

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

McCabe Corporation et al.,	:	
	:	
Plaintiffs-Appellants,	:	
v.	:	No. 12AP-204
	:	(Ct.Cl. No. 2009-01476)
Ohio Environmental Protection Agency	:	
et al.,	:	(REGULAR CALENDAR)
	:	
Defendants-Appellees.	:	
	:	

D E C I S I O N

Rendered on December 31, 2012

The Law Office of Norman A. Abood, and Norman A. Abood,
for appellants.

Michael DeWine, Attorney General, and Randall W. Knutti,
for appellees.

APPEAL from the Court of Claims of Ohio.

DORRIAN, J.

{¶1} Plaintiffs-appellants, McCabe Corporation and Edward M. McCabe (collectively "McCabe"), appeal from a judgment of the Court of Claims of Ohio granting summary judgment in favor of defendants-appellees, Ohio Environmental Protection Agency and the State of Ohio (collectively "OEPA"). The court concluded that McCabe's claims, including claims of fraud, fraudulent inducement, defamation, negligence, and interference with contract, were barred, some by the doctrine of res judicata and some by the statute of limitations. For the following reasons, we affirm.

I. Facts and Case History

A. Proceedings in Montgomery County (Case No. 1998 CV 3449)

{¶2} Disposition of this appeal does not require us to recite in detail the rather complicated factual and procedural background of this case. In summary, the case involves property in Montgomery County that has, in the past, been used as a hazardous waste recycling facility ("the site"). In 1995, the OEPA investigated and initiated administrative action to enforce Ohio's environmental protection laws at the site, which was at that time owned by Republic Environmental Systems, Inc.¹ As a result of the investigation, OEPA and Republic began negotiating a closure plan setting forth specific required action to clean the site of hazardous conditions. On June 28, 1996, Republic submitted a closure plan to the OEPA, and that plan was revised on February 4, 1997.

{¶3} On December 17, 1997, McCabe entered into a contract with Republic to purchase the land and buildings at the site. As consideration for the purchase, McCabe paid \$10.00 and agreed to assume all of Republic's responsibilities and liabilities to complete closure and other remedial requirements at the premises as imposed by the closure plan and any consent agreements Republic had with governmental authorities. At the time the parties executed the contract, Edward McCabe acknowledged that he had reviewed the closure plan and consent agreements then in existence. Neither the closure plans nor any other OEPA documents available to McCabe referenced the possibility of subsoil contamination of the property. McCabe also acknowledged that he had fully inspected the property, had satisfied himself as to all matters related to hazardous and toxic materials and substances, and was purchasing the real property on an "as is" basis. On June 29, 1998, Republic transferred the real property to McCabe by deed.

{¶4} In September 1998, OEPA approved the closure plan for the site. It also filed a complaint in the Montgomery County Court of Common Pleas alleging violations of Ohio's hazardous waste laws. That case was resolved on October 22, 1998 by the entry of a consent order. The consent order required implementation of the steps set forth in the closure plan to alleviate soil and ground water contamination at the site. McCabe was not

¹ Republic Environmental Systems, Inc., its subsidiary, Republic Environmental Systems (Ohio), Inc., and a successor company, Brac, Inc., were all parties in the Montgomery County proceedings. They are collectively referred to in this opinion as "Republic."

a party to the closure plan, nor was it a party to the consent order. The consent order further provided that its provisions would be binding upon Republic's assigns and successors in interest. McCabe began implementing closure activities, as contemplated by the purchase contract, on October 14, 1998.

{¶5} In June 2007, OEPA filed a contempt action alleging violations of the October 1998 consent decree. OEPA named both McCabe and Republic as defendants. McCabe filed an answer and a cross-claim against OEPA and asserted that it was not a proper party to the suit. McCabe asserted as an affirmative defense that OEPA's contempt action against it was barred because OEPA "participated in the Fraudulent Inducing of the McCabe Defendants to enter into a contract with the non-McCabe Defendants [i.e., Republic] to the detriment of the McCabe Defendants." *State ex rel. Rogers v. Republic Environmental Sys., Inc.*, 2d Dist. No. 23513, 2010-Ohio-5523, ¶ 59. Similarly, it argued that OEPA's claims were barred because OEPA "participated in the wrongful, and/or negligent, and/or fraudulent misrepresentation of the costs required to perform the work required to complete the provisions of the Closure Plan." *Id.* at ¶ 61. Subsequently, McCabe filed a third-party complaint against Republic.

{¶6} Prior to trial, OEPA and Republic filed motions in limine challenging the inclusion on McCabe's witness list of the names of several OEPA employees. OEPA sought to bar the testimony of their employees, arguing that it would not be relevant to the matter before the court in Montgomery County, i.e., whether compliance with the consent decree had been achieved. In addition, OEPA acknowledged that McCabe had made informal allegations against the state but argued that only the Court of Claims would have jurisdiction to hear claims based on those allegations, should McCabe formally assert them. In response, McCabe argued that it had justifiably relied on what it characterized as misrepresentation and concealment of facts by the potential witnesses prior to the time that McCabe had contracted to buy the site and that the purchase contract was thus void ab initio.

{¶7} On April 25, 2008, the Montgomery County Court of Common Pleas issued a decision denying OEPA's and Republic's motions in limine. The court noted that McCabe had not formally asserted claims against OEPA, but, if it had, those claims would rest within the exclusive jurisdiction of the Court of Claims. *See* R.C. 2743.03(A)(1)

("[T]he court of claims * * * has exclusive, original jurisdiction of all civil actions against the state permitted by the waiver of immunity contained in section 2743.02 of the Revised Code.") The court stated, however, that testimony of the OEPA employees arguably was relevant to affirmative defenses McCabe had included in its responsive pleadings. Accordingly, the court refused to enter a pretrial order precluding McCabe from calling the OEPA employees as witnesses. The court concluded that "[p]rovided that the McCabe Defendants use evidence related to alleged misrepresentations as a shield rather than a sword, it shall be admissible absent some independent grounds for exclusion." (Montgomery County Common Pleas Court Apr. 25, 2008 Decision, at 13-14.)

{¶8} On February 13, 2009, the common pleas court in Montgomery County rejected the defenses asserted by Republic and McCabe and found both defendants to be in civil contempt based on noncompliance with the 1998 consent decree. The court noted a lack of any "evidence that McCabe conducted any independent environmental assessment of the property at or prior to the time of purchase, as one would think a reasonable prudent purchaser would do for an 'as is' purchase of an urban brownfield property." (Montgomery County Common Pleas Court Feb. 13, 2009 Decision, at 4.) Regarding the issue of McCabe's allegations of fraudulent conduct on the part of OEPA, the court stated in its findings of fact:

[T]he Court finds no credible evidence that OEPA intentionally made material misrepresentations to the McCabe Defendants, upon which they reasonably relied, in purchasing the Facility. In fact, the McCabe Defendants did not have communications with OEPA about the Facility until after the McCabes had purchased it. OEPA did not know of the McCabe Defendants['] involvement with the Facility until after the Consent Order and Closure Plan had been finalized and filed. The Court finds no fraud or misrepresentation by OEPA to the McCabe Defendants that would serve as a bar to OEPA enforcing the Consent Order against them by way of contempt.

(Emphasis sic.) (Feb. 13, 2009 Decision, at 9-10.)

{¶9} McCabe appealed to the Second District Court of Appeals. McCabe argued, inter alia, that the trial court had erred in not recognizing its affirmative defenses alleging fraud. The Second District responded to McCabe's argument that OEPA had, in

conjunction with Republic, failed to disclose hazardous conditions of which it was aware, as follows:

The record, however, does not support McCabe's bare assertion in this regard. The record establishes that there were no communications between McCabe and the Ohio EPA regarding the facility until after McCabe purchased the facility from Republic. Further, the evidence presented at the hearing before the trial court establish[ed] that the Ohio EPA did not even know of McCabe's involvement with the facility until well after the Consent Order had been finalized and filed. Thus, *no evidence exists which supports McCabe's affirmative defense that the State participated in any way with Republic to fraudulently induce McCabe to purchase the facility.*

(Emphasis added.) *Rogers* at ¶ 63.

B. Proceedings in the Court of Claims of Ohio

{¶10} On January 20, 2009, while the contempt action in the common pleas court was pending, McCabe filed a complaint in the Court of Claims naming OEPA as defendant, thereby initiating the action that underlies this appeal. McCabe argued that OEPA was liable to it based on multiple theories of recovery and again claiming that OEPA had failed to disclose all it knew concerning possible subsoil contamination at the site. McCabe claimed that OEPA knew as early as 1995 of the presence of additional contamination but failed to disclose that knowledge to it, a potential purchaser, or to the public in general. McCabe further asserted that it had expended nearly \$1 million to clean up the site. It sought an award of both compensatory and punitive monetary damages, costs, and attorney fees.

{¶11} OEPA filed a motion, pursuant to Civ.R. 12(B)(6), to dismiss McCabe's complaint for failure to state a claim. The Court of Claims granted OEPA's motion, in part, reasoning that the statute of limitations² had expired, barring the defamation and interference-with-contract claims McCabe had alleged, as well as any other of McCabe's claims that accrued before January 20, 2007. Because only claims that accrued on or after January 20, 2007 (two years prior to the date of the filing of the Court of Claims

² R.C. 2743.16(A) provides that civil actions against the state in the court of claims shall be commenced no later than two years after the date of the accrual of the cause of action or within any shorter period that is applicable to similar suits between private parties.

complaint) could go forward, McCabe's claims that accrued before January 20, 2007, were, in the view of the Court of Claims, time-barred.³

{¶12} The court noted McCabe's assertion that it had not been aware of the extent of OEPA's knowledge of undisclosed contamination until OEPA filed its contempt proceedings in 2007 but held that that circumstance did not preclude application of the statute of limitations. It acknowledged that Ohio courts apply a discovery rule as to certain torts, such as medical malpractice. "The "discovery rule" generally provides that a cause of action accrues for purposes of the governing statute of limitations at the time when the plaintiff discovers or, in the exercise of reasonable care, should have discovered the complained of injury." *Cristino v. Bur. of Workers' Comp.*, 10th Dist. No. 12AP-60, 2012-Ohio-4420, ¶ 40, quoting, *Investors REIT One v. Jacobs*, 46 Ohio St.3d 176, 179 (1989). But the Court of Claims further recognized that courts have "declined to extend the [discovery] rule unless it is specifically incorporated into a statute." (Court of Claims July 6, 2009 Entry, at 3.) It noted that R.C. 2305.09 provides that, in an action for fraud, the cause does not accrue until the fraud is discovered, thus specifically making the discovery rule applicable to fraud claims. The court observed that McCabe had alleged fraud by OEPA but had not specified in the complaint the date on which McCabe had discovered the alleged fraud. The Court of Claims concluded that if, as McCabe claimed, it had first discovered OEPA's allegedly fraudulent conduct at the time OEPA initiated the contempt proceedings, i.e., on July 20, 2007, then McCabe's fraud claims based on that conduct had accrued after January 20, 2007, and McCabe arguably had timely filed a claim for fraud.

{¶13} On November 28, 2011, OEPA filed in the Court of Claims a motion for summary judgment as to McCabe's remaining claims, i.e., claims that sounded in fraud or fraudulent inducement that McCabe had discovered on or after January 20, 2007. OEPA argued that the doctrine of issue preclusion barred those claims because the Montgomery County common pleas and appellate courts had determined that the record of the contempt action contained no evidence that OEPA had engaged in fraudulent conduct

³ See Court of Claims Feb. 3, 2012 Decision, at 2, describing its earlier entry as constituting a dismissal of "plaintiffs' claims of defamation and any other claims that accrued on or before January 20, 2007."

and had rejected McCabe's affirmative defenses based on alleged fraudulent conduct by OEPA. Reasoning that the doctrine of *res judicata* precluded relitigation of the issues of fraud and misrepresentation alleged in McCabe's complaint, the Court of Claims granted OEPA's motion for summary judgment and entered judgment in favor of OEPA.

{¶14} McCabe timely appealed, presenting the following as assignments of error:

[1.] The Trial Court erred in finding that the Montgomery County Court of Common Pleas is a "court of competent jurisdiction" capable of adjudicating Plaintiffs/Appellants' claims for monetary damages against the State of Ohio.

[2.] The Trial Court erred in finding that the Montgomery County Court of Common Pleas case arose out of the same "transaction" as is involved in this case.

{¶15} The case is now before us for resolution.

II. Legal Analysis

{¶16} Summary judgment is appropriate where "the moving party demonstrates that (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) 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." *Capella III, L.L.C. v. Wilcox*, 190 Ohio App.3d 133, 2010-Ohio-4746 (10th Dist.), ¶16, citing *Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, ¶ 6. Moreover, "appellate review of summary-judgment motions is *de novo*." *Id.*, citing *Andersen v. Highland House Co.*, 93 Ohio St.3d 547, 548 (2001). "De novo appellate review means that the court of appeals independently reviews the record and affords no deference to the trial court's decision." *Holt v. State*, 10th Dist. No. 10AP-214, 2010-Ohio-6529, ¶ 9 (internal citations omitted).

{¶17} In the case before us, the Court of Claims ruled that the courts of Montgomery County had resolved the factual question as to whether OEPA had engaged in fraudulent conduct against McCabe and in favor of OEPA. It held, therefore, that the doctrine of *res judicata* precluded McCabe from attempting to relitigate that issue in the Court of Claims action.

{¶18} "The doctrine of *res judicata* involves both claim preclusion (historically called estoppel by judgment in Ohio) and issue preclusion (traditionally known as

collateral estoppel)." *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 381 (1995). The doctrine of issue preclusion, which is implicated in the case before us, "holds that a fact or a 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." *Ft. Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.*, 81 Ohio St.3d 392, 395 (1998). Moreover, "an absolute due process prerequisite to the application of collateral estoppel is that the party asserting the preclusion must prove that the identical issue was actually litigated, directly determined, and essential to the judgment in the prior action." *State ex rel. Davis v. Pub. Emps. Retirement Bd.*, 120 Ohio St.3d 386, 2008-Ohio-6254, ¶ 28, quoting *Goodson v. McDonough Power Equip., Inc.*, 2 Ohio St.3d 193, 195 (1983). The issue preclusion doctrine "precludes the relitigation, in a second action, of an issue that has been actually and necessarily litigated and determined in a prior action that was based on a different cause of action." *Davis* at ¶ 27, quoting *Ft. Frye Teachers Assn.* at 395. Even where the cause of action in the subsequent suit is different, the judgment in the prior suit may nevertheless affect the outcome of the second suit. *Id.*

{¶19} Thus, the elements of issue preclusion under Ohio law are that: (1) the identical issue or fact was actually and directly at issue in a previous action; (2) the issue or fact was passed upon and determined by a court of competent jurisdiction; (3) the issue or fact was actually litigated, directly determined, and essential to the final judgment in the prior action; and (4) both actions involved the same parties, or their privies. The doctrine thus "prevents parties from relitigating in a subsequent case facts and issues which were fully litigated in a previous case." *Saxe v. Dlusky*, 10th Dist. No. 09AP-673, 2010-Ohio-5323, ¶ 20, citing *State ex rel. Shemo v. Mayfield Hts.*, 95 Ohio St.3d 59, 2002-Ohio-1627. *Accord*, 1 Restatement of the Law 2d, Judgments, Section 27 (1982) ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.").

{¶20} The first element of issue preclusion, i.e., that the identical issue or fact was actually and directly at issue in a previous action, is present in the case before us. In the

common pleas court contempt action, McCabe pleaded the agency's fraudulent conduct as an affirmative defense, thereby raising the issue of whether OEPA had acted fraudulently relative to disclosing conditions and clean-up costs of the site. In the Court of Claims, McCabe raised the same issue in claiming that OEPA was liable to it in damages based on the agency's fraudulent conduct relative to its disclosure of the conditions and clean-up costs of the site. Thus, the same factual dispute was at issue in both cases.

{¶21} The second element of collateral estoppel is that the issue or fact was previously passed upon and finally determined by a court of competent jurisdiction. That element is also met in this case. It is true that the Montgomery County Court of Common Pleas lacked jurisdiction to enter a judgment of liability against OEPA, as claims of that nature against the state may only be brought in the Court of Claims. But the Montgomery County court had jurisdiction to entertain OEPA's action to enforce the 1999 consent decree and, accordingly, had jurisdiction to determine the affirmative defenses raised by McCabe in that action. As recognized by the common pleas court, McCabe raised the issue of fraud as a shield rather than a sword, and the court therefore had jurisdiction to determine whether OEPA had, in fact, acted fraudulently. It determined that OEPA had not acted fraudulently, entered judgment accordingly, and that judgment was affirmed by the court of appeals.

{¶22} The third element of issue preclusion is that the court's prior finding as to the issue in question was essential to the court's earlier judgment. As summarized in the Restatement: "If issues are determined but the judgment is not dependent upon the determinations, relitigation of those issues * * * is not precluded * * * [and] have the characteristics of dicta." Restatement of the Law 2d, Judgments, Section 27 (h) (1982).

{¶23} In this case, we find that the common pleas court's factual finding that OEPA had not engaged in fraudulent conduct was essential to the judgment in the prior contempt action. We acknowledge that establishment of this element of issue preclusion is a closer question but conclude that it is also satisfied in this case. In the first action, McCabe itself voluntarily put at issue the question of whether OEPA had engaged in fraudulent conduct by pleading it as an affirmative defense. The Court of Common Pleas of Montgomery County was thus required to determine whether that alleged affirmative defense barred a finding of contempt against McCabe. The common pleas court allowed

McCabe to call OEPA employees as witnesses over the objection of OEPA, after which the court found that McCabe had failed to present credible evidence that OEPA intentionally made material misrepresentations to McCabe, upon which McCabe reasonably relied in purchasing the site. It accordingly rejected McCabe's affirmative defense and resolved the issue of OEPA's alleged fraudulent conduct in a manner inconsistent with the elements of a cause of action in fraud as asserted by McCabe in the Court of Claims.

{¶24} In pleading and attempting to prove fraudulent conduct as an affirmative defense in the contempt action, McCabe had itself, in effect, made essential the issue of whether OEPA had acted fraudulently. We refuse to countenance the premise that a party may raise and litigate an affirmative defense and, thereafter, upon the court's finding of a lack of evidence supporting that defense, argue that the asserted affirmative defense was nevertheless insufficient as a matter of law and therefore not essential to the judgment.

{¶25} Our conclusion is reinforced by a 2001 decision of the United States Court of Appeals, Eighth Circuit, in which the court applied the doctrine of issue preclusion in a case asserting claims for common law fraud and violation of the Racketeer Influenced and Corrupt Organizations Act. *Minneapolis Community Dev. Agency v. Buchanan*, 268 F.3d 562 (8th Cir.2001). The defendants in a second action asserted that the plaintiffs had asserted fraud as an affirmative defense in prior condemnation proceedings and that the issue of fraud had been litigated and determined by a jury in the defendants' favor. The defendants claimed that the question of whether they had engaged in fraud had been answered in their favor in the condemnation action and that the doctrine of issue preclusion precluded further litigation of that question in the second action. A majority of the court disagreed with the dissenting judge, who believed that determination of the question of fraud had not been essential to the judgment in the first case because the condemnation court lacked jurisdiction over complaints of fraud. *See also Abdulhay v. Bethlehem Med. Arts, L.P.*, 425 F. Supp.2d 646, 656 (E.Dist.Pa.2006) (collateral estoppel barred the plaintiffs in second action, who had been the defendants in a prior action, from relitigating issues raised by the plaintiffs in their answer in the prior action, as those issues had been considered and determined by the court in the prior action).

{¶26} The fourth element of issue preclusion is that both actions involved the same parties or their privies. There is no question that both McCabe and OEPA were parties both in the Montgomery County litigation and the Court of Claims litigation.

{¶27} Because all four elements of issue preclusion exist in this case, that doctrine bars McCabe from attempting to prove in the Court of Claims that OEPA's employees engaged in fraudulent conduct that damaged McCabe. Having chosen to raise as an affirmative defense the issue of whether OEPA had engaged in fraudulent conduct, McCabe is bound by the previous courts' determination of the truth or falsity of that factual allegation. The Montgomery courts clearly rejected McCabe's allegation that OEPA had acted fraudulently. Because McCabe could not, under the doctrine of issue preclusion, relitigate that finding, entry of summary judgment in OEPA's favor on McCabe's claims that included fraudulent conduct as an element was appropriate. Accordingly, the trial court did not err in granting summary judgment in OEPA's favor on McCabe's fraud claims.

{¶28} McCabe has additionally argued in this court that it pled theories of recovery other than those grounded on fraudulent conduct by OEPA. It asserts that its complaint should be read as presenting claims of negligent misrepresentation (as opposed to intentional misrepresentation). It additionally claims that its complaint alleged breach of statutory and common-law duties, including a duty to disclose contamination of which it was aware in the closure plan documents, and to assure adequate financial resources existed to restore the site to a non-hazardous state. McCabe alleged the existence of those duties and claimed that OEPA failed to satisfy them. It contends that the Court of Claims therefore inappropriately resolved those claims against McCabe.

{¶29} Those claims, however, sound in negligence⁴ and would have accrued during the late 1990's. The Court of Claims dismissed all of McCabe's claims that arose prior to January 20, 2007 based on expiration of the statute of limitations. In view of the fact that McCabe has failed to argue in this court that the Court of Claims erred in its legal application of the statute of limitations, we will not disturb that court's dismissal of

⁴ Indeed, in its brief, McCabe characterizes the remaining claim as "negligence claims" and refers the court to Restatement of the Law, 2d, Torts, Section 552 (1977) ("*Information Negligently Supplied for the Guidance of Others.*") (Emphasis added.) (McCabe Reply Brief at 3.)

McCabe's negligence claims. Specifically, McCabe has failed to include an assignment of error arguing that the Court of Claims erred in refusing to apply a discovery rule that would extend for a period of approximately ten years the time within which McCabe was required to file its non-fraud tort claims.

III. Conclusion

{¶30} Accordingly, we overrule both of McCabe's assignments of error and affirm the judgment of the Court of Claims of Ohio.

Judgment affirmed.

TYACK and KLATT, JJ., concur.
