

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF SPARTANBURG )  
 )  
 Equinox, LLC, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 Brandon Epps & Courtney Epps, )  
 )  
 Defendants. )  
 \_\_\_\_\_ )  
 )  
 Brandon Epps and Courtney Epps, As Next of )  
 Friends of Alexis Marion Hucks, Adrienne )  
 Belle Hucks, Wells Skipper Hucks, Sawyer )  
 Lane Epps, Cooper Wade Epps, and Lili )  
 Madelyn Epps, )  
 )  
 Third-Party Plaintiffs, )  
 )  
 vs. )  
 )  
 Richard B. Dreskin, )  
 )  
 Third-Party Defendant. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
 SEVENTH JUDICIAL CIRCUIT  
  
 C. A. No. 2017-CP-42-04476

**ORDER**



This matter came before the Court on Third-Party Defendant Richard B. Dreskin’s (hereinafter, “Dreskin”) motion to dismiss all claims asserted against him in the “Second Amended Answer and Counterclaims and Third-Party Claims” (hereinafter, the “Second Amended Answer” or “SAA”) filed by Defendants and Third-Party Plaintiffs on October 12, 2020. The present motion is asserted pursuant to Rule 12(c), SCRPC, and was heard on March 24, 2021. The moving party was represented at the hearing by R. Hudson Smith of Eller Tonnsen Bach, LLC. Richard B. Fennell of James, McElroy, and Diehl, PA represented Defendants and Third-Party Plaintiffs. Generally, this case relates to a dispute over a residential lease agreement and tenants’ claims for

damages from alleged mold exposure. For the reasons set forth below, the Court grants Dreskin's motion for judgment on the pleadings.

### **I. FACTUAL ALLEGATIONS**

Relevant to this motion, Plaintiff Equinox, LLC ("Equinox") and Defendant Courtney Epps entered into a 1-year lease agreement (the "Lease") on February 1, 2016 for a residential home located at 618 Garden Rose Court, Greer, SC 29651 (the "Premises") for \$2,200 payable on the first day of each month. *See* Plaintiff's Amended Complaint, filed Feb. 14, 2018 (the "Amended Complaint" or "AC"), ¶¶ 5-6. Subsequently, on or about October 1, 2017, Equinox and both defendants entered into the "Lease Extension and Modification," which added Defendant Brandon Epps as a tenant and extended the Lease's term until September 30, 2018. *See id.*, ¶¶ 10-11. Dreskin is alleged to be the managing member of Equinox. *See* Second Amended Answer, p. 9, ¶ 56.

Beginning around May 2017, Defendants notified Equinox for the first time that they believed mold was present at the Premises, which Equinox alleges it never located despite its investigation. *See id.*, p. 11, ¶ 68; *see also* AC, ¶ 13. On or about October 9, 2017, Equinox notified Defendants they would be evicted if they did not cure months of unpaid rent, and Defendants abandoned the Premises, notified Equinox of their termination of the Lease, and claimed various health ailments and property damage due to mold exposure. *See* AC, ¶¶ 15-16; *see also* SAA, p. 10, ¶¶ 61-62.

### **II. PROCEDURAL HISTORY**

After its initial ejectment proceedings were dismissed in the Magistrate Court, Equinox filed the instant lawsuit on December 7, 2017 against Defendants Brandon Epps and Courtney Epps, and the defendants filed an answer and counterclaims on January 15, 2018 seeking damages from Equinox for breach of contract, breach of warranty of habitability, nuisance, and negligence.

After Equinox filed an amended complaint on February 14, 2018, the defendants filed an answer and counterclaims including the same causes of action against Equinox. Although Defendants filed a motion seeking to add necessary parties on November 21, 2018, no additional pleadings were filed by Defendants' former counsel before her withdrawal on March 11, 2019 or the following 7 months while Defendants represented themselves *pro se*.

After new counsel appeared on their behalf, Defendants filed a "Motion for Leave to Amend Answer" on December 6, 2019, seeking to assert claims against a new party, Richard B. Dreskin. Before the motion was heard by the Court, the parties filed a consent motion to dismiss this matter under Rule 40(j), SCRPC, and the Court issued an order dismissing the case on January 23, 2020. Before the Court restored this case to the active docket on May 12, 2020, and before any ruling had been issued on their previously filed motion to amend their answer, Defendants filed a separate lawsuit asserting virtually identical claims against Equinox and Dreskin on April 16, 2020 under Case No. 2020-CP-42-01301 (the "2020 Action") and a motion seeking to consolidate the 2020 Action with this case which had been dismissed for almost 4 months.

On October 9, 2020, the Court issued an order acknowledging that the "parties agreed it is in the best interests of judicial economy for the claims at issue in the 2017 Action and the 2020 Action to proceed under one civil action number." Order, filed Oct. 9, 2020. On October 12, 2020, Defendants filed their "Second Amended Answer, Counterclaims, and Third-Party Claims" adding Richard B. Dreskin as a party in this litigation. *See* SAA. On November 12, 2020, Dreskin filed the instant motion for judgment on the pleadings.

### **III. DISCUSSION**

#### **A. The Statute of Limitations Bars Defendants/Third-Party Plaintiffs' Claims Against Dreskin for Breach of Contract Accompanied by Fraudulent Act, Violation of the S.C. Unfair Trade Practices Act, and Conversion**

In this case, Defendants/Third-Party Plaintiffs' causes of action asserted against Third-Party Defendant Richard B. Dreskin individually for breach of contract accompanied by fraudulent act, violation of the S.C. Unfair Trade Practices Act, and conversion began to accrue in May 2017. *See* SAA, p. 11, ¶ 68; *see also* Defendants' Memorandum of Law in Opposition, filed Mar. 23, 2021, p. 2. The parties also agree that each of these claims is governed by a 3-year statute of limitations. *See* S.C. Code Ann. § 15-3-530(1), -530(2), -530(5). Although these claims began to accrue in May 2017, the first pleading in this action asserting any claims against Mr. Dreskin individually was filed more than 3 years later on October 12, 2020 with the Second Amended Answer.

While they acknowledge that the Second Amended Answer was filed more than 3 years after May 2017, Defendants and Third-Party Plaintiffs argue their action was timely "commenced" against Dreskin by Defendants' "Motion for Leave to Amend Answer" filed December 6, 2019 while Dreskin was not a party to the litigation. They also contend that "these claims against Dreskin" were timely filed with the filing of the 2020 Action. In South Carolina, an action is barred unless it is "commenced" within the period set forth in statute. S.C. Code Ann. § 15-3-510. In order to commence a civil action, the action must be filed and served either within the applicable statute of limitations or within 120 days after the statutory period expires. Rule 3, SCRPC; *see also* S.C. Code Ann. § 15-3-20. No provision is made for "commencement" of a civil action upon the filing of a motion to amend or any relation back to the date of the motion to amend. *Id.* The parties agree that South Carolina's appellate courts have never decided whether the mere filing of a motion to amend satisfies the requirements of "commencing" an action under Rule 3 and S.C. Code Ann. §§ 15-3-20, -510. *See* Def. Memo., filed Mar. 23, 2020, p. 5.

Defendants cite to a North Carolina Court of Appeals decision, *Simpson v. Hatteras Island Gallery Restaurant, Inc.*, 109 N.C. App. 314 (N.C. Ct. App. 1993), which is not controlling on this Court. Although Defendants assert that *Simpson* represents a result with which South Carolina's appellate courts would agree, this Court comes to the opposite conclusion. South Carolina's operative statute, S.C. Code Ann. § 15-3-30 ("A civil action is commenced when the summons and complaint are filed."), more closely mirrors the language of Georgia's statute, Ga. Code Ann. § 9-11-3 ("A civil action is commenced by filing a complaint with the court."), which its courts have interpreted to mean that only a pleading can commence an action – a motion to amend is not sufficient. *Exel Transp. Services, Inc. v. Sigma Vita, Inc.*, 288 Ga.App. 527, 530, 654 S.E.2d 665, 669 (Ga. App. 2007) (observing that the appellant "cited no authority for the proposition that the mere filing of a motion for a permissive counterclaim is the equivalent of bringing a claim."). In contrast to the statutes of South Carolina and Georgia, the North Carolina statutes at issue in *Simpson* are silent as to whether the filing of a summons and complaint (or a motion) are required to commence an action. *See* N.C.G.S.A. § 1-15, *et seq.* Accordingly, this Court concludes that the filing of the motion to amend in this case did not stop the running of the Statute of Limitations as to Dreskin.

Furthermore, the Court finds that the granting of Defendants' motion to amend does not stop the running of the statute of limitations as to a third party not part of the litigation. When Defendants filed their "Motion for Leave to Amend Answer" on December 6, 2019, Mr. Dreskin was not a party to the litigation at that time. Further, although the Court issued an order on December 3, 2018 adding the defendants' six children as "third-party plaintiffs," no third-party complaint or pleading was filed in this Action by these parties until nearly 2 years later on October 12, 2020. As the Notice of Electronic Filing filed after the motion clearly indicates, only Plaintiff

Equinox, LLC was served electronically with Defendants' "Motion for Leave to Amend Answer." See Notices of Electronic Filing, filed Dec. 6, 2019 and Oct. 19, 2020. The record does not include any evidence that Mr. Dreskin was served with Defendants' Motion to Amend, whether by personal service or service through his counsel.

As both Rule 3, SCRCPP and S.C. Code Ann. § 15-3-20(B) make clear, an action cannot be "commenced" against an opposing party unless it is timely served on the party after filing. Because Mr. Dreskin was not a party to the litigation when Defendants filed their Motion to Amend and there is no evidence that Defendants served Dreskin with their motion to amend, the Court's order granting the motion, or the pleading alleging claims against Dreskin, the Court finds that neither the filing nor the subsequent granting of Defendants' Motion to Amend stopped the running of the Statute of Limitations as to Dreskin.

Finally, to the extent that Defendants argue their motion to amend tolled any period for commencement, the Court notes that this action was voluntarily dismissed by the parties pursuant to Rule 40(j), SCRCPP on January 23, 2020 before any ruling was issued on Defendants' motion to amend. Rule 40(j) terminates the pendency of motions filed but not decided. Said differently, a motion does not remain "pending" after a case is dismissed pursuant to Rule 40(j). Therefore, to the extent that the Court could impute any "tolling" to the pendency of the motion to amend filed December 6, 2019, any such tolling was effectively terminated on January 23, 2020 as neither the motion nor this litigation was "pending" after January 23, 2020.

In accordance with the above, the Court finds that three of four claims asserted by Defendants and Third-Party Plaintiffs against Mr. Dreskin individually for breach of contract accompanied by fraudulent act, violation of the S.C. Unfair Trade Practices Act, and conversion are barred by the applicable statute of limitations and should be dismissed as a matter of law. Not

encompassed in this decision is whether the statute of limitation will or will not prevent, as a matter of law, recovery against Mr. Dreskin in the event that liability is established against Plaintiff Equinox, LLC at trial.

**B. Defendants/Third-Party Plaintiffs' Claim for "Alter Ego" Against Dreskin Must be Dismissed**

The Court finds that the fourth and final remaining cause of action against Dreskin for "alter ego" must be dismissed because it is not a cause of action recognized by South Carolina law. In *Drury Dev. Corp. v. Found. Ins. Co.*, 380 S.C. 97, 668 S.E.2d 798 (2008), the South Carolina Supreme Court explored the nature of alter ego liability not as a separate cause of action but rather a theory of procedural relief and ultimately held that a creditor need not obtain a judgment against an insolvent corporation before suing individual shareholders. The Court first noted that alter ego relief is an issue that is often considered post-judgment. *Id.*, 380 S.C. at 102 ("[I]t is undoubtedly true that the corporate veil is often pierced post-judgment."). The *Drury* court noted that the defendant shareholders had erroneously "conflated the concept of a claim with that of a judgment" noting that "an attempt to pierce the corporate veil is not itself a cause of action but rather a means of imposing liability on an underlying cause of action." *Id.*, at 103 (citing 1 William Meade Fletcher Et Al., *Fletcher Encyclopedia Of The Law Of Private Corporations*, § 41.10 (per. ed., rev. vol. 2006)). The Supreme Court concluded the opinion with its finding that "South Carolina law is clear that plaintiffs attempting to pierce the corporate veil must state a claim against the corporate entity in order to proceed on a veil piercing theory." *Id.*

As *Drury* makes clear, South Carolina does not recognize a stand-alone cause of action of "alter ego." Therefore, this Court does not view the "alter ego" allegations as presenting a proper legal theory of direct liability against Dreskin. For a member of a limited liability company to be held personally liable or responsible for acts of the LLC, the LLC must first be proven to be legally

culpable. If all Defendants' other causes of action fail against Equinox, their final cause of action for "alter ego" against Mr. Dreskin must fail. In other words, Defendants' eighth cause of action for alter ego could not stand alone if the other seven causes of action were dismissed by the Court. Therefore, under *Drury*, the Eighth Cause of Action for "Alter Ego" against Dreskin must be dismissed because it is not a separate cause of action recognized by South Carolina law.

**C. Defendants/Third-Party Plaintiffs' Claim for "Alter Ego" Against Dreskin Must Be Dismissed**

On January 26, 2021, Defendants and Third-Party Plaintiffs filed their "Motion for Partial Summary Judgment." This motion was docketed but was not reached during the March 24, 2021 hearing. Therefore, the Court makes no ruling on the motion for partial summary judgment in this Order, and the motion is still pending to be heard and should be docketed.

**IV. CONCLUSION**

In conclusion, the Court hereby GRANTS Third-Party Defendant Richard B. Dreskin's Motion pursuant to Rules 12(b)(6) and/or Rule 12(c) and finds that all claims, counterclaims, and/or third-party claims asserted against Dreskin in his individual capacity by Defendants/Third-Party Plaintiffs Brandon Epps and Courtney Epps, individually and as next of friends of Alexis Marion Hucks, Adrienne Belle Hucks, Wells Skipper Hucks, Sawyer Lane Epps, Cooper Wade Epps, and Lili Madelyn Epps ARE DISMISSED.

IT IS SO ORDERED.

*[Electronic Signature Page Follows]*



Spartanburg Common Pleas

**Case Caption:** Equinox, Llc , plaintiff, et al VS Brandon Epps , defendant, et al  
**Case Number:** 2017CP4204476  
**Type:** Order/Other

IT IS SO ORDERED

s/ J. Mark Hayes, II #2132

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