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# Commonwealth of Kentucky

# Court of Appeals

NO. 2017-CA-000882-MR

NIRMALA NOROHNA AND INTERNATIONAL DATA GROUP — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY SHAW, JUDGE
ACTION NO. 16-CI-005135

RONALD W. ZOLKIEWICZ; RONALD W. ZOLKIEWICZ LIVING TRUST; KENNETH R. WICKER; KENNETH R. WICKER LIVING TRUST, TECHNOLOGY CONSULTING, INC.; AND TOWER HEALTH, LLC — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; JOHNSON AND NICKELL, JUDGES.

CLAYTON, CHIEF JUDGE: Nirmala Noronha and International Data Group ("IDG"), a now-dissolved company, appeal the Jefferson Circuit Court's order of dismissal with prejudice. The trial court dismissed the claim because it was barred by the statute of limitations.

After careful consideration, we affirm.

BACKGROUND

The background for this action is longstanding. IDG was incorporated by Ms. Noronha's now ex-husband. In 1990, Ronald Zolkiewicz and Kenneth Wicker formed the partnership CZW and entered into an agreement with IDG to provide marketing and management services in exchange for an ownership interest in IDG. CZW acquired a fifty percent interest in IDG and Ms. Noronha and her husband owned the other fifty percent interest. Zolkiewicz and Wicker also formed a new corporation, TCI, which allegedly participated in the sale and general management of IDG. Finally, the two men created Tower Health, which they were the sole members, to operate IDG's self-funded health insurance plan.

In 1998, Zolkiewicz and Wicker allegedly entered into an amended Buy-Sell Agreement, which devised that the purchase price of IDG stock would be determined by a particular formula. At the same time, IDG issued 250 shares each to the Ronald W. Zolkiewicz Living Trust and the Kenneth R. Wicker Living Trust.

IDG began operating at a loss sometime in the late 1990s. Ms. Noronha claimed that Zolkiewicz and Wicker had exclusive control over IDG's billing and accounting, and knowingly, recklessly, and in bad faith violated their fiduciary duties to IDG and Ms. Noronha by engaging in self-dealing for personal and financial benefit. She maintained that by diverting IDG's accounting receivables to themselves, IDG went bankrupt.

In June 1999, IDG re-purchased the stock it had issued to Ronald W. Zolkiewicz Living Trust and the Kenneth R. Wicker Living Trust. Ms. Noronha asserted that IDG overpaid to repurchase the stock and that Zolkiewicz and Wicker knew that IDG would have no cash reserves to operate if IDG entered this leveraged buy-back of its stocks. Specifically, Ms. Noronha alleged that this buy-back caused IDG to be unable to pay its federal withholding taxes.

The origin of this lawsuit occurred on April 30, 2001, when the Internal Revenue Service ("IRS") assessed taxes against Ms. Noronha for IDG's failure to pay federal withholding taxes in the second and third quarters of 2000. Ms. Noronha contested the assessment asserting that she was an innocent spouse and not involved in the business operation of IDG. Later, she filed for bankruptcy protection on November 30, 2006.

The IRS filed a proof of claim in the Chapter 13 bankruptcy claim for $170,221.81 due in withholding taxes by IDG. Ms. Noronha objected to the claim arguing that it would be unfair to hold her liable for these taxes. In 2007, the United States Bankruptcy Court for the Western District of Kentucky upheld the IRS's tax assessment despite Ms. Noronha's claim that she was an innocent spouse. On September 12, 2008, the United States District Court for the Western District of Kentucky affirmed the bankruptcy court's decision. Next, Ms. Noronha appealed the case to the Sixth Circuit Court of Appeals, which affirmed the lower court's decision on November 6, 2009. Ms. Noronha began paying the assessment in October 2011 and paid it off in April 2015.

In 2006, during her challenge of the IRS assessment, Ms. Noronha and David Noronha, now her ex-husband, filed a complaint in Jefferson Circuit Court against Ronald Zolkiewicz, Ronald W. Zolkiewicz Living Trust, Kenneth Wicker, and Kenneth R. Wicker Living Trust alleging breach of fiduciary duty and fraud based on an ostensible mismanagement of the company. The 2006 case highlighted almost identical facts as in this matter, related to the same series of events, and made similar claims of fraud and breach of fiduciary duty. The defendants moved to dismiss the complaint because it was barred by the applicable statute of limitations. On April 27, 2006, the trial court granted defendants' motion and dismissed the 2006 complaint.

A decade later, on October 17, 2016, Ms. Noronha and IDG filed a second lawsuit against the same defendants, as well as her ex-husband,[1] TCI, and Tower Health. Ms. Noronha and IDG claimed, as noted above, that the Appellees diverted IDG's accounts receivable to themselves leaving no money for IDG to pay its employees and withholding taxes. She sought recovery from the Appellees for the alleged funds that she argued the Appellees took from IDG to pay themselves leaving the company unable to pay its payroll, payroll taxes, and operating expenses.

The Appellees have again moved to dismiss the claim under Kentucky Rules of Civil Procedure (CR) 12.02. The relevant portion of the motion to dismiss was that Ms. Noronha and IDG's claims are barred by the applicable statute of limitations. In response to the motion to dismiss, Ms. Noronha focused on the indemnity and unjust enrichment claims against Appellees. She proffers that the claim did not accrue until 2011 when she began making payments to the IRS, and consequently, the claim was timely filed within the five-year statute of limitations for indemnity claims in Kentucky.

The Appellees challenge Ms. Noronha's interpretation of Kentucky law on the statute of limitations for indemnity. They believe that Ms. Noronha's indemnity claim accrued when she acquired knowledge of the IRS's assessment of

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[1] David Noronha was named as a defendant in the Complaint but was never served and was not involved in the case at the trial court level.

IDG's withholding taxes in 2001, and hence, the statute of limitations expired five years later in 2006. Further, they contend that the claim is also barred by res judicata principles since Ms. Noronha could have made the indemnity claim in the 2006 lawsuit.

On April 26, 2017, the trial court dismissed, without analysis, the complaint against the appellees under CR 12.02. In a one-line handwritten notation the trial court stated the claim was barred by the statute of limitations. Ms. Noronha now appeals the dismissal of the case.

STANDARD OF REVIEW

In ruling on a motion to dismiss, "the pleadings should be liberally construed in a light most favorable to the plaintiff[,]" all allegations being taken as true. *Mims v. Western-Southern Agency, Inc.*, 226 S.W.3d 833, 835 (Ky. App. 2007). Therefore, a trial court has no need to make findings of fact but instead the question is purely a matter of law. *Fox v. Grayson*, 317 S.W.3d 1, 7 (Ky. 2010). "Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief?" *Id*.

Hence, "the question is purely a matter of law." *James v. Wilson*, 95 S.W.3d 875, 884 (Ky. App. 2002). And since a motion to dismiss for failure to state a claim upon which relief may be granted is a pure question of law, a reviewing court owes no deference to a trial court's determination, and the appellate court reviews the issue *de novo*. *Morgan v. Bird*, 289 S.W.3d 222, 226 (Ky. App. 2009).

## ANALYSIS

The sole issue in this appeal is whether the trial court erred in holding that Ms. Noronha's claims for indemnity and unjust enrichment are time-barred by the statute of limitations.

On appeal, Noronha maintains that her claims for indemnity and unjust enrichment are not barred by the statute of limitations. She argues that the Appellees' alleged misconduct caused IDG to be unable to pay its withholding taxes in 1999, and the debt for these unpaid taxes, with interest and penalties, was assessed on Ms. Noronha in 2001. Therefore, Ms. Noronha argues that because of Appellees alleged misconduct, she has a valid claim for indemnity or unjust enrichment. She maintains that the Appellees are liable to her for the taxes and penalties. Hence, Ms. Noronha seeks indemnification for the payment of IDG's taxes, which she argues were the responsibility of the Appellees.

Regarding the statute of limitations, Ms. Noronha contends that her claim did not accrue until 2011 when she began paying the tax assessment to the IRS. She asserts that in Kentucky, claims for unjust enrichment and indemnity do not accrue until the party seeking indemnification makes payment to the original claimant and suffers the loss for which it seeks indemnification. Since Ms. Noronha did not begin paying the taxes until 2011, she contends that the indemnity claim was timely filed in 2016 because it was within the five-year statute of limitations for indemnity claims in Kentucky.

In the case at bar, both parties agree that the applicable statute of limitations for unjust enrichment and indemnity is five years. *See* KRS 413.120; *Degener v. Hall Contracting Corporation*, 27 S.W.3d 775, 782 (Ky. 2000). But they disagree as to when the five-year statute of limitations accrued. Ms. Noronha proffers that the statute only began to accrue after she started making payments to the IRS in 2011. The Appellees counter that she is mistaken and that, under Kentucky law, the statute began to accrue when Ms. Noronha learned about her liability for the IRS's tax assessment, that is, when the IRS filed its tax assessment.

Thus, the Appellees believe that Ms. Noronha's indemnity claim began to accrue when she received notice of the liability in 2001, when the IRS assessed IDG's withholding taxes against her. They also point out that Ms. Noronha could have made the indemnity claim in the 2006 complaint. Further, the Appellees answer that even if Ms. Noronha's claim for indemnity did not accrue until the tax judgment was made final by the Sixth Circuit on November 6, 2009. The claims are still barred because Ms. Noronha filed the lawsuit on October 17, 2016, and the Sixth Circuit's tax judgment in 2009, seven years ago, is also outside the five-year limitations period.

We believe that the specific question regarding when the statute of limitations accrues in an indemnity case was answered in *Affholder, Inc. v. Preston Carroll Co., Inc.*, 27 F.3d 232, 235 (6th Cir. 1994). Significantly, the facts in *Affholder* mirror the facts here.

*Affholder* involved a construction cost dispute that arose in a project for the Metro Sewer District of Louisville ("MSD"). For the project, MSD hired several companies to perform design and management services and hired several other construction companies to construct the project. *Id*. at 234. One of the construction companies, Preston Carroll, subcontracted with Affholder Inc. to perform the underground construction. *Id*. Because of alleged errors in the project's design, Affholder experienced difficulties. *Id*. When MSD refused to approve the cost increases requested by Affholder, Affholder sued Preston Carroll for reimbursement. *Id.* Thereafter, the construction companies filed a third-party complaint against MSD and, a year later, amended the complaint to seek indemnity from several other third-party subcontractors. *Id*.

The United States District Court dismissed Affholder and the third-party complaint. The Sixth Circuit reversed the District Court's decision regarding the third-party complaint, but, on remand, the third-party defendant's motion for summary judgment was granted on a statute of limitations argument. Next, the case was appealed to the Sixth Circuit.

The Sixth Circuit then sought clarification from the Kentucky Supreme Court on the applicable statute of limitations. It certified several questions about third-party indemnity claims directly to the Kentucky Supreme Court. One question concerned the appropriate statute of limitations for an indemnity claim. The Supreme Court answered that for an indemnity case, the appropriate statute of limitations is the five-year period of KRS 413.120. *Id*. at 234. Here, both Ms. Noronha and the Appellees agree that the statue of limitations is five years.

But *Affholder*, in particular, addressed the disputed issue in this matter, that is, when does the statute of limitations in an indemnity action commences to run. The Supreme Court elucidated that "[a] party is responsible to know the date on which a cause of action is or reasonably should have been discovered." *Id*. at 235. And the Supreme Court continued that it is this knowledge, whether actual or imputed, that triggers the start of any applicable statute of limitations. *Id*. at 235 (citations omitted).

The Supreme Court then settled the precise question of when an indemnity claim accrues. The Supreme Court was specifically asked the following questions:

> 1. Under what circumstances does the statute of limitations begin to run:
> a. when the written agreement is executed?
> b. when the general contractor is sued on the subcontractor's underlying claim?
> c. when judgment is entered against the general contractor on the subcontractor's claim?
> d. when payment is actually made?

*Id*. at 233.

The Supreme Court clarified:

> The date of the filing of the claim was the first moment in time that the construction companies could have possibly known that they were facing potential liability. It is that knowledge which triggers the beginning of the running of the statute of limitations. The appropriate five-year statute of limitations pursuant to KRS 413.120 for an indemnity claim by the construction companies against the engineering firms began to run with the filing of Affholder's action against those construction companies on March 23, 1982.

*Id*.

Hence, the Supreme Court unequivocally held that construction companies' indemnity claims arose when Affholder's filed against them, and the statute of limitations began to accrue for their indemnity action at that time.

Here, like the facts in *Affholder,* Ms. Noronha learned about her tax liability when, in 2001, the IRS assessed IDG's unpaid withholding taxes against her. At this time, she had notice of a possible indemnity action against Appellees. Until the IRS filed its tax assessment against Ms. Noronha, any indemnity claim against the Appellees was purely conjecture and possibly non-existent. Once the tax assessment was filed, however, Ms. Noronha had actual knowledge of possible liability.

In fact, the Supreme Court directly rejected Ms. Noronha's reasoning that the action did not begin to run until after she completed payments for the alleged liability. One certified question posed to the Supreme Court was – "[u]nder what circumstances does the statute of limitations begin to run . . . when payment is actually made?" The Supreme Court rejected that possibility when it determined that limitations period for the third-party began to run with the filing of an action against the potentially injured party not when payment for the liability was made by that injured party.

Ms. Noronha emphatically argues that Appellees are mistaken in the interpretation of *Affholder* and that her indemnity claim did not accrue until she began making payments to the IRS. Although Ms. Noronha admits that she became aware of the tax liability in April 2001, she reasons that the Appellees confuse the term "exposed to liability" with the commencement of the limitations period. Then, Ms. Nohonha, without attribution, opines that "exposed to liability" for common law indemnity requires an underlying liability in terms of a judgment, settlement, or at least an ongoing proceeding for damages. She provides no citation for this claim.

Next, relying on *Degener*, Ms. Noronha states that "a claim for indemnity is not a claim in which the claimant seeks damages for his/her own personal injuries, but is one in which the claimant seeks restitution for damages he/she was required to pay for injuries sustained by another and which were entirely or primarily caused by the party against whom indemnity is sought." *Degener*, 27 S.W.3d at 781-82. Nonetheless, this reasoning does not address that once a claim is filed against the indemnitee, he or she is put on notice that they are facing potential liability.

Ms. Noronha cites many cases to support her claim but none are specifically on point. Hence, we are not persuaded by Ms. Noronha's arguments that *Affholder* was not on point. Many are dated prior to *Affholder*. And the cases for the most part stand for the principle that an indemnity claim bears a different statute of limitations than the underlying claim. This principle does not change the holding in *Affholder* regarding when an injured party first learns about the potential for indemnity against a third party. Nowhere does Ms. Noronha provide a case that disputes the holding in *Affholder*. These cases also do not contradict that the date a claim is filed provides notice to the injured party that is facing potential liability and starts the running of the five-year statute of limitations. Obviously, the statute of limitations only indicates the time for filing a lawsuit, and persons filing lawsuits for indemnity, including Ms. Noronha, must still prove that they have a legitimate claim.

Thus, when the IRS filed its tax assessment, Ms. Noronha had knowledge of a tax debt, "exposure to liability," for which, she could have filed an action against the Appellees to indemnify her. Moreover, the decision by Ms. Noronha to fight the tax assessment does not negate the running of the statute of limitations. Here, she did not file such a lawsuit until almost fifteen years later. Noronha's theory that the statute did not begin to run until she completed payments to the IRS would push the statute of limitations past the fifteen-year limitations. Stretching the time for filing a lawsuit for indemnity pass fifteen years, as Ms. Noronha claims, is an absurd result and renders the purpose of the statute of limitations meaningless. Hence, we hold that by 2016, the indemnity and unjust enrichment claims were barred by the five-year statute of limitations for indemnity.

The Appellees also argue that Ms. Noronha's claim is impeded by the principles of res judicata and issue preclusion. However, it is not necessary for us to address this legal principle since we have determined that the statute of limitations conclusively bars Ms. Noronha's claims for indemnity and unjust enrichment.

## CONCLUSION

The statute of limitations for Ms. Noronha's indemnity and unjust enrichment claims began to run in 2001 and expired in 2006. Therefore, the trial court did not err in dismissing the case with prejudice.

We affirm the decision of the Jefferson Circuit Court.

JOHNSON, JUDGE, CONCURS.

NICKELL, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

George R. Carter
Louisville, Kentucky

BRIEF FOR APPELLEE:

Thad M. Barnes
Frederick R. Bentley, III
Louisville, Kentucky