

IN THE COURT OF APPEALS OF OHIO  
FOURTH APPELLATE DISTRICT  
WASHINGTON COUNTY

DOUGLAS S. GARDNER,	:	Case No. 18CA13
Plaintiff-Appellant,	:	
v.	:	<u>DECISION AND</u>
	:	<u>JUDGMENT ENTRY</u>
RODNEY E. PAXTON,	:	
Defendant-Appellee.	:	<b>RELEASED: 11/05/2018</b>

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APPEARANCES:

Douglas S. Gardner, Marietta, Ohio, pro se.

Timothy C. Loughry, Loughry, Buell & Sipe, LLC, Marietta, Ohio, for appellee Paxton.  
Harsha, J.

{¶1} Douglas S. Gardner appeals the entry of summary judgment in favor of Rodney E. Paxton on claims arising from a limited liability company they co-owned. The trial court determined that res judicata barred the action, the statute of frauds barred one of the claims for contribution to the business, and Gardner lacked standing to raise four of the claims. Now Gardner asserts that the trial court erred by granting summary judgment in favor of Paxton.

{¶2} Gardner argues that Paxton's summary judgment motion was defective because it was not made with the requisite particularity for him to make an appropriate response. Gardner forfeited this error by failing to raise it below, when he submitted a full response to the merits of the motion.

{¶3} Next Gardner argues that the trial court erred in holding that R.C. 1705.09(B) barred one of his claims for contributions from Paxton. But the trial court did not err because any promise to contribute to the limited liability company is not

enforceable unless it is in writing. The answers to interrogatories that Gardner relies upon do not constitute a sufficient promise to contribute to the company. Rather they confirmed an oral agreement.

{¶4} Gardner also claims that the trial court erred in granting summary judgment based on *res judicata*. But the exhibits attached to Paxton's motion supported the court's finding on Gardner's first two claims. They established that Gardner could have raised them in prior litigation over the limited liability company.

{¶5} Finally, Gardner's brief does not contest the trial court's holding that he lacked standing to raise his four remaining claims.

{¶6} Therefore, we overrule Gardner's assignment of error and affirm the judgment of the trial court.

## I. FACTS

{¶7} Gardner filed a complaint in the Washington County Court of Common Pleas against Paxton alleging that Paxton and he were both members of Triple Tree Pre-cut Products ("Triple Tree"), a limited liability company. Gardner alleges Paxton had failed to make equal contributions and had engaged in various improper transactions involving Triple Tree. Paxton moved to dismiss the complaint under Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted and for failure to allege fraud with particularity as required by Civ.R. 9(B). Gardner opposed the motion, contending that his claims accrued after the conclusion of *Gardner's Custom Sawing, LLC v. Silvesco, Inc.*, Washington Cty. Common Pleas Case No. 10 OT 41, which involved winding up the affairs of Triple Tree. The trial court denied the motion but ordered Gardner to file an amended complaint.

{¶8} In his amended complaint Gardner raised six “claims”:<sup>1</sup> (1) an adjustment of the parties’ contributions based on their agreement that they would share the profits and losses of Triple Tree equally; (2) payment by Paxton for a review of the Triple Tree transactions; (3) an accounting of Paxton’s and his company Silvesco’s use of Triple Tree’s fixtures after a May 2012 fire at the Silvesco plant; (4) a reduction of Paxton’s recorded contributions to account for equity in a loader; (5) an accounting for Paxton’s use of a Triple Tree truck; and (6) an order compelling Paxton to comply with his legal obligation to determine the money due and owing between the parties in the conduct and winding up of Triple Tree and the use of the company’s property.

{¶9} Paxton then filed a second motion to dismiss, which was based in part on res judicata due to the trial court’s judgment in *Gardner’s Custom Sawing*. The trial court granted the motion based on res judicata.

{¶10} On appeal we reversed and remanded because in general, “[r]es judicata is an affirmative defense that cannot be raised in a motion to dismiss under Civ.R. 12(B)[,]” and “[t]he trial court should have converted Paxton’s motion to dismiss into a summary judgment motion under Civ.R. 56 and given the parties an opportunity to respond with supporting documents under Civ.R. 56(C).” *Gardner v. Paxton*, 4th Dist. Washington No. 17CA22, 2018-Ohio-52, ¶ 13.

{¶11} Paxton then moved for summary judgment, arguing that R.C. 1705.09(B) barred Gardner’s first claim, res judicata barred all of Gardner’s claims, and Gardner lacked standing to raise his last four claims. Paxton attached copies of Gardner’s

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<sup>1</sup> Gardner’s amended complaint referred to these as “counts,” and they appear to constitute six requests for different relief. We will refer to these counts as claims although it is difficult to discern what the legal claim for relief is for some of them.

amended complaint in *Gardner's Custom Sawing* and the trial court's 2013 judgment in that case. In that amended complaint Gardner and his limited liability company, Gardner's Custom Sawing, LLC, raised five claims against Paxton, his wife, Michelle, and their business, Silvesco, including an accounting of all expenditures of Triple Tree, an allocation of credits and debits between the parties based on their respective 50% stakes in it, and Paxton's alleged improper transactions. In that case the trial court entered a judgment of \$5,185.15 in favor of Paxton, his wife, and their business and against Gardner and his business. It also ordered that the remaining assets of Triple Tree be sold at a public sale within 90 days, with the net proceeds to be evenly divided between Gardner and Paxton.

{¶12} Gardner's memorandum in opposition to Paxton's motion for summary judgment addressed the merits of Paxton's motion. However, he did not claim that the motion was procedurally deficient or that the evidence attached to it was improper. And he attached several unverified documents to his memorandum. The trial court granted Paxton's motion to strike the attached items from Gardner's memorandum.

{¶13} The trial court granted Paxton's motion for summary judgment based on res judicata, also found that Gardner's first claim was barred by R.C. 1705.09(B), and he lacked standing to raise his last four claims.

## II. ASSIGNMENT OF ERROR

{¶14} Gardner assigns the following error for our review:

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO APPELLEE RODNEY E[.] PAXTON.

## III. STANDARD OF REVIEW

{¶15} Appellate review of summary judgment decisions is de novo, governed by the standards of Civ.R. 56. *Vacha v. N. Ridgeville*, 136 Ohio St.3d 199, 2013-Ohio-3020, 992 N.E.2d 1126, ¶ 19. Summary judgment is appropriate if the party moving for summary judgment establishes that (1) there is no genuine issue of material fact, (2) reasonable minds can come to but one conclusion, which is adverse to the party against whom the motion is made, and (3) the moving party is entitled to judgment as a matter of law. Civ.R. 56; *New Destiny Treatment Ctr., Inc. v. Wheeler*, 129 Ohio St.3d 39, 2011-Ohio-2266, 950 N.E.2d 157, ¶ 24; *Chase Home Finance, LLC v. Dunlap*, 4th Dist. Ross No. 13CA3409, 2014-Ohio-3484, 2014 WL 3940314, ¶ 26.

{¶16} The moving party has the initial burden of informing the trial court of the basis for the motion by pointing to summary judgment evidence and identifying parts of the record that demonstrate the absence of a genuine issue of material fact on the pertinent claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996); *Chase Home Finance* at ¶ 27. Once the moving party meets this initial burden, the nonmoving party has the reciprocal burden under Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue remaining for trial. *Dresher* at 293, 662 N.E.2d 264.

#### IV. LAW AND ANALYSIS

{¶17} In his assignment of error Gardner asserts that the trial court erred in granting summary judgment in favor of Paxton on the six claims in his amended complaint.

{¶18} First he argues that Paxton's summary judgment motion was defective because it did not provide the requisite particularity for him to make an appropriate

response. See *HomEq Servicing Corp. v. Schwanberger*, 4th Dist. Scioto No. 07CA3146, 2008-Ohio-2478, ¶ 12, citing *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 114, 526 N.E.2d 798 (1988) and Civ.R. 7(B)(1) (“when a party moves for summary judgment, they must state their reasons with particularity so that the non-moving party has notice and an opportunity to marshal evidence as required by Civ.R. 56(E)”).

{¶19} Gardner forfeited this error by failing to raise it below. See *State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 15, quoting *State v. Awan*, 22 Ohio St.3d 120, 122, 489 N.E.2d 277 (1986), quoting *State v. Childs*, 14 Ohio St.2d 56, 236 N.E.2d 545 (1968), paragraph three of the syllabus (“It is a well-established rule that ‘an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court’ ”); *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 21 (“In contrast to waiver, forfeiture is the failure to timely assert a right or object to an error”); see also *Bennett v. Mishell*, 4th Dist. Meigs No. 07CA2, 2008-Ohio-1287, ¶ 13 (failure to object to summary judgment evidence below forfeited error on appeal). Moreover Paxton’s motion for summary judgment was sufficiently particular. Gardner was not denied notice and the opportunity to gather and present evidence to oppose Paxton’s motion. In fact, Gardner filed a memorandum in opposition that addressed the merits of the motion.

{¶20} Next Gardner contends that the trial court erred in holding that his first claim was barred by R.C. 1705.09(B). Gardner alleged Paxton’s breach of an agreement to share the profits and losses of Triple Tree equally, which required an

adjustment of their contributions. Under that statute “[a] promise by a member to contribute to the limited liability company is not enforceable unless it is set forth in a writing signed by the member.” See also *Baldwin’s Oh. Prac. Bus. Org.*, Section 14:15 (2017). Gardner argues that Paxton’s written answers to interrogatories in the prior *Gardner’s Custom Sawing* case established a promise. But none of those answers constitutes a written promise by Gardner to contribute to Triple Tree; his written answer merely confirmed an oral agreement. And in fact, Gardner’s exhibit to the memorandum in opposition was a letter stating that the parties’ agreement for Triple Tree was oral. Therefore, the trial court did not err in concluding that Gardner’s first claim was barred by R.C. 1705.09(B).

{¶21} Gardner additionally asserts that the trial court erred by holding that his claims were barred by res judicata. Under the doctrine of res judicata, “ [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.’ ” *Kelm v. Kelm*, 92 Ohio St.3d 223, 227, 749 N.E.2d 299 (2001), quoting *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 653 N.E.2d 226 (1995), syllabus. “Res judicata bars the litigation of all claims that either were or might have been litigated in a first lawsuit.” *Hughes v. Calabrese*, 95 Ohio St.3d 334, 2002 -Ohio- 2217, 767 N.E.2d 725, ¶ 12. Gardner’s first two claims, requesting an accounting and resolution of the parties’ contributions as members to Triple Tree, were or could have been raised in his prior litigation, *Gardner’s Custom Sawing v. Silvesco, Inc.*. That litigation resolved the parties’ contributions and resulted in the winding up of Triple Tree. Consequently, res judicata barred the claims in Gardner’s complaint.

{¶22} Finally, the trial court ruled that Gardner lacked standing to raise his remaining claims. Because Gardner does not challenge the merits of this holding on appeal, we affirm it. See *State ex rel. Rose v. McGinty*, 123 Ohio St.3d 86, 2009-Ohio-4050, 914 N.E.2d 366, ¶ 2 (affirming judgment of lower court because appellant did not challenge all of the independent reasons given by the court in its judgment).

{¶23} Because Gardner has not established that the trial court erred by granting summary judgment to Paxton, we overrule his assignment of error, and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

**JUDGMENT ENTRY**

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Court of Common Pleas to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Hoover, P.J. & McFarland, J.: Concur in Judgment and Opinion.

For the Court

BY: \_\_\_\_\_  
William H. Harsha, Judge

**NOTICE TO COUNSEL**

**Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.**