

[Cite as *Washington v. JP Morgan Chase Bank, N.A.*, 2018-Ohio-986.]
STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

WAYMAN E. WASHINGTON,)	CASE NO. 17 MA 0115
)	
PLAINTIFF-APPELLANT,)	
)	
VS.)	OPINION
)	
JP MORGAN CHASE BANK N.A. et al.,)	
)	
DEFENDANTS-APPELLEES.)	

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas of Mahoning County, Ohio
Case No. 2017 CV 465

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellant: Wayman Washington, *pro se*
#632-492
Richland Correctional Institution
1001 Olivesburg Road
P.O. Box 8107
Mansfield, Ohio 44901

For Defendants-Appellees: Atty. Daniel Gibson
Brickler & Eckler LLP
100 South Third Street
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JUDGES:

Hon. Carol Ann Robb
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: March 2, 2018

[Cite as *Washington v. JP Morgan Chase Bank, N.A.*, 2018-Ohio-986.]
ROBB, P.J.

{¶1} Plaintiff-Appellant Wayman E. Washington appeals the decision of Mahoning County Common Pleas Court granting Defendant-Appellee JPMorgan Chase Bank, N.A.'s Civ.R. 12(B)(6) motion to dismiss the complaint because the complaint was filed after the expiration of the statute of limitations. Appellant argues the trial court erred in dismissing the action because the statute of limitations did not begin to run until he sent his 2015 certified demand letter seeking the return of his property. He asserts the discovery rule is applicable and tolled the statute of limitations period.

{¶2} The trial court's dismissal of the complaint is affirmed. The complaint on its face indicates Appellant knew the property was allegedly taken in the summer of 2009. The demand letter did not toll the statute of limitations nor act as discovery of the alleged taking of the property.

Statement of the Case

{¶3} On February 23, 2017, Appellant filed a complaint against Appellee and four John Does. The complaint alleged in 2009 Appellant owned property known as Youngstown City Lot 39340 in Brockway-Williamson-Knott Company's Plat. Appellee was allegedly the mortgage and lien holder of the structure and land owned by Appellant. The complaint alleges that in the summer of 2009, Appellee and John Doe defendants entered the building without permission, sealed the residence prohibiting anyone from entering without permission from Appellee, and unlawfully removed property owned by Appellant from the residence. Appellant sent a certified letter dated July 16, 2015 to Appellee demanding the return of personal property unlawfully taken. Appellee did not respond to the letter. 2/23/17 Complaint.

{¶4} The complaint asserted five causes of action against Appellee and John Doe defendants – conversion, civil action for criminal act, theft, conspiracy based on conversion, and negligence for loss of income. Appellant sought compensatory and punitive damages. 2/23/17 Complaint.

{¶5} In response to the complaint, Appellee filed a Civ.R. 12(B)(6) motion to dismiss. Appellee asserted the statute of limitations for all claims was four years.

The complaint alleged the actions taken by Appellee and John Doe defendants occurred in 2009. Consequently, the face of the complaint indicated all claims were barred by the statute of limitations. Appellee also asserted the conspiracy claim was not pled with specificity, and the negligence claim was barred by the economic loss doctrine. 4/14/17 Motion to Dismiss.

{¶6} Instead of responding to the motion to dismiss, Appellant filed an amended complaint. The allegations in the amended complaint are nearly identical to the allegations in the original complaint. The amended complaint differs in two respects. First, instead of claiming the property was taken unlawfully, the complaint simply alleges it was taken. Second, the amended complaint added a sixth cause of action, replevin. 4/28/17 Amended Complaint.

{¶7} The trial court overruled Appellee's motion to dismiss as moot because the amended complaint superseded the original complaint. 5/11/17 J.E.

{¶8} Appellee then filed a motion to dismiss the amended complaint. Appellee once again argued the allegations were time barred. It indicated the statute of limitations for all six causes of action raised in the amended complaint was four years. The face of the amended complaint indicated the complained of actions constituting the basis for the six causes of action occurred in the summer of 2009; more than four years prior to the filing of the complaint. Appellee also asserted the conspiracy claim was not pled with the required specificity, and the negligence claim was barred by the economic loss doctrine. 5/12/17 Motion to Dismiss.

{¶9} In response, Appellant filed an opposition motion. Appellant only addressed the conversion action in the opposition motion. He argued a conversion action for the return of personal property does not begin to run until the demand and refusal to return the property occurs. He also invoked the discovery rule, claiming the statute of limitations does not begin to run until the plaintiff discovered or should have discovered the claimed matters. 6/5/17 Motion in Opposition.

{¶10} Appellee replied to the opposition motion asserting Appellant conceded all claims except for the conversion claim were barred by the statute of limitations, the conspiracy claim was not pled with specificity, and the economic loss doctrine

barred the negligence claim. Appellee argued the conversion claim was barred by the statute of limitations because Appellant acknowledged in his complaint that the alleged unlawful conversion occurred in 2009. Thus, the discovery rule was not applicable. It also asserted the statute of limitations was not tolled until the 2015 demand letter was issued because Appellant's claim was for the return of personal property taken unlawfully. A demand for the return of property is only at issue when the conversion claim asserts the property was lawfully taken. 6/9/17 Reply.

{¶11} The trial court granted Appellee's motion to dismiss. 6/22/17 J.E. Appellant timely appealed that decision. 7/17/17 NOA.

Assignment of Error

"The trial court erred when it dismissed Appellant's complaint pursuant to Civ.R. 12(B)(6)."

{¶12} A Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief may be granted is a procedural motion that tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 605 N.E.2d 378 (1992). In order to dismiss a complaint for failure to state such a claim, the court must find beyond doubt that appellant can prove no set of facts warranting relief after it presumes all factual allegations in the complaint are true, and construes all reasonable inferences in appellant's favor. *State ex rel. Seikbert v. Wilkinson*, 69 Ohio St.3d 489, 490, 633 N.E.2d 1128 (1994). The trial court may look only to the complaint to determine whether the allegations included within it are legally sufficient to state a claim. *State ex rel. Hanson*.

{¶13} A Civ.R. 12(B)(6) motion to dismiss based on a violation of a statute of limitations should be granted only where the complaint conclusively shows on its face that the action is time barred. *Velotta v. Leo Petronzio Landscaping, Inc.*, 69 Ohio St.2d 376, 379, 433 N.E.2d 147 (1982). To conclusively demonstrate the action is time barred, the allegations in the complaint must demonstrate the applicable statute of limitations, and the absence of factors which would toll the pertinent statute, or make it inapplicable. *Lindsey v. Schuler*, 7th Dist. No. 11 MA 205, 2012-Ohio-3675, ¶ 11.

{¶14} We review dismissals pursuant to Civ.R. 12(B)(6) de novo. *State ex rel. Ohio Civ. Serv. Emps. Assn. v. State*, 146 Ohio St.3d 315, 2016-Ohio-478, 56 N.E.3d 913, ¶ 12.

{¶15} Conversion claims “shall be brought within four years after the cause accrued.” R.C. 2305.09. A cause of action “accrues” when the tortious acts are committed. *Lynch v. Dial Fin. Co.*, 101 Ohio App.3d 742, 747, 656 N.E.2d 714 (8th Dist.1995). The discovery rule is applicable to conversion claims. *Investors REIT One v. Jacobs*, 46 Ohio St.3d 176, 181, 546 N.E.2d 206 (1989). The discovery rule tolls the statute of limitations until a plaintiff discovers or, in the exercise of reasonable diligence, should have discovered, the injury. *O’Stricker v. Jim Walter Corp.*, 4 Ohio St.3d 84, 447 N.E.2d 727 (1983), paragraph two of the syllabus; *Melnyk v. Cleveland Clinic*, 32 Ohio St.2d 198, 290 N.E.2d 916 (1972).

{¶16} The face of Appellant’s complaint indicates he knew the conversion of his property occurred in the summer of 2009. The complaint was not filed until February 23, 2017, long after the expiration of the four year statute of limitations.

{¶17} Appellant contends the statute of limitations did not begin to run until he sent his July 16, 2015 demand letter. Thus, according to him, the action was filed within the four year statute of limitations and the trial court improperly dismissed his complaint. His argument is based on the discovery rule and the elements of conversion. He asserts conversion requires demand and refusal to return property, and therefore, the statute of limitations does not begin to run until the demand is made.

{¶18} Appellee counters arguing there are two types of conversion claims, one is for lawfully taking of property and the other is for the unlawful taking of property. Appellant’s original complaint alleged the property was unlawfully taken. For property taken unlawfully there is no requirement for demand and refusal to return. Accordingly, the statute of limitations was not tolled.

{¶19} This court agrees with Appellee’s position as to the lawful taking of property.

{¶20} “Conversion is the wrongful exercise of dominion over property to the exclusion of the rights of the owner, or withholding it from his possession under a claim inconsistent with his rights.” *State ex rel. Toma v. Corrigan*, 92 Ohio St.3d 589, 752 N.E.2d 281 (2001). “The elements of a conversion action are: (1) the plaintiff had ownership or right of possession of the property at the time of conversion; (2) the defendant's conversion of plaintiff's property by a wrongful act or disposition; and (3) resulting damages.” *Raze Internatl., Inc. v. Southeastern Equip. Co.*, 2016-Ohio-5700, 69 N.E.3d 1274, ¶ 49 (7th Dist.).

{¶21} There are two additional elements the plaintiff must prove if the defendant came into possession of the property lawfully. *Semco, Inc. v. Sims Bros.*, 3d Dist. No. 9-12-62, 2013-Ohio-4109, ¶ 33; *Young v. Eich*, 7th Dist. No. 10 MA 191, 2012-Ohio-1687, ¶ 23. They are: (1) he or she demanded the return of the property from the possessor after the possessor exerted dominion or control over the property, and (2) the possessor refused to deliver the property to its rightful owner. *Semco; Young*. “The object of the demand and refusal elements are to ‘turn an otherwise lawful possession into an unlawful one, by reason of a refusal to comply * * *.’” *Semco* at ¶ 33. A demand and refusal is necessary only where the person alleged to have converted the property has rightfully obtained possession of the property. *Koe-Krompecher v. City of Columbus*, 10th Dist. No. 05AP-697, 2005-Ohio-6504, ¶ 20.

{¶22} The argument made by Appellant is a common argument. However, the argument is meritless. Appellate courts routinely explain demand and refusal is not required to trigger the statute of limitations when the original taking was unlawful. *Davis v. Canton*, 5th Dist. No. 2013CA00080, 2014-Ohio-195, ¶ 16-17; *Floch v. Davis*, 11th Dist. No. 2013-T-0021, 2013-Ohio-4968, ¶ 45-46; *Koe-Krompecher*, 2005-Ohio-6504 at ¶ 21-22; *Firsdon v. Mid-American Natl. Bank & Trust Co.*, 6th Dist. No. 90WD083, 1991 WL 2554218 (Oct. 11, 1991). The complaint did not allege the taking was lawful. Therefore, demand and refusal was not required. The statute of limitations began to run when the taking occurred, when it was discovered, or when it should have been reasonably discovered. Appellant alleged he knew about

the taking in the summer of 2009. Therefore, that is when the statute of limitations began to run, which expired three years prior to the filing of the complaint.

{¶23} Appellant's citation to *Rutan* does not alter the above analysis. *Rutan* was a case where the alleged property was undisputedly lawfully taken. *Rutan v. Reed*, 10th Dist. No. 06AP-1115, 2007-Ohio-5005. In holding the trial court correctly determined the statute of limitations had run, the appellate court stated:

Generally, in instances in which a defendant rightfully obtains property but subsequently converts it wrongfully, discovery occurs when the plaintiff demands return of his or her property, or the defendant denies plaintiff's title to the property. * * * Nonetheless, "the statute of limitations may run sooner than the demand or refusal date if the Court determines Plaintiff discovered or should have discovered the alleged conversion at a different date."

Id. at ¶ 7.

{¶24} The *Rutan* court found the demand for the return of the property occurred more than four years prior to the filing of the complaint. *Id.* at ¶ 10-11. Since that case dealt with a lawful taking, the statements regarding a demand and refusal are not applicable; *Rutan* is not instructive and does not alter the above analysis.

{¶25} Appellant's sole assignment of error lacks merit. The trial court's Civ.R. 12(B)(6) dismissal is affirmed.

Donofrio, J., concurs.

Waite, J., concurs.