

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

BAY MECHANICAL &
ELECTRICAL CORP.

C.A. Nos. 17CA011136
 17CA011150

Appellant/cross-appellee

v.

2D CONSTRUCTION CO., LLC

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 14CV184571

Appellee/cross-appellant

DECISION AND JOURNAL ENTRY

Dated: March 29, 2019

HENSAL, Judge.

{¶1} Bay Mechanical & Electrical Corp. appeals a judgment of the Lorain County Court of Common Pleas that granted summary judgment to 2D Construction Co., LLC on its breach of contract action. 2D appeals a judgment of that court that granted summary judgment to Bay on its counterclaims and summary judgment to Ohio Farmers Insurance Co. and DH Charles Engineering, Inc. on its claims against those parties. For the following reasons, the judgments are reversed.

I.

{¶2} The City of Elyria hired Bay to construct a pump station using a design by URS Corp. Because Bay’s expertise is limited to mechanical and electrical systems, it contracted with 2D to excavate the site, install the footers, and perform other work called for in the design. After the foundation walls were finished, however, a different subcontractor noticed that one of the walls had sunk by a couple of inches. Bay engineered a solution, which the City approved.

When the City refused to pay for the additional work, however, Bay sued it. It also sued URS, alleging that the problem with the wall was attributable to URS's design.

{¶3} According to Bay, during the discovery process, it learned that the cause of the sinking wall may not have been URS's design, but 2D's failure to follow the design. 2D, meanwhile, which had performed some of the additional work called for in Bay's sinking-wall solution, stopped working on the site, allegedly because Bay had stopped paying it. Bay eventually entered into a settlement agreement with the City and URS. Two weeks later, it sued 2D for breach of contract. 2D counterclaimed, alleging breach of contract and other claims. 2D also sued Ohio Farmers, which had issued a payment bond regarding the project. 2D later filed a third-party complaint against DH Charles, seeking indemnification from DH Charles in case it ended up being liable to Bay.

{¶4} Following discovery, 2D moved for summary judgment on Bay's claims against it. Bay, Ohio Farmers, and DH Charles moved for summary judgment on 2D's claims against them. The trial court granted each of the summary judgment motions. Bay and 2D have appealed the trial court's judgments. This Court will begin with a review of Bay's appeal.

II.

BAY'S ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO APPELLEE ON APPELLANT'S CLAIMS BASED UPON ITS FINDING THAT APPELLANT'S CLAIMS AGAINST APPELLEE ARE BARRED UNDER THE DOCTRINE OF RES JUDICATA OR COLLATERAL ESTOPPEL.

{¶5} Bay argues that the trial court incorrectly granted summary judgment to 2D on its breach of contract claim. Under Civil Rule 56(C), summary judgment is appropriate if:

(1) [n]o 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 such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc., 50 Ohio St.2d 317, 327 (1977). To succeed on a motion for summary judgment, the movant bears the initial burden of demonstrating that there are no genuine issues of material fact concerning an essential element of the opponent's case. *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). If the movant satisfies this burden, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." *Id.* at 293, quoting Civ.R. 56(E). This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996).

{¶6} The trial court granted 2D's motion for summary judgment because it concluded that Bay's breach of contract claim was barred by the doctrine of res judicata. 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 transaction or occurrence that was the subject matter of the previous action." *Grava v. Parkman Twp.*, 73 Ohio St.3d 379 (1995), syllabus.

{¶7} "In Ohio, '[t]he doctrine of res judicata encompasses the two related concepts of claim preclusion, also known as res judicata or estoppel by judgment, and issue preclusion, also known as collateral estoppel.'" *State ex rel. Schachter v. Ohio Pub. Emps. Retirement Bd.*, 121 Ohio St.3d 526, 2009-Ohio-1704, ¶ 27, quoting *O'Nesti v. DeBartolo Realty Corp.*, 113 Ohio St.3d 59, 2007-Ohio-1102, ¶ 6. "Claim preclusion prevents subsequent actions, by the same parties or their privies, based upon any claim arising out of a transaction that was the subject matter of a previous action." *Id.*, quoting *O'Nesti* at ¶ 6. "The previous action is conclusive for all claims that were or that could have been litigated in the first action." *Id.* "Collateral estoppel (issue preclusion) prevents parties or their privies from relitigating facts and issues in a

subsequent suit that were fully litigated in a prior suit.” *Thompson v. Wing*, 70 Ohio St.3d 176, 183 (1994). It applies “when the fact or issue (1) was actually and directly litigated in the prior action, (2) was passed upon and determined by a court of competent jurisdiction, and (3) when the party against whom collateral estoppel is asserted was a party in privity with a party to the prior action.” *Id.*

{¶8} The action between Bay, the City, and URS was dismissed after the parties entered into a settlement. Because there were no facts or issues actually determined by the court in that case, it cannot serve as the basis for collateral estoppel. Accordingly, we will only consider whether claim preclusion applies.

{¶9} In *Johnson’s Island, Inc. v. Bd. of Twp. Trustees*, 69 Ohio St.2d 241 (1982), the Ohio Supreme Court explained that the requirement for claim preclusion that “the parties to the subsequent action must be identical to those of the former action or be in privity with them” is “based upon the requirement that there be mutuality of estoppel.” *Id.* at 244.

The mutuality requirement is closely related to, and for all practical purposes co-extensive with, the requirement of identity of parties or privity. * * * The estoppel effect of the judgment operates mutually if the person taking advantage of the judgment would have been bound by it had the result been the opposite. Conversely, a stranger to the prior judgment, being not bound thereby, is not entitled to rely upon its effect under the claim of res judicata or collateral estoppel.

Id.

{¶10} The parties in this action are not identical to the prior action. The question, therefore, is whether 2D is in privity with the City or URS, who were parties to that action. We note that the trial court did not specifically address the issue of privity in its journal entry. “[T]he concept of privity for purposes of res judicata is ‘somewhat amorphous.’” *State ex rel. Schachter*, 121 Ohio St.3d 526, 2009-Ohio-1704, at ¶ 33, quoting *Brown v. Dayton*, 89 Ohio

St.3d 245, 248 (2000). Traditionally, privity was found to exist “only when a person succeeded to the interest of a party or had the right to control the proceedings or make a defense in the original proceeding.” *O’Nesti*, 113 Ohio St.3d 59, 2007-Ohio-1102, at ¶ 9. Now, however, the Ohio Supreme Court applies a “broad definition[.]” *State ex rel. Schachter* at ¶ 33. Thus, “[a] contractual or beneficiary relationship is not required.” *Id.* For example, under certain circumstances, a mutuality of interest or active participation in the original lawsuit may create privity. *Id.* at ¶ 34.

{¶11} Despite the broader definition of privity that the Ohio Supreme Court allows, we conclude that 2D was not in privity with the City or URS. There was no contractual relationship between 2D and the defendants in Bay’s prior action. To the extent that 2D participated in that lawsuit, it was in support of Bay’s claims, not the City’s and URS’s defense. 2D also does not have a mutuality of interest with the City and URS. According to the parties, the issue in the prior lawsuit was whether the foundation wall sank because of URS’s design. 2D, however, was not involved in the design of the pump station. It also would not have been bound by any judgment against the City or URS in the prior action. Accordingly, there is no basis for us to conclude that there is privity between 2D and the defendants in Bay’s original lawsuit. Because of the lack of privity, claim preclusion does not apply to Bay’s breach of contract claim against 2D. That claim, therefore, is not barred under the doctrine of res judicata. In light of the fact that res judicata was 2D’s only argument for why it was entitled to summary judgment, we conclude that the trial court incorrectly granted 2D’s motion. Bay’s assignment of error is sustained.

2D’S ASSIGNMENT OF ERROR I

THE TRIAL COURT INCORRECTLY GRANTED SUMMARY JUDGMENT
TO BAY MECHANICAL & ELECTRICAL CORPORATION, OHIO

FARMERS AND DH CHARLES ENGINEERING, INC. WITHOUT GIVING ANY INDICATION OF WHAT IT ACTUALLY DECIDED.

2D'S ASSIGNMENT OF ERROR II

THE TRIAL COURT INCORRECTLY GRANTED SUMMARY JUDGMENT TO BAY MECHANICAL & ELECTRICAL CORPORATION AND OHIO FARMERS ON 2D'S SECOND AMENDED COMPLAINT.

{¶12} 2D argues that the trial court incorrectly granted Bay's, Ohio Farmers', and DH Charles' motions for summary judgment on its claims against them. As an initial matter, we must address Bay's motion to dismiss, which argues that 2D failed to file its notice of appeal within the time required under Ohio Appellate Rule 4(A). Under Rule 4(A)(1), a party who wishes to appeal "shall file the notice of appeal required by App.R. 3 within 30 days of that entry." According to Bay, the document that 2D faxed to the clerk of court before the deadline was insufficient because 2D did not also pay the required filing fee at that time.

{¶13} Under Rule 3(A), "[a]n appeal as of right shall be taken by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4." The trial court granted Bay's, Ohio Farmers', and DH Charles's motions for summary judgment on May 8, 2017. The record indicates that 2D submitted its notice of appeal by fax on June 6, 2017, which was within Rule 4(A)'s 30-day time limit. The clerk of court stamped 2D's notice of appeal as "FILED" on that date. Accordingly, we conclude that 2D's notice of appeal was timely under Appellate Rules 3 and 4. Bay's motion to dismiss is denied.

{¶14} Regarding whether the trial court erred when it granted Bay's, Ohio Farmers', and DH Charles' motions for summary judgment, we note that Bay made numerous arguments for why it was entitled to judgment as a matter of law. Initially, it argued that 2D's claims were barred by res judicata because 2D could have intervened in its action against the City. Regarding 2D's breach of contract claim, Bay asserted that the work that 2D was seeking payment for was

not covered by their original contract but for the extra work that was required after 2D failed to follow URS's design plans. It argued that their contract provided a way for 2D to receive payment for the extra work, but 2D did not pursue it. It also argued that, since there was no written change order, 2D was barred from seeking payment for its extra work. Bay argued that, in addition, it was only required to pay 2D for extra work if the City approved the work, which the City did not. It also argued that 2D is not entitled to additional compensation because 2D breached their contract by walking off of the job. It further argued that, since 2D left the job early, it was entitled, under their contract, to deduct from its payments to 2D any amount that it had to pay others to complete the work. Because its completion costs exceed the amount 2D seeks to recover, 2D is not entitled to any additional compensation.

{¶15} Regarding 2D's other claims, Bay argued that 2D was not entitled to recover under the Prompt Payment Act because the act does not apply when charges are disputed. It argued that 2D was not entitled to recover on its quantum meruit claim because their contract addressed the issue of payment for extra work and because quantum meruit does not apply to political subdivisions. It argued that 2D was not entitled to a declaration because 2D's declaratory judgment claim was duplicative of its breach of contract claim. Ohio Farmers argued that it was entitled to summary judgment on 2D's bond claim for the same reasons that Bay was entitled to summary judgment on 2D's breach of contract claim. Finally, in a separate motion, DH Charles argued that it was entitled to summary judgment on 2D's claims against it because the claims were barred by the applicable statute of limitations, the claims were barred by the economic loss rule, and it was not a joint tortfeasor.

{¶16} In opposition to Bay's, Ohio Farmers', and DH Charles' motions for summary judgment, 2D asserted many defenses. Regarding its claims against Bay and Ohio Farmers, 2D

argued that res judicata did not apply because it was not a party to the prior action. It argued that the extra work it performed was outside the scope of its written contract with Bay, but, even if the work was within the scope of the contract, Bay waived the written change order requirement. Regarding whether the City approved the extra work, 2D argued that the City approved it by entering into a settlement agreement with Bay regarding the extra work. 2D also argued that any rejection by the City of the extra work had to be in a written decision, and there had been no such decision. 2D also argued that Bay did not resolve its dispute with the City in good faith. Regarding 2D's failure to finish the extra work, 2D argued that it was excused from performance because Bay breached their contract. In addition, Bay refused to let it finish the work. 2D argued that, even if it did breach their agreement, Bay was required to notify it of the alleged breach and give it time to cure, which Bay did not do. 2D also argued that Bay's defense that 2D breached the contract, just like its breach-of-contract claim, was barred under the doctrine of res judicata. Furthermore, 2D argued that, even if it breached the contract, there were genuine issues of material fact regarding Bay's completion costs.

{¶17} Regarding 2D's other claims, 2D argued that its Prompt Payment Act claim could proceed because Bay did not dispute 2D's expenses in time. In addition, the payment owed to 2D was not the sort that was subject to the dispute exception. Regarding its quantum meruit claim, 2D argued that it was allowed to assert the claim as an alternative theory of recovery in case its breach of contract claim was unsuccessful. It also argued that it was entitled to seek a declaratory judgment in addition to its other requested relief. Finally, it argued that Ohio Farmers is liable on its bond to the same extent as Bay.

{¶18} The Ohio Supreme Court has explained that, even though an appellate court independently reviews the record when it reviews a trial court's decision to grant a motion for

summary judgment, the appellate court “has a different focus than the trial court.” *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 360 (1992). In *Murphy*, the trial court “informed the parties that it had not read any of the evidence submitted in support of, or in opposition to,” a motion for summary judgment. *Id.* at 357. The Ohio Supreme Court held that an appellate cannot “cure the trial court’s failure to examine the evidence[,]” explaining that, “[i]f the trial court does not consider all the evidence before it, an appellate court does not sit as a reviewing court, but, in effect, becomes a trial court.” *Id.* at 360.

{¶19} This Court has also recognized that its “role on appeal is to review the trial court’s decision and determine whether it is supported by the record.” *Allen v. Bennett*, 9th Dist. Summit Nos. 23570, 23573, 23576, 2007-Ohio-5411, ¶ 21. Here, the trial court granted Bay’s, Ohio Farmers’, and DH Charles’ motions without explanation. Although those parties offered multiple reasons for why they were entitled to summary judgment, the trial court did not indicate which grounds it found valid. Some of the alleged grounds, however, could serve as a sufficient basis for granting summary judgment on one or more of the claims, independent of the remaining arguments. We would exceed our authority as a reviewing court if we considered an issue that the trial court did not reach because it found a different argument sufficient for granting summary judgment. *Murphy* at 360; *see also Mourton v. Finn*, 9th Dist. Summit No. 26100, 2012-Ohio-3341, ¶ 9. In addition, some of the conclusions that can be drawn from Bay’s, Ohio Farmers’, and DH Charles’ arguments may be legally inconsistent with each other.

{¶20} It also is not clear whether the trial court reviewed all of the materials it was required to review when it determined whether to grant summary judgment to Bay, Ohio Farmers, and DH Charles. Although it wrote that it had “considered the motions and the entire

record,” it was only in regard to whether there was “no just reason for delay” under Civil Rule 54(B).

{¶21} In light of the myriad of arguments advanced by the parties for and against summary judgment, we conclude that the trial court’s journal entry granting summary judgment to Bay, Ohio Farmers, and DH Charles is insufficient to allow this Court to “properly function as a reviewing court[.]” *Mourton* at ¶ 9. Accordingly, we reverse and remand the trial court’s judgment as to their motions for summary judgment.

III.

{¶22} The judgments of the Lorain county Court of Common Pleas are reversed. This matter is remanded for proceedings consistent with this decision.

Judgments reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to both parties.

JENNIFER HENSAL
FOR THE COURT

SCHAFER, P. J.
CALLAHAN, J.
CONCUR.

APPEARANCES:

DENNIS R. FOGARTY, Attorney at Law, for Appellant.

MARC R. HERTRICK, Attorney at Law, for Appellant.

JAMES T. DICKSON, Attorney at Law, for Appellant.

CARI FUSCO EVANS, Attorney at Law, for Appellant.

JUSTIN M. ALABURDA, Attorney at Law, for Appellant.

KEITH A. SAVIDGE, Attorney at Law, for Appellee.