

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

THE WHITE FAMILY COMPANIES, INC:

Plaintiff-Appellant : C.A. CASE NO. 23305

vs. : T.C. CASE NO. 07CV2759

INVESCO, LTD., et al. :

Defendants-Appellees :

. . . . .

O P I N I O N

Rendered on the 15<sup>th</sup> day of January, 2010.

. . . . .

Paul H. Shaneyfelt, Atty. Reg. No.0065629, 210 W. Main Street,  
Troy, OH 45373  
Attorney for Plaintiff-Appellant

Steven K. Dankof, Sr., Atty. Reg. No. 0010428, 1500 Kettering Tower,  
Dayton, OH 45423  
Attorney for Defendants-Appellees

. . . . .

GRADY, J.:

{¶1} This is an appeal from a judgment of the common pleas court in an action for declaratory judgment.

{¶2} Plaintiff, The White Family companies, Inc. ("WFC"), made a series of loans to Defendant, Invesco, Ltd. ("Invesco") in 1998 and 1999. On October 20, 1999, Invesco tendered repayment to WFC in the amount of \$3,260,000 in a check drawn on the trust account maintained by Dayton Title Agency ("Dayton Title") at

National City Bank. WFC presented the check to National City Bank, and received an Official Check in return, which National City Bank then honored by paying \$3,260,000 to WFC.

{¶3} It was subsequently determined that the Dayton Title trust account contained insufficient funds to cover Invesco's check, due to fraud. Dayton Title filed for bankruptcy protection.

In a series of proceedings, the bankruptcy court found that the payment by Dayton Title to WFC constituted a fraudulent transfer, and it ordered WFC to repay Dayton Title \$3,260,000, plus accrued interest. Dayton Title appealed that judgment to the Federal District court, where it remains pending.

{¶4} On April 3, 2007, WFC filed the action for declaratory relief underlying this appeal against Invesco and Michael Karaman in the common pleas court. WFC asked the court to declare that, to the extent WFC will be required to repay any amounts it received in checks drawn on Dayton Title's account in the bankruptcy proceeding, Invesco is liable to WFC in the same amount. WFC also asked the court to declare that Karaman is likewise liable to WFC as a guarantor of Invesco's obligations.

{¶5} Defendants Invesco and Karaman filed an answer denying WFC's allegations and a counterclaim pleading a statute of limitations defense. On February 4, 2009, the common pleas court found that WFC's claims against Invesco and Karaman based on loans WFC made to Invesco in 1998 and 1999 are governed by the six-year

U.C.C. statute of limitations, R.C. 1303.16(A), which would bar any action by Invesco on those claims. The court granted Invesco and Karaman a judgment on the declaratory relief WFC sought as well as judgment on their counterclaim. WFC filed a notice of appeal.

FIRST ASSIGNMENT OF ERROR

{¶ 6} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FINDING THAT THE SIX-YEAR STATUTE OF LIMITATIONS SET FORTH IN R.C. 1303.16(A) WAS A BAR TO APPELLANT'S DECLARATORY JUDGMENT CLAIMS AND BY GRANTING JUDGMENT TO APPELLEES ON THEIR COUNTERCLAIM."

SECOND ASSIGNMENT OF ERROR

{¶ 7} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FINDING THAT APPELLANT'S ONLY CURRENT OR FUTURE CLAIM FOR RELIEF AGAINST APPELLEES WAS AN ACTION TO ENFORCE AN OBLIGATION UNDER A NOTE SUBJECT TO THE SIX-YEAR LIMITATION PERIOD IN R.C. 1303.16(A)."

THIRD ASSIGNMENT OF ERROR

{¶ 8} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FINDING THAT THE LIMITATIONS PERIOD IN R.C. 1303.16(A) BEGAN TO RUN IN 1999 AND HAS SINCE EXPIRED."

FOURTH ASSIGNMENT OF ERROR

{¶ 9} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FINDING THAT THE LIMITATION PERIOD IN R.C. 1303.16(A) WAS NOT EQUITABLY TOLLED BY VIRTUE OF THE PAYMENTS MADE BY KARAMAN TO APPELLANT AND KARAMAN'S ACKNOWLEDGMENT OF HIS CONTINUED OBLIGATION TO

APPELLANT.”

{¶ 10} WFC argues that the trial court found that its claims against Invesco and Karaman are governed by R.C. 1303.16(A) because the court mistakenly believed the parties had so stipulated. WFC contends that its claims may be pled on multiple theories, including against Invesco for monies had and received and against Karaman as a guarantor. Such claims are not subject to the six-year statute governing actions on an instrument, R.C. 1303.16(A). They are instead governed by R.C. 1303.16(G)(1) and (2), which imposes a three year statute of limitations period “after the cause of action accrues.” An action as to those causes would accrue upon WFC’s disgorgement of funds, if WFC is ordered to do so by the Bankruptcy Court.

{¶ 11} The errors that WFC assigns relate to the merits of the trial court’s determination that WFC’s declaratory judgment is time-barred. Following oral argument, and based on questions the court had asked, Invesco requested leave to file a supplemental brief on the issue of ripeness or justiciability of WFC’s claims.

We granted leave, and the parties have since filed supplemental briefs on the issue.

{¶ 12} The jurisdiction of the court of common pleas and its divisions is determined by statute. Section 4(B), Article IV Ohio Constitution. R.C. 2721.02(A) authorizes that court “to declare rights, status, and other legal relations whether or not further

relief is or could be claimed." However, a prerequisite to any such determination is that an actual controversy exists. *Karches v. City of Cincinnati* (1988), 38 Ohio St.3d 12. A court may, and we believe should, refuse to render a declaratory judgment or decree when no uncertainty or controversy would be terminated thereby. *Walker v. Walker* (1936), 132 Ohio St. 137.

{¶ 13} Invesco contends that both the parties and the trial court agreed that WFC's claim presented an actual controversy. However, that is an issue of law and not subject to stipulation.

{¶ 14} At this time, it is uncertain whether the Federal District Court will affirm its Bankruptcy Court's order requiring WFC to repay Dayton Title. That uncertainty could not be terminated by the declarations WFC asked the common pleas court to make concerning the liability of Invesco and Karaman to WFC in the event the Federal District Court affirms the Bankruptcy Court's order. Indeed, the declarations WFC requests are wholly contingent on a finding by the Federal District Court sustaining the order of the Bankruptcy Court. Until that occurs, in due time, no actual controversy exists which the requested declarations could determine.

{¶ 15} Because no actual controversy exists that the trial court could resolve or aid in resolving, the court abused its discretion in granting declaratory relief for Invesco and Karaman. The assignments of error are sustained. The judgment from which the

appeal is taken will be reversed and vacated.

BROGAN, J. And FAIN, J., concur.

Copies mailed to:

Paul H. Shaneyfelt, Esq.  
Steven K. Dankof, Sr., Esq.  
Hon. Connie S. Price