

[Cite as *Casciani v. Critchell*, 2015-Ohio-977.]

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

BARBARA J. CASCIANI,	:	APPEAL NO. C-140338
		TRIAL NO. A-1102316
Plaintiff-Appellant,	:	
		<i>OPINION.</i>
vs.	:	
BRIAN J. CRITCHELL,	:	
and	:	
NISBET, INC., d.b.a. NISBET	:	
BROWER,	:	
Defendants-Appellees.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed in Part and Reversed in Part, and Cause Remanded

Date of Judgment Entry on Appeal:

Bieser, Greer & Landis LLP, and *David P. Williamson*, for Plaintiff-Appellant,
Markesbery & Richardson LPA, and *Jeffrey A. Kaleda*, for Defendants-Appellees.

Please note: this case has been removed from the accelerated calendar.

SYLVIA S. HENDON, Presiding Judge.

{¶1} Plaintiff-appellant Barbara J. Casciani has appealed from the trial court's entry granting summary judgment to defendants-appellees Nisbet, Inc., d.b.a. Nisbet Brower ("Nisbet") and Brian J. Critchell on the claims raised in Casciani's second amended complaint.

{¶2} Because we conclude that the trial court erred in granting summary judgment on Casciani's claims for tortious interference with her contract with Washington Mutual Bank and tortious interference with her business relationship with Washington Mutual Bank, we reverse the trial court's judgment with respect to those two claims. The trial court's judgment is otherwise affirmed.

Facts and Procedure

{¶3} In May of 2006, Casciani entered into a contract with Brandenburg Construction for the construction of a new home on the property located at 11217 Riversedge Court in Loveland. Construction supplies and materials for Casciani's home were obtained from Nisbet. Critchell, a Nisbet employee, was in charge of Brandenburg Construction's account with Nisbet.

{¶4} Casciani contracted with Washington Mutual Bank in July of 2006 to obtain financing for the construction of her home. Brandenburg Construction was to be paid in draws from Casciani. Nisbet, in turn, was paid directly by Brandenburg Construction and had no direct contract with Casciani. Jack Brandenburg, president of Brandenburg Construction, arranged with Critchell for Nisbet to ship certain materials to a home that Brandenburg was renovating in Tennessee and to invoice

those materials on the account that Nisbet had created for the materials purchased for the construction of Casciani's home.

{¶5} Casciani began to suspect that she had paid Brandenburg Construction for more construction supplies than she had actually received. On March 17, 2007, she stopped Brandenburg Construction from continuing work on her home so that she could resolve her concerns. After Casciani halted construction, Brandenburg Construction filed a mechanic's lien against her property on March 22, 2007. On April 11, 2007, Nisbet filed its own mechanic's lien for materials that it had furnished but had not yet received payment on. Included in this lien were materials that had been sent to Jack Brandenburg's property in Tennessee and had not been used in the construction of Casciani's home. A subcontractor who had performed work on Casciani's home also filed a third lien against her property.

{¶6} Washington Mutual discontinued financing on the construction of Casciani's home. With some difficulty, Casciani had to obtain a construction loan from a different lender. Brandenburg and Nisbet each filed complaints against Casciani in the Hamilton County Court of Common Pleas. Washington Mutual Bank was named as an additional defendant in Nisbet's complaint. Both complaints were later dismissed.

{¶7} On July 30, 2009, Casciani filed a complaint in the case numbered A-0907333 against various defendants, including Jack Brandenburg, Brandenburg Construction, Nisbet, and Critchell. Casciani later amended her complaint before entering into a settlement agreement with the Brandenburg defendants and dismissing all claims against Nisbet and Critchell without prejudice. The amended complaint in A-0907333 was not made a part of this court's record on appeal.

{¶8} On March 18, 2011, Casciani filed a new complaint in the case numbered A-1102316 against Nisbet and Critchell. She amended this complaint on October 5, 2011, and it is the claims raised in this amended complaint that are before us on appeal. Casciani's amended complaint contained the following claims: tortious interference with contracts, relating to both Casciani's contract with Brandenburg Construction and her contract with Washington Mutual Bank; tortious interference with business relationships, relating to both Casciani's relationship with Brandenburg Construction and her relationship with Washington Mutual Bank; conversion; and conspiracy.

{¶9} Nisbet and Critchell filed a motion for summary judgment on all claims raised in Casciani's amended complaint. They alleged that the claims for tortious interference with contracts and tortious interference with business relationships were filed outside of the applicable limitations period, and that they were entitled to summary judgment on the merits of all asserted claims. The trial court granted Nisbet's and Critchell's motion for summary judgment.

{¶10} Casciani has appealed. She argues in her sole assignment of error that the trial court erred in granting summary judgment to Nisbet and Critchell.

Standard of Review

{¶11} We review a trial court's grant of summary judgment de novo. *See Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Summary judgment is appropriately granted when there exist no genuine issues of material fact, the party moving for summary judgment is entitled to judgment as a matter of law, and the evidence, when viewed in favor of the nonmoving party,

permits only one reasonable conclusion that is adverse to that party. *See State ex rel. Howard v. Ferreri*, 70 Ohio St.3d 587, 589, 639 N.E.2d 1189 (1994).

Statute of Limitations

{¶12} We first must ascertain whether Casciani filed within the applicable limitations period her claims for tortious interference with contracts and tortious interference with business relationships. Casciani, Nisbet, and Critchell agree that these claims are subject to a four-year limitations period provided in R.C. 2305.09(D). But they disagree as to when the limitations period began to run.

{¶13} R.C. 2305.09 provides as follows:

Except as provided for in division (C) of this section, an action for any of the following causes shall be brought within four years after the cause thereof accrued:

(A) For trespassing upon real property;

(B) For the recovery of personal property, or for taking or detaining it;

(C) For relief on the ground of fraud, except when the cause of action is a violation of section 2913.49 of the Revised Code, in which case the action shall be brought within five years after the cause thereof accrued;

(D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 1304.35, 2305.10 to 2305.12, and 2305.14 of the Revised Code;

(E) For relief on the grounds of a physical or regulatory taking of real property.

If the action is for trespassing under ground or injury to mines, or for the wrongful taking of personal property, the causes thereof shall not accrue until the [wrong] is discovered; nor, if it is for fraud, until the fraud is discovered

{¶14} The Ohio Supreme Court considered when the limitations period provided for in R.C. 2305.09 commenced to run in *Investors Reit One v. Jacobs*, 46 Ohio St.3d 176, 546 N.E.2d 206 (1989). The court recognized that the General Assembly had purposely included a discovery rule for certain actions arising under R.C. 2305.09, namely for actions involving trespassing under ground, the wrongful taking of personal property, and fraud. *Id.* at 181. It noted that “[t]he legislature’s express inclusion of a discovery rule for certain torts arising under R.C. 2305.09, including fraud and conversion, implies the exclusion of other torts arising under the statute, including negligence.” *Id.*

{¶15} We hold that, as provided for in R.C. 2305.09, the discovery rule is inapplicable to Casciani’s tortious interference claims, and that the limitations period for these two claims began to run at the time that the tortious actions were committed. *Id.* at 182.

{¶16} Consequently, Casciani’s claims for tortious interference with contracts and tortious interference with business relationships, as they relate to Casciani’s contract and business relationship with Brandenburg Construction, were not timely filed. Casciani’s complaint alleged that Nisbet and Critchell had tortiously interfered with her contract and relationship with Brandenburg Construction by shipping materials to Jack Brandenburg’s home in Tennessee and then invoicing those materials on Casciani’s account with Nisbet. Critchell testified in his

deposition that Nisbet had begun shipping materials to Tennessee and invoicing those materials on Casciani's account in July of 2006. While this practice was ongoing, it had culminated and resulted in any potential interference by March 17, 2007, when Casciani stopped Brandenburg Construction from continuing further work on her home. So the four-year-limitations period had already run when Casciani filed her complaint on March 18, 2011.

{¶17} But Casciani's two tortious interference claims as they relate to her contract and relationship with Washington Mutual Bank were timely filed. With respect to these claims, Casciani alleged in her complaint that Nisbet's mechanic's lien contained false statements because it sought payment for materials that had never been provided to Casciani, but had instead been delivered to Jack Brandenburg's Tennessee home. As a result of the mechanics' liens filed against her, including the lien filed by Nisbet, Washington Mutual Bank ceased funding Casciani's construction. Nisbet's and Critchell's allegedly tortious interference occurred on April 11, 2007, when the mechanic's lien was filed. The limitations period for the claims involving tortious interference with Casciani's contract and relationship with Washington Mutual Bank had not yet run when Casciani filed her complaint on March 18, 2011.

{¶18} In summary, Casciani's claims for tortious interference with contracts and tortious interference with business relationships, as they relate to her contract and relationship with Washington Mutual Bank, were filed within the applicable limitations period. But the limitations period for these claims, as they relate to her contract and relationship with Brandenburg Construction, had already run at the time that Casciani filed her complaint.

Savings Statute

{¶19} Casciani contends that her claims for tortious interference with her contract and relationship with Brandenburg Construction were timely filed under R.C. 2305.19, commonly referred to as the savings statute. R.C. 2305.19(A) provides that

In any action that is commenced or attempted to be commenced, if in due time a judgment for the plaintiff is reversed or if the plaintiff fails otherwise than upon the merits, the plaintiff or, if the plaintiff dies and the cause of action survives, the plaintiff's representative may commence a new action within one year after the date of the reversal of the judgment or the plaintiff's failure otherwise than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later.

{¶20} Casciani dismissed her claims against Nisbet and Critchell without prejudice in the case numbered A-0907333 on October 26, 2010. She commenced her new action on March 18, 2011. This was within one year of her “fail[ure] otherwise than upon the merits.” But even when the new action is timely commenced according to the terms of the savings statute, R.C. 2305.19 is only applicable when the original and new actions are substantially the same. *See Children's Hosp. v. Ohio Dept. of Pub. Welfare*, 69 Ohio St.2d 523, 525, 433 N.E.2d 187 (1982). The two actions will be considered substantially the same when they contain “similar factual allegations so that it can reasonably be said that the party or parties were put on fair notice of the type of claims that could be asserted.”

Lanthorn v. Cincinnati Ins. Co., 4th Dist. Adams No. 02CA743, 2002-Ohio-6798, ¶ 27.

{¶21} In her original complaint in the case numbered A-0907333, Casciani raised two claims against Nisbet and Critchell, conspiracy and slander of title. Consequently, R.C. 2305.19 will only save Casciani's tortious interference claims if the original complaint contained sufficient factual allegations to put Nisbet and Critchell on notice that claims involving tortious interference with Casciani's contract and relationship with Brandenburg Construction could be asserted. After reviewing the original complaint in the case numbered A-0907333, we find that it did not contain sufficient factual allegations to provide such notice.

{¶22} Both tortious interference claims raised in the current action concern Nisbet's practice of shipping materials to Jack Brandenburg's property in Tennessee and then invoicing those materials to Casciani's account with Nisbet. The factual allegations in the original action concerned the mechanic's lien that Nisbet had filed against Casciani's property. The original complaint simply contained no allegations that Nisbet had invoiced Casciani for materials that had been shipped to property owned by Jack Brandenburg in Tennessee. It did not put Nisbet and Critchell on notice of claims for tortious interference with contracts and tortious interference with business relationships concerning Casciani's contract and relationship with Brandenburg Construction.

{¶23} Thus, because they were filed outside of the limitations period, we hold that the trial court appropriately granted summary judgment to Nisbet and Critchell on those claims.

Merits of Summary Judgment

{¶24} We now consider whether summary judgment was appropriately granted on the merits of Casciani's claims for conspiracy, conversion, and tortious interference with her contract and business relationship with Washington Mutual Bank.

{¶25} Casciani failed to argue the merits of her conspiracy claim both in her responsive motion to Nisbet's and Critchell's motion for summary judgment and in her appellate brief. Consequently, we conclude that she has abandoned any error with respect to that claim. *See Thomas v. Cohr, Inc.*, 197 Ohio App.3d 145, 2011-Ohio-5916, 966 N.E.2d 915, ¶ 4 (1st Dist.); App.R. 12(A)(2).

{¶26} We have previously defined the tort of conversion as "the wrongful exercise of dominion or control over property in exclusion of the owner's right, or the withholding of property from the owner's possession under a claim inconsistent with the owner's rights." *Alexander v. Motorists Mut. Ins. Co.*, 1st Dist. Hamilton No. C-110836, 2012-Ohio-3911, ¶ 20, citing *Zacchini v. Scripps Howard Broadcasting Co.*, 47 Ohio St.2d 224, 226, 351 N.E.2d 454 (1976), *rev'd on other grounds*, 433 U.S. 562, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977). To succeed on a claim for conversion, a plaintiff must establish his or her own ownership or right to possession of the property at the time that it was converted, the defendant's conversion of the property by a wrongful act, and damages. *Id.* Further, if the defendant obtained possession of the property lawfully, the plaintiff must additionally establish that he or she demanded that the defendant return the property after the defendant had exercised dominion or control over it, and that the defendant refused to do so. *Id.*

{¶27} With respect to her conversion claim, Casciani alleged in her complaint that Nisbet and Critchell had charged Brandenburg Construction, who in turn had charged Casciani, for materials that were sent to Jack Brandenburg's Tennessee property, and that Nisbet had been paid for these materials with proceeds from Casciani's loan with Washington Mutual Bank. Casciani contends that this amounted to a wrongful withholding of her property, including both construction materials and loan proceeds.

{¶28} To the extent that Casciani's claim concerns the conversion of materials that she alleged rightfully belonged to her, we hold that the trial court appropriately granted summary judgment to Nisbet and Critchell because they do not have possession of these materials. Rather, Jack Brandenburg retained possession of the materials that had been improperly invoiced to Casciani's account.

{¶29} We further hold that the trial court properly granted summary judgment on Casciani's conversion claim as it relates to her loan proceeds. The record simply contains no evidence that Jack Brandenburg or Brandenburg Construction paid Nisbet for these materials with proceeds that it had received in draws from Casciani's loan with Washington Mutual Bank.

{¶30} We now consider Casciani's tortious interference claims. To succeed on a claim for tortious interference with contracts, a plaintiff must establish that a contract existed, that the defendant knew of that contract, intentionally procured a breach of that contract, and acted without justification, and that the plaintiff suffered resulting damages. *Id.* at ¶ 33. To succeed on a claim of tortious interference with a business relationship, a plaintiff must show that the defendant purposely and improperly interfered with the plaintiff's business relationship by either "(1) inducing

or otherwise causing a third person not to enter into or continue the prospective relation, or (2) preventing the plaintiff from acquiring or continuing the prospective relation.” *Id.* at ¶ 30. And, as with a claim for tortious interference with contracts, the plaintiff must show that the interference was without justification or privilege. *Id.*

{¶31} Following our review of the record, we conclude that genuine issues of material fact remain with respect to both of these claims. Nisbet contends that it had no knowledge of Casciani’s relationship and contract with Washington Mutual Bank. But the record demonstrates that Nisbet named Washington Mutual as a defendant in the complaint it filed seeking to foreclose on its mechanic’s lien. Issues of fact remain as to when Nisbet became aware of Casciani’s contract with Washington Mutual, and whether Nisbet possessed that knowledge at the time that it filed a mechanic’s lien against Casciani’s property. Further, it is undisputed that Nisbet’s mechanic’s lien included materials that had been shipped to Jack Brandenburg’s property in Tennessee and had not been received by Casciani. These false statements in the lien create issues of fact as to whether Nisbet’s interference was intentional and improper and as to whether it was done without justification or privilege. Additional issues of fact remain as to whether Nisbet’s filing of a mechanic’s lien containing false statements induced Washington Mutual Bank to discontinue financing the construction of Casciani’s home.

{¶32} For these reasons, we hold that the trial court erred in granting Nisbet and Critchell summary judgment on Casciani’s claims for tortious interference with contracts and tortious interference with business relationships, as those claims relate

to her contract and business relationship with Washington Mutual Bank. We, therefore sustain in part Casciani's assignment of error.

Conclusion

{¶33} The trial court properly granted summary judgment to Nisbet and Critchell on Casciani's claims for conversion, conspiracy, tortious interference with her contract with Brandenburg Construction, and tortious interference with her business relationship with Brandenburg Construction. But the trial court erred in granting summary judgment on Casciani's claims for tortious interference as they relate to her contract and relationship with Washington Mutual Bank. We, therefore, reverse the trial court's grant of summary judgment on those two claims and remand for further proceedings consistent with this opinion. In all other respects, we affirm the trial court's judgment.

Judgment affirmed in part and reversed in part, and cause remanded.

MOCK and HILDEBRANDT, JJ., concur.

LEE H. HILDEBRANDT, JR., retired, from the First Appellate District, sitting by assignment.

Please note:

The court has recorded its own entry on the date of the release of this opinion.