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Voluntary dismissal did not toll the statute of limitations

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A voluntary dismissal did not toll the statute of limitations and did not give plaintiffs a year to re-file their case under the Massachusetts Savings Statute, a Superior Court judge has ruled in a case of first impression.

The statute, G.L.c. 260, §32, allows a case to be re-filed within a year if it was dismissed for any "matter of form."

But a voluntary dismissal is not a "matter of form," Superior Court Judge Judith Fabricant ruled.

"Plaintiffs have cited no case, and the Court has found none, treating a voluntary dismissal as a matter of form for purposes of the statute," she wrote. "The plaintiffs' argument would make application of the statute depend on determination of the plaintiffs' subjective motive for their own voluntary action. That cannot be what the legislature intended."

As a result, Fabricant dismissed a case brought by hedge fund investors who voluntarily dismissed their suit in the Delaware Court of Chancery and sought to re-file it later in the Suffolk Superior Court's Business Litigation Session.

The 20-page decision is *Cannonball Fund, Ltd., et al. v. Dutchess Capital Management, LLC, et al.*, Lawyers Weekly No. 12-269-11. The full text of the ruling can be ordered at masslawyersweekly.com.

Bad form

Dismissals based on lack of jurisdiction are considered "matters of form" under the statute, said Sanford F. Remz of Boston, who represented the defendants, but the Delaware suit did not specifically cite any jurisdictional grounds for the plaintiffs' request.

REMZ
Represented the defendants

The Yurko, Salvesen & Remz practitioner said Fabricant's ruling marked the first time a Massachusetts judge had ever been asked to decide whether the Savings Statute applies to voluntary dismissals.

"The takeaway from this case is that lawyers need to take precautions before dismissing a suit if they have the intent to re-file and the statute of limitations is lurking," he said. "A lawyer, for instance, can seek a stipulated dismissal on grounds of jurisdiction and there will be a tolling of the statute, but the bottom line is that [the plaintiffs] didn't ask for that here."

Virtually every state in the U.S. has a savings statute, Remz said.

But Massachusetts, unlike some other jurisdictions, does not expressly indicate whether voluntary dismissals are included or excluded from the law, he noted.

"When you don't have the benefit of a decision or stipulation or court ruling, then plaintiffs can simply ascribe a voluntary dismissal to any subjective reason that would happen to fall within the statute," he said. "That is where the court would run into trouble."

Such an outcome, Remz added, would put a judge in the difficult position of having to conduct an individualized inquiry into the underlying reason for a dismissal.

"Judge Fabricant did not consider what happened in Delaware to be a court ruling, but rather a rubber stamp," he said. "It was not clear how she would have ruled had the reason for the dismissal been stated on the record, because that's not what we were dealing with here."

Allen N. David of Boston's Peabody & Arnold, who argued a 1st U.S. Circuit Court of Appeals case cited by Fabricant, said there is no doubt a dismissal for want of jurisdiction is a matter of form under the statute.

David, who is not involved in *Cannonball,* said the lack of substantive involvement by a judge in Delaware distinguished the case from the 1st Circuit matter.

"Where there is no judicial resolution of the actual reason for a dismissal, it strikes me that the Savings Statute would not apply," he said. "That really does change the analysis."

George M. Linge of Reed Smith represented the plaintiffs. The Pittsburgh litigator, who is admitted in Massachusetts, acknowledged that his clients have filed a notice of appeal but otherwise declined to comment.

Same suit

Plaintiffs Cannonball Fund invested with defendant Duchess Capital Management and several of its subsidiaries.

The plaintiffs alleged that the defendants misrepresented their stated objectives and breached their fiduciary duties by making a series of questionable investments in two companies.

Beginning in 2003, they claimed, the defendants invested approximately $30 million in two companies for the purpose of enriching themselves through fees, stock grants and other compensation. The companies eventually failed.

The defendants notified the plaintiffs in a Feb. 27, 2008 letter that their redemption rights in the hedge fund had been frozen.

When the plaintiffs filed suit in Delaware in April 2010, some of the defendants moved to dismiss on jurisdictional grounds.

Following an October 2010 hearing on that question, the plaintiffs voluntarily dismissed the case without prejudice.

CASE: *Cannonball Fund, Ltd., et al. v. Dutchess Capital Management, LLC, et al.,* Lawyers Weekly No. 12-269-11

COURT: Superior Court

ISSUE: Is a voluntary dismissal a "matter of form" such that plaintiffs have a year to re-file their case under the Massachusetts Savings Statute?

DECISION: No

They filed their 12-count complaint in the BLS in June 2011, asserting claims similar claims to those in the Delaware action.

'Pro forma'

In dismissing the case, Fabricant said the only action taken by the judge in Delaware was to approve an unopposed motion for voluntary dismissal.

The judge in Delaware did not provide any grounds for doing so, Fabricant added.

"Such an action by a court is essentially pro forma," she said. "It does not constitute a ruling on personal jurisdiction or any other 'matter of form.'"

Fabricant added that the plaintiffs were on notice of the alleged misconduct for more than three years before filing suit in Boston.

Although the statute of limitations can be tolled based on a defendant's improper self-dealing, such a claim fails once a plaintiff is on "inquiry notice" of the misconduct, she said.

Fabricant wrote that inquiry notice does not require actual discovery of a defendant's wrongdoing. Instead, the statute of limitations begins to run when the plaintiffs should have discovered the fraudulent scheme.

"Here … the plaintiffs were on inquiry notice of the facts constituting the alleged breach by the time the [defendants] informed them of the freeze on February 29, 2008," she said. MLW