

IN THE CIRCUIT COURT OF MARION COUNTY, MISSISSIPPI

SWEET VALLEY MISSIONARY BAPTIST  
CHURCH a/k/a HUB COMMUNITY BAPTIST

PLAINTIFF

V.

MISSISSIPPI FARM BUREAU MUTUAL  
INSURANCE COMPANY and ALFA INSURANCE  
CORPORATION, A/K/A, ALFA GENERAL INS.  
CORP., A/K/A, ALFA MUTUAL GENERAL INS.  
CO., A/K/A, ALFA SPECIALTY INS. CORP.

CAUSE NO. 2010-0042P  
**FILED**  
SEP 23 2010  
JESSE LOFTIN, CIRCUIT CLERK  
BY \_\_\_\_\_ DEFENDANTS  
D.C.

ORDER OF DISMISSAL

COMES NOW, before this Court, Defendant Alfa Insurance Corporation's Motion to Dismiss. In rendering its decision, the Court has reviewed the Motion together with all documents and correspondence pertaining to the matter. Accordingly, the Court is of the opinion that the Motion is well-taken and should be GRANTED, for the following reasons, to-wit:

This case arises from damage to the property of Sweet Valley Missionary Baptist Church ("Plaintiff") allegedly sustained after the landfall of Hurricane Katrina on August 29, 2005. On October 14, 2005, Alfa Insurance Corporation ("Alfa") paid benefits to the Plaintiff in the amount of \$9,951.89, for damage sustained by the Plaintiff's property. The Plaintiff has filed this suit alleging breach of contract against Alfa for denial of payment or failure to pay full benefits.

The first Complaint filed by the Plaintiff was filed on August 29, 2008, and that cause was dismissed without prejudice by Order of the Court on July 1, 2009. On July 8, 2009, the Plaintiff filed a Motion to Set Aside Judgment, or in the alternative, Motion for New Trial. The Motion was not noticed for hearing until November 2, 2009, at which time it was noticed for hearing on January 29, 2010. At the conclusion of the hearing on the Motion on January 29, 2010, the Honorable Prentiss

G. Harrell denied the Plaintiff's Motion and the Plaintiff filed a new Complaint that same day.

Alfa has filed this Motion to Dismiss arguing that the statute of limitations had run at the time the Plaintiff filed their new Complaint on January 29, 2010. The Plaintiff contends that the new Complaint was not time-barred because the statute of limitations was tolled by the filing of their Motion to Set Aside Judgment on July 8, 2009. The Plaintiff also contends that it was afforded one year from the dismissal of the case in which to refile under the savings statute.

## DISCUSSION

### TOLLING OF STATUTE OF LIMITATIONS

The three (3) year period of limitation found in Mississippi Code Annotated § 15-1-49 applies to the Plaintiff's claim in this matter. Miss. Code Ann. § 15-1-49. Alfa has conceded that the Plaintiff's cause of action accrued on October 14, 2005, meaning the statute of limitations was tolled upon the timely filing of the Plaintiff's initial Complaint on August 29, 2008. The statute of limitations began to run again following dismissal of the case without prejudice on July 1, 2009. *Deposit Guar. Nat. Bank v. Roberts*, 483 So. 2d 348, 352 (Miss. 1986). At that time, forty-five (45) days remained in the Plaintiff's period of limitation.<sup>1</sup> The Plaintiff contends that the statute of limitations was tolled once again upon the filing of its Motion to Set Aside Judgment on July 8, 2009, and remained tolled until the Court's Order disposing of that Motion on January 29, 2010.

Nowhere within the Motion to Set Aside Judgment or the Memorandum in Support did the

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<sup>1</sup> The Plaintiff's three-year period of limitation began running on October 15, 2005. Since the calendar year 2008 was a leap year, and three hundred sixty-five (365) day periods of time are utilized in computing "years" within the meaning of a statute of limitations, forty-five (45) days remained in the Plaintiff's period of limitation once it began running again. *Arceo v. Tolliver*, 19 So. 3d 67 (Miss. 2009); see also *Page v. University of Southern Mississippi*, 878 So. 2d 1003 (Miss. 2004).

Plaintiff assert the procedural vehicle or legal authority through which they were proceeding on the Motion. “[W]here a motion calls into question the correctness of all or any part of a judgment ... and where the motion is filed within the time allowed by Rule 59, we will presume that the motion has been filed under Rule 59 without regard to how it may be styled.” *Bruce v. Bruce*, 587 So. 2d 898, 904 (Miss. 1991). The Plaintiff’s Motion to Set Aside Judgment certainly “questioned the correctness” of the Court’s dismissal without prejudice, as the Plaintiff sought to have the dismissal set aside because it was the result of improperly noticed motions filed by the Defendants. Motion to Set Aside Judgment, at pp. 1-2. As such, the Motion was in the proper nature of a Rule 59 motion. Since this matter never proceeded to trial either with or without a jury, relief pursuant to Rule 59(a)-(d) was unavailable to the Plaintiff. Therefore, the Motion to Set Aside Judgment was a Rule 59(e) Motion.

The Plaintiff has cited this Court to the Mississippi Supreme Court opinion in *Bruce v. Bruce*, wherein the Supreme Court held that, “Rule 59 motions stay the running of the thirty day time period [for appeal] and the enforceability of judgments.” *Bruce*, 587 So. 2d 898, 903 (Miss. 1991). The Plaintiff contends that under *Bruce*, the filing of its Motion to Set Aside Judgment tolled the statute of limitations until that Motion was disposed of. This Court acknowledges that the running of time for filing an appeal under Rule 4(a) of the Mississippi Rules of Appellate Procedure was stayed by the Plaintiff’s timely filing of its Motion to Set Aside Judgment. However, that stay does not overlap into the separate and independent period of limitation during which a cause of action may be brought. Notwithstanding the *Bruce* decision, this Court is unaware of any authority under which a Rule 59(e) Motion can toll the running of the statute of limitations.

The Plaintiff had a choice of two (2) paths to pursue in this matter when Judge Harrell

dismissed its first Complaint without prejudice. The first path was to seek an appeal of the decision in the Mississippi Supreme Court. Had the Plaintiff taken that action, this Court is of the opinion that the statute of limitations would have tolled until the time the Plaintiff received an adverse ruling on appeal. At that point, the Plaintiff could have filed a new complaint. The second path, which was ultimately chosen by the Plaintiff, was to file a “post-trial motion” under Rule 59. By pursuing this route, the Plaintiff abandoned the grounds that were available to it for tolling the statute of limitations. The moment that the Plaintiff’s time for appealing Judge Harrell’s dismissal without prejudice ran,<sup>2</sup> the posture of the case reverted back to its condition at the time of the dismissal. As discussed *supra*, the statute of limitations began to run again on July 2, 2009, and expired on August 16, 2010. Therefore, the new Complaint filed by the Plaintiff on January 29, 2010, is time-barred under the statute of limitations.

#### **SAVINGS STATUTE**

The Plaintiff also argues that its claim is not time-barred because it was afforded one (1) year from the dismissal without prejudice to file a new complaint under Mississippi Code Annotated § 15-1-69. Miss. Code Ann. § 15-1-69, known as the “savings statute,” provides:

If in any action, duly commenced within the time allowed, the writ shall be abated, or the action otherwise avoided or defeated, by the death of any party thereto, or for any matter of form ... the plaintiff may commence a new action for the same cause, at any time within one year after the abatement or other determination of the original suit.

Miss. Code Ann. § 15-1-69.

The Mississippi Supreme Court has framed the ‘true meaning’ of the savings statute as follows:

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<sup>2</sup> The Order denying the Motion to Set Aside Judgment was filed on January 29, 2010, meaning the Plaintiff had until March 1, 2010, to file a notice of appeal. Miss. R. App. P. 4(a), (d).

“Where the plaintiff has been defeated by some matter not affecting the merits, some defect or informality, which he can remedy or avoid by a new process, the statute shall not prevent him from doing so, provided he follows it promptly, by suit within a year.” *Crawford v. Morris Transportation, Inc.*, 990 So. 2d 162, 173-74 (Miss. 2008) (quoting *Hawkins v. Scottish Union & National Ins. Co.*, 69 So. 710, 713 (Miss. 1915)).

The issue in determining the application of the savings statute in this case is whether the dismissal without prejudice was for a “matter of form.” The Plaintiff argues that it was, as it was based upon defects which did not “touch upon the merits of Plaintiff’s cause of action and therefore, fall[] squarely within the purview of the savings statute.” Memorandum in Support of Response, at p. 4.

The Plaintiff has cited the Court to the cases of *Arceo v. Tolliver*, 19 So. 3d 67 (Miss. 2009), and *Marshall v. Kansas City Southern Railways Co.*, 7 So. 3d 210 (Miss. 2009). The Supreme Court held in both of these cases that the dismissals without prejudice that had occurred were for a matter of form and that the savings statute applied to permit the plaintiffs to commence new actions. In *Arceo v. Tolliver*, the Supreme Court held that the dismissal of the plaintiff’s complaint for failure to comply with the notice provisions of the Medical Malpractice Tort Reform Act was for a matter of form. *Arceo*, 19 So. 3d at 75. In *Marshall v. Kansas City Southern Railways Co.*, the Supreme Court held that the dismissal for lack of subject matter jurisdiction was for a matter of form. *Marshall*, 7 So. 3d at 216. These cases are not on point, as the dismissal without prejudice that occurred in the case *sub judice* was based upon “the Plaintiff’s failure to cooperate in discovery, failure to adhere to the Scheduling Order entered by this Court, and failure to appear at the hearing of these Motions.” Order of Dismissal.

Unlike a dismissal for lack of subject matter jurisdiction or failure to satisfy statutory notice requirements, an involuntary dismissal for discovery violations ordinarily operates as an adjudication upon the merits. *Marshall v. Burger King*, 2 So. 3d 702, 707-08 (Miss. Ct. App. 2008); *see also* Miss. R. Civ. P. 41(b). Judge Harrell's Order of Dismissal was clearly intended as a sanction for discovery violations, and did not specify that the dismissal was not to operate as an adjudication upon the merits. Accordingly, this Court is of the opinion that the Order of Dismissal was based upon a matter affecting the merits of the case, and not for a matter of form. Therefore, the savings statute was inapplicable to allow the Plaintiff to file its new Complaint on January 29, 2010.

#### CONCLUSION

The filing of the Plaintiff's Motion to Set Aside Judgment failed to toll the statute of limitations in this matter, and upon dismissal without prejudice, the statute of limitations began to run again and expired on August 16, 2010. The savings statute is inapplicable to have permitted the Plaintiff to commence a new action because the dismissal was not for a matter of form. Therefore, the Plaintiff's Complaint filed on January 29, 2010, was time-barred and the Defendants' Motion to Dismiss should be GRANTED.

IT IS THEREFORE, ORDERED AND ADJUDGED, that Defendant Alfa Insurance Corporation's Motion to Dismiss is hereby GRANTED, for the reasons discussed herein.

SO ORDERED AND ADJUDGED, this the 23 day of September, 2010.

  
CIRCUIT JUDGE