

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CIVIL DIVISION

PAUL AND LINDA STOSS,	:	
INDIVIDUALLY AND AS H/W,	:	
Plaintiffs	:	
	:	
v.	:	No. 10-0559
	:	
SINGER FINANCIAL CORPORATION AND	:	
PAUL SINGER, INDIVIDUALLY,	:	
Defendants	:	
Matthew B. Weisberg, Esquire		Counsel for Plaintiffs
Scot M. Wisler, Esquire		Counsel for Defendants

Nanovic, P.J. - February 29, 2012

MEMORANDUM OPINION

By order dated February 24, 2010, the United States District Court for the Eastern District of Pennsylvania (District Court) dismissed Plaintiffs' claims against Defendants for predatory lending. Whether Plaintiffs timely transferred their pendent state claims in the federal action to this court, and whether the facts averred will sustain such claims are the issues before us.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs, Paul and Linda Stoss, began this suit by the filing of an eight count complaint in the District Court on December 24, 2008. On June 6, 2009, in response to a motion to dismiss, the complaint was amended (First Amended Complaint) and

reduced to three counts: Count I - Civil RICO; Count II - Fraud; and Count III - Wrongful Use of Civil Proceedings under 42 Pa.C.S.A. § 8351. In response to a second motion to dismiss, on February 24, 2010, the District Court dismissed Counts I and II of the amended complaint with prejudice, and further dismissed Count III, without prejudice, for lack of subject matter jurisdiction.¹

On March 8, 2010, Plaintiffs filed a certified copy of the complaint originally filed in the federal district court, together with a praecipe to transfer, with this court. This praecipe, directed to the Carbon County prothonotary's office, requested the transfer of Plaintiffs' case against Defendants

¹ To succeed in a cause of action for wrongful use of civil proceedings, a plaintiff must allege and prove the following three elements: 1) that the underlying proceedings were terminated in their favor; 2) that defendants caused those proceedings to be instituted without probable cause; and 3) that the proceedings were instituted for an improper purpose.

Bannar v. Miller, 701 A.2d 242, 247 (Pa.Super. 1997), *appeal denied*, 723 A.2d 1024 (Pa. 1998).

The underlying proceedings upon which Plaintiffs base this claim are a mortgage foreclosure complaint and confession of judgment, both filed by the Defendant Singer Financial Corporation against Plaintiffs on August 17, 2007. The mortgage foreclosure action was discontinued by Singer, with prejudice, on September 19, 2007. The judgment confessed was marked satisfied, also on September 19, 2007. The mortgage and note which were the subject of the underlying proceedings evidenced a \$400,000.00 loan by Singer secured by Plaintiffs' farm.

In essence, Plaintiffs aver in the First Amended Complaint that on the same date both proceedings were commenced, Plaintiffs' property was sold at a price sufficient to cover any monies due Singer and there was no need to bring suit. Plaintiffs also contend that the loan made by Singer to Plaintiffs was predatory, one which Defendants knew Plaintiffs could not afford, and that the fees and interest charged by Defendants were exorbitant, deceptive and confiscatory. The individual Defendant Paul Singer is averred to be an officer and principal of Singer Financial Corporation, whom Plaintiffs contend was instrumental in securing the loan.

"from the Eastern District of Pennsylvania Federal Court to the Carbon County Court of Common Pleas."

Defendants filed objections to this purported transfer on March 29, 2010. In these objections, Defendants contended that because the only pleading Plaintiffs filed with this court was the original federal complaint, rather than the First Amended Complaint, the latter being the subject of the District Court's dismissal order, Plaintiffs failed to file all of the related and requisite pleadings from the United States Court as required by 42 Pa.C.S.A. § 5103. In their objections, Defendants further questioned the adequacy of the First Amended Complaint to set forth a cause of action for wrongful use of civil proceedings. In response to these objections, Plaintiffs filed a Second Amended Complaint on April 20, 2010.

Defendants filed their objections to the Second Amended Complaint on May 10, 2010. In these objections, Defendants argued that the filing of the Second Amended Complaint did not satisfy Section 5103(b)'s requirement that all of the related pleadings in the federal court be filed with this court to effect transfer, namely the First Amended Complaint, and further, that both the First Amended and Second Amended Complaints failed to aver the essential elements of a cause of action for wrongful use of civil proceedings. Thereafter, on May 24, 2010, Plaintiffs filed for the second time a praecipe to

transfer, together with a certified copy of the same original federal complaint which had previously been filed with this court on March 8, 2010.

By order dated October 13, 2010, we granted Defendants' objections to the Second Amended Complaint and ordered this complaint stricken. The legal sufficiency of the First Amended Complaint was not addressed since a copy of that complaint had yet to be filed with this court. We further permitted Plaintiffs thirty days from the date of entry of our order "within which to comply with the requirements of 42 Pa.C.S.A. § 5103(b)(2) in order to perfect the transfer of any claim raised by them which was dismissed by the United States Court for lack of jurisdiction."

On November 12, 2010, Plaintiffs filed a praecipe to transfer "the attached Amended Civil Action Complaint and the Order and Opinion from the Eastern District of Pennsylvania Federal Court to the Carbon County Court of Common Pleas." Certified copies of the First Amended Complaint as well as the District Court's memorandum opinion and order dated February 24, 2010, dismissing the case, accompanied this filing.²

Preliminary objections to the First Amended Complaint were filed by Defendants on November 19, 2010. In these objections, in addition to averring that Plaintiffs had failed

² A copy of the District Court's memorandum opinion and order dated February 24, 2010, may be found at 2010 WL 678115 (E.D.Pa. 2010).

to file a copy of the First Amended Complaint when first seeking to transfer Plaintiffs' state claims to this court, Defendants also averred that Plaintiffs had failed to promptly transfer the case from the federal court to this court pursuant to Section 5103(b) after the claims in the federal action were dismissed for lack of jurisdiction, and that the First Amended Complaint was legally insufficient to sustain a cause of action for wrongful use of civil proceedings.

Defendants' objections to the First Amended Complaint were followed by the filing of Plaintiffs' Third Amended Complaint on December 10, 2010, to which Defendants filed preliminary objections on December 23, 2010. In these objections, Defendants pursued their previous claim that Plaintiffs had failed to promptly transfer the case pursuant to Section 5103(b), the First Amended Complaint not having been filed with this court until eight months, two weeks and two days after the District Court's Order dated February 24, 2010, dismissing the First Amended Complaint for lack of jurisdiction. Defendants also contended that the Third Amended Complaint, which consisted of one count and which, for the first time, identified two causes of action - wrongful use of civil proceedings and abuse of process - was legally insufficient to support either claim. Finally, with respect to the claim for abuse of process, Defendants argued that this was a new claim

not previously raised and that it was barred by the statute of limitations. It is these objections to Plaintiffs' Third Amended Complaint which are now before us.

DISCUSSION

Compliance with 42 Pa.C.S.A. § 5103

Section 5103 provides, in relevant part, as follows:

§ 5103. Transfer of erroneously filed matters

(a) General rule.-If an appeal or other matter is taken to or brought in a court or magisterial district of this Commonwealth which does not have jurisdiction of the appeal or other matter, the court or magisterial district judge shall not quash such appeal or dismiss the matter, but shall transfer the record thereof to the proper tribunal of this Commonwealth, where the appeal or other matter shall be treated as if originally filed in the transferee tribunal on the date when the appeal or other matter was first filed in a court or magisterial district of this Commonwealth. . . .

(b) Federal Cases.-

(1) Subsection (a) shall also apply to any matter transferred or remanded by any United States court for a district embracing any part of this Commonwealth. In order to preserve a claim under Chapter 55 (relating to limitation of time), a litigant who timely commences an action or proceeding in any United States court for a district embracing any part of this Commonwealth is not required to commence a protective action in a court or before a magisterial district judge of this Commonwealth. Where a matter is filed in any United States court for a district embracing any part of this Commonwealth and the matter is dismissed by the United States court for lack of jurisdiction, any litigant in the matter filed may transfer the matter to a court or magisterial

district of this Commonwealth by complying with the transfer provisions set forth in paragraph (2).

(2) ... [S]uch transfer may be effected by filing a certified transcript of the final judgment of the United States court and the related pleadings in a court or magisterial district of this Commonwealth. The pleadings shall have the same effect as under the practice in the United States court, but the transferee court or magisterial district judge may require that they be amended to conform to the practice in this Commonwealth. . . .

42 Pa.C.S. § 5103(a) - (b) (2).

On its face, Section 5103(b)(2) does not provide any time period within which the transfer to state court is to be effected after dismissal by the federal court for lack of jurisdiction. In order to fill this void, the Superior Court in Williams v. F.L. Smithe Machine Co., Inc., 577 A.2d 907 (Pa.Super. 1990), *appeal denied*, 593 A.2d 422 (Pa. 1991), created a general promptness requirement. Therein, the Court stated:

[F]or benefit of both bench and bar, we now emphasize that in order to protect the timeliness of an action under 42 Pa.C.S.A. § 5103, a litigant, upon having his case dismissed in federal court for lack of jurisdiction, must promptly file a certified transcript of the final judgment of the federal court and, at the same time, a certified transcript of the pleadings from the federal action. The litigant shall not file new pleadings in state court.

Id. at 910.

The Williams' court thus held that "if a matter is originally filed within the statute of limitations in federal court but is dismissed for lack of jurisdiction, a litigant may effect transfer of the action to a state court by complying with the provisions of 42 Pa.C.S. § 5103(b), and the state court will treat the matter as if it were originally filed in the state court, despite the fact that the federal court took no action to transfer the case or take any other action." Collins v. Greene County Memorial Hospital, 615 A.2d 760, 762 (Pa.Super. 1992), *aff'd*, 640 A.2d 379 (Pa. 1994). Stated differently, provided the requirements of Section 5103(b)(2) are met, "the date of the federal filing becomes the date of the state filing for purposes of the applicable statute of limitations." Chris Falcone, Inc. v. Insurance Co. of State of Pennsylvania, 907 A.2d 631, 636 (Pa.Super. 2006), *appeal denied*, 917 A.2d 312 (Pa. 2007).

"Section 5103 allows a party to transfer a case dismissed by a federal court on jurisdictional grounds to an appropriate state court, bringing with the case its federal filing date for purposes of the statute of limitations." Kelly v. Hazleton General Hospital, 837 A.2d 490, 493 (Pa.Super. 2003). "The stated policy behind this section is to preserve a claim or cause of action timely filed in federal court on the ground that the claimant[s] should not lose [their] opportunity to litigate the merits of the claim simply because [they] erred

regarding federal jurisdiction.” *Id.* at 494 (quoting Commonwealth v. Lambert, 765 A.2d 306, 320 (Pa.Super. 2000)). To have this protection, however, the case must be promptly transferred following its dismissal by the federal court.

The promptness requirement is “consistent with the policy of avoiding stale claims, making the processes of justice as speedy and efficient as possible, and preventing the possibility of the plaintiff retaining exclusive control over the action for a period in excess of the statute of limitations.” Collins, 615 A.2d at 762. If “a litigant fails to promptly transfer the action to the appropriate court, then the litigant abuses [Section 5103(b)’s protection from the bar of the statute of limitations], . . . subverts the policies underlying the statute of limitations, and undermines the speedy and efficient processes of justice.” *Id.* at 763. When a litigant fails to meet the promptness requirement of 42 Pa.C.S.A. § 5103, the complaint does not relate back to the federal court filing date and may be barred by the statute of limitations.

“[T]he promptness requirement under the statute is measured from the date the federal court dismisses the case for lack of jurisdiction.” Chris Falcone, Inc., 907 A.2d at 640. “Once the federal court dismisses a case for lack of jurisdiction, it is then incumbent upon the litigant to take

further action under the statute to move the case to state court.” *Id.* at 637 (citation and quotation marks omitted). “The plain language in Section 5103, in conjunction with the case law interpreting that section, allocates to the transferring litigant the affirmative duty to protect the federal filing date.” *Id.* at 638.

In this case, the transfer Plaintiffs purported to make on March 8, 2010, did not comply with Section 5103’s filing requirements. This filing was not accompanied by either a certified transcript of the final order of the federal court dismissing the case or a certified transcript of the related pleadings from that case, most particularly the First Amended Complaint which was the subject of the District Court’s February 24, 2010, order. Not until November 12, 2010, when Plaintiffs filed certified copies of the First Amended Complaint and the District Court’s order and memorandum opinion of February 24, 2010, were Plaintiffs for the first time in compliance with the filing requirements of Section 5103. This filing, however, was eight months, two weeks and two days after the federal court’s dismissal of Plaintiffs’ federal suit. Whether this delay meets the promptness requirements created by the case law of this Commonwealth is the specific issue we must decide.

Furthermore, the answer to this question is critical to Plaintiffs’ claims for wrongful use of civil proceedings and

abuse of process. Both have a two-year statute of limitations. See 42 Pa.C.S.A. § 5524(1). Accepting the best case scenario for Plaintiffs, the running of the statute began when the underlying claims against them were discontinued by Defendant Singer Financial Corporation on September 19, 2007. Plaintiffs commenced their federal suit on December 24, 2008, within the statutory period, and the federal court dismissed the suit on February 24, 2010, outside this statutory period. Hence, Plaintiffs' claims are timely only if promptly transferred to this court within the meaning of Section 5103 so as to preserve the original federal filing date.

On this narrow issue, the case law is against Plaintiffs. See Williams (allowing transferred case to go forward in state court, despite seven-month delay in filing a certified transcript of the final judgment of the United States court and related federal pleadings following dismissal by the federal court; court granted a one-time exception to the court-created promptness requirement due to the then existing dearth of case law interpreting the time within which a transfer under 42 Pa.C.S.A. § 5103 must be effected); Collins (holding seven-month delay between dismissal from federal court and filing requisite paperwork to transfer case to state court did not comply with promptness requirement under the transfer statute; defendant's preliminary objections to transfer granted and

affirmed on appeal); Ferrari v. Antonacci, 689 A.2d 320 (Pa.Super. 1997), *appeal denied*, 698 A.2d 594 (Pa. 1997) (holding one year delay between dismissal from federal court and taking any action in state court did not comply with promptness requirement of the transfer statute; defendant's preliminary objections, which questioned whether the transfer was promptly taken, were granted and affirmed on appeal); Kelly (holding nine-month delay between dismissal from federal court and complying with filing requirements of Section 5103(b), notwithstanding earlier filing of a new complaint in state court, did not comply with promptness requirement under the transfer statute; defendant's motion for judgment on the pleadings granted and affirmed on appeal); Chris Falcone, Inc., (holding ten-month delay between dismissal from federal court and complying with filing requirements of Section 5103(b), notwithstanding earlier filing of a new complaint in state court, did not comply with the promptness requirement under the transfer statute; defendant's motion for summary judgment granted and upheld on appeal).

In Collins, the trial court noted that the time and effort to file in state court pursuant to the transfer statute would likely be less than that required for filing an amended pleading or filing a responsive pleading after the disposition of preliminary objections, for which the Pennsylvania Rules of

Civil Procedure allot twenty days. Collins, 615 A.2d at 760-61. In the same case, the Superior Court suggested that the Legislature set a specific time requirement of thirty days to effect transfer. *Id.* at 763. Although neither the Legislature nor the courts have ever set a specific number of days by which the transfer must be effected, Kelly, 837 A.2d at 496, the settled case law cited in the preceding paragraph makes clear that eight months is too long. *Cf.* Ferrari (holding that the trial court correctly relied on the provisions of 42 Pa.C.S.A. § 5103, as interpreted by the courts of this Commonwealth, in finding as a matter of law, without the need for a fact-finding determination, that a one-year delay was untimely) and Kelly (holding that notwithstanding the filing of a new complaint in state court sixteen days after dismissal by the federal court, a nearly nine-month delay in filing documents required for a Section 5103(b) transfer was untimely).³

³ Plaintiffs' contention in their briefs filed with this court and at the time of oral argument that the delay and defect in filing the proper paperwork was attributable to the federal court is difficult to reconcile with the case law imposing the burden of prompt filing on Plaintiffs. In any event, factual statements made by counsel in briefs are not undisputed facts which we may consider in ruling on Defendants' preliminary objections. In contrast, the chronology of when documents were filed and upon which we have based our decision is not in dispute. Under this timeline, Plaintiffs did not conform to the statutory requirements until more than eight months after the federal court case was dismissed. Along this same vein, notwithstanding Plaintiffs' claim that Defendants have not been prejudiced by this delay, the issue is not whether Defendants have been prejudiced, but whether Plaintiffs have complied with the promptness requirement. Chris Falcone, Inc. v. The Insurance Company of the State of Pennsylvania, 907 A.2d 631, 640 (Pa.Super. 2006).

Finally, contrary to Plaintiffs' assertions that our October 13, 2010 order excused any late filing and is now the law of the case, Plaintiffs misread

CONCLUSION

It is never easy to dismiss a claim for reasons other than a resolution on its merits. Nor, do we do so lightly here. Nevertheless, we find the delay of eight and a half-months between the District Court's dismissal of Plaintiffs' federal claims and the required filing in this court of certified transcripts of the final judgment of the federal court and the related pleadings of that court to be inexcusable and contrary to the rational underlying the court-imposed promptness requirement. See Kelly, 837 A.2d at 496 (noting that as between two innocent parties, attorney error, if it occurred, should be borne by the party who accredited that attorney). Consequently, Defendants' motion for dismissal will be granted.⁴

BY THE COURT:

P.J.

the meaning and import of that order. The issue then before us was what was filed, not whether it was timely. As was made clear in our footnote to that order, the order was intended to address the absence of material filings to perfect a transfer under Section 5103 - the failure of Plaintiffs to file a certified transcript of the federal district court judgment and the related federal pleadings with this court, and not the timeliness of such filings. At the time, we did not have copies of the First Amended Complaint or the District Court's memorandum opinion and order to review. The question of timeliness was first raised in Defendants' preliminary objections filed on November 19, 2010, to the First Amended Complaint which Plaintiffs filed with this court on November 12, 2010. This was after the issuance of the October 13, 2010, order.

⁴ Given this disposition, we do not address Defendants' demurrer to the Third Amended Complaint or assertion that Plaintiffs' claim for abuse of process is a new claim barred by the statute of limitations.

[FN-01-12]

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Plaintiffs	:	
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SINGER FINANCIAL CORPORATION AND	:	
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Defendants	:	
Matthew B. Weisberg, Esquire		Counsel for Plaintiffs
Scot M. Wisler, Esquire		Counsel for Defendants

ORDER OF COURT

AND NOW, this 29th day of February, 2012, upon consideration of Defendants' preliminary objections to Plaintiffs' Third Amended Complaint, review of the briefs filed by the parties in support of their respective positions, and following argument and in accordance with our memorandum opinion of this same date, it is hereby

ORDERED and DECREED that the preliminary objections are sustained and that the Plaintiffs' Third Amended Complaint is dismissed with prejudice.

BY THE COURT:

P.J.