[Cite as *Silver v. Krulak*, 2011-Ohio-1666.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93285

RICHARD SILVER

PLAINTIFF-APPELLANT

vs.

SANDY KRULAK, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-674227

BEFORE: Cooney, J., Stewart, P.J., and E. Gallagher, J.

RELEASED AND JOURNALIZED: April 7, 2011

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COLLEEN CONWAY COONEY, J.:

{¶ 1} Plaintiff-appellant, Richard M. Silver ("Silver"), appeals the trial court's dismissal of his complaint against defendant-appellee, Sandy Krulak ("Krulak"). We find no merit to the appeal and affirm.

{¶ 2} Silver's complaint in Common Pleas Case No. CV-674227 alleged the same causes of action that were the subject of a previously filed complaint, Case No. CV-575857, that had been dismissed for "failure to prosecute." Instead of appealing that dismissal, Silver filed the second complaint. Krulak filed a motion to dismiss the complaint, arguing that the

action was barred by res judicata, because the original complaint was dismissed for failure to prosecute, which constitutes an adjudication upon the merits. The trial court agreed and granted Krulak's motion to dismiss.

{¶ 3} In its journal entry of dismissal, the trial court noted that pursuant to Civ.R. 41(B)(1), when a trial court dismisses a case for failure to prosecute, such dismissal "operates as an 'adjudication on the merits,' unless the court, in its order of dismissal, otherwise specifies. Civ.R. 41(B)(3). See *Thomas v. Freeman* (1997), 79 Ohio St.3d 221, 224[, 680 N.E.2d 997]." The court went on to explain that because the dismissal entry of the first complaint did not specify that the dismissal was without prejudice,[1] Silver's second complaint, which alleged the same facts against the same parties, was barred by the doctrine of res judicata.

{¶ 4} Silver now appeals, pro se, from the dismissal of the refiled case.[2] He raises eight assignments of error, six of which challenge rulings the trial court made in the previous action, Case No. CV-575857, which was never appealed.[3] For the following reasons, this court does not have jurisdiction to

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[1]Appellant has not made the record in the first case part of the record on appeal. Therefore, this court does not have the actual dismissal entry to review.

[2]In August 2009, Silver filed a motion for stay of this appeal due to his medical treatment. This court granted the stay and received no further communication from Silver.

[3]The assignments of error are set forth in the appendix.

address those six assignments of error that relate to Case No. CV-575857, which was dismissed in 2008.

{¶ 5} The trial court dismissed Silver's complaint in Case No. CV-575857 for failure to prosecute. The dismissal was with prejudice because the dismissal entry did not specify otherwise. Civ.R. 41(B)(3); *Home Loan Sav. Bank v. Russell*, Coshocton App. Nos. 10-CA-05 and 10-CA-08, 2010-Ohio-6409, ¶23. A dismissal with prejudice is an adjudication on the merits and appealable under R.C. 2505.03. *Tower City Properties v. Cuyahoga Cty. Bd. of Revision* (1990), 49 Ohio St.3d 67, 69, 551 N.E.2d 122.

{¶ 6} Pursuant to App.R. 12(A)(1), an appellate court may "[r]eview and affirm, modify or reverse the judgment or final order appealed." However, App.R. 4(A) requires that an appeal be filed within thirty days of the date of the entry of the judgment being appealed. An appellate court lacks jurisdiction over any appeal that is not timely filed. *State ex rel. Pendell v. Adams Cty. Bd. of Elections* (1988), 40 Ohio St.3d 58, 60, 531 N.E.2d 713. When Silver failed to file a timely appeal of the trial court's 2008 dismissal of his complaint in Case No. CV-575875, that judgment became settled. *State v. Lucerno*, Cuyahoga App. No. 89039, 2007-Ohio-5537, ¶9.

{¶ 7} Furthermore, where a complaint is dismissed with prejudice, "the remedy is not to file a second case, but to appeal the dismissal with prejudice." *Estate of Hards v. Shore*, Cuyahoga App. No. 86103, 2005-Ohio-6385, ¶14. When Silver abandoned his rights in the first case and allowed the appeal time to expire, he waived his right to further adjudicate the issues in the first case. Id., citing *Cockfield v. Bloodworth* (Sept. 17, 1987), Cuyahoga App. No. 53374.

{¶ 8} Therefore, this court does not have jurisdiction to address the issues raised in assigned errors 1-4, and 6 and 7 because they were not appealed within thirty days of judgment as required by App.R. 4(A).

Res Judicata

{¶ 9} In his fifth assignment of error, Silver argues the trial court erred by dismissing his complaint in Case No. CV-674227 as barred by res judicata. We disagree.

{¶ 10} Krulak moved for dismissal of Silver's complaint pursuant to Civ.R. 12(B)(1) and (B)(6), arguing that Silver's claims were barred by res judicata. We review an order granting a Civ.R. 12(B)(6) motion to dismiss de novo. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶5. We afford no deference to the trial court's decision and independently review the record to determine whether the dismissal was

appropriate. *Hollins v. Shaffer*, 182 Ohio App.3d 282, 2009-Ohio-2136, 912 N.E.2d 637, ¶12.

{¶ 11} Under the doctrine of res judicata, "a valid, final judgment bars all subsequent actions based on any claim arising out of the transaction or occurrence that was the subject matter of the prior action." *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 382, 1995-Ohio-331, 653 N.E.2d 226. The doctrine of res judicata acts to bar a claim when the following four elements are met: (1) there is a final, valid decision on the merits by a court of competent jurisdiction; (2) there is a second action that involves the same parties, or their privies, as the first action; (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 a transaction or occurrence that was the subject matter of the first action. *Portage Cty. Bd. of Commrs. v. Akron*, 109 Ohio St.3d 106, 123, 2006-Ohio-954, 846 N.E.2d 478.

{¶ 12} We find that all the elements of res judicata were met. The trial court dismissed Silver's original complaint for "failure to prosecute" pursuant to Civ.R. 41(B)(1). Because the dismissal was with prejudice, it constituted an "adjudication on the merits." *Tower City Properties* at 69; Civ.R. 41(B)(3). Silver's second complaint alleged the same causes of action against the same defendants arising from the same alleged partnership agreement between the

parties. Silver's complaint in Case No. CV-674227 alleges, verbatim, the same claims set forth in his amended complaint in Case No. CV-575857. Hence all four elements for res judicata were met and we find no error in the trial court's dismissal of the complaint.

{¶ 13} The fifth assignment of error is overruled.

Thomas v. Freeman

{¶ 14} In the eighth assignment of error, Silver contends the trial court erred in its application of the Supreme Court's decision in *Thomas* to the facts of this case. In *Thomas*, the Ohio Supreme Court found that the previous dismissal of the plaintiffs' complaint "for lack of prosecution" was "otherwise than on the merits," thereby allowing plaintiffs to refile their action under the savings statute. Silver suggests that under *Thomas*, the trial court's dismissal of his original complaint for failure to prosecute was without prejudice.

{¶ 15} However, the *Thomas* court explained that generally Civ.R. 41(B)(1) and (B)(3) provide that a dismissal for failure to prosecute is with prejudice unless otherwise specified. In creating an exception to the general rule, the *Thomas* court held that where there has been no service on the defendant, the court lacks jurisdiction to render an adjudication on the merits. Therefore, the *Thomas* court concluded that "where the facts

indicate that a plaintiff has not acquired service on the defendant, the court may characterize its dismissal as a failure to prosecute pursuant to Civ.R.41(B)(1) * * * but the dismissal * * * will be otherwise than on the merits under Civ.R. 41(B)(4)." Id. at 227.

{¶ 16} In contrast, Silver had service on the defendants before the trial court dismissed his first complaint. Accordingly, the trial court applied the general rule described in *Thomas* that holds that a dismissal for failure to prosecute is with prejudice unless otherwise specified, and the court properly determined that Silver's second complaint was barred by res judicata. We find no error in the trial court's application of *Thomas* to the facts of the instant case or its dismissal of Silver's second complaint.

{¶ 17} Accordingly, the eighth assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant 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.

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COLLEEN CONWAY COONEY, JUDGE

MELODY J. STEWART, P.J., and
EILEEN A. GALLAGHER, J., CONCUR

APPENDIX

I. ASSIGNMENT OF ERROR NO. 1: THE TRIAL COURT ERRED AS A MATTER OF LAW TO THE PREJUDICE OF THE PLAINTIFF BY NOT ENFORCING PLAINTIFF'S DEFAULT JUDGMENT WHEN DEFENDANT DID NOT ANSWER COMPLAINT.

II. ASSIGNMENT OF ERROR NO. 2: THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF BY NOT GRANTING SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF WHEN ALL ISSUES HAD BEEN RESOLVED.

III. ASSIGNMENT OF ERROR NO. 3: THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF WHEN CIV.R. 41 WAS MISUSED AGAINST PLAINTIFF, THE RULE ACTUALLY SUPPORTS PLAINTIFF.

IV. ASSIGNMENT OF ERROR NO. 4: THE TRIAL COURT ERRED WHEN IT PROCLAIMED PLAINTIFF FAILED TO PROSECUTE, WHEN PLAINTIFF FILED SUMMARY JUDGMENTS AND DEFAULTS, MOST COURTS WOULD SUGGEST THAT THOSE FILINGS ARE STRONG ACTIONS BY THE PLAINTIFF IN PROSECUTING.

V. ASSIGNMENT OF ERROR NO. 5: THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF WHEN IT USED RES JUDICATA AS A CAUSE FOR DISMISSAL, WHEN AFTER FIVE YEARS (5), THIS COURT NEVER RESOLVE[D] ANY ISSUES, ALL OF THE ISSUES RAISED HAVE GONE UNANSWERED.

VI. ASSIGNMENT OF ERROR NO. 6: THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF WHEN IT DIRECTED THIS CASE TO ARBITRATION WITHOUT CONSENT BY THE PARTIES AND KNOWING THE CEILING FOR RECOVERING AT ARBITRATION IS $50,000, AND PLAINTIFF IS SEEKING IN EXCESS OF $5,000,000 IN LOSSES FROM DEFENDANT.

VII. ASSIGNMENT OF ERROR NO. 7: THE TRIAL COURT ERRED TO THE PREJUDICE OF THE PLAINTIFF WHEN THE COURT AFTER ACCEPTING THE CASE BACK FROM THE ERROR OF SENDING THE CASE TO ARBITRATION, ELECTED TO USE THE ORIGINAL PRETRIAL DATES WITHOUT NOTIFYING THE PARTIES OF THE CHANGE, THE RESULT, BOTH PARTIES MISSED THE TRIAL DATE.

VIII. ASSIGNMENT OF ERROR NO. 8: THE TRIAL COURT ERRED TO THE PREJUDICE OF THE PLAINTIFF WHEN IT CITES THOMAS V. FREEMEN (1997) OHIO ST.3d 221, IN THAT CASE THE OHIO SUPREME COURT SUPPORTS PLAINTIFF IN THIS CASE.