

STATE OF MICHIGAN
COURT OF APPEALS

PAULINE M. KIDDER

Plaintiff-Appellant,

v

ELECTRONIC DATA SYSTEMS and GENERAL
MOTORS CORPORATION,

Defendants-Appellees.

UNPUBLISHED

October 8, 1996

No. 178021

LC No. 93-021230 CK

Before: Murphy, P.J., and Reilly, and C.W. Simon, Jr.*, JJ

PER CURIAM.

Plaintiff appeals as of right a circuit court order granting defendants summary disposition on the grounds that her action was barred by the statute of limitations. The trial court rejected plaintiff's argument that the action was not barred because the statute of limitations was tolled by the filing of three earlier actions, which were denied class certification. On appeal, plaintiff argues that the trial court erroneously calculated the length of the period of tolling. We affirm.

Plaintiff filed this action on April 14, 1993. The parties agree that without tolling, the statute of limitations would have expired on February 14, 1991, 793 days before plaintiff's action was filed. The parties also recognize that the pendency of a class action that is later denied certification tolls the statute of limitations as to asserted members who would have been parties had the suit been permitted to continue as a class action. *Warren Consolidated Schools v WR Grace & Co*, 205 Mich App 580, 585; 518 NW2d 508 (1994). The parties agree that the statute of limitations was tolled for ninety-six days as a result of the proceedings in *Munday v Electronic Data Systems*, Wayne County Circuit Court No. 91-104091 CK. The contested issues in this case concern the calculation of the days the statute of limitations was tolled by the proceedings in two other cases in the federal system i.e., *Cattin v General Motors*, 955 F2d 416 (CA 6, 1992) and *Malzahn v General Motors*, 968 F2d 1215 (CA 6, 1992).

* Circuit judge, sitting on the Court of Appeals by assignment.

The trial court incorrectly stated that plaintiff's computation of the cumulative tolling period included time in which appeals of the respective cases were pending in this Court and the Sixth Circuit Court of Appeals. In fact, plaintiff never argued that the statute was tolled during the pendency of appellate proceedings. Because of the court's misunderstanding of plaintiff's argument, it never addressed the merits of the issues that plaintiff did raise concerning the calculation of the tolled periods. Nevertheless, this Court will review issues that were not decided by the trial court if the question is one of law and all of the facts necessary for its resolution have been presented. *Detroit v Department of Social Services*, 197 Mich App 146, 158; 494 NW2d 805 (1992).

The parties agree that the statute of limitations was tolled beginning on October 30, 1986, the day that *Malzahn* was filed. Plaintiff contends that the tolling ended when the class certification was denied on February 6, 1991. Defendants contend that the tolling ended when the complaint was amended on December 23, 1987, to redefine the class in a manner that excluded plaintiff as a potential member of the class. We agree with defendants. Once the complaint was amended, plaintiff was on notice that the *Malzahn* plaintiffs no longer represented her interests. She was no longer a member of a putative class who would have been a party had the suit been permitted to continue as a class action. *Warren, supra*; See also *Ganousis v EI duPont de Nemours & Co*, 803 F Supp 149, 155-156 (ND Ill, 1992); *Byrd v Travenol Lab*, 675 F Supp 342, 347-348 (ND Miss, 1987). Thus *Malzahn* provided 419 days of tolling.

With respect to the tolling provided by the *Cattin* action, the parties dispute when the tolling began. In order for plaintiff's action to have been timely, *Cattin* must provide 278 days of tolling.¹ Plaintiff contends that the period of tolling should begin on November 19, 1984, the day the *Cattin* action was filed. The difficulty with plaintiff's position is that she agrees that her causes of action did not accrue until nearly three months later or February 15, 1985. We agree with defendants that there can be no tolling until the statute of limitations has begun to run. See *Durant v Dep't of Education (On Second Remand)*, 186 Mich App 83, 99-100; 463 NW2d 461 (1990). The parties agree that the *Cattin* tolling ended on October 31, 1985, when the class certification was denied. Even if the statute was tolled from February 15, 1985 to October 31, 1985, *Cattin* does not provide the necessary 278 days of tolling to result in a cumulative total of 793 days so that plaintiff's complaint would not be barred by the statute of limitations.

In conclusion, despite the tolling provided by *Malzahn*, *Cattin*, and *Munday*, plaintiff's complaint is barred by the statute of limitations. We affirm, albeit for a different reason than that relied upon by the trial court when it granted defendants' motion.

Affirmed.

/s/ William B. Murphy
/s/ Maureen P. Reilly
/s/ Charles W. Simon, Jr.

¹ The complaint was filed 793 days late. *Munday* provides 96 days and *Malzahn*, 419. Thus, 793 minus 96, minus 419 equals 278.