

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

BERT'S SUBARU, INC.,)
)
 Plaintiff)
)
 v.)
)
 CHRYSLER CREDIT CORPORATION,)
)
 Defendant)

Docket No. 98-203-P-C

RECOMMENDED DECISION ON DEFENDANT'S MOTION TO DISMISS

The defendant moves to dismiss this action that it removed from state court on the ground that each of the claims asserted is barred by an applicable statute of limitations. The plaintiff contends that its earlier intervention in a state-court action, subsequently reversed by the state courts, tolls any applicable statute of limitations for the period during which it was a party in that action and, in the alternative, that the date of accrual of its causes of action for the purpose of application of any statute of limitations cannot be determined from the face of its complaint. I recommend that the court grant the motion.

I. Applicable Legal Standard

The defendant's motion does not specify the section of Fed. R. Civ. P. 12(b) under which it is proceeding, but Rule 12(b)(6), failure to state a claim upon which relief may be granted, is the only section of the rule that applies to statute of limitations defenses. "When evaluating a motion to

dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending the plaintiff every reasonable inference in [its] favor.” *Pihl v. Massachusetts Dep’t of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). The defendant is entitled to dismissal for failure to state a claim “only if it clearly appears, according to the facts alleged, that the plaintiff cannot recover on any viable theory.” *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990); *see also Jackson v. Faber*, 834 F. Supp. 471, 473 (D. Me. 1993).

II. Factual Background

The complaint sets forth the following factual basis for the plaintiff’s claims. The plaintiff corporation was formed in 1989 by the principal owner and president of Bert’s L/A Auto Sales, Inc. (“Bert’s L/A”) in anticipation of obtaining a Subaru automobile dealership to “co-exist” with the Jeep/AMC dealership owned and operated by Bert’s L/A, with the intention that the Subaru dealership would increase operating revenue for the overall operation. Complaint (included in Docket No. 1) ¶¶ 3-5. The defendant provided floor-plan financing to Bert’s L/A. *Id.* ¶ 3. The defendant gave Bert’s L/A permission to open a Subaru dealership at the existing Jeep/AMC location and Bert’s L/A received a written commitment from Subaru to sell it a franchise, subject to certain financing requirements. *Id.* ¶¶ 6, 8.

In December 1989 Bert’s L/A and the plaintiff received a commitment from a local bank for financing in the amount of \$600,000 that would, inter alia, allow Bert’s L/A to satisfy its accrued obligation to the defendant and the plaintiff to purchase the Subaru franchise. *Id.* ¶ 9. The defendant in January 1990 directed Bert’s L/A and the plaintiff not to accept the bank financing, took actions to prevent any such acceptance and promised to provide a more advantageous financing package.

Id. ¶¶ 10-11. In May 1990 the defendant indicated that it would not in fact provide Bert's L/A and the plaintiff with any such financing. *Id.* ¶ 13. As a result, Bert's L/A was forced to terminate business operations in October 1990 and the plaintiff did not have the necessary financing to purchase the Subaru franchise. *Id.* ¶¶ 14-15. Also as a result, the plaintiff was never capitalized and never became operational. *Id.* ¶ 16. Bert's L/A brought suit in state court in January 1992 against the defendant. *Id.* ¶ 17. That action was consolidated with an action entitled *Chrysler Credit Corporation v. Auto Park Assoc.*, an action by the defendant against the owner of the real estate upon which Bert's L/A conducted its business and the individual guarantors on the loan agreements between Bert's L/A and the defendant. *Id.*

The complaint asserts seven claims against the defendant: (i) breach of contract; (ii) breach of the contract between Bert's L/A and the defendant, with the plaintiff as a third-party beneficiary; (iii) breach of a covenant of good faith and fair dealing; (iv) violation of the Automobile Dealers' Day in Court Act, 15 U.S.C. § 1221 *et seq.*; (v) violation of the Maine Motor Vehicle Dealers Act, 10 M.R.S.A. § 1171 *et seq.*; (vi) tortious interference with business operations; and (vii) tortious interference with a prospective business relationship. The complaint also seeks punitive damages in a separate count. The complaint was filed in state court on March 30, 1998, almost eight years after the plaintiff's cause of action accrued. Notice of Removal (Docket No. 1) ¶ 1.

III. Discussion

The defendants contend that each of the substantive counts in the complaint is subject to dismissal under the applicable statute of limitations. The state-law claims are subject to the six-year statute of limitations set forth in 14 M.R.S.A. § 752, with the exception of the claim under the Maine

Motor Vehicle Dealers Act which has its own four-year statute of limitations, 10 M.R.S.A. § 1183. The federal statutory claim is subject to a three-year statute of limitations, 15 U.S.C. § 1223. The plaintiff's opposition to the motion to dismiss includes extensive unsupported factual allegations upon which it bases its argument that its presence as a party in the state-court proceeding brought by Bert's L/A against the defendant from October 24, 1995 to March 11, 1998, when the Law Court held in *Chrysler Credit Corp. v. Bert Cote's L/A Auto Sales, Inc.*, 707 A.2d 1311, 1315-16 (Me. 1998), that the Maine Superior Court had exceeded the bounds of its discretion when it allowed Bert's L/A to add the plaintiff as a party to that action, shows that it filed its claims against the defendant within the statute of limitations period. In the alternative, the plaintiff argues that (i) the statutes of limitations should be tolled for the period during which it was a party to the state-court action; (ii) its causes of action did not accrue in 1990, as the defendant maintains, but only upon some unknown later but timely date when it actually suffered harm from the defendant's actions; and (iii) the defendant's actions caused it continuing harm "until at least 1995 when Plaintiff surrendered the Jeep Eagle franchise and gave up any hope of securing the then outstanding Subaru dealership for the Lewiston/Auburn region." Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss (Docket No. 7) at 12. Of course, by the terms of the plaintiff's own complaint, it never held the Jeep Eagle franchise.

Both of the parties have referred the court to the Law Court's opinion in *Chrysler Credit Corp. v. Bert Cote's L/A Auto Sales, Inc.* For purposes of this analysis only, I will assume *arguendo* that the information set forth in that opinion is part of the record before this court. Ordinarily, the consideration by the court of any material outside the pleadings will transform a motion to dismiss into one for summary judgment by operation of Fed. R. Civ. P. 12(b), and any such materials

submitted by the parties must meet the requirements of Fed. R. Civ. P. 56. It is only because these facts ultimately make no difference in terms of my recommended disposition of the motion that they are mentioned here. I specifically decline to treat this motion as one for summary judgment.

At the state-court trial of the consolidated actions, Bert's L/A was allowed to introduce evidence concerning the projected profitability of the proposed Subaru dealership. *Chrysler Credit*, 707 A.2d at 1314. At the close of its presentation of evidence, Bert's L/A moved and was permitted to amend its complaint to include Bert's Subaru as a plaintiff. *Id.* at 1314-15. The jury returned a verdict in favor of Bert's L/A in the amount of \$250,000 and in favor of Bert's Subaru in the amount of \$300,000. *Id.* at 1315. The Law Court held that "the court exceeded the bounds of its discretion by granting [Bert's L/A's] motion to amend its pleadings to add Bert's Subaru as a party in interest at the conclusion of [Bert's L/A's] case-in-chief." *Id.* at 1316. The Law Court's opinion is dated March 11, 1998. *Id.* at 1311.

The fact that claims asserted in an untimely action were also raised in a timely action that was subsequently dismissed does not toll the statute of limitations applicable to those claims for purposes of the second action. If the plaintiff's argument to the contrary were correct, a party that otherwise would be protected by a statute of limitations would remain vulnerable indefinitely to a claim that was timely brought but subsequently dismissed, for whatever reason. That result would directly undermine at least one aspect of the rationale upon which statutes of limitation are based, namely, that stale claims should not be prosecuted. The plaintiff relies on *Duddy v. McDonald*, 148 Me. 535 (1953), as its support for this argument, but it reads far too much into the Law Court's statement in that opinion that "[a]ctions brought within [the period specified by a statute of limitations] toll the statute." *Id.* at 537. The Law Court was merely stating a general proposition. It most definitely was

not referring to a separate, earlier and dismissed or otherwise terminated action tolling the statute of limitations for purposes of a second action. No such factual scenario was presented in *Duddy*.

The Law Court has not ruled on this issue in any reported case. The issue was raised but not decided in *Dougherty v. Oliviero*, 427 A.2d 487, 488-89 (Me. 1981). Absent controlling state-law precedent, a federal court sitting in diversity has the discretion to certify a state-law question to the state's highest court, or to predict what the high court would do when the path the state court would take is reasonably clear. See *Lyons v. National Car Rental Sys., Inc.*, 30 F.3d 240, 245 (1st Cir. 1994); *Nieves v. University of Puerto Rico*, 7 F.3d 270, 274 (1st Cir. 1993). This question is not appropriate for certification. See *White v. Edgar*, 320 A.2d 668, 677 (Me. 1974). "Where unsettled questions [of law] are involved, we can assume that [Maine]'s highest court would adopt the view which, consistent with its precedent, seems best supported by the force of logic and the better-reasoned authorities." *Ryan v. Royal Ins. Co. of Am.*, 916 F.2d 731, 739 (1st Cir. 1990). The force of logic supports the conclusion that filing a timely claim that is subsequently dismissed does not serve to toll the statute of limitations applicable to that claim if it is ever filed again. My research has not located any reported cases in which such a result has occurred. Depriving defendants of the protection of statutes of limitation in this manner is an action that should be undertaken by the legislature, not the courts. I conclude that the Law Court would hold that the plaintiff's claims, to the extent raised in the state-court action brought by Bert's L/A to which the plaintiff was joined as a party plaintiff after the presentation of the case-in-chief at trial, were not exempt from application of the statute of limitations when raised in a separate action after the plaintiff's admission to the first action as a party was overturned on appeal, given all of the circumstances present here.

The same is true of the federal statutory claim. *Stein v. Reynolds Sec., Inc.*, 667 F.2d 33, 33-

34 (11th Cir. 1982) (federal statute of limitations not tolled when plaintiff files claim that is later dismissed by court).

The plaintiff's second argument is based on the doctrine of equitable tolling, which is applied "only when the circumstances that cause a plaintiff to miss a filing deadline are out of [its] hands."

Kelley v. NLRB, 79 F.3d 1238, 1248 (1st Cir. 1996).

Cases in which the equitable tolling doctrine is invoked are most often characterized by some affirmative misconduct by the party against whom it is employed, such as an employer or an administrative agency. Courts generally weigh five factors in assessing claims for equitable tolling: (1) lack of actual knowledge of the filing requirement; (2) lack of constructive knowledge of the filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the defendant; and (5) a plaintiff's reasonableness in remaining ignorant of the notice requirement.

Id. (internal quotation marks and citations omitted). Here, while the delay in filing this action was perhaps outside the plaintiff's control after it had been added to the state-court action as a plaintiff in 1995, that delay was not caused by the defendant. *Id.* The plaintiff was represented by counsel, who must be deemed to have been aware of the existence of statutes of limitation between 1990 and 1995, when no action was taken by the plaintiff. There was a marked lack of diligence in pursuing the plaintiff's rights during those five years.¹ The absence of prejudice to the defendant here "is not an independent basis for invoking the doctrine and sanctioning deviations from established procedures." *Id.* at 1250, quoting *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984). *See also De Casenave v. United States*, 991 F.2d 11, 12 (1st Cir. 1993) (plaintiffs not entitled to equitable tolling of claim during pendency of first lawsuit that was dismissed). As to the federal claim, I conclude that the plaintiff is not entitled to equitable tolling of the statute of

¹ Bert's L/A filed its state-court action against the defendant in January 1992. *Chrysler Credit*, 707 A.2d at 1314.

limitations.

The result is the same with respect to the state-law claims. The Law Court has noted that the statute of limitations for such claims may be equitably tolled when strict application of the statute would be inequitable. *Dasha v. Maine Med. Ctr.*, 665 A.2d 993, 995 n.2 (Me. 1995) (distinguishing doctrine of equitable estoppel as applied to statutes of limitation). However, this case does not present one of the rare cases in which application would be inequitable. The fact that the plaintiff finds its claims subject to the two state-law statutes of limitation in this case is due not to any action by the defendant and only in a narrow technical sense to circumstances beyond its control. The plaintiff chose, for whatever reason, not to bring an action against the defendant within the first five years after the events giving rise to its claims and then only to seek to join an action brought against the defendant by a related but distinct corporate entity after that entity had completed its presentation of evidence against the defendant at trial. The choice to intervene in the state-court action at that very late date was subject to the clear risk that the trial court's decision to allow that intervention would be overturned on appeal. The result of the plaintiff's lack of diligence cannot be considered a surprise. Considering all of the circumstances, I conclude that application of the statutes of limitation to the plaintiff's state-law claims would not be inequitable.

Finally, the plaintiff's contentions that its causes of action did not accrue in 1990 but at some unspecified but timely later date when it actually suffered harm from the defendant's actions and that the defendant's actions caused it harm that continued into the limitations period cannot be reasonably inferred from the allegations in its complaint. *Pihl*, 9 F.3d at 187 (court considering motion to

dismiss extends plaintiff every reasonable inference in its favor).²

IV. Conclusion

For the foregoing reasons, I recommend that the defendant's motion to dismiss be **GRANTED.**

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 2nd day of September, 1998.

*David M. Cohen
United States Magistrate Judge*

² The plaintiff contends, with respect to its claim under the Maine Motor Vehicle Dealers Act, that the applicable statute of limitations is extended by fraudulent concealment of the cause of action by the defendant and that it is entitled to take advantage of this provision. Plaintiff's Memorandum at 15. The complaint, however, does not include any allegation that could possibly be construed to raise the claim that the defendant fraudulently concealed such a cause of action from the plaintiff.