

Court of Claims of Ohio

The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

HAROLD FITZGERALD

Case No. 2005-08441

Plaintiff

Judge Joseph T. Clark

v.

DECISION

BUREAU OF WORKERS'
COMPENSATION

Defendant

{¶1} On August 14, 2007, defendant filed a motion for summary judgment. On September 17, 2007, after obtaining leave of court, plaintiff filed a response. On September 19, 2007, an oral hearing was held on the motion. At the conclusion of the proceedings, the court announced its decision that defendant's motion was GRANTED and that the trial set for September 20, 2007, would not go forward as scheduled. The basis for the court's decision is set forth below.

{¶2} Civ.R. 56(C) states, in part, as follows:

{¶3} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, 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. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor." See also *Gilbert v. Summit County*, 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317.

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{¶4} The crux of defendant's motion is that the instant case is plaintiff's third attempt to file the same lawsuit and his second attempt to utilize the savings provisions of R.C. 2305.19. Defendant argues that it is axiomatic that the savings statute may be used only one time and that this case is therefore barred by the statute of limitations. The court agrees.

{¶5} Plaintiff's civil actions stem from his dissatisfaction with defendant's handling of his workers' compensation claim. At some point in 1997, plaintiff vented his frustrations to certain of defendant's employees. On November 21, 1997, criminal misdemeanor charges of menacing by stalking and aggravated menacing were filed by one of the employees in the Franklin County Municipal Court. It was alleged that plaintiff made threatening comments to the effect that he wanted someone's head cut off and placed on a stick and for that person's butt to be cut into pieces. It was also alleged that plaintiff made statements that he knew where certain employees lived. (Defendant's Exhibit 1.) Ultimately, on March 12, 1998, the criminal charges were dismissed. (Defendant's Exhibit 1.) According to plaintiff, the dismissal was granted because none of the individuals involved in filing the charges appeared at any of the scheduled court proceedings.

{¶6} In each action, plaintiff alleges, among other things, that his comments were taken out of context; that the criminal charges filed against him were false and malicious; and that the charges were made in order to divert attention away from defendant's wrongdoings. The actions assert claims of malicious prosecution, perjury, conspiracy, and deprivation of civil and constitutional rights.

{¶7} Plaintiff's first action against defendant and its employees was filed in United States District Court, S.D. Ohio, Eastern Division, Case No. C-2-00-188, on February 18, 2000. On February 6, 2001, the court granted defendant's motion for judgment on the pleadings and dismissed plaintiff's claims "otherwise than upon the merits." The court held that plaintiff's claims against the individual employees in their official capacities were barred by Eleventh Amendment immunity, that the individual defendants were entitled to

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qualified immunity and that the court did not have jurisdiction over plaintiff's state law claims. Plaintiff appealed to the United States Court of Appeals, Case No. 01-3261, and on November 30, 2001, the District Court's dismissal was affirmed.

{¶18} On November 29, 2002, plaintiff filed his first action in this court, under Case No. 2002-10461. On November 6, 2003, that case was dismissed without prejudice pursuant to Civ. R. 41(B)(1) for failure to prosecute. At the time, the court was not aware of plaintiff's previous action in the U.S. District Court and, thus, did not consider it when dismissing the case without prejudice. Plaintiff appealed to the Tenth District Court of Appeals, Case No. 03AP-1197, and on July 15, 2004, this court's judgment was affirmed.

{¶19} On July 15, 2005, plaintiff filed the instant action making the same allegations stated in the two previous actions, but also including for the first time a claim of slander. Defendant argues, and this court agrees, that when plaintiff filed Case No. 2002-10461 he used his one-time opportunity to avail himself of the savings statute.¹ See *Stover v. Wallace* (Feb. 16, 1996), Franklin App. No. 95APE06-743. ("the savings statute may be used only once to invoke an additional one year time period in which to refile an action.") In *McGowan v. Family Med., Inc.*, Stark County App. No. 2001CA00385, 2002-Ohio- 4071, the court explained that "in order to employ the savings statute, a plaintiff must satisfy at least two elements: (1) commencement of an action before the statute of limitations has expired; and (2) failure otherwise than upon the merits after the statute of limitations has expired. (Citation omitted.) When a plaintiff has already utilized the savings statute once, it means that he or she has re-filed an action after the statute of limitations has expired. Thus, an attempt to use the savings statute a second time, to file a third complaint, is an attempt to refile an action that was not commenced before the statute of limitations

¹The version of R.C. 2305.19 in effect at the time provided in relevant part:

"In an action commenced, or attempted to be commenced, if in due time a judgment for the plaintiff is reversed, or if the plaintiff fails otherwise than upon the merits, and the time limited for the commencement of such action at the date of reversal or failure has expired, the plaintiff * * * may commence a new action within one year after such date."

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expired. (Citation omitted.) The third complaint therefore fails to qualify for re-filing under R.C. 2305.19 because it constitutes an attempt to re-file an action that was not commenced before the expiration of the statute of limitations (Citation omitted.)”

{¶10} While plaintiff argues that his action in the U.S. District Court “does not count” and that his first use of the savings statute was made in filing the instant action, he can point to no authority to support such contention. On the other hand, there is authority for the proposition that the savings statute applies to claims that were originally filed in federal court and re-filed in a state court. See *Wasyk v. Trent* (1963), 174 Ohio St. 525, 530 (“where a plaintiff institutes a civil action in a federal court and defendant appears generally by counsel and files a motion to dismiss on the ground that there is no diversity of citizenship, and that court, after a hearing, dismisses the action on that ground, the action is commenced, and its dismissal is a failure of the action otherwise than upon the merits and such plaintiff can bring a new action in a court of this state under the provisions of Section 2305.19, Revised Code.”)

{¶11} In short, the court finds that the instant action fails to qualify for re-filing under R.C. 2305.19 and is barred by the statute of limitations. Further, plaintiff’s slander claim, having accrued at the latest when the criminal proceedings were dismissed on March 12, 1998, and asserted for the first time in this action, filed on July 15, 2005, is clearly barred by the one-year statute of limitations set forth under R.C. 2305.11.²

{¶12} Finally, irrespective of the foregoing analysis, plaintiff’s claims for relief under 42 U.S.C. 1983 and 1985 must fail. It is well-settled that the Court of Claims lacks subject matter jurisdiction over constitutional claims. See *Graham v. Ohio Board of Bar Examiners* (1994), 98 Ohio App.3d 620. Actions in the Court of Claims are limited to those that could

²R.C. 2305.11 provides in relevant part that: “(A) An action for libel, slander, malicious prosecution, or false imprisonment, * * * shall be commenced within one year after the cause of action accrued, * * *.”

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be brought against private parties. *Bleicher v. University of Cincinnati College of Medicine* (1992), 78 Ohio App.3d 302, 306. The alleged constitutional violations in this case require an element of state action and, therefore, could not be brought against a private individual. *Id.* at 307. Accordingly, the court is without jurisdiction to hear such claims.

{¶13} For the forgoing reasons, the court concludes that no genuine issues of material fact exist for trial and defendant's motion for summary judgment shall be granted. As a result, plaintiff's September 5, 2007 motion to compel is DENIED as moot.

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JUDGMENT ENTRY

BUREAU OF WORKERS'
COMPENSATION

Defendant

An oral hearing was conducted in this case upon defendant's motion for summary judgment. For the reasons set forth in the decision filed concurrently herewith, defendant's motion for summary judgment is GRANTED and judgment is rendered in favor of defendant. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

JOSEPH T. CLARK
Judge

cc:

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LH/cmd
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