[Cite as *Roberts v. Jackass Flats, L.L.C.*, 2016-Ohio-610.]

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

JAMES ROBERTS	:	
	:	
Plaintiff-Appellant	:	C.A. CASE NO. 26811
	:	
v.	:	T.C. NO. 15CV3113
	:	
JACKASS FLATS, LLC	:	(Civil Appeal from
	:	Common Pleas Court)
Defendant-Appellee	:	
	:	
	:	

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O P I N I O N

Rendered on the ___19th___ day of ____February____, 2016.

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FROELICH, J.

{¶ 1} James Roberts appeals from a judgment of the Montgomery County Court of

Common Pleas, which granted the motions of Jackass Flats, LLC, and John Walsh, a member of Jackass Flats, to dismiss Roberts's complaint, pursuant to Civ.R. 12(B)(6). For the following reasons, the trial court's judgment will be reversed, and the case will be remanded for further proceedings.

{¶ 2} Roberts's complaint alleged the following facts:

{¶ 3} In 2013, Matthew Sorg was appointed as a Receiver for Jackass Flats in Montgomery C.P. No. 2012 CV 8182. Pursuant to his authority as Receiver, Sorg employed Roberts as an independent contractor to provide management of the day-to-day operations of Jackass Flats. Sorg, with authority from the court, promised to pay Roberts $1,000 per week for every week that Roberts provided management services. From time to time, Sorg, on behalf of Jackass Flats, asked Roberts to advance sums to finance the day-to-day operations and agreed to reimburse Roberts for those advancements. Roberts loaned $16,206.41 to Jackass Flats, and is still owed $10,320.66 for those advancements. Jackass Flats, through Sorg, agreed to pay Roberts a bonus of $1,000 upon the sale of the receivership assets. By April 2015, Roberts was owed $34,000 for unpaid management fees and the bonus. Roberts received $13,248 in April 2015 and $7,000 in June 2015.

{¶ 4} On June 12, 2015, Roberts filed a complaint against Jackass Flats, raising claims for breach of contract, unjust enrichment, and promissory estoppel based on the unpaid management fees, advancements, and bonus. Roberts sought $31,072.66, plus costs and interest, from Jackass Flats.[1] Jackass Flats's alleged liability was based on

[1] It appears that Roberts's request for $31,072.66 did not take into account the $7,000 payment in June 2015. ($10,320.66 + $34,000 - $13,248 = $31,072.66)

Roberts's allegation that Sorg was the "duly authorized agent" of Jackass Flats.

{¶ 5} Roberts attempted to serve Jackass Flats through service of summons upon the Receiver, Sorg. No answer was filed, and Jackass Flats asserts that it was not properly served.

{¶ 6} On June 23, 2015, Jackass Flats and Walsh each filed motions to dismiss the complaint. Both asserted that Roberts had not provided any services to Jackass Flats pursuant to any written or oral agreement and that Roberts was not acting on behalf of Jackass Flats. Walsh characterized the complaint as a collateral attack on a judgment in Case No. 2012 CV 8182, which, he said, had determined Roberts's entitlement to compensation for the services he rendered to the Receiver; Walsh asserted that the matter was res judicata. Jackass Flats similarly stated that "the only remedy for an alleged contractee with a receiver is through pursuit in the receivership. On those issues this Court has already spoken."

{¶ 7} Roberts did not respond to the motions to dismiss, but he filed an amended complaint and a motion to substitute Sorg for Jackass Flats as the party-defendant. *See* Civ.R. 15(A). The amended complaint named Sorg, in his capacity as Receiver for Jackass Flats, as the party-defendant, and Sorg's name was substituted for Jackass Flats throughout the amended complaint.[2] The amended complaint was otherwise substantially the same as the original complaint.

{¶ 8} On July 27, 2015, prior to any response by Sorg to the amended complaint,

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[2] The record reflects that Jackass Flats apparently does not consider itself to have been dismissed from the action as a result of the amended complaint. It continues to participate in the litigation and asserts in its appellate brief that the amended complaint was improperly filed without leave.

the trial court sustained the motions to dismiss.[3] After stating the standard for ruling on a Civ.R. 12(B)(6) motion, the trial court discussed that a receiver is an officer of the court, subject to the oversight of the court, and that a party must seek leave of court to sue to a receiver. The court then found:

> * * * Roberts is dissatisfied with this court's decision in Case No. 2012CV8182 wherein the court resolved his claim against the receivership. Roberts simply seeks to collaterally attack this court's judgment in Case No. 2012CV8182. Roberts was not granted leave to file his Complaint against Sorg. Still further, Roberts' claims have been resolved in Case No. 2012CV8182 wherein the court issued its decision relating to Roberts' claims against the receivership. Further, the receiver may act only with authority of the court and under the control and direction of the court. The receiver is not free to enter into the agreements claimed by Plaintiff. The court finds beyond doubt from the allegations and pleadings, without resort to any extraneous material, that there is no set of facts which could conceivably be proved by Plaintiff that would allow the case to be submitted to the jury, and that no additional amendment to the Complaint could cure the defect, and the Motions to Dismiss are SUSTAINED.

{¶ 9} Roberts appeals from the trial court's judgment, claiming that the trial court

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[3] The trial court addressed both Jackass Flats's and Walsh's motions to dismiss. Walsh was not named as a party to this action, and he is not mentioned in the complaint or amended complaint. Walsh's status as a member of Jackass Flats, LLC, did not authorize him to file a motion in this lawsuit. Consequently, the trial court erred in granting his motion. Nevertheless, as Walsh's motion raised issues that were substantially similar to those in Jackass Flats's motion to dismiss, any error in this regard was harmless.

"improperly dismissed the Appellant's Complaint based upon the principle of res judicata."

{¶ 10} "A motion to dismiss a complaint for failure to state a claim upon which relief can be granted, pursuant to Civ.R.12(B)(6), tests the sufficiency of a complaint." *Grover v. Bartsch*, 170 Ohio App.3d 188, 2006-Ohio-6115, 866 N.E.2d 547, ¶ 16 (2d Dist.). The court must construe the complaint in the light most favorable to the plaintiff, presume all of the factual allegations in the complaint are true, and make all reasonable inferences in favor of the plaintiff. *Id*., citing *Mitchell v. Lawson Milk Co*., 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). A motion to dismiss under Civ.R. 12(B)(6) should be granted only where the complaint, so construed, demonstrates that plaintiff can prove no set of facts entitling him to relief. *Id*.

{¶ 11} The doctrine of res judicata encompasses the two related concepts of claim preclusion (estoppel by judgment) and issue preclusion (collateral estoppel). *Grava v. Parkman Twp*., 73 Ohio St.3d 379, 381, 653 N.E.2d 226 (1995). "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.' " (Emphasis omitted.) *Kelm v. Kelm*, 92 Ohio St.3d 223, 227, 749 N.E.2d 299 (2001), quoting *Grava* at syllabus. Furthermore, res judicata bars the litigation of "all claims which were or might have been litigated in a first lawsuit." (Emphasis omitted.) *Natl. Amusements, Inc. v. Springdale*, 53 Ohio St.3d 60, 62, 558 N.E.2d 1178 (1990); *see also Kelm* at 227; *Grava* at 382.

{¶ 12} In the absence of allegations in the complaint that reflect the trial court's actions in Case No. 2012 CV 8182, the trial court could not grant a Civ.R. 12(B)(6) motion on res judicata grounds. As we recently stated in *Rodefer v. McCarthy*, 2015-Ohio-3052,

36 N.E.3d 221 (2d Dist.):

> * * * "[w]hen a defense of res judicata requires consideration of materials outside the record, the defense may not be determined on a Civ.R. 12(B)(6) motion to dismiss. *State ex rel. Freeman v. Morris*, 62 Ohio St.3d 107, 109, 579 N.E.2d 702 (1991). The procedural method to rule on the res judicata defense was either to convert the Civ.R. 12(B)(6) motion to a motion for summary judgment (as permitted by the rule) or to conduct a trial on the issue." *Folck v. Khanzada*, 2d Dist. Clark No. 2012-CA-18, 2012-Ohio-4971, ¶ 8. A trial court is not permitted to take judicial notice of the record in other litigation, even when that action was before the same court. *E.g., MacConnell v. Dayton*, 2d Dist. Montgomery No. 25536, 2013-Ohio-3651, ¶ 14, fn. 2; *Davis v. Haas*, 2d Dist. Montgomery No. 24506, 2011-Ohio-5201, ¶ 19.

Rodefer at ¶ 31. We concluded in *Rodefer* that, in the absence of any allegations in the complaint that established that res judicata barred the plaintiff's claim, the trial court erred in dismissing the complaint, pursuant to Civ.R. 12(B)(6), based on res judicata. *Id*. at ¶ 32.

{¶ 13} Here, Roberts's complaint alleges that Sorg was appointed as receiver for Jackass Flats in Case No. 2012 CV 8182; the same allegations appear in the amended complaint. However, neither the original nor amended complaint mentions that he had previously attempted to seek redress for his alleged unpaid management fees, advancements, and bonus in that other action or any other action. Nor do the complaints indicate that the trial court had previously entered a judgment against him on his claims

for the unpaid management fees, advancements, and bonus. Although the trial court was aware of Roberts's filings in Case No. 2012 CV 8182 and of the common pleas court's ruling in that case, Roberts did not attach any documents from Case No. 2012 CV 8182 to either complaint. As a result, the trial court was not permitted to consider the record in Case No. 2012 CV 8182 in ruling on the motions to dismiss. Based on the allegations in the complaint alone, the trial court erred in concluding that Roberts's complaint was a collateral attack on the judgment in Case No. 2012 CV 8182 and in dismissing the complaint on res judicata grounds.

{¶ 14} The trial court also dismissed the complaint on the ground that Roberts had not sought leave to sue Sorg. The trial court stated in its ruling, "Permitting a party to sue a receiver without leave of court would render it 'impossible for the court to discharge its duty to preserve the property and distribute its proceeds among those entitled to it according to their equities and priorities.' *Bank One, N.A. v. Oaks of Medina*, 2005-Ohio-3546, *quoting Barton v. Barbour*, 104 U.S. 126, 136 ([1881]). It is entirely within the discretion of the court whether to permit a party to bring claims against a receiver. *Dorr Run Coal Co. v. Nelsonville Coal Co*., 11 Ohio N.P. 38 (1910)."

{¶ 15} As stated by the trial court, the Ohio Supreme Court has held that a receiver cannot be sued, in the absence of statutory authority, without leave of the court that appointed him or her. *Dorr Run Coal Co., supra*. However, the Ohio Supreme Court has further held that "[a] failure to obtain leave of court to sue a receiver does not affect the jurisdiction of the court in which the suit is brought to hear and determine it. The requirement is for the protection of the receiver; and, if waived by him [or her], no advantage can be taken of the omission by any one else." *Tobias v. Tobias*, 51 Ohio St.

519, 38 N.E. 317 (1894), syllabus. *See also Fusion Oil, Inc. v. American Petroleum Retail, Inc.*, Case No. 3:05CV7434, 2006 WL 2010770 (N.D.Ohio July 17, 2006), citing *Tobias*; Annotation, *Failure to obtain permission to sue receiver as affecting jurisdiction of action*, 29 A.L.R. 1460 (1924) ("Though leave to sue a receiver is generally required * * *, the great weight of authority is to the effect that failure to secure permission to sue a receiver appointed by a state court does not affect the jurisdiction of the court in which the suit is brought. In the jurisdictions so holding, it is commonly held that the defect is merely technical, and may be remedied by order or may be waived.").

{¶ 16} Sorg did not seek dismissal of the lawsuit against him due to Roberts's failure to seek leave of court to sue him as Receiver for Jackass Flats. Jackass Flats and Walsh could not, and did not attempt to, raise this potential objection on Sorg's behalf, and the trial court erred in raising and granting this objection sua sponte.

{¶ 17} The trial court's judgment will be reversed, and the matter will be remanded for further proceedings.

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DONOVAN, P.J., concurs.

HALL, J., concurring:

{¶ 18} I have previously commented, "It seems counterintuitive that a court cannot take judicial notice of its own records in its own prior case on the same subject matter between the same two parties, but that's the law. *See, e.g., Charles v. Conrad*, 10th Dist. Franklin No. 05AP-410, 2005-Ohio-6106, ¶ 26. The reasoning for such a restriction is that an appellate court cannot review the trial court's reliance on the prior proceeding because that prior record is not before the appellate court. *Id*. That rationale makes

little sense when the trial court, as here, specifically quotes the entirety of the prior record relied upon, and, as here, neither party disputes the accuracy of the prior record. With the advent of readily available electronic records from which anyone can promptly verify the accuracy of a court's judicial notice, the days of placing unnecessary restriction on a court's judicial notice of indisputable facts may be numbered." *MacConnell v. Dayton*, 2d Dist. Montgomery No. 25536, 2013-Ohio-3651, ¶ 14, fn. 2. I now suggest that the fact that there was a prior judgment affecting this case, and its terms, is no less verifiably certain than the fact that Third and Main Streets intersect in downtown Dayton. But given the current state of the law on this subject, I concur.

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