

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

Gene G. Garza

Court of Appeals No. L-13-1180

Appellant

Trial Court No. CI0201301740

v.

Norfolk Southern Railway Company

DECISION AND JUDGMENT

Appellee

Decided: March 28, 2014

* * * * *

Norman A. Abood, for appellant.

David A. Damico, for appellee.

* * * * *

YARBROUGH, P.J.

I. Introduction

{¶ 1} Appellant, Gene Garza, appeals from the judgment of the Lucas County Court of Common Pleas dismissing his personal injury action filed pursuant to the Federal Employers’ Liability Act (“FELA”). We affirm.

{¶ 2} On November 10, 2008, Garza allegedly was injured in the course of his employment as a locomotive engineer for appellee, Norfolk Southern Railway Company (“Norfolk”). On November 8, 2011, Garza filed his initial FELA claim against Norfolk in the Lucas County Court of Common Pleas. The parties do not dispute that the initial complaint was filed within the three-year statute of limitations provided by 45 U.S.C. 56. However, on February 19, 2013, Garza voluntarily dismissed his complaint pursuant to Civ.R. 41(A)(1)(a). Immediately thereafter, Garza refiled his FELA complaint in the same trial court.

{¶ 3} Norfolk subsequently filed a Civ.R. 12(B)(6) motion to dismiss Garza’s refiled complaint on the basis that it was outside of the statute of limitations. The trial court granted Norfolk’s motion, and Garza has timely appealed, presenting one assignment of error for our review:

1. Whether the Trial Court erred in not recognizing a Rule of Equitable Tolling of the Statute of Limitations susceptible of Uniform National Application.

II. Analysis

{¶ 4} We review dismissals granted pursuant to Civ.R. 12(B)(6) de novo. *McMullian v. Borean*, 167 Ohio App.3d 777, 2006-Ohio-3867, 857 N.E.2d 180, ¶ 8 (6th Dist.). “A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint.” *Id.* “[I]t must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to

recovery.” *Id.* “[A]s long as there is a set of facts, consistent with the plaintiff’s complaint, which would allow the plaintiff to recover, the court may not grant a defendant’s motion to dismiss.” *Id.*

{¶ 5} At the outset, we note that the parties agree that Garza’s refiled complaint was filed more than three years after the cause of action accrued. Further, the parties agree that Ohio’s savings statute, R.C. 2305.19, does not apply to FELA claims. *Burnett v. New York Cent. RR. Co.*, 380 U.S. 424, 432-433, 85 S.Ct. 1050, 13 L.Ed.2d 941 (1965). Thus, for Garza’s refiled complaint to be within the statute of limitations, the statute of limitations must have been otherwise tolled.

{¶ 6} *Burnett* provides for such an equitable tolling of the statute of limitations. In that case, the petitioner filed his FELA claim in an Ohio state court before the statute of limitations had run. The claim, however, was eventually dismissed for improper venue. Eight days after the claim was dismissed, but more than three years after the cause of action accrued, the petitioner filed an identical claim in the appropriate federal district court. Upon motion, the district court dismissed the petitioner’s claim as being outside of the three-year statute of limitations. The Sixth Circuit affirmed. However, the United States Supreme Court reversed, and held that “when a plaintiff begins a timely FELA action in a state court having jurisdiction, and serves the defendant with process and plaintiff’s case is dismissed for improper venue, the FELA limitation is tolled during the pendency of the state suit.” *Id.* at 435.

{¶ 7} In support of its holding, the United States Supreme Court recognized that one of the legislative purposes for enacting a statute of limitations for FELA was to establish national uniformity in the bringing of those claims. To that end, the court identified that states take two different approaches in dealing with claims initiated in the wrong venue. Some states allow the claims to be transferred, thereby obviating the need to refile. Claims brought in those states would not be barred by the statute of limitations. The remaining states utilize savings statutes that provide for a specified period of time from the dismissal for refiling. However, the court declined to incorporate those savings statutes because they vary widely from state to state, which “would defeat the aim of a federal limitation provision designed to produce national uniformity.” *Id.* at 433. Thus, to avoid the effect of the statute of limitations on claims in those states, and to ensure national uniformity, the United States Supreme Court held that, for FELA claims that had been dismissed for improper venue, the statute of limitations was equitably tolled until the dismissal became final. *Id.* at 435.

{¶ 8} Garza contends that the holding in *Burnett* should also apply to the present situation, wherein Garza voluntarily dismissed his complaint pursuant to Civ.R. 41(A)(1)(a). The primary purpose of statutes of limitations is “to assure fairness to defendants.” *Burnett* at 428. “Such statutes ‘promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.’” *Id.*, quoting *Order of RR. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348-349, 64 S.Ct. 582, 88 L.Ed.

788 (1944). However, “[t]his policy of repose, designed to protect defendants, is frequently outweighed * * * where the interests of justice require vindication of the plaintiff’s rights.” *Id.* Garza argues that none of the purposes of the statute of limitations are relevant here in that he has not sat on his rights, Norfolk has been aware of the litigation, and none of the evidence has been lost. Further, he argues that allowing the statute of limitations to be equitably tolled would not disrupt national uniformity in its application. Thus, he concludes that the trial court erred when it dismissed his claim.

{¶ 9} Norfolk, on the other hand argues that considerations of national uniformity are not at issue here. Instead, Norfolk contends that Garza placed himself in this position by voluntarily dismissing his claim after the statute of limitations had run. Norfolk asserts that neither it, nor the trial court, prevented Garza from pursuing his original action. Thus, Garza is not a proper candidate to receive the benefits of equity. Further, Norfolk notes that Garza has not cited any case law that supports his position, whereas several state courts have held to the contrary. *See, e.g., Ross v. Union Pacific RR. Co.*, 906 S.W.2d 711 (Mo.1995) (statute of limitations not equitably tolled where plaintiff voluntarily dismissed FELA claim and sought to refile the next day); *McKinney v. CSX Transp., Inc.*, 298 S.C. 47, 378 S.E.2d 69 (1989); *Huett v. Illinois Cent. Gulf RR. Co.*, 268 Ill.App.3d 494, 644 N.E.2d 474 (Ill.App.1994); *Lipsteuer v. CSX Transp., Inc.*, 236 Ga.App. 806, 513 S.E.2d 532 (Ga.App.1999).

{¶ 10} We find Norfolk’s argument to be persuasive. The equitable tolling remedy announced in *Burnett* operated to provide uniformity amongst plaintiffs in the

several states whose claims had been dismissed for improper venue. Here, however, Garza has failed to explain how plaintiffs in different states would reach different results when they voluntarily dismiss their claims. Further, we note the distinction between a complaint being involuntarily dismissed for improper venue versus a voluntary dismissal pursuant to Civ.R. 41(A)(1)(a). Ultimately, Garza chose to dismiss his claim knowing that he was then outside of the statute of limitations. Thus, he cannot now rely on equity to avoid the consequences of his decision.

{¶ 11} Accordingly, we agree with the other courts that have examined this issue, and hold that the time to file a complaint under FELA is not tolled where a plaintiff voluntarily dismisses his or her original complaint, and refiles outside of the statute of limitations. Garza's assignment of error is not well-taken.

III. Conclusion

{¶ 12} For the foregoing reasons, the judgment of the Lucas County Court of Common Pleas is affirmed. Garza is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

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

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, P.J.
CONCUR.

JUDGE

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:
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