

[Cite as *GLA Water Mgt. Co. v. Univ. of Toledo*, 2011-Ohio-4655.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

GLA Water Management Company, :
 :
 Plaintiff-Appellant, :
 :
 v. : No. 10AP-1129
 : (C.C. No. 2010-07679)
 University of Toledo et al., : (ACCELERATED CALENDAR)
 :
 Defendants-Appellees. :

D E C I S I O N

Rendered on September 15, 2011

Bahret & Associates Co, L.P.A., Robert J. Bahret, Paul R. Bonfiglio, and Christine M. Gaynor, for appellant.

Michael DeWine, Attorney General, William C. Becker, and Jerry K. Kasai, for appellees.

APPEAL from the Court of Claims of Ohio.

SADLER, J.

{¶1} Appellant, GLA Water Management Company, appeals from a judgment of the Court of Claims of Ohio, which granted a motion to dismiss filed by appellees, University of Toledo, University of Toledo Medical Center, Bowling Green State University, and the state of Ohio. For the following reasons, we affirm.

{¶2} We first address the "Motion for Stay" filed by appellant in this court on May 25, 2011. Appellant asks this court to stay these proceedings pending the outcome of an appeal that the parties are currently litigating in the Sixth District Court of Appeals. The issue in the Sixth District case, according to appellant, is whether the Lucas County Court of Common Pleas had subject matter jurisdiction over appellant's prior claim for money damages against appellees or whether exclusive jurisdiction rested with the Court of Claims. Appellant asserts that, if the Sixth District orders that the Lucas County action be dismissed for lack of jurisdiction, the Court of Claims "would clearly be incorrect" in its holding that appellant's complaint was barred by the statute of limitations. (Motion at 4.) Apparently, appellant believes a dismissal from the Sixth District would constitute a "failure otherwise than upon the merits," thereby allowing appellant to use the savings statute, R.C. 2305.19, to refile its action in the Court of Claims.

{¶3} The issue before this court, however, is not whether appellant can use the savings statute to file its complaint in the Court of Claims *after* the Lucas County case is dismissed. Instead, this court must determine whether appellant was permitted to use the savings statute when it filed its complaint in the Court of Claims on May 28, 2010. The issues being litigated in the Sixth District will have no bearing on the issues presented in this appeal. Accordingly, appellant's motion for stay is denied.

{¶4} We now turn to the merits of this appeal. The relevant facts for our consideration are undisputed and are provided below.

{¶5} On July 26, 2007, appellant filed a complaint against appellees in the Lucas County Court of Common Pleas. The complaint sought injunctive relief and

money damages based on appellees' refusal to award a bid to appellant for work in a water treatment project. When appellees moved to dismiss the Lucas County complaint on the grounds that only the Court of Claims had jurisdiction over the action, appellant attempted to dismiss the money damages portion of its action pursuant to Civ.R. 41(A); however, appellant continued to pursue its request for declaratory judgment and injunctive relief.

{¶6} On May 28, 2010, appellant filed an action against appellees in the Court of Claims seeking money damages. Appellees moved to dismiss the complaint on July 1, 2010, arguing, inter alia, that the complaint was filed beyond the two-year statute of limitations contained in R.C. 2743.16. In its memorandum opposing the motion, appellant asserted that its damages claim was brought within two years because it was "moved" from Lucas County and "reasserted" in the Court of Claims.

{¶7} In an entry filed on November 5, 2010, the trial court granted appellees' motion to dismiss, which the trial court construed as a motion filed pursuant to Civ.R. 12(B)(6). The trial court determined that appellant's complaint established that the statute of limitations began to run no later than February 2008. Given that appellant did not file its complaint in the Court of Claims until May 28, 2010, over two years later, the trial court determined that the action was filed beyond the two-year statute of limitations.

{¶8} The trial court also held that appellant could not use the savings statute to file the complaint in the Court of Claims because appellant did not actually dismiss its money damages claim in Lucas County. Based on the Supreme Court of Ohio's decision in *Pattison v. W.W. Grainger, Inc.*, 120 Ohio St.3d 142, 2008-Ohio-5276, the trial court concluded that appellant's attempt to dismiss, pursuant to Civ.R. 41(A), only

the money damages claim in Lucas County was a "nullity" because Civ.R. 41(A) does not allow for the dismissal of a portion of the claims against a certain defendant.

{¶9} In an appeal from the trial court's judgment of dismissal, appellant advances the following two assignments of error for our consideration:

1. The court below erred in finding that Appellant's claim for money damages is barred by the statute of limitations instead of determining that, because the partial dismissal of Appellant's claims is a nullity, the claim remains pending.
2. The court below erred when it determined that Appellant abandoned its claim for money damages when it filed a notice of voluntary dismissal pursuant to Civ.R. 41(A)(1) in conjunction with Appellant's Petition/Motion for Removal.

{¶10} We review de novo a trial court's decision to dismiss a complaint for failure to state a claim upon which relief can be granted pursuant to Civ.R. 12(B)(6). *Shockey v. Wilkinson* (1994), 96 Ohio App.3d 91, 94. "A motion to dismiss based upon a statute of limitations may be granted when the complaint shows conclusively on its face that the action is time-barred." *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006-Ohio-2625, ¶11, citing *Velotta v. Leo Petronzio Landscaping, Inc.* (1982), 69 Ohio St.2d 376, paragraph three of the syllabus.

{¶11} In deciding whether to dismiss a complaint under Civ.R. 12(B)(6), 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. The trial court cannot dismiss a complaint under Civ.R. 12(B)(6) unless it appears beyond a 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, Inc.* (1975), 42 Ohio St.2d 242, syllabus.

{¶12} Appellant's first assignment of error argues that the trial court erred by determining that appellant's action in the Court of Claims was barred by the applicable statute of limitations. We disagree.

{¶13} Pursuant to R.C. 2743.16(A), civil actions against the state in the Court of Claims "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." " 'Ordinarily, a cause of action accrues and the statute of limitations begins to run at the time the wrongful act was committed.' " *Sizemore v. Ohio Veterinary Med. Licensing Bd.*, 10th Dist. No. 10AP-841, 2011-Ohio-2273, ¶9, quoting *DiNozzi v. Ohio State Dental Bd.*, 10th Dist. No. 08AP-609, 2009-Ohio-1376, ¶15.

{¶14} Appellant does not dispute that the two-year statute of limitations began to run at some point prior to February 13, 2008, when the parties were already engaged in litigation in the Lucas County Court of Common Pleas. In its complaint filed in the Court of Claims on May 28, 2010, appellant referenced the Lucas County litigation and attached several judgment entries from that case, one of which referenced a hearing attended by the parties as early as February 13, 2008. Under R.C. 2743.16(A), appellant had two years from that date, at the latest, to initiate its claims against appellees in the Court of Claims. Because appellant did not file its complaint in the Court of Claims until May 28, 2010, the action was filed beyond the applicable statute of limitations.

{¶15} Notwithstanding the above, appellant argues that the Court of Claims action was timely because, at the time the action was filed, appellant's money damages claim remained pending in Lucas County. However, even if we were to agree that appellant's damages did remain pending, appellant does not explain how this fact tolled or suspended the statute of limitations with regard to the filing of the action in the Court of Claims.

{¶16} To the extent appellant relies on the savings statute, R.C. 2305.19, such reliance is misplaced. R.C. 2305.19 affords a plaintiff a limited period of time to refile a dismissed claim that would otherwise be time-barred. The statute provides: "In any action that is commenced or attempted to be commenced, * * * if the plaintiff fails otherwise than upon the merits, the plaintiff * * * may commence a new action within one year after the date of * * * the plaintiff's failure otherwise than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later." R.C. 2305.19(A). Thus, even after the applicable statute of limitations has expired, the savings statute permits a plaintiff to refile within one year after the action has failed "otherwise than upon the merits."

{¶17} This court has consistently held that "the savings statute does not apply where a plaintiff files a second complaint before failing otherwise than upon the merits in a previous complaint." *Windsor House, Inc. v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 09AP-584, 2010-Ohio-257, ¶19, citing *Boozer v. Univ. of Cincinnati School of Law*, 10th Dist. No. 05AP-1099, 2006-Ohio-2610; see also *Partin v. Ohio Dept. of Transp.*, 158 Ohio App.3d 200, 2004-Ohio-4038. In *Windsor House*, the plaintiff filed an action in the Court of Claims while its original action remained pending in the Franklin

County Court of Common Pleas. We stated that, because the plaintiff's earlier complaint remained pending at the time the plaintiff filed its complaint in the Court of Claims, the plaintiff did not file the Court of Claims complaint within one year after a "failure otherwise than upon the merits," as required for application of R.C. 2305.19. *Id.* at ¶19; see also *Partin* (holding that there was no failure otherwise than upon the merits, as required by R.C. 2305.19, where the plaintiffs did not dismiss their common pleas complaint before filing in the Court of Claims).

{¶18} We reach the same conclusion here. Even if we were to agree that appellant's damages claim remained pending in Lucas County at the time appellant filed its complaint in the Court of Claims, appellant did not file its action in the Court of Claims within one year after a "failure otherwise than upon the merits," as required to invoke the savings statute. "Although courts liberally construe the savings statute, a plaintiff must satisfy the criteria of the statute in order to prevent circumvention of the statute of limitations and unfairness to defendants." *Boozer* at ¶32, citing *Motorists Mut. Ins. Co. v. Huron Rd. Hosp.*, 73 Ohio St.3d 391, 397, 1995-Ohio-119.

{¶19} Accordingly, appellant's first assignment of error is overruled.

{¶20} Appellant's second assignment of error challenges a passage in the trial court's entry of dismissal where, in summarizing the procedural history of the case, the trial court stated that appellant "abandoned the prayer for money damages by filing a notice of voluntary dismissal pursuant to Civ.R. 41(A)." (Entry at 2.) Apparently, appellant construes the trial court's use of the word "abandoned" as a finding that appellant *permanently* abandoned its money damages claim. We decline to interpret the trial court's statement, however, because appellant fails to explain how the use of

the word "abandoned" had any bearing on the trial court's legal analysis or the timeliness of the action under the statute of limitations. We have already held, in disposing of appellant's first assignment of error, that the Court of Claims action was properly dismissed for failure to comply with the applicable statute of limitations. Because appellant does not attempt to explain how the trial court's use of the word "abandoned" changes this conclusion, appellant has not demonstrated reversible error. Accordingly, appellant's second assignment of error is overruled.

{¶21} Having overruled appellant's first and second assignments of error, we affirm the judgment of the Court of Claims of Ohio.

*Motion for stay denied;
judgment affirmed.*

CONNOR and DORRIAN, JJ., concur.
