

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

James A. Peng, et al.

Court of Appeals No. L-12-1279

Appellants

Trial Court No. CI0201008241

v.

David Fink, et al.

DECISION AND JUDGMENT

Appellees

Decided: July 12, 2013

* * * * *

Eric H. Zagrans, for appellants.

Robert H. Eddy and Colleen A. Mountcastle, for appellees
Theodore M. Rowen and Spengler Nathanson P.L.L.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, which dismissed appellants' legal malpractice complaint against appellees due to the failure to timely commence the action in accordance with the savings statute deadline. For the reasons set forth below, this court affirms the decision of the trial court.

{¶ 2} On December 17, 2007, James Peng, Anna Peng, Photo USA Corporation, North American Investment Corporation, and Photo USA Electronic Graphic, Inc. (“appellants”), filed a legal malpractice suit against appellees. The alleged legal malpractice was in connection to past legal representation provided by attorneys Theodore Rowen, David Fink, and their respective law firms, Spengler Nathanson and Fink & Johnson (“appellees”).

{¶ 3} Due to the continued pendency of the federal litigation against appellants by one of their Toledo area competitors alleging unfair business practices, from which the legal malpractice claims by appellants against appellees arose, it was determined that the legal malpractice suit would be more appropriately pursued at a later time. On December 11, 2009, the legal malpractice suit was dismissed without prejudice in accordance with Civ.R. 41(A)(2). The dismissal enabled appellants to refile their case pursuant to Ohio’s “savings statute,” R.C. 2305.19(A). Pursuant to the savings statute and Civ.R. 3(A), appellants had one year from the date of refiling to timely “commence” the action against appellees. Accordingly, they needed to complete valid service on the parties within one year of the date of refiling. On December 10, 2010, almost exactly one year later, appellants timely refiled the legal malpractice action. Thus, service needed to be complete in the refiled action on or before December 10, 2011. It was completed on December 14, 2011.

{¶ 4} On February 8, 2012, appellees filed a motion to dismiss appellants’ case for failure to “commence” the action within the requisite statutory period in accordance with

R.C. 2305.19(A) and Civ.R. 3(A). On August 31, 2012, the trial court granted appellees' motion to dismiss. On September 28, 2012, appellants filed this appeal.

{¶ 5} On appeal, appellants set forth this sole assignment of error:

The trial court committed reversible error as a matter of law by dismissing the refiled action with prejudice and by deviating from the Ohio Supreme Court's clear pronouncement that the one-year time period under Civil Rule 3(A) for obtaining service on defendants in order to commence a civil action is satisfied by submitting service instructions to the clerk of the court within one year of filing the complaint.

{¶ 6} The following undisputed facts are relevant to the issues raised on appeal.

Appellants, who are husband and wife, jointly own California and Chinese based companies that produce customized coffee mugs that are used in advertising. These mugs are known as "sublimation mugs." In 2005, a Toledo area business competitor of appellants filed suit against appellants in federal court alleging that appellants engaged in various unlawful business practices.

{¶ 7} Throughout the course of litigation between these coffee mug competitors, appellants were unsatisfied with their legal counsel. The record reflects that they changed legal counsel three times. Accordingly, the appellees in the subject legal malpractice action consist of the prior lawyers and law firms who formerly represented appellants. In 2007, appellants first filed a legal malpractice suit against appellees regarding legal services provided in the federal business litigation.

{¶ 8} On December 11, 2009, given the ongoing pendency of the related federal case, appellants' legal malpractice action was dismissed without prejudice pursuant to Civ.R. 41(A)(2). On December 10, 2010, appellants refiled their action in accordance with Ohio's saving statute, R.C. 2305.19(A). However, in order to successfully refile pursuant to the savings statute, appellants were also required to complete service upon appellees by December 10, 2011. The record clearly reflects that service of process was not obtained until December 14, 2011, four days after the deadline passed. Thus, the trial court dismissed appellants' complaint with prejudice. This appeal ensued.

{¶ 9} In the sole assignment of error, appellants assert that the trial court erred in granting the disputed motion to dismiss. After careful examination of the record, we do not concur. In support, appellants rely on the Ohio Supreme Court's decisions in *Goolsby v. Anderson Concrete Corp.*, 61 Ohio St.3d 549, 575 N.E.2d 801 (1991) and *Sisk & Assoc., Inc. v. Commt. to Elect Timothy Grendell*, 123 Ohio St.3d 447, 2009-Ohio-5591, 917 N.E.2d 271.

{¶ 10} R.C. 2305.19(A), the savings statute which controls the propriety of the refiled action, establishes in relevant part:

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 plaintiff's
failure otherwise than upon the merits or within the period of the original

applicable statute of limitations, whichever occurs later. This division applies to any claim asserted in any pleading by a defendant.

{¶ 11} The record of evidence clearly shows that the refiling was not commenced in accordance with the requisite deadline. Pursuant to R.C. 2305.19(A) and Civ.R. 3(A), appellants were required to complete service within one year of the December 10, 2010 date of refiling. Civ.R. 3(A) states, “[a] civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing upon a named defendant.” Appellants were required both to refile the complaint by December 10, 2010, and to also complete service by December 10, 2011. Service was not achieved until December 14, 2011. As such, appellants failed to timely refile the case.

{¶ 12} Appellants maintain that *Goolsby* and *Sisk* support the propriety of their refiling. We find that *Goolsby* is distinguishable from the instant case such that it supports the disputed dismissal.

{¶ 13} In *Goolsby*, the appellant did not instruct the clerk of the court to effect service on her complaint until two days before the applicable statute of limitations expired. Ultimately, service was obtained four days late. *Goolsby* at ¶ 2. In contrast to the instant case, the appellant’s request in *Goolsby* was submitted within the original statute of limitations. The appellant eventually dismissed the action and later refiled it. The appellee filed a motion to dismiss the refiled action because service was not completed on the original action within the statutorily required period. The trial court

granted the motion. The appeals court affirmed this holding. *Id.* at ¶ 4 of the syllabus. The matter was then appealed to the Supreme Court of Ohio.

{¶ 14} On appeal to the Ohio Supreme Court, the court held that the appellant's instruction to the clerk of the court acted as the equivalent of a dismissal and refiling of her original complaint. *Id.* at ¶ 3. Notably, the court's reasoning centered on the fact that the appellant's original complaint and attempt at service occurred within the statute of limitations for the complaint. The court reasoned that if the appellant had dismissed and refiled her case on the day she gave the instruction to the clerk, she would have had a year from the refile date to complete service under Civ.R. 3(A). *Id.* Under this scenario, the court simply acted as though the appellant had dismissed and refiled the case. This allowed the service which was originally untimely to be considered properly commenced.

{¶ 15} However, in the instant case, appellants' request to the clerk involved a refiled complaint rather than an original complaint. In addition, appellants in the instant case were acting outside of the original statute of limitations, as evidenced by their use of the savings statute. Thus, an exception granted for an action that was within its original statute of limitations period does not apply to this scenario.

{¶ 16} Likewise, in *Sisk*, the refiling of the complaint was performed within the original statute of limitations and not pursuant to R.C. 2305.19. *Sisk* at ¶ 2.

{¶ 17} Our decision in *Hill v. Yeager*, 6th Dist. No. WD-04-010, 2004-Ohio-5663, also provides guidance in the present case. In *Hill*, the appellee failed to perfect service upon the appellant until 14 months after filing her original complaint. Therefore, the

service was completed outside of the applicable statute of limitations. This court recognized that under the service requirements of Civ.R. 3(A), appellee's action was not timely commenced. *Id.* at ¶ 10. *Hill* appropriately identifies that perfecting service outside of the applicable statute of limitations is fatal to an action.

{¶ 18} Having carefully considered the record of evidence, as applied to the governing statutes and precedent, we find that appellants were required to actually complete service on or before December 10, 2011. Merely submitting instructions to the clerk of the court does not constitute commencement of an action for purposes of the savings statute deadlines. As such, the trial court properly dismissed appellants' complaint. Wherefore, we find appellants' assignment of error not well-taken.

{¶ 19} The judgment of the Lucas County Court of Common Pleas is hereby affirmed. Appellants are ordered to pay the costs of this appeal pursuant to App.R.24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, J.

JUDGE

James D. Jensen, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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