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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Georgetown County Court of Common Pleas
H. Steven DeBerry, IV, Circuit Court Judge
Case No.: 2020-CP-22-00991

Case No.: 2022-000058

Michael Mares and Emergency Power, LLC,

Appellants,

v.

**Bradley Douglas Marx (deceased) and
Catherine Marx, Individually and in
her capacity as Personal Representative
of the Estate of Bradley Douglas Marx,**

Respondents.

INITIAL BRIEF OF APPELLANT

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May 4, 2022

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INTRODUCTION

This is an appeal from the Georgetown County Court of Common Pleas Order of the Honorable H. Steven DeBerry, IV entered December 2, 2021, whereby the Court granted Defendants' Motion to Dismiss the Complaint filed by Plaintiffs.

Plaintiff Michael Mares and Decedent Bradley Marx formed a limited liability company, Emergency Power, LLC, on September 16, 1996 in the State of Michigan, with each partner holding a 50% ownership interest in the LLC. Decedent moved to Georgetown County, South Carolina, in 2018 and utilized company funds to purchase a home, purchase a car, and utilized the company credit card for personal purchases. After the Decedent's death in 2019 Plaintiffs discovered that Decedent had been embezzling from the company since approximately 2013. (Complaint ¶¶ 5-8)

In December of 2020 Plaintiffs brought this action against Defendants for conversion and unjust enrichment and requested the imposition of a Constructive Trust. In accordance with S.C. Code Ann. §15-3-530(4), a three year statute of limitations applies. The Statute of Limitations does not begin to run until a person knew, or should have known, that they suffered a harm and the nature of that harm. *See* S.C. Code Ann 15-3-530(9). As Plaintiffs were not aware of the embezzlement of Decedent until May of 2020, the Statute of Limitations should expire in May of 2023. While the SC Probate Code does provide that actions be commenced within one year after the date of the decedent, the fact that the embezzlement was not discovered until after the decedent's death, and that the embezzlement in question involved not only the

Decedent, but also the Decedent's Spouse, the Defendant Catherine Marx, Plaintiffs were entitled to file a civil action in accordance with S.C. Code Ann 15-3-530(9).

Defendants filed a Motion to Dismiss based solely on the statute of limitations argument under the S.C. Probate Code. Based on Plaintiffs' failure to file suit within the one-year statute therein, the Court of Common Pleas ordered that this matter be dismissed in its entirety as "Plaintiffs' claims were not filed within one year of the death of Bradley Douglas Marx" and "Plaintiffs' claims were not filed within thirty days of the mailing of the notice of disallowance of claim." The Court failed to consider all arguments and claims brought by Plaintiffs that are not covered under the S.C. Probate Code statute of limitations.

STATEMENT OF ISSUES ON APPEAL

- I. Did the Court commit reversible error by dismissing all of the plaintiffs' causes of action and alleged damages?**
- II. Did the Circuit Court commit reversible error by solely relying on the SC Probate Code in determining the appropriate Statute of Limitations?**
- III. Did the Circuit Court commit reversible error by misinterpreting and failing to properly apply Orders of the SC Supreme Court?**

STATEMENT OF THE CASE

This action arises from actions of both the Decedent and the Decedent's Spouse, the Defendant Catherine Marx, which actions were discovered by the Plaintiff herein approximately 6 months after the death of Bradley Marx.

Factual Background

Plaintiff, Michael Mares, and Bradley Douglas Marx (hereinafter "Decedent") formed Emergency Power, LLC with the Michigan Secretary of State on September 16, 1996, with each of the partners holding a 50% ownership interest in the LLC. On March 22, 2018 Decedent purchased a home in Murrells Inlet, South Carolina with his wife, Catherine Marx as joint tenants with right of survivorship. Bradley Douglas Marx dies on November 24, 2019.

In or about May of 2020 Plaintiff discovered that Decedent had been embezzling from the company from at least April 16, 2013 until the time of his death. Decedent used his corporate American Express credit card to make personal purchases including, but not limited to, his personal auto insurance and other personal expenses. Decedent transferred funds from the business to his personal account held jointly with Defendant Catherine Marx, and withdrew company funds to purchase a private vehicle that was not used for business. It is believed that the Defendants deprived the Plaintiff LLC of no less than \$200,000.00 over time, through personal account transfers, and bonuses paid solely to himself without approval from the company.

Plaintiffs brought an action, in the Georgetown County Court of Common Pleas, for conversion and unjust enrichment based on information that Decedent transferred large sums of corporate receipts and funds to Defendant Catherine Marx and other family members, thereby unjustly enriching Marx and other members of Decedent's family, at the expense of Plaintiffs.

The Circuit Court Hearing on Defendants' Motion to Dismiss

The matter came before the Circuit Court on November 12, 2021. The Defendants' Motion to Dismiss is premised on their claim that Plaintiffs have been barred pursuant to S.C. Code §62-3-803, because Plaintiffs are allegedly outside of the statute of limitations. There are, however, genuine issues of material fact as to various aspects of the Plaintiffs' claims herein, which are not, or in some cases, arguably should not, be barred by any applicable statute of limitations.

Plaintiffs argued at hearing, that even if the lower court took the position that the statute of limitations may have closed as to some of the Defendants, particularly the estate, but it has not closed as to the personal representative of the estate, or as to Catherine Marx in her individual capacity. (Transcript pp. 7-11) Significantly, in South Carolina, statutes of limitations are governed by the "discovery rule," which provides that the applicable statute does not begin to run until discovery of "such facts as would have led to the knowledge [of the claim], if pursued with reasonable diligence." Burgess v. American Cancer Society, 300 S.C. 182, 185, 386 S.E.2d 798 (Ct. App. S.C. 1989)(internal citations omitted). Here, the Plaintiff has no history of business disputes with his business partner, Bradley Marx, and had no reason to suspect that his partner, the Decedent Bradley Marx, and his wife, the Defendant Catherine Marx, had been embezzling from him for some time, as the Decedent and the Defendant Catherine Marx had successfully concealed the matter from Michael Mares. Mr. Mares became aware of the Defendants' embezzlement, conversion and unjust enrichment only after

the Decedent had passed away, and specifically, approximately 6 months after the date of death of Bradley Marx.

Plaintiffs further argued at hearing that even if Plaintiffs' claims are disallowed as to one Defendant (particularly the Estate) pursuant to the Probate Code, Plaintiffs' claims are permitted against the remaining Defendants pursuant to the applicable statute of limitations referenced above.

The Complaint properly alleges a cause of action for Conversion. The Plaintiffs' Complaint states that Bradley Marx, the decedent, had been embezzling from the Plaintiffs for a number of years. Catherine Marx, individually, has been a co-conspirator in her individual capacity in this course of conduct which effected the conversion and embezzlement of the Company's funds. She should not be shielded for these actions by a misplaced reliance on a single provision of the Probate Code, which does not bar the Plaintiffs' claims herein.

If Plaintiffs are allowed to proceed with their case and conduct discovery, we believe that discovery will very likely to reveal that the Company paid for specific housing expenses for Catherine Marx, and that Catherine Marx in that and other ways directly participated in, and benefited from, the embezzlement and conversion of Emergency Power LLC funds. As such, Plaintiffs contend in our Complaint that they are entitled to a constructive trust against the house (and any other property) that the Company paid for, or paid expenses toward, and for which such expenditures were not authorized, and directly benefited Defendant Catherine Marx.

By granting Defendants' Motion to Dismiss, solely based on the SC Probate Code, the lower Court has failed allow Plaintiffs an opportunity to pursue justified claims for unjust enrichment and conversion, against Catherine Marx and the Estate, which should not have been barred by the Statute of Limitations relied upon by the lower court.

Since the initial filing of Plaintiffs' Complaint, additional facts have come to light that will establish that Catherine Marx directly engaged and participated in the activities giving rise to each of the alleged causes of action, either in her individual capacity, as Personal Representative, and/or as a co-conspirator. As such, the claims asserted against her in this Action are not barred by § 62-3-803 of the S.C. Probate Code.

Circuit Court's Order

On December 2, 2021, the Circuit Court issued an Order granting Defendants' Motion to Dismiss based on the one-year statute of limitations under the South Carolina Probate Code. S.C. Code Ann. §62-3-803.

Plaintiffs' Motion for Reconsideration, filed on December 10, 2021, was subsequently denied on January 7, 2022.

The Circuit Court's Order failed to address the fact that claims against the individual Defendant, Catherine Marx, are not considered under the same statute of limitations as those against the Estate of Bradley Douglas Marx.

STANDARD OF REVIEW

On appeal from an order granting a motion to dismiss, the appellate court applies the same standard that governs the trial court. The appellate court will review all

ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the appellant, the non-moving party below. Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001); Williams v. Chesterfield Lumber Co., 267 S.C. 607, 230 S.E.2d 447 (1976).

Further, in review of the reported case law, it appears that this appeal may present a novel question of law in South Carolina. In cases that do indeed raise a novel question of law, the appellate court is free to decide the question with no particular deference to the lower court. IO, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000) (citing S.C. Const. art. V, §§ 5 and 9, S.C. Code Ann. §§ 14-3-320 and -330 (1976 & Supp. 2005), and S.C. Code Ann § 14-8-200 (Supp.2005); Osprey, Inc. v. Cabana Ltd. Partnership, 340 S.C. 367, 372, 532 S.E.2d 269, 272 (2000); Clark v. Cantrell, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000); Madison ex rel. Bryant v. Babcock Center, Inc., 371 S.C. 123, *134, 638 S.E.2d 650, 655 - 656 (S.C., 2006)

ARGUMENT

I. Did the Court commit reversible error by dismissing all of the plaintiffs' causes of action and alleged damages?

Plaintiffs' Complaint includes allegations that are directed not only against Catherine Marx in her capacity as the Personal Representative of the Estate of Bradley Marx, but also in her individual capacity. Claims against the Defendant Catherine Marx in her individual capacity would not be barred by the provisions of the Probate Code that the Court has relied upon in dismissing the Plaintiff's claims. Plaintiffs

contend that the Circuit Court's ruling in this regard is erroneous, and that the decision of the lower court should be reversed.

II. Did the Circuit Court commit reversible error by solely relying on the SC Probate Code in determining the appropriate Statute of Limitations?

In their Motion to Dismiss, the Defendants did not challenge the Plaintiffs' claims of conversion and unjust enrichment. As such, no challenge is properly before the Court and no such challenges should be considered by the Court if raised at this juncture. The Plaintiffs properly alleged causes of action for conversion and unjust enrichment, that were timely filed in accordance with the three (3) year statute of limitations under S.C. Code Ann. §15-3-530(4).

The purpose of statutes of limitation is to ensure litigation is "brought within a reasonable time in order that evidence be reasonably available and there be some end to litigation." City of North Myrtle Beach v. Lewis-Davis, 360 S.C. 225, 231, 599 S.E.2d 462, 464 (Ct. App. 2004) (quoting Webb v. Greenwood County, 299 S.C. 267, 276, 92 S.E.2d 688, 691 (1956)). "[S]tatutes are designed to promote justice by forcing parties to pursue a case in a timely manner. Parties should act before memories dim, evidence grows stale or becomes nonexistent, or other people act in reliance on what they believe is a settled state of public affairs." State ex rel. Condon v. City of Columbia, 339 S.C. 8, 19, 528 S.E.2d 408, 413-14 (2000).

Plaintiffs discovered the embezzlement of Defendants in May of 2020. Accordingly, the filing of an action with the Circuit Court on December 7, 2020, for conversion and unjust enrichment with a request that the court impose a constructive trust, was timely filed.

III. Did the Circuit Court commit reversible error by misinterpreting and failing to properly apply Orders of the SC Supreme Court related to COVID-19 Pandemic and the Extensions of Certain Filing Deadlines and the Forgiveness of Certain Procedural Defaults during the Pandemic?

The lower court below has mis-interpreted and failed to properly apply the relief provided to litigants for procedural defaults under the Orders of the South Carolina Supreme Court related to extensions of time and forgiveness of procedural defaults during the COVID-19 pandemic. *See, In RE: Operation of the Trial Courts During the Coronavirus Emergency*, dated April 3, 2020, as Amended December 16, 2020, Appellate Case No. 2020-000447 (the "COVID Orders"). Even if the Statute of Limitations contained in the Probate Code at S.C. Code §62-3-803 did apply as a bar to all of the Plaintiffs' claims on the first anniversary of the Decedent's death, which Plaintiffs contend is not the case, the Supreme Court has set forth guidance in the COVID Orders which indicate that trial court filings due on or after April 3, 2020, were "automatically extended for thirty (30) days." *See* COVID Orders at § (9)(A). If the Court extended the deadline imposed upon the Plaintiff by the trial court, November 24, 2020 (*see* Order of Dec. 2, 2021, at p. 7), by thirty days as provided by the COVID Orders, the Plaintiffs' Complaint, filed on December 7, 2020, would have been timely.

CONCLUSION

For the reasons set forth herein, Plaintiffs respectfully request that this Court should reverse the judgment of the lower court, and restore the Plaintiffs' action as an active case in the Circuit Court below.

Respectfully submitted,

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Dated: May 4, 2022
Myrtle Beach, South Carolina

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STATE OF SOUTH CAROLINA
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Respondents.

PROOF OF SERVICE

I certify that on the 4th day of May, 2022, I served the Initial Brief of Appellants on each party or counsel of record by mailing or hand delivery in the manner prescribed by the applicable Rule of Civil Procedure as follows:

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Re: Mares et al v. Marx et al
Case Number: 2020-CP-26-0991
Our File Number: 020.038

Dear Sir/Madam:

Enclosed please find Initial Brief of Appellants and Designation of Matter for filing with the Court. Kindly file the originals and return clocked copies to my office in the envelope provided.

Thank you for your consideration in this matter. If you have any questions or concerns, please feel free to contact my office.

Yours sincerely,



Reese R. Boyd, III

RRB/cmp
Enc.

cc: Audra M. Byrd, Esq.

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