NO. 37977-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MICHAEL D. McPHEE,

Appellant,

v.

STEINHAUER FAMILY INVESTMENTS, LLC,

Respondent.

ADDITIONAL BRIEF OF RESPONDENT

David J. Corbett, WSBA #30895
DAVID CORBETT PLLC
2106 N. Steele Street
Tacoma, Washington 98406
Telephone: (253) 414-5235
david@davidcorbettlaw.com

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I. THE COURT'S QUESTION ABOUT THE STIPULATION

This Court has asked for additional briefing on the question of "whether the statute of limitations is tolled by the parties' stipulation in this case." For the reasons spelled out below, Respondent Steinhauer Family Investments LLC ("Steinhauer") believes that the answer to this question is "no." The stipulation could not directly toll the statute of limitations, nor is there any persuasive argument for equitable tolling based on the stipulation. This Court should affirm the trial court, and confirm that the statute of limitations has run on both parties' claims.

II. TERMS OF THE STIPULATION

The stipulation at issue here, located in the record at CP 34-35, bears the title "Stipulation for Transfer to Private Arbitration and to Set Aside Case Schedule," and states in its entirety as follows:

> COMES NOW Plaintiff, Michael McPhee, d/b/a The Michael D. McPhee Company, by and through Thomas L. Dickson and Kelly DeLaat-Maher of the Dickson Law Offices, attorneys of record, and Defendant Steinhauer Family Investments, LLC, by and though its attorney of record, Tracey A. Thompson, and stipulate to the following: This matter should be stayed and the case schedule set aside so that the parties may pursue private arbitration, as required by contract by the parties. Nonetheless, the Court shall retain jurisdiction for entry and enforcement of the Arbitrator's decision once arbitration has been had. The parties request that this court enter an order in accordance.

III. ARGUMENT AND AUTHORITY

The first part of the argument below shows that the question of whether the stipulation tolled the statute of limitations is relevant only if the trial court properly issued the CR 41(b)(2) dismissal and denied

McPhee's CR 60 motion. The second part demonstrates that if the case was properly dismissed, the stipulation could not directly toll the statute of limitations in a possible future case. The third part considers, and rejects, the possibility that the stipulation plays a part in a persuasive argument for equitable tolling of the statute. The fourth part goes beyond the express terms of the Court's question and shows why the existence of the stipulation does not undermine the trial court's rulings.

1. Error by the trial court in issuing the CR 41(b)(2) dismissal or in denying McPhee's CR 60 Motion would render this Court's question moot, because the statute would be tolled by the continuation of the current case

Steinhauer believes that the trial court acted properly in issuing the CR 41(b)(2) dismissal and by denying McPhee's CR 60 motion.[1] He respectfully submits that Court's question regarding the statute of limitations is moot unless the Court agrees that the trial court acted properly and within its discretion. If the trial court erred in either the dismissal or the denial of the CR 60 motion, this Court would overrule the trial court and reinstate the case, and the statute of limitations would be tolled by the continued existence of the case itself. See Karl B. Tegland and Douglas J. Ende, 15A *Washington Practice, Handbook on Civil*

[1]To briefly review: the trial court properly implemented the express mandate of CR 41(b)(2). Nothing in the former Chapter 7.04 RCW stripped the court of the power to do so, and indeed that law was structured to give the trial court considerable control over case management—as opposed to decisions on the merits—pending arbitration. In *Tjart v. Smith Barney*, 107 Wn. App. 885, 28 P.3d 823 (Div. I 2001), the trial court dismissed a matter for lack of prosecution despite it being stayed for arbitration, and the Court of Appeals affirmed without referring to any jurisdictional problem. Finally, McPhee's failure to respond to the CR 41(b)(2) notice was not excusable neglect, and the trial court did not abuse its discretion in finding that his CR 60 Motion was not brought within a reasonable time.

Procedure (2008), § 67.18 (noting that "[i]f the trial court dismisses the plaintiff's case but is reversed on appeal, the plaintiff need not refile . . . . the case simply proceeds as if the case were never dismissed"). The next two sections, therefore, assume that the trial court's rulings were proper, and analyze whether the stipulation could somehow toll the statute of limitations in a hypothetical future case brought by either party.

2. The stipulation did not directly toll the state of limitations

"When an action is dismissed, the statute of limitations continues to run as though the action had never been brought." *Fittro v. Alcombrack*, 23 Wn. App. 178, 180, 596 P.2d 665 (Div. I, 1979). This principle has its primary application to dismissals without prejudice, like the one issued by the trial court below, because "if a dismissal is with prejudice, the statute of limitations is ordinarily irrelevant." Tegland and Ende, 15A *Washington Practice, Handbook on Civil Procedure* (2008), § 67.14 See also *Tjart*, 107 Wn. App. at 893 (analyzing issue of appealability of a dismissal assumed to be without prejudice where matter had been stayed for arbitration per court order, and finding the matter to be appealable because the statute of limitations expired during the pendency of the dismissed case, effectively terminating the action).

The stipulation entered into by the parties here does not change this result. In order for it even to attempt to do so directly (leaving aside for the moment arguments invoking equitable tolling), the stipulation would have to state something like the following: "the parties stipulate that in the event this case is dismissed for lack of prosecution, this

agreement will function as the equivalent of the commencement of a new case, relating back to the date of this agreement."

This is not what the stipulation at issue says. Its only concern was the administration of the then-current case: "This matter [that is, this court case] should be stayed and the case schedule set aside so that the parties may pursue private arbitration, as required by contract of the parties." CP 34. If the case in which the stipulation was entered was properly dismissed, the stipulation—concerned as it was with the administration of the case—became a nullity.[2] Accordingly, the stipulation at issue in this case did not directly toll the statute of limitations.

3. The stipulation provides no basis for equitable tolling of the statute of limitations in a possible future re-litigation of the current case

The preceding section considered and rejected the possibility that the stipulation is the direct legal equivalent of the commencement of a new action relating back to the date of the filing of the first case. Conceptually, however, there is a distinct question as to whether the stipulation could be seen as part of a pattern of misleading conduct that suffices to equitably bar either of the parties from invoking the statute of

[2] Even if the stipulation had directly claimed to serve as the equivalent of the commencement of a new case in the event the current case was dismissed, it would almost surely be of no legal effect. RCW 4.16.170 governs the "commencement" of a case for the purpose of tolling the statute of limitations. Steinhauer has found no authority suggesting that parties could stipulate around the requirements of RCW 4.16.170 and specify a different type of "commencement" for the purpose of tolling the statute of limitations. In particular, parties cannot "commence" an action for the purpose of satisfying the statute of limitations by beginning—or even completing—contractual arbitration. Since completing arbitration encompasses "agreeing to arbitration," it follows that merely agreeing to arbitration (or stipulating thereto) cannot count as the "commencement" of an action under RCW 4.16.170.

limitations defense in a possible future action.[3] The answer to this question, however, is also clearly "no."

None of Steinhauer's actions during the pendency of the case below—including entering into the stipulation—were unfair, misleading, or otherwise capable of supporting a claim that he is barred from invoking the statute of limitations defense in a future case. See, e.g., *Trotzer v. Vig*, 149 Wn. App. 594, 607, 203 P.3d 1056 (Div. 2, 2009) (noting that '[t]he predicates for equitable tolling are bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff").[4] Although McPhee now implies that his failure to prosecute his claims is somehow Steinhauer's fault, the evidence refutes this implication.

To begin with, McPhee asserts that Steinhauer "compelled" him to stipulate to arbitration. CP 41. This claim overlooks the fact that the parties had agreed to arbitration in their original contract. CP 20. McPhee has never claimed that the contract was the product of duress, yet the stipulation simply re-affirmed the dispute resolution terms of the contract

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[3] Both parties signed the stipulation, and each failed to energetically prosecute its respective claims. If the stipulation by itself indirectly barred one of the parties from invoking the statute of limitations, it would bar both of them from doing so.

[4] Applying the doctrine of equitable tolling of the statute of limitations to the issues in this case involves taking that doctrine a considerable way from its native habitat. Washington cases involving equitable tolling typically address the question of whether a party's behavior before the commencement of the action on review could serve to toll the statute of limitations in that case. See, e.g., *Trotzer*, 149 Wn. App. at 607 (concerning representations made in a letter written before the case commenced), and *Millay v. Cam*, 135 Wn.2d 193, 206-207, 955 P.2d 791 (1998) (concerning pre-suit representations of redemptioner in possession). Here, by contrast, the question is whether either party's actions after the case on review commenced could result in equitable tolling in a future case. Concerns about misconduct during the course of a case may be best analyzed using some other framework than that of equitable tolling of the statute of limitations. Here, however, there was no relevant misconduct, and no need for any such inquiry.

in a way that spared both parties the expense of litigating a motion to compel.

Second, by McPhee's own account a substantial part of the overall delay in this case—from October, 2001 until early 2004—was due to McPhee's initial inability to pay for arbitration. CP 41-43. McPhee tries to blame Steinhauer for his financial hardship, but to accept this claim would effectively pre-judge the merits: Steinhauer wrongfully contributed to McPhee's financial woes only if he wrongfully breached the contract.

Third, more than a year passed between the time when Steinhauer indicated that he could not pay for arbitration and the time McPhee brought his motion to transfer the matter back to the trial court. McPhee has advanced no reason to blame this delay on Steinhauer. CP 200, ¶ 2.

Fourth, the last action of record in this case, prior to the notice of dismissal, was the trial court's denial on October 31, 2005 of McPhee's motion to transfer the matter out of arbitration. For about a week after that, the parties briefly discussed a site visit as a prelude to arbitration. CP 208-211. It was McPhee's side that dropped the ball in this exchange: they decided to hire an engineer to accompany them on the site visit, but were unable to do so. CP 210 (top email), CP 185, 196, 202. McPhee never got back to Steinhauer with a proposal of dates for a site visit. CP 202. Steinhauer cannot be blamed—or at the very least not blamed alone—for the fact that the case then sat idle for approximately 15 months.

Fifth, McPhee waited almost a year after the CR 41(b)(2) dismissal before filing his CR 60 Motion. This delay cannot be attributed to a