[Cite as *Paul v. Tri Cty. Concrete*, 2017-Ohio-5582.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104920

RAJINDER PAUL

PLAINTIFF-APPELLEE

vs.

TRI COUNTY CONCRETE

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Parma Municipal Court
Case No. 2016 CVI 01519

BEFORE: Celebrezze, J., Kilbane, P.J., and E.T. Gallagher, J.

RELEASED AND JOURNALIZED: June 29, 2017

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FRANK D. CELEBREZZE, JR., J.:

{¶1} Appellant, Tri County Concrete ("Tri County"), appeals from a decision in favor of appellee, Rajinder Paul, in a small claims action filed by Paul alleging the concrete supplied by Tri County for his driveway was defective. Tri County argues that Paul's action, the second action he filed involving the construction of a driveway, is barred by res judicata. After a thorough review of the record and law, this court reverses the decision of the lower court.

I. Factual and Procedural History

{¶2} Paul executed a contract with Cosimo Celima Cement Work ("Cosimo") for the construction of a concrete driveway and sidewalk. The contract specified that Cosimo would supply all materials. The driveway and sidewalk were poured in 2013 with concrete Cosimo purchased from Tri County. Three concrete trucks delivered concrete for the job. The driveway was installed and Paul paid for the work. Soon after completion, however, Paul noticed spalling in four or five blocks of the 15 block driveway. After calls and discussions did not result in any resolution to the problem, Paul filed suit in the Parma Municipal Court, Small Claims Division, against Cosimo. That case resulted in a defense verdict.

{¶3} Paul then filed another small claims action against Tri County on May 6, 2016. A hearing was conducted before a magistrate on June 8, 2016. There, Paul testified that his driveway had experienced some type of delamination where, in certain

spots, the top of the concrete was peeling or chipping away. He stated that no one parks on the driveway because he and his wife park in the garage and that no salt or deicing materials are used on the driveway. He further asserted that of the three loads of concrete that were delivered, only portions of the driveway that were poured with concrete from the second truck had issues. Paul further testified that he sealed the driveway every winter. When asked by the magistrate if Paul had anyone come out and look at the driveway to see what was wrong and how much it would cost to fix, he testified that he had, and that they had said nothing was wrong, but if he wanted to replace the identified blocks it would cost about $5,000.

{¶4} Tri County's owner, Tony Farinacci, testified next, but the recording device in the courtroom stopped working. The magistrate supplied a statement of what transpired following Paul's testimony as an addendum to the transcript.

{¶5} Farinacci testified that he was informed of the complaints Paul had and conducted a job site visit to inspect the concrete. He noticed some spalling that appeared to run along lines consistent with the path of car tires. In July 2015, he conducted a test of the strength of the concrete and found that it met the standards that were ordered by Cosimo. Farinacci also testified that the spalling was likely the result of a lack of sealant, cheap sealant, over finishing, improper finishing, or water added.

{¶6} Paul then testified that there were areas that were not subject to vehicle traffic where the problem was occurring. He further reiterated that he regularly sealed the driveway and did not use deicing materials on the driveway. The magistrate then

considered this testimony, along with the result in the previous case, and issued a written decision in favor of Paul. The court's decision relied heavily on the fact that Cosimo had been found not liable in the prior case. Tri County filed objections to the magistrate's decision arguing that Paul failed to meet his burden of proof and also noted that the prior decision precluded suit under the doctrine of res judicata. The objections to the magistrate's decision were overruled and the trial court adopted the magistrate's decision finding in favor of Paul in the amount of $3,000. Tri County then filed the instant appeal.

II. Law and Analysis

{¶7} On appeal, Tri County argues that Paul's second suit is barred by the claim preclusion branch of the doctrine of res judicata. Tri County also argues that even if it was not, there is no relationship necessary for liability between Tri County and Paul, and Paul failed to meet his burden of proof at trial. Because the first issue is dispositive, the others will not be addressed.

A. Res judicata

{¶8} The doctrine of res judicata is a rule of law that promotes judicial economy, finality of judgments, and preserves resources of litigants and the court. It "requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it." *Natl. Amusements v. Springdale*, 53 Ohio St.3d 60, 62, 558 N.E.2d 1178 (1990). Its two branches preclude rearguing issues that were previously litigated — issue preclusion — and claims that were litigated in a previous suit — claim preclusion.

{¶9} For the claim preclusion branch to apply

> the party asserting it must demonstrate the following three elements: "(1) the plaintiff brought a previous action against the same defendant; (2) there was a final judgment on the merits of the previous action; and (3) the new claim was pursued in the first action, or it arises out of the same transaction that was the subject matter of the first action." *Hempstead v. Cleveland Bd. of Edn.*, 8th Dist. No. 90955, 2008-Ohio-5350, ¶ 7, citing *Smith v. Bd. of Cuyahoga Cty. Commrs.*, 8th Dist. No. 86482, 2006-Ohio-1073, at ¶ 16-18. As a general rule, however, res judicata is applicable if the parties to the subsequent action are either identical to those of the former action, or were in privity with them. *Johnson's Island, Inc. v. Bd. of Twp. Trustees of Danbury Twp.* (1982), 69 Ohio St.2d 241, 244, 431 N.E.2d 672, citing *Lakewood v. Rees* (1937), 132 Ohio St. 399, 403, 8 N.E.2d 250. (Other citations omitted.)

E.B.P., Inc. v. 623 W. St. Clair Ave., L.L.C., 8th Dist. Cuyahoga No. 93587, 2010-Ohio-4005, ¶ 37. The test for privity is generally a mutuality of interest: "[t]he doctrine of res judicata * * * applies when a [d]efendant, although not a party to the prior suit, is in privity with named [d]efendants in the prior suit. For purposes of res judicata, a person is in privity with another if he is so identified in interest with such person that he represents the same legal right." *Deaton v. Burney*, 107 Ohio App.3d 407, 413, 669 N.E.2d 1 (2d Dist.1995). *See also Midwest Curtainwalls, Inc. v. Pinnacle 701, L.L.C.*, 8th Dist. Cuyahoga No. 92269, 2009-Ohio-3740, ¶ 43. Here, Tri County and Cosimo were in privity of contract. The contract between Cosimo and Tri County for the purchase of concrete is in the record and indicates that eight cubic yards of concrete were supplied for the job. "While a contractual or beneficiary relationship is sufficient, it is not necessary to establish privity. Even unrelated parties will be bound by the result in a prior proceeding where there is 'a mutuality of interest, including an identity of a desired

result.'" *Midwest Curtainwalls* at ¶ 44, quoting *Brown v. Dayton*, 89 Ohio St.3d 245, 248, 730 N.E.2d 958 (2000).

{¶10} This court recently indicated that res judicata barred claims against an embalmer where those claims were not asserted in a prior suit against a funeral home that employed the embalmer as an independent contractor. *Ferrara v. Vicchiarelli Funeral Servs.*, 2016-Ohio-5144, 68 N.E.3d 171 (8th Dist.). There, the Ferraras filed an action against a funeral home for the alleged mishandling of the final arrangements of a loved one, and the funeral home filed a counterclaim for the remaining balance due under the contract for funeral services. *Id*. at ¶ 3. The Ferraras voluntarily dismissed their claims against the funeral home and other defendants. *Id*. The case proceeded on the counterclaim alone, and judgment was rendered in favor of the funeral home. *Id*. The Ferrraras filed a new complaint with additional causes of action and additional parties, including the coroner and embalmer employed by the funeral home. *Id.* at ¶ 4. On a motion for summary judgment filed by the funeral home defendants, the trial court granted judgment in their favor, finding res judicata precluded the second suit. *Id*. at ¶ 6. On appeal, the Ferraras argued that res judicata did not bar the claims against the coroner and embalmer because they were not parties to the earlier suit. *Id*. at ¶ 15. This court rejected that argument finding the claim preclusion branch of res judicata barred suit against the same party or those in privity for claims arising out of a single transaction. *Id*. at ¶ 18. This court determined that res judicata precluded suit even where the embalmer was an independent contractor. *Id.*

{¶11} Here, the claims against Tri County were the same claims asserted against Cosimo involving the same transaction. In his suit against Cosimo, Paul specifically alleged that the concrete used by Cosimo was defective and that Cosimo was liable for any damages that resulted. The magistrate relied on the decision in the first case, in part, to find that Tri County was liable for damages to the driveway. However, the decision in the first case indicates that Paul failed to meet his burden of proof to establish that the driveway was defective. The decision specifically mentions normal spalling, lack of sealant, and the use of deicing products as likely causes for any damage. Further, the decision in the first case contains an erroneous statement of law. It states, "[t]he Plaintiff indicated they believed that [the] batch of cement was defective and as the Defendant ordered it, it was the Defendant's responsibility. That is not the case. As a matter of law, if the cement was defective, the Plaintiff's recourse would be against the supplier." That is an incorrect statement of the law.[1] Paul contracted with Cosimo for the installation of a driveway. If that finished product was defective, Paul had a cause of action against the contractor and Cosimo can be found liable for breach of contract on showing proof of the claim. *See Bd. of Edn. v. Fry, Inc.*, 22 Ohio App.3d 94, 489 N.E.2d 294 (10th Dist.1984). *See also Glagola v. Tarr*, 1 Ohio App.2d 312, 193 N.E.2d 532 (8th Dist.1963) (general contractor was found liable for a defective driveway installed by a subcontractor; the general contractor then sued the subcontractor who furnished the

[1] Under a breach of implied warranty claim, a plaintiff may pursue a claim against the supplier of concrete, but it is not limited to that claim.

materials and installed the driveway). Others may also be liable, but that does not preclude recovery.

{¶12} In *United Methodist Church v. Dunlop Constr. Prods., Inc.*, 8th Dist. Cuyahoga Nos. 60390, 60391, 60392, and 60652, 1992 Ohio App. LEXIS 1983 (Apr. 16, 1992), this court found that a roof installer was not liable for a leaking roof where the evidence at trial showed no improper work by the installer, but that the roof system supplied by the manufacturer was defective. *Id*. at 24-26. However, in that case, the roof installer was contracted only to install the roof. The contract did not include supplying the materials for the job, which were separately purchased by the property owner through an independent distributor of the roofing manufacturer. *Id*. at 2-3.

{¶13} The contract between Paul and Cosimo specified that Cosimo would supply all materials for the job. Therefore, under common law principles, Cosimo had a duty to perform in a workmanlike manner, using proper materials. *Mitchem v. Johnson*, 7 Ohio St.2d 66, 73, 218 N.E.2d 594 (1966).

{¶14} The trial court's erroneous conclusion in the first case created a situation where a homeowner was needlessly required to file multiple actions in an effort to obtain relief. Further, the decision in the first case extinguished all claims that arose from the transaction between the parties and those in privity with them. Res judicata bars Paul's present action. However, the magistrate's decision in the present case seems to rely heavily on the fact that Cosimo was found not liable, even though there is a paucity of evidence in the present case that the concrete was defective. Paul's own testimony

indicates that he was told by an independent, third-party concrete contractor that there was nothing wrong with the concrete when he got an estimate for the cost of replacement.

III. Conclusion

{¶15} The resultant situation is untenable for Paul, but this court is bound to apply the applicable law. The earlier suit involved the same transaction, encompassed the same claims, and Paul's claims against Cosimo and Tri County were required to be litigated in one action because Tri County is in privity with Cosimo. Res judicata precludes recovery against Tri County for precisely the reason demonstrated in this case. The trial court relied on the earlier verdict to impose liability on Tri County even when there was no evidence of fault on Tri County's part.

{¶16} This cause is reversed and remanded to the Parma Municipal Court for further proceedings consistent with this opinion.

It is ordered that appellant recover of said appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Parma Municipal 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.

FRANK D. CELEBREZZE, JR., JUDGE
MARY EILEEN KILBANE, P.J., and
EILEEN T. GALLAGHER, J., CONCUR