IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

GLORIA LABELLA,

Appellant,

v. Case No. 5D20-2120

ROBERT A. LABELLA, JR, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERT ACCURSIO LABELLA,

Appellee.
_____/

Opinion filed July 9, 2021

Appeal from the Circuit Court
for Orange County,
Chad K. Alvaro, Judge.

Scott E. Siverson, of Siverson Law Firm PLLC, Winter Garden, for Appellant.

Douglas P. Gerber, of Killgore, Pearlman, Semanie, Denius & Squires, P.A., Orlando, for Appellee.

LAMBERT, C.J.

Gloria LaBella ("Gloria") appeals the summary final judgment that was contemporaneously entered against her and in favor of the appellee, Robert

A. LaBella, Jr., as Personal Representative of the Estate of Robert Accursio LaBella ("Estate"),[1] in two separate cases that were consolidated below. As we explain, we reverse this summary judgment as to one of the cases and remand for further proceedings in that case.

The underlying facts that gave rise to the separate cases are not critical to our disposition of this appeal, other than to mention that both cases concern a prenuptial agreement executed by Gloria and her now-deceased husband. Without getting into detail, in 2017, Gloria filed a two-count civil suit against the Estate; and, in 2019, she filed a separate declaratory judgment action, also against the Estate. Following consolidation, a motion for summary judgment filed by the Estate, and the hearing held on the motion, the trial court entered the singular summary final judgment in the consolidated cases that are now before us, determining that the doctrine or defense of collateral estoppel applied so as to bar Gloria's claims in both cases.

Preliminarily, we affirm the summary final judgment entered in the 2019 declaratory judgment action without further comment. However, based on the following three principles, we reverse this summary final judgment as to the 2017 civil suit.

[1] The deceased was Gloria's husband.

The first principle that we apply here is that "[c]onsolidation does not merge suits into a single cause or change the rights of the parties, or make those who are parties in one suit parties in another. Rather, each suit maintains its independent status with respect to the rights of the parties involved." *Santiago v. Mauna Loa Invs., LLC*, 189 So. 3d 752, 757 (Fla. 2016) (quoting *Shores Supply Co. v. Aetna Cas. & Sur. Co.*, 524 So. 2d 722, 725 (Fla. 3d DCA 1988)). Stated differently, "consolidated cases do not lose their individual identities as distinct, separately-filed causes of action." *OneBeacon Ins. v. Delta Fire Sprinklers*, *Inc.*, 898 So. 2d 113, 116 (Fla. 5th DCA 2005) (citing *CDI Contractors, LLC v. Allbrite Elec. Contractors, Inc.*, 836 So. 2d 1031, 1033 (Fla. 5th DCA 2002)). As such, while the parties in the consolidated cases below are the same, the causes of action asserted by Gloria in each case, and the specific defenses raised by the Estate in each case, remained separate and distinct.

Second, "[g]enerally, collateral estoppel is an affirmative defense which must be raised in an answer." *Norwich v. Glob. Fin. Assocs., LLC*, 882 So. 2d 535, 536 (Fla. 4th DCA 2004) (quoting *Bess v. Eagle Cap., Inc.*, 704 So. 2d 621, 622 (Fla. 4th DCA 1997)). "An exception [to this principle] is made, however, where the face of the complaint is sufficient to demonstrate the existence of the defense." *Id.* (quoting *Bess*, 704 So. 2d at

622). Here, the Estate raised collateral estoppel as a defense to the 2019 declaratory judgment action, but it did not assert this defense in its answer to Gloria's 2017 civil suit. Moreover, the face of the complaint filed in the 2017 case does not sufficiently demonstrate the existence of this defense.

The third and final controlling principle or rule of law here is that a summary final judgment cannot be based upon a defense raised in the summary judgment motion that had not been previously asserted in the answer. *See Danford v. City of Rockledge*, 387 So. 2d 968, 969–70 (Fla. 5th DCA 1980) ("Procedurally, we agree with the appellant that an affirmative defense of res judicata or release should not be raised by a motion for summary judgment prior to raising such defense in an answer."); *Robbins v. Dep't of Nat. Res.*, 468 So. 2d 1041, 1043 (Fla. 1st DCA 1985) ("[J]udgment should not have been entered predicated upon an affirmative defense which had never been properly raised by the defendant."), *disapproved on other grounds by Mazzeo v. City of Sebastian*, 550 So. 2d 1113 (Fla. 1989); *B.B.S. v. R.C.B.*, 252 So. 2d 837, 839 (Fla. 2d DCA 1971) ("An affirmative defense must be pleaded and not raised by a motion for summary judgment supported by an affidavit."). Simply put, the trial court erred by entering the summary final judgment in the 2017 civil case based on the defense of

collateral estoppel when that defense had not been raised by the Estate in that specific case.

Accordingly, we affirm the summary final judgment entered in the 2019 declaratory judgment action, but reverse the same summary final judgment entered in the 2017 civil suit and remand for further proceedings in that case.[2]

AFFIRMED, in part; REVERSED, in part; REMANDED for further proceedings.

EVANDER and WALLIS, JJ., concur.

[2] To be clear, we take no position as to the merits of the collateral estoppel defense regarding the 2017 civil suit, nor should our reversal here be construed as denying the Estate the opportunity to request an amendment of its pleadings below to assert this defense in that case, if it so chooses.