

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

Lisa M. Williams,)
)
 Plaintiff,)
)
 v.)
)
 Bristol Bay Native Corporation,)
 Jessie Elizabeth Williams and)
 Cody Francis Williams,)
)
 Defendants.)
)
 _____)

Case No. 3AN-18-06416 CI

**ORDER GRANTING BRISTOL BAY NATIVE CORPORATION'S MOTION
FOR SUMMARY JUDGMENT [CASE MOTION # 1]**

Plaintiff Lisa Williams ("Williams") filed the Complaint on April 23, 2018. On June 28, 2018, Defendant Bristol Bay Native Corporation ("BBNC") moved for summary judgment and to dismiss the lawsuit, arguing that the claim is barred by the two-year tort statute of limitations. Williams filed an Opposition and requested oral argument on July 18, 2018, arguing that the two-year statute of limitations is inapplicable and instead the three-year contract statute of limitations or the ten-year catchall statute of limitations applies to this case. BBNC filed its Reply on July 30, 2018. Oral argument was held on August 20, 2018. Williams filed a supplemental memorandum on August 27, 2018. BBNC's response to the supplemental memorandum was filed on September 4, 2018. The Court has reviewed and considered the documents filed in the case, together with the arguments of counsel, and now issues an Order Granting BBNC's Motion for Summary

Judgment for the reasons set forth below.

I. Background

The parties agree to the facts stated herein, and agree that the question of which statute of limitations applies to this case is ripe for decision on summary judgment.

Lisa Williams alleges that 37 shares of BBNC stock were wrongfully transferred to Defendants Jessie Elizabeth Williams (“Jessie”) and Cody Francis Williams (“Cody”) after her husband, Earl A. Williams (“Earl”), passed away in February, 2014.¹ Earl drafted and signed a handwritten will in 2013, leaving all of his property to Lisa Williams.² Earl registered the 2013 will with the Anchorage Superior Court on May 9, 2013.³ On February 17, 2014, he executed another handwritten will, which purported to supersede and revoke the 2013 will, and to leave all of his worldly possessions to his children, Jessie and Cody Williams.⁴ Earl’s 2013 will was admitted to probate, and Lisa Williams was appointed as Personal Representative.⁵

Initially BBNC was aware of the 2013 will only, and tentatively determined that Lisa Williams would inherit Earl’s 37 BBNC shares.⁶ On February 18, 2015, BBNC sent transfer notices to Lisa Williams, Jessie, and Cody, informing them that BBNC intended to transfer the shares to Lisa Williams.⁷ On March 10, 2015, BBNC was provided with

¹ Compl. at 1, ¶¶ 1–10.

² Mot. Summ. J., Ex. 1, 2013 Will.

³ 3AN-13-00126 WI.

⁴ Mot. Summ. J., Ex. 2, 2014 Will.

⁵ Case No. 3AN-14-2298 PR.

⁶ Mot. Summ. J., Ex. 3, Taday Aff.

⁷ *Id.*, Ex. 4, Feb. 18, 2015 30-day Notice.

the 2014 will.⁸ On April 27, 2015, BBNC sent Williams another notice, informing her that BBNC re-determined the distribution of ANCSA stock because it received a will that supersedes the will on file, and that BBNC intended to distribute the shares to Jessie and Cody within 30 days from the date of the letter.⁹ The letter also advised Lisa Williams that she may bring an action in Superior Court under AS 13.16.705 if she disagrees with BBNC's determination. On May 29, 2015, BBNC transferred 37 shares of stock owned by Earl to Jessie and Cody Williams, along with all distributions and dividends BBNC had held in trust since Earl's death.¹⁰

On April 23, 2018, over two years later, Lisa Williams filed the Complaint.¹¹ She asserts that BBNC should have conveyed the shares of stock to her as the sole heir and beneficiary under Earl's will. She seeks an order requiring BBNC to "(a) cancel the 37 share[s] of stock that were transferred to Jessie and Cody, (b) issue the 37 shares of stock to Lisa, and (c) pay and distribute to Lisa all dividends and distributions from or on account of the 37 shares of stock."¹²

II. Standard

Summary judgment is appropriate when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law.¹³ "Only in the unusual circumstance in which 'there exist uncontroverted facts that determine when

⁸ *Id.*, Ex. 3, Taday Aff. ¶¶ 6–8.

⁹ *Id.* at ¶ 8; Ex. 5, April 27, 2015 30-day Notice.

¹⁰ *Id.*, Ex. 3, Taday Aff. ¶ 9.

¹¹ Compl. at 1.

¹² Compl. at 3.

¹³ ALASKA R. CIV. P. 56(c); *Interior Cabaret, Hotel, Restaurant & Retailers Ass'n v. Fairbanks North Star Borough*, 135 P.3d 1000, 1002 (Alaska 2006).

a reasonable person should have been on inquiry notice' can a court properly resolve the question [of whether the statute of limitations has run] as a matter of law.”¹⁴ In this case, the parties agree that there is no genuine dispute as to any material fact. The Court is mindful that the defense of statute of limitations is “generally disfavored by the courts” and that “doubts as to which of two statutes is applicable in a given case should be resolved in favor of applying the statute containing the longer limitations period.”¹⁵

III. Discussion

The question before the Court is whether the claim is barred by the statute of limitations. Williams did not file the Complaint until almost three years after the May 29, 2015 transfer of the shares to Jessie and Cody. Specifically at issue is whether (1) Williams' claim sounds in contract, in which case the three-year statute of limitations under AS 09.10.053 applies; (2) the two-year statute of limitations applies under AS 09.10.070(a)(2), (3), or (5); or (3) the ten-year statute of limitations under AS 09.10.100 applies.

AS 09.10.053, *Contract actions to be brought in three years*, provides that a person may not bring an action upon a contract or liability, express or implied, unless that action is commenced within three years.¹⁶ AS 09.10.070, *Actions for torts, for injury to personal property, for certain statutory liabilities, and against peace officers and coroners to be brought in two years*, provides as follows, in relevant part:

¹⁴ *John's Heating Serv. v. Lamb*, 46 P.3d 1024, 1031 (Alaska 2002) (quoting *Palmer v. Borg-Warner Corp.*, 818 P.2d 632, 634 (Alaska 1990)).

¹⁵ *Lee Houston & Assocs., Ltd. v. Racine*, 806 P.2d 848, 854–55 (Alaska 1991).

¹⁶ AS 09.10.053.

(a) Except as otherwise provided by law, a person may not bring an action . . . (2) for . . . injury to the rights of another not arising on contract and not specifically provided otherwise; (3) for taking, detaining, or injuring personal property, including an action for its specific recovery . . . or (5) upon a liability created by statute, other than a penalty or forfeiture; unless the action is commenced within two years of the accrual of the cause of action.¹⁷

AS 09.10.100, *Other actions in 10 years*, provides “[a]n action for a cause not otherwise provided for may be commenced within 10 years after the cause of action has accrued.”¹⁸

A. The Three-Year Contract Statute of Limitations Does Not Apply to Williams’ Claim

BBNC asserts that Williams’ allegations resemble a tort action, and do not sound in contract.¹⁹ Williams contends that there is an implied contractual relationship between Williams and BBNC under AS 13.16.705 and that the three-year contract statute of limitations in AS 09.10.053 should apply.²⁰ She argues that “[a]n action against the directors of a corporation for breach of their duties is an action for implied contract.”²¹ Both parties agree that a shareholder derivative suit is a contract action.²² However, the parties disagree as to whether a suit contesting ownership of stock by someone who has never been a shareholder is a contract action. BBNC claims it is not. BBNC asserts that because Williams is not a shareholder, and does not have any colorable contractual relationship with BBNC or its directors, she lacks standing to allege any direct or

¹⁷ AS 09.10.070.

¹⁸ AS 09.10.100.

¹⁹ Mot. Summ. J. at 5.

²⁰ Opp. at 4–5.

²¹ Opp. at 4 (citing *Bibo v. Jeffrey's Restuarant*, 770 P.2d 290, 295 (Alaska 1989)).

²² Reply at 2.

derivative claim against BBNC.²³ Moreover, BBNC claims that under either an express or implied theory of contract, none of the wills could have been considered to constitute an offer, acceptance, or consideration with respect to BBNC.²⁴

The “‘gravamen’ of the plaintiff’s claim determines whether the ‘contract’ or tort’ statute of limitations applies.”²⁵ The Court considers not only whether a contractual relationship exists, but also whether the nature of the action and the injury sounds in contract.²⁶ Here, the action does not sound in contract. There is no implied or express contract between Williams and BBNC, or Williams and Earl, which would give rise to a plausible contract claim against BBNC. There is no basis for the Court to interpret Earl’s 2013 will as creating a contract between Williams and Earl, or between BBNC and Earl, with Williams as a third party beneficiary.

AS 13.16.705 does not create a contractual relationship between Williams and BBNC.²⁷ The Court is unaware of any authority indicating that a statutory obligation creates a contractual obligation. Williams filed this action to resolve a dispute regarding who is entitled to Earl’s shares of stock. Williams did not file an action for breach of contract, breach of fiduciary duties, or a shareholder derivative suit. Instead, she seeks an order requiring BBNC to cancel the transfer of shares to Jessie and Cody and to issue the

²³ Reply at 3.

²⁴ Resp. to Supp. at 3.

²⁵ *Lee Houston*, 806 P.2d at 852.

²⁶ *See* 54 C.J.S. *Limitations of Actions* § 115 (“The character of the action as of tort or on contract must be determined by the nature of the grievance rather than the form of the complaint or petition, and in this connection, the predominant characteristic of the action is determinative. Accordingly, tort actions arising from contractual obligations should be controlled by and subject to the statute of limitations for torts.”).

²⁷ While “stock” includes membership in a corporation, the right to bring an independent action in the Superior Court does not create a contract between the corporation and the potential shareholder. AS 13.16.705(a), (g).

shares of stock to her. She does not allege damages.

While Williams completed a Potential Shareholder Information Form, she is not a shareholder of BBNC. There is no other relationship between Williams and BBNC indicating that BBNC owes a duty to her. The facts of this case are distinguishable from those where the action arises out of a professional service relationship. In *Lee Houston & Assocs., Ltd. v. Racine*, the Alaska Supreme Court relied in part on the “or liability” language of the contract statute of limitations and concluded that the longer contract statute of limitations applied to claims of negligence, misrepresentation, and fraud arising out of a professional service relationship.²⁸ The Alaska Supreme Court concluded that the contract statute of limitations “must be interpreted as applying to a category of actions broader than those based only on contract principles.”²⁹ Both the contract and the tort statute of limitations refer to actions brought upon a liability. As discussed below, to the extent that Williams relies on any liability that BBNC has, the Court concludes that it is a liability created by statute that would fall within AS 09.10.070(a)(5) instead of AS 09.10.053.

Because there is no contractual relationship or other duty arising from a contract, the Court concludes that Williams’ claim against BBNC does not sound in contract for the purpose of AS 09.10.053, and the three-year statute of limitations does not apply to her claim.

²⁸ *Lee Houston*, 806 P.2d at 854-55.

²⁹ *Id.* at 854.

B. The Two-Year Statute of Limitations For Injury To the Rights of Another Not Arising on Contract Applies to Williams' Claim

A two-year statute of limitations applies to an action for “injury to the rights of another not arising on contract.”³⁰ Under AS 13.16.705, “[i]n case of dispute as to the person entitled to receive [Native corporation] stock, a person claiming ownership may bring an independent action in the superior court.”³¹ There is no specific statute of limitations referenced in AS 13.16.705. In this case, Williams asserts her right to ownership of BBNC shares of stock and the concomitant rights to the benefits of stock ownership, such as distributions and voting rights. The Court concludes that Williams’ claim for the recovery of ownership of BBNC shares is a claim for injury to the rights of another not arising on contract.

The cause of action in this case is similar to a cause of action for tortious interference with contract. Williams essentially alleges that BBNC interfered with her “contract” with Earl to gift his shares to her upon his death, and that BBNC interfered with that arrangement by determining ownership of the shares and transferring them to Jessie and Cody instead of to her. Williams now asks the Court to reverse BBNC’s wrongful transfer of the shares, and to return them to Williams, the rightful owner.

In *Law Offices of Steven D. Smith, P.C. v. Borg-Warner Sec. Corp.*, the Alaska Supreme Court held that economic losses arising from the cancellation of a contingency

³⁰ AS 09.10.070(a)(2). The Court does not ascribe any particular meaning to the end of the clause, which reads “and not specifically provided otherwise.” It appears to duplicate the “[e]xcept as otherwise provided by law” language, which was added in 1997, along with what is now (a)(3) regarding personal property. The parties agree that this portion of the clause refers to other statute of limitations clauses.

³¹ AS 13.16.705.

fee contract, caused by and claimed against a third party, constituted an injury to the rights of another *not* arising in contract, and therefore subject to the two-year statute of limitations in AS 09.10.070.³² The economic loss arising from a third-party's interference with a contingency fee agreement is analogous to Williams' request for the return of shares arising from BBNC's interference with Earl's 2013 will which bequeathed the shares to her.

As discussed below, the Court concludes that the shares of stock are intangible property. To the extent that Williams seeks to assert her rights to the shares, this is an action to recover an intangible property right. Such an action sounds in tort.³³ Williams' claim for the return or transfer of these shares necessarily seeks a ruling that she has a right to the shares. Accordingly, it is appropriate to consider her claim as one for the injury to the rights of another. Moreover, it is consistent and reasonable to apply a two-year statute of limitations to claims for injury to both intangible and tangible personal property.³⁴ It would defy reason to apply a two-year statute of limitations to claims for taking or injuring tangible personal property and a ten-year statute of limitations for taking or injuring intangible personal property.

Williams' claim is a claim for injury to the rights of another, not arising on contract. Because the Court concludes that Williams' claim is one for injury to the rights

³² 993 P.2d 436, 444–46 (Alaska 1999).

³³ See, e.g., *Local Trademarks v. Price*, 170 F.2d 715, 718–19 (5th Cir. 1948) (affirming lower court's holding that copyright infringement is an injury to the rights of the owner to an intangible right, not arising from contract); *King Bros. Prods. v. RKO Teleradio Pictures, Inc.*, 208 F. Supp. 271, 277 (S.D.N.Y. 1962) (holding that action for taking or depriving another of an intangible incorporeal right sounds in tort).

³⁴ See AS 09.10.070(a)(3) (establishing two-year statute of limitations for injuring personal property).

of another not arising on contract, the two-year statute of limitations applies to her claim.

C. The Two-Year Statute of Limitations for Taking, Detaining, or Injuring Personal Property Does Not Apply to Williams' Claim

BBNC argues that AS 09.10.070(a)(3) applies because the BBNC shares are “personal property.”³⁵ Williams argues that the shares are not personal property because the Alaska Supreme Court has held that “personal property” is “tangible property,” and shares are not tangible.³⁶

In *Kodiak Elec. Ass'n, Inc. v. DeLaval Turbine, Inc.*, the Alaska Supreme Court concluded that the phrase “injuring personal property” incorporates actions for injury to tangible property, but declined to define “the exact parameters of the types of actions encompassed within ‘injuring personal property’”³⁷ In *Law Offices of Steven D. Smith*, the Alaska Supreme Court rejected an argument that “personal property” includes economic loss, and reiterated that personal property refers to tangible property.³⁸

While it is possible that physical stock certificates may be considered tangible personal property, shares of stock are intangible.³⁹ Black's Law Dictionary defines intangible property as “Property that lacks a physical existence. Examples include stock

³⁵ Reply at 3–5.

³⁶ *Law Offices of Steven D Smith, P.C.*, 993 P.2d at 445–46 (citing *Kodiak Elec. Ass'n, Inc. v. DeLaval Turbine, Inc.*, 694 P.2d 150, 156 (Alaska 1984)); Opp. at 2.

³⁷ *Kodiak Elec. Ass'n, Inc.*, 694 P.2d at 156, n. 9.

³⁸ *Law Offices of Steven D Smith, P.C.*, 993 P.2d at 445. In neither of these cases does the Alaska Supreme Court distinguish the ruling in *State v. Wakefield Fisheries, Inc.*, 495 P.2d 166, 172 (Alaska 1972), that the statute of limitations for actions to recover personal property applies to the overpayment of taxes.

³⁹ See *Comm'r of Internal Revenue v. Scatena*, 85 F.2d 729, 732 (9th Cir. 1936); see also *Pilgrim's Pride Corp. v. C.I.R.*, 141 T.C. 533, 541 (2013), rev'd 779 F.3d 311 (5th Cir. 2015); see also *Dilley v. Ketchikan Gateway Borough*, 855 P.2d 1335, 1336–37 (Alaska 1993) (holding that pull-tabs are intangible property).

options and business goodwill.”⁴⁰ Tangible personal property is defined as “[c]orporeal personal property of any kind; personal property that can be seen, weighed, measured, felt, touched, or in any other way perceived by the senses, examples being furniture, cooking utensils, and books.”⁴¹ BBNC shares cannot be seen, weighed, felt, or perceived by the senses.

Black’s Law Dictionary defines “personal property” as “[a]ny movable or intangible thing that is subject to ownership and not classified as real property.”⁴² But given the Alaska Supreme Court’s interpretation that “personal property” refers to “tangible property,” Williams’ action to recover BBNC shares is not “taking, detaining, or injuring personal property” under AS 09.10.070(a)(3). Although shares of stock are intangible, they do represent rights that can be injured and wrongfully interfered with, as described above. Moreover, the statutory scheme established for the inheritance of Native corporation stock parallels the procedure for the transfer of personal property, providing a right to bring an action to challenge such transfer.⁴³

D. In the Alternative, the Two-Year Statute of Limitations for an Action Upon a Liability Created by Statute Applies to Williams’ claim

The Court concludes above that Williams’ action is one for the recovery of intangible personal property, seeking an order requiring BBNC to cancel the shares of stock that were wrongfully transferred to Jessie and Cody and to issue the shares of stock

⁴⁰ PROPERTY, *Intangible Property*, BLACK’S LAW DICTIONARY (10th ed. 2014).

⁴¹ PROPERTY, *Tangible Personal Property*, BLACK’S LAW DICTIONARY (10th ed. 2014).

⁴² PROPERTY, *Personal Property*, BLACK’S LAW DICTIONARY (10th ed. 2014).

⁴³ See AS 13.16.705(a), providing that a person entitled to the stock has the remedy set out in AS 13.16.685. AS 13.16.685 allows a person to bring an action to recover personal property, or to compel the transfer of personal property.

to her, and pay and distribute to her all dividends and distributions from or on account of the shares of stock. As set forth above, the Court concludes the action is one for injury to the rights of another not arising on contract. However, in the alternative, the Court concludes that this action is brought upon a liability created by statute.

BBNC argues that, because the Alaska Native Claims Settlement Act mandates BBNC stock descend by will or intestate,⁴⁴ and AS 13.16.705 requires BBNC to determine the person entitled to the stock, it is a “liability created by statute” under AS 09.10.070(a)(5). BBNC also points out that its determination can then be disputed in Superior Court.⁴⁵

Black’s Law Dictionary defines “liability” as “[t]he quality, state, or condition of being legally obligated or accountable; legal responsibility to another or to society, enforceable by civil remedy or criminal punishment.”⁴⁶ The Alaska Supreme Court has interpreted “liability created by statute” to include suits for monetary liabilities created by statute, including tax refunds, strict liability for the release of hazardous substances, obligations of employers to pay due compensation upon termination, obligations to compensate for employment discrimination, and statutory liens.⁴⁷ The Alaska Supreme

⁴⁴ See, e.g., *Calista Corp. v. Mann*, 564 P.2d 53, 58–59 (Alaska 1977) (“Section 7(h)(2) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1606(h)(2), directs that upon the death of a stockholder, ownership in his stock shall be transferred in accordance with his last will and testament or ‘under the applicable laws of intestacy.’ . . . [T]his language, which requires disposition of property in accord with state laws, also grants to the state courts the powers to interpret those laws.”).

⁴⁵ AS 13.16.705(a) (“In case of dispute as to the person entitled to receive the stock, a person claiming ownership may bring an independent action in the superior court.”).

⁴⁶ LIABILITY, BLACK’S LAW DICTIONARY (10th ed. 2014).

⁴⁷ *Kenai Peninsula Borough v. Port Graham Corp.*, 871 P.2d 1135, 1139 (Alaska 1994); *Flint Hills Res. Alaska, LLC v. Williams Alaska Petroleum, Inc.*, 377 P.3d 959, 971–72 (Alaska 2016); *Reed v. Municipality of Anchorage*, 741 P.2d 1181, 1185 (Alaska 1987); *Grundberg v. Alaska State Comm’n for Human Rights*, 333 P.3d 1, 4 (Alaska 2014); *Marine Const. & Design Co. v. Vessel Tim*, 434 P.2d 683, 685 (Alaska 1967).

Court has also indicated that a “liability created by statute” must explicitly supersede an existing common law remedy for the statute of limitations for the common law remedy to not apply.⁴⁸ Other courts have interpreted similar language to mean a liability created by statute that did not otherwise exist at common law.⁴⁹

AS 13.16.705 places an obligation on Native corporations to make the determination of the person entitled to stock in the corporation. It explicitly provides that settlement common stock or other inalienable stock in a Native corporation is not subject to probate. The statute explicitly authorizes an independent action to be filed in the Superior Court when there is a dispute as to the person entitled to receive the stock. The Court concludes that the statutory framework regarding the inheritance of Native corporation stock explicitly supersedes the common law remedy of handling such disputes in the context of a probate matter. Instead, the liability is placed upon the Native corporation per AS 13.16.705.

Because BBNC’s duty to make a determination of the person entitled to the stock, and the ability to challenge BBNC’s decision, exists only by virtue of AS 13.16.705(a), the Court concludes that Williams’ action is “upon a liability created by statute.”

⁴⁸ *State v. Wakefield Fisheries, Inc.*, 495 P.2d 166, 172 (Alaska 1972), *overruled on other grounds in Principal Mut. Life Ins. Co. v. State, Div. of Ins. Dep’t of Commerce & Econ. Dev.*, 780 P.2d 1023 (Alaska 1989).

⁴⁹ *See, e.g.*, 54 C.J.S. *Limitations of Actions* § 119 (“A statutory period of limitation for an action on a liability created by statute, other than a penalty or forfeiture, as prescribed by many statutes, applies only where the liability is one which would not exist but for the creative statute.”); *Torrealba v. Kesmetis*, 178 P.3d 716, 722 (Nevada 2008) (“The phrase ‘liability created by statute’ means a liability which would not exist but for the statute. Where a duty exists only by virtue of a statute the obligation is one created by statute.”) (quotations and citations omitted); *Royal Ins. Co. v. Roadarmel*, 11 P.3d 105, 108 (Montana 2000) (“[T]he phrase ‘liability created by statute’ has a settled meaning in the law of Montana as well as other states. This Court has construed the phrase to mean a liability which would not exist but for the statute.”) (internal quotations omitted)).

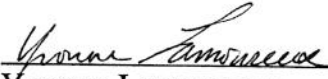
E. The Ten-Year Statute of Limitations for a Cause Not Otherwise Provided For Does Not Apply to Williams' Claim

Williams argues that if the contract statute of limitations does not apply, then the catch-all ten-year statute of limitations in AS 09.10.100 should apply.⁵⁰ BBNC argues that the two-year statute of limitations for AS 09.10.070(a) applies, and that the legislature would never have intended the ten-year statute of limitations to apply to Native corporation share ownership determinations.⁵¹ Because the Court concludes that AS 09.10.070(a)(2) or, in the alternative, AS 09.10.070(a)(5) applies, the ten-year statute of limitations for other actions does not apply here.

IV. Conclusion

The parties agree that there is no dispute of material fact regarding when the cause of action accrued. The Court concludes that the two-year statute of limitations applies to this case and bars Williams' claims. BBNC's Motion for Summary Judgment is granted. Plaintiff's Complaint is hereby dismissed.

IT IS SO ORDERED this 24th day of September 2018, at Anchorage, Alaska.



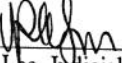
Yvonne Lamoureux
Superior Court Judge

⁵⁰ Opp. at 3.

⁵¹ Reply at 7.

I certify that on 9/24/18
a copy of the above was served on:

- W. Artus - email
- R. Hume - email
- C. Williams - mailed
- J. Williams - mailed



P. Lee, Judicial Assistant