

BAZELON LESS & FELDMAN, P.C.

Richard L. Bazelon
Noah H. Charlson
6000 Sagemore Drive, Suite 6301
Marlton, New Jersey 08053-3944
Phone: 856.988.1319
Fax: 856.988.0194

PUBLIC INTEREST LAW CENTER OF PHILADELPHIA

Michael Churchill, *pro hac vice*
125 South Ninth Street, Suite 700
Philadelphia, PA 19107
(215) 627-7100

THE RELIEF SET FORTH BELOW
IS ORDERED AND FILED

DEC 07 2007

MICHAEL J. HOGAN, J.S.C.

KATHLEEN BOWERS,

Plaintiff

v.

UNIVERSITY OF IOWA,

Defendant.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
BURLINGTON COUNTY

DOCKET NO. BUR L 910-07

CIVIL ACTION

Return Date: *December 7*
~~November 16, 2007~~

**ORDER DENYING DEFENDANT'S
MOTION TO DISMISS THE COMPLAINT**

This matter having been opened to the Court, the Honorable Michael J. Hogan, J.S.C. presiding, upon Notice of Motion to Dismiss the Complaint Pursuant to Rule 4:6-2, Margulies Wind, P.C., attorneys for Defendant University of Iowa (Jack Jay Wind, Esquire, appearing), and opposition having been received by Bazelon, Less & Feldman, P.C., attorneys for the Plaintiff Kathleen Bowers (Noah H. Charlson, Esquire, appearing), and the Court having considered the papers submitted and the arguments of counsel, and for good cause shown,

It is on this 7th day of December **ORDERED** that defendant's Motion to Dismiss is

DENIED.

*please see attached
decision.*

BY THE COURT:

Michael J. Hogan J.S.C.

Hon. Michael J. Hogan, J.S.C.

PREPARED BY THE COURT

KATHLEEN BOWERS,

Plaintiff,

v.

UNIVERSITY OF IOWA,

Defendant.

: SUPERIOR COURT OF NEW JERSEY
: BURLINGTON COUNTY
: LAW DIVISION

: DOCKET NO.: BUR-L-0910-07

: **Decision Denying Defendant's motion to**
: *dismiss*

Dated: December 7, 2007

Richard L. Bazelon, Esq., Attorney for Plaintiff

Barbara Ransom, Esq., Attorney for Plaintiff

Jack Jay Wind, Esq., Attorney for Defendant

THE RELIEF SET FORTH BELOW
IS ORDERED AND FILED

DEC 07 2007

MICHAEL J. HOGAN, J.S.C.

HOGAN, J.S.C.

Defendant, University of Iowa, brings this present motion to dismiss the complaint pursuant to R. 4:6-2. Opposition has been filed. The court has considered those papers submitted and oral argument. The court now holds, for the foregoing reasons, Defendant's, University of Iowa, motion to dismiss is DENIED.

FACTS

This matter arises out of a ten year federal court litigation by Michael Bowers, and later his mother, Kathleen Bowers, to remedy the alleged discrimination by the University and others against Michael Bowers, a high school football player, by reason of his learning disability, occurring in 1995 and 1996.

Plaintiff's Complaint asserts claims under the New Jersey Law Against Discrimination (N.J.S.A. 10:5-12(f)), and common law claims for fraud, promissory estoppels and equitable estoppels (hereinafter "State Law Claims"). Plaintiff's Complaint alleges (1) the unlawful discrimination based on disability committed by the University in terminating its recruitment of Michael Bowers to play football upon discovery he had taken special education courses because of his learning disability, and (2) the University's scheme to deceive Michael Bowers and make

false promises of a football scholarship, which it later denied him.

This case was originally brought against the University in federal district court in New Jersey on September 8, 1997 based on NJLAD. Pursuant to an opinion and order of the District Court, the Complaint was amended on August 6, 2001 to add the State Law Claims.

On February 1, 2007, the Third Circuit Court of Appeals determined that the Eleventh Amendment to the United States Constitution barred Plaintiff from pursuing the State Law Claims against Defendant University, but denied the University's claim that it had immunity under the Eleventh Amendment with respect to Plaintiff's federal claims. This Order became final on March 8, 2007. Defendant University moved for reconsideration and the Third Circuit's mandate remanding the case to the district court was not issued until March 19, 2007. The Complaint in this matter was then filed sixteen days later in New Jersey Superior Court.

The University has now moved to dismiss the Complaint on the pleadings, on the basis of the statute of limitations, claiming that despite the pendency of the federal action, Plaintiff waited too long following the Third Circuit's decision to file this Complaint.

Plaintiff argues that New Jersey law provides for the tolling of the statute of limitations for any period during which an action against the same defendant, raising the same claims, is pending in a different jurisdiction. Plaintiff argues that the pleadings in this matter make clear that Plaintiff re-filed in Superior Court of New Jersey sixteen days following the Third Circuit's Final Order and Mandate dismissing the State Law Claims. Plaintiff asserts that the Supreme Court has applied the tolling doctrines of substantial compliance and equitable tolling for periods longer than the sixteen day period here. Therefore, Plaintiff argues that the statute of limitations was tolled during the federal action and defendant's motion to dismiss should be denied.

LEGAL DISCUSSION

Rule 4:6-2(e), in pertinent part, states:

Every defense, legal or equitable, in law or fact, to a claim for relief in any complaint, counterclaim, cross-claim, or third-party complaint shall be asserted in the answer thereto, except that the following defenses may at the option of the pleader be made by motion, with briefs: ... (e) failure to state a claim upon which relief can be granted, ... If a motion is made raising any of these defenses it shall be made before pleading if a further pleading is to be made. No defense or objection is waived by being joined with one or more other defenses in an answer or motion. Special appearances are superseded. If, on a motion to dismiss based on the defense numbered (e), matters outside the pleading are presented to and not

excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided by R. 4:46, and all parties shall be given reasonable opportunity to present all material pertinent to such a motion.

In NCP Litigation Trust v. KPMG LLP, 187 N.J. 353, 365 (2006), the Supreme Court opined that a motion to dismiss under R. 4:6-2(e) should be granted only in the rarest of instances. The Court stated:

this matter is before us on a Rule 4:6-2(e) motion to dismiss. On such motions, a trial court should grant a dismissal "in only the rarest of instances." Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 772 (1989). A court's review of a complaint is to be "undertaken with a generous and hospitable approach," *id.* at 746, and the court should assume that the nonmovant's allegations are true and give that party the benefit of all reasonable inferences, Smith v. SBC Communications Inc., 178 N.J. 265, 282 (2004). If "the fundament of a cause of action may be gleaned even from an obscure statement of claim," then the complaint should survive this preliminary stage. Craig v. Suburban Cablevision, Inc., 140 N.J. 623, 626 (1995) (citation omitted).

In Staub v. Eastman Kodak Co., 320 N.J. 34, 54 (App. Div. 1999), the court stated:

A long line of New Jersey cases have held that the filing of an action in one forum will toll the statute of limitations during the pendency of that proceeding so that, if the action is dismissed without an adjudication on the merits, the plaintiff can, subject to equitable considerations, pursue substantially the same claim in another forum, even if the action is instituted in the second forum after the expiration of the period of limitations.

In Galligan v. Westfield Centre Service, Inc., 82 N.J. 188, 190 (1980), the Court held that plaintiff's action was tolled during the period in which a federal court action asserting the same claims was pending, where the federal action was subsequently dismissed for lack of jurisdiction, and plaintiff re-filed in state court twenty-two (22) days later. The Court opined that a mechanistic application of the statute of limitation would inflict unnecessary harm without advancing the legislative purpose of the statute of limitations. *Id.* at 92.

In Negron v. Llarena, 156 N.J. 296 (1998), the Court re-affirmed the principal stated in Galligan, holding that a plaintiff whose wrongful death claim was timely filed in federal court, but subsequently was dismissed for lack of jurisdiction, was not barred by the statute of limitations when she re-filed in state court eleven (11) weeks after the federal dismissal. The Negron Court applied the doctrine of substantial compliance, used to "avoid technical defeats of valid claims." *Id.* at 305. Substantial compliance requires:

(1) the lack of prejudice to the defending party; (2) a series of steps taken to comply with the statute involved; (3) a general compliance with the purpose of the statute; (4) a reasonable notice of petitioner's claim[;] and (5) a reasonable explanation why there was not a strict compliance with the statute.

Id. at 305 (citing Bernstein v. Board of Trustees of Teachers' Pension & Annuity Fund, 151 N.J. Super. 71, 76-77 (App. Div. 1977)). The Court held that plaintiff had substantially complied with the statute of limitations finding that:

Negron's failure to file her wrongful death complaint in New Jersey court within the statute of limitations did not prejudice defendant because the filing came immediately following dismissal in federal court. Defendant could not have been prejudiced because he was already prepared for the lawsuit.

Id. at 305.

Defendant relies on Binder v. Price Waterhouse & Co., LLP, 393 N.J. Super. 304 (App. Div. 2007), arguing for an adherence to the statute of limitations and for dismissal of the Complaint. In Binder, the court held that in cases involving "substantive" statutes of limitations, as in statutory rather than common law claims, the principles of equitable tolling, rather than substantial compliance, should apply. Id., 393 N.J. Super. at 311-12. Equitable tolling, which is similar to the substantial compliance doctrine, permits the tolling of the statute of limitations in various circumstances, including where "a plaintiff has timely asserted his rights mistakenly... in the wrong forum," Id. at 312. This requires a showing that plaintiff has acted with "reasonable insight and diligence." Id. at 313.

In Binder, the plaintiff, a trustee in bankruptcy, filed an action in bankruptcy court, which was dismissed for a lack of subject matter jurisdiction after three years. Plaintiff then filed an action in state court asserting identical claims, eight and a half months following the dismissal of the federal claim. The Appellate Division, applying the equitable tolling doctrine, found that the eight and a half month delay in re-filing demonstrated a lack of reasonable diligence by plaintiff and hence justified the imposition of the statute of limitations. Id. at 314.

The court in Binder even compared plaintiff's eight month delay with the eleven week delay in Negron. The court stated:

Unlike in Negron, where the Supreme Court excused a delay in filing a state claim eleven weeks after the federal court's dismissal, in this case, Binder waited eight months to file a complaint in state court only to have it dismissed for lack of prosecution and had to re-file in October 2005, over one year after the dismissal of the federal action. Accordingly, Binder cannot rely on the principle of

substantial compliance when the facts reveal that he did not diligently or substantially act to assert a state court claim in a timely manner.

In the present matter, Plaintiff has acted with reasonable diligence. Plaintiff first filed the original complaint against Defendant within the statute of limitations in District Court. The matter was litigated at the federal level for over ten years. The District Court originally rejected the Defendant's Eleventh Amendment Immunity defense. The Third Circuit reversed the District Court's decision in an Order dated February 1, 2007. The Defendant then filed a motion for reconsideration of the Third Circuit's Opinion, which was denied by Order dated March 8, 2007. The Third Circuit's remanding of the case did not issue until March 19, 2007.

Upon issuance of the remanding back to District Court, Plaintiff filed this present action on April 4, 2007, sixteen days after the Third Circuit's mandate. With Negron and Galligan providing guidance, this action was reasonably timely filed. Even using the Third Circuit's February 1, 2007 Order, Plaintiff filed within a reasonable time period. Like the plaintiff in Negron, Plaintiff has substantially complied with the statute of limitations. In addition, 28 U.S.C. § 1367(d) provides that state statutes of limitations "shall be tolled while the claim is pending and for a period of thirty days after it is dismissed unless state law provides for a longer tolling period."

Defendant, at oral argument, alleged prejudice by reason of the lapse of time between the Third Circuit's Order and the filing of this action. Defendant asserted that many of the witnesses have retired or are no longer employed at the University of Iowa. However, Defendant's argument that they are prejudiced because of fading recollections and inconvenience are unfounded. Had those dismissed federal claims not be dismissed but remanded, Defendants would have had to proceed with the merits of the Plaintiff's claims at the federal level. In addition, remaining federal claims are still pending in federal court. With discovery complete, Defendant has not been prejudiced by lapse of time.

For the reasons state above, Defendant's, University of Iowa, motion to dismiss is DENIED.