

Court of Claims of Ohio

The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

ALTERNATIVES UNLIMITED-SPECIAL, INC., et al.

Plaintiffs

v.

OHIO DEPARTMENT OF EDUCATION

Defendant

Case No. 2009-03410

Judge Joseph T. Clark

DECISION

{¶ 1} On March 31, 2009, defendant filed a motion to dismiss, or in the alternative, a motion for summary judgment. On April 16, 2009, plaintiffs, Alternatives Unlimited-Special, Inc. (individually AU-Special), and Alternatives Unlimited, Inc. (individually AU, Inc.) (collectively referred to as plaintiffs) filed a response.

{¶ 2} Inasmuch as a determination of the motion requires the court to consider evidentiary materials submitted by the parties, the court shall review the motion pursuant to the standard set forth in Civ.R. 56(C).

{¶ 3} Civ.R. 56(C) states, in part, as follows:

{¶ 4} “Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, 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. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from

the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor." See also *Gilbert v. Summit County*, 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317.

{¶ 5} Plaintiffs' claims arise from a contract that was executed by the parties in 1999. Plaintiffs have re-filed claims that were originally filed in Case No. 2002-04682.

On December 9, 2008, the Tenth District Court of Appeals issued a decision in Case No. 2002-04682 affirming the May 2, 2008 judgment of this court which granted partial summary judgment to defendant, Ohio Department of Education (ODE). In its decision, the court of appeals summarized the procedural history of the case as follows:

{¶ 6} "On May 7, 2002, [plaintiffs] filed suit against ODE in the Court of Claims, asserting two causes of action for breach of contract, which included claims for promissory estoppel and unjust enrichment. [Plaintiffs] generally sought declaratory judgment and monetary damages for ODE's failure to pay for all of the students actually enrolled and taught at CALA, as well as the alleged invalid, unilateral rescission of the contract. ODE countered that it owed no obligation to provide funding for students improperly enrolled in grades two, seven, and eight, and that certain individuals associated with [plaintiffs] were entitled to rescind the contract as the governing authority. ODE also asserted that [plaintiffs] lacked standing to bring suit on the contract.

{¶ 7} "The issues of liability and damages were bifurcated, and the case eventually proceeded to trial regarding liability only on July 12, 2004. On September 15, 2005, the trial court issued its judgment in favor of ODE, concluding that neither AU-Special nor AU, Inc. was a party to the contract as the governing authority for CALA, and, thus, they lacked standing to pursue their claims for breach of contract. [Plaintiffs] appealed, and in *Alternatives Unlimited-Special, Inc. v. Ohio Dep't of Educ.*, 168 Ohio App. 3d 592, 2006 Ohio 4779, 861 N.E.2d 163 ('Alternatives I'), this court reversed the judgment of the trial court, finding ODE was estopped from denying [plaintiffs'] standing based upon an unrelated case in another appellate jurisdiction, in which the state and

[plaintiffs] agreed that [plaintiffs] were the ‘governing authority’ for CALA, and, thus, were the proper party in the present case. This court remanded the matter to the Court of Claims.

{¶ 8} “Upon remand, prior to trial, ODE moved for partial summary judgment, arguing that the contract between the parties was never modified to include funding for grades two, seven, and eight. After an oral hearing on ODE’s motion for partial summary judgment, at which [plaintiffs] did not appear, the trial court granted ODE’s motion. On April 23, 2008, [plaintiffs] moved to amend their complaint to dismiss without prejudice all remaining claims not related to the funding for grades two, seven, and eight. On May 2, 2008, the trial court entered judgment for ODE.” *Alternatives Unlimited-Special, Inc. v. Ohio Dept. of Educ.*, Franklin App. No. 08AP-396, 2008-Ohio-6427, ¶ 4-6.

{¶ 9} Plaintiffs are seeking to litigate claims that were asserted in Case No. 2002-04682, but were “dismissed” when the court issued its May 2, 2008 entry both granting plaintiffs’ motion to amend the complaint and then rendering judgment in favor of defendant. Counts 1 through 3 of the complaint in this case are identical to the first three counts in the complaint filed in Case No. 2002-04682. Counts 4 and 5 are claims for attorney’s fees and prejudgment interest, respectively.

{¶ 10} Defendant asserts that the refiled claims are precluded by the doctrine of res judicata based upon the outcome in Case No. 2002-04682 and, in the alternative, that plaintiffs’ complaint was filed beyond the time for the running of the statute of limitations.

{¶ 11} “Civ.R. 8 designates res judicata as an affirmative defense and it is not listed in Civ.R. 12(B) as a defense that may be raised by motion. Thus, the defense of res judicata may not be raised by motion to dismiss under Civ.R. 12(B).” *Marok v. The Ohio State University*, Franklin App. No. 07AP-921, 2008-Ohio-3170, ¶ 13. Furthermore, affirmative defenses cannot be asserted for the first time in a motion for summary judgment. *Id.* at ¶ 11. Accordingly, defendant is not entitled to a judgment based upon the affirmative defense of res judicata.

{¶ 12} In the alternative, defendant argues that plaintiffs’ remaining claims are barred by the applicable statutes of limitations.

{¶ 13} R.C. 2743.16(A) states in pertinent part:

{¶ 14} “[C]ivil actions against the state permitted by sections 2743.01 to 2743.20 of the Revised Code shall be commenced no later than two years after the date of accrual of the cause of action or within any shorter period that is applicable to similar suits between private parties.”

{¶ 15} The wrongful rescission of the contract at issue is alleged to have occurred as of August 1, 2001. Applying R.C. 2743.16, the statutory period for plaintiffs to file their complaint against the state ended on August 1, 2003. However, plaintiffs contend that their claims are subject to the savings provisions of R.C. 2305.19.

{¶ 16} R.C. 2305.19 provides in relevant part:

{¶ 17} “In an action commenced, or attempted to be commenced, if in due time a judgment for the plaintiff is reversed, or if the plaintiff fails otherwise than upon the merits, and the time limited for the commencement of such action at the date of reversal or failure has expired, the plaintiff, or, if he dies and the cause of action survives, his representatives may commence a new action within one year after such date.”

{¶ 18} Plaintiffs allege that the court’s order granting leave to amend the complaint in Case No. 2002-04682 constituted a dismissal without prejudice which operates as a failure otherwise than upon the merits for the purposes of the savings statute. The court disagrees.

{¶ 19} Plaintiffs’ motion to amend their complaint pursuant to Civ.R. 15(A) was combined with a Civ.R. 41(A) motion to “voluntarily dismiss all remaining claims without prejudice.” The court granted the motion to amend noting that Civ.R. 15(A) is the proper vehicle for a party to create a final appealable order under the circumstances. The Supreme Court of Ohio has recently addressed this issue upon the certification of a conflict and determined that in a case where a plaintiff has asserted multiple claims against a single defendant and some of those claims have been adjudicated by the court in an entry that does not contain Civ.R. 54(B) language, the plaintiff cannot create a final order by simply dismissing the remaining claims pursuant to Civ.R. 41(A). *Pattison v. W.W. Grainger, Inc.*, 120 Ohio St.3d 142, 2008-Ohio-5276, ¶ 22; See also *Dohme v Eurand Am., Inc.*, 121 Ohio St.3d 277, 2009-Ohio-506.

{¶ 20} In *Pattison*, the court reasoned that “Civ.R. 41(A) allows for a dismissal of all claims against particular defendants. * * * [W]ere Civ.R. 41(A) to be used to dismiss fewer than all of the claims against a certain defendant, a plaintiff could create a final and appealable order as to one issue under Civ.R. 41(A) while still saving the dismissed claim to be refiled later. To allow a partial Civ.R. 41(A) dismissal is potentially prejudicial to defendants.” Id. at ¶ 20. Indeed, the *Pattison* court addressed the concern that allowing a plaintiff to dismiss, without prejudice, a part of a cause of action “would permit piecemeal litigation and piecemeal appeals, which are disfavored in the law.” Id. ¶ 8. According to the holding in *Pattison*, “[i]n order to appeal an adverse judgment on one or more claims of a multicount complaint, a plaintiff must dismiss *with* prejudice all other unresolved claims.” (Emphasis in original.) Id. at ¶ 24 (Lundberg Stratton, J., dissenting).

{¶ 21} Whenever the claim asserted in an amended complaint arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original complaint, the amendment supercedes the original complaint and relates back to the date of the original pleading. Civ.R. 15(C). It is undisputed that plaintiffs’ complaint in this case arose out of the same contract that was at issue in the original complaint. Inasmuch as the amended complaint in Case No. 2002-04682 did not include the claims that are asserted in this case, those claims did not fail otherwise than on the merits. In other words, the savings statute does not operate to preserve claims that were previously abandoned by amendment.

{¶ 22} For the foregoing reasons, the court finds that there is no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law. Defendant’s motion for summary judgment shall be granted.

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JUDGMENT ENTRY

A non-oral hearing was conducted in this case upon defendant's motion for summary judgment. For the reasons set forth in the decision filed concurrently herewith, defendant's motion for summary judgment is GRANTED and judgment is rendered in favor of defendant. Court costs are assessed against plaintiffs. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

JOSEPH T. CLARK
Judge

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AMR/cmd
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