

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001175-MR

GARY BUIS

APPELLANT

v. APPEAL FROM CASEY CIRCUIT COURT
HONORABLE WILLIAM M. HALL, JUDGE
ACTION NO. 01-CI-00162

ROGER P. ELLIOTT AND
SHEILA H. ELLIOTT

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BAKER, BARBER, AND JOHNSON, JUDGES.

BAKER, JUDGE. Gary Buis brings this appeal from a May 11, 2002, order of the Casey Circuit Court. We affirm.

The present controversy surrounds a land contract whereby appellees purported to convey appellant two tracts of land containing approximately 147 acres. Appellees had previously conveyed these two tracts of land to Vicky and Terry Cox in 1994. However, appellees deemed the Coxes to be in

breach of their contract and reacquired the property through "self-help." Appellees then conveyed the property to appellant; appellant entered and took possession of the property. As a result, the Coxes filed a complaint in the Casey Circuit Court (Civil Action No. 98-CI-00107). Therein, they alleged that appellees breached the land contract and had wrongfully retaken possession of the property through self-help. The Coxes also filed claims against appellant for intentional interference with a business relationship and for trespass.

It appears that appellant failed to enter an appearance, and, as a result, on October 13, 1998, a default judgment was entered against him. Thereafter, appellant was adjudged liable for \$21,795.22 in damages. On August 24, 2000, appellant filed a *pro se* motion to vacate the default judgment; on January 12, 2001, appellant, through counsel, further moved the court to set aside the default judgment and for leave to file an answer and cross-claim against appellees. The circuit court ultimately entered an order denying appellant's motions to set aside and vacate the default judgment and motions for leave to file an answer and cross-claim.¹

¹ We observe that an appeal of this order was taken to our Court, and the matter is now pending before the Supreme Court on a Motion for Discretionary Review. As pointed out by appellee, "[i]f the Supreme Court rules in favor of Buis in the first case and this Court reverses the opinion of the Casey Circuit Court in this case, the Appellees herein could be in a position of defending the exact same claim in two law suits before two different Special Judges of the Casey Circuit Court at the same time." Brief for Appellee at 3.

On August 29, 2001, appellant filed the instant action alleging breach of contract, unjust enrichment, and seeking indemnification from appellees. Appellees moved to dismiss based upon the doctrine of *res judicata*. On May 11, 2002, the circuit court agreed with appellees and dismissed the instant action. This appeal follows.

Appellant contends the circuit court committed error by dismissing his action based upon the doctrine of *res judicata*. In the order dismissing the action, the circuit court concluded:

The significant fact is as stated in the last paragraph of Plaintiff's Statement of Facts. "On January 12, 2001, the lawfirm of David A. Nunery, P.S.C. entered its appearance for Gary and moved the Court to set aside the default judgment . . . and grant Gary leave to file an answer and crossclaim." This crossclaim was the exact claim filed herein.

Circuit Court Order p. 3. The circuit court viewed appellant's cross-claim in Civil Action No. 98-CI-00107 as exactly identical to appellant's claims in the instant action; hence, the circuit court determined that the instant action was barred by the doctrine of *res judicata*.

After a thorough review of the record, we were unable to locate the cross-claim filed in Civil Action No. 98-CI-00107 or a copy thereof. As appellant's contentions of error center upon whether the instant action is barred by the doctrine of *res*

judicata, we think an examination of the cross-claim is essential to our review of this appeal. We observe that the burden is on appellant to provide this Court with an adequate record to review the decision of the circuit court. See Fanelli v. Commonwealth, Ky. 423 S.W.2d 255 (1968), rev'd on other grounds, 455 S.W.2d 126 (1969). In the absence hereof, the circuit court's judgment is presumed to be proper. See Liberty Life Insurance Co. v. Strauss, 234 Ky. 608, 28 S.W.2d 955 (1930). Accordingly, we are compelled to summarily affirm.

For the foregoing reasons, the order of the Casey Circuit Court is affirmed.

BARBER, JUDGE, CONCURS.

JOHNSON, JUDGE, DISSENTS BY SEPARATE OPINION.

JOHNSON, JUDGE, DISSENTING. I respectfully dissent.

I do not believe that a review of the cross-claim that the circuit court would not allow Buis to file is essential to our review of this appeal. Since the circuit court denied Buis's motion for leave to file a cross-claim against the Elliotts, the allegations in the cross-claim are irrelevant. The circuit court's denial of Buis's motion for leave to file the tendered cross-claim does not constitute a previous adjudication on the merits of Buis's claims against the Elliotts.

In City of Louisville v. Professional Firefighters Assoc., Ky., 813 S.W.2d 804, 807 (1991), our Supreme Court

adopted the following language from Cream Top Creamery v. Dean Milk Co., Inc., 383 F.2d 358, 362 (6th Cir. 1967):

"[W]here the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action. (Citation omitted)."

Since the cause of action underlying this appeal involves claims by Buis against the Elliotts that have never been adjudicated, these claims are not barred by res judicata.

BRIEF FOR APPELLANT:

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