

[Cite as *Chahda v. Youseff*, 2004-Ohio-635.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 82505

JUAN E. CHAHDA	:	
	:	ACCELERATED DOCKET
Plaintiff-Appellant	:	
	:	JOURNAL ENTRY
-vs-	:	
	:	AND
HALIM YOUSEFF, ET AL.	:	
	:	OPINION
Defendants-Appellees	:	

Date of Announcement of Decision:	FEBRUARY 12, 2004
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Character of Proceeding:	Civil appeal from Court of Common Pleas Case No. 409669
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Judgment:	Reversed and remanded.
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Date of Journalization:

Appearances:

For Plaintiff-Appellant:	FRANK J. GROH-WARGO, ESQ. 2 Berea Commons, Suite 215 P.O. Box 1059 Berea, Ohio 44017
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For Defendants-Appellees:	THOMAS G. LOBE, ESQ. 1995 Huntington Building 925 Euclid Avenue Cleveland, Ohio 44115-1407
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For J. H. & H. Management, Inc.: SCOTT H. SCHARF, ESQ.  
Skylight Office Tower  
1660 West Second St., #270  
Cleveland, Ohio 44113-1498

JAMES J. SWEENEY, J.

{¶1} This appeal is before the Court on the accelerated docket pursuant to App.R. 11.1 and Loc. App.R. 11.1.

{¶2} Plaintiff-appellant Juan E. Chahda (“Juan”) appeals from the dismissal of his complaint against defendants-appellees Halim (“Halim”) and Lynne Youseff (collectively referred to as “Youseff”) by the Cuyahoga County Court of Common Pleas. For the following reasons, we reverse and remand. The record before us reveals the following: Juan and Halim were two of the initial incorporators and shareholders in a company called J.H. & H. Management, Inc. (“J.H. & H.”). In November 1990, Halim agreed to sell his shares in J.H. & H. to Juan. Juan made ten payments totaling \$26,852, and one additional payment in the amount of \$15,000 toward the purchase of these shares.

{¶3} On June 14, 2000, Juan filed a complaint against the Youseffs for breach of contract in the Cuyahoga County Court of Common Pleas. Plaintiff’s cause of action alleged that the Youseffs failed to reimburse him in the principal amount of \$41,852 for the sale of shares and monies paid to them.

{¶4} On January 10, 2001, the Youseffs filed a motion to dismiss on the grounds that the Ohio court lacked jurisdiction over the subject matter of the complaint. Specifically, the Youseffs alleged that the claims asserted by Juan were under the exclusive jurisdiction of the U.S. Bankruptcy Court.

{¶5} On May 16, 2001, the trial court granted the motion to dismiss. Juan now appeals from that judgment and raises two assignments of error for our review.

{¶6} "I. The lower court erred as a matter of law by failing to apply the correct standard of review when granting the defendant's motion to dismiss plaintiff's complaint based upon allegations and assertions contained outside the pleadings, and which motion was not properly supported by affidavits, exhibits or attachments as required."

{¶7} when ruling on a motion to dismiss pursuant to Civ.R.12(B)(6), the trial court must presume all factual allegations contained in the complaint to be true and make all reasonable inferences in favor of the non-moving party. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192. Dismissal, pursuant to Civ.R. 12(B)(6), is appropriate only where it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim, which would entitle him to relief. *York v. Ohio State Hwy. Patrol* (1991), 60 Ohio St.3d 143, 144.

{¶8} In resolving a Civ.R. 12(B)(6) motion, a court is confined to the allegations contained in the complaint and, as an appellate court, we must independently review the complaint to determine if dismissal was appropriate. *McGlone v. Grimshaw* (1993), 86 Ohio App.3d 279, 285. A motion under Civ.R. 12(B)(6) must be judged on the face of the complaint alone. *State ex rel. Findlay Publishing Co. v. Schroder* (1996), 76 Ohio St.3d 580, 581.

{¶9} Here, the Youseffs' motion to dismiss relies on information that is not contained in the complaint. Specifically, they allege that Juan's claims are barred

by a prior bankruptcy proceeding and that the claims asserted by him are the exclusive property of the bankruptcy estate. The Youseffs did not attach any documentation from the bankruptcy court to support their motion.

{¶10} Civ.R. 12(B) provides, in pertinent part:

{¶11} "When a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleading and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. Provided however, that the court shall consider only such matters outside the pleadings as are specifically enumerated in Rule 56. All parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56."

{¶12} Here, the bankruptcy proceeding is a matter "outside the pleadings." Accordingly, the trial court was obligated to convert the motion to dismiss into a motion for summary judgment. The "shall" language in the text of Civ.R. 12(B) is mandatory. A court can only go beyond the averments in the complaint if it converts the motion to dismiss into one for summary judgment. *Petrey v. Simon* (1983), 4 Ohio St.3d 154, 156. Our review of the record does not indicate that the court converted the motion to dismiss to a motion for summary judgment. Nor does the judgment entry itself indicate such a conversion. Because the record does not reflect a conversion, the trial court was confined to the averments of the complaint, which were sufficient to state a claim. Indeed, in his brief in opposition to the motion to dismiss, Juan denies having been named a party in any bankruptcy proceeding.

Furthermore, when a court converts a motion to dismiss into one for

summary judgment, it must notify all parties. *Federated Dept. Stores, Inc. v. Lindley* (1987), 30 Ohio St.3d 135, 137; *Petrey*, supra at 156. A trial court commits reversible error when it fails to notify the parties that it is converting a 12(B)(6) motion into one for summary judgment. *State ex rel. Boggs v. Springfield Local School Dist. Bd. of Edn.* (1995), 72 Ohio St.3d 94. Accordingly, even if the trial court had converted the Youseffs' motion to dismiss into one for summary judgment, it failed to give notice as mandated by the Civil Rules.

{¶13} Assignment of Error I is sustained.

{¶14} The remaining assignment is moot by virtue of our determination of the first assignment of error and we need not consider it. See App.R. 12(A)(1)(c).

{¶15} Judgment reversed and remanded.

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FRANK D. CELEBREZZE, JR., P.J., and DIANE KARPINSKI, J., concur.

It is ordered that appellant recover of appellees his costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas 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.

JAMES J. SWEENEY  
JUDGE

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. 112, Section 2(A)(1).