

[Cite as *Lewis v. Cleveland*, 2011-Ohio-347.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95110

KENNETH LEWIS

PLAINTIFF-APPELLANT

vs.

CITY OF CLEVELAND, ET AL.

DEFENDANTS-APPELLEES

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-699147

BEFORE: Sweeney, P.J., Jones, J., and Rocco, J.

RELEASED AND JOURNALIZED: January 27, 2011

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JAMES J. SWEENEY, P.J.:

{¶ 1} Plaintiff-appellant Kenneth Lewis (“plaintiff”) appeals the court’s judgment granting summary judgment to defendant-appellee the city of Cleveland (“Cleveland”) in this action claiming discrimination, unjust enrichment, back pay, fraud, and intentional infliction of emotional distress. After reviewing the procedural history of the case and pertinent law, we affirm.

{¶ 2} In 1987, Cleveland hired plaintiff as a truck driver. Plaintiff’s employment with Cleveland is governed by the International Brotherhood of Teamsters Local 244 collective bargaining agreement (“the Agreement”). Included within the scope of the Agreement are “rates of pay, wages, hours, and

other conditions of employment * * *.” As part of his job, plaintiff may operate equipment other than a standard truck. When this happened, plaintiff was entitled to “Plus Adjustment Rates,” or additional hourly wages, under the Agreement.

{¶ 3} The Agreement also governs grievances plaintiff may have with his employment. The Agreement defines a “grievance” as “a dispute or difference between the City and employee(s) or the City and the Union concerning the interpretation and/or application of and/or compliance with any provision(s) of this Contract * * *.” Additionally, the Agreement details a four-step procedure that shall be followed when a grievance arises. This procedure begins with the employee notifying his or her Union representative of the situation and, should the matter not be resolved earlier, culminates in “final and binding arbitration.”

{¶ 4} On February 4, 2008, plaintiff filed a complaint against Cleveland in Cuyahoga County Common Pleas Court listing various causes of action related to his allegation that, dating back to 1992, he was not paid additional hourly wages when he operated a “boom truck.” On April 22, 2008, the court dismissed plaintiff’s case for lack of subject matter jurisdiction, stating that: “If a party asserts claims that arise from or are dependent on the collective bargaining rights created by R.C. Chapter 4117, [the Ohio State Employment Relations Board (“SERB”)] possesses exclusive jurisdiction over the claims.” See Cuyahoga County Common Pleas Court Case No. CV-649774.

{¶ 5} On July 20, 2009, plaintiff filed a second complaint against Cleveland in Cuyahoga County Common Pleas Court alleging discrimination, unjust enrichment, back pay, fraud, and intentional infliction of emotional distress related to unpaid additional hourly wages for operating a “boom truck” since 1992. On April 26, 2010, the court granted Cleveland’s summary judgment motion without opinion.

{¶ 6} Plaintiff appeals and raises one assignment of error for our review.

{¶ 7} “I. The trial court erred in granting the defendant-appellee summary judgment.”

{¶ 8} Appellate review of summary judgment is de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241. The Ohio Supreme Court stated the appropriate test in *Zivich v. Mentor Soccer Club* (1998), 82 Ohio St.3d 367, 369-370, 696 N.E.2d 201, as follows:

{¶ 9} “Pursuant to Civ.R. 56, summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor. *Horton v. Harwick Chem. Corp.* (1995), 73 Ohio St.3d 679, 653 N.E.2d 1196, paragraph three of the syllabus. The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to

judgment as a matter of law. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264, 273-274.”

{¶ 10} In its summary judgment motion, Cleveland essentially argued two points. First, that the court lacked subject matter jurisdiction over plaintiff’s case, because plaintiff failed to exhaust the grievance procedure provided in the agreement, which was his exclusive remedy. Second, that the case was barred by the doctrine of res judicata based on the dismissal of Case No. CV-649774. We find Cleveland’s res judicata argument dispositive.

{¶ 11} Generally, a dismissal for lack of subject matter jurisdiction does not operate as an adjudication on the merits. Civ.R. 41(B)(4). Consequently, a dismissal for lack of jurisdiction will not trigger the doctrine of res judicata to bar subsequent actions. *State ex rel. Schneider v. Bd. of Edn.* (1988), 39 Ohio St.3d 281, 530 N.E.2d 206. However, an exception to this rule was recognized in *Diagnostic & Behavioral Health Clinic, Inc. v. Jefferson Cty. Mental Health, Alcohol & Drug Addiction Bd.*, Jefferson App. No. 01JE5, 2002-Ohio-1567.

{¶ 12} The Ohio Supreme Court explained that the “doctrine of res judicata involves both claim preclusion (historically called estoppel by judgment in Ohio) and issue preclusion (traditionally known as collateral estoppel).” *Grava v. Parkman Twp.* (1995), 73 Ohio St.3d 379, 381, 653 N.E.2d 226. The instant case concerns collateral estoppel, which “holds that a fact or point that was actually and directly at issue in a previous action, and was passed upon and determined by a court of competent jurisdiction, may not be drawn into question

in a subsequent action between the same parties or their privies, whether the cause of action in the two actions be identical or different. * * * ‘In short, under the rule of collateral estoppel, even where the cause of action is different in a subsequent suit, a judgment in a prior suit may nevertheless affect the outcome of the second suit.’” *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 (internal citation omitted).

{¶ 13} To successfully assert collateral estoppel, the moving party must prove the following: (1) The non-moving party was a party, or in privity with a party, to the prior action; (2) There was a final judgment on the merits in the prior action; (3) The operative issue was necessary to the final judgment; and (4) The operative issue in the prior action is identical to the issue in the subsequent action. *Monahan v. Eagle Picher Industries, Inc.* (1984), 21 Ohio App.3d 179, 180-181, 486 N.E.2d 1165. See, also, *Miller v. Coldwell Banker Hunter Realty*, Cuyahoga App. Nos. 93529 and 93662, 2010-Ohio-5840.

{¶ 14} In the instant case, the first, third, and fourth elements are easily met. The parties to both actions are identical; the operative issue — the court’s lack of subject matter jurisdiction — was not only necessary to the first judgment, it was the only issue decided; and plaintiff offered no evidence to show that the court’s lack of subject matter jurisdiction was cured.

{¶ 15} Whether the dismissal for lack of subject matter jurisdiction operates as a “final judgment on the merits” for collateral estoppel to preclude subsequent

litigation was thoroughly analyzed by the Seventh District Court of Appeals of Ohio in *Diagnostic*, supra:

{¶ 16} “Every court is said to have authority to consider its own jurisdiction. Therefore, the Franklin County Court of Common Pleas was competent to rule on the question of the scope of its own jurisdiction. In the instant matter, the Franklin County Court examined [the case],¹ ruled on the question of jurisdiction and found it lacking. Furthermore, that decision became a final judgment by a court competent to make that decision, and the ‘correctness’ of the determination became irrelevant when the time for appeal passed. As a result, *res judicata* dictated that the Jefferson County Court likewise rule it lacked subject matter jurisdiction over [the case], as the Franklin County Court determined [it was a case] over which a common pleas court lacks jurisdiction.” *Diagnostic* at ¶14 (internal citations omitted).

{¶ 17} The *Diagnostic* Court turned to federal courts for further guidance on this issue:

{¶ 18} “It is well-settled law that dismissal of a suit for lack of subject matter jurisdiction ‘precluded relitigation of the same issue of subject matter jurisdiction in a second federal suit on the same claim.’ As the Supreme Court explained in

¹ In *Diagnostic*, a doctor filed a civil lawsuit against a county Board seeking payment for Medicaid services. The case was dismissed for lack of subject matter jurisdiction, because the Board was a State agency and the Ohio Court of Claims had exclusive jurisdiction over litigation against it. Id.

Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee: A party that has had an opportunity to litigate the question of subject matter jurisdiction may not, however, reopen that question in a collateral attack upon an adverse judgment. It has long been the rule that principles of *res judicata* apply to jurisdictional determinations both subject matter and personal. 456 U.S. 694, 702.” *Diagnostic*, at ¶16 (quoting *Fletcher v. City of Paducah* (Aug. 23, 1990), United States Court of Appeals for the Sixth Circuit No. 89-6569) (other internal citations omitted).

{¶ 19} The reasoning behind the *Diagnostic* holding was further explained by the court: “If *res judicata* could never bar a plaintiff from refiling based upon the lack of subject matter jurisdiction, a party could forum shop until they found a court to accept their case. If a party cannot cure the defect that prevents the exercise of jurisdiction over the claim, and disagrees with the trial court’s decision, the proper avenue would be the appellate process.” *Diagnostic*, at ¶18.

{¶ 20} This case is unique because, although it was decided on summary judgment, we need not look at the substantive facts surrounding plaintiff’s claims.

It is enough to know that the Cuyahoga County Court of Common Pleas dismissed plaintiff’s first cause of action regarding disputed wages for lack of subject matter jurisdiction. Plaintiff did not appeal this dismissal. Without curing the jurisdictional defect, plaintiff then brought a second cause of action based on the same wage dispute, against the same party, in the same court. Now,

whether the court lacked subject matter jurisdiction is irrelevant because collateral estoppel bars this second action from litigation.

{¶ 21} Accordingly, there are no genuine issues regarding the procedural facts of this case, and Cleveland is entitled to judgment as a matter of law. The court did not err in granting Cleveland's summary judgment motion, and plaintiff's sole assignment of error is overruled.

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 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.

JAMES J. SWEENEY, PRESIDING JUDGE

LARRY A. JONES, J., and
KENNETH A. ROCCO, J., CONCUR