

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

| | | |
|--------------------------------|---|-----------------------------|
| Kevin A. Tolliver, | : | |
| | : | |
| Plaintiff-Appellant, | : | No. 08AP-1083 |
| | : | (C.P.C. No. 07CVH-11-15096) |
| v. | : | |
| | : | (REGULAR CALENDAR) |
| Scott A. Mittman, Esq. et al., | : | |
| | : | |
| Defendants-Appellees. | : | |

D E C I S I O N

Rendered on July 23, 2009

Kevin A. Tolliver, pro se.

*Lee C. Mittman & Associates Co., L.P.A., Lee C. Mittman and
Scott A. Mittman*, pro se.

APPEAL from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} Plaintiff-appellant, Kevin A. Tolliver ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas, which dismissed his complaint against defendants-appellees Scott A. Mittman, Lee C. Mittman, and Lee C. Mittman & Associates Co., L.P.A. (collectively "appellees"), pursuant to Civ.R. 12(B)(6).

{¶2} Appellant filed his original action against appellees on December 1, 2003.¹ In the complaint, appellant alleged legal malpractice originating from appellees' handling of appellant's bankruptcy action. Appellant voluntarily dismissed the complaint on

¹ Appellant is and has been appearing pro se in this matter and is currently incarcerated and serving a sentence of 18 years to life for the killing of his fiancé.

January 11, 2006, pursuant to Civ.R. 41(A). Thereafter, on January 5, 2007, appellant filed his complaint in the United States District Court for the Southern District of Ohio, Eastern Division. The federal court dismissed the action for lack of jurisdiction on November 19, 2007.

{¶3} On November 6, 2007, prior to the federal court's dismissal of his action, appellant filed the instant action in the common pleas court. Appellees filed a joint motion to dismiss the complaint on December 11, 2007, contending the action was time barred as it was filed 23 months after his voluntary dismissal of the original complaint. The trial court agreed and granted appellees' motion to dismiss.

{¶4} Appellant timely appeals and brings the following two assignments of error for review:

ASSIGNMENT OF ERROR NO. 1:

WHERE THE REASON FOR PLAINTIFF'S VOLUNTARY DISMISSAL OF STATE SUIT WAS A GOOD-FAITH RELIANCE ON FEDERAL COURT EXECUTIVE DIRECTOR'S OPINION THAT FEDERAL JURISDICTION AND VENUE WAS PROPER THE U.S. DISTRICT COURT HAD JURISDICTION TO TOLL, OR RESTART, § 2305.19 SAVINGS STATUTE BY THE PERIOD OF ACTUAL CONTROVERSY IN THAT COURT. - - ALTERNATIVELY 60(B) PETITION SHOULD HAVE OPERATED TO RESTORE THE ORIGINAL CASE. IT IS ERROR TO DISMISS SUCH A CASE AS TIME BARRED.

ASSIGNMENT OF ERROR NO. 2:

WHEN PLAINTIFF INSTITUTES CIVIL ACTION IN FEDERAL COURT AND DEFENDANT APPEARS AND FILES A MOTION TO DISMISS ON GROUNDS THAT THERE IS "NO DIVERSITY OF CITIZENSHIP" AND THE FEDERAL COURT DISMISSES ON THAT GROUND, THE ACTION IS COMMENCED AND THE FAILURE IS "OTHER THAN UPON MERIT" WITHIN SAVINGS STATUTE, AND PLAINTIFF CAN BRING A NEW ACTION IN STATE COURT.

IT IS ERROR TO DISMISS SUCH A CASE AS TIME
BARRED.

{¶5} Appellate review of a trial court's decision to dismiss a case, pursuant to Civ.R. 12(B)(6), is de novo. *Singleton v. Adjutant Gen. of Ohio*, 10th Dist. No. 02AP-971, 2003-Ohio-1838. In order for a court to dismiss a case, pursuant to Civ.R. 12(B)(6), "it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, syllabus. The court must presume all factual allegations in the complaint are true and draw all reasonable inferences in favor of the non-moving party. *Bridges v. Natl. Engineering & Contracting Co.* (1990), 49 Ohio St.3d 108, 112. In considering a motion to dismiss under Civ.R. 12(B)(6), the court looks only to the complaint to determine whether the allegations are legally sufficient to state a claim. *Springfield Fireworks, Inc. v. Ohio Dept. of Commerce*, 10th Dist. No. 03AP-330, 2003-Ohio-6940. We will not, however, consider unsupported conclusions that may be included among, but not supported by, the factual allegations of the complaint, because such conclusions cannot be deemed admitted and are not sufficient to withstand a motion to dismiss. *Wright v. Ghee*, 10th Dist. No. 01AP-1459, 2002-Ohio-5487, citing *Grange Mut. Cas. Co. v. Klatt* (Mar. 18, 1997), 10th Dist. No. 96APE07-888.

{¶6} Because they are interrelated and both challenge the trial court's dismissal of his complaint for being time barred, we will address these assigned errors together. Reduced to their essence, these two assigned errors contend the trial court erred in concluding appellant could not utilize the savings statute to re-file his complaint in the

common pleas court after it was dismissed from the federal district court for lack of jurisdiction.²

{¶7} Pursuant to R.C. 2305.11(A), an action for legal malpractice must be filed within one year after the cause of action accrued. The alleged malpractice here took place at some time between 2000 and 2003 as that was the time frame of appellant's bankruptcy proceedings. Though his original action for legal malpractice was filed on December 1, 2003, appellant voluntarily dismissed the action on January 11, 2006. Thus, the statute of limitations had expired at the time appellant dismissed his complaint. Thus, his November 6, 2007 filing could be timely only by application of R.C. 2305.19, Ohio's savings statute, which provides that an action that "fails otherwise than upon the merits" may be re-filed by a plaintiff "within one year after the date of * * * the plaintiff's failure otherwise than upon the merits." Appellant's dismissal of his original complaint pursuant to Civ.R. 41(A)(1) constituted a failure "otherwise on the merits" within the meaning of R.C. 2305.19. *Estate of Millhon v. Millhon Clinic, Inc.*, 10th Dist. No. 07AP-413, 2007-Ohio-7153, ¶18, citing *Frysinger v. Leech* (1987), 32 Ohio St.3d 38, paragraph two of the syllabus.

{¶8} Appellant did not, however, file this action within one year of his Civ.R. 41(A) dismissal and, therefore, this action is not "saved" by the savings statute. It is axiomatic that the savings statute may be used only once to re-file a case. *Bailey v. Ohio State Dept. of Transp.*, 10th Dist. No. 07AP-849, 2008-Ohio-1513, ¶10, discretionary appeal not allowed, citing *Thomas v. Freeman*, 79 Ohio St.3d 221, 227, 1997-Ohio-395,

² Though this matter refers to prior actions that have been filed and dismissed, it does not present matters outside the complaint as appellant's complaint sets forth the procedural history of the prior actions. Additionally, attached to the complaint are an affidavit of appellant and multiple exhibits that reference the prior actions and their disposition.

citing *Hancock v. Kroger Co.* (1995), 103 Ohio App.3d 266. See also *Estate of Carlson v. Tippet* (1997), 122 Ohio App.3d 489; *Triplett v. Beachwood Village, Inc.*, 158 Ohio App.3d 465, 2004-Ohio-4905; *Gruber v. Kopf Builders, Inc.*, 147 Ohio App.3d 305, 2001-Ohio-4361.

{¶9} In *Bailey*, the plaintiff filed an action in the Cuyahoga County Court of Common Pleas and subsequently dismissed the matter pursuant to Civ.R. 41(A) on June 22, 2001. By this date the underlying statute of limitations for his claims had expired. Pursuant to the savings statute, however, the plaintiff's July 10, 2001 re-filing was timely. The defendants sought dismissal of the action for lack of jurisdiction arguing the matter was required to be brought in Franklin County. The trial court granted the defendants' motion to dismiss, and the Eighth District Court of Appeals affirmed the trial court's dismissal. The plaintiff then filed a complaint in the Franklin County Court of Common Pleas. The defendants once again sought dismissal, this time arguing application of the savings statute failed because it had already been used once when the complaint was re-filed in Cuyahoga County. The trial court granted the defendants' motion to dismiss and this court affirmed.

{¶10} Despite the fact that his re-filed complaint was dismissed by the Cuyahoga County Common Pleas Court for lack of jurisdiction, this court held the plaintiff could not utilize the savings statute to re-file his complaint in Franklin County. Specifically, this court stated, "[b]ecause plaintiff invoked the savings statute in order to re-file his complaint in Cuyahoga County, he cannot for the second time use the statute to render his Franklin County complaint timely. Accordingly, the trial court properly concluded the applicable statute of limitations bars plaintiff's complaint." *Id.* at ¶14. See also *Iglodi v.*

Montz (Aug. 31, 1995), 8th Dist. No. 68621 (holding the savings statute cannot be used more than once, even when the prior cases were involuntarily dismissed without prejudice).

{¶11} Appellant also contends this matter should be decided on the merits and not on mere "technicalities." While a trial court may have some flexibility with procedural rules, it lacks that flexibility when a party raises the expiration of the applicable statute of limitations as a defense. *Id.* at ¶16, citing *Giallombardo v. Terhune* (Nov. 24, 1995), 11th Dist. No. 95-L-046.

{¶12} Because the trial court properly concluded appellant's claims were barred by the statute of limitations and appellant was not entitled to invoke the savings statute a second time, we overrule appellant's two assignments of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT and TYACK, JJ., concur.
