

RENDERED: OCTOBER 1, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000646-MR

RANDY A. COBURN

APPELLANT

v. APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE ROBERT B. CONLEY, JUDGE
ACTION NO. 09-CI-00004

CSX TRANSPORTATION, INC.

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: DIXON, LAMBERT, AND WINE, JUDGES.

WINE, JUDGE: Randy A. Coburn appeals from an Order of the Greenup Circuit Court granting summary judgment in favor of CSX Transportation, Inc. For the reasons stated below, we affirm.

Factual and Procedural Background

On December 17, 2007, Randy Coburn, a resident of Ohio, filed a Federal Employer's Liability Act ("FELA") claim against CSX Transportation, Inc. in Franklin County, Ohio state court. Coburn alleged that CSX's negligence led to the injury he suffered while working at the company's Russell, Kentucky rail yard on January 5, 2005.

CSX moved to dismiss Coburn's case on grounds of *forum non conveniens*. The Ohio court granted the motion on May 22, 2008, and Coburn did not appeal. More than seven months later, on January 7, 2009, Coburn re-filed his complaint in Greenup Circuit Court, the county where the Russell, Kentucky rail yard is located.

CSX moved for summary judgment, arguing that the statute of limitations had run, thereby barring Coburn's claim. As noted by CSX, the statute of limitations on a FELA claim is three years. 45 U.S.C.A. §56. When Coburn filed the first action in Ohio, 1076 days of that three year period had expired, leaving Coburn nineteen days in which to re-file his claim. Since the statute of limitations was tolled during the pendency of the Ohio claim as well as during the thirty-day appeal period following its dismissal, Coburn had until July 11, 2008, in which to re-file; however, he did not file his claim in the Greenup Circuit Court until January 7, 2009, nearly six months after the statute of limitations had run.

In his response to CSX's motion, Coburn argued that summary judgment was not appropriate, and that CSX should be estopped from using the statute of limitations as a defense. In support of his argument for equitable

estoppel, Coburn provided an affidavit in which his attorney, Alva A. Hollon, Jr., outlined past cases involving CSX in which CSX had agreed to be bound by the saving statute of the state granting the *forum non conveniens* dismissal. Coburn argued that CSX should be estopped from invoking the statute of limitations because CSX's past conduct induced Mr. Hollon to delay filing the claim in Greenup County, Kentucky. In response, CSX argued that it engaged in no conduct that would warrant equitable estoppel and, furthermore, that this case is unlike the previous CSX cases cited by Coburn.

Finding no genuine issue of material fact, the Greenup Circuit Court granted CSX's motion for summary judgment on March 12, 2009. Coburn filed a timely appeal of the Greenup Circuit Court's summary judgment order.

Analysis

When presented with an appeal of a summary judgment, this Court must determine "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). As this is a question of law, we will review *de novo*. *Cinelli v. Ward*, 997 S.W.2d 474 (Ky. App. 1998).

Coburn argues that the trial court improperly granted summary judgment because a genuine issue of material fact existed concerning whether the doctrine of equitable estoppel tolled the statute of limitations. Coburn claims that in the past, CSX has agreed to be bound by the saving statute of the state granting

the *forum non conveniens* dismissal. According to Coburn, this “well-established history of acting a particular way” caused him to justifiably delay re-filing his claim in a more convenient forum; therefore, the doctrine of equitable estoppel should have been invoked in order to toll the statute of limitations and to prevent CSX from asserting that Coburn’s action was time barred.

In *Gosney v. Glenn*, 163 S.W.3d 894 (Ky. App. 2005), the Kentucky Court of Appeals outlined the essential elements of equitable estoppel. First, there must be “[c]onduct which amounts to a false representation or concealment of material facts.” *Id.* at 899. Second, the party to be estopped is aware of the real facts but the other party has no knowledge of or no means to obtain knowledge of the true facts. Third, the party to be estopped has the intention or expectation that the other party will act in reliance upon his conduct. Finally, the other party detrimentally relies upon the conduct of the estopped party. *Id.* Additionally, the Supreme Court of Kentucky has stated that, “in order to toll the limitations period, the [conduct] envisioned by KRS 413.190(2) [,which addresses conduct that obstructs an action,] . . . must represent an ‘affirmative act’ and ‘cannot be assumed.’” *Emberton v. GMRI, Inc.*, 299 S.W.3d 565, 573 (Ky. 2009).

To invoke equitable estoppel, the party to be estopped must have displayed conduct which is intended to represent or conceal material facts of which the estopped party is aware but which are unknown to the other party. In arguing for estoppel, Coburn suggests that CSX’s conduct in previous cases led him to justifiably believe that his claim was timely re-filed in the Greenup Circuit Court

and thus, provided sufficient grounds for estoppel. However, Coburn has failed to recognize a significant distinction between CSX's conduct in the present case and CSX's conduct in each of the previous cases to which he refers.

In the prior cases, CSX actively agreed to be bound by the saving statute of the state in which the claim was originally filed, a fact to which Coburn's own attorney has attested in his sworn affidavit. As stated in CSX's brief, however, the reason CSX agreed to be bound by the original state's saving statute in two of the referenced cases was because the statute on the plaintiff's claim had run, and in order to obtain dismissal on *forum non conveniens*, CSX agreed to preserve the plaintiff's right of action. In the present case, however, Coburn still had adequate time in which to re-file his claim after it was dismissed by the Ohio court.

Furthermore, while Coburn may argue that such conduct constitutes the "affirmative act" referred to by the Supreme Court of Kentucky in *Emberton*, Coburn has failed to provide evidence to suggest that CSX intended that Coburn rely on such past conduct or that CSX attempted to conceal any material fact to this case. *Emberton*, 299 S.W.3d at 572. Additionally, CSX has in no way taken an affirmative action directed toward Coburn in order to mislead or misrepresent its position to Coburn. CSX did not suggest that it would be willing to be bound by Ohio's saving statute in the present case; rather, Coburn simply made an assumption.

Coburn's estoppel argument fails for another reason. In order to invoke estoppel, the party to be estopped must "act with the intention or expectation his conduct will be acted upon." *Howard v. Motorists Mut. Ins. Co.*, 955 S.W.2d 525, 528 (Ky. 1997), quoting *Gray v. Jackson Purchase Production Ass'n*, 691 S.W.2d 904, 906 (Ky. App. 1985). Coburn, however, has offered no evidence to suggest CSX intended or expected its past conduct to lull Coburn into delaying the re-filing of his claim. Furthermore, nothing in Coburn's brief or his attorney's sworn affidavit suggests misconduct on the part of CSX.

Therefore, considering the factual differences between these cases and the fact that CSX did not make any representation to Coburn with the intent to mislead him, it was likely not reasonable for Coburn to rely on CSX's actions in these unrelated cases.

Having presented no relevant evidence to prove the validity of his estoppel claim, Coburn has failed to provide the Court with any genuine issue of material fact which would warrant reversing the trial court. *Gailor v. Alsabi*, 990 S.W.2d 597, 604 (Ky. 1999), citing *Adams v. Ison*, 249 S.W.2d 791, 793 (Ky. 1952).

For the reasons herein stated, we affirm the Greenup Circuit Court's judgment granting summary judgment in favor of CSX.

ALL CONCUR.

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