[Cite as *Friel v. Swartz*, 2012-Ohio-2405.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Lawrence W. Friel, Jr.,	:	
Plaintiff-Appellee,	:	
		No. 11AP-277
v.	:	(C.P.C. No. 05CVH-5825)
Margaret E. Swartz,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on May 31, 2012

Giorgianni Law, LLC, and *Paul Giorgianni*, for appellee.

Onda, LaBuhn, Rankin & Boggs Co., LPA, and *Patrick H. Boggs*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, P.J.

{¶ 1} This is an appeal by defendant-appellant, Margaret E. Swartz, from a decision and entry of the Franklin County Court of Common Pleas granting summary judgment in favor of plaintiff-appellee, Lawrence W. Friel, Jr., and denying appellant's motion for summary judgment.

{¶ 2} On May 25, 2005, appellee filed a complaint against appellant in the Franklin County Court of Common Pleas asserting claims for breach of contract and unjust enrichment. In the complaint, appellee alleged that appellant had executed a loan agreement and promissory note in favor of appellee on June 6, 1985, under which appellant promised to pay to the order of appellee the sum of $7,448.19, with the

principal and interest due and payable June 1, 1990. The complaint further alleged that appellant had failed to make any payments in accordance with the loan agreement and promissory note.

{¶ 3} On July 11, 2005, appellant filed an answer and counterclaim. In the counterclaim, appellant alleged that appellee's act of filing the complaint violated R.C. 4112.02 (Ohio's anti-discrimination statute) and 42 U.S.C. 12203(a) (the anti-retaliation provision of the Americans with Disabilities Act). Appellant also asserted a claim for intentional infliction of emotional distress.[1]

{¶ 4} On August 8, 2007, appellant filed a motion to dismiss, arguing that the United States Bankruptcy Court had exclusive jurisdiction over the issue of whether appellee's claim on the loan had been discharged as a result of a 2002 bankruptcy filing by appellant.[2] On August 10, 2007, appellee filed a motion with the bankruptcy court to re-open the case, seeking in part a ruling by the bankruptcy court as to whether the debt had been discharged. On August 21, 2007, the trial court granted a stay of the proceedings pending resolution of the bankruptcy matter. Appellee's claims for breach of contract and unjust enrichment were subsequently resolved through the bankruptcy proceedings.

{¶ 5} On December 3, 2009, appellee filed a motion with the trial court to reactivate the case, which the court granted. After the case was reactivated, the only remaining claims for the trial court were those raised in appellant's counterclaim. The parties subsequently submitted cross-motions for summary judgment. By decision and entry filed April 10, 2009, the trial court issued a decision finding appellant's counterclaim to be barred by the doctrine of res judicata. Appellant appealed that decision, and this court issued a decision finding that appellant's retaliation counterclaim under the Americans with Disabilities Act failed, but that the trial court erred in dismissing appellant's retaliation counterclaim under R.C. 4112.02 based upon the doctrine of res judicata. *See Reid v. Plainsboro Partners, III*, 10th Dist. No. 09AP-442, 2010-Ohio-4373.

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[1] The trial court subsequently granted appellee's motion to dismiss appellant's claim for intentional infliction of emotional distress.

[2] Appellee was apparently not listed as a creditor at the time appellant filed for bankruptcy in 2002. *See Reid v. Plainsboro Partners, III*, 10th Dist. No. 09AP-442, 2010-Ohio-4373, ¶ 73.

{¶ 6} Following this court's remand, appellee filed a motion for summary judgment on December 6, 2010 asserting that appellant's counterclaim failed to state a claim under R.C. 4112.02 because her allegations did not describe "discrimination." Alternatively, appellee argued that the filing of the complaint constituted activity protected under the petition clause of the First Amendment. On December 20, 2010, appellant file a memorandum in opposition to appellee's motion for summary judgment. Also on that date, appellant filed her own motion for summary judgment. By decision and entry filed March 2, 2011, the trial court granted summary judgment in favor of appellee, and denied appellant's motion for summary judgment.

{¶ 7} On appeal, appellant sets forth the following four assignments of error for this court's review:

> I. THE TRIAL COURT ERRED IN FINDING MARGARET SWARTZ IS NOT PROTECTED AGAINST THE RETALIATORY CONDUCT BY LAWRENCE FRIEL, JR. PURSUANT TO R.C. 4112.01(I).
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> II. THE TRIAL COURT ERRED IN DENYING THE MOTION OF MARGARET SWARTZ FOR PARTIAL SUMMARY JUDGMENT TO FIND THAT LAWRENCE FRIEL, JR., LACKED A LEGITIMATE, OBJECTIVE BASIS FOR FILING THE COMPLAINT.
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> III. THE TRIAL COURT ERRED IN FINDING THE COMPLAINT FILED BY LAWRENCE FRIEL, JR., IS PROTECTED BY THE FIRST AMENDMENT.
>
> IV. THE TRIAL COURT ERRED IN ITS APPLICATION OF ISSUE PRECLUSION.

{¶ 8} The general issue on appeal is whether the trial court erred in granting summary judgment in favor of appellee. Appellant, the daughter of appellee, argued before the trial court that appellee's claim on the promissory note was brought solely in retaliation for appellant's advocacy on behalf of her sister (Madelynn Reid) arising out of an earlier proceeding before the Ohio Civil Rights Commission. In its decision, the trial court set forth two separate reasons for granting summary judgment in favor of appellee: (1) no discriminatory conduct was alleged, and (2) appellee's complaint was not objectively baseless on the merits.

{¶ 9} Pursuant to Civ.R. 56(C), "summary judgment shall be granted when the filings in the action, including depositions and affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Bonacorsi v. Wheeling & Lake Erie Ry. Co.*, 95 Ohio St.3d 314, 2002-Ohio-2220, ¶ 24. In reviewing a trial court's granting of a motion for summary judgment, an appellate court "stands in the shoes of the trial court and reviews all questions of law de novo." *Lynch v. Lilak*, 6th Dist. No. E-08-024, 2008-Ohio-5808, ¶ 9, citing *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996).

{¶ 10} We will first address appellant's second and third assignments of error, in which appellant contends that the trial court erred in finding appellee had an objective basis for filing his complaint and in finding that the complaint is protected by the First Amendment's Petition Clause. The trial court analyzed these issues under the framework set forth by the Supreme Court of Ohio in *Greer-Burger v. Temesi*, 116 Ohio St.3d 324, 2007-Ohio-6442.

{¶ 11} Under the facts of *Greer-Burger*, an employee had unsuccessfully sued an employer for sexual harassment, and the employer then initiated an action against the employee for abuse of process, malicious prosecution, and intentional infliction of emotional distress. The Ohio Civil Rights Commission subsequently found that the employer's suit against the employee was retaliation, and ordered the employer to pay the employee's attorney fees. The trial court affirmed the agency's determination, and the employer sought further review before the Supreme Court. In *Greer-Burger*, the Supreme Court held that the employer's lawsuit against an employee did not constitute retaliatory conduct if the employer could demonstrate that the suit was not "objectively baseless." *Id*. at ¶ 16.

{¶ 12} In addressing the issue of whether a suit is objectively baseless, the court in *Greer-Burger* looked to the United States Supreme Court's definition of "sham" litigation as set forth in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 60 (1993). Specifically, the court in *Greer-Burger* at ¶ 10-11, held in part:

> The right to petition one's government for the redress of grievances is enshrined within the First Amendment to the

> United States Constitution. It reads, "Congress shall make no law * * * abridging * * * the right of the people * * * to petition the Government for a redress of grievances." In our own jurisprudence, we recognize that the "ability to seek redress in the courts is a fundamental right, guaranteed by the due process provision of the Fourteenth Amendment to the United States Constitution, and restrictions on such a right require 'close scrutiny' by the judiciary." *Krause v. State* (1972), 31 Ohio St.2d 132, 150, 60 O.O.2d 100, 285 N.E.2d 736 (Brown, J., dissenting).
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> Despite the paramount importance placed on the ability to access the courts for redress of injuries, the right is not absolute. Of particular relevance to our discussion here is that the First Amendment does not protect "sham" litigation. *E. RR. Presidents Conference v. Noerr Motor Freight, Inc.* (1961), 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (in the context of antitrust litigation). The United States Supreme Court has defined sham litigation as a "lawsuit [that is] objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized * * *." *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.* (1993), 508 U.S. 49, 60, 113 S.Ct. 1920, 123 L.Ed.2d 611.

(Footnote omitted.)

{¶ 13} In *Professional Real Estate Investors* at 62, the United States Supreme Court, in addition to defining sham litigation, held that "[t]he existence of probable cause to institute legal proceedings precludes a finding that an antitrust defendant has engaged in sham litigation." The court further observed that "[p]robable cause to institute civil proceedings requires no more than a 'reasonabl[e] belie[f] that there is a chance that [a] claim may be held valid upon adjudication.' " *Id*. at 62-63, citing Restatement of the Law 2d, Torts, Section 675, Comment e, at 454-55 (1977).

{¶ 14} Upon review of the record in the instant case, we conclude, as did the trial court, that the lawsuit brought by appellee was not objectively baseless. In appellee's action against appellant for breach of contract and unjust enrichment, appellee alleged in paragraph five of the complaint that appellant executed and delivered a loan agreement

and promissory note to appellee on June 6, 1985, under which appellant promised to pay appellee the sum of $7,448.19, due and payable on June 1, 1990. Attached to the complaint were copies of the loan agreement and promissory note. The promissory note, which contained appellant's signature, recited that the note was secured by a pledge of stock. The complaint further alleged that appellant had failed to make any payments in accordance with the loan agreement and promissory note.

{¶ 15} Appellant has not denied the existence of the loan agreement and promissory note. In her answer and counterclaim filed July 11, 2005, appellant "admit[ted] the allegation in Paragraph 5 of the Complaint that Plaintiff loaned her monies that she agreed in writing to repay and did repay, but asserts that the loan agreement speaks for itself and denies any application of the terms of the agreement." Similarly, in appellant's motion for summary judgment, filed January 15, 2009, appellant acknowledged that (1) appellee agreed to lend money to appellant, (2) the total amount of the loan was $7,448.19, and (3) under the terms of the loan agreement, appellant was required to deliver to appellee, as security for the amounts due and owing, appellant's interest in three different stocks.

{¶ 16} Appellant argues that appellee lacked a reasonable basis for filing the 2005 complaint because such action was barred by the applicable statute of limitations. In the proceedings before the trial court, the parties disagreed as to which statute of limitations was applicable to appellee's claim. Specifically, appellant asserted that appellee's claim fell within the six-year statute of limitations of R.C. 1303.16(A) (pertaining to certain negotiable instruments, i.e., notes payable at a definite time, under Ohio's version of the Uniform Commercial Code ("UCC")). In contrast, appellee argued that his claim fell within the 15-year statute of limitations of R.C. 2305.06 (for contracts in writing). Appellee maintained that the statute of limitations did not begin to run until June 1, 1990, when the note became due and payable, and therefore the claim was timely filed under the limitations period of R.C. 2305.06. Appellee also argued before the trial court, as he does on appeal, that dismissal of an action on limitations grounds is other than on the merits, and therefore the existence of an affirmative defense is not relevant to the issue of whether a plaintiff has an objective basis on the merits.

{¶ 17} In general, case law supports appellee's argument that courts have treated dismissals based upon affirmative defenses, such as limitations defenses, as "not on the merits in the sense that the underlying substantive claim has been adjudicated." *In re Marino,* 181 F.3d 1142, 1144 (9th Cir.1999).[3] *See also Lackner v. LaCroix,* 25 Cal.3d 747, 751-52 (1979) (characterizing a dismissal on statute of limitations defense as procedural, and holding that "the purpose served by dismissal on limitations grounds is in no way dependent on nor reflective of the merits—or lack thereof—in the underlying action"); *Palmer Dev. Corp. v. Gordon,* 723 A.2d 881, 884 (Me.1999) ("A successful statute of limitations defense does not reflect on the merits of an action."). Similarly, this court has previously held that "an affirmative defense is separate from the merits of the plaintiff's cause of action and bars recovery even when the plaintiff has established a prima facie case." *Natl. City Mtge. Co. v. Richards*, 182 Ohio App.3d 534, 2009-Ohio-2556, ¶ 20 (10th Dist.). Further, under Ohio law, "[a] statute of limitations is an affirmative defense that is waived unless pled in a timely manner." *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 75 (1998).

{¶ 18} Given the posture of the instant action, the trial court never determined whether appellee's claim was barred by a statute of limitations defense. However, even assuming that a successful defense of a claim based upon statute of limitations is relevant in considering whether a plaintiff had probable cause to initiate a lawsuit, it does not follow that appellee's claim in this case was objectively baseless.

{¶ 19} While appellant contends that the six-year statute of limitations under R.C. 1303.16 would have barred appellee's claim, appellee points out that the promissory note at issue was executed in 1985 and matured in 1990, four years before the effective date (August 19, 1994) of R.C. 1303.16, Ohio's version of UCC 3-118. Appellant relies upon a Cuyahoga County Court of Appeals decision, *Walsh v. Urban,* 8th Dist. No. 85466, 2005-Ohio-3727, for the proposition that R.C. 1303.16 has retroactive application. The decision in *Walsh*, however, addressed the ten-year statute of limitations for demand notes under R.C. 1303.16(B) rather than an action to enforce a note payable at a definite time under

[3] The issue of whether dismissal of a statute of limitations defense is "on the merits" often arises in the context of malicious prosecution actions. *Miskew v. Hess,* 21 Kan.App.2d 927, 939 (1996). The generally accepted rule is that "a statute of limitations termination is not a favorable termination for the purposes of a malicious prosecution action." *Id*. at 940.

R.C. 1303.16(A) . In fact, the court in *Walsh* acknowledged its own prior decision, *Novak v. CDT Dev. Corp.*, 8th Dist. No. 83655, 2004-Ohio-2558, in which it held that R.C. 1303.16(A) did not apply retroactively. Further, at least one other Ohio Appellate Court has held, in addressing R.C. 1303.16(G)(1), that the legislature did not give that provision retrospective application, and therefore "R.C. 1303.16 is 'presumed to be prospective in its operation.' " *Geraldo v. First Dominion Mut. Life Ins. Co.*, 6th Dist. No. L-01-1210, 2002-Ohio-4654, ¶ 28.

{¶ 20} Federal courts, in addition to considering whether a claimant had a reasonable belief of a valid claim in initiating a civil proceeding, have held that a substantial ground for difference of opinion is indicative of probable cause to initiate a civil proceeding. *Bobrick Corp. v. Santana Prods., Inc.*, 698 F.Supp.2d 479, 496 (M.D.Pa.2010). Under this analysis, " '[a] substantial ground for difference of opinion exists when there is a genuine doubt or conflicting precedent as to the correct legal standard.' " *Id.*, quoting *Eli Lilly & Co. v. Actavis Elizabeth, LLC*, D.N.J. No. 07-3770 (Feb. 23, 2010).

{¶ 21} Based upon this court's de novo review, we conclude that appellee's claim was not "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Professional Real Estate Investors* at 60. Here, the issue of appellant's potential liability on the loan agreement and promissory note was genuine. Although not dispositive, we note that, during the somewhat lengthy course of litigation in this case, appellee's claim previously survived a motion for summary judgment. Specifically, in a decision and entry filed March 28, 2007, the trial court denied motions for summary judgment filed by both appellant and appellee, in which the court noted there "is no dispute between the parties regarding the existence of this agreement, the amount, or the signatures of the parties on the documents. What is at issue is whether Swartz ever paid it back." The court further noted in that decision that appellant "offers a multitude of copies of bank statements, stock receipts, and the like for the proposition, perhaps, that the loan was repaid. However, none of that information clearly shows repayment of the loan." Based upon the materials submitted in the competing motions for summary judgment, the court found that a genuine issue of material fact remained as to whether or not the loan was repaid.

{¶ 22} Further, while appellant contends that the claim was barred by virtue of the six-year statute of limitations under R.C. 1303.16(A), the question of whether that statutory provision should be given retroactive application was arguably unsettled at the time of the filing of the complaint, and there does not appear to be consensus among Ohio appellate courts. As noted, at least two courts have issued decisions casting doubt on whether the legislature intended retroactive application of R.C. 1303.16. *See Novak* at ¶ 17 ("CDT does not allege there exists, nor do we find any language in R.C. 1303.16 that expressly indicates the General Assembly intended a retroactive application of the statute"); *see also Geraldo* at ¶ 28.

{¶ 23} Upon review, we conclude there existed a genuine disagreement on this issue and that it was not unreasonable for appellee to advance the argument that, because the loan agreement and promissory note were both executed in 1985, and matured in 1990, four years before the effective date of R.C. 1303.16(A), the six-year limitations period under that statute was not applicable. Stated otherwise, appellee had probable cause to believe the 2005 claim might be upheld as having been filed within the 15-year statute of limitations period under R.C. 2305.06. *See Professional Real Estate Investors* at 65 (finding that, "[e]ven in the absence of supporting authority, [the defendant] would have been entitled to press a novel copyright claim as long as a similarly situated reasonable litigant could have perceived some likelihood of success"). *See also* Restatement of Law 2d, Torts, Section 674, Comment e ("a reasonable belief in the possibility that the claim may be held valid is sufficient to give probable cause for the initiation of civil proceedings"). Thus, the trial court did not err in granting summary judgment in favor of appellee based upon a determination that appellee's action on the loan agreement and promissory note was not a sham lawsuit, and therefore the litigation was protected by the First Amendment right to petition.

{¶ 24} Accordingly, appellant's second and third assignments of error are without merit and are overruled.

{¶ 25} In the remaining two assignments of error, appellant argues that the trial court erred in finding appellant is not protected against retaliatory conduct under R.C. 4112.01, and that the court erred in finding appellant's statute of limitations defense is precluded by a ruling of the bankruptcy court. We need not address those assignments of

error, however, as they are rendered moot by our disposition of the second and third assignments of error.

{¶ 26} Based upon the foregoing, appellant's second and third assignments of error are overruled, the first and fourth assignments of error are rendered moot, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

TYACK and DORRIAN, JJ., concur.

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