[Cite as *Bingham v. Evenflo Co., Inc.*, 2010-Ohio-2264.]

IN THE COURT OF APPEALS OF MIAMI COUNTY, OHIO

DORA E. BINGHAM :

Plaintiff-Appellant : C.A. CASE NO. 09CA0039

vs. : T.C. CASE NO. 07-364

EVENFLO COMPANY, INC. ET AL. : (Civil Appeal from Common Pleas Court)

Defendants-Appellees :

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O P I N I O N

Rendered on the 21st day of May, 2010.

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Joseph E. Gibson, Atty. Reg. No. 0047203, 545 Helki Road, Vandalia, OH 45377-1503
Attorney for Plaintiff-Appellant

Lisa Patterson, 25 E. Mill Street, Springboro, OH 45066
Attorney for Defendants-Appellees

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GRADY, J.:

{¶ 1} This is an appeal from a summary judgment for the employer in a workers' compensation appeal.

{¶ 2} On May 4, 2007, Defendant-Appellee, Evenflo Company, Inc. ("Evenflo"), filed a notice of appeal pursuant to R.C. 4123.512(A) to the court of common pleas from an order of the industrial commission allowing Plaintiff-Appellee, Dora E.

Bingham, to amend her claim for workers' compensation benefits to include several additional conditions. Bingham thereafter filed her petition and complaint pursuant to R.C. 4123.512(D) on May 31, 2007, containing a statement of facts showing a cause of action to participate in the workers' compensation fund for the additional conditions the industrial commission had allowed.

{¶ 3} On March 7, 2008, Bingham filed a notice pursuant to Civ.R 41(A), voluntarily dismissing her petition and complaint. Bingham's notice cited and relied on *Kaiser v. Ameritemps, Inc.* (1999), 84 Ohio St.3d 411. In that case, the Supreme Court held that "[a] workers' compensation claimant may employ Civ.R. 41(A)(1)(a) to voluntarily dismiss an appeal to the court of common pleas brought by an employer under R.C. 4123.512." *Id.* at Syllabus by the Court. With reference to the one-year "savings statute," R.C. 2305.19, which precludes claims refiled later than one year from the time of the voluntary dismissal, the *Kaiser* court added: "If the employee does not refile his complaint within a year's time, he can no longer prove his entitlement to participate in the workers' compensation system." *Id.* at 415.

{¶ 4} On July 17, 2009, more than one year after Bingham's notice of voluntary dismissal was filed, Evenflo filed a Civ.R. 56 motion for summary judgment. Evenflo argued that it is entitled to judgment as a matter of law on the cause of action in the petition

and complaint that Bingham filed on May 31, 2007, because Bingham had failed to refile her petition and complaint within one year after her notice of voluntary dismissal was filed.

{¶ 5} On January 9, 2009, Bingham filed a Motion For Leave To Re-File Complaint and a Response To Defendant's Motion For Summary Judgment. Bingham contended that she voluntarily dismissed her petition and complaint with Evenflo's agreement in order to continue an approaching trial date and allow time for settlement negotiations to continue. Bingham further contended that a settlement agreement had been delayed by difficulties in securing the approval of the Social Security Administration in establishing a Medicare Set-Aside Account in which to deposit some or all of the workers' compensation benefits Bingham would receive from a settlement of her claim. In his affidavit in support of Bingham's applications, her counsel stated:

{¶ 6} "2. During the course of the case, attempts were made to negotiate a full and final settlement of all of Ms. Bingham's claims. A settlement demand letter was submitted to Defense Counsel, Ms. Lisa Patterson.

{¶ 7} "3. On more than one occasion Ms. Patterson indicated to me that this case can be settled, and that the parties were not all that far apart. However she did state that issues regarding the Social Security Medicare Set Aside Account would have to be

resolved. This would entail establishing a Medicare Set-Aside Account (an 'MSA') which does take a very long time in many cases. After discussing the case with Ms. Patterson, I agreed to Voluntarily Dismiss the case under rule 41(A) of the Ohio rules of Civil Procedure. It was my full intention to amicably resolve this case during the pending period without the need for re-filing the case back into court. I filed the Voluntary dismissal rather than requiring Ms. Patterson to dismiss her Notice of Appeal to allow the parties time in which to settle the matter. We discussed the case several times through 2008 and 2009.

{¶ 8} "4. On April 23, 2009 (after the due date for the re-filing of the case) Attorney Patterson and I had a conversation at the Ohio Industrial Commission between workers' compensation hearings wherein the settlement of this case was discussed, and problems associated with the Medicare Set-Aside Account would have to be addressed. We discussed how this might even push back a trial date on the case whenever it is re-filed. At no time did Ms. Patterson indicate to me that the case was due for re-filing, or that the matter was not on track for a full and final settlement. Based on this and several other conversations, it was my impression that this case was going to be settled out of court, be it administratively under O.R.C. Section 4123.65, or otherwise. I proceeded under this understanding."

{¶ 9} On August 25, 2009, the common pleas court overruled Bingham's motion for leave to refile her complaint, and the court granted Evenflo's motion for summary judgment. Bingham filed a notice of appeal from the order granting Evenflo's motion for summary judgment.

ASSIGNMENT OF ERROR

{¶ 10} "THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AS THE CASE WAS CLOSE TO SETTLING AND PLAINTIFF RELIED IN GOOD FAITH ON DEFENDANT'S REPRESENTATIONS."

{¶ 11} Summary judgment may not be granted unless the entire record demonstrates that there is no genuine issue of material fact and that the moving party is, on that record, entitled to judgment as a matter of law. Civ.R. 56. The burden of showing that no genuine issue of material fact exists is on the moving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64. All evidence submitted in connection with a motion for summary judgment must be construed most strongly in favor of the party against whom the motion is made. *Morris v. First National Bank & Trust Co.* (1970), 21 Ohio St.2d 25. In reviewing a trial court's grant of summary judgment, an appellate court must view the facts in a light most favorable to the party who opposed the motion. *Osborne v. Lyles* (1992), 63 Ohio St.3d 326. Further, the issues of law involved are reviewed de novo. *Nilavar v. Osborn* (1998),

127 Ohio App.3d 1.

{¶ 12} Bingham first argues that the trial court lacked jurisdiction to grant the motion for summary judgment Evenflo filed because Bingham's Civ.R. 41(A)(1)(a) notice of voluntary dismissal terminated the court's jurisdiction in the action. We do not agree.

{¶ 13} The jurisdiction of the court of common pleas was invoked by the R.C. 5123.512(A) notice of appeal that Evenflo filed. "The voluntary dismissal of the claimant's complaint does not affect the employer's notice of appeal, which remains pending until the refiling of the claimant's complaint." *Kaiser v. Ameritemps, Inc.*, 84 Ohio St. 3d at 415. Therefore the voluntary dismissal of Bingham's complaint did not divest the court of its jurisdiction in the action to grant the motion for summary judgment Evenflo filed. *McKinney v. Ohio State Bureau of Workers' Compensation*, Franklin App. No. 04AP-1086, 2005-Ohio-2330.

{¶ 14} Second, Bingham returns to her argument that the circumstances of this case should preclude the bar against refiling announced in *Kaiser*. That principle was more recently affirmed in *Fowee v. Wesley Hall, Inc.*, 108 Ohio St.3d 533, 2006-Ohio-1712, in which the syllabus states:

{¶ 15} "In an employer-initiated workers' compensation appeal pursuant to R.C. 4123.512, after the employee-claimant files the

petition as required by R.C. 4123.512 and voluntarily dismisses it as allowed by Civ.R. 41(A), if the employee-claimant fails to refile within the year allowed by the saving statute, R.C. 2305.19, the employer is entitled to judgment on its appeal. (*Robinson v. B.O.C. Group, Gen. Motors Corp.* (1998), 81 Ohio St.3d 361, 691 N.E.2d 667, modified.)"

{¶ 16} Bingham relies on the holding of the Eighth District Court of Appeals in *Gonzales v. Alcon Industries, Inc.*, Cuyahoga App. No. 92274, 2009-Ohio-2587. In *Gonzalez*, a workers' compensation claimant voluntarily dismissed his complaint but failed to refile it within one year. The employer moved for a judgment on the pleadings, pursuant to Civ.R. 12(C). In opposing the motion, the claimant filed an affidavit of his attorney, who stated that the employer's attorney induced him to dismiss the complaint based on a verbal agreement that the employer would then not wish to pursue its appeal. The employer denied the allegation, and attached an affidavit in support thereof.

{¶ 17} The trial court in *Gonzalez* granted the employer's motion for judgment on the pleadings. The appellate court reversed. After observing that the standards for a Civ.R. 12(C) motion are identical to those applicable to a Civ.R. 56 motion for summary judgment, the court held that the claimant in *Gonzales* preserved a genuine issue of material fact concerning the defense of equitable

estoppel, because "it must first be determined whether the parties entered into an agreement." *Id.*, at ¶11.

{¶ 18} The *Gonzales* court reasoned that R.C. 2305.19, the one-year savings statute, functions much as a statute of limitations does, and observed that "[e]quitable estoppel can preclude a defendant from asserting the bar of the statute of limitations where the misrepresentation induced a delay in the filing of the action." *Id.*, at ¶10, citing *Hutchinson v. Wenzke* (1999), 131 Ohio App.3d 613. The *Gonzales* court also cited the following holding in *Markese v. Ellis* (1967), 11 Ohio App.2d 160, 163:

{¶ 19} "We recognize the principle of law that one cannot justly or equitably lull his adversary into a false sense of security, and thereby cause the adversary to subject a claim to the bar of the statute of limitations, and then be permitted to plead the very delay caused by his course of conduct as a defense to the action when brought. The doctrine of estoppel has been primarily formulated to prevent results contrary to good conscience and fair dealing."

{¶ 20} Equitable estoppel is estoppel by misrepresentation. *Fleming v. City of Steubenville* (1931), 44 Ohio App. 121. "'In order to constitute this kind of estoppel there must exist a false representation or concealment of material facts; it must have been

made with knowledge, actual or constructive, of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted upon; and the party to whom it was made must have relied on or acted upon it to his prejudice.'" *Id.*, at 125-126, quoting 21 Corpus Juris Secundum, at p. 1119.

{¶ 21} In his affidavit, Bingham's attorney averred that the representations made by Evenflo's attorney "that this case can be settled, and that the parties were not all that far apart," adding "that issues regarding the Medical Set-Aside Account would have to be resolved," had induced him to file the notice of voluntary dismissal. Counsel further stated that "we discussed the case several times throughout 2008 and 2009." However, and unlike in *Gonzales,* counsel did not allege any agreement that Evenflo would not pursue the R.C. 4123.512 appeal it had filed in exchange for Bingham's notice of voluntary dismissal. Neither did counsel allege that he was in any way induced by Evenflo to not refile Bingham's complaint within one year. Instead, Bingham's counsel averred that "[i]t was my full intention to amicably resolve this case during the pending period without the need for refiling the case back in court." Counsel nevertheless acknowledged that the proposed settlement agreement was contingent on resolving issues regarding the Medicare Set-Aside Account within one year following

his notice of dismissal, and that those issues were not resolved within that time.

{¶ 22} R.C. 2305.19 imposed an obligation on Bingham to refile her complaint within the year following her notice of voluntary dismissal, in order to preserve her right to prosecute the claim for relief her complaint had presented. Evenflo is entitled to a judgment on that claim for relief for Bingham's failure to refile her complaint. Nothing in the record of this proceeding demonstrates a misrepresentation on the part of Evenflo that would permit imposition of an equitable estoppel to bar Evenflo from obtaining the judgment to which it is entitled. The law charges parties in litigation to be vigilant to their rights and duties. Bingham, and not Evenflo, is charged with the consequences of Bingham's failure to refile. We note that R.C. 4123.65 allows parties to enter into an enforceable settlement memorialized by their written agreement, which could have relieved Bingham of her obligation to refile while the matter of the Medicare Set-Aside Account remained unsettled.

{¶ 23} On this record, we find that Evenflo was entitled to summary judgment on the motion it filed. Therefore, the trial court did not err when it granted summary judgment for Evenflo on its motion.

{¶ 24} The assignment of error is overruled. The judgment of

the trial court will be affirmed.

BROGAN, J., And FROELICH, J., concur.

Copies mailed to:

Joseph E. Gibson, Esq.
Lisa Patterson, Esq.
Hon. Jeffrey M. Welbaum