

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Alternatives Unlimited-Special, Inc. et al., :
Plaintiffs-Appellants, :
v. : No. 09AP-756
(C.C. No. 2009-03410)
Ohio Department of Education, : (ACCELERATED CALENDAR)
Defendant-Appellee. :

D E C I S I O N

Rendered on March 25, 2010

Luper Neidenthal & Logan, and Luther L. Liggett, Jr., for appellants.

Richard Cordray, Attorney General, Susan M. Sullivan, and Christopher P. Conomy, for appellee.

APPEAL from the Court of Claims of Ohio.

SADLER, J.

{¶1} Appellants, Alternatives Unlimited-Special, Inc. ("AU-Special") and Alternatives Unlimited, Inc. ("AU") (collectively "appellants"), filed this appeal seeking reversal of a judgment by the Court of Claims of Ohio dismissing their complaint on statute of limitations grounds.

{¶2} AU-Special is a non-profit corporation that contracted with the State Board of Education to form a community school in Cleveland, with AU providing management

services for the school. The community school operated under the name Cleveland Alternative Learning Academy ("CALA"). Appellee, the Ohio Department of Education ("appellee" or "ODE"), entered into a contract with AU-Special for CALA to operate as a community school offering education to students in grades three, four, five, and six, starting in the 1999-2000 school year.

{¶3} CALA subsequently offered enrollment to students in grades two, seven, and eight for the 1999-2000 school year. Appellants sent a letter to ODE asking for approval of the expanded enrollment, but ODE refused to modify the existing contract unless certain actions were taken by AU-Special. As a result, ODE did not provide funding for those students in grades two, seven, and eight. CALA ceased operating during the 2001 school year, purportedly in part due to the lack of funding for the students in grades two, seven, and eight.

{¶4} Appellants filed suit in the Court of Claims under case No. 2002-04682, asserting two causes of action for breach of contract, including claims for promissory estoppel and unjust enrichment for ODE's failure to pay for all students enrolled in CALA, including students in grades other than two, seven, and eight. The complaint also alleged that ODE improperly rescinded the contract. The matter proceeded to a trial on the issue of liability only, after which the trial court granted judgment in favor of ODE on the ground that appellants were not proper parties to the contract for the purposes of bringing the action. We reversed that judgment, finding that appellants were proper parties. *Alternatives Unlimited-Special v. Ohio Dept. of Edn.*, 168 Ohio App.3d 592, 2006-Ohio-4779.

{¶5} On remand, ODE filed a motion for partial summary judgment, arguing that it was entitled to judgment as a matter of law on the claims that it breached the contract with regard to payments for students in grades two, seven, and eight, since the contract had never been modified to include a provision for payment for students in those grades. The trial court held an oral hearing on the motion for partial summary judgment, for which appellants failed to appear. After the hearing, the trial court granted partial summary judgment in favor of ODE.

{¶6} Appellants filed a pleading entitled a Motion to Amend, stating in the body of the motion that the purpose was "to amend their Complaint pursuant to Rule 15(A), Ohio Rules of Civil Procedure, to voluntarily dismiss all remaining claims without prejudice pursuant to Rule 41(A), in light of the Court's 'Entry Granting Defendant's Motion for Partial Summary Judgment' entered April 10, 2008." Appellants further stated that their intention in filing the motion was to allow them to immediately appeal the trial court's decision granting summary judgment on the claims relating to the students in grades two, seven, and eight. Appellants argued that filing a motion to amend to delete the remaining claims was the proper method to allow them to immediately appeal the trial court's ruling.

{¶7} ODE filed a pleading stating that it waived any objection to the motion to amend the complaint. The trial court issued a judgment entry granting the motion to amend, noting that "[a]lthough there is some disagreement among Ohio appellate courts whether Civ.R. 15(A) is the appropriate procedural vehicle for a party to create a final appealable order under such circumstances, the majority of courts in Ohio favor that approach."

{¶8} Appellants then filed their appeal on the issue of whether the trial court appropriately granted summary judgment on the claims regarding students in grades two, seven, and eight. We affirmed the trial court's decision. *Alternatives Unlimited-Special v. Ohio Dept. of Edn.*, 10th Dist. No. 08AP-396, 2008-Ohio-6427.

{¶9} Appellants then filed this action under case No. 2009-03410, stating in the complaint that it was a refiled action identifying the previous case number. The complaint asserted claims for breach of contract, promissory estoppel, unjust enrichment, prejudgment interest, and attorney fees. Prior to filing an answer, ODE filed a motion to dismiss or, in the alternative, for summary judgment, arguing that appellants' claims were barred by the doctrine of res judicata or, in the alternative, were barred by the applicable statute of limitations.

{¶10} ODE attached to its motion an affidavit from one of its counsel, incorporating the complaint from case No. 2002-03482. ODE argued, among other things, that appellants had abandoned their claims regarding the students in grades other than two, seven, and eight by amending their complaint, and that there was no procedural mechanism that allowed appellants to preserve those other claims while pursuing an appeal on the claims upon which the trial court had granted partial summary judgment. Appellants filed a memorandum contra, arguing that the amendment of their complaint to remove the claims regarding the other students constituted a failure other than upon the merits, and thus appellants were entitled to the protection of the savings statute set forth in R.C. 2305.19.

{¶11} The trial court rendered a decision denying ODE's motion with regard to its claim that the action was barred by the doctrine of res judicata, finding that res judicata is

not a defense that can be raised under Civ.R. 12 by way of a motion made prior to the filing of an answer, and that it was improper for ODE to assert the defense for the first time in a motion for summary judgment. However, the trial court concluded that summary judgment was proper on ODE's assertion that the action was barred by the two-year statute of limitations set forth in R.C. 2743.16(A). The court concluded that appellants' amendment of their complaint to remove the claims regarding students other than those in grades two, seven, and eight constituted an abandonment of those claims, and therefore was not a failure otherwise than upon the merits for purposes of the savings statute. The trial court thus granted summary judgment in favor of ODE.

{¶12} Appellants filed this appeal, asserting two assignments of error:

First Assignment of Error: The trial court erred by dismissing claims properly re-filed pursuant to Ohio's Savings Statute, R.C. §2305.19.

Second Assignment of Error: The trial court erred by rendering summary judgment on an affirmative defense prior to defendant filing its answer.

{¶13} In the body of its brief, ODE asserts a cross-assignment of error, asserting:

THE COURT OF CLAIMS ERRED IN DENYING THE DEPARTMENT'S MOTION IN THE ALTERNATIVE FOR SUMMARY JUDGMENT BASED ON THE DEFENSE OF RES JUDICATA.

{¶14} For ease of discussion, we first address appellants' second assignment of error. In this assignment of error, the issue is whether it was proper for ODE to raise the statute of limitations as an affirmative defense in a motion for summary judgment filed prior to the filing of an answer.

{¶15} Ohio courts have generally recognized that an affirmative defense is waived by a party's failure to raise the defense in: (1) a responsive pleading filed pursuant to Civ.R. 8(C), (2) a Civ.R. 12(B) motion filed prior to the filing of a responsive pleading, or (3) an amended pleading filed pursuant to Civ.R. 15. *Mills v. Whitehouse Trucking Co.* (1974), 40 Ohio St.2d 55. In post-answer motions, the courts have further concluded that it is improper to raise an affirmative defense for the first time in a motion for summary judgment. *Marok v. The Ohio State Univ.*, 10th Dist. No. 07AP-921, 2008-Ohio-3170; *Carmen v. Link* (1997), 119 Ohio App.3d 244.

{¶16} Civ.R. 8(C) sets forth a list of affirmative defenses that must be set forth in a responsive pleading, which includes the statute of limitations defense employed by ODE in this case. Civ.R. 12(B) sets forth a list of defenses that may, at the option of the party asserting them, be set forth in a motion filed prior to the filing of a responsive pleading, including failure to state a claim for which relief can be granted under Civ.R. 12(B)(6). Expiration of the statute of limitations can be the basis for a Civ.R. 12(B)(6) motion to dismiss where the complaint conclusively shows on its face that the statute has expired. See, e.g., *Maga v. Brockman*, 2d Dist. No. 23495, 2010-Ohio-382.

{¶17} Here, the face of the complaint stated that it was a refiled complaint, identified the case number of the previously filed case, and alleged that the savings provision set forth in R.C. 2305.19 applied. Thus, on its face, the complaint could not be disposed of by way of a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim for which relief can be granted. The trial court recognized this and treated ODE's motion as strictly a motion for summary judgment, since the motion required consideration of evidentiary materials outside the complaint; specifically, the pleadings involving the

amendment of the complaint in the previous case to remove those claims involving students in grades other than two, seven, and eight.

{¶18} The trial court stated in relation to ODE's res judicata argument that it could not consider affirmative defenses raised for the first time in a motion for summary judgment filed prior to the filing of an answer. If that proposition is correct, the trial court should have denied ODE's motion as to both of the affirmative defenses asserted and required ODE to file an answer. However, for the reasons stated below, we find nothing improper in ODE's filing of a motion for summary judgment on the statute of limitations defense prior to its filing an answer.

{¶19} First, by its terms, Civ.R. 56 does not include any limitation on the time for filing a motion for summary judgment that would apply under the circumstances of this case. Civ.R. 56(A) provides that a party seeking recovery on a claim can only file a motion for summary judgment on that claim after the time for filing a responsive pleading has expired or after the adverse party has filed a motion for summary judgment. However, the provision applicable to parties defending against a claim, Civ.R. 56(B), contains no such limitation, providing only that that party can move for summary judgment "at any time." Thus, the rule permits a defendant to move for summary judgment before a responsive pleading is filed. *State v. Wilkins* (1998), 127 Ohio App.3d 306, citing Ohio Practice, Baldwins, Klein/Darling Ed., Section 56-7, at 554.

{¶20} Second, the line of cases on which the trial court apparently relied to find that it could not consider ODE's motion for summary judgment on res judicata grounds involved waiver of affirmative defenses by failing to include those defenses in an answer, and then raising those defenses for the first time in a post-answer motion. See, e.g., *Mills*

at 60 (statute of limitations defense raised for the first time by way of motion made at trial was waived); *Eulrich v. Weaver Bros., Inc.*, 165 Ohio App.3d 313, 2005-Ohio-5891 (immunity defense not raised in answer filed by the defendant was raised for the first time in a post-answer motion for summary judgment); *Kritzwiser v. Bonetzky*, 3d Dist. No. 8-07-24, 2008-Ohio-4952 (affirmative defense of setoff waived by failure to assert the defense in an answer or by presenting evidence at trial).

{¶21} The underlying concern for refusing to allow an affirmative defense to be raised for the first time by way of a post-answer motion is that a plaintiff must be placed on notice that a defendant intends to assert a particular defense, thus allowing the parties to conduct discovery regarding the asserted defense. Here, by virtue of the unique factual and procedural posture of the case, appellants could not have been prejudiced by the timing of ODE's motion. Although requiring consideration of matters outside the pleadings, ODE's motion did not require further development of the factual record by way of discovery, but, instead, required resolution of the strictly legal question of what effect the amendment of the complaint in the prior case to delete some of the claims had on appellants' ability to refile those claims in this case. While the better practice may have been for ODE to file its answer asserting both of the affirmative defenses, and then file a post-answer motion for summary judgment, the trial court did not err in considering ODE's motion for summary judgment as to ODE's statute of limitations defense.¹ Accordingly, appellants' second assignment of error is overruled.

¹ We emphasize that in most cases, a pre-answer motion for summary judgment would not be proper due to the necessity of developing the factual record.

{¶22} In their first assignment of error, appellants argue that the trial court erred when it found that appellants' claims regarding students in grades other than two, seven, and eight were barred by the statute of limitations. Resolution of this issue depends on what effect appellants' amendment of their complaint in the previously filed case to remove the claims had on their ability to refile those claims.

{¶23} The motion filed by appellants in the previous action was styled as a motion to amend, but the actual language used in the motion was a combination of Civ.R. 15(A) and Civ.R. 41(A), with Civ.R. 41(A) being cited to support their request that the amendment would result in the claims being dismissed without prejudice. Although appellants' motion did not specify which specific division of Civ.R. 41(A) appellants were relying on, given that appellants were seeking dismissal by order of the court, rather than effectuating a unilateral dismissal, it appears that their basis was Civ.R. 41(A)(2).² The stated purpose for the motion was to create a final appealable order as to the court's judgment regarding the students in grades two, seven, and eight so that appellants could immediately appeal that judgment without waiting for resolution of the other claims.

{¶24} The trial court considered the motion without reference to Civ.R. 41(A), other than to observe that the Supreme Court of Ohio was considering at that time a case involving the question of whether a plaintiff can create a final order by voluntarily dismissing, pursuant to Civ.R. 41(A), claims on which the trial court has not ruled. The trial court granted appellants' motion to amend, noting that "[a]lthough there is some disagreement among Ohio appellate courts whether Civ.R. 15(A) is the appropriate

² Civ.R. 41(A)(2) states, in relevant part, "Except as provided in division (A)(1) of this rule, a claim shall not be dismissed at the plaintiff's instance except upon order of the court and upon such terms and conditions

procedural vehicle for a party to create a final appealable order under such circumstances, the majority of courts in Ohio favor that approach." Because the trial court

treated the motion strictly as a Civ.R. 15(A) motion to amend, and no appeal was ever raised regarding the trial court's treatment of the motion as such, we must confine our consideration to the issue of whether a party using Civ.R. 15(A) to remove claims, coupled with a request that the removal of those claims would result in a dismissal without prejudice, as appellants did here, can receive the benefit of the savings statute when refiling the removed claims.

{¶25} We note that, after the trial court granted appellants' motion to amend, the Supreme Court of Ohio decided the issue of whether Civ.R. 41(A)(1) can be used to create a final appealable order when a trial court has resolved some, but not all, of the claims in a case, holding that Civ.R. 41(A)(1) does not provide such a mechanism. *Pattison v. W.W. Grainger, Inc.*, 120 Ohio St.3d 142, 2008-Ohio-5276. In dicta, the court noted the cases from some of the appellate districts, including this court, that have held that "the proper procedure for a plaintiff to dismiss fewer than all claims against a single defendant is to amend the complaint pursuant to Civ.R. 15(A)." *Id.* at ¶19, citing *Reagan v. Ranger Transp., Inc.* (1995), 104 Ohio App.3d 15; *Kildow v. Home Town Improvements*, 5th Dist. No. CT2001-0057, 2002-Ohio-3824; *Lewis v. J.E. Wiggins & Co.*, 10th Dist. No. 04AP-469, 2004-Ohio-6724.

{¶26} Although the Supreme Court of Ohio implicitly recognized in *Pattison*, and we held in *Lewis*, that Civ.R. 15(A) is the proper mechanism for a party to create a final appealable order after a trial court has entered judgment on some, but not all, claims in a case, neither of those decisions is dispositive of the issue before us in this case. Here, the issue is whether appellants, having employed Civ.R. 15(A) coupled with a request to dismiss claims without prejudice so as to create a final appealable order, can receive the

benefit of the savings statute if the statute of limitations has expired before the appellate court has ruled on the final appealable order created by the amendment. We hold that under the unique facts in this case, the savings statute applies because the Civ.R. 15(A) amendment, coupled with the request that the amendment would result in a dismissal without prejudice, was a failure otherwise than upon the merits; and appellants refiled their complaint within one year after those claims failed otherwise than upon the merits. Therefore, appellants' claims were not barred by the statute of limitations.

{¶27} R.C. 2305.19(A) provides, in relevant part, that:

In any action that is commenced or attempted to be commenced, 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.

{¶28} Here, the trial court granted appellants' motion to amend their complaint to remove the claims regarding students other than those in grades other than two, seven, and eight on May 2, 2008. Appellants filed their refiled complaint on March 20, 2009. Thus, if the amendment to the complaint to remove the claims regarding students in grades other than two, seven, and eight constituted a failure otherwise than upon the merits of those claims, the savings statute applies.

{¶29} The stated purpose for appellants' motion to amend their complaint to remove the claims remaining after the trial court's grant of partial summary judgment was to effect a dismissal of those claims, and the trial court treated the motion as such. In addition, appellants stated their intention that the purpose of the amendment was to dismiss the remaining claims without prejudice. ODE filed a response to appellants'

motion to amend stating that it waived any objection to the amendment, which would have included a waiver of any objection to the characterization of the amendment as a dismissal without prejudice. The trial court in its judgment entry specifically repeated appellants' assertion that the amendment would result in a dismissal without prejudice, and then simply granted the motion. Thus, under these circumstances, the amendment to remove the claims regarding students other than those in grades two, seven, and eight resulted in a dismissal without prejudice, and therefore was a failure otherwise than upon the merits. Consequently, the savings statute applied, and the trial court erred when it concluded that the statute of limitations barred these claims. Accordingly, appellants' first assignment of error is sustained.

{¶30} As for ODE's cross-assignment of error, appellants filed a motion to strike the cross-assignment, arguing that ODE failed to file a proper notice of appeal from that portion of the trial court's judgment. We issued an entry stating that we would address appellants' motion to strike in the course of our consideration of the merits of appellants' appeal.

{¶31} ODE did not file a separate notice of appeal on its argument that the trial court erred when it denied that portion of ODE's motion for summary judgment that was predicated on res judicata grounds. Under App.R. 3(C)(1), a notice of cross-appeal must be filed when the cross-appealing party seeks to change the judgment. App.R. 3(C)(2) provides that no notice of cross-appeal is required where a party seeks to defend a judgment on grounds other than those relied upon by the trial court.

{¶32} ODE argues that summary judgment should have been granted in its favor on the ground of res judicata, an issue the trial court concluded it could not address. As

such, ODE's filing appears to be in the nature of a conditional cross-assignment of error: having sustained appellants' first assignment of error, ODE argues that we could affirm the trial court's judgment in its favor based on the doctrine of res judicata. Because ODE does not seek to change the judgment in its favor, a notice of cross-appeal was arguably not required.

{¶33} However, we need not address this issue, because even if ODE's argument regarding application of the doctrine of res judicata were properly before us, the issue is premature, because the Court of Claims has yet to address it. Since this case must be remanded to the trial court for further proceedings, the Court of Claims will have the opportunity to address the res judicata argument at the appropriate time. Thus, ODE's cross-assignment of error is overruled as moot, and appellants' motion to strike that cross-assignment is denied as moot.

{¶34} Accordingly, we deny appellants' motion to strike appellee's cross-assignment of error as moot, sustain appellants' first assignment of error, overrule appellants' second assignment of error, and overrule ODE's cross-assignment of error as moot. Thus, the judgment of the Court of Claims of Ohio is affirmed in part and reversed in part, and this case is remanded to the trial court for further proceedings consistent with this decision.

*Motion to strike cross-assignment of error denied as moot;
judgment affirmed in part and reversed in part,
cause remanded.*

BRYANT and McGRATH, JJ., concur.
