STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS
Alan Sheppard, Ed Sheppard, Randy Bates, Eddie White and Dan Radovanick, Individually and as Members of Wando River, L.L.C. v. William O. Higgins, Trenholm Walker and Clay McCullough Plaintiff(s), v. William O. Higgins, Trenholm Walker and Clay McCullough Defendant(s).	)	C/A NUMBER: 2009-CP-10-5838 **ORDER GRANTING DEFENDANT WILLIAM O. HIGGINS MOTION TO DISMISS**

Pursuant to Rules 12(b)(5) and 12(b)(6) of the South Carolina Rules of Civil Procedure, Defendant William O. Higgins, by and though his counsel, moved this Court for an Order dismissing the causes of action set forth in Plaintiffs' Complaint. A hearing on this motion took place on December 9, 2010 before the Honorable Roger Young, wherein counsel for all parties appeared and presented their respective arguments. For the reasons stated herein, the Complaint is dismissed as to William O. Higgins.

FACTS

On September 15, 2009, Plaintiffs filed this action sounding in legal malpractice against Defendant William O. Higgins arising out of transaction from September of 2006 involving real property located at Detyens Lamb Lane in Mt. Pleasant, South Carolina. Plaintiffs selected the box for legal malpractice on the Civil Action Coversheet that was

filed with the Complaint. On January 14, 2010 the Summons and Complaint was hand-delivered to Mary Conn at Ellis, Lawhorne & Sims, P.A., who is the legal assistant to Higgins. More than 120 days elapsed from the time the Summons and Complaint was filed and service of the same was attempted. Mary Conn is an employee of Ellis, Lawhorne, and Sims, P.A. and she serves as legal secretary to Higgins. As stated in Ms. Conn's affidavit, which is attached to Defendant's Motion to Dismiss, a gentleman gave her a copy of the Summons and Complaint at the offices of Ellis, Lawhorne, and Sims, P.A. Further, Ms. Conn states that she is not authorized by appointment or by law to receive service on behalf of Higgins.

After this attempted service, Plaintiffs have not attempted to serve William O. Higgins. To date, William O. Higgins has neither been personally served with the Summons and Complaint nor has anyone left copies of the Summons and Complaint at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, nor has anyone delivered a copy of the Summons and Complaint to an agent authorized by appointment or by law to receive service of process.

LAW/ANALYSIS

I. SERVICE OF THE SUMMONS AND COMPLAINT WAS IMPROPER.

Plaintiffs' case must be dismissed pursuant to SCRCP 12(b)(5) because service was improper so it was not accomplished as to Higgins. SCRCP 4(d)(1) allows service to be made as follows:

> Upon an individual other than a minor under the age of 14 years or an incompetent person, by delivering a copy of the summons and complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing

therein, or by delivering a copy to an agent authorized by appointment or by law to receive service of process.

While the Supreme Court of South Carolina has "never required exacting compliance with the rules to effect service of process." Roche v. Young Bros., 318 S.C. 207, 456 S.E.2d 897, 899 (1995), the must be sufficient compliance with the service rules. See also Langley v. Graham, 322 S.C. 428, 472 S.E.2d 259, 259-60 (App.1996) (noting that process was addressed to defendant at his private residence, but defendant's sister signed for the process). In Roche, the Supreme Court ruled that the Plaintiff must only show compliance with the rules. Id. at 211. The person in Roche who signed the certified mailing slip was an officer of the defendant company that was sued and the defendant failed to show that the officer was not authorized to accept service. In the present case, Ms. Conn's affidavit proves that she was not authorized to accept service.

Plaintiffs completely failed to comply with SCRCP 4(d)(1) regarding service of process. Service was only attempted upon an employee of Ellis, Lawhorne, and Sims, P.A. who was not authorized by appointment or by law to receive service of process. Ms. Conn is not an agent for Higgins, rather she is an employee of the law firm. Plaintiffs have provided no testimony to contradict this statement or to show that proper service was attempted by the other methods outlined in SCRCP 4(d)(1). Rather, Plaintiffs rely upon hearsay and conclusory statements when stating in their brief that the "Defendant was in his office when service was being made upon him, and his secretary indicated to the process server that she could take the papers for him." The statement must be excluded because Plaintiffs have provided no proof of service or testimony from the process server to support this allegation. There is no evidence that the process server

asked Ms. Conn to confirm that she was authorized to accept service or that she sign a document or an affidavit confirming service.

Plaintiffs also rely upon Mull v. Ridgeland Realty, LLC, 387 S.C. 479, 693 S.E.2d 27 (Ct.App. 2010) for the propositions that they sufficiently complied with the service rules such that Defendant had notice of the action and the Court has personal jurisdiction of Defendant. In Mull, the sole issue was whether the defendant was properly served at the registered agent's address that was on file with the South Carolina Secretary of State. The plaintiff's attorney served the complaint via certified mail at the registered agent's South Carolina address and sent a copy of the complaint via certified mail to the registered agent's address in New York. The registered agent signed the return receipt, contacted plaintiff's counsel, and sought an extension to respond, but never responded to the complaint. In Mull, the registered agent had notice and interacted with plaintiff's counsel, but chose to not participate in the litigation. The Mull Court ultimately ruled that service was proper under the statute dealing with service of a corporation through its registered agent.

That is not the case in the present action. Higgins did not answer and instead has filed a Motion to Dismiss to challenge the service of the Summons and Complaint, which was not proper as to an individual pursuant to the South Carolina Rules of Civil Procedure. The court lacks personal jurisdiction over Higgins because service was not proper. Further, in the Mull case, and the others cited by Plaintiffs, service was attempted upon a corporate entity rather than an individual. Corporations must be notified through an agent because they must operate through their agents and employees. In this case,

Plaintiffs sued Higgins as an individual rather than a corporate entity. Plaintiffs failed to properly serve William O. Higgins so the Complaint is dismissed.

II. SERVICE WAS NOT TIMELY.

Plaintiffs failed to commence the action against William O. Higgins. Even if this Court finds that Plaintiffs substantially complied with the service rules, the Summons and Complaint were untimely so this lawsuit has not commenced and must be dismissed. SCRCP 3(a)(2) requires:

> A civil action is commenced when the summons and complaint are filed with the clerk of court if:
> ....
> (2) if not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing.

(emphasis supplied). Until an action is commenced, there is no proceeding pending and, thus, nothing to refer. Chabek v. Nationwide Mut. Fire Ins. Co., 303 S.C. 26, 397 S.E.2d 786 (Ct.App. 1990); cf. State v. McQuillan, 252 Mo. 334, 338-9, 158 S.W. 652, 653 (1913) ("Before there can be a reference there must be an action pending."). In Chabek, the case was referred to a Master before the Summons and Complaint was filed and served in the prior related action. Therefore, the Court had nothing to refer.

The statute of limitations for legal malpractice claims is three years. S.C. Code § 15-3-530(5). The transaction at issue in this matter took place in September of 2006 so the Summons and Complaint had to be served by September of 2009 to avoid the rule found in SCRCP 3(a)(2), which requires service not later than 120 days after the Summons and Complaint are filed if they are not served prior to the expiration of the statute of limitations. Service was not attempted until January 14, 2010, after the expiration of the

statute of limitations, so SCRCP 3(a)(2) is applicable such that the Summons and Complaint must be served within the required 120 days of filing to commence the action. Plaintiffs filed the Summons and Complaint on September 15, 2009 so these must be served by January 13, 2010, which was the 120th day after filing. Plaintiffs attempted service of the Summons and Complaint on January 14, 2010, which was the 121st day after the Summons and Complaint were filed. Therefore, this action was not commenced.

Plaintiffs state that the Plaintiffs were filing the case pro se so the rules of procedure should not strictly apply in their case because they were trying to comply. However, there is only one set of procedural rules in civil court that apply to represented and unrepresented parties who choose to proceed in the Court of Common Pleas. In this matter, the Summons and Complaint is dismissed as to William O. Higgins because it was not timely commenced.

III. ALAN SHEPPARD LACKED STANDING TO BRING THIS ACTION ON BEHALF OF WANDO RIVER, LLC.

Wando River, LLC was not represented by an attorney at the time that Alan Sheppard filed the action pro se. Wando River, LLC must be dismissed from this action because Alan Sheppard did not have standing to bring this action on behalf of the corporate entity. Defendant requests that this Court take judicial notice that Alan Sheppard is not a member of the South Carolina Bar and is not authorized to practice law in this State. In Renaissance Enterprises, Inc. v. Summit Teleservices, Inc., 334 S.C. 649, 515 S.E.2d 257 (1999), the Supreme Court held that a non-lawyer may not represent a corporation in circuit or appellate courts. In later action, the United States District Court relied upon the reasoning in Renaissance Enterprises when it dismissed claims, without prejudice, that were brought on behalf of a corporate entity that was not represented by

counsel on the grounds that the non-lawyer did not have standing to bring claims on behalf of the corporation. See Penland Financial Services, Inc. v. Select Financial Services, LLC, 2008 WL 5279638 (D.S.C. 2008). For this reason, the claims asserted by Wando River, LLC against William O. Higgins are not properly before this Court and are dismissed.

IV. PLAINTIFFS FAILED TO COMPLY WITH STATUTORY REQUIREMENTS PRIOR TO BRINGING A PROFESSIONAL MALPRACTICE ACTION.

S.C. Code §15-36-100(B) requires that "the plaintiff must file as part of the complaint an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit. This requirement is applicable to legal malpractice actions via S.C. Code §15-36-100 (G)(2). The proper result for failure to file the required expert affidavit is dismissal and is governed by S.C. Code §15-36-100(F) of this statute states in relevant portion that:

> If a plaintiff fails to file an affidavit as required by this section, and the defendant raises the failure to file an affidavit by motion to dismiss filed contemporaneously with its initial responsive pleading, the complaint is not subject to renewal after the expiration of the applicable period of limitation unless a court determines that the plaintiff had the requisite affidavit within the time required pursuant to this section and the failure to file the affidavit is the result of a mistake.

Plaintiffs have not provided an expert affidavit, specifying the acts or omissions, contemporaneously with filing the complaint that alleges professional negligence against Defendant William O. Higgins. Plaintiff did not file and expert affidavit prior to or with the filing the Summons and Complaint, nor any time since.

S.C. Code §15-36-100(C) provides an exception to the contemporaneous filing requirement. The statute states in relevant part:

> The contemporaneous filing requirement of subsection (B) does not apply to any case in which the period of limitation will expire, or there is a good faith basis to believe it will expire on a claim stated in the complaint, within ten days of the date of filing and, because of the time constraints, the plaintiff alleges that an affidavit of an expert could not be prepared. In such a case, the plaintiff has forty-five days after the filing of the complaint to supplement the pleadings with the affidavit. Upon motion, the trial court, after hearing and for good cause, may extend the time as the court determines justice requires. If an affidavit is not filed within the period specified in this subsection or as extended by the trial court and the defendant against whom an affidavit should have been filed alleges, by motion to dismiss filed contemporaneously with its initial responsive pleading that the plaintiff has failed to file the requisite affidavit, the complaint is subject to dismissal for failure to state a claim. The filing of a motion to dismiss pursuant to this section, shall alter the period for filing an answer to the complaint in accordance with Rule 12(a), South Carolina Rules of Civil Procedure.

Plaintiffs have not filed an expert affidavit in this matter at any time so the exception is not applicable in this case.

The appellate courts in South Carolina have not applied these statutory provisions in a legal malpractice context. In the recent opinion, Rotureau v. Chaplin, 2009 WL 5195968 (D.S.C.), the United States District Court dismissed the legal malpractice claim, without prejudice, for failure to state a claim because the plaintiff did not provide an affidavit from an attorney that stated a single negligent act or omission. The Rotureau court held that the requirement was substantive law of South Carolina rather than merely procedural. In this case, Plaintiffs allege in Paragraph 4 of their Complaint that Higgins:

> was required to exercise the same legal skill as a reasonably competent attorney and to use reasonable care in determining and implementing a strategy to be followed to achieve the Plaintiff's legal goals. As a fiduciary of Plaintiff, Defendant was obligated to treat all information relating to a Plaintiff's representation as confidential and to zealously represent the

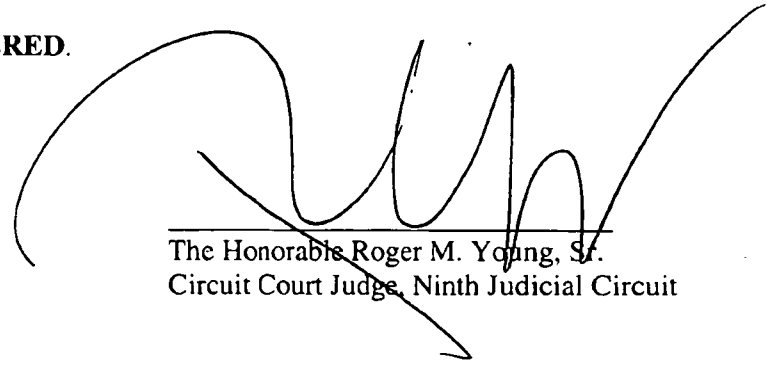
Plaintiff's interests, including the disclosure of any conflicts of interest that might impair the Defendant to ability to represent the Plaintiff.

Allegations such as those stated above require the affidavit of an expert to establish the duty and the breach thereof. Further, Plaintiffs allege in Paragraph 6(c) that Higgins failed "to provide Plaintiff with the minimum standard of care." Again, an expert affidavit is required for this allegation regarding the standard of care. These allegations are a complex amalgam of ethical rules, which require an expert affidavit to establish. For this reason, Plaintiffs' Complaint is dismissed against William O. Higgins.

CONCLUSION

For the reasons set forth above, the Complaint is dismissed with prejudice as to Defendant William O. Higgins.

AND IT IS SO ORDERED.



The Honorable Roger M. Young, Sr.
Circuit Court Judge, Ninth Judicial Circuit

Columbia, South Carolina

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