**[Cite as *Snyder v. Gleason Constr.*, 2013-Ohio-1930.]**

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

| | |
|---|---|
| Sarah Snyder, et al. | Court of Appeals No. L-12-1187 |
| Appellants | Trial Court No. CI0201105996 |
| v. | |
| Gleason Construction Co., Inc. and United Research Services Corp. | **DECISION AND JUDGMENT** |
| Appellees | Decided: May 10, 2013 |

* * * * *

Daryl K. Rubin and Phillip G. Bazzo for appellants.

Shannon J. George for appellee.

* * * * *

**SINGER, P.J.**

**{¶ 1}** Appellants appeal a judgment of the Lucas County Court of Common Pleas, dismissing their complaint alleging damage from "trespassory water home invasion" at the hand of appellee construction company. For the reasons that follow, we reverse.

**{¶ 2}** Appellants are Geoffrey and Sarah Snyder and 28 other couples, individuals and businesses in the Bennett area sewer district in north Toledo. On August 18, 2011,

following a heavy rain, appellants experienced a massive influx of surface water and sewage onto their property and into their basements. Substantial damage is said to have occurred.

**{¶ 3}** On October 14, 2011, 23 of the appellants, on behalf of themselves and others similarly situated, sued URS Corporation ("URS") and appellee, Gleason Construction Co., Inc. In a 28-page complaint, appellants alleged that URS, as author of a study concerning the separation of storm and sanitary sewers in the Bennett area, negligently failed to identify a number of vented manhole lids in sanitary sewers, providing a path for rain water to infiltrate the sanitary sewers. This, appellants alleged, contributed to the water "home invasion" of August 18, 2011.

**{¶ 4}** Appellee, appellants alleged, contracted with the city of Toledo to construct the separate storm and sanitary sewers in the Bennett area. As part of that contract, appellee assumed operation of the sewers during the construction period. As operator, appellants maintained, appellee undertook responsibility to control water, a duty it breached by permitting flooding on August 18. Moreover, appellants alleged, appellee negligently failed to remove obstructive drain covers it had installed, preventing storm water from being diverted away from appellants' property.

**{¶ 5}** Moreover, appellants alleged,

> **38.** Defendant Gleason knew or should have known that rainfall such as the Occurrence Period Rainfall would more likely than not cause home water invasions into the Plaintiff Sanitary Sewer Invasion Subclass' homes.

**38.1** Sanitary Sewer Home Invasions had occurred during rainfalls in 2000, 2006, 2008, 2009, and 2010.

**38.2** Defendant Gleason knew or should have known of this history of these Sanitary Sewer Water Home Invasions.

**{¶ 6}** Both URS and appellee moved to dismiss appellants' complaint, "pursuant to Civ.R. 12(B)." URS eventually settled with appellants and was dismissed from the case. In support of its motion, appellee argued that appellants failed to state a claim for relief because its claim was barred due to governmental immunity and/or the applicable statute of limitiations.

**{¶ 7}** On March 16, 2012, the trial court held a hearing on appellee's motion. On April 9, 2012, appellants filed their "First Amended Complaint as of Right per Civ.R.15.A." The 54 page amended complaint added six plaintiffs, deleted class action language and reframed the causes of action. On June 13, 2012, the trial court issued its decision, denying what it characterized as "Plaintiffs' * * * motion to amend their complaint" and granting appellee's motion to dismiss.

**{¶ 8}** The court stated:

> According to Plaintiffs' complaint, Defendants' negligence which allowed rainfall to act as the proximate cause of "home water invasions" occurring "in 2000, 2006, 2008, and 2012." [sic] Thus, Plaintiffs claim to have knowledge of the link between Defendant's work and the injury to their property as early as 2000. [T]he statute of limitations is fixed at four years. The discovery rule for negligence claims commences when a

plaintiff knew or should have known of damage to property. * * *

Moreover, many of these plaintiffs had acted on these events by filing suit against Gleason in 2008 for the 2000 and 2006 flooding [.]

**{¶ 9}** The court also noted that some of the plaintiffs had sued appellee in 2009, dismissed the suit and did not refile within the one year period permitted under the savings statute. "To allow Plaintiffs to revive their suit by simply refiling beyond the time allowed by statute would circumvent the entire purpose of the savings statute [.]" Finding the statute of limitations issue dispositive, the court declined to consider the governmental immunity defense

**{¶ 10}** From this judgment, appellants now bring this appeal. Appellants set forth the following ten assignments of error:

**Assignment of Error I:** Because Gleason did not file a responsive pleading to the **October 14, 2011** Original Complaint, the trial court erred in failing to deem the properly-filed **April 9, 2012** First Amended Complaint as having superseded the Original Complaint and, consequently, in failing to consider the averments of the First Amended Complaint as superseding the averments of the Original Compliant, rendering his [sic] **June 13, 2012** dismissal under Civ.R. 12(B) moot.

**Assignment of Error II:** The trial court erred in relying upon documents not part of the Original Complaint and unsworn attorney motion statements in granting Defendant Gleason's Civ.R. 12(B) motion.

**Assignment of Error III:** Even assuming for argument that five plaintiffs litigated the same issue with Gleason in ***Morelli*** (which facts are (1) not set out in the Complaint, (2) denied by Plaintiffs and (3) not documented anywhere in this record), the trial court erred in dismissing the twenty-nine plaintiffs who were not identified by Gleason as ***Morelli*** litigants based upon R.C. 2305.19 relating to the one year statute of limitations following voluntary dismissal.

**Assignment of Error IV:** The trial court erred in treating the statute of limitation defenses under R.C. 2305.09 and R.C. 2305.19 as Civ.R. 12(B) defenses because a statute of limitations defense is not an enumerated defense under Civ.R. 12(B) and, further, not unequivocally conclusive from the averments set out in the four-corners of the Complaint.

**Assignment of Error V:** The trial court erred in failing to favorably construe the August 18, 2011 "Occurrence Date" definition and to favorably apply other standards applicable to a Civ.R. 12(B)(6) analysis of Plaintiff's Complaint when granting Gleason's Motion to Dismiss.

**Assignment of Error VI:** The trial court erred by failing to notify the non-movant Plaintiffs that the trial court was converting Gleason's Civ.R. 12(B) motion to a Civ.R. 56 motion for summary judgment.

**Assignment of Error VII:** The trial court erred in both its selection of the applicable statute of limitations and in its application of the statute of

limitations in finding that the statute of limitations had run as to Plaintiffs' August 18, 2011 claims raised in Plaintiffs' Complaint.

**Assignment of Error VIII:** The trial court erred in finding the ***Morelli*** case and the alleged, unsupported assertion of a Gleason dismissal had any applicability to the Plaintiffs **Snyders'** claims.

**Assignment of Error IX:** The trial court erred in exercising jurisdiction to decide whether R.C. 2305.19 controls where the ***Morelli*** case remains pending and where the trial judge in ***Morelli*** has a record for making a decision.

**Assignment of Error X:** The trial court erred in judging the First Amended Compliant as "moot" where the First Amended Complaint states claims for the August 18, 2011 trespassory sewer water invasions.

**{¶ 11}** Appellee's motion to dismiss failed to state with any particularity the subsection of Civ.R. 12(B) upon which it relied in interposing its motion. Since the basis of the trial court's decision to grant the motion was premised on expiration of the statute of limitations and that is one of the defenses which, under certain specific circumstances, may be raised by a Civ.R. 12(B)(6) motion, *Alcala v. Autullo*, 6th Dist. Nos. S-06-035, S-06-041, 2007-Ohio-5309, ¶ 14, that will be the basis of our analysis.

**{¶ 12}** Review of a judgment granting a Civ.R. 12(B)(6) motion is de novo. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5.

When ruling on a motion to dismiss for a failure to state a claim upon which relief can be granted, a court must presume the truth of the factual allegations in the complaint and must make all reasonable inferences in favor of the non-moving party. *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). It must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him or her to recover. *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 327 N.E.2d 753 (1975), syllabus. The court may not rely on allegations or evidence outside the complaint unless, with reasonable notice to the parties, it treats the motion as a Civ.R. 56 motion for summary judgment. Civ.R. 12(B); *State ex rel. Natalina Food Co. v. Ohio Civ. Rights Comm.*, 55 Ohio St.3d 98, 99, 562 N.E,.2d 1383 (1990). For these reasons, motions to dismiss for failure to state a claim are rarely successful. *Tri-State Computer Exchange v. Burt*, 1st Dist. No. C-020345, 2003-Ohio-3197, ¶ 12.

**{¶ 13}** Whether a Civ.R. 12(B)(6) motion is converted to a summary judgment proceeding or not, a court is not permitted to take judicial notice of proceedings in another case, even a prior proceeding before the same court involving the same parties. *McMahon v. Continental Express, Inc.*, 6th Dist. No. WD-07-030, 2008-Ohio-76, ¶ 34.

## I. Summary Judgment Conversion

**{¶ 14}** Civ.R. 12(B) provides that,

> [w]hen 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. Provided, however, that the court shall consider only such matters outside the pleadings as are specifically enumerated in Rule 56. All parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56.

**{¶ 15}** If a court converts a case from a motion to dismiss for failure to state a claim to a summary judgment, it must provide all parties notice of its intent to do so at least 14 days prior to the hearing on the motion. *Petrey v. Simon*, 4 Ohio St.3d 154, 447 N.E.2d 1285 (1983), paragraphs one and two of the syllabus.

**{¶ 16}** In their sixth assignment of error, appellants claim that the trial court considered the pleadings in other cases brought by some of the plaintiffs in this matter. Thus, appellants insist, the court converted a Civ.R. 12(B)(6) motion to a summary judgment and failed to provide the requisite notice to the parties.

**{¶ 17}** Appellants are correct. Consideration by the court of anything outside the four corners of the complaint is improper when considering a Civ.R. 12(B)(6) motion. Reliance on such evidence or allegations constitutes conversion of the motion to a motion for summary judgment and triggers the notice requirement. Moreover, as it appears the outside material that the trial court considered was by way of judicial notice of pleadings in other cases, such consideration was improper. *McMahon*, supra. Accordingly, appellants' sixth and second assignments are well-taken.

## II. Amended Complaint

**{¶ 18}** Although appellants prevailed on their sixth and second assignments of error, this is insufficient to reverse the trial court's judgment. Consideration of other cases supported only alternate rationale for the court's conclusion that appellants' claims were barred by the statute of limitations. Its principal basis for this conclusion derives from its analysis of the complaint itself. A motion to dismiss based upon a statute of limitations may be granted only when the complaint shows conclusively on its face that the action is time-barred. *Velotta v. Leo Petronzio Landscaping, Inc.*, 69 Ohio St.2d 376, 346, 433 N.E.2d 147 (1982), paragraph three of the syllabus.

**{¶ 19}** Before we consider such an analysis, however, we must determine whether the courts consideration of the initial complaint was proper. Civ.R. 15(A) permits a party to amend a pleading as a matter of right any time before a responsive pleading is served. *State ex rel. Hanson v. Guernsey Cty. Bd. of Comm.* 65 Ohio St.3d 545, 549, 605 N.E.2d 378 (1992). "Pleadings" include only complaints, answers and replies. Civ.R. 7(A), *King v. Semi Valley Sound, L.L.C.*, 9th Dist. No. 25655, 2011-Ohio-3567, ¶ 6. A Civ.R. 12(B)(6) motion is not a pleading under the rules. *State ex rel. Hanson, supra*.

**{¶ 20}** In this matter, appellee filed no answer, only a motion to dismiss. As a result, appellants, by right, were entitled to file an amended complaint without leave of the court. Consequently, the trial court's analysis was predicated on the wrong complaint. This matter must be reversed and remanded to the trial court so that it may be afforded an opportunity to analyze the correct complaint. Accordingly, appellants' first assignment of error is well-taken. Appellants' remaining assignments of error are moot.

**{¶ 21}** On consideration whereof, the judgment of the Lucas County Court of Common Pleas is reversed. This matter is remanded to said court for further proceedings. It is ordered that appellee pay the court costs of this appeal pursuant to App.R. 24.

Judgment Reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE