATEMENT OF FACTS

On May 26, 2013, Inmate was stabbed by a fellow inmate. Inmate filed a lawsuit on May 18, 2015, alleging gross negligence against SCDC and its employees for failing to protect him. [Supp. R. pp. 1-8]. The claim was brought under the S.C. Tort Claims Act. [*Id.*]. The Complaint was filed eight (8) days before the statute of limitations expired. The Complaint was delivered to SCDC but was never served on the Attorney General's Office as required by Rule 4, SCRPC. [Supp. R. pp. 9-15].

On December 7, 2015, SCDC filed and served a Motion to Dismiss and Memorandum in Support specifically pointing out the service error. Inmate admitted receiving the motion and memo and yet took no steps to correct the service error. On March 29, 2016, Judge Manning issued an Order dismissing the case as to SCDC for lack of proper service. The dismissal was without prejudice. [R. pp. 1-5].

On December 6, 2016, Inmate filed the present action against SCDC based upon the same facts alleged in the 2015 Complaint. [R. pp. 6-15]. SCDC moved to dismiss the case as it was time barred. [Supp. R. pp. 20-21]. The motion was denied. [R. p. 16].

On March 14, 2018, SCDC filed a Motion for Summary Judgment arguing equitable tolling did not apply and, therefore, the claim was time-barred. [R. pp. 17-18; Supp. R. pp. 22-26]. On July 10, 2019, the trial court granted the Motion for Summary Judgment. [R. pp. 23-28].

ARGUMENTS

I. THE TRIAL COURT PROPERLY GRANTED THE MOTION FOR SUMMARY JUDGMENT.

A. Inmate's gross negligence argument is not before the Court.

First, Inmate argues SCDC was negligent or grossly negligent in failing to protect him from harm. [Inmate Brief, p. 6]. Inmate asks this Court to issue a judgment against SCDC for monetary damages. [Inmate Brief, p. 6]. This issue is not before this Court.

The trial court denied without prejudice the argument that SCDC was entitled to judgment in its favor as a matter of law for failing to show any evidence of gross negligence. [R. pp. 23-28].

Accordingly, any review of this issue is not before the Court.

B. Inmate’s claim was not equitably tolled.

‘[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.’ . . .

‘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.’ . . .

The party claiming the statute of limitations should be tolled bears the burden of establishing sufficient facts to justify its use. . . .It has been observed that “[e]quitable tolling typically applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control.”

Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr., 386 S.C. 108, 115–16, 687 S.E.2d 29, 32–33 (2009) (internal citations omitted).

Inmate’s response to SCDC’s Motion for Summary Judgment presented no argument as to why the statute of limitations should be equitably tolled, nor does he present any argument in his appeal as to equitable tolling. [Inmate Brief, pp. 8-10; Response in Opposition, p. 2]. Accordingly, Inmate failed to carry his burden of proof to establish his claim was equitably tolled and he has abandoned any argument that the trial

judge erred in holding the statute of limitations was not equitably tolled, and the appeal should be dismissed. *Palmer v. State*, 427 S.C. 36, 47, 829 S.E.2d 255, 261 (Ct. App. 2019) (holding “[a]n issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority”).

Instead, Inmate argues SCDC waived the statute of limitations argument because it consented to the first action being dismissed without prejudice. [Inmate Brief, p. 9; Response in Opposition, p. 4]. Inmate’s argument is misplaced.

In general, when an action is dismissed without prejudice, the statute of limitations will bar a subsequent suit if the statute runs in the interim. *Norris v. State*, 335 S.C. 30, 515 S.E.2d 523 (1999). However, where the State consents to the dismissal of a PCR application after the statute of limitations has run and agrees that the petitioner should be allowed to refile an application, the State is estopped from asserting the statute of limitations as a defense to a subsequent PCR application.

Carter v. State, 337 S.C. 17, 18, 522 S.E.2d 342, 343 (1999).

To the extent the *Carter* would apply to a non-PCR suit for damages, the argument fails. SCDC did not voluntarily consent to the 2015 case being dismissed without prejudice. SCDC filed a motion asking the trial court to dismiss the action *with prejudice* as service had not been perfected, no action had been commenced, and the statute of limitations had run since the filing of the action. [Supp. R. pp. 9-15]. Judge Manning, *sua sponte*, granted the motion but dismissed the case without prejudice. [R, pp. 1-5].

Next, Inmate argues SCDC violated Rule 60, SCRCP, by not seeking reconsideration of Judge Toal’s 2017 Order denying SCDC’s Motion to Dismiss. [Inmate Brief, pp. 9-10; Response in Opposition, p. 4].

In ruling on SCDC's Motion to Dismiss the underlying action, she issued the following Form 4 Order:

Defendant's Motion to Dismiss is denied on the basis that Plaintiff intended to Amend his Complaint in accord. with Judge Manning's ruling in 2015CP4003008. Instead he brought a new case. This matter is the very same case as 2015CP403008, which has not been dismissed with prejudice. I regard the new suit as an amendment of the older.

[R. p. 16].

Judge Toal made no ruling on the statute of limitations argument or equitable tolling. Even if a trial court has the inherent power to determine that a previously dismissed case was "amended" by a new lawsuit filed eight (8) months later, the same statute of limitations and equitable tolling argument remained to be decided. Regardless, the denial of a motion to dismiss does not establish the law of the case and the issue raised in the motion can be raised again at a later state of the proceedings. *McLendon v. S.C. Dep't of Highways & Pub. Transp.*, 313 S.C. 525, 526 n.2, 443 S.E.2d 539, 540 (1994). Accordingly, Inmate's argument is without merit and the appeal should be dismissed.

CONCLUSION

For the reasons set forth, Respondent respectfully requests the trial court's Order granting it summary judgment be affirmed.

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CERTIFICATE OF COUNSEL

I hereby certify that Respondent’s Final Brief complies with South Carolina Appellate Rule 211(B).

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