

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

RALPH NADER, et al.)	
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)	
Appellants)	
)	
v.)	D.C. Cir. No. 08-7074
)	
DEMOCRATIC NATIONAL)	
COMMITTEE, et al.)	
)	
Appellees)	
)	

APPELLANTS' PETITION FOR REHEARING
OR REHEARING EN BANC

Pursuant to Circuit Rule 35 of the Federal Rules of Appellate Procedure, Appellants respectfully petition the Court for rehearing or rehearing en banc, on the ground that the panel decision derogates from this Court's decisions governing the standard of review under Rule 12(b) so significantly that it represents a departure from the settled law of this Court. Specifically, the panel decision conflicts with this Court's decisions recognizing that dismissal under Rule 12(b) is not permitted on statute of limitations grounds unless it appears beyond doubt that the claims are time-barred. *See Firestone v. Firestone*, 76 F.3d 1205, 1208-09 (D.C. Cir. 1996) (citing *Jones v. Rogers Memorial Hosp.*, 442 F.2d 773 (D.C. Cir. 1971)).

The panel decision also conflicts with this Court's decisions recognizing that

dismissal under Rule 12(b) is not permitted when the discovery rule raises an issue of fact as to when the plaintiff knew or should have known of a cause of action. *See Goldman v. Bequai*, 19 F.3d 666, 672 (D.C. Cir. 1994) (applying D.C. law) (citing *Byers v. Burleson*, 713 F.2d 856, 861 (D.C. Cir. 1983) (same)). Finally, the panel decision conflicts with a decision of this Court recognizing that the statute of limitations begins to run on an abuse of process claim not when the abusive process issues, but when the abusive claim ceases to be asserted. *See Whelan v. Abell* (“*Whelan I*”), 953 F.2d 663, 673 (D.C. Cir. 1992). Rehearing en banc is therefore necessary to secure and maintain uniformity of the Court’s decisions governing the appropriate standard of review under Rule 12(b).

INTRODUCTION

This Court’s June 9, 2009 Opinion properly recognized that the District Court decision dismissing Appellants’ Amended Complaint should not be affirmed on the grounds that the District Court specified. By invoking the statute of limitations to affirm, however, this Court, like the District Court, disposed of this case on grounds that are plainly inapplicable and inappropriate under the well-settled standard of review governing motions to dismiss under Rule 12(b). Appellants therefore respectfully suggest that the

Court overlooked or misapprehended three key points of law, which preclude dismissal of their claims on statute of limitations grounds.

First, a cause of action for abuse of process does not accrue when process issues, as the Court concluded, but rather when the defendant ceases to assert the abusive claim. Second, the statute of limitations does not begin to run under the discovery rule when a reasonably diligent plaintiff would have initiated an investigation, as the Court concluded, but only thereafter, and only if, as a matter of law, such an investigation would have revealed evidence of defendants' wrongdoing. Third, questions of fact regarding the timeliness of a claim cannot be decided upon a motion to dismiss, as the Court concluded, but rather must be resolved by the jury.

The foregoing points of law are dispositive of this appeal. If the Court had properly considered them, it could not have invoked the statute of limitations to affirm dismissal under Rule 12(b). Accordingly, Appellants respectfully request that the Court reconsider its Opinion and set aside its judgment, so that Appellants may have their day in court to prove the allegations in their well-pleaded Amended Complaint.¹

¹ Rehearing is particularly warranted here, where the Court affirmed dismissal on grounds that received only cursory briefing, as one of many arguments raised by Defendants in the proceedings below. The Court recognized that Appellants' claims raise "interesting legal issues of first impression," Slip Op. 11, and "questions of state law on which we lack

ARGUMENT

I. THE COURT APPLIED AN IMPROPER STANDARD OF REVIEW UNDER RULE 12(B) BY DECIDING AS A MATTER OF LAW THAT APPELLANTS' CLAIMS ARE TIME-BARRED.

A. The Amended Complaint Is Not Untimely on Its Face.

The Amended Complaint alleges that Defendants jointly planned and executed a nationwide conspiracy to abuse judicial processes, by filing 29 complaints before 19 tribunals between June and October of 2004, with the intent to cause Appellants financial injury and other harm, and to disrupt Appellants' lawful participation in the 2004 presidential election. Am. Comp. ¶¶ 3-4. Defendants filed the first of their 29 complaints on June 23, 2004, Am. Comp. ¶ 72, and the last one on October 25, 2004. Am. Comp. ¶ 227 (citing Federal Election Commission ("FEC") MUR 5581). Defendants continued to assert such claims before the FEC as late as April of 2006, and in state court proceedings as late as August of 2006. Am. Comp. ¶¶ 194-95, 227; *see In re Nomination Paper of Ralph Nader*, 905 A.2d 450 (Pa. 2006) (affirming unprecedented judgment directing candidates to pay \$81,102.19

instructive precedents." *Id.* at 12. Therefore, as Appellants previously argued, remand of this exclusively state law action to the Superior Court of the District of Columbia is the proper disposition of this case, in which the federal claims were dismissed before trial, before discovery and before the District Court had even ruled upon the motions to dismiss. Reply Brief of Appellant at 21-24.

in litigation costs to nominal parties who challenged their nomination petitions).

As a preliminary matter, the Court's conclusion that the foregoing facts demonstrate that the Amended Complaint is "untimely on its face" rests on an erroneous assumption. Slip Op. 19. The Court asserted, without citation, that the statute of limitations for an abuse of process claim "would ordinarily run from the date on which abusive process last issued." Slip Op. 13. As the Court has previously recognized, however, the "statute of limitations on an abuse of process charge begins to run not when the defendant institutes the allegedly abusive claim, but when he ceases to assert it." *Whelan I*, 953 F.2d at 673 (emphasis added) (citing *Neumann v. Vidal*, 1982-2 Trade Cas. (CCH) Par. 64,933, 72,770 (D.D.C. 1981)); *see Rothenberg v. Ralph D. Kaiser Co. (In re Rothenberg)*, 173 B.R. 4, 9 (Bankr. D. D.C. 1994); *see also* J.A. Bock, *When Statute of Limitations Begins to Run Against Cause of Action for Abuse of Process*, 1 A.L.R. 3d 953 (2008) (collecting state and federal cases applying same rule); 1 AM JUR 2d *Abuse of Process* § 26 (2005). Therefore, because the Court itself acknowledged that Defendants continued to assert abusive claims within the limitations period, Slip Op. 5, Appellants' claims arising from such conduct are not time-barred. *See Whelan I*, 953 F.2d at 673.

B. The Court Erroneously Relied on the Discovery Rule to Conclude as a Matter of Law That Appellants' Abuse of Process Claims Accrued Before October 30, 2004.

The Court properly invoked the discovery rule to determine when Appellants' claims accrued, but it erred by relying on that rule to conclude, as a matter of law, on the pleadings, that such claims accrued before October 30, 2004. The discovery rule is a tolling doctrine, *see Beard v. Edmondson & Gallagher*, 790 A.2d 541, 548 (D.C. 2002), which applies in cases where “the relationship between the fact of injury and the alleged tortious conduct is obscure.” *Mullin v. Washington Free Weekly*, 785 A.2d 296, 298 (D.C. 2001) (citation omitted). In such cases, the discovery rule tolls the running of the statute of limitations until a plaintiff “actually knows, or with the exercise of reasonable diligence would have known, of some injury, its cause-in-fact, and some evidence of [the defendant’s] wrongdoing.” *Diamond v. Davis*, 680 A.2d 364, 381 (D.C. 1996).

Applying the discovery rule to the facts of this case, the Court concluded that Appellants’ “timely filing window [under a three year statute of limitations] cannot stretch back any earlier than October 30, 2004.” Slip Op. 13. Because Appellants knew “immediately” that Defendants’ baseless lawsuits were the cause in fact of their injury, the Court reasoned, “the only question is whether [Appellants] knew, or should have known, of “some

evidence” of a conspiracy to abusively deploy a pattern of baseless suits against [them].” *Id.* at 15. Not only is the answer to that question no, however, but it is also the wrong question.

As the Court properly recognized, Appellants’ claims are based on a civil conspiracy theory that “aggregates the [Defendants’] many challenges into a single pattern of baseless litigation.” Slip Op. 10. The Court correctly characterized this “aggregated, conspiratorial theory” as “essential to the validity of [Appellants’] claims.” *Id.* at 10-11. After acknowledging that Appellants’ cause of action arises from coordinated, aggregate conduct, however, the Court improperly applied the statute of limitations on a serial, lawsuit-by-lawsuit basis.

Where Appellants allege that Defendants’ 29 complaints were filed in 19 tribunals pursuant to a conspiracy planned, coordinated and executed by a national political party that sought to misuse state court and federal agency processes to prevent its competitors from participating in a federal election, allegations relating low-level operative like Defendant Moffett, or one lawsuit in Maine, are not sufficient to create the cause of action. The missing element is the role of Defendant DNC in coordinating these efforts. This is precisely the evidence that Defendant DNC and others explicitly denied and fraudulently concealed in 2004, Am. Comp. ¶¶ 64-65, 204, and this is

precisely the evidence that became available only *after the election*, when federal law required disclosures to the FEC.

The Court thus erred in applying the discovery rule by focusing its inquiry on whether Appellants knew, or should have known, of “some evidence of a conspiracy” against them. Slip Op. 15 (quotation marks omitted). The proper question is whether Appellants knew, or should have known, of some evidence “that they suffered injury *due to the defendants’ wrongdoing*.” *Doe*, 814 A.2d at 945 (emphasis added) (quoting *Mullin*, 785 A.2d at 299) (citing *Colbert v. Georgetown University*, 641 A.2d 469, 472-73 (D.C. 1994) (en banc)); see *Diamond*, 680 A.2d at 379. This distinction is critical, because “to be on notice of an obligation to inquire is not the same thing as to have notice of the factual basis of one’s claims.” *Hohri v. United States of America*, 782 F.2d 227, 249 n.55 (D.C. Cir 1986). See *Wagner v. Sellinger*, 847 A.2d 1151, 1155 (D.C. 2004) (evidence insufficient to allow claims to survive motion to dismiss is insufficient to start statute of limitations). Accordingly, while Appellants may have had notice of their obligation to investigate potential claims during the 2004 election, it was error for the Court to conclude, as a matter of law, that Appellants had constructive or actual notice of the factual basis for such claims before October 30, 2004.

C. The Court Improperly Imputed Inquiry Notice of Defendants' Wrongdoing to Appellants Without Considering Whether a Reasonable Investigation Under the Circumstances Would Have Produced Actual Notice.

Before a court may impute inquiry notice of a claim to a plaintiff in a case in which the discovery rule applies, the court must determine that a reasonable investigation under the circumstances, as a matter of law, “would have led to actual notice.” *Doe v. Medlantic*, 814 A.2d 939, 945 (D.C. 2003) (quoting *Diamond*, 680 A.2d at 372). This inquiry is “highly fact-bound and requires an evaluation of all of the plaintiff’s circumstances.” *Diamond*, 680 A.2d at 372. If the Court recognized its obligation to conduct an inquiry into the reasonableness of Appellants’ investigation, however, it gave no indication thereof. Instead, the Court asserted, in the final paragraph of its Opinion, that “[w]hatever the [Defendants] tried to conceal,” Appellants had “constructive knowledge of some evidence of wrongdoing by each current defendant” prior to October 30, 2004. Slip Op. 19.

As an initial matter, whether Defendants “succeeded” in fraudulently concealing their wrongdoing is manifestly a question of fact, Slip Op. 14, which is plainly inappropriate for an appellate court to decide. *See National Railroad Passenger Corp. v. Krouse*, 627 A.2d 489, 498 (D.C. 1993) (declining to decide whether plaintiff should have discovered claim during seven week period immediately following injury). Moreover, the conclusion

that Appellants should have discovered their cause of action by October 30, 2004 – a mere five days after Defendants filed their last complaint – is tantamount to a finding that Appellants are “guilty of ordinary negligence” in not discovering their cause of action prior to that date. *Diamond*, 680 A.2d at 375-76 (D.C. 1996). The question of a plaintiff’s diligence is also a question of fact, however, which cannot be decided upon a motion for summary judgment, much less a motion to dismiss. *See Ehrenhaft v. Price*, 483 A.2d 1192, 1204 (D.C. 1984); *Duckett v. District of Columbia*, 654 A.2d 1288, 1290 n.2 (D.C. 1995) (citation omitted).

Even if it were appropriate for the Court to decide when Appellants should have discovered the factual basis of their claims, the Court’s analysis was flawed, because the Court failed to recognize that inquiry notice may be imputed to a plaintiff only “*after* due investigation.” *Doe*, 814 A.2d at 945 (emphasis in original) (quoting *Diamond*, 680 A.2d at 372). Thus, the Court recited allegations in the Amended Complaint that purportedly placed Appellants on notice of their claims prior to October 30, 2004, without making any effort to distinguish evidence that Appellants only discovered after that date, following an investigation. *See Diamond*, 680 A.2d at 371 n.8 (“allegations of facts in a complaint...are not necessarily the same as evidence of timely knowledge of facts sufficient to infer knowledge of a

cause of action”). The Court noted, for example, that Defendant DNC “organized and paid for” Defendants’ “not-so-secret meeting” at the Four Seasons, Slip Op. 2-3, but the Court overlooked the fact that such evidence was not discoverable until *after* the 2004 election, when federal law required its disclosure to the FEC. Likewise, the Court noted that the Vice Chair of Defendant DNC (who was also chairman of his state party) filed one of Defendants’ complaints, Slip Op. 15, but this was neither public knowledge nor inconsistent with Defendants’ cover story that *state* party officials were filing such complaints independently and without coordination or support from the national party. Am. Comp. ¶ 64. Accordingly, whether knowledge of such facts may be imputed to Appellants is a question for the jury. As the District of Columbia Court of Appeals has stated:

It is for the jury to resolve any disputed facts relevant to the determination of the accrual of the statute of limitation. Included in the possible disputed facts is the reasonableness of the plaintiff’s actions or inactions in light of what may be otherwise undisputed facts.

Brin v. S.E.W. Investors, 902 A.2d 784, 800 (D.C. 2006). Therefore, because “a reasonable jury could find that the statute of limitations did not bar the action,” it was error for the Court to affirm dismissal on such grounds. *Id.*

II. IF THE COURT HAD APPLIED THE PROPER STANDARD OF REVIEW, IT COULD NOT HAVE INVOKED THE STATUTE OF LIMITATIONS TO AFFIRM DISMISSAL UNDER RULE 12(B).

This Court has repeatedly held that courts should hesitate to grant dismissal on statute of limitations grounds based solely on the face of a complaint. *See Firestone*, 76 F.3d at 1208-09 (citing *Richards v. Mileski*, 662 F.2d 773, 775 (D.C. Cir. 1981); *Jones*, 442 F.2d at 775). Because the statute of limitations is an affirmative defense, it cannot support a motion to dismiss “unless it appears beyond doubt” that the plaintiff cannot prove a set of facts that would entitle the plaintiff to relief. *Jones*, 442 F.2d at 775. But while this standard is well-settled, it was apparently overlooked by the Court, which failed to cite *any* standard governing its decision to affirm dismissal on statute of limitations grounds. Slip Op. 12.

As the foregoing discussion demonstrates, the Court’s assertion that Appellants had “actual knowledge of their cause of action” more than three years before they filed suit falls far short of the exacting standard governing dismissal on statute of limitations grounds. Slip Op. 16. The Court’s decision thus conflicts not only with the decisions of this Court which recognize and adhere to that standard, *Firestone*, 76 F.3d at 1208-09; *Richards*, 662 F.2d 775; *Jones*, 442 F.2d at 775, but also with the decisions of this Court which recognize that dismissal on the pleadings is inappropriate where application of discovery rule raises questions of fact. *Goldman*, 19 F.3d at 672; *Byers*, 713 F.2d at 861. Underscoring this error,

the Court repeatedly and improperly relied on cases that were not decided upon motions to dismiss, but upon motions for summary judgment. Slip Op. 14 (citing *Riddell v. Riddell Washington Corp.*, 866 F.2d 1480, 1494 (D.C. Cir. 1989) (reversing summary judgment entered for defendant on statute of limitations grounds)); *id.* at 17 (citing *Fitzgerald v. Seamans*, 553 F.2d 220, 229 (D.C. Cir. 1977) (reversing summary judgment for one defendant on statute of limitations grounds and affirming for other defendants)).²

In order to conclude that the statute of limitations bars these claims, the Court speculates as to what Appellants should have known, and when they should have known it. Fortunately, such speculation is unnecessary. On August 5, 2004, individuals not party to this action filed an FEC complaint alleging conspiracy claims against these same parties based on the same evidence on which this Court now relies to confer notice upon Appellants – including the newspaper articles and testimony from the Maine proceeding. *See* FEC MUR 5509, First General Counsel’s Report, 2 (February 24, 2005) < <http://eqs.nictusa.com/eqs/searcheqs>>. The FEC

² Similarly, the District of Columbia Court of Appeals consistently declines to decide discovery rule cases on the pleadings. *See Diamond*, 680 A.2d at 381; *see also Brin*, 902 A.2d 784; *Doe*, 814 A.2d 939; *Wagner*, 847 A.2d 1151; *Morton v. National Medical Enterprises, Inc.*, 725 A.2d 462 (D.C. 1999); *Hendel v. World Plan Executive Council*, 705 A.2d 656 (D.C. 1997); *Duckett*, 654 A.2d 1288; *Colbert*, 641 A.2d 469 (en banc); *Bussineau v.*

dismissed such claims as “speculative and insufficiently specific to justify investigation.” Likewise, the District Court for the Southern District of New York dismissed a similar conspiracy claim arising from the same set of facts, again brought by individuals not party to this case, on the ground that the claim relied on “mere conclusory allegations.” *Fulani v. McAuliffe*, 2005 U.S. Dist. LEXIS 20400 (S.D.N.Y. 2005). That case was litigated between October and December of 2004 – at the very time when this Court asserts that Appellants had notice of their claims. Although this Court is not bound by the foregoing decisions, they demonstrate that the evidence available in 2004 was insufficient to support Appellants’ cause of action. At the very least, such decisions create a question of fact for a jury to decide.

President and Directors of Georgetown College, 518 A.2d 423, 430 (D.C. 1986); *Ehrenhaft*, 483 A.2d 1192; *Burns v. Bell*, 409 A.2d 614 (D.C. 1979).

CONCLUSION

For the foregoing reasons, the Court should grant Appellants' Petition and vacate its Judgment entered on June 9, 2009.

Dated: July 9, 2009

Respectfully submitted,

/s/ Oliver B. Hall

Oliver B. Hall
D.D.C. Bar No. 976463
1835 16th Street N.W.
Washington, D.C. 20009
(617) 953-0161
Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of July 2009, I served a copy of the attached Petition for Rehearing or Rehearing en Banc, on behalf of all Appellants, by the Court's electronic filing service, or by first-class mail, postage prepaid, upon each of the following:

Joseph E. Sandler
John Hardin Young
SANDLER, REIFF & YOUNG
300 M Street S.E., Suite 1102
Washington, D.C. 20003

Douglas K. Spaulding
REED SMITH, LLP
1301 K Street, N.W.
Suite 1100 – East Tower
Washington, D.C. 20005

Attorneys for Appellees Democratic
National Committee, Jack Corrigan and
Mark Brewer

Attorney for Appellee Reed Smith, LLP

Lawrence Noble
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM, LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005

Laurence E. Gold
1666 Connecticut Avenue, N.W.
Suite 500
Washington, D.C. 20009

Attorney for Appellee America Coming
Together

Attorneys for Appellees The Ballot
Project, Inc., Toby Moffett, Robert
Brandon and Elizabeth Holtzman

/s/ Oliver B. Hall

Oliver B. Hall

Mark E. Elias
PERKINS COIE
607 14th Street, N.W.
Washington, D.C. 20005

Attorneys for Appellees Kerry-Edwards
2004, Inc. and John Kerry

Michael B. Trister
LICHTMAN, TRISTER & ROSS,
PLLC
1666 Connecticut Avenue, N.W.
Suite 500
Washington, D.C. 20009

Attorney for Appellee Service
Employees International Union

