2026 WL 1856350
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Court of Appeals of Georgia.

HENDERSON

v.

GARDNER.

A26A0001
|
June 26, 2026

Attorneys and Law Firms

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Opinion

Barnes, Presiding Judge.

***1** The trial court dismissed Christopher Henderson's renewed complaint after concluding that OCGA § 9-2-61 (a), the renewal statute, did not apply to Henderson's case because there had been a judicial determination dismissing the earlier complaint. Henderson appeals from that order. Following our review, we affirm.

In construing the proper application of the renewal statute, OCGA § 9-2-61, we apply a de novo standard of review. *Gresham v. Harris*, 329 Ga.App. 465, 467, 765 S.E.2d 400 (2014).

On March 31, 2022, Christopher Henderson was involved in a car accident with Ralph Gardner. On February 19, 2024 in the State Court of Cobb County, Henderson filed a complaint for damages against Gardner for injuries he alleged were sustained in the accident. On October 4, 2024, in response to Gardner's motion to dismiss, the trial court dismissed the complaint for failure to set forth facts establishing venue. The order noted that Henderson's complaint had failed to allege any facts supporting venue or jurisdiction in Cobb County, and that rather than amend the complaint to include such facts, Henderson had instead stated in his *response* to the motion to dismiss that the accident occurred in Cobb County.

Henderson filed the subject complaint on November 7, 2024 in the Superior Court of Cobb County, and Gardner moved to dismiss the complaint asserting that it was filed outside the statute of limitations. Henderson responded that the complaint was dismissed for lack of venue, which is without prejudice, and was renewed within six months of the dismissal pursuant to OCGA § 9-2-61 (a),[1] and thus not subject to dismissal. The trial court granted the motion to dismiss, concluding that OCGA § 9-2-61 (a) was not applicable to the case. The trial court found that the statute did not apply because there had been a judicial determination that dismissal was authorized, rather than Henderson voluntarily discontinuing or dismissing the complaint, as required by the statute. The trial court noted that while the statute permits renewal upon a judicial dismissal based on lack of subject matter jurisdiction, "[t]hat [privilege] does not apply in this matter." See OCGA § 9-2-61 (c). The trial court cited as persuasive authority *Sharpe v. McCartney*, 370 Ga. App. 329, 897 S.E.2d 479 (2024) and *Mikell v. Certain Underwriters at Lloyds, London*, 288 Ga. App. 430, 654 S.E.2d 227 (2007).

***2** In *Sharpe*, the appellant asserted that the trial court erred in finding that her action was not renewable under OCGA § 9-2-61 (a) because the federal court's dismissal of her original action due to a lack of diligence in perfecting service was "without prejudice" and did not address the merits. 370 Ga. App. at 329, 897 S.E.2d 479. This Court disagreed, citing as controlling the Supreme Court of Georgia's decision in *Hobbs v. Arthur*, 264 Ga. 359, 444 S.E.2d 322 (1994). We noted that,

> *Hobbs* held that "[t]he renewal statute is remedial in nature; it is construed liberally to allow renewal where a suit is disposed of on any ground not affecting its merits." Id. at 360 [, 444 S.E.2d 322]. The *Hobbs* court was clear, however, that the renewal statute does not apply "to cases decided on their merits *or* to void cases," and "[a] suit is ... void and incapable of renewal under OCGA § 9-2-61 (a) if there has been a judicial determination that dismissal is authorized." Id. "[U]nless and until the trial court enters an order dismissing a valid action, it is merely voidable and not void." Id (emphasis supplied).

Sharpe, 370 Ga. App. at 332, 897 S.E.2d 479.

In affirming the trial court's dismissal and finding that per *Hobbs*, OCGA § 9-2-61 (a) was inapplicable, this Court concluded that

> [h]ad Sharpe filed a voluntary dismissal before the federal court issued its dismissal order, this case would be in a different procedural posture and the renewal statute might

> well apply, but Sharpe may not wait until the original court dismisses her case for lack of diligent service within the applicable statute of limitation and then re-file a complaint in an attempt to overcome the dismissal of her original action. Once the federal court dismissed Sharpe's original action for lack of diligence in perfecting service, the original action became void and not subject to renewal.

Sharpe, 370 Ga. App. at 334, 897 S.E.2d 479.

Likewise in *Mikell*, in noting the "judicial dismissal based on a nonamendable defect" of lack of standing, this Court agreed with the trial court's conclusion that OCGA § 9-2-61 (a) did not apply and that the statute of limitations barred the appellant's attempt to renew the complaint. 288 Ga. App. at 431-432, 654 S.E.2d 227.

Henderson filed a motion for reconsideration of the dismissal in which he argued that a dismissal on the basis of venue was not a dismissal on the merits pursuant to OCGA § 9-11-41(b)[2] and thus the trial court erred in finding that his complaint could not be renewed. Henderson further argued that the cases cited by the trial court in its order "have no relevance to the timely renewal of a lawsuit that was dismissed for a matter that was not on the merits." Henderson instead relied on this Court's holdings in *Shaw v. Lee*, 187 Ga. App. 689, 371 S.E.2d 187 (1988) and *Bowman v. Ware*, 133 Ga. App. 799, 213 S.E.2d 58 (1975). Both cases, he argued, clearly held that the involuntary or voluntary status of the dismissal is irrelevant for purposes of the renewal statute as long as the grounds were not based on the merits.

***3** In its subsequent denial of Henderson's motion for reconsideration, the trial court noted that whether the decision was decided on the merits was irrelevant to the disposition because a case is void and incapable of renewal "where a judicial determination has been made that dismissal is authorized." The court further noted that the cases cited by Henderson were decided under an earlier version of OCGA § 9-2-61 (a), and that the language in the current version of the statute "carves out the sort of dismissal that occurred in this case."[3] Henderson appeals from that order.

On appeal, Henderson contends that the trial court erred in finding that OCGA § 9-2-61 did not apply because the trial court, rather than Henderson, had made a judicial determination dismissing the case and thus rendering the case void, such that the new complaint was barred by the statute of limitations. According to Henderson, historically our courts have found that the renewal statute applies to voluntarily and involuntarily dismissed cases and that a dismissal based on improper venue is not an adjudication on the merits, and in ruling otherwise, the trial court had erroneously extended *Sharpe* beyond its very narrow holding related only to the applicability of OCGA § 9-2-61 (a) to a dismissal for improper service. Henderson notes that our appellate courts in *Patterson v. Douglas Women's Center*, 258 Ga. 803, 374 S.E.2d 737 (1989), and *Fowler v. Aetna Casualty and Surety*, 159 Ga. App. 190, 283 S.E.2d 69 (1981), have held that actions in which venue is improper are not void. See *Patterson,* 258 Ga. at 804 (4), 374 S.E.2d 737 (citing *Fowler*, 159 Ga. App. at 190, 283 S.E.2d 69, in noting that "[o]ur courts have held that actions in which venue was improper are not void[.]"). Because such controlling precedent contradicts the trial court's judgment, he argues, reversal is required.

> When a plaintiff relies upon the renewal statute to recommence a suit that otherwise would be barred by the statute of limitation, the renewal petition must show affirmatively that the former petition was not a void suit, that it is such a valid suit as may be renewed under OCGA § 9-2-61, that it is based upon substantially the same cause of action, and that it is not a renewal of a previous action which was dismissed on its merits so that the dismissal would act as a bar to the rebringing of the petition.

***4** *Strickland v. Geico Gen. Ins. Co.* 358 Ga. App. 158, 159, 854 S.E.2d 348 (2021) (citation and punctuation omitted). In delineating adjudications on the merits, OCGA § 9-11-4 (b) provides in relevant part that, "[a]ny other dismissal under this subsection and any dismissal not provided for in this Code section, *other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party*, does operate as an adjudication upon the merits unless the court in its order for dismissal specifies otherwise." (emphasis supplied). However, although a dismissal for improper venue may not operate as a decision on the merits, "renewal does not apply to cases decided on their merits *or* to void cases." *Patterson*, 258 Ga. at 804 (3), 74 S.E.2d 737 (emphasis supplied). Thus, in this case, the renewal statute would not apply if Henderson's case is void as a result of the dismissal.

In *Tate v. Coastal Utilities*, 247 Ga. App. 738, 545 S.E.2d 124 (2001), we noted that, "[i]f service was never perfected, then the original action is void, since the filing of a complaint without perfecting service does not constitute a pending suit," but that "a suit is *also* void and incapable of renewal under OCGA § 9-2-61 (a) if there has been a judicial determination that dismissal is authorized. However, unless and until the trial court enters an order dismissing a valid action, it is merely voidable and not void." 247 Ga. App. at 739-40

(1), 545 S.E.2d 124. See also *Allen v. Kahn*, 231 Ga. App. 438, 440, 499 S.E.2d 164 (1998) (explaining that renewal remained available to a plaintiff where the original action was filed prior to the running of the statute of limitation and proper service was not perfected on a defendant until after the expiration of such statute, provided that the plaintiff voluntarily dismissed the original action before the trial court ruled that the case should be dismissed for lack of diligence in perfecting service).

Accordingly, whether dismissal for venue is an adjudication on the merits is not dispositive in determining whether Henderson's complaint falls within the parameters of the renewal statute. As emphasized in *Sharpe*, "[t]he *Hobbs* court was clear ... that the renewal statute does not apply to cases decided on their merits or to void cases, and a suit is void and incapable of renewal under OCGA § 9-2-61 (a) if there has been a judicial determination that dismissal is authorized." 370 Ga. App. at 332, 897 S.E.2d 479 (citation modified).

This Court must presume that "the legislature meant something by the passage of [a statute] and [we are] charged with the duty to construe a statute so as not to render it meaningless." *Powell v. Studstill*, 264 Ga. 109, 113 (3) (b), 441 S.E.2d 52 (1994); *Handel v. Powell*, 284 Ga. 550, 554-555, 670 S.E.2d 62 (2008) (courts must construe a statute "to give sensible and intelligent effect to all of its provisions and to refrain from any interpretation which renders any part of the statute meaningless") (citation and punctuation omitted). In doing so we also "must presume that the General Assembly meant what it said and said what it meant." *Deal v. Coleman*, 294 Ga. 170, 172 (1) (a), (751 S.E.2d 337) (2013) (citation and punctuation omitted). And we must likewise adhere to the principle of statutory interpretation that "changes in statutory language generally indicate an intent to change the meaning of the statute." *Jones v. Peach Trader,* 302 Ga. 504, 514 (III), 807 S.E.2d 840 (2017) (citation and punctuation omitted). Consequently, we cannot ignore the legislature's specific omission of the provision "[i]f a plaintiff shall be nonsuited," from the 1967 amendment to OCGA § 9-2-61. See generally *Five Star Athlete Mgmt. v. Davis*, 355 Ga. App. 774, 780 (2), 845 S.E.2d 754 (2020) (noting that where trial court concluded that term "services" met definition of personal property under RICO Act, "[t]o effectuate the trial court's interpretation, this Court would have to ignore the legislature's explicit use of the terms 'real property' or 'personal property,' and presume the legislature intended the broader definition of property to apply. This we cannot do.").

***5** Thus, given these circumstances, the trial court did not err in finding that Henderson's complaint was incapable of renewal pursuant to OCGA § 9-2-61.

Judgment affirmed.

Markle and Hodges, JJ., concur.

All Citations

--- S.E.2d ----, 2026 WL 1856350

Footnotes

1 OCGA § 9-2-61 (a) provides in relevant part:

> When any case has been commenced in either a state or federal court within the applicable statute of limitations and the plaintiff discontinues or dismisses the same, it may be recommenced in a court of this state or in a federal court either within the original applicable period of limitations or within six months after the discontinuance or dismissal, whichever is later, subject to the requirement of payment of costs in the original action as required by subsection (d) of Code Section 9-11-41; provided, however, if the dismissal or discontinuance occurs after the expiration of the applicable period of limitation, this privilege of renewal shall be exercised only once. ... c) The provisions of subsection (a) of this Code section granting a privilege of renewal shall apply if an action is discontinued or dismissed without prejudice for lack of subject matter jurisdiction in either a court of this state or a federal court in this state.

2 OCGA § 9-11-41(b) provides in relevant part that,

> The effect of dismissals shall be as follows: (1) A dismissal for failure of the plaintiff to prosecute does not operate as an adjudication upon the merits; and (2) Any other dismissal under this subsection and any dismissal not provided for

in this Code section, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, does operate as an adjudication upon the merits unless the court in its order for dismissal specifies otherwise.

3 The former renewal statute provided, in relevant part, that [i]f a plaintiff shall be nonsuited, or shall discontinue or dismiss his case, and shall recommence within six months, such renewed case shall stand in the same footing, as to limitation, with the original case[.]" Ga. Code Ann. § 3-808 (1933). In 1967, the statute was amended and the provision "[i]f a plaintiff shall be nonsuited" was deleted. Ga. L. 1967, pp. 226, 244, § 39. Relatedly, Ga. Code Ann. § 110–310 provided: "A non suit shall not be granted merely because the court would not allow a verdict for plaintiff to stand; but if the plaintiff fails to make out a prima facie case, or if, admitting all the facts proved and all reasonable deductions from them, the plaintiff ought not to recover, a non suit shall be granted. A judgment of non suit shall not bar a subsequent action for the same cause brought in due time." See *Crow v. Whitfield*, 105 Ga. App. 436, 439, 124 S.E.2d 648 (1962). Ga. Code Ann. § 110-310, the nonsuit statute, was abolished effective January 1, 1967, upon the enactment of the Georgia Civil Practice Act, Ga. Code Ann. § 81A-201. *Bowen v. State*, 239 Ga. 517, 517-518 (1), 238 S.E.2d 62 (1977). See *National Carloading Corp. v. Security Van Lines*, 164 Ga. App. 850, 851 (1), 297 S.E.2d 740 (1982) ("The remedy of nonsuit as formerly available under Code § 110-310 no longer exists. Code § 110-310 was specifically repealed by the Civil Practice Act. Code Ann. § 81A-201.") (citation and punctuation omitted).

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