

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2004-007697

08/10/2004

HON. THOMAS DUNEVANT, III

CLERK OF THE COURT  
D. Raybon  
Deputy

FILED: 08/17/2004

LARRY RAY EAMES

LARRY RAY EAMES  
BOX 26040 , FCI, REG 20640-013  
BEAUMONT TX 77720

v.

A MELVIN MCDONALD, et al.

WILLIAM D HOLM

MINUTE ENTRY

The Court has considered Defendants' Motion to Dismiss, Defendant's Objection to Plaintiff's Request for Conditional Judgment on the Pleadings, Plaintiff's Request for Leave to Amend/TRO, Defendant's Motion to Strike Plaintiff's Oral Argument Memorandum and the briefs. The Court finds and rules as follows:

**TIMELINE**

<b><u>Plaintiff</u></b>	<b><u>Date</u></b>	<b><u>Defendants</u></b>
Complaint	May 6 (served)	
	June 9	Motion to Dismiss (12(b)(6))
Request for Conditional Judgment on Pleadings	June 10	
	June 18	Objection to Plaintiff's Request For Conditional Judgment on Pleadings
Motion to Strike/Response To Motion to Dismiss	June 21	
Request for Leave to Amend/ TRO	June 25	
Oral Argument Memorandum Docket Code 019	July 2	

Form V000A

Page 1

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2004-007697

08/10/2004

<u>Plaintiff</u>	<u>Date</u>	<u>Defendants</u>
Request for Reconsideration of Oral Argument	July 2	
Plaintiff's Reply to Defendant's [sic] Objections to Plaintiff's Request for Conditional Judgment On the Pleadings	July 2	
	July 6	Reply in Support of Motion to Dismiss
	July 8	Motion to Strike Plaintiff's "Oral Argument Memorandum"
	July 8	Defendants Response to Plaintiff's Request for Leave to Amend/TRO

Plaintiff Eames had his original complaint served on May 6, triggering the Rule 12(a)(1)(A) time limit of 20 days to file an Answer. McDonald and Jones Skelton & Hochuli, did not file an answer. However, they did file a Rule 12(b)(6) Motion to Dismiss, on June 9. (From now on, the Court will refer only to McDonald; JS&H is implied.) On June 7, Eames mailed a Request for Conditional Judgment on the Pleadings, citing McDonald's failure to file a timely answer by May 26, and attempting to invoke Rule 8(d), admitting all averments in the Complaint. This was received by the Court on June 10.

### **Request for Conditional Judgment on the Pleadings**

It is not clear just what Plaintiff means by a "conditional" judgment on the pleadings. Plaintiff never defines the term, and in the conclusion Plaintiff calls simply for a judgment on the pleadings. Defendant characterizes Eames's petition for Conditional Summary Judgment as a Petition for Default, which is not appropriate in a case where the opposing party has submitted responsive filings. (**Defendants' Objection to Plaintiff's Request** restates the statute of limitations argument. **Plaintiff's Reply to Defendant's Objections** merely restates his argument for judgment on the pleadings.) In fact, Eames is basing his motion on McDonald's failure to provide a timely answer. His interpretation of Rule 12(c) is that, once the twenty-day window is past, the pleadings are closed and the court must rule on what is before it as of that time.

However, Rule 12(b) defenses do not have to be plead as an answer (though they can be); they can be raised by motion, as McDonald has done. For the purposes of a Rule 12(b) motion, the allegations are taken as true anyway.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2004-007697

08/10/2004

THEREFORE, IT IS ORDERED denying Plaintiff's Request for Conditional Judgment of the Pleadings.

**Motion to Dismiss**

The statute of limitations is three years (from date of discovery) for the fraud claims, two years for all others. Thus, as to the claims in the complaint:

First. Legal malpractice, breach of fiduciary duty, and fraud are time-barred because, if there was fraud, Eames learned of it at the 1998 trial. Second, improper billing (basically misappropriation) is time-barred because Plaintiff should have compared what he paid Defendant with what the billings accounted for. Moreover, Plaintiff knew at least something in November 1998, when he wrote to McDonald for another accounting; even if the clock is started on that date, the limitations period is still long past. Third, fourth and fifth claims of fraud are time-barred for the same reasons. In addition, the fifth claim of fraud is time-barred since Plaintiff learned of payment at time of trial. Sixth. Misappropriation. The allegations are too inadequate to even determine if a claim is stated. Seventh, legal malpractice is time-barred, since any alleged malpractice was known at least as early as 1997, when Eames fired McDonald. Eighth, attorney fees is only applicable if the other counts discussed above survive, which they do not.

Thus, all the allegations are time-barred. Since there was no answer in which the statute of limitations was raised, Defendant's Motion to Dismiss will be treated as a motion for summary judgment. Rule 12(b).

THEREFORE, IT IS ORDERED granting Defendant's Motion for Summary Judgment.

**Plaintiff's Combined Motion to Strike and Response to Defendant's [sic] Motion to Dismiss.**

This motion makes several points. First, it repeats the request for judgment on the pleadings, "striking" the Rule 12(b)(6) motion and granting the relief sought. Second, it repeats the allegations in the Complaint, saying that Eames anticipated the statute of limitations argument and that the documentation attached to the Complaint proves that the proper date to begin tolling was actually when Eames received McDonald's final accounting on August 15, 2003; the defense in the Motion to Dismiss is therefore frivolous and the same remedy as above should be granted. However, this does not square with case law like *Richards v. Powercraft Homes*, 139 Ariz. 242, 245-46 (1984) and *Alaface v National Investment Co.*, 181 Ariz. 586, 591 (App. 1994), which starts the clock when the alleged wrongdoing either was known or would have been known with reasonable care and diligence, not when the plaintiff became fully aware. The Court determines that Eames knew that, by his calculation, McDonald was holding a large sum of money which should have been returned to him – the "what" and "who" – but failed to bring suit for over five years. Third, Eames denies that oral argument is necessary, but if the court deems otherwise, seeks a Writ of Habeas Corpus ad Testificandum to be served on the

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2004-007697

08/10/2004

United States Marshals Office. The Court concludes that a motion to strike is improper and that the proper action, if appropriate would be to deny the motion.

THEREFORE, IT IS ORDERED denying Plaintiff's Combined Motion to Strike/Motion for Writ of Habeas Corpus ad Testificandum.

**Request for Leave to Amend Complaint and Request for Temporary Restraining Order**

First, the Court notes that Plaintiff has failed to submit a draft amended complaint. Thus, Plaintiff's Request to Amend Complaint is procedurally insufficient. The requested Amendment itself does not materially affect the pending motions addressed this minute entry. Eames claims that he had not sent McDonald any personal correspondence since filing the State Bar complaint in 2003. He therefore contends that McDonald's complaint to the warden at FCI Beaumont was intended to harass, and seeks a TRO to prevent future contact as well as damages for the past contact. McDonald contends that Eames had been sending letters to McDonald, his wife, and his colleagues as late as February 2004 and that McDonald instructed the warden at Beaumont not to pass through letters to McDonald or JS&H as "legal mail." In light of the Court's rulings in this minute entry, Plaintiff's Request to Amend and Request for Temporary Restraining Order is rendered moot.

THEREFORE, IT IS ORDERED denying Plaintiff's Request for Leave to Amend Complaint and Request for Temporary Restraining Order.

**Plaintiff's Oral Argument Memorandum**

This rehashes earlier claims; it barely mentions oral arguments. Striking it as an improper filing, as McDonald urges, would not affect the record in any material way.

THEREFORE, IT IS ORDERED denying Defendant's Motion to Strike.

**Plaintiff's Request for Reconsideration of Necessity of Oral Argument**

This again repeats the basic claims in the suit. It does deal somewhat with its ostensible subject, though only to assert that there is no reason to hold oral arguments given the written record.

THEREFORE, IT IS ORDERED granting Plaintiff's Request for Reconsideration of Oral Argument and deeming that no oral argument is needed.