[Cite as *Buckeye Retirement Co., L.L.C., Ltd. v. Busch*, 2011-Ohio-1125.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
GREENE COUNTY

BUCKEYE RETIREMENT Co., LLC, Ltd.	:	
	:	Appellate Case No. 2010-CA-51
Plaintiff-Appellant	:	
	:	Trial Court Case No. 2007-CV-590
v.	:	
	:	
JOHN R. BUSCH	:	(Civil Appeal from
	:	Common Pleas Court)
Defendant-Appellee	:	
	:	

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O P I N I O N

Rendered on the 11th day of March, 2011.

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FAIN, J.

{¶ 1} Plaintiff-appellant Buckeye Retirement Co., LLC, Ltd. appeals from a summary judgment rendered in favor of defendant-appellee John R. Busch. Buckeye contends that the trial court erred in rendering summary judgment in Busch's favor on the basis of res judicata, because Busch was not a party to a prior action involving Buckeye, and Busch is not in privity with a party to the prior action. Buckeye further contends that the cause of action against Busch is not the same, and involves proof that differs from the proof needed in the prior action.

{¶ 2} We conclude that the trial court erred in rendering summary judgment in Busch's favor. Busch was not a party to the prior action, which was an adversary proceeding between Buckeye and a debtor in bankruptcy. Busch is also not in privity with the debtor. Even under relaxed standards of mutuality of interest, Busch is not entitled to the benefit of res judicata, because he would not have been bound by a judgment rendered in the bankruptcy case.

{¶ 3} We find it unnecessary to address Buckeye's alternative arguments against the application of res judicata. Because we conclude that the trial court erred in applying res judicata, the judgment of the trial court is Reversed, and this cause is Remanded for further proceedings consistent with this opinion.

I

{¶ 4} In June 2007, Buckeye filed a complaint for money damages against John Busch, Thomas Noland, and Statman, Harris & Eyrich, LLC (Busch, Noland, and Statman).

Buckeye alleged that it is the assignee and owner of all claims of National City Bank, f/k/a Provident (Provident) in connection with loans that Provident made to Busch's employer, U.S. Aeroteam Inc. (USAT) between August and December 2003.

{¶ 5} According to affidavits and supporting documents attached to the complaint, USAT and Provident entered into an asset-backed revolving loan agreement in November 2000. For purposes of securing a loan under the agreement, USAT granted Provident a security interest in USAT's inventory, accounts receivable, equipment, fixtures, furniture, general intangibles, and the proceeds and products thereof. Provident perfected its security interest, which was a first lien, by filing a UCC-1 financing statement with the Ohio Secretary of State, and by requiring USAT to deposit all receivables into a Cash Collateral Account (CCA) at Provident.

{¶ 6} Under the loan agreement, USAT was required to immediately deposit all collections on the collateral in the CCA, over which Provident had the sole power of withdrawal. The revolving line of credit on the loan was subject to a maximum amount not to exceed the lesser of: (1) $2,500,000; or (2) a formula consisting of the sum of several amounts that are referred to collectively as the Borrowing Base.[1] In accordance with the financing agreement, USAT regularly presented financial information, statements, and certified documents to Provident in order to obtain regular loan advances. These documents included collateral reports known as Borrowing Base Certificates (BBCs), which contained information on accounts receivable, inventory, cash, and the general ledger. The loan

[1]The Borrowing Base consists of the sum of: (a) the lesser of 50% of the cost or market value, whichever is lower, of Eligible Inventory; (b) 80% of the outstanding amount of Eligible Accounts; and (c) 100% of the balance of the Cash Collateral Account.

agreements required this information to be based on complete and accurate information, as contained in USAT's books and records.

{¶ 7} At all times relevant, Suhas Kakde was the president, chief executive, and majority stockholder of USAT. Kakde had signed a $2,500,000 promissory note on behalf of USAT, and had also personally guaranteed USAT's loans. Busch was the chief financial officer for USAT, and is the individual who prepared, signed, and forwarded the BBCs to Provident.

{¶ 8} In order to receive advances during August through December, 2003, USAT was required to submit BBCs that accurately reflected USAT's Borrowing Base. After Provident received a BBC indicating an adequate borrowing base, Provident calculated the amount that USAT could withdraw. Under the loan agreement, USAT and the person signing the BBCs warranted that the information was true and accurate, and warranted that USAT would not omit material facts.

{¶ 9} In July 2003, Busch and Kakde met with Noland regarding a potential bankruptcy filing by USAT. Busch and Kakde knew that under the loan, USAT was required to maintain its cash collateral in a bank account with Provident. Noland allegedly told USAT to open a separate account at a bank other than Provident, and to conceal the existence of the account from Provident. USAT opened an account at Bank One, N.A., n/k/a JP Morgan Bank, N.A. (Bank One), without Provident's knowledge. USAT then deposited several hundred thousand dollars in payments of accounts receivable and other funds into this account. In order to conceal the existence of the account from Provident, Busch prepared a number of false BBCs between August and December, 2003, that did not include the true

amount of the accounts receivable upon which USAT had received payments. Allegedly at Noland's direction, USAT paid Noland's law firm, Statman, more than $50,000 from the Bank One account.

{¶ 10} USAT filed for Chapter 11 bankruptcy in late December 2003. Shortly thereafter, judgment was granted in Provident's favor, and against Kakde, in the amount of $2,030,632.87, plus interest, on the promissory note that Kakde had guaranteed. The judgment was assigned to Buckeye, effective December 9, 2004. After Kakde filed a personal bankruptcy action, Buckeye objected to the discharge of Kakde's debt. In February 2008, the bankruptcy court concluded that Buckeye had failed to establish the nondischargeability of the debt. See *In re Kakde* (S. D. Ohio 2008), 382 B.R. 411.

{¶ 11} In the meantime, Buckeye had filed its complaint for money damages against Busch, Noland, and Statman in the Greene County Common Pleas Court. Noland and Statman filed a notice of removal to the United States District Court, contending that the state action was related to USAT's chapter 11 bankruptcy proceeding and to Kakde's personal bankruptcy action. In March 2008, the United States District Court filed an entry and order granting Buckeye's motion to remand the matter to state court. The federal court concluded that Buckeye's case was unrelated to the bankruptcy actions.

{¶ 12} Following the remand, Noland and Statman filed a motion for summary judgment, which was denied with respect to Buckeye's claims for tortious interference with contract. The trial court concluded that there were genuine issues of material fact concerning whether Noland's legal advice to USAT was protected by qualified privilege. Busch then filed a motion for summary judgment in April 2010, alleging that Buckeye's claims were

barred by res judicata. The motion was supported by the bankruptcy decision in *Kakde*, and by Busch's affidavit, which identified him as the "Busch" referred to in the *Kakde* decision.[2]

{¶ 13} In June 2010, the trial court rendered summary judgment in Busch's favor. The court concluded that although Busch was not a party to the *Kakde* litigation, the relationship between Busch and Kakde was "close enough" to include Busch within res judicata. The court also concluded that while the claims in the *Kakde* case were "s*tyled* differently" from the complaint against Busch, "they reach the same conclusion." June 28, 2010 Entry and Order, p. 4 (italics in original). The court held, therefore, that Buckeye's claims against Busch were barred by res judicata. In July 2010, the court filed a final judgment entry, which dismissed the claims against Busch, and also included a Civ. R. 54(B) certification. Subsequently, Buckeye dismissed its claims against Noland and Statman without prejudice. This is an appeal from the summary judgment rendered in favor of Busch.

II

{¶ 14} Buckeye's sole assignment of error is as follows:

{¶ 15} "AS A MATTER OF LAW, THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT/APPELLEE JOHN R. BUSCH ON THE BASIS OF RES JUDICATA WHERE THE PARTIES TO THE PRIOR ACTION WERE NOT THE SAME, WHERE THE PARTIES WERE NOT IN PRIVITY, WHERE THE CAUSES OF ACTION WERE DIFFERENT, AND WHERE THE PROOF NEEDED TO ESTABLISH THE CAUSES OF ACTION WAS DIFFERENT THAN IN THE PRIOR

[2]Busch had testified as a witness in *Kakde*, during the hearing on whether Kakde's debt to Buckeye was dischargeable. Busch was not a party to that case, however.

ACTION."

{¶ 16} Under this assignment of error, Buckeye contends that the trial court erred in applying res judicata, because Busch was not a party to the prior action involving Buckeye and Kakde, and Busch was also not in privity with Kakde. In addition, Buckeye contends that the action before us involves different causes of action and different proof than the bankruptcy action.

{¶ 17} "The 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. * * * 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. * * * Where a claim could have been litigated in the previous suit, claim preclusion also bars subsequent actions on that matter. * * *

{¶ 18} "Issue preclusion, on the other hand, serves to prevent relitigation of any fact or point that was determined by a court of competent jurisdiction in a previous action between the same parties or their privies. * * * Issue preclusion applies even if the causes of action differ." *O'Nesti v. DeBartolo Realty Corp.*, 113 Ohio St.3d 59, 61, 2007-Ohio-1102, ¶ 6-7 (citations omitted).

{¶ 19} In *O'Nesti*, the court noted that "[f]or claim preclusion to apply, the parties to the subsequent suit must either be the same or in privity with the parties to the original suit." Id. at ¶ 9 (citation omitted). The trial court in the case before us concluded that while "Busch was not a party to the *Kakde* action, his relationship to Kakde was 'close enough' to include" Busch within res judicata. June 28, 2010 Entry and Order, p. 5. Under applicable standards,

we review the trial court's decision de novo, without according deference. " 'The issue of whether res judicata * * * applies in a particular situation is a question of law that is reviewed under a de novo standard.' * * * A de novo standard of review affords no deference to the trial court's decision, and we independently review the record to determine whether res judicata applies." *Hempstead v. Cleveland Bd. of Edn.*, Cuyahoga App. No. 90955, 2008-Ohio-5350, ¶ 6 (citations omitted).

{¶ 20} In *O'Nesti*, the Supreme Court of Ohio considered whether employees of the same employer were in privity with each other for purposes of applying claim preclusion. Some employees of the DeBartolo Realty Corporation had obtained judgment against DeBartolo in 1999, based on DeBartolo's failure to distribute deferred stock following its merger with a subsidiary. 2007-Ohio-1102, ¶ 2. In 2003, two more employees sued, demanding their shares. The trial court rendered summary judgment in their favor, based on res judicata and collateral estoppel. Id. at ¶ 3. The court of appeals affirmed the decision of the trial court, holding that the employees were in privity with employees who had filed the earlier action, due to their mutuality of interests, including their shared employment and participation in the stock incentive plan. Id. at ¶ 4. The Supreme Court of Ohio then reversed, concluding that privity did not exist. In discussing privity, the Supreme Court of Ohio noted that:

{¶ 21} "Privity was formerly 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. * * * An interest in the result of and active participation in the original lawsuit may also establish privity. * * * Individuals who raise identical legal claims and seek identical

rather than individually tailored results may be in privity. *Brown v. Dayton* (2000), 89 Ohio St.3d 245, 248, 730 N.E.2d 958. This court has since stated that privity is a somewhat amorphous concept in the context of claim preclusion. *Kirkhart v. Keiper*, 101 Ohio St.3d 377, 2004-Ohio-1496, 805 N.E.2d 1089, ¶ 8, citing *Brown*, 89 Ohio St.3d at 248, 730 N.E.2d 958. A 'mutuality of interest, including an identity of desired result,' might also support a finding of privity. *Brown* at 248, 730 N.E.2d 958. *Mutuality, however, exists only 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. at ¶ 9 (citations omitted and italics added). The Supreme Court of Ohio declined to apply res judicata in *O'Nesti*, because the only commonalities of the employees with the prior plaintiffs were that they were all employed by the same company and were subject to the same stock incentive plan. The employees in the current suit sought individually tailored results. They also had not actively participated in, nor did they have control over, the prior lawsuit.

{¶ 22} In the case before us, there is no evidence that Busch either actively participated in, or had control over, the prior lawsuit. More importantly, Busch is a complete stranger to the bankruptcy litigation, and would not have been bound by a result in that case. Therefore, even under the most relaxed standard of mutuality of interests that has been employed, Busch was not in privity with Kakde, and is not entitled to the benefit of claim preclusion. For the same reason, Busch is not entitled to the benefit of issue preclusion, or collateral estoppel.

{¶ 23} In responding to Buckeye's assignment of error, Busch contends that the cases

cited by Busch are outdated, and that privity is no longer limited to successors of an estate or interest, or to those who have control of a proceeding. In this regard, Busch relies on *State ex rel. Davis v. Pub. Emps. Retirement Bd.*, 174 Ohio App.3d 135, 2007-Ohio- 6594, in which the Franklin County Court of Appeals considered whether issue preclusion applied to various employees of the Franklin County Public Defender who claimed a right to participation in the Ohio Public Employees Retirement System. The application of issue preclusion was based on a previous lawsuit that had been filed by another employee. Id. at ¶ 8-10. Citing *O'Nesti*, *Brown*, and other Supreme Court of Ohio cases, the Tenth District Court of Appeals noted that the definition of privity has been relaxed, that "neither a contractual nor a beneficiary relationship is necessary," and that a "mutuality of interest *might* also support a finding of privity, suggesting that mutuality of interest is not always enough to warrant such a finding." Id. at ¶ 23 and 27 (italics in original). The Tenth District Court of Appeals rejected a finding of privity, because of insufficient mutuality of interest, including identity of desired result, and the absence of any facts demonstrating a special relationship between the employees. Id. at ¶ 30.

{¶ 24} *Davis* does not add anything new to the jurisprudence on privity, but merely follows existing authority of the Supreme Court of Ohio – authority that we have cited and applied. We also note that Buckeye's brief cites recent authority, like *O'Nesti*.

{¶ 25} The correct standard is that in order for res judicata to apply, the parties must be the same or must be in privity with the parties to the prior action, as the term "privity" has been interpreted by the Supreme Court of Ohio. Under the most recent interpretations of the meaning of privity, Busch – the party seeking to gain the benefit of res judicata – was not in

privity with Kakde, the party to the prior action. Accordingly, the trial court erred in concluding that Busch and Kakde are in privity.

{¶ 26} Buckeye also contends that Kakde's bankruptcy action involves different causes of action and different proof than the action before us. In view of the fact that we have already found that Busch and Kakde are not in privity, which is dispositive of Buckeye's sole assignment of error, we find it unnecessary to address Buckeye's alternative arguments against the application of res judicata.

{¶ 27} Because Busch and Kakde are not in privity, the doctrine of res judicata does not apply. The trial court erred in rendering summary judgment in favor of Busch. Buckeye's sole assignment of error is sustained.

III

{¶ 28} Buckeye's sole assignment of error having been sustained, the judgment of the trial court is Reversed, and this cause is Remanded for further proceedings.

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GRADY, P.J., and FROELICH, J., concur.

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