

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Castle King LLC,	:	
	:	
Plaintiff-Appellant,	:	No. 10AP-735
	:	(C.C. No. 2009-08241)
v.	:	
	:	
Attorney General of Ohio,	:	(ACCELERATED CALENDAR)
	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on March 29, 2011

Luis Manuel Alcalde; Kopech & O'Grady LLC, and David A. Kopech, for appellant.

Michael DeWine, Attorney General, Randall W. Knutti, and Christopher P. Conomy, for appellee.

APPEAL from the Court of Claims of Ohio.

SADLER, J.

{¶1} Plaintiff-appellant, Castle King LLC, appeals from the judgment of the Court of Claims of Ohio granting the motion to dismiss appellant's complaint, pursuant to Civ.R. 12(B)(6), filed by defendant-appellee, Attorney General of Ohio.

{¶2} As ascertained from the complaint, appellant is a limited liability company located in South Carolina and a distributor of skill-based amusement machines.

Appellant asserts it entered into a settlement agreement with appellee on May 22, 2007 to settle litigation and create a protocol for approval of skill-based amusement machines to be operated in Ohio and to allow appellant to place such machines in the Ohio market. According to appellant, though appellee found that the "Match Um Up" machine was a lawful skill-based amusement machine, appellee failed to provide appellant with an approved method of certifying the machine. Therefore, on August 29, 2007, appellant filed a motion to enforce the terms of the settlement agreement. After a hearing on the motion, the trial court rendered a decision on October 4, 2007 that ordered enforcement of the settlement agreement. On October 23, 2007, the Ohio General Assembly enacted legislation pertaining to the regulation of games of skill in Ohio, and the parties litigated the effect of the new law on the terms of the settlement agreement. On appeal, this court held on December 23, 2008 that the settlement agreement should have been terminated as of the date of new legislation, to wit: October 23, 2007.

{¶3} The matter currently before us arises out of the complaint filed by appellant on October 15, 2009 asserting breach of contract based on appellee's alleged breach of the parties' settlement agreement entered on May 22, 2007. Appellee filed a motion to dismiss asserting the complaint was untimely as it had been filed beyond the requisite two-year statute of limitations. In response, appellant filed an amended complaint on December 2, 2009. According to appellant, appellee's "breach of the Settlement Agreement and Consent Order proximately caused [appellant] to lose profits of over Four Million Dollars (\$4,000,000.00) between the period of June 22, 2007 and October 25, 2007." (Amended Complaint at 7.)

{¶4} Appellee filed a motion to dismiss the amended complaint on January 14, 2010. In the motion to dismiss, appellee again argued this matter was time-barred because it was filed beyond the two-year statute of limitations contained in R.C. 2743.16(A). The trial court agreed, and on July 7, 2010, issued a decision granting appellee's motion to dismiss appellant's complaint. The trial court determined that, at the very latest, appellant was aware of the breach of contract when it filed the motion to enforce the settlement agreement on August 29, 2007. Therefore, because this complaint was not filed until October 15, 2009, the trial court held it was filed beyond the applicable two-year statute of limitations.

{¶5} This appeal followed, and appellant asserts the following two assignments of error:

FIRST ASSIGNMENT OF ERROR

The Court of Claims erred in dismissing Appellant's complaint by failing to apply the appropriate standard.

SECOND ASSIGNMENT OF ERROR

The Court of Claims erred in finding that the statute of limitations began to run August 29, 2007.

{¶6} Because both assignments of error contend the trial court erred in dismissing the complaint on the basis that it is time-barred, they will be addressed jointly.

{¶7} In deciding whether to dismiss a complaint, pursuant to Civ.R. 12(B)(6), for failure to state a claim upon which relief can be granted, the trial court must presume all factual allegations in the complaint are true and construe the complaint in the light most favorable to the plaintiff, drawing all reasonable inferences in favor of plaintiff. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192. Before the court may dismiss the

complaint, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling the plaintiff to recovery. *O'Brien v. Univ. Community Tenants Union* (1975), 42 Ohio St.2d 242, syllabus. We review de novo the dismissal of a complaint pursuant to Civ.R. 12(B)(6). *Shockey v. Wilkinson* (1994), 96 Ohio App.3d 91, 94.

{¶8} In this case, the trial court determined the applicable statute of limitations bars appellant's complaint. A complaint may be dismissed, pursuant to Civ.R. 12(B)(6), as failing to comply with the applicable statute of limitations if the face of the complaint makes clear that the action is time-barred. *Steiner v. Steiner* (1993), 85 Ohio App.3d 513, 518-19; *Swanson v. Boy Scouts of Am.*, 4th Dist. No. 07CA663, 2008-Ohio-1692, ¶6, quoting *Doe v. Robinson*, 6th Dist. No. L-07-1051, 2007-Ohio-5746, ¶17, citing *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006-Ohio-2625, ¶11. Only where the complaint shows conclusively on its face that the action is time-barred should a Civ.R. 12(B)(6) motion to dismiss based upon the statute of limitations be granted. *Swanson*, quoting *Jackson v. Sunnyside Toyota, Inc.*, 175 Ohio App.3d 370, 2008-Ohio-687, ¶15.

{¶9} It is not contested that the applicable statute of limitations is found in R.C. 2743.16(A), which provides, in relevant part, "civil actions against the state permitted by sections 2743.01 to 2743.20 of the Revised Code shall be commenced no later than two years after the date of accrual of the cause of action or within any shorter period that is applicable to similar suits between private parties." A cause of action for breach of contract accrues when the breach occurs or when the complaining party suffers actual damages. *Bell v. Ohio State Bd. of Trustees*, 10th Dist. No. 06AP-1174, 2007-Ohio-2790, ¶27, citing *Thompson v. Ohio Dept. of Transp.* (Nov. 26, 1996), 10th Dist. No. 96API04-

497, citing *Midwest Specialties, Inc. v. Firestone Tire & Rubber Co.* (1988), 42 Ohio App.3d 6, 9.

{¶10} Thus, the dispute in this matter is when the breach of contract action accrued so as to start the running of the statute of limitations and whether this can be determined from the face of the complaint. According to appellant, the complaint does not conclusively establish that the action is time-barred. Moreover, appellant argues the trial court erred in finding the statute of limitations began to run on August 29, 2007 because its breach of contract action did not accrue until December 23, 2008, the date that this court issued a decision in the appeal concerning the order granting the motion to enforce the settlement agreement.

{¶11} We are not persuaded by appellant's arguments. The amended complaint asserts that appellant breached the settlement agreement resulting in lost profits from June 22 to October 25, 2007. Thus, according to the amended complaint, the cause of action accrued on June 22, 2007 because that is when the breach of contract occurred and actual damages were suffered. *Bell*. Nowhere in the amended complaint does appellant assert it was unaware of the breach or that it was prevented from asserting a breach of contract action within two years of that date.

{¶12} However, even assuming June 22, 2007 cannot be construed as the accrual date for appellant's cause of action, the amended complaint states that appellant filed a motion to enforce the settlement agreement on August 29, 2007. The motion to enforce was based on the same conduct as this breach of contract action, which was appellee's alleged failure to certify appellant's machines. Thus, as the trial court held, "[m]aking all reasonable inferences in favor of [appellant], it is clear that [appellant] was

aware that a breach of the agreement had occurred at the very latest on August 29, 2007." (July 7, 2010 Decision at 3.) Therefore, whether one uses June 22 or August 29, 2007 as the date of accrual, because this breach of contract action was not filed until October 15, 2009, it was not filed within the two-year statute of limitations contained in R.C. 2743.16(A).

{¶13} This court has repeatedly held that enforcement of a valid settlement agreement may be sought either by filing an independent action sounding in breach of contract or, where the original action has not been dismissed, enforcement may be sought by filing, pursuant to Civ.R. 15(E), a supplemental pleading in the original action that sets forth the terms of the alleged settlement agreement and the alleged breach of that agreement. *Boster v. C & M Servs., Inc.* (1994), 93 Ohio App.3d 523, 525-26; *Bolen v. Young* (1982), 8 Ohio App.3d 36, 38; *Putnam v. Hogan* (Feb. 23, 1995), 10th Dist. No. 94APE07-1089. However, our research did not reveal, and appellant did not furnish, any precedent providing for the tolling of the statute of limitations for a breach of contract claim where a party chooses to seek redress by filing a motion to enforce the terms of a settlement agreement rather than an independent action sounding in breach of contract. While a party may opt to proceed in a certain fashion, it does not necessarily follow that a statute of limitations will be tolled while one option is pursued over the other.

{¶14} We find it is clear from the face of the amended complaint that appellant's claim was filed beyond the two-year statute of limitations as it was not filed within two years of the date of accrual, and that the amended complaint provides no basis for tolling the statute of limitations. Consequently, we find the trial court did not err in dismissing

appellant's amended complaint, pursuant to Civ.R. 12(B)(6), and we overrule appellant's two assignments of error.

{¶15} Having overruled appellant's two assignments of error, we hereby affirm the judgment of the Court of Claims of Ohio.

Judgment affirmed.

BRYANT, P.J., and TYACK, J., concur.
