

LEXSEE 1997 OHIO APP. LEXIS 2116

**CWP LIMITED PARTNERSHIP, Plaintiff-Appellant vs. SAMUEL VITRANO, JR.,
ET AL., Defendants-Appellees**

NO. 71314

**COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT,
CUYAHOGA COUNTY**

1997 Ohio App. LEXIS 2116

May 15, 1997, DATE OF ANNOUNCEMENT OF DECISION

PRIOR HISTORY: [*1] **CHARACTER OF PROCEEDING:** Civil appeal from Common Pleas Court. Case No. 290275.

DISPOSITION: JUDGMENT: AFFIRMED.

COUNSEL: APPEARANCES:

For plaintiff-appellant: Daniel D. Domozick, Matthew J. Morelli, GOODMAN WEISS MILLER GOLDFARB, 100 Erievue Plaza, 27th Floor, Cleveland, Ohio 44114-1824.

For defendants-appellees, Samuel Vitrano, Jr. and Karen Vitrano: Ted Chuparkoff, The Evans Building, 333 South Main Street, Suite 501, Akron, Ohio 44308.

For defendants-appellees, John and Sharon Kolinoff: David Looney, 80 S. Summit Street, Suite 200, Akron, Ohio 44308-1719.

JUDGES: JOSEPH J. NAHRA, JUDGE. PORTER, P.J., and DYKE, J., CONCUR.

OPINION BY: JOSEPH J. NAHRA

OPINION

JOURNAL ENTRY and OPINION

NAHRA, J.:

Appellant, CWP Limited Partnership ("CWP"), appeals from the trial court's ruling which vacated judgment in favor of CWP and dismissed its lawsuit without prejudice. For the following reasons we affirm the trial court's ruling.

CWP is a limited partnership which leases commercial property in northeast Ohio. CWP entered into a lease with appellees, Samuel and Karen Vitrano (the "Vitrano's") and John and Sharon Kolinoff (the "Kolinoffs"). Pursuant to this agreement, appellees executed a [*2] cognovit note in favor of CWP. Allegedly, appellees failed to pay rent and breached the lease. In turn, this breach gave CWP the right to obtain judgment on the cognovit note.

On May 31, 1995, CWP commenced this action in order to obtain judgment on the cognovit note. Unbeknownst to

the trial court, on April 26, 1995, the Vitranos had commenced litigation in the Summit County Court of Common Pleas. In that case, the "Summit County case," appellees sought inter alia to rescind the cognovit note because of the allegedly fraudulent acts of CWP, its general partners, and its agent. After the Vitranos' Summit County complaint was served upon CWP, but before it answered, CWP obtained judgment on the cognovit note in the court below.

Shortly thereafter, appellees applied to the Cuyahoga County trial court to vacate the judgment. Appellees' motion notified the trial court of the existence and nature of the Summit County litigation. Specifically, through attached affidavits, the motion indicated that the Vitranos "instituted an action in the Summit County Court of Common Pleas, being Case No. CV95-04-1547, bearing the caption * * *, for fraud, and rescission of contract and the \$ 30,000.00 [*3] cognovit note." Therein, appellees claimed that the Cuyahoga County trial court's improper exercise of personal jurisdiction over the appellees and the allegedly fraudulent acts of CWP, its general partners and its agent, constituted grounds for relief under *Civ.R. 60(B)*. The trial court denied the motion without a hearing.

Subsequently, on March 8, 1996, appellees filed a motion to vacate a void judgment. For the first time, appellees alleged that the Cuyahoga County trial court lacked subject matter jurisdiction over the cognovit note. Appellees contended that exclusive jurisdiction over the note had previously vested in the Summit County Court of Common Pleas. After a hearing, the trial court granted the motion and dismissed the lawsuit without prejudice. The trial court indicated that the two cases were directly related and that jurisdiction was exclusively held by the Summit County court. Additionally, the court indicated that CWP should have sought to obtain judgment on the cognovit note by asserting a compulsory counterclaim in the Summit County litigation.

CWP appeals and assigns five errors for review.

I.

Appellant's first and fifth assignments of error are essentially [*4] identical and will be addressed simultaneously. CWP's first assignment of error states:

THE TRIAL COURT ERRED BY VACATING THE CUYAHOGA COUNTY JUDGMENT AND
DISMISSING THE CUYAHOGA COUNTY LITIGATION.

Appellant's fifth assignment of error states:

THE TRIAL COURT ERRED IN DISMISSING THE CUYAHOGA COUNTY LITIGATION AND
VACATING THE COGNOVIT NOTE JUDGMENT AGAINST KOLINOFF. [SIC]

In both assigned errors, appellant contends that the Cuyahoga County court possessed jurisdiction over the action to render judgment on the cognovit note.

The Ohio Supreme Court, in *Whitehall ex rel. Wolfe v. Ohio Civ. Rights Comm.* (1995), 74 Ohio St. 3d 120, 656 N.E.2d 684, summarized the jurisdictional priority rule, at 123:

As between [state] courts of concurrent jurisdiction, the tribunal whose power is first invoked by the institution of proper proceedings acquires jurisdiction to the exclusion of all other tribunals, to adjudicate upon the whole issue and to settle the rights of the parties. (internal quotations omitted)

See, also, *State ex rel. Sellers v. Gerken* (1995), 72 Ohio St. 3d 115, 117, 647 N.E.2d 807. Generally, "it is a condition of the [*5] operation of the state jurisdictional priority rule that the claims or causes of action be the same in both cases." *Whitehall ex rel. Wolfe, supra*. Thus, "if the second case is not for the same cause of action, nor between the same parties, the former suit will not prevent the latter." *State ex rel. Sellers, supra*. *State ex rel. Judson v. Spahr* (1987), 33 Ohio St. 3d 111, 113, 515 N.E.2d 911.

This general rule is subject to an exception. In *State ex rel. Charron-Krofta v. Corrigan*, 1995 Ohio App. LEXIS 4520 (Oct. 12, 1995), Cuyahoga App. No. 69434, unreported, we stated:

In a second line of authority emanating from the Supreme Court of Ohio, the court has applied the concurrent jurisdiction priority rule in cases where the two lawsuits were not identical but were sufficiently similar. *State ex rel. Racing Guild of Ohio v. Morgan* (1985), 17 Ohio St. 3d 54, 476 N.E.2d 1060 * * *; *State ex rel. Phillips v. Polcar* (1977), 50 Ohio St. 2d 279, 364 N.E.2d 33, * * *; *John Weenink & Sons Co. v. Court of Common Pleas* (1948), 150 Ohio St. 349, 82 N.E.2d 730, * * *. (Internal citations omitted.)

Thus, where a suit is commenced in one jurisdiction which involves the "whole issue" between [*6] the parties, a second court may not interfere with the resolution of the issue filed in the first court. *Michaels Bldg. Co. v. Cardinal Fed. S. & L. Bank* (1988), 54 Ohio App. 3d 180, 182, 561 N.E.2d 1015. This court, in *Michaels, supra*, set forth a test to determine when two lawsuits involve the "whole issue" between parties.

The determination of whether two cases concern the same "whole issue" or matter is a two-step analysis. First, there must be cases pending in two different courts of concurrent jurisdiction involving substantially the same parties. Second, the ruling of the court subsequently acquiring jurisdiction may affect or interfere with the resolution of the issues before the court where suit was originally commenced.

Accord *Red Head Brass, Inc. v. Action Coupling & Equipment, Inc.*, 1994 Ohio App. LEXIS 4728 (Oct. 19, 1994), Wayne App. No. 2866, unreported; *Ford Motor Credit Co. v. Griffin* (Dec. 11, 1990), Montgomery App. No. 11877, unreported. See *State ex rel. Racing Guild of Ohio v. Morgan* (1985), 17 Ohio St. 3d 54, 17 Ohio B. Rep. 45, 476 N.E.2d 1060.

In this case, the trial court properly applied the jurisdictional priority rule. First, the two suits involved substantially [*7] the same parties. The Cuyahoga County litigation was brought by CWP against the Vitranos and the Kolinoffs. The Summit County case was brought by the Vitranos against CWP, its general partners, Industo, Inc., and Erie Coast Properties, Inc., and CWP's agent, Morton Levin. It is clear that two of the three parties in the Cuyahoga County case are the principal parties in the Summit County litigation. Further, it may be improper to proceed with the Summit County litigation without adding the Kolinoffs.

Second, a ruling in the Cuyahoga County case would certainly affect or interfere with the resolution of the issues in the case pending in Summit County. This case sought to obtain judgment and consequent rights of enforcement on the very note which the Vitranos challenged in Summit County. Accordingly, it is difficult to imagine how the Cuyahoga County case would not affect the Summit county litigation.

Indeed, this critical element is demonstrated in the record. The Summit County Court of Common Pleas rendered summary judgment against the Vitranos on their claims of fraud and breach of contract. In its judgment, the Summit County Court of Common Pleas stated:

Wherefore, it is specifically [*8] concluded that the Defendants' allegation that this matter is res judicata (sic) is well taken. * * * In short, the Vitranos could have litigated the issues in Summit County as sought by their initial filing. However, when they became aware of the action in Cuyahoga County they had to elect to have the matters transferred and brought to Summit County or allow the review to go forward in Cuyahoga County. This they did not do. * * * This Court concludes that Plaintiffs are inextricably bound by the decisions of the Cuyahoga County Common Pleas Court * * *.

Thus, the judgments of the Cuyahoga County Court directly and dramatically affected the proceedings in Summit County. The second element articulated in *Michaels, supra*, is easily met. Because both elements articulated in *Michaels, supra*, are present, the Summit County court had priority of jurisdiction to "adjudicate upon the whole issue

and to settle the rights of the parties." *The John Weenink & Sons Co. v. Court of Common Pleas* (1948), 150 Ohio St. 349, 82 N.E.2d 730 (paragraph 3 of the syllabus).

Appellant contends that *Devito v. University Hospitals of Cleveland*, 1992 Ohio App. LEXIS 774 (Feb. 20, 1992), Cuyahoga App. No. 62626, [*9] unreported, mandates a different conclusion. In that case, Nicholas DeVito ("DeVito") was sued by a medical doctor in municipal court for services rendered. DeVito counterclaimed in an amount exceeding the municipal court's jurisdiction. Shortly thereafter, DeVito commenced litigation in the Cuyahoga County Court of Common Pleas against the doctor and several other medical practitioners and institutions. After this second lawsuit was commenced, the municipal court certified the first lawsuit to the Cuyahoga County Common Pleas Court. The trial court in the second lawsuit dismissed the case for want of jurisdiction based on the first lawsuit. On review, the issue was whether the trial court in the second suit properly dismissed the case based on the jurisdictional priority rule. We stated:

Complete jurisdiction vested initially in the common pleas court in [the second case]. * * * The municipal court never obtained jurisdiction over that entire lawsuit because the DeVito's counterclaim exceeded the monetary jurisdiction of the court and certification was required.

Accordingly, we held that the Common Pleas Court possessed jurisdiction over the second lawsuit and that [*10] it erred by dismissing the second case. The facts of DeVito do not resemble the instant matter because the first court never possessed jurisdiction over the entire case. *DeVito, supra*, is therefore inapposite.

Further, appellant's argument that the Vitranos "voluntarily, intentionally and knowingly" chose to litigate the issues of fraud and rescission in Cuyahoga County is misplaced. Appellant suggests that by including the fraud claim as a basis for relief from the judgment, appellees assented to the jurisdiction of the Cuyahoga County court over the entire matter. To the contrary, it is clear that the appellees sought only to vacate the improperly entered judgment. Nothing in the record indicates that the appellees attempted or desired to fully litigate the issue in the trial court below.

Ultimately, this case demonstrates the proper application of the jurisdictional priority rule. The Summit County litigation was commenced prior to the Cuyahoga County litigation. Consequently, priority of jurisdiction rests with the Summit County court. Because of the cognovit nature of this action, the Vitranos had no opportunity to oppose the judgment prior to its entry. Within weeks of [*11] said judgment, appellees notified the trial court regarding the existence and nature of the Summit County case. The trial court ultimately recognized that it lacked jurisdictional priority, vacated the inappropriate judgment, and dismissed the lawsuit. These decisions were proper.

For the forgoing reasons, appellant's first and fifth assignments of error are overruled.

II.

Appellant's second, third and fourth assignments of error each attack the trial court's conclusion that CWP's cognovit suit was a compulsory counterclaim in the Summit County case. The three assignments of error state respectively:

VITRANO [sic] CANNOT ARGUE IN THE SECOND MOTION TO VACATE THAT CWP SHOULD HAVE FILED THE COGNOVIT NOTE COMPLAINT AS A COMPULSORY COUNTERCLAIM IN THE SUMMIT COUNTY LITIGATION.

VITRANO'S [sic] FAILURE TO ASSERT THE COMPULSORY COUNTERCLAIM ISSUE ON DIRECT APPEAL CONSTITUTES A WAIVER.

CWP'S COGNOVIT NOTE LAWSUIT WAS NOT A COMPULSORY COUNTERCLAIM IN THE SUMMIT COUNTY LITIGATION.

Our decision with respect to appellant's first and fifth assignments of error render appellant's second, third and fourth assignments of error moot. Pursuant to *App.R. 12(A)(1)(c)*, we [*12] decline to address these assignments of error.

Judgment affirmed.

It is ordered that appellees recover of appellant their costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure*.

PORTER, P.J., and

DYKE, J., CONCUR.

JOSEPH J. NAHRA

JUDGE

N.B. This entry is an announcement of the court's decision. See *App.R. 22(B), 22(D) and 26(A)*; *Loc.App.R. 27*. This decision will be journalized and will become the judgment and order of the court pursuant to *App.R. 22(E)* unless a motion for reconsideration with supporting brief, per *App.R. 26(A)*, is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement [*13] of decision by the clerk per *App.R. 22(E)*. See, also, *S. Ct. Prac.R. II, Section 2(A)(1)*.