NO. COA05-1595

NORTH CAROLINA COURT OF APPEALS

Filed: 19 September 2006

TWAM, LLC and DANNY BOST,
Plaintiffs-Appellants,

v.

Cabarrus County
No. 05-CVS-01602

THE CABARRUS COUNTY
BOARD OF EDUCATION,
Defendant-Appellee.

Appeal by Plaintiffs from order entered 6 September 2005 by Judge Richard L. Doughton in Superior Court, Cabarrus County. Heard in the Court of Appeals 16 August 2006.

Wilson & Iseman L.L.P., by G. Gray Wilson and Edward T. Shipley, III, for Plaintiffs-Appellants.

Womble Carlyle Sandridge & Rice, PLLC, by Mark P. Henriques, for Defendant-Appellee.

McGEE, Judge.

TWAM, LLC and Danny Bost (Plaintiffs) appeal the dismissal of their complaint, as amended, against the Cabarrus County Board of Education (Defendant). In a prior action, Plaintiffs filed a complaint against Defendant on 2 April 2004, alleging that Plaintiffs purchased forty-three acres of real property on which they planned to construct a residential subdivision. Defendant agreed to grant Plaintiffs a water and sewer easement on real property known as Mount Pleasant Elementary School for the sum of

$3,750.00. However, Defendant's grant of the easement was contingent upon the approval of the proposed subdivision by the Mt. Pleasant Planning and Zoning Commission (the Commission). Plaintiffs tendered a check in the amount of $3,750.00 to Defendant, which Defendant accepted.

In the prior action, Plaintiffs also alleged they filed an application with the Commission seeking approval of a preliminary plat subdividing the real property for the proposed subdivision. The Commission considered Plaintiffs' application on two occasions and each time delayed a decision on the application. However, the Commission's planning staff recommended approval of the application, subject to two conditions. Plaintiffs subsequently filed a petition for writ of certiorari with the trial court, seeking an order requiring the Commission to approve Plaintiffs' subdivision. While the writ of certiorari was pending, the Commission voted to deny Plaintiffs' application for a preliminary plat. Defendant then mailed a check in the amount of $3,750.00 to Plaintiffs, along with a letter explaining that Defendant was returning the check because the Commission had voted to deny Plaintiffs' application, and that Defendant's grant of an easement had been conditional upon the Commission's approval of Plaintiffs' application.

Plaintiffs alleged they then returned Defendant's check. They also sent Defendant a letter stating that no final action had been taken on Plaintiffs' subdivision because the Commission's vote to deny Plaintiffs' application had been invalid and the matter was

still pending. The trial court found that the Commission's vote denying Plaintiffs' application was invalid and ordered that the Commission approve Plaintiffs' application subject to the conditions recommended by the Commission's planning staff. The Commission then approved Plaintiff's application subject to those conditions. Plaintiffs further alleged that Defendant again sent Plaintiffs a check for $3,750.00 and a letter stating that Defendant had decided to "revoke its conditional approval of the easement." Plaintiffs returned Defendant's check for $3,750.00 and wrote a letter stating that "[D]efendant could not unilaterally 'revoke' the decision to grant a sewer easement because [P]laintiffs had paid for the easement, [the Commission] had approved the development, and [P]laintiffs had expended substantial amounts of time and money in reliance on [D]efendant's promise to grant the easement." Plaintiffs alleged they entered into a contract with Defendant for the purchase of the easement and that Defendant breached the contract by failing to grant Plaintiffs the easement. Plaintiffs sought specific performance and damages.

In the prior action, a jury determined that (1) "Plaintiffs and . . . Defendant enter[ed] into a contract for an easement of right of way for purposes of constructing sewer and water lines across the property of Mount Pleasant Elementary School[,]" but (2) "Defendant [did not] breach the contract by repudiation[.]" The trial court entered judgment on 7 February 2005 and ordered that "[P]laintiffs take nothing by this action and that it be dismissed with prejudice." No appeal was filed from the trial court's

judgment in the prior action.

Plaintiffs filed another complaint against Defendant on 31 May 2005, again seeking specific performance and damages for breach of the contract to grant the easement. Plaintiffs alleged that after entry of judgment in the prior action, they made a written demand for the easement and Defendant again refused to grant the easement to Plaintiffs. Plaintiffs filed an amendment to the complaint on 6 September 2005, adding a paragraph. The trial court concluded Plaintiffs' complaint, as amended, was barred by *res judicata* and on 6 September 2005, granted Defendant's motion to dismiss, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) and Rule 12(b)(6). Plaintiffs appeal.

Appellate review of an order granting a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction is *de novo*. *Smith v. Privette*, 128 N.C. App. 490, 493, 495 S.E.2d 395, 397 (1998). The standard of review of an order granting a Rule 12(b)(6) motion to dismiss is "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not." *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). "In ruling upon such a motion, the complaint is to be liberally construed, and the court should not dismiss the complaint 'unless it appears beyond doubt that [the] plaintiff could prove no set of facts in support of his claim which would entitle him to relief.'" *Holloman v. Harrelson*,

149 N.C. App. 861, 864, 561 S.E.2d 351, 353 (quoting *Dixon v. Stuart*, 85 N.C. App. 338, 340, 354 S.E.2d 757, 758 (1987)), *disc. review denied*, 355 N.C. 748, 565 S.E.2d 665 (2002). "Where the complaint discloses an unconditional affirmative defense which defeats the claim asserted or pleads facts which deny the right to any relief on the alleged claim, the complaint may properly be dismissed by a motion under Rule 12(b)(6)." *Jackson v. Carolina Hardwood Co.*, 120 N.C. App. 870, 872-73, 463 S.E.2d 571, 573 (1995).

Plaintiffs argue the trial court erred by granting Defendant's motion to dismiss on the basis of *res judicata*. Specifically, Plaintiffs argue that because the judgment in the first action only determined that a valid contract existed and that Defendant had not yet breached the contract by repudiation, the judgment did not determine whether Plaintiffs would thereafter be entitled to specific performance of the contract. Plaintiffs argue that Defendant's "refusal to honor the verdict in the first action provided the legal basis for [Plaintiffs'] current breach of contract action." Accordingly, "the instant case concerns issues not addressed by the jury as they were never reached or adjudicated in the first action."

However, the trial court's judgment in the first action did not state Defendant had not yet breached the contract by repudiation. Rather, the jury determined that Defendant did not breach the contract by repudiation, and the trial court entered a judgment that "[P]laintiffs take nothing by this action and that it

be dismissed with prejudice."

Under the doctrine of *res judicata*, "a final judgment on the merits in a prior action will prevent a second suit based on the same cause of action between the same parties or those in privity with them." *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986).

> In order to successfully assert the doctrine of res judicata, a litigant must prove the following essential elements: (1) a final judgment on the merits in an earlier suit, (2) an identity of the causes of action in both the earlier and the later suit, and (3) an identity of the parties or their privies in the two suits.

Moody v. Able Outdoor, Inc., 169 N.C. App. 80, 84, 609 S.E.2d 259, 262 (2005). "A dismissal with prejudice is an adjudication on the merits and has res judicata implications." *Caswell Realty Assoc. v. Andrews Co.*, 128 N.C. App. 716, 720, 496 S.E.2d 607, 610 (1998). The scope of *res judicata* "extends not only to matters actually determined but also to other matters which in the exercise of due diligence could have been presented for determination in the prior action." *Gaither Corp. v. Skinner*, 241 N.C. 532, 535-36, 85 S.E.2d 909, 911 (1955). In breach of contract actions, "only one action for damages will lie." *Id.* at 536, 85 S.E.2d at 912.

Plaintiffs rely on *Bockweg v. Anderson*, 333 N.C. 486, 428 S.E.2d 157 (1993), where the plaintiff Cynthia Bockweg filed an action in federal court alleging the defendants were negligent (1) in failing to monitor the plaintiff's nutrition, which caused the plaintiff to suffer brain damage, and (2) in failing to diagnose and treat the plaintiff's pelvic infection, which caused the

unnecessary loss of the plaintiff's reproductive organs. *Id.* at 488, 428 S.E.2d at 159. The parties voluntarily dismissed without prejudice the claim involving the plaintiff's pelvic infection. *Id.* The jury returned a verdict in favor of the defendants on the claim of failure to monitor the plaintiff's nutrition, and the trial court entered judgment accordingly. *Id.* at 489, 428 S.E.2d at 159. In a subsequent action filed in state court, the plaintiff re-filed her negligence claim involving her pelvic infection. *Id.* Our Supreme Court recognized that the claim involving the plaintiff's pelvic infection was separate and distinct from the claim for defendants' failure to monitor the plaintiff's nutrition. *Id.* at 494, 428 S.E.2d at 163. Therefore, because the claim involving the plaintiff's pelvic infection had been dismissed in the federal action,

> the pleadings [in the federal action] no longer raised the issue of [the] defendant[s'] negligence in reference thereto, nor could the issue have been submitted to or decided by the jury in the federal court action. It must follow then that the judgment on the jury verdict in the federal court action was not a final judgment on the merits of the dismissed claim so as to bar this state court action.

Id. at 493, 428 S.E.2d at 162. Our Supreme Court therefore determined that *res judicata* did not bar the second negligence claim. *Id.*

The present case, however, is distinguishable from *Bockweg*. In this case, unlike *Bockweg*, the complaint in Plaintiffs' second action raised the same claim determined by the trial court in the first action. In both complaints, Plaintiffs alleged a breach of

contract based on the same act, being the refusal to grant the easement; and in both complaints, Plaintiffs sought the same remedies of specific performance and damages. In the pleadings in the first action, Plaintiffs alleged that their agreement with Defendant for the easement was a contract and that Defendant breached that contract by refusing to grant the easement. The jury in the first action determined that Plaintiffs and Defendant had entered into a contract, but that Defendant had not breached the contract by repudiation. The trial court ordered that "[P]laintiffs take nothing by this action and that it be dismissed with prejudice."

Plaintiffs also cite *Country Club of Johnston Cty., Inc. v. U.S. Fidelity & Guar. Co.*, 150 N.C. App. 231, 563 S.E.2d 269 (2002), in support of their argument. In *Country Club of Johnston County, Inc.*, the defendant appealed from judgment for the plaintiff on the plaintiff's claims for bad faith and unfair and deceptive practices. *Id.* at 237, 563 S.E.2d at 274. The defendant also appealed from the denial of its motion to dismiss and motions for a directed verdict, for judgment notwithstanding the verdict, or for a new trial. *Id.* In a prior suit, the defendant had filed a declaratory judgment action against the plaintiff seeking a determination of insurance coverage. *Id.* at 233-34, 563 S.E.2d at 271-72. In that action, the plaintiff filed an answer and counterclaim alleging that the defendant negligently failed to provide an extension of the defendant's insurance coverage. *Id.* at 234, 563 S.E.2d at 272. The trial court entered summary judgment

for the defendant, which was later reversed. *Id.* However, while an appeal was pending, the plaintiff voluntarily dismissed its counterclaim without prejudice and filed the action for bad faith and unfair and deceptive practices. *Id.*

On appeal of the judgment for the plaintiff on the bad faith and unfair and deceptive practices claims and the denial of the defendant's motions, the defendant argued that the plaintiff's claims were barred by *res judicata*. *Id.* at 238, 563 S.E.2d at 274. Specifically, the defendant argued the plaintiff's claims were barred by "the rule against claim-splitting because the [plaintiff] knew of the claims which it brings forth here at the time [the defendant] filed its declaratory judgment action." *Id.*

However, our Court determined that "[t]he declaratory judgment action involved issues of coverage such as waiver and estoppel, and not the issues presented in this suit, namely, bad faith and unfair and deceptive practices." *Id.* at 240, 563 S.E.2d at 275. Our Court also stated that the plaintiff did not assert a claim for unfair and deceptive practices in its counterclaim in the declaratory judgment action and was not aware of the facts giving rise to that claim until after it filed its counterclaim. *Id.* at 240, 563 S.E.2d at 275-76. We concluded that the plaintiff's complaint

> was not barred by *res judicata* because it did not bring forth claims which had already been litigated. Rather, it brought forth entirely different claims, based in part upon [the defendant's] actions in handling the [plaintiff's] claim, which were not at issue in the declaratory judgment action and which were not fully known to the [plaintiff] at

> that time.

Id. at 241, 563 S.E.2d at 276.

In the present case, Plaintiffs argue that as in *Country Club of Johnston County, Inc.*, they "could not have maintained their present claims in the first action[] because [P]laintiffs['] . . . present claims rely on and were prompted by the previous verdict." However, Plaintiffs' second action is identical to their first action. Plaintiffs are seeking the same remedies of specific performance and damages, for the same wrong, the refusal of Defendant to grant the easement. The jury's determination in the first action that the parties had entered into a contract to convey the easement does not provide a basis for this action because the jury also determined Defendant did not breach the contract and the trial court ordered that Plaintiffs "take nothing."

Our Supreme Court's decision in *Gaither* is analogous to the present case. In *Gaither*, the plaintiff entered into a contract with the defendant for the defendant to construct a store on real property owned by the plaintiff. *Gaither*, 241 N.C. at 533, 85 S.E.2d at 910. After the building was completed, the defendant filed a complaint against the plaintiff seeking the balance due on the contract and payment for additional work done to the premises by the defendant. *Id.* at 534, 85 S.E.2d at 910. The plaintiff filed an answer and a counterclaim alleging that the defendant failed "in specific particulars to perform the contract." *Id.* The trial court entered a consent judgment, resolving the action, which provided that "the parties take nothing further by reason of this

action." *Id.* at 536, 85 S.E.2d at 912.

Thereafter, the plaintiff filed a complaint against the defendant alleging that the defendant failed to construct the roof of the building according to the plaintiff's plans and specifications. *Id.* at 534, 85 S.E.2d at 910. Evidence showed that the plaintiff was aware of defects in the roof of the building prior to entry of judgment in the first action. *Id.* at 536, 85 S.E.2d at 912. Our Supreme Court recognized that

> where the omission of an item from a single cause of action is caused by fraud or deception of the opposing party, or where the owner of the cause of action had no knowledge or means of knowledge of the item, the judgment in the first action does not ordinarily bar a subsequent action for the omitted item.

Id. at 536, 85 S.E.2d at 912. However, the Court held in *Gaither* that *res judicata* barred the plaintiff's second action because the plaintiff was aware of the defective roof before judgment was entered in the first action. *Id.* at 536-37, 85 S.E.2d at 912-13.

Plaintiffs attempt to distinguish *Gaither* by arguing they could not have reasonably known at the time judgment was entered in the first action, that Defendant would refuse to grant the easement to Plaintiffs pursuant to the contract. However, prior to judgment being entered in the first action, Defendant had already refused to grant the easement. In the first action, Plaintiffs had sought to enforce the contract by seeking specific performance and damages for breach of contract. The jury determined that although Plaintiffs and Defendant had entered into a contract, Defendant had not breached the contract by repudiation. *See generally Poor v.*

Hill, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000) (stating that "[t]he elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract."). The trial court then dismissed the complaint in the first action with prejudice and ordered that "[P]laintiffs take nothing by this action[.]" Plaintiffs did not appeal that judgment.

After judgment was entered in the first action, Defendant again refused to convey the easement to Plaintiffs. Plaintiffs then filed the present action seeking the same remedies of specific performance and damages, for breach of the same contract.

The trial court's order dismissing with prejudice Plaintiffs' claim for breach of contract in the first action was a final judgment on the merits. Because Plaintiffs' present claim for breach of contract is based on the same cause of action between the same parties as those in the first action, *res judicata* bars Plaintiffs' claim. The trial court's dismissal of Plaintiffs' present claim is affirmed.

Affirmed.

Judges BRYANT and ELMORE concur.

Report per Rule 30(e).