



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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October 24, 2023

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Re: Phillip Ryan Aluko, et al. v. James Robert Brown, Jr. (CL-2023-9510)

Dear Counsel:

Before the Court is the Plaintiffs' *Motion for Reconsideration of Court's Order of October 6, 2023*.¹ The motion presents a question of first impression in the Commonwealth: ***For purposes of calculating when a statute of limitation expires, is a plaintiff whose cause of action accrued during the Covid-19 judicial emergency entitled not only to the tolling period after the cause of action accrued but before the cause of action accrued as well?*** The Plaintiffs

¹ It is the Court's understanding that the motion for reconsideration is made on behalf of both Plaintiff Phillip Ryan Aluko and Madam Aluko, given that the Court's October 6th Order dismissed with prejudice the entirety of case numbered CL-2023-9510, which is styled "Phillip Ryan Aluko et al. vs. James Robert Brown, Jr." Although Phillip Ryan Aluko's case and Madame Aluko's case initially had separate case numbers in the General District Court, their cases were consolidated on January 4, 2023 under Case Number GV22013091-00. On appeal to the Circuit Court, they were given one case number (CL-2023-9510).

OPINION LETTER

argue that they are entitled to both periods of tolling. The Defendant asserts that the Plaintiffs' claim "makes no logical sense" and requests the Court to deny reconsideration. (Def.'s Opp'n at 5).

For the reasons stated in this Letter Opinion, the Court holds that the Plaintiffs' tolling argument is without merit. Plaintiffs were certainly entitled to the benefit of a period of tolling during the judicial emergency but only as to the time period *after* their action accrued.

Plaintiffs also make an alternative argument, *i.e.*, that they are entitled to equitable tolling. The Court finds this assertion to also be without merit.

Background and Procedural History

On June 7, 2020, Plaintiffs were in a car accident on I-66 in Fairfax County. In their Complaint, filed in the General District Court on August 31, 2022, they assert that the Defendant "recklessly and negligently struck Plaintiffs vehicle," causing injuries and other damages. (Compl. ¶ 6).

The Complaint named four plaintiffs: Phillip Ryan Aluko and Madam Aluko, in their individual capacities, and Phillip Ryan Aluko, as Parent and Next Friend of [REDACTED] a minor, and Madam Aluko, as Parent and Next Friend of [REDACTED], a minor. (Compl. at 1). The Plaintiffs subsequently moved to non-suit all but Phillip Ryan Aluko, and the non-suit was granted by a judge of the General District Court on October 26, 2022. According to the Defendant, the three Plaintiffs who non-suited subsequently filed new lawsuits in the General District Court. The Defendant filed a plea in bar on statute of limitations grounds against the claims of Phillip Ryan Aluko and Madame Aluko, which were sustained by a judge of the General District Court on May 3, 2023. This appeal followed.

On October 6, 2023, the Defendant's Plea in Bar based on the expiration of the statute of limitations came before this Court. After hearing argument, the Court sustained the Plea in Bar and dismissed the case with prejudice. On October 16, 2023, the Plaintiffs filed the instant motion for reconsideration of the Court's October 6th Order. On or about October 23, 2023, the Defendant filed his opposition. The matter is now ripe for decision.

Discussion

A. Tolling of the Statute of Limitations pursuant to the Judicial Emergency Orders

On March 16, 2020, the Supreme Court of Virginia declared a judicial emergency in response to the Covid-19 pandemic. Between March 16, 2020 and July 8, 2020, the Supreme Court issued six additional orders extending the judicial emergency. In the Seventh Order, the Supreme Court stated that "[t]he tolling period as a result of the Judicial Emergency for such statutes of limitation and deadlines shall be limited to March 16, 2020 through July 19, 2020."

Va. Sup. Ct.'s Order Extending Declaration of Judicial Emergency in Response to COVID-19 Emergency July 8, 2020.²

To understand the impact of this Order on the instant case, consider three scenarios:

- **Scenario 1:** A cause of action accrues prior to the beginning of the judicial emergency and would expire, absent a tolling period, sometime between March 16, 2020, and July 19, 2020. Under this circumstance, the plaintiff would have the benefit of the entire tolled period of the judicial emergency. Whatever time remained on the statute of limitations on March 16, 2020, would begin to run again on July 20, 2020.
- **Scenario 2:** A cause of action accrues prior to the beginning of the judicial emergency and would expire, absent a tolling period, at a date *after* July 19, 2020. Under this circumstance, like the first scenario, the plaintiff would have the benefit of the entire tolled period of the judicial emergency. See *English v. Quinn*, 76 Va. App. 80 (2022).
- **Scenario 3:** A cause of action accrues during the time period between March 16, 2020, and July 19, 2020. Under this circumstance, the plaintiff would have the benefit of that portion of the tolled period between the date the cause of action accrued and July 19, 2020. This is the instant case.

The accident giving rise to the cause of action occurred on June 7, 2020. (Compl. ¶ 5). Pursuant to Virginia Code § 8.01-243, the statute of limitations for personal injuries is two years. Thus, absent the tolling provisions of the Judicial Emergency Orders, the statute of limitations would have expired on June 7, 2022. However, because of the Judicial Emergency Orders, the Plaintiffs had the benefit of an additional 43 days, calculated as the number of days between the date of the accident and the end of the tolling period. The effect of these additional tolled days extended the expiration date of the statute of limitations from June 7, 2020, to July 19, 2022.³ Since the Plaintiff's lawsuit was not filed until August 31, 2022, it was filed beyond the expiration date of the statute of limitations.

Plaintiffs argue, however, that they are entitled to the *entire* 126 days that the Supreme Court of Virginia tolled statutes of limitations – including even those days before the accident took place. To support this argument, the Plaintiff cites language in the judicial emergency orders that referred to the tolling of “all deadlines” and “all statutes of limitations.” (Pl.'s Mot. Recons. at 3). The Plaintiff is incorrect. This language does not support their argument.

² Thus, a cause of action that had the benefit of the *entirety* of the tolled time period would have an additional 126 days added to its statute of limitations.

³ Another way of reaching the same result is to recognize that when a cause of action accrued during the time period tolled by the Judicial Emergency Orders, the running of the statute of limitations was effectively suspended through July 19, 2020, and only began its two-year run the next day.

The Plaintiffs assert that “[t]his exact issue was covered” in *English v. Quinn*. (Pl.’s Mot. Recons. at 4). The Court disagrees. *English v. Quinn* dealt with “Scenario 2”, i.e., that situation where the cause of action accrued before March 16, 2020, and expired after July 19, 2020. That is not *this* case. Here, the cause of action accrued *during* the tolling period, not before it began. A statute of limitation cannot begin to run – indeed, it does not even exist as a “limitation” – before a cause of action accrues. See *Kerns v. Wells Fargo Bank, N.A.*, 296 Va. 146, 154 (2018). In March, April and May of 2020, the Plaintiffs had not yet been in the car accident now before the Court. *A tolling period must toll something*. Prior to June 7, 2020, there was nothing to toll.

Virginia Code §8.01-230 states: “In every action for which a limitation period is prescribed, the right of action shall be deemed to accrue and the prescribed limitation period shall begin to run from the date the injury is sustained in the case of injury to the person or damage to property....” See also *Kerns v. Wells Fargo Bank, N.A.*, 296 Va. at 154 (2018) (“The limitation period in a pure statute of limitations, unlike that in a statute of repose, begins to run on the date of accrual.”). And “[a] right of action cannot accrue until there is a cause of action.” *Caudill v. Wise Rambler, Inc.*, 210 Va. 11, 13(1969).

Here, there was no right of action, no cause of action, no injury, no damage, no statute of limitations and, therefore, no tolling of a statute of limitations, prior to June 7, 2020. Therefore, the time period between March 16, 2020 and June 7, 2020 must be excluded from the calculation of the number of days tolled by the Judicial Emergency Orders. When that is done, the statute of limitations expired on July 19, 2023. The lawsuit, therefore, was filed after the statute of limitations expired.

B. Equitable Tolling

Alternatively, the Plaintiffs argue that they are entitled to “equitable tolling.” The Court disagrees.

“Any invocation of equity to relieve the strict application of a statute of limitations must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes.” *Spencer v. Sulton*, 239 F.3d 626, 629 (4th Cir. 2001). Equitable tolling is “reserved for those rare instances where—due to circumstances external to the party’s own conduct—it would be unconscionable to enforce the limitation period against the party and gross injustice would result.” *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000).

The Plaintiffs rely on *Ceriani v. Dionysus, Inc.*, 599 F. Supp. 3d 365 (E.D. Va. 2022) in support of their equitable tolling argument. That reliance is misplaced: *Ceriani*’s only similarity to the instant case is that each case concerns the Supreme Court of Virginia’s Judicial Emergency Orders.

Ceriani was a “Scenario 2” case, not a “Scenario 3” case. *Ceriani* concerned a cause of action that accrued *before* the tolling period began and was due to expire *after* the tolling period ended. United States Magistrate Judge Lawrence R. Leonard concluded in *Ceriani* that the tolling period would apply to such cases. The Court of Appeals in *English v. Quinn* would later

reach the same conclusion. However, at the time Judge Leonard issued his decision, the Court of Appeals had not yet decided *English v. Quinn*, and so it was uncertain whether the appellate courts of Virginia would find that the tolling period applied to statutes of limitations that were due to expire *after* the tolling period ended.⁴ Given that uncertainty, Judge Leonard reached the alternative question of whether equitable tolling would apply.

Judge Leonard wrote: “While generally speaking a lawyer’s miscalculation of a limitations period is not a valid basis to justify equitable tolling, a miscalculation may constitute extenuating circumstances where there is a lack of clarity in a statute that contributes to a misunderstanding of a limitations period.” *Ceriani*, 599 F. Supp. 3d at 371 (citation omitted). Judge Leonard held that such a circumstance existed, noting that there was a variance in language between the Second Judicial Emergency Order, and subsequent orders.⁵

Judge Leonard concluded that it was “reasonable” for the Plaintiff to believe that the judicial emergency orders tolled statutes of limitation that expired *after* the tolling period had ended. *Id.* at 371-372. In contrast, it was not “reasonable” for the Plaintiffs in the instant case to

⁴ Judge Leonard’s decision was issued on April 20, 2022. The Court of Appeals opinion in *English v. Quinn* was issued on November 29, 2022. At the time of Judge Leonard’s opinion in *Ceriani*, the only opinion that had been issued in *English v. Quinn* was the Circuit Court’s opinion finding that the Supreme Court’s tolling orders did not apply to cases in which the statute of limitations were due to expire after the tolling period ended. *See English v. Quinn*, No. CL20-2857, 2022 WL 363981 (Va. Cir. Ct. Feb. 7, 2022). That decision would ultimately be reversed by the Court of Appeals, but that would not happen until seven months after Judge Leonard issued his decision.

⁵ Specifically, the language in the Second Judicial Emergency Order that Judge Leonard cited was this sentence: “With the exception of matters enumerated herein, all applicable deadlines, time schedules and filing requirements, including any applicable statute of limitations *which would otherwise run during the period this order is in effect*, are hereby tolled and extended ... for the duration of this Order.” (Emphasis Added.) Judge Leonard noted that the later Judicial Emergency Orders did not contain the italicized language, suggesting that *all* statutes of limitations were tolled, whether they expired *during* the tolling period or *after* the tolling period ended. Judge Leonard wrote: “[E]ven if the Supreme Court of Virginia’s Emergency Orders only operated to toll statutes of limitations which expired *within* the tolling period, because of the way those orders are worded Plaintiff’s belief that the Emergency Orders applied to toll statutes of limitations which expired *after* the tolling period was reasonable.” *Ceriani v. Dionysus, Inc.*, 599 F.Supp. at 371. At the time Judge Leonard rendered his opinion, he did not have the benefit of the Court of Appeals decision in *English v. Quinn*. In that decision, the Court of Appeals found that the Second Judicial Emergency Order and the later Judicial Emergency Orders were not at variance, holding that the word “run” that appeared in the Second Judicial Emergency Order “referred to limitations periods that would be ongoing during the period of judicial emergency, rather than those that would ‘expire.’” *English v. Quinn*, 76 Va. App. at fn. 10.

believe they were entitled to the *entirety* of the tolling period rather than only that period of time after their cause of action accrued. None of the judicial emergency orders modified the determination of when a cause of action accrued, nor suggested, implied, or intimated that a cause of action accruing during the judicial emergency could somehow reach back into the past to acquire a tolling period for an event that had not yet even occurred. Thus, contrary to the Plaintiffs' assertion, *Ceriani* provides no support for its equitable tolling argument.

In *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005) (citation omitted), the United States Supreme Court said the following with respect to equitable tolling: "Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." On the record before this Court, there is no basis for the Court to find that the Plaintiffs have carried their burden of proving diligence in pursuing their rights. Two years and 43 days was certainly a sufficient amount of time for the Plaintiffs to file their complaint. To the extent that the Plaintiffs may have relied on an *unreasonable* interpretation of the Judicial Emergency Orders, it would not excuse or mitigate the failure to timely file their complaint. Moreover, while it is certainly true that the Covid-19 pandemic was an "extraordinary circumstance," there was nothing about the pandemic or the Judicial Emergency Orders that compromised the Plaintiffs' ability to calculate when their cause of action accrued or to recognize that a tolling period cannot begin before the event giving rise to a cause of action has occurred.

Therefore, the Court finds that the Plaintiffs cannot avail themselves of equitable tolling in this case.

Conclusion

For the reasons articulated in this Opinion, the Court DENIES the Plaintiffs *Motion for Reconsideration of Court's Order of October 6, 2023*. Case number CL-2023-9510 stands dismissed with prejudice. An Order shall issue this day.

Sincerely,

A solid black rectangular box redacting the signature of Judge Randy I. Bellows.

Judge Randy I. Bellows

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

PHILIP RYAN ALUKO, et al.,
Plaintiffs,

versus

JAMES ROBERT BROWN, JR.,
Defendant.

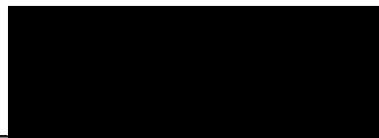
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CIVIL CASE NO. CL-2023-9510

**ORDER REGARDING PLAINTIFFS' MOTION FOR RECONSIDERATION
OF COURT'S ORDER OF OCTOBER 6, 2023**

Before the Court is the Plaintiffs' Motion for Reconsideration of Court's Order of October 6, 2023. That Order granted the Defendants' Plea in Bar on statute of limitations grounds and dismissed the case with prejudice. For the reasons stated in today's Letter Opinion, the Plaintiffs' Motion for Reconsideration is DENIED and CL-2023-9510 stands dismissed with prejudice.

SO ORDERED, this 24 day of October, 2023.



JUDGE RANDY I. BELLOWS

ENDORSEMENT OF THIS ORDER IS WAIVED IN THE DISCRETION OF THE COURT
PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA