

[Cite as *Newman v. Martinez*, 2016-Ohio-647.]

IN THE COURT OF APPEALS OF OHIO  
FOURTH APPELLATE DISTRICT  
PIKE COUNTY

JILL NEWMAN,	:	
Plaintiff-Appellee,	:	Case No. 15CA857
vs.	:	
HEIDI MARTINEZ,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

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APPEARANCES:

Teresa Cunningham, Law Office of Teresa Cunningham, Florence, Kentucky, for appellant.

Anthony A. Moraleja, Waverly, Ohio, for appellee.

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CIVIL APPEAL FROM COUNTY COURT  
DATE JOURNALIZED: 2-8-16  
PER CURIAM.

{¶ 1} Heidi Martinez, a Kentucky resident, filed a complaint in a Kentucky court and alleged that Jill Newman, an Ohio resident, had breached their agreement concerning Martinez's two horses and sought damages related to a veterinarian's bill for one of the horses. The next day, Newman filed a complaint in an Ohio court and alleged that Martinez had breached their agreement concerning Martinez's two horses and requested \$3,000 in damages. The Ohio court granted Martinez's motion to stay the case pending the resolution of the Kentucky case.

{¶ 2} After the Kentucky court entered judgment in favor of Newman on Martinez's claim, Martinez filed a motion for summary judgment in the Ohio case based on the Full Faith

and Credit Clause of the United States Constitution and res judicata. The trial court denied the motion and the case proceeded to trial. The trial court entered judgment in Newman's favor for \$3,000 plus interest.

{¶ 3} On appeal, Martinez asserts that the trial court erred by denying her motion for summary judgment. We agree. The trial court erroneously applied the jurisdictional-priority rule in its decision because that rule does not apply when an action is pending in another state. Moreover, Newman conceded in filings in the underlying case that she had been served in the Kentucky case, so the trial court erred by determining that it had not been shown that the Kentucky court had established personal jurisdiction. Also, we find nothing to indicate that Newman raised an issue concerning personal jurisdiction in that court, so as to preclude a waiver of the issue by her voluntary appearance in that court. Moreover, because the prior Kentucky case involved the same agreement that formed the basis for the Ohio case, Newman should have raised her claims in the Kentucky case as a compulsory counterclaim. By not doing so, res judicata and the Full Faith and Credit Clause barred her Ohio claim, and the trial court erred by not granting summary judgment in favor of Martinez. Thus, we sustain Martinez's assignment of error, reverse the trial court's judgment and remand the cause to enter summary judgment in favor of Martinez.

## I. FACTS

{¶ 4} On September 25, 2012, Martinez, a Kentucky resident, filed a small claims complaint against Newman, an Ohio resident, in the Kenton District Court in Kentucky. In her complaint, Martinez alleged that she and Newman "had an agreement where she would pasture board my horse Cody—and in return I allowed her to use my horse Apache" and "she was to

return” Apache to her. According to Martinez, when she attempted to retrieve Cody Newman told her that she could not have him unless she gave Newman Apache’s papers or paid Newman \$1,200. Martinez also alleged that Newman kept Apache in a field with a stud horse for breeding purposes, even though Martinez did not agree to this arrangement. These events prompted Martinez to remove both horses. Martinez then incurred a veterinary bill to have Apache tranquilized and palpated to see if she was pregnant. Martinez requested \$285 in damages for the veterinary bill and the related expenses that she incurred as a result of Newman’s breach of their agreement.

{¶ 5} The next day, on September 26, 2012, Newman filed a complaint against Martinez in the Pike County Court in Ohio. Newman alleged that she entered into a verbal agreement with Martinez in the winter of 2010 in which Newman would board and feed Cody for one year in exchange for Martinez giving Newman Apache. Newman further alleged that when Martinez failed to retrieve Cody toward the end of 2011, they agreed that Martinez would pay Newman \$100 per month to continue boarding the horse. According to Newman, Martinez paid this fee for January and February 2012, but did not pay for March and April 2012. Newman claimed that they then agreed that Martinez tendered a \$1,200 check, postdated to May 10, 2012, for Martinez to take both horses. However, when Newman attempted to cash the check on that date, she discovered that Martinez had stopped payment on the check. Newman sought \$3,000 in damages for Martinez’s breach of their agreement concerning the two horses.

{¶ 6} Subsequently, Martinez filed a motion to dismiss Newman’s Ohio action and a supplemental motion to dismiss, or, in the alternative, to stay the Ohio case pending the resolution of the pending Kentucky case. In her supplemental motion, Martinez noted that the

Kentucky case had been continued until December 4, 2012 to obtain service on Newman. In her response, Newman conceded that she “was served in November for a court date of December 4, 2012 in the Kenton District Court” in Kentucky. In October 2012, the trial court granted Newman’s motions and stayed the Ohio action pending the resolution of the Kentucky case.

{¶ 7} In November 2012, Newman filed a motion to dismiss “for improper venue/lack of jurisdiction” and a motion for a continuance in the Kentucky case. In her motion, Newman argued that the Kenton District Court was the improper venue and lacked jurisdiction. However, the Kenton District Court denied the motion to dismiss and transferred the case to the regular docket upon Martinez’s payment of a fee. Later, in June 2013, the Kenton District Court entered judgment in favor of Newman on Martinez’s claim based on a breach of the parties’ agreement. Also, Newman did not file any counterclaim in the Kentucky case to raise her claim that she was entitled to damages based on Martinez’s breach of their agreement.

{¶ 8} Following the resolution of the Kentucky case, the Ohio case proceeded. Martinez filed an answer and a motion for summary judgment. In her motion for summary judgment, Martinez claimed that Newman’s claim should be dismissed based on the Full Faith and Credit Clause and res judicata (Newman’s Ohio action was barred because she should have raised her claim as a counterclaim in the Kentucky case). Martinez attached various documents to her motion without incorporating or referring to them by affidavit. In her memorandum in opposition, Newman argued that summary judgment was not appropriate because genuine issues of material fact remained regarding whether Martinez breached the parties’ contract. In her reply, Martinez argued that res judicata applied because Newman’s claim arose out of the same transaction or occurrence as her Kentucky claim (the parties’ agreement concerning the two

horses) and Newman had a duty to file a compulsory counterclaim in the Kentucky case to raise her claim. In rebuttal, Newman contended that because the claims did not arise from the same transaction or occurrence, her claim is not a compulsory counterclaim that had to be raised in the Kentucky case. Neither party argued that the Kentucky court lacked personal jurisdiction over Newman.

{¶ 9} In March 2013, the trial court denied Martinez’s motion for summary judgment. In its decision, the trial court applied the jurisdictional-priority rule and held that “[b]ecause there is no evidence presented by [Martinez] that the Kenton District Court asserted personal jurisdiction over Ms. Newman prior to the Pike County Court asserting personal jurisdiction over Ms. Martinez, the Court is unable to say that the Kenton District Court has jurisdictional priority over the Pike County Court.” The trial court further determined that “[p]roof of jurisdictional priority must be provided before [Martinez] can advance the theories presented in its Motion for Summary Judgment and subsequent Supporting Memorandum” and that “[i]f [Martinez] cannot present evidence that the jurisdictional priority rule gives the Kenton District Court priority over the Pike County Court, then all of its theories for summary judgment are moot.”

{¶ 10} After the case proceeded to trial, the trial court entered judgment in Newman's favor for \$3,000 plus interest from Martinez. This appeal followed.

## II. ASSIGNMENT OF ERROR

{¶ 11} Martinez assigns the following error for our review:

"Whether the Trial Court Erred by denying Appellant’s Motion for Summary Judgment."

## III. STANDARD OF REVIEW AND APPEALABILITY

{¶ 12} Appellate review of a summary judgment decision is de novo, governed by the standards of Civ.R. 56. *Vacha v. N. Ridgeville*, 136 Ohio St.3d 199, 2013-Ohio-3020, 992 N.E.2d 1126, ¶ 19. Summary judgment is appropriate if the party moving for summary judgment establishes that (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, which is adverse to the party against whom the motion is made. Civ.R. 56(C); *New Destiny Treatment Ctr., Inc. v. Wheeler*, 129 Ohio St.3d 39, 2011-Ohio-2266, 950 N.E.2d 157, ¶ 24; *Ohio Atty. Gen. v. Brock*, 4th Dist. Hocking No. 14CA19, 2015-Ohio-4173, ¶ 12.

{¶ 13} The moving party has the initial burden, by pointing to summary judgment evidence, of informing the trial court of the basis for the motion and identifying the parts of the record that demonstrate the absence of a genuine issue of material fact on the pertinent claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). Once the moving party meets this initial burden, the nonmoving party has the reciprocal burden under Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial. *Id.*

{¶ 14} Insofar as Newman objects on appeal to the uncertified nature of the exhibits attached to Martinez's motion for summary judgment, it appears that she did not raise this objection in her memoranda in opposition. Thus, Newman waived any error in the trial court's consideration of that evidence. *See, e.g., Carr v. State*, 4th Dist, Vinton No. 14CA697, 2015-Ohio-3895, ¶ 31; *State ex rel. Gilmour Realty, Inc. v. Mayfield Hts.*, 122 Ohio St.3d 260, 2009-Ohio-2871, 910 N.E.2d 455, ¶ 17.

{¶ 15} Regarding the appealability of the trial court's decision to deny Martinez's motion for summary judgment, "[a] party may appeal the denial of a motion for summary judgment after

a subsequent adverse final judgment.” See *Martin v. Jones*, 2015-Ohio-3168, \_\_ N.E.3d \_\_, ¶ 32 (4th Dist.), citing *Balson v. Dodds*, 62 Ohio St.2d 287, 405 N.E.2d 293 (1980), paragraph one of the syllabus (“A trial court’s denial of a motion for summary judgment is reviewable on appeal by the movant from a subsequent adverse final judgment”). “[W]hen a trial court denies a motion for summary judgment based upon the resolution of a purely legal question, an appellate court may review that decision regardless of the movant’s success at trial.” *American Family Ins. Co. v. Hoop*, 4th Dist. Adams No. 13CA983, 2014-Ohio-3773, ¶ 24; *Martin* at ¶ 33. Here, because the trial court’s denial of Martinez’s motion for summary judgment was based on a question of law, the trial court’s decision is properly before us in this appeal.

#### IV. LAW AND ANALYSIS

{¶ 16} In her sole assignment of error, Martinez asserts that the trial court erred by denying her motion for summary judgment. The trial court denied the motion because it determined that the jurisdictional-priority rule governed the case, and that Martinez could not prove that the Kentucky court had priority because the court could not determine whether and when the Kentucky court asserted personal jurisdiction over Newman. Consequently, the trial court determined that the jurisdiction issue rendered all of Martinez’s claims moot.

{¶ 17} "The jurisdictional-priority rule provides that as between state courts of concurrent jurisdiction, the tribunal whose power is first invoked acquires exclusive jurisdiction to adjudicate the whole issue and settle the rights of the parties." *State ex rel. Vanni v. McMonagle*, 137 Ohio St.3d 568, 2013-Ohio-5187, 2 N.E.3d 243, ¶ 8. The Supreme Court of Ohio has “recognized that the jurisdictional-priority rule can apply even when the causes of action and relief requested are not exactly the same, as long as the actions present part of the

same ‘whole issue.’ ” *State ex rel. Dunlap v. Sarko*, 135 Ohio St.3d 171, 2013-Ohio-67, 985 N.E.2d 450, ¶ 11.

{¶ 18} In the case sub judice, we believe that the trial court erred by holding that the jurisdictional-priority rule is dispositive of the case because “[t]he rule of jurisdictional priority applies only to ‘actions pending in different *Ohio courts* that have concurrent jurisdiction.’ ” (Emphasis added.) *Developers Diversified Realty v. Coventry Real Estate Fund II, L.L.C.*, 8th Dist. Cuyahoga No. 97231, 2012-Ohio-1056, ¶ 30, quoting *Nationwide Mut. Fire Ins. Co. v. Modroo*, 11th Dist. Geauga No. 2004-G-2557, 2004-Ohio-4697, ¶ 12. “ ‘[I]t does not apply when an action is pending in another state as in this case.’ ” *Id.*, quoting *Nationwide* at ¶ 12; *see also Long v. Grill*, 2003-Ohio-5665, 799 N.E.2d 642, ¶ 27 (10th Dist.) (“The ‘rule of priority of jurisdiction’ applies to actions pending in different Ohio courts that have concurrent jurisdiction; it does not apply when an action is pending in another state”).

{¶ 19} Instead, when a case that involves part or all of the same whole issue is pending in another state, an Ohio court has three options: (1) it can grant a stay of the Ohio proceeding pending the resolution of the earlier action outside Ohio; (2) it can proceed with the action in Ohio; or (3) it can dismiss the action under the doctrine of forum non conveniens. *Developers Diversified Realty* at ¶ 31; *Walp v. Walp*, 3d Dist. Auglaize No. 2-05-10, 2005-Ohio-4181, ¶ 11. Here, the trial court chose the first alternative by granting a stay of the underlying case pending the resolution of the Kentucky proceeding instituted by Martinez a day earlier than the Ohio case instituted by Newman.

{¶ 20} As the court explained in *Commercial Union Fire Ins. v. Wheeling Pittsburgh Corp.*, 106 Ohio App.3d 477, 486-487, 666 N.E.2d 571 (2d Dist. 1995), quoting 20 American



Jurisprudence 2d, Courts, Section 95, at 399 (1995) (footnotes omitted), this holding is consistent with various legal encyclopedias and treatises:

“The rule of priority does not apply, as a matter of duty, between courts of different states. As a matter of comity, however, a court of one state may stay a proceeding pending before it on the ground that a case involving the same subject matter and the same parties is pending in a court of another state. Also, in view of the full faith and credit clause of the Federal Constitution, once the proceeding on the same case has been finally adjudicated by the court of a sister state, res judicata effect must be given to it by the court of the forum state.”

{¶ 21} In the case at bar, the jurisdictional-priority rule did not apply and the trial court erred by holding that the jurisdictional-priority rule rendered Martinez's claims, which relied on full faith and credit and res judicata, to be moot. As the *Commercial Union* court observed, under the Full Faith and Credit Clause of the United States Constitution, once the case involving the same subject matter as the stayed Ohio case is finally adjudicated, it must be given the same res judicata effect that it would have in the other state. *Id.*

{¶ 22} The Full Faith and Credit Clause, Article IV, Section I of the United States Constitution, provides that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.” “The doctrine of full faith and credit requires that the state of Ohio give to these acts, records, and judicial proceedings of another state the same faith and credit ‘as they have by law or usage in the courts of such State \* \* \* from which they are taken.’” *Holzemer v. Urbanski*, 86 Ohio St.3d 129, 132, 712 N.E.2d 713 (1999). Therefore, we must give the same effect to the Kentucky court judgment that Kentucky would. *See, e.g., Holzemer* at 133 (“in our full faith and credit inquiry in this case, Ohio’s views on res judicata do not play a role. What matters is whether *Michigan* law would preclude Holzemer from raising her claims”).

{¶ 23} "[T]he Supreme Court of the United States has construed the Full Faith and Credit Clause to require other states to give judgments only as much effect as they have in the state where they are rendered; it does not require them to give more." *Meenach v. Gen. Motors Corp.*, 891 S.W.3d 398, 401 (Ky.1995), citing *New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 67 S.Ct. 903, 91 L.Ed. 1133 (1947). Initially, "[i]f the court of the State which rendered the judgment had no jurisdiction over the person or the subject matter, the jurisdictional infirmity is not saved by the Full Faith and Credit Clause." *Halvey* at 614.

{¶ 24} In the case sub judice, the trial court determined that insufficient evidence existed to show that Newman was served in the Kentucky case. A court must have personal jurisdiction to hear a matter affecting a specific person. *Nordike v. Nordike*, 231 S.W.3d 733, 737 (Ky.2007). Personal jurisdiction is secured by service of notice of the suit or voluntary appearance in the proceedings. *Burton & Burton Tower Co. v. Dowell*, 471 S.W.2d 708 (Ky.1971). We believe, however, that the trial court erred in its determination because Newman had conceded in her opposition to Martinez's supplemental motion to dismiss (or, in the alternative, to stay) that she had been served in November 2012 with notice of Martinez's case. Moreover, although Newman filed a motion to dismiss based on "improper venue/lack of jurisdiction," she did not specify that the Kentucky court lacked personal jurisdiction over her, and instead framed the issue as one of venue. Further, nothing indicates that Newman's appearances in the Kentucky case were anything but voluntary. In fact, Newman did not assert that the Kentucky court lacked personal jurisdiction over her in her memoranda in opposition to Martinez's motion for summary judgment, and she does not specifically argue now that that court lacked personal jurisdiction over her. Therefore, we believe that the trial court erred by relying

on this unargued, unsupported contention to deny the motion for summary judgment.

{¶ 25} Turning to the merits of Martinez’s claims, the preclusive effect of the prior judgment in this case requires consideration of Kentucky res judicata law. *See Holbrook v. Shelter Ins. Co.*, 186 Fed.Appx. 618, 620 (6th Cir.2006). “In Kentucky, three elements are required before res judicata acts to preclude a subsequent claim: ‘First, there must be identity of the parties. Second, there must be identity of the two causes of action. Third, the [prior] action must be decided upon the merits.’ ” *Id.* at 620-621, quoting *Newman v. Newman*, 451 S.W.2d 417, 419 (Ky.1970).

{¶ 26} Here, the first requirement was satisfied—the parties in the Ohio case are the same as the parties in the Kentucky case.

{¶ 27} Next, notwithstanding Newman’s conflation of the remaining requirements to argue that there was no judgment on the merits in the Kentucky court on her claims she raised in the Ohio case, she concedes that the Kentucky court entered a judgment on the merits on Martinez’s claims in that case, and the entry included in the summary judgment evidence establishes that. Thus, the third requirement of a judgment on the merits in the prior Kentucky action was satisfied.

{¶ 28} Therefore, the remaining question is whether there was an identity of the causes of action in the Kentucky and Ohio cases. “In Kentucky, this part of the test is construed broadly.” *Holbrook*, 186 Fed.Appx. at 621. Newman’s contention that the Kentucky judgment barred only the precise issue litigated in that case (Newman’s responsibility for the veterinary bill for one of Martinez’s horses) is incorrect because “ ‘res judicata applies not only to the points upon which the court was required by the parties to form an opinion and pronounce judgment, but to

every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.’ ” *Id.* quoting *Combs v. Prestonsburg Water Co.*, 84 S.W.2d 15, 18 (Ky.1935); *see also DLX, Inc. v. Kentucky*, 381 F.3d 511, 520 (6th Cir.2004) (“Kentucky state law applies res judicata to bar not just asserted claims, but all claims which should have been raised in prior litigation”).

{¶ 29} "Compulsory counterclaims are ‘claims which should have been raised in prior litigation.’ ” *Holbrook* at 621, quoting *DLX* at 520. Kentucky Rule of Civil Procedure 13.01 specifies that certain counterclaims are compulsory:

A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

{¶ 30} "Kentucky law thus precludes assertion of compulsory counterclaims for the first time in a subsequent action.” *Holbrook* at 621, citing *England v. Coffey*, 350 S.W.2d 163, 164 (Ky.1961). A comparison of the parties' complaints establishes that the claim Newman raised in her Ohio case arose from the same transaction as the claim Martinez raised in her Kentucky action—the verbal agreement concerning Newman’s boarding of Martinez’s two horses. Newman’s purported liability to Martinez for the veterinary bill and related expenses was part of the same issue as Newman’s claim under the parties’ agreement. Consequently, Newman should have raised her claim in the Kentucky action. In fact, Newman attaches to her appellate brief her motion to dismiss for “improper venue/lack of jurisdiction” in an even earlier case filed by Martinez against her in the Boone District Court in Kentucky in which Newman specified that she needed a continuance because she needed additional time to file a counterclaim through a

Kentucky attorney. (Aee Brief, Ex. F, p. 2) This indicates that Newman knew of the importance of filing a counterclaim to raise her claim in any Kentucky action that Martinez brought against her.

{¶ 31} Newman argues that she had no duty to file the counterclaim in Martinez's Kentucky action because, based on Ohio law, no counterclaim is required in a small claims proceeding, and, when the case was transferred, the Ohio case was already pending. However, Newman's claim is meritless because Kentucky law, not Ohio law, governs the applicability of res judicata here. Moreover, although the case was transferred to the regular docket of the Kentucky Court after the Ohio case had commenced, the Kentucky case commenced one day before the Ohio case. Newman cites no applicable law that the date the case was transferred to the regular docket should govern for the applicability of the Kentucky compulsory-counterclaim rule, and we are aware of none.

{¶ 32} Therefore, we believe that the trial court erred by denying Martinez's motion for summary judgment. Res judicata barred Newman from raising a claim that she should have raised as a compulsory counterclaim in Martinez's prior Kentucky action against her based on the parties' same agreement concerning the boarding of Martinez's two horses. Thus, we hereby sustain Martinez's sole assignment of error.

## V. CONCLUSION

{¶ 33} In summary, we believe that the trial court erred by denying Martinez's motion for summary judgment because res judicata barred Newman's claim. Having sustained Martinez's sole assignment of error, we hereby reverse the trial court's judgment and remand the cause for the entry of summary judgment in favor of Martinez.

JUDGMENT REVERSED AND CAUSE  
REMANDED FOR FURTHER  
PROCEEDINGS CONSISTENT WITH  
THIS OPINION.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS REVERSED and that the CAUSE IS REMANDED for further proceedings consistent with this opinion. Appellee shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Pike County Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

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

Harsha, J., Abele, J. & McFarland, J.: Concur in Judgment & Opinion

For the Court

BY: \_\_\_\_\_  
William H. Harsha, Judge

BY: \_\_\_\_\_  
Peter B. Abele, Judge

BY: \_\_\_\_\_  
Matthew W. McFarland, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.