

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Mark A. Hill,	:	
	:	
Plaintiff-Appellant,	:	
	:	
v.	:	No. 11AP-1023
	:	(C.P.C. No. 10CVH-01-1206)
William S. Freeh, Jr.,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on September 28, 2012

Mark A. Hill, pro se.

Stephen A. Moyer, for appellee.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Plaintiff-appellant, Mark A. Hill ("appellant"), appeals from a judgment entered by the Franklin County Court of Common Pleas granting defendant-appellee, William S. Freeh's ("Freeh") motion to dismiss complaint, or alternatively, motion for summary judgment, on the basis that the doctrine of jurisdictional priority prevents appellant from pursuing his claims against Freeh in a second lawsuit after appellant's motion for leave to amend his answer and assert counterclaims in a previously filed lawsuit was denied. Although we find the jurisdictional priority doctrine to be inapplicable to the instant case, we affirm the trial court's decision to grant judgment in favor of Freeh on other grounds, specifically, Civ.R. 13(A).

{¶ 2} Appellant and Freeh entered into an "Investor Agreement" contract on or about October 25, 2004 involving the purchase of 175 acres of land for development of single-family home sites in Licking County, Ohio. Under the agreement, Freeh was to

purchase the two parcels of land at issue, while appellant was to develop and sell the lots. Freeh purchased the first parcel, which consisted of 88 of the 175 acres set forth in the agreement, and appellant began development. However, Freeh did not purchase the remaining parcel. Appellant was unable to sell the property and/or the lots. Appellant eventually purchased the second parcel of land on his own after obtaining a personal mortgage. Freeh sold a 46 acre tract from the first parcel to another buyer and transferred the remaining 42 acres to appellant. On or about May 25, 2006, appellant re-sold the 42 acres transferred to him by Freeh and the second parcel to a third party.

{¶ 3} On October 9, 2007, Freeh filed a complaint against appellant and against Equine Estates, LLC and New Albany Polo, LLC, purported shell corporations owned by appellant, alleging breach of contract. Freeh further alleged he was entitled to the proceeds from the sale of the 42 acres by appellant to the third party. This case was assigned to the Honorable John F. Bender of the Franklin County Court of Common Pleas. On August 11, 2008, appellant filed an answer asserting numerous affirmative defenses.

{¶ 4} Subsequently, on March 2, 2009, appellant filed a motion for leave to file an amended answer with counterclaims. Appellant's proposed counterclaims alleged Freeh breached the "Investor Agreement" by failing to purchase all 175 acres of land as required by the contract. Appellant also asserted said breach made it impossible to continue to proceed with the development of the land and to sell the property sites, thereby resulting in lost profits, as well as damages consisting of expenses incurred for the initial development of the land, including expenditures for hydrology reports, surveyors, engineering services, and marketing, among others. Freeh opposed appellant's request for leave to add counterclaims.

{¶ 5} On January 11, 2010, Judge Bender issued a decision and entry denying appellant's motion for leave to amend his answer and add counterclaims out of rule, finding the motion to be untimely and unsupported by a demonstration of oversight, inadvertence, or excusable neglect. Judge Bender further found the proposed counterclaims to be compulsory counterclaims.

{¶ 6} Approximately two weeks later, on January 26, 2010, appellant filed his own complaint in the instant case against Freeh and involving the same "Investor

Agreement" that was the subject matter of the case before Judge Bender. This case was assigned to the Honorable Julie M. Lynch. Like his proposed counterclaims, appellant's complaint alleged Freeh breached the contract by failing to purchase all 175 acres of land, making it impossible to proceed with the development project, and therefore resulting in lost profits and lost sales. Again, appellant alleged he was entitled to damages for expenses incurred in developing the land and preparing it for re-sale, including expenditures for hydrology reports, surveyors, engineering services, and marketing, among others.

{¶ 7} In response to appellant's complaint, Freeh filed a motion to dismiss appellant's complaint on March 8, 2010, asserting appellant's complaint involved allegations which were identical to those set forth in the case before Judge Bender. As a result, Freeh argued appellant's assertions were barred under the principles of estoppel and res judicata and pursuant to Civ.R. 12(B)(6), since the claims asserted in the complaint had previously been determined by Judge Bender to be compulsory counterclaims. Judge Lynch did not immediately rule on this motion.

{¶ 8} On September 14, 2011, Freeh filed a second motion to dismiss or, alternatively, a motion for summary judgment, based upon the doctrine of jurisdictional priority. Appellant opposed Freeh's motion, arguing the jurisdictional priority rule was not applicable because the claims and causes of action were not the same in both cases, since appellant was a plaintiff in one case and a defendant in the other case. Appellant also asserted that the issues alleged by the parties and the damages requested by the parties were different.

{¶ 9} On October 20, 2011, Judge Lynch granted Freeh's second motion to dismiss complaint or alternatively, motion for summary judgment, finding that, pursuant to the doctrine of jurisdictional priority, the court could not properly exercise jurisdiction over appellant's complaint. Judge Lynch declined to address Freeh's arguments relating to Civ.R. 13(A), the doctrines of res judicata and estoppel, and Civ.R. 12(B)(6), as set forth in the initial motion. Instead, Judge Lynch found Freeh's initial motion to dismiss complaint to be rendered moot based upon her resolution of the second motion. This timely appeal now follows in which appellant asserts one assignment of error for our review:

The Court below erred to the prejudice of the Plaintiff Appellant, by granting Defendant[']s Motion For Summary Judgment based on the doctrine of "Jurisdictional Priority", when this doctrine has no applicability to this case where there are different Plaintiffs, different Defendants, different causes of action pl[e]d, different issues, and different damages sought.

{¶ 10} In his single assignment of error, appellant submits the trial court erred in dismissing his complaint on the basis of the doctrine of jurisdictional priority. We agree. However, we find a separate and independent ground exists for affirming the trial court's decision to grant judgment in favor of Freeh.

{¶ 11} "[T]he jurisdictional priority rule contemplates cases pending in two different courts of concurrent jurisdiction-not two cases filed in the same court." *Fenner v. Kinney*, 10th Dist. No. 02AP-749, 2003-Ohio-989, ¶ 14. *See also Bright v. Family Medicine Found., Inc.*, 10th Dist. No. 02AP-1443, 2003-Ohio-6652 (jurisdictional priority rule not applicable; both cases were filed in the Franklin County Court of Common Pleas); and *B-Dry System, Inc. v. Kronenthal*, 2d Dist. No. 17130 (June 30, 1999) (pursuant to the jurisdictional priority rule, exclusive jurisdiction vested in the Greene County Court of Common Pleas, not the Montgomery County Court of Common Pleas). Consequently, because the two cases at issue in the matter before us were filed in the same court—the Franklin County Court of Common Pleas—the jurisdictional priority rule is not applicable and cannot serve as a basis for dismissing appellant's complaint.

{¶ 12} Nevertheless, we find appellant's complaint filed before Judge Lynch cannot stand.

{¶ 13} In analyzing appellant's March 2, 2009 motion for leave to file an amended answer with counterclaims, Judge Bender reviewed the proposed claims and determined they were compulsory counterclaims pursuant to Civ.R. 13(A). Although that judgment is not specifically before us on appeal, we agree with that determination. Civ.R. 13(A) states as follows:

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.

{¶ 14} In *Geauga Truck & Implement Co. v. Juskiewicz*, 9 Ohio St.3d 12, 14 (1984), the Supreme Court of Ohio determined "[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 satisfied, the claim is a compulsory counterclaim in the earlier action and is barred by virtue of Civ.R. 13(A). *Rettig Enterprises, Inc. v. Koehler*, 68 Ohio St.3d 274, 277 (1994), citing *Geauga Truck*. "The goal of the rule is to resolve all related claims in one action thereby avoiding multiple lawsuits on claims arising from a single transaction or occurrence." *Rymers v. Rymers*, 11th Dist. No. 2011-L-064, 2012-Ohio-1675, ¶ 47. "All existing claims between opposing parties that arise out of the same transaction or occurrence must be litigated in a single lawsuit pursuant to Civ.R. 13(A), no matter which party initiates the action." *Rettig* at paragraph one of the syllabus. "The purpose of Civ.R. 13(A) requiring a party to file a counterclaim is to enable a court to settle all related claims in one action and thereby avoid a wasteful multiplicity of litigation on claims which arise from a single transaction or occurrence." *State ex rel. Massaro Corp. v. Franklin Cty. Court of Common Pleas*, 65 Ohio App.3d 428, 430 (10th Dist.1989). "The rule additionally implicates res judicata as a party who fails to assert a compulsory counterclaim will be barred from doing so in any later action." *Rymers* at ¶ 47.

{¶ 15} In determining whether claims arise out of the same transaction or occurrence, Ohio courts use the "logical relation" test. *The Kendall Group Ltd. v. Fifth Third Bank*, 10th Dist. No. 09AP-772, 2010-Ohio-4733, ¶ 20. Under the "logical relation" test, "[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.'" *Rettig* at 278, Staff Notes (1970) to Civ.R. 13, quoting *Great Lakes Rubber Corp. v. Herbert Cooper Co.*, 286 F.2d 631, 634 (3d Cir.1961). This test "comports with the object and purpose of Civ.R. 13(A)

* * * to avoid a multiplicity of actions and to achieve a just resolution by requiring in one lawsuit the litigation of all claims arising from common matters." *Rettig* at 278, citing Staff Notes. Therefore, multiple claims are compulsory counterclaims if they " 'involve many of the same factual issues, or the same factual and legal issues, or where they are offshoots of the same basic controversy between the parties.' " *Id.* at 279, quoting *Great Lakes Rubber Corp.* at 634.

{¶ 16} Here, appellant argues the counterclaims he attempted to assert in the case before Judge Bender are completely unrelated to the claims he is attempting to set forth in his complaint assigned to Judge Lynch. He also argues the parties in the two cases are different. We disagree with both assertions.

{¶ 17} First, the fact that appellant is the plaintiff in one case and the defendant in the other is of no consequence. Appellant and Freeh are both parties in the Judge Bender case as well as the Judge Lynch case.

{¶ 18} Second, we further find that both sets of claims arise out of the same transaction, namely, the "Investor Agreement." In his complaint, Freeh contends appellant breached the agreement by failing to share the proceeds from the sale of the land, as required by the contract. Appellant, through his proposed counterclaims, attempted to allege he was not required to share the proceeds with Freeh, but was instead entitled to lost profits and damages from Freeh as a result of Freeh's failure to purchase the second parcel of land, which subsequently resulted in appellant's inability to properly develop the land and sell the lots. Similarly, in appellant's complaint, appellant alleges Freeh breached the contract by failing to purchase both parcels of land, thereby making it impossible to proceed with the project, which in turn resulted in lost profits and sales. Freeh responded with a motion to dismiss, arguing appellant's complaint mirrored the counterclaims he had unsuccessfully attempted to assert in the first lawsuit. In short, both cases involve the same controversy regarding the terms of the "Investor Agreement" and whether or not there was a breach of that agreement and by whom. The fact that the claimed damages are alleged to be different does not change this.

{¶ 19} In addition, it is readily apparent based upon the facts alleged by both sides that appellant's claim for breach of contract and his corresponding request for lost profits and damages existed at the time Freeh filed his complaint before Judge Bender.

However, it appears appellant simply chose not to assert those claims at that time. *See* "Motion for Leave to Plead Regarding the Filing of An Amended Answer With Counter Claims" (R. 17; exhibit A, at 2) ("[Appellant] has been reticent about developing this suit into a full blown fight. However, as [Freeh] continues to attack, [appellant], regrettably, must muster his full Defenses and counterattacks.").

{¶ 20} Finally, as Judge Bender also found, it is clear that the multiple claims at issue arise out of the same transaction or occurrence, pursuant to the "logical relation" test, and thus, appellant's claims are compulsory counterclaims which must be asserted in the first lawsuit. Appellant's claims are based on an alleged breach of the "Investor Agreement," as are Freeh's claims. Separate trials on each of their respective claims would involve substantial duplication. Because both appellant's and Freeh's claims involve many of the same factual and/or legal issues, and because they are "offshoots of the same basic controversy between the parties" (*see Rettig* at 278), we too find appellant's claims to be compulsory counterclaims, and thus appellant was required to pursue any claims associated with the "Investor Agreement" in the first lawsuit.¹ *See also Toledo Indus. Maintenance & Supply v. Spartan Chem. Co., Inc.*, 6th Dist. No. L-03-1209, 2004-Ohio-2466, ¶ 25, quoting *Rettig* at 279 ("Inasmuch as the claims stem from the agreement between the parties dictating the way their enterprise will be carried on, they are 'offshoots of the same basic controversy between the parties.' "); and *The Kendall Group* at ¶ 31 (Civ.R. 13(A) serves as a bar even where a party has voluntarily withdrawn a compulsory counterclaim in an earlier action).

{¶ 21} We draw further support for our decision here from a case which shares many parallels with the case at issue before us. In *Schrock Rd. Mkts., Inc. v. Sun Life Assur. Co. of Canada*, 5th Dist. No. 11CAE020015, 2011-Ohio-4087, the trial court found in favor of Sun Life on a declaratory judgment action involving property ownership. On appeal, the Fifth District reversed and remanded for further proceedings, at which time Schrock Road Markets moved for leave to file supplemental counterclaims. Said motion

¹ We acknowledge that appellant did in fact attempt to pursue his claims against Freeh in the first lawsuit, but he was denied leave to amend his answer to include counterclaims. The appeal before us does not address the issue of Judge Bender's decision to deny appellant's motion for leave to amend his answer to include counterclaims and we are unaware of any appeal having been filed with respect to that judgment. We further note that the case before Judge Bender remains pending with active claims, at least as of the date of oral argument and according to the current case docket.

for leave was denied, but approximately two weeks later, Schrock Road Markets filed a new complaint asserting the same claims it previously attempted to file as supplemental counterclaims in the first lawsuit. The trial court in the second lawsuit granted Sun Life's motion to dismiss the second lawsuit, determining that those claims should have been alleged as compulsory counterclaims in the first lawsuit pursuant to Civ.R. 13(A). Although the court of appeals ultimately reversed the decision of the trial court in the second lawsuit, the stated basis for the reversal was the fact that the trial court considered evidence outside of the four corners of the pleadings (*e.g.*, previous rulings) without converting the motion to dismiss to a motion for summary judgment.

{¶ 22} Given the desire of the courts to avoid a multiplicity of lawsuits, and given the clear requirements of Civ.R. 13(A), allowing appellant to reassert his claims via his complaint assigned to Judge Lynch would run afoul of the court system's clear desire to avoid piecemeal litigation and of Civ.R. 13(A) itself. *See Sec. Natl. Bank & Trust Co. v. Reynolds*, 2d Dist. No. 2007 CA 66, 2008-Ohio-4145, ¶ 39. Furthermore, Civ.R. 13(A) does not allow appellant to make an end-run around Judge Bender's decision and get a second bite at the apple in a separate lawsuit.

{¶ 23} Based upon the foregoing, we sustain appellant's assignment of error to the extent that we find the trial court erred in applying the jurisdictional priority rule to dismiss appellant's complaint. However, the assignment of error is overruled to the extent that we find it is proper to grant summary judgment in favor of Freeh in this matter.

{¶ 24} Although Judge Lynch did not decide this matter based upon Civ.R. 13(A), said basis was argued and presented to the court, but simply not analyzed and considered by the trial court. Nevertheless, pursuant to our *de novo* review, it is proper for us to affirm the trial court's decision to grant judgment in favor of Freeh, even though it is on the basis of Civ.R. 13(A), rather than the jurisdictional priority rule. *See Chickey v. Watts*, 10th Dist. No. 04AP-818, 2005-Ohio-4974, ¶ 16, citing *Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41-42 (9th Dist.1995) (an appellate court must affirm the trial court's judgment if any grounds raised by the movant in the trial court support it, even if the trial court failed to consider those particular grounds).

{¶ 25} Accordingly, the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BROWN, P.J., and KLATT, J., concur.
