[Cite as *Wiggins Invest., Inc. v. Waterstreet Mgt., L.L.C.*, 2016-Ohio-4869.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103820

WIGGINS INVESTMENT, INC., ET AL.

PLAINTIFFS-APPELLANTS

vs.

WATERSTREET MANAGEMENT, L.L.C., ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-14-834663

BEFORE: Boyle, P.J., Blackmon, J., and Laster Mays, J.

RELEASED AND JOURNALIZED: July 7, 2016

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MARY J. BOYLE, P.J.:

{¶1} Plaintiffs-appellants, Wiggins Investment, Inc. ("Wiggins Investment") and Daryn Kinkoph ("Daryn") (collectively "plaintiffs"), appeal from the trial court's judgment granting summary judgment in favor of defendants-appellees, Steven Boukis ("Steven") and Waterstreet Management, L.L.C. ("Waterstreet Management"), on plaintiffs' claims for fraud and conspiracy to commit fraud. They raise the following two assignments of error:

> I. The trial court erred in concluding that appellants' causes of action were barred by the doctrine of res judicata.
>
> II. The trial court erred in concluding that appellee Waterstreet cannot conspire with Peter Boukis.

{¶2} Finding merit to the appeal, we reverse.

A. Procedural History and Facts

{¶3} In June 2011, plaintiffs and Wolfgang Enterprises, Inc. entered into a purchase agreement whereby plaintiffs agreed to purchase and Wolfgang agreed to sell the business assets of its restaurant ("the Waterstreet Grill") located at 1265 West Ninth Street in Cleveland, Ohio for the total amount of $230,000.

{¶4} In January 2012, plaintiffs sued Wolfgang Enterprises and its owner, Peter Boukis ("Peter"), alleging several claims relating to the sale of the restaurant, including claims for breach of contract, negligent misrepresentation, and fraud. The Wolfgang

case proceeded to trial, and a jury awarded plaintiffs the amount of $213.905.70 in compensatory damages plus $1 in punitive damages (hereinafter "the Wolfgang case").

{¶5} In October 2014, plaintiffs filed the underlying case against Waterstreet Management and Steven, asserting claims for fraud against Steven and a claim for conspiracy to commit fraud against Steven and Waterstreet Management. Specifically, plaintiffs alleged that Steven falsely represented "that certain tax returns and employee payroll information were accurate" in order to induce them to purchase the Waterstreet Grill restaurant, and that Steven failed to inform plaintiffs that Waterstreet Management existed and that Waterstreet Management "employed various workers at the restaurant." Plaintiffs further alleged that Steven and Waterstreet Management "conspired with Wolfgang and Peter to defraud plaintiffs." According to the complaint, "plaintiffs learned for the first time of the existence" of Waterstreet Management during the Wolfgang trial.

{¶6} Waterstreet Management immediately moved for summary judgment on the claims asserted against it, arguing that the claim is barred by the previous action — the Wolfgang case — and that, contrary to plaintiffs' assertion in their complaint, Peter is the sole member of Waterstreet Management; therefore, plaintiffs' claim fails because a limited liability company cannot conspire with its sole member to commit a tort. The trial court subsequently granted the motion.

{¶7} In July 2015, Steven moved for summary judgment, arguing that the fraud claim fails as a matter of law because Steven made no false representations. As for

plaintiffs' allegation that Steven failed to disclose the existence of Waterstreet Management and its relationship to Wolfgang, Steven argued that it had no duty to disclose. Steven further alleged that the civil conspiracy claim failed as a matter of law because the record established that Daryn dealt exclusively with Peter and the business broker hired by Peter.

{¶8} The trial court subsequently granted summary judgment in favor of Steven, but not on the grounds asserted in Steven's motion. Instead, the trial court found that summary judgment was proper on the basis of res judicata, stating the following:

> A jury verdict was reached in a prior lawsuit (Case CV 773253). Wherein named parties were Peter Boukis, owner of Wolfgang, and Wolfgang Enterprises, the company that owned and operated 1265 West 9th Street and that executed the purchase agreement. The second action, which is this case, has named defendant Steven Boukis who was also involved in the management of 1265 West 9th Street and in the disputed purchase transaction by providing employee payroll records and operation and management information for 1265 West 9th Street during transaction negotiations.
>
> "A mutuality of interest" is sufficient to establish the element of privity. Peter Boukis shares a mutuality of interest with defendant Steven Boukis. The alleged fraud that occurred during the sale and purchase negotiations of 1265 West 9th Street should have been argued in the original lawsuit. Additionally, this case alleges the same underlying facts as the initial suit. The elements to support the claim of res judicata are present and litigation of claims arising out of the same underlying facts are barred.

{¶9} Plaintiffs now appeal, arguing that the trial court should not have granted the motions for summary judgment filed by Waterstreet Management and Steven.

B. Standard of Review

{¶10} We review an appeal from summary judgment under a de novo standard. *Baiko v. Mays*, 140 Ohio App.3d 1, 10, 746 N.E.2d 618 (8th Dist.2000). Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate. *N.E. Ohio Apt. Assn. v. Cuyahoga Cty. Bd. of Commrs*., 121 Ohio App.3d 188, 192, 699 N.E.2d 534 (8th Dist.1997).

{¶11} Civ.R. 56(C) provides that before summary judgment may be granted, a court must determine that

> (1) no genuine issue as to any material fact remains to be litigated,
>
> (2) the moving party is entitled to judgment as a matter of law, and
>
> (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmoving party.

State ex rel. Duganitz v. Ohio Adult Parole Auth., 77 Ohio St.3d 190, 191, 672 N.E.2d 654 (1996).

{¶12} The moving party carries an initial burden of setting forth specific facts that demonstrate his or her entitlement to summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996). If the movant fails to meet this burden, summary judgment is not appropriate, but if the movant does meet this burden, summary judgment

will be appropriate only if the nonmovant fails to establish the existence of a genuine issue of material fact. *Id.* at 293.

C. Application of Res Judicata

{¶13} In their first assignment of error, plaintiffs argue that the trial court erred in granting the defendants' motion for summary judgment on res judicata grounds. Plaintiffs contend that the application of the doctrine "would lead to an injustice" because the defendants concealed information. They further maintain that the defendants are not in privity with Peter and Wolfgang for the doctrine to apply as a matter of law.

{¶14} In *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 653 N.E.2d 226 (1995), syllabus, the Ohio Supreme Court, in explaining the doctrine of res judicata, held that "[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." The doctrine of res judicata applies to those who were parties in the prior action, to those who were in privity with the litigants, and also to those who could have joined the action and did not. *Jarvis v. Wells Fargo Bank*, 7th Dist. Columbiana No. 09 CO 6, 2010-Ohio-3283, citing *Howell v. Richardson*, 45 Ohio St.3d 365, 367, 544 N.E.2d 878 (1989); *Keeley & Assocs., Inc. v. Integrity Supply, Inc.*, 120 Ohio App.3d 1, 4, 696 N.E.2d 618 (10th Dist.1997).

{¶15} The Ohio Supreme Court has recognized that "what constitutes privity in the context of res judicata is somewhat amorphous." *Brown v. Dayton*, 89 Ohio St.3d 245, 248, 730 N.E.2d 958 (2000). Consequently, the court has "applied a broad definition to

determine whether the relationship between the parties is close enough to invoke the doctrine." *Kirkhart v. Keiper*, 101 Ohio St.3d 377, 2004-Ohio-1496, 805 N.E.2d 1089, ¶ 8, citing *Brown*. Thus, "'a mutuality of interest, including an identity of desired result,' may create privity." *Id.*

> Mutuality, however, exists only if "the person taking advantage of the judgment would have been bound by it had the result been the opposite. Conversely, a stranger to the prior judgment, being not bound thereby, is not entitled to rely upon its effect under the claim of res judicata or collateral estoppel."

O'Nesti v. DeBartolo, 113 Ohio St.3d 59, 2007-Ohio-1102, 862 N.E.2d 803, ¶ 9, quoting *Johnson's Island, Inc. v. Danbury Twp. Bd. of Trustees*, 69 Ohio St.2d 241, 244, 431 N.E.2d 672 (1982).

{¶16} Here, there is simply not enough evidence before the trial court to conclude that privity exists between Steven and Peter. Aside from the fact that Steven did not move for summary judgment on res judicata grounds, the record does not support the trial court's conclusion that "a mutuality of interest" exists to invoke the doctrine. The mere fact that they are brothers and that Steven worked at the restaurant for his brother is not enough to sua sponte determine that privity exists. *See generally Johnson v. Norman*, 66 Ohio St.2d 186, 190, 421 N.E.2d 124 (1981) (privity generally does not arise out of the parent-child relationship); *O'Nesti* (co-employees subject to the same employment-related contract, without more, does not establish privity).[1]

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[1] We further note that the Supreme Court of Ohio has held that granting summary judgment based on an argument not raised in the motion for summary judgment constitutes reversible error because the court has denied the opposing party a meaningful opportunity to respond. *State ex rel.*

{¶17} While it is not clear that the trial court granted summary judgment in favor of Waterstreet Management on res judicata grounds, Waterstreet Management broadly raised res judicata in its motion for summary judgment. But Waterstreet Management did not make any argument, let alone prove, privity between the parties in its underlying motion for summary judgment. And as discussed below, a genuine issue of material fact exists as to Peter's connection to Waterstreet Management.

{¶18} Accordingly, based on the lack of briefing and insufficient evidence in the record, we find that the award of summary judgment on res judicata grounds for either party was error.

{¶19} The first assignment of error is sustained.

D. Summary Judgment in Favor of Waterstreet Management

{¶20} In their second assignment of error, plaintiffs argue that the trial court erred in granting summary judgment in favor of Waterstreet Management.

{¶21} According to Waterstreet Management's motion for summary judgment, it is entitled to judgment as a matter of law because Peter is its sole member and, therefore, a conspiracy claim with Peter or Wolfgang Enterprises (where Peter is also the sole member) cannot lie.

{¶22} "Generally, in the context of civil liability, where all defendants, allegedly coconspirators, are members of the same collective entity, corporate or municipal, there

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Sawicki v. Ct. of Common Pleas of Lucas Cty., 121 Ohio St.3d 507, 2009-Ohio-1523, 905 N.E.2d 1192, ¶ 27.

are not two separate 'people' to form a conspiracy." *Daudistel v. Silverton*, 1st Dist. Hamilton No. C-130661, 2014-Ohio-5731, ¶ 45; *see also Ohio Vestibular & Balance Ctrs., Inc. v. Wheeler*, 2013-Ohio-4417, 999 N.E.2d 241, ¶ 28-30 (6th Dist.), citing *Kerr v. Hurd*, 694 F.Supp.2d 817, 834 (S.D. Ohio 2010) (explaining that "[a] corporation cannot conspire with its own agents or employees."). In support of its motion, Waterstreet Management attached the affidavit of Peter, who averred that he is the sole shareholder of Wolfgang Enterprises and the sole member and managing member of Waterstreet Management. Waterstreet Management also offered the personal tax return of Peter, wherein the profit or loss of Waterstreet Management is reported on Schedule C of the return.

{¶23} Plaintiffs opposed the motion on the grounds that a genuine issue of material fact exists as to whether Peter is the sole managing member of Waterstreet Management. While they do not dispute the governing law that precludes a conspiracy claim between a corporate entity and its sole member, plaintiffs offered evidence that attacks the credibility of Peter's affidavit. Specifically, plaintiffs relied on Peter's own deposition testimony where he directly contradicts the statement of his affidavit. In his deposition, Peter expressly denied that he has been involved with any other companies "in terms of an ownership interest" other than Standard Contracting, Inc. and Wolfgang Enterprises, Inc.

{¶24} Based on the conflict between Peter's earlier deposition testimony and his affidavit, plaintiffs argue that a genuine issue of material fact exists as to Peter's

credibility — an issue that can only be resolved by the trier of fact. We agree. As recognized by the Ohio Supreme Court, "[i]f an affidavit of a movant for summary judgment is inconsistent with the movant's former deposition testimony, summary judgment may not be granted in the movant's favor." *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, 850 N.E.2d 47, paragraph two of the syllabus (applying *Turner v. Turner*, 67 Ohio St.3d 337, 617 N.E.2d 1123 (1993)). Here, the record contains a conflict between the evidence offered by both parties that raises a genuine issue of material fact. We cannot agree that the record unequivocally establishes that Peter is the managing and sole member of Waterstreet Management. Accordingly, because a genuine issue of material fact exists, Waterstreet was not entitled to the award of summary judgment on the conspiracy claim.

{¶25} The second assignment of error is sustained.

{¶26} Judgment reversed and case remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellants recover from appellees the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing 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.

MARY J. BOYLE, PRESIDING JUDGE

PATRICIA ANN BLACKMON, J., and
ANITA LASTER MAYS, J., CONCUR