

STATE OF OHIO                     )  
  )ss:  
COUNTY OF SUMMIT            )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

ANGELA DECAPRIO, et al.

C. A. No.       24840

Appellants

v.

GAS & OIL, INC., et al.

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF SUMMIT, OHIO  
CASE No.     CV 2003 11 6682

Appellees

DECISION AND JOURNAL ENTRY

Dated: March 3, 2010

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CARR, Presiding Judge.

{¶1} Appellants, Angela DeCaprio, et al., (“DeCaprio”) appeal the judgment of the Summit County Court of Common Pleas, which denied a motion to reinstate the case to the active docket. This Court reverses.

I.

{¶2} DeCaprio filed a complaint sounding in negligence and trespass against appellee, Joseph Moneskey, his company, Gas & Oil, Inc., and one of his employees. The incidents underlying the complaint involved the dumping of fuel oil in DeCaprio’s basement and its subsequent clean up. DeCaprio sought judgment against Moneskey under the theory of piercing the corporate veil. The defendants filed an answer to the complaint.

{¶3} Before the issues were resolved, Gas & Oil, Inc. filed a notice of bankruptcy filing and automatic stay. Moneskey was not identified as a party to the bankruptcy proceedings.

The trial court transferred the case to the inactive docket pending notification that the federal stay order had been removed.

{¶4} DeCaprio subsequently filed a notice of voluntary dismissal pursuant to Civ.R. 41(A)(1) of all claims against Gas & Oil, Inc., leaving pending the claims against Moneskey. DeCaprio then moved to reinstate its case against Moneskey. Moneskey opposed the motion, appending his affidavit going to the merits of the piercing issue. DeCaprio replied. On June 5, 2009, the trial court denied the motion to reinstate the case and further concluded that DeCaprio could not prevail on its claims under the theory of piercing the corporate veil. DeCaprio filed a timely appeal, raising two assignments of error for review.

## II,

### **ASSIGNMENT OF ERROR I**

“THE TRIAL COURT ERRED IN CONSIDERING THE AFFIDAVIT OF MR. MONESKEY ON THE PLAINTIFFS’ MOTION TO REOPEN THE CASE.”

{¶5} DeCaprio argues that the trial court erred by considering Moneskey’s affidavit when it denied the motion to reopen the case. This Court agrees.

{¶6} The sole issue before the trial court was whether, in light of DeCaprio’s dismissal of all claims against the only party involved in bankruptcy proceedings, it should reinstate the case to the active docket. In both the motion to reinstate and the response, DeCaprio concluded by asking the trial court to “reinstate this case for purposes of proceeding directly against Mr. Moneskey[.]” and “reinstate the case so that they can proceed directly against Mr. Moneskey.” Instead, the trial court erroneously treated the motion to reinstate as a motion for summary judgment, considered extrinsic evidence, and resolved the underlying case on the merits.

{¶7} This Court is aware of one mechanism by which the trial court may convert another motion into a motion for summary judgment. Civ.R. 12(B) allows a trial court to treat a

motion to dismiss for failure to state a claim upon which relief can be granted as a motion for summary judgment when the motion to dismiss presents matters outside the pleadings. The trial court must then accord all parties a reasonable opportunity to present proper Civ.R. 56 evidence. There is no mechanism, however, for a trial court to convert a motion to reactivate a case into a motion for summary judgment. The purpose of DeCaprio's motion was merely to resume the opportunity to proceed substantively on the claims. By considering evidence and addressing the merits of the case, the trial court overstepped its authority and resolved issues beyond the scope of the pending motion.

{¶8} DeCaprio's first assignment of error is sustained. The matter is remanded for the trial court's determination whether reinstatement of the case to the active docket is appropriate where no remaining party to the action is involved in bankruptcy proceedings.

#### **ASSIGNMENT OF ERROR II**

“THE TRIAL COURT ERRED IN HOLDING AS A MATTER OF LAW THAT THE CORPORATE FORM COULD NOT BE DISREGARDED IN THIS CASE.”

{¶9} DeCaprio argues that the trial court erred by concluding as a matter of law that DeCaprio could not prevail on the pending claims under the theory of piercing the corporate veil.

{¶10} Because this Court's resolution of the first assignment of error is dispositive, we decline to address the second assignment of error as it has been rendered moot for purposes of this appeal. See App.R. 12(A)(1)(c).

#### **III.**

{¶11} DeCaprio's first assignment of error is sustained. We decline to address the second assignment of error. The judgment of the Summit County Court of Common Pleas is

reversed and the cause remanded to the trial court for proceedings consistent with this opinion.

Judgment reversed  
and cause remanded.

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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 Appellee.

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DONNA J. CARR  
FOR THE COURT

WHITMORE, J.  
MOORE, J.  
CONCUR

APPEARANCES:

J. THOMAS HENRETTA, Attorney at Law, for Appellants.

JOSEPH MONESKEY, pro se, Appellee.