



face of Plaintiff's Petition, it is apparent that the statute of limitations has run on Plaintiff's claim against Heartland. Further, the face of Plaintiff's Petition reflects that the Plaintiff has not pled an exception to the statute of limitations in her First Amended Petition. Heartland stresses that, despite Plaintiff's submission of numerous exhibits, the only issue is whether on the face of Plaintiff's First Amended Petition Plaintiff's claims are time barred, and whether she pled an exception to such bar. However, even if the Court could consider the exhibits, it may not do so in a motion to reconsider a motion to dismiss as neither Plaintiff, nor this Court, has provided notice to Heartland that the Court would consider matters outside the pleadings.

Heartland argues that Plaintiff's Amended Petition reflects that her claim is time barred, and that she did not plead an exception. Heartland argues that if Plaintiff believed there was an exception to the statute of limitations, Plaintiff had an affirmative duty to plead the avoidance or face a grant of dismissal. Specifically, Heartland suggests that if Plaintiff believed the statute of limitations was tolled, the exception relieving Plaintiff from the bar of the statute of limitations must be pleaded by her. *Bosworth v. Sewell*, 918 S.W.2d 773 (Mo. banc 1996). Finally, Heartland argues that this Court cannot reach the Plaintiff's argument that Plaintiff's claims relate back to the original petition against Action Oil, as this would be evidence outside the pleadings.

As such this Court's dismissal of Count II of Plaintiff's First Amended Petition was proper, and this Court should grant Heartland's Motion to Dismiss Count II of Plaintiff's Second Amended Petition for the same reason. Accordingly, Heartland asks this Court to grant their Motion to Dismiss Count II of Plaintiff's Second Amended Petition for Damages, and to deny Plaintiff's Motion to Reconsider.

#### Plaintiff-Orlando

In Plaintiff's Motion to Reconsider, Plaintiff argues that although the five year Statute of Limitations had technically run and would normally bar Plaintiff from joining Heartland as a Defendant in this matter, Heartland could not be joined before this time because it was under the protection of the U.S. Bankruptcy Court for the Northern District of Texas. Accordingly, although this Court granted the dismissal of Plaintiff's claims as untimely, Plaintiff's claims against Heartland did in actuality meet the time requirements as the statute of limitations in this case was tolled during the pendency of Heartland's bankruptcy pursuant to Mo. Rev. Stat. §

516.260. *Major Lumber Company, Inc. v. G & B Remodeling, Inc.*, 817 S.W.2d 474 (Mo. Ct. App. 1991). Pursuant to 11 U.S.C. 108(c), Plaintiff has until 30 days after notice of the termination or expiration of the stay in the bankruptcy case to file her claim. Plaintiff's Motion for Leave to Amend to add Heartland was filed on December 29, 2010, seven days after the automatic stay was lifted in the bankruptcy proceeding.

Plaintiff argues that Heartland's argument that this Court cannot review the exhibits attached to the Motion to reconsider are misplaced. Plaintiff points out that Missouri Supreme Court Rule 55.27(b) states, in relevant part:

If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 74.04, and all parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 74.04.

Under Rule 55.27(b), argues Plaintiff, the Court may consider the exhibits attached to Plaintiff's Motion for Reconsideration, and treat the Defendant's Motion to Dismiss as a Motion for Summary Judgment under Rule 74.04.

Further, argues Plaintiff, the claims relate back to the filing of the original lawsuit against Action Oil, in that Heartland had notice of Plaintiff's claims long before the statute of limitations ran on her claims. Plaintiff also argues that the exception to the statute of limitations was pled to the Court in Plaintiff's Motion for Leave to File First Amended Petition for Damages that sought to join Heartland, filed on December 29, 2009.

Finally, argues Plaintiff, the Motion to add Heartland was within thirty (30) days of the conclusion of Heartland's bankruptcy case, which was timely pursuant to 11 U.S.C. § 108(c). Accordingly, Plaintiffs ask this Court to deny Heartland's Motion to Dismiss Count II of Plaintiff's Second Amended Petition and to Reconsider this Court's grant of Dismissal as to Count II of Plaintiff's First Amended Petition.

#### HOLDING

The Court finds that whether claims are dismissed on the grounds that they are barred by the statute of limitations is an issue of law. *Bettis v. Potosi R-III Sch. Dist.*, 51 S.W.3d 183, 185 (Mo. App. W.D. 2001). A Petition may not be dismissed for violating the statute of limitations unless it is clearly established on the face of the Petition and without exception that the cause of

action is time barred. *Webster v. Atwo I, Inc.*, 296 S.W.3d 501, 503 (Mo. App. W.D. 2009). A motion to dismiss is solely a test of the adequacy of the plaintiff's petition. *See Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306 (Mo. banc 1993).

Further, the Court finds that Section 516.120(4) of the Missouri Revised Statutes is the applicable Statute of Limitations that applies to this matter. Section 516.120(4) provides as follows: Within five years:

- (4) An action for taking, detaining, or injury any goods or chattels, including actions for the recovery of specific personal property, or for any other injury to the person or rights of another, not arising on contract and not herein otherwise enumerated.

Heartland correctly points out that this Court does have jurisdiction to reconsider the Order entered by this Court granting Heartland's initial motion to dismiss. However, argues Heartland, if Plaintiff believed the statute of limitations was tolled, the exception relieving Plaintiff from the bar of the statute of limitations must be pled by her. *Bosworth v. Sewell*, 918 S.W.2d 773 (Mo. banc 1996). The Court agrees with Heartland. Plaintiff did not plead an exception to the statute of limitations in either their first Amended Petition or their Second Amended Petition.

On May 26, 2010, pursuant to Missouri Supreme Court Rule 67.06, this Court granted Heartland's Motion to Dismiss Count II of Plaintiff's First Amended Petition for Damages and also granted Plaintiff's Motion to File Second Amended Petition.

Rule 67.06 provides the following:

On sustaining a motion to dismiss a claim, counterclaim or cross-claim the court shall freely grant leave to amend and shall specify the time within which the amendment shall be made or amended pleading filed. If the amended pleading is not filed within the time allowed, final judgment of dismissal with prejudice shall be entered on motion except in cases of excusable neglect; in which cases amendment shall be made promptly by the party in default.

The Court is aware of Plaintiff's pending Motion for Leave to file Third Amended Petition, filed July 27, 2011. Defendant has asked for an extension of time to file a response to this Motion once the Court rules on the Motion to Dismiss and the Motion to Reconsider. Plaintiff's counsel indicated at the hearing on September 30, 2011 that Defendant's Motion for Extension of Time was unopposed.

Being duly advised of the premises, and for good cause shown, the Court finds as follows:

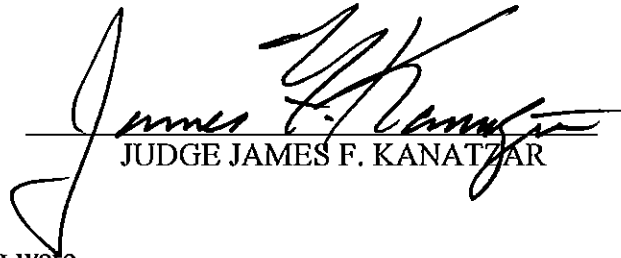
Plaintiff's Motion to Reconsider Order Granting Defendant Heartland's Motion to Dismiss is **DENIED**.

Defendant Heartland's Motion to Dismiss Count II of Plaintiff's Second Amended Petition for Damages is **GRANTED**. Plaintiff has failed to allege an exception to the Statute of limitations in her Second Amended Petition. This Court reserves ruling on Plaintiff's Motion for Leave to File Third Amended Petition, pursuant to Supreme Court Rule 67.06, until Defendant has had time to file a response to said Motion.

Defendant's Motion for Leave to Enlarge Time to Respond to Plaintiff's Motion to File Third Amended Petition is **GRANTED**. Defendant has ten (10) days from the date of this Order to file its Response.

**IT IS SO ORDERED.**

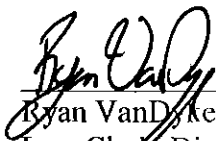
Oct. 3, 2011  
Date

  
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JUDGE JAMES F. KANATZAR

I hereby certify that copies of the foregoing were duly faxed/mailed this day to all counsel of record.

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Ryan VanDyke  
Law Clerk, Division 5