
IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

No. 2007-IA-01286-SCT

HENLEY TIMBER CO., CHARLES PETITIONERS/DEFENDANTS/APPELLANTS
W. HENLEY, INDIVIDUALLY AND
D/B/A HENLEY TIMBER CO.

v.

ROBERT JOSEPH PONTI, JR. RESPONDENT/PLAINTIFF/APPELLEE

REPLY BRIEF OF APPELLANTS

**Appeal from the
Circuit Court of Hancock County, Mississippi,
Cause No. 01-0484**

(Oral Argument Requested)

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Argument

The application of a statute of limitations is a question of law, which is reviewed *de novo*. Caves v. Yarbrough, 2007 WL 3197504 (Miss.) (Miss.,2007). See also, ABC Mfg. Corp. v. Doyle, 749 So.2d 43(¶ 10) (Miss.1999) (citing Ellis v. Anderson Tully Co., 727 So.2d 716 (¶ 14) (Miss.1998)); Southern Win-Dor, Inc. v. RLI Ins. Co. (Miss. App., 2005) *cert. denied*, 927 So.2d 750 (Miss. Apr. 06, 2006).

In his brief, the Plaintiff mistakenly claims that the Defendants are attempting to "relitigate" an issue regarding service of process. This is simply erroneous. The Defendants are not asking this Court, nor did it ask the trial court, to reconsider or set aside any previous order of the trial court regarding service of process. Since one of the trial court's orders of January 24, 2005 allowed the Plaintiff to serve process on the Defendants, the Defendants, upon being finally properly served with process, then raised - by motion to dismiss - a legitimate affirmative defense based upon the expiration of the statute of limitations.

The three-year statute of limitations for this action based on a car wreck of 12/5/1998 would have expired on 12/5/2001, but the Plaintiff's filing of his Complaint on 12/5/2001 tolled the running of the statute for 120 days, or until 4/4/2002. M.R.Civ.P. 4(h). Thereafter the remainder of the three year statute of limitations (had there been any) would have resumed running, but since the Complaint was filed on the three-year anniversary of the accrual of the cause of action, there simply was no further time for the Plaintiff to complete service, and the statute therefore expired on 4/4/02. The Defendants are entitled to rely on the

statute of limitations to bar the Plaintiff's action. See, Southern Win-Dor, Inc. v. RLI Ins. Co. (Miss. App., 2005) *cert. denied*, 927 So.2d 750 (Miss. Apr. 06, 2006).

In Southern Win-Dor, the Mississippi Court of Appeals addressed a plaintiff's claim that the defendant in that case was "equitably estopped" from raising the affirmative defense of the expiration of the applicable statute of limitations. The Court of Appeals cited and discussed Izard v. Mikel, 163 So. 498, 499 (Miss. 1935), a case in which estoppel was applied to allow a foreclosure sale even though the statute of limitations had passed. In Izard, the debtor had promised to renew his promissory note so long as the plaintiff did not go forward with the foreclosure. Then when the applicable statute of limitations expired, the debtor asserted it as an affirmative defense. The Court of Appeals in Southern Win-Dor held that Izard was distinguishable because there was no promise on the part of the defendant to induce the plaintiff not to timely bring suit.

In case *sub judice*, there was no promise or representation upon which the plaintiff relied which resulted in the plaintiff's failure to timely serve process on the defendants. The plaintiffs simply failed to comply with the rules concerning service of process and the trial court found that the defendants were not properly before the court.

The Southern Win-Dor Court further stated:

[t]he primary purpose of statutory time limitations is to compel the exercise of a right of action within a reasonable time.... They are designed to suppress assertion of false and stale claims, when evidence has been lost, memories have faded, witnesses are unavailable, or facts are incapable of production because of the lapse of time. Accordingly, **the fact that a barred claim is a just one or**

has the sanction of a moral obligation does not exempt it from the limitation period. These statutes of repose apply with full force to all claims and courts cannot refuse to give the statute effect merely because it seems to operate harshly in a given case. The establishment of these time boundaries is a legislative prerogative.

Southern Win-Dor, Inc. v. RLI Ins. Co., (Miss.App.,2005) citing, Cole v. State, 608 So.2d 1313, 1317-18 (Miss.1992) (Emphasis added).

The Plaintiff in his brief cites to a passage from one of the hearings held in this matter in which counsel for the defendants expresses sympathy for the Plaintiff's position/circumstance. Apparently this is intended to suggest that the Defense counsel actually agreed with the position taken by Plaintiff at the hearing. However, the expression of sympathy by defense counsel does not equate to the Defendant's counsel agreement with the Plaintiff's arguments that the statute of limitations should be ignored or disregarded, or that the Plaintiff had "good cause" for not properly serving the Defendants with process within the time provided by the statute and Rule 4(h).

CONCLUSION

The Defendants make no collateral attack on the trial court's ruling of January 24, 2005 regarding whether the Plaintiff could serve process on the Defendants. The Defendants admittedly did not raise the statute of limitations issue at the hearing on the Plaintiff's motion for time to serve the Defendants, but since as the Court ruled the Defendants were not even "before the court" at the time, and the Plaintiff had yet to achieve proper service of process even at that point, it was not incumbent upon the Defendants to raise the issue then. Given that

the Plaintiff had not done it properly yet, and given that there might be a possibility for some negotiated settlement, the Defendants were not obligated to raise the statute of limitations issue, or any other affirmative defenses, until they had been served and were properly before the Court on the merits. The Defendants were permitted to wait and see whether the Plaintiff would ever actually consummate proper service of process. When this was finally accomplished, the Defendants then did, as was their right, assert the affirmative defense of the expiration of the statute of limitations, and moved to dismiss. The Trial Court erred in not granting that motion.

The Plaintiff's January 20, 2005 Motion for Extension of Time to Serve Defendants is of no moment since the statute of limitations had already expired, and the Defendants, in January 2005, could not agree to "turn back time" and restore a statute of limitations which had already run. While, hypothetically, it might have been possible for the Defendants to agree to not raise as an affirmative defense the expiration of the statute of limitations, there is no evidence that this happened. Plaintiff's counsel does not assert that any such agreement existed, and neither of the trial court's orders of January 24, 2005 recited that the Defendants were waiving any affirmative defenses. Neither of those Orders addressed, or even indicated a intent to address, any statute of limitations issue. However, when service of process was finally accomplished, the Defendants immediately moved to dismiss based upon this affirmative defense.



WHEREFORE, Henley Timber Co., Charles W. Henley, Individually, and d/b/a Henley Timber Co. respectfully reassert their prayer that this Court **reverse** the Circuit Court of Hancock County, and **render** this matter finding that the plaintiff's

claims against these Defendants are barred pursuant to the applicable statute of limitations, Miss. Code Ann. § 15-1-49.

RESPECTFULLY SUBMITTED, this the 25th day of April, 2008.

HENLEY TIMBER CO., CHARLES W. HENLEY,
Individually, and d/b/a HENLEY TIMBER CO.,
Appellants

By: ANDERSON, CRAWLEY & BURKE, PLLC
Their Attorneys

By: 
Kenneth S. Womack / MB No. 

CERTIFICATE OF SERVICE

COMES NOW the undersigned Kenneth S. Womack, who hereby certifies that he has this day served, via United States Postal Service, First Class, Postage Pre-paid, a true and correct copy of the above and foregoing **Reply Brief of Appellants** to the Honorable William M. Cunningham, Attorney for Plaintiff, at his regular mailing address of Burns, Cunningham, Mackey and Pillingim, Attorneys at Law, P.O. Box 1583, Mobile, Alabama 36633, sent via facsimile 251-432-0625., and to the Honorable Roger T. Clark, Circuit Court Judge, Post Office Box 1461, Gulfport, Mississippi 39502.

So Certified, this the 25th day of April, 2008.


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