

RENDERED: SEPTEMBER 30, 2011; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000035-MR

DAVID S. BUTLER

APPELLANT

v.

APPEAL FROM MONROE CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 09-CI-00124

NAOMI BUTLER JORDAN AND
HUSBAND JAMES JORDAN; NELDA
BIGGERSTAFF AND HUSBAND DENNIE
BIGGERSTAFF; DARRELL BUTLER
AND WIFE SHERRIE BUTLER

APPELLEES

OPINION AFFIRMING

** ** * ** * ** *

BEFORE: TAYLOR, CHIEF JUDGE; KELLER, JUDGE; LAMBERT,¹ SENIOR
JUDGE.

LAMBERT, SENIOR JUDGE: David S. Butler appeals from a judgment of the

Monroe Circuit Court dismissing his action to set aside a deed on grounds of

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

forgery. The circuit court concluded that his claim was precluded by prior litigation between the parties and was thus barred by *res judicata*. For reasons that follow, we affirm.

Appellant and Appellees are the children, by blood or marriage, of Clyde Butler and Geneva Butler, both of whom are now deceased. Prior to their deaths, the Butlers conveyed by deed 96 acres of real property to Appellees Dennie and Nelda Biggerstaff on October 20, 1994. The Biggerstaffs subsequently conveyed this same property to Nelda Biggerstaff, to Appellee Naomi Butler Jordan, and to Appellant on November 19, 1994, again by deed.

On January 11, 2000, following the deaths of the Butlers, a document purporting to be the will of Clyde Butler was presented by Appellant for probate in the Monroe District Court. The will was dated October 11, 1994, and indicated that it was prepared nine days prior to the Butlers' deed of conveyance to the Biggerstaffs. The will was eventually probated and recorded in the Monroe County Clerk's office. Although the record is not entirely clear on this point, it (along with Appellant's complaint in the current action) suggests that the will would have given the subject real property to Appellant had the property not been conveyed to the Biggerstaffs.

On May 2, 2000, a complaint was filed in Monroe Circuit Court by a number of the Appellees seeking to set aside this purported will. The complaint was assigned Civil Action Number 00-CI-00059. On June 27, 2001, Appellant filed a counterclaim in this action wherein he moved to set aside the

aforementioned deeds. Of particular relevance here, Appellant's counterclaim alleged the following:

14. In the alternative, the Plaintiffs, individually or acting in concert, failed, either intentionally or unintentionally, to obtain the authentic and/or properly notarized signature of Clyde T. Butler on that Document (Exhibit 2) purporting to be the Deed to his County House Road property.

15. On the basis of the foregoing, the document (Exhibit 2) purporting to be the Deed to the County House Road property and purporting to transfer said property to Dennie Biggerstaff and his wife, Nelda Biggerstaff, is null, void, and without any effect of law whatsoever.

The circuit court dismissed Appellant's counterclaim on grounds that it had not been filed in a timely fashion. Appellant's efforts to reverse the decision on appeal were rejected.

On September 25, 2009, Appellant filed the complaint in the current action, wherein he contended that the original deed from the Butlers to the Biggerstaffs should be set aside as void because it contained a forged signature of Clyde Butler. Appellant also asked that all subsequent transfers of real estate showing that deed as a source of title be set aside, including the deed of November 19, 1994. In support of Appellant's claim of forgery, the complaint included an attached report of a handwriting expert opining that the contested signature was not that of Clyde Butler. Appellant alleged that this forged signature was placed in the deed by other parties in order to remove the affected property from Butler's estate and from the provisions of Butler's will.

Appellees James and Naomi Butler Jordan responded to Appellant's complaint by moving to dismiss the action pursuant to Kentucky Rules of Civil Procedure (CR) 12.02(f). They argued that Appellant had not stated a claim upon which relief could be granted because his suit was barred pursuant to the doctrine of *res judicata*. They specifically contended that his action to set aside the subject deed had been "finally adjudicated" in the previous will contest action between the parties – Civil Action No. 00-CI-00059 – when Appellant's counterclaim seeking to set aside the deed had been dismissed. The circuit court agreed with Appellees and dismissed Appellant's current action on grounds that both lawsuits involved the "same nucleus of facts" and that the authenticity of Clyde Butler's signature on the subject deed had been raised and decided in the first lawsuit. This appeal followed.

Before addressing the merits of Appellant's appeal, we first note that although Appellees tendered their motion to dismiss pursuant to CR 12.02(f), they supplemented their motion with matters outside of the record. Because of this, the motion to dismiss effectively became one for summary judgment; therefore, we conduct our review accordingly. CR 12.02; CR 12.03; *Kreate v. Disabled American Veterans*, 33 S.W.3d 176, 178 (Ky. App. 2000); *Cabinet for Human Resources v. Women's Health Services, Inc.*, 878 S.W.2d 806, 807 (Ky. App. 1994).

The standards for reviewing a circuit court's entry of summary judgment are well-established and were concisely summarized by this Court in *Lewis v. B & R Corp.*, 56 S.W.3d 432 (Ky. App. 2001):

The standard of review on appeal when a trial court grants a motion for summary judgment is “whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present “at least some affirmative evidence showing that there is a genuine issue of material fact for trial.”

Id. at 436 (internal footnotes and citations omitted). Because summary judgments involve no fact finding, we review the circuit court's decision *de novo*. *3D Enters. Contr. Corp. v. Louisville & Jefferson County Metro. Sewer Dist.*, 174 S.W.3d 440, 445 (Ky. 2005); *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

Appellant contends that dismissal of his complaint was inappropriate because the issue of whether Clyde Butler's signature was forged is a new one that was not litigated in the previous lawsuit between the parties; therefore, he argues, *res judicata* is inapplicable here.

Res judicata generally “applies to bar consideration of a claim that was, or could have been, brought in prior litigation between the parties.” *Bowling v. Kentucky Dept. of Corrections*, 301 S.W.3d 478, 486 (Ky. 2009), *as corrected*

(Jan. 4, 2010). The doctrine of *res judicata* consists of two subparts: claim preclusion and issue preclusion. *Yeoman v. Com., Health Policy Bd.*, 983 S.W.2d 459, 464-65 (Ky. 1998). “Claim preclusion bars a party from re-litigating a previously adjudicated cause of action and entirely bars a new lawsuit on the same cause of action,” while “[i]ssue preclusion bars the parties from relitigating any issue actually litigated and finally decided in an earlier action.” *Id.* at 465.

Claim preclusion requires three elements: (1) identity of the parties, (2) identity of the causes of action, and (3) resolution on the merits. *Coomer v. CSX Transp., Inc.*, 319 S.W.3d 366, 371 (Ky. 2010). The first and third elements have been satisfied here.² Therefore, the only question remaining is whether there is identity of the causes of action.

The “key inquiry” in determining whether two lawsuits concern the same controversy for purposes of *res judicata* is “whether they both arise from the same transactional nucleus of facts. If the two suits concern the same controversy, then the previous suit is deemed to have adjudicated every matter which was or could have been brought in support of the cause of action.” *Yeoman*, 983 S.W.2d at 465. The latter principle is commonly referred to as the “rule against splitting causes of action,” and it is one aspect to be considered when determining whether

² Appellant’s counterclaim to set aside the subject deeds in the first action was dismissed because it was not filed within the applicable statute of limitations. A dismissal based upon the statute of limitations operates as an adjudication on the merits for purposes of *res judicata*. *Dennis v. Fiscal Court of Bullitt County*, 784 S.W.2d 608, 609-10 (Ky. App. 1990). With this said, claim preclusion can still apply without a resolution on the merits if it is determined that the claim should have been raised in the earlier proceeding. *Cherry v. Augustus*, 245 S.W.3d 766, 774-75 (Ky. App. 2006).

there is identity of the causes of action. *Coomer*, 319 S.W.3d at 371 n.9.

Essentially, the rule requires a court to determine the scope of the first action in order to decide if the second action involves issues which should have been litigated in the first action, but were not. *Id.* This principle has been long-recognized in Kentucky jurisprudence:

The rule is elementary that, when a matter is in litigation, parties are required to bring forward their whole case; and ‘the plea of res judicata applies not only to the points upon which the court was required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.’ *Davis v. McCorkle*, 77 Ky. [14 Bush] 746 [1879]; *Williams v. Rogers*, 77 Ky. [14 Bush] 776 [1879]; *Hardwicke v. Young*, [110 Ky. 504] 62 S. W. 10 [1901].

Combs v. Prestonsburg Water Co., 260 Ky. 169, 84 S.W.2d 15, 18 (1935), quoting *Locke v. Commonwealth*, 113 Ky. 864, 69 S. W. 763, 764 (1902). “[T]he rule that forbids parties from asserting rights or defenses by sporadic piecemeal precludes them from asserting again anything incident to, and necessarily connected with, the subject-matter of the former litigation which might have properly been interposed . . . therein.” *Id.*; see also *Bowling*, 301 S.W.3d at 486.

In his counterclaim in the first action, Appellant asserted that “the Plaintiffs, individually or acting in concert, *failed, either intentionally or unintentionally, to obtain the authentic and/or properly notarized signature of Clyde T. Butler* on that Document (Exhibit 2) purporting to be the Deed to his County House Road property.” (Emphasis added). Thus, the issue of the

authenticity of Clyde Butler's signature on the subject deed was clearly raised in that lawsuit and resolved by dismissal.

Moreover, even if it could be argued that this claim did not encompass Appellant's current assertion of forgery, *res judicata* would still apply since the issue of forgery is undoubtedly a point which properly belongs to the subject of the litigation between the parties in the first action since it was clearly within the scope of that case and its issues. *Combs*, 260 Ky. 169, 84 S.W.2d at 18; *see also Hays v. Sturgill*, 302 Ky. 31, 193 S.W.2d 648, 650 (1946). As noted, Appellant's counterclaim in the first action challenged the authenticity of Clyde Butler's signature. An assertion of forgery is obviously and necessarily within the scope of such an allegation. Appellant's related claim that the forgery issue presents "newly discovered evidence," *i.e.*, the handwriting expert's conclusion that Butler's signature was forged, is similarly unavailing since such analysis could have been presented in the first action.

For these reasons, the Monroe Circuit Court did not err in dismissing Appellant's claim on grounds of *res judicata*. Appellant's challenge to the authenticity of Clyde Butler's signature on the subject deed was raised and decided in the previous litigation, and any claim of forgery was properly a subject of that litigation. Accordingly, the judgment of the Monroe Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Fred G. Greene
Russellville, Kentucky

BRIEF FOR APPELLEES NAOMI
BUTLER JORDAN, JAMES
JORDAN, NELDA BIGGERSTAFF,
AND DENNIE BIGGERSTAFF:

Thomas W. Davis
Glasgow, Kentucky

BRIEF FOR APPELLEES DARRELL
BUTLER AND SHERRIE BUTLER:

Benjamin D. Rogers
Glasgow, Kentucky