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Kim v. Dickinson Wright, PLLC, 135 Nev. Adv. Op. 20, 442 P.3d 1070 (Jun. 13, 2019)

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STATUTE OF LIMITATIONS: TOLLING

Summary

The Court reversed the district court's order granting the motion to dismiss and determined 28 U.S.C. § 1367(d), the statute of limitations for a state-law claim filed in federal court, stops running only while the claim is pending in federal court and for 30 days after the state-law claim's dismissal.² Further, Nevada's litigation malpractice rule, which does not apply to non-adversarial or transactional representation, or before the attorney files a complaint, tolls a litigation malpractice claim's statute of limitations until the underlying litigation is resolved and damages are certain, preserving the statute of limitations under NRS 11.207(1) which requires a party to bring an action within 2 years of discovering a cause of action.³

Background

Kim hired Charles M Damus, Esq. to handle a property dispute, upon which Damus was fired after failing to file a complaint to protect Kim's interest in the property. Kim subsequently hired Gibson Lowry Burris LLP ("Gibson") to pursue claims related to the property dispute and amended to include claims against Damus for legal malpractice, negligent undertaking to perform service and unjust enrichment for failure to file a complaint stopping the property foreclosure. Gibson filed each claim in Nevada's federal district court.

Dickinson Wright, PLLC, absorbed the Gibson firm, and entered into an amended and restated legal services agreement with Kim, during which Kim's federal action was ongoing. Over three years later, Kim inquired with Dickinson Wright whether her malpractice claims had been filed in state court, and Dickinson Wright responded that Gibson (the previous firm) had not done so, and Dickinson Wright would not do so because it was terminating its representation of Kim. Kim filed a malpractice complaint against Dickinson Wright.

The district court granted Dickinson Wright's motion to dismiss, finding that the statute of limitations had not run on Kim's Damus claim under 28 U.S.C. § 1367(d) and NRS § 11.207(1); however the statute of limitations had run on Kim's claim against Dickinson Wright, and was time-barred under NRS § 11.207(1).⁴

Discussion

¹ By Elizabeth Davenport.

² 28 U.S.C. § 1367(d) (2018).

³ NEV. REV. STAT. 11.207(1) (1997).

⁴ 28 U.S.C. § 1367(d), NEV. REV. STAT. 11.207(1).

The Court reviewed the order granting NRCP 12(b)(6) motion to dismiss, reviewing all legal conclusions and statutory constructions de novo, and recognizing all factual allegations as true, with inferences in the plaintiff's favor.⁵

28 U.S.C. § 1367(d)'s plain language distinguishes between the word "claim" and "action," making it clear that the relevant statute of limitations is not tolled while the entire "action" is pending, but only while the "claim" is pending; and that a dismissal of a claim, rather than the entire action, triggers the running of the statute of limitations.⁶ Additionally, the Court adopts the Supreme Court's explanation that § 1367(d) further suspends the statute of limitations while the state-law claim is pending in federal court and for 30-days post dismissal.⁷ Therefore, the district court erred in applying § 1367(d) by tolling the statute of limitations for Kim's claim until the action was no longer pending.

Further, the Court reviews Nevada's statute of limitations for legal malpractice, NRS 11.207(1), and Nevada's special tolling rule for litigation malpractice.⁸ The litigation malpractice rule "does not apply to non-adversarial or transactional representation, and it does not apply before the attorney files a complaint." The litigation malpractice rule instead tolls the malpractice statute of limitations two-year discovery rule, tolling "until the underlying litigation is resolved and damages are certain." Therefore, the district court erred by applying the litigation malpractice rule to Kim's Damus claim which was non-adversarial, while it does apply to Kim's Dickinson Wright claim, who was representing her in an adversarial claim.

Conclusion

The Court held that 28 U.S.C. § 1367(d) tolls the statute of limitations both while the state law claim is pending in federal court under supplemental jurisdiction and for at least 30 days after dismissal from federal court, regardless of the status of other claim's in that action. Further, the Court held Nevada's litigation malpractice rule applies to the two-year discovery statute of limitations in NRS 11.207(1), tolling an adversarial malpractice claim's statute of limitations until the underlying litigation is resolved and damages are certain; conversely, the litigation malpractice rule does not apply to non-adversarial or transactional representation or before the attorney files a complaint.

⁵ FED. R. CIV. P. 12(b)(6); *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227–28, 181 P.3d 670, 672 (2008); *Cox Constr. Co., LLC v. CH2 Invs., LLC*, 129 Nev. 139, 142, 296 P.3d 1202, 1203 (2013).

⁶ 28 U.S.C. § 1367(d) (stating "[t]he period of limitations for any claim asserted under [supplemental] jurisdiction, and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under [supplemental] jurisdiction, shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.").

⁷ *Id.*

⁸ NEV. REV. STAT. 11.207(1) (1997) (providing an "action against an attorney . . . to recover damages for malpractice, whether based on a breach of duty or contract, must be commenced within 4 years after the plaintiff sustains damage or within 2 years after the plaintiff discovers or through the use of reasonable diligence should have discovered the material facts which constitute the cause of action, whichever occurs earlier."); *Branch Banking*, 134 Nev., Adv. Op. 106, 432 P.3d 736, 738–40.

Therefore, applying the Court's interpretation of 28 U.S.C § 1367(d), the statute of limitations continued to run during Dickinson Wright's representation of Kim. While Kim's claims against Damus were not adversarial and consequently the tolling rule does not apply, the tolling rule did apply to Kim's malpractice claim against Dickinson Wright since their representation was an adversarial proceeding. Accordingly, the Court reversed the district court's order of dismissal and remanded to the district court for further proceedings consistent with this opinion.