ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JUDGE DAVID M. GLOVER

DIVISION IV

CA06-138

September 20, 2006

RONNEY EVANS APPELLANT	APPEAL FROM THE CRAWFORD COUNTY CIRCUIT COURT
V.	[CV-04-420]
BRENSHER PROPERTIES, L.L.C., DOUGLAS BRENT MEDLOCK, and SHERYL MEDLOCK	HONORABLE GARY R. COTTRELL, JUDGE
APPELLEES	REVERSED AND REMANDED

This one-brief appeal arises from the trial court's dismissal of appellant Ronney Evans's complaint. In the complaint, appellant alleged in pertinent part that appellees Brent and Sheryl Medlock had been the sole shareholders and officers of a company called Medco, Inc.; that an $85,000 judgment against Medco, Inc., had been entered in favor of appellant; that prior to Medco, Inc.'s filing for bankruptcy, the Medlocks transferred all of their individual assets, as well as all of the assets of Medco, Inc., to appellee Brensher Properties, LLC, in order to avoid satisfaction of appellant's judgment; and, that in doing so, they violated Arkansas Code Annotated section 4-26-1103 (Repl.

2001).[1] In connection with those allegations, appellant sought by his complaint to pierce the corporate veil of appellee Brensher Properties, LLC, and to pursue appellees Brent and Sheryl Medlock to collect on the $85,000 judgment that had been entered earlier against Medco, Inc. Appellees answered the complaint and incorporated into it their three-paragraph motion to dismiss, contending in part that appellant's action was barred by the doctrine of *res judicata*. Following a hearing on the motion to dismiss, the trial court granted it.

The court's order of dismissal provided: "*After reviewing the motion, the file and other matters before the Court*, the Court does hereby find that the debt which is the subject of this action was properly before the Federal Bankruptcy Court and that jurisdiction was properly before that court and that this matter should have been tried by the Federal Bankruptcy Court." (Emphasis added.) Appellant's subsequent motion for reconsideration was denied, and this appeal followed. Appellant contends that the trial court erred in granting appellees' motion to dismiss and in denying appellant's motion for reconsideration on the basis of *res judicata* because appellant did not have a full and fair opportunity to litigate the issue in question. Finding error in the trial court's dismissal of the case, we reverse and remand for proceedings consistent with this opinion.

Standard of Review

[1] One or both of the Medlocks subsequently filed personal bankruptcy, which was apparently dismissed.

A motion to dismiss is converted to a motion for summary judgment when matters outside the pleadings are presented to and not excluded by the court. *Francis v. Francis*, 343 Ark. 104, 31 S.W.3d 841 (2000). Here, it is clear from the language of the order of dismissal, previously emphasized, that matters outside the pleadings were considered by the trial court in deciding appellees' motion to dismiss. Consequently, we review this appeal as one from summary judgment.

Summary judgment is appropriate when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *Francis, supra*. The law is well settled that summary judgment is to be granted by a trial court only when it is clear that there are no genuine issues of material fact to be litigated, and the party is entitled to judgment as a matter of law. *Id*. Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Id*. On review, our appellate courts determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leave a material fact unanswered. *Id*. This court views the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id*. Our appellate review focuses not only on the pleadings, but also on the affidavits and other documents filed by the parties. *Id*.

Subpoint A

Under his first subpoint, appellant contends that he should be allowed to pursue common law fraud causes of action, to pierce the corporate veil of Brensher Properties, LLC, and to pursue the Medlocks to collect on the $85,000 judgment from the earlier case of *Evans v. Medco, Inc*. The problem with his argument is that the trial court did not grant the motion to dismiss for any of the reasons addressed by appellant under this subpoint, even though they were presented as bases for dismissal by appellees in their motion to dismiss. The trial court granted the motion to dismiss on the basis that "the debt which is the subject of this action was properly before the Federal Bankruptcy Court and that jurisdiction was properly before that court and that this matter should have been tried by the Federal Bankruptcy Court." Accordingly, it is the *res judicata* argument that appellant raises in his second subpoint that challenges the basis upon which the trial court actually granted appellees' motion to dismiss. Therefore, we need not address the arguments discussed by appellant under his first subpoint.

Subpoint B

For his second subpoint, appellant contends that his attempt to sustain a common-law-fraud and fraudulent-transfer action is not precluded by the doctrine of *res judicata* and that the trial court's decision to grant appellees' motion to dismiss should be reversed. We agree that the trial court erred in its dismissal of appellant's case.

The following colloquy at the July 15, 2005 hearing is pertinent to the decision reached by the trial court:

THE COURT: I understand, but the question here is a procedural one as to whether or not the creditors had an opportunity to investigate and bring that up before the bankruptcy court. [Appellant's Attorney], did you have a chance at that time to do that, or were you cut off from that?

[APPELLANT'S ATTY]: Your Honor, we exhausted this, to my knowledge, and I can provide the court with the documents that I'm relying upon. It is my impression that we were cut off from the possibility of proceeding any further.

THE COURT: Why don't you get that to me. I believe the motion to dismiss has to be dealt with first. If the court denies your motion to dismiss, you'll be ordered to comply with the discovery. If the court dismisses the case, then it's not an issue. *If you had an opportunity to go into bankruptcy to find assets, and for bankruptcy to handle that, I consider your case over. If you did not, you were cut off from that; you were not given an opportunity to fully do that, then, I'm for letting you have this action*. Provide me with whatever documents you need to and see what I can do.

(Emphasis added.) By letter to the court dated July 15, 2005, the same date of the hearing, appellant's attorney reported in pertinent part:

> I indicated to the Court that I was under the impression that due to the Termination of Medco, Inc.'s bankruptcy case, we were unable to pursue our cause of action against Medco, Inc. However, it appears that I was incorrect *in that* although, Medco, Inc. did not receive a discharge of their debts, they did close their bankruptcy case to conclusion. As such, I am not attaching any documentation to this correspondence.

(Emphasis added.) Earlier that day, there had been a discussion at the hearing regarding whether Medco, Inc.'s bankruptcy case was *terminated* for failure to follow procedure or whether its debts were *discharged*. The above-quoted portion of appellant's attorney's

letter, which certainly was not in affidavit form, does not completely clarify the situation; neither does the trial court's order of dismissal, to-wit:

> After reviewing the Motion, the file and other matters before the Court, the Court does hereby find that the debt which is the subject of this action was properly before the Federal Bankruptcy Court and that jurisdiction was properly before that court and that this matter should have been tried by the Federal Bankruptcy Court. Defendant's Motion to Dismiss is hereby granted.

Appellant's attorney additionally argued in her July 15 letter:

> However, as I indicated to the Court in this morning's hearing, I am reiterating our reliance on Plaintiff's Response and Brief in Support of Plaintiff's Response to Defendant's Motion to Dismiss as our basis for asking the Court to deny Defendant's Motion to Dismiss. . . . Specifically, noting that the case in front of this Court is a different cause of action (Piercing the Corporate Veil) than in Plaintiff's first cause of action and that the doctrine of res judicata bars another action by the Plaintiff only on the same claim or cause of action.... As we filed a Complaint to Pierce the Corporate Veil (of Brensher Properties, LLC) in the present case, we are not attempting to re-litigate the same issues as in the first cause of action against Medco, Inc. As set forth in Plaintiff's Brief, the test in determining whether res judicata applies is "whether matters presented in a subsequent suit were necessarily within the issues of the former suit and might have been litigated therein." ... Plaintiff's present action could not have been brought in his former suit because the Defendants created Brensher Properties, LLC subsequent to the first suit.

In *Harrison v. Loyd*, 87 Ark. App. 356, 367, 192 S.W.3d 257, 264 (2004), this court explained:

> Four elements must exist for *res judicata* to apply: (1) the first suit resulted in a final judgment on the merits; (2) the first suit was based on proper jurisdiction; (3) both suits involve the same cause of action or claim; (4) both suits involve the same parties or their privies. *Crockett & Brown, P.A. v. Wilson*, 314 Ark. 578, 864 S.W.2d 244 (1993). *Res judicata* bars not only the relitigation of claims that were actually litigated in the first suit, *but also those that could have been litigated*. *Searcy v. Davenport*, 352 Ark. 307, 100 S.W.3d 711 (2003). Thus, where a lawsuit is based on the same events as the subject matter of the previous lawsuit, *res*

> *judicata* will apply even if the subsequent lawsuit raised new legal issues and seeks additional remedies. *Id*.

(Emphasis added.)

Here, at a minimum, element three appears to be lacking. That is, as argued by appellant, the instant case does not seem to involve the same cause of action or claim as that which was tried and resulted in the earlier $85,000 judgment. Moreover, without more to go on, we are not convinced that the claims presented here *could have been litigated* in the other action. Neither this court nor the trial court was presented with enough information about exactly what went on in bankruptcy court to truly understand whether appellant's claim could have been pursued there.

Consequently, in light of our standard of review, we have concluded that the trial court disposed of this case prematurely based upon the doctrine of *res judicata*. It was appellees' burden to establish *prima facie* entitlement to summary judgment. We hold that they failed to do so. Genuine issues of material fact remained unanswered, and summary judgment was not appropriate. We therefore reverse and remand this case for proceedings consistent with this opinion.

Reversed and remanded.

PITTMAN, C.J., and GLADWIN, J., agree.