In the Missouri Court of Appeals
Eastern District

DIVISION FOUR

JOHN M. ROWLING,	)	ED99401
	)	
Appellant/Cross-Respondent,	)	Appeal from the Circuit Court
	)	of the City of St. Louis
v.	)	1122-CC01256-01
	)	
NESTLE HOLDINGS, INC.,	)	Honorable Steven R. Ohmer
	)	
Respondent/Cross-Appellant.	)	Filed: October 15, 2013

Introduction

Appellant John M. Rowling[1] (Rowling) appeals the judgment of the trial court dismissing his breach of contract petition with prejudice as time-barred under the five-year statute of limitations in Section 516.120(1).[2] Rowling argues that the trial court erroneously failed to apply the ten-year statute of limitations found in Section 516.110(1), or alternatively, that the trial court erred in finding Rowling's petition untimely, because the five-year statute of limitations was tolled. We would affirm. However, because we encounter inconsistency in the application of our state's statutes of limitations regarding

[1] Appellant also brings this appeal on behalf of a class of plaintiffs that was certified by the trial court. For the sake of simplicity, we refer to Rowling as the appellant throughout, but in doing so we refer to him both as an individual appellant and as representative of the class.

[2] All statutory references are to RSMo. (Supp. 2012), unless otherwise indicated.

actions on contracts containing a promise to pay money, we transfer to the Missouri Supreme Court to resolve the issue, pursuant to Rule 83.02.[3]

Background

On January 15, 2001, Respondent Nestle Holdings, Inc. (Nestle) entered into an Agreement and Plan of Merger (Merger Agreement) with Ralston Purina Company (Ralston). The Merger Agreement contemplated that at the "effective time" of the merger, all Ralston stock would be converted into a right to receive $33.50 per share. Rowling was a shareholder with Ralston and a third-party beneficiary under the Merger Agreement.

On March 30, 2011, Rowling filed a petition on behalf of himself and a class of Ralston shareholders alleging that Nestle breached the Merger Agreement by failing to timely pay for Rowling's shares. The petition alleged Nestle paid the amount due on December 18, 2001, but the stock was actually converted on December 12, 2001. The petition requested statutory interest for the late payment.

The trial court certified the class action. Nestle moved to dismiss the petition on several grounds, including that the action was barred by the applicable statute of limitations. The trial court determined that the petition alleged a breach of incidental or implied terms of a contract, thus the claim was governed by a five-year statute of limitations. The trial court dismissed Rowling's petition with prejudice. This appeal follows.

[3] All rule references are to Mo. R. Civ. P. (2013), unless otherwise indicated.

Standard of Review

We review a trial court's dismissal of a petition *de novo*. City of Lake St. Louis v. City of O'Fallon, 324 S.W.3d 756, 759 (Mo. banc 2010). We take all the allegations of the petition as true and grant the plaintiff all reasonable inferences therefrom. Gianella v. Gianella, 234 S.W.3d 526, 529 (Mo. App. E.D. 2007). We may affirm the judgment on any ground asserted in the motion to dismiss. Cmty. Title Co. v. U.S. Title Guar. Co., 965 S.W.2d 245, 250 (Mo. App. E.D. 1998).

Discussion

Rowling raises five points on appeal regarding his claim that the trial court erred in dismissing his petition with prejudice. First, Rowling argues that the trial court applied the wrong statute of limitations, and that his petition was timely under the ten-year period allowed in Section 516.110(1). Next, Rowling argues in the alternative that if the five-year period is applicable, his petition was timely because the statute was tolled. In Point Three, Rowling argues that the trial court erred in finding that his petition failed to adequately allege equitable tolling. Rowling argues in Point Four that the trial court erred in dismissing with prejudice because he should have had an opportunity to amend his petition to cure his equitable tolling allegations. Rowling's final point argues that none of the other bases contained in Nestle's motion to dismiss justified the trial court's dismissal of his petition.

In a cross-appeal that has been consolidated here with Rowling's appeal, Nestle argues that the trial court erred in certifying Rowling's claim as a class-action suit. Rowling moves to dismiss Nestle's cross-appeal on the ground that Nestle is not aggrieved by class certification and thus has no standing to appeal. Because we would

affirm the trial court's dismissal of Rowling's petition, we need not consider whether the class was properly certified. Thus, we would dismiss Nestle's cross-appeal as moot. Accordingly, we would deny Rowling's motion to dismiss Nestle's cross-appeal as moot. We turn to Rowling's points on appeal.

Point One

Rowling argues that the trial court erred in applying a five-year statute of limitations because his action arose from a contract containing a promise to pay money, and thus fell under Missouri's ten-year statute of limitations, Section 516.110(1). We find application of the statute is unclear given these facts, even in light of the Missouri Supreme Court's clarification of the statute's application in Hughes Development Co. v. Omega Realty Co., 951 S.W.2d 615 (Mo. banc 1997). Our deference to this Court's precedent would lead us to affirm the trial court's application of the five-year statute of limitations here, but in light of the plain language of Section 516.110(1), the dearth of case law addressing the particular circumstances here, and inconsistency in case law addressing similar circumstances, we transfer to the Missouri Supreme Court to resolve this issue.

Dismissal due to a statute of limitations is proper only where it is clearly established on the face of the petition that the suit is time-barred. Gianella, 234 S.W.3d at 529. Section 516.120(1) states that "[a]ll actions upon contracts, obligations or liabilities, express or implied, except those mentioned in [S]ection 516.110" must be brought "[w]ithin five years." Section 516.110(1) provides ten years in which to bring the following:

> An action upon any writing, whether sealed or unsealed, for the payment of money or property.

Thus, if Section 516.110(1) applies to the present action, as Rowling urges, then his petition on its face does not establish that it was time-barred.

The threshold issue in determining whether the ten-year statute applies is whether the underlying writing at issue contains a promise to pay money.[4] See Hughes, 951 S.W.2d at 617. This is based on the plain language of Section 516.110(1) as interpreted by the Missouri Supreme Court in Hughes. Id. (pointing out inconsistent application of Section 516.110(1), focusing on plain language). The Supreme Court concluded that the statute's application is broad, finding it applies to every suit to recover money promised in a written contract, whether or not extrinsic evidence is needed to prove the specific amount owed under the contract. Id.[5] (finding a written contract promising a certain percentage of future earnings fell under Section 516.110(1) even though exact amount due had to be shown by extrinsic evidence of earnings); see also Cmty. Title Co. v. Stewart Title Guar. Co., 977 S.W.2d 501, 502-03 (Mo. banc 1998). Thus, from Hughes we infer that the phrase "for the payment of money" modifies "any writing," thus requiring courts in the future to first determine whether the writing at issue contains a promise to pay money. Nearly all of the case law discussing Section 516.110(1) is focused on this threshold issue.

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[4] We note that while the language of the statute includes contracts "for the payment of money *or property*" (emphasis added), we simplify our analysis by referring only to the promise to pay money, as that is the relevant portion of the statute given the facts here. However, our analysis is not intended to write the words "or property" out of the statute or to suggest that promises of property would not be subject to a similar analysis. See Oberle v. Monia, 690 S.W.2d 840, 844 (Mo. App. E.D. 1985) (applying Section 516.110(1) to promise to transfer property deed).

[5] Specifically, the court listed several cases analyzing the two statutes of limitation, noting that cases applying the ten-year statute had "in common a rule that any writing containing a promise by the defendant to pay money falls under the ten-year statute of limitations where the plaintiff seeks monetary damages." Hughes, 951 S.W.2d at 617. Then, from case law declining to apply the ten-year statute, the court observed a rule that for the ten-year statute to apply, "the contractual writing must establish an absolute and fixed liability without resort to extrinsic evidence." Id. The court went on to say, "[g]iven the state of the case law, we are fully justified in ignoring the precedent in favor of the statute itself." Id.

However, here, that issue is settled: the Merger Agreement does contain a promise to pay $33.50 per share of stock. The parties agree this promise would bring the case under Section 516.110(1) if Nestle had failed to pay the promised $33.50 per share. But the question here is whether the fact that the Merger Agreement met that threshold requirement allows any type of claim arising from the Merger Agreement to be subject to the ten-year statute of limitations, or whether the suit must be to recover the promised $33.50 per share in order to fall under Section 516.110(1). In terms of the plain language of the statute, "[a]n action upon any writing . . . for the payment of money or property," this issue centers on the meaning of the words "an action." And the precise question is whether "an action" is also modified by the phrase "for the payment of money," or whether the fact that the underlying writing contains a promise to pay money is sufficient. On this issue, there is very little direct guidance in case law.[6] An examination of cases that do address this issue leads us to conclude that courts across the state interpret "an action" differently.

First, the Missouri Supreme Court has not addressed this issue squarely, but appellate courts have made inferences about the type of action that falls under Section 516.110(1) primarily from two Missouri Supreme Court cases where the focus has been on the threshold issue of whether there is a writing promising money. In Sam Kraus Co. v. State Highway Commission, 416 S.W.2d 639 (Mo. 1967),[7] the court's language

[6] While Hughes clarified that the plain language of Section 516.110(1) unambiguously shows that the writing must be for the payment of money, and the court concluded that all actions to recover the promised money certainly do fall under the ten-year statute of limitations; the court did not go so far as to exclude any other suit, or to expound upon whether a suit over some other provision of a contract containing a promise to pay money falls under the ten-year statute or the five-year statute. See Hughes, 951 S.W.2d at 617.

[7] Here we note and briefly address Rowling's argument that any case decided prior to Hughes is no longer good law. While there is some indication of this interpretation in more recent case law, we do not agree with this interpretation. See Midwest Div.-OPRMC, LLC v. Dept. of Soc. Servs., Div. of Med. Servs., 241

suggested a requirement that the suit must be to recover the money promised by the contract in order to fall under Section 516.110(1):

> It has long been the rule in this State that in order to bring an action upon any writing for the payment of money or property, "it must appear in the statement of the cause of action that the money or property sued for is promised to be paid or given by the language of the writing, and that such promise does not arise only upon proof of extrinsic facts."

Id. at 641 (quoting Parker-Washington Co. v. Dennison, 183 S.W. 1041, 1042 (Mo. 1916)). Yet in Kraus, the issue was whether the writing before the court contained the promise to pay the money sought, and thus the Supreme Court's conclusion was centered on whether the money sued for in that case was actually promised by the writing. See also Silton v. Kansas City, 446 S.W.2d 129, 132 (Mo. 1969) (finding no promise to pay contained in writing; stating "an action for damages for breach of contract is governed by the five-year statute and where the obligation to pay is contingent upon proof of extrinsic facts").

Nevertheless, this Court has interpreted Kraus and Silton as requiring that the suit seek recovery of the promised money in order to fall under the ten-year statute of limitations. In Lato v. Concord Homes, Inc., this Court considered an action alleging

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S.W.3d 371, 384 (Mo. App. W.D. 2007) (interpreting Hughes as "[o]verturning nearly a century of case law"). First, Hughes did not list most of the earlier precedent we discuss here. Moreover, in Community Title v. Stewart Title Guaranty Co., 977 S.W.2d 501 (Mo. banc 1998), which the Missouri Supreme Court decided the year after it handed down Hughes, the court discussed two cases as precedent that were included in Hughes's list of cases the court chose to ignore. Compare Cmty. Title, 977 S.W.2d at 502 (citing Superintendent of Ins. v. Livestock Market, 709 S.W.2d 897 (Mo. App. W.D. 1986) and Martin v. Potashnick, 217 S.W.2d 379 (Mo. 1949)) with Hughes, 951 S.W.2d at 617 (same). We take this to mean that the Hughes court did not intend to overrule any of those cases except to the extent they conflicted with Hughes's holding. Because we find Hughes did not address the issue here, we find Hughes did not overrule prior cases shedding light on that issue. However, in the event we misinterpret the application of the Missouri Supreme Court's holdings, this is something the Supreme Court may also choose to resolve upon transfer.

breach of express and implied warranties regarding a contract for construction of a home. This Court in essence interpreted the Missouri Supreme Court precedent this way:

> Section 516.110[(1)] applies only in instances in which an express written obligation provides for the payment of money . . . *and* that the money or property sued for is that money or property promised by the language of the writing.

659 S.W.2d 593, 594 (Mo. App. E.D. 1983) (emphasis added) (citing Silton, 446 S.W.2d at 132; Kraus, 416 S.W.2d at 641). The Lato court went on to find that the appellants had sought compensatory damages from the builder for breach of an implied or incidental contract term, rather than enforcement of any promise to pay money. As such, the court concluded, the suit was governed by the five-year statute of limitations in Section 516.120. Lato, 659 S.W.2d at 594.

Thus, precedent from this Court holds that in order for the ten-year statute of limitations to apply, the money sued for must be the same money promised by the writing, and not based on an ancillary contract term. See also Lake St. Louis Cmty. Ass'n v. Oak Bluff Pres., 956 S.W.2d 305, 308 (Mo. App. E.D. 1997) (holding that suit for damages for breach of association's promise to build marina was not request for equitable enforcement of contract, thus five-year statute applied); Hampton Foods, Inc. v. Wetterau Fin. Co., 831 S.W.2d 699, 701 (Mo. App. E.D. 1992) (finding that while written promise to pay money existed, the suit "s[ought] instead damages for the breach of another term of the contract," thus five-year statute of limitations applied); accord Oberle v. Monia, 690 S.W.2d 840, 844 (Mo. App. E.D. 1985) (holding ten-year statute applied to action for enforcement of written promise to transfer property deed). The implication from these cases is that both the five-year and the ten-year statute may apply

to the same contract for the payment of money, depending on which provision of the contract provides the basis of the lawsuit.

More recently, this Court has focused on the distinction between enforcement and breach, even more than on the promise to pay, in deciding whether the ten-year statute of limitations applies to a particular contract. In Amistad v. A.L.W. Group, this Court found that even an action seeking enforcement of a term other than the promise to pay money falls under Section 516.110(1), because it is still an action for enforcement of the contract rather than a breach of contract action seeking damages. 60 S.W.3d 25, 27 (Mo. App. E.D. 2001) (citing Lake St. Louis, 956 S.W.2d at 308; Oberle, 690 S.W.2d at 844) (applying Section 516.110(1) to counts of petition seeking enforcement of dissolution provision of partnership agreement). Amistad indicates that the scope of Section 516.110(1) includes an action for enforcement of any provision of a written contract that has met the threshold requirement by promising payment of money. Cf. Lake St. Louis, 956 S.W.2d at 308 (suggesting that if suit had been for equitable enforcement of contract, Section 516.110(1) would have applied). This conclusion cuts against the requirement in Lato that the suit must be for the promised money. Though not determined by an analysis of the statute's plain language, the more recent rule from this Court seems to be that once the threshold requirement of a writing containing a promise to pay has been met, any suit to enforce any term of the writing may be brought within ten years under Section 516.110(1). See Amistad, 60 S.W.3d at 27; cf. Lake St. Louis, 956 S.W.2d at 308; but see Sharpe v. Sharpe, 243 S.W.3d 414, 418 (Mo. App. E.D. 2007) (restating in dicta Lato's requirement that suit be to recover promised money).

In contrast, the Southern District has found that Section 516.110(1) applied to an action for damages arising from breach of a contract containing a promise to pay money, even though the suit did not seek to recover any promised money. See East Hills Condos. Ltd. P'ship v. Tri-Lakes Escrow, Inc., 280 S.W.3d 728, 733-34 (Mo. App. S.D. 2009). There, the appellant had promised a landowner that the appellant would disburse money to third-party construction contractors upon receiving lien waivers. The appellant had disbursed the money without obtaining the required lien waivers, and the landowner sought damages incurred in resolving several contractors' claims that they had not been paid. Id. at 729-30. The Southern District, citing Hughes's statement that its interpretation of Section 516.110(1) is "admittedly quite broad," found that the petition sought judgment against the appellant "as per the terms of the [a]greement," and therefore the ten-year statute applied. Id. at 734 (quoting Hughes, 951 S.W.2d at 617). Thus, the rule in the Southern District seems to be that any suit arising from a writing that meets the threshold requirement, containing a promise to pay money, falls under Section 516.110(1)'s ten-year statute of limitations.[8]

These cases indicate that while all courts apply Hughes's broad application of the threshold requirement, that the writing at issue contain a promise to pay money and extrinsic evidence may be used to determine the amount; not all courts agree on what types of actions arising from such a writing may be brought within ten years. Thus, there

[8] We also note that in East Hills, the money promised by the contract was money the appellant promised to pay to third parties. 280 S.W.3d at 729-30. Thus, the landowner plaintiff was not the recipient of the promise to pay money. While this factual circumstance raises an issue not before us, regarding whether the plaintiff must be the recipient of the promise to pay, the fact that the promise was to a third-party in East Hills further illustrates the broad application of Section 516.110(1) in the Southern District. See East Hills, 280 S.W.3d at 735 n.7 (declining to consider appellant's argument that Section 516.110(1) is not applicable to promises to pay third parties because appellant cited no relevant authority).

is apparent disagreement among Missouri appellate courts regarding the meaning of the words "an action" under the statute.[9]

Turning to the circumstances here, Rowling's petition seeks statutory interest for late payment. Rather than seeking to enforce timely payment, a factual impossibility at the time Rowling filed suit, the petition seeks damages for the breach of the timeliness provision, in the form of statutory interest.[10] As discussed above, under East Hills, this action would be included under Section 516.110(1), because the threshold requirement has been met in terms of the writing containing a promise to pay money. However, the Eastern District has not applied Section 516.110(1) as broadly and makes a distinction instead between actions for enforcement and actions for breach. See Amistad, 60 S.W.3d at 27; cf. Lake St. Louis, 956 S.W.2d at 308. Thus, in deference to Eastern District precedent, we would affirm the trial court's conclusion that the ten-year statute does not apply in this action for damages in the form of statutory interest. But, because we find application of Section 516.110(1) is inconsistent among our appellate districts, we transfer to the Missouri Supreme Court. Rule 83.02.

Point Two

Because we would affirm the trial court's dismissal of Rowling's petition as time-barred, we next address Rowling's alternative argument that the five-year statute of limitations was tolled due to the pendency of a class action lawsuit against Nestle in the State of Ohio. "Statutes of limitation are favored in the law and cannot be avoided unless

[9] No Missouri case discusses the meaning of "an action" in the context of 516.110(1).

[10] Though Rowling urges that his request is for enforcement of the contract's timeliness requirement in his opening brief, in his reply brief he confirms that his request is actually one for damages due to breach. He states that he "seeks damages in the form of interest which is 'the measure of damages for failure to pay money when payment is due.'" Reply Br. at 3 (quoting Denton Constr. Co. v. Mo. State Hwy. Comm'n, 454 S.W.2d 44, 59 (Mo. 1970)).

the party seeking to do so brings himself strictly within a claimed exception." White v. Zubres, 222 S.W.3d 272, 276 (Mo. banc 2007). "The statute of limitations may be suspended or tolled only by specific disabilities or exceptions enacted by the Legislature and the courts are not empowered to extend those exceptions." Shelter Mut. Ins. Co. v. Director of Rev., 107 S.W.3d 919, 923 (Mo. banc 2003) (quoting Cooper v. Minor, 16 S.W.3d 578, 582 (Mo. banc 2000)). Beyond specific statutory exceptions, the only equitable tolling exceptions recognized by our Missouri courts are essentially where either pending litigation elsewhere has prevented the plaintiff from bringing suit earlier, or where the defendant himself has prevented the plaintiff from timely bringing suit. See Adams v. Div. of Employment Sec., 353 S.W.3d 668, 673 (Mo. App. E.D. 2011) (rule of equitable tolling including where defendant prevents plaintiff from bringing suit and where plaintiff mistakenly files in wrong forum); State ex rel. Mahn v. J.H. Berra Constr. Co., 255 S.W.3d 543, 547 (Mo. App. E.D. 2008) (litigation exception).

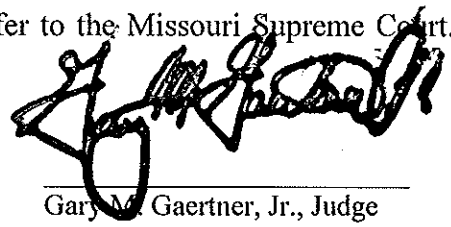
Rowling has not demonstrated that any of these equitable exceptions apply herein. Therefore, we would find that the five-year statute of limitations was not tolled under Missouri law, and we would deny this point.[11]

Conclusion

Application of Section 516.110(1)'s ten-year statute of limitations in this Court's precedent is proper where an action arising from a writing containing a promise to pay money seeks enforcement of one of the contract terms. Because Rowling's petition instead seeks damages for Nestle's alleged breach of the Merger Agreement's timeliness provision, our precedent would lead us to apply the five-year statute of limitations

[11] Rowling's remaining points on appeal would be relevant only if we would have granted either this point or Point One. Thus, we would deny Rowling's remaining points as moot.

contained in Section 516.120 to his claim, and under Missouri law, we would conclude the statute was not tolled. However, because of the inconsistent case law application of Section 516.110(1) regarding the types of claims that fall under Section 516.110(1) once the threshold requirement of a writing containing a promise to pay has been met, and the plain meaning of Section 516.110(1) itself, we transfer to the Missouri Supreme Court. Rule 83.02.



Gary M. Gaertner, Jr., Judge

Lisa S. Van Amburg, P.J., concurs.
Patricia L. Cohen, J., concurs.