[Cite as *Montello v. Ackerman*, 2010-Ohio-3459.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

SAM MONTELLO,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2010-L-007**
- vs -	:	
THOMAS ACKERMAN,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Case No. 08 CV 001678.

Judgment: Affirmed.

David M. Lynch, 29311 Euclid Avenue, #200, Wickliffe, OH 44092 (For Plaintiff-Appellant).

Charles V. Longo and *Matthew D. Greenwell*, Charles V. Longo, Co., L.P.A., 25550 Chagrin Boulevard, #320, Beachwood, OH 44122 (For Defendant-Appellee).

COLLEEN MARY O'TOOLE, J.

{¶1} Sam Montello appeals from the grant of summary judgment to Thomas Ackerman by the Lake County Court of Common Pleas in his action for breach of contract and/or fraud regarding the proceeds from a real estate development, "Cali Woods," located in Concord Township, Lake County, Ohio. The trial court found any action by Mr. Montello was barred by the applicable statutes of limitations, the Statute of Frauds, and res judicata. We affirm.

{¶2} According to Mr. Montello, in June 1984, he and a friend, Joseph Cali, entered a verbal agreement to acquire land in Lake County, Ohio, to be developed into residential real estate. In return for providing capital, Mr. Montello was to receive one half of any proceeds from the development, which was named Cali Woods. While described as a "verbal partnership" in Mr. Montello's complaint, the parties do not appear to dispute that Cali Woods was organized at some point into a corporation, "Cali Woods, Inc."

{¶3} Mr. Montello alleges that he was introduced to Mr. Ackerman in 1995, and that Mr. Ackerman was project manager for the development of Cali Woods. He alleges that Mr. Ackerman entered into a verbal contract with him, to assure that Mr. Montello received his one half of any proceeds from the project. Attached to Mr. Montello's complaint is a written agreement between Joseph Cali, his wife, Sarah, and Mr. Ackerman, dated June 1995, by which the Calis and Mr. Ackerman agreed to form a development corporation for the lands constituting Cali Woods, with the Calis to own one half of the corporation, Mr. Ackerman, the other half. Essentially, the Calis were to provide the land for the development, and Mr. Ackerman, the expertise in running it. Mr. Montello was not a party to this agreement, nor mentioned in it.

{¶4} In his deposition, Mr. Montello stated that he knew as early as 1998, that Mr. Cali and Mr. Ackerman were failing to live up to their duty to provide him his money from Cali Woods, or any accounting of its affairs. In 1999, Mr. Montello filed suit in the Circuit Court for the Twentieth Judicial Circuit, Collier County, Florida, against Mr. Cali, Cali and Associates, Inc., and others. Mr. Ackerman was not a party to that action. In

June 2006, this Florida action was settled pursuant to arbitration, with Mr. Montello receiving $550,000. In relevant part, the settlement agreement states as follows:

{¶5} "5. The parties hereby release each other as well as any business entity that they may have an interest in and each others (sic) blood relatives from any and all causes of action or claims from the beginning of the world to the date of this agreement with the exception of the obligations in this settlement agreement."

{¶6} March 30, 2007, Mr. Montello filed his initial complaint against Mr. Ackerman in the trial court, that being Case No. 07-CV-000923. Mr. Ackerman answered and counterclaimed. April 9, 2008, Mr. Montello moved to dismiss the case without prejudice, which motion the trial court granted in part, leaving Mr. Ackerman's counterclaim pending.

{¶7} May 20, 2008, Mr. Montello refiled the instant case. Mr. Ackerman answered and counterclaimed, which answer and counterclaim were, eventually amended. Mr. Ackerman moved for summary judgment April 17, 2009, which motion Mr. Montello opposed. Mr. Ackerman further filed a response to Mr. Montello's opposition. August 6, 2009, the trial court granted the motion for summary judgment. Mr. Montello timely noticed this appeal, assigning a single error:

{¶8} "The Trial Court errored (sic) in granting Summary Judgment for the Defendant."

{¶9} "'Pursuant to Civ.R. 56(C), summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.' *Holik v. Richards*, 11th Dist. No. 2005-A-0006, 2006-Ohio-2644, ¶12, citing *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, ***. 'In addition, it must appear

from the evidence and stipulations that reasonable minds can come to only one conclusion, which is adverse to the nonmoving party.' Id. citing Civ.R. 56(C). Further, the standard in which we review the granting of a motion for summary judgment is de novo. Id. citing *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, ***.

{¶10} "Accordingly, '(s)ummary judgment may not be granted until the moving party sufficiently demonstrates the absence of a genuine issue of material fact. The moving party bears the initial burden 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.' *Brunstetter v. Keating*, 11th Dist. No. 2002-T-0057, 2003-Ohio-3270, ¶12, citing *Dresher* at 292. 'Once the moving party meets the initial burden, the nonmoving party must then set forth specific facts demonstrating that a genuine issue of material fact does exist that must be preserved for trial, and if the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party.' Id., citing *Dresher* at 293.

{¶11} "***

{¶12} "***

{¶13} "Since summary judgment denies the party his or her 'day in court' it is not to be viewed lightly as docket control or as a 'little trial.' The jurisprudence of summary judgment standards has placed burdens on both the moving and nonmoving party. In *Dresher v. Burt*, the Supreme Court of Ohio held that the moving party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record before the trial court that

demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. The evidence must be in the record or the motion cannot succeed. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case but must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden outlined in the last sentence of Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial. If the nonmoving party fails to do so, summary judgment, if appropriate shall be entered against the nonmoving party based on the principles that have been firmly established in Ohio for quite some time in *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, ***.

{¶14} "The court in *Dresher* went on to say that paragraph three of the syllabus in *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, ***, is too broad and fails to account for the burden Civ.R. 56 places upon a *moving* party. The court, therefore, limited paragraph three of the syllabus in *Wing* to bring it into conformity with *Mitseff*. (Emphasis added.)

{¶15} "The Supreme Court in *Dresher* went on to hold that when *neither* the moving nor nonmoving party provides evidentiary materials demonstrating that there are no material facts in dispute, the moving party is not entitled to a judgment as a matter of law as the 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.' Id. at 276. (Emphasis added.)" *Welch v. Ziccarelli*, 11th Dist. No. 2006-L-229, 2007-Ohio-4374, at ¶36-37, 40-42. (Parallel citations omitted.)

{¶16} In support of his assignment of error, Mr. Montello raises three issues. First, he asserts the trial court erred in finding that this action was barred by the statute of limitations. Second, he asserts that, since his alleged oral agreement with Mr. Ackerman was for the division of profits from the sale realty arising from a partnership, it does not fall within the Statute of Frauds. Third, Mr. Montello asserts that the settlement of his claims against Mr. Cali in the Florida case does not place the bar of res judicata upon an action against Mr. Ackerman.

{¶17} The statute of limitations concerning (most) oral contracts is six years. R.C. 2305.07. In this case, Mr. Montello admitted in deposition that he believed neither Mr. Cali, nor Mr. Ackerman, were performing under the alleged oral agreements in 1998. He did not commence any action against Mr. Ackerman until 2007. A cause of action for breach of an oral contract accrues "when the plaintiff discovers the omission to perform as agreed in the oral contract." *Aluminum Line Products, Co. v. Brad Smith Roofing Co., Inc.* (1996), 109 Ohio App.3d 246, 258. In the instant case, this would mean the limitations period expired no later than the end of 2004. Further, as Mr. Ackerman points out, this court has held that the six year limitations period on oral contracts to pay money, wherein no specific time for payment is stipulated, begins "to run from the date the initial promise was made." *Mines v. Phillips* (1987), 37 Ohio

App.3d 121, 122. Application of this rule to the instant case would mean the limitations period expired at the end of 2001.

{¶18} While it appears to us that this case sounds in contract, analysis under a fraud theory gives Mr. Montello no comfort. The general statute of limitations for fraud is four years. R.C. 2305.09(C). This court has held that a cause of action for fraud accrues either: "(1) when the fraud is discovered; or (2) when, in the exercise of reasonable diligence, the fraud should have been discovered." *Marshall v. Silsby*, 11th Dist. No. 2004-L-094, 2005-Ohio-5609, at ¶26. As Mr. Montello discovered the alleged fraud in 1998, this means the limitations period expired no later than the end of 2002.

{¶19} Mr. Montello cites to the decision of the Supreme Court of Ohio in *Weber v. Billman* (1956), 165 Ohio St. 431, in an attempt to avoid the bar of the statute of limitations. Like the trial court, we find that case distinguishable. The *Weber* court held: "Where a contract of employment is a continuing one with no fixed date of termination, the statute of limitations does not begin to run until the services rendered under such contract actually end." *Weber* at paragraph three of the syllabus. *Weber* involved a situation where appellee's great uncle promised to see she was taken care of, if she would devote herself to nursing him during the declining years of his life. As the *Weber* court stated, "there was persuasive evidence before the jury to warrant the finding that there was a continuing contract which terminated only with the death of the decedent." Id. at 439. In this case, on the contrary, Mr. Montello alleges the existence of a continuous contract with Mr. Ackerman to turn over proceeds from the Cali Woods development, which Mr. Ackerman breached as early as 1998. Indeed, if we were to

apply the reasoning in *Weber* to this case, we would be required to dismiss it, and order the trial court to do the same, as no cause of action could yet have accrued.

{¶20} The first issue lacks merit. This action is barred by the applicable statutes of limitations.

{¶21} Under his second issue, Mr. Montello asserts the trial court erred in finding this action was barred by the Statute of Frauds, as codified at R.C. 1335.05. This section provides, in pertinent part:

{¶22} "No action shall be brought whereby to charge the defendant, upon a special promise, to answer for the debt, default, or miscarriage of another person; nor to charge an executor or administrator upon a special promise to answer damages out of his own estate; nor to charge a person upon an agreement made upon consideration of marriage, or upon a contract or sale of lands, tenements, or hereditaments, or interest in or concerning them, or upon an agreement that is not to be performed within one year from the making thereof; unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him or her lawfully authorized."

{¶23} Refusing to reach the question of whether the alleged agreement between Mr. Montello and Mr. Ackerman involved an interest in realty, the trial court nevertheless found that R.C. 1335.05 applied, since, according to Mr. Montello's own testimony, the contract between himself and Mr. Ackerman was not intended to be performed within a year.

{¶24} As support for this issue, Mr. Montello cites to the decision of the Court of Appeals for the Eighth Appellate District in *Furth v. Farkasch* (1927), 26 Ohio App. 258,

wherein the court held, at paragraph one of the syllabus: "Oral contract creating partnership relation between parties to share in money realized from commissions for sale of real estate, which had been earned by one party, *held* not within statute of frauds ***." (Emphasis sic.) As noted by the Court of Appeals for the Tenth Appellate District in *Gunsorek v. Heartland Bank* (1997), 124 Ohio App.3d 735, 740-742, *Furth* is an early example of a line of appellate decisions in this state holding that the Statute of Frauds does not apply to oral partnerships to share in the profits from the sale of realty, or to acquire and develop realty not already owned by one of the partners. When such agreements pertain to property already owned by one of the partners, the Statute of Frauds applies. *Gunsorek* at 742-745.

{¶25} We respectfully decline to rely on *Furth*, and related cases. As Mr. Ackerman indicates, the viability of these cases is questionable, following the decision of the Supreme Court of Ohio in *Olympic Holding Co., L.L.C. v. ACE Ltd.*, 122 Ohio St.3d 89, 2009-Ohio-2057. In that case, the Court held, in an action between title insurers and reinsurers:

{¶26} "In *Garg v. Venkataraman* (1988), 54 Ohio App.3d 171, 172-173, ***, the court stated, 'While joint venture agreements may be oral, they are, nonetheless, still contracts, and thus subject to all of the applicable requirements of contract law, including the Statute of Frauds.' Thus, *Garg* held that if a joint agreement does not comply with the statute of frauds, it is unenforceable and cannot impose any fiduciary duties upon the parties. Id. at 172. We agree with *Garg* and therefore hold that a joint-venture agreement that does not comply with the statute of frauds is unenforceable, and

an unenforceable joint-venture agreement cannot impose any fiduciary duties on the parties." *Olympic Holding Co.* at ¶46.

{¶27} In view of this mandate applying the Statute of Frauds to joint ventures, it appears likely to us that the Supreme Court would also hold that the statute applies to partnerships. We further note the court in *Olympic Holding Co.* held: "When parties to an alleged agreement did *not* intend the agreement to be performed in less than a year, the statute of frauds renders that agreement unenforceable." Id. at ¶48. (Emphasis sic.) As the trial court correctly noted, Mr. Montello's own evidence indicates the agreement between him and Mr. Ackerman was not intended to be performed in less than a year. Consequently, the Statute of Frauds bars the enforcement of the agreement.

{¶28} The second issue lacks merit. This action is barred by the Statute of Frauds.

{¶29} Under his third issue, Mr. Montello argues that the settlement of his Florida action against Mr. Cali does not place the bar of res judicata on his action against Mr. Ackerman. As we noted above, paragraph 5 of the settlement of that action, entered into in June 2006, provided that Mr. Montello and Mr. Cali released each other, "as well as any business entity that they may have an interest in *** from any and all causes of action or claims from the beginning of the world to the date of this agreement ***[.]" Mr. Montello asserts that this settlement and release does not apply to Mr. Ackerman, since he is not a business entity.

{¶30} In *State ex rel. Nickoli v. Erie Metroparks*, 124 Ohio St.3d 449, 2010-Ohio-606, at ¶21-22, the Supreme Court of Ohio stated:

{¶31} "In Ohio, '(t)he doctrine of res judicata encompasses the two related concepts of claim preclusion, also known as res judicata or estoppel by judgment, and issue preclusion, also known as collateral estoppel.' *O'Nesti v. DeBartolo Realty Corp.*, 113 Ohio St.3d 59, 2007-Ohio-1102, ¶6, ***. 'Claim preclusion prevents subsequent actions, by the same parties or their privies, based upon any claim arising out of a transaction that was the subject matter of a previous action,' whereas issue preclusion, or collateral estoppel, 'precludes the relitigation, in a second action, of an issue that had been actually and necessarily litigated and determined in a prior action that was based on a different cause of action.' *Ft. Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.* (1998), 81 Ohio St.3d 392, 395, ***; see *Holzemer v. Urbanski* (1999), 86 Ohio St.3d 129, 133, ***.

{¶32} "For res judicata to apply, 'one of the requirements is that the parties to the subsequent action must be identical to or in privity with those in the former action.' *Kirkhart v. Keiper*, 101 Ohio St.3d 377, 2004-Ohio-1496, ***, ¶8." (Parallel citations omitted.)

{¶33} "'What constitutes privity in the context of res judicata is somewhat amorphous. A contractual or beneficiary relationship is not required: "In certain situations (***) a broader definition of privity is warranted. As a general matter, privity is merely a word used to say that the relationship between the one who is a party on the record and another is close enough to include that other within the res judicata."' *Brown* [*v. Dayton* (2000)], 89 Ohio St.3d [245,] *** 248 (quoting *Thompson v. Wing* [(1994)], 70 Ohio St.3d 176, ***). 'Privity has also been defined as "such an identification of interest of one person with another as to represent the same legal right."' *Green v. City of*

Akron, 9th Dist. Nos. 18284, 18294, 1997 Ohio App. LEXIS 4425, *** (Oct. 1, 1997) (quoting *Buchanan v. Palcra Inc.*, 6th Dist. No. E-87-22, 1987 Ohio App. LEXIS 10285, *** (Dec. 31, 1987))." *Elec. Enlightenment, Inc. v. Kirsch*, 9th Dist. No. 23916, 2008-Ohio-3633, at ¶8. (Parallel citations omitted.)

{¶34} "The doctrine of *res judicata* requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it." (Emphasis sic.) *National Amusements, Inc. v. Springdale* (1990), 53 Ohio St.3d 60, 62.

{¶35} In this case, the June 1995 agreement between the Calis and Mr. Ackerman, attached to Mr. Montello's own complaint, indicates that Mr. Cali and Mr. Ackerman were business partners in the development of Cali Woods. We believe this is sufficient to establish privity between them. Consequently, in settling the Florida action between himself and Mr. Cali, Mr. Montello was required to except Mr. Ackerman from the operation of the settlement and release, in order to avoid the bar of res judicata. He did not.

{¶36} The third issue lacks merit. This action is barred by res judicata.

{¶37} The judgment of the Lake County Court of Common Pleas is affirmed.

{¶38} It is the further order of this court that appellant is assessed costs herein taxed.

{¶39} The court finds there were reasonable grounds for this appeal.

MARY JANE TRAPP, P.J., concurs,

DIANE V. GRENDELL, J., concurs in judgment only.