FOR PUBLICATION

IN THE SUPERIOR COURT OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

KEITH WAIBEL, as Trustee for the Junior Larry Hillbroom Trust; MARCIANO IMEONG, and NAOKO IMEONG, Plaintiffs, vs. **MYRON A. FARBER; JOHN FRANCIS PERKIN; BRUCE JORGENSEN; and THE ST. PAUL FIRE & MARINE INSURANCE COMPANY,** Defendants.	**CIVIL ACTION NO. 01-0236D** **ORDER GRANTING FOURTH-PARTY DEFENDANT ST. PAUL'S MOTION TO DISMISS DAVID J. LUJAN'S THIRD PARTY ("FOURTH-PARTY") COMPLAINT PURSUANT TO COMM. R. CIV. P. RULE 12(B)(6)**
JOHN FRANCIS PERKIN, Third-Party Plaintiff/ Counterclaim Defendant, vs. **DAVID J. LUJAN,** Third-Party Defendant/ Counterclaim Plaintiff.	
DAVID J. LUJAN, Fourth-Party Plaintiff, vs. **THE ST. PAUL FIRE & MARINE INSURANCE COMPANY,** Fourth-Party Defendant.	

I. INTRODUCTION AND PROCEDURAL BACKGROUND

This matter came before the Court in a hearing in Courtroom 220A on October 14, 2003, at 1:30 p.m. to consider the parties' supplemental memoranda to St. Paul Fire & Marine Insurance Company's MOTION TO DISMISS DAVID J. LUJAN'S THIRD-PARTY COMPLAINT PURSUANT TO COMM. R. CIV. P. RULES 12(B)(2) AND 12(B)(6), which addressed the applicable statute of limitations for this action against St. Paul, as well as the issue of personal jurisdiction with respect to St. Paul. At the hearing, the Court issued its oral ruling finding that St. Paul was subject to the personal jurisdiction of the court and thereby denied its motion to dismiss under Rule 12(b)(2). This Court further found that the applicable statute of limitation with respect to Lujan's direct action against St. Paul is two (2) years, pursuant to 7 CMC § 2503, given that "abuse of civil proceedings" is a form of personal injury within that section's meaning. *See also* October 16, 2003, ORDER DENYING ST. PAUL'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION.

The two-year statute of limitation expired as of November 13, 2002, two years after the dismissal of the *Farber v. Lujan*[1] federal civil action that Lujan bases the present "abuse of civil proceedings" complaint on (hereinafter "the Federal action"). Lujan's Third-Party ("Fourth-Party") Complaint against St. Paul was not filed until November 15, 2002 (*see* Lujan's FIRST AMENDED ANSWER TO THIRD-PARTY COMPLAINT, AND THIRD-PARTY COMPLAINT) and his Counterclaim against Perkin was not filed until August 28, 2003 (see Lujan's SECOND AMENDED ANSWER AND COUNTERCLAIM). Thus, neither was commenced until after the statutory period had expired. Based on Lujan's argument that the statute of limitation was tolled, the Court withheld judgment on the statute of limitations issue, pending the parties' submission of

---

[1] *Myron A. Farber v. David J. Lujan et al.*, N.Mar.I. District Court Civil Action No. 00-0014.

supplemental memoranda addressing the question of whether 7 CMC § 2503 was tolled with respect to Lujan's action against St. Paul by the filing of Lujan's MOTION TO AMEND ANSWER AND ASSERT COUNTERCLAIM AND THIRD PARTY COMPLAINT. Based upon the memoranda submitted to the Court, the arguments of counsel, and a review of the applicable rules, statutes and case law, this Court finds that the statute of limitations in question was not tolled and has expired, and that, for the following reasons, the present action against St. Paul is barred under 7 CMC § 2503 and 7 CMC § 2511.

II. ANALYSIS

A. LUJAN'S MOTION TO "AMEND" HIS ANSWER BY ASSERTING A COUNTERCLAIM AND THIRD PARTY COMPLAINT DOES NOT "RELATE BACK" TO EITHER PERKIN'S FILING OF HIS THIRD-PARTY COMPLAINT AGAINST LUJAN OR LUJAN'S ANSWER TO THAT COMPLAINT.

Third-Party Defendant (and "Fourth-Party" Plaintiff) David J. Lujan argues that, by filing (on September 25, 2002) his MOTION TO AMEND ANSWER AND ASSERT COUNTERCLAIM AND THIRD PARTY COMPLAINT (hereinafter "Motion to Amend") as well as a *proposed* "Fourth-Party" complaint against St. Paul, he tolled the statute of limitations with respect to the "Fourth-Party" Complaint that he eventually filed against St. Paul on November 18, 2002 under the Commonwealth's "direct action" statute. Lujan based this "direct action" against St. Paul on Perkin's (St. Paul's insured's) alleged "malicious prosecution" of him (hereinafter described as "abuse of civil proceedings") in the prior federal action. The statute of limitations' period for the claim of "abuse of civil proceedings" elapsed as of November 13, 2002, two years after the dismissal of the Federal action, and five days prior to the filing of Lujan's "Fourth-Party" Complaint against St. Paul. Lujan argues that his "Fourth-Party" Complaint against St. Paul (filed on November 18, 2002) related back to the September 25, 2002 filing of his Motion to Amend under Com. R. Civ. P. Rule 15(c). Additionally, Lujan argues that the "Fourth Party"

Complaint thereby related back to his *Answer* (filed June 19, 2002), which in turn related back to Perkin's Third-Party Complaint (filed April 22, 2002), and that his civil action against St. Paul therefore fell within the statute's two-year time span. Com. R. Civ. P. Rule 15(c) allows, under certain enumerated circumstances, for the relation back of an amendment to a pleading. Rule 15(c) reads, in relevant part:

> Rule 15 (c). RELATION BACK OF AMENDMENTS. **An amendment of a pleading relates back to the date of *the original pleading* when**
> (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleadings, or
> (3) the amendment changes the party or the naming of a party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.
> ....

(Emphasis added). Lujan argues that both Rules 15(c)(2) and (c)(3) are applicable here.

This Court finds that the relation-back doctrine expressed in Rule 15(c)(2) does not, by its terms, contemplate the relation-back of entirely new claims asserted in a Third-Party Complaint and/or Counterclaim to an Answer, the "original pleading". Lujan's Motion to Amend purported to amend his Answer by filing a "Fourth-Party" Complaint against St. Paul, as well as a Counterclaim against Perkin, but those underlying pleadings did not raise *defenses* to Perkin's Third-Party Complaint (as an Answer would do), but instead addressed the entirely new, *assertive* claim of "abuse of civil proceedings." The simple distinction between a motion to amend an answer and the motions to assert a "Fourth-Party" complaint and a counterclaim is further illustrated by the fact that, when Lujan later filed those pleadings, they were not

submitted to the Court as amended portions of his Answer (as the original motion proposed), but as separate, distinct pleadings. *See* Lujan's FIRST AMENDED ANSWER TO THIRD-PARTY COMPLAINT, AND **THIRD-PARTY COMPLAINT**; *see also* Lujan's SECOND AMENDED ANSWER AND **COUNTERCLAIM**. The Motion to Amend Lujan's Answer is completely unrelated to what he claims to amend, and again, the pleadings that were ultimately submitted to the Court did not amend it. By the terms of Com. R. Civ. P. Rule 15, only *amendments of pleadings* can relate back to the original pleadings, and in this case, Lujan's Motion to Amend his answer in reality did not seek to amend his answer to assert additional defenses, but sought only to assert a right of action, or a direct action, under 4 CMC § 7502(e) via a "Fourth-Party" Complaint against St. Paul for a cause of action that arose in the Commonwealth, i.e., Lujan's "abuse of civil proceedings" Counterclaim against Perkin. Accordingly, Lujan's "Fourth-Party" Complaint asserting a direct action against St. Paul cannot relate back to his Answer to Perkin's Third-Party Complaint via the filing of his Motion to Amend, or to Perkin's filing of his Third-Party Complaint against Lujan.

B. THE STATUTE OF LIMITATIONS WAS NOT TOLLED, BECAUSE NO CAUSE OF ACTION WAS INITIATED WITHIN THE STATUTORY PERIOD.

Another issue facing the Court is whether the statute of limitations in this case was tolled by the mere filing of Lujan's motion to amend his answer. Section 2511 of Title 7 of the Commonwealth Code states that "[a] civil action or proceedings *to enforce a cause of action* mentioned in this chapter *may be commenced* within the period of limitation herein prescribed, and not thereafter, except as otherwise provided in this chapter". (emphasis added) Section 2503 of Title 7 contains similar language, providing that "actions" for personal injuries "shall be commenced only within two years after the cause of action accrues." Thus, the questions

remaining before the Court are whether, by filing a motion to amend an answer to assert both a counterclaim against Perkin and a "Fourth-Party" complaint against St. Paul, Mr. Lujan was commencing a "civil action" (within the meaning of 7 CMC § 2511), and if not, whether the Motion to Amend could have (by some other operation of law) tolled the statute of limitations with respect to claims against those would-be defendants.

Rule 3 of the Commonwealth Rules of Civil Procedure (which is modeled after the identical Federal Rules at Fed. R. Civ. P. Rule 3) states simply that "[a] civil action is commenced by filing a complaint with the court." Despite Lujan's counsel's in-court declaration that he would provide case law to support his contention that the filing of a *motion* may also toll the statute of limitations, he has failed to do so, and has actually neglected to address this topic altogether in his supplemental memorandum to the Court.

It has since come to the Court's attention that case law *does* exist to support Lujan's argument, all of it arising from federal court decisions interpreting Rule 3 of the Federal Rules of Civil Procedure. *See, e.g., McDermott v. Mercury Capital Services Inc.*, 1996 U.S. Dist. LEXIS 22076 at *9 (N.D. Ga. 1996) (holding that "[t]he well-settled general rule is that the filing of a motion to amend tolls the running of the statute of limitations"); *see also Rademaker v. E.D. Flynn Export Co.*, 17 F.2d 15 (5th Cir. 1927); *Mayes v. AT&T Information Systems, Inc.*, 867 F.2d 1172 (8th Cir. 1989). However, it appears that even more persuasive authority exists to support the opposite conclusion. *See Walker v. Armco Steel Corp.*, 446 U.S. 740, 750; 100 S. Ct. 1978, 667-68 (1980) (which states that "[t]here is no indication that [Fed. R. Civ. P. Rule 3] was intended to toll a state statute of limitations, much less that it purported to displace state tolling rules for purposes of statutes of limitations"); *see also Schach v. Ford Motor Co.*, 210 F.R.D. 522, 523-24 (M.D. Pa. 2002) (quoting *Buranosky v. Himes*, 34 Pa. D. & C.2d 509, 511-12, in

holding that "'[t]he rule is well settled and supported by extensive authority that for the purpose of tolling the statute of limitations an action is commenced when the praecipe is filed, the writ paid for and the case properly indexed and docketed'").

One significant dissimilarity between the pro-tolling cases cited above and the present case is that all of those cases were based on Federal question jurisdiction, not diversity jurisdiction, and thus were not as closely related to the procedural setting of a state court, or in this case, that of the Commonwealth Superior Court. *See Schach v. Ford Motor Co.*, 210 F.R.D. at 525 n.6. As the Second Circuit Court of Appeals in *Ellenbogen v. Rider Maintenance Corp.*, 794 F.2d 768, 772 (2d Cir. 1986) explained, and as subsequently noted in the *Schach v. Ford Motor* case, "[t]he policies favoring close adherence to state statute of limitations rules in diversity cases are largely absent when the legal action is based upon federal substantive law." *See Schach v. Ford Motor*, 210 F.R.D. at 524. In fact, a federal court sitting in original jurisdiction is not bound to apply a state's statute of limitations, and federal courts may reject the application of state laws in any situation where they believe them to be "inconsistent with the federal policy underlying the cause of action under consideration." *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 465; 95 S. Ct. 1716, 1722 (1975). This procedural distinction, standing alone, persuades the Court that the pro-tolling cases' reasoning should not be applied to this case.

The most substantial feature distinguishing the present case from all of the pro-tolling cases cited, and what most convinces this Court that tolling should not apply here, is that in all of the pro-tolling (*and* anti-tolling) cases cited, it was a *Plaintiff* who sought to *amend* a *complaint,* whereas in the present case, it is a third-party *Defendant* (Lujan) who ostensibly sought to "amend" *an answer* to assert a new ("Fourth Party") *complaint*, as well as a *counterclaim*. As

addressed earlier with respect to the "relation back" doctrine, there was no actual "amendment" of Lujan's "Answer," and that motion would have been captioned more accurately as two separate motions: a "Motion to Assert a Third-Party ("Fourth Party") Complaint" and a "Motion to Assert a Counterclaim." The purpose and effect of Lujan's "Motion to Amend" are distinguishable from the circumstances involved in the pro-tolling cases, since the pro-tolling cases only involve motions to actually amend a complaint that previously asserted claims. Even if we were to take the "Motion to Amend" at its face, it seeks to assert a *completely new claim* within an *answer*, not within a complaint. Not only is an answer not a "complaint," but by its nature, it cannot constitute a "civil action or proceedings to enforce a cause of action" under 7 CMC § 2511. Likewise, a motion to amend an answer cannot be said to initiate a cause of action.

The case law, as well as the express wording of the applicable statutes of limitation (7 CMC § 2503 and 7 CMC § 2511), together with Com. R. Civ. P. Rule 3, reinforce the conclusion that Lujan's motion to amend his answer did not constitute the initiation of "a civil action or proceedings to enforce a cause of action," and therefore did not toll the statute of limitations. A civil action must be commenced within the period specified by the applicable statute of limitations, and (according to Com. R. Civ. P. Rule 3) "[a] civil action is commenced by filing a *complaint* with the court" (emphasis added). Even if this Court were to accept the proposition that a motion to amend a complaint commences a civil action, a motion to amend an answer is distinguishable, and cannot be understood to "commence a civil action" for tolling purposes, because an answer is a non-assertive, defensive pleading. Furthermore, a motion to amend an answer with a new, "Fourth Party" *complaint*, as well as a *counterclaim*, does not really seek to

"amend" an answer at all, and is therefore even further distinguished from the circumstances underlying the pro-tolling cases.

C. THE DOCTRINE OF EQUITABLE TOLLING IS INAPPLICABLE TO THIS CASE.

Lujan at oral argument urges the Court to hold that, absent any other legal basis, the equitable doctrine of "equitable tolling" should apply to toll the statute of limitations. In support of this argument, Lujan has argued that St. Paul had actual notice of the pendency and substance of the action proposed in the Motion to Amend prior to the termination of the statute of limitations period, and that St. Paul accepted service of a copy of that motion at the time that it was filed, along with a copy of the proposed "Fourth-Party" complaint to be entered against it. *See* DAVID J. LUJAN'S MEMORANDUM THAT THIRD-PARTY COMPLAINT AGAINST ST. PAUL RELATES BACK TO FILING OF ORIGINAL PLEADING BEFORE THE EXPIRATION OF THE STATUTE OF LIMITATION (hereinafter "Lujan's Memo"), at 3, 6. St. Paul has not denied Lujan's statement that it had actual notice prior to the running of the period of limitation, and so the Court deems this admitted as true. Nevertheless, notice is but one of three factors considered in determining whether equitable tolling will apply in a given case. For equitable tolling to apply, "(1) the defendant must receive timely notice of the claims; (2) the defendant must suffer no prejudice from the delay; and **(3) the plaintiff must act reasonably and in good faith.**" *Oden v. Marianas College*, 2003 MP 13 ¶ 21, *citing Zhang Gui Juan v. Commonwealth*, 2001 MP 18 ¶ 19 (emphasis added).

Even if this Court were to assume that Lujan's delay resulted in no prejudice to St. Paul (though no evidence has been submitted to support this), Lujan did not act reasonably and in good faith in failing to bring his claim within the statutory period. Lujan has stated in his defense that it wasn't until the deposition of John Perkin on September 11, 2002, that Perkins'

insurer's identity was revealed, and that was why he was so late in pursuing his claim against St. Paul. *See* Lujan's Memo, at 6. First of all, the Court notes that Lujan's deposition of Mr. Perkin was for his defense, not in pursuance of any asserted civil claims against Perkin or any possible insurer of Perkin. Secondly, considering that Lujan's cause of action against Perkin for abuse of civil proceedings was available to him anytime within two years of November 13, 2000 (the date that the Federal action against Lujan was dismissed), it stands to reason that Lujan, being a lawyer himself, would recognize that Perkin must have been insured by *some* insurance company, and that that insurance company would be liable to contribute to or indemnify against whatever liability could be attributed to Perkin. Any reasonable individual in the same situation, mindful of the statute of limitations running against him or her, would promptly inquire (by deposition or otherwise) to determine the identity of the insurer. Instead, Lujan waited nearly twenty-two months before inquiring. Also, rather than waiting until November 13, 2002 (which was, coincidentally, the day that the limitation period elapsed) for the Court to rule on his motion to amend his answer to assert a "Fourth-Party" complaint against St. Paul and a counterclaim against Perkin, Lujan could have moved to shorten time, informing the Court that the time period specified in the statute of limitations may run out with respect to both causes of action, even if he believed the statute of limitations for his direct action against St. Paul should be six years under 7 CMC § 2505 instead of two years under 7 CMC § 2503. As this Court stated in its oral ruling finding that the two year statute of limitations applies to Lujan's direct action against St. Paul, it is unreasonable to conclude that, even if a tortfeasor is liable for a cause of action for only two years after the cause of action accrues under 7 CMC § 2503(d), the insurer of the tortfeasor would be liable for a longer period of time --- for six years. The insurer's liability to an injured party is a derivative action of the insured's liability to the injured party, and so the

Commonwealth's direct action statute adopts the statute of limitations governing the underlying cause of action, as opposed to creating a new cause of action. In this case, Perkin is the insured of St. Paul, and Lujan's cause of action against Perkin is for a tort. Accordingly, St. Paul may raise the two-year statute of limitations defense against Lujan just as Perkin may.[2]

Finally, Lujan could have simply filed a new, separate civil action against St. Paul. These facts, taken together, demonstrate to the Court that Lujan's conduct was unreasonable, and for that reason, the Court rejects the application of the equitable tolling doctrine in this case.

III. CONCLUSION

In conclusion, this Court finds (1) that Lujan's "Fourth-Party" Complaint against St. Paul does not relate back (vis-a-vis the filing of Lujan's Motion to Amend his Answer) to the date Lujan filed his Answer to Perkin's Third-Party Complaint, nor to the date Perkin filed his Third-Party Complaint against Lujan; (2) that Lujan failed to commence a civil action (consistent with Com. R. Civ. P. Rule 3's use of that expression) within the two-year statute of limitations period required under 7 CMC § 2503 and 7 CMC § 2511; and (3) that the filing of Lujan's motion to amend his answer did not toll the two-year statute of limitations on his direct action. Lujan's "Fourth-Party" Complaint against St. Paul is therefore untimely, in violation of 7 CMC § 2503, and must be dismissed under Com. R. Civ. P. Rule 12(b)(6) for failing to state a claim on which relief can be granted.

For the foregoing reasons, St. Paul's Motion to Dismiss Lujan's Third-Party Complaint is hereby GRANTED, and David J. Lujan's "Fourth-Party" Complaint against St. Paul is hereby dismissed with prejudice.

---

[2] On the other hand, if the injured party's cause of action against the insured is subject to a six year statute of limitations, such as for legal malpractice, the injured party must commence his direct action against the insurer within six years after the cause of action accrues. *See Bank of Saipan v. Carlsmith Ball*, Orig. Action No. 99-004 (NMI Oct. 1999). See also, 4 CMC 7502(e) ("provided, that the cause of action arose in the Commonwealth").

SO ORDERED this 28th day of November, 2003.

RAMONA V. MANGLONA, Associate Judge