

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Ohio Environmental Development Limited Partnership,	:	
	:	
Plaintiff-Appellant,	:	
	:	No. 09AP-683
v.	:	(C.C. No. 2009-01123)
	:	
Ohio Environmental Protection Agency et al.,	:	(REGULAR CALENDAR)
	:	
Defendants-Appellees.	:	

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D E C I S I O N

Rendered on February 9, 2010

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*McMahon DeGulis LLP, Stephen H. Daniels, Michael S. McMahon, and Evan J. Palik, for appellant.*

*Richard Cordray, Attorney General, Velda K. Hofacker-Carr, Kristin S. Boggs, and Robert K. James, for appellee Ohio Environmental Protection Agency.*

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APPEAL from the Court of Claims of Ohio.

SADLER, J.

{¶1} Plaintiff-appellant, Ohio Environmental Development Limited Partnership ("appellant"), appeals from the judgment of the Court of Claims of Ohio, in which that court granted the Civ.R. 12(B)(6) motion of defendant-appellee, Ohio Environmental Protection Agency ("appellee"), to dismiss appellant's complaint for breach of contract and promissory estoppel.

{¶2} According to the complaint, in 1993, the Ohio General Assembly passed Senate Bill 18, which authorized appellee to administer a vehicle emission test program in Cincinnati. The United States Environmental Protection Agency ("USEPA") approved Ohio's plan for its program, as set forth in S.B. 18 and contained in Ohio's State Implementation Plan ("SIP"), submitted pursuant to the federal Clean Air Act. S.B. 18 provided that private companies would operate the emission test ("E-Check") facilities, and specified that the owner of the facility had to be different from the owner of the equipment and the land upon which the facility would be operated.

{¶3} On September 12, 1994, appellee entered into a contract with MARTA Technologies, Inc. ("MARTA"), under which MARTA would operate the E-Check program in the Cincinnati area. The contract specified that the contract term would end on December 31, 2005, and contained an option for the parties to renew the contract. In turn, MARTA entered into a lease agreement with appellant, by which MARTA leased appellant's property for purposes of operating 13 different E-Check testing sites. The lease agreement specified that it would expire on January 2, 2006, and it contained an option for two five-year extensions.

{¶4} In 2005, appellee requested that USEPA approve a revision to Ohio's SIP that would allow appellee to terminate the E-Check program in Cincinnati. On December 31, 2005, prior to receiving USEPA's approval to revise Ohio's SIP, appellee allowed its contract with MARTA to expire and elected not to renew it, effectively ending the E-Check program in the Cincinnati area. In turn, MARTA allowed its lease with appellant to expire on the expiration date of January 2, 2006, and elected not to renew. On November 3, 2008, USEPA approved appellee's requested revision to Ohio's SIP.

{¶5} On January 6, 2009, appellant filed this action against appellee in the Court of Claims of Ohio. In its complaint, appellant alleged that it was a third-party beneficiary of appellee's contract with MARTA and sought damages for breach of contract and promissory estoppel. The trial court dismissed the complaint, finding that appellant's causes of action accrued on December 31, 2005 or, at the latest, on January 2, 2006, and were therefore barred by the two-year limitation period found in R.C. 2743.16.

{¶6} Appellant timely appealed and advances four assignments of error for our review, as follows:

Assignment of Error No. 1

The Court of Claims erred in dismissing the complaint as time barred because each day appellee violated federal law constituted an ongoing breach of contract, the final breach occurring in November, 2008.

Assignment of Error No. 2

The Court of Claims erred in dismissing the complaint as time barred because each day appellee violated federal law constituted a separate breach of contract, the final breach occurring in November, 2008.

Assignment of Error No. 3

The Court of Claims erred in dismissing the complaint as time barred because appellant's cause of action for promissory estoppel did not accrue until November, 2008.

Assignment of Error No. 4

The Court of Claims erred in granting appellee's Rule 12(B) motion to dismiss without treating said motion as a Rule 56 motion for summary judgment when, to properly consider the statute of limitations issue, the court was required to look beyond the face of the complaint.

{¶7} In the case of *Neinast v. Ohio Expositions Comm.*, 10th Dist. No. 09AP-349, 2009-Ohio-4850, ¶8, this court recently set forth the standards applicable to review of a Civ.R. 12(B)(6) dismissal:

A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 1992 Ohio 73. In order for a trial court to grant a motion to dismiss for failure to state a claim upon which relief may be granted, "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. In construing the complaint upon a Civ.R. 12(B)(6) motion, a court must presume all factual allegations contained in the complaint to be true and make all reasonable inferences in favor of the non-moving party. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192. We review a judgment on a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted de novo. *Stewart v. Fifth Third Bank of Columbus* (Jan. 25, 2001), 10th Dist. No. 00AP-258. In addressing a Civ.R. 12(B)(6) motion, a trial court may only consider the statements and facts contained in the complaint and may not consider or rely on evidence outside the complaint. *Estate of Sherman v. Millhon* (1995), 104 Ohio App.3d 614, 617.

{¶8} In appellant's first and second assignments of error, it argues that the trial court erred in dismissing the breach of contract claim as time-barred because every day on which appellee was not operating an E-Check program in Cincinnati – between December 31, 2005, when appellee terminated its contract with MARTA, and November 3, 2008, when the USEPA approved modification of Ohio's SIP – appellee committed a new and/or continuous breach of its contract with MARTA, of which appellant claims to be a third-party beneficiary.

{¶9} Appellant contends that appellee's failure to operate the E-Check program, without approval of same from USEPA, was a violation of the federal Clean Air Act and

was, therefore, a violation of the "commercial good faith" clause contained in appellee's contract with MARTA for each and every day that such violation continued. That clause stated, "It is understood and agreed by the parties hereto that this contract and all parts hereof shall be performed in commercial good faith."

{¶10} "Good faith" is defined as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." R.C. 1302.01(A)(2). Appellant argues, without citation to authority therefor, that compliance with the federal Clean Air Act is a "reasonable commercial standard of fair dealing." It also asks this court to assume that appellee violated the federal Clean Air Act by its decision not to renew its contract with MARTA. This argument is unavailing.

{¶11} "The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement." *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St.3d 130, 132. There is nothing in appellee's contract with MARTA that requires it to comply with the Clean Air Act. If the parties had intended the contract to require this, they would have made such a requirement an explicit part of the contract. Moreover, there is no authority for the proposition that the Clean Air Act is a "reasonable commercial standard of fair dealing in the trade."

{¶12} Appellant also argues that this case presents an instance of continuing breaches of contract such as in the cases of *Singleton v. Adjutant Gen. of Ohio*, 10th Dist. No. 02AP-971, 2003-Ohio-1838, and *Kwan v. Schlein* (S.D.N.Y. 2006), 441 F.Supp.2d 491. Those cases are readily distinguishable. In *Singleton*, we recognized a continuous breach of a duty to remove unflattering items from the plaintiff's personnel file because the duty had been imposed by explicit language in an earlier settlement agreement

between the plaintiff and the state. The duty continued unless and until the state actually removed the items. Until the state completed the specific act of removal, it was in breach. In *Kwan*, the contract involved was open-ended, with no termination date, and thus specifically required continued and ongoing performance (specifically, payment of book royalties).

{¶13} In the present case, after December 31, 2005, no contract existed between appellee and MARTA, and the parties had fulfilled all of their respective obligations to each other under the contract. Therefore, after that date, there were no ongoing or continuing duties required of either party. Appellant fails to convince us that one can breach a contract that is no longer in force.

{¶14} "A cause of action for breach of contract accrues when the breach occurs or when the complaining party suffers actual damages." *Bell v. Ohio St. Bd. of Trustees*, 10th Dist. No. 06AP-1174, 2007-Ohio-2790, ¶27. Appellant's breach of contract claim is premised upon appellee's December 31, 2005 non-renewal of its contract with MARTA, which resulted in MARTA's January 2, 2006 non-renewal of its lease with appellant. Therefore, appellant's cause of action for breach of contract accrued on December 31, 2005 or, at the very latest, January 2, 2006. Pursuant to R.C. 2743.16, appellant was required to commence its action within two years from the date its cause of action accrued. Because it failed to do so, and the failure is apparent from the face of the complaint, the trial court correctly dismissed the claim.

{¶15} For these reasons, we overrule appellant's first and second assignments of error.

{¶16} In its third assignment of error, appellant argues that the trial court erred in dismissing its promissory estoppel claim as time-barred because, it again contends, the cause of action did not accrue until November 2008 when USEPA approved changes to Ohio's SIP. For the same reasons expressed in our discussion of appellant's first two assignments of error, we reject appellant's argument.

{¶17} We note initially that "[a]s a general rule, promissory estoppel does not apply against the state, its agencies, arms and agents." *Ohio Assn. of Pub. School Employees v. School Employees Retirement Sys. Bd.*, 10th Dist. No. 04AP-136, 2004-Ohio-7101, ¶48. Even if promissory estoppel can be brought here, generally, a cause of action accrues when the wrongful act is committed. *O'Stricker v. Jim Walter Corp.* (1983), 4 Ohio St.3d 84, 87. The elements of a cause of action for promissory estoppel are: (1) a clear, unambiguous promise; (2) reasonable and foreseeable reliance upon the promise by the person to whom the promise is made; and (3) resulting injury to the party who relied on the promise. *Raabe v. Ohio Bd. of Speech-Language Pathology & Audiology*, 10th Dist. No. 04AP-954, 2005-Ohio-2335, ¶28.

{¶18} According to appellant's complaint, appellee broke its promise to continue the Cincinnati E-Check program no later than December 31, 2005, which is the allegedly wrongful act that caused the damages appellant claims it suffered. Appellant claims that its cause of action did not accrue until November 2008 because, it contends, until that date it "had no way of knowing whether or not its properties would be needed should the Ohio EPA have reinstated the program." (Brief of appellant, 28-29.) However, this does not change the fact that appellant suffered damages beginning, at the latest, on January 2, 2006, when its lease contract with MARTA expired. The fact that it chose to do nothing

in the hope that appellee would reinstitute the E-Check program, with no separate promise that appellee would do so, does not toll the running of the two-year statute of limitation.

{¶19} For these reasons, appellant's third assignment of error is overruled.

{¶20} In its fourth assignment of error, appellant argues that the trial court erred in granting appellee's Civ.R. 12(B)(6) motion without converting the same to a motion for summary judgment because, "to properly consider the statute of limitations issue, the court was required to look beyond the face of the complaint." (Assignment of Error Number Four.)

{¶21} First, the record reveals that appellant never requested that the court convert appellee's motion to dismiss into a motion for summary judgment. As such, appellant has waived this argument. *Feibel v. Columbus*, 10th Dist. No. 09AP-472, 2009-Ohio-6779, ¶24. We have already determined that the trial court did properly consider the statute of limitations issue based on the face of the complaint alone. Because the trial court did not consider any matters outside of the complaint, it did not err in failing to convert the motion to dismiss to a motion for summary judgment. *Davidson v. Davidson*, 3d Dist. No. 17-05-12, 2005-Ohio-6414, ¶27. For these reasons, appellant's fourth assignment of error is overruled.

{¶22} Having overruled all four of appellant's assignments of error, we affirm the judgment of the Court of Claims of Ohio.

*Judgment affirmed.*

BRYANT and McGRATH, JJ., concur.

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