

[Cite as *Austin v. Club E., Inc.*, 2011-Ohio-119.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95312

DORI AUSTIN

PLAINTIFF-APPELLANT

vs.

CLUB E., INC., ET AL.

DEFENDANTS-APPELLEES

**JUDGMENT:
REVERSED AND REMANDED**

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-707465

BEFORE: Boyle, J., Stewart, P.J., and Sweeney, J.

RELEASED AND JOURNALIZED: January 13, 2011

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MARY J. BOYLE, J.:

{¶ 1} This case came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1.

{¶ 2} Plaintiff-appellant, Dori Austin, appeals the trial court's judgment in favor of defendants-appellees, Club E., Inc. and Charles Wright, on her claim for sexual harassment, contending that the trial court erroneously found that the doctrine of res judicata applied. Finding merit to the appeal, we reverse and remand for further proceedings.

Procedural History and Facts

{¶ 3} In October 2009, Austin commenced the underlying action against her former employer, Club E., and two individually named officers/owners of the corporation (Charles Wright and Bradley Sandiford), asserting a single claim of sexual harassment. Specifically, she alleged, among other things, that “she was subjected to unwanted touching and lewd remarks from Defendant Wright” and that she was “terminated from her job position, since she refused to accept the unwanted overtures of Defendant Wright.”

{¶ 4} Austin subsequently dismissed her claim against Sandiford. The remaining defendants moved to dismiss the complaint against them on the grounds that the claim was barred by the doctrine of res judicata. According to defendants’ motion to dismiss, Austin’s employment was terminated because she repeatedly failed to appear for work. Following her termination, Austin filed suit against defendants in February 2008 (Case No. CV-650390) seeking money damages arising out of her employment, which she ultimately recovered after the defendants failed to answer or respond to the allegations. Defendants argued that Austin’s claim in the underlying case arose from the same employment at issue in her 2008 case, and her failure to assert the claims in the former action barred her instant claim.

{¶ 5} The trial court treated defendants’ motion to dismiss as a motion for summary judgment because the defendants relied on allegations outside of the pleadings and gave Austin an opportunity to respond. Austin subsequently

opposed the motion, arguing that the 2008 case related only to defendants' failure to pay her and other employees their fair wages in accordance with state and federal law. According to Austin, the first suit did not allege any facts related to the sexual harassment claim that she now asserts in the underlying case, and therefore the doctrine of res judicata is inapplicable.

{¶ 6} The trial court granted judgment in favor of the defendants, finding that the doctrine of res judicata applied because, "although the causes of action are different, both arise out of [Austin's] employment with defendants and were known to [Austin] at the time of filing the first lawsuit." The court further noted that "res judicata bars [Austin] from bringing additional claims against the same defendants which might have been litigated in the first lawsuit."

{¶ 7} Austin appeals, raising the following single assignment of error:

{¶ 8} "The trial court erred when it dismissed [Austin's] sexual harassment complaint based on res judicata."

Standard of Review

{¶ 9} We review an appeal from summary judgment under a de novo standard. *Baiko v. Mays* (2000), 140 Ohio App.3d 1, 10, 746 N.E.2d 618. Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate. *N.E. Ohio Apt. Assn. v. Cuyahoga Cty. Bd. of Commrs.* (1997), 121 Ohio App.3d 188, 192, 699 N.E.2d 534.

{¶ 10} Civ.R. 56(C) provides that before summary judgment may be granted, a court must determine 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 the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmoving party.” *State ex rel. Duganitz v. Ohio Adult Parole Auth.* (1996), 77 Ohio St.3d 190, 191, 672 N.E.2d 654.

{¶ 11} The moving party carries an initial burden of setting forth specific facts that demonstrate his or her entitlement to summary judgment. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264. If the movant fails to meet this burden, summary judgment is not appropriate, but if the movant does meet this burden, summary judgment will be appropriate only if the nonmovant fails to establish the existence of a genuine issue of material fact. *Id.* at 293.

Res Judicata

{¶ 12} In her sole assignment of error, Austin contends that her sexual harassment claim is not barred by the doctrine of res judicata because the claim did not arise out of the same transaction or occurrence that was the subject matter of her 2008 suit.

{¶ 13} The doctrine of res judicata can be divided into two subparts: claim preclusion and issue preclusion. *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 381, 1995-Ohio-331, 653 N.E.2d 226. Under claim preclusion, a party who prevails in one action is precluded from relitigating the same cause of action against the same party. *Id.* at syllabus. Under issue preclusion, also known as collateral estoppel, the party is precluded from relitigating in a second action an issue that has been actually and necessarily litigated and determined in a prior action that was based on a different cause of action. *Fort Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.*, 81 Ohio St.3d 392, 395, 1998-Ohio-435, 692 N.E.2d 140, citing *Whitehead v. Gen. Tel. Co.* (1969), 20 Ohio St.2d 108, 112, 254 N.E.2d 10. Issue preclusion does not apply in this case because the alleged sexual harassment violations were clearly not litigated in the first case. Instead, this appeal pertains solely to whether res judicata bars Austin's subsequent sexual harassment claim.

{¶ 14} In *Grava*, the Ohio Supreme Court set forth the standard for res judicata of a claim as follows: “[A] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the same transaction or occurrence that was the subject matter of a previous action.” *Id.* at 382. Relying on federal law, the Ohio Supreme Court has identified four elements necessary to bar a claim under the doctrine of res judicata: (1) there is a final, valid decision on the merits by a court of competent jurisdiction; (2) the

second action involves the same parties or their privies as the first; (3) the second action raises claims that were or could have been litigated in the first action; and (4) the second action arises out of the transaction or occurrence that was the subject matter of the previous action. *Portage Cty. Bd. of Commrs. v. City of Akron*, 109 Ohio St.3d 106, 123, 2006-Ohio-954, 846 N.E.2d 478, citing *Hapgood v. Warren* (C.A.6, 1997), 127 F.3d 490, 493.

{¶ 15} The dispositive issue in this appeal hinges on whether Austin’s sexual harassment claim asserted in the underlying action arose from the same transaction or series of connected transactions out of which the wage claims arose in the 2008 action. As to this issue, the Ohio Supreme Court has observed that a “transaction” is a “common nucleus of operative facts.” *Grava* at 382, quoting 1 Restatement of the Law 2d, Judgments (1982), Section 24, Comment b.

{¶ 16} Relying on *Grava*, appellees contend that the Ohio Supreme Court has declared that res judicata bars all claims that could have been brought in the prior action. But as recognized by the Second District, this holding in *Grava* “remains subject to the requirement that the claims in the two actions must arise from the same transaction or series of connected transactions, or a common nucleus of operative facts.” *Miami Valley Hosp. v. Purvis*, 2d Dist. No. 21740, 2007-Ohio-4721, ¶15. And while the common nucleus of operative facts requirement is not avoided by seeking a different remedy in the subsequent

action or by presenting grounds or theories of the case not presented in the first, the same facts, however, must be at issue in the two actions. *Id.*, citing *Brown v. City of Dayton*, 89 Ohio St.3d 245, 2000-Ohio-148, 730 N.E.2d 958; see, also, *Truax v. Em Industries, Inc.* (1995), 107 Ohio App.3d 210, 668 N.E.2d 524 (despite employee's claims arising out of her employment, court found that the employee's earlier arbitration did not bar employee's subsequent unlawful retaliation suit because they did not involve the same transaction or occurrence).

{¶ 17} Appellees maintain that both claims arise out of Austin's employment and therefore arise out of the same transaction. We disagree. This interpretation exceeds the Ohio Supreme Court's requirement of a common nucleus of operative facts. Here, the only information contained in the record that ties these two lawsuits together is that Austin was employed by the defendants at the time that the purported claims arose. But the first lawsuit related to the defendants' failure to comply with state and federal law regarding wages. And while neither party attached copies of the pleadings in the first case or other evidentiary materials related to the prior action, we fail to see how claims related to the hours worked and compensation paid share the "same core of facts" of a sexual harassment claim. See *Grava* at 383 (implicitly recognizing that the controversy in the two actions must share the "same core of facts" for res judicata to apply). If the record was more developed and demonstrated an overlap of facts, aside from mere employment at the time that the claims arose,

we may have reached a different conclusion. Compare *Doolittle v. Zapis* (Aug. 18, 2000), 11th Dist. No. 99-T-0084. But based on the record before us, we cannot say that appellees satisfied their burden and demonstrated that they were entitled to judgment as a matter of law on res judicata grounds.

{¶ 18} Austin's sole assignment of error is sustained.

Judgment reversed and case remanded for further proceedings consistent with this opinion.

It is ordered that appellant recover from appellees 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.

MARY J. BOYLE, JUDGE

MELODY J. STEWART, P.J., and
JAMES J. SWEENEY, J., CONCUR