

COURT OF APPEALS
HOLMES COUNTY, OHIO
FIFTH APPELLATE DISTRICT

KAREN M. BOEHNLEIN-PRATT

Plaintiff-Appellant

-VS-

VENTUS CORPORATION, ET AL.

Defendants-Appellees

: JUDGES:

: Hon. W. Scott Gwin, P.J.

: Hon. Sheila G. Farmer, J.

: Hon. Patricia A. Delaney, J.

: Case No. 14CA011

: O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Holmes County Court
of Common Pleas, Case No. 13CV112

JUDGMENT:

AFFIRMED

DATE OF JUDGMENT ENTRY:

July 10, 2015

APPEARANCES:

For Plaintiff-Appellant:

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CHRISTOPHER M. WHITE
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For Defendants-Appellees:

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Delaney, J.

{¶1} Plaintiff-appellant Karen M. Boehnlein-Pratt appeals from the November 3, 2014 Decision and Judgment Entry of the Holmes County Court of Common Pleas. Defendants-appellees are Thomas Pratt, Cynthia Pratt, and Ventus Corporation.

{¶2} This case is related to, but not consolidated with, *Boehnlein-Pratt v. Ventus Corporation et al.*, 5th Dist. Holmes No. 15CA002. The parties in the instant appeal are Karen M. Boehnlein-Pratt (appellant), her former sister-in-law Cynthia Pratt ("Cynthia"); her former brother-in-law Thomas Pratt ("Thomas") and the Ventus Corporation ("Ventus"). Cynthia and Thomas are president and vice-president, respectively, of Ventus. Timothy M. Pratt ("Timothy") is appellant's ex-husband and Thomas' brother. Timothy is a co-defendant in the underlying lawsuit and is the appellee in the related appeal, *Boehnlein-Pratt v. Ventus Corporation et al.*, 5th Dist. Holmes No. 15CA002.¹

{¶3} Both appeals arise from the same factual background and procedural history, *infra*. Both appeals raise the same assignments of error, issues, and arguments. We therefore issue the same opinion under each appropriate case number.

FACTS AND PROCEDURAL HISTORY

{¶4} The following facts are adduced from the record in the trial court, including the parties' Civ.R. 56 evidence.

{¶5} Appellant and Timothy were married in 1977. Timothy is a dentist and eventually established a practice located at 150 West Front Street, Killbuck, Ohio.

¹ The underlying suit initially included two additional defendants, Michael Pratt and "Baimtec," who are not parties to either appeal.

{¶6} Timothy's dental practice was interrupted at least twice when his license was suspended due to issues arising from an addiction to prescription and illegal drugs.

{¶7} Thomas and Cynthia reportedly created Ventus Corporation as an entity through which Thomas would consult with aerospace manufacturers in the United States and China. One such manufacturer is "Baimtec," described as a China-based manufacturer of aviation materials and titanium implants. In 2011, Timothy and Thomas discussed creation of a business producing dental implants with Timothy providing dental expertise.

The "Stock Purchase Agreement" and Related Agreements

{¶8} Timothy, Thomas, and Cynthia produced a Stock Purchase Agreement ("Agreement") effective January 1, 2012 attempting to effectuate the following in pertinent part:

VENTUS agrees to sell, and [Timothy] agrees to buy, one hundred (100) shares of Stock in VENTUS for Two Hundred Thousand Dollars (\$200,000) plus the assets of the Practice and the contemporaneous execution of the Lease Agreement contained herein. Ventus certifies that one hundred (100) shares of Stock represents twenty percent (20%) of the five hundred (500) shares of Stock authorized by Ventus Corporation. [Timothy] agrees to continue the operation of the Practice and to consult with Ventus for implantable medical/dental products.

{¶9} Attached to the Agreement is Exhibit A, "Items Included in Asset Transfer," which includes Timothy's dental and lab equipment, office equipment,

furniture, clinical supplies and instruments, records, files, and "contracts or agreements for the practice." Exhibit B is a "Lease Agreement" purporting to lease the premises of the dental practice at 150 West Front Street to Ventus for 20 years with an annual rental payment to the landlord, Timothy, of one dollar per year.

{¶10} Also relevant to the Agreement is a "Mutual Confidentiality Agreement" executed on September 21, 2011 by Ventus and Timothy preventing disclosure of information regarding the pending business transaction of creating dental implants.

{¶11} On January 13, 2012, Cynthia wrote a letter to Timothy stating he is in default of the Agreement and the Lease Agreement due to his "lack of action and cooperation" and the Agreement was therefore terminated. Only the Mutual Confidentiality Agreement remained in place.

The Divorce: Status of the Dental Practice

{¶12} On January 26, 2012, appellant filed a complaint for divorce against Timothy in the Holmes County Court of Common Pleas, Case Number 12 DR 006. During the discovery process, appellant received a copy of the Agreement attached to Timothy's first set of interrogatories and request for production of documents. This is the first time appellant became aware of the existence of the Agreement.

{¶13} In Timothy's pretrial statement in the divorce, he states in pertinent part:

* * * *

Article III. The Dental Practice and Dental Property.

Tim sold the dental practice to Ventus Corporation prior to the commencement of these proceedings. Given the problems that developed in 2012, [Timothy] was unable to make any payments or

develop this venture with Ventus Corporation which focuses on dental implants. It is [Timothy's] goal to reestablish his income and bring this agreement to a current status. However, at this point, the dental practice, because of this agreement, and the limited income, has no value.

* * * *

The business location of the dental practice is owned by [Timothy]. [Timothy] believes its value is approximately \$90,000. There is no mortgage indebtedness pertaining to this property. However, [Timothy] must retain this property to continue generating his dental income. He also must maintain this property unencumbered as he needs some collateral in order to borrow money at times to pay the debts assigned to him. Thus, it is [Timothy's] position that he be awarded the dental business property.

* * * *

{¶14} In appellant's Trial Brief in the divorce case, she states in pertinent part:

4. Wife's proposal for the Court's order.

* * * *

c. Dental Practice.

i. [Timothy] should be awarded the Dental Practice.

ii. [Timothy] should be required to pay all debt regarding the Dental Practice and hold [appellant] harmless thereon.

* * * *.

{¶15} Neither party sought appraisal of the dental practice during the divorce.

{¶16} The resulting divorce decree of May 24, 2013 states the following regarding the dental practice:

* * * *.

B. [Timothy's]Dental Practice.

[Timothy] transferred his dental practice to Ventus Corporation. * * * *.

Regarding [Timothy's] dental practice located in Killbuck, Ohio, the Court found that this is marital property. No appraisal was done on said property nor was there an appraisal done of the dental practice of [Timothy].

The Court finds that [Timothy] has committed gross financial misconduct in transferring the dental practice to Ventus Corporation. The Court is extremely skeptical of the legitimacy of this transfer and finds as a matter of law that the transfer is a mere sham to avoid this asset being included in the final divorce settlement.

The Court awards the dental practice and the Killbuck real estate to [Timothy] subject to the mortgage to Killbuck CIC. [Timothy] shall be solely responsible for said debt on the Killbuck property.

* * * *.

{¶17} No appeal was filed from the divorce decree.

The Ventus Litigation

{¶18} On December 19, 2013, appellant filed a complaint against Ventus, Timothy, Cynthia, and Thomas, along with Baimtec² and Michael Pratt,³ for conversion, fraud, and civil conspiracy related to the Agreement, alleging appellees conspired to wrongfully deprive appellant of her interest in the dental practice.

{¶19} During depositions in the instant case, appellant was questioned as to why she did not depose or otherwise pursue Thomas, Cynthia, and Ventus during the divorce. Appellant replied she chose not to pursue the matter at that time because their daughter was getting married and she "couldn't believe that they had initiated this. And I didn't want to do anything about it at that time." (Deposition, 36-37).

{¶20} Appellant filed a motion for partial summary judgment on her conversion claim. Timothy, Ventus, Thomas, and Cynthia filed motions⁴ for summary judgment as to the entire complaint. On November 3, 2014, the trial court granted the motion for summary judgment of Thomas, Cynthia, and Ventus and denied appellant's motion for partial summary judgment. On January 7, 2014, the trial court granted Timothy's motion for summary judgment and denied appellant's motion for partial summary judgment against Timothy. The Complaint was therefore dismissed as to Timothy, Ventus, Thomas, and Cynthia.

² Baimtec is a Chinese corporation and apparently a motion for default judgment against Baimtec remains pending.

³ Michael Pratt is the son of Thomas and Cynthia and was eventually dismissed from the suit.

⁴ Thomas, Cynthia, and Ventus are represented by counsel. Timothy is not represented but filed a pro se motion for summary judgment.

{¶21} In the instant case, appellant appeals from the trial court's Decision and Judgment Entry of November 3, 2014.⁵

{¶22} Appellant raises one assignment of error:⁶

ASSIGNMENT OF ERROR

{¶23} "I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO APPELLEES."

ANALYSIS

{¶24} Appellant argues the trial court erred in granting summary judgment on behalf of Thomas, Cynthia, and Ventus. We disagree.

{¶25} Motions for summary judgment are determined pursuant to Civ.R. 56(C), which states in pertinent part:

Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. * * * A summary judgment shall not be rendered unless it appears from such

⁵ In the related appeal, 5th Dist. Holmes No. 15CA002, appellant appeals the January 7, 2014 entry.

⁶ Appellant raises three issues within her sole assignment of error: "I. The trial court's finding that the Ventus letter terminated the terms of the stock purchase agreement describing the transfer of the marital property was against the manifest weight of the evidence; II. The trial court's finding that no assets were transferred pursuant to the stock purchase agreement was against the manifest weight of the evidence; and III. The trial court's decision to grant summary judgment to appellees on the basis that appellant sustained no damages as a result of the transfer of assets pursuant to the stock purchase agreement was against the manifest weight of the evidence."

evidence or stipulation and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

{¶26} The moving party bears the initial responsibility of informing the trial court of the basis for the motion and identifying those portions of the record before the trial court, which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). The nonmoving party then has a reciprocal burden of specificity and cannot rest on the allegations or denials in the pleadings, but must set forth “specific facts” by the means listed in Civ.R. 56(C) showing that a “triable issue of fact” exists. *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 115, 526 N.E.2d 798 (1988).

{¶27} Pursuant to the above rule, a trial court may not enter summary judgment if it appears a material fact is genuinely disputed. *Vahila v. Hall*, 77 Ohio St.3d 421, 429, 674 N.E.2d 1164 (1997), citing *Dresher*, *supra*, 75 Ohio St.3d at 280.

{¶28} Our standard of review is de novo, and as an appellate court, we must stand in the shoes of the trial court and review summary judgment on the same standard and evidence as the trial court. *Watson v. Chase Home Fin., L.L.C.*, 5th Dist. Richland No.13 CA 100, 2014-Ohio-4018, ¶ 15, citing *Smiddy v. The Wedding Party, Inc.*, 30 Ohio St.3d 35, 506 N.E.2d 212 (1987).

Issue Raised Below

{¶29} Appellant argues, in part, the trial court should not have granted summary judgment for appellees because the Agreement survived the termination letter of January 13, 2012. Appellees respond this argument was not raised in the trial court; therefore, appellant's arguments here premised upon survival of the Agreement have been waived. Upon our review of the parties' arguments for and against summary judgment, we find appellant inferred survival of the Agreement in her motion for partial summary judgment upon her conversion claim and in her opposition to appellees' motions for summary judgment. We therefore review appellant's claims on the merits.

Appellant's Claims

{¶30} Appellant argues the very existence of the Agreement and the accompanying Lease Agreement constitute a wrongful transfer of appellant's marital property. We disagree and find no evidence any such transfer occurred, and no evidence appellant was injured as a result thereof.

{¶31} Conversion is an exercise of dominion or control wrongfully exerted over property in denial of or under a claim inconsistent with the rights of another. *Joyce v. Gen. Motors Corp.*, 49 Ohio St.3d 93, 96, 551 N.E.2d 172 (1990); *Union Sav. Bank v. White Family Cos., Inc.*, 167 Ohio App.3d 51, 2006-Ohio-2629, 853 N.E.2d 1182, ¶ 26 (2nd Dist.). Typically, "[t]he elements of a conversion cause of action are (1) plaintiff's ownership or right to possession of the property at the time of the conversion; (2) defendant's conversion by a wrongful act or disposition of plaintiff's property rights; and (3) damages." *Dice v. White Family Cos.*, 173 Ohio App.3d 472, 2007-Ohio-5755, 878 N.E.2d 1105, ¶ 17 (2nd Dist.).

{¶32} We find appellees neither converted nor disposed of appellant's property rights in the dental practice. Moreover, appellant did not sustain any damages. Black's Law Dictionary (10th ed. 2014) defines *dominion* as "control; possession." Appellant insists the mere existence of the Agreement constitutes appellees' "wrongful exercise of dominion over" the dental practice, but the record is devoid of any evidence appellees wrongfully possessed or controlled any of those assets at any time. Thomas and Cynthia were not known to have ever entered the premises at the dental practice, much less transferred assets, and Timothy's activity at the practice consisted of his work as a dentist. Appellant has not demonstrated a triable issue of fact upon the conversion claim.

{¶33} Appellant's fraud claim must also fail. In *Cohen v. Lamko, Inc.*, 10 Ohio St.3d 167, 169, 462 N.E.2d 407 (1984), the Ohio Supreme Court set forth the elements of fraud as: (a) a representation or, where there is a duty to disclose, concealment of a fact; (b) which is material to the transaction at hand; (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred; (d) with the intent of misleading another into relying upon it; (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance. *Id.* at 169, quoting *Friedland v. Lipman*, 68 Ohio App.2d 255, 429 N.E.2d 456 (8th Dist.1980), paragraph one of the syllabus.

{¶34} In the instant case, we find no evidence of any false representation to appellant or any reliance by appellant upon a misrepresentation. She was not aware of the existence of the Agreement until the divorce proceedings, by which time the

Agreement was terminated and had no effect on her interest in marital property. Construing the facts in favor of appellant, we find the only "falsity" to be Timothy's assertion of the existence of the Agreement in the divorce in an attempt to keep the dental practice out of the settlement, a feat easily overcome by the trial court in the divorce decree. Timothy's actions in the divorce proceedings are not under review, however, and in the present context we find the trial court properly granted summary judgment upon appellant's fraud claim. No triable issue of fact exists as to a false representation to appellant, her reliance thereon, or any resulting injury.

{¶35} Appellant has also failed to support her claim of civil conspiracy. Even if we were to infer the Agreement was a concerted effort by all of the appellees to keep Timothy's dental practice out of the divorce, appellant has not established any injury or actual damages. The tort of civil conspiracy is "a malicious combination of two or more persons to injure another in person or property, in a way not competent for one alone, resulting in actual damages." *Kenty v. Transamerica Premium Ins. Co.*, 72 Ohio St.3d 415, 419, 650 N.E.2d 863 (1995), quoting *LeFort v. Century 21-Maitland Realty Co.*, 32 Ohio St.3d 121, 126, 512 N.E.2d 640, 645 (1987).

{¶36} Finally, appellees argue appellant failed to establish elements permitting her to pierce the corporate veil of Ventus. We note "[p]iercing the corporate veil is not a claim, it is a remedy encompassed within a claim. It is a doctrine wherein liability for an underlying tort may be imposed upon a particular individual." *RCO Internatl. Corp. v. Clevenger*, 180 Ohio App.3d 211, 214, 2008-Ohio-6823, 904 N.E.2d 941, ¶ 11 (10th Dist.), citing *Geier v. Natl. GG Industries, Inc.*, Lake App. No. 98-L-172, 1999 WL 1313640 (Dec. 23, 1999). Generally corporations are distinct legal entities, and

shareholders, officers and directors are not normally liable for the debts of the corporation. *Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos. Inc.* (1993), 67 Ohio St.3d 274, 287, 617 N.E.2d 1075. Based upon our denial of appellant's claims, the question of whether individual liability may be imposed is moot. Moreover, no evidence of injury or an unjust loss to appellant is evident in this record.

{¶37} Appellant's arguments are premised upon her insistence that a transfer of assets took place. We find no evidence of any such transfer in the record. It is undisputed that none of the assets listed in the Agreement's Exhibit A, "Items Included in Asset Transfer," ever changed hands between the parties. It is undisputed that Thomas did not comply with his obligations under the Agreement, no transfer took place, the Lease Agreement (Exhibit B) was never effectuated, and the Agreement itself was rendered a nullity. The trial court properly granted summary judgment for each appellee as to all of appellant's claims on the merits.

Res Judicata and Collateral Estoppel

{¶38} In the alternative, we agree with appellee that res judicata operates to bar appellant's claims in the instant case.

{¶39} Timothy produced the Agreement during the divorce proceeding and argued the dental practice had no value because of its purported "sale" to Ventus, Thomas, and Cynthia. The trial court found Timothy's subterfuge here to constitute gross financial misconduct, a "sham" transaction designed to avoid including the dental practice in the divorce settlement. The trial court included the dental practice in the divorce settlement and in the resulting equitable award to appellant: Timothy received

the practice and accompanying debt, and appellant received a lifetime award of spousal support.

{¶40} We find appellees' supplemental authority to be instructive. The essential issue in *Cornell v. Rudolph*, as here, is what effect a valid divorce decree has upon a party's subsequent attempt to relitigate the status of a marital asset. 3rd District Allen No. 1-10-89, 2011-Ohio-4322, ¶ 15. Following the rationale of *Cornell* in the instant case, the effect of the Agreement upon the dental practice "was a matter to be decided at the time of the divorce by the domestic relations court." *Id.*, citing R.C. 3105.171(B) ["stating that in divorce proceedings, the court shall determine what constitutes marital property, what constitutes separate property, and 'the court shall divide the marital and separate property equitably between the spouses' because the domestic relations court 'has jurisdiction over all property in which one or both spouses have an interest.'"]

{¶41} In *Cornell*, the appellate court questioned why the appellant failed to raise pertinent issues during the divorce because Civ.R. 75(B) allows joinder of parties in a divorce action who may have an interest in marital property to be divided. *Cornell*, supra, 2011-Ohio-4322 at ¶ 16, citing Civ.R. 75(B)(1) and *Maloney v. Maloney*, 160 Ohio App.3d 209, 2005-Ohio-1368, 826 N.E.2d 864 (2nd Dist.). In the instant case, we need not speculate: appellant testified she was fully aware of the implication appellees conspired to deprive her of her interest in the dental practice but deliberately chose not to pursue Thomas, Cynthia, and Ventus. With regard to Timothy's actions, appellant's position in the divorce was she did not want the dental practice. Unlike *Cornell*, in which the divorce decree was silent as to the specific property at issue, here the divorce court

considered the effect of the Agreement, found it to be a sham effort to exclude the dental practice from the settlement, and made the respective awards accordingly.

{¶42} As in *Cornell*, we find the present litigation to be barred by res judicata and collateral estoppel. *Id.* at ¶ 17 ["Not only does R.C. 3105.171(l) prohibit a court from modifying a prior property division, but (appellant's) effort to do so is barred by res judicata, i.e. collateral estoppel * * *"].

{¶43} Res judicata is defined as "[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–Ohio–331, 653 N.E.2d 226, syllabus. "The doctrine of *res judicata* involves both claim preclusion (historically called estoppel by judgment in Ohio) and issue preclusion (traditionally known as collateral estoppel)." *Id.* at 381. Claim preclusion "prevents a party from litigating a cause of action after a prior court has rendered a final judgment on the merits of that cause as to that party." *Krahn v. Kinney*, 43 Ohio St.3d 103, 107, 538 N.E.2d 1058 (1989), citing *Norwood v. McDonald*, 142 Ohio St. 299, 52 N.E.2d 67 (1943), paragraph one of the syllabus. Issue preclusion "precludes the relitigation of an issue that has been 'actually and necessarily litigated and determined in a prior action.'" *Krahn*, at 107, quoting *Goodson v. McDonough Power Equipment, Inc.*, 2 Ohio St.3d 193, 195, 443 N.E.2d 978 (1983).

{¶44} We find appellant had a full and fair opportunity to litigate her claims against Timothy, Thomas, Cynthia, and Ventus during the divorce proceedings and is therefore precluded from relitigating those issues in the instant case. *Cornell*, 2011-Ohio-4322 at ¶ 19.

CONCLUSION

{¶45} The trial court properly granted summary judgment in favor of appellees Timothy, Thomas, Cynthia, and Ventus and properly denied partial summary judgment in favor of appellant. Appellant's sole assignment of error is overruled and the judgment of the Holmes County Court of Common Pleas is affirmed.

By: Delaney, J. and

Gwin, P.J.

Farmer, J., concur.