

[Cite as *Lame, Inc. v. E.G. Sys., Inc.*, 2015-Ohio-686.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 101566

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**LAME, INC.**

PLAINTIFF-APPELLANT

vs.

**E.G. SYSTEMS, INC.**

DEFENDANT-APPELLEE

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**JUDGMENT:**  
AFFIRMED

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-13-812243

**BEFORE:** Keough, J., Celebrezze, A.J., and Kilbane, J.

**RELEASED AND JOURNALIZED:** February 26, 2015

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KATHLEEN ANN KEOUGH, J.:

{¶1} Plaintiff-appellant LAME, Inc. (“LAME”) appeals from the trial court’s judgment denying its motion for leave to amend its complaint and granting the motion for summary judgment of defendant-appellee E.G. Systems, Inc. d/b/a Scott’s Lawn Service (“Scott’s”). Finding no merit to the appeal, we affirm.

#### I. Background

{¶2} On April 18, 2012, LAME filed a complaint against Scott’s for damages incurred when Scott’s allegedly trespassed on residential property located at 375 Balmoral Drive in Richmond Heights, Ohio, and negligently spread chemicals and fertilizer that destroyed the lawn and shrubbery. Scott’s filed an answer denying the allegations and asserting that LAME lacked standing to maintain the action. Additionally, on January 11, 2013, counsel for Scott sent a letter to LAME’s counsel advising that LAME was not the legal or equitable owner of the Balmoral Drive property as evidenced by a judgment in earlier court proceedings involving LAME, and that LAME therefore lacked standing to pursue the action. Two weeks later, LAME voluntarily dismissed its complaint.

{¶3} Nevertheless, on August 14, 2013, LAME filed a second complaint against Scott’s, asserting the same claims relating to Scott’s alleged trespass and negligent action regarding the Balmoral Drive property. Scott’s filed an answer in which it again asserted that LAME lacked standing to pursue the action. Additionally, on September 4, 2013, counsel for Scott’s sent LAME’s counsel a letter again advising that LAME did not hold valid title to the Balmoral Drive property and requesting immediate dismissal of the complaint. LAME did not respond to the letter and did not dismiss its complaint, but instead continued to litigate its claims.

{¶4} On March 5, 2014, three months before the scheduled trial date, LAME filed a

motion to amend its complaint, seeking to add Luann Mitchell as a new-party plaintiff. Scott's filed a brief in opposition to LAME's motion. Subsequently, Scott's filed a motion for summary judgment in which it argued that it was entitled to judgment as a matter of law because (1) LAME lacked standing to pursue its claims because it had no ownership interest in the Balmoral Drive property; and (2) even if she were joined as a party, Mitchell lacked standing and was estopped from pursuing any claims against Scott's.

{¶5} As support for its summary judgment motion, Scott's offered the following evidence. On July 31, 1989, the Balmoral Drive property was conveyed to Mitchell<sup>1</sup> via warranty deed. On June 13, 2005, Western Reserve Area Agency on Aging ("WRAAA") filed a post-judgment motion for attorney fees against Mitchell in Cuyahoga County Probate Court, based on Mitchell's frivolous commencement and prosecution since 2002 of an action against WRAAA.<sup>2</sup> On December 30, 2005, while the motion for fees was pending and in an apparent effort to avoid execution against the property, Mitchell tried to transfer the Balmoral Drive property via quit claim deed to LAME. On November 30, 2006, the probate court granted the motion for attorney fees and entered judgment against Mitchell in the amount of \$32,154.79 plus post-judgment interest at the statutory rate. The judgment was subsequently reduced to a lien on the property.

{¶6} In 2009, WRAAA filed a complaint for declaratory judgment, fraudulent transfer, and foreclosure of judgment lien against Mitchell and LAME. *Western Reserve Area Agency on Aging v. Mitchell*, Cuyahoga C.P. No. CV-09-694799 (Apr. 19, 2013). Among other claims,

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<sup>1</sup>Mitchell is an attorney licensed to practice in the state of Ohio. Her license was suspended in 2008 for fraudulent conduct, frivolous litigation, and violation of the Code of Professional Responsibility.

<sup>2</sup>*Mitchell, Guardian for Bertha L. Washington v. Western Reserve Agency on Aging*, Cuyahoga County Probate Court No. 2002 ADV 59296.

WRAAA sought a declaratory judgment that the quit claim deed filed on December 30, 2005, purporting to transfer the Balmoral Drive property from Mitchell to LAME was void and therefore ineffective to transfer any interest to LAME, and a decree of foreclosure based upon its judgment lien.

{¶7} On January 31, 2011, a magistrate in the foreclosure case issued a magistrate's decision granting judgment to WRAAA on its count for declaratory judgment. Specifically, the magistrate's decision stated that "LAME, Inc. was not, and is not, a legal entity capable of holding legal title or of being served." The decision found that LAME, Inc. was nothing more than a trade name, and the name had not been filed until February 19, 2010, well after the attempted transfer by quit claim deed. The decision further found that "[e]ven if LAME, Inc. had been a valid trade name when the quit claim deed was recorded, it was not, and never has been, an entity capable of holding title to real property." Accordingly, the magistrate ruled that "the quit claim deed purporting to transfer Mitchell's interest to LAME is void and ineffective to transfer any interest in the property." The decision also granted judgment to WRAAA on its claim for foreclosure on the Balmoral Drive property. The trial court adopted the magistrate's decision on April 19, 2013, and subsequently ordered the marshaling of liens and sale of the property.

{¶8} Throughout the foreclosure proceedings, Mitchell claimed that she had no ownership interest in the property and that LAME held exclusive title such that WRAAA had no right in foreclosure. But presumably sensing the loss of the property, on June 24, 2013, Mitchell filed a voluntary petition in bankruptcy under Chapter 7 in the United States Bankruptcy Court for the Northern District of Ohio. *In re: Mitchell*, N.D. Ohio Case No. 13-14494-aih. On Schedule A of the bankruptcy petition, Mitchell represented for the first time that she held fee

simple title to the Balmoral Drive property. She included the property on Schedule C of the petition seeking a homestead exemption under R.C. 2329.66(A)(1). Notably, the petition did not schedule any claim or cause of action against Scott's.

{¶9} An order of discharge was entered in the bankruptcy case on October 2, 2013. Subsequently, on April 30, 2014, Mitchell secured the homestead exemption on the property. In the interim, LAME had filed the two complaints against Scott's regarding the Balmoral Drive property.

{¶10} On May 2, 2014, the trial court in this case issued a judgment entry and opinion denying LAME's motion to amend the complaint to add Mitchell as the real party in interest, and granting Scott's motion for summary judgment. The trial court found that LAME's motion to amend was filed after the close of discovery, three months prior to trial, and almost two years after the filing of the original complaint. Accordingly, the trial court ruled that under Civ.R. 17, LAME's motion was untimely and allowing amendment would cause substantial hardship to Scott's.

{¶11} With respect to Scott's motion for summary judgment, the trial court noted that the magistrate's decision entered on January 31, 2011, in the foreclosure case specifically found that LAME "was not and is not a legal entity capable of holding legal title or of being served," and that the trial court in that case had subsequently adopted the magistrate's decision. Accordingly, the trial court found that "[i]t has been previously determined, and no issue of fact remains, that LAME never received legal or equitable title in the property. LAME, therefore, has no interest in claims asserted against Scott's." The trial court therefore granted Scott's motion for summary judgment. This appeal followed.

## II. Analysis

{¶12} In its two assignments of error, LAME contends that the trial court erred in denying its motion for leave to amend its complaint and in granting Scott's motion for summary judgment. The gist of LAME's argument is that the trial court should have granted the motion to amend because that would have cured LAME's lack of standing and then Scott's would not have been entitled to summary judgment. LAME's arguments are without merit.

{¶13} We review the grant or denial of summary judgment de novo, applying the same standard as the trial court. *Ford Motor Credit Co., L.L.C. v. Collins*, 8th Dist. Cuyahoga No. 101405, 2014-Ohio-5152, ¶ 9. Under Civ.R. 56(C), summary judgment is appropriate where (1) there is no genuine issue as to any material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) after construing the evidence most favorably for the nonmoving party, reasonable minds can only reach a conclusion that is adverse to the nonmoving party. *Id.*, citing *Zivich v. Mentor Soccer Club, Inc.*, 82 Ohio St.3d 367, 369-370, 696 N.E.2d 201 (1998); *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977).

{¶14} With respect to motions to amend the complaint, we review a trial court's decision to grant or deny such motion for an abuse of discretion. *Tenable Protective Serv. v. Bit-E-Technologies, L.L.C.*, 8th Dist. Cuyahoga No. 89958, 2008-Ohio-4233, ¶ 26. To demonstrate an abuse of discretion in denying a motion to amend, appellant must demonstrate that the trial court's denial was unreasonable, arbitrary, or unconscionable. *Id.*; *see also Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶15} Civ.R. 17(A) provides that:

Every action shall be prosecuted in the name of the real party in interest. \* \* \* No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest. \* \* \*

{¶16} LAME argues that before denying its motion to amend the complaint, under Civ.R. 17(A), the trial court was required to first determine whether LAME was not the real party in interest, and if it was not, to then allow a reasonable time to cure the lack of standing. LAME contends that the trial court failed to properly apply Civ.R. 17 in this case because it “simultaneously” denied its motion to amend the complaint to add Mitchell as the real party in interest and granted Scott’s motion for summary judgment. LAME, however, ignores the requirement that any motion to amend a complaint must be timely.

{¶17} Civ.R. 17 “provides a plaintiff with an opportunity to amend his complaint *if it is done in a reasonable time.*” (Emphasis added.) *Johnson’s Janitorial Serv. v. Alltel Corp.*, 92 Ohio App.3d 327, 328, 635 N.E.2d 60 (9th Dist.1993); *see also Patterson v. V & M Auto Body*, 63 Ohio St.3d 573, 576, 589 N.E.2d 1306 (1992). “The timeliness of the motion is defined by the reasonable diligence of the moving party and any prejudice to defendant’s ability to defend, and those are questions of law to be determined by the court.” *Id.* at fn.1.

{¶18} Here, it is apparent that LAME’s motion to amend the complaint to add Mitchell as the real party in interest was not made in a “reasonable time.” As evidenced by the magistrate’s decision rendered in January 2011, LAME knew *two years* before filing its second complaint against Scott’s in August 2013, that it had no interest in the Balmoral Drive property and hence, that it was not the proper party to file a complaint against Scott’s for any alleged claims relating to the property. Moreover, counsel for Scott’s reminded LAME that it did not hold any interest in the property immediately after LAME filed its second complaint and requested immediate dismissal of the case. LAME ignored defense counsel’s request, however, and continued to litigate its claims, including taking the Civ.R. 30(B)(5) deposition of Scott’s branch manager.



LAME waited until after discovery in the case was closed, and only three months before the scheduled trial date, to move to amend the complaint to add Mitchell.

{¶19} In short, LAME knew it lacked standing but waited to try to amend until the eve of trial. Under these circumstances, the trial court did not abuse its discretion in finding LAME's motion to amend untimely and prejudicial to Scott's ability to defend the case.

{¶20} Furthermore, LAME's reliance on Civ.R. 17 is misplaced because the Ohio Supreme Court has held that Civ.R. 17(A) is not available where, as here, the party commencing the litigation lacks standing. In *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, the Ohio Supreme Court reasoned:

Standing is required to invoke the jurisdiction of the common pleas court. Pursuant to Civ.R. 82, the Rules of Civil Procedure do not extend the jurisdiction of the courts of this state, and *a common pleas court cannot substitute a real party in interest for another party if no party with standing has invoked its jurisdiction in the first instance.*

(Emphasis added.) *Id.* at ¶ 38; *see also CitiMortgage, Inc. v. Patterson*, 8th Dist. Cuyahoga No. 98360, 2012-Ohio-5894, ¶ 12-18.

{¶21} As the magistrate's decision determined, and as adopted by the trial court without modification, the quit claim deed from Mitchell to LAME was void and ineffective to transfer any interest in the Balmoral Drive property to LAME. Because LAME never received legal or equitable title in the property, it had no interest in claims asserted against Scott's with respect to the property and, accordingly, lacked standing. Because LAME lacked standing when it filed its complaint, it could not invoke Civ.R. 17(A) to add Mitchell as a purported real party in interest. Accordingly, the trial court did not abuse its discretion in denying LAME's motion to amend.

{¶22} Likewise, the trial court properly granted Scott's motion for summary judgment. As discussed above, LAME lacked standing to pursue any claims against Scott's and, therefore,

reasonable minds could only conclude that Scott's was entitled to judgment as a matter of law.

{¶23} Likewise, even if she were joined as a party, Mitchell is not the real party in interest. The moment Mitchell filed her petition in the bankruptcy case, any and all claims, whether asserted or unasserted, became the property of the bankruptcy estate. *Ohio v. Kovacs*, 469 U.S. 274, 105 S.Ct. 705, 83 L.Ed.2d 649, fn. 12 (1985); *In re Cottrell*, 876 F.2d 540, 542 (6th Cir.1989). The bankruptcy trustee is the representative of the estate, with the capacity to sue or be sued. 11 U.S.C. §323 (2014). Thus, the bankruptcy trustee, not Mitchell, has exclusive authority to maintain a cause of action against Scott's. Moreover, because Mitchell did not disclose any claim against Scott's in her bankruptcy petition, she is estopped from pursuing them in this action. *Bruck Mfg. Co. v. Mason*, 84 Ohio App.3d 398, 616 N.E.2d 1168 (8th Dist.1992) (longstanding bankruptcy tenet requires a debtor to disclose any litigation likely to arise in a non-bankruptcy context; failure to do so triggers equitable estoppel, operating against a subsequent attempt to prosecute the claim).

{¶24} Because neither LAME nor Mitchell could present a genuine issue for trial, the trial court properly granted summary judgment. The first and second assignments of error are overruled.

{¶25} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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.

KATHLEEN ANN KEOUGH, JUDGE

FRANK D. CELEBREZZE, JR., A.J., and  
MARY EILEEN KILBANE, J., CONCUR