[Cite as *Tri-State Group v. Metcalf & Eddy of Ohio, Inc.*, 2009-Ohio-3902.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92660

TRI STATE GROUP, INC.

PLAINTIFF-APPELLANT

vs.

METCALF & EDDY OF OHIO, INC.

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-674246

BEFORE: Dyke, J., Cooney, A.J., and Rocco, J.

RELEASED: August 6, 2009

JOURNALIZED:

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ANN DYKE, J.:

{¶ 1} Tri-State Group, Inc. ("Tri-State") appeals from the order of the trial court that dismissed its complaint against Metcalf & Eddy of Ohio, Inc. ("M & E"), pursuant to the jurisdictional-priority rule. For the reasons set forth below, we affirm.

{¶ 2} The record reveals that Tri-State filed suit against M & E in the Cuyahoga County Court of Common Pleas on December 4, 2007. Within this action, Tri-State alleged that it entered into an engineering and consulting services contract with M & E in connection with the Ohio Environmental Protection Agency approved closure plan of Tri-State's Fly Ash Facility, and that M & E breached this agreement. M & E filed counterclaims in this action. The record further reveals that Tri-State voluntarily dismissed its claims on October 20, 2008, and M & E dismissed its counterclaims.

{¶ 3} On October 20, 2008, M & E filed a complaint[1] against Tri-State in the Belmont County Court of Common Pleas. M & E set forth claims for declaratory judgment of provisions of the April 2004 engineering and consulting agreement; breach of this agreement; abuse of process; and unjust enrichment. The record further reflects that Tri-State was served with process in the Belmont County matter on the day the action was filed.

{¶ 4} On October 23, 2008, Tri-State refiled the instant matter against M & E in the Cuyahoga County Court of Common Pleas, and asserted claims for breach of the April 2004 engineering and consulting agreement, and negligent

[1]The record indicates that M & E's Belmont action was actually filed several hours before the first Tri-State action was voluntarily dismissed. Nonetheless, the effect of this dismissal is that the action is treated as if it had never been commenced. *Zimmie v. Zimmie* (1984), 11 Ohio St.3d 94, 95, 464 N.E.2d 142.

misrepresentation regarding its knowledge and expertise. M & E was served in this matter on October 31, 2008.

{¶ 5} M & E subsequently moved to dismiss the refiled Cuyahoga County action for lack of subject matter jurisdiction pursuant to the jurisdictional-priority rule. The trial court later concluded that this motion was well-taken and in a written opinion noted that both matters contained identical parties; both matters set forth claims for declaratory judgment of the April 2004 agreement; Tri-State's claim for breach of contract is a compulsory counterclaim in the Belmont County action; and a ruling "in Cuyahoga on the breach of contract claim would no doubt 'affect or interfere with' the Belmont court's resolution of the declaratory judgment."

{¶ 6} Tri-State now appeals asserting a sole assignment of error.

{¶ 7} Within its assignment of error, Tri-State maintains that because its re-filed action in Cuyahoga County sets forth claims for breach of contract and negligent misrepresentation, it sets forth claims that are separate and distinct from those set forth by M & E in the Belmont action, and jurisdiction in Cuyahoga County will not affect or interfere with the resolution of the issues in Belmont County.

{¶ 8} Pursuant to the jurisdictional-priority rule, "'[a]s between [state] courts of concurrent jurisdiction, the tribunal whose power is first invoked by the institution of prior proceedings acquires jurisdiction, to the exclusion of all other tribunals, to adjudicate upon the whole issue and to settle the rights of the parties.'" *State ex rel. Racing Guild of Ohio v. Morgan* (1985), 17 Ohio St.3d 54, 56, 476 N.E.2d 1060, quoting *State ex rel. Phillips v. Polcar* (1977), 50 Ohio St.2d 279, 364 N.E.2d 33, syllabus.

{¶ 9} In general, the jurisdictional-priority rule applies when the causes of action are the same in both cases, and if the first case does not involve the same cause of action or the same parties as the second case, the first case will not prevent the second. *State ex rel. Shimko v. McMonagle,* 92 Ohio St.3d 426, 429, 2001-Ohio-301, 751 N.E.2d 472. Nonetheless, the rule may apply even if the causes of actions and requested relief are not identical. *State ex rel. Sellers v. Gerken*, 72 Ohio St.3d 115, 117, 1995-Ohio-247, 647 N.E.2d 807. That is, if the claims in both cases are such that each of the actions "comprises part of the 'whole issue' that is within the exclusive jurisdiction of the court whose power is legally first invoked[,]" the jurisdictional-priority rule may be applicable.

{¶ 10} The determination of whether two cases involve the "whole issue" or matter requires a two-step analysis:

{¶ 11} "First, there must be cases pending in two different courts of concurrent jurisdiction involving substantially the same parties. Second, the ruling of the court subsequently acquiring jurisdiction may affect or interfere with the resolution of the issues before the court where suit was originally commenced." *Michaels Bldg. Co. v. Cardinal Fed. S. & L. Bank* (1988), 54 Ohio App.3d 180, 183, 561 N.E.2d 1015.

{¶ 12} Applying the foregoing, we note that in this matter, the parties are identical. As to whether the ruling of the court subsequently acquiring jurisdiction (Cuyahoga) may interfere with the resolution of the earlier action (Belmont), we note that this element has been satisfied where the later court is asked to determine what is essentially a compulsory counterclaim that is to be raised in the earlier suit. See

Langaa v. Pauer, Geauga App. No. 2001-G-2405, 2002-Ohio-5603. The *Langaa* Court stated:

{¶ 13} "Here, the claims asserted by appellant in her Geauga County complaint are certainly related to and arose out of the same occurrence as Pauer's complaint in Cuyahoga County and appellant's counterclaim and cross-claim in the same case. In fact, the claims asserted by appellant are very similar to or restate those that are pending in Cuyahoga County. As a result, even if there were no jurisdictional questions, appellant's complaint could have been dismissed on the grounds that the asserted claims could have and should have been raised in the Cuyahoga County action."

{¶ 14} Similarly, in this matter, the claims asserted in Tri-State's Cuyahoga action are related to and arise out of the same occurrence and transaction as M & E's earlier filed Belmont action and is a compulsory counterclaim to the claims asserted by M & E. Civ.R. 13. Accordingly, the ruling of the court subsequently acquiring jurisdiction (Cuyahoga) may interfere with the resolution of the earlier action (Belmont).

{¶ 15} The trial court properly applied the jurisdictional-priority rule and properly dismissed this matter. The assignment of error is without merit.

Judgment affirmed.

It is ordered that appellee recover from appellant its 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.

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ANN DYKE, JUDGE

COLLEEN CONWAY COONEY, A.J., and
KENNETH A. ROCCO, J., CONCUR