

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Cadles of Grassy Meadows, II, LLC,
Assignee of First Federal Savings
and Loan

Court of Appeals No. L-09-1267

Trial Court No. CI0198603253

Appellant

v.

Charles J. Kistner, et al.

DECISION AND JUDGMENT

Appellees

Decided: May 21, 2010

* * * * *

Joseph D. Datchuk, for appellant.

Adrian C. Ribovich, for appellees.

* * * * *

HANDWORK, J.

{¶ 1} This accelerated appeal is from the September 22, 2009 judgment of the Lucas County Court of Common Pleas, which denied the motion of Cadles of Grassy Meadows II, LLC, hereinafter "Cadles," to revive the judgment entered in case No.

CI0198603253, entered on March 6, 1987. Upon consideration of the assignments of error, we reverse the decision of the lower court. Appellant, Cadles, asserts the following assignment of error on appeal:

{¶ 2} "1. The trial court erred by retroactively applying the ten-year limitation period set forth in Ohio Revised Code Sec. 2325.18 in denying Appellant Cadles of Grassy Meadows II, L.L.C's [sic] Motion for Revivor."

{¶ 3} In 1986, First Federal Savings and Loan Association of Toledo, hereinafter "First Federal," brought a foreclosure action against Charles and Sandra Kistner. Judgment was rendered against the Kistners in 1987 for \$28,064.10 plus interest and costs. First Federal obtained a certificate of judgment, which was recorded. The mortgage was foreclosed and the property was sold to First Federal, but the judgment was not fully satisfied. First Federal recorded its certificate of judgment lien on March 12, 1987. Pursuant to R.C. 2329.07, the judgment became dormant on March 12, 1992.

{¶ 4} On August 7, 2009, Cadles, as assignee of the judgment lien of First Federal, moved the court to revive the judgment pursuant to R.C. 2325.15 and 2325.17. Cadles asserted that \$11,655.99 is still owed, plus interest, or \$25,658.72. The Kistners opposed revivor of the judgment on grounds that Cadles had abandoned its right and because the statute of limitations barred revival of the judgment.

{¶ 5} Cadles argued that inaction was not sufficient to support a finding of abandonment of the statutory right of revivor and that it and its predecessors had made numerous efforts to contact the Kistners. Furthermore, Cadles argued that the current

version of the statute of limitations does not apply because at the time the judgment became dormant, the statute in effect (R.C. 2325.18, effective October 1, 1953) provided for a 21-year statute of limitations for revivor proceedings.

{¶ 6} The trial court determined on September 22, 2009, that the judgment became dormant on March 12, 1992, and that revival of the judgment was barred because R.C. 2325.18(A), effective currently, requires that the judgment could only be revived within 10 years and that more than 17 years had passed since this judgment became dormant. Cadles sought an appeal from this judgment.

{¶ 7} On appeal, Cadles argues that the court erred as a matter of law in applying the current version of R.C. 2325.18 retroactively. Cadles argues that the right to sue became a vested, substantial right at the time the judgment became dormant. Therefore, retroactive application of the revised R.C. 2325.18 would be unconstitutional under Section 28, Article II of the Ohio Constitution. Furthermore, Cadles argued that statutes are presumed to be prospective only.

{¶ 8} The Kistners argue that it is not a matter of applying the statute retroactively. Rather, they argued, when the statute of limitations was changed and reduced the time within which revivor must be sought, the right to file a revivor action was altered. Cadles had 90 days between the time the act altering the law was passed and when it became effective to revive its judgment, and it failed to do so.

{¶ 9} Upon becoming dormant, an Ohio judgment may not be enforced and has no legal effect unless the judgment can be revived in accordance with Ohio law. *In re*

Stoddard (Bkrtcy.N.D.Ohio 2000), 248 B.R. 111, 116-117. Seeking to revive a judgment does not involve the creation of a new action, but merely the institution of a special proceeding within the original action. *Bartol v. Eckert* (1893), 50 Ohio St. 31, 45; *State v. Jones* (Oct. 16, 2000), 12th Dist. No. CA2000-02-015, at 3, quoting *Donellan Jerome, Inc. v. Trylon Metals* (N.D.Ohio 1967), 11 Ohio Misc. 265, 270 F.Supp. 996, 998; and *Deville Lumber Co., Inc. v. Welday Real Estate, Inc.* (Aug. 9, 1989), 9th Dist. No. 1792, at 1. Such a proceeding is merely remedial and not on the merits. *Bartol v. Eckert*, supra, and *Wayne Bldg. & Loan Co. v. Headley* (1940), 64 Ohio App. 355, 360.

{¶ 10} To avoid revival of the judgment, the debtor must prove that "the judgment has been paid, settled or barred by the statute of limitations." *Dillon v. Four Dev. Co.*, 6th Dist. No. L-04-1384, 2005-Ohio-5253, ¶ 17 (citation omitted). Generally, the "action to revive a judgment can only be brought within ten years from the time it became dormant * * *." R.C. 2325.18(A) (effective June 2, 2004). The prior version of the statute (effective October 1, 1953 to June 1, 2004) provided for a 21-year statute of limitations for asserting the right to revivor. The issue raised in this case is which version of the statute is applicable.

{¶ 11} The fifth appellate district addressed this issue indirectly when it merely applied the current statute to a judgment that went dormant prior to the effective date of the statute. *Thompson v. Bayer*, 5th Dist. No. 08-CA-89, 2009-Ohio-4955, ¶ 20. Our court, however, applied the older statute under similar circumstances without addressing the issue of which statute was applicable. *Dillon*, supra at ¶ 17.

{¶ 12} Interestingly, this same issue arose in 1893 after the creation and amendment of the statute of limitations for revivor proceedings (73 Ohio Laws 148, which was carried into the 1880 Revised Statutes as R.C. 5368). *Bartol*, 50 Ohio St. 31. In that case, the creditor sought in 1885 to revive an 1845 judgment, which had become dormant in 1863. The creditor had been unable to revive the judgment from 1858 to 1876 because she was a married woman subject to the disability of coverture.

{¶ 13} The debtor argued that the action was barred by the 21-year statute of limitations for reviving dormant judgments that had been enacted in 1876 while the judgment was dormant. That statute provided that any judgment already rendered and any judgment to be rendered had to be revived within 21 years after it became dormant. In 1878, the statute was amended to provide that no action could be brought to revive a judgment 21 years after it had become dormant. While the first statute was expressly made retroactive, the amended statute did not clearly indicate whether it was to be applied retroactively.

{¶ 14} The Supreme Court of Ohio first held that without an expression of retroactivity, and based on the general rule that amendments shall not affect causes already existing, the 1878 statute was not applicable and that the motion to revive was late under the original 1876 statute. Secondly, the court considered the constitutionality of retroactively applying the 1876 statute and held that no vested right had been taken away or impaired by the statute. The creditor had her judgment on the merits and revivor was merely the remedy for enforcement of a right already established. *Id.* at 43.

{¶ 15} There continues to be a two-part test to determining whether a statute can be applied retroactively. There must be a clear, express legislative intent to apply the statute retroactively. If there is, the statute must affect only remedial, not substantive, rights or it will be found to violate Section 28, Article II of the Ohio Constitution. *State ex rel. Romans v. Elder Beerman Stores Corp.* (2003), 100 Ohio St.3d 165, 2003-Ohio-5363, ¶ 11, citing *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, superseded on other grounds by statute as stated in *Hannah v. Dayton Power & Light Co.* (1998), 82 Ohio St.3d 482, 484.

{¶ 16} The Kistners argue that the right to file the revivor motion is derived directly from the statute which also creates the statute of limitations. We disagree. R.C. 2323.15 gives rise to the right to revive a dormant judgment. R.C. 2325.18 provides a statute of limitation for doing so.

{¶ 17} In this case, the current version of R.C. 2325.18, effective June 2, 2004, did not clearly provide for retroactive application of the statute. Accordingly, our inquiry stops there and we need not address the issue of whether the statute affects remedial or substantive rights. This statute was not intended to apply to dormant judgments that existed as of June 2, 2004. Therefore, the prior version of the statute, which provided for a 21-year statute of limitation, controls this case. We find that the trial court erred by applying the current version of the statute. Therefore, we find appellant's sole assignment of error well-taken.

{¶ 18} Having found that the trial court did commit error prejudicial to appellant and that substantial justice has not been done, the judgment of the Lucas County Court of Common Pleas is reversed. This case is remanded to the trial court for further proceedings consistent with this judgment. Appellees are hereby ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.