[Cite as *Fields v. DeMassimo*, 2012-Ohio-2118.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

HERMAN FIELDS,	:	**O P I N I O N**
Plaintiff-Appellant,	:	
		CASE NO. 2011-G-3032
- vs -	:	
JAMES DEMASSIMO,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Case No. 11P000344.

Judgment: Affirmed.

James L. Hardiman, 75 Public Square, Suite 1111, Cleveland, OH 44113 (For Plaintiff-Appellant).

Craig G. Pelini and *Randall M. Traub,* Pelini, Campbell, Williams & Traub, L.L.C., Bretton Commons, #400, 8040 Cleveland Avenue, N.W., North Canton, OH 44720 (For Defendant-Appellee).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Herman Fields, appeals the summary judgment entered against him by the Geauga County Court of Common Pleas on his claim for "negligent assault" in favor of appellee, James DeMassimo. At issue is whether appellant re-filed his complaint in compliance with Ohio's savings statute, R.C. 2305.19. For the reasons that follow, we affirm.

{¶2} The statement of facts that follows is derived from the trial court's docket; the affidavit of Fields' counsel, James L. Hardiman, presented in opposition to summary judgment; and the undisputed facts.

{¶3} On June 2, 2007, an incident occurred between the parties on the premises of Wal-Mart Stores, Inc. in Bainbridge Township, Ohio, during which DeMassimo allegedly assaulted Fields.

{¶4} On July 18, 2008, Fields filed a complaint in the trial court asserting claims for assault against DeMassimo and negligence against Wal-Mart, alleging that Wal-Mart failed to provide adequate security. Fields later amended his claim against DeMassimo to allege negligent assault. After filing its answer and engaging in discovery, Wal-Mart filed a motion for summary judgment. On July 23, 2009, the court granted Wal-Mart's motion and entered summary judgment in its favor. The court made its judgment a final order pursuant to Civ.R. 54(B), but Fields did not appeal the judgment.

{¶5} Thereafter, DeMassimo proposed that the case be submitted to mediation and Fields agreed. Subsequently, on March 23, 2010, Fields voluntarily dismissed his complaint pursuant to Civ.R. 41(A)(1)(a). While Fields argues the action was dismissed by agreement of the parties, the dismissal was not "by stipulation" pursuant to Civ.R. 41(A)(1)(b). Nor did the notice of dismissal or any other writing indicate that the dismissal was pursuant to an agreement of the parties.

{¶6} The parties engaged a mediator, and the mediation was scheduled for October 22, 2010. However, on the day before the scheduled mediation, October 21, 2010, DeMassimo's counsel, Craig G. Pelini, sent a letter via e-mail to Mr. Hardiman and the mediator cancelling the mediation because Mr. Hardiman had not provided the

medical records that Mr. Pelini had been requesting, which, he said, were necessary to evaluate Fields' claim. Mr. Pelini stated that once the documents were produced, the parties could agree on another date to conduct the mediation.

{¶7} After the October 22, 2010 mediation was cancelled, Mr. Hardiman made numerous telephone calls to Mr. Pelini's office in efforts to re-schedule the mediation. However, according to Mr. Hardiman, Mr. Pelini did not respond to these calls, and the mediation was never re-scheduled.

{¶8} Although the due date for re-filing the complaint pursuant to Ohio's savings statute was March 23, 2011, Fields did not re-file his action until March 28, 2011, five days after the due date.

{¶9} In his affidavit in opposition to summary judgment, Mr. Hardiman stated that he did not timely re-file the action on or before March 23, 2011, because he was led to believe that re-filing the complaint would not be necessary due to "the agreement for private mediation and the indication that mediation would proceed as scheduled." Mr. Hardiman also stated that DeMassimo's actions in proposing mediation and later declining to participate in it "constituted a factual misrepresentation" on which Mr. Hardiman reasonably relied in not timely re-filing the action. However, in his notice of voluntary dismissal, filed after the parties agreed to mediation, Fields expressly reserved the right to re-file his action within one year of the date of his dismissal pursuant to the savings statute. He therefore acknowledged the savings statute applied to him and he was required to re-file by March 23, 2011, in the event mediation did not result in a settlement. Fields did not provide any reason in the trial court as to why he re-filed his action on March 28, 2011, rather than by the March 23, 2011 deadline.

{¶10} In his answer to Fields' re-filed complaint, DeMassimo denied its material allegations and asserted various affirmative defenses, including Fields' failure to timely re-file the action pursuant to the savings statute. Subsequently, DeMassimo filed a motion for summary judgment, arguing that Fields' complaint was barred because it was not re-filed in compliance with the savings statute. In opposition, Fields argued that DeMassimo's actions induced him to voluntarily dismiss this action, and DeMassimo should be equitably stopped from asserting as a defense Fields' failure to comply with the savings statute.

{¶11} On July 12, 2011, the trial court granted DeMassimo's motion for summary judgment, finding no evidence that defense counsel lulled Fields or his counsel into a false sense of security or that DeMassimo induced Fields to believe the savings statute would not apply. The court also found that Fields had ample opportunity to re-file the case within the one-year statutory period, but failed to do so.

{¶12} On July 22, 2011, Fields filed a motion for relief from the trial court's summary judgment. He attached various letters to his motion that were referenced in Mr. Hardiman's summary judgment affidavit, but which Mr. Hardiman had inadvertently failed to attach to it. Fields argued the letters showed the trial court erred in entering summary judgment and asked the court to "reconsider" its ruling. The court had noted in its award of summary judgment the absence of these exhibits as referenced in Mr. Hardiman's affidavit, but stated that "[e]ven if they were attached, from their descriptions given by Plaintiff's counsel they would not have changed this ruling." The exhibits were six letters by the parties' attorneys and the mediator regarding Mr. Pelini's proposal of mediation, the retention of the mediator, the scheduling of the mediation, Mr. Pelini's

multiple requests for Fields' medical records prior to mediation, Mr. Pelini's cancellation of the mediation due to Mr. Hardiman's failure to submit Fields' medical records, and Mr. Hardiman's itemization of specials. Before DeMassimo responded to Field's motion for relief from judgment and while that motion was pending, on August 11, 2011, Fields appealed the trial court's entry of summary judgment against him. Apparently due to this appeal, the trial court did not rule on the motion for relief from judgment. We remanded the case to the trial court for its ruling on Fields' motion and the trial court denied it.

{¶13} Fields asserts two assignments of error. For his first assigned error, he alleges:

{¶14} "The trial court committed error in granting defendant-appellee's motion for summary judgment based upon its mistaken belief that defendant-appellee should not be equitably estopped from using the one-year statute of limitation [sic] as a bar where defendant-appellee induced plaintiff-appellant into believing that the one-year period within which to refile his complaint did not apply."

{¶15} Fields argues that because the parties agreed to submit this case to mediation, the trial court erred in entering summary judgment in favor of DeMassimo due to Fields' failure to timely re-file the action. Fields argues the doctrine of equitable estoppel should have been applied to prevent DeMassimo from asserting Fields' violation of the savings statute as a defense. We do not agree.

{¶16} In order for summary judgment to be granted, the movant must prove that no genuine issue of material fact remains to be litigated; the movant is entitled to judgment as a matter of law, and it appears from the evidence that reasonable minds

can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385 (1996). Further, the Supreme Court of Ohio stated in *Dresher v. Burt*, 75 Ohio St.3d 280, 296 (1996) that the movant bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of fact on the nonmoving party's claim. If the movant satisfies its burden, then the nonmoving party has the burden to provide evidence demonstrating a genuine issue of material fact. If the nonmoving party does not satisfy this burden, then summary judgment is appropriate. Civ.R. 56(E). Appellate courts review a trial court's grant of summary judgment de novo. *Alden v. Kovar*, 11th Dist. Nos. 2007-T-0114 and 2007-T-0115, 2008-Ohio-4302, ¶34.

{¶17} The parties do not dispute that, pursuant to R.C. 2305.10, the period of limitations applicable to Fields' claim was two years and that, as of the date Fields voluntarily dismissed his action, the statute of limitations had run.

{¶18} The dismissal of actions is governed by Civ. R. 41. Civ. R. 41(A)(1) governs dismissals initiated by the plaintiff. Under Civ. R. 41(A)(1)(a), the plaintiff may unilaterally dismiss his action before the commencement of trial simply by filing a notice of dismissal. Further, Civ. R. 41(A)(1)(b) authorizes the dismissal of actions by stipulation of all parties. A dismissal under Civ. R. 41(A)(1), whether by notice or stipulation, is without prejudice "'[u]nless otherwise stated in the notice of dismissal or stipulation.'" *Chadwick v. Barba Lou, Inc.*, 69 Ohio St.2d 222, 225 (1982), quoting Civ.

R 41 (A)(1). Further, a dismissal "without prejudice" is one "otherwise than upon the merits." *Chadwick* at 226.

{¶19} R.C. 2305.19, Ohio's savings statute, provides that an action can be recommenced within one year if the plaintiff fails otherwise than upon the merits. That statute provides:

> **{¶20}** (A) In any action that is commenced * * *, if in due time * * * 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. (Emphasis added.)

{¶21} Pursuant to the foregoing rules and legislation, Fields had one year from March 23, 2010, the date on which he voluntarily dismissed the action, in which to re-file his action. He was therefore required to re-file his action on or before Wednesday, March 23, 2011. Because he did not re-file until five days later, on March 28, 2011, his re-filing was untimely.

{¶22} With respect to Fields' argument that DeMassimo should have been equitably estopped from asserting the savings statute as a defense, this court in *JRC Holdings, Inc. v. Samsel Servs. Co.*, 166 Ohio App.3d 328, 2006-Ohio-2148 (11th Dist.), held that the doctrine of equitable estoppel precludes a defendant from using a limitations statute as a defense to a claim when the defendant's conduct induced the delay in filing the action. *Id.* at ¶28. This court held that in order for equitable estoppel to apply, the plaintiff must prove four elements: (1) that the defendant made a factual

misrepresentation; (2) that the misrepresentation misled the plaintiff; (3) that the misrepresentation induced the plaintiff to reasonably and justifiably rely on it by delaying the filing of the action until after the expiration of the statutory period; and (4) that the reliance caused detriment to the plaintiff. *Id.* Ohio Appellate Districts have held that when applied to a limitations defense, a plaintiff must show that the defendant misrepresented the length of the limitations period or promised a better settlement if the plaintiff did not bring suit. *Id.* The Ohio Supreme Court has stated that for equitable estoppel to apply, the plaintiff must show the defendant committed "actual or constructive fraud." *State ex rel. Ryan v. State Teachers Retirement Sys.*, 71 Ohio St.3d 362, 368 (1994).

{¶23} In *Payton v. Rehberg*, 119 Ohio App.3d 183 (8th Dist.1997), a case involving Ohio's savings statute, the plaintiff's claim arose from injuries she sustained in an automobile accident with the defendant driver. The plaintiff later voluntarily dismissed her claim and reserved the right to re-file. After she re-filed the action, the trial court entered summary judgment in favor of the defendant on the ground that the claim was not timely re-filed under the savings statute. The plaintiff appealed, arguing that the action was not barred because defense counsel had agreed to negotiate a settlement of her claim once he received all of her medical records. She argued that the doctrine of equitable estoppel precluded the driver from using the savings statute as a defense. The Eighth District disagreed, holding that "even if defense counsel indicated that defendants would be willing to negotiate a resolution of plaintiff's claim once all her medical bills were received, the plaintiff, as a matter of law, would not be justified in reasonably relying on those representations in not refiling her complaint before * * * the

savings statute had expired." *Id.* at 190. The court held that in these circumstances, there was no evidence that the defendant's conduct caused the plaintiff to reasonably and justifiably fail to timely re-file her lawsuit. *Id.* The court further held that a plaintiff is "conclusively presumed to be aware of the requirements of the rules under which he [chooses] to proceed." *Id.* at 192.

{¶24} Further, in *Young v. Leslie*, 9th Dist. No. 08CA0015, 2009-Ohio-396, the Ninth District considered a case strikingly similar to the instant matter. While the case was pending, the insurer began settlement discussions with the plaintiffs. Following a dismissal without prejudice, the insurer made a settlement offer, which was never accepted, and the parties agreed to mediate the case. Before the case was re-filed, the parties chose the mediator and agreed to a mediation date that was *one month beyond the one year re-filing period of the savings statute.* Three days before the mediation, the defendant's counsel informed the plaintiffs' counsel that the offer was withdrawn because the plaintiffs' claim was time-barred in that the plaintiffs had not re-filed their claim within one year from the time their original action was dismissed. That same day the plaintiffs re-filed their claim. The defendant filed a motion for summary judgment. The plaintiffs argued the defendant's savings-statute defense was barred by equitable estoppel because, they said, the insurer made an offer to settle and engage in mediation and represented that the matter would be resolved at mediation. The trial court entered summary judgment for the defendant because the plaintiffs did not re-file their complaint within one year after it was dismissed. The Ninth District affirmed, holding that in order to demonstrate a genuine issue of material fact on the issue of equitable estoppel in the context of a limitations defense, the plaintiffs were required,

but failed, to produce evidence: (1) that the defendant or his insurer made "a factual misrepresentation as to the statute of limitations" or (2) that the parties entered an "agreement to waive or toll it." *Id.* at ¶8. The court stated:

> **{¶25}** [T]he Youngs were in a position to know that the statute of limitations would expire on September 14, 2007, and that they needed to refile their complaint in order to preserve their claim and continue settlement negotiations with Westfield. *Westfield's willingness to mediate the case while the Youngs had a viable claim did not equate to a waiver of the statute of limitations, nor did it represent an unconditional guarantee to continue to mediate once the Youngs' claim was no longer actionable.* (Emphasis added.) *Id.*

{¶26} Turning our attention to the facts of the instant case, Fields argues that the trial court erred in entering summary judgment in favor of DeMassimo on his savings-statute defense because, Fields claims, a genuine issue exists regarding the applicability of the equitable estoppel doctrine. We do not agree.

{¶27} First, Fields concedes on appeal that he had the duty to show either an affirmative misstatement by Fields that the statutory period to bring his action was larger than it actually was or a waiver based on a promise that the case would settle even if the claim was not re-filed. However, Fields does not identify any such misstatement of fact or promise allegedly made by DeMassimo. In his affidavit, Mr. Hardiman stated that because the parties agreed to mediate, he "was led to believe that refiling the case would not be necessary." However, while DeMassimo agreed to mediation, there is no evidence that he misrepresented the length of time allotted by the savings statute or

that he waived the savings-statute defense by agreeing to settle the case even if Fields did not timely re-file his complaint.

{¶28} Second, contrary to Fields' argument, DeMassimo's agreement to submit the case to mediation while Fields had a viable claim did not constitute a waiver of the savings statute or an obligation to continue to negotiate once Fields' claim was no longer actionable. *Young, supra*. Fields has failed to cite any pertinent, countervailing authority.

{¶29} Third, Fields' reservation of the right to re-file his action within one year pursuant to the savings statute in his notice of voluntary dismissal demonstrates he was aware that, despite the parties' prior agreement to mediate, he was required to re-file his action by March 23, 2011. If it was truly Fields' understanding that the savings statute did not apply to him due to the parties' agreement to mediate, there would have been no reason for him to recite his obligation to re-file within one year pursuant to that statute in his notice of dismissal. In any event, as the Eighth District in *Payton*, *supra*, held, Fields was "conclusively presumed to be aware of the requirements of the rules under which [he] chose to proceed." Moreover, the fact that Fields re-filed his action five days after the due date is additional evidence he was aware that the savings statute applied to him. Unfortunately, he re-filed his action five days late.

{¶30} Fourth, while Fields argues the complaint was dismissed by agreement of the parties, the documentary evidence demonstrates otherwise. As noted above, Fields voluntarily dismissed his action by notice, pursuant to Civ.R. 41(A)(1)(a), rather than by stipulation, pursuant to Civ.R. 41(A)(1)(b). Moreover, the notice of dismissal itself did not indicate it was by agreement of the parties, and Fields has presented no document

indicating that dismissal was the result of the parties' agreement. Further, Civ.R. 41(A)(1)(a) contemplates unilateral action on the part of the plaintiff. *Payton*, *supra*, at 191. In any event, even if the action was dismissed by stipulation or agreement of the parties, *unless the agreement expressly tolled the limitations period, the dismissal would not have entitled Fields to avoid his obligation to re-file the action within the one-year limit imposed by the savings statute. Boggs v. Baum*, 10th Dist. No. 10AP-864, 2011-Ohio-2489, ¶38-40. It is worth noting that, even though the parties agreed to mediation, there was no need for Fields to dismiss his action while the parties attempted to mediate. Mediation can proceed prior to or while litigation is pending. See R.C. Chapter 2710. There is no requirement that litigation be delayed, stayed, or dismissed while mediation proceeds. *Id.*

{¶31} Fifth, according to Fields, DeMassimo became uncooperative with his efforts between October 2010 and March 2011 to re-schedule the mediation. Fields argues it was apparent that DeMassimo had no intent of proceeding with mediation. Thus, by Fields' own admission, by late October 2010, he was aware that DeMassimo was no longer willing to proceed with mediation. Fields was therefore on notice that mediation was no longer a viable option and that the case would have to proceed to trial. As a result, any continued reliance by Fields on the parties' agreement to mediate in this five-month period would not have been reasonable, thus barring the application of the doctrine of equitable estoppel.

{¶32} In summary, the record is devoid of any evidence that DeMassimo made a misleading factual misrepresentation about the length of the limitations period that induced Fields to re-file his complaint beyond the one-year time limit imposed by the

savings statute. Moreover, there is no evidence that DeMassimo waived the statute of limitations defense by agreeing that if mediation failed to result in a settlement, he would settle even if Fields failed to timely re-file his complaint. We agree with the trial court's finding that, based on the undisputed evidence, DeMassimo did not lull Fields into a false sense of security; that DeMassimo did not induce Fields to believe that the savings statute would not apply to him; that Fields had ample opportunity to re-file the case within the one-year statutory period; and that Fields did not do so. We therefore hold the trial court did not err in awarding summary judgment against Fields and in favor of DeMassimo.

{¶33} Fields' first assignment of error is overruled.

{¶34} For his second and final assignment of error, Fields contends:

{¶35} "The trial court committed error in failing to grant plaintiff-appellant's timely filed motion for relief from judgment pursuant to civil rule [sic] 60(B)."

{¶36} We review an appeal from the award or denial of a Civ.R. 60(B) motion for relief from judgment under an abuse of discretion standard. *Doddridge v. Fitzpatrick*, 53 Ohio St.2d 9 (1978), syllabus. This court has stated that the term "abuse of discretion" is one of art, connoting judgment exercised by a court, which does not comport with reason or the record. *In re Edgell*, 11th Dist. No. 2009-L-065, 2010-Ohio-6435, ¶45

{¶37} Civ.R. 60(B) provides that, on motion, the court may relieve a party from a final judgment for, among other things, mistake, inadvertence, surprise or excusable neglect; or fraud of an adverse party.

{¶38} In order to prevail on a motion for relief from judgment under Civ.R. 60(B), the movant must demonstrate: "(1) the party has a meritorious defense or claim to

present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B) * * *; and (3) the motion is made within a reasonable time * * *." *GTE Automatic Elec. Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146 (1976), paragraph two of the syllabus.

{¶39} For the reasons that follow, Fields' motion for relief from judgment lacked merit. First, Fields attached various documents regarding mediation to his motion, which Mr. Hardiman had inadvertently failed to attach to his summary-judgment affidavit. The trial court stated in its award of summary judgment that, based on Mr. Hardiman's description of the documents, even if they had been attached to his affidavit, they would not have changed the court's ruling. Second, Fields merely repeated the same arguments he made in opposition to summary judgment without presenting any additional argument. Third, while Fields asserts on appeal fraud and excusable neglect as grounds for relief, *he did not assert any ground for relief under Civ.R. 60(B) in the trial court*. He therefore waived this argument on appeal. Fourth, Fields stated in his motion for relief from judgment that "it was the parties [sic] understanding that if mediation did not produce resolution, *the matter would be returned to the Court [sic], so that the Court could assume responsibility to finally resolve the matter*." (Emphasis added.) Fields thus conceded that if mediation did not result in a settlement, the case would have to be returned to the court for trial. As he acknowledged in his notice of voluntary dismissal, this would be done by his re-filing the complaint within one year from the date of the dismissal. By failing to timely re-file, Fields lost the right to continue to pursue his action. In view of the foregoing analysis,

we hold that the trial court did not abuse its discretion in denying Fields' motion for relief from judgment.

{¶40} Fields' second assignment of error is overruled.

{¶41} For the reasons stated in this opinion, the assignments of error lack merit. It is the judgment and order of this court that the judgment of the Geauga County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, P.J.,

MARY JANE TRAPP, J.,

concur.