[Cite as *Kerr v. Lakewood Shore Towers, Inc.*, 2010-Ohio-265.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93462

STEVE KERR

PLAINTIFF-APPELLANT

vs.

LAKEWOOD SHORE TOWERS, INC., ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-671936

BEFORE: Celebrezze, J., Blackmon, P.J., and Stewart, J.

RELEASED: January 28, 2010

JOURNALIZED:

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} This cause came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1, the trial court records, and briefs of counsel.

{¶ 2} Plaintiff-appellant, Steven Kerr ("appellant"), appeals the trial court's grant of summary judgment in favor of defendants-appellees, Lake Shore Towers, Inc.[1], 609 Walnut Limited Partnership, Showe Management Corp., and Maric Ball (collectively referred to as "appellees"). Based on our review of the record and pertinent case law, we reverse and remand.

{¶ 3} Appellant was a tenant at Lake Shore Towers, located at 12506 Edgewater Drive in Lakewood, which was owned and operated by appellees. Appellant was informed by appellee Maric Ball ("Ball"), the apartment's community manager, that he would need to remove his personal belongings from the building's storage room because the room was going to be cleaned out.[2] According to Ball's deposition testimony, she told appellant to be at the storage room on September 26, 2002 at 1:00 p.m.

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[1] The correct name of defendant-appellee is Lake Shore Towers Apartments, as registered with the office of the Ohio Secretary of State.

[2] Both parties acknowledge that the storage room was not readily accessible to tenants because it was kept locked and only certain employees of Lake Shore Towers had keys.

{¶ 4} When appellant arrived at the storage room, he was told where his possessions were located and was permitted to sort through the items on the storage room's floor. While appellant was sorting through his belongings, a six-foot table that was leaning against one of the room's walls fell on top of him, knocking him to the ground. Appellant suffered personal injuries as a result of this incident.

{¶ 5} In 2003, appellee Lake Shore Towers ("Lake Shore") filed an action against appellant in the Lakewood Municipal Court for forcible entry and detainer, breach of the lease agreement, and back rent ("the 2003 action"). Appellant filed a counterclaim and amended counterclaim alleging violation of the Landlord Tenant Act, fraudulent inducement, and retaliatory eviction. Since appellant's counterclaim brought the cause of action beyond the jurisdictional limitation of the municipal court, the matter was transferred to the Cuyahoga County common pleas court. That case was ultimately resolved in favor of Lake Shore, and the decision of the trial court was upheld on appeal.[3]

{¶ 6} On September 29, 2008, appellant filed a complaint in the common pleas court against appellees. The first count of appellant's complaint alleged that appellees "negligently created a dangerous condition in the apartment's storage area and/or negligently maintained the storage room," and thus, they

[3] *Showe Management Corp. v. Kerr*, Cuyahoga App. No. 83406, 2004-Ohio-2557.

should be held liable for his injuries. The second count of appellant's complaint alleged that appellees violated certain provisions of the Landlord Tenant Act.[4]

{¶ 7} Appellees filed a motion for summary judgment arguing that appellant's claims were compulsory counterclaims to the 2003 action, and thus, they were barred by the doctrine of res judicata. Appellees also argued that the Landlord Tenant Act was inapplicable to appellant's case because the storage room where he was injured was not a common area. Appellees then argued that appellant was a licensee of the premises, and thus, they could only be held liable for willful and wanton conduct. Appellees argued that, even assuming appellant was a business invitee when he was in the storage room, appellant was unable to prove negligence as a matter of law, and thus, they were entitled to summary judgment.[5] Appellees finally argued that the table was an open and obvious condition, and thus, they had no duty to protect appellant from it.

{¶ 8} The trial court granted summary judgment in favor of appellees, and this appeal followed. In his sole assignment of error, appellant argues that the trial court committed reversible error when it granted summary judgment in favor of appellees.

Law and Analysis

[4]Ohio's Landlord Tenant Act is located in Revised Code Chapter 5321.

[5] Appellees specifically argued that the table was not an unreasonably dangerous condition, as appellant would be required to demonstrate in order to sustain a negligence claim as a business invitee.

{¶ 9} "Civ.R. 56(C) specifically provides that before summary judgment may be granted, it must be determined that: (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc*. (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

{¶ 10} It is well established that the party seeking summary judgment bears the burden of demonstrating that no issues of material fact exist for trial. *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 330, 106 S.Ct. 2548, 91 L.Ed.2d 265; *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115, 526 N.E.2d 798. In *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107, 662 N.E.2d 264, the Ohio Supreme Court modified and clarified the summary judgment standard as applied in *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095. Under *Dresher*, "the moving party bears the initial responsibility of informing the trial court of the basis for the motion, *and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim.*" (Emphasis in original.) Id. at 296. The nonmoving party has a reciprocal burden of specificity and cannot rest on mere allegations or denials in the pleadings. Id. at 293. The nonmoving party must

set forth "specific facts" by the means listed in Civ.R. 56(C) showing a genuine issue for trial exists. Id.

{¶ 11} This court reviews the lower court's grant of summary judgment de novo. *Brown v. Scioto County Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 622 N.E.2d 1153. An appellate court reviewing the grant of summary judgment must follow the standards set forth in Civ.R. 56(C). "The reviewing court evaluates the record * * * in a light most favorable to the nonmoving party. * * * [T]he motion must be overruled if reasonable minds could find for the party opposing the motion." *Saunders v. McFaul* (1990), 71 Ohio App.3d 46, 50, 593 N.E.2d 24.

Res Judicata

{¶ 12} Appellees first argued in their motion for summary judgment that appellant's claims were barred by the doctrine of res judicata. The facts on this particular issue indisputably show the following: (1) appellant's personal injury claim arose on September 26, 2002, (2) appellees filed a suit in the municipal court against appellant in April 2003 for forcible entry and detainer and back rent, (3) after that suit was concluded, appellant filed this suit in the common pleas court alleging that appellees negligently maintained the storage room and violated the Landlord Tenant Act, and (4) both parties admitted at the trial court level and in this appeal that the Landlord Tenant Act is inapplicable to this case because appellant's injuries did not occur in a common area. Although there is no genuine issue of material fact with regard to this particular issue, we must now determine whether appellees were entitled to judgment as a matter of law.

{¶ 13} In support of their argument that appellant's claims are barred by res judicata, appellees rely on *Sherman v. Pearson* (1996) 110 Ohio App.3d 70, 673 N.E.2d 643; *Haney v. Roberts* (1998), 130 Ohio App.3d 293, 720 N.E.2d 101; and *Carter v. Russo Realtors* (Mar. 7, 2000), Franklin App. No. 99AP-585. Appellees specifically contend that appellant's personal injury claim was a compulsory counterclaim to the 2003 action and because he did not raise the claim in that action, his cause of action is now barred by the doctrine of res judicata.

{¶ 14} Appellant argues that Civ.R. 13(A), pertaining to compulsory counterclaims, is inapplicable to forcible entry and detainer actions. As such, appellant argues that he was not required to assert his personal injury claims in the 2003 action and his cause of action is not barred. This argument is misguided.

{¶ 15} In *Haney*, supra, the court considered a similar issue. The appellant in *Haney* argued that Civ.R. 13(A) was inapplicable to forcible entry and detainer actions where the landlord was only seeking restitution of the premises and had no separate claim for damages. *Haney*, supra, at 295. When ruling on this issue, the court in *Haney* held that Civ.R. 13(A) does not apply to forcible entry and detainer actions that are not joined by any other action. Id. at 300. This is not the case, however, when the landowner couples the forcible entry and detainer action with an action for back rent or damages. Id. Once the forcible

entry and detainer action is coupled with an action for back rent or damages, Civ.R. 13(A) is applicable and all compulsory counterclaims must be asserted.

{¶ 16} While we recognize that Civ.R. 13(A) is applicable to some forcible entry and detainer actions, we must now determine whether the claim asserted by appellant was a compulsory counterclaim to the 2003 action so that his claims are barred by res judicata. As previously indicated, appellees relied on *Sherman*, supra, to support their contention that appellant's claims are, in fact, barred. While *Sherman* stands for the proposition that claims under the Landlord Tenant Act are compulsory counterclaims in suits for forcible entry and detainer and back rent, it is not dispositive in this case.

{¶ 17} In *Sherman*, the appellant was injured when she fell on a set of stairs in a common area of her apartment building. *Sherman*, supra, at 72. After this injury, her landlord filed an action against her for forcible entry and detainer and back rent. Id. After the action for forcible entry and detainer was resolved, the tenant filed a personal injury suit against the landlord. Id. The tenant argued that the stairs were negligently maintained, and thus, the landlord had violated the Landlord Tenant Act. See id. The trial court held that the tenant's personal injury action was a compulsory counterclaim to the landlord's forcible entry and detainer action and that the tenant's failure to assert the claim in the prior action resulted in it being barred by the doctrine of res judicata. Id.

{¶ 18} The appellate court in *Sherman* upheld the trial court's dismissal of the tenant's claims. The court employed the logical relation test, analyzed infra,

which is the test to be utilized to determine if two claims are compulsory counterclaims. Id. at 72-73. The court noted that the Landlord Tenant Act imposes specific statutory duties upon a landlord, and the violation of these duties would constitute negligence per se. Id. at 74. The court held that "[b]oth actions involved rights and duties arising from the rental agreement. Accordingly, the logical-relation test for a compulsory counterclaim, rather than merely a permissive counterclaim, is satisfied." Id. at 75, citing McCormac, Ohio Civil Rules Practice (2 Ed. 1988) 199, Section 8.04.

{¶ 19} Appellant's complaint included two causes of action — common law negligence and violation of the Landlord Tenant Act. While the same two causes of action were alleged by the tenant in *Sherman*, that case is distinguishable for one significant reason. Unlike *Sherman*, both parties in this case recognized, on appeal and at the lower level, that appellant's injuries did not occur in a common area, and thus, the Landlord Tenant Act is inapplicable. In fact, appellees stated in their motion for summary judgment that "although [appellant] was a tenant of Lake Shore Towers at the time of the accident, the accident occurred in a storage room of the apartment building that was not a common area for tenants but was maintained under lock and key. * * * Since the accident occurred in a location that was not a common area accessible to tenants, the Landlord-Tenant Act does not apply to [appellant's] claims herein." In his reply to the motion for summary judgment, appellant argued that appellees' "argument that res judicata bars Mr. Kerr's claims must fail because [appellees]

have argued that the Landlord-Tenant Act does not [apply] to this case. Mr. Kerr agrees."

{¶ 20} Had appellant asserted a compulsory counterclaim in the 2003 action arguing that appellees negligently maintained the storage room in violation of the Landlord Tenant Act, that cause of action would have been necessarily dismissed since both parties admit that the Landlord Tenant Act is inapplicable to appellant's claims for personal injury. While *Sherman* held that claims based upon the Landlord Tenant Act are compulsory counterclaims to forcible entry and detainer actions, this holding was premised upon the fact that both causes of action would have arisen from the landlord-tenant relationship. Any viable claim appellant has against appellees is not based upon the landlord-tenant relationship, but upon appellees' alleged duty to maintain the storage room in a certain condition for all occupants. Since appellant's only viable cause of action does not stem from the Landlord Tenant Act or from the lease agreement between himself and appellees, *Sherman* is inapplicable, and appellant's claims are not barred by the doctrine of res judicata.

{¶ 21} Analyzing appellant's cause of action under the test set forth for compulsory counterclaims warrants the same result. Compulsory counterclaims are governed by Civ.R. 13(A), which provides that "[a] pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its

adjudication the presence of third parties of whom the court cannot acquire jurisdiction." The purpose of this rule is to foster judicial economy and avoid multiplicity of actions. See *Rettig Enterprises, Inc. v. Koehler*, 68 Ohio St.3d 274, 278, 1994-Ohio-127, 626 N.E.2d 99.

{¶ 22} A two-part test is utilized to determine if Civ.R. 13(A) is applicable. Id. at 277, quoting *Geauga Truck & Implement Co. v. Juskiewicz* (1984), 9 Ohio St.3d 12, 14, 457 N.E.2d 827, 829. First, we must ask whether the subsequently filed claim existed at the time of the previous action. Id. If it did exist, we must determine whether the two claims arise out of the same transaction or occurrence. Id. If both prongs of this test are satisfied, the claim is barred by Civ.R. 13(A) and the doctrine of res judicata. See id.

{¶ 23} In this case, it is undisputed that appellant's personal injury claim existed when the forcible entry and detainer action was filed against him. More specifically, the event in question occurred on September 26, 2002, and the forcible entry and detainer action was not filed until April 8, 2003. Because appellant's personal injury action existed when the forcible entry and detainer was filed, we must now determine whether the two claims arise out of the same transaction or occurrence for the purposes of implicating Civ.R. 13(A).

{¶ 24} Ohio utilizes the logical relation test when determining whether claims arise out of the same transaction or occurrence. Id. at 278. "Under this test, '[a] compulsory counterclaim is one which "is logically related to the opposing party's claim where separate trials on each of their respective claims

would involve a substantial duplication of effort and time by the parties and the courts."'" Id., quoting Staff Notes (1970) to Civ.R. 13, quoting *Great Lakes Rubber Corp. v. Herbert Cooper Co.* (C.A.3, 1961), 286 F.2d 631, 634. Two claims are compulsory counterclaims when they "involve many of the same factual issues, or the same factual and legal issues, or where they are offshoots of the same basic controversy between the parties[.]" *Great Lakes Rubber Corp.*, supra, at 634.

{¶ 25} Application of the logical relation test concludes that the two claims at issue in this case are not compulsory counterclaims. The 2003 forcible entry and detainer action stemmed from the landlord-tenant relationship between the parties. Although appellant's complaint in this action contained a cause of action based upon the Landlord Tenant Act, the parties correctly assert that the Landlord Tenant Act is inapplicable because appellant's injuries did not occur in a common area. In *Rettig*, supra, the Court held that the two claims at issue were compulsory counterclaims because both actions involved obligations arising from a business arrangement between the parties. Since only one of the two claims at issue here stems directly from the landlord-tenant relationship, we cannot hold that the claims are compulsory counterclaims.

{¶ 26} Similarly, in *McAlpine v. Patrick*, Cuyahoga App. No. 86453, 2006-Ohio-1101, ¶16, this court found that two claims were compulsory counterclaims because "each cause of action set forth by McAlpine arose from the landlord-tenant relationship that existed between the parties * * *."

{¶ 27} Although the 2003 action arose out of the landlord-tenant relationship, appellees' duty to maintain the storage room, which was admittedly not a common area, in a certain condition is imposed at common law and not through the Landlord Tenant Act. As such, we find that there is no logical relation between appellant's personal injury claim and the 2003 forcible entry and detainer action filed by appellees. Accordingly, the two are not compulsory counterclaims of one another and the current action is not barred by res judicata.

Invitee v. Licensee

{¶ 28} After admitting that the Landlord Tenant Act is inapplicable to his case, appellant's only remaining claim is that appellees negligently maintained the storage room and must be held liable for his injuries. On appeal, appellant argues that genuine issues of material fact remain regarding whether he was an invitee or a licensee at the time of his injury, and thus, summary judgment was inappropriate. Appellant argues that he was an invitee, that appellees failed to exercise reasonable care, and that appellees are liable for his injuries. Appellees, however, argue that appellant was a licensee because he was in the storage room for his own benefit, retrieving his personal belongings, and thus, they could only be held liable for wanton and willful conduct. Appellees further argue appellant did not prove that they failed to meet this standard of care and, as such, summary judgment was properly granted in their favor.

{¶ 29} The difference between licensees and business invitees is pivotal to appellant's personal injury action. Business invitees are those individuals who

come onto the premises of another for a purpose that is beneficial to the owner. *Light v. Ohio Univ.* (1986), 28 Ohio St.3d 66, 68, 502 N.E.2d 611. "Conversely, a person who enters the premises of another by permission or acquiescence, for his *own* pleasure or benefit, and not by invitation, is a licensee." (Emphasis in original.) *Provencher v. Ohio Dept. of Transp.* (1990), 49 Ohio St.3d 265, 266, 551 N.E.2d 1257. The Court in *Provencher* further held that a business invitee's benefit must be tangible or economic in order to be recognizable. *Aust v. Spirit Communication Contracting, Inc.* (July 31, 1997), Cuyahoga App. No. 70773, citing *Provencher*, supra.

{¶ 30} "Where the evidence is such as to warrant, it is the duty of the trial court to submit to the jury with proper instructions the question whether the person injured on the premises of another by the claimed negligence of the owner thereof was at the time of such injury on the premises either at the express or implied invitation of the defendant, or whether he was a trespasser or a mere licensee." Id., quoting *Pennsylvania R. Co. v. Vitti* (1924), 111 Ohio St. 670, 146 N.E. 94, at syllabus.

{¶ 31} This case contains conflicting evidence with regard to whether appellant was in the storage room for his own benefit or for the benefit of appellees. Appellant's deposition testimony indicates that appellee Maric Ball told him to be at the storage room at 1:00 p.m. on September 26, 2002 in order to collect his personal belongings. Appellant also testified that the personal items he was collecting were Christmas decorations he had loaned to the apartment

complex for at least two Christmas seasons. While Ball testified that some of the items were Christmas decorations, she could not remember whether appellant had any other personal belongings stored in the storage room.

{¶ 32} The following exchange took place during Ball's deposition:

{¶ 33} "Q: And was this, to your knowledge, if you remember, were you calling to say get your stuff out of here or was he making arrangements or were you making the arrangement because he said hey, I want my stuff out of here?

{¶ 34} "A: I made the arrangements because we wanted to get the stuff cleared out of there that didn't belong in there and obviously his personal things didn't belong in there."

{¶ 35} When asked whether appellant had lent the Christmas decorations to the apartment complex for its use, Ball testified: "I don't know. I didn't, I wasn't there when it took place. I didn't start until July."

{¶ 36} Based on appellant's testimony that the Christmas decorations were loaned to the apartment complex for its use and Ball's testimony that appellant was being permitted to store his items in the storage room, reasonable minds could reach differing conclusions with regard to whether appellant was in the storage room for his personal benefit. As such, it is questionable whether appellant was an invitee or a licensee. Because appellant's legal status determines the duty owed by appellees, this is an issue that should have been reserved for a jury rather than determined on summary judgment.

{¶ 37} We also note that there is a genuine issue of material fact with regard to how the table fell on appellant. According to Ball's testimony, while Kerr was still lying on the floor after his injury, he indicated that he had tripped over the table. In contrast, appellant testified in his deposition that he had no knowledge of how the table fell. As such, genuine issues of material fact remain and summary judgment was improperly granted in appellees' favor.

Conclusion

{¶ 38} Since any viable personal injury claim appellant may have against appellees does not stem directly from the landlord-tenant relationship, his personal injury action was not a compulsory counterclaim to Lake Shore Tower's 2003 forcible entry and detainer action. As such, appellant's personal injury action is not barred by the doctrine of res judicata. Likewise, genuine issues of material fact remain with regard to appellant's status as an invitee or a licensee when the event occurred and with regard to the cause of his injuries. For these reasons, summary judgment was improperly granted in favor of appellees.

{¶ 39} This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recover of said appellees 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 common pleas 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.

FRANK D. CELEBREZZE, JR., JUDGE

PATRICIA ANN BLACKMON, P.J., and
MELODY J. STEWART, J., CONCUR