IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

EMPIRE FINANCIAL SERVICES, INC.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. 00C-09-235 SCD**
	:	
THE BANK OF NEW YORK (Delaware) and JAMES ARMISTEAD, jointly and severally,	:	
	:	
	:	
Defendants.	:	

Submitted: January 8, 2001
Decided: January 12, 2001

Upon Defendants' Motion to Dismiss - Granted in part; Denied in part.

ORDER

The Defendants, The Bank of New York (Delaware) ("BNY") and James Armistead ("Armistead"), have filed a motion to dismiss this action. The grounds of the motion are (1) that the claim is barred by the statute of limitations, and (2) the Delaware savings statute[1] does not apply.

This lawsuit follows another arising from the same facts. That lawsuit was dismissed when I granted a motion to dismiss The Bank of New York (Delaware) because of insufficiency of service of process.

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[1] **10 *Del. C.* § 8118(a).**

That decision was appealed to and affirmed by the Delaware Supreme Court.

Defendant Armistead also filed a motion to dismiss due to failure to properly serve him, service having been accepted by a person, not his agent, at his place of business. By decision dated October 27, 2000, I denied the motion to dismiss, but gave the plaintiff 30 days to achieve service on Armistead.

The Delaware savings statute provides:

> **If in any action duly commenced within the time limited therefor in this chapter, the writ fails of a sufficient service or return by any unavoidable accident, or by any default or neglect of the officer to whom it is committed; or if the writ is abated, or the action otherwise avoided or defeated by the death of any party thereto, or for any matter of form . . . a new action may be commenced, for the same cause of action, at any time within one year after the abatement or other determination of the original action . . ..**

Delaware courts have held that this statute has a remedial purpose and should be liberally construed so that disputes may be decided upon their merits rather than upon procedural technicalities. The statute "was designed to mitigate against the harshness of the defense of the statute of limitations against a plaintiff who, through no

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[2] *Id.*

[3] *See Vari v. Food Fair Stores, New Castle, Inc.*, Del. Supr., 205 A.2d 529 (1964); *Gosnell v. Whetsel*, Del. Supr., 198 A.2d 924 (1964); *Viars v. Surbaugh*, Del. Super., 335 A.2d 285 (1975); *Leavy v. Saunders*, Del. Super., 319 A.2d 44 (1974); *Howmet Corp. v. City of Wilmington*, Del. Super., 285 A.2d 423 (1971).

fault of his own, finds his cause technically barred by lapse of time." Although the Delaware Supreme Court has stated that the savings provision was not intended to be "a refuge for careless and negligent counsel," it is applicable if "it appears that no harm will result from the allowance of a second suit." In a subsequent decision, the Supreme Court stated that the law favors decision on the merits where "defendant has not been prejudiced since he was given prompt notice of plaintiff's intention to litigate," and held that if a plaintiff is within the terms of the statute, he or she has an absolute right to bring a second suit. Thus, the savings statute "confers upon a plaintiff the independent right to bring a second cause of action where a prior timely action has been dismissed because of a failure to perfect service of process within the period of limitations."

A plaintiff seeking relief under the savings statute must meet two requirements: "(1) they must have [duly] commenced an action before the statute of limitations barred the action, and (2) the writ which subsequently issues must have been 'abated.'" This Court has

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[4] ***Giles v. Rodolico*, Del. Supr., 140 A.2d 263, 267 (1958).**
[5] ***Id.***
[6] ***Id.***
[7] ***Gosnell v. Whetsel*, Del. Supr., 198 A.2d 924 (1964).**
[8] ***Id.* at 927.**
[9] ***Gaspero v. Douglas*, Del. Super., 1981 WL 10228, at *3, Christie, J. (Nov. 6, 1981).**
[10] ***Id.* at *2.**

determined that "duly" means "properly" or "upon a proper foundation, as distinguished from mere form." As for the second requirement, the Delaware Supreme Court has held that "the statute clearly indicates that abatement, in and of itself, is a separate and distinct ground for invoking the provisions of the statute." In interpreting the statute, the Court went on to say that the language 'for any matter of form' qualifies the phrase 'or the action otherwise avoided or defeated' and does not qualify or limit the language referring to the abatement of the action. Finally, the Court stated that upon affirmance of the judgment of dismissal in an initial action, the cause of action abates and the savings provision becomes applicable.

Lastly, this Court has held that in order to warrant relief under 10 *Del. C.* § 8118(a), the Court must determine that the defendant has not been prejudiced by events following the filing of the initial suit. In *Gosnell*, the Delaware Supreme Court found that prompt notice to defendant of plaintiff's intention to litigate was sufficient to establish absence of prejudice. In *Twyman v. Rice*, this Court found that when plaintiffs' counsel had written to defendant's insurer numerous times in

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[11] *Ellis v. Davis*, Del. Super., C.A. No. 97C-08-014, 1998 WL 281053, at *3, Quillen, J. (May 11, 1998) (quoting Black's Law Dictionary, 4th ed. (1951), p. 591).
[12] *Gosnell v. Whetsel*, Del. Supr., 198 A.2d 924, 927 (1964).
[13] *Id.* (citations omitted).

a three-year period, had furnished medical records, bills, and periodic updates of plaintiff's condition, and had sent a copy of the complaint and notification that it had been filed to the insurer, the defendant was not prejudiced by the plaintiff filing a new action under the savings provision.

In the instant case, Empire's initial action was filed in a timely manner and service was properly attempted within the applicable time limits, thus fulfilling the first requirement discussed above. Although service was refused due to a technical error in the caption (showing Bank of New York N.A. instead of Bank of New York (Delaware)), defendant BNY and defendant's counsel were clearly aware of the filing of the action. Defendant's counsel spoke and corresponded with plaintiff's counsel on several occasions requesting extensions of time to respond to the complaint. In addition, BNY filed an answer to the complaint on September 30, 1999. BNY noted in its answer that it was incorrectly identified in the caption to the complaint and that it was asserting the affirmative defense of insufficiency of process. It is undisputed that BNY was aware of the claim against it.

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[14] **Del. Super., 1988 WL 32002, Taylor, J. (March 14, 1988).**

Finally, plaintiff has also met the provisions of the second requirement -- the abatement of the writ. Although plaintiff's counsel duly commenced the action, the writ failed of sufficient service when BNY refused service due to the incorrect name in the complaint's caption. Dismissal of the action against BNY by this Court, and the subsequent affirmance of that dismissal by the Delaware Supreme Court, abated, i.e., effectively destroyed, the cause of action. Therefore, as held in *Gosnell*, the savings provision in 10 *Del. C.* § 8118(a) became applicable.

The savings provision of 10 *Del. C.* § 8118(a) is applicable to BNY. The defendant's Motion to Dismiss is DENIED.

As to Armistead, the facts are less clear. Plaintiff is directed to supplement the record within 10 days as to the status of service of process on Armistead, as it appears that service may have been achieved in the first action filed.

IT IS SO ORDERED.

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Judge Susan C. Del Pesco

Original to Prothonotary
xc: Raymond M. Radulski, Esquire
M. Duncan Grant, Esquire
Andrea B. Unterberger, Esquire