[Cite as *Hawke, Inc. v. Universal Well Servs., Inc.*, 2010-Ohio-4730.]

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

HAWKE, INC., et al.	C. A. No. 25056
Appellants	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
UNIVERSAL WELL SERVICES, INC.	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellee	CASE No. CV 2009-04-3180

DECISION AND JOURNAL ENTRY

Dated: September 30, 2010

BELFANCE, Presiding Judge.

{¶1} Plaintiffs-Appellants, Hawke, Inc., Charles Wood, Lenora Wood, and Greg Wood appeal the rulings of the Summit County Court of Common Pleas in favor of Universal Well Services, Inc. ("Universal Well"). For the reasons set forth below, we affirm in part, and reverse in part.

I.

{¶2} Charles, Lenora, and Greg Wood are shareholders of Hawke, Inc. and own an oil and gas well in Coshocton County. In 2001, Hawke, Inc. and Universal Well entered into four contracts, whereby Universal Well would perform various cementing services on the oil and gas well. Specifically, on September 1, 2001, the parties contracted for the performance of a "surface job" and a "long string" job. Hawke, Inc. paid Universal Well for these services. On September 28 and October 1, 2001, the parties contracted for the performance of the "squeeze job" which is described as a remedial action. Universal Well was not paid for this service. On

October 2, 2001, the parties contracted for the performance of "plugging" services. Universal Well was not paid for this service.

{¶3} In April 2002, Universal Well sued Hawke, Inc. for account and breach of contract for Hawke's failure to pay for the "squeeze job" and for the "plugging" services. In June 2002, Hawke, Inc. filed an answer and counterclaim alleging negligence and breach of contract. Hawke, Inc. asserted that Universal Well poured the well with "unsettling cement, resulting in the well being nearly one-hundred percent (100%) unproductive." Hawke, Inc. sought $470,000 for lost proceeds, $135,000 for "original production cost of the well as well as the additional costs incurred by Hawke[, Inc.] due to Universal[Well's] actions[,]" as well as attorney fees and costs.

{¶4} In November 2003, Hawke, Inc. voluntarily dismissed its counterclaim without prejudice pursuant to Civ.R. 41(A). Thereafter, the trial court issued a judgment entry awarding Universal Well $4,533.65 on its complaint.

{¶5} In February 2009, Hawke, Inc. and the Woods filed a complaint against Universal Well for negligence, gross negligence, and breach of contract and applicable warranties in Coshocton County. The action was subsequently transferred to Summit County. The complaint alleged that "services performed regarding the 'long string' [job] were negligent, grossly negligent, in breach of written contractual obligations, and in breach of contractual and other applicable warranties evidencing a direct and proximate cause of significant and irreparable damages to [Hawke, Inc.'s and the Woods'] property." These allegations were not otherwise clarified. Hawke, Inc. and the Woods sought an unspecified amount in excess of $25,000. Attached to the complaint were several exhibits, including copies of invoices related to the four contracts, copies of the contracts for the "surface job" and "long string" job, a copy of Universal

Well's 2002 complaint, a copy of Hawke, Inc.'s answer and counterclaim, a copy of Hawke, Inc.'s voluntary dismissal entry, and a copy of the judgment entry in the prior litigation.[1]

{¶6} Universal Well filed an answer which included several affirmative defenses, including, that the claims were barred by the statute of limitations and res judicata/collateral estoppel. Universal Well also filed a motion for judgment on the pleadings in which it asserted that Hawke, Inc.'s claims were compulsory counterclaims in the prior litigation and thus the claims were barred by res judicata and Civ.R. 13(A). Universal Well additionally argued in its motion that the claims were barred by the applicable statute of limitations. Universal Well attached several documents to its motion. Hawke, Inc. and the Woods filed a motion to strike Universal Well's Civ.R. 12(C) motion or in the alternative, to treat the motion as a motion for summary judgment. They also presented arguments in opposition to Universal Well's Civ.R. 12(C) motion. Universal Well replied.

{¶7} The trial court denied Hawke, Inc.'s and the Woods' motions, concluding that the issues raised in Universal Well's motion could be addressed in a motion for judgment on the pleadings. The trial court also refused to strike the documents appended to Universal Well's motion finding that they were identical to the documents attached to Hawke, Inc.'s and the Woods' complaint. Finally, the trial court granted Universal Well's motion for judgment on the pleadings, concluding that Hawke, Inc.'s counterclaim in the 2002 suit and the claims in the present suit were compulsory counterclaims and thus were barred by res judicata.

[1] Other documents are attached to the complaint; however, these all appear to be original time stamped filings connected to the transfer of the case from Coshocton County and do not appear to have been attached by Hawke, Inc. and the Woods. Thus, this Court will not consider them as part of the pleadings for purposes of Civ.R. 10(C).

{¶8} Hawke, Inc. and the Woods have appealed to this Court, raising four assignments of error for our review. Some of the assignments of error will be consolidated to facilitate our analysis.

II.

ASSIGNMENT OF ERROR I

> "The trial court erred in granting Appellee Universal[Well's] Motion for Judgment on the Pleadings."

ASSIGNMENT OF ERROR III

> "Plaintiff's Complaint Complies with Civil Rule 8 and States a Claim for Relief with Sufficient Underlying Facts that Relate to and Support Alleged Claims. Alternatively, the Court should have entertained a motion to supplement the Complaint or the Complaint could be dismissed otherwise than on the merits and without prejudice."

ASSIGNMENT OF ERROR IV

> "The Trial Court Abused its Discretion [in] Dismissing All Claims of All Plaintiffs in a 12(C) proceeding."

{¶9} This Court has stated that a "'Civ.R. 12(C) motion for judgment on the pleadings has been characterized as a belated Civ.R. 12(B)(6) motion for failure to state a claim upon which relief may be granted, and the same standard of review is applied to both motions." *Dunfee v. Oberlin School Dist.*, 9th Dist. No. 08CA009497, 2009-Ohio-3406, at ¶6, quoting *Pinkerton v. Thompson*, 174 Ohio App.3d 229, 2007-Ohio-6546, at ¶18. Therefore, this Court's review is de novo. Id. "'The trial court's inquiry is restricted to the material allegations in the pleadings.'" Id. "'[A]ll the factual allegations of the complaint are presumed true and all reasonable inferences are made in favor of the nonmoving party[.]'" Id. "However, an exception does exist to permit consideration of documents attached and incorporated into pleadings." *Riolo v. Oakwood Plaza Ltd. Partnership*, 9th Dist. No. 04CA008555, 2005-Ohio-2150, at ¶6, citing Civ.R. 10(C). "To uphold a judgment on the pleadings pursuant to Civ.R. 12(C), a reviewing

court must find, beyond a doubt, that the plaintiff could prove no set of facts in support of his claim that would entitle him to the relief requested." *Riolo* at ¶6.

{¶10} In Hawke, Inc.'s and the Woods' third assignment of error, they contend that their complaint is sufficient under Civ.R. 8. However, it does not appear that the trial court determined that the complaint failed to comply with Civ.R. 8. Hawke, Inc. and the Woods concede as much in their appellate brief. In addition, it appears, at least with respect to Hawke, Inc.'s and the Woods' breach of contract claim, that Universal Well in its reply brief in the trial court agreed that Hawke, Inc.'s and the Woods' complaint did not fail in that regard. Therefore, as this issue was not contested in the trial court, nor did the trial court rule against Hawke, Inc. and the Woods on this particular issue, we overrule the third assignment of error.

{¶11} In Hawke, Inc.'s and the Woods' first and fourth assignments of error, they assert that the trial court erred in granting judgment on the pleadings. Essentially, they maintain that the trial court erred in concluding that the claims of the complaint were compulsory counterclaims in the prior litigation, and thus, the action was barred by res judicata. Based upon the facts of this particular case, we agree.

{¶12} We begin our discussion by noting that this Court has previously stated that "[t]he doctrine of res judicata is not grounds for dismissal pursuant to Civ.R. 12(C). Rather, the proper mode for raising the defense of res judicata is through a motion for summary judgment after an answer is filed." (Internal citation omitted.) *Business Data Systems, Inc. v. Figetakis*, 9th Dist. No. 22783, 2006-Ohio-1036, at ¶11. "A trial court generally cannot make the factual determinations necessary to determine whether res judicata bars the action without looking outside the pleadings." Id. Nonetheless, this Court has previously affirmed a decision of a trial court dismissing a complaint following a motion for judgment on the pleadings based upon the

doctrine of res judicata. See *Hammerschmidt v. Wyant Woods Care Ctr.* (Dec. 27, 2000), 9th Dist. No. 19779, at *1-*2; *Warner Cable Communications, Inc. v. Neusser* (Oct. 6, 1993), 9th Dist. No. 16106, at *1-*3. We believe the instant case serves as an example as to why the granting of a motion for judgment on the pleading based upon res judicata should be the rare exception, as opposed to the general rule.

{¶13} Here, Universal Well successfully argued in the trial court that Hawke, Inc.'s and the Woods' present claims were compulsory counterclaims in the 2002 litigation and thus Hawke, Inc. and the Woods were barred by res judicata from litigating the claims in the present action.

{¶14} We therefore proceed to analyze whether Hawke, Inc.'s and the Woods' current claims were compulsory counterclaims in the prior proceedings. In so doing, we look only to the pleadings and any appropriate attachments under Civ.R. 10(C).

{¶15} Attached to Hawke, Inc.'s and the Woods' present complaint were copies of invoices for the four contracts, copies of the contracts for the "surface job" and the "long string" job, a copy of the complaint from the prior action, a copy of Hawke, Inc's answer and counterclaim from the prior action, a copy of the voluntary dismissal from the prior action, and a copy of the judgment entry from the prior action. Attached to the complaint from the prior action were two invoices and attached to the answer and counterclaim from the prior action was a copy of the first page of a contract which appears to be identical to the first page of the "long string" contract.

{¶16} Civ.R. 10(C) provides that "[a] copy of any written instrument attached to a pleading is a part of the pleading for all purposes." In the past, this Court has broadly interpreted Civ.R. 10(C) to provide that "documents" in general attached to the pleading become part of the

pleading. See, e.g., *Smith v. Nagel*, 9th Dist. No. 23551, 2007-Ohio-2894, at ¶8 (concluding that a transcript attached to the pleading became part of the pleading); *Business Data Systems, Inc.* at ¶7; *Riolo* at ¶6; *Hammerschmidt*, at *1 (noting that "the trial court was permitted to take judicial notice of the order by the Medina Court of Common Pleas in reviewing Appellee's motion for judgment on the pleadings since the judgment was incorporated into the pleadings and was set forth in the pleadings as an affirmative defense."). But, see, *Inskeep v. Burton*, 2nd Dist. No. 2007 CA 11, 2008-Ohio-1982, at ¶17; *Smith* at ¶22 (Carr, J., dissenting).

{¶17} As the result in this case would be the same whether all or only some of the documents were deemed as part of the pleadings, we will assume, without deciding that all of the documents attached to the complaint listed above became part of the complaint and were therefore appropriately considered for purposes of judgment on the pleadings.

{¶18} Civ.R. 13(A) states that

> "[a] pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13."

The Supreme Court has held that

> "'[t]he two-pronged test for applying Civ.R. 13(A) is: (1) does the claim exist at the time of serving the pleading * * *; and (2) does the claim arise out of the transaction or occurrence that is the subject matter of the opposing claim.' If both prongs are met, then the present claim was a compulsory counterclaim in the earlier action and is barred by virtue of Civ.R. 13(A)." *Rettig Enterprises, Inc. v. Koehler* (1994), 68 Ohio St.3d 274, 277, quoting *Geauga Truck & Implement Co. v. Juskiewicz* (1984), 9 Ohio St.3d 12, 14.

{¶19} The logical relation test is utilized to determine if the claims arise out of the same transaction or occurrence. *Rettig,* 68 Ohio St.3d at 278. This test provides that "[a] compulsory counterclaim is one which is logically related to the opposing party's claim where separate trials on each of their respective claims would involve a substantial duplication of effort and time by the parties and the courts." (Internal quotations and citations omitted.) Id. The word "transaction" can have varying meanings depending on the situation. Id. "It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship. * * * That they are not precisely identical, or that the counterclaim embraces additional allegations * * * does not matter." (Internal quotations and citations omitted.) Id.

{¶20} We cannot conclude from the facts before us, after making all reasonable inferences in favor of Hawke, Inc. and the Woods, that the present claims are, or are not, compulsory counterclaims.

{¶21} Woods' current claims are not detailed and are rather non-specific, making it difficult to discern if the current claims meet the precise standard set forth above. Hawke, Inc. and the Woods allege in their current complaint only the following:

> "Hawke alleges that services performed regarding the 'long string' (i.e. September 1, 2001 written contract) were negligent, grossly negligent, in breach of written contractual obligations, and in breach of contractual and other applicable warranties evidencing a direct and proximate cause of significant and irreparable damages to [Hawke, Inc.'s and the Woods'] property.
>
> "Therefore, [Hawke, Inc. and the Woods] pray for relief for compensable, contractual, exemplary, statutory, and equitable damages in an amount in excess of twenty-five thousand dollars ($25,000.00)[.]"

{¶22} From only these allegations, it is unclear what damages Hawke, Inc. and the Woods are currently alleging, when the damages occurred, what precisely caused the damages,

when they became aware of the damage and thus, whether these claims existed at the time of pleading in the prior litigation. See *Rettig*, 68 Ohio St.3d at 277, quoting *Geauga Truck & Implement Co.*, 9 Ohio St.3d at 14. Thus, as it is not clear at this stage of the proceedings whether Hawke, Inc.'s and the Woods' current claims are compulsory counterclaims, it cannot be said that they are barred by res judicata. This Court's consideration of the lack of specificity of the allegations contained in the current complaint does not suggest a requirement of anything more than the notice pleading required under Civ.R. 8(A); instead, we merely point out that based upon a complaint drafted following the Civ.R. 8(A) guidelines, it is usually difficult to determine whether a current claim is barred by res judicata based only upon the pleadings. While the claims may be compulsory counterclaims that are barred by res judicata, such determination requires factual evidence which makes summary judgment, rather than judgment on the pleadings, the appropriate vehicle for that determination. This is not the exceptional case where res judicata can be resolved by a motion for judgment on the pleadings.

{¶23} Further, as the trial court declined to address Universal Well's assertion that Hawke, Inc.'s and the Woods' claims are barred by the applicable statute of limitations, we decline to determine that issue in the first instance. Therefore, we sustain Hawke, Inc.'s and the Wood's first and fourth assignment of error.

III.

ASSIGNMENT OF ERROR II

> "The Trial Court Abused Its Discretion in Denying Plaintiffs[']/Appellants[']
> Motion to Strike and Motion Under Civil Rule 56 for Extension of Time for
> Discovery."

{¶24} Hawke, Inc. and the Woods assert in their second assignment of error that the trial court erred in denying their motion to strike and in denying their motion for an extension of time

for discovery, which requested that the trial court treat the motion for judgment on the pleadings as one for summary judgment.

{¶25} To the extent Hawke, Inc. and the Woods assert that the trial court erred in failing to strike materials from Universal Well's motion for judgment on the pleadings and erred in considering those materials in ruling on Universal Well's motion, this argument is rendered moot by our resolution of Hawke, Inc.'s and the Woods' first and fourth assignments of error in which we reversed the trial court's ruling. See App.R. 12(A)(1)(c).

{¶26} To the extent Hawke, Inc. and the Woods assert that the trial court erred in denying their motion to have the motion for judgment on the pleadings converted into a motion for summary judgment, we disagree. This Court has previously stated that "[n]o mechanism exists under the civil rules to convert a Civ.R. 12(C) motion to one for summary judgment[.]" (Internal quotations and citations omitted.) *Business Data Systems, Inc.* at ¶¶9, 17. Therefore, we overrule Hawke, Inc.'s and the Woods' second assignment of error.

IV.

{¶27} In light of the foregoing, we affirm in part, and reverse in part, the judgment of the Summit County Court of Common Pleas and remand the matter for proceedings consistent with this opinion.

Judgment affirmed in part,
reversed in part,
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 Summit, 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 all parties equally.

EVE V. BELFANCE
FOR THE COURT

MOORE, J.
CONCURS

CARR, J.
CONCURS, SAYING:

{¶28} I write separately because I do not believe res judicata may be raised under any circumstances in a motion for judgment on the pleadings. As I articulated in *Hammerschmidt v. Wyant Woods Care Ctr.* (Dec. 27, 2000), 9th Dist. No. 19779 (Carr, J., dissenting), in analyzing a motion to dismiss under Civ.R. 12(B) that was granted on the basis of res judicata, the Supreme Court of Ohio noted that a claim for res judicata must be brought in a motion for summary judgment. See *State, ex rel. Freeman v. Morris* (1991), 62 Ohio St.3d 107, 109. Here, the trial court should have denied Universal Well's motion for judgment on the pleadings.

APPEARANCES:

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