[Cite as *Brisk v. Draf Industries, Inc.*, 2012-Ohio-1311.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Paul Brisk,	:	
Plaintiff-Appellant,	:	
		No. 11AP-233
v.	:	(M.C. No. 2010 CVF 031869)
Draf Industries, Inc. et al.,	:	(ACCELERATED CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on March 27, 2012

Law Office of Jeffrey H. Jordan, and *Jeffrey H. Jordan*, for appellant.

Cavitch, Familo & Durkin Co., L.P.A., Eric J. Weiss, and *Megan R. Miller*, for appellee Draf Industries, Inc.

APPEAL from the Franklin County Municipal Court.

BROWN, P.J.

{¶ 1} This is an appeal by plaintiff-appellant, Paul Brisk, from a judgment of the Franklin County Municipal Court, granting a motion to dismiss filed by defendant-appellee, Draf Industries, Inc. ("Draf").

{¶ 2} On August 13, 2010, appellant filed a complaint, naming as defendants Draf and Jeffrey L. Sachs. The complaint alleged that Draf, as maker, and Sachs, as guarantor, owed appellant money on a cognovit promissory note. The complaint asserted causes of action for breach of contract, unjust enrichment, and promissory estoppel.

{¶ 3} On September 20, 2010, Draf filed a motion to dismiss pursuant to Civ.R. 12(B)(6). In the accompanying memorandum in support, Draf argued that appellant's claims were time-barred pursuant to R.C. 1303.16(A). On October 4, 2010, appellant filed a memorandum in opposition to the motion to dismiss asserting that the 15-year statute

of limitations for written contracts under R.C. 2305.06 was applicable rather than the six-year statute of limitations under R.C. 1303.16. Attached to the memorandum was the affidavit of appellant, who averred in part "[t]hat, if either of the defendants in this case * * * has been in Ohio at any time between the time they signed the cognovit note * * * and the present, then I am unaware of it." On October 13, 2010, Draf filed a motion to strike the affidavit of Brisk. By entry filed October 22, 2010, the trial court granted Draf's motion to strike, as well as Draf's motion to dismiss.

{¶ 4} On November 1, 2010, appellant filed a motion for relief from judgment pursuant to Civ.R. 60(B)(1). On November 10, 2010, Draf filed a memorandum in opposition to appellant's motion for relief from judgment. By entry filed November 22, 2010, the trial court granted appellant's motion for relief from judgment and set aside the court's entry filed October 22, 2010.

{¶ 5} On December 2, 2010, Draf filed a motion for reconsideration of the trial court's entry granting appellant's motion for relief from judgment. On February 14, 2011, the trial court filed a decision and entry denying Draf's motion for reconsideration and its motion to strike, but granting Draf's motion to dismiss on the basis that the complaint was barred by the six-year limitations period within R.C. 1303.16(A).

{¶ 6} On appeal, appellant sets forth the following single assignment of error for this court's review:

> The Trial Court Erred to the Prejudice of Plaintiff-Appellant Paul Brisk by Sustaining Defendant-Appellee Draf Industries, Inc.'s Motion to Dismiss.

{¶ 7} Appellant raises two primary arguments under his assignment of error; specifically, that the trial court erred in (1) dismissing the case for failure to state a claim under circumstances where appellant could still prove facts entitling him to recovery, and (2) rendering its decision by considering facts outside the pleadings.

{¶ 8} Civ.R. 12(B) states in part:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: * * * (6) failure to state a claim upon which relief can be granted

> * * *. When a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleading and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56.

{¶ 9} A Civ.R. 12(B)(6) 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), citing *Assn. for the Defense of the Washington Local School Dist. v. Kiger*, 42 Ohio St.3d 116, 117 (1989). In order for a trial court to grant a motion to dismiss for failure to state a claim upon which relief can be granted, it must appear "beyond doubt from the complaint that the plaintiff can prove no set of facts entitling her to relief." *Grey v. Walgreen Co.*, 8th Dist. No. 96846, 2011-Ohio-6167, ¶ 3, citing *LeRoy v. Allen, Yurasek & Merklin*, 114 Ohio St.3d 323, 2007-Ohio-3608, ¶ 14.

{¶ 10} In ruling on a Civ.R. 12(B)(6) motion, a trial court "cannot resort to evidence outside the complaint to support dismissal [except] where certain written instruments are attached to the complaint." *Park v. Acierno*, 160 Ohio App.3d 117, 2005-Ohio-1332, ¶ 29 (7th Dist.), citing Civ.R. 10(C) and (D).[1] Rather, "[i]f a Civ.R. 12(B)(6) movant relies on evidence outside of the complaint and its attachments, then Civ.R. 12(B) specifies that the motion must either be denied or converted to a summary judgment motion, which would proceed under Civ.R. 56." *Acierno* at ¶ 30, citing *Petrey v. Simon*, 4 Ohio St.3d 154 (1983).

{¶ 11} An appellate court employs "a de novo standard of review for motions to dismiss filed pursuant to Civ.R. 12(B)(6)." *Grey* at ¶ 3, citing *Greeley v. Miami Valley Maintenance Contractors, Inc.*, 49 Ohio St.3d 228 (1990). Under de novo analysis, we are required to "accept all factual allegations of the complaint as true and draw all reasonable inferences in favor of the nonmoving party." *Grey* at ¶ 3, citing *Byrd. v. Faber*, 57 Ohio St.3d 56 (1991).

{¶ 12} As noted, in its motion to dismiss, Draf asserted that appellant's action was barred by the statute of limitations set forth under R.C. 1303.16(A). Under Ohio law, "[a]

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[1] Civ.R. 10(D) states in part: "When any claim or defense is founded on an account or other written instrument, a copy of the account or written instrument must be attached to the pleading."

party may assert a statute of limitations defense through a Civ.R. 12(B)(6) motion to dismiss if the defense is apparent in the complaint." *Kelley v. Stauffer*, 10th Dist. No. 10AP-235, 2010-Ohio-4522, ¶ 9.

{¶ 13} Appellant's complaint alleged in part the following:

> Defendants, in consideration of a loan, signed a promissory note, a copy of which is attached hereto and marked Exhibit A.
>
> Defendants have failed to pay Plaintiff under the terms of the promissory note.
>
> As a direct and proximate result of Defendants' failure to pay, Plaintiff has been damaged in the sum of $10,300.00, plus interest at the rate of 18% per year, accruing from February 4, 2000.

{¶ 14} Attached to appellant's complaint as "Exhibit A" was a copy of a "cognovit promissory note," signed by Jeffrey L. Sachs as President of Draf. The document states in part:

> FOR VALUE RECEIVED, the undersigned promises to pay to the order of Paul Brisk the sum of ten thousand dollars, ($10,000.00), plus six percent, (6%), interest per annum from and after August 4, 1999, under the following terms:
>
> The sum of ten thousand three hundred dollars, ($10,300.00), shall be due on or before the 4th day of February, 2000. If said payment is not received by Paul Brisk * * * by the close of business on its due date this note shall be deemed in default and Paul Brisk shall be entitled to interest at the rate of eighteen percent, (18%), per annum from date of default.

{¶ 15} The trial court determined that the cognovit note was a negotiable instrument under R.C. 1303.03. Pursuant to R.C. 1303.03(A), a "negotiable instrument" is defined as:

> [A]n unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it meets all of the following requirements:

> (1) It is payable to bearer or to order at the time it is issued or first comes into possession of a holder.
>
> (2) It is payable on demand or at a definite time.
>
> (3) It does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain any of the following:
>
> (a) An undertaking or power to give, maintain, or protect collateral to secure payment;
>
> (b) An authorization or power to the holder to confess judgment or realize on or dispose of collateral;
>
> (c) A waiver of the benefit of any law intended for the advantage or protection of an obligor.

{¶ 16} In concluding that the note is a negotiable instrument, the trial court held in part:

> On its face, the cognovit note was an unconditional promise to pay a fixed amount of money, specifically $10,300, plus interest. R.C. 1303.03(A). The note was payable to order when it was issued: it was payable "to the order of Paul Brisk." R.C. 1303.03(A)(1). The note was also payable at a definite time: February 4, 2000, by the close of business. R.C. 1303.03(A)(2). The note contained a permissible cognovit provision, too. R.C. 1303.03(A)(3)(b) and 1303.03(A)(3)(c). Thus, the note is a negotiable instrument.

{¶ 17} We agree with the trial court that the document at issue is a negotiable instrument as defined under R.C. 1303.03(A). *See Parmore Group v. G & V Invest., Ltd.*, 10th Dist. No. 05AP-756, 2006-Ohio-6986, ¶ 17 ("The question of whether a document is a negotiable instrument is determined from the language used on the face of the document by its maker or drawer.").

{¶ 18} Having determined that the note is a negotiable instrument, we next address appellant's contention that the trial court erred in concluding that R.C. 1303.16(A) is the applicable statute of limitations. As noted under the facts, appellant argued before the trial court that the applicable statute of limitations in this action was R.C. 2305.06, which provides in part that "an action upon a specialty or an agreement,

contract, or promise in writing shall be brought within fifteen years after the cause thereof accrued." Appellant argues that the Supreme Court of Ohio has ruled that the 15-year statute of limitations under R.C. 2305.06 applies to cognovit notes. *See Alliance First Natl. Bank v. Spies*, 158 Ohio St. 499 (1953), paragraph two of the syllabus ("The agreement which the law implies from the cognovit provisions of a note, that the grant of authority involved in those provisions shall be irrevocable, is an agreement in writing and so governed by the fifteen-year statute of limitations. Section 11221, General Code."). Appellant acknowledges, however, that the decision in *Alliance First Natl. Bank* was decided prior to the enactment of Ohio's version of the Uniform Commercial Code (codified in Ohio Revised Code Chapter 1301 et seq.).

{¶ 19} In *Parmore Group* at ¶ 23, this court held that a promissory note, containing a promise to pay a fixed amount on or before a certain date, constituted a negotiable instrument under R.C. 1303.03(A), and that such note was "subject to the six-year statute of limitations set forth in R.C. 1303.16(A)" rather than the 15-year statute of limitations under R.C. 2305.06. In that case, this court rejected the appellant's argument that, even if the note qualified as a "negotiable instrument," it was also a contract and, therefore, should be subject to R.C. 2305.06. *Id*. at ¶ 5.

{¶ 20} Other Ohio appellate courts have similarly found that the more specific statute of limitations set forth under R.C. 1303.16 controls over R.C. 2305.06. *See J & A Inc. v. Francis*, 6th Dist. No. H-03-006, 2004-Ohio-1039, ¶ 18 ("The statute of limitations set forth in R.C. 1303.16(B) specifically applies to demand notes whereas the statute of limitations set forth in R.C. 2305.06 applies to contracts in general."). *See also Cyphers v. Balzer*, 2d Dist. No. 22182, 2007-Ohio-6133, ¶ 58 ("Because R.C. 1303.16(G) is a specific statute of limitations, it would control over the more general statues of limitation for written and unwritten contracts in R.C. 2305.06 and R.C. 2305.07"); *Straka v. Fisler*, 8th Dist. No. 88005, 2007-Ohio-981, ¶ 8 (in claim for judgment on promissory note, trial court erred in applying 15-year statute of limitations under R.C. 2305.06 as 1303.16 was controlling for demand notes rather than the general provisions of R.C. 2305.06).

{¶ 21} In reaching its determination that R.C. 1303.16 was the controlling statute of limitations in an action for enforcement of a cognovit demand note, the court in *J & A* observed that "R.C. 1303.16(B) is clearly more specific than R.C. 2305.06," and cited Ohio

case law for the proposition that, " '[i]n making the choice between two statues of limitations applicable to the same conduct, it is settled law that: "A special statutory provision which relates to the specific subject matter involved in litigation is controlling over a general statutory provision which might otherwise be applicable." ' " *J & A* at ¶ 17, quoting *Love v. Port Clinton*, 37 Ohio St.3d 98, 99 (1988), quoting *Andrianos v. Community Traction Co.*, 155 Ohio St. 47 (1951), paragraph one of the syllabus.

{¶ 22} In the present case, the trial court, in resolving the conflict between the limitations periods within R.C. 2305.06 and 1303.16(A), noted that "R.C. 2305.06 addresses only written contracts generally, while R.C. 1303.16(A) addresses notes due at a definite time—a much more specific type of written contract." The trial court thus determined that the more specific of the two statutes, R.C. 1303.16(A), was the controlling provision regarding the limitations period. We agree with the trial court's analysis. *See Parmore Group* and *J & A.* We further agree with the trial court's determination that the decision in *Alliance First Natl. Bank* is distinguishable, as it was rendered prior to the enactment of R.C. 1303.16, and did not address negotiable instruments nor did it resolve the conflict between R.C. 2305.06 and 1303.16.

{¶ 23} Pursuant to R.C. 1303.16(A), "an action to enforce the obligation of a party to pay a note payable at a definite time shall be brought within six years after the due date or dates stated in the note or, if a due date is accelerated, within six years after the accelerated due date." The due date of the note at issue in this case was February 4, 2000 and, therefore, as determined by the trial court, appellant had until February 4, 2006 to file his complaint.

{¶ 24} Appellant also argues, however, that the trial court erred in failing to find that the limitations period was tolled pursuant to R.C. 2305.15(A); that statute, which provides a statutory exception to the statute of limitations, states in part: "When a cause of action accrues against a person, if the person is out of the state, * * * the period of limitation for the commencement of the action as provided in sections 2305.04 to 2305.14, 1302.98, and 1304.35 of the Revised Code does not begin to run until the person comes into the state or while the person is so absconded or concealed."

{¶ 25} At the outset, as observed by the trial court, the above statutory language of R.C. 2305.15 only provides for the tolling of periods of limitation with respect to "sections

2305.04 to 2305.14, 1302.98, and 1304.35 of the Revised Code," and does not include R.C. 1303.16(A). Further, even assuming the applicability of R.C. 2305.15, this court has previously held that "[a] determination of the applicability of R.C. 2305.15(A) requires facts concerning the circumstances of [a defendant's] presence and absence from Ohio," and "[t]hose facts must be alleged in the complaint in order for a complaint to survive a Civ.R. 12(B)(6) motion to dismiss." *Kelley* at ¶ 13. *See also Hutchins v. Turner,* 10th Dist. No. 93AP-69 (June 17, 1993) (trial court properly dismissed plaintiff's complaint based upon statute of limitations; "[p]laintiff's complaint does not assert any facts which would support application of R.C. 2305.15"); *Noe v. Smith*, 143 Ohio App.3d 215 (4th Dist.2000) (trial court did not err in dismissing plaintiff's complaint pursuant to Civ.R. 12(B)(6); plaintiff failed to allege in her complaint that defendant absented himself from the state or that the statute of limitations had tolled). In the instant case, appellant's complaint "did not allege any facts that would support the application of R.C. 2305.15(A) to toll the statute of limitations." *Kelley* at ¶ 14.

{¶ 26} Finally, a review of the trial court's decision does not support appellant's contention that the trial court considered matters outside the allegations in the complaint in granting the motion to dismiss. While appellant submitted his own affidavit, it is clear that the trial court did not consider it; rather, the trial court specifically noted that it "may not consider Plaintiff's affidavit when deciding the pending motion to dismiss." (Tr. Ct. Decision at 3.)

{¶ 27} Upon review, the trial court did not err in finding that appellant's complaint was barred by the six-year statute of limitations under R.C. 1303.16(A). Based upon the foregoing, appellant's single assignment of error is overruled and the judgment of the Franklin County Municipal Court is hereby affirmed.

Judgment affirmed.

TYACK and CONNOR, JJ., concur.

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