

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

PATRICIA TOWLES,)
Plaintiff,)
)
v.)
) C. A. No.: 07C-03-069 CLS
JENNIFER MASTIN)
Defendant.)
)
)

Submitted: September 13, 2007

Decided: October 18, 2007

*Upon Consideration of Defendant's Motion to Dismiss
GRANTED.*

MEMORANDUM OPINION

Michael L. Sensor, Esquire, of Wilmington, Delaware, Attorney for
Plaintiff.

Nancy Chrissinger-Cobb, Esquire, of Wilmington, Delaware, Attorney for
Defendant.

SCOTT, J

INTRODUCTION

Before the Court is defendant's motion to dismiss plaintiff's complain, arguing that it falls outside the provisions of 10 Del. C. § 8118 (hereinafter referred to as the "Savings Statute"). The initial complaint was filed in New Jersey against defendant, a Delaware resident, alleging injuries from an accident which took place in Delaware. The New Jersey suit was dismissed for lack of personal jurisdiction. The Court finds the Savings Statute does not apply; therefore, the motion will be granted.

FACTS

Plaintiff and defendant were involved in a motor vehicle accident in New Castle, Delaware on June 24, 2004.¹ Plaintiff alleges that she sustained physical injuries as a result.² Plaintiff was a resident of New Jersey at the time of the accident.³

Plaintiff's prior New Jersey counsel sent a letter of representation to defendant's insurance adjuster on March 28, 2005. In June 2006, in accordance with 18 Del. C. § 3914, counsel for plaintiff was informed by the insurance adjuster of the impending statutory deadline for filing an action in Delaware. Defense counsel stated at oral argument that New Jersey counsel

¹ D.I. 1 at 1.

² *Id.* at 2.

³ *Id.*

advised defendant's insurance adjuster, as early as May 2005, that defendant could speak with plaintiff only after an action was filed.

Counsel for defendant indicated that while there were also service of process issues, ultimately, the New Jersey action was dismissed on October 20, 2006 for lack of personal jurisdiction.⁴ This action was filed March 7, 2007.⁵

PARTIES CONTENTIONS

Defendant's Argument

Defendant argues that the failed New Jersey action is not sufficient to meet the "duly commenced" requirement of the Savings Statute. To be "duly commenced," defendant argues, the action must have been properly filed or based upon a proper foundation.⁶ Plaintiff argues defendant failed to make a reasonable inquiry into whether the New Jersey court could properly exercise jurisdiction before filing an action there.

Plaintiff's Response

First, plaintiff argues that Delaware law interpreting the Savings Statute makes a distinction in applying that statute based upon the reason for which the original action was dismissed. In so arguing, plaintiff cites to a

⁴ D.I. 1 at 3. Plaintiff does not dispute this, but indicates proper service was obtained in this action.

⁵ *Id.*

⁶ D.I. 3 at 2 citing *Ellis v. Davis*, 1998 WL 281053.

District Court decision as well as, the *Howmet*⁷ decision by this court.

Moreover, plaintiff avers, the ultimate purpose of the statute is that an action should not be dismissed where the defendant is placed on notice of plaintiff's intent to litigate.⁸ Plaintiff argues that defendant is not alleging a lack of notice of the New Jersey action. Further, plaintiff avers that by obtaining a dismissal of the New Jersey action, defendant had actual notice of an intent to litigate the incident.

Finally, plaintiff argues that the Savings Statute applies even when counsel's actions were "careless," so long as notice of intent to litigate is received. Counsel for plaintiff admits that the actions of his predecessor were careless. However, plaintiff argues that no harm will result to defendant if the court permits this suit to continue. Moreover, counsel for plaintiff states that the only remaining redress for his client if this case is dismissed will be a malpractice claim against the New Jersey attorney.

DISCUSSION

As a threshold matter, it appears undisputed that if the Savings Statute does not apply then the action is untimely.⁹ The Court is mindful of the

⁷ 285 A.2d 423 (Del. Super. Ct. 1971).

⁸ To support this proposition, plaintiff cites: *Giles v. Rodolico*, 140 A.2d 263, 268 (Del. 1958). *Accord. Purnell v. Dodman*, 311 A.2d 877, 880 (Del. Super. Ct. 1973); *Viars v. Surbaugh*, 335 A.2d 285, 289 (Del. Super. Ct. 1975); *Criswell v. McFadden*, 2006 WL 435717 (D. Del).

⁹ The applicable statute of limitations is two years under 10 Del. C. § 8119.

liberal construction of the Savings Statute. Such a rule enables parties to have their day in court despite technical errors.¹⁰ The rule is not designed to act as a “refuge for careless and negligent counsel, but . . . it appears that no harm will result from the allowance of a second suit.”¹¹ The Savings Statute can apply if counsel has made an “oversight.”¹² Application of the rule requires the Court to balance the equities.

In *Leavy*,¹³ this Court ruled that the Savings Statute applies even when there is a failure by counsel. However, the facts of that case are distinguishable from the present matter. In that instance, there was some question as to where the incident at issue took place. Moreover, plaintiff submitted to a medical examination at defendant’s request after the Pennsylvania action was filed but before its dismissal on jurisdictional grounds.

No such good faith exists here for several reasons; first, no basis has been presented to this Court which would indicate a New Jersey court could have personal jurisdiction over defendant. There have been no facts presented to this court indicating the defendant resided in New Jersey or that the accident took place in New Jersey.

¹⁰ *Howmet Corp. v. City of Wilmington*, 285 A.2d 423, 426 (Del. Super. Ct. 1971).

¹¹ *Giles*, 140 A.2d at 267.

¹² *Leavy v. Saunders*, 319 A.2d 44, 47 (Del. Super. Ct. 1974) citing *Giles supra*.

¹³ 319 A.2d at 47.

New Jersey counsel represented plaintiff for nearly two years before filing suit on the eve of the tolling of the statute of limitations. In fact, the insurance adjuster informed plaintiff's counsel of the impending deadline to file a Delaware action. To apply the Savings Statute here would be stretching the purpose of the statute. The purpose is to allow suits to go forward despite careless oversights of counsel. Here, counsel represented plaintiff for nearly two years and was given notice of the impending statute of limitations in Delaware, yet still filed suit in New Jersey; "[s]ection 8118 is not directed to neglect of an attorney."¹⁴

Delaware law directs the Court to balance the equities when deciding whether the Savings Statute applies.¹⁵ At oral argument, counsel indicated that defendant was served in the Delaware action, but not in the New Jersey action. Plaintiff's counsel responded by arguing that the insurance company had notice of the prior action. However, unless defendant has designated the insurance company as her agent, service of process upon the company is not sufficient to serve defendant.¹⁶ While counsel for plaintiff stated he spoke with defendant after filing the present action, the Delaware suit was filed

¹⁴ *Pac. Ins. Co. v. Higgins*, 1993 WL 133181 at *2 (Del. Ch.).

¹⁵ *Giles*, 140 A.2d at 267 "We think it would be a miscarriage of justice to hold that no cause of action can now be brought by reason of the expiration of time." *See also*, *Gaspero v. Douglas*, 1981 WL 10228 (Del. Super. Ct.) "I am also of the opinion that the equities of the case weigh in favor of the plaintiff."

¹⁶ *Taylor v. Champion*, 693 A.2d 1072, 1075 (Del. 1997).

almost three years after the accident. Plaintiff argues that defendant is not prejudiced because her carrier will defend her, but any judgment against defendant will be against her personally. Defendant was not timely placed on notice of an intent to litigate as plaintiff has not offered evidence indicating that service was perfected in the New Jersey action and service upon the insurance carrier is insufficient.

CONCLUSION

For the forgoing reasons, defendant's motion to dismiss is **GRANTED.**

IT IS SO ORDERED.

Judge Calvin L. Scott