

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

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COMPLETE TITLE OF CASE:

CREST CONSTRUCTION II, INC. AND METRO ENERGY, INC.,

Appellants

v.

JOHN A. HART, ET ALIA,

Respondents

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DOCKET NUMBER WD78135

DATE: April 19, 2016

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Appeal From:

Circuit Court of Clay County, MO  
The Honorable Janet Lodwick Sutton, Judge

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Appellate Judges:

Division Three  
James Edward Welsh, P.J., Thomas H. Newton, and Gary D. Witt, JJ.

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Attorneys:

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Attorneys:

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**MISSOURI APPELLATE COURT OPINION SUMMARY  
MISSOURI COURT OF APPEALS, WESTERN DISTRICT**

CREST CONSTRUCTION II, INC. AND METRO ENERGY, INC.,  
Appellants, v. JOHN A. HART, ET ALIA, Respondents

**WD78135**

**Clay County**

Before Division Three Judges: Welsh, P.J., Newton, and Witt, JJ.

Crest Construction filed a petition in state court in September 2010 asserting breach of contract, fraud, conversion, and civil conspiracy claims arising out of a business relationship that Crest allegedly entered with some of the defendants to purchase vehicle sales contracts and promissory notes obtained by them from third-party customers. The relevant events pertaining to that relationship purportedly occurred from December 2003 through December 2004. Crest had filed a complaint in federal court in October 2007 raising similar claims under state law along with a claim under federal law involving the same business transaction. The federal court dismissed the federal claim and decided not to consider the state-law claims in a judgment issued less than thirty days before Crest filed its state-court petition.

The state court issued a default judgment in Crest's favor as to one group of defendants that had not appeared to defend the lawsuit and granted the joint motion to dismiss filed by the remaining defendants, finding that Crest's claims were not timely filed, the alleged contract was not in writing and thus could not be enforced, and the petition did not include sufficient detail to support the claims filed as to each defendant. Because the trial court did not award damages against the defaulting defendants, this Court dismissed Crest's appeal from that ruling. The trial court then conducted a hearing on damages and awarded Crest \$4.1 million against the defendants who were in default. The trial court again dismissed the lawsuit as to the remaining defendants with prejudice for the same reasons they were dismissed earlier. Crest appeals.

**AFFIRMED.**

**Division Three holds:**

In the first point, Crest argues that the trial court erred by concluding that the federal litigation between the parties did not extend the filing deadline that applied to the claims in the state lawsuit. Crest relies a federal law, 28 U.S.C. § 1367(d), that tolls applicable state statutes of limitations when a federal court, as here, declines to hear the state-law based claims that are included in a lawsuit raising claims under federal law. We disagree.

Subsection 1367(d) has not previously been interpreted and applied in Missouri. Because the events arising out of the business relationship at the core of the federal complaint allegedly occurred no later than December 31, 2004, the state-law based claims would have been extinguished under Missouri's five-year statute of limitations on December 31, 2009, while the claims were pending in federal court. If the claims Crest asserted in the state-court petition were the same as those asserted in federal court, however, the filing deadline would have been extended under subsection 1367(d), and its state petition would have been timely. We agree with the trial court that, while the federal and state lawsuits both included breach of contract, fraud,

conversion, and civil conspiracy claims, the new facts alleged in the state action fundamentally changed the causes of action alleged in federal court.

Guided by res judicata principles that help courts decide whether the same claims have been filed against the same parties in a subsequent lawsuit and cannot be retried, and comparing the federal complaint with the first amended state petition, we find many new details in the latter that would have changed the remedies available to Crest as to a number of defendants sued but not specifically alleged to have done anything in its federal lawsuit. The state petition also alleged activity occurring through 2008 in an apparent effort to extend the start date of the limitations period. As to those allegations raised and those defendants named in the state petition but not specifically included in the federal complaint, section 1367(d) did not toll the statute of limitations, and the state lawsuit was not timely filed as to them. Because we also find that the claims that were tolled under section 1367(d)—i.e., those claims that are the same in both lawsuits—do not survive under Crest’s remaining points on appeal, we agree with the trial court’s disposition.

In the second point, Crest argues that the trial court erred by ruling that its unwritten contract with the defendants did not come within the “partial performance” exception to the statute of frauds, which requires that contracts which exceed one year in duration, as here, must be in writing to be enforceable. Crest sets forth the elements of proving the “partial performance” exception in its brief, but fails to argue how its first amended petition set forth facts showing that its partial performance took the verbal agreement outside the statute of frauds. We agree with the trial court that the unwritten contract could not be enforced. Point two is denied.

In the third and final point, Crest argues that the trial court erred by finding its fraud claims stated with insufficient particularity. It also argues that any deficiency in its pleadings, particularly with respect to one defendant, was corrected by testimony introduced during the damages hearing. Because the parties had agreed only to the admission of testimony regarding the defaulting defendants, we do not consider any evidence introduced during this hearing as to any other defendant. Reviewing the elements required for pleading and proving fraud, we agree with the trial court that Crest did not plead sufficient facts. For example, Crest did not allege what right its owner and president, an experienced businessman, would have to rely on an unwritten “promise” that his investment in the loans used to purchase used autos would be returned in full in addition to making him a twenty-four percent return. Point three is denied.

Therefore, we affirm the trial court’s judgment dismissing Crest’s petition with prejudice as to the non-defaulting defendants.

Opinion by Thomas H. Newton, Judge

April 19, 2016

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