

**IN THE DISTRICT COURT OF BROWN COUNTY, NEBRASKA**

**RAYMOND DILLON,**

Plaintiff,

vs.

**BROWN COUNTY, NEBRASKA, GREG  
McBRIDE, and JAMES L. HUCKABAY,  
SR.,**

Defendants.

Case No. CI03-38

**JUDGMENT OF  
DISMISSAL**

**DATE OF HEARING:** November 25, 2003.

**DATE OF RENDITION:** December 9, 2003.

**DATE OF ENTRY:** See court clerk’s file-stamp date per § 25-1301(3).

**APPEARANCES:**  
 For plaintiff: Todd Flynn without plaintiff.  
 For defendants: Charles W. Campbell without defendants.

**SUBJECT OF ORDER:** Plaintiff’s motion to dismiss.

**PROCEEDINGS:** See journal entry rendered following hearing.

**MEMORANDUM:**

1. The defendants’ motion to dismiss asserts three grounds: (a) pendency of another action in the United States District Court, (b) failure to state a claim because the claim is barred by the statute of limitations, and, (c) absence of subject matter jurisdiction.

2. This court concludes that the first and third grounds lack merit and should be denied. This court further concludes that the second ground supports the defendants’ motion for the reasons stated below.

3. The plaintiff’s complaint asserts a claim under the Political Subdivisions Tort Claims Act. NEB. REV. STAT. § 13-901 *et seq.* (Reissue 1997).

4. The plaintiff’s claim arises from events occurring on July 5, 2000. The plaintiff filed a notice of claim with the defendant county on January 29, 2001. The plaintiff

withdrew his claim by filing a prior case in this court on December 14, 2001 (Case No. CI01-65). On March 6, 2002, the plaintiff commenced a federal court action, including a state-law negligence-based claim. On March 21, 2002, this court granted the plaintiff's motion to dismiss his first state court case without prejudice. Subsequently on September 30, 2003, the federal district court granted a summary judgment for defendants on the federal claims. The federal court declined to exercise supplemental jurisdiction over the state negligence claim and dismissed that claim without prejudice. The plaintiff appealed from the federal court judgment. That appeal remains pending in the Eighth Circuit Court of Appeals. On October 7, 2003, the plaintiff commenced the present case in this court.

5. Section 13-919(1) generally imposes a two-year statute of limitations. Thus, the last day for filing the complaint would have been July 5, 2002. Obviously, the plaintiff filed the present complaint over 15 months after the expiration of the statute. The plaintiff relies on section 13-919(2) to avoid the statute of limitations. That section states:

If a claim is . . . filed *under any other law of this state* and a *determination* is made by a . . . court *that the act provides the exclusive remedy* for the claim, the time . . . to begin suit under the act shall be extended for a period of six months from the date of the court order making such determination . . . if the time . . . to begin suit under the act would otherwise expire before the end of such period.

NEB. REV. STAT. § 13-919(2) (Reissue 1997) (emphasis supplied).

6. The recently-adopted Nebraska Rules of Pleading in Civil Actions govern this case. Under former law, a defendant was permitted to assert the limitations bar by demurrer where the petition on its face showed that the cause of action was ostensibly barred by the statute of limitations and failed to allege some excuse which tolled the operation and bar of the statute. *Manker v. Manker*, 263 Neb. 944, 644 N.W.2d 522 (2002). This court has found no Nebraska case determining the propriety of asserting the limitations bar by motion to dismiss. However, the federal courts construe the equivalent federal rule to allow such assertion by motion to dismiss. *Williams v. Hartje*, 827 F.2d 1203 (8th Cir. 1987). This court concludes that the Nebraska Rule 12(b)(6) authorizes assertion of the limitations bar by motion to dismiss.

7. This court must therefore consider whether the savings clause of § 13-919(2) avoids the bar of § 13-919(1). The recent case of *Keller v. Tavarone*, 265 Neb. 236, \_\_\_ N.W.2d \_\_\_ (2003) provides some guidance but is not controlling. In *Keller*, the plaintiff failed to file her claim with the subject county within one year after the cause of action accrued. Here, the plaintiff timely filed his claim with the proper county. This case concerns the limitation to begin suit rather than compliance with the condition precedent (filing the claim) to commencement of suit. In *Keller*, the Supreme Court did not have to determine whether the first-filed medical malpractice suit constituted a claim “made or filed under any other law of this state.”

8. This court concludes that neither the plaintiff’s federal claims nor the state tort claim joined in the federal court complaint constitute “a claim . . . filed under any other law of this state.” The federal claims arise under federal law and not under any law of Nebraska. The state-law negligence-based claim arises under the waiver of sovereign immunity provided by the Political Subdivisions Tort Claims Act. While the state claim arose under a “law of this state,” it did not stem from any “*other* law of this state.” This court concludes that the plain and unambiguous words of the statute preclude application of the savings clause to this case.

9. Further, the federal district court did not determine that the Political Subdivisions Tort Claims Act provides the exclusive remedy for the claim. The federal court merely exercised its discretion to decline supplemental jurisdiction over the state claim. The federal court’s decision failed to meet the plain language of the second condition of the § 13-919(2) savings clause.

10. Because the plaintiff’s complaint fails to plead a valid excuse tolling the operation and bar of § 13-919(1), the motion must be granted. This court concludes that there is no reasonable possibility of amendment to cure the defect and therefore grants a judgment of dismissal with prejudice.

**JUDGMENT:**

IT IS THEREFORE ORDERED AND ADJUDGED  
that:

1. The motion to dismiss is granted as to paragraph 2 thereof and denied as to paragraphs 1 and 3.
2. The plaintiff's complaint is dismissed with prejudice at plaintiff's cost.
3. This is a final judgment.

Signed in chambers at **Ainsworth**, Nebraska, on **December 9, 2003**;  
 DEEMED ENTERED upon file stamp date by court clerk.  
 If checked, the court clerk shall:

BY THE COURT:

- Enter judgment on the judgment record.  
 Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.
- Mail postcard/notice required by § 25-1301.01 within 3 days ("Judgment of Dismissal entered").  
 Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.
- If not already done, immediately transcribe trial docket entry dictated in open court.  
 Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.
- Note the decision on the trial docket as: [date of filing] **Signed "Judgment of Dismissal" entered.**  
 Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.
- Mail a copy of this order to all counsel of record and any pro se parties.  
 Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.

---

**William B. Cassel**  
 District Judge

Mailed to: