

STATE OF MICHIGAN
COURT OF APPEALS

STACY HAWKINS,

Plaintiff-Appellant,

v

DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

UNPUBLISHED

April 20, 2010

No. 293478

Court of Claims

LC No. 08-000100-MP

Before: SAAD, P.J., and HOEKSTRA and MURRAY, JJ.

PER CURIAM.

Plaintiff appeals as of right the order of the Court of Claims granting summary disposition to defendant. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff reports that he, while a prisoner in defendant's custody, was party to a class-action settlement. According to the settlement terms, any participating prisoner claiming denial of access to the courts as the result of defendant's mail-by-disbursement policy¹ would have the claim deemed to have accrued on November 4, 2003, allowing plaintiff until November 3, 2006, to commence action. See MCL 600.5805(10) (general limitations period for personal injury); MCL 600.6452(1) (limitations for actions in the Court of Claims).

Plaintiff asserts that on November 1, 2006, while still imprisoned, he mailed a copy of his complaint, along with a motion for partial waiver of the filing fee, a notarized civil action certificate of prisoner account activity, an affidavit regarding suspension of fees or costs, and a twelve-month printout of his prison account activity, to the Court of Claims. See MCL 600.2963 (setting forth filing requirements for indigent prisoners). Plaintiff further reports that the clerk of the court date-stamped the cover letter for November 1, 2006, but returned his pleadings for want of a notarized affidavit of indigency, and that by the time he received the returned papers the limitations period had run.

¹ Plaintiff asserts that this policy cost him some appellate opportunities. The merits of the underlying litigation are not here at issue.

Plaintiff did not refile until late August or early September of 2008. Defendant moved for summary disposition pursuant to MCR 2.116(C)(7) (claim barred by the statute of limitations). Defendant disputed plaintiff's assertion that he was entitled to put forward an accrual date of November 4, 2003, for purposes of the underlying cause of action, but moved for summary disposition on the ground that even assuming the correctness of plaintiff's position in this regard,² the claim was now time barred. In opposing summary disposition, plaintiff, now on parole, asserted that a clerical error foiled his timely attempt to commence action in the first instance, and asked that he be deemed to have satisfied the statute of limitations. The trial court summarily granted summary disposition on the ground that "[p]laintiff's latest claim accrued on November 4, 2003," and was thus "barred by the three-year statute of limitations."

We review de novo a trial court's decision on a motion for summary disposition. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). Whether a claim is barred by the statute of limitations and the application of equitable tolling are questions of law, subject to de novo review. *James v Alberts*, 464 Mich 12, 14; 626 NW2d 158 (2001); *McKiney v Clayman*, 237 Mich App 198, 201; 602 NW2d 612 (1999).

Plaintiff's account of his initial attempt at commencing action suggests that he did everything right, but was thwarted, and thus placed outside the period of limitations, by an error of the clerk of the court. MCL 600.2963(1) sets forth detailed requirements for a prisoner to follow if commencing action and claiming some measure of indigence. Plaintiff apparently satisfied the requirements, which did not include the submission of an affidavit of indigency.

MCL 600.2963(7) provides for where "the court, pursuant to court rule, waives or suspends the payment of fees and costs in an action." The court rule governing indigency requires a party claiming indigency to make a showing of that indigency "by ex parte affidavit *or otherwise*." MCR 2.002(C) (persons on public assistance) and (D) (all other indigent persons) (emphasis added). Because MCL 600.2963(1) requires documentation which should show the extent of a prisoner's indigency, that documentation should satisfy the court rule requirement for a showing "by ex parte affidavit *or otherwise*." Accordingly, if, as plaintiff reports, the clerk of the court returned his pleadings for want of an affidavit of indigency, the clerk did so in error.

In seeking to avoid dismissal on the basis of the statute of limitations, on grounds of having been made to miss the filing deadline through an error on the part of the court, plaintiff invokes, though not by name, the doctrine of equitable tolling. The doctrine applies to "extraordinary" situations where it would be unfair to allow a statute of limitations defense to prevail because of particular and unusual inequities. See *Ward v Siano*, 272 Mich App 715, 718; 730 NW2d 1 (2006), rev'd 480 Mich 979 (2007), citing 51 Am Jur 2d, Limitation of Actions, § 174, pp 563-564.

At first glance, plaintiff's protestation that he was thwarted by a clerical error on the part of the trial court seems a good reason to invoke the doctrine. But "equity aids the vigilant, not

² The trial court apparently did not decide this issue, but instead joined defendant in assuming the truth of plaintiff's assertions for purposes of the motion. We do likewise for purposes of appeal.

those who sleep on their rights.” *Falk v State Bar*, 411 Mich 63, 113 n 27; 305 NW2d 201 (1981) (RYAN, J., joined by MOODY and FITZGERALD, JJ.) (quotation omitted). In this case, because plaintiff did not refile his complaint until more than 20 months after his first attempt and the expiration of the period of limitations, plaintiff cannot be said to have been vigilant.

In his brief on appeal, plaintiff explains the reason for the delay:

[Plaintiff] feared that if a trial court summarily dismissed his action on limitations grounds and he was not able to pay the filing fee he would lose his right to file an appeal of right from that decision and possibly even his right to file by leave. MCL 600.2963(8)^[3] strictly forbids a prisoner from commencing an appeal if he has not paid the filing fee on the underlying case. Because [plaintiff] did not have the money to pay the filing fee on the underlying case if his action was dismissed on limitations grounds he would not have been able to commence an appeal unless he came up with \$150 before the time for filing elapsed.

[Plaintiff's] reading of the applicable law left him believing that if he filed his action before he could come up with the money to pay his filing fee he would lose his opportunity to access this Court of Appeals. The clerk's error caused [plaintiff] to chose [sic] between delaying the re-filing of his action and between the prospect of being deprived of a meaningful opportunity to be heard on the merits of his claim.

We find this explanation unsatisfactory. Plaintiff fails to explain why, having initially attempted to avail himself of the avenues for at least partial waiver of fees by reason of indigency set forth in MCL 600.2963, he did not continue to do so as part of immediate attempts to get his day in court despite the court clerk's alleged error. Because a prisoner need not pay fees and costs duly waived because of indigency, such are not “outstanding” for purposes of MCL 600.2963(8) and would not bar an appeal.

Assuming, without deciding, that plaintiff's account of the court clerk's error as the sole cause of his failing to commence action within the applicable limitations period presents a good case for invocation of equitable tolling, we conclude that he was nonetheless not entitled to let month after month go by as if the limitations period could forever be extended or ignored. We hold that, having failed to exercise due diligence in the matter, plaintiff has forfeited his right to invoke that doctrine. The trial court thus correctly dismissed this case as untimely.

³ That subsection provides, “A prisoner who has failed to pay outstanding fees and costs as required under this section shall not commence a new civil action or appeal until the outstanding fees and costs have been paid.”

Affirmed.

/s/ Henry William Saad

/s/ Joel P. Hoekstra

/s/ Christopher M. Murray