[Cite as *Charvat v. GVN Michigan, Inc.*, 2010-Ohio-3209.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Philip J. Charvat,	:	
Petitioner-Appellant,	:	
		No. 09AP-1075
v.	:	(C.P.C. No. 09CVH-07-11096)
GVN Michigan, Inc.,	:	(ACCELERATED CALENDAR)
Respondent-Appellee.	:	

D E C I S I O N

Rendered on July 8, 2010

Ferron & Associates, LPA, John W. Ferron, Lisa A. Wafer, and *Jessica G. Fallon,* for appellant.

Porter Wright Morris & Arthur, LLP, James B. Hadden, and *Anthony R. McClure*; *Weinstock & Scavo, P.C.,* and *Anthony Polvino,* for appellee.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Petitioner-appellant, Philip J. Charvat, appeals from a judgment of the Franklin County Court of Common Pleas granting the motion to dismiss of respondent-appellee, GVN Michigan, Inc. Petitioner assigns a single error:

> THE TRIAL COURT ERRED BY DISMISSING APPELLANT'S PETITION IN DISCOVERY BASED UPON ITS FINDING THAT APPELLANT'S UNDERLYING CLAIMS ARE BARRED BY *RES JUDICATA*.

Because the allegations of petitioner's complaint fail to establish the element of privity necessary to establish res judicata, the trial court erred in granting respondent's motion to dismiss, and we reverse.

I. Facts and Procedural History

{¶2} On January 22, 2009, petitioner filed a complaint in the United States District Court for the Southern District of Ohio ("federal case") against respondent, a vacation travel club with facilities in Dublin, Ohio. Petitioner asserted respondent violated the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. 227, et seq., the related regulations under 47 C.F.R. 64.1200, the Ohio Telephone Solicitation Sales Act ("TSSA"), R.C. 4719.01, et seq., the Ohio Consumer Sales Practices Act ("CSPA"), R.C. 1345.01, et seq., and various provisions of the Ohio Administrative Code pertaining to consumer advertisements. The complaint alleged the violations occurred between May 28, 2005 and September 14, 2006, when petitioner received at his residence ten unsolicited telemarketing calls from respondent.

{¶3} In a November 8, 2006 letter, respondent advised petitioner that respondent did not place seven of the ten phone calls of which petitioner complained. Instead, the letter identified three entities, by their initials only, that respondent claims were responsible for placing the calls. Respondent referred to the entities as HLK, CMN, and IMS (collectively, "the three entities"). Petitioner named the three entities as defendants in the federal case by their initials only. Because petitioner obtained no further identifying information about them, petitioner never obtained service upon any of the three entities.

{¶4} Respondent eventually made an offer of judgment to petitioner pursuant to Fed.Civ.R. 68; petitioner accepted it. On June 23, 2009, the federal court entered a

judgment in favor of petitioner and against respondent in the amount of $27,000. (Petition, ¶14.)

{¶5} After unsuccessfully attempting to obtain further identifying information from respondent about the three entities, petitioner on July 24, 2009 filed a petition in discovery pursuant to R.C. 2317.48 in the Franklin County Court of Common Pleas. Petitioner sought a court order authorizing petitioner to serve upon respondent interrogatories requesting the complete names, addresses and telephone numbers of the three entities so he could pursue TCPA, TSSA, and CSPA claims against them.

{¶6} On August 31, 2009, respondent, before filing an answer, moved to dismiss the petition for failure to state a claim upon which relief can be granted pursuant to Civ.R. 12(B)(6), arguing res judicata bars petitioner's underlying claims against the three entities. In his memorandum in opposition to respondent's motion, petitioner argued res judicata did not preclude his petition or bar his claims against the three entities because they were not in privity with respondent for purposes of the judgment entered against respondent in the federal case. Petitioner further argued equity prohibits respondent from invoking the doctrine of res judicata.

{¶7} On October 21, 2009, the trial court filed a decision and entry granting respondent's motion to dismiss. The trial court agreed with respondent that res judicata bars petitioner's claims against the three entities, as they were in privity with respondent. On November 18, 2009, petitioner filed a timely notice of appeal.

II. Assignment of Error

{¶8} In his sole assignment of error, petitioner contends the trial court erroneously determined res judicata bars his underlying claims against the three entities.

{¶9} "When reviewing a judgment granting a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim, an appellate court must independently review the complaint to determine if dismissal is appropriate." *Wooden v. Kentner*, 153 Ohio App.3d 24, 2003-Ohio-2695, ¶6, quoting *Gleason v. Ohio Army Natl. Guard* (2001), 142 Ohio App.3d 697, 700 (internal quotation marks omitted). "The appellate court need not defer to the trial court's decision in Civ.R. 12(B)(6) cases." Id., quoting *Gleason*.

{¶10} "In order to sustain dismissal of a complaint under Civ.R. 12(B)(6) for failure to state a claim upon which relief may be granted, it must appear beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief." *LeRoy v. Allen, Yurasek & Merklin*, 114 Ohio St.3d 323, 2007-Ohio-3608, ¶14, citing *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006-Ohio-2625, ¶11. "The allegations of the complaint must be construed as true." Id., citing *Maitland v. Ford Motor Co.*, 103 Ohio St.3d 463, 2004-Ohio-5717, ¶11. "Furthermore, the complaint's material allegations and any reasonable inferences drawn therefrom must be construed in the nonmoving party's favor." Id., citing *Kenty v. Transamerica Premium Ins. Co.*, 72 Ohio St.3d 415, 418, 1995-Ohio-61.

{¶11} Respondent argues the trial court properly granted its motion to dismiss the petition in discovery because the petition failed to articulate a cognizable claim. See *Moritz v. S. Ohio Corr. Facility* (Dec. 22, 1998), 10th Dist. No. 98AP-574, citing *Bridgestone/Firestone, Inc. v. Hankook Tire Mfg. Co., Inc.* (1996), 116 Ohio App.3d 228, 232 (finding dismissal of petition in discovery proper where petitioner "failed to aver sufficient facts to reveal a 'potential cause of action' against either defendant"). According to respondent, res judicata bars any potential claim.

{¶12} "[A] final judgment or decree rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction is conclusive of rights, questions and facts in issue as to the parties and their privies, and is a complete bar to any subsequent action on the same claim or cause of action between the parties or those in privity with them." *State ex rel. Schneider v. Bd. of Edn. of N. Olmsted City School Dist.* (1988), 39 Ohio St.3d 281, 282, quoting *Johnson's Island, Inc. v. Bd. of Twp. Trustees* (1982), 69 Ohio St.2d 241, 243. Application of the doctrine of res judicata does not depend on whether the original claim explored all possible theories of relief. *Hamrick v. Daimler Chrysler Motors,* 9th Dist. No. 03CA008371, 2004-Ohio-3415, ¶13, citing *Brown v. Dayton,* 89 Ohio St.3d 245, 248, 2000-Ohio-148. Rather, "a valid, final judgment upon the merits of a case bars any subsequent action 'based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action.' " *Hamrick,* quoting *Grava v. Parkman Twp.,* 73 Ohio St.3d 379, 382, 1995-Ohio-331.

{¶13} "The doctrine of res judicata encompasses the two related concepts of claim preclusion, also known as res judiciata or estoppel by judgment, and issue preclusion, also known as collateral estoppel." *State ex rel. Schachter v. Ohio Pub. Emps. Retirement Bd.*, 121 Ohio St.3d 526, 2009-Ohio-1704, ¶27, quoting *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." Id., quoting *O'Nesti.* "The previous action is conclusive for all claims that were or could have been litigated in the first action." Id.

{¶14} Respondent's motion to dismiss raised res judicata, or claim preclusion. "For claim preclusion to apply, the parties to the subsequent suit must either be the same or in privity with the parties to the original suit." *O'Nesti* at ¶9*,* citing *Johnson's Island* at 244. Because the parties are not the same, the issue of privity is central to respondent's res judicata contentions.

{¶15} "Privity was formerly found to exist only when a person succeeded to the interest of a party or had the right to control the proceedings or make a defense in the original proceeding." Id., citing *Whitehead v. Gen. Tel. Co.* (1969), 20 Ohio St.2d 108, 114, overruled in part on other grounds, *Grava* at 379. In addition, privity could arise where one had "[a]n interest in the result of and active participation in the original lawsuit" or where individuals raise "identical legal claims and seek identical rather than individually tailored results." *O'Nesti* at ¶9, citing *Grava; Brown* at 248.

{¶16} While the Supreme Court of Ohio acknowledged that "privity is a somewhat amorphous concept in the context of claim preclusion, * * * [a] 'mutuality of interest, including an identity of desired result,' might also support a finding of privity." *O'Nesti,* quoting *Brown* at 248 (noting a mutuality of interest, including an identity of desired result, creates privity between plaintiffs in the case, where in the prior litigation all sought the same disallowance of the ordinance and all for the same reason, an alleged violation of 30-day publication rule). "Mutuality, however, exists only if 'the person taking advantage of the judgment would have been bound by it had the result been the opposite. Conversely, a stranger to the prior judgment, being not bound thereby, is not entitled to rely upon its effect under the claim of res judicata or collateral estoppel.' " Id., quoting *Johnson's Island* at 244. In the end, "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.' " *Schachter* at ¶20, affirmed, 121 Ohio St.3d 526, 2009-Ohio-1704, quoting *Thompson v. Wing* (1994), 70 Ohio St.3d 176, 184, quoting *Bruszewski v. United States* (C.A.3, 1950), 181 F.2d 419, 423 (Goodrich, J., concurring).

{¶17} Within that context, petitioner argues the three entities were not in privity with respondent in the federal case because respondent's offer of judgment bound only respondent, not the three entities. Stated another way, petitioner contends no mutuality of interest exists because the three entities are not obligated to satisfy the offer of judgment in the federal case.

{¶18} Respondent counters that petitioner's petition repeatedly and expressly refers to the three entities as "agents" of respondent. Respondent asserts "it is well settled that a principal-agent relationship satisfies the privity requirement of res judicata where the claims alleged are within the scope of the agency relationship." (Respondent's brief at 7, quoting *ABS Industries, Inc. v. Fifth Third Bank* (C.A.6, 2009), 333 Fed.Appx. 994, 999). Noting the petition further contends the three entities placed calls "on behalf of, and for the benefit of" respondent, respondent argues the three entities as a result also acted in the scope of the agency relationship, thus satisfying the privity requirement of res judicata. (Petition, ¶3-5.)

{¶19} Agency is "the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." *ABS Industries* at 1000, quoting Restatement (Third) of

Agency Section 1.01 (2006) (internal quotation marks omitted). "[W]hether a relationship is characterized as agency in an agreement between parties or in the context of industry or popular usage is not controlling." Id., quoting Restatement (Third) of Agency Section 1.01 (2006) (internal quotation marks omitted).

{¶20} Were it a blanket rule in Ohio that every principal-agent relationship satisfies the privity requirement of res judicata, respondent's argument would be more persuasive. Without question, *ABS Industries* cites several Ohio cases to support the connection between agency and privity. See *Cook v. Criminger*, 9th Dist. No. 22313, 2005-Ohio-1949 (holding res judicata precluded consideration of state claims against individual university employees involving the same conduct that formed the basis for prior federal claims resolved in favor of the state university, as the state action concerned the employees' actions as agents of the university and thus established privity); *Waddell v. Boldman*, 4th Dist. No. 01CA721, 2002-Ohio-4229 (holding defendant contractual employee was in privity with plaintiff's former husband, through an agency relationship, and thus a prior divorce action resolving issues about timbering land had res judicata effect against plaintiff in her subsequent action alleging defendant cut timber on the land without authorization); *Transcontinental Ins. Co. v. Edgewood Golf & Swim Club, Inc.* (July 20, 1992), 5th Dist. No. CA-8795 (holding res judicata precluded plaintiff insurance company's action to collect an unpaid premium, where prior action of plaintiff's agent to collect an unpaid balance against the same defendant was settled and dismissed with prejudice, both balances were owing prior to the commencement of the original action, and the agent had apparent authority to collect both balances).

{¶21} The cases *ABS Industries* cites, however, all involve either employer-employee relationships or insurance situations where the agency relationship is well defined. Moreover, each of the cases involved at least some examination of the actual nature of the agency relationship to determine whether it satisfied the elements of privity. The cases thus suggest the rule that a principal-agent relationship satisfies privity for purposes of res judicata is fact-based and case-specific. Accordingly, at least one Ohio case found that where the previous litigation did not explicitly determine a new defendant's "status as an employee, agent, or independent contractor," and such a determination "affect[s] his liability in the present case," summary judgment on grounds of res judicata is inappropriate. *McCrory v. Children's Hosp.* (1986), 28 Ohio App.3d 49, 52-53 (finding res judicata did not bar subsequent negligence suit against a physician, a potential employee, agent, or independent contractor of the state, after plaintiff succeeded in a suit in the Court of Claims against the state).

{¶22} Respondent nonetheless relies on *ABS Industries* to support the trial court's decision to dismiss petitioner's petition, because *ABS Industries* involved a Civ.R. 12(B)(6) motion to dismiss where the plaintiff's complaint alleged agency. Although the court in *ABS Industries* granted defendant's motion to dismiss, it did so based on both the "explicit allegations of agency in [the] complaint and the specific language of the Agreement, which also supports the existence of an agency relationship as defined by Ohio law[.]" *ABS Industries* at 1001-02.

{¶23} The plaintiff in *ABS Industries* attached a copy of the agency agreement to its complaint to establish the existence of an actual agency relationship between the defendant in that action and the defendant in the previous action. The plaintiff

subsequently argued its complaint did not intend to suggest the first defendant "would function as an agent in the legal sense." Id. at 1000. The court, however, excerpted various provisions of the agency agreement plaintiff attached to its complaint to illustrate an agency relationship between these parties that was sufficient to establish privity for the purposes of res judicata. Id. at 1001.

{¶24} Unlike the plaintiff in *ABS Industries*, petitioner here did not attach a copy of any agency agreement to his petition, and nothing in the petition indicates such an agreement exists between respondent and the three entities. The mere fact that respondent's liability may have rested, in part, on the actions of the three entities "confuses the privity analysis with that of the doctrine of *respondeat superior*. The two are far from coextensive." *Headley v. Bacon* (C.A.8, 1987), 828 F.2d 1272, 1277. See also *Carter v. U-Haul Internatl.*, 10th Dist. No. 09AP-310, 2009-Ohio-5358, ¶20, citing *Ruggiero v. Std. Mgt.* (Dec. 19, 1995), 10th Dist. No. 95APE05-641, citing *Midland Buckeye Fed. S. & L. Assn. v. Arbonne Internatl., Inc.* (Dec. 12, 1988), 5th Dist. No. 7556 (noting "[t]he bare assertion of agency is no more than a conclusion of law" when it is not accompanied by supporting facts) and *FIA Card Servs., N.A. v. Ryan*, 10th Dist. No. 09AP-193, 2009-Ohio-6660, ¶7, citing *Morrow v. Reminger & Reminger Co., L.P.A.*, 183 Ohio App.3d 40, 2009-Ohio-2665, ¶7 (pointing out that although a court in reviewing a motion to dismiss must presume all factual allegations in the complaint are true, "[t]he court need not * * * accept as true unsupported legal conclusions in the complaint").

{¶25} Petitioner's petition alleges the three entities were the agents of respondent, but the petition does not allege or attach any information regarding the nature of their relationships. Despite petitioner's using the term "agent" to describe the function of the

three entities, we are unable to ascertain whether the requisite mutuality of interest exists to support privity. Moreover, although the federal case was settled, the petition alleges respondent made its offer of judgment in the federal case on its own behalf only. A party not bound by a prior judgment "is not entitled to rely upon its effect under the claim of res judicata or collateral estoppel." *O'Nesti* at ¶9. The allegations of the complaint, construed in the light most favorable to petitioner, suggest that, even if the three entities were respondent's agents, the offer was not made on their behalf. Such a conclusion, in turn, suggests not only that the federal court judgment does not bind the three entities but that privity is lacking.

{¶26} Respondent does not cite a case indicating all agency relationships give rise to privity for purposes of res judicata. Yet that is what we would have to conclude to uphold the trial court's decision to dismiss the petition. When we construe the allegations of the petition in a manner most favorable to petitioner, we are unable to determine whether the three entities are in privity with respondent for purposes of res judicata. Accordingly, the trial court erred in granting respondent's motion to dismiss the petition. Petitioner's sole assignment of error is sustained, the judgment of the trial court is reversed, and this matter is remanded to the trial court for further proceedings consistent with this decision.

Judgment reversed
and case remanded.

SADLER and CONNOR, JJ., concur.

_____