[Cite as *Strebler v. Morgan Stanley & Co., Inc.*, 2015-Ohio-4034.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

DANIEL J. STREBLER	C.A. No. 27721
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2013 09 4284
MORGAN STANLEY & CO., INC., et al.	
Appellees	

DECISION AND JOURNAL ENTRY

Dated: September 30, 2015

SCHAFER, Judge.

{¶1} Plaintiff-Appellant, Daniel Strebler, appeals the judgment of the Summit County Court of Common Pleas dismissing his complaint against Defendants-Appellants, Morgan Stanley & Co., Inc. and Morgan Stanley Financial Advisor and Investment Representative Compensation Plan (collectively, "Appellees"), for failure to state a claim upon which relief can be granted. For the reasons that follow, we affirm the trial court's judgment.

I.

{¶2} Strebler filed a complaint against Appellees arising from his past employment with Morgan Stanley as a financial advisor. The complaint made the following relevant allegations. While Strebler was employed, Morgan Stanley offered a voluntary Wealth Creation Program in which eligible employees contributed a portion of their paychecks in exchange for "Stock Units," which correspond to shares of Morgan Stanley stock. Morgan Stanley matched employee contributions at either 20 or 40 percent, depending on the employee's level within the

company. Upon voluntary termination of employment, an employee's unvested Stock Units are forfeited.

{¶3} Strebler contributed $44,000 via the Wealth Creation Program during 2007 and 2008. On February 2, 2009, he voluntarily terminated his employment and Morgan Stanley canceled his unvested Stock Units. Additionally, Morgan Stanley did not return the $44,000 in contributions made by Strebler into the Wealth Creation Program. Based on these allegations, Strebler's complaint asserted claims for conversion, breach of fiduciary duty, and unjust enrichment. It also sought a declaratory judgment regarding his rights in relation to his participation in the Wealth Creation Program.

{¶4} Paragraph 40 of the complaint relates to prior litigation between the parties (the "Federal Case"). It states as follows:

> Strebler's current claims for Declaratory Judgment, Breach of Fiduciary Duty, Conversion, and Unjust Enrichment were previously pled in a complaint filed on January 29, 2010 in a case styled JRA Strebler v. Morgan Stanley & Co, Inc., et al. No. 5:10_CV_00206 USDC (Ohio ND ed) assigned to Judge Adams. In an order entered on June 23, 2010 (DE 17), Judge Adams stated that: "These proceedings are perpetually stayed and the case closed subject to reopening after a final decision from the arbitrator." After arbitration, as Judge Adams had suggested in his "closing" order (DE 17), Strebler filed a motion to reopen the case. In response to Strebler's motion, Judge Adams entered an Order (DE 26) "denying Plaintiff's motion to reopen the case" and thereafter dismissed the case on September 7, 2012 (DE 27). On appeal, the Sixth Circuit affirmed the district court on May 2, 2013, stating, "The judgment of the district court is AFFIRMED, no prejudicial error in the judgment and proceedings in district court." CA No. 12-4183.

Nothing was attached to the complaint regarding the Federal Case.

{¶5} Appellees did not file an answer. Rather, they first sought to remove this matter to the United States District Court for the Northern District of Ohio. But, the district court remanded this matter to the trial court. Appellees then filed a motion to dismiss the complaint pursuant to Civ.R. 12(B)(6). The basis for the motion was that res judicata barred all of

Strebler's claims. Attached to the motion were several orders and judgments from the Federal Case. Appellees never filed a motion to convert the motion to dismiss into a motion for summary judgment. Nevertheless, the trial court granted Appellees' motion to dismiss after finding that res judicata applied in this matter and barred all of Strebler's claims.

{¶6} Strebler filed this timely appeal, presenting two assignments of error for our review. Because the assignments of error are interrelated, we elect to address them together.

II.

Assignment of Error I

The trial court erred as a matter of law when it granted Morgan Stanley's motion to dismiss the plaintiff's complaint pursuant to Civ.R. 12(B)(6), for failure to state a claim upon which relief can be granted, when to reach its decision the trial court relied upon the doctrine of *res judicata* even though Strebler's state law claims have not been fully and fairly litigated.

Assignment of Error II

The trial court erred in misconstruing the Sixth Circuit's order affirming the district court's perpetual closure of the well-pled (ERISA federal) case.

{¶7} In his assignments of error, Strebler argues that the trial court erred in dismissing the complaint pursuant to Civ.R. 12(B)(6) on the basis that res judicata barred all of his claims. Specifically, he argues that the trial court erred in determining that the Federal Case included a final judgment on the merits that disposed of his claims. We disagree.

{¶8} We review a trial court's granting of a motion to dismiss pursuant to Civ.R. 12(B)(6) de novo. *Owens v. Haynes*, 9th Dist. Summit No. 27027, 2014-Ohio-1503, ¶ 11, citing *Ohio Bur. of Workers' Comp. v. McKinley*, 130 Ohio St.3d 156, 2011-Ohio-4432, ¶ 12. "Dismissal of a claim is appropriate where, after accepting as true all factual allegations of the claim and resolving all reasonable inferences in favor of the nonmoving party, 'it appears beyond doubt that the nonmoving party cannot prove any set of facts entitling him to the requested

relief.'" *Thomas v. Bauschlinger*, 9th Dist. Summit No. 26485, 2013-Ohio-1164, ¶ 12, quoting *LaSalle Bank, N.A. v. Kelly*, 9th Dist. Medina No. 09CA0067-M, 2010-Ohio-2668, ¶ 19, citing *State ex rel. Hanson v. Guernsey Cty. Bd of Commrs.*, 65 Ohio St.3d 545, 548 (1992). We must restrain our review to simply the allegations in the complaint and we "may not consider any materials or evidence outside of the complaint." *Equable Ascent Fin., L.L.C. v. Ybarra*, 9th Dist. Lorain Nos. 12CA010290, 12CA010296, 2013-Ohio-4283, ¶ 13. Dismissal pursuant to Civ.R. 12(B)(6) on the basis of an affirmative defense is appropriate "so long as the basis for the defense is apparent from the face of the complaint." *Pierce v. Woyma*, 8th Dist. Cuyahoga No. 94037, 2010-Ohio-5590, ¶ 38. Consequently, although "[a]s a general rule, the defense of *res judicata* may not be raised by a motion to dismiss under Civ.R. 12(B)(6)," there is "an exception to the general rule" when the complaint "allege[s] facts proving the [previous] opportunity to fully litigate" the claims raised in the current lawsuit.[1] *Thrower v. Slaby*, 9th Dist. Summit No. 16935, 1995 WL 231210, * 2-3 (Apr. 19, 1995).

{¶9} "The doctrine of res judicata encompasses the two related concepts of claim preclusion, also known as res judicata or estoppel by judgment, and issue preclusion, also known as collateral estoppel." *O'Nesti v. DeBartolo Realty Corp.*, 113 Ohio St.3d 59, 2007-Ohio-1102, ¶ 6. This matter implicates claim preclusion, which "prevents subsequent actions, by the same

[1] We are aware that there is precedent in this Court stating that res judicata should be raised as an affirmative defense in an answer and then asserted as a basis for summary judgment. *E.g., Costoff v. Akron Med. Ctr.*, 9th Dist. Summit No. 21212, 2003-Ohio-962, ¶ 14. Indeed, we have previously found under different circumstances that the failure to follow this procedure for the assertion of a res judicata defense mandates the reversal of a trial court's dismissal pursuant to Civ.R. 12(B)(6). *E.g., Hamrick v. DaimlerChrysler*, 9th Dist. Lorain No. 02CA008191, 2003-Ohio-3150, ¶ 7. Nevertheless, the resolution of this matter does not conflict with this precedent. Unlike the *Hamrick* ambit of cases, this matter involves an unambiguous allegation in the complaint regarding the previous litigation, the nature of its claims, and the litigation's outcome. Additionally, Strebler does not argue on appeal that *Hamrick* applies here and requires a reversal of the trial court's judgment.

parties, or their privies, based upon any claim arising out of a transaction that was the subject matter of a previous action." *Id*. In such a situation, "[t]he previous action is conclusive for all claims that were or that could have been litigated in the first action." *State ex rel. Schachter v. Ohio Pub. Emps. Retirement Bd.*, 121 Ohio St.3d 526, 2009-Ohio-1704, ¶ 27, citing *Holzemer v. Urbanski*, 86 Ohio St.3d 129, 133 (1999). We have previously described the claim preclusion prong of res judicata as providing 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.'" *Perrine v. Patterson*, 9th Dist. Summit No. 22993, 2006-Ohio-2559, ¶ 22, quoting *Grava v. Parkman Twp.*, 73 Ohio St.3d 379 (1995), syllabus.

{¶10} After exclusively scrutinizing the allegations in the complaint, and taking them as true and resolving all inferences in favor of Strebler, we determine that the trial court properly found that res judicata barred all of his claims in this matter. Strebler concedes that both the Federal Case and this matter involve the same parties, the same claims, and arise out of the same transaction. The only difference on appeal between the parties' positions is whether the Federal Case included a final judgment on the merits that bars Strebler's claims in this matter. Based on the allegations in Paragraph 40 of the complaint, we conclude that it did.

{¶11} We preliminarily note that "'an arbitration award has the same preclusive effect as the court judgment for the matters it decided.'" *Business Data Sys., Inc. v. Gourmet Café Corp.*, 9th Dist. Summit No. 23808, 2008-Ohio-409, ¶ 33, quoting *City of Cleveland v. Assn of Cleveland Firefighters, Local 93*, 20 Ohio App.3d 249, 254 (8th Dist.1984). According to the allegations in the complaint, the Federal Case involved the same claims as those asserted in this matter. Those claims were then referred to arbitration and the Federal Case was closed. After arbitration, Strebler attempted to reopen the Federal Case, but his motion was denied in the

district court before the Sixth Circuit Court of Appeals subsequently affirmed the district court's judgment.

{¶12} These allegations establish that the Federal Case terminated after a final judgment from the arbitrator, the district court, and the Sixth Circuit. As a result, we must reject Strebler's contention that there was no final judgment on the merits of his claims and affirm the trial court's determination that res judicata bars all of his claims. *See Thrower*, 1995 WL 231210, at * 3 ("On the basis of the pleadings alone, therefore, the trial court was justified in dismissing [the plaintiff]'s complaint because he alleged facts proving the opportunity to fully litigate the issues between [the parties]."). We also reject Strebler's argument to the extent that he suggests that there was no final judgment in the Federal Case that resolved his claims since the Sixth Circuit's order only related to the district court's refusal to reopen the case. Res judicata encompasses not only claims actually raised and litigated, but also those that *could have been litigated*. *See Singfield v. Yuhasz*, 9th Dist. Summit No. 22432, 2005-Ohio-3636, ¶ 16 ("As the facts underlying [the plaintiff]'s claims could have been litigated in his federal suit, he is now forever barred from asserting them in another action."), citing *Natl. Amusements, Inc. v. Springdale*, 53 Ohio St.3d 60, 62 (1990).

{¶13} Accordingly, we overrule Strebler's first and second assignments of error.

III.

{¶14} Having overruled Strebler's assignments of error, we affirm the judgment of the Summit County Court of Common Pleas.

Judgment affirmed.

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(C). 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 Appellant.

JULIE A. SCHAFER
FOR THE COURT

WHITMORE, J.
CONCURS.

CARR, P. J.
DISSENTING.

{¶15} I respectfully dissent. Although a motion to dismiss under Civ.R. 12(B)(6) may be granted where the complaint clearly demonstrates that the matter either has been or could have been litigated previously, it should not have been granted under the circumstances of this case. It is unclear from the complaint, specifically paragraph 40, what transpired in federal court. There are numerous gaps that cannot be explained without looking at materials outside the complaint. For example, the complaint does not allege that Morgan Stanley filed a motion to dismiss and/or to compel arbitration in federal court, but the trial court, in granting the motion to dismiss,

specifically indicated that Morgan Stanley had filed these motions. Because these allegations are not in the complaint, the trial court must have considered other outside information. This is inappropriate when ruling on a motion to dismiss pursuant to Civ.R. 12(B)(6).

{¶16} I would reverse and remand.

APPEARANCES:

BRUCE H. WILSON, Attorney at Law, for Appellant.

JONATHAN P. CORWIN and STEVEN A. CHANG, Attorneys at Law, for Appellee.