

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

THERESA SMALL,)	
)	
Claimant-Below/Appellant)	
)	
v.)	C.A. No. 07A-05-009 FSS
)	
MBNA AMERICA,)	
)	
Employer-Below/Appellee.)	
)	

Submitted: May 2, 2008
Decided: July 7, 2008

ORDER

On Appeal From the Industrial Accident Board - *AFFIRMED*

Employee, Theresa Small, appeals the Industrial Accident Board's April 19, 2007 ruling dismissing her claim against her employer, MBNA America, because the two-year statute of limitations, 19 *Del. C.* § 2361(a), had expired. Small asserts that the Board erred because it did not apply 10 *Del. C.* § 8118, the "savings statute," which would have extended the filing deadline by a year.

Small filed her original claim on June 21, 2006, one day before the two-year statute of limitations expired. The Board dismissed the original claim in October 2006, for failure to prosecute. Small did not move to reargue or vacate the ruling. Instead,

three months later, on January 29, 2007, she re-filed the claim. On April 19, 2007, the Board ruled that the two-year statute of limitations barred Small's re-filed claim. This appeal followed.

I.

Small worked as an office clerk for MBNA. She filed documents and entered data into the company's computer. On June 22, 2004, she notified MBNA that her hands tingled, they were numb, and they had "locked-up," all signs of carpal stress disorder. Her symptoms prevented her from doing her job. (She no longer works for the bank.)

Small blamed MBNA for her wrist problems. On March 31, 2005, she filed a Petition to Determine Compensation Due, stating that the parties could not agree on compensation. In response, on May 3, 2005, MBNA submitted a Request for Production, asking Small to identify all doctors who had treated her within ten years. On August 2, 2005, Small's attorney withdrew the Petition, but informed the Board that she "anticipate[d] re-filing in the near future." Small re-filed on June 21, 2006, one day before the two-year statute of limitations expired.¹

A hearing was scheduled for October 24, 2006. In response, on

¹ Cf. *Conagra/Pilgrim's Pride, Inc. v. Green*, 2008 WL 2429113 (Del. June 17, 2008) (TABLE) (withdrawal and re-filing approved).

September 1, 2006, MBNA submitted another Request for Production. The document reiterated MBNA's earlier request for the doctors' identities. Again, Small did not produce the names.

On October 24, 2006, Small's attorney requested a continuance because Small was in Florida following her grandchild's birth. The Board denied the continuance and granted MBNA's request to dismiss for failure to prosecute owing to Small's absence and her failure to complete the pretrial memorandum or to identify any medical experts on her behalf. The dismissal did not state that it was without prejudice.

Small did not petition for a rehearing or reargument of the Board's dismissal.² On January 29, 2007, she re-filed the dismissed claim. MBNA moved to dismiss the re-filed, previously dismissed claim, asserting the two-year statute of limitations had expired by the time Small had re-filed the previously dismissed claim. On April 19, 2007, the Board granted MBNA's motion "with prejudice." Small's current attorney then filed this timely appeal.

² I.A.B. R. 21(A), (C).

II.

The court has a limited role on an administrative appeal, confined to the issues contained in the record below.³ The court examines whether substantial evidence supports the Board's legal ruling and whether it is legally correct.⁴

III.

The issue now is whether the Board correctly ruled that the statute of limitations had expired before Small filed her January 27, 2007 claim, which was thirty-one months after the statutory period began. Small contends that the Board erred because the savings statute extended the filing deadline to October 24, 2007. Small argues the savings statute "is entitled to liberal construction" to accommodate the courts' desire to "hear . . . petitions argued on their merits rather than being dismissed for procedural reasons." It applies when the defendant "cannot show prejudice by the commencement of a second action."

The Board correctly found that the statute of limitations barred Small's claim. The statute of limitations on a compensation claim expires after twenty-four

³ *Nanticoke Homes v. Miller*, 2003 WL 22232809 (Del. Super. Sept. 29, 2003).

⁴ *State v. Cephus*, 637 A.2d 20 (Del. 1994).

months.⁵ The statute of limitations began on June 22, 2004. Her previous attorney filed her claim on January 29, 2007, thirty-one months later. Simply put, the statutory period expired seven months before Small filed the claim that is the subject of the appeal.

Small's savings statute argument is unavailable as a matter of longstanding procedure because she did not present it at the Board's April 19, 2007 hearing. The appeals process limits the court to examining the issues the litigant presented to the tribunal below.⁶ The record from the Board's April 19, 2007 hearing gives no indication that Small mentioned the savings statute. Therefore, Small cannot raise the savings statute on appeal.

Even without the procedural default, the savings statute does not apply because it "saves" claims dismissed for simple technical errors like insufficient service or improper venue.⁷ It applies when the second action would not prejudice the defendant because he is aware of the plaintiff's attempts to bring him into court. Small's claim did not fail because of insufficient service or her previous attorney's

⁵ 19 Del. C. § 2361.

⁶ See *Wilmington Trust Co. v. Connor*, 415 A.2d 773 (Del. 1980); *Equitable Trust Co. v. Gallagher*, 77 A.2d 548 (Del. 1950); *Nanticoke Homes v. Miller*, 2003 WL 22232809 (Del Super. Sept. 29, 2003) (citing Super. Ct. Civ. R. 72(g)).

⁷ 10 Del. C. § 8118.

simple neglect, but because she did not appear before the Board on October 24, 2006 nor did she meet her discovery obligations.⁸ Small's conduct justified dismissal for failure to prosecute.

Moreover, *res judicata* compounds Small's challenges here. The savings statute only applies when the dismissal is "without prejudice." A dismissal "with prejudice" is an adjudication "on the merits" and *res judicata* forecloses a losing party from asserting an adjudicated claim against the same party. A dismissal for failure to prosecute is deemed an adjudication "upon the merits," unless the dismissal expressly states otherwise.⁹ Neither the transcript of the Board's October 24, 2006 hearing, nor the Board's decision expressly state that the dismissal was "without prejudice." Therefore, not only was Small's re-filed claim too late, it was barred by the earlier dismissal of the same claim for failure to prosecute.

Small could have asked the Board to reconsider its October ruling. After a dismissal, a litigant has ten days to petition the Board to rehear the claim or vacate the decision.¹⁰ Failing in that, Small could have filed a direct appeal challenging the

⁸ See *Giles v. Rodolico*, 140 A.2d 263 (Del. 1958); *Gosnell v. Whetsel*, 198 A.2d 924 (Del. 1964).

⁹ *O'Donnell v. Nixon Unif. Serv. Inc.*, 2003 WL 21203291, at *3 (Del. Super. May 20, 2003).

¹⁰ I.A.B. R. 21(A).

dismissal.¹¹ Small let the decision stand and that too foreclosed Small's attempt to re-file the claim.

IV.

A litigant cannot re-file a claim after it was dismissed for failure to prosecute and after the statute of limitations has expired. Therefore, the Board's April 19, 2007 ruling dismissing the claim is correct and it is *AFFIRMED*.

IT IS SO ORDERED.

Date: July 7, 2008

FWSS
Judge

oc: Prothonotary (Civil)
pc: Scott A. Simpson, Esquire
R. Stokes Nolte, Esquire

¹¹ I.A.B. R. 21(C).