[Cite as *Yamada v. No-Burn of Ohio, L.L.C.*, 2009-Ohio-3321.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF MEDINA	)	

ERMA K. YAMADA, et al. Appellants v. NO-BURN OF OHIO, LLC, dba NO-BURN, INC., aka NO-BURN INCORPORATED Appellee	C.A. No. 08CA0094-M APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF MEDINA, OHIO CASE No. 08CIV1096

DECISION AND JOURNAL ENTRY

Dated: July 6, 2009

BELFANCE, Judge.

{¶1} Plaintiffs-Appellants Donald K. Yamada, executor of the estate of Erma K. Yamada ("Estate"), and Hawaii No-Burn, Inc. appeal the judgment of the Medina County Court of Common Pleas granting summary judgment in favor of Defendant-Appellee No-Burn of Ohio, LLC, doing business as No-Burn, Inc., aka No-Burn Incorporated. For reasons set forth below, we reverse.

I.

{¶2} No-Burn, Inc. manufactures a fire retardant product. In 2002, Erma K. Yamada entered into a contract between No-Burn, Inc. and Hawaii No-Burn, Inc., her soon-to-be solely owned corporation, whereby Hawaii No-Burn/Erma K. Yamada would become the exclusive dealership of No-Burn products for the State of Hawaii. Subsequently, No-Burn, Inc. reduced Hawaii No-Burn's status to non-exclusive. Erma K. Yamada filed a complaint against No-Burn,

Inc. in August 2005, alleging that No-Burn, Inc. breached the exclusive dealership agreement by reducing her status to non-exclusive after she failed to participate in No-Burn's Complete Operations Liability Insurance (COLI) coverage and its Fire Resistance Certification Rating (FRCR) program, which Erma K. Yamada contended were requirements not found in the original contract. Erma K. Yamada's complaint contained two counts, one for breach of contract, and one seeking a preliminary and permanent injunction.

{¶3} No-Burn, Inc. then filed an answer and "cross-claim"[1] against Hawaii No-Burn, Inc. who was not a party to the action. No-Burn, Inc. alleged that it terminated the contract after Hawaii No-Burn failed to obtain COLI coverage or FRCR documentation and failed to meet certain quota requirements. No-Burn, Inc. alleged that Hawaii No-Burn breached the contract by continuing to use the No-Burn name and by not returning sales materials, entitling No-Burn, Inc. to in excess of $25,000.00 in damages "and/or as an alternative or additional remedy, to [permanent] injunctive relief."

{¶4} During the course of the litigation, because Erma K. Yamada was suffering from health problems that impaired her ability to travel, she moved to have her testimony preserved. Video conferencing was suggested as a substitute to Erma K. Yamada's presence at trial. Prior to the May 14, 2008 trial date, No-Burn, Inc. requested that it be allowed to speak with Erma K. Yamada's physician about her condition. Erma K. Yamada's physician could not be made

---

[1] While No-Burn, Inc. titled its claim against Hawaii No-Burn as a cross-claim, its claim was not technically a cross-claim, as Hawaii No-Burn was not a party at the time No-Burn, Inc. filed its answer. See Civ.R. 13(G). Nor was No-Burn, Inc.'s claim a third-party claim, as Hawaii No-Burn, Inc. was not liable to No-Burn, Inc. for all or part of Erma Yamada's claim against No-Burn, Inc. See Civ.R. 14(A). The proper procedure would have been for No-Burn, Inc. to join Hawaii No-Burn as a party and then file a claim against Hawaii No-Burn. However, as it appears the trial court accepted the addition of Hawaii No-Burn as a defendant, we will refer to No-Burn, Inc.'s claim as a "cross-claim."

available to No-Burn, Inc. prior to trial, and as such the trial court would not allow the video conference. Accordingly, the day before trial, Erma K. Yamada filed a dismissal of her complaint without prejudice. Thereafter, the trial court entered an agreed-upon entry concerning No-Burn's "cross-claim" providing that "injunctive relief is awarded permanently enjoining Hawaii No-Burn, Inc. from using in any manner the trade name(s) and proprietary and/or trade information of No-Burn, Incorporated * * *." An award of nominal damages was crossed off on the entry.

{¶5} On June 10, 2008, Erma K. Yamada and Hawaii No-Burn filed a complaint against No-Burn of Ohio, LLC alleging a claim for breach of contract and a claim for unjust enrichment, and seeking in excess of $25,000.00 in damages. Erma K. Yamada passed away on June 11, 2008, and Donald K. Yamada, as the executor of her estate was substituted as a plaintiff. No-Burn of Ohio then filed an answer and motion for summary judgment. In No-Burn of Ohio's motion for summary judgment it essentially made two arguments: (1) that No-Burn of Ohio is not a proper party and not a party to the contract[2] and (2) that the Estate's and Hawaii No-Burn's claims were barred by the doctrine of *res judicata*. The trial court granted summary judgment to No-Burn of Ohio on the basis of *res judicata* and dismissed the Estate's and Hawaii No-Burn's complaint. The Estate and Hawaii No-Burn have appealed, raising a sole assignment of error.

II.

ASSIGNMENT OF ERROR I.

"THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS-APPELLEES"

---

[2] No-Burn of Ohio technically made three arguments in its motion because it also claimed that it was not a proper party based upon the statute of frauds.

{¶6} This Court reviews a trial court's ruling on a motion for summary judgment *de novo* and applies the same standard as the trial court. *Chuparkoff v. Farmers Ins. of Columbus, Inc.*, 9th Dist. No. 22712, 2006-Ohio-3281, at ¶12. The facts are viewed in the light most favorable to the nonmoving party. Id.

{¶7} Pursuant to Civ.R. 56(C), summary judgment is appropriate when: "(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 such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made." *State ex rel. Zimmerman v. Tompkins* (1996), 75 Ohio St.3d 447, 448.

{¶8} On a motion for summary judgment, the moving party has the burden of demonstrating that no genuine issues of material fact exist. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292. The burden then shifts to the nonmoving party to provide evidence showing that a genuine issue of material fact does exist. *Dresher*, 75 Ohio St.3d at 293. Pursuant to Civ.R. 56(E), the nonmoving party may not simply rest on the allegations of its pleadings; it must provide the court with evidentiary material, such as affidavits, written admissions, and/or answers to interrogatories, to demonstrate a genuine dispute of fact to be tried. See, also, *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735.

{¶9} "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. The Supreme Court of Ohio has held 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." Id. at 382. "Accordingly, before *res judicata*/collateral estoppel can apply one must have a final judgment." *Ganley v. Subaru of Am.*, 9th Dist. No. 07CA0092-M, 2008-Ohio-3588, at ¶31.

{¶10} As we determine that the trial court's entry awarding No-Burn, Inc. a permanent injunction in the previous action was ambiguous as to whether the trial court would award No-Burn, Inc. damages in the future, we also conclude that the order determining the "cross-claim" is not a final order. While the entry initially sought to award No-Burn, Inc. nominal damages, that portion of the entry was crossed out. While this could be interpreted to indicate that the parties decided that No-Burn, Inc. would not recover any damages, it also could be interpreted to mean that a damages award would be determined at a future date. Further, in light of the particular circumstances of this case, crossing out the damages portion appears to be a deliberate act aimed at preserving the claims of Yamada and Hawaii No-Burn. Because we determine that the entry relative to No-Burn's "cross-claim" was not final, *res judicata* cannot apply. See id.

{¶11} Thus, we must consider whether No-Burn of Ohio could have been awarded summary judgment under the theory that it was not a proper party to the action. Initially, we note that the trial court stated that it believed "summary judgment might not be appropriate at this time on [this issue] * * *." After reviewing the record, we agree with the trial court and determine summary judgment was not appropriate on this issue.

{¶12} The transcript from No-Burn of Ohio's summary judgment motion hearing reveals that the issue as to whether No-Burn of Ohio is a proper party revolves around which entity bought the assets of the Michigan corporation, No-Burn, Inc. ("Michigan No-Burn"). The 2002 contract at issue was between Hawaii No-Burn and Michigan No-Burn. The original lawsuit filed in 2005 was against No-Burn, Inc., an entity located in Ohio ("Ohio No-Burn").

Mr. William Kish, Jr. is the president of Ohio No-Burn and a member of the LLC, No-Burn of Ohio (the current Appellee). Apparently, sometime in 2003, Mr. Kish and another individual bought the assets of Michigan No-Burn.

{¶13} The Estate and Hawaii No-Burn argue that No-Burn of Ohio was the only entity in existence at the time of the asset purchase. They contend that No-Burn of Ohio must be a proper party as it must have been the entity that purchased the assets of Michigan No-Burn. No-Burn of Ohio maintains that it is not a signatory to the contract, has never been a party to the contract, and has not been unjustly enriched. No-Burn of Ohio contends that Ohio No-Burn bought the assets of Michigan No-Burn. At the summary judgment hearing, the parties agreed that if No-Burn of Ohio did purchase the assets of the Michigan entity, then No-Burn of Ohio would be a proper party. Essentially summary judgment would be properly granted to No-Burn of Ohio on this issue if it produced evidence demonstrating that Ohio No-Burn, and not No-Burn of Ohio, purchased Michigan No-Burn's assets.

{¶14} We cannot conclude that No-Burn of Ohio met its burden under *Dresher*, 75 Ohio St.3d at 292, as there is a material dispute of fact as to which entity purchased the assets of Michigan No-Burn. No-Burn of Ohio produced two affidavits by Kish. One of the affidavits states that "at my May 5, 2006 deposition, I told Erma Yamada and her attorney Ted Lesiak that the Ohio corporation No Burn, Inc. purchased all the assets of the entity Michigan corporation known as No-Burn, Inc." However, upon examination of Kish's deposition we do not find that such a statement was made during his deposition. Kish stated in his deposition that "[i]n January of '03, another person and I bought No-Burn, Inc. of Michigan, bought the assets." Kish also made the following statement during his deposition: "Basically, No-Burn, Inc. of Ohio, as we continued to grow after we bought the business in 2003 * * *." Thus, Kish did not actually

testify that the assets of Michigan No-Burn were purchased by Ohio No-Burn. As the evidence provided by No-Burn of Ohio is inconclusive and does not establish that it was not a proper party, it has not met its burden. Id. We conclude that there remains a dispute of material fact as to whether No-Burn of Ohio is indeed a proper party to this action and as such we cannot conclude that summary judgment in favor of No-Burn of Ohio is proper.

III.

{¶15} In light of the foregoing, we reverse the judgment of the Medina County Court of Common Pleas and remand for proceedings consistent with this opinion.

Judgment reversed
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

EVE V. BELFANCE
FOR THE COURT

MOORE, P. J.
WHITMORE, J.
CONCUR

APPEARANCES:

THEODORE J. LESIAK, Attorney at Law, for Appellants.

ANDREW S. MCILVAINE, Attorney at Law, for Appellee.