[Cite as *Gonzales v. Alcon Industries, Inc.*, 2009-Ohio-2587.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92274

FREDI GONZALEZ

PLAINTIFF-APPELLANT

vs.

ALCON INDUSTRIES, INC., ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-594645

BEFORE: Blackmon, J., Rocco, P.J., and Dyke, J.

RELEASED: June 4, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Fredi Gonzalez appeals the trial court's granting the motion for judgment on the pleadings filed by appellee Alcon Industries, Inc. ("Alcon"). He assigns the following error for our review:

> **"I. The trial court erred to the prejudice of plaintiff-appellant in granting defendant-appellee's motion for judgment on the pleadings."**

{¶ 2} Having reviewed the record and pertinent law, we reverse and remand the trial court's judgment for proceedings consistent with this opinion. The apposite facts follow.

Facts

{¶ 3} Gonzalez is an employee of Alcon. On November 3, 2004, he sustained an accidental injury while working at the job, which was described as a right lateral epicondylitis. He filed a claim for benefits with the Ohio Bureau of Workers' Compensation; his claim was allowed by the District Hearing Officer. Alcon pursued appeals at all levels of the Industrial Commission; the Commission affirmed the Bureau's allowance of the claim. As a result, on June 22, 2006, Alcon filed an appeal pursuant to R.C. 4123.512 to the Court of Common Pleas. On June 29, 2006, Gonzalez filed a complaint as required by the statute[1] and discovery proceeded.

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[1]R.C. 4123.512(D) requires the employee-claimant to file the petition for appeal regardless of the fact the employer is the party that filed the notice of appeal as the employee has the burden to show he is entitled to the benefits regardless of the fact the

{¶ 4} On March 14, 2007, Gonzalez voluntarily dismissed his complaint pursuant to Civ.R. 41(A). On July 17, 2008, Alcon filed a motion for judgment on the pleadings; it argued that because Gonzalez failed to refile his complaint within the year following the dismissal as required by the savings statute, Alcon was entitled to judgment in its favor.

{¶ 5} In opposing Alcon's motion for judgment on the pleadings, Gonzalez's attorney argued that Alcon's attorney had induced him to dismiss the complaint based on a verbal agreement that Alcon would not wish to pursue the appeal. Gonzalez's attorney attached an affidavit attesting to the oral agreement. Alcon denied entering into an oral agreement and attached an affidavit in support thereof.

{¶ 6} The trial court granted Alcon's motion for judgment on the pleadings pursuant to the Ohio Supreme Court's decision in *Fowee v. Wesley Hall, Inc.*[2] In *Fowee*, the Ohio Supreme Court held that, in an employer-initiated workers' compensation appeal, when the employee voluntarily dismisses the complaint

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employee prevailed before the Industrial Commission. *Robinson v. B.O.C. Group, Gen. Motors Corp.*, 81 Ohio St.3d 361, at 366, 1998-Ohio-432.

[2]108 Ohio St.3d 533, 2006-Ohio-1712.

and fails to refile within one year of the savings statute, the employer is entitled to judgment.[3]

Judgment on the pleadings

{¶ 7} In his sole assigned error, Gonzalez argues the trial court erred by granting Alcon's motion for judgment on the pleadings.[4] We review the trial court's decision regarding judgment on the pleadings de novo.[5] Applying this standard, we conclude the trial court erred.

{¶ 8} A motion for judgment on the pleadings has been characterized as a belated Civ.R. 12(B)(6) motion; however, unlike a determination under Civ.R. 12(B)(6), which allows for review of the complaint alone, review under Civ.R. 12(C) allows all pleadings to be considered.[6] A judgment on the pleadings may

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[3]Id. at syllabus.

[4]We note Gonzalez contends the trial court did not have his motion in opposition to the motion for judgment on the pleadings because this court requested from him a time-stamped copy of the motion. The trial court's docket, however, indicates the motion in opposition was filed on August 4, 2008, which was well before the trial court entered judgment on October 2, 2008. Therefore, we presume the trial court had the motion before it when it ruled on the motion. Accordingly, we will address Gonzalez's assigned error as if the court did in fact have the motion before it.

[5]See *Jarina v. Fairview Hosp.*, Cuyahoga App. No. 91468, 2008-Ohio-6846; *Tenable Protective Servs. v. Bit E-Technologies, L.L.C.*, Cuyahoga App. No. 89958, 2008-Ohio-4233; *Chromik v. Kaiser Permanente*, Cuyahoga App. No. 89088, 2007-Ohio-5856, citing *Gawloski v. Miller Brewing Co.* (1994), 96 Ohio App.3d 160, 163.

[6]*State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, at 569, 1996-Ohio-459.

be granted where no material factual issue exists and the moving party is entitled to judgment as a matter of law.[7] The nonmoving party is entitled to have all material allegations in the complaint, with all reasonable inferences to be drawn therefrom, construed in his or her favor.[8] Thus, the very nature of a Civ.R. 12(C) motion is specifically designed to resolve solely questions of law.[9]

{¶ 9} Admittedly, a review of the pleadings does not reveal the oral agreement surrounding the voluntary dismissal. However, by virtue of the peculiar circumstances of this case, it would be impossible for the pleadings to reveal evidence of the oral agreement. The original complaint was dismissed and a second one was not refiled according to Gonzalez because of the alleged agreement. However it would be unfair to allow Alcon to benefit from this procedural glitch if an agreement existed.

{¶ 10} Equitable 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.[10] Thus, if Alcon is not abiding by an agreement between the

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[7]*State ex rel. Pirman v. Money*, 69 Ohio St.3d 591, 592-593, 1994-Ohio-2008.

[8]Id.; *Case Western Reserve University v. Friedman* (1986), 33 Ohio App.3d 347, at 348; *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, at165.

[9]*State ex rel. Midwest Pride IV, Inc.*, supra.

[10]See *Hutchinson v. Wenzke* (1999), 131 Ohio App.3d 613; *Schrader v. Gillette* (1988), 48 Ohio App.3d 181; *Markese v. Ellis* (1967), 11 Ohio App.2d 160.

parties regarding the dismissal, it would be inequitable to allow Alcon to benefit from its misrepresentation by choosing a legal vehicle that prevents Gonzalez from raising the agreement as a defense. As the appellate court in *Markese v. Ellis*[11] explained:

> **"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."**[12]

{¶ 11} In the instant case, if the parties did have an agreement regarding the dismissal, then Alcon's conduct induced Gonzalez to fail to refile the complaint. In order for equitable estoppel to apply, however, it must first be determined whether the parties entered into an agreement. This issue cannot be resolved via a motion for judgment on the pleadings as it requires a

[11]*Markese*, supra.

[12]Id. at 163.

determination of material facts that are disputed by the parties. Whether an agreement was entered into is not a question of law, but a question of fact.

{¶ 12} We conclude, under these circumstances, where equity demands a determination whether an agreement was entered into regarding the dismissal, the trial court's granting judgment on the pleadings was improper. Thus, under the peculiar facts of this case, we conclude the trial court erred in granting judgment on the pleadings. Gonzalez's assigned error is sustained.

Judgment reversed and remanded for proceedings consistent with this opinion.

It is, therefore, considered that said appellant recover of said appellees his costs herein taxed.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, JUDGE

KENNETH A, ROCCO, P.J., and
ANN DYKE, J., CONCUR