[Cite as *Swank v. Swank*, 2010-Ohio-3105.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
ROBERT SWANK AND	:	Hon. W. Scott Gwin, P.J.
E. CLARK SWANK	:	Hon. William B. Hoffman, J.
	:	Hon. Sheila G. Farmer, J.
Plaintiffs-Appellants	:	
	:	
-vs-	:	Case No. 10-CA-2
	:	
FREEMAN J. SWANK, JR., ET AL	:	
	:	O P I N I O N
Defendants-Appellees		

CHARACTER OF PROCEEDING:	Civil appeal from the Richland County Court of Common Pleas, Case No. 02-CV-12-H
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	June 30, 2010

APPEARANCES:

For Plaintiffs-Appellants

MICHAEL L. INSCORE
INSCORE, RINEHARDT,
WHITNEY & ENDERLE CO., LPA
13 Park Avenue West, Ste. 400
Mansfield, OH 44902-1741

For Defendant-Appellee

WILLIAM TRAVIS MCINTYRE
24 West Third Street # 206
Mansfield, OH 44902

KENNETH R. BEDDOW
24 West Third Street #306
Mansfield, OH 44902

BENJAMIN D. KITZLER
3 North Main Street
Mansfield, OH 44902

ROBERT S. NAYLOR
5775 Perimeter Dr., Ste. 180
Dublin, OH 43017-3238

Gwin, P.J.

{¶1} Plaintiffs-appellants Robert L. and E. Clark Swank appeal a summary judgment of the Court of Common Pleas of Richland County, Ohio, entered in favor of defendants-appellees Freeman J. Swank, Jr. and Mary Jane Swank, First National Bank of Shelby nka First Citizens Bank, Henry L. Hopkins, Thomas J. Budd, Vorys Sater Seymour & Pease, and John Keller. Appellants assign three errors to the trial court:

{¶2} "I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN GRANTING THE MOTIONS OF ALL REMAINING DEFENDANTS FOR SUMMARY JUDGMENT.

{¶3} "II. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FAILING TO DECIDE, AND ABUSED ITS DISCRETION IN FAILING TO GRANT, PLAINTIFFS' MOTION FOR LEAVE TO AMEND/SUPPLEMENT THEIR COMPLAINT.

{¶4} "III. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FAILING TO GRANT PLAINTIFFS' MOTION TO STRIKE AFFIDAVITS AND EVIDENTIARY MATERIALS FILED BY DEFENDANTS FIRST CITIZENS BANK AND HENRY L. HOPKINS."

{¶5} The case has a long and tortuous history dating back to at least 1995. Freeman Swank, Sr., now deceased, and his wife Rheabelle Swank are the parents of Freeman Swank, Jr., Robert L. Swank, and E. Clark Swank. Freeman Sr. and Rheabelle owned over 500 acres of farm land, on which they conducted dairy and farming operations and raised hogs.

{¶6} Robert and Clark worked on the family farm, Robert beginning in 1965 and Clark in 1968. They ceased working on the farm in 1995. They alleged Swank Sr. had

always said the real estate must all be titled in the name of the elder Swanks in order to avoid substantial capital gains taxes. However, Robert alleged Freeman Sr. had promised that approximately 285 acres of the property, including the dairy operations and a farm house where Robert lived, would be conveyed to Robert upon the deaths of his parents, if not sooner. Clark alleged the Sr. Swanks had promised to title 270 acres of the property, where the parties conducted the hog raising operation, as well as the farmhouse where Clark lived, to Clark upon his parents' deaths if not sooner. Clark and Robert alleged they were actually partners in the family farm, but because of income tax considerations, the family operated the business as a proprietorship rather than a partnership.

{¶7} Both Clark and Robert allege during the time they worked the family farm they received weekly draws of substantially less than the minimum wage, along with tenancy rights in the farmhouses. They allege from time to time, each had to borrow money to finance various aspects of the farming operations and to maintain and purchase farm equipment and livestock.

{¶8} In 1995, Freeman, Sr. became seriously ill and Freeman, Jr. began taking more interest in his parents' affairs. Over the years, the senior Swanks accumulated considerable debt, and eventually defaulted on their payments to creditors. Freeman Jr. purchased the defaulted first mortgage on the property and became the assignee.

{¶9} Since that time, Robert and Clark have filed various actions, asserting their expectation to share in the inheritance of the farms. Pertinent to the case at bar is Richland County Common Pleas Case No. 97-11-H, which presented four legal theories

of recovery: (1) breach of partnership and contractual obligations; (2) interference with expectancy interest; (3) constructive fraud; and (4) unjust enrichment.

{¶10} Robert and Clark filed case number 00-649, first raising the claims also filed in 02-12, from which the present appeal is taken. Clark and Robert asked for a declaratory judgment regarding whether Freeman Jr.'s course of conduct, coupled with the conduct of the various other defendants, constitutes a malicious combination, conspiracy, and/or other tortious conduct, including spoliation, fabrication, distortion of evidence, and attempt to disrupt Clark and Robert's prosecution of 97-11-H. They also prayed for monetary damages.

{¶11} Specifically, Clark and Robert allege the bank and its officer conspired with Freeman Sr. and Jr.'s attorneys to create the appearance that the farming operation was in financial difficulties, so as to enable Freeman Jr. to acquire the property. Clark and Robert allege the appellees knew or should have known of Clark and Robert's claims against the property, and they argue the farm was actually solvent.

{¶12} On January 9, 2001, the trial court dismissed Case No. 00-649-H, finding no fraud or wrongful disruption. In 00-649, the trial court discussed appellants claims', finding the allegations in the complaint against Freeman Jr. and Mary Jane consist of nothing more than what any owner of property might do***" . Judgment Entry of January 9, 2001, at page 2. The court found as to the defendant Bank, law firm, and the individuals associated with them, the allegations "***consist of nothing more than providing ordinary services at their request.´ Id. The court found "all of the allegations against the financier and attorneys consist of nothing more than providing ordinary services to clients at their request." Id.

{¶13} The court concluded only if Clark and Robert could establish a partnership could they assert an interest in the property. The trial court found "at this time, plaintiffs can prove no set of facts showing they have an interest in the farm. The nature and extent of their interest, if any, must await a resolution in Case No. 97-11-H. This action is, at best premature." Id., 2-3.

{¶14} The court also found as to the claims of spoliation and destruction of evidence in Case No. 97-11-H, until a result in the earlier case is obtained, Robert and Clark could prove no damages in this case.

{¶15} In case number 00-649-H, Clark and Robert filed a notice of appeal and also a motion for relief from judgment pursuant to Civ. R. 60 (B). However, they later withdrew both the appeal and the motion.

{¶16} In entering summary judgment in 02-12,the case at bar, the court found the allegations in 00-649 and the present case are virtually the same against all defendants. The court found this action is barred by the principles of res judicata, and noted Civ. R. 41 (B)(3) required the court to consider the dismissal of 00-649 to be on the merits because the order did not specify otherwise.

{¶17} On October 17, 2005, this court decided the case of *Swank et al v. Estate of Swank, et al,* Richland App. Nos. 2004-CA-0110, 2004-CA-0111, and 2004-CA-0112, 2005-Ohio-5524. In the 2005 appeal, this court reviewed several cases arising out of the Court of Common Pleas, including 97-11-H. We found the various contractual interests Clark and Robert claimed were in reality an unenforceable contract to make a will, because there was no present interest, by partnership or otherwise, supported by

the evidence. *Swank* at paragraph 91. However, we also found there were equitable claims Clark and Robert may pursue.

I

{¶18} In their first assignment of error, appellants argue the trial court erred as a matter of law in granting summary judgment in favor of the appellees.

{¶19} Civ. R. 56 states in pertinent part:

{¶20} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, 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. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

{¶21} A trial court should not enter a summary judgment if it appears a material fact is genuinely disputed, nor if, construing the allegations most favorably towards the non-moving party, reasonable minds could draw different conclusions from the undisputed facts, *Houndshell v. American States Insurance Company* (1981), 67 Ohio St. 2d 427. The court may not resolve ambiguities in the evidence presented, *Inland*

Refuse Transfer Company v. Browning-Ferris Industries of Ohio, Inc. (1984), 15 Ohio St. 3d 321. A fact is material if it affects the outcome of the case under the applicable substantive law, *Russell v. Interim Personnel, Inc.* (1999), 135 Ohio App. 3d 301.

{¶22} When reviewing a trial court's decision to grant summary judgment, an appellate court applies the same standard used by the trial court, *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St. 3d 35. This means we review the matter de novo, *Doe v*. *Shaffer,* 90 Ohio St.3d 388, 2000-Ohio-186.

{¶23} The party moving for summary judgment bears the initial burden of informing the trial court of the basis of the motion and identifying the portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the non-moving party's claim, *Drescher v. Burt* (1996), 75 Ohio St. 3d 280. Once the moving party meets its initial burden, the burden shifts to the non-moving party to set forth specific facts demonstrating a genuine issue of material fact does exist, Id. The non-moving party may not rest upon the allegations and denials in the pleadings, but instead must submit some evidentiary material showing a genuine dispute over material facts, *Henkle v. Henkle* (1991), 75 Ohio App. 3d 732.

{¶24} In addition to the pleadings, the parties filed a stipulation with the motion for summary judgment. The stipulation recited the procedural history, see supra.

{¶25} Civ. R. 41 states in pertinent part:

{¶26} "(A) Voluntary dismissal: effect thereof

{¶27} "(1) By plaintiff; by stipulation. Subject to the provisions of Civ. R. 23(E), Civ. R. 23.1, and Civ. R. 66, a plaintiff, without order of court, may dismiss all claims asserted by that plaintiff against a defendant by doing either of the following:

{¶28} "(a) filing a notice of dismissal at any time before the commencement of trial unless a counterclaim which cannot remain pending for independent adjudication by the court has been served by that defendant;

{¶29} "(b) filing a stipulation of dismissal signed by all parties who have appeared in the action.

{¶30} "Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits of any claim that the plaintiff has once dismissed in any court.

{¶31} "(2) By order of court. Except as provided in division (A)(1) of this rule, a claim shall not be dismissed at the plaintiff's instance except upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon that defendant of the plaintiff's motion to dismiss, a claim shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under division (A)(2) of this rule is without prejudice.

{¶32} "(B) Involuntary dismissal: effect thereof

{¶33} * * *

{¶34} "(3) Adjudication on the merits; exception. A dismissal under division (B) of this rule and any dismissal not provided for in this rule, except as provided in division (B)(4) of this rule, operates as an adjudication upon the merits unless the court, in its order for dismissal, otherwise specifies."

{¶35} In 00-649, the trial court discussed appellants claims, finding the allegations in the complaint against Freeman Jr. and Mary Jane consist of nothing more than what any owner of property might do***" . Judgment Entry of January 9, 2001, at page 2. The court found as to the defendant Bank, law firm, and the individuals associated with them, the allegations "***consist of nothing more than providing ordinary services at their request. Id. The court concluded only if Clark and Robert could establish a partnership could they assert an interest in the property.

{¶36} It is undisputed the judgment entry dismissing Case No. 000-649, does not specify whether it is on the merits. Thus, we must construe the language of the judgment entry.

{¶37} The parties disagree as to the legal effect of the court's finding in 00-649, that at the time of the dismissal Clark and Robert could prove no set of facts showing any interest in the farm, and the nature and extent of their interest would be resolved in Case No. 97-11-H. The court found the action was premature. It also found they could prove no damages for their claims of spoliation and destruction of evidence, until the partnership issue in 97-11 was resolved

{¶38} Clark and Robert argue res judicata does not preclude this action because the dismissal of 00-649 was procedural, and not on the merits. They also argue the court's finding that the claim was premature implies the court believed the claim could be pursued in the future.

{¶39} Appellees, on the other hand, argue the dismissal of the 00-649H was not procedural, and therefore there was a judgment on the merits.

{¶40} The trial court's use of the word "premature" is somewhat misleading. Obviously the court was not using the term "premature" in the sense that the cause of action had not accrued and was not ripe for determination. Instead, the court was referring to the fact that the basis for appellants' claimed interest in the land was already being litigated in 97-11, and the result in 97-11 would determine the parties' status in this case.

{¶41} We find the judgment entry dismissing 00-649-H was not on the merits, but instead, anticipated that if Clark and Robert were successful in 97-11-H, then they would have standing to re-file and pursue the causes of action originally set out in 00-649. However, the analysis cannot end there because 97-11-H has been decided in appellees' favor.

{¶42} In *Anderson v. Eyman,* 180 Ohio App. 3d 794, 2009-Ohio-102, 907 N.E. 2d 730, this court stated "[t]he doctrine of res judicata involves both claim preclusion (historically called estoppels by judgment in Ohio) and issue preclusion (traditionally known as collateral estoppel.) *Grava v*. *Parkman Township* (1995), 73 Ohio St. 3d 379, 381, 653 N.E. 2d 226. The doctrine of collateral estoppel 'holds that fact or point that was actually and directly at issue in a previous action, and was passed upon and determined by a court of competent jurisdiction, may not be drawn into question in a subsequent action between the same parties or their privies, whether the cause of action in the two actions be identical or different.' *Fort Frye Teachers Association, OEA/NEA v. State Employment Relations Board* (1998), 81 Ohio St. 3d 392, 395, 692 N.E. 2d 140; see also *Norwood v. McDonald* (1943), 142 Ohio St. 299, 27 O. O. 240, 52 N.E. 2d 67, paragraph 3 of the syllabus. Essentially, collateral estoppel prevents parties

from re-litigating facts and issues that were fully litigated in a previous case. *State ex rel. Shemo v. Mayfield Heights* (2002), 95 Ohio St. 3d 59, 64, 765 N.E. 2d 345. ***" *Anderson* at paragraph 28.

{¶43} We find the dismissal in 00-649-H is not, standing by itself, res judicata to this case. However, reading 00-649-H in conjunction with our prior opinion discussing 97-11 supra, we find the question of a partnership was finally determined. The trial court had found only if appellants were successful in establishing a partnership could they proceed on these causes of action. 97-11-H established the parties did not have a partnership, and therefore res judicata prevents Clark and Robert from re-litigating the question of partnership in this case. We conclude the trial court was correct in its conclusion.

{¶44} The first assignment of error is overruled.

II.

{¶45} In their second assignment of error, Clark and Robert argue the trial court erred in refusing to permit them to amend or supplement their complaint. They sought leave to amend and supplement the complaint by adding Regal Eagle Enterprises, Inc. and Mary Jane Swank in her capacity as trustee. Clark and Robert assert that in other litigation, they became aware that legal title to the farm in question had been assigned to Regal Eagle.

{¶46} The trial court actually did not rule upon the motion, but the dismissal of the action while the motion was pending is implicitly a denial.

{¶47} In *Erwin v. Bryan,* ____ Ohio St. 3d ___ 2010-Ohio-2202, __ N.E. 2d ___, the Ohio Supreme Court noted although parties may be added or dropped by order of court

upon motion of any party or on the court's own initiative, a trial court has discretion to refuse to allow an amendment to add party defendants when the plaintiff's claims against them are on their face totally futile. *Erwin* at paragraph 39, citations deleted.

{¶48} Because Robert and Clark's claims were barred by the principals of res judicata, we find no abuse of discretion in the trial court's denial of the motion.

{¶49} The second assignment of error is overruled.

III.

{¶50} In their third assignment of error, Clark and Robert argue the trial court erred as a matter of law in not striking the affidavits and evidentiary material filed by defendants-appellees First Citizens Bank and Henry L. Hopkins.

{¶51} Because we find the doctrine of res judicata bars all claims, we find this issue is moot. The third assignment of error is overruled.

{¶52} For the foregoing reasons, the judgment of the Court of Common Pleas of Richland County, Ohio, is affirmed.

By Gwin, P.J., and
Farmer, J., concur;
Hoffman, J., concurs
in judgment only

_____
HON. W. SCOTT GWIN

_____
HON. WILLIAM B. HOFFMAN

_____
WSG:clw 0615 HON. SHEILA G. FARMER

[Cite as *Swank v. Swank*, 2010-Ohio-3105.]

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

ROBERT SWANK AND E. CLARK SWANK	:	
Plaintiffs-Appellants	:	
-vs-	:	JUDGMENT ENTRY
FREEMAN J. SWANK, JR., ET AL	:	
Defendants-Appellees	:	CASE NO. 10-CA-2

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Richland County, Ohio, is affirmed. Costs to appellants.

_____
HON. W. SCOTT GWIN

_____
HON. WILLIAM B. HOFFMAN

_____
HON. SHEILA G. FARMER