[Cite as *Ardary v. Stepien*, 2004-Ohio-630.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 82950

SCOTT ARDARY, ET AL.,	:	
	:	
	:	JOURNAL ENTRY
PLAINTIFFS-APPELLANTS	:	
	:	AND
v.	:	
	:	OPINION
BRIAN STEPIEN, ET AL.	:	
	:	
	:	
DEFENDANTS-APPELLEES	:	

DATE OF ANNOUNCEMENT OF DECISION:	FEBRUARY 12, 2004
CHARACTER OF PROCEEDING:	Civil appeal from Common Pleas Court, Case No. CV-462849.
JUDGMENT:	REVERSED AND REMANDED.
DATE OF JOURNALIZATION:	

APPEARANCES:

For Plaintiffs-Appellants:	Allen A. Kacenjar Edmund G. Tallos Allen A. Kacenjar Co., L.P.A. Suite 400 Brookview Center 5241 Broadview Road Cleveland, OH 44131
For Defendants-Appellees: Realty One and Cheryl Wiegand	Jon F. Deegan J. Terence Burke 6000 Rockside Woods Blvd. Cleveland, OH 44131-2350

[CONTINUED]

Brian and Cindy Stepien: Jon P. Yormick
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TIMOTHY E. McMONAGLE, J.

{¶1} Plaintiffs-appellants, Scott and Laura Ardary, appeal from the trial court judgment granting the motion to dismiss of defendants-appellees, Realty One, Cheryl Wiegand, and Brian and Cindy Stepien. For the reasons that follow, we reverse and remand.

{¶2} The record reflects that in February 2002, appellants filed suit in common pleas court, alleging that the Stepiens had fraudulently misrepresented the condition of the septic tank and system of the home they sold to appellants in December 2000. The Stepiens answered, generally denying the allegations of the complaint and asserting numerous affirmative defenses, including res judicata.

{¶3} In a subsequent amended complaint, appellants also named Realty One and Cheryl Wiegand, the listing real estate broker and agent, as defendants. Prior to answering the complaint, Realty One and Wiegand filed a motion to dismiss pursuant to Civ.R. 12(B).[1] The Stepiens subsequently joined in the motion.

{¶4} In their motion, appellees argued that appellants' complaint was barred by res judicata and, therefore, failed to

[1]We note that only Realty One filed the motion to dismiss. After appellants filed their brief in opposition, however, Realty One *and Cheryl Wiegand* filed a brief in reply requesting that the trial court dismiss the matter. Thus, we will assume for purposes of this opinion that Wiegand joined in the motion, even though she never filed her own motion to dismiss or any notice indicating that she joined in Realty One's motion.

state a claim upon which relief could be granted. See Civ.R. 12(B)(6). Appellees argued that on May 22, 2001, appellants had filed suit, pro se, in Parma Municipal Court against the Stepiens and Realty One and their claim in that case "involve[d] the same transaction and common nucleus of operative facts as alleged by the plaintiffs [in the Common Pleas Court case]: the purchase and sale of the subject property and the same alleged defects in that property." According to appellees, the final judgment rendered in that case precluded appellants' subsequent action.

{¶5} Appellees attached a copy of the complaint filed by appellants in Parma Municipal Court to their motion to dismiss. Appellants' handwritten complaint stated:

{¶6} "We purchased our home in Jan. 2001, and *the location of the septic tank was never disclosed.* About 1-1/2 months after we moved in we had major sewage back-up in the garage & laundry room. Toilet tissue is coming up through the drains & we cannot use the washing room much at all. *I called a septic company to come & clean it and when they arrived neither I or them were able to find the septic.* I then called my realty agent to ask her to contact the previous owners & their agent *to find the location.* The Realty One agent, Cheryl Wiggins (sic), said she was done with the case, gave my agent the customer's phone number & hung up. My agent then called Mr. Stepien & he got rude w/her and hung the phone up. *I only wanted to know where the septic was so I could find it and can get no cooperation.* By law they are supposed to provide the location and it is buried somewhere in the yard. I called the

Board of Health and they came out and *could not find the septic*. I now have a tremendous amount of sewage & I can not clean the tank because it is buried, my garage floor is damaged & the problem is getting worse. I will provide pictures, bills & estimates of excavating the yard *to find the septic*." (Emphasis added.) In their complaint, appellants estimated the excavation cost at $2500.00.

{¶7} Appellees also attached to their motion to dismiss copies of several summons issued by the Parma Municipal Court to appellees in which the court advised them of appellants' claim "in connection with defendants' refusal to disclose location of septic tank" and setting trial for June 21, 2001. Finally, appellees attached a copy of a journal entry from the Parma Municipal Court dated June 29, 2001, which stated:

{¶8} "Plaintiffs failed to appear. All Defendants appeared. Matter is dismissed with prejudice for failure to prosecute claim."

{¶9} None of the exhibits attached to appellees' motion were certified or authenticated in any manner.

{¶10} Appellants filed a brief in opposition to appellees' motion, in which they argued that their fraud claim was not barred by res judicata because it did not accrue until after the action in Parma Municipal Court had been concluded. In his affidavit attached to the brief in opposition, Scott Ardary averred:

{¶11} "***

{¶12} "2. Affiant states that he caused the filing of a Small Claims Complaint in the Parma Municipal Court on or about the 21st day of June, 2001.

{¶13} "3. Affiant states that the sole reason for the filing of said complaint was to compel the Defendants to disclose the location of the septic tank. Out of sheer frustration that he could not find its location and was getting no cooperation from Defendant sellers or Defendant Realtor with reference to the resolution of that issue.

{¶14} "4. Affiant further states that after the date the Parma Municipal Court ruled on the Small Claims Complaint, i.e., subsequent to January (sic) 29, 2001, that he learned that the Defendants had problems with their septic system and as a result their cause of action against the various Defendants then arose. ***"

{¶15} The trial court subsequently granted appellees' motion to dismiss. In its journal entry, the trial court stated:

{¶16} "Defendants' motions to dismiss are granted. The above-captioned matter is dismissed with prejudice on the grounds that it is barred by the doctrine of res judicata. Final."

{¶17} Appellants timely appealed. In their single assignment of error, appellants contend that the trial court erred in dismissing their case on the grounds that it was barred by res judicata. We agree.

{¶18} First, as Ohio courts have repeatedly recognized, res judicata is not a defense which can be raised by a motion to

dismiss pursuant to Civ.R. 12(B) because that defense must be proved with evidence outside the pleadings. *State ex rel. Freeman v. Morris* (1991), 62 Ohio St.3d 107, 109. Pursuant to *Freeman*, "the court may not dismiss a case, via a motion to dismiss, on res judicata grounds." *Shaper v. Tracy, Tax Commr.* (1995), 73 Ohio St.3d 1211, 1212.

{¶19} Civ.R. 12(B) provides that res judicata may be raised in a pre-answer motion for summary judgment. In such an instance, however, the evidence a court may consider in connection with such a motion is strictly limited to "such matters outside the pleadings as are specifically enumerated in Rule 56." Civ.R. 56(C) enumerates this evidence as "pleading[s], depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact." Here, the copies of summons issued by the Parma Municipal Court, appellants' complaint filed there and the journal entry of the Municipal Court, all submitted without a properly framed affidavit, were none of these. *Freeman,* supra; *Molten Metal Equip. v. Metaullics System Co.* (2000), Cuyahoga App. No. 76407. Thus, appellees' motion to dismiss was not proper for conversion into a motion for summary judgment. *Freeman,* supra, citing *Biskupich v. Westbay Manor Nursing Home* (1986), 33 Ohio App.3d 220.

{¶20} Moreover, if a trial court converts a motion to dismiss into a motion for summary judgment, the trial court must give notice to the parties and reasonable opportunity to present Civ.R. 56 evidence. *City Mgmt. Sys. v. Blakely*, Summit App. No. 21162,

2003-Ohio-524, citing *Cooper v. Highland Co. Bd. of Commrs.*, Highland App. No. 01CA15, 2002-Ohio-2353. The record demonstrates that the trial court in this case did not give the parties any such notice.

{¶21} Accordingly, the trial court erred in granting appellees' motion to dismiss on the grounds that appellants' claim was barred by res judicata.

{¶22} Moreover, any judgment in appellees' favor would have been in error even if appellees had properly presented their res judicata defense in a motion for summary judgment.

{¶23} In *Grava v. Parkman Twp.* (1995), 73 Ohio St.3d 379, the Supreme Court of Ohio held that "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." The Supreme Court has defined "transaction" as a "common nucleus of operative facts."

{¶24} Thus, for res judicata to apply under this theory, appellees' actions of allegedly misrepresenting the condition of the septic system must arise from the same "transaction or occurrence" that led to appellants' first suit. As appellants' complaint makes clear, however, the "occurrence" or "transaction" which triggered the first lawsuit was appellees' refusal to disclose the location of the septic tank to appellants upon their request. Appellees' alleged fraud in misrepresenting the condition of the septic system to appellants months earlier during the sale of their home was action independent of their refusal to disclose

the location of the septic tank and does not arise from "a common nucleus of operative facts" with those events relating to their refusal to disclose the location of the septic tank.

{¶25} Moreover, the only evidence in the record regarding when appellants discovered appellees' alleged fraud (Scott Ardary's affidavit) indicates that appellants did not discover that the septic problems were known to appellees, but not revealed to appellants, until after the small claims complaint was filed and dismissed. Therefore, appellants' cause of action for fraud had not accrued when they filed the first lawsuit. See, e.g., *Palm Beach Co. v. Dun & Bradstreet* (1995), 106 Ohio App.3d 167, 171 ("[A] cause of action for fraud accrues when the fraud is, or should have been, discovered."); *Katz v. Guyuron* (2000), Cuyahoga App. No. 76342 (same). It is axiomatic that res judicata cannot be used to bar claims in a subsequent suit that had not even accrued at the time of the initial lawsuit.[2]

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[2]Any argument that appellants *should have* discovered the alleged fraud when their septic tank backed up is without merit. First, any issue regarding when appellants should have discovered appellees' alleged fraud is obviously an issue of fact that would render summary judgment in favor of appellees improper. Moreover, the mere fact that appellants' septic system backed up after they purchased the home was not sufficient to put them on notice that appellees had fraudulently misrepresented the condition of the septic system when they sold their home to appellants. In response to the question, "If owner knows of any current leaks, backups or other material problems with the sewer system servicing the property, please describe:" on the Residential Property Disclosure Form, appellees wrote, "Unsure of septic condition, age; last cleaning Summer, 1998." Even septic tanks in good condition backup for various reasons. Thus, simply because appellees were allegedly "unsure" of the condition of the septic tank and it subsequently did, indeed, backup, would not immediately put appellants on notice of fraud. Here, the alleged fraud came to light only when the same contractors who had worked on the septic

{¶26} Appellees cite *Bernard Group v. New Hope Alternative Therapy Research*, 153 Ohio App.3d 393, 2003-Ohio-4195, as support for their position that appellants' fraud claim is barred by res judicata. In *Bernard Group*, this court reversed the trial court's grant of a default judgment in favor of the plaintiff. We held that the plaintiff-landlord's common pleas court action for breach of a lease agreement for failure to pay rent and breach of contract was barred by a dismissal with prejudice for failure to prosecute entered by the municipal court in an earlier case filed by the plaintiff. Accordingly, we held that the trial court had erred in granting a default judgment to the plaintiff.

{¶27} *Bernard Group* is easily distinguishable from this case, however. In that case, the claims presented by the landlord-plaintiff in both the municipal court case and the common pleas court case were both premised upon the tenant's failure to pay rent. Therefore, although the plaintiff only asserted a cause of action for forcible entry and detainer in its municipal court case, but asserted claims for breach of the lease agreement and breach of contract in the common pleas court, the same "transaction" or "occurrence" led to both actions. Accordingly, the landlord's claims of breach of lease agreement and breach of contract

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system when appellees owned the home were serendipitously called to the home by appellants and commented that they had worked on the septic system for the prior owners. At that point, it became apparent to appellants that appellees were not at all "unsure" about the condition of the septic system when they completed the Residential Property Disclosure Form.

subsequently raised in the common pleas court were appropriately barred by res judicata.

{¶28} Here, however, as noted earlier, appellants' first lawsuit was not based upon the same "transaction" or "occurrence" as its second lawsuit. Contrary to appellees' argument, the septic tank backup did not create a "common nucleus of operative facts" that led to both lawsuits. Rather, appellees' refusal to disclose the location of the septic tank was the "transaction" that led to appellants' first lawsuit; appellees' alleged fraudulent misrepresentation was the "transaction" or "occurrence" that gave rise to appellants' second suit.

{¶29} Finally, we note that res judicata is not a shield to protect the blameworthy. "The doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time, but rather a rule of fundamental and substantial justice, or public policy and of private peace. The doctrine may be said to adhere in legal systems as a rule of justice. Hence, the position has been taken that the doctrine of res judicata is to be applied in particular situations as fairness and justice require, and that it is not to be applied so rigidly as to defeat the ends of justice or so as to work an injustice." *Grava*, (Douglas, J., dissenting), supra, quoting 46 American Jurisprudence 2d (1994) 786-787, Judgments, Section 522.

{¶30} Whether appellees actually misrepresented the condition of the septic system is for a jury to determine. The doctrine of res judicata cannot be used to protect them in this case.

Reversed and remanded.

SEAN C. GALLAGHER, J., CONCURS IN JUDGMENT ONLY.

MICHAEL J. CORRIGAN, P.J., CONCURS WITH SEPARATE CONCURRING OPINION.

MICHAEL J. CORRIGAN, P.J., concurring.

{¶31} I concur with the majority to the extent that the trial court, pursuant to appellees' motion to dismiss, improperly dismissed appellants' complaint based on the doctrine of res judicata, as such affirmative defense may not be raised by a Civ.R. 12(B) motion to dismiss. Because the proper vehicle to dismiss appellants' complaint based on res judicata is by way of a Civ.R. 56 motion for summary judgment, I concur that the matter be reversed and remanded.

{¶32} However, because the majority unnecessarily addresses the merits of appellants' fraud claim, in response, I respectfully disagree that such claim would not have been barred by res judicata. Appellants' fraud claim raised in the second action arises from the same common nucleus of operative facts as in the first action. Because appellants knew or should have known when they filed their first action that the alleged defects in the septic tank could have been the result of appellees' alleged failure to disclose such defects, appellants' fraud claim in the second action would be barred by res judicata.

This cause is remanded for further proceedings consistent with the opinion herein.

It is, therefore, ordered that appellants recover from appellees costs herein.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).