

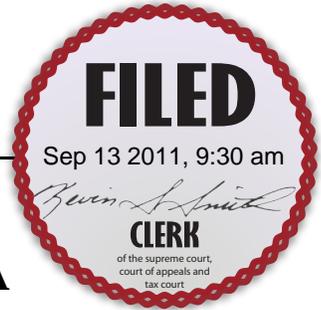
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**IN THE
COURT OF APPEALS OF INDIANA**

JANICE A. and KENNETH F. DEVLIN,)
)
Appellant-,)
)
vs.)
)
AC ROOFING INC. and ARNOLD W. COOK,)
)
Appellee-.)

No. 34A02-1012-MI-1375

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable Donald E. Currie, Special Judge
Cause No. 34D04-0811-MI-1329

September 13, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Janice¹ A. Devlin and Kenneth F. Devlin appeal the denial of their motion for summary judgment and the denial of their motion to dismiss pursuant to Ind. Trial Rule 12(B)(8). The Devlins raise two issues for review:

1. Did the trial court err in determining that summary judgment was inappropriate because the complaint filed by AC Roofing, Inc. and Arnold Cook was not barred by the doctrine of res judicata?
2. Did the trial court err in determining that the Devlins are not entitled to dismissal under T.R. 12(B)(8)?

We reverse and remand.

On or about October 22, 2004, AC Roofing and Arnold Cook (president and principal shareholder of AC Roofing) entered into a real and personal asset purchase agreement with Consolidated Roofing (of which Janice Devlin was president and Kevin Devlin was vice president). On August 1, 2007, Cook filed a civil complaint against the Devlins, personally, and Consolidated Roofing under Cause Number 34D04-0711-CC-01269 (Cause No. 1269). On August 9, 2007, Cook amended the complaint as a matter of course in accordance with Ind. Trial Rule 15(A). The complaint in Cause No. 1269 raised issues as to whether Consolidated Roofing and the Devlins had complied with certain provisions of the real and personal asset purchase agreement. The Devlins filed a motion to dismiss pursuant to T.R. 12(B)(6), asserting they were not parties to the contract in their individual capacities. After holding a hearing on the issue, the trial court granted the Devlins' motion to dismiss on January 14, 2008. Cook did not pursue an interlocutory appeal of the trial court's dismissal and did not move to amend the pleading within ten days after service of notice of the court's

¹ We note that throughout the various pleadings and documents included in the record on appeal, Janice is spelled "Janice" and also as "Janis." Herein, we will use the former spelling.

order granting the Devlins' motion to dismiss. *See* T.R. 12(B)(6)² and T.R. 15(A).³ Well beyond the ten-day allotment, Cook filed a motion for leave to file a second amended pleading. On June 16, 2008, the court held a hearing on the matter and subsequently denied Cook's request to amend the complaint.

On November 17, 2008, Cook and AC Roofing filed a second complaint under Cause Number 34D04-0811-MI-1329 against the Devlins alleging a breach of fiduciary duties on behalf of the Devlins. On January 20, 2009, the Devlins filed their motion for summary judgment, designation of evidence, and brief. The Devlins subsequently filed a motion to dismiss pursuant to T.R. 12(B)(8). The trial court held a hearing on the Devlins' motion for summary judgment and motion to dismiss on August 27, 2010. On October 21, 2010, the trial court entered its order denying the Devlins' motion for summary judgment. The court's order was silent as to the Devlins' motion to dismiss.⁴ The Devlins filed a motion to

² T.R. 12(B)(6) provides:

When a motion to dismiss is sustained for failure to state a claim under subdivision (B)(6) of this rule the pleading may be amended once as of right pursuant to Rule 15(A) within ten [10] days after service of notice of the court's order sustaining the motion and thereafter with permission of the court pursuant to such rule.

³ T.R. 15(A) provides:

A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted, and the action has not been placed upon the trial calendar, he may so amend it at any time within thirty [30] days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within twenty [20] days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

⁴ The parties have failed to provide an adequate record regarding the proceedings challenging the original complaint. This has hindered this court's ability to properly analyze the issues herein presented. We have relied upon the statements of fact provided by the parties (which were largely agreed upon by the parties) and the chronological case summary.

reconsider with the trial court and on December 3, 2010, the court entered an order reaffirming its denial of the Devlins' motion for summary judgment and also denying their motion to dismiss. The trial court granted the Devlins' request to certify its ruling for interlocutory appeal. This court accepted jurisdiction over this interlocutory appeal on February 11, 2011.

1.

The Devlins contend the trial court erred in denying their motion for summary judgment. On review of a trial court's decision to grant or deny summary judgment, we apply the same standard as the trial court. *See Pfenning v. Lineman*, 947 N.E.2d 392 (Ind. 2011). Specifically, we must decide whether there is a genuine issue of material fact that precludes summary judgment and whether the moving party is entitled to judgment as a matter of law. *Id.* After the moving party has sustained its initial burden of proving the absence of a genuine issue of material fact and the appropriateness of judgment as a matter of law, the party opposing summary judgment must respond by designating specific facts establishing a genuine issue for trial. *Id.*

The basis for the Devlins' motion for summary judgment is that the complaint filed in the instant action was barred by the doctrine of res judicata, the issue having been previously decided in Cause No. 1269 when the Devlins were dismissed from that action pursuant to T.R. 12(B)(6).

The doctrine of res judicata bars litigation of a claim after a final judgment has been rendered on a matter in a prior action involving the same claim between the same parties or their privies. *Wagle v. Henry*, 679 N.E.2d 1002 (Ind. Ct. App. 1997). Four requirements

must be satisfied for res judicata to apply: (1) the former judgment must have been rendered by a court of competent jurisdiction; (2) the former judgment must have been rendered on the merits; (3) the matter now in issue was, or could have been, determined in the prior action; and (4) the controversy adjudicated in the former action must have been between parties to the present suit or their privies. *Id.*

Here, the dismissal of the Devlins in Cause No. 1269 was not a final judgment. *Ind.*

Appellate Rule 2(H) defines a final judgment as follows:

- (1) it disposes of all claims as to all parties;
- (2) the trial court in writing expressly determines under Trial Rule 54(B) or Trial Rule 56(C) that there is no just reason for delay and in writing expressly directs the entry of judgment (i) under Trial Rule 54(B) as to fewer than all the claims or parties, or (ii) under Trial Rule 56(C) as to fewer than all the issues, claims or parties;
- (3) it is deemed final under Trial Rule 60(C);
- (4) it is a ruling on either a mandatory or permissive Motion to Correct Error which was timely filed under Trial Rule 59 or Criminal Rule 16; or
- (5) it is otherwise deemed final by law.

The dismissal of the Devlins in Cause No. 1269 did not dispose of all claims as to all parties⁵ nor is there anything in the record indicating the trial court expressly directed entry of final judgment as to the Devlins. Subsections 3, 4, and 5 are inapplicable to the current case.

Moreover, the dismissal of the Devlins in Cause No. 1269 was not an adjudication on the merits. Following a dismissal under T.R. 12(B)(6), the plaintiff is entitled to amend his complaint pursuant to T.R.12(B)(6) and T.R. 15(A) or to elect to stand upon his complaint

⁵ The action remains *in fieri* as between Cook and Consolidated Roofing.

and to appeal from the order of dismissal. Because the complaining party remains able to file an amended complaint as a matter of right within ten days after served with notice that the motion to dismiss was sustained or at anytime thereafter with permission of the court, a T.R. 12(B)(6) dismissal is a dismissal without prejudice. *See Thacker v. Bartlett*, 785 N.E.2d 621 (Ind. Ct. App. 2003). Thus, such dismissal does not operate as an adjudication on the merits and is not a basis for res judicata. *Id.* “A Trial Rule 12(B)(6) dismissal becomes an adjudication on the merits only after the complaining party opts to appeal the order instead of filing an amended complaint.” *Thacker v. Bartlett*, 785 N.E.2d at 624.

Here, although Cook moved to amend his complaint outside of the ten-day time period set forth in T.R. 12(B), which motion was denied by the trial court, Cook could have filed a second motion to amend his complaint. Further, Cook did not elect to pursue an interlocutory appeal from the trial court’s dismissal of the Devlins in Cause No. 1269 or from the denial of his motion to amend.⁶ *See Georgos v. Jackson*, 790 N.E.2d 448 (Ind. 2003) (holding that there is no requirement that an interlocutory appeal be taken and that plaintiff may elect to wait until the end of litigation to raise the issue on appeal from a final judgment).

For these reasons, we must conclude that the prior dismissal of the Devlins in Cause No. 1269 is not res judicata, and thus, the trial court properly denied the Devlins motion for summary judgment on this basis.

⁶This does not mean that the Devlins are at the mercy of Cook and are left hanging until such time as Cook decides to appeal their dismissal after entry of a final judgment. In the interest of finality, the Devlins may request the trial court to expressly determine that “there is no just reason for delay” and “expressly direct[]

The Devlins argue that the trial court erred in concluding that the current action should not be dismissed pursuant to T.R.12(B)(8). T.R. 12(B)(8) allows a party to move for dismissal on the grounds that the “same action is pending in another state court in this state.”

When an action is pending before a court of competent jurisdiction, other courts must defer to that court’s extant authority over the case. *Thacker v. Bartlett*, 785 N.E.2d 621 (citing *State ex rel. Meade v. Marshall Superior Court II*, 644 N.E.2d 87 (Ind. 1994)). Courts observe this deference in the interests of fairness to litigants, comity between and among the courts of this state, and judicial efficiency. *State ex rel. Meade v. Marshall Superior Court II*, 644 N.E.2d 87. T.R. 12(B)(8) implements these principles. *Id.* See also *Crawfordsville Apartment Co. v. Key Trust Co. of Fla.*, 692 N.E.2d 478 (Ind. Ct. App. 1998). “This rule applies where the parties, subject matter, and remedies of the competing actions are precisely the same, and it also applies when they are only substantially the same.” *Thacker v. Bartlett*, 785 N.E.2d at 625.

Here, we recognize that the present case includes AC Roofing as an additional plaintiff not involved in Cause No. 1269. The record is clear, however, that Cook (the sole plaintiff in Cause No. 1269) is the president and principal shareholder of AC Roofing, essentially making AC Roofing an alter ego of Cook. No argument is made on appeal that the parties, the subject matter of the two actions, or that the remedies sought in the two actions are not substantially the same. In fact, a comparison of the complaint from the instant

entry of judgment.” See Ind. Trial Rule 54(B). Such determination starts the clock on the plaintiff’s appellate rights.

case with the complaint from Cause No. 1269 shows striking similarities, with some provisions being nearly verbatim recitation of claims. Based on the complaints, it is clear that the subject matter and remedies in both suits are substantially the same.

Further, Cause No. 1269 is still “pending” in another court in this State. To be sure, the suit between Cook and Consolidated Roofing continued and is currently pending on appeal. And, although the action against the Devlins was “dismissed” under Cause No. 1269, the action was never decided on the merits and theoretically, the trial court could have reconsidered its denial of Cook’s motion to amend the complaint. *See Thacker v. Bartlett*, 785 N.E.2d 621. Based on the foregoing, we conclude that the trial court erred in denying the Devlins’ motion to dismiss pursuant to T.R. 12(B)(8).

Reversed and remanded.

BAILEY, J., and BROWN, J., concur.