

RENDERED: SEPTEMBER 26, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-000305-MR

SASAN SHAFAGHI AND
NURDAN SHAFAGHI

APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 03-CI-04779

WASHINGTON MUTUAL BANK, FA;
J.W.I., INC.; AND JEFF WOLFE

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; DIXON AND LAMBERT, JUDGES.

DIXON, JUDGE: Sasan Shafaghi and Nurdan Shafaghi¹ (“Shafaghi”) appeal from an order of the Fayette Circuit Court granting summary judgment in favor of

¹ Nurdan Shafaghi is the former wife of Sasan Shafaghi. Mrs. Shafaghi, a named Appellant, has not participated in this appeal.

Washington Mutual Bank, FA (“Washington Mutual”), Jeff Wolfe and J.W.I., Inc.² (collectively, “Wolfe”). We affirm.

Shafaghi owns a home at 324 Ashmoor Drive in Lexington, Kentucky. The property is encumbered by a mortgage held by Washington Mutual. On February 4, 2000, the home was severely damaged by a fire. In April 2001, Shafaghi entered into a construction contract with Wolfe for restoration of the home. Ultimately, Shafaghi ceased making progress payments to Wolfe, and Wolfe abandoned the restoration project in July 2001.

In February 2002, Wolfe filed suit against Shafaghi in Fayette Circuit Court, alleging breach of the construction contract. Shafaghi filed a third-party complaint against his homeowner’s insurance company alleging bad faith. Wolfe subsequently moved for summary judgment, and in January 2003, the circuit court granted Wolfe’s motion without opposition from Shafaghi. The court found that Wolfe was owed \$23,728.74 for the construction work he completed. Thereafter, Shafaghi’s bad faith claim was heard by a jury, and Shafaghi received a judgment of \$127,500.00 plus attorney’s fees.

Following the jury trial, Shafaghi filed a motion to alter, amend or vacate the summary judgment in favor of Wolfe. Shafaghi alleged Wolfe had not completed the work and asked the court to compel performance. The court denied Shafaghi’s motion, and no appeal was taken.

² J.W.I., Inc. is a building restoration and construction company owned by Jeff Wolfe.

In November 2003, Washington Mutual filed a foreclosure complaint against Shafaghi. Washington Mutual also named Wolfe as a defendant in the action because he held a mechanic's lien on the property. On December 19, 2003, Shafaghi filed an answer and asserted a counterclaim against Washington Mutual. He alleged that Washington Mutual improperly disbursed funds to Wolfe and failed to inspect the property. Thereafter, on August 10, 2004, Shafaghi filed an amended answer and asserted a cross claim against Wolfe. In his cross claim, Shafaghi contended that Wolfe made fraudulent misrepresentations about the construction project and negligently damaged the property during construction.

Following a lengthy period of discovery, Washington Mutual and Wolfe moved for summary judgment. On January 10, 2007, the trial court granted summary judgment against Shafaghi, and this appeal followed.

Summary judgment “should only be used ‘to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant.’” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 483 (Ky. 1991) (quoting *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985)). Accordingly, on appellate review of a summary judgment, we must determine “whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996) (citing Kentucky Rules of Civil Procedure (CR) 56.03).

Shafaghi's Cross Claims Against Wolfe

Shafaghi contends that genuine issues of fact exist as to whether Wolfe made negligent or fraudulent misrepresentations about the construction of the house and whether the construction was defective. Wolfe argues that Shafaghi's claims are barred by *res judicata* because they should have been raised as compulsory counterclaims in the first litigation. CR 13.01.

“The rule of *res judicata* is an affirmative defense which operates to bar repetitious suits involving the same cause of action.” *Yeoman v. Commonwealth*, 983 S.W.2d 459, 464 (Ky. 1998). Claim preclusion, a subpart of *res judicata*, “bars a party from re-litigating a previously adjudicated cause of action and entirely bars a new lawsuit on the same cause of action.” *Id.* at 465.

The key inquiry in deciding whether the lawsuits concern the same controversy is whether they both arise from the same transactional nucleus of facts. If the two suits concern the same controversy, then the previous suit is deemed to have adjudicated every matter which was or **could have been brought** in support of the cause of action.

Id. (internal citations omitted) (emphasis added).

CR 13.01 states in relevant part:

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 transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

Shafaghi opines that his allegations against Wolfe were not known to him at the time of the first litigation; thus, he contends that his claims are not barred. We disagree.

First, Shafaghi claims Wolfe made material misstatements as to the completion date for the project. The record reflects that Wolfe and his construction supervisor advised Shafaghi that construction on the home would be complete in August 2001. Shafaghi overlooks the fact the he ceased making payments to Wolfe prior to August 2001 and that he requested significant changes to the original work order. Nevertheless, Shafaghi was clearly aware of these alleged misrepresentations at the time of the first litigation.

Second, Shafaghi asserts that, in the prior litigation, Wolfe fraudulently misstated the value of his work and recovered a judgment for work that was unfinished. The record refutes this claim.

In November 2001, Shafaghi wrote a letter to Washington Mutual complaining that the construction was incomplete and Wolfe should not be paid. Shafaghi wrote a second letter to Washington Mutual in December 2002, asserting that Wolfe had not earned the money he sought to recover in the then-pending litigation. Consequently, the initial letter reveals that Shafaghi was clearly dissatisfied with the cost and workmanship of the project prior to the first lawsuit.

Finally, as to his claim of defective workmanship, Shafaghi opines that he did not have the expertise to recognize faulty construction at the time of the first lawsuit. He contends that he did not learn of the defects until a structural

engineer evaluated the property in the summer of 2003. However, contrary to these assertions, in his deposition, Shafaghi testified that he was aware of the defective construction “shortly after” Wolfe abandoned the project in the summer of 2001.

Despite Shafaghi’s argument to the contrary, the record shows that his claims “properly belonged to the subject of the litigation in the first action and which in the exercise of reasonable diligence might have been brought forward at the time.” *Egbert v. Curtis*, 695 S.W.2d 123, 124 (Ky. App. 1985). Consequently, Shafaghi was required, pursuant to CR 13.01, to bring his compulsory counterclaim against Wolfe during the breach of contract litigation. We conclude that summary judgment was proper, as Shafaghi’s cross claim against Wolfe is barred by *res judicata*.

Shafaghi’s Counterclaim Against Washington Mutual

Shafaghi contends that Washington Mutual improperly disbursed funds to Wolfe for work that was incomplete and “breached its duty to inspect the repairs” to the property. Washington Mutual points out that it made the April 2003 payment pursuant to the judgment entered in Fayette Circuit Court. Washington Mutual further notes that Shafaghi endorsed the check payable to Wolfe.

Even considering the record in the light most favorable to Shafaghi, we are not persuaded that a genuine issue of fact exists. As we have already noted, Shafaghi was dissatisfied with Wolfe’s allegedly incomplete performance, but he failed to bring a compulsory counterclaim against Wolfe or oppose summary

judgment. In his February 2003 motion to vacate Wolfe's summary judgment, Shafaghi contended that Wolfe failed to complete the work under the contract. Yet, in this appeal, Shafaghi opines that he endorsed the April 2003 check because he relied on Wolfe's assertions during the breach of contract litigation that the work was finished. Furthermore, Shafaghi cites no authority supporting his argument that Washington Mutual owed him a duty to inspect the house prior to disbursing funds pursuant to a valid court order. After reviewing the record, we conclude summary judgment in favor of Washington Mutual was proper.

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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