**[Cite as *Gao v. Barrett*, 2011-Ohio-3929.]**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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| Xudong Gao, | : | |
| Plaintiff-Appellant, | : | |
| | | No. 10AP-1075 |
| v. | : | (C.P.C. No. 09CVC-06-8989) |
| Michelle Barrett, | : | (ACCELERATED CALENDAR) |
| Defendant-Appellee. | : | |

D E C I S I O N

Rendered on August 9, 2011

*Hillard M. Abroms*, for appellant.

*Regan B. Tirone*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

**{¶1}** Appellant, Xudong Gao, appeals from the judgment of the Franklin County Court of Common Pleas, in which the trial court ordered summary judgment in favor of appellee, Michelle Barrett. For the following reasons, we affirm the trial court's judgment.

**{¶2}** From 2005 to 2009, appellant filed a total of three personal-injury actions against appellee in the Franklin County Court of Common Pleas, each arising from an

automobile collision that occurred on May 2, 2003. Appellant's first complaint, filed on May 2, 2005, sought reimbursement for medical expenses, lost wages, and loss of life enjoyment. On July 17, 2006, the trial court dismissed the case without prejudice for want of prosecution.

**{¶3}** Appellant, represented by the same counsel, refiled the action on July 13, 2007. The second complaint contained the same allegations as those in the first and sought the same relief. On June 16, 2008, the trial court dismissed the case again, without prejudice, for want of prosecution.

**{¶4}** After obtaining new counsel, appellant filed a third complaint on June 16, 2009. The complaint asserted that the case was being "refilled [sic] pursuant to this Court's journal entry of June 16, 2008 and time stamped with the Franklin Clerk of Courts on June 17, 2008 (Case No. 07 CVC 07 09268)." (Complaint at ¶1.) Appellant perfected service of the complaint on December 3, 2009, but appellee failed to file a timely answer or other responsive pleading. Consequently, appellant obtained default judgment against appellee on March 19, 2010.

**{¶5}** On April 14, 2010, appellee moved to set aside the default judgment pursuant to Civ.R. 60(B)(1), claiming that her failure to respond to the complaint was due to "excusable neglect." Simultaneously, appellee sought leave to file an answer instanter. Appellant did not respond to either motion, and the trial court granted both requests on May 14, 2009.

**{¶6}** Appellee's answer presented several affirmative defenses. Among them, she asserted that the complaint was barred by the statute of limitations and that

appellant could not invoke the savings statute, R.C. 2305.19, to file after the statute of limitations had expired.

**{¶7}** On August 9, 2010, appellee moved for summary judgment, reasserting her challenges to the timeliness of the complaint. To demonstrate that appellant had used the savings statute once before, appellee attached the judgment entries dismissing the first two actions. Appellant did not respond, and, on October 18, 2010, the trial court granted summary judgment in favor of appellee, holding that the complaint was untimely and that appellant could not invoke the savings statute more than once.

**{¶8}** This appeal followed. Appellant now advances two assignments of error for our consideration:

> [I.] Whether Appellee waived its objection to the lower Court allowing a re-filing of the action where the Court previously involuntarily dismissed Appellant's action without prejudice for failure to obtain service over the Appellee.
>
> [II.] Whether Appellee's failure to file a Motion to Dismiss, failure to request a preliminary hearing on its affirmative defenses and filing of its Motion for Summary Judgment out of rule was "invited error."

**{¶9}** We review the trial court's grant of summary judgment de novo. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, ¶8. To obtain summary judgment, the movant must show that (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion when viewing evidence in favor of the nonmoving party and that conclusion is adverse to the nonmoving party. Civ.R. 56(C); *Hudson v. Petrosurance, Inc.*, 127 Ohio St.3d 54, 2010-Ohio-4505, ¶29.

**{¶10}** The movant bears the initial burden of informing the trial court of the basis for the motion and of identifying those portions of the record demonstrating the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. Once the moving party discharges its initial burden, summary judgment is appropriate only if the nonmoving party does not respond, by affidavit or as otherwise provided in Civ.R. 56, with specific facts showing that a genuine issue exists for trial. Civ.R. 56(E); *Dresher* at 293; *Vahila v. Hall*, 77 Ohio St.3d 421, 430, 1997-Ohio-259.

**{¶11}** Appellant's first assignment of error claims that appellee waived her challenge to the timeliness of the complaint. Appellant provides no legal or factual basis for this waiver claim—indeed, he does not mention waiver in the argument supporting his assignment of error. Instead, appellant seems to disagree with the trial court's ruling that the savings statute did not authorize the filing of the third complaint. As explained below, we find neither of these claims to be persuasive.

**{¶12}** Ohio's savings statute, R.C. 2305.19, affords a plaintiff a limited period of time to refile a dismissed claim that would otherwise be time-barred. The statute provides: "In any action that is commenced or attempted to be commenced, * * * if 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." R.C. 2305.19(A). Thus, even after the applicable statute of limitations has expired, the savings statute permits a plaintiff to refile within one year after the action has failed "otherwise than upon the merits."

**{¶13}** "It is axiomatic that the savings statute may be used only once to re-file a case." *Moore v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 10AP-732, 2011-Ohio-1607, ¶20, citing *Bailey v. Ohio State Dept. of Transp.*, 10th Dist. No. 07AP-849, 2008-Ohio-1513; see also *Thomas v. Freeman*, 79 Ohio St.3d 221, 227, 1997-Ohio-395. The statute was not designed to keep actions alive in perpetuity. *Dagart v. Ohio Dept. of Transp.*, 171 Ohio App.3d 439, 2006-Ohio-6179, ¶21, citing *Romine v. Ohio State Hwy. Patrol* (2000), 136 Ohio App.3d 650, 654. "To allow a plaintiff to use R.C. 2305.19 more than once would 'frustrate the purpose of the civil rules which are intended to prevent indefinite filings.' " *Bailey* at ¶13, quoting *Dagart* at ¶21.

**{¶14}** In this case, appellant filed the same action three times and attempted to use the savings statute twice. The first complaint was filed on May 2, 2005, the last day of the applicable two-year statute of limitations. See R.C. 2305.10. This action failed "otherwise than upon the merits" when the trial court dismissed the case without prejudice on July 17, 2006. See *Johnson v. H & M Auto. Serv.*, 10th Dist. No. 07AP-123, 2007-Ohio-5794, ¶7, quoting *Thomas* at fn. 2 ("Generally, a dismissal without prejudice constitutes 'an adjudication otherwise than on the merits' with no res judicata bar to refiling the suit."). Thus, when appellant refiled on July 13, 2007, within one year after the first dismissal, he necessarily invoked the savings statute. This action also failed "otherwise than upon the merits" when the trial court dismissed the case on June 16, 2008. Because appellant was not authorized to re-invoke the savings statute, his third complaint was time-barred. As such, the trial court properly granted appellee's motion for summary judgment.

**{¶15}** Contrary to appellant's claim, appellee did not waive her challenges to the timeliness of the complaint. Civ.R. 8(C) sets forth a list of affirmative defenses that must be set forth in a responsive pleading, including the statute of limitations defense. Appellee complied with this rule by asserting the statute of limitations defense in her answer immediately upon obtaining relief from default judgment. She was not required to reassert this defense by way of a motion to dismiss pursuant to Civ.R. 12(B)(6), as the complaint did not conclusively show that the action was untimely. See *Alternatives Unlimited-Special, Inc. v. Ohio Dept. of Edn.*, 10th Dist. No. 09AP-756, 2010-Ohio-1226, ¶16. On its face, the complaint indicated that the action was properly refiled within one year after the previous dismissal, denoting a first-time usage of the savings statute. Thus, to establish appellant's prior usage of the savings statute, appellee relied on evidence outside the face of the complaint, i.e., the entries of dismissal from the first and second actions. Appellee's motion for summary judgment was the appropriate vehicle to present such matters from outside the pleadings. See Civ.R. 12(B); *Alternatives Unlimited-Special, Inc*. at ¶17.

**{¶16}** In the final analysis, appellee met her initial burden under Civ.R. 56 by establishing that the complaint was time-barred and that appellant could not re-invoke the protections of the savings statute. Appellant did not offer any opposing evidence of the kind required by Civ.R. 56(C) to demonstrate a genuine issue of material fact. Because appellant failed to meet his reciprocal burden, the trial court properly granted summary judgment in appellee's favor.

**{¶17}** Therefore, appellant's first assignment of error is overruled.

**{¶18}** In his second assignment of error, appellant claims that the doctrine of "invited error" prohibited appellee from seeking summary judgment. We disagree. "Under this doctrine, a party is not entitled to take advantage of an error that he himself invited or induced the court to make." *State ex rel. Kline v. Carroll*, 96 Ohio St.3d 404, 2002-Ohio-4849, ¶27, citing *Lester v. Leuck* (1943), 142 Ohio St. 91, paragraph one of the syllabus. Here, appellee does not seek to reverse a judgment, nor does she seek reversal based upon an error for which she was "actively responsible." See *State v. Kollar* (1915), 93 Ohio St. 89, 91. Indeed, appellant has not identified any "error" that has been "invited" by appellee. As explained above, summary judgment was appropriate. Appellee did not invite the filing of an untimely complaint, and she did not induce appellant's failure to file to oppose the motion for summary judgment. Thus, appellant's reliance on the "invited error" doctrine is misplaced.

**{¶19}** Accordingly, appellant's second assignment of error is overruled.

**{¶20}** Having overruled appellant's first and second assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

BROWN and DORRIAN, JJ., concur.

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