This opinion is nonprecedential except as provided by Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1210

Andres Lugo,
Appellant,

vs.

ProPharma PV, Inc., et al.,
Respondents,

Linden Capital Partners,
Respondent.

Filed February 21, 2023
Affirmed
Gaïtas, Judge

Ramsey County District Court
File No. 62-CV-21-2523

Andrew Lugo, Davenport, Florida (self-represented appellant)

Julie R. Landy, Faegre Drinker Biddle & Reath LLP, Minneapolis, Minnesota (for respondent ProPharma PV, Inc., ProPharma Group, and Odyssey Investment Partners, LLC)

Lawrence M. Shapiro, Jeya Paul, Greene Espel PLLP, Minneapolis, Minnesota (for respondent Linden Capital Partners)

Considered and decided by Larson, Presiding Judge; Gaïtas, Judge; and Klaphake, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

GAÏTAS, Judge

Appellant Andres Lugo sued respondents ProPharma PV, Inc., ProPharma Group, and Odyssey Investment Partners, LLC (ProPharma), and Linden Capital Partners (Linden), alleging that these entities violated a stock option agreement that he entered into with his former employer Product Safety Resources, Inc. (PROSAR), which was later acquired by a ProPharma entity. The district court dismissed Lugo's complaints, determining that statutes of limitations barred Lugo's claims and that Lugo's complaint failed to state claims upon which relief could be granted. Lugo appeals, arguing that the district court incorrectly calculated the applicable limitations periods and erred in determining that he had failed to state cognizable legal claims. Because Lugo's claims are time barred by statutes of limitations, we affirm.

FACTS[1]

In October 2003, PROSAR hired Lugo as a toxicologist. Almost four years later, PROSAR terminated Lugo's employment.

Lugo's employment package with PROSAR included a stock option agreement. The option agreement allowed Lugo to purchase PROSAR stock, even after his employment ended. Approximately one month after PROSAR terminated Lugo's employment, he exercised his option to buy PROSAR stock.

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[1] In reviewing a district court's grant of motions to dismiss, the appellate court accepts the factual allegations in the complaint as true. *See Abel v. Abbott Nw. Hosp.*, 947 N.W.2d 58, 64 n.2 (Minn. 2020). Our statement of the facts is based on the allegations in Lugo's complaint.

In May 2015, ProPharma-MN acquired PROSAR via a short-form merger, and the resulting entity, ProPharma PV, Inc., was part of the ProPharma Group. The ProPharma Group was acquired by Linden in 2016 and then by Odyssey in 2020.

In 2021, Lugo sued respondents. He alleged that the 2015 merger violated the terms of his option agreement and Minnesota law.

Lugo's Option Agreement with PROSAR

The option agreement allowed Lugo to purchase up to 8,000 PROSAR stock shares at $0.05 per share. Under the agreement, however, Lugo could not purchase all 8,000 shares at once. Instead, his shares vested according to a schedule specified in paragraph 3 of the option agreement. Regarding that schedule, paragraph 3 states:

> During the first year after the date of this Agreement, this option shall not be exercisable. Thereafter, this option shall be exercisable to the extent of twenty-five percent (25%) of such total number of shares during each succeeding year until the earlier of the time this option shall have become exercisable to the extent of one hundred percent (100%) of the total number of shares granted or its termination as provided herein.

The option agreement also addressed the duration of the option. According to paragraph 3, if Lugo survived and continued working for PROSAR, the option would automatically terminate after ten years (i.e., in October 2013), unless it was "terminated earlier under the provisions of Paragraphs 10 or 11." Paragraph 10 discusses the status of the option upon termination of employment, stating:

> If the optionee ceases to be an employee . . . , this option shall completely terminate on the earlier of (i) the close of business on the three-month anniversary date of such termination of employment, and (ii) the expiration date under this option. In such period following such termination of employment, this option shall be exercisable only to the extent the option was

> exercisable on the date of termination of employment, but had not previously been exercised.

Paragraph 11 articulates when and how the option would terminate upon Lugo's death. The option agreement gave Lugo alone the option to purchase stock during his lifetime. Paragraph 4 provides that the option "shall not be transferable . . . other than by will or by the laws of descent and distribution."

The option agreement detailed how Lugo's "unexercised portion of the option" would be affected if there was a change in the nature of the stock of the company, such as through a merger. In the case of such an event, paragraph 12 requires any unexercised portion of the option to be adjusted, reduced, or enlarged "as appropriate," meaning that the "optionee shall have such anti-dilution rights under the option with respect to such events, but shall not have 'preemptive' rights." Paragraph 13 states that the option agreement binds "the company (i.e., PROSAR) and its successors and assigns."

When PROSAR terminated Lugo's employment in September of 2007, Lugo made multiple attempts to purchase more PROSAR stock than allowed by the option agreement. Lugo was informed that, because he had been employed for under four years, only 75% of his shares had vested under paragraph 3 of the option agreement. In October 2007, Lugo exercised his option and purchased 6,000 shares of PROSAR stock at $0.05 per share.

Merger of PROSAR and ProPharma-MN

On May 12, 2015, PROSAR was acquired by ProPharma-MN through a short-form merger. PROSAR sent a "notice of merger" to all its shareholders, including Lugo, on May 20, 2015. The notice stated that the merger occurred pursuant to Minnesota Statutes section 302A.621, which governs the merger of a parent company and a subsidiary. It also included a "plan of merger" document, which stated that "[e]ach outstanding share of common stock . . . shall be converted into the right to receive the Per Share Merger Consideration in accordance with the terms and subject to the conditions of this Plan of Merger." Under the terms of the merger plan, Lugo was entitled to about $0.075 for each of his shares.[2] Finally, the notice included a copy of the procedure Lugo could follow to assert dissenters' rights under Minnesota law.

Lugo did not formally exercise dissenters' rights using the procedure outlined in the notice. Instead, he handwrote his response on the notice stating, "I, Andres Lugo refuse to sell my 6,000 shares of common stock because of [a] violation of my rights."

In July 2020, after Lugo inquired about the status of his shares, a ProPharma Group board member[3] contacted him about receiving the compensation he was still owed for his 6,000 shares of PROSAR stock. It was after this conversation that Lugo brought suit against respondents.

Lugo's Lawsuit

On April 30, 2021, Lugo filed a complaint against respondents in the district court, but he did not serve the complaint on respondents. Several months later, on August 20, 2021, Lugo filed an amended complaint entitled "summons and complaint motion." This

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[2] In his complaint, Lugo states that, under the terms of the merger plan, he was offered $0.0747 per share. Lugo filed the notice of merger as an exhibit to his complaint but did not include the page discussing the amount he was offered per share. Respondents filed the entire notice-of-merger document with their motion to dismiss, which shows that Lugo was offered $.0759 per share.

[3] In his complaint, Lugo also states this person was a board member of Linden, but Linden refutes that fact.

filing included a certificate of service that stated that Lugo had mailed the summons and complaint to respondents via United States express mail. On November 8, 2021, a default hearing notice was issued because respondents had not answered either complaint. On November 10, 2021, Lugo filed a second amended complaint—dated November 9, 2021—and again mailed it to respondents.

Respondents then filed a nondispositive motion and requested a meeting with the district court to explain why a default hearing was improper. *See* Minn. R. Gen. Prac. 115.04(d) (allowing and encouraging parties to informally resolve certain nondispositive issues "through a telephone conference with the judge or judicial officer"). Following a chambers meeting, the district court granted respondents' request to strike the default hearing because proper service had not yet been effectuated. Lugo then filed a letter, which the district court construed as a motion for reconsideration of the decision. He argued in the letter that service through United States express mail was proper.

On December 6, 2021, before the district court addressed Lugo's letter, Lugo filed a third amended complaint.

Days later, on December 10, 2021, the district court reaffirmed its ruling that proper service of the summons had not yet occurred because personal service of pleadings is required, and Lugo had mailed his pleadings to respondents. *See* Minn. R. Civ. P. 4.03(c). ProPharma and Linden finally waived service on December 16 and December 20, 2021, respectively.

District Court's Dismissal of Lugo's Lawsuit

After the service issue was resolved, respondents moved to dismiss the lawsuit. They argued that Lugo's claims were all barred by statutes of limitation and that Lugo's November 9 and December 6 complaints failed to state a claim upon which relief could be granted.

Following a hearing, the district court dismissed Lugo's claims against respondents. The district court determined that Lugo's claims were time barred because they were brought outside of the time-period allowed by the applicable statutes of limitations. And the district court determined that, because Lugo's complaint also failed to state a claim upon which relief could be granted, dismissal was appropriate under Minnesota Rule of Civil Procedure 12.02(e).

DECISION

Lugo challenges the district court's decision to dismiss his lawsuit. He argues that the district court incorrectly identified the date when the limitations period for his causes of action began to run and therefore erred in dismissing his claims as time barred. He also contends that the district court misinterpreted the option agreement, which led to the erroneous dismissal of his complaint under Minnesota Rule of Civil Procedure 12.02(e) for failure to state a valid legal claim. We conclude that Lugo's claims accrued in May 2015. And because he commenced his lawsuit after the deadlines provided by the applicable statutes of limitations, his claims were time barred.

Before we turn to Lugo's arguments, we must identify which of the multiple complaints filed in this case we are considering. In its motion to dismiss, ProPharma referred to Lugo's second amended complaint filed on November 9. Linden's motion, on the other hand, referenced the third amended complaint filed on December 6. The district court focused on the November 9 complaint but stated that it would have "reach[ed] the same conclusion on both of the [November 9 and December 6] complaints." We have reviewed both the November 9 and the December 6 complaints. These complaints are not materially different, and they allege the same claims. Thus, our analysis concerns both the November 9 and December 6 complaints, which we refer to collectively as Lugo's complaint.

Lugo's complaint states three causes of action against respondents. First, it asserts a breach-of-contract claim, alleging that the May 2015 merger between PROSAR and ProPharma-MN breached the option agreement because it prevented Lugo from exercising his option to purchase additional shares and it did not vindicate his anti-dilution rights. Second, the complaint claims that respondents engaged in "predatory and deceptive pricing" when they offered to buy his shares for $0.0747 in connection with the 2015 merger. Third, the complaint alleges that respondents violated the Minnesota Business Corporation Act (MBCA), Minnesota Statutes sections 302A.001-.92 (2022), during the merger by not allowing Lugo to assert his anti-dilution rights and by offering an unfair price for his shares.[4]

[4] Lugo also argues before this court that respondents violated Minnesota Statutes section 181.64 (2022), which makes it unlawful to use false statements to induce another to enter employment. Lugo did not raise this claim in the November 9 or December 6 complaints, or in his two preceding complaints. Because Lugo did not assert this claim in the district court, we do not consider it. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (concluding that a reviewing court may only consider issues that were presented and considered by the district court).

The district court determined that each of Lugo's three claims was barred by the applicable statute of limitations. Statutes of limitations help ensure that evidence is not lost to time. *See Park Nicollet Clinic v. Hamann*, 808 N.W.2d 828, 832 (Minn. 2011). These statutes preclude a plaintiff's cause of action if it is not brought within a designated time period after the cause of action accrues. *Weston v. McWilliams & Assocs.*, 716 N.W.2d 634, 641 (Minn. 2006); *see* Minn. Stat. § 541.01 (2022) ("Actions can only be commenced within the periods prescribed in this chapter, after the cause of action accrues."); *see also Wichelman v. Messner*, 83 N.W.2d 800, 821 (Minn. 1957) ("[A] statute of limitations necessarily deprives a person of an interest which he would be able to assert in the absence of the statute if he fails to commence action in the stated period."). A cause of action accrues, and the statute of limitations period begins running, when "all of the elements of the action have occurred, such that the cause of action could be brought and would survive a motion to dismiss for failure to state a claim." *Park Nicollet Clinic*, 808 N.W.2d at 832. "Because an assertion that the statute of limitations bars a cause of action is an affirmative defense, the party asserting the defense has the burden of establishing each of the elements." *MacRae v. Group Health Plan, Inc.*, 753 N.W.2d 711, 716 (Minn. 2008). An appellate court "review[s] de novo the construction and application of a statute of limitations, including the law governing the accrual of a cause of action." *Sipe v. STS Mfg., Inc.*, 834 N.W.2d 683, 686 (Minn. 2013) (quotation omitted).

To decide whether a cause of action was commenced within the timeframe provided by the applicable statute of limitations, a court must determine when the action was commenced. "A civil action is commenced . . . (a) when the summons is served . . . or

(b) at the date of signing a waiver of service pursuant to Rule 4.05." Minn. R. Civ. P. 3.01(a), (b); *see also Doerr v. Warner*, 76 N.W.2d 505, 511 (Minn. 1956) ("As a general rule a civil action is commenced, and the court thereby acquires jurisdiction, when personal service upon the defendant is actually made as prescribed by statute or rule."); *Wick v. Wick*, 670 N.W.2d 599, 604 (Minn. App. 2003) (relying on *Doerr*, 76 N.W.2d at 511 and rule 3.01 when stating, "[c]ivil actions . . . are commenced by service of a summons on the defendant").

The district court determined that Lugo commenced his actions against ProPharma PV, ProPharma Group, and Odyssey on December 16, 2021, when they waived service, and against Linden on December 20, 2021, when it waived service. It is unclear whether Lugo challenges this determination on appeal. In any event, we agree that Lugo commenced his actions in December 2021. Although Lugo *filed* his first complaint on April 30, 2021, respondents were never properly served. Respondents formally waived service on December 16, 2021, and December 20, 2021, which commenced the action pursuant to Minnesota Rule of Civil Procedure 3.01(b). Thus, in deciding whether Lugo's actions were commenced within the applicable limitations periods, we use December 2021 as the date the actions were commenced.

We next determine when Lugo's three causes of action accrued and whether his December 2021 lawsuit was commenced within the applicable limitations periods for those causes of action.

A. Lugo's breach of contract claim is time-barred.

Lugo's complaint alleges that his option agreement was a contract and that respondents breached the contract. The statute of limitations period for a breach of contract claim is six years. *See* Minn. Stat. § 541.05, subd. 1(1) (2022). The cause of action for a breach-of-contract claim "accrues when the terms of the contract are breached." *St. Paul Fire & Marine Ins. Co. v. A.P.I., Inc.*, 738 N.W.2d 401, 408 (Minn. App. 2007), *rev. denied* (Minn. Dec. 11, 2007); *see also Levin v. C.O.M.B. Co.*, 441 N.W.2d 801, 803 (Minn. 1989) ("[I]t has long been settled that a cause of action for breach of contract accrues on the breach of the terms of the contract.").

The complaint asserts that the May 2015 merger breached the option agreement in two ways. First, it states that the May 2015 merger prevented Lugo from exercising his option to purchase additional shares. However, Lugo's option to purchase shares expired in December 2007, three months after he was terminated. According to the option agreement, when an employee is terminated from employment, the option "shall completely terminate on the earlier of (i) the close of business on the three-month anniversary date of such termination of employment, and (ii) the expiration date under this option." And Lugo's complaint states that his employment was terminated on or around September 6, 2007. Because Lugo's option expired in 2007, the 2015 merger did not impact his option to purchase shares and was not the triggering event for the statute of limitations. Any breach-of-contract claim concerning Lugo's option to purchase shares would have accrued before the option expired in 2007. Thus, the six-year statute of limitations barred Lugo's breach-of-contract claim as to his option to purchase shares.

Second, Lugo's complaint alleges that the 2015 merger breached his option agreement because it did not vindicate his anti-dilution rights under the agreement. Because this alleged breach-of-contract occurred in May 2015—when the merger occurred and Lugo was notified of it—Lugo's cause of action accrued then. Given the six-year limitations period, Lugo had until May 2021 to commence his cause of action. When Lugo commenced his lawsuit in December 2021, the limitations period had expired.

We reject Lugo's argument, made for the first time on appeal, that the merger was not "complete" until June 2016, when he received a letter that included a "check for [his] proportionate share of the final escrow balance resulting from the completed acquisition of [PROSAR]." Lugo's complaint states that the merger occurred in May 2015 and that he received notice of the merger at that time, including information about how much he would be compensated for his shares and how to assert dissenters' rights.[5]

Because Lugo commenced his cause of action for breach of contract outside of the six-year limitations period, the district court properly dismissed the claim.

B. Lugo's claim for "predatory and deceptive pricing" is time barred.

Lugo's complaint alleges a cause of action for "predatory and deceptive pricing," stating that the price he was offered for his stock in connection with the May 2015 merger was "predatory." As the district court observed, predatory pricing is an antitrust-law

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[5] Lugo also argues on appeal that the statute of limitations period began running after his conversation with the ProPharma board member in July of 2020 because he only then became aware of his breach-of-contract claim. But a cause of action based on a breach of contract accrues even "when the aggrieved party was ignorant of the facts constituting the breach." *Jacobson v. Bd. of Trs. of the Tchrs. Ret. Ass'n*, 627 N.W.2d 106, 110 (Minn. App. 2001), *rev. denied* (Minn. Aug. 15, 2001). Thus, we are not persuaded by this argument.

concept. *See* Minn. Stat. § 325D.52 (2022) ("The establishment, maintenance, or use of . . . monopoly power over any part of trade or commerce by any person or persons for the purpose of affecting competition or controlling, fixing, or maintaining prices is unlawful."); *see also Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222 (1993) (analyzing a claim for predatory pricing under section 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2 (1988)); *Prestressed Concrete, Inc. v. Bladholm Bros. Culvert Co.*, 498 N.W.2d 274 (Minn. App. 1993) (applying the Minnesota Antitrust Law of 1971, Minn. Stat. §§ 325D.49-.66 (1990), to a claim of predatory pricing and comparing Minnesota's antitrust statute to the Sherman Antitrust Act), *rev. denied* (Minn. May 28, 1993). A four-year statute-of-limitations period applies to antitrust claims in Minnesota. *See* Minn. Stat. § 325D.64, subd. 1 (2022) (stating that actions brought under the Minnesota Antitrust Law of 1971 "shall be forever barred unless commenced within four years of the date upon which the cause of action arose").

Lugo agrees that the alleged predatory pricing occurred "at the merger," which occurred in May 2015. Thus, his claim, which was not brought until December 2021, is time barred.

For the first time on appeal, Lugo argues that his predatory pricing claim was not an antitrust claim, but instead, was a claim that "the abusive offer of 7.47 cents per share . . . made at the merger" violated his rights under the option agreement. But as discussed above, any claim that the 2015 merger was a breach of contract is also time barred.

Because Lugo's "predatory and deceptive pricing" claim was not commenced within four years or six years of the 2015 merger, the district court correctly dismissed it as time barred.

C. Lugo's claim that respondents violated the MBCA, which we construe as a breach-of-contract claim, is time-barred.

The final cause of action alleged in Lugo's complaint is a violation of the MBCA. According to the complaint, respondents violated the MBCA "by altering and/or abolishing preferential rights described in Paragraphs 1, 2, 3, 12, and 13" of the option agreement, and "by not applying [his] adjustment and antidilution rights."

As a basis for the MCBA claim, the complaint cites Minnesota Statutes section 302A.471, entitled "Rights of dissenting shareholders." The complaint relies on subdivision 1 of that statute, which provides, in part:

> A shareholder of a corporation may dissent from, and obtain payment for the fair value of the shareholder's shares in the event of, any of the following corporate actions:
>
> (a) unless otherwise provided in the articles, an amendment of the articles that materially and adversely affects the rights or preferences of the shares of the dissenting shareholder in that it:
>
> (1) alters or abolishes a preferential right of the shares;
>
> (2) creates, alters, or abolishes a right in respect of the redemption of the shares, including a provision respecting a sinking fund for the redemption or repurchase of the shares.

Minn. Stat. § 302A.471, subd. 1(a).

Although section 302A.471 outlines the rights of shareholder dissenters, including the opportunity to "obtain payment for the fair value of [their] shares," it does not create a cause of action. We have previously determined that "[a]sserting appraisal rights[6] is the exclusive remedy available to a shareholder dissenting from a freeze-out merger unless there are allegations of misrepresentation, fraud, deceit, or breach of fiduciary duty involved in effecting the merger." *Sifferle*, 384 N.W.2d at 510. Because Lugo's claim that respondents violated section 302A.471 is not a valid cause of action, there is no corresponding statute of limitations.

We agree with the district court that, given Lugo's factual assertions, the cause of action is more akin to a breach-of-contract claim. The complaint alleges that respondents violated certain provisions in the option agreement. And it asserts that respondents failed to afford Lugo his "adjustment and antidilution rights," which were referenced in the option agreement. We therefore understand the third cause of action in the complaint to be a claim for breach of contract.

According to the complaint, the third cause of action was triggered by the May 2015 merger. Because the cause of action accrued in May 2015, and Lugo commenced his lawsuit in December 2021—after the six-year limitations period for a breach-of-contract claim had expired—it was time barred. The district court therefore correctly dismissed the claim.

Based on our de novo review, we conclude that all of Lugo's claims were barred by the applicable statutes of limitations. Accordingly, we do not reach the district court's

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[6] As used in this case, "appraisal rights" are the same as "dissenters' rights." *See Sifferle v. Micom Corp.*, 384 N.W.2d 503, 506 (Minn. App. 1986), *rev. denied* (Minn. June 13, 1986).

alternative ground for dismissing the case—that Lugo's complaint failed to state a claim upon which relief could be granted.

Affirmed.