

[Cite as *Ward v. Cent. Invest. L.L.C.*, 2010-Ohio-6114.]

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

RICHARD H. WARD, : APPEAL NO. C-100080
Plaintiff-Appellant, : TRIAL NO. A-0903845

vs. : *DECISION.*

CENTRAL INVESTMENT LLC, :
Defendant-Appellee. :

CENTRAL INVESTMENT LLC, : APPEAL NO. C-100081
Plaintiff-Appellee, : TRIAL NO. A-0701616

and :

KEVIN E. SHELL, Ancillary :
Administrator of the Estate of John F. :
Koons, III, et al., :

Plaintiffs, :

vs. :

RICHARD H. WARD, :
Defendant-Appellant, :

and :

DREW & WARD CO., L.P.A., et al., :

Defendants. :

OHIO FIRST DISTRICT COURT OF APPEALS

Civil Appeals From: Hamilton County Common Pleas Court

Judgments Appealed From Are: Affirmed

Date of Judgment Entry on Appeal: December 15, 2010

Robert A. Klingler Co. L.P.A., and Robert A. Klingler, for Appellant Richard H. Ward,

Helmer, Martins, Rice & Popham, Co. L.P.A., James B. Helmer, Jr., Paul B. Martins, Julie W. Popham, and Erin M. Campbell, and Taft, Stettinius & Hollister, LLP, William Stuart Dornette, and Adam McNeeley, for Appellee Central Investment LLC.

Please note: This case has been removed from the accelerated calendar.

Per Curiam.

{¶1} In these consolidated appeals, appellant Richard H. Ward, a longtime counselor to appellee Central Investment LLC (“CI LLC”) and its founder, Bud Koons, appeals from the trial court’s determination that Ward had breached a consulting agreement with CI LLC. The agreement was designed to keep Ward’s experience and knowledge available to CI LLC. Because CI LLC was entitled to judgment as a matter of law on its claim that Ward had breached the agreement when he aided the preparation of litigation adverse to CI LLC’s interests and then concealed his conduct from CI LLC, we affirm the trial court’s entry of summary judgment for CI LLC. We also affirm the trial court’s dismissal of Ward’s attempt to revive counterclaims that he had previously dismissed.

I. The Consulting Agreement

{¶2} In an earlier appeal from interlocutory orders entered in CI LLC’s case against Ward, we described the factual background of these lawsuits. “Ward was a lifelong friend of Bud Koons, and both * * * Ward and the law firm of Drew & Ward had represented Bud Koons [and CI LLC] on various legal matters for numerous years.”¹

{¶3} In recognition of Ward’s decades-long representation of CI LLC and of Koons himself, CI LLC and Ward entered into a consulting agreement on February 28, 2005. The agreement expressed CI LLC’s “desire[] to retain the availability of [Ward] to advise on its business.” Ward agreed to provide consulting services to CI LLC “at such times as [CI LLC] may reasonably request.” The agreement specifically stated that Ward’s consulting services would not extend to providing legal counsel.

¹ *Shell v. Drew & Ward Co., L.P.A.*, 178 Ohio App.3d 163, 2008-Ohio-4474, 897 N.E.2d 201, ¶2.

{¶4} “In consideration for [Ward] agreeing to provide” consulting services for a five-year period, CI LLC was obligated to make monthly payments to Ward totaling \$250,000 per year. The payments were due to Ward whether or not CI LLC requested any services and were due even if Ward, then in his eighties, died. The agreement also provided that “[t]he consideration for such fees is [Ward’s] willingness to provide the Services * * *.” Between February 2005 and March 2006, when CI LLC stopped payments, it had paid Ward \$312,500.10.

II. The Cundall Litigation

{¶5} Three days after the effective date of the consulting agreement, Koons died. “Shortly after Koons’ death, Nick Ward [Ward’s son] and the law firm of Drew & Ward filed suit against Koons’ estate on behalf of Michael Cundall, Koons’ nephew. The legal action initiated by Nick Ward, [the ‘Cundall litigation’], alleged that Koons had breached a fiduciary duty to Cundall and his relatives with respect to Koons’ role as trustee over a trust that the Cundall relatives had been beneficiaries of.”² The goal of the Cundall litigation was to subject the Koons trusts to an “equitable readjustment” or “reallocation.” The suit sought damages of \$300 million “from these trusts,” and Nick Ward’s modified fee agreement guaranteed him “50% of amounts recovered.”

III. The Breach-of-Contract Claims and Counterclaims

{¶6} After Drew & Ward had begun the Cundall litigation, representatives of the Koons estate and CI LLC filed suit against Ward, Nick Ward, and Drew & Ward, in the case numbered A-0701616, asserting claims for breach of fiduciary duty, breach of contract, replevin, conversion, and legal malpractice. CI LLC and the representatives “asserted that the defendants [including Ward] had utilized and relied on confidential

² Id. at ¶3.

documents and information that they had obtained as legal representatives of Bud Koons to bring the cause of action against Koons' estate.”³

{¶7} After an extensive period of discovery and numerous pretrial proceedings, Ward and the law firm settled all of CI LLC's claims, except for its breach-of-contract claim for \$5 million. Ward remained as the sole defendant. Ward had advanced counterclaims asserting that CI LLC had also breached the agreement when it stopped making payments in March 2006 after learning of the Cundall litigation. Ward dismissed his counterclaims on March 2, 2009. Both CI LLC and Ward moved for summary judgment on CI LLC's breach-of-contract claim.

{¶8} On June 29, 2009, the trial court entered summary judgment for CI LLC. It also determined that Ward's breach-of-contract counterclaims had been dismissed with prejudice and denied Ward's motion to vacate the dismissal pursuant to Civ.R. 60(B), as well as his motion for leave to refile the counterclaims.

{¶9} In its January 8, 2010, entry, the trial court reaffirmed that Ward had breached the consulting agreement and ordered him to repay all fees received since March 22, 2005. In a separate order journalized that day, the trial court dismissed Ward's complaint in the case numbered A-0903845. In that complaint, Ward had attempted to revive the same claims that he had raised in the counterclaims that he had previously dismissed. These appeals followed.

IV. Ward Breached the Consulting Agreement

{¶10} In his first assignment of error, Ward asserts that the trial court erred in granting summary judgment for CI LLC on its breach-of-contract claim, and in denying his motion for summary judgment on that claim. Ward has taken these appeals from a voluminous record developed over three years of litigation. But a court is not precluded

³ Id. at ¶4.

from granting summary judgment merely because of the length of the factual record. The function of summary judgment is to determine from the evidentiary materials if triable factual issues exist, regardless of whether the facts are complex.⁴ And “[t]he interpretation of clear, unambiguous contract terms is a question of law particularly appropriate for resolution by summary judgment.”⁵

{¶11} Civ.R. 56(A) makes summary judgment available to a party like CI LLC seeking to recover upon its own claim or counterclaim.⁶ A party moving for summary judgment bears the burden of establishing that (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to summary judgment as a matter of law; and (3) it appears from the evidence, when viewed in a light most favorable to the nonmoving party, that reasonable minds can only come to a conclusion adverse to that party.⁷

{¶12} Where a party seeks affirmative relief on its own claim as a matter of law under Civ.R. 56(A), it bears the burden of affirmatively demonstrating that there are no genuine issues of material fact with respect to every essential element of its claim.⁸ Here, neither Ward nor CI LLC asserted that genuine issues of material fact remained. Both moved for summary judgment as a matter of law on the breach-of-contract claim. To prevail on such a claim, a claimant must establish the existence of a contract, performance on its part, breach by the other party, and its own damage or loss.⁹

{¶13} Neither party challenges the validity of the consulting agreement. Ward, however, argues that CI LLC breached the agreement when it withheld payments after

⁴ See *Gross v. Western-Southern Life Ins. Co.* (1993), 85 Ohio App.3d 662, 666-667, 621 N.E.2d 412; see, also, *Southside River-Rail Terminal Inc. v. Crum & Forster Underwriters*, 157 Ohio App.3d 325, 330, 2004-Ohio-2723, 811 N.E.2d 150.

⁵ *Costanzo v. Nationwide Mut. Ins. Co.*, 161 Ohio App.3d 759, 2005-Ohio-3170, 832 N.E.2d 71, ¶19; see, also, *Inland Refuse Transfer Co. v. Browning-Ferris Indus. of Ohio, Inc.* (1984), 15 Ohio St.3d 321, 322, 474 N.E.2d 271.

⁶ See *Robinson v. B.O.C. Group*, 81 Ohio St.3d 361, 367, 1998-Ohio-432, 691 N.E.2d 667.

⁷ See *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107, 662 N.E.2d 264.

⁸ See *id.* at 294, 1996-Ohio-107, 662 N.E.2d 264, citing *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115, 526 N.E.2d 798; see, also, *Stillwell v. Johnson* (1991), 76 Ohio App.3d 684, 688, 602 N.E.2d 1254.

⁹ See *Brunsmann v. W. Hills Country Club*, 151 Ohio App.3d 718, 2003-Ohio-891, 785 N.E.2d 794, ¶11 (internal citations omitted).

March 2006. Ward maintains that while he remained willing to consult, CI LLC simply chose not to consult with him after the Cundall litigation had been revealed, and thus that it failed to make payments that he was entitled to under the consulting agreement. CI LLC maintains that Ward breached the consulting agreement when he aided the preparation of the Cundall litigation and concealed his conduct from CI LLC when it sought consultation on his role in April 2006.

{¶14} Here, from the evidence properly placed before the trial court, when construed most strongly in favor of Ward, we conclude that Ward breached his express duties under the consulting agreement, as well as the implied duty of good faith and fair dealing inherent in any contract.

{¶15} Ward had played a key role in preparing the Cundall litigation, which began within days after Ward had signed the consulting agreement with CI LLC. On March 22, 2005, Ward drafted a letter to an attorney who had been nominated as a co-trustee for the Cundalls. Ward suggested that claims existed against Bud Koons and certain of his trusts. The cotrustees of the target trusts, ultimately named as defendants in the Cundall litigation, included the managers and officers of CI LLC. The assets of those trusts consisted largely of CI LLC stock.

{¶16} While Ward's son and his law firm prepared the Cundall litigation, Ward admitted that he did not tell CI LLC that he had retained his son to provide legal advice to him concerning the Koons trusts, that he had given his son and the Drew & Ward law firm access to the legal files of Bud Koons, the Koons trusts, and CI LLC, and that his son was consulting with Cundall. Ward kept these actions secret from CI LLC. And he continued to collect payments under the consulting agreement.

{¶17} On April 11, 2006, after the Cundall litigation had commenced, CI LLC wrote to Ward and invoked the consulting agreement. It stated that “[i]n order for CI LLC to utilize your services under the Agreement, it is necessary to fully understand your relationship with the Drew & Ward Law Firm” then representing the adverse Cundall

litigants. Ward replied, stating that “I have no secrets from you,” and that “I have no stake in [my son’s] Cundall case. Although I firmly believe that neither I nor our office has a conflict of interest in that matter, *I have stayed away from it* and do not intend to participate in it henceforth.”¹⁰

{¶18} Ward’s conduct and his misleading answer to the April 11 inquiry demonstrated that Ward was no longer available “to provide” consulting services to the officers and managers of CI LLC. Despite his statements to the contrary, his conduct demonstrated that his “willingness” to consult in any meaningful way was illusory. We hold that Ward breached the express terms of the consulting agreement as a matter of law.

{¶19} Moreover, every contract contains “an implied duty for parties to act in good faith and to deal fairly with each other.”¹¹ That duty implies a party’s “ ‘honesty and reasonableness in enforcement of a contract’ and [its] ‘faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.’ ”¹² Ward’s conduct between March 22, 2005, and the filing of the Cundall litigation, as well as his answer to CI LLC’s April 2006 inquiry, demonstrated a breach of this duty even when the evidence in this case is construed most strongly in favor of Ward. In suggesting and aiding the preparation of the Cundall litigation, Ward had acted adversely to the agreed common purpose of the consulting agreement. And Ward’s dissembling answer to CI LLC’s April 2006 inquiry about his role in the litigation called into question his honesty and faithfulness to the agreement and CI LLC’s justified expectations in it.

{¶20} Since Ward had breached the consulting agreement, CI LLC was justified in stopping its payments, and it was also entitled to the repayment of consulting fees paid between March 22, 2005, and March 2006. The first assignment of error is overruled.

¹⁰ Emphasis added.

¹¹ *Littlejohn v. Parrish*, 163 Ohio App.3d 456, 2005-Ohio-4850, 839 N.E.2d 49, ¶27; see, also, *Gator Dev. Corp. v. VHH, Ltd.*, 1st Dist. No. C-080193, 2009-Ohio-1802, ¶24; *Roth v. Natl. City Bank*, 1st Dist. No. C-100216, 2010-Ohio-5812, ¶18.

¹² *Stephan Business Ents. v. Lamar Outdoor Advertising Co. of Cincinnati*, 1st Dist. No. C-070373, 2008-Ohio-954, ¶19, quoting *O’Brien v. Ravenswood Apts., Ltd.*, 169 Ohio App.3d 233, 2006-Ohio-5264, 862 N.E.2d 549, ¶36, and *Littlejohn v. Parrish* at ¶26; see, also, *Blair v. McDonagh*, 177 Ohio App.3d 262, 2008-Ohio-3698, 894 N.E.2d 377, ¶43.

V. Ward's Attempt to Reassert Dismissed Claims

{¶21} Ward's second assignment of error, in which he argues that the trial court erred in denying his Civ.R. 60(B) motion to vacate the dismissal of his breach-of-contract counterclaims and his motion for leave to refile the counterclaims, is overruled. The dismissal of a compulsory counterclaim is a dismissal with prejudice, and Civ.R. 13(A) operates as a bar to the subsequent assertion of that claim.¹³ On March 2, 2009, Ward dismissed his counterclaims against CI LLC, including count five in which Ward alleged that CI LLC had breached the consulting agreement by halting payments. Moreover, in response to the trial court's inquiry as to whether Ward's counterclaims would be reasserted later in the proceedings, Ward's counsel assured the trial court that they would not.

{¶22} A party seeking relief under Civ.R. 60(B) must demonstrate that (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time.¹⁴ Since Ward failed to demonstrate the first element necessary for granting relief, and since any mistake or neglect by his counsel in dismissing his counterclaims was imputed to Ward under Civ.R. 60(B)(1),¹⁵ the trial court did not abuse its discretion when it denied the motion.

{¶23} Ward's third assignment of error, in which he contends that the trial court erred in dismissing his complaint in the case numbered A-0903845, is similarly overruled. The complaint alleged the identical claim raised in his counterclaims: that CI LLC had breached the consulting agreement by halting payments. As in our resolution of the second assignment of error, we hold that the March 2009 dismissal of Ward's compulsory counterclaims operated as a bar to his subsequent assertion of an identical claim.

¹³ See *Stern v. Whitlach & Co.* (1993), 91 Ohio App.3d 32, 36, 631 N.E.2d 680; see, also, *Kendall Group Ltd. v. Fifth Third Bank*, 10th Dist. No. 09AP-772, 2010-Ohio-4733, ¶31.

¹⁴ See *GTE Automatic Elec. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, 150, 351 N.E.2d 113.

¹⁵ See *Poe v. Ferguson*, 1st Dist. Nos. C-070445 and C-070446, 2008-Ohio-1442, ¶13.

VI. Attorney-Client Privilege

{¶24} In his final assignment of error, Ward argues that the trial court erred by ruling in July 2007 that CI LLC had not waived its attorney-client privilege by filing its legal-malpractice claims against Ward. Ward argues that “[i]f this case is reversed and remanded for further proceedings, including a trial, this ruling cannot be permitted to prevent Ward from using ‘privileged’ documents that are essential to his case.”¹⁶

{¶25} We note that the trial court revised the 2007 order that is the subject of this assignment of error. In July 2009, the court recognized a limited waiver, under *Grace v. Mastruserio*,¹⁷ of CI LLC’s attorney-client privilege in regard to the information necessary for Ward to defend against the legal-malpractice claims. Since Ward cannot demonstrate any prejudice flowing from the earlier order, the fourth assignment of error is overruled.

VII. Conclusion

{¶26} Having overruled each of Ward’s assignments of error, we affirm the judgments of the trial court.

Judgments affirmed.

CUNNINGHAM, P.J., SUNDERMANN and MALLORY, JJ.

Please Note:

The court has recorded its own entry on the date of the release of this decision.

¹⁶ Ward’s Brief at 33.

¹⁷ 182 Ohio App.3d 243, 2007-Ohio-3942, 912 N.E.2d 608, ¶21 et seq.