[Cite as *Polivchak v. Polivchak Co.*, 2010-Ohio-1656.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91794

DIANE POLIVCHAK

PLAINTIFF-APPELLEE

vs.

THE POLIVCHAK COMPANY, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-642466

BEFORE: Sweeney, J., Stewart, P.J., and Jones, J.

RELEASED: April 15, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

JAMES J. SWEENEY, J.:

{¶ 1} Defendants-appellants, The Polivchak Company, David Polivchak, James Polivchak, and Denise Adams, appeal the grant of summary judgment in favor of appellee, Diane Polivchak, trustee of the Polivchak

Family Living Trust. After a thorough review of the record, and for the following reasons, we affirm the determination of the trial court.

{¶ 2} The Polivchak Company, an Ohio partnership, began as a venture between Bruce Polivchak and his mother, Adla Polivchak. The partnership was formed to operate a catering business located in Strongsville, Ohio. Adla transferred her majority interest in the partnership to her four children. After transfer, each of her children had a 25 percent interest in the company. A partnership agreement was executed on December 21, 1992, which governed the management of the company and the rights and responsibilities of the partners.

{¶ 3} Bruce died leaving his entire estate to the Polivchak Family Living Trust. His wife, Diane, as trustee, instituted an action in 2003 enforcing her husband's right to sell his interest in the partnership upon death. Article IX of the partnership agreement dealt with restrictions on transferring a partnership interest and called for an appraisal of the business and payment of one-quarter of the value of the business to the trust. Each partner had a life insurance policy taken out by and payable to The Polivchak Company in order to provide the funds necessary to purchase a deceased partner's interest; however, due to appreciation in the value of the business, the policy was inadequate. The partnership agreement spoke to this issue and directed the partners to execute a cognovit note in the amount of the

difference between the policy proceeds and the value of the deceased partner's share payable to the deceased partner's estate.

{¶ 4} David and James signed a cognovit note on April 1, 2006[1] in accordance with the partnership agreement in their individual and representative capacities as part of a settlement to terminate the litigation initiated by Diane. Denise refused to sign, claiming the value of the appraisal was too high. After default on the cognovit note, Diane entered judgment on the note on May 17, 2006 and brought an action in foreclosure on real property owned by The Polivchak Company. The trial court in the foreclosure action granted Diane's motion for summary judgment. This appeal timely followed.

Law and Analysis

{¶ 5} Appellants present one assignment of error for our review, claiming that the underlying judgment that appellee's foreclosure was predicated on was void, and therefore the foreclosure action was contrary to law.[2]

{¶ 6} This court reviews the lower court's granting of summary judgment de novo. *Brown v. Scioto Cty. Commrs.* (1993), 87 Ohio App.3d 704, 622 N.E.2d 1153. An appellate court reviewing the grant of summary

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[1]The note was dated and effective January 1, 2002.

[2]The assigned error states: "The trial court erred by granting appellee, Diane Polivchak's, motion for summary judgment and order for foreclosure based upon a confession to judgment and cognovit note signed in a previous action that was voiid [sic] and contrary to law."

judgment must follow the standards set forth in Civ.R. 56(C). "The reviewing court evaluates the record * * * in a light most favorable to the nonmoving party. * * * [T]he motion must be overruled if reasonable minds could find for the party opposing the motion." *Saunders v. McFaul* (1990), 71 Ohio App.3d 46, 50, 593 N.E.2d 24.

{¶ 7} In support of their assigned error, appellants put forth four arguments, all relying on the premise that the underlying judgment was void as a matter of law. Appellants first argue that the cognovit note and resultant judgment are void ab initio. They claim that the actions of David and James were outside their authority under the partnership agreement, and therefore could not and did not bind the partnership when they signed the cognovit note. Appellants conclude that The Polivchak Company's property is not subject to foreclosure because the company is not liable on the note and resultant judgment.

{¶ 8} Article VIII of the Partnership Agreement governs the management of partnership affairs. Section 8.01 states that "[a]ll questions relating to the conduct and management of the Partnership business shall be determined by the vote of a majority in interest (more than fifty percent * * *) in the ownership of the Partnership." Section 8.02 specifies that "[n]o Partner, acting alone, shall have authority with respect to the Partnership and this Agreement to:

{¶ 9} "* * *

{¶ 10} "(f) Make, execute, or deliver any deed, long-term ground lease, contract to sell all or any part of any Partnership property, or execute any new note or mortgage;

{¶ 11} "(g) Do any of the following:

{¶ 12} "(i) Confess a judgment[.]"

{¶ 13} Appellants argue that this section precludes James and David from binding the partnership because no vote was held, and therefore they acted outside their authority under the agreement. However, by signing the note, David and James were acting within a specific grant of authority under the partnership agreement.

{¶ 14} Article XI of the agreement requires all surviving partners to execute a cognovit note whose form is set forth in Exhibit B of the agreement. Paragraph three of Article XI provides:

{¶ 15} "Should the Partnership not have in effect insurance policies on the life of the Partner in an amount sufficient to pay the entire purchase price of the Partner's Partnership interest, * * * the balance of said purchase price shall be paid in One Hundred Twenty (120) equal monthly installments. * * * It is agreed that the Partnership shall execute a cognovit promissory note (the "Note") to the personal representative or estate of the deceased shareholder * * * to evidence the terms and conditions of the payment of the balance of said purchase price being paid in accordance with this Article XI of this Agreement. The remaining Partners and their spouses, if any, shall guarantee the

payment of the note. * * * The Note shall be in the form attached hereto as Exhibit B." Appellants' references to Article 8.01 and 8.02 of the agreement are to no avail. The partnership agreement not only authorized David and James to sign the cognovit note, but required all partners to do so. Because these actions are sanctioned in the partnership agreement, the cognovit note and subsequent judgment are not void ab initio. Therefore, the trial court did not err in granting appellee's motion for summary judgment.

{¶ 16} Appellants' other arguments address why the trial court lacked the ability to foreclose on partnership property based on the fact that the judgment was void. Having found that the judgment was not void, appellants' arguments explaining why the trial court's grant of summary judgment for appellee was inappropriate are not well-taken.

{¶ 17} The trial court ruled that "[a] judgment was granted in Case No. 591838 and the present foreclosure was filed to execute on that previous judgment. This court will not act as the court of appeals and question the validity of the previous judgment granted against the Polivchak Company."

{¶ 18} Under the claim preclusion branch of res judicata, "[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 1995-Ohio-331, 653 N.E.2d 226, at the syllabus. See, also, Black's Law Dictionary (6th Ed.1990) 1305 (defining res judicata as a "[r]ule that a final

judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action"). Issue preclusion, or collateral estoppel, precludes relitigation of an issue that has been "actually and necessarily litigated and determined in a prior action." *Krahn v. Kinney* (1989), 43 Ohio St.3d 103, 107, 538 N.E.2d 1058.

{¶ 19} Appellants argue that res judicata does not bar relitigation of the validity of the cognovit note and judgment. "In our jurisprudence, there is a firm and longstanding principle that final judgments are meant to be just that — final. See *Kingsborough* [*v. Tousley* (1897)], 56 Ohio St. [450] at 458, 47 N.E. 541. Therefore, subject to only rare exceptions, direct attacks, i.e., appeals, by parties to the litigation, are the primary way that a civil judgment is challenged. For these reasons, it necessarily follows that collateral or indirect attacks are disfavored and that they will succeed only in certain very limited situations. See *Coe v. Erb* (1898), 59 Ohio St. 259, 267-268, 52 N.E. 640." *Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, ¶22. Therefore, "absent an invalid or void judgment * * *, a valid judgment cannot be collaterally attacked." Id., citing *Lewis v. Reed* (1927), 117 Ohio St. 152, 159, 157 N.E. 897.

{¶ 20} Citing to Ms. Adams's absence from the prior litigation, the note, and judgment, appellants claim that res judicata does not apply in this case.

However, res judicata applies to the parties to a prior action *as well as their privies*. *State ex rel. Scripps Howard Broadcasting Co. v. Cuyahoga Cty. Court of Common Pleas, Juv. Div.* (1995), 73 Ohio St.3d 19, 24, 652 N.E.2d 179. "In order for res judicata to bar a second suit, the following elements must be present: (a) an existing final judgment; (b) rendered on the merits without fraud or collusion; (c) by a court of competent jurisdiction; (d) is conclusive of all rights, questions, and facts in issue; (e) as to the parties and their privies; and (f) in all other actions in the same or any other judicial tribunal or concurrent jurisdiction. *Ohio Dept. of Human Serv. v. Kozar* (1995), 99 Ohio App.3d 713, 716, 651 N.E.2d 1039, citing to *Quality Ready Mix, Inc. v. Mamone* (1988), 35 Ohio St.3d 224, 520 N.E.2d 193. The Ohio Supreme Court has recently defined 'privity' as '* * * merely a word used to say that a relationship between the one who is a party on the record and another is close enough to include the other within the res judicata.' *Thompson v. Wing* (1994), 70 Ohio St.3d 176, 184, 637 N.E.2d 917." *Corradi v. Bear Creek Investments* (May 14, 1998), Cuyahoga App. No. 72915, 4. In the present case, Ms. Adams was a partner in the partnership and was close enough to be considered in privity with the signatory partners and included within res judicata.

{¶ 21} The trial court properly ordered foreclosure of partnership property based on a final, valid judgment. The authority and actions of the

partners who signed the cognovit note were sufficient to bind the partnership and render the partnership liable on the note and subsequent judgment.

{¶ 22} Judgment affirmed.

It is ordered that appellee recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, JUDGE

MELODY J. STEWART, P.J., and
LARRY A. JONES, J., CONCUR