NO. COA12-534
NORTH CAROLINA COURT OF APPEALS

Filed: 20 November 2012

ETHEL MYERS KING,
Plaintiff-Appellant,

v. Columbus County
No. 11 CVS 906

SHEILA DENICE BLANTON,
Defendant-Appellee.

Appeal by Plaintiff from order entered 21 November 2011 by Judge D. Jack Hooks, Jr. in Superior Court, Columbus County. Heard in the Court of Appeals 9 October 2012.

Wright, Worley, Pope, Ekster & Moss, PLLC, by Paul J. Ekster and Rick W. Scott, for Plaintiff-Appellant.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Ellen P. Wortman, for Defendant-Appellee.

McGEE, Judge.

Sheila Denice Blanton (Blanton) filed a complaint on 14 July 2010 alleging that Ethel Myers King (King) ran a red light and struck Blanton's vehicle, damaging Blanton's vehicle and injuring Blanton. Blanton alleged that King was negligent, and that King's negligence "was the sole, direct and proximate cause

of the accident, injuries and damages suffered by [Blanton] and her motor vehicle[.]"

King's insurance company, InsTrust Insurance Company (InsTrust), provided an attorney to defend King in the suit filed by Blanton. In May 2011, the parties reached an agreement, whereby Blanton agreed to voluntarily dismiss her claims with prejudice in exchange for a cash settlement. Blanton's action was voluntarily dismissed with prejudice on 3 May 2011. The record does not include any answer filed in response to Blanton's 14 July 2010 complaint, but Blanton and King agree that King did not file any counterclaim in response to Blanton's complaint.

King filed the present action on 30 June 2011. In her complaint, King alleged that it was Blanton who ran a red light and caused the 23 April 2010 collision, and that Blanton's negligence was the sole proximate cause of injury to King. Blanton filed an answer and motions to dismiss on 3 August 2011. Blanton alleged that King's action should have been filed as a compulsory counterclaim to Blanton's 14 July 2010 action and, therefore, King had lost her right to bring her negligence claim by failing to include it as a counterclaim to Blanton's 14 July 2010 action. The trial court heard Blanton's motions to dismiss on 19 September 2011. Because the trial court considered

documents outside the pleadings, the trial court treated Blanton's motions to dismiss as motions for summary judgment, granted summary judgment in favor of Blanton, and dismissed King's action with prejudice. King appeals.

I.

The sole issue on appeal is whether the trial court erred in granting summary judgment in favor of Blanton.

II.

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.'" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation omitted).

III.

King argues that the trial court erred by granting summary judgment in favor of Blanton because King had not had the opportunity to prosecute her claim against Blanton. Blanton argued to the trial court, and argues on appeal, that King's action against Blanton was a compulsory counterclaim to Blanton's 14 July 2010 action and, because King failed to file this compulsory counterclaim, King is estopped from filing this claim now as a separate action.

N.C. Gen. Stat. § 1A-1, Rule 13(a) (2011) governs compulsory counterclaims, and states:

> Compulsory counterclaims. – 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.

N.C.G.S. § 1A-1, Rule 13(a) (2011).[1] Our Court has explained Rule 13(a) as follows:

> "The purpose of Rule 13(a), making certain counterclaims compulsory, is to enable one court to resolve 'all related claims in one action, thereby avoiding a wasteful multiplicity of litigation.'" Determining whether a particular claim "arises out of the same transaction or occurrence" requires consideration of "(1) whether the issues of fact and law are largely the same; (2) whether substantially the same evidence is involved in each action; and (3) whether there is a logical relationship between the two actions." In addition, there must be "a logical relationship in the nature of the actions and the remedies sought."

Kemp v. Spivey, 166 N.C. App. 456, 458, 602 S.E.2d 686, 688 (2004) (citations omitted). We hold that King's claim "arises out of the same transaction or occurrence[.]" *Id.* The same collision is at the heart of both actions; the only dispute is

[1] Rule 13(a) includes two exceptions to the rule which are not relevant to this appeal.

where the fault for the collision lay. King's claim was, therefore, a compulsory counterclaim to Blanton's 14 July 2010 action. The only remaining question is whether Rule 13(a) required dismissal of King's claim.

In *Kemp*, this Court addressed a similar situation. *Kemp* involved an automobile accident where one of the parties who had failed to file a compulsory counterclaim attempted to institute an action after the initial matter had been resolved by a settlement. *Id.* at 457, 602 S.E.2d at 687. This Court acknowledged that different considerations might come into play when an action is settled than when an action is determined on the merits. *Id.* at 459-60, 602 S.E.2d at 689. This Court looked to the following two federal opinions for guidance. *Id.* at 460-61, 602 S.E.2d at 689. In *Dindo v. Whitney*, the First Circuit reasoned:

> The bar arising out of Rule 13(a) has been characterized variously. Some courts have said that a judgment is res judicata of whatever could have been pleaded in a compulsory counterclaim. Other courts have viewed the rule not in terms of res judicata, but as creating an estoppel or waiver. The latter approach seems more appropriate, at least when the case is settled rather than tried. The purposes of the rule are "to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters." If a case has been tried, protection both of the court and of the parties dictates that there should be no

> further directly related litigation. But if the case is settled, normally the court has not been greatly burdened, and the parties can protect themselves by demanding cross-releases. In such circumstances, absent a release, better-tailored justice seems obtainable by applying principles of equitable estoppel.
>
> If [the current plaintiff], clearly having opportunity to assert it, . . . knew of the existence of a right to counterclaim, the fact that there was no final judgment on the merits should be immaterial, and a Rule 13(a) bar would be appropriate. His conscious inaction . . . created the very additional litigation the rule was designed to prevent[.]

Dindo v. Whitney, 451 F.2d 1, 3 (1st Cir. 1971) (citations omitted). This Court then cited *LaFollette v. Herron*, 211 F. Supp. 919, 920-21 (E.D. Tenn. 1962), for the proposition that we should examine the actions of the party filing the subsequent action in determining whether Rule 13(a) should bar that subsequent action. The dispositive question in *LaFollette* seemed to be whether the settlement of the original action occurred in a manner which deprived the relevant party of a reasonable opportunity to file the compulsory counterclaim. *Id.*

This Court, in *Kemp*, adopted the waiver/estoppel approach for situations where the original action had been settled by the parties. We then determined that the plaintiff in *Kemp* had been aware of the relevant events and circumstances surrounding the claims, had an opportunity to present her counterclaim prior to

settlement, and was represented by attorneys. *Kemp*, 166 N.C. App. at 461, 602 S.E.2d at 689. This Court, in *Kemp*, suggested that this could be enough to find that the plaintiff was estopped from prosecuting the action because she had not filed it as a compulsory counterclaim. *Id*.

However, this Court remanded because the trial court had dismissed the matter pursuant to a 12(b)(6) motion and, therefore, had not afforded the parties "full opportunity to present evidence on the issue of estoppel." *Id*. The trial court in *Kemp* had considered evidence outside the pleadings, so the motion to dismiss had been converted into a motion for summary judgment. However, because of this conversion, "the parties were not afforded a 'reasonable opportunity to present all material made pertinent to such a motion by Rule 56.' N.C.G.S. § 1A-1, Rule 12(b)." *Id*. at 462, 602 S.E.2d at 690. The matter was remanded for a hearing. *Id*.

Unlike in *Kemp*, the trial court in this matter recognized that the motion to dismiss pursuant to N.C.G.S. § 1-A1, Rule 12(b)(6) had been converted into a motion for summary judgment. The trial court held a hearing, and the attorneys for the parties argued the *Kemp* opinion and estoppel. **R 83-94** King had her opportunity to present all pertinent material on estoppel.

King and Blanton were the two drivers involved in the 23 April 2010 collision. Blanton initiated a negligence action against King on 14 July 2010. King's insurance company, InsTrust, provided King with an attorney for her defense. When an attorney is hired by an insurer to defend an insured, "the attorney's primary allegiance must remain with the insured," even though the attorney may be representing the insurer as well. *Nationwide Mut. Fire Ins. Co. v. Bourlon*, 172 N.C. App. 595, 602, 617 S.E.2d 40, 45 (2005) (citation omitted).

King had more than nine months between the time Blanton filed the 14 July 2010 action and the time of the settlement and voluntary dismissal of that action on 3 May 2011. King makes no argument, and the record includes nothing indicating that King was unaware of her right to file a counterclaim, or that she was not advised that she would forfeit her right to file a claim if she did not file the compulsory counterclaim. *See Whitney*, 451 F.2d at 3. We hold that, on these facts, King's failure to file her compulsory counterclaim constituted a waiver and estops her from bringing a new action for negligence based upon the same events that were at the heart of Blanton's 14 July 2010 action. King's argument is without merit.

Affirmed.

Judges BRYANT and THIGPEN concur.

Report per Rule 30(e).