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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Case No. 2021-CP-10-03740
Appellate Case No. 2022-00399

Amenhotep Myers,.....Appellant,

v.

South Carolina DMV and Kevin Schwedo..... Respondents.

INITIAL BRIEF OF RESPONDENT

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ISSUES ON APPEAL

- I. **WHETHER MYERS ACTUALLY MADE A MOTION TO AMEND HIS COMPLAINT.**

- II. **WHETHER THE TWO ISSUE RULE PRECLUDES CONSIDERATION OF THE APPEALED ISSUES.**

- III. **WHETHER THE STATUTE OF LIMITATIONS HAS EXPIRED.**

STATEMENT OF THE CASE

Mr. Myers, an attorney, (SC Bar #104924) acting in a *pro se* capacity, filed his original Summons and Complaint in the Charleston County Court of Common Pleas on August 16, 2021. Respondents filed a motion to dismiss on September 16, 2021. On October 22, 2021, Myers e-mailed counsel for Respondents asking for consent to amend the complaint. (E-mail 1). The undersigned responded asking for a copy of the proposed pleading. (E-mail 1). After review, on November 1, 2021, the undersigned advised that she could not consent and provided her reasons why. (E-mail 2). On December 15, 2021, Myers sent another proposed amended complaint with a request for consent and advising that he would file a motion to amend if counsel would not consent. (E-mail 3). On December 15, 2021, the undersigned advised that she had reviewed the proposed amended complaint and could not consent. (E-mail 4). No motion to amend was filed with the court.

A notice of hearing was sent on January 13, 2022, for a hearing on February 11, 2022. As of the morning of February 11, 2022, no motion to amend was filed by Myers. A hearing was held on February 11, 2022, and the court granted the motion dismiss on all grounds by order filed February 16, 2022. Appellant filed a motion to reconsider on February 25, 2022, and the same was denied by order filed on March 2, 2022. Appellant filed his Notice of Appeal on March 22, 2022.

STATEMENT OF THE FACTS

Mr. Myers was arrested for DUI and given a license suspension on July 7, 2018. (Notice of Suspension). The hearing on the Implied Consent suspension was requested on August 7, 2018. (Notice with Hrg Request). The request for a hearing was filed one day after the deadline. However, on August 13, 2018, when a clerk put the request into the system, she did not realize

that it was a day late and because of that, the entire matter had to be deleted and re-entered. When it was deleted, a letter was automatically generated to Mr. Myers telling him that his suspension was lifted. (Letter #1). Once the matter was re-entered, another letter was generated, also on August 13, 2018, advising him of the date of his hearing on the suspension. (Letter #2). Myers received both letters. (Transcript P.8 L.25- P.9 L.1). He also received copies of the SCDMV's motion to dismiss the Implied Consent hearing as the request was filed out of time (served on Myers on August 14, 2018) (Motion), the hearing officer's order to him to file a response (served on August 20, 2018, by e-mail) (Order), and the hearing officer's order dismissing the challenge to the implied consent suspension, which was served on him by e-mail on September 19, 2018. (Order) Myers ignored all of these subsequent communications.

Myers has further admitted that he was notified by Uber and Lyft on August 12, 2019, that his license was suspended. (Complaint). He did not file the Complaint in this case until August 16, 2021, over a year after the expiration of the two-year statute of limitations based on the conflicting letters and eleven months after receiving the hearing officer's order dismissing the implied consent challenge and upholding the license suspension. S.C. Code Ann. § 15-78-110. Even using the Uber and Lyft notifications as the latest date (which respondents do not), Mr. Myers still missed the statute of limitations by several days.

During the hearing on the Motion to Dismiss, Myers told the judge that "other remaining concerns that opposing counsel has can be dealt with, with an amended complaint with leave from the Court." (Transcript, 7/17-19). He later told the court that "[w]ith leave from the court, I can amend my complaint...". However, he never actually made a motion to amend the complaint or actually asked the court for leave to amend his complaint. He also did not properly file a motion

to amend the complaint and pay the motion fee prior to the hearing, despite communicating with counsel and advising that he would do so.

STANDARD OF REVIEW

The standard of review for the Mr. Myers's appeal of Judge Young's denial of his oral motion to amend the complaint is abuse of discretion. *Health Promotion Specialists, LLC v. South Carolina Bd. of Dentistry*, 403 S.C. 623, 743 S.E. 2d 808 (SC, 2013). This Court reviews the trial court's grant of a motion to dismiss *de novo*, though respondent asserts that because Myers has not appealed all grounds on which the court based its order, the two issue rule precludes the need for this court to consider the sole issue appealed.

ARGUMENT

Respondents assert that the statute of limitations has expired for claims of Gross Negligence and for Declaratory Judgment. Further, the Respondents were not properly served with the Summons and Complaint. Additionally, Mr. Shwedo is not a proper party pursuant to the South Carolina Tort Claims Act, S.C. Code §15-78-10 *et. seq.* and the Department is entitled to immunity pursuant to the Tort Claims Act. Appellant Myers has only appealed the claim that his oral motion to amend his complaint was denied. He has failed to appeal the other grounds.

I. MYERS DID NOT PROPERLY FILE OR MAKE A MOTION TO AMEND HIS PLEADING

Mr. Myers did not properly serve the respondents. As the South Carolina Department of Motor Vehicles is a state agency, and Kevin Shwedo is a state officer, service must be accomplished on each pursuant to SCRCF Rule 4(d)(5), which requires, "*State Officer or Agency.*

Upon an officer or agency of the State by delivering a copy of the summons and complaint to such officer or agency and by sending a copy of the summons and complaint by registered or certified mail to the Attorney General at Columbia.” In this case, the summons and complaint were mailed to the Attorney General as evidenced by the filed Affidavit of Service. However, neither Director Shwedo nor the SCDMV were ever served. One hundred and twenty days from the date of filing, August 16, 2021, was December 14, 2021. This deadline for service had expired as of the time of the hearing. SCRCRCP Rule 4(d)(5); SCRCRCP Rule 3(a)(2). Myers, a South Carolina licensed attorney, should not be permitted to ignore the rules of civil procedure and benefit from his own failure to follow the same. Without having properly served the respondents within the required 120 days, means that the lawsuit was never properly commenced to begin with. Without having a properly commenced lawsuit, there is nothing to amend.

Myers’ argues that the court needed to rule on his oral ‘motion’ to amend in its written order. Myers only advised the court that he believed he could remedy the issues involved in the motion to dismiss by adding a claim for promissory *estoppel*. The judge clearly told Myers during the hearing that his discussion regarding an amendment was not persuasive. (Order P. 10).

Also importantly, Mr. Myers has asked this court to require the trial court to rule on his informal motion to “amend[] the Complaint to add an additional claim”. (Appellant’s brief, pp.7-8). Myers is not asking to substitute a new claim for the bad claims, he is merely asking to add on. That does not make the current allegations any more valid. Mr. Myers did not properly file a motion to amend his Complaint, did not pay the court’s mandatory motions fee, give counsel ten days-notice, and did not present the court with the proposed amended pleading, despite having prepared multiple versions that were presented to counsel and rejected for consent. The court was left with pure speculation and conjecture by Mr. Myers about the amendment.

The futility was obvious in that the statute of limitations had already expired on all claims, Mr. Myers had never served the respondents and the time for service had expired, and he had improperly included Mr. Schwedo as a party. All of these positions make the amendment futile without even considering the ruling that the plaintiff had failed to state a claim for which relief could be granted. The court acted properly with regard to denying the plaintiff's oral motion to amend, if it can even be considered such, during the hearing. This ruling should be upheld.

II. THE TWO-ISSUE RULE APPLIES TO THIS APPEAL AS MYERS FAILED TO APPEAL ALL GROUNDS FOR THE ORDER.

“Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case.” *Horton v. City of Columbia*, 408 S.C. 27, 757 S.E. 2d 537, 540 (Ct. App. 2014) quoting *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E. 2d 900, 903 (2010); see also *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 566, 511 S.E. 2d 372, 378 (Ct. App. 1998)(holding an “unchallenged ruling, right or wrong is the law of the case and requires affirmance”). Here, the trial court granted the motion to dismiss based on multiple grounds – (1) the Statute of Limitations; (2) Failure to Serve; (3) Failure to State a Claim for which Relief may be Granted; and (4) Dismissing Kevin Schwedo as an improper defendant.

Myers has made absolutely no argument that the order dismissing this matter on any of these bases other than the statute of limitations was improper or against settled law. Therefore, it is the law of the case that Kevin Schwedo is dismissed as an improper defendant. Further, it is the law of the case that the respondents were not properly and timely served with the Summons and Complaint. Finally, it is the law of the case that the Complaint fails to state a claim for which

relief may be granted. On these grounds alone, this court should affirm the decision of the trial court dismissing this matter.

III. MYERS MISSED THE STATUTE OF LIMITATIONS FOR HIS CLAIMS

The allegations in this case are subject to the two-year statute of limitations as set forth in S.C. Code Ann. § 15-78-110 of the Act:

Except as provided for in Section 15-3-40, any action brought pursuant to this chapter is forever barred unless an action is commenced within two years after the date the loss was or should have been discovered; provided, that if the claiming first filed a claim pursuant to this chapter, then the action for damages based upon the same occurrence is forever barred unless the action is commenced within three years of the date the loss was or should have been discovered.

A three-year statute of limitations is only available to a party who files a “verified claim”. *See* S.C. Code Ann. § 15-78-80 (Supp. 2002); *Flateau v. Harrelson*, 355 S.C. 197, 207, 584 S.E. 2d 413 (Ct. App. 2003); *see also Joubert v. South Carolina Dept’ of Soc. Servs.*, 341 S.C. 176, 534 S.E. 2d 1 (Ct. App. 2000) (if plaintiff files a statutorily-defined claim within one year of loss or injury, statute of limitations is extended to three years). Here, Mr. Myers did not file a statutorily compliant verified claim. As there is no evidence that Myers filed a verified claim, the three-year statute of limitations does not apply and the two-year statute of limitations is applicable. The DUI arrest and license suspension in this case occurred on July 7, 2018. The hearing on the Implied Consent suspension was requested on August 7, 2018. The letter at issue in this case was sent on August 13, 2018, and the hearing officer upheld the suspension on September 19, 2018. The allegations relating to Gross Negligence relate to the letters sent to Mr. Myers on August 13, 2018. Mr. Myers received one letter saying the suspension was deleted, and a second letter dated the same day, advising that the suspension was in effect and his request for hearing had been received. He also received copies of the SCDMV’s motion to dismiss the Implied Consent hearing as the

request was filed out of time (served August 14, 2018), the hearing officer's order to him to file a response (served on August 20, 2018 by e-mail), and the hearing officer's order dismissing the challenge to the implied consent suspension, which was served on him by e-mail on September 19, 2018.

Mr. Myers claims he relied on the single letter dated August 13, 2018, that said the suspension was deleted. (Letter #1). He thereafter completely ignored correspondence, motions and orders to the contrary. (Letter #2, Motion, Order). The Complaint in this case was filed on August 16, 2021, over a year after the expiration of the two-year statute of limitations based on the conflicting letters and eleven months after receiving the hearing officer's order dismissing the implied consent challenge and upholding the license suspension. S.C. Code Ann. § 15-78-110. Additionally, in paragraph 28, Mr. Myers indicates that he was notified by Uber and Lyft on August 12, 2019, that his license was suspended. (Complaint). The fact that he was dilatory in taking any action on such notices does not inure to his benefit in calculating the statute of limitations. While all this was going on, Mr. Myers was in law school. He graduated from law school in 2019. He knew or should have known that he had an issue with his driver's license when he was arrested for driving under the influence and his implied consent challenge was dismissed at the latest. However, even using this date as the date of notice, he has missed the two year statute of limitations by several days. Therefore, the claim for Gross Negligence should be dismissed on the basis that the statute of limitations has expired.

Declaratory Judgment actions have a three year statute of limitations, but Mr. Myers' request for declaratory relief is unclear at best. Mr. Myers appears to be asking the court to declare that the right to operate a motor vehicle is a fundamental right under the due process clause of the 14th Amendment of the United States Constitution. A drivers license is not a right, but a privilege

that can be taken away when a driver commits a violation of driving laws – i.e. driving while under the influence of alcohol or drugs. Mr. Myers’ privilege to operate a motor vehicle was suspended by virtue of his arrest for DUI and refusal to take a breathalyzer test on July 7, 2018. Even if the court were to consider declaring the operation of a motor vehicle a fundamental right (which it is not) the statute of limitations for such an action would be July 7, 2021. This matter was not filed until August 16, 2021, more than a month after the expiration of the statute of limitations. And further, the matter was not timely served and therefore never formally or timely commenced.

CONCLUSION

Mr. Myers’ failure to serve SCDMV and Schwedo means that his civil action was never actually ‘commenced.’ Therefore, there was nothing to amend. Further, because Myers has failed to appeal all grounds for the dismissal of this matter, the two issue rule applies. Additionally, the statute of limitations expired prior to filing, Myers did not properly move to amend his pleading and such amendment would in fact be futile. For all of these reasons, Respondents respectfully request that this Court affirm the February 16, 2022, order dismissing this matter and the March 2, 2022 order denying the motion to reconsider; for costs and fees; and for all other measures of relief as this Court deems just and proper.

Respectfully submitted,

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