IN THE SUPREME COURT OF THE STATE OF DELAWARE

GERRY J. MOTT	)	
	)	No. 612, 2011
Defendant Below,	)	
Appellant,	)	Court Below: Superior Court
v.	)	of the State of Delaware in and
	)	for Sussex County.
STATE OF DELAWARE,	)	
	)	Cr. ID No. 0806026343
Plaintiff Below,	)	
Appellee.	)	

Submitted: June 7, 2012
Decided: July 31, 2012

Before **STEELE**, Chief Justice, **HOLLAND** and **BERGER,** Justices**.**

Upon appeal from the Superior Court. **AFFIRMED.**

William F. Richardson, Assistant Public Defender, Georgetown, Delaware for appellant.

Josette D. Manning, Deputy Attorney General, Wilmington, Delaware for appellee.

STEELE, Chief Justice:

Owner of Pulse Construction, Gerry J. Mott, the defendant-appellant, appeals a Superior Court judgment finding Mott guilty of one count of Construction Fraud. A Superior Court judge sentenced him to probation and ordered restitution in the amount of $68,576.89.[1] During the restitution hearing, the trial judge refused to hear testimony regarding a loan of $20,000 Mott claimed he made to the complainants for windows and doors that Mott installed in their home. On appeal, Mott claims that the sentencing judge improperly interpreted the statutory formula for calculating the amount of loss to a victimized home buyer. He also contends that the trial judge improperly refused to allow testimony at Mott's restitution hearing regarding the "set off" for the $20,000 given to the home buyers for windows and doors. We affirm the judgment because Mott failed to bring a counterclaim in an earlier mechanics lien suit implicating the $20,000 alleged debt and Super. Ct. Civ. R. 13(a) now bars him from doing so.

I. FACTS AND PROCEDURAL HISTORY

Mott, through his company Pulse Construction, entered into a contract in 2005 to build a new home for Joshua and Julia Littleton. The contract contained a draw schedule for Mott to receive payments. In March 2006, Joshua Littleton saw a mechanics lien posted on his new home. After consulting with an attorney, the Littletons discovered there were actually two liens on the property. Pulse

[1] 11 *Del. C.* § 917.

Construction subcontractors had filed the liens. One of which was CRM (Construction Resource Management). Instead of fully paying the subcontractors, Mott had apparently diverted the funds for another use in violation of the New Home Construction Fraud statute.[2] CRM filed a mechanic's lien action against the Littletons and Mott. The Littletons filed a crossclaim against Mott because he failed to make payments to CRM. Mott did not file a counterclaim for the debt the Littletons allegedly owed him. At trial, the judge found CRM's work credible and satisfactory.

> Before Mr. Littleton saw the posting, he had paid two draw payments on October 26, 2005 and January 11, 2006 totaling $102,000. From the second payment, Pulse and Littleton agreed that $19,600 would be paid to Littleton for windows and other items supplied by Littleton. Under the draw schedule, the foundation work was to be complete by the second draw, and Pulse had the funds to satisfy CRM's claim but did not pay CRM for the masonry work.[3]

After Mott's conviction on the instant construction fraud charge, the trial judge ordered that Mott pay restitution in the amount of $68,567.89 to the Littletons. The total figure included the principal amount of the liens ($43,693.77), attorney's fees, interest and other incidental costs.

At the restitution hearing, counsel for Mott attempted to introduce evidence of a $20,000 debt the Littletons allegedly owed him. The judge was familiar with

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[2] 11 *Del. C.* § 917 (b).

[3] *Constr. Resource Management v. Littleton*, C.A. No. 06L-03-031-RFS, at 5 (Del. Super. Aug. 28, 2008).

the argument from the earlier mechanic's lien trial and found the claimed $20,000 "set off" irrelevant to restitution in the criminal case. He refused to allow it to be relitigated at the restitution hearing. He listened to the argument briefly and ultimately decided that any debt owed by the defendant to the victims was a "civil issue."[4] Because it was a "civil issue," the judge decided it should not be dealt with or litigated during the crime related restitution hearing.

II. DISCUSSION

In this appeal we are asked to determine whether the trial judge properly refused to consider testimony regarding a $20,000 set off for Mott's loan to the Littletons. When the challenge to a restitution order hinges on a legal issue and resolution requires statutory interpretation, we review the issue *de novo*.[5]

In *Fields v. Frazier*, [6] a Superior Court judge cited Super. Ct. Civ. R. 13(a), which states:

> A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its

[4] App. to Appellant's Opening Br. A-48.

[5] *Redick v. State*, 858 A.2d 947, 951 (Del. 2004).

[6] *Fields v. Frazier*, C.A. No. 05C-06-166MMJ, at 2 (Del. Super. Nov. 21, 2005).

> adjudication the presence of third parties of whom the Court cannot acquire jurisdiction.[7]

The Court went on to hold that if an issue has been or could have been litigated in a previous proceeding and no compulsory counterclaim triggered a final resolution of the dispute, then the claim may not be relitigated or brought for the first time in a later action.

Mott should have filed a counterclaim for the debt the Littletons' allegedly owed him in the mechanics lien suit. The testimony regarding the $20,000 arose out of the same transaction or occurrence as the Littletons' crossclaim against him. If Mott indeed loaned $20,000 to the Littletons for doors and windows as part of the home construction, the Littletons' crossclaim against Mott is "logically related" to the subject matter of the debt the Littletons owed Mott.[8] Superior Court rules mandate a *compulsory* counterclaim in response to the crossclaim because it is intertwined with the materials used in the construction of the Littletons' home. Therefore, Mott's $20,000 putative claim results from the same transaction or occurrence that formed the basis for the mechanics lien case.

Mott's claim for a $20,000 "set off" arose from the Littletons' and Mott's 2005 agreement and once the mechanics lien was placed on the Littletons' house

[7] Super. Ct. Civ. R. 13(a).

[8] The tests applied to a counterclaim arising from the same transaction or occurrence, including same issues of fact and law, use of same evidence, and "logical relation" between the claims, is whether there is a "logical relationship" between the original action and the later action.

and the Littletons crossclaimed against him, Mott was compelled to file a counterclaim if he wished to receive a set off for the $20,000.

Rule 13(a) further states that the pleader need not state the counterclaim if pleader meets one of two exceptions:

> At the time the action was commenced the claim was the subject of another pending action, or the opposing party brought suit upon the claim by attachment or other process by which the Court did not acquire jurisdiction to render a person judgment on that claim, and the pleader is not stating any counterclaim under this Rule. [9]

Mott's claim does not fit within the two exceptions to Rule 13 because his claim for $20,000 was not the subject matter of another separate action. Second, the Littletons did not sue Mott by attachment or any other process in which the Court did *not* have jurisdiction over him. Therefore, Mott does not satisfy either of the exceptions. He failed to file the compulsory counterclaim and is now barred forever.[10]

The doctrine of *res judicata* states that a final judgment upon the merits rendered by a court of competent jurisdiction may be raised as a bar to the maintenance of a second suit in a different court regarding the same matter

[9] Super. Ct. Civ. R. 13(a).

[10] Mott brought a counterclaim against Construction Resource Management in the earlier suit regarding the mechanics lien, however, this counterclaim simply put in issue Construction Resource Management's performance and not any money the Littletons owed or any claim for a set off against any amount owed to them.

between the same parties.[11] In *Epstein v. Chatham Park, Inc.*, we announced a five pronged test to determine when *res judicata* bars a claim.[12] First, the original court must have had jurisdiction over the subject matter and the parties. Second, the parties to the original action must be the same as those parties, or their privies, in the current case. Third, the original cause of action, or the issues decided, must be the same in both cases. Fourth, the issues in the earlier action must have been decided adversely to the current plaintiff. Fifth, the decree in the earlier action was a final decree.[13]

The five elements of *res judicata* are satisfied here. We conclude that *res judicata* bars Mott from asserting testimony about the set off because the original court had proper jurisdiction over the subject matter in the earlier mechanics lien suit. Second, the Littletons in the original mechanics lien suit are the same parties claiming restitution here. Third, the original cause of action regarding the mechanics lien and dispute about the debt owed by the Littletons, is the same as in the restitution claim.

Although the issues in the mechanics lien case are not the same as this case, the fourth element is satisfied because the "bar of *res judicata* extends to all issues

[11] *Epstein v. Chatham Park, Inc.*, 153 A.2d 180, 183 (Del. Super. 1959).

[12] *Rumsey Electric Co. v. University of Delaware*, 334 A.2d 226, 228. (Del. Super. 1975).

[13] *Id.*

which *might* have been raised and decided in the first suit as well as to all issues that actually were decided."[14]

In *Myrks*, a father asked the court to reconsider his child support requirements and requested a paternity test because he did not believe he was the father of the child. The court held that the father was barred by *res judicata* from challenging the earlier paternity determination, even though the issue of paternity was not previously litigated. The father in *Myrks* had his opportunity in court and should have requested a paternity test at the earlier trial. Similarly, Mott briefly mentioned the money loaned to the Littletons for doors and windows in the mechanics lien case, but never formally filed a counterclaim for the set off in the earlier trial. *Res judicata* bars issues that *might* have been or could have been raised in an earlier proceeding.

Finally, the fifth element is satisfied because the judgment of the Superior Court was a final judgment. *Res judicata,* therefore, bars Mott from asserting his $20,000 set off against the Littletons in the restitution hearing or in any civil action going forward.

The public policy goals of judicial economy of litigation in the Courts is to put an end to litigation once a party has had its day in court and a full opportunity

[14] *Blake v. Myrks*, 606 A.2d 748, 750 (Del. 1992) (citing *Foltz v. Pullman, Inc.*, 319 A.2d 38, 40 (Del. Super. 1974) (emphasis added).

to present its case. Both the *res judicata* doctrine and Rule 13(a) serve the public policy goals of managing litigation.[15] That policy would not allow a claimant to prolong legal issues by continuing to bring up facts and claims that could have been litigated in an earlier proceeding.

> The doctrine of *res judicata* is primarily one of public policy . . . it's roots lie in the principle that public policy and welfare require a definite end to litigation when each of the parties has had a full, free and untrammeled opportunity of presenting all of the facts pertinent to the controversy.[16]

We understand the Superior Court's distinction between a civil dispute and criminal dispute. We do not, however, hold here that no viable civil claim can ever be asserted to offset a claim of entitlement to restitution. In this case, the public policy behind *res judicata* applies at this restitution hearing. *Res judicata* bars Mott's claimed set off against restitution he owes to the Littletons.

Finally, Mott contends that the trial judge erred, as a matter of law, in calculating the restitution, including his failure to consider the set off. Restitution is what the defendant owes to a victim because of the defendant's criminal conduct. The primary purpose for the restitution hearing was to make the Littletons

[15] *Mother African Union First Colored Methodist Protestant Church v. The Conference of African Union First Colored Methodist Protestant Church*, 1995 Del. Ch. LEXIS 87, at 6. (Del. Ch. July 13, 1995).

[16] *Coca Cola Co. v. Pepsi-Cola Co*., 36 Del. (6 W.W.Harr.) 124, 130 (Del. 1934).

whole.[17] The trial judge did not commit reversible error by excluding further testimony about the set off and by ultimately refusing to consider it. The court heard Mott's proffer on the set off during the hearing, determined it was not relevant to restitution and refused to allow Mott to relitigate the issue. Fortuitously, the judge presiding over the restitution hearing had presided over the mechanics lien trial and he was, therefore, fully aware of the basis for Mott's claim to a set off.

The trial judge did not err by ordering the broadly crafted restitution to the Littletons pursuant to section 4106 of Title 11 of the Delaware Code. Section 4106, the governing statute, specifically states that victims should be compensated for "other expenses and inconveniences incurred by them as a direct result of the crime."[18] This includes attorney's fees, interest on the liens, and other related costs.

III. CONCLUSION

For the foregoing reasons, the judgment of the Superior Court is affirmed.

[17] *Locklear v. State*, 692 A.2d 898, 900 (Del. 1997).

[18] 11 *Del. C.* § 4106.