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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001700-MR

JOHN WAYNE LAYCOCK, AND
DAVID LAYCOCK — APPELLANTS

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NO. 10-CI-01110

DENNIS KEAGLE — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, DIXON, AND STUMBO, JUDGES.

CAPERTON, JUDGE: The Appellants, John and David Laycock appeal from the trial court's grant of Appellee, Dennis Keagle's motion to dismiss their complaint due to the statute of limitations. Having reviewed the arguments presented by the parties, the applicable law, and the record, we conclude that the trial court did not err and accordingly, affirm.

Keagle worked as a security guard for a private company which provided him with a handgun for work. On June 25, 2009, Keagle returned home from work wearing his uniform and still carrying his issued firearm. Keagle had a longstanding dispute with John Laycock, his next-door neighbor. An altercation occurred between the parties outside of Keagle's residence; he raised his pistol, pointed it at the motor vehicle which David Laycock was driving and John Laycock was a passenger, and fired into the lower door panel of the car. Keagle claimed that he only intended to scare the Laycocks and that he fired multiple times after he saw movement inside the vehicle. The Laycocks sped away and were both struck by bullets and sustained serious physical injuries.

After the shooting Keagle left his home and drove into Cincinnati where he was ultimately stopped and arrested. He was charged with assault and ultimately entered a guilty plea in the Campbell Circuit Court.

On July 20, 2010, the Laycocks filed their complaint alleging that Keagle intentionally shot the Laycocks on June 25, 2009, and that they sustained injuries therefrom. Due to Keagle's incarceration, the court appointed a guardian ad litem ("GAL"). The GAL filed his report and stated that he was unaware of any defense which Keagle could assert. The Laycocks filed their motion for default. Keagle filed a handwritten *pro se* answer and did not assert any specific defense therein. A new GAL was appointed by the court. The Laycocks filed their motion for summary judgment. The second GAL filed an answer on behalf of Keagle, without leave of the court, which did not assert any affirmative defense of statute

of limitations. The second GAL also filed a response to the motion for summary judgment. The court granted the motion for summary judgment on May 13, 2011.

Keagle, via new retained counsel, filed a motion to set aside the summary judgment, a motion to dismiss as the complaint was barred by a one-year statute of limitations, and leave to file an amended answer. Counsel for Keagle argued that the Laycocks did not file the action within the applicable one year statute of limitations per KRS 413.140[1] and that Keagle had very little interaction

[1] (1) The following actions shall be commenced within one (1) year after the cause of action accrued:
(a) An action for an injury to the person of the plaintiff, or of her husband, his wife, child, ward, apprentice, or servant;
(b) An action for injuries to persons, cattle, or other livestock by railroads or other corporations, with the exception of hospitals licensed pursuant to KRS Chapter 216;
(c) An action for malicious prosecution, conspiracy, arrest, seduction, criminal conversation, or breach of promise of marriage;
(d) An action for libel or slander;
(e) An action against a physician, surgeon, dentist, or hospital licensed pursuant to KRS Chapter 216, for negligence or malpractice;
(f) A civil action, arising out of any act or omission in rendering, or failing to render, professional services for others, whether brought in tort or contract, against a real estate appraiser holding a certificate or license issued under KRS Chapter 324A;
(g) An action for the escape of a prisoner, arrested or imprisoned on civil process;
(h) An action for the recovery of usury paid for the loan or forbearance of money or other thing, against the loaner or forbearer or assignee of either;
(i) An action for the recovery of stolen property, by the owner thereof against any person having the same in his possession;
(j) An action for the recovery of damages or the value of stolen property, against the thief or any accessory; and
(k) An action arising out of a detention facility disciplinary proceeding, whether based upon state or federal law.
(2) In respect to the action referred to in paragraph (e) of subsection (1) of this section, the cause of action shall be deemed to accrue at the time the injury is first discovered or in the exercise of reasonable care should have been discovered; provided that such action shall be commenced within five (5) years from the date on which the alleged negligent act or omission is said to have occurred.
(3) In respect to the action referred to in paragraph (f) of subsection (1) of this section, the cause of action shall be deemed to accrue within one (1) year from the date of the occurrence or from the date when the cause of action was, or reasonably should have been, discovered by the party injured.
(4) In respect to the action referred to in paragraph (h) of subsection (1) of this section, the cause of action shall be deemed to accrue at the time of payment. This limitation shall apply to all

with the two previous GALs as a result of his incarceration. Counsel further argued that there were issues with the service of documents at the wrong address as further reasons for the communication problems. Counsel for the Laycocks, during oral argument before the trial court, admitted that he knowingly filed the action outside of the statute of limitations, but argued to the court that Keagle's repeated failure to raise the statute of limitations waived the defense.

The court granted Keagle's motion to vacate the summary judgment order in the interests of justice, for three reasons: (1) that the motion to alter, amend, or vacate was timely filed; (2) the difficulties in communicating between Keagle and the GALs; and (3) the admission of the Laycocks' counsel that he had knowingly filed the action outside of the one year limitation. The court further granted leave to Keagle to file an amended answer, which included the affirmative defense of the complaint being barred by the statute of limitations.

Thereafter, the Laycocks filed a motion to amend their complaint to include additional claims. The court permitted the Laycocks to amend their complaint to include intentional infliction of emotional distress but denied leave to amend the complaint to include assault due to the one-year statute of limitations. The court then ruled on Keagle's motion to dismiss and agreed that the one year

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payments made on all demands, whether evidenced by writing or existing only in parol.
(5) In respect to the action referred to in paragraph (i) of subsection (1) of this section, the cause of action shall be deemed to accrue at the time the property is found by its owner.
(6) In respect to the action referred to in paragraph (j) of subsection (1) of this section, the cause of action shall be deemed to accrue at the time of discovery of the liability.
(7) In respect to the action referred to in paragraph (k) of subsection (1) of this section, the cause of action shall be deemed to accrue on the date an appeal of the disciplinary proceeding is decided by the institutional warden.

statute of limitations barred the Laycocks' battery claims. The court reasoned that while Keagle had not properly pled the affirmative defense of statute of limitations, the complaint on its face shows that it was filed outside of the one-year limitation. It is from this order that the Laycocks now appeal.

On appeal, the Laycocks argue[2] that the court erred in holding that the affirmative defense of statute of limitations was not waived by Keagle. In support thereof, the Laycocks assert: (1) Keagle's pleading of the defense of statute of limitations does not relate back to the date of the original answer as to the Laycocks' claims asserted in the original complaint; and (2) the rule that the statute of limitations may properly be before the court even when not affirmatively pled in a responsive pleading is in conflict with the rules of civil procedure and prior case law, and should by modified by overruling the relevant portion of *Underwood v. Underwood*, 999 S.W.2d 716 (Ky. App. 1999).

In response, Keagle argues: (1) the court correctly ruled that the initial complaint was barred by the applicable statute of limitations; and (2) Keagle was entitled, in the interest of justice, to raise the defense of statute of limitations. We believe that these arguments may be condensed to a sole issue on appeal, namely, whether the trial court properly considered the statute of limitations when Keagle failed repeatedly to plead the defense until his retained counsel brought the issue to the court's attention.

[2] In their reply brief the Laycocks argue that Keagle did not provide citation to the record to support his counterstatement. After our review, we agree, and accordingly did not consider this portion of his brief. *See* CR 76.12(4) and *Commonwealth v. Crum*, 250 S.W.3d 347, 349 (Ky. App. 2008).

Based upon our review of the record, we infer from the court's order that it considered matters outside the pleadings in reaching its decision on the motion to dismiss, namely that of the admission of Appellants' counsel. A trial court is free to consider matters outside the pleadings; however, doing so converts the request for dismissal into a motion for summary judgment. Kentucky Rules of Civil Procedure (CR) 12.02; *McCray v. City of Lake Louisvilla*, 332 S.W.2d 837, 840 (Ky.1960).

The applicable standard of review on appeal of a summary judgment is, "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). Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." CR 56.03. The trial court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest v. Scansteel Service Center, Inc*., 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment is proper only "where the movant shows that the adverse party could not prevail under any circumstances." *Id.* However, "a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of

material fact requiring trial." *Hubble v. Johnson*, 841 S.W.2d 169, 171 (Ky. 1992), *citing Steelvest, supra. See also O'Bryan v. Cave*, 202 S.W.3d 585, 587 (Ky. 2006); *Hallahan v. The Courier Journal*, 138 S.W.3d 699, 705 (Ky. App. 2004).

Since summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo. Lewis v. B & R Corporation*, 56 S .W.3d 432, 436 (Ky. App. 2001). With this in mind we turn to the sole issue on appeal, whether the trial court properly considered the statute of limitation when Keagle failed repeatedly to plead the defense until his retained counsel brought the issue to the court's attention.

The Laycocks are correct that, "Ordinarily under CR 12.03 a statute of limitation must be pled and a failure so to do constitutes a waiver of that defense." *Commonwealth, Dept. of Highways v. Chinn*, 350 S.W.2d 622, 623 (Ky. 1961). While the failure of Keagle to repeatedly plead the statute of limitation until his retained counsel brought the issue to the court's attention may have resulted in the defense being waived, the trial court properly considered the issue:

> Agnes argues that the trial court erred in relying upon the statute of limitations because the executrix did not specifically plead the defense in her initial answer and motion to dismiss. The issue of the statute of limitations was not raised for three (3) weeks after filing of the answer until the filing of the second motion to dismiss. The statute of limitations is an affirmative defense. CR 8.03; *Thompson v. Ward,* Ky., 409 S.W.2d 807, 808–09 (1966). The defense must be raised in either the initial answer or in a motion to dismiss in lieu of an answer. CR 12.02. Since the executrix did not raise the issue timely, Agnes argues that the defense was waived.

> We agree that the executrix did not raise the issue of statute of limitations in a timely manner. The defense must be raised in an initial pleading, either by answer or by a motion to dismiss. Yet, while the executrix's failure to specifically plead the defense may constitute a waiver of the defense, we do not conclude that the trial court's consideration of the issue was error.
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> First, although failure to plead the statute of limitations constitutes a waiver of that defense, if the complaint on its face shows that the action is barred by time, the statute of limitations may be raised by a motion to dismiss. *Tomlinson v. Siehl*, Ky., 459 S.W.2d 166 (1970). The statute of limitations issue was clear from the face of the complaint.

Underwood v. Underwood, 999 S.W.2d 716, 720 (Ky. App. 1999).

Sub judice, the statute of limitations issue was clear from the face of the complaint. Thus, even if Keagle waived this defense, the court could properly consider it upon a motion to dismiss. We decline to overrule *Underwood* as urged by the Laycocks, as this matter has long been settled in Kentucky. *Carr v. Texas Eastern Transmission Corp*., 344 S.W.2d 619, 621 (Ky. 1961):

> An affirmative defense to a claim may be taken advantage of by a motion to dismiss if, as was the case here, the defense is shown on the face of the complaint. *See* Clay, CR 8.03, comment 3. This is particularly true with respect to the defense of limitations. *See Roush v. First National Bank & Trust Co*., 310 Ky. 408, 220 S.W.2d 984 [1949].

As such, the trial court did not err in considering the matter given that the defense was shown on the face of the complaint. Moreover, we agree with the trial court that Keagle was entitled to summary judgment as the applicable statute of limitations barred the Laycocks' claims for assault and battery.

Finding no error, we affirm.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Gary J. Sergent
Covington, Kentucky

Ronald J. Denicola
Cincinnati, Ohio

BRIEF FOR APPELLEE:

Stuart P. Brown
Covington, Kentucky