

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-056397

08/09/2013

HONORABLE THOMAS L. LECLAIRE

CLERK OF THE COURT
K. Hartley
Deputy

DIEDES TRANSPORTATION INC

JOSEPH E COLLINS

v.

PENNY FULLER & ASSOCIATES INC, et al.

PATRICK J MONAHAN

DOCKET - NE

UNDER ADVISEMENT RULING
PARTIAL DISMISSAL
MOTION FOR SUMMARY JUDGMENT

Defendants Penny Fuller & Associates, Inc., Employee Leasing Payroll, LLC., and Penny Fuller move for summary judgment on Plaintiff's Complaint. Defendants collectively claim that the Plaintiff has failed to state actionable claims pursuant to Rule 56, Ariz.R.Civ.Proc. (It would appear that the motion is designable under Rule 12(b)(6) Ariz.R.Civ.Proc and analyzed under Rule 56.) After reviewing the facts, oral argument, and applicable authority, the motion is GRANTED in part, and DENIED in part.

STANDARD OF REVIEW

Summary Judgment is appropriate if, after reviewing the facts in the light most favorable to the non-moving party, no genuine issues of material fact remain. See e.g., *Joseph v. Markoviyz*, 27 Ariz. App. 122, 551 P.2d 571 (App. 1976).

DISCUSSION

The Defendant and Plaintiff Concur That Defendant Employee Leasing Payroll, LLC is Improperly Joined as a Party Defendant.

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Defendant argues that Employee Leasing Payroll, LLC was wrongfully named as a party in the Plaintiff's cause of action. The Plaintiff, admits Employee Leasing Payroll, LLC is improperly named. *See* Plaintiff's Response in Opposition to Motion for Summary Judgment, p. 5, l. 20-25 (April 22, 2013).

Therefore, with the admission of and concurrence by both Plaintiff and Defendant of the wrongful naming of Employee Leasing Payroll, LLC as a party to the claim,

IT IS ORDERED that Employee Leasing Payroll, LLC is DISMISSED as a party.

The Statute of Limitations under A.R.S. § 12-542 bars recovery of Plaintiff's Professional Malpractice Claim.

Defendants assert, "On August 10, 2009, the IRS advised both Plaintiff and Defendant of the final audit and accounting deficiency." *See* Defendants' Motion for Summary Judgment, p. 3, l. 9-14 (March 18, 2013). Subsequently, Plaintiff asserts, "Even though the IRS began its Audit in 2009, Plaintiff started his formal protest on 9/12/2011." *See* Plaintiff's Response in Opposition to Motion for Summary Judgment, p. 2, l. 10-12 (April 22, 2013). "The protest was completed on 03/12/2013." *Id.*

In their respective memoranda, Plaintiff and Defendants both acknowledge that the IRS completed a final audit in August of 2009. Subsequently, Plaintiff filed a claim with the Court on November 10, 2011.

The actionable harm occurred on August 10, 2009. *See* Defendants' Motion for Summary Judgment, p. 3, l. 9-14 (March 18, 2013). The fact that Plaintiff may have taken action subsequent to the harm does not toll the action. Nor does remedial action. Discharge of the debt is not the harm; the existence of the debt forms the cause of action. A.R.S. § 12-542, provides a two year statute of limitation for filing tort actions for Professional Malpractice. Over two years had lapsed between the IRS final audit and accounting deficiency on August 10, 2009, and Plaintiff's Court filing on November 10, 2011. Under A.R.S. § 12-542, the statute of limitations expired as of August 10, 2011, on the negligence claim.

IT IS ORDERED that Defendants' Motion for Summary Judgment on Statute of Limitations is GRANTED.

Plaintiff's Breach of Contract Claim is actionable.

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The Court determines that there are outstanding and triable issues of material fact and conflicting inferences that must be proven and decided during trial proceedings. *See, e.g., Executive Towers v. Leonard*, 7 Ariz. App. 331, 439 P.2d 303 (1968).

IT IS ORDERED that Defendant's Motion for Summary Judgment on Breach of Contract is DENIED.

/S/ JUDGE THOMAS L. LeCLAIRE

THOMAS L. LeCLAIRE
JUDGE OF THE SUPERIOR COURT

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.