

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

Robert Miller, et al.

Court of Appeals No. OT-12-010

Appellees

Trial Court No. 09CV276

v.

All American Homes of
Ohio, LLC, et al.

DECISION AND JUDGMENT

Appellant

Decided: March 22, 2013

* * * * *

David P. Bertsch, for appellees.

Sandra M. Kelly and Trevor Q. Gasper, for appellant All
American Homes, LLC.

* * * * *

SINGER, P.J.

{¶ 1} Appellant, All American Homes, LLC, appeals from the December 14, 2011 and March 16, 2012 judgments of the Ottawa County Court of Common Pleas, which, in part, denied summary judgment to appellant. For the reasons which follow, we reverse. On appeal, appellant asserts the following assignments of error:

(1) The trial court erred when it failed to rule that Plaintiffs' claim for breach of contract/warranties against All American Homes, LLC was barred by the applicable statute of limitations.

(2) The trial court erred when it failed to find, as a matter of law, All American Homes, LLC did not contract with Plaintiffs or otherwise provide any warranty to Plaintiffs upon which Plaintiffs could base any breach of contract or warranty claim.

(3) The trial court erred when it failed to find the U.C.C. remedies sought by Plaintiffs in their Complaint inapplicable in the context of residential construction.

(4) The trial court erred when it failed to find Plaintiffs' claims under the U.C.C. were barred by a lack of privity.

{¶ 2} Appellees, Robert and Paula Miller, originally filed a complaint in 2005 in Ottawa County against "All American Homes, Statutory Agent Corporate Services, 50 W. Broad Street, Columbus, Ohio" and "Flickinger Builders." The case was dismissed without prejudice in 2007. In 2008, appellees filed a complaint in Cuyahoga County, where they resided, but venue was later changed to Ottawa County. Appellees asserted claims against appellant, "All American Homes, 2831 Dexter Drive, Elkhart, Indiana," All American Homes of Ohio, LLC, Paul Flickinger, and Flickinger Builders, Inc. d/b/a All American Homes. Both Flickinger and Flickinger Builders, Inc. were dismissed with prejudice from this action. Ultimately, All American Homes of Ohio,

LLC and appellees reached a settlement and All American Homes of Ohio, LLC is not a party to this appeal.

{¶ 3} In their complaint, appellees asserted claims of negligence, breach of contract and breach of express and implied warranties, and violations of the Ohio Consumer Protection Act. Appellees' claims arose out of the installation of their module home on Catawba Island, Ottawa County, in 2001. Appellees alleged the home cannot be adequately heated in the winter or air-conditioned in the summer and the house has defective siding, windows, and doors that were never repaired or replaced.

{¶ 4} All American Homes of Ohio, LLC, is an Ohio limited liability company, which formerly manufactured modular home components it sold to independent builders for use in constructing residential housing and manufactured the home at issue. All American Homes of Ohio, LLC, closed its manufacturing operations sometime after 2006. This company is one of several wholly-owned subsidiaries of appellant, All American Homes, LLC, an Indiana corporation. Rick Bedell is the president of both appellant and all of the subsidiary "All American" companies. Delven Herr was the vice president of appellant and All American Homes of Ohio, LLC from 2006 until 2011, and was responsible for overseeing the operation of all of the subsidiaries.

{¶ 5} The "All American" businesses operated as follows. Each manufacturing subsidiary worked from three standard sets of specifications prepared by appellant, but the subsidiaries were permitted to modify the home to meet the marketplace in their area. The standard specifications would be altered every few years based upon input from the

subsidiaries. These subsidiaries manufactured only the “All American” brand. Builders, like Flickinger Builders, Inc., would contract with the subsidiary to purchase the homes.

{¶ 6} In this case, Flickinger, the principal owner of Flickinger Builders, Inc., constructed the home. Appellees entered into a purchasing agreement on September 29, 2001 for the purchase and installation of an All American module home. The contract title included: “FLICKINGER BUILDER, INC., ALL AMERICAN HOMES” and was executed by appellees and Sheila Dress, builder.

{¶ 7} Both appellant, All American Homes, LLC, and All American Homes of Ohio, LLC filed motions for summary judgment and appellees opposed the motions. On December 14, 2011, the trial court found that because the home was completed in 2002 and the original claim of a violation of the Ohio Consumer Sales Practices Act was not filed until 2005, that claim was barred by the applicable two-year statute of limitations. The court further found that the negligence claim was barred by the economic loss doctrine. However, the court found that summary judgment was not appropriate for the breach of contract and breach of express and implied warranties claims because there were genuine issues of material fact as to the existence of a contract and whether a breach occurred.

{¶ 8} On March 16, 2012, the court entered a second judgment setting forth an agreed settlement of the case. The agreement provided for a settlement of the breach of contract and breach of warranties claims against All American Homes of Ohio, LLC. Furthermore, the court entered final judgment pursuant to Civ.R. 54(B) with respect to

the denial of summary judgment on the breach of contract and breach of warranties claims against appellant, All American Homes, LLC, thereby allowing appellant to immediately appeal four specifically-identified issues arising from the court's denial of its summary judgment motion.

{¶ 9} On appeal, appellant challenges the trial court's denial of its motion for summary judgment. The appellate court reviews the grant of summary judgment under a de novo standard of review. *Doe v. Shaffer*, 90 Ohio St.3d 388, 390, 738 N.E.2d 1243 (2000), citing *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Applying the requirements of Civ.R. 56(C), we uphold summary judgment when it is clear “(1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) 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, who is entitled to have the evidence construed most strongly in his favor.” *Harless v. Willis Day Warehousing Co., Inc.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

{¶ 10} In its first assignment of error, appellant argues the trial court erred by failing to find that appellees' claims of breach of contract and express and implied warranties are barred by the applicable statute of limitations. The trial court, by not addressing this argument directly had implicitly rejected appellant's argument.

{¶ 11} R.C. 1302.98(A) specifies a four-year statute of limitation for an action involving a breach of contract or breach of express/implied warranty claims from the date

the cause of action accrued. The savings statute, R.C. 2305.19(A), preserves a timely-filed action for one year after it has been voluntarily dismissed.

{¶ 12} The purpose of a statute of limitations “is to promote justice by preventing surprise through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded and witnesses have disappeared.” *Kinney v. Ohio Dept. of Adm. Servs.*, 30 Ohio App.3d 123, 126, 507 N.E.2d 402 (10th Dist.1986).

Unlike the statute of limitations, the savings statute is a remedial statute and, therefore, liberally construed so that cases are decided on their merits rather than procedural technicalities. *Chadwick v. Barba Lou, Inc.*, 69 Ohio St.2d 222, 227, 431 N.E.2d 660 (1982), citing *Cero Realty Corp. v. Am. Mfrs. Mut. Ins. Co.*, 171 Ohio St. 82, 85, 167 N.E.2d 774 (1960). Thus, when the savings statute is limited to actions which were timely commenced, the saving statute is consistent with the goals for statutes of limitations. *Kinney*.

{¶ 13} For the savings statute to apply, (1) plaintiff’s claims must have been disposed of other than on the merits, and (2) action must have been commenced or attempted to be commenced. *Coleman v. Dept. of Rehab. and Corr.*, 6th Cir. No. 01-3169, 2002 WL 2026070 (Aug. 28, 2002). The second requirement is not met when “the parties and relief sought in the new action are different from those in the original action.” *Children’s Hosp. v. Ohio Dept. of Public Welfare*, 69 Ohio St.2d 523, 433 N.E.2d 187 (1982), paragraph one of the syllabus. *See also Heilprin v. Ohio State Univ.*

Hosps. of Ohio State University, 31 Ohio App.3d 35, 37, 508 N.E.2d 178 (10th Dist.1986).

{¶ 14} Appellant asserts that appellees' breach of contract/warranty claims accrued as of November 6, 2002, the date the trial court determined the cause of action for a violation of the Ohio Consumer Sales Practices Act accrued. This date was the final walk-through for the completed home. Appellant argued in its motion for summary judgment and again on appeal that it was not named in a lawsuit until the second suit was filed in December 2008. We agree.

{¶ 15} Appellees filed its first complaint naming "All American Homes, Statutory Agent Corporate Services, 50 W. Broad Street, Columbus, Ohio," which the trial court, in its December 14, 2011, judgment identified as All American Homes of Ohio, LLC. In its second complaint, appellees named both appellant, All American Homes, LLC, and All American Homes of Ohio, LLC as defendants. Appellees argued that appellant is the actual company doing business as "All American." Appellees also argue that appellant was put on notice of the breach of contract/warranty claims by the first complaint since the president and vice president of the Ohio subsidiary and appellant are the same.

{¶ 16} Appellees cite to *Cox v. Ohio Parole Commn.*, 31 Ohio App.3d 216, 509 N.E.2d 1276 (10th Dist.1986). In that case, the court concluded that the two suits were substantially similar even though the individual members of the Parole Commission were named in the first suit and the Parole Commission itself in the second suit. The court held that it was apparent that an action had "attempted to be commenced" against the

commission. *Id.* at 216. This case has been distinguished on the ground that it originates from a court of special jurisdiction. *Lewis v. Lawyer Chiropractic Clinic*, 4th Dist. No. 98CA2590, 1999 WL 713605, *6 (Aug. 26, 1999). Since a claim could only be brought against the parole commission and not its individual members in the court of claims, the appellate court interpreted the plaintiff's naming of the individual members as a technical error. We find this case is distinguishable from the case before us for the same reason.

{¶ 17} Appellees also cite to *Ferron v. Metareward, Inc.*, 698 F.Supp.2d 992 (S.D.Ohio 2010), which held that it was improper to dismiss a claim against two corporations for failure to state a claim based upon the statute of limitations when there was an allegation that the corporations were the alter egos of the corporation named in an earlier suit that had been voluntarily dismissed. *Id.* at 1008. The court concluded that, taking the allegations as true, the issue should not be resolved until after the parties had an opportunity to obtain further discovery. *Id.*

{¶ 18} The federal court accepted the alter ego theory without citation as to its applicability to the savings statute under Ohio law. We see the court's decision as a means to prevent the dismissal of an action where there was a possibility that there was merely a technical error in naming the correct defendant in the first lawsuit that would be resolved when further facts were known. In the case before us, however, the relationships between the corporations were known and there was no circumstance where the two corporations were using their names interchangeably. We find the *Ferron* case distinguishable on its facts as well.

{¶ 19} Here, appellees sought to sue the All American Homes of Ohio, LLC because it was the corporation that manufactured the home. Appellees later sought to include appellant in their suit because it was the corporation which created the standard set of specifications for the home appellees purchased. There is no indication in this case that appellees made an error in naming the correct defendant in the first suit or that appellees were prevented from discovering the corporate relationships or the role of appellant in the manufacture of this home. Instead, it appears that by failing to fully investigate whether appellant could be held responsible for appellees' losses, appellees limited their ability to recovery from only All American Homes of Ohio, LLC.

{¶ 20} The fact that the corporate officers are the same for both corporations does not affect the outcome of this case. The savings statute specifically requires that there must have been an action commenced against the defendant in order for the savings statute to extend the statute of limitations. Even though the common officers knew that an action had been filed against one of the subsidiaries, no suit was filed against appellant and the officers had no warning that several years later, appellant would also have to defend against the same action.

{¶ 21} We find that the trial court erred as a matter of law by denying appellant's motion for summary judgment based upon an expiration of the statute of limitations. Appellant's first assignment of error is found well-taken. Consequently, all of appellant's remaining assignments of error are rendered moot.

{¶ 22} The judgment of the Ottawa County Court of Common Pleas is reversed and remanded for proceedings consistent with this decision. Appellees are ordered to 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.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, P.J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
