[Cite as *Schafer v. Soderberg & Brenner, L.L.C.*, 2013-Ohio-3957.]

[Reconsideration granted on October 11, 2013. Please see 2013-Ohio-4528.]

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

Edmund M. Schafer	Court of Appeals No. OT-12-039
Appellant	Trial Court No. 09 CV 734 H
v.	
Soderberg & Brenner, LLC	**DECISION AND JUDGMENT**
Appellee	Decided: September 13, 2013

* * * * *

Richard M. Kerger and Khary L. Hanible, for appellant.

Sarah A. McHugh and William T. Maloney, for appellee.

* * * * *

SINGER, P.J.

{¶ 1} Appellant, Edmund M. Schafer, appeals from the December 3, 2012 judgment of the Ottawa County Court of Common Pleas granting appellee, Soderberg & Brenner, LLC (hereinafter "S&B"), summary judgment and dismissing appellant's complaint. For the reasons which follow, we reverse.

{¶ 2} Schafer is a former owner and employee of Soderberg & Schafer, LLC, an accounting firm (hereinafter "S&S"). In March 2008, Schafer served notice of his intent to retire from S&S no later than August 30, 2008, and cash out his interest in the company pursuant to a buy-sell agreement. Schafer and his partners, David Soderberg and Joseph Brenner, negotiated for a time but, by August 22, 2008, Schafer became dissatisfied with the negotiations and filed suit against S&S alleging breach of fiduciary duties and sought a declaratory judgment of the rights and duties under the buy-sell agreement. He later amended his complaint to add claims for breach of contract and breach of a "no-competition" agreement. Schafer alleged that in October 2008, Soderberg and Brenner held a meeting with Schafer to terminate his employment in November 2008. Schafer agreed to withdraw rather than be fired.

{¶ 3} After Schafer filed his first suit, Soderberg and Brenner formed a new limited liability company, S&B, allegedly to avoid the buyout obligation. Brenner attested that S&B was formed after S&S had dissolved on November 5, 2008, and S&S was in the process of winding up its affairs. S&B began operation on January 1, 2009. In December 2008, S&S discontinued its operation.

{¶ 4} After creating this new entity, Schafer asserts that S&B paid its expenses from S&S funds, used the S&S facilities, equipment, address, and telephone number, continued to service the same clients, and retained the same employees with the exception of Schafer and his wife. S&B also used allegedly used the financial history of S&S to obtain a line of credit.

{¶ 5} Schafer filed a second amended complaint on December 9, 2008, asserting an additional claim of breach of the S&S buy-sell agreement, sought declaratory judgment that the "no-competition" agreement was invalid, and sought damages as a result of the breach of the buy-sell agreement.

{¶ 6} In that action, the trial court determined that Soderberg and Brenner were not personally liable to Schafer as a matter of law. A jury proceeded to find that S&S owed Schafer $540,000. The jury also held that the buy-sell agreement did not require that a retiring partner must sign a "no-competition" agreement, Schafer did not breach the buy-sell agreement nor his duty of good faith and fair dealing, Schafer did not make performance under the buy-sell agreement impracticable, Schafer met the conditions under the buy-sell agreement for retirement, and Schafer was harmed by the breach of the buy-sell agreement by S&S. Because Schafer was deemed retired, the trial court held S&S had been dissolved and ordered Soderberg and Brenner to wind up the affairs of the company. The trial court denied the counterclaims of Soderberg and Brenner for declaratory judgment as to whether the buy-sell agreement was enforceable, whether Schafer had breached the buy-sell agreement, and whether the "no-competition" agreement was still in force.

{¶ 7} Schafer filed an appeal from the trial court's judgment asserting that the trial court erred by finding Soderberg & Brenner were not personally liable to Schafer. Upon review of the issue, we affirmed the trial court. *Schafer v. Soderberg & Schafer, C.P.A.s, L.L.C.*, 196 Ohio App.3d 458, 2011-Ohio-4687, 964 N.E.2d 24 (6th Dist.). S&B also

appealed from the trial court's decision. We found that the trial court did not abuse its discretion by refusing to declare the buy-sell agreement was unenforceable; by finding that Schafer had not violated the buy-sell agreement by giving notice of his intent to retire before he actually attained the age of retirement; and that Schafer's conduct did not amount to an anticipatory repudiation of the buy-sell agreement. We also found that the trial court did not err by submitting to the jury the issue of whether Schafer had to execute a new "no-competition" agreement before he could retire. *Id.*

{¶ 8} Meanwhile, Schafer filed a second lawsuit on December 8, 2009, which is the subject of this appeal, against S&B alleging that S&B was created in 2008 solely to defraud Schafer of his buy-out rights. Schafer sought to hold S&B liable as a successor entity. S&B filed two counterclaims against Schafer for declaratory judgment seeking a declaration that the company is not liable for the obligations of S&S and the company is not liable to Schafer.

{¶ 9} Both S&B and Schafer moved for summary judgment. First, S&B argued the theory of successor liability is not applicable in this case because Schafer can present no evidence that S&B is a successor company to S&S. Brenner attested that S&B is not a successor to S&S because S&B has a different ownership structure, its own Employer Identification Number, and its own operating agreement. He further attested that S&B did not acquire any substantial portion of the assets of S&S and operates as a separate and distinct legal entity. Second, S&B argued the issues raised are barred by the doctrine of res judicata because they were or could have been resolved in the first litigation.

{¶ 10} Schafer argued that he provided evidence of at least one check from D & G Focht that was made out to S&S, but was deposited in the account of S&B. The exhibit attached to the summary judgment motion, however, was merely a photocopy of a check and posting information which was not properly authenticated. Schafer also argues that Brenner's attestation that S&S funds were used to pay litigation fees evidences the use of S&S funds by S&B. Schafer asserted that he has been unable to examine all of the financial information necessary to prove his claim of fraud. Schafer further pointed to evidence from the transcripts of the first lawsuit, which were not made part of the record in this suit.

{¶ 11} The trial court granted S&B's motion for summary judgment and dismissed Schafer's complaint solely on res judicata grounds. The trial court found the facts which support Schafer's claim of fraud were either before the court in the first litigation or could have been presented in the first trial and Schafer did not present sufficient evidence of S&B's fraudulent actions to raise a genuine issue of fact in this case. S&B voluntarily dismissed its counterclaims. Schafer then sought an appeal to this court asserting the following assignments of error:

1. The Court erred in finding that res judicata precluded recovery in this case.

2. In granting summary judgment, the Court failed to rule upon the claim asserted by plaintiff-appellant -- successor liability.

{¶ 12} The appellate court reviews the grant of summary judgment under a de novo standard of review. *Doe v. Shaffer*, 90 Ohio St.3d 388, 390, 738 N.E.2d 1243 (2000), citing *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Applying the requirements of Civ.R. 56(C), we uphold summary judgment when it is clear "(1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) 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, who is entitled to have the evidence construed most strongly in his favor." *Harless v. Willis Day Warehousing Co., Inc.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

{¶ 13} In his first assignment of error, Schafer argues that the trial court erred as a matter of law when it held that the issues raised in this case are barred by the doctrine of res judicata.

{¶ 14} The doctrine of res judicata is comprised of both claim preclusion and issue preclusion. *Holzemer v. Urbanski*, 86 Ohio St.3d 129, 133, 712 N.E.2d 713 (1999). Both aspects of res judicata require the parties to the subsequent action to be identical to or in privity with the parties of the former action. *State ex rel. Nickoli v. Erie MetroParks*, 124 Ohio St.3d 449, 2010-Ohio-606, 923 N.E.2d 588, ¶ 22, and *Goodson v. McDonough Power Equip., Inc.*, 2 Ohio St.3d 193, 443 N.E.2d 978 (1983), paragraphs one and two of the syllabus. Privity is established by succeeding to the interest of a party, participation in the previous action or having right to control that proceeding, or having a "mutuality of

interest, including an identity of desired result." *O'Nesti v. DeBartolo Realty Corp.*, 113 Ohio St.3d 59, 2007-Ohio-1102, 862 N.E.2d 803, ¶ 9, citing *Brown v. Dayton*, 89 Ohio St.3d 245, 248, 730 N.E.2d 958 (2000), and *Goodson*. However, a party in the subsequent action who would not have been bound by the prior judgment is not entitled to assert a claim of res judicata. *O'Nesti.*

{¶ 15} In the case before us, appellant argues res judicata is not applicable because the issue in the first litigation (whether S&S was obligated to pay Schafer pursuant to the buy-sell agreement) is not identical to the issue in the second action (whether S&B should also be held liable for S&S's obligation). Secondly, Schafer argues the trial court erred by failing to rule on his motion for summary judgment and find successor liability existed as a matter of law.

{¶ 16} Ironically, the determination of the privity issue for res judicata purposes cannot be resolved without first resolving the central issue in this case, whether S&B should be liable for S&S's obligations because S&B was fraudulently created solely to avoid S&S's obligations. If S&B should be held liable, it is bound by the prior judgment against S&S. If S&B should not be held liable, res judicata does not apply because S&B and S&S are not in privity with each other. Therefore, we find the trial court erred by finding the doctrine of res judicata barred the action without determining whether S&B was liable for S&S's obligations. Schafer's first assignment of error is well-taken.

{¶ 17} In his second assignment of error, Schafer argues the trial court erred by failing to render summary judgment in his favor. We disagree. The burden of

establishing that summary judgment is an appropriate remedy always remains on the moving party. *Vahila v. Hall*, 77 Ohio St.3d 421, 429-429, 674 N.E.2d 1164 (1997). Furthermore, the moving party "must specifically delineate the basis for which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond." *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus. If the moving party bears the burden of production and proof at trial, that party "bears the burden of affirmatively demonstrating that, with respect to every essential issue of each count in the complaint, there is no genuine issue of fact." *Id*. at 115, citing *Massaro v. Vernitron Corp*., 559 F.Supp. 1068, 1073 (D.C.Mass.1983).

{¶ 18} Therefore, to obtain summary judgment in this case, Schafer was required to come forward with sufficient evidence to establish each and every element of his claim of fraud and S&B's liability as a successor corporation. Schafer did not attach any evidence to his motion. The photocopy of the check was not properly authenticated. *Doe v. Robinson*, 6th Dist. Lucas No. L-10-1032, 2010-Ohio-5894, ¶ 65, citing *Watts v. Watts*, 6th Dist. Lucas No. L-93-200, 1994 Ohio App. LEXIS 1120 (Mar. 18, 1994) (failure to authenticate evidence makes it devoid of evidentiary value). Furthermore, depositional evidence not properly filed in the record can only be considered if it is attached to a proper affidavit or was authenticated during a deposition. *Caravella v. West-WHI Columbus Northwest Partners*, 10th Dist. Franklin No. 05AP-499, 2005-Ohio-6762, ¶ 11 and *Waggoner v. Ohio Cent. R.R., Inc*., S.D. No. 2:06-CV-250, 2007 WL 4224217, *2

(Nov. 27, 2007), *modified on other grounds by Waggoner v. Ohio Cent. R.R., Inc.*, S.D. No. 2:06-CV-250, 2007 WL 4615788 (Dec. 31, 2007).

{¶ 19} Finally, Schafer asserted that he had not yet been able to examine all of the financial information to locate other examples of fraudulent actions. Without evidence, appellant's motion for summary judgment was premature. If he was unable to respond to S&B's motion for summary judgment because there had not been adequate time for discovery, Schafer should have sought relief under Civ.R. 56(F) or he has forfeited his right to challenge the adequacy of discovery upon appeal. *Baker v. Oregon City School Dist. Bd. of Ed.*, 6th Dist. Lucas No. L-11-1109, 2012-Ohio-972, ¶ 8.

{¶ 20} We conclude that Schafer did not support his motion for summary judgment with sufficient evidence to establish that he was entitled to judgment as a matter of law. Schafer's second assignment of error is not well-taken.

{¶ 21} Having found that the trial court did commit error in part which was prejudicial to appellant, the judgment of the Ottawa County Court of Common Pleas granting summary judgment to S&B on the basis that the claims were barred by the doctrine of res judicata is reversed. This case is remanded to the trial court for further proceedings consistent with this decision. Appellee, S&B, is ordered to pay the court 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.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE