[Cite as *Perk v. Tomorrows Home Solutions*, 2019-Ohio-103.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 107012

JAMES PERK

PLAINTIFF-APPELLANT

vs.

TOMORROWS HOME SOLUTIONS, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-17-880874

BEFORE: Boyle, P.J., Celebrezze, J., and Yarbrough, J.*

RELEASED AND JOURNALIZED: January 10, 2019

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MARY J. BOYLE, P.J.:

{¶1} Plaintiff-appellant, James Perk, appeals the trial court's judgment granting summary judgment to defendants-appellees, Tomorrows Home Solutions and Ohio Basement Systems (which we will refer to as "THS"[1]). Perk raises one assignment of error for our review:

> The trial court's decision to grant the appellee's motion for summary judgment constitutes reversible error.

{¶2} Finding no merit to Perk's assigned error, we affirm.

I. Procedural History and Factual Background

{¶3} In October 2013, Perk entered into a contract with "Tomorrows Home Solutions dba Ohio Basement Systems" to repair the foundation of his home for $9,450. A dispute arose

[1]Perk raises arguments relating to who the party defendant actually is. We will address his arguments later in the opinion but will refer to the defendant as THS throughout the opinion for ease of discussion except where necessary to address Perk's arguments regarding the defendant's identity.

regarding the work.

A. The First Lawsuit

{¶4} In May 2014, Perk brought a complaint against "Tomorrows Home Solutions L.L.C. dba Ohio Basement Systems" for fraud and breach of extended warranty. Perk alleged that Tomorrows Home Solutions L.L.C. d.b.a. Ohio Basement Systems performed the work "in a shoddy, poor, and unworkmanlike manner," and used "inferior" materials, which caused him "to incur significant additional costs in order to correct the defects and problems he experienced."

{¶5} THS answered Perk's original complaint and filed a counterclaim against Perk for $6,450 due under the contract. THS eventually moved for summary judgment on its counterclaim. Perk never opposed THS's summary judgment motion. Instead, Perk voluntarily dismissed his claims against THS. The trial court subsequently granted THS's summary judgment motion on its counterclaim against Perk. Perk appealed. *See Perk v. Tomorrows Home Solutions*, 8th Dist. Cuyahoga No. 104270, 2016-Ohio-7784. This court affirmed the trial court's decision entering judgment for THS in the amount of $6,450. *Id.* at ¶ 11.

B. The Second Lawsuit

{¶6} In May 2017, Perk refiled his complaint raising the exact same fraud and extended warranty claims, but this time against "Tomorrows Home Solutions" and "Ohio Basement Systems." Perk's refiled complaint was identical to his original complaint besides changing the name of the defendant.

{¶7} THS answered the complaint, denying the allegations and asserting, inter alia, that Perk's claims were barred by "res judicata based on the holdings and findings in [Cuyahoga C.P.] No. CV-14-825765" and this court's decision in *Perk*.

{¶8} In September 2017, THS moved for summary judgment based on res judicata. THS argued that "the prior judgment on the compulsory counterclaims necessarily implicates Ohio's doctrine of res judicata and bars all parties and their privies from pursuing any cause of action arising from the same underlying transaction or occurrence." THS attached a number of documents to its summary judgment motion, including Perk's original complaint and this court's decision in *Perk*.

{¶9} Perk opposed THS's summary judgment motion, arguing that his "pending claims" were not barred by res judicata because in his original complaint, he only sued one defendant, "Tomorrows Home Solutions dba Ohio Basement Systems," not two defendants as he did in his refiled complaint. Perk further argued that res judicata did not apply because the "trial court's decision in the first action only involved the original defendant's counterclaim," and thus, there "was no final judgment on the merits concerning the plaintiff's base claim."

{¶10} The trial court granted summary judgment to defendants. It is from this judgment that Perk now appeals.

II. Standard of Review

{¶11} We review a trial court's decision on summary judgment under a de novo standard of review. *Baiko v. Mays*, 140 Ohio App.3d 1, 10, 746 N.E.2d 618 (8th Dist.2000). Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate. *N.E. Ohio Apt. Assn. v. Cuyahoga Cty. Bd. of Commrs.*, 121 Ohio App.3d 188, 192, 699 N.E.2d 534 (8th Dist.1997).

{¶12} Civ.R. 56(C) provides that before summary judgment may be granted, a court must determine that (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that

reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmoving party. *State ex rel. Duganitz v. Ohio Adult Parole Auth*., 77 Ohio St.3d 190, 191, 672 N.E.2d 654 (1996).

{¶13} The moving party carries an initial burden of setting forth specific facts which demonstrate his or her entitlement to summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996). If the movant fails to meet this burden, summary judgment is not appropriate, but if the movant does meet this burden, summary judgment will be appropriate only if the nonmovant fails to establish the existence of a genuine issue of material fact. *Id*. at 293.

III. Res Judicata

{¶14} Under the doctrine of res judicata, "a valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the same transaction or occurrence that was the subject matter of a previous action." *Grava v. Parkman Twp*., 73 Ohio St.3d 379, 382, 653 N.E.2d 226 (1995). The Ohio Supreme Court has identified four elements necessary to bar a claim under the doctrine of res judicata: (1) there is a final, valid decision on the merits by a court of competent jurisdiction; (2) the second action involves the same parties or their privies as the first; (3) the second action raises claims that were or could have been litigated in the first action; and (4) the second action arises out of the transaction or occurrence that was the subject matter of the previous action. *Portage Cty. Bd. of Commrs. v. Akron*, 109 Ohio St.3d 106, 2006-Ohio-954, 846 N.E.2d 478, ¶ 84.

{¶15} Perk raises two arguments against res judicata. He maintains that (1) the second action did not involve the same parties, and (2) there was not a valid judgment on the merits of his claims in the first action because he voluntarily dismissed his claims without prejudice under

Civ.R. 41(A) before the trial court granted summary judgment to THS on its counterclaim.

{¶16} At the outset, we note that Perk's brief is lacking in several aspects. First, Perk's entire argument on the issue of res judicata is three short paragraphs that lack any reasoning (and his reply brief is one page without any substantial argument). Second, Perk fails to cite to relevant portions of the record on which he bases his assigned errors in violation of App.R. 16(A)(6). Finally, Perk violated App.R. 16(A)(7) because he does not cite to any authority in support of his arguments. App.R. 16(A)(7).

{¶17} "'It is not the function of this court to construct a foundation for [an appellant's] claims; failure to comply with the rules governing practice in the appellate courts is a tactic which is ordinarily fatal.'" *Catanzarite v. Boswell*, 9th Dist. Summit No. 24184, 2009-Ohio-1211, at ¶ 16, quoting *Kremer v. Cox*, 114 Ohio App.3d 41, 682 N.E.2d 1006 (9th Dist.1996). Therefore, "[w]e may disregard any assignment of error that fails to present any citations to case law or statutes in support of its assertions." *Frye v. Holzer Clinic, Inc.*, 4th Dist. Gallia No. 07CA4, 2008-Ohio-2194, ¶ 12; *see also* App.R. 16(A)(7); App.R. 12(A)(2). Nonetheless, in the interest of justice, we will address Perk's arguments.

A. Same Parties

{¶18} Perk first argues that his claims are not barred by res judicata because there is nothing in the record to establish that the two defendants in the refiled case, Tomorrows Home Solutions and Ohio Basement Systems, are the same as the one defendant in the first case, Tomorrows Home Solutions d.b.a. Ohio Basement Systems. We disagree.

{¶19} The contract that Perk entered into in October 2013 was with "Tomorrows Home Solutions dba Ohio Basement Systems." "D.b.a." means "doing business as" and signals to a consumer that a person or company is doing business under a fictitious name. *Family Med.*

Found., Inc. v. Bright, 96 Ohio St.3d 183, 186, 772 N.E.2d 1177 (2002), citing *Patterson v. V.M. Auto Body*, 63 Ohio St.3d 573, 589 N.E.2d 1306 (1992). There is no legal distinction between the individual or company and the fictitious name. *Patterson* at 574-575. "The designation 'd/b/a' * * * is merely descriptive of the person or corporation who does business under some other name. Doing business under another name does not create an entity distinct from the person operating the business." *Poss v. Morris*, 11th Dist. Ashtabula No. 94-A-0042, 1996 Ohio App. LEXIS 1210, 8 (Mar. 29, 1996), citing *Duval v. Midwest Auto City, Inc.*, 425 F.Supp. 1381, 1977 U.S. Dist. LEXIS 17408 (1977).

{¶20} Thus, in this case, Ohio Basement Systems is the fictitious name of Tomorrows Home Solutions and is not a separate entity from Tomorrows Home Solutions.

{¶21} Perk argues in his reply brief that THS never proved that "Tomorrows Home Solutions" and "Ohio Basement Systems" are "in privity with one another." Perk, however, did not raise this argument below. It is well established that a litigant's failure to raise an argument in the trial court waives the litigant's right to raise the issue on appeal. *Foster v. Wells Fargo Fin. Ohio, Inc.*, 195 Ohio App.3d 497, 2011-Ohio-4632, 960 N.E.2d 1022, ¶ 24 (8th Dist.). Accordingly, Perk cannot raise this issue for the first time on appeal.

{¶22} Moreover, even if not waived, Perk's argument lacks merit. Perk attached the foundation-repair agreement to his complaint as Exhibit A, which identifies the contractor as "Tomorrows Home Solutions dba Ohio Basement Systems." THS attached the same agreement to its answer and counterclaim. Accordingly, there is no genuine issue of material fact that Tomorrows Home Solutions and Ohio Basement Systems are the same entity with whom Perk contracted and later sued.

{¶23} Accordingly, Perk's argument that the first action and the second action do not

have the same parties is without merit.

B. Compulsory Counterclaims

{¶24} Perk further argues that because he voluntarily dismissed his claims against THS in the first action before the trial court ruled on THS's counterclaim, there is not a final judgment on the merits of his claims. Perk contends that without a final judgment on his claims, he can raise them again and res judicata does not apply.

{¶25} THS argues that Perk should have maintained his claims in the first action. THS contends that because Perk's claims arose out of the same transaction or occurrence, they were compulsory counterclaims under Civ.R. 13(A) that had to be brought or maintained in the original action. Because Perk voluntarily dismissed his claims in the first action under Civ.R. 41(A), THS asserts that res judicata now bars him from bringing his exact same claims in the refiled action. We agree with THS.

{¶26} In *Ferarra v. Vicchiarelli Funeral Servs.*, 2016-Ohio-5144, 69 N.E.3d 171 (8th Dist.), this court explained:

> Civ.R. 13(A) governs compulsory counterclaims. Under this rule, all existing claims between opposing parties that arise out of the same transaction or occurrence must be litigated in a single lawsuit, regardless of which party initiates the action. *Rettig Ents. v. Koehler*, 68 Ohio St.3d 274, 1994-Ohio-127, 626 N.E.2d 99 (1994), paragraph one of the syllabus. In addition to promoting judicial economy, the rule is designed to assist courts with the "orderly delineation of res judicata." *Lewis v. Harding*, 182 Ohio App.3d 588, 2009-Ohio-3071, 913 N.E.2d 1048, ¶ 12 (8th Dist.). A party who fails to assert a compulsory counterclaim at the proper time is barred from litigating that claim in a subsequent lawsuit. *Id*.
>
> Ohio courts use the "logical relation" test to determine whether a claim is a compulsory counterclaim. *Rettig Ents*. at paragraph two of the syllabus. Under this test, a compulsory counterclaim exists if that claim "is logically related to the opposing party's claim" such that "separate trials on each of their respective claims would involve a substantial duplication of effort and time by the parties and the courts[.]." *Id*. Accordingly, "multiple claims are compulsory counterclaims where they 'involve many of the same factual issues, or the same

> factual and legal issues, or where they are offshoots of the same basic controversy between the parties.'" *Id*. at 279, quoting *Great Lakes Rubber Corp. v. Herbert Cooper Co.*, 286 F.2d 631, 634 (3d Cir.1961).

Ferarra at ¶ 11-12.

{¶27} Perk does not even argue that his refiled claims are not logically related to THS's counterclaim that it filed in the original action or that his claims arose out of a separate occurrence or transaction. But applying the two-part *Rettig* test to the facts of this case, we find that Perk's refiled claims asserted against THS in the refiled action are compulsory counterclaims. Perk's claims existed in May 2014 when he filed his first complaint. In fact, the claims that he brought in his second complaint are identical to the ones he originally brought.

{¶28} Second, Perk's claims arose out of the same transaction or occurrence — the foundation-repair contract — that was the subject matter of THS's counterclaim in the first lawsuit. Thus, Perk's claims are logically related to THS's counterclaims and would involve many of the same factual issues at trial.

{¶29} Because the claims that Perk asserted against THS in the second complaint satisfy both prongs of the two-part *Rettig* test, they were compulsory counterclaims that either were or should have been asserted in the first lawsuit. Perk asserted his claims in the first lawsuit and then abandoned them. Because Perk's claims were compulsory counterclaims, however, he should have maintained them in the first action. Accordingly, Perk is barred from asserting his claims in the second lawsuit.

{¶30} In his reply brief to this court, Perk argues that two cases cited by THS — *Highfield v. Pietrykowski*, 6th Dist. Ottawa No. OT-16-008, 2016-Ohio-5695, and *Howell v. Richardson*, 45 Ohio St.3d 365, 544 N.E.2d 878 (1989) — are distinguishable and therefore do not stand for the proposition that his claims are barred by res judicata. THS, however, only

cites to these cases for black letter law on res judicata. It does not claim that these cases are analogous to the present case. Perk further claims that *Howell* turned "in part, on the doctrine of collateral estoppel, not the doctrine of res judicata." Res judicata, however, "involves both claim preclusion (historically called estoppel by judgment in Ohio) and issue preclusion (traditionally known as collateral estoppel)." *Grava*, 73 Ohio St.3d at 381, 653 N.E.2d 226. Thus, even if *Howell* had any bearing on the facts of the present case, which it does not, Perk's arguments are misplaced. Thus, Perk's second issue is without merit.

{¶31} Accordingly, we find that Perk's claims are barred by res judicata. Therefore, there are no genuine issues of material fact for the trial court to resolve, and summary judgment was proper. Perk's sole assignment of error is overruled.

{¶32} Judgment affirmed.

It is ordered that appellees recover from appellant the costs herein taxed.

The court finds there were no reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY J. BOYLE, JUDGE

FRANK D. CELEBREZZE, JR., J., and
STEPHEN A. YARBROUGH, J.,* CONCUR

* (Sitting by Assignment: Retired Judge Stephen A. Yarbrough of the Sixth District Court of Appeals.)