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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000969-MR

FARMERS CROP INSURANCE
ALLIANCE, INC. APPELLANT

v.

APPEAL FROM CLINTON CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 06-CI-00113

RONNIE GRAY APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; MOORE AND THOMPSON, JUDGES.

MOORE, JUDGE: Farmers Crop Insurance Alliance, Inc., appeals an April 30, 2009 order and judgment from the Clinton Circuit Court in favor of Ronnie Gray, awarding damages for breach of two insurance contracts and violation of Kentucky Revised Statute(s) (KRS) 304.12-230, the Unfair Claims Settlement Practices Act.

Farmers also argues the May 14, 2008 order of the trial court denying its motion for summary judgment and the trial court's holding, in that denial, that Farmers had waived any right to assert a contractual claims limitations period as an affirmative defense in the underlying proceedings was in error.[1]

The resolution of the issue of whether Farmers waived its right to assert the limitations period is dispositive to the resolution of all other issues in this appeal. As such, we include only those facts from the underlying matter necessary to develop this issue. We find that it was an abuse of discretion for the trial court to hold that Farmers had waived its right to assert the limitations period, we reverse that part of the trial court's May 14, 2008 order, and we remand this matter to the trial court for further proceedings not inconsistent with this opinion.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Ronnie Gray obtained two policies of tobacco crop hail insurance from Farmers Crop Insurance Alliance, Inc. These policies covered Gray's tobacco crops in Tennessee and Kentucky for the 2004 season. Both policies included the following provision:

16. SUIT AGAINST US.

[1] We note that Gray does not take issue with the fact that the only order listed in Farmers' notice of appeal is the trial court's order of April 30, 2009, rather than its May 14, 2008 order denying Farmers leave to amend and denying Farmers' motion for summary judgment. However, Farmers included its motion to amend and motion for summary judgment in its prehearing statement and both parties have addressed the merits of the May 14, 2008 order in their respective briefs. "Whatever the shortcomings [of a Notice of Appeal], except for tardy appeals and the naming of indispensible parties, we follow a rule of substantial compliance in regards to notices of appeal." *Lassiter v. American Exp. Travel Related Services Co., Inc.*, 308 S.W.3d 714, 718 (Ky. 2010). Because Gray does not argue prejudice, and because we find no prejudice to Gray demonstrated by the record of appeal before this court, Farmers' notice of appeal substantially complies with Kentucky Rule(s) of Civil Procedure (CR) 73.03.

> You cannot bring suit or action against us unless you have complied with all of the policy provisions.
>
> If you do enter suit against us you must do so within 12 months of the occurrence causing loss or damage.

Gray contacted Farmers in July of 2004 to report a possible hail loss with respect to both of his crops. In August of 2004, representatives of Farmers met with Gray at the Kentucky crop location. There, these representatives informed Gray that his crop damage was not sufficient to warrant payment under either policy.

On December 27, 2005, Farmers brought suit in Clinton District Court against Gray to collect approximately $4,000 in unpaid insurance premiums. On January 17, 2006, Gray answered and counterclaimed for breach of contract, citing as the basis for this breach Farmers' failure to provide coverage for his crop losses in 2004. Farmers answered Gray's counterclaim with a general denial. This matter was transferred to Clinton Circuit Court on June 22, 2006.

On January 9, 2008, pursuant to CR 15.01, Gray moved for leave to amend his counterclaim against Farmers to allege additional claims under Kentucky's Consumer Protection Act (KRS 367.170)[2] and Unfair Claim Settlement Practices Act (KRS 304.12-230). On January 22, 2008, the trial court

[2] Following the bench trial in this matter, the trial court did not allow Gray to recover on this claim. Gray does not appeal the trial court's decision.

granted him leave to do so within 30 days, and Gray filed his amended complaint on March 7, 2008.[3]

On April 1, 2008, Farmers responded to Gray's amended complaint with a motion for summary judgment. There, and for the first time, Farmers asserted the limitations period contained in its insurance contracts with Gray and claimed that, by virtue of that provision, Gray's suit was untimely.

On May 1, 2008, Gray stated the following in response to Farmers' motion for summary judgment:

> Pursuant to Rule 8.03 the matter of limitations of action must be affirmatively pled to become an issue in the case. Also, see *Thompson vs. Ward*, 409 S.W.2d 807 (Ky. 1966).
>
> The Plaintiff, in its reply to the counterclaim filed by the Defendant, did not raise said defense. Therefore, said defense has been waived. Furthermore, an agreed order was entered and signed by the Plaintiff's attorney transferring this case to Clinton Circuit Court. The only reason for transfer was the Defendant's counterclaim. Said motion to transfer was filed May 10, 2006 and was not opposed.
>
> A motion to amend the complaint, following discovery which revealed additional damages, was filed January 9, 2008. No objections were received and the Court permitted the complaint to be amended.
>
> Thus, based upon the above, the Plaintiff has obviously set [sic] on his hands regarding the defense of limitation. Said defense has long ago been waived. The Defendant and his attorney has [sic] spent a considerable time and expense to complete discovery and proceed with the case thus far. The Plaintiff cannot now state that said discovery was in vain by raising a limitations defense.

[3] There is no record of any dispute arising from Gray's filing his amended counterclaim 44 days after this order, rather than 30.

Gray included nothing with this response demonstrating the amount of time or expense he had put forth to complete discovery or proceed with this case.

Nevertheless, the trial court agreed. In an order of May 14, 2008, the trial court held that

> Gray is correct in asserting that Farmers waived the matter of limitations of action when they did not affirmatively plead such defense following the filing of Gray's counterclaim, pursuant to CR 8.03. This defense has now been advanced, following the amendment of Gray's counterclaim. However, since it could have been raised following the filing of the original response and counterclaim, due to it relating to the issue of limitations, this Court believes it is now untimely. This case was transferred, by agreed order, to Clinton Circuit Court for the sole reason that the damages asserted in Gray's counterclaim exceeded the jurisdictional threshold of the Clinton District Court. It would not only be improper but also unfair to allow this defense to be currently interjected, after considerable time, effort, and money has been expended by Gray in procuring discovery. Therefore, this Court concludes that summary judgment will not be granted on this basis.

In short, the trial court did not analyze the issue of the contractual limitations period from the standpoint of whether any genuine issue of fact existed regarding its applicability, per CR 56. Instead, the trial court exercised its discretion and determined that it would not allow Farmers to assert this defense at all. It held that allowing Farmers to do so would work an injustice against Gray, and thus approached this issue from the standpoint of CR 15.01, which governs the

procedure for whether and when a court should allow a party to amend its pleadings to assert a new defense or cause of action.[4, 5]

On May 21, 2008, Gray moved the court to set a date for trial. On March 19, 2009[6]—nearly one year after Farmers filed its motion for summary judgment—a bench trial was held in this matter. This appeal followed.

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[4] The parties do not present an argument regarding whether it was proper for the trial court to treat Farmers' motion as both for summary judgment and to amend its pleadings. Certainly, affirmative defenses may be waived if they are not properly pled in an answer or timely amendment to an answer as required by the Civil Rules.

However, as *dicta*, we note that the trial court's decision in this regard does not seem improper. Motions for summary judgment may be utilized to perform the function of the general demurrer under former Kentucky practice. *Watts v. Carrs Fork Coal Co.*, 275 S.W.2d 431, 432 (Ky. 1955). Nothing on the face of CR 15.01, which governs the procedure for amending pleadings, specifies what form a motion to amend a pleading must take. Additionally, this treatment promoted judicial economy; had the trial court denied summary judgment solely on the basis that Farmers had not separately moved to amend its answer to include this defense, Farmers likely would have moved to amend its answer in a separate motion and the trial court likely would have reviewed that separate motion and arrived at the same conclusion (*i.e.*, that Farmers had waived the limitations period) at that later date.

Furthermore, while we are unaware of any Kentucky authority addressing the practice of treating a motion for summary judgment as a motion to amend pleadings, a number of Federal courts, including the Sixth Circuit, have allowed this practice. For examples, *see Smith v. Sushka*, 117 F.3d 965, 969 (6th Cir. 1997) (treating a motion for summary judgment as a motion to amend and holding that the purpose of Federal Rule(s) of Civil Procedure (FRCP) 8(c), which is comparable to our CR 8.03, is to give the opposing party notice of the affirmative defenses and a chance to respond); *see also, Block v. First Blood Associates*, 988 F.2d 344, 350 (2nd Cir. 1993); *Thomas v. St. Luke's Health Systems, Inc.*, 869 F.Supp. 1413 (8th Cir. 1994). The reason appears to be that if a trial court chooses not to interpret a motion for summary judgment also as a motion for leave to amend a pleading, the trial court "exalts form over substance-technicality over reality." *Id*. at 1429.

[5] As a tangential matter, Farmers filed a motion for leave to amend its answer on May 28, 2008, in order to assert "additional defenses." This motion does not specify what these defenses were, but states that "Farmers seeks to Amend its original Answer to assert additional defenses. Kentucky case law is with examples allowing a party to amend its original answer to assert additional defenses, including the statute of limitations."

On June 11, 2008, the trial court denied Farmers' motion, ordered that "Farmers Crop waived its affirmative defense of the statute of limitations defense [sic] as its [sic] relates to the claims and damages asserted in Defendant's Counterclaim," but stated that "Farmers Crop has not waived the affirmative defense of statute of limitations defense [sic] as its [sic] relates to the new claims and damages asserted in Defendant's Amended Counterclaim."

The record does not indicate that Farmers amended its answer following this order. However, the issue in this case is whether Farmers waived a period of claims limitation specified by contract, not by statute. As such, we do not read the trial court's order to modify its previous

ANALYSIS

On appeal, Farmers argues the trial court erred in holding that it had waived its defense of the contractual period of limitation. Under the circumstances of this case, we agree.

Kentucky Rule of Civil Procedure 8.03 requires a party to "set forth affirmatively. . . statute of limitations . . . and any other matter constituting an avoidance or affirmative defense." By extension, a contractual provision limiting the statute of limitation would also be an affirmative defense. As such, either must be raised in the initial answer or in a motion to dismiss in lieu of an answer. CR 12.02. If they are not pled, this failure constitutes a waiver. *Commonwealth Dept. of Highways v. Chinn*, 350 S.W.2d 622, 623 (Ky. 1961).

However, as a practical matter there are numerous exceptions to this broad rule of waiver, the most significant being the rule allowing amendments to the answer under CR 15.01. If the trial court had permitted Farmers to amend its answer to assert the limitations period, that amendment would have related back to the date of its original answer and any waiver, by virtue of Farmers' failure to include the defense in its initial answer, would have been rescinded. CR 15.03(1).

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holding with respect to the contractual limitations period.

[6] Following the bench trial, Gray and Farmers stated in their proposed findings of fact and conclusions of law that the trial date was "March 29, 2009." Also, the court's order following the bench trial states that the date of trial was "March 29, 2009."

However, all pleadings prior to the trial stated that trial would be held on "March 19, 2009." In light of the fact that March 29, 2009 was a Sunday, it appears to this Court that March 19, 2009 was the actual date of trial.

In relevant part, CR 15.01 provides that leave to amend "shall be freely given when justice so requires." Federal courts have found that the thrust of the federal equivalent to this rule, Federal Rule(s) of Civil Procedure (FRCP) 15, is "that cases should be tried on their merits rather than the technicalities of pleadings." *Tefft v. Seward*, 689 F.2d 637, 639 (6th Cir. 1982); *see also General Electric Co. v. Sargent & Lundy*, 916 F.2d 1119, 1128 (6th Cir. 1990). Likewise, Kentucky courts have interpreted CR 15.01 to mean that, where "justice so requires," it is mandatory for the trial court to grant leave to amend. *Stout v. City of Martin*, 395 S.W.2d 591, 593 (Ky. 1965). The question becomes, then, when does justice require leave to amend a pleading? In this regard, the significant factors to be considered in determining whether to grant leave to amend are timeliness, excuse for delay, and prejudice to the opposite party. *Lawrence v. Marks*, 355 S.W.2d 162, 164 (Ky. 1961); *see also Ashland Oil & Refining Co. v. Phillips*, 404 S.W.2d 449, 450-1 (Ky. 1966).[7]

This case involves the trial court's refusal to permit Farmers to amend its pleadings to assert the limitations period; as such, the question is not whether a failure to plead an affirmative defense resulted in a waiver. Rather, the question is whether the trial court properly refused to allow Farmers to set that waiver aside.

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[7] Other factors include a party's repeated failure to cure deficiencies by amendment and futility of the amendment. *First Nat. Bank of Cincinnati v. Hartmann*, 747 S.W.2d 614 (Ky. App. 1988). Neither factor is germane to the resolution of this case because 1) Farmers had not attempted to amend its answer prior to filing its motion and 2) if the contractual limitations period applied, an amendment allowing for its assertion would not be futile. Rather, it would bar Gray's claims.

We review a trial court's decision to deny a party leave to amend under CR 15.01 for abuse of discretion. *Graves v. Winer*, 351 S.W.2d 193, 197 (Ky. 1961). And, "[t]he test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).[8] We analyze the facts of this case in view of the factors of timeliness, excuse for delay, and prejudice to the opposite party, below. *Lawrence,* 355 S.W.2d at 164.

Regarding the first factor, we note from the onset that "delay alone is insufficient reason to deny a motion to amend." *Estes v. Kentucky Utilities Co.*, 636 F.2d 1131, 1134 (6th Cir. 1980) (reviewing the standard for granting leave to amend pleadings under FRCP 15(a)); *see also Security Ins. Co. of Hartford v. Kevin Tucker & Associates, Inc.*, 64 F.3d 1001, 1009 (6th Cir. 1995) (citing *Moore v. City of Paducah*, 790 F.2d 557, 561 (6th Cir.1986)). Furthermore, Farmers did not file its motion in response to Gray's counterclaim because it was filed on January 17, 2006; it filed its motion to respond to Gray's counterclaim as amended on March 7, 2008. The time between Gray's amended complaint and Farmers' motion in response was a total of 25 days.

[8] Gray cites to *Johnson v. Staples*, 408 S.W.2d 206, 207 (Ky. 1966), for the proposition that "[a]fter a motion for summary judgment has been made, a motion to amend a pleading rests in the sound discretion of the trial court, and its ruling will not be disturbed unless an abuse of discretion is clearly shown." Assuming that *Johnson* would change the standard of review set forth herein, it has no applicability because the facts of that case are distinguishable. *Johnson* involved a trial court's refusal to allow a party to amend a complaint in *response* to a motion for summary judgment. Here, Farmers was not responding to a motion for summary judgment. It was asserting this defense as one basis for its own motion for summary judgment.

In any event, this motion was filed fully one year prior to the bench trial in this matter and at a time when a trial date had not been set. Gray had ample time to investigate this defense and to prepare a response and there is no indication from the record that he would have been precluded from asking for additional time to do so. Hence, any delay resulting solely from Farmers' failure to assert this defense earlier cannot be said to have caused Gray any undue surprise or hardship.

Regarding the second factor, the trial court did not consider whether Farmers had a valid excuse for failing to assert the limitations period at an earlier date. However, Farmers' motion was a response to Gray's amended complaint, which asserted two new theories of recovery. That amendment resulted in a new complaint which, in turn, entitled Farmers to respond as a matter of right. *See Curry v. Cincinnati Equitable Ins. Co*., 834 S.W.2d 701, 704 (Ky. App. 1992) (interpreting CR 15.01 to entitle an opposing party to respond to an amended complaint with an amended answer or motion to dismiss, and specifying that either response may include an affirmative defense not previously raised); *see also Hawes v. Cumberland Contracting Co.*, 422 S.W.2d 713, 714-15 (Ky. 1968) (holding that where a party filed only a motion to dismiss in response to an initial complaint, it was obligated to file a renewed motion in response to an amended complaint under penalty of default.) Thus, after Gray served Farmers with its amended complaint via mail, Farmers had a right to respond to it with its own amended answer within thirteen days, *i.e.*, until March 20, 2008, without leave of court. *See* CR 15.01 and 6.05.

If Farmers had simply filed an amended answer on April 1, 2008, rather than what the trial court construed as a motion for leave to amend its answer, the amended answer could have been considered untimely only by a margin of twelve days. And, the record provides some indication that Farmers' neglect in filing its motion on April 1, 2008, rather than March 20, 2008, was due to mistake rather than bad faith. On March 31, 2008, Farmers filed a motion for an enlargement of time to respond to Gray's amended complaint. Therein, it confused CR 12.01 (which provides a 20-day limit for responding to cross claims) with CR 15.01 (which provides a 10-day limit for responding to amended complaints), and explained that it had until March 30, 2008, to respond, but needed an extension of time to April 2, 2008, so it could respond with a dispositive motion.

Irrespective of the first two factors, however, it is the third factor of prejudice that demonstrates the trial court abused its discretion in this instance. Gray did not file his counterclaim in reliance upon Farmers' conduct. And, if Farmers' affirmative defense had been timely asserted and it was found to apply in this matter, Gray would have no cause to complain that he had no cause of action by virtue of the contractual limitations period. As such, the prejudice that resulted must be due in some way to the fact that Farmers' assertion of this defense was late. And in this regard, Gray responded to Farmers' motion arguing that he was prejudiced because he had spent "considerable time and expense to complete discovery," and the trial court cited Gray's time and expense as its basis for holding that Farmers had waived the contractual limitations period.

It has been held that a tardy motion to assert a statute of limitations defense would not be allowed where extensive trial preparation had already taken place. *Estes*, 636 F.2d at 1134. However, prejudice sufficient to warrant denying a motion to amend must be "significant." 6 Kentucky Practice, Rule 15.01 (6th ed. 2006). Furthermore, "[a]buse of discretion occurs when a court fails to state the basis for its denial. . . ." *Id*. In this regard, nothing in Gray's response, or in the court record up to the date of Farmers' motion, described the extent of the time or expense Gray exerted in this case until the time Farmers filed its motion.

Additionally, the state of the record as it appeared on the date the trial court deemed this defense waived tends to contradict the proposition that Gray could have been significantly prejudiced as a result of Farmers' delay. Between the date Gray filed his initial counterclaim and the date of Farmers' motion, the discovery in this case, as contained in the record, was limited to the following: 1) one set of interrogatories from Farmers, which Gray answered on May 17, 2006; 2) one set of interrogatories from Gray, which Farmers answered prior to August 20, 2006; and 3) five depositions, which Gray conducted on November 17, 2007, at 10 a.m., 10:30 a.m., 11 a.m., 11:30 a.m., and 1 p.m., respectively. Two motions to compel discovery, filed by Gray on June 27 and August 9, 2007, and a bill of costs, filed into the record fully one year after the trial court held Farmers had waived the contractual limitations period, are the only indications of Gray's discovery expenses. In the motions to compel discovery, Gray asked for attorney fees in the

amount of $250. In the bill of costs, Gray sought reimbursement for a court reporter fee, relating to the depositions, in the amount of $488.

In sum, Farmers filed its motion asserting the limitations period only twelve days after it could have done so as a matter of right and one year prior to the date of trial; further, the record itself gives no indication that this case had been vigorously litigated to the date of Farmers' motion, or that the time and expense Gray spent in conducting discovery rose to the level of significant prejudice. We believe the trial court abused its discretion when it held, under these circumstances, that Farmers had altogether waived its affirmative defense of the contractual limitations period.

Without doubt, "[t]he scope of the [trial] court's discretion is broad, and in a proper case conditions may be imposed on the party seeking [an] amendment; for example, costs of preparing litigation could be imposed on the party who asserts a valid, but untimely, dispositive affirmative defense." *Estes*, 636 F.2d at 1134 (citing 6 Wright and Miller, FEDERAL PRACTICE & PROCEDURE, § 1486 at 423 *et seq*. (1971)). However, "the purpose of pleading is to facilitate a proper decision on the merits," not "a game of skill in which one misstep by counsel may be decisive to the outcome." *Conley v. Gibson*, 355 U.S. 41, 48, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

CONCLUSION

We REVERSE the trial court, in part, with regard to its conclusion that Farmers had waived the contractual limitations period as an affirmative

defense. But, in the absence of a ruling from the trial court as to the validity or applicability of that limitations period under the circumstances of this case, this Court is unable to conclude whether that limitations period has been met. Because the contractual limitations period appears to encompass all of the conduct, transactions, and occurrences set forth in Gray's counterclaim and amended counterclaim, it would be inappropriate to review this case further without such a ruling. Thus, we remand this matter to the trial court for a determination of whether Gray's action against Farmers was, in fact, timely, and for other proceedings not inconsistent with this opinion. If the trial court finds the limitations period applies to each claim and has run, it is instructed to vacate the judgment.

We retain no further jurisdiction.

TAYLOR, CHIEF JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES A SEPARATE OPINION.

THOMPSON, JUDGE, DISSENTING: Respectfully, I dissent. Farmers answered Gray's counterclaim with a general denial and this matter was transferred to the circuit court on June 22, 2006. Farmers did not raise the affirmative defense of statute of limitations until April 1, 2008. I believe the trial court was in the best position to determine whether Gray had expended time and expense to complete discovery and proceed with the action.

The statute of limitations must be pled as an affirmative defense. CR 8.03. The failure to plead an affirmative defense results in a waiver of that defense.

Independent Order of Foresters v. Chauvin, 175 S.W.3d 610 (Ky. 2005). Because of the time between the filing of an answer and the attempt to argue the statute of limitations, I cannot agree that the trial court abused its discretion when precluding the statute of limitations as a defense.

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