DIVISION ONE
FILED: 06-17-2010
PHILIP G. URRY, CLERK
BY: PJL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JUANITA ORTIZ and ARMANDO ORTIZ, individually, and as husband and wife, Plaintiffs/Appellants, v. DAVID WESLEY DIETRICH and JANE DOE DIETRICH, individually, and as husband and wife; SUN DEVIL PLUMBING AND ROOTER, L.L.C., Defendants/Appellees.	No. 1 CA-CV 09-0598 DEPARTMENT B **MEMORANDUM DECISION** Not for Publication - (Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-090963

The Honorable Joseph Kreamer, Judge

REVERSED AND REMANDED

Keithly & English, P.C. — Anthony, NM
By J. Bradley Nichols
Attorneys for Plaintiffs/Appellants

Jones, Skelton & Hochuli, P.L.C. — Phoenix
By John M. DiCaro
Russell R. Yurk
Attorneys for Defendants/Appellees

G E M M I L L, Judge

¶1 Appellants Juanita and Armando Ortiz contend the trial

court erred by granting Appellees David Wesley Dietrich and Sun Devil Plumbing & Rooter, LLC's motion to dismiss the Ortizes' personal injury action on the ground it is barred by the statute of limitations. Because we agree that the action was timely initiated, we reverse the dismissal and remand for further proceedings.

FACTS AND PROCEDURAL BACKGROUND

¶2 On February 24, 2007, Juanita Ortiz was injured when the vehicle in which she was a passenger was struck by a commercial vehicle driven by Dietrich during the course and scope of his employment with Sun Devil. The Ortizes retained Keithly & English, P.C., a New Mexico law firm, to represent them in their negligence action against Dietrich and Sun Devil ("the Defendants").

¶3 Five days before the two-year statute of limitations expired, Keithly & English mailed the Ortizes' complaint, along with a certificate of compulsory arbitration, a summons, and the filing fee, to the clerk of the superior court by overnight delivery. These documents arrived the following day, February 20, 2009, and were received by the clerk. The two-year period of limitations expired on February 24, 2009.

¶4 The record indicates that on or about March 2, 2009, the clerk mailed these documents back to Keithly & English, along with the following explanation:

> Your check #8463 for $301.00 is being returned. The Certificate of Compulsory Arbitration has two titles. The title Compliant (sic) is next to the area where the case number is stamped. Each document can only have one title. The place where the title Certificate of Compulsory Arbitration is, is not in compliance with our format. Also you have not titled your Summons as a Summons. The Civil Cover Sheet you have included is outdated and a new one has been included for your convenience. Thank you.

¶5 On March 4, 2009, Keithly & English re-filed the complaint, certificate, and summons in superior court to conform to the clerk's requests. Thereafter, the Defendants moved to dismiss the complaint on the ground it was barred by the two-year statute of limitations. The Ortizes responded that the court should use its inherent equitable power to enter an order *nunc pro tunc* finding the complaint was timely filed or, alternatively, employ the doctrine of equitable tolling.

¶6 The trial court granted the Defendants' motion and dismissed the complaint with prejudice. The Ortizes timely appealed, and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

ANALYSIS

¶7 In granting the Defendants' motion to dismiss, the trial court was presented and considered matters outside the pleadings. The motion should have therefore been treated as one for summary judgment. *See Frey v. Stoneman*, 150 Ariz. 106, 109,

722 P.2d 274, 277 (1986). "In reviewing the granting of summary judgment on statute of limitations grounds, we view the evidence in a light most favorable to the party against whom summary judgment was entered and independently review any questions of law relating to the statute of limitations defense." *Logerquist v. Danforth*, 188 Ariz. 16, 18, 932 P.2d 281, 283 (App. 1996). We determine de novo whether the trial court erred in applying the law. *Id*.

¶8 Section 12-542 requires a plaintiff to commence an action for personal injuries "within two years after the cause of action accrues." An action is commenced by the filing of a complaint. *See* Ariz. R. Civ. P. 3. "Failure to do so within the time limit generally bars a negligence action. Thus, filing a complaint is critical for purposes of the statute of limitations." *Rowland v. Kellogg Brown and Root, Inc.*, 210 Ariz. 530, 532, ¶ 6, 115 P.3d 124, 126 (App. 2005) (citation omitted).

¶9 The complaint in this case was received by the clerk's office within the two year period of limitations provided by § 12-542. Thus, it would have been timely had it been filed by the clerk on the day it was received, February 20, 2009. The clerk declined to file the complaint, however, because of certain deficiencies and the clerk's office mailed the documents back to plaintiffs' counsel. Specifically, the clerk refused to

file the complaint because: (1) the certificate of compulsory arbitration had two titles; (2) the summons was not titled as such; and (3) the cover sheet form was outdated.[1] By the time the complaint and accompanying documents were re-filed, the two-year statute of limitations provided in § 12-542 had expired.

¶10 The issue is whether the court properly found the Ortizes' complaint is barred by the statute of limitations. We conclude the court erred in so finding because the complaint was constructively filed at the time it was originally received by the clerk on February 20, 2009.[2]

¶11 Our analysis begins with *Whittaker Corp. v. Estate of King*, 25 Ariz. App. 356, 543 P.2d 477 (1975). In *Whittaker*, the plaintiff mailed a complaint to the superior court, where it was

---

[1] In their opening brief the Ortizes suggest the complaint itself contained a technical error. The clerk's note does not necessarily indicate any such error, however, and the record suggests the complaint itself was in proper form. Although not essential to our determination, the fact that the complaint was in proper form provides further support for the conclusion that it should be considered to have been timely and appropriately submitted for filing.

[2] We note that the Ortizes' arguments have not used the specific words "constructive filing" or "constructively filed." The substance of their argument, however, encompasses the concept because they argue that the superior court should have deemed the pleadings timely filed in order to do substantial justice. Furthermore, Arizona has long recognized a strong preference that cases be resolved on their merits. *See City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, 178, ¶ 5, 181 P.3d 219, 225 (App. 2008) ("courts disfavor statute of limitations defenses, preferring instead to resolve litigation on the merits when possible").

received by the clerk within the period of limitation. *Id*. at 357, 543 P.2d at 478. It was returned to the plaintiff, however, because the caption did not describe the nature of the action, as was required by then-Rule XII of the Uniform Rules of Practice. *Id*. By the time the plaintiff re-filed a complaint in conformance with the Rule, it was outside the period of limitations and was dismissed. *Id*.

¶12 The court of appeals reversed, finding the complaint had been constructively filed on the day it was received in the clerk's office and the action should not have been dismissed. *Id*. The court reasoned that the purpose of Rule XII was to assist the court with case assignments and recordkeeping, and it stated:

> The rule does not authorize the Clerk of the Superior Court to reject the filing of the complaint if there is noncompliance with the classification requirement. The Clerk may, however, reject the filing pursuant to an order of the court to that effect. However, the rejection will not be held to affect the timeliness of filing if such an issue later arises.

Id. (emphasis added).

¶13 Similarly, in *Rowland v. Kellogg Brown and Root, Inc.*, 210 Ariz. 530, 531, ¶ 2, 115 P.3d 124, 125 (App. 2005), the plaintiff mailed a letter to the clerk's office within the two year period of limitations. The letter stated he had been injured while at Fort Huachuca by a forklift operator employed

by the defendants and the "[l]aw suite (sic) would be for Liability damages, bodily injuries, down time, and medical expenses, in the amount of Five million dollars. Please call me with any questions." *Id*. at ¶ 3. The letter contained his name and address and was captioned "Rowland VS Brown And Root." *Id*. The clerk returned the letter to the plaintiff "because the appropriate civil complaint was not sent to [their] office." *Id*. at ¶ 4. Thereafter, the plaintiff obtained counsel and re-filed a complaint, but the two year period of limitations had expired and the defendants were awarded summary judgment. *Id*.

¶14 In reversing the summary judgment, the court of appeals found the plaintiff's letter was sufficient to serve as a complaint under the minimal requirements of notice pleading. *Id*. at ¶¶ 10, 16. Citing *Whittaker*, the court concluded that, although plaintiff's complaint had been returned to him and had not been re-filed until after the statute of limitations had expired, it was "deemed to have been constructively filed before the limitations period had elapsed." *Id*. at ¶ 16.

¶15 As in *Whittaker* and *Rowland*, the Ortizes' complaint was received by the clerk's office within the applicable period of limitations. There has been no question that the substance of the complaint conformed to the minimal requirements of notice pleading. The deficiencies with the pleadings were technical and affected the clerk's office's administrative functions.

Such technical deficiencies or irregularities -- an outdated cover sheet and a certificate on compulsory arbitration having two titles -- are not fatal for purposes of the statute of limitations.[3] We note that, although the original summons was returned because it was not appropriately titled, the Defendants were served with a valid summons within 120 days of the Ortizes' original attempt to file the complaint, in compliance with Rule 4(i).

¶16 The dispositive question here is whether the clerk's office had a complaint in its possession, sufficient to initiate an action, before the expiration of the statute of limitations. The answer is yes. The complaint is deemed to have been constructively filed on February 20, 2007, and it is therefore not barred by the statute of limitations. *See Rowland*, 210 Ariz. at 534, ¶ 16, 115 P.3d at 128; *Whittaker*, 25 Ariz. App. at 357, 543 P.2d at 478. *Accord Cintron v. Union Pac. R.R. Co.,* 813 F.2d 917, 920-21 (9th Cir. 1987) (reversing dismissal of complaint as outside statute of limitations when complaint was timely received by clerk's office and returned for lack of cover sheet and failure to punch two holes at top of complaint); *Loya v. Desert Sands Unified Sch. Dist.*, 721 F.2d 279, 281 (9th Cir.

[3] The court in *Rowland* noted that it had found no statute or rule "that permits the clerk of the court to reject an improperly formatted or deficient pleading." 210 Ariz. at 532-33, ¶ 9, 115 P.3d at 126-27. Neither have we found such a statute or rule.

1983) ("We therefore hold that for purposes of the statute of limitations the district court should regard as 'filed' a complaint which arrives in the custody of the clerk within the statutory period but fails to conform with formal requirements in local rules."). *Cf. Justice v. United States*, 6 F.3d 1474, 1479 (11th Cir. 1993) (stating interests of justice align with plaintiff when "she timely files a technically defective pleading and in all other respects acts with 'the proper diligence . . . which . . . statutes of limitation were intended to insure'") (quoting *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 430 (1965)).

¶17 Because we determine the court erred in finding the Ortizes' complaint was not timely filed, we do not address their alternative argument that the court should have employed the doctrine of equitable tolling.

CONCLUSION

¶18 For the foregoing reasons, the judgment in favor of Defendants is reversed and this case remanded for further proceedings consistent with this decision.

__/s/_____
JOHN C. GEMMILL, Presiding Judge

CONCURRING:

__/s/_____
PATRICIA K. NORRIS, Judge

___/s/_____
MAURICE PORTLEY, Judge