[Cite as *Savoy v. Univ. of Akron*, 2012-Ohio-1962.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Alan Savoy,	:	
Plaintiff-Appellant,	:	
v.	:	No. 11AP-183 (C.C. No. 2010-11285)
The University of Akron,	:	
Defendant-Appellee.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on May 3, 2012

Elk & Elk Co., Ltd., and *Peter D. Traska*, for appellant.

Michael DeWine, Attorney General, and *Amy S. Brown*, for appellee.

APPEAL from the Court of Claims of Ohio

CONNOR, J.

{¶ 1} Plaintiff-appellant, Alan Savoy, appeals from a decision of the Court of Claims of Ohio dismissing his action against defendant-appellee, the University of Akron ("University"). The basis for the dismissal is that the complaint was filed in the Court of Claims after the expiration of the two-year statute of limitations under R.C. 2743.16(A) for claims asserted again the state of Ohio and its affiliated entities.

{¶ 2} Savoy began the present case with a complaint filed in the Court of Claims on October 18, 2010, stating claims for false arrest, defamation, breach of contract, and violation of constitutional rights. The events giving rise to the claims, according to the complaint, took place between April 25 and May 16, 2008, the University responded with a motion to dismiss pursuant to Civ.R. 12(B)(6) for failure to state a claim. The basis of

the motion was that the complaint, on its face, established an interval of more than two years between the occurrence of the events complained of and the filing of the complaint, and thus the claim was time-barred.

{¶ 3} Savoy responded to the motion to dismiss with a motion to strike, which asserted, inter alia, that his intervening filing of a case in federal court invoked application of Ohio's "savings statute" for refiled actions, R.C. 2305.19, and that less than a year (the period prescribed by the savings statute) had elapsed between dismissal of the federal action and the filing of the present action.

{¶ 4} The trial court granted the motion to dismiss. Savoy has timely appealed and brings the following assignment of error:

> IT WAS ERROR TO DISMISS THIS CASE AS UNTIMELY FILED BECAUSE THE APPELLANT DEMONSTRATED THE APPLICABILITY OF THE SAVINGS STATUE IN THE TRIAL COURT.

{¶ 5} In order for a trial court to dismiss a complaint under Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted, it must appear beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle plaintiff to the relief sought. *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 245 (1975). When addressing such motion, the court must take the allegations in the complaint as true and draw any reasonable inferences in favor of the nonmoving party. *Id.* Upon appeal, our review of the trial court's decision to dismiss a complaint pursuant to Civ.R. 12(B)(6) is de novo. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, ¶ 5.

{¶ 6} "A complaint may be dismissed under Civ.R. 12(B)(6) for failing to comply with the applicable statute of limitations when the complaint on its face *conclusively* indicates that the action is time-barred." (Emphasis added.) *Ohio Bur. of Workers' Comp. v. McKinley*, 103 Ohio St.3d 156, 2011-Ohio-4432, ¶ 13, citing *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006-Ohio-2625, ¶ 11. This holding, however, must be read in conjunction with the general rule that an "affirmative defense is generally not properly raised in a Civ.R. 12(B)(6) motion, as it also typically requires reference to materials outside the complaint." *Jude v. Franklin Cty.*, 10th Dist. No. 03AP-1053, 2004-

Ohio-2528, ¶ 11, citing *Helman v. EPL Prolong, Inc.*, 139 Ohio App.3d 231 (7th Dist.2000). The various tolling exceptions to Ohio's statutes of limitation, including the refiling provisions of the savings statute, will often invoke questions of fact that may go beyond the scope of the bare dates set forth in the complaint. Because of this, the question of whether a complaint, on its face, "conclusively" fails as time-barred often requires more than mere reference to the overlong interval between the injury and commencement of the action. "For there to be a conclusive showing in that regard, the complaint must show both: (1) the relevant statute of limitations; and (2) the absence of factors which would toll the statute or make it inapplicable." *Id.*

{¶ 7} Under these conditions, a better procedure is to address affirmative defenses by way of a motion for summary judgment that will allow introduction of additional facts beyond the complaint. "The statute of limitations bar is an affirmative defense, Civ.R. 8(C), and is therefore not raised by a motion to dismiss under Civ.R. 12(B). Plaintiff failed to object to Defendant's Civ.R. 12(B)(6) motion on that basis, and instead filed an affidavit contra the motion. That submission presented an issue of fact not resolved by the pleadings. In that instance, Civ.R. 12(B) requires the court to convert the motion to a motion for summary judgment pursuant to Civ.R. 56." *Thomas v. Progressive Cas. Ins. Co., Inc.*, 2d Dist. No. 24519, 2011-Ohio-6712, ¶ 36.

{¶ 8} We note that, in addition to the Ohio precedent described above, federal courts have also expressed reluctance to force a plaintiff to anticipate in his complaint affirmative defenses that have yet to be raised by answer: "Dismissal under Rule 12(b)(6) was irregular, for the statute of limitations is an affirmative defense." Fed.R.Civ.P. 8(c). A complaint states a claim on which relief may be granted whether or not some defenses are potentially available. "This is why complaints need not anticipate and attempt to plead around defenses." *United States v. N. Trust Co.*, 372 F.3d 886, 888 (7th Cir.2004), citing *Gomez v. Toledo*, 446 U.S. 635 (1980), and *United States Gypsum Co. v. Indiana Gas Co., Inc.*, 350 F.3d 623 (7th Cir.2003).

{¶ 9} In the posture of the present case, we find that the judgment of the Court of Claims must be reversed. Responding to the motion for dismissal for failure to state a claim, Savoy presented information to the court indicating that the action was indeed timely filed within the one-year period of the savings statute. In so holding, we

acknowledge that we must distinguish our judgment in *Feagin v. Mansfield Correctional Institution*, 10th Dist. No. 07AP-182, 2007-Ohio-4862. That case, however, lies more clearly within the ambit of *McKinley*, in that the plaintiff failed to put before the trial court any response indicating that the statute of limitations was in fact inapplicable due to operation of the savings statute or some other tolling circumstance. In accordance with the authorities above, it is always difficult to fairly serve the interest of justice by reaching the substantial merits of the case when forcing a plaintiff to anticipate affirmative defenses for which a plaintiff may, in fact, have a sound rebuttal in the complaint. *Feagin* is and ultimately distinguishable on the present facts. The judgment of the Court of Claims of Ohio is accordingly reversed, and the matter is remanded for further proceedings in accordance with law and this decision.

Judgment reversed;
cause remanded.

TYACK, J., concurs.
SADLER, J., dissents.

SADLER, J., dissenting.

{¶ 10} Because I disagree with the majority's decision to reverse and remand this case to the trial court, I respectfully dissent.

{¶ 11} The University filed a motion to dismiss arguing Savoy's complaint conclusively indicated that the action was filed beyond the requisite two-year statute of limitations. While the majority notes this court's acknowledgment in *Jude v. Franklin Cty.*, 10th Dist. No. 03AP-1053, 2004-Ohio-2528, that the affirmative defense of the expiration of the statute of limitations is generally not properly raised in a Civ.R. 12(B)(6) motion because it typically requires reference to materials outside the complaint, a closer reading of *Jude*'s holding reveals that when a violation of the statute of limitations is apparent from the face of the complaint, it may be raised in a Civ.R. 12(B)(6) motion. "For there to be a conclusive showing in that regard, the complaint must show both: (1) the relevant statute of limitations; and (2) the absence of factors which would toll the statute or make it inapplicable." *Jude* at ¶ 11.

{¶ 12} Here, the complaint conclusively establishes that the action was filed beyond the two-year statute of limitations and the complaint contains no indication of any

factors which would toll the statute or make it inapplicable. In my view, the trial court did precisely what it was required to do when ruling on a Civ.R. 12(B)(6) motion and did not resort to evidence outside the complaint to support dismissal. *Brisk v. Draf Industries, Inc.*, 10th Dist. No. 11AP-233, 2012-Ohio-1311, ¶ 10 (recognizing that the trial court specifically noted it may not consider plaintiff's affidavit when deciding a pending motion to dismiss); *Miller v. Village of Lincoln Heights*, 1st Dist. No. C-110276, 2011-Ohio-6722 (unauthorized documents attached to memorandum in response to motion to dismiss cannot be considered when ruling on Civ.R. 12(B)(6) motion to dismiss).

{¶ 13} To find dismissal inappropriate in the case sub judice, the majority looks to Savoy's motion to strike that was filed 30 days after the University filed its Civ.R. 12(B)(6) motion. In the motion to strike, Savoy alleges the intervening filing of a case in federal court invoked application of Ohio's savings statute. However, rather than amend the complaint, Savoy filed a motion to strike with an attached unauthenticated copy of an order from the Summit County Court of Common Pleas.[1] Even if this attachment could be considered when determining a Civ.R. 12(B)(6) motion, I find it insufficient to create an issue of fact as the majority so finds. The purported order indicates it is partially granting a motion for summary judgment filed by the defendant in the case concerning Savoy's complaint alleging a violation of Ohio's public records act. While this purported order references a memorandum opinion of the United States District Court, Northern District of Ohio, acting under its federal question jurisdiction, there is no indication that either court filing constitutes a tolling event under Ohio's savings statute.

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[1] Pursuant to Civ.R. 15(A), "[a] party may amend his pleading once as a matter of course at any time before a responsive pleading is served * * *. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party." A Civ.R. 12(B) motion to dismiss is not a responsive pleading. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 549 (1992). Thus, when a defendant files a motion to dismiss in lieu of an answer, a plaintiff has a right to file an amended complaint without prior leave of court. *Boylen v. Ohio Dept. of Rehab. & Corr.*, 182 Ohio App.3d 265, 2009-Ohio-1953, ¶ 43 (5th Dist.); *Welch v. Finlay Fine Jewelry Corp.*, 10th Dist. No. 01AP-508 (Feb. 12, 2002); *Bell v. Coen*, 48 Ohio App.2d 325, 327 (9th Dist. 1975). *See also Sony Electronics, Inc. v. Grass Valley Group, Inc.*, 1st Dist. No. C-010133 (Mar. 22, 2002) (in Ohio, a party may amend its complaint once, as a matter of right and without leave of the court, at any time before a responsive pleading has been filed or the complaint has been dismissed). After the entry of a final appealable order dismissing the original complaint, a plaintiff can only seek to amend its complaint through the submittal of a Civ.R. 60(B) motion along with a proposed amended complaint. *Rahn v. Whitehall*, 62 Ohio App.3d 62, 67 (10th Dist.1989); *W. Ins. Co. v. Lumbermans Mut. Ins. Co.*, 26 Ohio App.3d 137, 139 (9th Dist. 1985).

{¶ 14} Further, I find *Feagin v. Mansfield Corr. Inst.*, 10th Dist. No. 07AP-182, 2007-Ohio-4862, is not distinguishable from the instant case and the majority's reliance on *Thomas* to be misplaced. In *Feagin*, the trial court granted the defendant's motion for judgment on the pleadings based upon the expiration of the statute of limitations. On appeal, the plaintiff argued the trial court erred in dismissing his complaint and not applying Ohio's savings statute because the trial court was aware he had previously filed the same claims, which were dismissed for lack of jurisdiction, in the Richland County Court of Common Pleas. According to the plaintiff, the trial court was made aware of the previous filing when the plaintiff orally advised the court of such fact at the hearing. This court rejected the plaintiff's arguments and held the trial court was correct in concluding that when the face of a complaint indicates that it is statutorily time-barred, judgment on the pleadings is properly entered. In doing so, this court relied on *Allstate Ins. Co. v. Stanley*, 5th Dist. No. 95 CA 99 (Mar. 8, 1996), which held judgment on the pleadings was required when the face of the complaint indicated that it was time-barred, despite the plaintiff's protestations that it intended to utilize the savings statute because it had previously filed the complaint and the same had been dismissed. While there are factual distinctions between *Feagin* and the instant matter, I do not find *Feagin* distinguishable to an extent requiring us to reach an opposite conclusion here.

{¶ 15} With respect to *Thomas v. Progressive Cas. Ins. Co., Inc.*, 2d Dist. No. 24519, 2011-Ohio-6712, a reading of that case reveals *Thomas*'s language relied upon by the majority was dicta and a recognition that in addition to its reasons for reversing the trial court's dismissal, the appellate court "[did] not endorse the procedure that was followed" in that case. *Id*. at ¶ 36.

{¶ 16} Because I would conclude it appears beyond doubt from the complaint that this matter is barred by the applicable statute of limitations, I would affirm the trial court's decision granting the University's Civ.R. 12(B)(6) motion to dismiss. Therefore, I respectfully dissent from the majority's opinion holding otherwise.

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