

[Cite as *Sheldon v. Burke*, 2016-Ohio-941.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103576

RITA SHELDON, ET AL.

PLAINTIFFS-APPELLANTS

vs.

THOMAS E. BURKE, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-14-832420

BEFORE: E.T. Gallagher, J., Keough, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: March 10, 2016

ATTORNEY FOR APPELLANTS

John M. McCarty
1265 West 6th Street, Suite 400
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEES

Bethany E. Thomas
Christopher Ankuda
Paul Morway
Ankuda, Stadler & Moeller, Ltd.
1100 Superior Avenue, Suite 1120
Cleveland, Ohio 44114

EILEEN T. GALLAGHER, J.:

{¶1} This cause came to be heard on the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1. Plaintiffs-appellants, Rita Sheldon and Larry E. Sheldon (collectively “the Sheldons”), appeal an order dismissing their complaint. They assign one error for our review:

1. The trial court erred in dismissing the underlying action, relying solely on Ohio Civil Rule 3(A), despite it being refiled pursuant to Ohio Civil Rule 4(E) and Ohio Revised Code Section 2305.19.

{¶2} We find no merit to the appeal and affirm the trial court’s judgment.

I. Facts and Procedural History

{¶3} The Sheldons filed a complaint against defendants-appellees, Thomas E. Burke and the Estate of Thomas E. Burke (collectively “Burke”), alleging that on July 8, 2011, Burke negligently caused a motor vehicle accident in which Rita Sheldon was injured. Larry E. Sheldon alleged a loss of consortium claim resulting from his wife’s injuries.

{¶4} The Sheldons filed the complaint on May 29, 2013, almost two years after the accident. The trial court later dismissed the complaint pursuant to Civ.R. 3(A) because the Sheldons failed to obtain service within one year. The Sheldons subsequently filed a motion for relief from judgment pursuant to Civ.R. 60(B), which was denied.

{¶5} The Sheldons refiled their complaint and, this time, obtained service on Burke. Burke filed a motion to dismiss the complaint for failure to state a claim, arguing

the Sheldons failed to commence the action within the two-year statute of limitations provided by R.C. 2305.10(A). The trial court agreed and dismissed the complaint. The Sheldons now appeal from that judgment.

II. Law and Analysis

A. Standard of Review

{¶6} We review an order dismissing a complaint for failure to state a claim for relief de novo. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44. When reviewing a Civ.R. 12(B)(6) motion to dismiss, we must accept the material allegations of the complaint as true and make all reasonable inferences in favor of the plaintiff. *Johnson v. Microsoft Corp.*, 106 Ohio St.3d 278, 2005-Ohio-4985, 834 N.E.2d 791, ¶ 6. To prevail on the motion, it must appear from the face of the complaint that the plaintiff can prove no set of facts that would justify a court granting relief. *O'Brien v. Univ. Comm. Tenants Union, Inc.*, 42 Ohio St.2d 242, 245, 327 N.E.2d 753 (1975).

B. Statute of Limitations

{¶7} The statute of limitations is an affirmative defense and is generally not properly raised in a Civ.R. 12(B)(6) motion to dismiss. *PNC Bank, N.A. v. J & J Slyman, L.L.C.*, 8th Dist. Cuyahoga No. 101777, 2015-Ohio-2951, ¶ 13, citing *Lisboa v. Tramer*, 8th Dist. Cuyahoga No. 97526, 2012-Ohio-1549, ¶ 13. However, the Ohio Supreme Court has held that a court may dismiss a complaint pursuant to Civ.R. 12(B)(6) for failing to comply with the applicable statute of limitations where the complaint, on its

face, conclusively indicates that the action is time barred. *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006-Ohio-2625, 849 N.E.2d 268, ¶ 11; *Mills v. Whitehouse Trucking Co.*, 40 Ohio St.2d 55, 58, 320 N.E.2d 668 (1974).

C. Motion to Dismiss

{¶8} In their sole assignment of error, the Sheldons argue the trial court erred in granting Burke’s motion to dismiss. They contend their complaint was timely filed pursuant to R.C. 2305.19, Ohio’s “savings statute,” because the dismissal of their first complaint was without prejudice pursuant to Civ.R. 4(E).

{¶9} Where a claim is properly filed within the required statute of limitations, but is subsequently dismissed without prejudice after the statute of limitations has expired, the savings statute provides the plaintiff a limited time period in which to “save” his or her claim by refileing the complaint. *Graf v. Cirino*, 8th Dist. Cuyahoga No. 96011, 2011-Ohio-3473, ¶ 8. The purpose underlying the savings statute is to provide a party with a final opportunity to bring an action that would otherwise be time barred. *See Motorists Mut. Ins. Co. v. Huron Rd. Hosp.*, 73 Ohio St.3d 391, 396, 653 N.E.2d 235 (1995).

{¶10} R.C. 2305.19 provides:

In any action that is commenced or attempted to be commenced, [and] if in
due time * * * the plaintiff fails otherwise than upon the merits, the plaintiff
* * * may commence a new action within one year after the date of * * *

the plaintiff's failure otherwise than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later.

{¶11} According to the complaint, Rita Sheldon was injured in a motor vehicle accident on July 8, 2011. R.C. 2305.10 provides a two-year limitations period for bringing personal injury claims. The complaint alleges nothing about the previously filed complaint or the reason for its dismissal. On the face of the complaint, the statute of limitations expired July 8, 2013, but the refiled complaint was not filed until September 8, 2014.

{¶12} The Sheldons nevertheless contend their complaint was timely filed within the one-year "savings" period provided in R.C. 2305.10. However, in order to avail oneself of the savings statute, the original action that was dismissed must have been "commenced" within the applicable statute of limitations. *Anderson v. Borg Warner Corp.*, 8th Dist. Cuyahoga Nos. 80551 and 80926, 2003-Ohio-1500, ¶ 27 (Asbestos claims were barred by statute of limitations where plaintiffs failed to obtain service on the defendants within one year of filing their complaint.).

{¶13} Civ.R. 3(A) defines the commencement of a civil action and states, in relevant part, that "[a] civil action is commenced by filing a complaint with the court, *if service is obtained within one year from such filing upon a named defendant.*" (Emphasis added.)

{¶14} Although the refiled complaint fails to mention the original complaint and the reason for its dismissal, the Sheldons acknowledge that they failed to serve Burke

with their original complaint within a year of its filing. Because the Sheldons' original action was never commenced as defined by Civ.R. 3(A), the savings statute was inapplicable. By the time the Sheldons filed their second complaint on September 8, 2014, the two-year statute of limitations provided in R.C. 2305.10 had expired on July 8, 2013, because the injury allegedly occurred on July 8, 2011. Therefore, the Sheldons' complaint was barred by the statute of limitations.

{¶15} The sole assignment of error is overruled.

{¶16} Judgment affirmed.

It is ordered that appellees recover from appellants 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.

EILEEN T. GALLAGHER, JUDGE

KATHLEEN ANN KEOUGH, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR