

STATE OF OHIO
COUNTY OF CUYAHOGA

) IN THE COURT OF COMMON PLEAS
) SS.
) Civil Case No. 542522

WILLIAM MADUNICKY,

Plaintiff,

Vs.

SIMON S. ZARIFE., et al,

Defendants.

)
)
) **JOURNAL ENTRY AND**
) **OPINION**

Kathleen Ann Sutula, J:

IT IS SO ORDERED:

Defendants move this Court to grant summary judgment in its favor as to the totality of Plaintiff William Madunicky’s (hereinafter “Plaintiff”) claims.

In his Complaint, Plaintiff alleges that Defendants breached their duty to Plaintiff by failing to correct and make accessible the exclusive access to the rented portions of Plaintiff’s premises resulting in Plaintiff’s fall and injuries therefrom.

I. Procedural History

As Defendants premise their motion for summary judgment based on statute of limitation grounds in relation to O.R.C. §2305.19 (the savings statute) and Civil Rule 41(A)(1)(a) it is necessary for the Court to delve into the procedural background of this matter.

The action was initially filed on January 3, 2003, by attorney Michael Cassidy.¹ On September 8, 2003, the date the Court had ordered Plaintiff to comply with outstanding discovery requests, Plaintiff's counsel filed a "Motion to Dismiss Without Prejudice." The "motion" reads "Plaintiff, William Madenucky [sic], by and through counsel...hereby dismisses the within action without prejudice under Civil Rule 41(A)(1)(a)."

On September 16, 2003, the Court noted that on "... 9/8/03, Pltf. dismissed the action, without prejudice, pursuan [sic] to Civ.R. 41(A)(1)(a)," and the docket reflected the disposition of the motion as being "unknown."² Plaintiff, with new counsel, re-filed the suit on September 10, 2004. Defendants now assert that Plaintiff has re-filed the case outside the timeframe specified under the savings statute.

II. Summary Judgment Standard

When ruling on motions for summary judgment, Rule 56 (C) of the Ohio Rules of Civil Procedure guides the Court. As the Ohio Supreme Court has outlined, Rule 56(C) permits the Court to grant summary judgment when (1) there are no genuine issues of material fact; (2) reasonable minds can come to only one conclusion, and the conclusion adversely affects the non-moving party; and (3) the moving party is entitled to judgment as a matter of law. *Zivich v. Mentor Soccer Club* (1998), 82 Ohio St.3d 367, 369-370.

¹ Case number CV-03-490283.

² The Common Pleas Court utilizes a computer docketing system which gives the trial court several options ranging from "granted", "denied", "granted in part", "granted in part and denied in part", to "unknown" in order to dispose of a motion. Furthermore, the way the system has been established, despite the fact the Court is more than cognizant that a notice of dismissal filed pursuant to Civil Rule 41 is self-effectuating, the docketing system requires the Court to recognize in some active manner the filing of that notice in order to remove the dismissed case from the Court's docket.

Since summary judgment is such a drastic measure, cutting off a party's right to present its case at trial, courts should grant summary judgment motions sparingly. *Dupler v. Mansfield Journal* (1980), 64 Ohio St.2d 116, 120, 413 N.E.2d 1187. By the same token, however, courts can, and should, grant summary judgment motions when the case has been fully developed by discovery and the record demonstrates that, construing all the facts and inferences in the non-movant's favor, the non-moving party would not be entitled to judgment as a matter of law. *Dupler*, 64 Ohio St.2d at 120.

In order for the Court to grant summary judgment, the moving party has the burden of demonstrating through the evidence detailed in Civ.R. 56(C) that the opposing party cannot establish any elements of its claims.³ *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264. If the movant fulfills its burden, the burden will then shift to the non-moving party to produce evidence to establish the elements of its claims. *Mootispaw v. Eckstein* (1996), 76 Ohio St.3d 383, 385. If, however, the non-movant fails to satisfy its burden, a court's granting of summary judgment is not only proper- it is mandated. *Celotex Corp. v. Catrett* (1986), 477 U.S. 317.

III. The September 8, 2003 Filing

This issue boils down to Plaintiff's filing of September 8, 2003 and when the case was dismissed. Civil Rule 41(A)(1)(a), which Plaintiff referenced in said filing, provides that a plaintiff may file a notice of dismissal at any time before the commencement of trial, and it is well-settled that such dismissals are self-executing. *Parker v. Cleveland Pub. Library* (Cuyahoga 2004), 2004-Ohio-4492, at ¶16. A plaintiff's unfettered right to dismiss its case is then assisted by Ohio's General

³ The evidence to be used includes the pleadings, depositions, interrogatory answers, admissions, affidavits, transcripts of evidence, and written fact stipulations. Civ.R. 56(C).

Assembly which continues to permit a plaintiff to re-file its previously dismissed case within one-year of the dismissal unless the original statute of limitations has not yet run. *See* O.R.C. §2305.19; *Parker*, 2004-Ohio-4492.

Given this procedural chessboard, Defendants posit that Plaintiff voluntarily dismissed the first action on September 8, 2003, meaning that the case had to be re-filed within one year of that date. Plaintiff, however, contends that the filing of September 8, 2003, was a motion to dismiss which requires court action pursuant to Civil Rule 41(A)(2), and thus the savings statute commenced on September 16, 2003.

In construing a court filing, this Court, as Judge Michael J. Corrigan has stated in two recent cases, must construe the document to ascertain its true meaning rather than relying solely on a caption. *See e.g., Rhoades v. Cuyahoga Metro. Hous. Auth.* (Cuyahoga 2005), 2005-Ohio-505; *Leski v. Ricotta* (Cuyahoga 2004), 2004-Ohio-2860; *see also Geauga Cty. Bd. of Health v. Pauer* (Gauga, 2003), 2003-Ohio-6740. In reviewing the plain text of the document, nowhere in the self-styled “motion” filed on September 8, 2003, did Plaintiff move the Court to dismiss the case.⁴ *See Andrews v. Sajar Plastics, Inc.* (Gauga 1994), 98 Ohio App.3d 61. Rather, the document before the Court, although captioned as a motion, reads as if it was a typical notice of dismissal, and the Court summarily treated it as such.

Moreover, exercising an abundance of caution, realizing that because of the error in how the document was styled that there could be some future confusion as to when

⁴ Of course, if the Court of Appeals holds that the “motion” should have been treated as a motion, which is quite the conundrum since a plaintiff has the unqualified right to dismiss its claims at any time prior to a trial’s commencement, but said motions would require a trial court’s intervention thereby ceding the power to dismiss without prejudice to the trial court, this Court could have little problem in finding such motions merit-less, thus forcing a plaintiff to trial rather than dismissing their case, which many plaintiffs are wont to do with their first filing.

the savings statute would commence, the Court explicitly wrote in its September 16, 2003, journal entry that the case had been dismissed pursuant to Civil Rule 41(A)(1)(a). The Court's journal entry, therefore, which clearly treated the "motion" as a notice, was a nullity that was not needed in order to dispose of the case pursuant to Civil Rule 41(A)(1)(a). Although not directly on point, the Eighth District's opinion in *Parker* is quite apposite of the issues currently before this Court.

In *Parker*, the plaintiff voluntarily dismissed his case on April 25, 2002. The trial court acknowledged that dismissal in a journal entry dated May 6, 2002. Plaintiff then re-filed the case on May 5, 2002. In affirming the trial court's motion to dismiss on the basis that the case was re-filed untimely, the appellate court stated that it was the filing of the notice of dismissal, and not some subsequent journal entry, which this court has explained the necessity for in footnote 2, that began the running of the savings statute. *Parker*, 2004-Ohio-4492, at ¶16. The situation presented in *Parker*, therefore, is virtually indistinguishable from that before this Court, with the exception being the misnomer of the September 8, 2003, notice of dismissal.

IV. Conclusion

It is, therefore, ORDERED, ADJUDGED, and DECREED:

After construing the facts in the light most favorable to the non-moving party, there are no genuine issues of material facts. The "motion" filed on September 8, 2003, was, in reality, a notice of dismissal and dismissed the case upon its filing. The failure to re-file the suit within one year of that date takes the re-filed matter outside the realm of the savings statute.

While this holding may seem harsh and could lead to a new slew of problems for those involved, this Court is not in the position to either make new law or remedy prior failings at the expense of the law. Reasonable minds, therefore, can reach only one conclusion in this matter. Defendants' Motion for Summary Judgment is well taken. The Court grants Defendants' Motion for Summary Judgment for good cause shown. Judgment is entered in Defendants' favor and against Plaintiff.

Costs to Plaintiff.

FINAL.

DATE: February ____, 2005

KATHLEEN ANN SUTULA, JUDGE

CERTIFICATE OF SERVICE

A copy of the foregoing Journal Entry and Opinion has been sent via fax and regular U.S. mail on this _____ day of February, 2005, to the following:

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