[Cite as *Daniel v. Shorebank Cleveland*, 2010-Ohio-1054.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92832

JAMES S. DANIEL, ET AL.

PLAINTIFF-APPELLANTS

vs.

SHOREBANK CLEVELAND

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-606990

BEFORE: Dyke, P.J., Celebrezze, J., and Sweeney, J.
RELEASED: March 18, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

ANN DYKE, P.J.:

{¶ 1} Plaintiff-appellants, Juliet Heslop Daniel ("Juliet"), James S. Daniel ("James") and Apartment Rehabers, L.L.C. ("Apartment Rehabers") (collectively "plaintiffs") appeal the trial court's order of summary judgment in favor of defendant-appellee, ShoreBank Cleveland ("ShoreBank" or "defendant"). For the reasons set forth below, we affirm.

{¶ 2} On June 26, 2000, plaintiffs and defendant entered "The Construction Loan Agreement" (the "Construction Loan"). In this document, which was signed by Juliet and James in their capacity as members of Apartment Rehabers, defendant agreed to lend Apartment Rehabers $141,750 for the renovation of property located on Glenside Road in Cleveland, Ohio. That same day, the parties also executed a "Promissory Note." Pursuant to the terms of the Note, Apartment Rehabers, as a borrower and Juliet and James as co-signers, agreed to repay ShoreBank the $141,750 plus interest per the terms of the Construction Loan.

{¶ 3} On October 29, 2001, after plaintiffs defaulted on the Construction Loan by failing to complete the renovation by January 1, 2001, ShoreBank filed a foreclosure action against Apartment Rehabers and requested foreclosure on its lien on the Glenside property. *ShoreBank Cleveland v. Apartment Rehabers*, LLC, Cuyahoga County Court of Common Pleas, Case No. 451808 ("*ShoreBank I*"). Additionally, on December 21, 2001, ShoreBank filed a complaint with the Cuyahoga County Court of Common Pleas against James and Juliet seeking to collect the amounts due under the Promissory Note. *ShoreBank Cleveland v.*

Daniel, Cuyahoga County Court of Common Pleas, Case No. 457319 ("*ShoreBank II*").

{¶ 4} Moreover, plaintiffs allege, but defendant denies, that sometime before November 13, 2002, ShoreBank agreed to lend plaintiffs an additional $44,000 to complete the renovations to the Glenside Road property ("*Loan Agreement II*"). Also prior to this date, Plaintiffs allege that, in reliance on the *Loan Agreement II,* they procured an additional $10,000 of their personal money to complete the project.

{¶ 5} Thereafter, on April 3, 2003, ShoreBank, James, Juliet and Apartment Rehabers signed a "Settlement Agreement" in which they agreed to settle all matters which are the subject matter of the lawsuits in *ShoreBank I and II*.

{¶ 6} Despite the Settlement Agreement, on November 13, 2006, more than three years later, plaintiffs instituted the instant action, based on the same Construction Loan and Promissory Note which was the subject of the *ShoreBank I and II* cases. In the complaint, plaintiffs presented three causes of action against defendant: Count I alleged breach of the Construction Loan and Promissory Note, Count II alleged breach of agreement for an additional loan of $44,000 and Count III alleged fraud.

{¶ 7} On May 16, 2008, defendant filed a motion for summary judgment, arguing that plaintiffs' claims were barred by the doctrine of res judicata and statute of limitations. The trial court granted said motion on January 22, 2009.

Plaintiffs now appeal and present two assignments of error for our review. Their first states:

{¶ 8} "The trial court committed error in finding the doctrine of 'res judicata' applied where no prior judgments were issued."

{¶ 9} With regard to procedure, we note that we review an appeal from summary judgment under a de novo standard. *Baiko v. Mays* (2000), 140 Ohio App.3d 1, 746 N.E.2d 618.

{¶ 10} Civ.R. 56(C) provides that before summary judgment may be granted, a court must determine that "(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 the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmoving party."

{¶ 11} The moving party carries an initial burden of providing specific facts that demonstrate its entitlement to summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107, 662 N.E.2d 264. If the movant fails to meet this burden, summary judgment is not appropriate. Id. On the other hand, if the movant does meet this burden, summary judgment is only appropriate if the nonmovant fails to establish the existence of a genuine issue of material fact. Id.

{¶ 12} With regard to the substantive law, the Supreme Court of Ohio in *Grava v. Parkman Township*, 73 Ohio St.3d 379, 1995-Ohio-331, 653 N.E.2d 226, syllabus, 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."

{¶ 13} The doctrine of res judicata acts to bar a claim when the following four elements are met: (1) there is a final, valid decision on the merits by a court of competent jurisdiction; (2) there is a second action that involves the same parties, or their privies, as the first action; (3) the second action raises claims that were or could have been litigated in the first action; and (4) the second action arises out of a transaction or occurrence that was the subject matter of the first action. *Portage Cty. Bd. of Commrs. v. Akron*, 109 Ohio St.3d 106, 123, 2006-Ohio-954, 846 N.E.2d 478.

{¶ 14} In the case sub judice, we find that all the elements of res judicata have been met. As to the first element, plaintiffs maintain that the settlement agreement between the parties does not constitute a final, valid decision by a court. In *MCM Funding 1997-1, Inc. v. Amware Distribution Warehouses M&M, LLC*, Cuyahoga App. No. 87041, 2006-Ohio-3326, we held that "[a] settlement agreement between parties operates as res judicata to the same extent as an adjudication on the merits." In so finding, we relied on the Supreme Court of Ohio's opinion in *Gilbraith v. Hixson* (1987), 32 Ohio St.3d 127, 129, 512 N.E.2d 956, in which the court stated as follows:

{¶ 15} "With respect to the effect to be given to the nonadversarial nature of the proceedings, we have said, in *Horne v. Woolever* (1959), 170 Ohio St. 178, 182, 10 O.O.2d 114, 117, 163 N.E.2d 378, 382, that, as a general rule, a consent

judgment operates as res judicata with the same force given to a judgment entered on the merits in a fully adversarial proceeding. See *Vulcan, Inc. v. Fordees Corp.* (C.A.6, 1981), 658 F.2d 1106 (strong public interest in achieving finality in litigation is advanced by giving res judicata effect to consent decrees). Implicit in the rule is the recognition that a judgment entered by consent, although predicated upon an agreement between the parties, is an adjudication as effective as if the merits had been litigated and remains, therefore, just as enforceable as any other validly entered judgment. *Sponseller v. Sponseller* (1924), 110 Ohio St. 395, 399, 144 N.E. 48, 50. See, also, *Ohio State Medical Bd. v. Zwick* (1978), 59 Ohio App.2d 133, 139-140, 13 O.O.3d 178, 181-182, 392 N.E.2d 1276, 1280."

{¶ 16} In the case sub judice, the Settlement Agreement between the parties constituted an adjudication upon the merits. As a result of the Agreement, defendant dismissed both the *Shorebank I and II* lawsuits. Both lawsuits concerned the Construction Loan, Promissory Note and any actions that were raised or could have been raised concerning the renovations at the Glenside Road property. Accordingly, the first element of res judicata is present.

{¶ 17} As to the second element, we find that this action involves the same parties, or their privity, as those involved in the first action. The Settlement Agreement, which resolved *Shorebank I or II*, was signed by all the plaintiffs in this action: James, Juliet and James on behalf of Apartment Rehabers. Thus, the instant action involves the exact same parties as the Settlement Agreement.

Additionally, we note that in regard to the two prior litigations, the parties are likewise identical. ShoreBank was the plaintiff in both *Shorebank I* and *II*. The defendant in *ShoreBank I* was Apartment Rehabers and the defendants in *ShoreBank II* were James and Juliet. Accordingly, the second element of res judicata is present.

{¶ 18} We also note that even if James and Juliet, or in the alternative Apartment Rehabers, did not sign the Settlement Agreement or were excluded from *ShoreBank I* or *ShoreBank II*, each would still be considered in privity with each other. In *Brown v. Dayton* (2000), 89 Ohio St.3d 245, 248, 730 N.E.2d 958, the Ohio Supreme Court defined privity in the context of res judicata as "a mutuality of interest, including an identity of desired result." There can be no dispute that all three plaintiffs in this matter share "a mutuality of interest" in these matters.

{¶ 19} As to the third element, plaintiffs' first claim in their complaint that ShoreBank breached the Construction Loan Agreement and Promissory Note. Any alleged breach of these agreements should have been raised prior to April 3, 2003 when the parties reached the Settlement Agreement that concerned the Construction Loan Agreement and Promissory Note.

{¶ 20} Likewise, plaintiffs' second and third causes of action in this litigation should have been raised prior to the Settlement Agreement. In their second count, plaintiffs allege that defendant promised, but failed to loan, Apartment Rehabers an additional $44,000 to complete the renovations to the Glenside

property. Plaintiffs further allege in their fourth count that, as a result of ShoreBank's promise, plaintiffs were fraudulently induced to invest $10,000 of their own money into the project. Defendant denies such an agreement and plaintiffs have not produced a written document. Nevertheless, assuming arguendo that such an agreement existed, a claim of breach and fraud based upon this alleged agreement would be barred by the doctrine of res judicata. Plaintiffs had the opportunity to present these issues before signing the Settlement Agreement in April of 2003. As admitted by plaintiffs in their appellate briefs, they knew of defendant's alleged breach of this agreement and the resulting fraud by November 13, 2002. Accordingly, the third element of res judicata has been met.

{¶ 21} Finally, this action arises out of the same transaction or occurrence that was the subject matter of the first action. There can be no denial that the basis of all three of plaintiffs' causes of actions asserted were the agreements with ShoreBank with respect to the renovations of the Glenside property. Accordingly, the fourth and final element of the doctrine of res judicata has been met.

{¶ 22} Having determined that all four elements are present in this case, we affirm the trial court's grant of summary judgment in favor of defendant based upon the doctrine of res judicata. Plaintiffs' first assignment of error is overruled.

{¶ 23} As our decision affirming summary judgment on res judicata grounds is dispositive of this appeal, we find plaintiffs' second assignment of error[1] moot and decline to address its merits pursuant to App.R. 12(A).

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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

ANN DYKE, PRESIDING JUDGE

JAMES J. SWEENEY, J., CONCURS
FRANK D. CELEBREZZE, JR., J., DISSENTS
(SEE ATTACHED DISSENTING OPINION)

FRANK D. CELEBREZZE, JR., J., DISSENTING:

{¶ 24} I respectfully dissent from the majority's holding that appellants' claims are barred by res judicata.

Res Judicata

[1]"The trial court committed error in finding that the statute of limitations applied to the breach of contract and fraud claims."

{¶ 25} Res judicata bars relitigation of an "issue that has been definitively settled by *judicial decision*." (Emphasis added.) Black's Law Dictionary (8th ed. 2004). Since a final judicial determination on the merits is required before the doctrine of res judicata can be used as a defense to a claim, the doctrine was applied in error by the trial court.

{¶ 26} Examining the record from the prior two common pleas cases, *Shorebank I* and *II*, no settlement agreement was referenced in the court's order of dismissal. The entries disposing of the prior two cases state that "PLAINTIFF HAVING FILED A NOTICE OF DISMISSAL, CASE DISMISSED WITHOUT PREJUDICE."[2] Because the settlement agreement was not incorporated into the order of dismissal, and the prior two cases were dismissed without prejudice, the cases cited by Shorebank and the majority are inapplicable to the present case.

{¶ 27} The majority holds that the first *Grava* element, a final adjudication on the merits, has been met in this case. They cite to a line of cases purporting to stand for the proposition that a settlement agreement "operates as res judicata to the same extent as an adjudication on the merits." *MCM Funding* at ¶35. However, *MCM Funding* dealt with a dispute over rents that was settled in a bankruptcy proceeding. That settlement was

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[2] *Shorebank II*, CV-457319. The journal entry in *Shorebank I*, CV-451808, is not materially different.

approved by the bankruptcy court and entered on the record, thus making it a final judicial determination. The case cited within *MCM Funding*, *Gilbraith v. Hixon* (1987), 32 Ohio St.3d 127, 512 N.E.2d 956, deals with a consent judgment entered on the record, also making the settlement a final judicial determination.

{¶ 28} Shorebank's arguments in support are also unpersuasive. Citing *Goff v. Slywka* (Feb. 24, 1994), Cuyahoga App. No. 64690, Shorebank claims that a settlement agreement between parties operates as a final adjudication on the merits. However, in *Goff*, a settlement agreement was entered into, and the settlement agreement was incorporated into the journal entry that dismissed the case with prejudice. A dismissal with prejudice is a final adjudication on the merits. *Estate of Hards v. Shore*, Cuyahoga App. No. 86103, 2005-Ohio-6385, at ¶11, citing *Tower City Properties v. Cuyahoga County Bd. of Revision* (1990), 49 Ohio St.3d 67, 69, 551 N.E.2d 122. However, a dismissal without prejudice is a termination "otherwise than upon the merits and leaves the parties in the same position as if the plaintiff had not commenced the action." *Westerhaus v. Weintraut* (Aug. 31, 1995), Cuyahoga App. No. 68605, citing *Central Mut. Ins. Co. v. Bradford-White Co.* (1987), 35 Ohio App.3d 26, 519 N.E.2d 422.

{¶ 29} Without a valid, final judicial determination on the merits, a settlement agreement is simply a contract between two parties. It has no

more res judicata effect than any other private contract. Even if a case is dismissed because the parties agree to settle their dispute, without incorporation of that settlement agreement into the dismissal order or a dismissal with prejudice, res judicata does not apply. See *S/O, ex rel. Northpoint Properties, Inc. v. Markus*, Cuyahoga App. No. 82848, 2003-Ohio-5252, ¶26-31.

{¶ 30} A review of the case law leads to the conclusion that the prior two cases were dismissed without prejudice, and without any indication that the settlement agreement was incorporated into the judgment entries and enforceable by the trial court. Thus, they do not act to bar appellants from litigating an issue arising from the same transaction. Because the first prong of the test for the applicability of res judicata as set forth in *Grava* is not satisfied, the trial court erred when it awarded Shorebank summary judgment on the grounds that res judicata barred appellants' claims.

Fraud

{¶ 31} In appellants' second assignment of error, they take issue with the trial court's determination that their claims of breach of contract and fraud were barred by the statute of limitations. However, the journal entry granting summary judgment states that only the fraud charge was barred by its four-year statute of limitations. Therefore, only the statute of limitations as it relates to the fraud charge should be addressed.

{¶ 32} An action for fraud is governed by a four-year statute of limitations, as set forth in R.C. 2305.09. This four-year term is not absolute because time begins to run only when the allegedly defrauded party learns of or reasonably should have learned of the fraud. *Wooten v. Republic Savings Bank*, 172 Ohio App.3d 722, 2007-Ohio-3804, 876 N.E.2d 1260, at ¶43.

{¶ 33} The fraud alleged by appellants was that Shorebank induced them to invest an additional sum of $10,000 into the remodeling project. This transaction was supposed to be completed by May 2001. Appellants received Shorebank's notice of default in October 2001. If Shorebank was supposed to have provided the additional $44,000 in May 2001, which it did not, and appellants received notice that Shorebank intended to foreclose on property pursuant to the construction loan agreement in October 2001, then this is the time that appellants reasonably learned of the fraud. As such, the four-year statute of limitations began to run in October 2001.

{¶ 34} Appellants claim that they learned of the fraud only upon examining Shorebank's interrogatories on November 13, 2002. Appellants argue that the dates set forth above are "nebulous" and cannot be correct when appellants have set forth a specific date when they learned of the fraud. However, the rule provides that the statute begins to run when the party *reasonably should have discovered the fraud*. *Craggett v. Adell Ins. Agency* (1993), 92 Ohio App.3d 443, 635 N.E.2d 1326 (no more than a reasonable

opportunity to discover fraud is required to start the period of limitation). At the very latest, appellants should have discovered the fraud when it was clear that Shorebank intended to seek remedies under the agreements, including foreclosure.

{¶ 35} Whether appellants learned of this when they received Shorebank's notice of default in the second week of October or when Shorebank filed its foreclosure action at the end of October does not change the analysis or the result. These events should have put appellants on notice that Shorebank was not going to provide an additional $44,000 under the agreement appellants claim Shorebank entered into. As such, the four-year statute of limitations had run when appellants filed suit in November 2006.

Conclusion

{¶ 36} Given that Shorebank structured the settlement agreement to allow it to dismiss the prior two cases without prejudice and without putting the settlement agreement on the record before the trial court, it robbed the prior litigation of the res judicata effect and the ability to preclude relitigation of those issues because it was not a final judicial determination. However, appellants' fraud claim is barred by the statute of limitations, and the trial court did not err in so holding.