IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

EVANS LANDSCAPING, INC.,	:	APPEAL NO. C-150617 TRIAL NO. A-1400841
Plaintiff,	:	
vs.	:	*JUDGMENT ENTRY.*
MID ATLANTIC SALT, LLC.,	:	
Defendant/Third-Party Plaintiff-Appellant,	:	
vs.	:	
AUGUST ROBBEN SONS, INC.,	:	
Third-Party Defendant-Appellee.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Defendant/third-party plaintiff-appellant Mid Atlantic Salt, LLC., ("Mid Atlantic") challenges the trial court's entry of summary judgment in favor of third-party defendant-appellee August Robben Sons, Inc., ("August Robben").

In early 2011, Mid Atlantic contracted with August Robben for various services including the "outside storage" of road salt at August Robben's facility located near a creek which drains into the Ohio River. Mid Atlantic planned to use or resell the salt before winter, but two mild winters had left a significant amount of the salt unused. The salt pile

was not covered by a tarp to prevent erosion by the elements. In mid-2012, the Ohio Environmental Protection Agency ("OEPA") notified August Robben and Mid Atlantic that Mid Atlantic's salt was leeching off the storage site. It ordered the pile to be covered by a tarp. Mid Atlantic covered the pile at its own expense.

By January 2014, the pile had been reduced to 3,700 tons, and Mid Atlantic was unable to fulfill its contract to deliver 4,500 tons of salt to plaintiff Evans Landscaping, Inc. Evans Landscaping sued for damages. In January 2015, Mid Atlantic filed a third-party complaint against August Robben raising claims of conversion and breach of a bailment contract. In July 2015, Mid Atlantic amended its complaint to add a claim of tortious breach of bailment. August Robben answered the amended complaint and raised a counterclaim for unpaid salt-storage fees. After a lengthy period of discovery, August Robben moved for summary judgment on every claim. The trial court granted its motion.

In its second assignment of error,[1] Mid Atlantic argues that the trial court erred in granting summary judgment in favor of August Robben on its breach-of-a-bailment-contract claim. The gravamen of Mid Atlantic's argument is that August Robben breached the parties' bailment contract when it failed to discharge its duty to cover Mid Atlantic's salt with a tarp.

We review de novo the granting of summary judgment. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) the evidence, when viewed in favor of the nonmoving party, permits only one reasonable conclusion and that conclusion is adverse to the nonmoving party. *See* Civ.R. 56(C). The moving party bears the initial burden of

[1] On April 19, 2016, this court dismissed Evans Landscaping from this appeal. Mid Atlantic's first assignment of error addressed alleged errors affecting only Evan Landscaping. Therefore, we will not address that assignment of error. *See* App.R. 12(A)(1).

informing the court of the basis for the motion and demonstrating the absence of any genuine issues of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). When, as here, the moving party discharges that burden, the nonmoving party then has a reciprocal burden and must set forth specific facts showing that some issue of material fact remains to be litigated. *Id.*

To prevail on its breach-of-contract claim, Mid Atlantic must prove a contractual obligation that was breached by August Robben. *See Sullivan v. Anderson Twp.*, 1st Dist. Hamilton No. C-070253, 2009-Ohio-6646, ¶ 17; *see also Am. Sales v. Boffo*, 71 Ohio App.3d 168, 175, 593 N.E.2d 316 (2d Dist.1991).

Here, construing the evidence in favor of the nonmoving party, Mid Atlantic, permits only one reasonable conclusion adverse to Mid Atlantic. The deposition testimony of Mid Atlantic's owner Stephen Stein reveals that, at contract formation, neither party contemplated covering the salt pile. Mid Atlantic had assumed, wrongly, that it would use the entirety of the pile in the winter of 2011-2012.

Because Mid Atlantic failed to demonstrate the existence of a genuine issue of material fact as to whether August Robben was contractually obligated to cover the salt pile—an essential element of its breach-of-a-bailment-contract claim—summary judgment was properly entered on that claim. *See Sullivan* at ¶ 17; *see also Brunsman v. W. Hills Country Club*, 151 Ohio App.3d 718, 2003-Ohio-891, 785 N.E.2d 794, ¶ 16 (1st Dist.); *Dresher*, 75 Ohio St.3d at 293, 662 N.E.2d 264. The second assignment of error is overruled.

In its third assignment of error, Mid Atlantic argues that the trial court erred in entering summary judgment in favor of August Robben on Mid Atlantic's claim for tortious breach of bailment because it had been filed outside the two-year statute of

limitations provided in R.C. 2305.10. August Robben timely raised this affirmative defense in its amended answer, refiled with consent of Mid Atlantic.

R.C. 2305.10(A) provides that an action for injury to "personal property shall be brought within two years after the cause thereof arose." *See N & D, Inc. v. Harrod*, 73 Ohio App.3d 299, 303, 596 N.E.2d 1136 (3d Dist.1991); *see also Underwriters at Lloyd's under Policy No. LHO 10497 v. Peerless Storage Co.*, 404 F.Supp. 492, 496 (S.D.Ohio 1975) (holding the two-year period of R.C. 2305.10 applicable to an action seeking to recover for injury to personal property under a bailment contract). The affirmative defense of the untimely filing of a complaint outside the relevant statute of limitations may be resolved by summary judgment. *E.g., Reith v. McGill Smith Punshon, Inc.*, 163 Ohio App.3d 709, 2005-Ohio-4852, 840 N.E.2d 226 (1st Dist.).

Here, construing the evidence in favor of Mid Atlantic permits only one reasonable conclusion: that Mid Atlantic had learned of its claim against August Robben no later than July 2012 when it received notice from OEPA that salt from its pile was flowing into the adjoining creek. Since Mid Atlantic did not file its tortious-bailment claim until July 1, 2015,—three years later—its claim was untimely filed and the trial court did not err in granting summary judgment in favor of August Robben. *See* R.C. 2305.10(A); *see also Dresher*, 75 Ohio St.3d at 293, 662 N.E.2d 264. The third assignment of error is overruled.

Mid Atlantic's fourth assignment of error, in which it contends that the trial court erred in entering summary judgment on August Robben's counterclaim for unpaid storage charges incurred in January 2014, is without merit. When, as here, a party seeking affirmative relief on its own counterclaim discharges its burden with respect to every essential element of its counterclaim, the nonmoving party then has a reciprocal burden to establish the existence of triable, genuine issues of material fact. *See* Civ.R. 56(A); *see also*

Capital Fin. Credit, LLC v. Mays, 191 Ohio App.3d 56, 2010-Ohio-4423, 944 N.E.2d 1184, ¶ 4 (1st Dist.).

Yet Mid Atlantic has not pointed to any facts in the record to challenge August Robben's claim. The undisputed evidence reveals that Mid Atlantic agreed to pay the monthly storage fees, which included those for January 2014. The fourth assignment of error is overruled.

Therefore, we affirm the trial court's judgment.

Further, a certified copy of this judgment entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

CUNNINGHAM, P.J., MOCK and **STAUTBERG, JJ.**

To the clerk:

Enter upon the journal of the court on September 30, 2016
per order of the court _____.
Presiding Judge