

[Cite as *Nick Mayer Lincoln Mercury v. Ohio Bur. of Workers' Comp.*, 2010-Ohio-2782.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93752

NICK MAYER LINCOLN MERCURY

PLAINTIFF-APPELLANT

vs.

**OHIO BUREAU OF WORKERS' COMPENSATION,
ET AL.**

DEFENDANTS-APPELLEES

**JUDGMENT:
REVERSED AND REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-689611

BEFORE: McMonagle, J., Kilbane, P.J., and Jones, J.

RELEASED: June 17, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) 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(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten 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(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

CHRISTINE T. McMONAGLE, J.:

{¶ 1} Plaintiffs-appellant, Nick Mayer Lincoln Mercury, individually and on behalf of all others similarly situated (“the class”), appeal the trial court’s judgment granting the motion to dismiss of defendant-appellee, the Ohio Bureau of Workers’ Compensation (“the Bureau”). We reverse and remand.

I

{¶ 2} In April 2009, Nick Mayer filed a “class action complaint for equitable relief,” alleging that the Bureau was collecting funds from it and the class in violation of the Ohio Revised Code.¹ Nick Mayer claimed that the Bureau was collecting premiums from it and the class prospectively rather than retrospectively, and sought relief of “equitable disgorgement.”

{¶ 3} In May 2009, the Bureau filed a motion to dismiss Nick Mayer’s complaint for lack of subject matter jurisdiction under Civ.R. 12(B)(1). The Bureau’s motion was based on its contention that all the issues of fact and law, and the relief requested, were subsumed in another case previously filed

¹Specifically, Nick Mayer alleged a violation of R.C. 4123.29(A)(4)(c). As set forth in the complaint, that section provided as follows: “In providing employer group plans under division (A)(4) of this section, the administrator shall consider an employer group as a single employing entity for the purposes of retrospective rating. No employer may be a member of more than one group for the purpose of obtaining workers compensation coverage under this division.”

The section was amended, effective January 6, 2009. As amended, “group” was substituted for “retrospective” before “rating” in the first sentence, so that the sentence reads, in pertinent part, that “the administrator shall consider an employer

in the Cuyahoga County Court of Common Pleas, i.e., *San Allen, Inc. v. Marsha P. Ryan, Admr., Ohio Bur. of Workers' Comp.*, Case No. CV-644950.²

The Bureau argued that the jurisdictional priority rule applied.

{¶ 4} The trial court granted the motion, stating the following: “Court finds that disgorgement is a[n] equitable remedy and not a [claim for relief].³ Therefore defendant[']s motion to dismiss is granted. Court costs assessed to the plaintiffs.” It is from that judgment that Nick Mayer appeals.⁴

II

{¶ 5} The trial court dismissed the complaint because it found that Nick Mayer pled disgorgement as a claim for relief where no such claim exists. Thus, the court dismissed the complaint for failure to state a claim upon which relief can be granted under Civ.R. 12(B)(6), not under Civ.R. 12(B)(1) as requested.

{¶ 6} The claim for relief set forth in Count 1 of the complaint was for a violation of R.C. 4123.29(A)(4)(c). Disgorgement was Nick Mayer’s *prayer* for relief (i.e., the remedy sought), not its *claim* for relief. Because the trial

group as a single employing entity for purposes of group rating.”

²This case and the *San Allen* case were consolidated and placed on the same judge's docket.

³The trial court used the term “cause of action.” The correct term however is “claim for relief.” See Civ.R. 8(A).

⁴We review the dismissal of a complaint under Civ.R. 12 de novo. *Pro Se Commercial Properties v. Illuminating Co.*, Cuyahoga App. No. 92961, 2010-Ohio-516, ¶7.

court dismissed Nick Mayer’s complaint upon belief that Nick Mayer pled disgorgement as a claim for relief where, in fact, Nick Mayer had not, the dismissal was in error.

{¶ 7} Moreover, had the court dismissed the case for lack of subject matter jurisdiction under Civ.R. 12(B)(1) based on the jurisdictional priority rule, as urged by the Bureau, the dismissal likewise would have been in error.

{¶ 8} “The jurisdictional priority rule provides that ‘as *between courts* of concurrent jurisdiction, the tribunal whose power is first invoked by the institution of proper proceedings acquires jurisdiction, to the exclusion of all other tribunals, to adjudicate upon the whole issue and to settle the rights of the parties.’” (Emphasis added.) *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} This court has held that “[t]he jurisdictional priority rule prevents the prosecution of two actions involving the same controversy in *two courts* of concurrent jurisdiction at the same time.” (Emphasis added.) *Davis v. Cowan Systems*, Cuyahoga App. No. 83155, 2004-Ohio-515, ¶11. “The determination of whether two cases concern the same ‘whole issue’ is a two-step analysis. First, there must be cases pending in *two different courts* of concurrent jurisdiction involving substantially the same parties; and

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.” (Emphasis added.) Id. at ¶14, citing *CWP Ltd. Partnership v. Vitrano* (May 15, 1997), Cuyahoga App. No. 71314.

{¶ 10} This case and the *San Allen* case were not pending in two different courts of concurrent jurisdiction. In fact, they were pending in the same court before the same judge. The jurisdictional priority rule is therefore inapplicable.

{¶ 11} In light of the above, Nick Mayer’s sole assignment of error is sustained. Judgment reversed; case remanded.

It is ordered that appellant recover from appellee the Bureau costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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.

CHRISTINE T. McMONAGLE, JUDGE

MARY EILEEN KILBANE, P.J., and
LARRY A. JONES, J., CONCUR

