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COURT OF APPEALS
DIVISION I
SEATTLE, WA
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No. 70322-6

King County Superior Court No. 12-2-07660-0 SEA

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ADAM ZACKS and LYNN RESNICK-ZACKS, husband and wife, and the marital
community thereof composed,

Petitioners,

v.

RAINIER ROOFING & REMODELING, LLC, a Washington limited
liability company; OSSES CONTRACTORS, INC., a Washington
corporation; and PANELMASTERS, LLC, a Washington limited
liability company.

Respondents

RESPONDENT'S BRIEF

LAW OFFICES OF SWEENEY, HEIT, DIETZLER

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A. INTRODUCTION

This appeal filed by Petitioners, Adam Zacks and Lynn Resnick-Zacks, stems from the trial court's Order dismissing all claims against Respondent, Arden Drywall, as untimely pursuant to RCW 25.15.303. Arden Drywall, a limited liability corporation, was administratively dissolved on September 2, 2008. In 2008 RCW 25.15.303 required claims against dissolved corporations to be filed within three years of their effective dissolution. The statute did not make a distinction between canceled and dissolved corporations. In 2009 the legislature amended RCW 25.15.303 extending the three year period to five years. In 2010, the legislature amended RCW 25.15.303 further and required corporations to file a certificate of dissolution. Under the 2010 amendments, filing a certificate of dissolution triggers a three-year survival period during which claims can be brought by or against the corporation. Petitioners asserted that the 2009 and 2010 amendments to RCW 25.15.303 should apply retroactively to their claims against Arden Drywall.

B. STATEMENT OF THE CASE

This matter arises from water intrusion and resultant damage at a newly constructed single family residence located at 2441 Queen Anne Ave. North, Seattle, King County, Washington ("residence"). CP 1 – 8. PB Elemental designed the residence, and Lead Construction acted as the general contractor. CP 1 – 8. Lead Construction hired various

subcontractors to work on the residence. *Id.* One of those subcontractors was Arden Drywall. CP 189-305. Arden Drywall's scope of work was limited to work within the building's envelope. They hung, taped, and primed the drywall of the residence's interior walls and ceilings. Arden Drywall's last day of work at the residence was August 5, 2006. *Id.* After the home was substantially complete, several different entities purchased and then sold the property. In June 2010, the Appellants purchased the residence. CP 189-305. Shortly thereafter Appellants claim that they found significant instances of water intrusion including leaks in the home's roof. CP 306-307. Although one of Arden's co-defendant's alleged that the absence of a vapor barrier on the home's exterior walls may have caused or contributed to moisture buildup in the home's roof, application of this barrier was not within Arden's scope of work. CP 189-305. Although Arden's work was not implicated, appellants nonetheless chose to include Arden within their lawsuit. CP 189-305. Arden's work on the subject residence occurred as the housing market was in free fall. Unable to find additional work, Arden ceased all operations and did not pay their annual licensing fee. On September 2, 2008, the Washington Secretary of State issued a Certificate of Dissolution that administratively dissolved Arden Drywall. CP 133-144. Three years and 11 months after Arden was administratively dissolved by the Secretary of State, the appellants filed a construction defect lawsuit against the subcontractors involved in the residence's

original construction.¹ CP 189-305. The Appellant's alleged that Arden was both negligent and materially breached the terms of its contract with general contractor, Lead Construction. Id.

On March 12, 2013 Arden filed a Motion for Summary Judgment to dismiss the Appellants' claims. CP 133-144. Arden alleged, among other things, that the Appellant's claims were barred by RCW 25.15.303. Id.

Appellants responded arguing that the amendments to the Limited Liability Act in 2009 and 2010 precluded cancellation of Arden's certificate of formation. Appellant's argued that these amendments were remedial and therefore, should retroactively apply to Arden's earlier dissolution.

CP 173-188. The trial court correctly determined that the version of RCW 25.15.303 in effect in 2008 was a statute of limitation which required claims such as appellants' to be filed within three years of Arden's administrative dissolution. Applying well established rules of statutory construction the trial court determined that the amendments to the Limited Liability Act enacted by the Legislature in 2009 and 2010 were neither remedial nor corrective and therefore, these changes were to be applied prospectively.

As it was undisputed that appellants filed their lawsuit against Arden more

¹ Prior to filing suit, the Appellants negotiated a settlement with PB Elemental and Lead Construction. The terms of this agreement allowed the Appellants to step into the shoes of PB Elemental and Lead Construction and prosecute claims against their subcontractors. CP 61-70.

than three years after the administrative dissolution, the trial court properly granted Arden's motion for summary judgment. The Court did not rule on the other issues in Arden's motion. CP 332-334.

C. ARGUMENT

In Washington, limited liability companies can dissolve in several different ways. They can adopt a triggering event in their limited liability company agreement, they can dissolve by consent of their members, they can dissolve through judicial action, or they can dissolve through administrative action by the secretary of state. RCW 25.15.270. As to the latter, administrative dissolution can occur when, for example, the limited liability company fails to file required annual reports or pay required license fees as occurred in the case of Arden Drywall.

As noted by the appellants, dissolution does not terminate the existence of the limited liability company. Instead, it begins a period in which the affairs of the company must be wound up. RCW 25.15.270(1). Winding up involves liquidating assets, paying creditors, and distributing proceeds from liquidation of assets to the members of the company. *Chadwick Farms Owner's Ass'n v. FHC, LLC*, 166 Wn.2d 178, 188, 207 P.3d 1251 (2009). Following the limited liability company's dissolution and during the winding up period, lawsuits against the company permissible. RCW 25.15.295(2); See also *Chadwick Farms Owner's Ass'n v. FHC, LLC*, 166 Wn.2d 178, 190, 207 P.3d 1251 (2009). In 2008, if an administratively

dissolved company failed to seek reinstatement within two years after the date of dissolution, then by operation of law, its certificate of formation was canceled by the secretary of state two years later. RCW 25.15.285(4). Once a limited liability company's certificate of formation is canceled, it no longer exists as a separate legal entity and cannot be sued. *Chadwick Farms Owner's Ass'n*, 166 Wn.2d at 195.

Although Arden was administratively dissolved and did not seek reinstatement within two years, it does not appear that the secretary of state ever canceled their certificate of formation. Appellants have taken the position that the secretary of state's failure to cancel Arden's certificate of formation placed the company in a perpetual state of winding up.

Commencing in 2009, the Legislature made a series of changes to the Limited Liability Act. In 2009, the Legislature made an incremental change to RCW 25.15.290. The 2009 amendment merely lengthened the time period between the administrative dissolution of a corporation and cancelation from two years to five. However, in 2010 the Legislature made a series of sweeping changes to the Act. The administrative dissolution process in place at the time of Arden's 2008 dissolution was scrapped. Commencing in 2010 amendments, a limited liability company could no longer automatically dissolve by simply failing to file annual reports or pay the required license fee. To begin the winding up process,

a limited liability company now has to file a certificate of dissolution with the secretary of state. RCW 25.15.273; RCW 25.15.303. Under the current statutory scheme, filing a certificate of dissolution triggers a three-year winding up period during which the company remains subject to lawsuits. After the three-year period expires, the company's certificate of formation is automatically canceled. RCW 25.15.303.

Appellants reason that because Arden's certificate of formation was not canceled as it should have been on September 2, 2010, the 2009 and/or 2010 amendments to the Limited Liability Act apply. For the reasons set forth below, this argument must fail.

1. At the time of Arden's administrative dissolution, RCW 25.15.303 was a statute of limitation which required appellants to file their claim against Arden on or before September 2, 2011.

When Arden Drywall was administratively dissolved by the Washington Secretary of State on September 2, 2008, Washington's survival of claims statute, RCW 25.15.303, provided as follows:

[t]he dissolution of a limited liability company does not take away or impair any remedy available against that limited liability company, its managers, or its members for any right or claim existing, or any liability incurred at any time, whether prior to or after dissolution, unless an action or other proceeding thereon is not commenced within three years after the effective date of dissolution. Such an action or proceeding against the limited liability company may be defended by the limited liability company in its own name.

See RCW 25.15.303 (Laws 2006, c. 325, § 1) (underline added for emphasis).²

The survival of claims statute in the Act, RCW 25.15.303, as it existed at the time of Arden's administrative dissolution, was a statute of limitation. See *Serrano on California Condominium Homeowners Ass'n v First Pacific*, 143 Wn.App. 521, 530, 178 P.3d 1059 (2008). It limited suits against dissolved LLCs to those "commenced within three years after the effective date of dissolution." The statute never mentioned "cancellation." Although the term "effective date of dissolution" was not defined in the Act, it was subsequently interpreted by the Division One Court of Appeals as the date of administrative dissolution. *Serrano*, 143 Wn.App. at 525; *Hartford Ins. Co. v. Ohio Cas. Ins. Co.*, 145 Wn.App. 765, 189 P.3d 195 (2008).

² Since 2008 the legislature amended RCW 25.15.303, which now goes as follows:

Except as provided in RCW 25.15.298, the dissolution of a limited liability company does not take away or impair any remedy available to or against that limited liability company, its managers, or its members for any right or claim existing, or any liability incurred at any time, whether prior to or after dissolution, unless the limited liability company has filed a certificate of dissolution under RCW 25.15.273, that has not been revoked under RCW 25.15.293, and an action or other proceeding thereon is not commenced within three years after the filing of the certificate of dissolution. Such an action or proceeding by or against the limited liability company may be prosecuted or defended by the limited liability company in its own name.

See RCW 25.15.303 (Laws 2010, c. 196, § 11). The 2006 version of RCW 25.15.303 applies to claims against Arden Drywall, because it administratively dissolved in 2008, two years prior to the 2010. Further, the 2010 amendments do not apply to Arden Drywall's dissolution and remedies available after dissolution, because there is no evidence to indicate that the 2010 amendments to RCW 25.15.303 retroactively apply.

In September, 2008, the appellants could pursue a cause of action against Arden, but only if the action was commenced within three years of Arden Drywall's administrative dissolution. RCW 25.15.303; *see also Serrano*, 143 Wn.App. at 525; *Chadwick Farms Owner's Ass'n v. FHC, LLC*, 166 Wn.2d 178, 198, 202-03, 207 P.3d 1251 (2009). Because Arden was administratively dissolved on September 2, 2008, the appellants were required to file suit on or before September 2, 2011. The appellants waited until August 15, 2012 to file suit and the trial court properly dismissed their cause of action as it fell outside the three-year statute of limitations.

2. Amendments to legislation such as those made to the Limited Liability Act in 2009 and 2010 cannot be applied retroactively.

Appellants have chosen to ignore RCW 25.15.303 and instead argue that the 2009 and/or 2010 amendments should apply retroactively. However, this argument ignores a basic rule of statutory construction that new legislation operate prospectively unless contrary legislative intent is clearly expressed. *In re Estate of Burns*, 131 Wn.2d 104, 110, 928 P.2d 1094 (1997) (citing *Macumber v. Shafer*, 96 Wn.2d 568, 570, 637 P.2d 645 (1981)); *Baker v. Baker*, 80 Wn.2d 736, 741, 498 P.2d 315 (1972); *Pape v. Department of Labor & Indus.*, 43 Wn.2d 736, 741, 264 P.2d 241 (1953).

The version of RCW 25.13.303 which passed into law in June, 2010 does not even mention retroactive application. There is no statement of legislative intent evidencing such an intention. Moreover, the presumption in favor of prospectivity is strengthened when the Legislature, as occurred

with the 2010 changes to RCW 25.15.303, uses only present and future tenses in drafting the statute. *Adox v. Children's Orthopedic Hospital*, 123 Wn.2d 15, 30, 864 P.2d 921 (1993); *Johnston v. Beneficial Management*, 85 Wn.2d 637, 641, 538 P.2d 510 (1975). Statutes are applied retroactively only in those limited circumstances where they clarify or technically correct ambiguous statutory language *without changing prior case law construction*, or if they relates to practice, procedure or remedies and do not affect a substantive or vested right.”³ *Barstad v. Stewart Title Guar. Co.*, 145 Wash.2d 528, 536–37, 39 P.3d 984 (2002); *Johnston, supra*, at 641-42 (citing *Tellier v. Edward*, 56 Wn.2d 652, 354 P.2d 925 (1960)). None of these circumstances are applicable to the case at bar.

The 2010 changes to RCW 25.15.303 were not curative. A statutory amendment is curative only if it clarifies or technically corrects an ambiguous statute *In Re F.D. Processing*, 119 Wn.2d at 452, 119 P.2d 1303 (1992). Ambiguity only exists when a law “can be reasonably interpreted in more than one way.” *Vashon Island v. Boundary Review Bd.*, 127 Wn.2d 759, 771, 903 P 2d 953 (1995). The version of RCW 25.15.303 in existence at the time of Arden’s administrative dissolution was not subject to more than one reasonable interpretation or otherwise ambiguous. *Chadwick Farms, supra*, at 195. Moreover, the legislature did not, by its 2010 amendments, seek to overrule what it

³ See also *In re Estate of Burns, supra*, citing *Landgraf v. USI Film Prods.*, 511 U.S. 244,114 S. Ct 1483, 1500, 128 L. Ed. 2d 229 (1994) (courts disfavor retroactivity because of the unfairness of impairing a vested right).

thought to be an incorrect judicial interpretation of an ambiguity in RCW 25.13.303. Accordingly, the changes to RCW 25.15.303 that were enacted by the legislature in 2009 and 2010, applied only to those companies which dissolved after their passage into law. These amendments cannot be applied to companies which were already administratively dissolved.

3. Arden's status as a canceled or dissolved limited liability company is irrelevant in a statute of limitations analysis.

The fact that the secretary of state failed to cancel Arden's certificate of formation is similarly irrelevant. The statute of limitation in effect in 2008 was triggered by Arden's administrative dissolution. Third parties such as appellants had until September 2, 2011 to file a claim against the dissolved company.

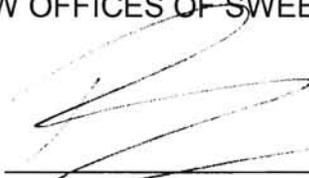
In 2008, Arden's dissolution triggered the operation of RCW 25.15.303's three-year statute of limitations. The time for third parties such as appellants to file suit against Arden expired on September 2, 2011. The Superior Court correctly found that appellants' failure to file their lawsuit within the time provided by the statute of limitation was fatal to their claim and properly granted summary judgment.

D. CONCLUSION

For the foregoing reasons, Arden Drywall respectfully ask this Court affirm the Superior Court's Order dismissing Arden.

DATED this 6th day of December, 2013.

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Respondents

PROOF OF SERVICE OF RESPONDENT'S BRIEF

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Jennifer Chong declares, under penalty of perjury under the laws of the State of Washington that the following is true.

1. I am employed by Law Offices of Sweeney, Heit, Dietzler, counsel of record for respondent Arden Drywall, LLC in this action; a resident of the State of Washington; over the age of 18 years; and not a party to this action.

2. On December 6, 2013 I arranged for the filing of Respondent's Brief with the Clerk of the Court of Appeals, Division One and served Petitioners Adam Zacks and Lynn Resnick-Zacks by electronically delivering a copy to their attorney Lindsey M. Pflugrath at lpflugrath@skellengerbender.com and klamb@skellengerbender.com; Respondents Rainer Roofing & Remodeling, LLC, by electronically delivering a copy to its attorney Kelly M. Madigan at madigak@nationwide.com and gregorL7@nationwide.com; and to Respondents Osses Contractors Inc., by electronically delivering a copy to its attorney James Purcell at jjp@markelpurcell.com.

Jennifer Chong, Legal Assistant



Date and Place of Execution: December 6, 2013 in Seattle, WA