[Cite as *Rimby v. Heritage Union Title Co., Ltd.*, 2021-Ohio-3635.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

JODY M. RIMBY,

Plaintiff-Appellant,

v.

HERITAGE UNION TITLE
COMPANY LTD., et al.,

Defendants-Appellees.

OPINION AND JUDGMENT ENTRY
Case No. 21 CO 0002

Civil Appeal from the
Court of Common Pleas of Columbiana County, Ohio
Case No. 2020 CV 345

BEFORE:
Carol Ann Robb, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:
Reversed and Remanded.

Atty. Michael O. Kivlighan, 3685 Stutz Drive, Suite 100, Canfield, Ohio 44406 and *Atty. Nicholas S. Cerni,* The Law office of Nicholas S. Cerni, 755 Boardman Canfield Road, Suite M-1, Youngstown, Ohio 44512 for Plaintiff-Appellant and

Atty. Emily K. Pidgeon, Clunk Law Office, 2040 South Union Avenue, Alliance, Ohio, 44601 for Defendant-Appellee Heritage Union Title Co. and *Atty. Jason M. Rebraca,* Johnson and Johnson Law Firm, 12 West Main. Street, Canfield, Ohio 44406 for Defendant-Appellee David J. Davanzo.

Dated: September 29, 2021

Robb, J.

{¶1} Plaintiff-Appellant Jody M. Rimby appeals the decision of the Columbiana County Common Pleas Court granting the motion to dismiss filed by Defendants-Appellees Heritage Union Title Company, Ltd. and David J. Davanzo in her action seeking a declaration on the release of escrowed funds and asserting tort claims against the title company. Appellant contends: her complaint sufficiently alleged an actual and justiciable controversy seeking declaratory relief; the court improperly considered items outside of the complaint in granting dismissal under Civ.R. 12(B)(6); the court applied an inapplicable section of bankruptcy law when stating her debt to her former spouse was non-dischargeable support; and the court improperly granted relief not sought by the defense or available upon dismissal when it ruled on the merits and ordered one defendant (the title company) to release the escrowed funds to the other defendant (Davanzo).

{¶2} Appellees contend the court lacked subject matter jurisdiction to rule on the request for declaratory relief. We conclude the court had jurisdiction and the court's ruling of dismissal and release of escrowed funds was improper. For the following reasons, the trial court's judgment is reversed, and the case is remanded for further proceedings.

STATEMENT OF THE CASE

{¶3} On September 28, 2020, Appellant filed a complaint seeking declaratory relief against the title company and Davanzo. The complaint also contained tort claims for unjust enrichment and conversion against the title company. The factual section of the complaint said Appellant sold her home in Leetonia on February 27, 2020 and the title company retained part of the proceeds in escrow due to the mistaken belief her former spouse (Davanzo) had a lien in the amount of $12,000 against the residence due to an

obligation in a May 26, 1999 decree of dissolution with an incorporated separation agreement.

{¶4} Attached as Exhibit A was a page from the closing disclosure, which said the title company would hold $12,005 for the clearing of title. Exhibit B was a page from the separation agreement in Columbiana County Common Pleas Court Case No. 1999 DR 157, which starts in the middle of the relevant sentence: "after the parties' child * * * reaches the age of eighteen years, Wife shall pay to Husband TWELVE THOUSAND DOLLARS ($12,000.00) as and for his interest in said real estate. Husband shall immediately quit claim his interest to wife." Exhibit C to the complaint was an October 27, 2004 bankruptcy schedule in which she listed Davanzo as a creditor for $12,000 as a result of an "unsecured property claim from prior divorce action".

{¶5} Appellant's complaint said: Davanzo never "filed for record" the decree in order to create a lien on the residence; she filed for Chapter 7 bankruptcy on July 30, 2004 listing the equity in the residence as $15,000; the real property exemption was $5,000 at the time; the trustee resolved the unprotected equity claim by having Appellant pay $5,000 into the bankruptcy estate; all creditors were notified to file a proof of claim since assets were recovered; Davanzo never filed a claim; and her debts were discharged on November 17, 2004.

{¶6} After setting forth these facts, count one of the complaint sought a declaration Appellant was entitled to the release of the escrowed funds as there was no existing claim or lien for which the title company could justifiably hold the proceeds from the sale of her home as any claim Davanzo had was discharged in bankruptcy. Count two claimed the title company was unjustly enriched at Appellant's expense by accepting and retaining her money and refusing to turn it over; she claimed this was willful, wanton, and reckless and sought punitive damages. Count three claimed the title company was liable to her for conversion by exercising unauthorized and wrongful dominion over her property.

{¶7} The title company filed a motion to dismiss. First, the motion claimed: their title search revealed the decree ordering Appellant to pay Davanzo $12,000 for his interest in the residence (listed a marital asset) within a reasonable time of the child turning 18; Appellant informed the title company the debt was discharged in her 2004

bankruptcy; Davanzo claimed it was not discharged; and the title company placed the amount in escrow due to the dispute and in accordance with the closing documents as the title company "is without direction as to its disposition."

{¶8} As to the unjust enrichment and conversion counts, the title company sought dismissal for failure to state a claim under Civ.R. 12(B)(6), arguing: there was a valid dispute over the dischargeability of the obligation to Davanzo at the time of closing; Appellant's allegations on the tort were bare legal conclusions; she signed the escrow agreement appointing the title company and approved the settlement holding back the escrowed funds; there was no benefit conferred on the title company by holding the funds; the funds were in an escrow account and not comingled; and the title company was not wrongfully exercising dominion or control over the escrowed funds.

{¶9} The title company attached: a copy of the signed purchase agreement appointing the title company as the insurer of title; an escrow agent appointment executed by Appellant on February 27, 2020; and additional pages from the closing disclosure in Appellant's Exhibit A (which showed the funds would be held in escrow to clear title) to demonstrate Appellant signed the closing disclosure on February 27, 2020.

{¶10} As to the claim for declaratory relief, the title company acknowledged a dispute over whether Appellant's obligation to Davanzo was discharged in the 2004 Bankruptcy, but the title company moved to dismiss under Civ.R. 12(B)(1) for lack of subject matter jurisdiction. The title company alleged the general division of the common pleas court lacked subject matter jurisdiction to apply a domestic relations decree, believing there was a separate domestic relations division.

{¶11} The title company suggested it would (after dismissal) file a Civ.R. 75(J) post-decree motion in 1999 DR 147 seeking to reopen and interplead the escrowed funds. In the alternative to dismissal of the declaratory action, it was suggested the court could transfer the matter to the domestic relations court after which the title company would move to interplead the funds.

{¶12} In supporting its *jurisdictional* argument, the title company reviewed bankruptcy law, acknowledging Appellant's bankruptcy was governed by law prior to the 2005 amendments to 11 U.S.C. 523 and citing subdivision (a)(5) (providing a debt is not dischargeable in bankruptcy if it is owed to a former spouse in connection with a court

order *for alimony, maintenance, or support*). The title company also cited the *Loveday* case from this court holding a spouse's failure to appear in the bankruptcy did not waive the right to challenge the dischargeability of the marital debt in a subsequent domestic relations proceeding as a state court has concurrent jurisdiction with the federal court on the issue of whether the debt was in the nature of spousal support. It was also noted the court was not confined to the complaint in ruling *on a Civ.R. 12(B)(1) motion*.

{¶13} Davanzo's motion to dismiss the declaratory relief claim said: "under 12(B)(6), this Court lacks jurisdiction over the subject matter of the complaint." He claimed the controversy must be raised in the domestic relations court as the bankruptcy court did not specifically rule on the matter and Appellant's claim was governed by the separation agreement in 1999 DR 157.

{¶14} Within this discussion, Davanzo said Appellant's obligation to pay him $12,000 was non-dischargeable in bankruptcy, citing pre-2005 amendment 11 USC 523(a)(5). He attached Appellant's November 7, 2004 general bankruptcy discharge as an exhibit, noting she was informed any debt in the nature of alimony, maintenance, or support is not discharged. Although not named as a defendant in the unjust enrichment and conversion counts, Davanzo agreed with the title company's dismissal motion for failure to state a tort claim, arguing an escrow account is necessarily a separate holding account at a bank which is not commingled with the funds of the escrow agent.

{¶15} Appellant's response to the two motions to dismiss said her complaint satisfied Civ.R. 8 by containing a short and plain statement of the claim showing she was entitled to relief. As for the claim for declaratory relief, she said a declaratory judgment would terminate the uncertainty or controversy, there was a real controversy between the parties which was justiciable in character, and speedy relief was necessary to preserve the parties' rights. Appellant noted the dismissal motions essentially admitted the existence of a redressable controversy by stating there is a dispute over who is entitled to the escrowed funds in light of the bankruptcy action. She also observed the motions attempted to raise facts outside of the complaint.

{¶16} As to the jurisdictional argument, Appellant claimed the law cited in the dismissal motions merely said federal and state courts have concurrent jurisdiction over whether a debt was dischargeable and did not specify the court in the domestic relations

case alone can declare the effect of a bankruptcy on an obligation in a dissolution decree. Addressing jurisdictional priority, she noted after the domestic relations case was final, her current action invoked the trial court's jurisdiction, before any attempt was made to invoke the concurrent jurisdiction of the court in the domestic relations case.

{¶17} As to the tort claims, Appellant said the title company cited facts outside of the complaint and presented affirmative defenses which were not the proper subject of a motion to dismiss, claiming she was entitled to discovery to determine if the funds were properly retained. It was also pointed out the two tort claims against the title company would not have been heard in the domestic relations case.

{¶18} In addressing the cited bankruptcy law, Appellant's response pointed out the defense relied on (a)(5), which provided alimony, maintenance, and spousal support are not dischargeable, but the defense failed to disclose (a)(15), which governed the discharge of *non-support* obligations in connection with divorce proceedings. The latter section required the creditor to request exception of the debt from discharge and required the bankruptcy court, after notice and hearing, to find the debtor lacked the ability to pay the debt or find discharging the debt would result in a benefit to the debtor that outweighs the detrimental consequences to the former spouse. Appellant noted the post-2005 amendment states non-support divorce obligations are not dischargeable (even without an adversarial action balancing the hardships), but the parties agreed that amendment was inapplicable to her pre-existing bankruptcy discharge.

{¶19} On January 13, 2021, the trial court granted the motions to dismiss based on Civ.R. 12(B)(6). The court recited: the property was encumbered by the 1999 dissolution decree with the attached separation agreement; Appellant claimed the obligation to Davanzo was discharged in bankruptcy; Davanzo claimed it remained outstanding; and the title company held $12,005 in escrow for clearing title. The court then said Appellant claimed the obligation was discharged in bankruptcy but only attached a list of unsecured creditors and failed to attach a certified copy showing those debts were discharged. The court concluded a debt to a former spouse for alimony, maintenance, or support in connection with a separation agreement or divorce decree is not discharged in bankruptcy and the obligation was still owed to Davanzo. The court ordered the title

company to release the escrowed funds to him to satisfy the dissolution decree and separation agreement.

{¶20} Appellant filed a timely notice of appeal. Her brief raises four assignments of error. But first, we address Appellees' argument that the trial court lacked subject matter jurisdiction over the declaratory action.

JURISDICTION IN DECLARATORY ACTION ON ESCROWED FUNDS

{¶21} The trial court's dismissal entry cited Civ.R. 12(B)(6) law and made decisions on entitlement to the escrowed funds. The court did not order dismissal based on the subject matter jurisdiction argument presented in the dismissal motions of both Appellees on the claim for declaratory relief. As the court declared Davanzo was entitled to the escrowed funds and ordered the title company to release them to him, the court implicitly ruled it had subject matter jurisdiction. Accordingly and because Appellant agreed the court had jurisdiction, Appellant's brief does not address the trial court's jurisdiction.

{¶22} Instead of defending the trial court's decision in the declaratory action, Appellees both argue the trial court's dismissal of the request for declaratory relief can be upheld on other grounds: lack of subject matter jurisdiction. *See* App.R. 3(C)(2) (the appellee need not file a cross-appeal or raise a cross-assignment of error if the appellee intends to defend the order appealed by the appellant on a ground other than that relied on by the trial court and the appellee does not seek to change the order). Appellees acknowledge their argument only applies to the claim for declaratory relief as the common pleas court had jurisdiction over the tort claims.

{¶23} Civ.R. 12(B)(1) provides for a motion to dismiss for lack of subject matter jurisdiction. The question in ruling on "a dismissal pursuant to Civ.R. 12(B)(1) is whether any cause of action cognizable by the forum has been raised in the complaint." *State ex rel. Bush v. Spurlock*, 42 Ohio St.3d 77, 80, 537 N.E.2d 641, 644 (1989). The standard of review is de novo. *State ex rel. Ohio Civ. Serv. Emps. Assn. v. State*, 146 Ohio St.3d 315, 2016-Ohio-478, 56 N.E.3d 913, ¶ 12.

{¶24} Davanzo relies on our *Loveday* case. In the context of determining whether the state court had jurisdiction, we held: "when dischargeability of a marital debt is not raised in bankruptcy court, then it is an issue which may be ruled on by a court with

concurrent jurisdiction after the discharge in bankruptcy." *Loveday v. Loveday*, 7th Dist. Belmont No. 02 BA 13, 2003-Ohio-1431, ¶ 18. *See also Kassicieh v. Mascotti*, 10th Dist. Franklin No. 05AP-684, 2007-Ohio-5079, ¶ 22. *Markley v. Markley*, 9th Dist. Wayne No. 07CA0085, 2008-Ohio-3208, ¶ 17 ("state courts have concurrent jurisdiction with bankruptcy courts to determine whether a particular obligation was a support obligation and, therefore, whether it was dischargeable in bankruptcy").

{¶25} Here, the parties agreed a state court has jurisdiction over the specific dischargeability question after the discharge in bankruptcy. Davanzo's dismissal motion attached the discharge, showing it was a general discharge with notice that a debt for support is not discharged. This was not part of the complaint, but in deciding a question of subject matter jurisdiction, the court can view items outside of the complaint. *Southgate Dev. Corp. v. Columbia Gas Transm. Corp.*, 48 Ohio St.2d 211, 214, 358 N.E.2d 526 (1976).

{¶26} We further observed in *Loveday*: "When determining whether [the former husband's] obligation to pay the marital debt was in the nature of spousal support, the trial court is not acquiring jurisdiction over [the former husband's) bankruptcy action. Instead, it is merely exercising its jurisdiction over *this divorce action*." (Emphasis added). *Loveday*, 7th Dist. No. 02 BA 13 at ¶ 22. We remanded to the domestic relations court because that is where the case originated upon the wife's motion for contempt filed in the domestic case. *See id. See also Markley*, 9th Dist. Wayne No. 07CA0085 (also arising from a contempt motion filed in the domestic case). These cases did not address whether the trial court can rule on the dischargeability issue in a declaratory judgment action or hold the matter can *only* be addressed within a prior domestic relations case.

{¶27} Davanzo relies on the jurisdictional priority rule and says the domestic relations court first acquired jurisdiction in the 1999 divorce case. Appellant's response to dismissal argued: because the domestic case had been completely adjudicated, there was concurrent jurisdiction until her declaratory judgment action invoked the jurisdiction of the general division. She also pointed out her action *was not an attempt to attack or modify the prior decree*. There was also an underlying suggestion that if Appellees wished to ensure the matter proceeded in the domestic relations case, the title company should have filed the Civ.R. 75(J) motion in the domestic relations case and interpleaded

the funds (as the title company's brief voiced it wanted to do) or Davanzo should have filed a motion to enforce or for contempt in the domestic relations case. The title company asked the court to alternatively transfer the case to the domestic relations "division," but the court chose not to do so.

{¶28} A court has full power to enforce its divorce decree or decree of dissolution with attached separation agreement. R.C. 3105.65(B). Civ.R. 75(J) provides: "The continuing jurisdiction of the court shall be invoked by motion filed in the original action, notice of which shall be served in the manner provided for the service of process * * *." Yet, this procedure was not invoked before (or even after) Appellant filed her civil complaint.

{¶29} The jurisdictional priority rule provides: between courts of concurrent jurisdiction, the court who first acquires jurisdiction over an action acquires jurisdiction, to the exclusion of all tribunals, to adjudicate upon the whole action and to settle the rights of the parties. *State ex rel. Dannaher v. Crawford*, 78 Ohio St.3d 391, 393, 678 N.E.2d 549 (1997). Once a court acquires jurisdiction of a cause of action, its authority continues until the matter is "completely and finally disposed of" and a court of concurrent jurisdiction cannot interfere. *John Weenink & Sons Co. v. Court of Common Pleas of Cuyahoga Cty.*, 150 Ohio St. 349, 82 N.E.2d 730 (1948), paragraphs two and three of syllabus.

{¶30} "The jurisdictional-priority rule requires that both actions be currently pending" and *does not apply where a final judgment had been entered before the second action was filed*. *State ex rel. Consortium For Econ. & Cmty. Dev. v. Russo*, 151 Ohio St.3d 129, 2017-Ohio-8133, 86 N.E.3d 327, ¶ 11. We also note "the jurisdictional-priority rule has no applicability when the cases are pending in the same court." *Id.* at ¶ 14. "[I]f two actions are pending in the same court before different judges, the parties have a method for vindicating those interests that is not available when the cases are filed in different courts—a motion for consolidation." *Id.* at ¶ 10.

{¶31} Here, the final judgment in the domestic relations case was entered long ago. There was no pending domestic relations case when this case was filed in order to invoke the jurisdictional priority rule. *See Rossi v. Rossi*, 7th Dist. Mahoning No. 20 MA 0086, 2021-Ohio-2348, ¶ 26 (stating the domestic relations division was divested of jurisdiction after the final judgment until a new filing in the case; where a contempt action

was filed in the domestic relations division after a contract action was filed in the general division based on a stock redemption agreement, note, and personal guaranty underlying a separation agreement).

{¶32} We next point out, "the priority doctrine does not apply where two courts have exclusive jurisdiction over different issues." *In re B.N.S.*, 2020-Ohio-4413, 158 N.E.3d 712, ¶ 18 (12th Dist.). The general jurisdiction of courts of common pleas is provided in R.C. 2305.01, which provides "original jurisdiction in all civil cases in which the sum or matter in dispute exceeds the exclusive original jurisdiction of county courts." *Seventh Urban Inc. v. University Circle*, 67 Ohio St.2d 19, 22, 423 N.E.2d 1070 (1981) (the Ohio Constitution does not confer jurisdiction to the courts but simply grants the "capacity to receive jurisdiction" to a common pleas court in all cases once the legislature grants the court power to exercise jurisdiction).

{¶33} "The court of common pleas including divisions of courts of domestic relations, has full equitable powers and jurisdiction appropriate to the determination of all domestic relations matters." R.C. 3105.011. Notably, "R.C. 2301.03 establishes the jurisdiction of the state's domestic relations courts in separate subsections; their jurisdiction can vary by county." *Pula v. Pula-Branch*, 129 Ohio St.3d 196, 2011-Ohio-2896, 951 N.E.2d 72, ¶ 6. *If* the statute "grants all the power in marriage-related cases to the domestic relations division, [it is] thus limiting the ability of other common pleas judges to preside over those cases. *Id.* We shall address whether a statute grants such power to a domestic relations division in the pertinent locality in a moment.

{¶34} We first mention that *after* a final divorce decree is entered, proceedings that may include interpreting a domestic relations decree have been permitted to occur in a division other than the domestic relation division, especially when other parties are involved. In a case cited by Appellant below, the Eighth District said "[w]hen a division of the common pleas has completed the disposition of a matter that is within the division's special assignment and later a controversy arises implicating both matters within the specialty and other issues not peculiar to it," the general and domestic relations divisions have concurrent jurisdiction. *Price v. Price*, 16 Ohio App.3d 93, 95, 474 N.E.2d 662 (8th Dist.1984), citing *Wagner v. Wagner*, 6th Dist. Lucas No. L-83-072 (July 22, 1983). The court was not dissuaded by the argument that Cuyahoga County had a separate statutory

domestic relations division and judge with jurisdiction. *See* R.C. 2301.03 (L)(1) (designating domestic relations division judges who shall exercise the same powers and jurisdiction as other common pleas court judges of Cuyahoga County and have "all the powers relating to all" cases of divorce, dissolution, legal separation, and annulment, unless a case is assigned to a court of common pleas judge for a special reason).

{¶35} More on point, the Eighth District has applied the general holding to a case seeking to enforce the divorce decree: "Because the domestic relations court had issued a judgment granting the divorce and providing for the division of the property, the domestic relations court no longer had exclusive jurisdiction over the matter and the common pleas court, which has concurrent jurisdiction, had the power to enforce the order of the domestic relations court." *Khan v. Hughes*, 8th Dist. Cuyahoga No. 102651, 2015-Ohio-4502, ¶ 14

{¶36} The Eleventh District recently held the general division had subject matter jurisdiction in a declaratory judgment action to determine title to alleged estate assets, where the court was required to interpret a separation agreement incorporated into a divorce decree. *Szokan v. Stevens*, 11th Dist. Lake No. 2020-L-020, 2020-Ohio-7001, ¶ 16-27. The court pointed out the jurisdiction of the domestic relations court ended with the decree and was not then re-invoked by motion. *Id.* at ¶ 28.

{¶37} We need not further delve into an analysis on the particular subject of a general division interpreting a domestic relations division's decree as that is not the situation before this court. The above-reviewed cases (which allowed general division to exercise jurisdiction after the final decree) involved counties with separate statutory domestic relations divisions with a statutorily assigned domestic relations judge.

{¶38} Columbiana County does not have a separate statutory domestic relations division or judge. *See* R.C. 2301.02(B) (providing the terms for two common pleas court judges in Columbiana County); R.C. 2301.03 (not naming a domestic relations division judge for Columbiana County). In counties where R.C. 2301.03 does not create a separate domestic relations division, "the division of cases is for administrative purposes and consequently does not limit the court of common pleas' subject-matter jurisdiction." *Reimund v. Hanna*, 3d Dist. Hancock No. 5-06-09, 2006-Ohio-6848, ¶ 10, 14 ("the

administrative division of cases in Hancock County did not limit the court of common pleas' subject-matter jurisdiction").[1]

{¶39} "Subject-matter jurisdiction is the power of a court to entertain and adjudicate a particular class of cases." *Bank of Am., N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, ¶ 18. "[T]he court of common pleas is a court of general jurisdiction, with subject-matter jurisdiction that extends to 'all matters at law and in equity that are not denied to it.' " *Id.* at ¶ 20. The prior domestic relations decree was filed in the same court as this complaint. Therefore, the same statutory division of the common pleas court presiding in this case would have presided over any motion which could have been filed under the domestic relations case. The court of common pleas in Columbiana County had the power to entertain and adjudicate the claim. The trial court implicitly and correctly found that its jurisdiction extended to the matters presented in Appellant's complaint. Accordingly, Appellees' argument on subject matter jurisdiction is overruled.

ASSIGNMENTS OF ERROR 1-2: DISMISSAL

{¶40} Appellant's first two assignments of error state:

"The Trial Court erred in granting Defendant's Motion to Dismiss."

"The Trial Court erred as a matter of law by failing to apply the correct standard of review when granting the defendant's motion to dismiss the plaintiff's complaint based upon allegations and assertions contained outside the pleadings."

{¶41} A Civ.R. 12(B)(6) dismissal for failure to state a claim upon which relief can be granted is a procedural motion that tests the legal sufficiency of the complaint and the trial court can therefore only view the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 605 N.E.2d 378 (1992). "To survive a motion to dismiss for failure to state a claim upon which relief can be granted, a pleader is ordinarily not required to allege in the complaint every fact he or she intends to prove;

[1] *See generally Centerburg RE LLC v. Centerburg Pointe Inc.*, 2014-Ohio-4846, 22 N.E.3d 296, ¶ 41 (5th Dist.) (rejecting the defendant's argument that the general division lacked subject matter jurisdiction in a civil action because the plaintiff's claims related to marital debt); *Cook v. Cook*, 6th Dist. Wood No. WD-89-21 (Jan. 26, 1990) (finding the trial court had jurisdiction over a partition action even though a dissolution decree ordered the husband to pay the wife one-half of the proceeds upon the sale of the marital property). We note there were no statutory domestic relations divisions in Knox or Wood Counties, the counties involved in those cases.

such facts may not be available until after discovery." *Id.* at 549. To dismiss a complaint on this ground, the court must find beyond doubt that the plaintiff can prove no set of facts warranting relief after it presumes all factual allegations in the complaint are true and construes all reasonable inferences in the plaintiff's favor. *State ex rel. Seikbert v. Wilkinson*, 69 Ohio St.3d 489, 490, 633 N.E.2d 1128 (1994).

{¶42} "When a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleading and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Civ.R. 56." *Adlaka v. Giannini*, 7th Dist. Mahoning No. 05 MA 105, 2006-Ohio-4611, ¶ 29, citing Civ.R. 12(B). "This process requires conversion and notice thereof." *Id.*, citing *State ex rel. Boggs v. Springfield Loc. Sch. Dist.*, 72 Ohio St.3d 94, 96, 647 N.E.2d 788 (1995). "[W]here the motion to dismiss, which relies on evidence outside of the complaint, is granted without conversion and notification, the dismissal is reversible." *Scardina v. Ghannam*, 7th Dist. Mahoning No. 04-MA-81, 2005-Ohio-3315, ¶ 18.

{¶43} Appellant states the trial court improperly considered items outside of the face of the complaint and items "outside of this action" without converting the motion and providing notice. Appellees complain Appellant's brief does not specify exactly what items outside of the complaint she believes the court improperly considered. Yet, Appellant refers to the trial court's consideration of "separate, predecessor actions."

{¶44} Appellant's complaint contained various allegations about the domestic relations case and the bankruptcy case, and she attached related documents to her complaint: a bankruptcy schedule, one page from the separation agreement which was incorporated into the dissolution decree, and the first page of the closing disclosure. "Material incorporated in a complaint may be considered part of the complaint for purposes of determining a Civ.R. 12(B)(6) motion to dismiss." *State ex rel. Crabtree v. Franklin Cty. Bd. of Health*, 77 Ohio St.3d 247, 249, 673 N.E.2d 1281 (1997), fn. 1 (considering various articles and public health studies attached to the complaint). *See also State ex rel. GMS Mgt. Co. Inc. v. Vivo*, 7th Dist. Mahoning No. 10 MA 1, 2010-Ohio-4184, ¶ 14 (considering written correspondence attached to the complaint); *Adlaka v. Giannini*, 7th Dist. Mahoning No. 05 MA 105, 2006-Ohio-4611 ("Where documents are

attached or incorporated into the complaint, the face of the complaint to be evaluated includes those documents.").

{¶45} Hence, the court could properly consider the attachments to Appellant's complaint. Yet, this would not allow the court's perusal of the files in other cases, even cases in the same court. As discussed further infra, the trial court could not have considered attachments to the dismissal motions in ruling on a Civ.R. 12(B)(6) motion.

{¶46} On the opposite side of the coin, there is the issue of an item the trial court found lacking from the complaint. (Davanzo attached the general discharge to his dismissal motion while arguing only the domestic court could exercise jurisdiction to determine whether the obligation was in the nature of support and fell outside of the discharge.) The trial court's dismissal entry said: "The Plaintiff filed an action in bankruptcy court and claims the debt owed to Defendant, David J. Davanzo, was discharged. However, the only documentation attached to her complaint is a Schedule F form listing her unsecured creditors. There is no certified copy showing those debts were discharged."

{¶47} Nevertheless, a plaintiff need not prove their claim in the complaint. *See Pfalzgraf v. Miley*, 7th Dist. Monroe No. 19 MO 0006, 2019-Ohio-4920, ¶ 13. We note Civ.R. 10(D) states if a claim is based on an account or written instrument, a copy of the account or instrument must be attached to the complaint. Even if this could be construed as applying to the bankruptcy discharge, neither a dismissal motion nor the trial court cited this rule. A failure to attach a document under Civ.R. 10(D) is contested by Civ.R. 12(E) motion for a more definite statement: "a party can still plead a prima facie case in such circumstances even without attaching the account or written agreement to the complaint. Thus, the complaint will survive a motion to dismiss for failure to state a claim." *Fletcher v. University Hosps. of Cleveland*, 120 Ohio St.3d 167, 2008-Ohio-5379, 897 N.E.2d 147, ¶ 11.

{¶48} Appellant states her complaint alleged sufficient facts to survive a motion to dismiss for failure to state a claim for a declaratory judgment. Pursuant to R.C. 2721.02(A), "courts of record may declare rights, status, and other legal relations whether

or not further relief is or could be claimed. No action or proceeding is open to objection on the ground that a declaratory judgment or decree is prayed for under this chapter."[2]

{¶49} Appellant emphasizes the complaint set forth facts as to the elements for declaratory relief: a real controversy between the parties, which is justiciable and ripe for speedy relief in order to preserve the rights of the parties which may be impaired. *See Burger Brewing Co. v. Liquor Control Comm.*, 34 Ohio St.2d 93, 97, 296 N.E.2d 261 (1973). She points out a declaratory judgment would terminate the uncertainty or controversy as required by R.C. 2721.07. "[T]he abuse-of-discretion standard applies to the review of a trial court's holding regarding justiciability; once a trial court determines that a matter is appropriate for declaratory judgment, its holdings regarding questions of law are reviewed on a de novo basis." *Arnott v. Arnott*, 132 Ohio St.3d 401, 2012-Ohio-3208, 972 N.E.2d 586, ¶ 13.

{¶50} Notably, the title company did not argue Appellant insufficiently stated a claim for declaratory relief as to the escrowed funds, raising only subject matter jurisdiction on this claim. Davanzo cited Civ.R. 12(B)(6) but said, "under 12(B)(6), this Court lacks subject matter jurisdiction" (and opined she failed to state a claim as to the torts against the title company). He mentioned his theory the debt was non-dischargeable support but did not say she failed to state a claim for which relief could be granted. On appeal, Appellees do not defend the court's use of Civ.R. 12(B)(6) as to the claim for declaratory relief.

{¶51} As Appellant points out, the complaint must merely contain a short and plain statement of the claim showing entitlement to relief and a demand for relief. Civ.R. 8(A). "[A]s long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss." *York v. Ohio State Hwy. Patrol*, 60 Ohio St.3d 143, 144, 573 N.E.2d 1063 (1991) (some facts may not be available until discovery). Appellant's complaint stated her debt to Appellant was discharged in bankruptcy; if true, she was entitled to the escrowed funds.

[2] *See also* R.C. 2721.03 (a person who is interested under a written contract or whose rights, status, or other legal relations are affected by a statute or contract may have determined questions of construction or validity arising under the instrument or statute and obtain a declaration of rights, status, or other legal relations under it); R.C. 2721.06 (the general powers conferred by R.C. 2721.02(A) are not limited or restricted by R.C. 2721.03).

Her complaint did not review the entire bankruptcy case or cite bankruptcy law on support, which was mentioned in the dismissal motions to support the contention that the matter should be heard by a domestic relations court.

{¶52} In effect, the trial court found the complaint sufficiently set forth a claim that could be addressed via declaratory relief as it essentially granted declaratory relief to Davanzo, entering a negative declaration as to Appellant's right to the escrowed funds. *See* R.C. 2721.02(A) ("The declaration may be either affirmative or negative in form and effect."). The court entered a merit ruling on the complaint and declared rights while dismissing the complaint under Civ.R. 12(B)(6), which actions are contradictory.[3]

{¶53} Appellant complains the trial court erred in ruling on the merits of the case without converting the dismissal motion to a summary judgment motion. A Civ.R. 12(B)(6) "motion to dismiss is a procedural tool which tests the sufficiency of the complaint, not the sufficiency of the evidence. Tests of the sufficiency of the evidence are handled utilizing motions for summary judgment under Civ.R. 56." *Pfalzgraf*, 7th Dist. No. 19 MO 0006 at ¶ 13. The request for declaratory relief was a cause of action, not a motion. "The court may advance on the trial list the hearing of an action for a declaratory judgment," but the procedure for obtaining a declaratory judgment "shall be in accordance with" the Rules of Civil Procedure. Civ.R. 57.

{¶54} The trial court stated although many debts are discharged in bankruptcy, a debt for a former spouse for alimony, maintenance, or support of the former spouse in connection with a separation agreement or divorce decree is not discharged in bankruptcy. The court then concluded the obligation was still owed by Appellant to Davanzo (and ordered the title company to release the escrowed funds to him). Constrained to the face of the complaint, the trial court thus concluded Appellant's obligation in the decree to pay Davanzo $12,000 for his interest in the house after their child turned 18 was a debt for the support of Davanzo.

[3] A Civ.R. 12(B)(6) motion attacks the sufficiency of the complaint and is not to be utilized to summarily review the merits of a cause of action. *State ex rel. Hummel v. Sadler*, 96 Ohio St.3d 84, 2002-Ohio-3605, 771 N.E.2d 853, ¶ 17. An exception exists in original actions on the merit issue of whether there is an adequate remedy at law; still, such dismissal based on the merits is "unusual" and to be granted with utmost caution. *Id.* at ¶ 18. A declaration for a defendant upon a dismissal is even more extreme than the denial of a writ (where a petitioner had an adequate remedy at law).

{¶55} However, the trial court's decision is unjustified. The portion of the record properly viewed in ruling on the dismissal motion does not include the entire dissolution decree with incorporated separation agreement but only one page from the separation agreement. This page does not even contain the complete sentence in the decree concerning the debt at issue; the page begins in the middle of the sentence establishing the debt at issue. We also note the record does not show the child's age, which appears to be the triggering event for the debt becoming due (rather than the date of the sale of the house). Likewise, the bankruptcy discharge was attached to the dismissal motion, not the complaint, and was viewable for 12(B)(1) but not for 12(B)(6).

{¶56} Furthermore, the court applied bankruptcy statutes in rendering a legal holding on the merits of the action where Appellant was only aware she was responding to a motion to dismiss on jurisdiction (and failure to state a claim on the torts). And, the court cited bankruptcy law on support which does not appear applicable from the face of the complaint. This leads to Appellant's next assignment of error.

ASSIGNMENT OF ERROR THREE: BANKRUPTCY LAW

{¶57} Even if the court could apply the bankruptcy law to the face of the complaint to ascertain if a debt was dischargeable at this earlier stage of the proceedings, Appellant states in her third assignment of error:

"The Trial Court erred in its interpretation of Bankruptcy Law."

{¶58} The parties agree to the bankruptcy law in effect during Appellant's 2004 bankruptcy applied. The motions to dismiss cited (a)(5) of 11 U.S.C. 523, while Appellant cited to (a)(15) and (c). The trial court cited (a)(5) in declaring Davanzo was entitled to the escrowed funds, suggesting the court was under the impression all monetary obligations in a domestic relations decree are support, maintenance, or alimony and not dischargeable.

{¶59} Pursuant to (a)(5), a discharge "does not discharge an individual debtor from any debt * * * to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record * * *." 11 U.S.C. 523(a)(5) ("but not to the extent that * * * such debt includes a liability designated as alimony,

maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support").

{¶60} At the time of Appellant's bankruptcy filing, 11 U.S.C. 523(a)(15) stated the discharge:

> does not discharge an individual debtor from any debt * * * not of the kind described in paragraph 5 that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a governmental unit unless—
>
> (A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or
>
> (B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor * * *."

11 U.S.C. 523 (a)(15).

{¶61} Yet, 11 U.S.C 523(c)(1) provided: "the debtor shall be discharged from a debt of a kind specified in paragraph * * * (15) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph * * * (15) * * * of subsection (a) of this section."[4]

{¶62} In applying (a)(5), the trial court quoted from our *Loveday* case. In *Loveday*, the former wife filed a post-decree contempt action in a domestic relations case due to the husband's failure to pay the marital debts, including the mortgage on the marital

[4] We note (a)(15) was added to 11 U.S.C. 523 in October 22, 1994, long before Appellant's bankruptcy. We also note after Appellant's bankruptcy, Congress eliminated from (a)(15) "unless" and the subsequent provisions in (A) and (B); Congress also eliminated the reference to (15) from (c)(1). This meant property settlements and other decree obligations under (a)(15) became non-dischargeable in the same manner as domestic support obligations in (a)(5). *See* April 20, 2005 amendments (effective 180 days thereafter). The parties agree the 2005 amendments are inapplicable here.

residence (which was subjected to foreclosure after she was granted the right to possession until the children turned 21). The former husband argued his bankruptcy discharged the obligation he owed under the divorce decree to pay these marital debts. The trial court believed it lacked jurisdiction to determine if the obligation was in the nature of support so as to be non-dischargeable in bankruptcy.

{¶63} After citing 11 U.S.C. 523(a)(5), we said there was no rule requiring the former wife to raise dischargeability of support in bankruptcy court. *Loveday v. Loveday*, 7th Dist. Belmont No. 02 BA 13, 2003-Ohio-1431, ¶ 10, 15. The former wife did not waive the ability to argue the obligation was non-dischargeable merely because she did not appear in bankruptcy court as that court did not specifically rule the debt was dischargeable. *Id.* at ¶ 24-25 (the general discharge is not res judicata on dischargeability). We thus remanded, concluding the state court had jurisdiction to determine whether the obligation in the decree was non-dischargeable support. The case did not stand for the proposition that a property division obligation was dischargeable support. The debtor-husband in *Loveday* was obligated to pay the mortgage while the wife had the right to possess the residence, which is distinct from the debtor-Appellant obtaining the deed to the house and owing the other spouse his share years in the future.

{¶64} Appellant's complaint did not admit her debt to Davanzo was in the nature of support. She attached a page from the separation agreement incorporated into the 1999 dissolution decree, and this page gave no indication Appellant's obligation to pay Davanzo $12,000 for his quit-claimed interest in the residence after the child turned 18 was in the nature of *Appellant's support of* Davanzo. She was the debtor in the bankruptcy, and the question under (a)(5) would be whether her debt to her former spouse was for alimony to, maintenance for, or support *of her former spouse*.

{¶65} As to (a)(15), which was raised in response to the motions to dismiss and which was not addressed by the trial court, Appellant's complaint did not admit Davanzo filed a request under 11 USC 523(c) (which would have prompted the bankruptcy court to hold a hearing after notice to determine whether the debt should be specified as dischargeable). The complaint alleged: Davanzo was listed in her bankruptcy as an unsecured creditor who was owed $12,000 from a property claim in a prior divorce; he

received notice to file a proof of claim in the bankruptcy court as assets had been recovered; and he failed to do so.

{¶66} Davanzo does not address (a)(5) or (a)(15) on appeal, urging merely the general division of the common pleas court lacked jurisdiction to issue a declaratory judgment about the effect of a bankruptcy discharge on an obligation in a domestic relations decree. The title company cites (a)(5), suggesting if that issue should be determined in domestic relations court, then any issue of dischargeability of an obligation in the decree should be determined in domestic relations court as it is for the domestic relations court to ensure the obligation is not one in support in order to apply (a)(15). *See* 11 U.S.C. 523(a)(15) (referring to an obligation that is "not of the kind described in paragraph 5 that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree * * *"). As below, the title company does not argue Appellant failed to state a claim upon which relief could be granted under Civ.R. 12(B)(6) as to the claim for declaratory relief, and Davanzo only argues it in so far as he believes subject matter jurisdiction falls under Civ.R. 12(B)(6) as opposed to (B)(1) as cited by the title company.

{¶67} Davanzo would need to establish how a property distribution ordering Appellant to pay Davanzo for his share of the house in the future (when the child turns 18) could be considered her obligation to provide support or maintenance of Davanzo or alimony owed to him. From the face of the complaint (including its attachments) and the dismissal arguments, it was erroneous to conclude Appellant could prove no set of facts entitling her to the escrowed funds. In any event, this is another topic remaining for a summary judgment motion if Davanzo feels he can legally support making it.

{¶68} As an aside, Davanzo's brief mentions he would argue on remand that even if the personal debt to him was discharged, he had in rem debt (a lien) which would not have been discharged; he claims he will argue the debt created in the decree was a lien because it specifically related to property and Appellant did not affirmatively seek to discharge a lien in her bankruptcy. The latter fact is outside of the complaint and again the entire decree is not part of the record on a motion to dismiss.

{¶69} For a lien to be created in a divorce decree, it must contain sufficient indicators of an intention to make particular identified property a security for an obligation

(or the debtor's promise to transfer the property as security). *Michael v. Miller*, 8th Dist. Cuyahoga No. 109121, 2021-Ohio-307, ¶ 48 (where the decree said "Husband shall secure his obligations by assigning to Wife his interest in [a corporation] to secure the payments due to Wife. Husband shall execute a Cognovit Note and stock pledge to secure the payments"). *See also Farrey v. Sanderfoot*, 500 U.S. 291, 293, 111 S.Ct. 1825, 114 L.Ed.2d 337 (1991) (where the divorce decree specifically granted the creditor spouse a "lien" against the real property). *Compare* 5/26/99 Decree. The only relevant line we have from the parties decree states Davanzo shall immediately quit-claim his interest to Appellant and Appellant shall pay Davanzo $12,000 "as and for his interest in said real estate" after their child turns 18 (rather than upon the sale).

{¶70} Davanzo acknowledges this issue is not before this court. And, he did not raise the issue below (specifying the issue was whether the debt was support and urging the question could only be answered by the domestic relations court). Appellant was thus unable to respond to the topic in the trial court. This was another topic to be addressed in summary judgment motions, rather than through a dismissal, and it does not appear the court rendered a judgment on this unidentified ground.

TORT CLAIMS

{¶71} As for the unjust enrichment and conversion counts filed against only the title company, Appellant's brief does not mention the elements of either tort and does not specifically address the dismissal of those counts. Yet, this appears to be because the trial court's dismissal of the case seemed wholly based on the ruling that Davanzo was entitled to the escrowed funds; i.e., if she was not entitled to the escrowed funds, then she failed to state a claim against the title company for unjust enrichment or conversion.

{¶72} The title company asked for Civ.R. 12(B)(6) dismissal for failure to state a claim on unjust enrichment and conversion because: there was a valid dispute at the time of closing over the dischargeability of Appellant's obligation to Davanzo in the decree; her allegations were bare legal conclusions; she signed the escrow agreement appointing the title company; she approved the settlement holding back the escrowed funds; there was no benefit conferred on the title company by holding the funds; the funds were in an escrow account and not comingled; and the title company was not wrongfully exercising dominion or control over the escrowed funds.

{¶73} Appellant indicated she had no knowledge as to where the funds were located, pointing to the purpose of discovery. In any event, as her response to the dismissal motion pointed out, the title company relied on evidence outside of the complaint to support their authority to hold the funds. The title company attached evidence to the dismissal motion showing: she signed a purchase agreement naming the title company; she signed the closing statement which showed the $12,000 amount was being held to clear title; and she signed an escrow agent agreement.

{¶74} These items were not part of the face of the complaint and could not be considered at the Civ.R. 12(B)(6) stage. The items constituted evidence appropriate for incorporation into a summary judgment motion in the manner outlined in Civ.R. 56. *See Adlaka*, 7th Dist. No. 05 MA 105 at ¶ 29, citing Civ.R. 12(B). If the court had relied on this evidence, the dismissal would be reversible as there was no conversion to summary judgment or notice. *Id.*, citing *State ex rel. Boggs*, 72 Ohio St.3d at 96; *Scardina*, 7th Dist. No. 04-MA-81 at ¶ 18. Regardless, as the court's dismissal of the torts was based on its decision that Davanzo was entitled to the escrowed funds, the dismissal of tort claims must be reversed as we are reversing the dismissal of the action for declaratory relief.

ASSIGNMENT OF ERROR 4: ORDER TO RELEASE FUNDS

{¶75} Appellant's fourth and final assignment of error contends:

"The trial court improperly granted relief not prayed for by the litigants."

{¶76} Appellant observes a pleading, including a counterclaim or cross-claim, must contain a short and plain statement of the claim showing entitlement to relief and a demand for relief. Civ.R. 8(A). There was no counterclaim or cross-claim filed here as the stage of the case had not yet reached the stage for filing a responsive pleading due to the motions to dismiss under Civ.R. 12(B). As Appellant points out, neither dismissal motion asked for an order releasing the escrowed funds to Davanzo, and such order would be inconsistent with a dismissal for failure to state a claim.

{¶77} Davanzo concedes the trial court could not order the release of the funds to him, but this concession is based on his contention the common pleas court lacked jurisdiction to rule on Appellant's request for declaratory relief. The title company claims, if this appeal had not been filed, it would have filed a post-decree motion under

Civ.R.75(J), seeking to reopen 99 DR 157 and interplead the funds (regardless of the order to release the funds to Davanzo).

{¶78} As recognized supra, although the trial court granted motions to dismiss, the court essentially ruled on the merits of the declaratory judgment action and entered declaratory judgment in favor of Davanzo. We note a negative declaration is permitted in a declaratory judgment action. *See* R.C. 2721.02(A) ("The declaration may be either affirmative or negative in form and effect."). However, as explained above, the procedure for obtaining a declaratory judgment shall be in accordance with the Rules of Civil Procedure. Civ.R. 57. As we are reversing the dismissal of the case under the prior analysis finding further proceedings were necessary, the trial court's corresponding order to release the escrowed funds to Davanzo is reversed as well.

{¶79} In conclusion, the court had subject matter jurisdiction, but the dismissal of the complaint accompanied by a negative declaration was not appropriate. The trial court's judgment is reversed, and the case is remanded for further proceedings.

Donofrio, P J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are sustained and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Columbiana County, Ohio, is reversed. The court had subject matter jurisdiction, but the dismissal of the complaint accompanied by a negative declaration was not appropriate. We hereby remand this matter to the trial court for further proceedings according to law and consistent with this Court's Opinion. Costs to be taxed against the Appellee.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.