

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

JOHN F. McDONAGH, et al.,	:	OPINION
Plaintiffs-Appellants,	:	
- vs -	:	CASE NO. 2002-T-0138
CORTLAND SAVINGS AND BANKING COMPANY,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Case No. 98 CV 65.

Judgment: Affirmed.

James M. Pietz, The Frick Building, Suite 200, Pittsburgh, PA 15219, and *Clair M. Carlin*, 62 South Main Street, P.O. Box 5369, Poland, OH 44514 (For Plaintiffs-Appellants).

Michael L. Robinson, 750 Springwater Drive, Akron, OH 44333 (For Defendant-Appellee).

WILLIAM M. O'NEILL, J.

{¶1} Appellants, John F. McDonagh and Virginia R. McDonagh, on behalf of themselves and other persons similarly situated, appeal from the September 27, 2002 judgment entry of the Trumbull County Court of Common Pleas, granting appellee's, Cortland Savings and Banking Company, cross motion for summary judgment and denying appellants' motion for partial summary judgment.

{¶2} On January 13, 1998, appellants filed a class action complaint against appellee alleging three counts: (1) breach of contract; (2) breach of contract, duty of good faith and fair dealing; and (3) fraudulent concealment. On April 15, 1999, appellants filed a motion for partial summary judgment on counts one, two, and three, pursuant to Civ.R. 56. On June 11, 1999, the trial court ordered that the instant action be maintained as a class action pursuant to Civ.R. 23. On July 19, 1999, appellee filed an appeal with this court based on the June 11, 1999 order granting class certification, which we dismissed on February 7, 2000. Appellee filed a cross motion for summary judgment on August 31, 2001.

{¶3} The facts of the case are as follows: on July 16, 1993, appellants filed a federal case, case No. 4-93-CV-1352, in the Northern District of Ohio, Eastern Division. Appellants alleged breach of contract and Racketeer Influenced and Corrupt Organizations Act (“RICO”) claims, as well as state law claims which were included as pendent causes of action. Appellants’ claims arose out of their May 6, 1988 purchase of interests in campground resorts, Ponderosa Park in Salem, Ohio and The Landing in North Lawrence, Ohio (“Resorts”). Appellants sought recovery of money paid pursuant to a contract with the Resorts’ principal owners, the LiVorio-Sabatini Group (“Group”), for the purchase of 1/750th interests in the Resorts which was financed by appellee.¹ Appellants specifically alleged that appellee engaged in a civil conspiracy with the Resorts’ developers, aided and abetted the developers, and committed fraud and racketeering under RICO provisions.

1. Initially, the Group obtained commercial financing from Bank One of Youngstown, Ohio in 1985. In order to gain an influx of financing and an appearance of credit-worthiness, the Group bribed two Bank One officials. However, in 1986, senior Bank One officials uncovered the fraud and canceled its loan relationship with the Group. As a result, the Group approached appellee for additional financing. In 1988, the Resorts filed Chapter 11 bankruptcy proceedings in the United States Bankruptcy Court for the Northern District of Ohio, Eastern Division, case Nos. 688-01441 and 688-01415.

{¶4} The federal district court ultimately entered summary judgment, dismissing the federal claims with prejudice and dismissing without prejudice the state law based Federal Trade Commission (“FTC”) Holder claims for lack of pendent jurisdiction. Appellants appealed that decision to the Sixth Circuit Court of Appeals, case No. 97-4349. While the Sixth Circuit appeal was pending, appellants filed an action in Trumbull County Court of Common Pleas, case No. 98 CV 65, which later granted appellee’s cross motion for summary judgment. On March 2, 1999, the Sixth Circuit upheld the dismissal of appellants’ claims and held that appellants’ contract, which was allegedly breached, was a contract for the purchase of real estate rather than for consumer goods and services.² As such, the Sixth Circuit reasoned that the FTC Holder Provision was not applicable and that appellants’ federal claims were time barred.³

{¶5} From its inception in 1985 through 1988, the Resorts developers constructed roads, restaurants, security gates, recreation buildings, and indoor swimming pools, as well as made improvements which included underground utilities and sewage treatment facilities. Appellants were invited through the use of the wires or mails to tour the Resorts and purchased an interest in the campgrounds by executing a form contract entitled “AGREEMENT FOR DEED.” In addition, appellants agreed to obtain installment loan financing through GEICO Financial Services (“GEICO”), who assigned the contracts to appellee.⁴

2. *Isaak v. Trumbull Sav. & Loan Co.* (C.A.6 1999), 169 F.3d 390.

3. *Id.*

4. Appellants John and Virginia McDonagh agreed to a purchase price of \$4,740. Also, we must note that the form installment loan contracts contained the FTC Holder Provision. However, since the Sixth Circuit concluded that appellants entered into transactions for the purchase of an interest in real estate, the FTC Holder Provision has no effect to the instant matter.

{¶6} The “AGREEMENT FOR DEED” set forth with specificity a detailed metes and bounds description of the property and stated in pertinent part:

{¶7} “Upon the payment of the total purchase price and full compliance with all terms and conditions contained in this Agreement and the Note, the Seller will execute and deliver to the Purchaser a Warranty Deed conveying title to the premises***. *** The parties recognize that the Seller has taken the property interest covered by this Agreement off the real estate market, has turned away prospective purchasers, and has incurred and will continue to incur development and other expenses in connection with the sale of this interest. *** No action may be brought by either party more than one year after the date of the last payment. Purchaser agrees that this Agreement shall be considered to have been made in the County of Trumbull, State of Ohio, and all questions concerning the enforceability of performance of any of its terms or conditions, or any rights or obligations of the parties, shall be governed by the laws of the State of Ohio. *** The Purchaser further understands and agrees that this purchase is on an ‘under development basis’ and that the use of the fully developed campgrounds is not guaranteed until [the Resorts] is fully developed. *** This Agreement, the Note and separate Real Estate Maintenance Contract contain all of the Agreements of the parties and no representation, oral or otherwise, shall be binding on the parties hereto.”

{¶8} Appellants John and Virginia McDonagh paid their obligation in full and received their Warranty Deed. Appellants John and Virginia McDonagh abandoned their interest in the Resorts on May 6, 1988, the date of purchase.

{¶9} According to the January 26, 1995 deposition testimony of Rodger Platt (“Platt”), appellee’s President, the loan transactions to the campground purchasers were not treated any differently than any other loans. Platt also stated that appellee did not

have any representatives at the Resorts, did not direct in any way the operation of the campgrounds, and was not aware of any scheme by or intent of the Resorts to file bankruptcy. Pursuant to the November 14, 1994 deposition of appellee's Vice President of Lending, John Martin ("Martin"), the loans appellee made to the campground purchasers were treated identically to all other loans made by appellee to other borrowers.

{¶10} Pursuant to the September 27, 2002 judgment entry, the trial court denied appellants' motion for partial summary judgment and granted appellee's cross motion for summary judgment. It is from that judgment that appellants filed a timely notice of appeal on October 8, 2002, and make the following assignments of error:

{¶11} "[1.] The trial court legally erred in holding that borrowers could not rely on the principles of collateral or judicial estoppel.

{¶12} "[2.] The trial court legally erred in entering a [Civ.R. 56] judgment on counts I-III by failing to apply the proper legal rule under Ohio law in determining whether the transactions constituted the conveyance of real estate or the sale of consumer services such that the FTC Holder Provision applied to the transaction contractually preserved borrowers claims for assertion against [appellee].

{¶13} "[3.] Alternatively, the trial court legally erred in dismissing counts I-III in holding that the common law close connection doctrine does not apply.

{¶14} "[4.] The trial court legally erred in entering the [Civ.R. 56] judgment by allowing [appellee] to assert contract defenses arising from the agreements for deed on behalf of the campgrounds even though the campgrounds were guilty of the first material breach of the agreements for deed."

{¶15} In their first assignment of error, appellants argue that the trial court erred in holding that they could not rely on the principles of collateral or judicial estoppel. Appellants stress that a federal court’s factual determination under Fed.R.Civ.P. 56 will collaterally and judicially estop the relitigation of the same issue in an Ohio state court proceeding if the requirements of these doctrines are satisfied.

{¶16} Fed.R.Civ.P. 56(C) states, in pertinent part, that summary judgment is appropriate where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.”

{¶17} Fed.R.Civ.P. 56(E) provides, in pertinent part:

{¶18} “***When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party’s pleading, but the adverse party’s response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.”

{¶19} “Collateral estoppel, an aspect of *res judicata*, prevents a question that has been actually and necessarily determined by a court of competent jurisdiction in a first cause of action from being relitigated between the same parties or their privies in a second, different cause of action.”⁵

5. *State ex rel. Brookpark Entertainment, Inc. v. Cuyahoga Cty. Bd. of Elections* (1991), 60 Ohio St.3d 44, 46, citing *Goodson v. McDonough Power Equip., Inc.* (1983), 2 Ohio St.3d 193, 195. See, also, *Ft. Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.* (1998), 81 Ohio St.3d 392, 395.

{¶20} “The doctrine of judicial estoppel prevents a litigant who has successfully taken a position in one action from taking a contradictory position in a subsequent action.”⁶

{¶21} In the case at bar, pursuant to the “AGREEMENT FOR DEED,” the parties agreed that any of its terms or conditions shall be governed by Ohio law. Based on *Brookpark, Ft. Frye, and Stanley*, supra, an issue must be actually litigated and necessarily decided in a prior action in order for collateral or judicial estoppel to apply. Appellants have alleged for numerous years that the developers of the Resorts engaged in a predetermined scheme to loot their businesses and file bankruptcy. However, appellants have never submitted any proof or substantial evidence to support their allegations, as the record does not substantiate their claim. The trial court properly determined that the only issue before the Sixth Circuit was whether appellants knew or should have known that their property interests were damaged more than four years before their complaints were filed. There is no evidence indicating that the existence or non-existence of a bust-out scheme was ever litigated. Therefore, the doctrines of collateral or judicial estoppel do not apply. Thus, appellants’ first assignment of error is without merit.

6. *Stanley v. Miamisburg* (Jan. 28, 2000), 2d Dist. No. 17912, 2000 Ohio App. LEXIS 205, at *11, citing *Scioto Mem. Hosp. Assn., Inc. v. Price Waterhouse* (1996), 74 Ohio St.3d 474, 481.

{¶22} In their second assignment of error, appellants contend that the trial court erred by dismissing counts one through three pursuant to Civ.R. 56 because it failed to apply the proper legal rule under Ohio law for determining whether the transactions constituted the conveyance of real estate or the sale of consumer services. Appellants stress that since the transactions at issue constitute a consumer transaction, the FTC Holder Provision applies.

{¶23} In order for a summary judgment to be granted, the moving party must prove:

{¶24} “(1) [N]o 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 such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made.”⁷

{¶25} The Supreme Court of Ohio has stated:

{¶26} “[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, *and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party’s claim.* The ‘portions of the record’ to which we refer are those evidentiary materials listed in Civ.R. 56(C), such as the pleadings, depositions, answers to interrogatories, etc., that have been filed in the case.”⁸

7. (Citation omitted.) *Mootispaw v. Eckstein* (1996), 76 Ohio St.3d 383, 385.

8. (Emphasis sic.) *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 296.

{¶27} If the moving party satisfies this burden, then the nonmoving party has the burden pursuant to Civ.R. 56(E) to provide evidence demonstrating a genuine issue of material fact. If the nonmoving party does not satisfy this burden, then summary judgment is appropriate.⁹ Appellate courts review a trial court’s granting of summary judgment de novo.¹⁰ The *Brown* Court stated that “we review the judgment independently and without deference to the trial court’s determination.”¹¹ An appellate court must evaluate the record “in a light most favorable to the nonmoving party.”¹² Furthermore, a motion for summary judgment must be overruled if reasonable minds could find for the party opposing the motion.¹³

{¶28} Theories of res judicata are used to prevent relitigation of issues already decided by a court or matters that should have been brought as part of a previous action. “[A] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claims arising out of the transaction or occurrence that was the subject matter of the previous action.”¹⁴ Res judicata “applies to extinguish a claim by the plaintiff against the defendant *even though the plaintiff is prepared in the second action (1) [t]o present evidence or grounds or theories of the case not presented in the first action, or (2) [t]o seek remedies or forms of relief not demanded in the first action.*”¹⁵

{¶29} In *Kovach v. Erie Islands Resort & Marina*, the court held that the purchase of an undivided one-fifteen thousandth interest in property which consisted of

9. Civ.R. 56(E).

10. *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711.

11. *Id.*

12. *Link v. Leadworks Corp.* (1992), 79 Ohio App.3d 735, 741.

13. *Id.*

14. *Grava v. Parkman Twp.* (1995), 73 Ohio St.3d 379, 382.

15. (Emphasis sic.) *Id.* at 383, quoting 1 Restatement of the Law 2d, Judgments (1982), Section 25.

campsites and other resort and recreational facilities constituted an interest in real estate rather than for personal services.¹⁶

{¶30} In the instant matter, the Sixth Circuit concluded that pursuant to *Kovach*, supra, appellants entered into transactions for the purchase of an interest in real estate rather than for personal services or membership in a club or organization.¹⁷ Appellants failed to appeal the Sixth Circuit's decision to the United States Supreme Court. Rather, appellants ask this court to review and reverse the Sixth Circuit's decision. However, this is not the proper forum. Because this claim is barred by the doctrine of res judicata, appellee was properly granted summary judgment. Thus, appellants' second assignment of error is without merit.

{¶31} In their third assignment of error, appellants contend that the trial court erred in dismissing counts I-III pursuant to Civ.R. 56 by determining that the close connection doctrine does not apply.

{¶32} In *Arcanum Natl. Bank v. Hessler*, the court set forth five factors in order to determine whether a close connection exists between a transferee and a transferor:

{¶33} "(1) Drafting by the transferee of forms for the transferor; (2) approval or establishment or both of the transferor's procedures by the transferee ***; (3) an independent check by the transferee on the credit of the debtor or some other direct contact between the transferee and the debtor; (4) heavy reliance by the transferor upon the transferee *** and; (5) common or connected ownership or management of the transferor and transferee."¹⁸

16. *Kovach v. Erie Islands Resort & Marina* (1994), 93 Ohio App.3d 11, 13.

17. *Isaak v. Trumbull Sav. & Loan Co.*, 169 F.3d at 397, citing *Kovach v. Erie Islands Resort & Marina*, supra.

18. *Arcanum Natl. Bank v. Hessler* (1982), 69 Ohio St.2d 549, 555, citing White & Summers, Uniform Commercial Code 481, (1972). See, also, *Star Bank, Natl. Assn. v. Cirrocumulus Ltd. Partnership* (1997), 121 Ohio App.3d 731, 746.

{¶34} In the case sub judice, pursuant to the September 27, 2002 findings of fact and conclusions of law, the trial court stated:

{¶35} “[Appellants] have not submitted any documentary evidence or cited any testimony to support their claims of close connectedness, fraudulent concealment or participation in a civil conspiracy. *** Given [appellants’] failure to conduct any discovery in these proceedings and given [appellants’] failure to submit relevant evidence or testimony supporting their claims, reasonable minds could come but to one conclusion and that is that [appellee] was not involved in a civil conspiracy, that [appellee] was not involved in any way in the day to day operation of the [R]esorts, was not involved in making decisions concerning the operation of the [R]esorts, [and] that a ‘close connectedness’ did not exist between [appellee] and the [R]esorts.” We wholeheartedly agree.

{¶36} Based on the foregoing facts, appellee had no contractual relationship whatsoever with appellants. Appellee was not in any manner a party to appellants’ contract with the Resorts. Also, pursuant to the deposition testimony of Platt and Martin, the loan transactions between appellee and the campground purchasers were not treated any differently than any other loans. Platt stated that appellee did not have any representatives at the Resorts, did not direct in any way the operation of the campgrounds, and was not aware of any scheme by or intent of the Resorts to file bankruptcy. We must stress that appellants failed to submit any evidence to the contrary. Therefore, based on *Arcanum*, supra, appellants fail to show that a close connection existed between appellee and the Resorts. Thus, appellants’ third assignment of error is without merit.

{¶37} In their fourth assignment of error, appellants argue that the trial court erred in entering the Civ.R. 56 judgment by allowing appellee to assert contract defenses arising from the agreements for deed on behalf of the campgrounds, even though the campgrounds were guilty of the first material breach of the agreements for deed.

{¶38} Where there has been a material breach of contract by one party, the other party may treat the contract as terminated and rescind it or may sue for damages.¹⁹ Generally, a party seeking to rescind must ““place the other in statu quo, by returning all money, property, or other benefits received by him under the contract which is sought to be rescinded, or by making a tender thereof of the other party.””²⁰

{¶39} As thoroughly discussed in the preceding assignments of error, the Sixth Circuit determined that appellants entered into a contract for the purchase of an interest in real estate, therefore, the FTC Holder Provision is inapplicable. No contractual relationship existed between appellee and appellants. Appellee was not a party to appellants’ contract with the Resorts. Again, no close connection existed between appellee and the Resorts. Appellants’ claim that the Resorts entered into contracts without any intention to ever build and operate fully developed campgrounds and that appellee knew of such is not supported by the evidence. In fact, from its inception in 1985 through 1988, the Resorts developers constructed roads, restaurants, security gates, recreation buildings, and indoor swimming pools, as well as made improvements which included underground utilities and sewage treatment facilities. Therefore, we agree with the trial court’s determination that appellants failed to provide any evidence

19. *Wilson v. Kreusch* (1996), 111 Ohio App.3d 47, 56.

20. *England v. O’Flynn* (Jan. 11, 2002), 2d Dist. No. 18952, 2002 Ohio App. LEXIS 54, at *14, quoting *Miller v. Bieghler* (1931), 123 Ohio St. 227, 233.

of a breach of a contractual promise to provide a “fully developed” resort. The “AGREEMENT FOR DEED” specifically states: “[t]he Purchaser further understands and agrees that this purchase is on an ‘underdevelopment basis’ and that the use of the fully developed campgrounds is not guaranteed until [the Resorts] is fully developed.” In any event, the trial court correctly ruled that appellee has no contractual liability to appellants. Thus, appellants’ fourth assignment of error is without merit.

{¶40} For the foregoing reasons, appellants’ assignments of error are not well taken. The judgment of the Trumbull County Court of Common Pleas is affirmed.

Judgment affirmed.

DIANE V. GRENDELL and CYNTHIA WESTCOTT RICE, JJ., concur.