

YEO v. STATE FARM FIRE AND CASUALTY INS. CO.

618 N.W.2d 916 (2000)

242 Mich. App. 483

Sheri YEO, a/k/a Sheri Firosz, Plaintiff-Appellant,

v.

STATE FARM FIRE AND CASUALTY INSURANCE COMPANY, Defendant-Appellee.

Docket No. 214209.

Court of Appeals of Michigan.

Submitted July 11, 2000, at Lansing.

Decided September 8, 2000, at 9:05 a.m.

Released for Publication November 16, 2000.

Colombo & Colombo, P.C. (by James H. Hudnut), Bloomfield Hills, for the plaintiff.

Patrick, Johnson & King, P.C. (by Patrick A. King and Paul H. Johnson, Jr.), Southfield, for the defendant.

Before: MURPHY, P.J., and MICHAEL J. KELLY and TALBOT, JJ.

PER CURIAM.



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Plaintiff appeals as of right from the trial court order that granted summary disposition to defendant on the basis that plaintiff's claim was time-barred. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

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Plaintiff argues on appeal that her claim was not time-barred because the period of limitation was tolled during the pendency of defendant's appeal to this Court in an earlier lawsuit. See *Yeo v. State Farm Ins. Co.*, 219 Mich.App. 254, 258-259, 555 N.W.2d 893 (1996). We do not find plaintiff's argument to be persuasive.

Pursuant to the tolling statute, M.C.L. § 600.5856; MSA 27A.5856, the period of limitation was tolled during the pendency of plaintiff's original lawsuit, which was dismissed without prejudice. See *Sherrell v. Bugaski*, 169 Mich.App. 10, 17, 425 N.W.2d 707 (1988). A dismissal without prejudice is not an adjudication on the merits and, therefore, the tolling statute applies. *Federal Kemper Ins. Co. v. Isaacson*, 145 Mich.App. 179, 183, 377 N.W.2d 379 (1985). While we generally

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agree with plaintiff that tolling may extend during appellate proceedings, see *Darin v. Haven*, 175 Mich.App. 144, 151-152, 437 N.W.2d 349 (1989), the period of limitation in this case was not tolled during the earlier appeal to this Court because the narrow issue raised in that appeal was whether the dismissal of plaintiff's claim on the basis of her failure to comply with a condition precedent to filing a lawsuit should have been *with* prejudice. Nothing prevented plaintiff from thereafter submitting to the requisite examination under oath, which she did, nor was defendant

prevented from subsequently denying plaintiff's claim, which it did. Contrary to plaintiff's argument, MCR 7.208(A) did not deprive the trial court of jurisdiction to entertain this lawsuit while the appeal of the earlier lawsuit was pending in this Court. Rule 7.208(A) only prohibits the court from which an appeal is taken from setting aside or amending the specific judgment or order appealed from. Accordingly, because plaintiff did not file the present lawsuit for nearly two years after defendant formally denied her claim, her lawsuit was time-barred. Summary disposition was properly granted.

Affirmed.