

[Cite as *Eppley v. Eppley*, 2010-Ohio-943.]

COURT OF APPEALS
HOLMES COUNTY, OHIO
FIFTH APPELLATE DISTRICT

BRYAN EPPLEY, ET AL	:	JUDGES:
	:	Hon. W.Scott Gwin, P.J.
Plaintiffs-Appellants	:	Hon. William B. Hoffman, J.
	:	Hon. John W. Wise, J.
-vs-	:	
	:	Case No. 2009-CA-009
BRAD EPPLEY	:	
	:	
Defendant-Appellee	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Civil appeal from the Holmes County Court of Common Pleas, Case No. 09CV018

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: March 9, 2010

APPEARANCES:

For Plaintiffs-Appellants

For Defendant-Appellee

THOMAS W. HARDIN
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Gwin, P.J.

{¶1} Appellants, Brian Eppley and Matrix Masters, Inc. appeal the July 19, 2009 Judgment Entry of the Holmes County Court of Common Pleas dismissing their lawsuit against appellee Brad Eppley.

STATEMENT OF THE CASE AND FACTS

{¶2} Appellee, Brad Eppley and appellant, Brian Eppley are brothers and the sole shareholders of appellant Matrix Masters, Inc. On January 31, 2008, appellee filed a lawsuit against appellant Brian Eppley seeking to dissolve appellant Matrix Masters, Inc. The trial court appointed a receiver to handle appellant Matrix Masters' affairs on January 31, 2008.

{¶3} On February 26, 2009, the complaint in this matter was filed. The complaint contained multiple claims, including a derivative claim asserted on behalf of Matrix Masters, Inc. by appellant against his brother, appellee, alleging conversion of corporate funds.

{¶4} On May 15, 2009, appellee moved to dismiss the 2009 lawsuit on the basis that it contained claims which were compulsory counterclaims that should have been brought in the 2008 lawsuit to dissolve the corporation. In the alternative, appellee sought to consolidate the two cases for trial. Discovery proceeded in both cases. Appellant filed a Motion on June 10, 2009, agreeing that judicial economy would best be served by consolidation. On July 1, 2009, appellant filed a memorandum arguing that res judicata did not apply to the 2009 action because the 2008 action was still pending and awaiting trial.

{¶15} On July 15, 2009, the trial court granted appellee's motion and entered judgment dismissing the 2009 action.

{¶16} Appellant timely appeals, raising two assignments of error:

{¶17} "I. WHETHER THE TRIAL COURT ERRED IN DISMISSING A SUIT FILED IN 2009, BECAUSE THE SUIT CONTAINED AT LEAST ONE COMPULSORY COUNTERCLAIM THAT SHOULD HAVE BEEN FILED IN A 2008 SUIT INVOLVING THE SAME PARTIES, WHEN THE 2008 SUIT WAS STILL PENDING AND WHERE NO FINAL APPEALABLE ORDER HAD BEEN ISSUED.

{¶18} "II. WHETHER THE TRIAL COURT ERRED BY FAILING TO CONSOLIDATE THIS ACTION WITH THE 2008 ACTION WHEN DISCOVERY HAD BEEN CONDUCTED ON A CONSOLIDATED BASIS."

I. & II.

{¶19} In his first assignment of error, appellant argues that the trial court improperly dismissed this case based on *res judicata*. In his second assignment of error appellant contends that the trial court erred by not ordering the 2008 and 2009 cases to be consolidated. Appellant's first and second assignments of error raise common and interrelated issues; therefore, we will address the arguments together.

{¶10} Civ.R. 13 provides:

{¶11} "**(A) Compulsory counterclaims.** A pleading shall state as a **counterclaim** any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. * * *"

{¶12} The purpose of this rule is to settle all related claims in one action and thereby avoid a wasteful multiplicity of litigation on claims that arise from a single transaction or occurrence. *Rettig Enterprises v. Koehler* (1994), 68 Ohio St.3d 274, 278, 626 N.E.2d 99, 102, citing Staff Notes (1970) to Civ.R. 13 and 6 Wright, Miller & Kane, Federal Practice and Procedure (Civil 2d 1990), 65, Section 1410; *State ex rel. Massaro Corp. v. Franklin Cty. Court of Common Pleas* (1989), 65 Ohio App. 3d 428, 430, 584 N.E.2d 756. The rule also provides for an orderly delineation of *res judicata*, *Cleveland v. A.J. Rose Mfg. Co.* (1993), 89 Ohio App.3d 267, 275, 624 N.E.2d 245, as failure to assert a compulsory counterclaim will result in its being barred in any subsequent action. See *Rettig*, 68 Ohio St.3d at 279; *Stern v. Whitlatch & Co.* (1993), 91 Ohio App.3d 32, 36, jurisdictional motion overruled (1994), 68 Ohio St.3d 1447; *Quintus v. McClure* (1987), 41 Ohio App.3d 402, 404, 536 N.E.2d 22.

{¶13} The Ohio Supreme Court has interpreted the rule to require “[a]ll existing claims between opposing parties that arise out of the same transaction or occurrence must be litigated in a single lawsuit pursuant to Civ.R. 13(A), no matter which party initiates the action.” *Rettig* supra, paragraph one of the syllabus. Accordingly, the Ohio Supreme Court has adopted the “logical relation” test, which provides that “a compulsory counterclaim is one which is logically related to the opposing party’s claim where separate trials on each of their respective claims would involve a substantial duplication of effort and time by the parties and the courts.” *Id.* at paragraph two of the syllabus. Therefore, “multiple claims are compulsory counterclaims where they ‘involve many of the same factual issues, or the same factual and legal issues, or where they are offshoots of the same basic controversy between the parties.’” *Rettig*, supra at 279,

626 N.E.2d 99, quoting *Great Lakes Rubber Corp. v. Herbert Cooper Co.* (C.A.3, 1961), 286 F.2d 631, 634.

{¶14} The United States Supreme Court in examining the federal counterpart to Civ.R 13(A) explained:

{¶15} “The requirement that counterclaims arising out of the same transaction or occurrence as the opposing party's claim ‘shall’ be stated in the pleadings was designed to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters. The Rule was particularly directed against one who failed to assert a counterclaim in one action and then instituted a second action in which that counterclaim became the basis of the complaint.” *Constr. Co., Inc. v. Pickard* (1962), 371 U.S. 57, 60, 83 S.Ct. 108.

{¶16} This case presents precisely that situation. Appellant did not assert a compulsory counterclaim in the litigation commenced in 2008 and subsequently instituted this new action over one year later based on that counterclaim.

{¶17} Generally, compulsory counterclaims that are not brought in the first suit are barred by *res judicata* from being litigated in a subsequent action. *Horne v. Woolever* (1959), 170 Ohio St. 178, 163 N.E.2d 378; *Broadway Management, Inc. v. Godale* (9th Dist. 1977), 55 Ohio App. 2d 49, 378 N.E.2d 1072. However, this case comes to us in the posture of a motion to dismiss. In the case at bar, according to the briefs filed by the parties, the 2008 litigation is still pending. Accordingly, appellant can conceivably file a motion to amend his answer in the 2008 suit to assert his counterclaim pursuant to Civ. R. 13(F).

{¶18} A consolidation of cases lies within the sound discretion of the trial court. *Director of Highways v. Kleines* (1974), 38 Ohio St.2d 317, 313 N.E.2d 370. The Supreme Court has defined abuse of discretion as implying that the court's attitude is unreasonable, arbitrary or unconscionable, see, e.g., *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶19} Consolidation of cases is controlled by Civ.R. 42(A). Civ.R. 42(A) states as follows: "When actions involving a common question of law or fact are pending before a court, that court after a hearing may order a joint hearing or trial of any or all the matters in issue in the actions; it may order some or all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

{¶20} Thus, the issue is whether the trial court abused its discretion when it granted appellee's motion to dismiss rather than ordering the case be consolidated.

{¶21} In this case, implicit within the trial court's granting of the motion to dismiss is the trial court's belief that the appellant's claim in this case was a compulsory counterclaim in the previous litigation. As the previous case is still pending, appellant cannot circumvent the requirements of Civ.R. 13(F) by instead seeking to consolidate the cases. Civ. R. 13(F), provides in relevant part,

{¶22} Civ.R. 13(F):

{¶23} "(F) Omitted counterclaim

{¶24} "When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment."

{¶25} The rule requires that the party seeking to set forth an omitted counterclaim seeks leave of court and makes a showing of oversight, inadvertence, excusable neglect, or that justice requires the amendment¹. If an omitted compulsory counterclaim were allowed to be asserted in a separate action and then “consolidated” with the original action, Civ. R. 13(F) would become a nullity.

{¶26} Under the circumstances herein, we find that the trial court did not abuse its discretion in dismissing, rather than consolidating, this case.

{¶27} Appellant’s first and second assignments of error are overruled.

{¶28} The judgment of the Court of Common Pleas, Holmes County, Ohio is affirmed.

By Gwin, P.J.,
Hoffman, J., and
Wise, J., concur

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

HON. JOHN W. WISE

¹ We express no opinion on the merits of any motion subsequently filed pursuant to Civ. R. 13(F).

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FIFTH APPELLATE DISTRICT

BRYAN EPPLEY, ET AL	:	
	:	
Plaintiff-Appellant	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
BRAD EPPLEY	:	
	:	
	:	
Defendant-Appellee	:	CASE NO. 2009-CA-009

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

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

HON. JOHN W. WISE