

STATE OF MICHIGAN
COURT OF APPEALS

DAVID RICHARDS,

Plaintiff-Appellant,

v

PAUL ATKINS, A & K CONSTRUCTION, and
PAUL ATKINS EXCAVATION COMPANY,

Defendants-Appellees.

UNPUBLISHED

May 19, 1998

No. 198338

Wayne Circuit

LC No. 95-533796 NO

Before: Neff, P.J., and O'Connell and Young, Jr., JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's order dismissing the case on defendant's theory that applicable statute of limitations barred the action. We reverse and remand for further proceedings.

I

This case arises from a fight between the parties on November 20, 1993, of which defendant evidently got the better. Plaintiff alleged resultant injuries including a closed head injury, broken teeth, and damage to both eyes. The incident led to a criminal trial, in which defendant was convicted of malicious destruction of property and simple assault.

Plaintiff filed his civil complaint on November 15, 1995, four days before the expiration of the two-year statute of limitations. MCL 600.5805(2); MSA 27A.5805(2). Plaintiff had difficulty serving defendant with the complaint and summons, and alleged that defendant was deliberately avoiding service. After receiving an extension of the time allowed for service, plaintiff served defendant on March 9, 1996, 111 days after the complaint was filed.

Defendant filed a motion for summary disposition on the ground that plaintiff's failure to complete service of process within the statute of limitations barred the cause of action. At the hearing on the motion, defendant cited MCL 600.5856; MSA 27A.5856, which provides that "statutes of limitations are tolled at the time . . . the complaint is filed and a copy of the summons and complaint are

served on the defendant,” or when “the complaint is filed and a copy of the summons and complaint in good faith are placed in the hands of an officer for immediate service, but in this case the statute shall not be tolled longer than 90 days” Plaintiff maintained that this tolling statute did not apply because plaintiff filed the complaint within the statutory period of limitations. Plaintiff argued alternatively that if tolling were necessary, it was achieved through continuous live process of service, and through plaintiff’s mental incapacity to comprehend his rights as the result of the injuries he suffered at the hands of defendant.

The circuit court granted defendant’s motion, specifically observing that plaintiff failed to serve defendant within the two-year statute of limitations, as extended by the statutory ninety-day tolling period. The court rejected plaintiff’s alternative arguments as well.

II

Plaintiff argues on appeal that he commenced the present action within the limitations period simply by filing his complaint, and that the tolling statute should never have come into play. We agree.

MCL 600.5805; MSA 27A.5805 provides in pertinent part as follows:

(1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff . . . , the action is commenced within the period of time prescribed by this section.

(2) The period of limitations is 2 years for an action charging assault, battery, or false imprisonment.

The statute does not require service on the defendant within the prescribed period. To the contrary, the statute requires only that the action be “commenced” within that time. As plaintiff correctly notes, MCR 2.101(B) provides that “[a] civil action is commenced by filing a complaint with a court.”

Our Supreme Court has held that § 5856, on which the trial court relied, governs when statutes of limitations are tolled, and “has nothing to do with when an action is commenced.” *Buscaino v Rhodes*, 385 Mich 474, 481; 189 NW2d 202 (1971). The Court explained:

. . . [T]here can be no issue of ‘tolling’ in any case where the action is commenced within the statutory period of limitation.

It is only when the action is not commenced within the statutory period - - as determined by consulting the date of claim, the date of filing the complaint and a calendar - - it is only when a *prima facie* bar of the statute appears, that tolling comes into play. [*Id.* (emphasis in original).]

In the present case, it is without question that plaintiff filed his complaint within the two-year statute of limitations. Plaintiff thus complied with the statute of limitations, and the tolling provisions of §5856 do not come into play. The trial court erred in dismissing plaintiff's action on this basis.

Because we grant plaintiff relief on the ground discussed above, we need not reach plaintiff's alternative arguments.

We reverse the judgment of the circuit court, and remand this case for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff

/s/ Peter D. O'Connell

/s/ Robert P. Young, Jr.