

[Cite as *Columbus Green Bldg. Forum v. State*, 2012-Ohio-4244.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Columbus Green Building Forum,	:	
Plaintiff-Appellant,	:	
v.	:	No. 12AP-66 (Ct. of Cl. No. 2011-09705)
State of Ohio et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

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D E C I S I O N

Rendered on September 18, 2012

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*Capital University Legal Clinic, and Eric R. McLoughlin, for appellant.*

*Michael DeWine, Attorney General, Randall W. Knutti, and Emily M. Simmons, for appellees.*

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APPEAL from the Court of Claims of Ohio.

FRENCH, J.

{¶ 1} Plaintiff-appellant, Columbus Green Building Forum ("CGBF"), appeals the judgment of the Court of Claims of Ohio, which dismissed its complaint against defendants-appellees, the state of Ohio and the Ohio Department of Development ("Department") (collectively, "defendants"), for lack of subject-matter jurisdiction. For the following reasons, we reverse the court's judgment and remand this matter for further proceedings.

## I. BACKGROUND

{¶ 2} CGBF filed this action in the Court of Claims on July 22, 2011.<sup>1</sup> CGBF's claims primarily stem from the administration of grants CGBF received from the Department in 2007, 2008, and 2009, to conduct educational programs and technical assistance workshops, including its annual green product exposition. The funding for the grants originated from the United States Department of Energy. Under the grants, CGBF was required to pay the costs of funded projects and to submit requests for reimbursement to the Department. CGBF received \$40,000 in reimbursements under the 2007 grant and \$105,000 in reimbursements under the 2008 grant.

{¶ 3} On September 30, 2008, the Department conducted an audit of CGBF's administration of the 2007 and 2008 grants. On December 3, 2008, the Department notified CGBF of its determination that CGBF had been reimbursed for \$70,114.45 in unallowable costs, constituting payments for "professional consulting services performed by a member of [CGBF's] Board of [Directors]."<sup>2</sup> The disputed costs consisted of payments to CGBF board members Meera Parthasarathy and Lisa Frasure. CGBF's 2007 grant proposal, which is attached to and incorporated into the 2007 grant agreement, requested \$18,630 for personnel costs to be paid to Parthasarathy. CGBF's 2008 grant proposal, which is attached to and incorporated into the 2008 grant agreement, requested \$45,600 for personnel costs to be paid to Parthasarathy. Both proposals identified Parthasarathy and Frasure as CGBF board members and identified Parthasarathy as the coordinator of the events for which CGBF sought funding.

{¶ 4} In determining that the disputed payments to Parthasarathy and Frasure were unallowable, the auditor relied on Office of Management and Budget Circular A-122 – *Cost Principles for Non-Profit Organizations* ("OMB A-122"), which undisputedly applies to CGBF's grants. OMB A-122 defines as allowable "[c]osts of professional and consultant services rendered by persons who are members of a particular profession or

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<sup>1</sup> The Court of Claims sua sponte dismissed two additional defendants—subdivisions of the Department—as surplusage on July 26, 2011.

<sup>2</sup> The parties resolved another dispute over \$300 of additional costs allegedly charged outside the 2007 grant period.

possess a special skill, *and who are not officers or employees of the non-profit [grantee].*" (Emphasis added.) CGBF disputed the audit findings and unsuccessfully attempted to resolve the disputed payments with the Department.

{¶ 5} On or about November 20, 2008, the Department approved CGBF's grant proposal for 2009 and entered into a 2009 grant with CGBF, for the period November 1, 2008 to September 30, 2009. On March 18, 2009, however, the Department notified CGBF that, based on the audit findings, it would not approve requests for reimbursement under the 2009 grant until Parthasarathy resigned from CGBF's board and CGBF acknowledged its intent to repay the alleged overpayments. Parthasarathy resigned from the CGBF board in February 2009, but CGBF has never indicated an intent to repay the alleged overpayments. In July 2009, the Department's Chief Legal Counsel, Candace M. Jones, solicited approval for an allowance of the disputed costs from the United States Department of Energy. Jones stated that the amounts paid to Parthasarathy "compensated her for services specifically contemplated and allowed by the subgrant" and that, "[t]o deny CGBF an allowance for compensation elevates the form of Ms. Parthasarathy's working relationship with CGBF over the substance of the services she performed."

{¶ 6} On November 3, 2009, CGBF and the Department executed a first amendment to the 2009 grant, which indicated that the issues surrounding the 2008 audit had been resolved. The amendment reactivated the 2009 grant and extended the period of the grant to September 30, 2010. In September 2010, CGBF and the Department executed a second amendment, which further extended the period of the 2009 grant to October 31, 2010. CGBF began to administer the 2009 grant only after the Department reactivated the grant via the first amendment, and CGBF submitted its first request for reimbursement under the 2009 grant on January 10, 2010. The Department approved and paid CGBF's January 10, 2010 request for reimbursement in the amount of \$5,935.86. CGBF submitted four subsequent requests for reimbursement between April and October 2010, totaling \$51,385.51. Although the Department approved each of CGBF's requests for reimbursement under the 2009 grant, it did not make any payments to CGBF after January 10, 2010.

{¶ 7} On January 3, 2011, CGBF received a letter from the Department, referencing "open audit findings" and stating that the Department would retain \$49,312.31 owing to CGBF under the 2009 grant to offset the overpayments identified in the 2008 audit. A subsequent email dated February 23, 2011, indicated that the Department would offset \$51,385.81 in approved reimbursements as partial repayment of the overpayments.<sup>3</sup> The Department thereafter turned the matter over to the Attorney General of Ohio for collection and, despite its setoff, certified the amount owing as \$70,114.45, plus interest and fees.

{¶ 8} CGBF's complaint sets forth five causes of action. In its first cause of action, CGBF disputes the 2008 audit findings. CGBF requests a declaratory judgment that the payments to Parthasarathy and Frasure were allowable costs and an equitable order that the Department reverse the audit findings and cease further collection attempts. In its second cause of action, CGBF alternatively requests a declaratory judgment that the remaining amount owing on the overpayments is \$14,090.79, after deducting certain disallowed costs and the amount of the setoff taken by the Department. In its third cause of action, which requests damages, CGBF alleges that defendants' failure to timely pay approved requests for reimbursement under the 2009 grant constituted a breach of contract.

{¶ 9} CGBF's fourth and fifth causes of action stem from related grant-making activity, but do not specifically involve CGBF's grants from the Department. CGBF's fourth cause of action, for declaratory and injunctive relief, challenges the Department's review process and its award of a 2010 grant to a competing application instead of to CGBF. For its 2010 grant proposal, CGBF partnered with The Ohio State University ("OSU") Department of Food, Agriculture, and Biological Engineering to propose programs that would be administered by The Ohio State University Extension network ("OSU Extension") throughout the state. The Department ultimately awarded the 2010 grant to a partnership between Green Energy Ohio and OSU Extension. CGBF alleges a conflict of interest or bias because a member of the Department's grant review team had

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<sup>3</sup> CGBF alleges that the total reimbursement, which the Department retained as a setoff, should have read \$51,385.51.

previously been employed by Green Energy Ohio. CGBF also alleges that the Department violated its policies and procedures relating to the review of grant applications and the award of grant money. CGBF's final cause of action seeks a declaratory judgment and injunctive relief relating to the Department's alleged removal of CGBF from an email distribution list used to notify potential grantees of requests for proposals. CGBF prays for damages, as well as declaratory and injunctive relief, under its fourth and fifth assignments of error.

{¶ 10} Defendants filed a motion to dismiss CGBF's complaint, pursuant to Civ.R. 12(B)(6) and (7), for failure to state a claim upon which relief can be granted and for failure to join necessary parties. CGBF opposed defendants' motion and responded to their Civ.R. 12(B)(6) and (7) arguments.

{¶ 11} On January 9, 2012, the Court of Claims sua sponte dismissed CGBF's complaint for lack of subject-matter jurisdiction, pursuant to Civ.R. 12(B)(1), a basis not raised by defendants. The Court of Claims determined that CGBF's claims sought solely equitable relief and concluded that, as a result, it lacked subject-matter jurisdiction. The court stated that it has subject-matter jurisdiction over equitable actions for declaratory relief only when they are ancillary to a claim against the state for monetary damages. In particular, the court found that CGBF's breach of contract claim was a claim for equitable relief, not monetary damages, because it sought a declaration that the Department incorrectly interpreted federal grant regulations in its audit findings. The court also stated that any claim for damages stemming from work performed after the 2008 audit was time-barred, as it would have accrued, at the latest, on March 18, 2009.

## **II. ASSIGNMENTS OF ERROR**

{¶ 12} CGBF filed a timely notice of appeal and now asserts the following assignments of error:

[I.] The Court of Claims erred in holding that CGBF's complaint only asserts claims for declaratory and equitable relief, that it does not assert any claims for monetary damages, and in dismissing CGBF's complaint for lack of subject matter jurisdiction due to these holdings.

[II.] The Court of Claims erred in holding that CGBF's claim for monetary damages arising from work performed under the 2009 Grant accrued on March 18, 2009, and in holding that such claim is therefore barred by the two-year statute of limitations set forth in R.C. 2743.16(A).

[III.] The Court of Claims erred in holding that it has subject matter jurisdiction over claims for declaratory and equitable relief against the state only when such claims are ancillary to a claim for monetary damages, and in dismissing CGBF's complaint for lack of subject matter jurisdiction due to this holding.

### III. DISCUSSION

{¶ 13} In its first assignment of error, CGBF asserts that the Court of Claims erred by dismissing its complaint for lack of subject-matter jurisdiction. Defendants concede that the Court of Claims has subject-matter jurisdiction over this case because the complaint contains claims for monetary damages. Despite defendants' concession regarding jurisdiction, a trial court's subject-matter jurisdiction raises a question of law that warrants consideration here. *See Rowell v. Smith*, 10th Dist. No. 10AP-675, 2011-Ohio-2809, ¶ 17.

{¶ 14} The issue of subject-matter jurisdiction involves "a court's power to hear and decide a case on the merits and does not relate to the rights of the parties." *Vedder v. Warrensville Hts.*, 8th Dist. No. 81005, 2002-Ohio-5567, ¶ 14. In considering whether to dismiss a claim for lack of subject-matter jurisdiction, a trial court "must determine whether the claim raises any action cognizable in that court." *Milhoan v. E. Loc. School Dist. Bd. of Edn.*, 157 Ohio App.3d 716, 2004-Ohio-3243, ¶ 10 (4th Dist.). We review a dismissal for lack of subject-matter jurisdiction de novo. *Moore v. Franklin Cty. Children Servs.*, 10th Dist. No. 06AP-951, 2007-Ohio-4128, ¶ 15.

{¶ 15} The Court of Claims is a court of limited jurisdiction that has exclusive, original jurisdiction over claims brought against the state as a result of the state's waiver of immunity in R.C. 2743.02. "R.C. 2743.02(A)(1) makes clear that the Court of Claims has jurisdiction to render judgment only as to those complaints which, prior to the enactment of the Court of Claims Act, were precluded by state immunity. Thus, where

the state has previously consented to be sued, the Court of Claims lacks jurisdiction." *Stauffer v. Ohio Dept. of Transp.*, 63 Ohio App.3d 248, 251 (10th Dist.1989).

{¶ 16} The Court of Claims has exclusive, original jurisdiction over civil suits for money damages against the state. *Friedman v. Johnson*, 18 Ohio St.3d 85, 87 (1985), citing *Boggs v. State*, 8 Ohio St.3d 15, 17 (1983). On the other hand, it generally lacks jurisdiction over declaratory judgment actions because, prior to the state waiving immunity, parties were permitted to bring declaratory judgment actions against the state in the courts of common pleas. *Tiemann v. Univ. of Cincinnati*, 127 Ohio App.3d 312, 318 (10th Dist.1998), citing *Racing Guild of Ohio, Loc. 304 v. State Racing Comm.*, 28 Ohio St.3d 317 (1986). The Court of Claims does, however, have jurisdiction over actions for equitable relief, including declaratory judgment, in limited circumstances. Pursuant to R.C. 2743.03(A)(2), when a claimant in an action over which the Court of Claims has jurisdiction also alleges a claim against the state for declaratory, injunctive or other equitable relief arising out of the same circumstances, the Court of Claims has exclusive, original jurisdiction to determine the equitable claim along with the legal claim. *Interim Healthcare of Columbus, Inc. v. Ohio Dept. of Adm. Servs.*, 10th Dist. No. 07AP-747, 2008-Ohio-2286, ¶ 13, citing *Friedman* at 87. In *Upjohn Co. v. Ohio Dept. of Human Servs.*, 77 Ohio App.3d 827, 834 (10th Dist.1991), this court suggested that claims for declaratory and/or injunctive relief may be brought in the Court of Claims "only if (1) they arise out of the same circumstances as plaintiffs' claim for money damages, and (2) plaintiffs' claim for money damages is permitted by the state's waiver of immunity."

{¶ 17} In light of these standards, the question before the Court of Claims was whether CGBF's complaint contained a claim for money damages permitted by the state's waiver of immunity. CGBF primarily argues that count three of its complaint, alleging a breach of the 2009 grant, states a legal claim for monetary damages within the Court of Claims' jurisdiction. CGBF contends that, because the Court of Claims has jurisdiction over its breach of contract claim, the court also has jurisdiction to determine its claims for declaratory and injunctive relief. The Court of Claims, on the other hand, sua sponte determined that CGBF's claims sought purely equitable relief. The court

stated that, "[a]lthough [CGBF] has attached a monetary value to its claim [for breach of contract], it is not a claim for monetary damages." The court did not consider whether any other claim in CGBF's complaint sought monetary damages.

{¶ 18} The Court of Claims properly recognized that not every claim seeking monetary relief is a claim for money damages. See *Interim Healthcare* at ¶ 15. Even where a claimant seeks relief that will ultimately result in the payment of money by the state, "a cause of action will sound in equity if 'money damages' is not the essence of the claim." *Id.*, citing *Ohio Academy of Nursing Homes v. Ohio Dept. of Job & Family Servs.*, 114 Ohio St.3d 14, 2007-Ohio-2620, ¶ 15. For example, an equitable action for specific relief, "seeking reimbursement of the compensation allegedly denied, is not transformed into a claim for damages simply because it involves the payment of money." *Zelenak v. Indus. Comm.*, 148 Ohio App.3d 589, 2002-Ohio-3887, ¶ 18 (10th Dist.), citing *Ohio Edison Co. v. Ohio Dept. of Transp.*, 86 Ohio App.3d 189, 194 (10th Dist.1993). In *Zelenak*, this court held that the plaintiffs' claim for specific temporary total disability compensation, to which they were statutorily entitled, sought equitable relief and not monetary damages. More recently, the Supreme Court of Ohio has distinguished monetary damages from equitable remedies as follows: "Unlike a claim for money damages where a plaintiff recovers damages to compensate, or substitute, for a suffered loss, equitable remedies are not substitute remedies, but an attempt to give the plaintiff the very thing to which it was entitled." *Interim Healthcare* at ¶ 15, citing *Santos v. Ohio Bur. of Workers' Comp.*, 101 Ohio St.3d 74, 2004-Ohio-28, ¶ 14.

{¶ 19} In *Cristino v. Ohio Bur. of Workers' Comp.*, 118 Ohio St.3d 151, 2008-Ohio-2013, issued the day after *Interim Healthcare*, the Supreme Court of Ohio offered a more in-depth discussion of the distinction between restitution as a legal remedy and restitution as an equitable remedy. *Cristino* relinquished his statutory rights to periodic payments for permanent total disability ("PTD") compensation in exchange for a lump-sum payment of the present value of his PTD claim, pursuant to an agreement with the bureau of workers' compensation. *Cristino*, on behalf of a class of similarly situated plaintiffs, requested from the court of common pleas, among other forms of relief, " 'full restitution of the difference between the amounts represented by the Administrator to



be the "actual present value" of their PTD claims and the true "actual present value" \* \* \*." *Id.* at ¶ 3. Called upon to determine whether the plaintiffs' claims sought legal or equitable remedies, the Supreme Court "look[ed] to the basis for the \* \* \* claim and the nature of the underlying remedies sought." *Id.* at ¶ 7, citing *Santos* at ¶ 13. The court also considered United States Supreme Court precedent that distinguished between a claim for funds due under a contract and a claim for funds due pursuant to a statute. See *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002) (holding that a claim for money due under a contract is " "quintessentially an action at law" " and seeks " 'the classic form of *legal relief*' ") (citations omitted) (emphasis sic); *Bowen v. Massachusetts*, 487 U.S. 879 (1988).

{¶ 20} Cristino claimed entitlement to additional funds pursuant to his lump-sum agreement with the bureau of workers' compensation. Relying on its prior holding in *Ohio Hosp. Assn. v. Ohio Dept. of Human Servs.*, 62 Ohio St.3d 97 (1991), the Supreme Court of Ohio held that "a claim against the state for money due under a contract is not a claim of equitable restitution and must be brought in the Ohio Court of Claims." *Cristino* at ¶ 16. See also *Measles v. Indus. Comm.*, 128 Ohio St.3d 458, 2011-Ohio-1523, ¶ 9 ("If the essence of a claim is not of restitution for money owed under a contract, but instead restitution for the state's unjust enrichment by withholding funds to which a worker had a statutory right, then the ultimate relief sought is equitable restitution."). In *Cristino*, the Supreme Court distinguished its holding in *Santos* that a suit seeking the return of specific funds wrongfully collected or held by the state is an equitable action. The *Cristino* court found *Santos* inapplicable because, in *Santos*, the plaintiffs "sought the return of funds that had once been in their possession and so belonged to them 'in good conscience.'" *Cristino* at ¶ 15, quoting *Great-West* at 213.

{¶ 21} CGBF's third cause of action sets forth a legal claim for funds due under the 2009 grant entered into between CGBF and the Department. "Government grant instruments, although not formal contracts, give rise to enforceable obligations analogous to contracts." *Bowen* at 923. Based on *Cristino*, we conclude that CGBF's claim for money due under the 2009 grant is a legal claim within the Court of Claims' exclusive, original jurisdiction. The Court of Claims therefore erred by concluding that

it lacked subject-matter jurisdiction over this action based on the lack of a legal claim for monetary damages. Because the Court of Claims has jurisdiction over count three, it also has jurisdiction over CGBF's claims for declaratory and injunctive relief, which arise from the same circumstances. *See Modern Office Methods, Inc. v. Ohio State Univ.*, 10th Dist. No. 11AP-1012, 2012-Ohio-3587, ¶ 11. For these reasons, we sustain CGBF's first assignment of error.

{¶ 22} We now turn to CGBF's second assignment of error, in which it contends that the Court of Claims erred by holding that any claim for monetary damages arising from work performed under the 2009 grant was time-barred by the statute of limitations in R.C. 2743.16(A). The Court of Claims' narrow holding with respect to the statute of limitations is limited to CGBF's third cause of action. As an alternative to its conclusion that CGBF's third cause of action sought purely equitable relief, the court held that any contractual claim for compensation arising from work performed after the audit would have accrued by March 18, 2009, when the Department notified CGBF that it would not approve any requests for payment under the 2009 grant until Parthasarathy resigned from the CGBF board and CGBF acknowledged its intent to repay the Department. We disagree.

{¶ 23} Defendants raised the statute of limitations under Civ.R. 12(B)(6), which permits a motion to dismiss for failure to state a claim upon which relief can be granted. A motion to dismiss for failure to state a claim is procedural and tests whether the complaint is sufficient. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548 (1992). In considering a Civ.R. 12(B)(6) motion, the trial court may review only the complaint and may dismiss the case only if it appears beyond doubt that the plaintiff can prove no set of facts entitling the plaintiff to recover. *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242 (1975), syllabus. The court may also consider exhibits incorporated into a complaint, as part of the complaint itself, for purposes of a Civ.R. 12(B)(6) motion. Civ.R. 10(C); *Brisk v. Draf Industries, Inc.*, 10th Dist. No. 11AP-233, 2012-Ohio-1311, ¶ 10. In its review, the court must presume all factual allegations are true and draw all reasonable inferences in favor of the non-moving party. *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192 (1988). We review a

Civ.R. 12(B)(6) dismissal de novo. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, ¶ 5.

{¶ 24} A breach of contract claim against the state is subject to the two-year limitations period set forth in R.C. 2743.16(A), which states, in pertinent part, that "civil 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." *See Bell v. Ohio State Bd. of Trustees*, 10th Dist. No. 06AP-1174, 2007-Ohio-2790, ¶ 19. A defendant may not typically raise a statute of limitations defense in a Civ.R. 12(B)(6) motion to dismiss because it generally requires reference to materials outside the complaint. *See Savoy v. Univ. of Akron*, 10th Dist. No. 11AP-183, 2012-Ohio-1962, ¶ 6; *Shampine v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 11AP-123, 2011-Ohio-6057, ¶ 10. Civ.R. 12(B)(6) dismissal based upon a statute of limitations is proper only when the complaint conclusively shows that the action is time-barred. *Id.*

{¶ 25} For the Court of Claims to have validly dismissed count three as untimely, it must appear conclusively from the complaint that CGBF's claim accrued more than two years before CGBF filed its complaint. The determination of when a cause of action accrued is a question of law that we review de novo. *Williams v. Bur. of Workers' Comp.*, 10th Dist. No. 09AP-1076, 2010-Ohio-3210, ¶ 21.

{¶ 26} Defendants have argued in their motion to dismiss and in their appellate brief that count three, as well as counts one and two, of CGBF's complaint arose either in December 2008, when CGBF received the audit report, or in March 2009, when the Department requested repayment. In either case, defendants maintain that CGBF's complaint, filed in July 2011, was time-barred. Although they acknowledge that CGBF denominated its third cause of action a claim for breach of the 2009 grant, defendants contend that it is time-barred because it would require the court to overturn the 2008 audit findings. In fact, defendants argue that count three does not allege a claim for breach of the 2009 grant at all but, instead, relates to performance under the earlier grants.

{¶ 27} A cause of action does not ordinarily accrue until actual damage occurs; "when one's conduct becomes presently injurious, the statute of limitations begins to run." *Children's Hosp. v. Ohio Dept. of Pub. Welfare*, 69 Ohio St.2d 523, 526 (1982), citing *State ex rel. Teamsters Loc. Union 377 v. Youngstown*, 50 Ohio St.2d 200 (1977). See also *C.E. Greathouse & Son, Inc. v. Middletown*, 12th Dist. No. CA 85-05-047 (June 30, 1986) (a cause of action accrues and the statute of limitations begins to run when all the elements of the cause of action have occurred). With specific reference to contract claims, the Supreme Court of Ohio has held that "'[a] cause of action for breach of contract does not accrue until the complaining party suffers actual damages as a result of the alleged breach.'" *Kincaid v. Erie Ins. Co.*, 128 Ohio St.3d 322, 2010-Ohio-6036, ¶ 13, quoting *Midwest Specialities, Inc. v. Firestone Tire & Rubber Co.*, 42 Ohio App.3d 6 (9th Dist.1988). Although the complaining party may suffer actual damage at the time of the breach, that is not always the case. See *Bell* at ¶ 27 ("A cause of action for breach of contract accrues when the breach occurs *or* when the complaining party suffers actual damages."). (Emphasis added.)

{¶ 28} Defendants maintain that the crux of CGBF's claim is the Department's entitlement to set off overpayments identified in the 2008 audit. Setoff is an affirmative defense that must be proven by the party asserting it. *First Natl. Bank of Louisville v. Hurricane Elkhorn Coal Corp. II*, 763 F.2d 188, 190 (6th Cir.1985). See also *Am. Motorists Ins. Co. v. Olin Hunt Specialty Prods., Inc.*, 10th Dist. No. 00AP-1313 (Sept. 20, 2001), quoting *Akron Natl. Bank & Trust Co. v. Roundtree*, 60 Ohio App.2d 13, 17 (9th Dist.1978) ("The defense of setoff is in the nature of an 'independent affirmative action.'"). A complaint need not anticipate and attempt to negate potential defenses. *Savoy* at ¶ 8. Thus, whether a complaint states a claim upon which relief can be granted is not dependant upon whether potential defenses are available. *Id.* Rather, "[a]s long as there is a set of facts consistent with the complaint that would allow the plaintiff to recover, dismissal under Civ.R. 12(B)(6) is not proper." *Jones v. Goodyear Tire & Rubber Co.*, 9th Dist. No. 21724, 2004-Ohio-2821, ¶ 12.

{¶ 29} The essential elements of a breach of contract claim are a contract, performance by the plaintiff, breach by the defendant, and resultant damage to the

plaintiff. *Flaim v. Med. College of Ohio*, 10th Dist. No. 04AP-1131, 2005-Ohio-1515, ¶ 12. CGBF alleges that the 2009 grant, with its two amendments, constitutes a legally binding contract, and defendants do not dispute that allegation. The 2009 grant required CGBF to incur the costs of funded programs and to submit supported requests for reimbursement to the Department. CGBF alleges that, pursuant to the 2009 grant, it incurred costs and submitted requests for reimbursement, totaling \$51,385.51, which the Department approved. Defendants admit they owed CGBF reimbursements in that amount. CGBF alleges that defendants' refusal to pay its approved requests for reimbursement constitutes a breach of the 2009 grant, and that CGBF has been damaged as a result, in an amount believed to be \$51,385.51. Thus, count three of CGBF's complaint sufficiently alleges the essential elements of a claim for breach of the 2009 grant, and consideration of the setoff issue is beyond the scope of our review under Civ.R. 12(B)(6). Defendants will be able to raise the issue of setoff as a defense, but the existence of an issue regarding a right of setoff does not conclusively demonstrate that count three fails to state a claim upon which relief can be granted or that CGBF's claim is untimely.

{¶ 30} In *Children's Hospital*, which involved a factual scenario similar to this case, the Supreme Court addressed the issue of claim accrual. There, Children's Hospital alleged that the Ohio Department of Public Welfare ("Welfare") wrongfully withheld payments for services the hospital rendered to Medicaid patients. As a result of an audit, Welfare demanded that the hospital repay prior overpayments. After the hospital exhausted the administrative appeal process, Welfare withheld a portion of the overpayments from its next payment to the hospital. The hospital brought an action for wrongful withholding of payment, and it reached the Supreme Court of Ohio on the issue of the timeliness of the hospital's complaint.

{¶ 31} In *Children's Hospital*, Welfare conducted its audit in 1972, demanded payment of \$169,866 in overpayments in August 1976, adjusted its books to indicate that it would deduct part of the overpayments from its next payment to the hospital in September 1977, and actually withheld a portion of the overpayments in October 1979. The Supreme Court held that "[t]he alleged wrongful act of which [the hospital]

complains is the withholding of money from payments made to [the hospital] and not the [earlier] entry made in [Welfare's] books of account \* \* \*, which produced no immediate injury or damage to [the hospital]." *Id.* at 526. Accordingly, the Supreme Court of Ohio determined that the hospital's cause of action accrued when Welfare actually withheld part of the alleged overpayment.

{¶ 32} With respect to count three of CGBF's complaint, the date of the alleged breach and the date that CGBF suffered actual damages as a result of the breach are the same. CGBF alleges that defendants breached the 2009 grant by withholding funds due to CGBF on or about January 3, 2011, and CGBF was not actually injured until that time.

{¶ 33} Had CGBF alleged that defendants failed to reimburse it for work performed under the 2009 grant prior to March 18, 2009, we might agree that its claim would have accrued when the Department froze the 2009 grant. That is not, however, what CGBF has alleged. Indeed, CGBF specifically alleged that it operated throughout 2009 with no grant funds. CGBF alleges that it did not begin to administer the 2009 grant until after the Department amended and reactivated the grant in November 2009, when the parties agreed that the audit issue "has \* \* \* been resolved." CGBF is not seeking payment for work performed either prior to March 2009 or during the period when the 2009 grant was frozen.

{¶ 34} The trial court held that CGBF's claim accrued in March 2009, but, at that time, CGBF had performed no work under the 2009 grant and had submitted no request for reimbursement. Defendants' duty to pay CGBF under the 2009 grant did not arise until CGBF incurred allowed costs related to the funded projects and submitted a request for reimbursement. CGBF alleges that defendants breached the 2009 grant by failing to timely reimburse it for its approved requests, submitted in 2010. CGBF submitted its first unpaid request for reimbursement in April 2010. Accordingly, no contractual claim arising out of defendants' obligation to reimburse CGBF under the 2009 grant could have arisen before that time. CGBF filed its complaint in July 2011, well within two years after its cause of action for breach of the 2009 grant accrued. Accordingly, the Court of Claims erred in determining that CGBF's third cause of action,

for monetary damages for breach of the 2009 grant, was time-barred. For these reasons, we sustain CGBF's second assignment of error.

{¶ 35} CGBF's third assignment of error asserts that the Court of Claims erred in stating that it has subject-matter jurisdiction over claims for declaratory and equitable relief only when those claims are ancillary to a claim for monetary damages. CGBF urges this court to reconsider its opinion in *Upjohn Co.*, which supports the Court of Claims' statement. Having determined, under CGBF's first and second assignments of error, that CGBF's complaint includes a timely claim for monetary damages and that the Court of Claims possesses subject-matter jurisdiction over this action, we need not address CGBF's third assignment of error, which is moot.

{¶ 36} In their appellate brief, defendants also argue that counts four and five of CGBF's complaint fail as a matter of law for other reasons, regardless of whether they state legal or equitable claims. They claim that CGBF lacks standing to pursue count five because the state is immune from suits for the violation of public duties. With respect to count four, defendants contend that OSU, as a partner in both CGBF and Green Energy Ohio's 2010 grant applications, is a necessary party, both as a plaintiff and as a defendant. Because the state cannot sue itself, defendants argue that count four must fail. The Court of Claims did not address either of those arguments, and because those arguments are not directly responsive to CGBF's assignments of error, we decline to address them, in the first instance, on appeal.

#### **IV. CONCLUSION**

{¶ 37} In conclusion, we sustain CGBF's first and second assignments of error, thus rendering CGBF's third assignment of error moot. We, therefore, reverse the judgment of the Court of Claims of Ohio and remand this matter to that court for further proceedings consistent with this decision and the law.

*Judgment reversed;  
cause remanded.*

BROWN, P.J., and KLATT, J., concur.

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