

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1996-CA-002132-MR

ROGER BROWN

APPELLANT

v. APPEAL FROM BOURBON CIRCUIT COURT  
HONORABLE DAVID L. KNOX, JUDGE  
ACTION NO. 93-CI-000144

BOURBON COUNTY GOVERNMENT and  
DIVERSIFIED FINANCIAL SYSTEMS, INC.

APPELLEES

OPINION  
AFFIRMING  
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BEFORE: GUIDUGLI, JOHNSON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from an order of the Bourbon Circuit Court, entered July 3, 1996. Roger Brown (Brown) argues that the circuit court erred in granting Diversified Financial Systems, Inc. (DFSI) and Bourbon County Government summary judgment, dismissing Brown's counterclaims and cross-claims against DFSI, and denying Brown summary judgment. Brown maintains that the court's rulings violated his civil rights and right to due process. We disagree with all of appellant's contentions, and, therefore, affirm.

The facts and procedural history of this case are not easily discernible. Apparently, Mid Central Construction Inc., of which Brown was a shareholder, planned to construct multifamily homes in Paris, Kentucky. Mid Central sought financing from Corinth Deposit National Bank (CDNB), who suggested Mid Central seek an indemnitor. On March 9, 1989, Fay Sams became that indemnitor and entered into a construction note with CDNB for \$105,000. Apparently, Brown was an indemnitor of Sams. Although over \$60,000 was disbursed by CDNB to pay materialmen, the vendors were not paid. By July 1989, it was clear to the bank that no progress on the construction project was being made. Lowe's Home Centers, Inc. (Lowe's) filed a mechanic's lien in September 1989 for over \$10,000. In November 1989, Lowe's filed suit to foreclose on the lien. The new Corinth bank was named a defendant and cross-claimed against Sams for breach of contract for allowing the lien by Lowe's to be filed. Sams cross-claimed against the bank for breach of contract--failure to properly pay invoices presented to it.

CDNB was declared insolvent by the Office of the Comptroller of the Currency on April 19, 1990, and the Federal Depositors Insurance Corporation (FDIC) was appointed its receiver. The FDIC was substituted for the bank in the case. On the same day, the loan, which is the subject of this case, was sold by the receiver to the FDIC in its corporate capacity. Sams filed a claim for damages with the FDIC on March 6, 1991. On November 12, 1991, Sams invoked the guaranty of indemnity clause against Brown, and six days later, deeded the Paris property to Brown. The FDIC assigned the mortgage to DFSI in October 1993.

The procedural history is equally confusing. On February 27, 1991, the U.S. District Court granted the FDIC and Lowe's summary judgment against Sams because Sams failed to respond to the motions. It then entered an April 3, 1991 judgment in favor of the FDIC, against Sams, for over \$70,000 and gave the FDIC a lien on the Paris property.

In June 1993, Bourbon County, by the Kentucky Secretary of Revenue, sued, in Bourbon Circuit Court, Sams, Brown, and the FDIC for taxes levied on the property between 1989 and 1992. The FDIC answered and filed a cross-claim against Sams and Brown, asserting a superior right to the property based on the federal court judgment.

Brown filed an answer, counterclaims, and cross-claims against various parties, including the FDIC, Bourbon County, and DFSI. He claimed that Bourbon County conspired to collect taxes with malice; that the FDIC willfully neglected and failed to sell the construction loan commitment to Sams for a higher price than that which they sold it to DFSI, without any notice to Sams; and that DFSI acted in bad faith, fraudulently, and was not a holder in due course. DFSI moved to strike the counterclaims and cross-claims for failure to state a claim for which relief might be granted. DFSI filed a third-party complaint in April 1994 against Sams and Brown, asking the court to recognize the federal court judgment granting it (through its assignor, FDIC) a superior lien on the property. The FDIC moved to remove its case to U.S. District Court in May 1994.

After the removal to federal court, Bourbon Circuit Court ruled, on August 11, 1994, upon DFSI's outstanding motion

and granted the motion to dismiss based on the April 3, 1991 Order of the U.S. District Court, which, the court found, addressed the same issues raised by Brown in his counterclaims and cross-claims. The court denied Brown's motion to reconsider its order.

On January 11, 1995, the federal court apparently issued an Opinion and Order<sup>1</sup> dismissing the FDIC as a party to the action because the action against it, by Brown, was time barred. FDIC was no longer the receiver at the time Brown filed his action. Brown sought reconsideration of the January 11, 1995 Opinion and Order dismissing the FDIC as a party to his action. In a July 3, 1995 Opinion and Order, the federal court made clear:

[T]he FDIC was not dismissed as a party to this action for the technical reason that Brown had not filed a response to the FDIC's motion to dismiss. Instead, the dismissal of the FDIC from this action was based on the merits of its motion that the claim filed against it on March 14, 1994, by Roger Brown was not subject to judicial review because this claim had not been filed with the FDIC as Receiver during the time the FDIC was Receiver for the Corinth Deposit National Bank. As this claim was time-barred, the fact that Brown had filed no response to the FDIC's motion to dismiss was irrelevant; the FDIC was dismissed from this action because Brown's claim against it was not timely filed.

In the meantime, on January 23, 1995, the action had been remanded to the Bourbon Circuit Court as a sanction for the

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<sup>1</sup>We use the word "apparently" because the January 11, 1995 Opinion and Order is not part of the record. It is the appellant's duty to designate the record. However, because a July 3, 1995 Opinion and Order of the federal court references the earlier Opinion and Order, we assume that it exists.

parties' failure to comply with an Order for Meeting and Report.

DFSI renewed its motion to dismiss Brown's claims against it in state court in March 1995. In May 1996, Bourbon County moved for summary judgment and order of sale, DFSI moved to convert its prior motion to a motion for summary judgment, and Brown moved for summary judgment against DFSI for failure to answer his interrogatories.

In its July 3, 1996 Order, the Bourbon Circuit Court ruled on these motions. The court denied Brown's motion for summary judgment because it had dismissed Brown's counterclaims and cross-claims on August 11, 1994, and, thus, DFSI was under no obligation to respond to his interrogatories.

Bourbon County's motion was granted because neither Brown nor Sams had ever appealed the decision to increase the assessment on the property and, thus, had not exhausted their administrative remedies. Therefore, they were not entitled to seek judicial review of the property valuation administrator's decision. In addition, the court found that Brown's counterclaim against Bourbon failed to state a claim upon which relief could be granted.

As to DFSI's motion for summary judgment, the court concluded:

[T]his Court is aware of the Order filed by the Federal District Court on February 27, 1991 in the case of Lowe's Home Centers, Inc. v. Midcentral Construction, Inc., et al, an action in which Mr. and Mrs. Sams were Defendants, which granted a Motion for Summary Judgment filed by the FDIC. In reading the Memoranda submitted by the FDIC in support of its Motion for Summary Judgment in that case, it appears that the very issues raised in this case were in issue in that

case. The Federal District Court's February 27, 1991 Order cites that Mr. Sams failed to make any response to FDIC's Motion. In view of that, since it appears to this Court that those issues were raised in the context of that Federal Court action, and since it further appears that Mr. Brown and Mr. Sams stand in the same shoes with respect to those issues, this Court believes that the doctrines of res adjudicata and collateral estoppel lead to a conclusion that those issues have been resolved, and are precluded from being raised in this action.

Brown's arguments are not easily decipherable. He clearly contests the circuit court's award of summary judgment to DFSI on the basis of res judicata. He argues that he was not a party to the U.S. District Court case brought by Lowe's; he was not in privity with Sams, who was a party thereto; Sams did not have a full and free opportunity to present his case; and the case was not fully and fairly litigated.

We believe the circuit court correctly found the doctrine of collateral estoppel applicable. Under this principle, a person who was not a party to the former action may assert res judicata against a party to that action so as to preclude the relitigation of an issue determined in the prior action. Sedley v. City of West Buechel, Ky., 461 S.W.2d 556 (1970). The elements essential to invoke collateral estoppel are: identity of issues; a final judgment on the merits; adjudication of an issue essential to the determination of the former case with the estopped party, who was given a full and fair opportunity to litigate; and a prior losing litigant. Moore v. Commonwealth, Ky., 954 S.W.2d 317 (1997).

The initial action of the FDIC in federal court against Sams alleged that Sams owed it over \$70,000 as a matter of law

for failure to use the disbursed loan amounts for material in the construction project. The certificate of service appended to the motion for summary judgment shows that Sams' attorney was served. Therefore, Sams had a full and fair opportunity to present his case. Whether he took advantage of that opportunity, and the reason why he may have failed to do so, are irrelevant. Moreover, the same issues raised in the prior proceeding are what Brown is attempting to argue in the state case. Sams and Brown were in privity. They share the same legal right and interest. BTC Leasing, Inc. v. Martin, Ky. App., 685 S.W.2d 191, 198 (1984). As such, Brown is a prior losing litigant.

Whether the prior judgment is considered a judgment on the merits is the pivotal question. The case of BTC Leasing involved an original default judgment. In the second action, the court applied collateral estoppel. Our Court was dubious as to whether the default judgment constituted a judgment on the merits:

We question whether the original judgment in Wayne Circuit Court is sufficiently "on the merits" so as to preclude its relitigation by the appellant. That judgment was rendered in default against William Burkett who by then had completely divested himself of any interest in the houseboat and had no dealings whatsoever with the appellant. We would be very reluctant to hold a judgment of such dubious quality as binding upon the appellant.

Id. at 197.

We believe BTC Leasing is distinguishable because in the case sub judice, Sams had good reason to defend against the claims of Lowe's and the FDIC. Burkett did not, as he had already divested himself of any interest in the property at hand.

Sams did not invoke the indemnity clause and deed the property to Brown until November 1991, whereas the federal court's judgment was rendered in February 1991. Thus, the summary judgment in this case was less dubious than the default judgment in BTC Leasing. Moreover, we do not want to promote a policy which would encourage a party not to respond to one suit and ensuing motions so as to avoid collateral estoppel in a subsequent action.

Consequently, we believe that the Bourbon Circuit Court correctly invoked collateral estoppel to both preclude Brown's claims against DFSI and to grant DFSI summary judgment. This determination also answers Brown's contentions that the court should have addressed whether DFSI was a holder in due course and that the court should have permitted the case to go to trial.

Brown also maintains the court erred in finding he failed to exhaust his administrative remedies before being allowed to contest the tax assessment. KRS 133.120(1) provides that an aggrieved taxpayer may appeal to the board of assessment appeals. If unhappy with the board's decision, Brown would then have to appeal to the Kentucky Board of Tax Appeals. KRS 133.120(6). Brown did not take this mandatory administrative route, and does not deny his failure to do so. Since the exhaustion of administrative remedies is dictated to prevent premature interference with agency processes, the circuit court was correct in granting Bourbon County summary judgment. Owensboro Nat. Bank v. Moore, 803 F. Supp. 24 (E.D. Ky. 1992).

Brown also asserts that the court erred in granting Edward Lorenz, the attorney for CDNB and the FDIC, summary



judgment. Brown did not make Lorenz an appellee to his appeal. Thus, because of Brown's failure to name a necessary party, we need not address this argument. CR 73.03; Braden v. Republic-Vanguard Life Ins. Co., Ky., 657 S.W.2d 241 (1983).

Appellant also contends that the circuit court should not have allowed removal to federal court since removal was premature. The issue of removal is one for the federal court to decide. 28 U.S.C. § 1446. Thus, these issues are not reviewable.

Brown maintains that the circuit court erred in allowing three agreed orders to be entered into record when he had not been served with same. The agreed orders are dated January 4, 1994 and February 18, 1994. Each bears the signature of Sams' attorney. Brown did not file his first pleading until March 14, 1994. As we have already stated that Sams and Brown shared the same legal interest, we see no error on behalf of the circuit court in allowing these orders to be made part of the record. Moreover, the orders allowed: FDIC to file an answer out of time; Van L. Sondgerath to be substituted as counsel for FDIC; and DFSI to be substituted for the FDIC as a real party in interest. We do not see how Brown was prejudiced by any of these orders.

Finally, Brown argues that the circuit court erred in refusing to order DFSI to answer his interrogatories because the court was going to rule in DFSI's favor on its motion for summary judgment, thus making the interrogatories moot. In fact, the court denied Brown's motion for summary judgment because it had previously dismissed his counterclaims and cross-claims on

August 11, 1994. This was the reason DFSI was under no obligation to respond to the interrogatories. Thus, we find no error in the court's ruling.

For the aforementioned reasons, the order of the Bourbon Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Roger Brown, Pro Se  
Clearwater, Florida

BRIEF FOR APPELLEE,  
DIVERSIFIED FINANCIAL SYSTEMS,  
INC.:

Van L. Sondgerath  
Covington, Kentucky