[Cite as *E.B.P., Inc. v. 623 W. St. Clair Ave., L.L.C.*, 2010-Ohio-4005.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93587

E.B.P., INC., DBA EPIC STEEL

PLAINTIFF-APPELLEE

vs.

623 W. ST. CLAIR AVENUE, LLC

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cleveland Municipal Court
Case No. 06 CVF 030587

BEFORE: Boyle, J., Gallagher, A.J., and Jones, J.

RELEASED AND JOURNALIZED: August 26, 2010

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MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant, 623 W. St. Clair Avenue, LLC ("623"), appeals from an entry granting summary judgment to plaintiff-appellee, E.B.P., Inc., d.b.a. Epic Steel ("Epic"). Finding no merit to the appeal, we affirm.

Procedural History and Factual Background

{¶ 2} In September 2001, 623 entered into a contract with Y Architects where Y Architects was to assist 623 with renovating an office building at 623 W. St. Clair Avenue. King Electric & Construction Company ("King") was chosen as the general contractor to perform the renovation. King retained several subcontractors to complete the work, including Epic. Under its contract

with King, Epic was to provide certain steel components and labor for the project.

{¶ 3} According to Epic, it fulfilled its obligations under the contract. Its work, however, failed inspection by the city of Cleveland. The city inspector found certain welds to be unacceptable. As soon as Epic discovered the problem, it corrected it — to the city inspector's satisfaction — within 24 hours. Neff Fremont, Epic's vice president, averred that even though it completed its work under the contract with King, that King failed to pay the remaining balance under the contract, which was approximately $15,000. As a result, in June 2002, Epic filed an affidavit for a mechanic's lien against the property located at 623 W. St. Clair Avenue.

{¶ 4} In May 2003, 623 filed suit in the common pleas court against King, Epic, and other subcontractors, alleging that the project was not timely or properly completed. In the complaint, 623 asserted two claims against Epic: a claim to quiet title and a claim for slander of title. Epic filed cross claims against King, but did not assert any claims against 623. In June 2004, 623 and King entered into a settlement agreement whereby King agreed to pay 623 over $300,000 in compensatory damages and attorney fees. Subsequently, 623 voluntarily dismissed the case with prejudice, including its claims against Epic.

{¶ 5} 623's counsel later sent Epic a letter advising it to either commence suit against 623 or release its mechanic's lien against the property. Epic, in

turn, commenced suit against 623 in November 2006, alleging claims of quantum meruit and unjust enrichment. 623 answered and asserted four counterclaims against Epic: quiet title, slander of title, breach of warranty, and breach of contract.

{¶ 6} In June 2007, the trial court granted 623's motion to dismiss Epic's complaint, declared Epic's lien against the property void, and ordered Epic to execute and file a satisfaction of mechanic's lien within ten days of the order. The trial court further ordered that 623's counterclaims remain pending.

{¶ 7} Although not entirely clear from the record, we can glean from the parties' filings below, as well as various trial court judgment entries, that the trial court held a trial on November 1, 2007. That same day, it issued the following judgment entry:

{¶ 8} "Case called for trial on the counterclaim. Plaintiff failed to appear. Evidence was presented in the form of testimony and exhibits. Judgment for defendant on the counterclaim. Damages will be determined at a non-oral hearing to be held on December 13, 2007 at 11:30."

{¶ 9} On February 19, 2008, the trial court issued the following judgment:

{¶ 10} "Case was previously called for trial on the counterclaim. Judgment for defendant was entered on November 1, 2007. Damage evidence was submitted by order of the court by affidavit and exhibits. No response to

damage evidence has been filed with this court. Damage award to defendant on the counterclaim in the amount of $184,094."

{¶ 11} The trial court never journalized either entry, neither the November 1, 2007 judgment entry nor the February 19, 2008 judgment entry.

{¶ 12} In April 2008, 623 initiated garnishment proceedings, and a hold was placed on Epic's bank account. It was after this occurred when Epic moved to stay the garnishment proceedings and vacate the trial court's November 1, 2007 and February 19, 2008 judgment entries. The trial court granted the stay and subsequently, on June 6, 2008, issued the following order:

{¶ 13} "*** Motion to Vacate Judgment is granted pursuant to Rule 60B(1). Court finds that Judgment was improperly entered as journal indicates that no notice of trial date was sent to parties. (Notice was given personally by court at pre-trial of August 16, 2007.) Trial on counterclaim was held on November 1, 2007, however only defendant appeared. Judgment was entered for defendant and the case was then set for non-oral hearing on damages for December 13, 2007. (See attached journal entry #1.) This entry was not journalized by the Court due to error. However, the court did issue notice of hearing date of December 13, 2007. Pursuant to a motion to continue that hearing, non-oral hearing was set for December 13, 2007. Hearing had, judgment issued in the amount of $184,094.00. This entry was also not journalized by the court. (See attached journal entry #2). *** Court finds that

due to the many errors of the court, the judgment must be vacated and the Motion to Vacate is granted."

{¶ 14} In January 2009, Epic moved for summary judgment, arguing that 623's claims were barred by res judicata and by the applicable statute of limitations. In June 2009, the trial court granted Epic's summary judgment motion, finding that "[a]ll matters relating to this case were previously disposed in the Cuyahoga County Common Pleas Court case number CV-03-500838."

{¶ 15} It is from this judgment that 623 appeals, raising three assignments of error for our review:

{¶ 16} "[1.] The trial court erred as a matter of law, first, failing to journalize entries of November 1, 2007, and February 19, 2008, and second, granting [Epic's] motion to vacate the non-journalized judgment entries, without first having recorded those entries.

{¶ 17} "[2.] The trial court erred as a matter of law and fact when it vacated the non-journalized judgment entries of November 1, 2007, and February 19, 2008, because actual and constructive notice was given.

{¶ 18} "[3.] The trial court erred as a matter of law when it granted summary judgment in favor of [Epic], pursuant to the doctrine of res judicata, because Epic Steel did NOT assert res judicata as an affirmative defense in its answer to 623's counterclaim; therefore, this affirmative defense is waived."

{¶ 19} We will address 623's assignments out of order for ease of discussion.

Res Judicata

{¶ 20} In its third assignment of error, 623 argues that the trial court erred when it granted summary judgment to Epic based upon the doctrine of res judicata. Specifically, 623 maintains that Epic waived the affirmative defense of res judicata because it failed to assert the defense in its answer to 623's counterclaims.

{¶ 21} Appellate courts review decisions on summary judgment de novo, viewing the facts as most favorable to the non-moving party and resolving any doubt in favor of that party. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241. Summary judgment is proper if there is no genuine dispute of a material fact so that the issue is a matter of law and reasonable minds could come to but one conclusion, that being in favor of the moving party. Civ.R. 56(C); *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

{¶ 22} 623 maintains that *State ex rel. Freeman v. Morris* (1991), 62 Ohio St.3d 107, 579 N.E.2d 702, and *Jim's Steak House, Inc. v. Cleveland*, 81 Ohio St.3d 18, 1998-Ohio-440, 688 N.E.2d 506, are dispositive of this issue and clearly establish that a party's failure to raise res judicata in either a responsive

pleading or by amendment, bars that party from raising it in a summary judgment motion. For the reasons that follow, we disagree.

{¶ 23} We agree with the reasoning of the Sixth Appellate District in *Internatl. EPDM Rubber Roofing Systems, Inc. v. GRE Ins. Group* (May 4, 2001), 6th Dist. No. L-00-1293. Regarding this exact issue, and after analyzing *Freeman* and *Jim's Steak House*, the Sixth District held that a party can raise the affirmative defense of res judicata for the first time in a summary judgment motion. The remaining analysis within this assignment of error is based upon the Sixth District's reasoning in *Internatl. EPDM*, as well as our own review of *Freeman* and *Jim's Steak House*.

{¶ 24} In the first case, *Freeman*, the defendant did not file an answer to the complaint, but filed a motion to dismiss with attachments to establish that the affirmative defense of res judicata should be applied. The Ohio Supreme Court noted that the lower court effectively converted the motion to dismiss into a motion for summary judgment. But since the defendant submitted the attachments without an affidavit, the Supreme Court ultimately concluded that the lower court improperly converted the Civ.R. 12(B) motion into a summary judgment motion. The Supreme Court went on to explain:

{¶ 25} "Civ.R. 8(C) designates res judicata an affirmative defense. Civ.R. 12(B) enumerates defenses that may be raised by motion and does not mention res judicata. Accordingly, we hold that the defense of res judicata may not be

raised by motion to dismiss under Civ.R. 12(B). See *Johnson v. Linder* (1984), 14 Ohio App.3d 412. In that case, the [Third District] held that the affirmative defense of res judicata could be raised by motion for summary judgment. We concur. However, as previously discussed, appellee's motion to dismiss was not proper for conversion into a motion for summary judgment and was not so converted." Id.

{¶ 26} A review of the facts of *Johnson*, cited with approval by the Supreme Court in *Freeman*, shows that there was an answer filed in the case; but the affirmative defense of res judicata was not raised in the answer. Instead, the defendant in *Johnson* raised res judicata for the first time in a motion for summary judgment. *Johnson* at 413-414. The Third District noted that res judicata is an affirmative defense that should ordinarily be raised in an answer, but then concluded that res judicata could be raised by summary judgment, because:

{¶ 27} "*** in 4 Anderson's Ohio Civil Practice 417, 419, Answer and Reply, Section 153.09, it is stated:

{¶ 28} "'*** [I]n Ohio prior to the Civil Rules, the courts permitted the disposition of actions involving *** res judicata by summary judgment ***.'" (Footnote omitted.)

{¶ 29} The Ohio Supreme Court's approval of *Johnson* establishes that the affirmative defense of res judicata can be raised for the first time in a motion

for summary judgment — even when it is not raised in an answer. By citing to *Johnson*, a case where no answer was filed, but the defense of res judicata was raised for the first time in a motion that was converted to a motion for summary judgment, the Ohio Supreme Court lent support to the belief that it has recognized an exception to the general rule that a party waives an affirmative defense if no answer is filed. The exception to the rule is that the affirmative defense of res judicata can be raised in a motion for summary judgment.

{¶ 30} In the second case, *Jim's Steak House*, the Ohio Supreme Court did not consider the issue we are presented with here, i.e., whether the defense of res judicata can be raised for the first time by motion for summary judgment. In *Jim's Steak House*, the defendant never filed an answer to an amended complaint. On the day the case was to go to trial, the defendant filed a motion to dismiss, arguing that res judicata applied. The trial court denied the motion to dismiss on the basis that it was untimely. Id. at 19.

{¶ 31} The Ohio Supreme Court held that because the defendant did not file an answer to the amended complaint, it "waived its opportunity even to raise res judicata as an affirmative defense." The court went on to say: "Affirmative defenses other than those listed in Civ.R. 12(B) are waived if not raised in the pleadings or in an amendment to the pleadings. Civ.R. 8; Civ.R. 15." Id. The court then, referring to *Freeman*, stated:

{¶ 32} "In [*Freeman* at 109], this court held that the defense of res judicata may not be raised by a motion to dismiss under Civ.R. 12(B). Thus, even assuming that the city's last-second filing of a motion to dismiss based on res judicata was timely filed, the affirmative defense of res judicata was improperly raised therein. The city failed to raise the defense in either a responsive pleading or by amendment, and therefore waived it." *Jim's Steak House* at 21.

{¶ 33} We therefore find *Jim's Steak House* to be factually distinguishable from the present case because there was no summary judgment motion filed in *Jim's Steak House*. The Supreme Court upheld its earlier decision in *Freeman*, where it recognized that the affirmative defense of res judicata could be raised for the first time in a motion for summary judgment, even when no answer had been filed in the case.

{¶ 34} Finally, we note that this court has already relied upon the Sixth Appellate District's decision in *Internatl. EPDM* for this exact proposition. See *Est. of Williams v. Deutsche Bank Trust Co. Am.*, 8th Dist. No. 90967, 2008-Ohio-3981, ¶14 ("And, although res judicata is not properly raised through a motion to dismiss, it may be raised in a motion for summary judgment even when no answer has been filed.").

{¶ 35} Accordingly, we conclude that the trial court could properly rely on res judicata to grant Epic judgment as a matter of law, if res judicata applied. Since our review is de novo, we must now determine if res judicata barred 623's

counterclaims. After a review of the record, we agree with the trial court that it did.

{¶ 36} Res judicata is a doctrine of judicial preclusion. It states 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." *Grava v. Parkman Twp.* (1995), 73 Ohio St.3d 379, 1995-Ohio-331, 653 N.E.2d 226, paragraph one of the syllabus. The prior judgment must be an order or decree entered on the merits by a court of competent jurisdiction. *Norwood v. McDonald* (1943), 142 Ohio St. 299, 52 N.E.2d 67.

{¶ 37} For res judicata to apply in a given situation, the party asserting it must demonstrate the following three elements: "(1) the plaintiff brought a previous action against the same defendant; (2) there was a final judgment on the merits of the previous action; and (3) the new claim was pursued in the first action, or it arises out of the same transaction that was the subject matter of the first action." *Hempstead v. Cleveland Bd. of Edn.*, 8th Dist. No. 90955, 2008-Ohio-5350, ¶7, citing *Smith v. Bd. of Cuyahoga Cty. Commrs.*, 8th Dist. No. 86482, 2006-Ohio-1073, at ¶16-18. As a general rule, however, res judicata is applicable if the parties to the subsequent action are either identical to those of the former action, or were in privity with them. *Johnson's Island, Inc. v. Bd. of Twp. Trustees of Danbury Twp.* (1982), 69 Ohio St.2d 241, 244,

431 N.E.2d 672, citing *Lakewood v. Rees* (1937), 132 Ohio St. 399, 403, 8 N.E.2d 250. (Other citations omitted.)

{¶ 38} Here, 623 previously filed an action in the common pleas court against King, Epic, and other subcontractors. It asserted two claims against Epic in that action — quiet title and slander of title. In the present case, it raised the same claims against Epic as it did in the common pleas court, as well as two additional claims of breach of contract and breach of warranty.

{¶ 39} After a review of the record, there is no question that the doctrine of res judicata bars 623's counterclaims. The municipal court action at issue here consists of the exact same parties as the common pleas court action. Further, two of the claims are exactly the same, and the other two arose from the same transaction that was the subject matter of the common pleas court action; all of 623's claims arose from the renovation project at 623 W. St. Clair Avenue.

{¶ 40} And finally, there was a judgment on the merits in the previous action; 623 dismissed the suit with prejudice. *State ex rel. Potain v. Mathews* (1979), 59 Ohio St.2d 29, 31, 391 N.E.2d 343. ("The dismissal of an action with prejudice is a complete adjudication of the issues presented by the pleadings.") 623 claims in its appellate brief that it "inadvertently dismissed" its claims against all defendants with prejudice, and that "it is clear that [it] intended only for its claims against King to be dismissed with prejudice and its claims against Epic Steel and the other defendants should have been dismissed without

prejudice." But this court does not see how that is "clear." Not only that, 623 *relied upon its dismissal with prejudice* in *this case* in its motion to dismiss Epic's complaint, claiming that Epic's causes of action were barred by res judicata. Referring to the common pleas court action, 623 stated: "Defendant [623] obtained a judgment in the previous lawsuit against [King] on July 8, 2004. The case was then dismissed with prejudice." (Emphasis is 623's.)

{¶ 41} Accordingly, we conclude that the trial court did not err when it granted summary judgment to Epic, as there are no genuine issues of material fact remaining. 623's third assignment of error is overruled.

Journalization and Vacation

{¶ 42} In its first assignment of error, 623 claims that the trial court erred when it failed to journalize its November 1, 2007 and February 19, 2008 judgment entries, and then subsequently erred when it vacated those judgment entries without ever journalizing them. In its second assignment of error, 623 argues the trial court erred when it granted Epic's "motion to vacate based upon notice of the trial date not being sent to Epic." We find these assignments of error to be related and thus, we will address them together.

{¶ 43} "The Civil Rules distinguish [a] 'decision,' which is the court's oral or written ruling on the issues before it, from [a] 'judgment,' which is the written final determination of those issues signed by the court and entered upon its journal." *Shah v. Cardiology S., Inc.*, 2d Dist. No. 20440, 2005-Ohio-211, ¶12.

Under Civ.R. 58, "[a] judgment is effective only when entered by the clerk upon the journal." Thus, it is not until journalization that "'[a] judgment is final, effective and imbued with a permanent character when filed with the clerk ***.'" *Atkinson v. Grumman Ohio Corp.* (1988), 37 Ohio St.3d 80, 523 N.E.2d 851, quoting *Cale Products, Inc. v. Orrville* (1982), 8 Ohio App.3d 375, 457 N.E.2d 854, paragraph two of the syllabus.

{¶ 44} The November 1, 2007 and February 19, 2008 judgment entries, which were never journalized, do not constitute final orders. Thus, they are nothing more than the court's announcement of a decision, and more akin to interlocutory orders (defined in Black's Law Dictionary as "any order other than a final order"). Black's Law Dictionary (9th Ed. 2009) 1207. It is undisputed that interlocutory orders are subject to modification, but final judgments and orders are not. See *Pitts v. Ohio Dept. of Transp.* (1981), 67 Ohio St.2d 378, 379, fn. 1, 423 N.E.2d 1105.

{¶ 45} In this case, since the November 1, 2007 and February 19, 2008 judgment entries were never journalized, the trial court was free to modify, alter, or vacate them. We therefore find 623's request for "[t]his honorable court" to "sustain [its] assignment of error and remand the matter with instructions for the trial court to journalize its judgment entries of November 1, 2007, and February 19, 2008," to be an exercise in futility.

{¶ 46} Moreover, since the unjournalized orders here were not final, it was not even necessary for the trial court to follow the confines of Civ.R. 60(B), since that provision only applies to final orders. See *Cale Products*, 8 Ohio App.3d 375 at paragraph one of the syllabus (Civ.R. 60 provides the exclusive means by which a court may employ to modify a *final* judgment).

{¶ 47} And as for 623's argument that Epic had actual and constructive notice of the judgments, and therefore the trial court should not have vacated them, we disagree. This reasoning ignores the language of Civ.R. 58, which states that "[a] judgment is effective only when filed with the clerk for journalization." The Ohio Supreme Court has held that "[a] court of record speaks only through its journal and not by oral pronouncement ***." *Schenley v. Krauth* (1953), 160 Ohio St. 109, 113 N.E.2d 625, paragraph one of the syllabus. The judge in this case was free to change her mind between the time of announcing the decisions and the filing of the judgment entries. 623's reasoning underscores the purpose of Civ.R. 58 and case law applying the rule.

{¶ 48} Accordingly, 623's first and second assignments of error are wholly without merit and we overrule them.

Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cleveland Municipal 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.

MARY J. BOYLE, JUDGE

SEAN C. GALLAGHER, A.J., and
LARRY A. JONES, J., CONCUR