

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

The Chef's Garden, Inc., et al.

Court of Appeals No. E-10-048

Appellants

Trial Court No. 2010-CV-0178

v.

Jeff Reep, etc., et al.

DECISION AND JUDGMENT

Appellees

Decided: July 8, 2011

* * * * *

David S. Pennington and Robert E. Moore, for appellants.

Brian J. Halligan and Valerie A. Lang, for appellees.

* * * * *

HANDWORK, J.

{¶ 1} Appellants, Chef's Garden, Inc., Robert L. Jones, The Research, Education and Charitable Association for the Benefit of Chef and Farmer, Culinary Vegetable Institute, Inc., and Le Jardin D'Eden, LLC., appeal from a judgment by the Erie County Court of Common Pleas, granting a motion to dismiss filed by appellees, Jeff Reep and

Ashland Comfort Control, Inc. For the reasons that follow, we reverse the judgment of the trial court.

{¶ 2} Chef's Garden is a vegetable farm that leases a commercial building from Culinary Vegetable Institute, Inc. On or about July 30, 2002, Chef's Garden, by and through its Secretary, Robert L. Jones, contracted with Ashland Comfort Control ("Ashland"), by and through its President and Secretary, Jeff Reep, to provide HVAC equipment and services at the Culinary Vegetable Institute, Inc. building.

{¶ 3} After work on the contract began, Chef's Garden became dissatisfied with Ashland Comfort's services and, in December 2002, filed a complaint against Ashland for breach of contract and other claims. On September 14, 2009, the matter went to a jury trial.

{¶ 4} Halfway through the second day of the trial, a problem occurred during Robert L. Jones's cross-examination. According to Ashland, at this point Chef's Garden realized that "although it had standing to prosecute the lawsuit[,] it nevertheless could not prove its claimed damages[, because] Chef's Garden did not own the improved real estate where the work was performed."

{¶ 5} Appellants assert that during Jones's testimony, "it became clear that a full and fair adjudication would require joining third parties who were not before the court as parties. These parties were primarily third-party beneficiaries of the contract."

{¶ 6} The evidence is undisputed in this case that Culinary Vegetable Institute is a separate business that, like Chef's Garden, is owned by the Jones family. Also

undisputed is that Culinary Vegetable Institute rents real estate for its building from Le Jardin D'Eden LLC. Le Jardin D'Eden LLC, is yet another Jones family-owned business.

{¶ 7} Veggie U., also a Jones family-owned business, exists, according to appellants, "for the purposes of research and education regarding the benefits and preparation of vegetables." Appellants state in their appellate brief that Veggie U. conducts certain of its business in the Culinary Vegetable Institute building.

{¶ 8} As indicated in the transcript of the original action, the trial court was initially going to dismiss the action sua sponte and without prejudice, by way of a journal entry.¹ The transcript makes clear that it was the plaintiff's intent to dismiss the matter without prejudice and to preserve the right to re-file the matter in the future. Thereafter, counsel for the defense argued that because the dismissal was a "unilateral act" – presumably because the defendant did not agree to the dismissal – it should occur by "notice."

{¶ 9} Plaintiff did not object to this change, and subsequently filed a notice of voluntary dismissal "pursuant to Civil Rule 41(A)(1)(a)," and "without prejudice." Thereafter, the plaintiff filed a motion seeking the trial court's permission to voluntarily dismiss the action without prejudice. In a judgment entry dated September 30, 2009, the trial court granted the plaintiff's written motion.

{¶ 10} On March 3, 2010, the plaintiff's action was re-filed in the instant case, with new plaintiffs named in the complaint. On April 30, 2010, appellees filed a motion

¹Pursuant to this court's order of March 23, 2011, only pages 136, 189, 200 and 201 of the trial transcript remain as part of the record in this case.

to dismiss the action on the ground that it was barred by res judicata. The trial court granted the motion by judgment entry dated July 29, 2010. As part of its analysis, the trial found that the notice of voluntary dismissal that was filed by Chef's Garden, Inc. in the earlier action "necessarily divest[ed] [the trial court] of further jurisdiction [in that action] and effectively dismiss[ed] the case on the merits, with prejudice as to future action."

{¶ 11} Appellants timely filed their notice of appeal, asserting the following assignments of error:

{¶ 12} 1. "The trial court erred when it deemed a dismissal for the purpose of joining necessary parties a dismissal on the merits, with prejudice."

{¶ 13} 2. "The trial court erred when it determined that the claims of plaintiffs who were not a party to the original case (Case No. 04-CV-762), were barred in the re-filed case (Case No. 2010-CV-178) by the doctrine of res judicata."

{¶ 14} 3. "The trial court erred when it failed to consider, or rule upon, the equitable doctrine of invited error."

{¶ 15} Appellants argue in their first assignment of error that the trial court erred in deeming the dismissal in the earlier action a dismissal on the merits, with prejudice. We agree.

{¶ 16} Civ.R. 41 pertinently provides:

{¶ 17} "(A) Voluntary dismissal: effect thereof.

{¶ 18} "(1) By plaintiff; by stipulation. Subject to the provisions of Civ.R. 23(E), Civ.R. 23.1, and Civ.R. 66, a plaintiff, without order of court, may dismiss all claims asserted by that plaintiff against a defendant by doing either of the following:

{¶ 19} "(a) filing a notice of dismissal at any time before the commencement of trial * * *;

{¶ 20} "(b) filing a stipulation of dismissal signed by all parties who have appeared in the action.

{¶ 21} "Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits of any claim that the plaintiff has once dismissed in any court."

{¶ 22} Thus, Civ.R. 41(A) gives a plaintiff authority to dismiss an action without a court order under just two circumstances: (1) where the plaintiff files notice of dismissal before the commencement of trial; or (2) where the plaintiff files a stipulation of dismissal that has been signed by all of the parties who have appeared in the action. Civ.R. 41(A)(1). Inasmuch as the defendant in the original action clearly did not enter into a stipulation of dismissal, Civ.R. 41(A)(1)(b) is inapplicable to the instant analysis. Accordingly, any dismissal by the plaintiff, alone, would have to have occurred by notice.

{¶ 23} As indicated by appellees, the filing of a notice of dismissal, pursuant to Civ.R. 41(A)(1)(a), results in an immediate dismissal of the action, which divests the trial

court in which the notice is filed of further jurisdiction to enter an order or render judgment. *Otworth v. Dept. of Mental Health* (Oct. 13, 1992), 10th Dist. No. 92AP-555.

{¶ 24} Here, however, Chef's Garden did not file its notice of voluntary dismissal before the commencement of trial. As indicated above, the notice was not filed until the second day of trial, and was filed in response to answers that were given by appellant Robert L. Jones on cross-examination.

{¶ 25} Because the notice was not filed before the commencement of trial, the notice was not filed in conformity with the express provisions of Civ.R. 41(A)(1)(a).

{¶ 26} We conclude that because Civ.R. 41(A)(1)(a) does not provide for, or otherwise contemplate, a plaintiff's voluntarily dismissing an action by notice after the commencement of trial, the purported notice of voluntary dismissal pursuant to Civ.R. 41(A)(1)(a) is a nullity and, as such, did not divest the trial court of jurisdiction. Cf. *Borchers v. Winzeler Excavating Co.* (April 10, 1992), 2d Dist. No. 13297 (holding that because Civ.R. 41(A)(1) does not provide for, or otherwise contemplate, the voluntary dismissal, without prejudice, of less than a plaintiff's entire cause of action, the plaintiffs' purported voluntary dismissal, without prejudice, of their third claim for relief was a nullity).

{¶ 27} Civ.R. 41(A)(2) relevantly provides:

{¶ 28} "By order of court. Except as provided in division (A)(1) of this rule, a claim shall not be dismissed at the plaintiff's instance except upon the order of court and upon such terms and conditions as the court deems proper. * * * Unless otherwise specified in the order, a dismissal under division (A)(2) of this rule is without prejudice."

{¶ 29} Ohio law is well settled that a voluntary dismissal without prejudice pursuant to Civ.R. 41(A)(2) is not an adjudication on the merits. *Siket v. L.K. Comstock & Co., Inc.* (Sep. 30, 1987), 11th Dist. No. 12-080.

{¶ 30} Because the originally filed notice of voluntary dismissal was a nullity, we conclude that the later filed motion to dismiss, without prejudice, that was filed by the plaintiff in the original action and the judgment entry granting that motion are the documents that ultimately terminated that action.

{¶ 31} The trial court expressly stated in its September 30, 2009 judgment entry granting the motion that the matter was dismissed without prejudice, and that the plaintiff retained the right to re-file at a later date.

{¶ 32} This dismissal, which was, in fact, pursuant to Civ.R. 41(A)(2), was not an adjudication on the merits. See *Siket*, supra.

{¶ 33} For all of the foregoing reasons, appellants' first assignment of error is found well-taken. Based upon this conclusion, we find appellants' second and third assignments to be rendered moot. Accordingly, the judgment of the Erie County Court of Common Pleas is reversed. Appellees are ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.