IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

WILLIAM BELL, t/a MARCRIS INVESTMENTS	:	APRIL TERM 2005
v.	:	NO. 1904
WILLIAM BERNICKER	:	COMMERCE PROGRAM

OPINION

Appellant, William Bell, t/a Marcris Investments, appeals from the Court's Order dated July 13, 2005. The July 13, 2005 Order sustained William Bernicker's ("Bernicker" or "Appellee") preliminary objections and dismissed William Bell, t/a Marcris Investments' ("Bell" or "Appellant") complaint with prejudice.

In November 1998, Bernicker signed a lease for commercial property owned by Bell (the "Lease"). The property consisted of the real property located at 1101-05 and 1109 South Second Street, 135 Ellsworth Street, and 124-136 Alter Street. The terms of the Lease were five (5) years and a monthly fixed rent of four thousand dollars ($4,000). Bernicker allegedly defaulted on the Lease, and Bell filed a complaint in confession of judgment against Bernicker on September 12, 2001 under the caption of Bell v. Bernicker, September Term 2001, No. 1073, Philadelphia Court of Common Pleas (the "2001 Case").

On July 17, 2003, Bernicker filed a petition to strike/open the confessed judgment (the "Petition"). On November 1, 2004, the Honorable Annette M. Rizzo granted the Petition and struck the confessed judgment, dismissing the complaint in confession of judgment with prejudice. Bell filed a Motion for Reconsideration on

November 10, 2004. On January 14, 2005, Judge Rizzo entered an Order dismissing Bell's Motion for Reconsideration with prejudice. Bell appealed from the Court's January 14, 2005 Order. The appeal was ultimately quashed by the Pennsylvania Superior Court on March 15, 2005.

In April 2005, Bell sued Bernicker for defaulting under the same lease agreement as in the 2001 Case, under the caption of Bell v. Bernicker, April 2005, No. 1904, Philadelphia Court of Common Pleas (the "2005 Case"). Bell's complaint in the 2005 Case alleged the same default of the Lease that was alleged in the 2001 Case. In the 2005 Case, however, Bell sought monetary damages under a breach of contract claim, rather than under a confession of judgment. On May 18, 2005, Bernicker filed preliminary objections asserting that Bell's 2005 Case should be barred, *inter alia*, on *res judicata* grounds. On July 13, 2005, the Court sustained Bernicker's preliminary objections and dismissed the 2005 Case with prejudice. Bell has appealed from the Court's Order of July 13, 2005.

Res judicata, or claim preclusion, "provides that where there is a final judgment on the merits, future litigation on the same cause of action is prohibited." McGill v. Southwark Realty Co., 828 A.2d 430, 435 (Pa. Commw. 2003). The doctrine of *res judicata* requires that both the former and latter suits possess the following four common elements: 1) identity in the thing sued upon; 2) identity in the cause of action; 3) identity of parties to the action; and 4) identity of the capacity of the parties to sue or be sued. Monroe Court Homeowner's Ass'n v. Southwark Realty Co., 2005 Phila. Ct. Com. Pl. LEXIS 28, *2, Commerce Program (2005), citing Gatling v. Eaton Corp., 2002 Pa. Super. 276, 807 A.2d 283, 287 (2002). Furthermore, *res judicata* "encompasses not only

those issues, claims or defenses that were actually raised in the prior proceeding, but also those which could or should have been raised but were not." Glynn v. Glynn, 2001 Pa. Super. 359, *P6, 789 A.2d 242, 250 (2001).

Bell's 2005 Case is barred on *res judicata* grounds. The 2001 Case and the 2005 Case possess all of the common elements necessary for the invocation of *res judicata*. First, the thing sued upon in both actions is the Lease, in particular the alleged default of rent payments under the Lease. Second, there is identity in the causes of action in both the 2001 Case and 2005 Case. All of the claims made in the 2005 Case were derived from the Lease that was the subject of the 2001 Case. Specifically, in the 2005 Case, Bell alleged that "in or about August 2001, Defendant [Bernicker] breached the Lease by failing to make the monthly Rent payment thereunder." See 2005 Case Complaint, ¶ 10. In the 2001 Case, Bell alleged that "from and since August 1, 2001, Defendant [Bernicker] has been and remains in default under the Lease by failing to pay the Rent due and owing for the Premises." See 2001 Case Complaint, ¶ 12. Both cases allege Bernicker's breach/default of the Lease, and both seek damages flowing from the alleged breach. A breach of contract claim is implicit in a complaint in confession of judgment, since there must be a breach in order to confess judgment. Thus, the issue of the breach of the Lease, and the consequences thereof, were or could have been litigated in the 2001 Case.[1] Lastly, the parties and their capacities are the same in both the 2001 Case and the 2005 Case.

[1] To the extent that Appellant may argue that there are now claims that were not made in the 2001 Case, those claims are waived because they could have been brought in the 2001 Case either at its inception or by way of amendment as they accrued. See Pa.R.C.P. 1020(d) ("If a transaction or occurrence gives rise to more than one cause of action heretofore asserted in assumpsit and trespass, against the same person, including causes of action in the alternative, they shall be joined in separate counts in the action against any such person. Failure to join a cause of action as required by this subdivision shall be deemed a waiver of that cause of action as against all parties to the action"). See also Top Quality Manuf. Inc. v. Sinkow, 2004

Furthermore, Judge Rizzo's dismissal of the 2001 Case was a final decision on the merits. Judge Rizzo dismissed the 2001 Case *with prejudice*. "With prejudice" means "an adjudication on merits and final disposition, barring right to bring or maintain an action on same claim or cause." Black's Law Dictionary 1603 (6th Ed., West 1990). Moreover, the "addition of the words 'with prejudice' to an order granting a motion to dismiss complaint indicates finality for purposes of appeal." Id. By dismissing the 2001 Case with prejudice, Judge Rizzo's November 1, 2004 Order was a final appealable order.[2] Bell's recourse was to take an appeal from this Order. However, Bell did not appeal this Order, but instead appealed the denial of his Motion for Reconsideration. The Superior Court quashed Bell's appeal as untimely. Bell cannot now re-litigate the same claims that were unsuccessful in both the trial and appellate courts. Therefore, the 2005 Case is barred on *res judicata* grounds.

For all the foregoing reasons, this Court respectfully suggests that its decision sustaining Bernicker's preliminary objections and dismissing Bell's complaint be upheld on appeal.

BY THE COURT:

Dated: October 28, 2005 **HOWLAND W. ABRAMSON, J.**

Phila. Ct. Com. Pl. LEXIS 61, *4, Commerce Program (2004).

Moreover, Bell's 2005 Complaint is based on alleged lease rights accruing through November 30, 2003, which were before or during the pendency of the 2001 Case. Bell has not asserted that any new claims arose *after* Judge Rizzo dismissed the 2001 Case on November 1, 2004.

[2] The Pennsylvania Superior Court, in its March 15, 2005 Order quashing Bell's appeal, stated that the "November 1st order was immediately appealable upon its entry on the trial court docket."

Indeed, Bell himself recognized the effect of Judge Rizzo's November 1, 2004 Order. In his Motion for Reconsideration of Judge Rizzo's November 1, 2004 Order, Bell argued that "to the extent that the November 1 Order strikes the confessed judgment and dismisses the Complaint in Confession of Judgment, with prejudice, [Bell] will be severely prejudiced in that [Bell] will not be able to assert [Bell's] substantive claims against [Bernicker] arising from [Bernicker's] breach of the Lease." See Bell's Motion for Reconsideration, ¶ 9.