

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

JOSEPH McCLASH,

Appellant,

v.

RANDY P. URSCHER AND SUSAN A. URSCHER,

Appellees.

No. 2D21-2147

November 30, 2022

Appeal from the Circuit Court for Manatee County; Charles Sniffen,
Judge.

Joseph McClash, pro se.

Brandon S. Vesely of The Florida Appellate Firm, P.A., St.
Petersburg, for Appellees.

KELLY, Judge.

Joseph McClash appeals from the final order dismissing his
complaint for declaratory and injunctive relief with prejudice.

Because the trial court dismissed Mr. McClash's complaint without

first allowing him to amend, we reverse and remand for further proceedings.

On January 15, 2021, Mr. McClash filed an action for declaratory and injunctive relief against Nick and Cindi Bollettieri¹ to determine his right under a deed to use the easement on the western edge of the Bollettieri's property and to enjoin the Bollettieris from obstructing the path that gave him access to Sola Palma Bay. Mr. McClash alleged that the Bollettieris continually blocked the easement by erecting a fence and later replacing the fence with landscaping and an invisible fence for an aggressive dog. He contended that when the Bollettieris disregarded his requests to remove the obstructions, on May 25, 2015, he and other adjacent landowners sent the Bollettieris a "Notice of Violation of Easement and Road Access" demanding that they remedy the violations of their rights to ingress and egress. This Notice was attached to Mr. McClash's complaint.

¹ During the pendency of this appeal, the Bollettieris sold their property to Randy and Susan Urschel, who have been substituted as appellees in this case.

The Bollettieris moved to dismiss the complaint on the basis that the action was time barred, among other grounds. They alleged that the "Notice of Violation" dated May 25, 2015, showed that the cause of action accrued in the time leading up to that date, thereby triggering the statute of limitations. *See* § 95.11(2)(b), Fla. Stat. (2021) (providing a five-year statute of limitations for "[a] legal or equitable action on a contract, obligation, or liability founded on a written instrument"). Thereafter, Mr. McClash moved to amend his complaint by supplementing it with additional exhibits showing that the Bollettieris constructed a new fence on the easement sometime in 2017. Mr. McClash argued that the exhibits showed there were additional violations of his right to use the easement after May 25, 2015, calling into doubt the date on which the statute of limitations expired. *See Aquatic Plant Mgmt., Inc. v. Paramount Eng'g, Inc.*, 977 So. 2d 600, 604 (Fla. 4th DCA 2007) (holding that the factual allegations in the complaint were insufficient to determine whether the action was barred by the statute of limitations); *see also Hearndon v. Graham*, 767 So. 2d 1179, 1184-85 (Fla. 2000) ("A statute of limitations 'runs from the time the cause of action accrues' which, in turn, is generally determined by

the date 'when the last element constituting the cause of action occurs.' " (quoting § 95.031(1), Fla. Stat. (1987))).

Without addressing the motion to amend, the trial court ruled that the facts within the four corners of the complaint and the attached Notice of May 25, 2015, showed that the cause of action accrued when the Bollettieris prevented use of the easement on or before May 25, 2015. *See Conrad v. Young*, 10 So. 3d 1154, 1158 (Fla. 4th DCA 2009) (noting that the cause of action for enforcement of an easement did not accrue until the servient owners refused requests to remove encroachments). Based on its determination that the five-year limitations period began running on May 25, 2015, and expired before the complaint was filed on January 15, 2021, the court granted the Bollettieris' motion and dismissed the complaint with prejudice, concluding that the statute of limitations issue could not be remedied by amendment. Mr. McClash appeals, contending that the trial court erred in failing to allow him to amend his complaint at least one time before a responsive pleading was filed. We agree.

Under Florida Rule of Civil Procedure 1.190(a), "[a] party may amend a pleading once as a matter of course at any time before a

responsive pleading is served." "[A] motion to dismiss is not a 'responsive pleading' because it is not a 'pleading' under the rules." *Boca Burger, Inc. v. Forum*, 912 So. 2d 561, 567 (Fla. 2005) (citing Fla. R. Civ. P. 1.100(a)). Because the Bollettieris had not served their answer and had only filed a motion to dismiss, the trial court abused its discretion in denying Mr. McClash the right to amend his complaint. *See id.* ("[T]he filing of a motion to dismiss does not terminate a plaintiff's absolute right to amend the complaint 'once as a matter of course.' "). Accordingly, we reverse.

Reversed and remanded for further proceedings.

CASANEUVA and STARGEL, JJ., Concur.

Opinion subject to revision prior to official publication.