

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2004-007697

08/31/2004

HON. THOMAS DUNEVANT, III

CLERK OF THE COURT
D. Raybon
Deputy

FILED: 09/02/2004

LARRY RAY EAMES

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BOX 26040 , FCI, REG 20640-013
BEAUMONT TX 77720

v.

A MELVIN MCDONALD, et al.

WILLIAM D HOLM

MINUTE ENTRY

The Court has considered Plaintiff's Motion (Request for Reconsideration). The Court finds and rules as follows:

Plaintiff is in error when he states that failure to file a timely Answer waives not only the right to Answer, but the right to file procedural motions. The only sanction for failing to file an Answer is that averments in the Complaint are deemed admitted. Ariz.R.Civ.P. 8(d). Such admission has no bearing on a motion for dismissal under Rule 12(b). Indeed, for the purposes of a motion to dismiss under Rule 12(b)(6) for failure to state a claim, Plaintiff's averments of fact are assumed to be true. Though Plaintiff had arguably moved for default (if his Request for Conditional Judgment on the Pleadings can be so characterized) prior to filing of Defendant's Motion to Dismiss, no default or other judgment had been entered, nor had the notice required by Rule 55(a) been given. Therefore, Defendant retained the right to present his defenses. *Corbet v. Superior Court*, 165 Ariz. 245, 248 (App. 1990).

As this Court previously held, Plaintiff's discovery of Defendant's alleged wrongdoing, which triggered the statute of limitations, did not depend, or should not have depended, on the documents he says he received belatedly. The statutory provisions concerned, A.R.S. §12-542 *et seq.*, are clear. Where the rights of the parties are clearly defined by statute, equity follows the law. *McDermott v. McDermott*, 129 Ariz. 76, 77 (App. 1981); *Ayer v. General Dynamics Corp.*,

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128 Ariz. 326, 328 (App. 1980). Thus, there is no lawful basis for equitable tolling. Plaintiff waited too long to file.

That his imprisonment may have caused Plaintiff some difficulty and delay is immaterial as a matter of law. Our Legislature made the conscious choice not to allow imprisonment to be considered in the calculation of the statute of limitations. See *Laws 1996*, Chapter 175 (deleting former subsection B to A.R.S. §12-502).

Plaintiff asks that the issue of equitable tolling go to the jury rather than be decided by the Court. Equitable tolling, as the name suggests, is an act of grace by the Court in Equity. However, here, equitable tolling does not apply for reasons stated above. Thus, there is no question of fact to go to a jury.

THEREFORE, IT IS ORDERED denying Plaintiff's Request for Reconsideration.