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Subpena Duces Tecum

CIVIL CASE

General Code, Sec. 11501, 3

The State of Ohio, Hocking County. Common Pleas Court

To FRED JURGENSMIER

You are hereby required to be and appear before the Common Pleas Court at the Court House in said County, on the 30 *day of* August *A. D. 19* 57, *at* 10:30 *o'clock* A. M., *to testify as a witness in a certain case pending in said Court, wherein* IN RE: THE VACATION AND ALTERATION OF PART OF PLAT OF GRACELAND ADDITION TO THE CITY OF LOGAN, OHIO WHICH PART OF THE PLAT TO BE VACATED AND ALTERED IS PARTICULARLY DESCRIBED AS BEING THE WEST HALF OF LOTS NOS. 12, 25, AND 50, AND ALL OF LOTS NOS. 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 51, and 52, in said Graceland Addition to The City of Logan, Ohio *Plaintiff*, *and Defendant*;

and also that you bring with you and produce at the time and place aforesaid

all of the books and records of the Logan Development Company

and not depart the Court without leave. Herein fail not, under penalty of the law. And have you then and there this writ.

Said Court requires your said attendance on behalf of the Defendant

WITNESS my hand and the seal of said Court, this 30th *day of* Aug. 19 57

(SEAL)

THELMA KEYES *Clerk*

Returned and Filed
Aug.30, 1957
Thelma Keyes Clerk
Hocking County Common Please Court By ..... *Deputy*

IN THE COURT OF COMMON PLEAS, HOCKING COUNTY, OHIO

IN RE: THE VACATION AND ALTERATION OF PART OF PLAT OF GRACELAND ADDITION TO THE CITY OF LOGAN, OHIO, WHICH PART OF THE PLAT TO BE VACATED AND ALTERED IS PARTICULARLY DESCRIBED AS BEING THE WEST HALF OF LOTS NOS. 12, 25 AND 50, AND ALL OF LOTS NOS. 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 51 AND 52 IN SAID GRACELAND ADDITION TO THE CITY OF LOGAN, OHIO.) NO. 11,404

M O T I O N

Now comes the Defendant and respectfully moves the Court to dismiss this Action, said Motion being made, and each Branch thereof as an independent Motion and not as a series, to be considered independently each of the other.

BRANCH I

Defendant says that the action should be dismissed because there was an action pending at the time this Action was commenced.

BRANCH II

Defendant moves the Court to dismiss the Action because the subject of action herein has been previously litigated and the subject of action is therefore Res Adjudicata.

BRANCH III

Defendant respectfully moves the Court to dismiss Logan Development Company as a party Plaintiff for the reason that Logan Development Company is admittedly guilty of maintenance.

M E M O R A N D U M

BRANCH I

The present Action is the second in a series of actions commenced by Logan Development Company as Plaintiff to relieve them from the covenants contained in their binding contract which platted the Graceland Addition and which restrictive covenants were carried forward to the lot holders by Logan Development Company's binding contract of Warranty Deed. Those restrictive covenants as designed and set up by Logan Development Company were covenants and limitations that ran with the land.

This first Action by Logan Developmant Company was pending in the Court of Common Pleas and the Defendant, James Comstock, was made a party thereto. The Defendant, James Comstock, filed his Answer in the first Case, being Number 11,382, and that matter was at issue before the action in Case Number 11,382, was terminated. The same Plaintiff files his Second Action covering exactly the same premises and involving the same parties, being Case Number 11,404. Notice constitutes the equivalent of service. Demanding exactly the same relief with precisely the same restrictive covenants to be relieved.

The Defendant contends that the Action pending in Case Number 11,382 precludes the Defendant from filing a Second Action until the First Action has been finally disposed of in some manner. In a case of similar nature where the parties has two actions pending at the same time, the court had this to say: Laurer Et. Al. Vs. Smith, 1 Occ. (N. S.) 121 at 123.

> "For a period of 83 days Plaintiff had two actions pending in the same court, for the same thing and between the same parties. Under the law, a party is not permitted to have and enjoy the luxury of more than one lawsuit concerning the same subject, between the same parties, in the same court and at the same time. All in excess of one suit would be regarded as vexatious and improper, and upon the attention of the court being directed to the fact by answer or demurrer would subject the offending party to discipline, requiring him to dismiss the vexatious suit and be made to pay the cost made in bringing them and perhaps, subject him to an action in behalf of the injured party for damages.

Rights in the case of Miller Vs. Court, 151 O. S. 397. In the 3rd sylabus the court said:

> "The second action should abate."

18 Abatement and Revival, 1 O. Jur. 19, Section 6.

> "The law does not permit a Defendant to be harrassed and oppressed by two actions for the same cause--where Defendant has a complete remedy by one."

The Court have been almost uniform in their decisions, holding that a pending action precludes a party from filing a Second Action. Weil Vs. Guerin, 42 O. S. 299. Part of the sylabus says:

> "The principal that the pending of a former suit, legal or equitable, between the same parties, for the same cause, is matter of defense to a second suit in a court of the same state, has its foundation in justice and is firmly established."

At page 304. In the Weil case the court says:

> "And, indeed, it is shown by the authorities I have cited, that oppressive and vexatious litigation can only be prevented, in any case, by strict adherence to rules well established, 'and prominent among these is the duty to avoid multiplicity of suits, and to attain a final and complete determination of all questions involved in it with the least delay and at the least possible expense,' " Penn Vs. Harward, 14 O. S. 302-306.

The item of Lis Pendens has been widely tested in the State of Ohio and the Courts have established defeinite standards to determine whether the action pending are identical. These tests are recorded in 1 O. Jur. 2D 21, Section 8, to-wit:

1. Would the evidence be the same in both petitions?
2. Would the measure of damage be the same in both actions?
3. Would the recovery in the First Action be a bar to a Second Action?
4. The subject matter or cause of action in each case should be the same.
5. It is often said that the cause of action must be identical. Maxwell Vs. Snyder.

The Plaintiff was not careful in the preparation and prosecution of his statutory claim. That mark of preparation and prosecution should not be charged to the Defendant, but the Plaintiff must suffer from his own ineptitude. In the action pending, being Case Number 11,382, the Plaintiff could have perfected his action against the Defendant by making use of legal tools available to him. Revised Code 2307.20 says:

> "Parties who are united in interest must be joined as Plaintiffs or Defendants."

The Plaintiff could have requested the Court's permission to have amended his Action to bring the proper parties before the court. 72 O. S. 494. Graphaphone Co. Vs. Slawson; Ramsdell Vs. Bonser, 53 O. App. 462; Young Vs. Meyers Et al., 124 O. S. 448.

In the last cited case of Young Vs. Meyers Et. Al., 124 O. S. 448, the court, in construing that statute, says:

> "Parties who are united in interest must be joined as Plaintiffs or Defendants is mandatory."

The Plaintiff might have protected his right of action by properly dismissing his First Action without prejudice to bringing a new action by virtue of Revised Code 2307.26. Revised Code 2307.26 reads as follows:

> "The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights. When such determination cannot be had without the presence of other parties, the court may order them to be brought in, or dismiss the action without prejudice."

It is clear that the Plaintiff has the right to dismiss his Action without prejudice to his right to bring another Action upon the same cause of action, but it is clear that the Defendant cannot, in the words of Laurer Et. Al vs Smith, 1 Occ. (N.S.).

> "Under the law, a party is not permitted to have and enjoy the luxury of moer than one law suit concerning the same subject, between the same parties, in the same court and at the same time."

The second law suit must abate and the Plaintiff must persue his remedy under the First Cause of Action.

1. O. Jur. 2 D 19, Section 6.

> "The pending of another action between the parties for the same cause, at the time of commencement of a Second Action, is not a defense of merits, but is as a matter of abatement thereof, and should raise question by answer or demurrer."

In a case citation with reference to abatement, the court says:

> "The code did not intend to make a new rule for determining the identity of causes of action, but to enforce the old maxim that no one should be twice vexed for the same cause." State vs Nolte, 11 O. S. 486 at 492.

As previously stated, the Defendant has been guiltless with reference to the Plaintiff's errors committed relative to the defense of Lis Pendens by the necessity for abating the Action in 11,404. The Defendant quotes our own Judge Rowland of Athens County when he says:

> "While it is intended that the Plaintiff shall have a quick and summary redress in such cases, the law also provides and such should be the case that the Defendant be also safeguarded. If he is cited into court, required to employ counsel and defendant and a verdict rendered in his favor he should not again be called upon to be required to employ counsel and prosecute a defense in another court, but should enjoy the benefits of Res Adjudicata as to such matters that was or could have been determined and litigated in the original action." In the case of Jones vs Whaley, 10 Ohio Opinions 87 at 92.

And again in a different case concerning the negligence of Plaintiff's or their Attorney's, the court says in the case of Ewing vs McNairy and Claffin, 20 O. S. 315 at 322.

> "The Plaintiffs simply seek relief against their own carelessness, or that of their attorney, without showing any fault or omission by the adversary party. Such relief the law never administers. By refusing to relieve parties against the consequences of their own neglect, it seeks to make them vigilant and careful. On any other principle there would be no end to an action, and there would be an end to all vigilance and care in its preparation and trial."

The Committed errors must be charges against the parties responsible for these errors. The parties seeking relief must be vigilant concerning his rights and cautious concerning details.

M E M O R A N D U M

BRANCH II

The Plaintiff in this Action as previously stated, filed an action in Court of Common Pleas based upon a remedy provided by Revised Code 711.17 being Case Number 11,382 and subsequently filed a Second Action in the same Court on the same statutory remedy being Case Number 11,404; both cases were pending for some time and the second case, being Number 11,404, was being heard upon appeal in the Court of Appeals when Plaintiff dismissed Cause Number 11,382 while the same was at issue without consent of the Defendant and over the objection of the Defendant.

The Journal Entry dismissing that Action reads as follows:

> "This 8th day of June, 1957, this cause came on to be heard upon the application and answer filed in this cause. The court being fully advised in the premises finds that there is a defect of parties and that the application of the Logan Development Company should be dismissed.
> It is therefore ordered, adjudged and decreed that the same is hereby dismissed and applicant is ordered to pay the costs."

_____ Judge

APPROVED:

_____ Attorney for Applicant

_____ Attorney for James Comstock

Filed June 8, 1957

It will be noted in the Journal Entry that the Court says:

"The Court being fully advised in the premises." It will be further noted that the Court said:

> "That the same is dismissed and applicant ordered to pay the costs."

Examination of the Journal Entry discloses that the Action was dismissed and the Plaintiff failed to reserve his right to file a new Action. In the case involved in 108 O.S. 30, the Court says:

> " A party who moves successfully for judgment upon the pleadings, cannot complain on the grounds that the issue of fact were not adjudicated."

Under the old chancery practice, dismissal, unless qualified by the words "without prejudice", was conclusive on the subject matter. 4 O.S. 251, 23 O.S. (560

In the case of Lauderback vs Collins, 4 O.S. 251 at 262, where it appeals that the dismissal was upon a hearing of the case, it should be imferred that it was upon merit. Revised Code 2323.04 provides that it is permissive for the Court to dismiss an action without prejudice; contrawise, it is true that where the court has dismissed an action without reserving the right to proceed to another action. The dismissal is with prejudice in the instant action in court would not reserve Plaintiff the right to file a Second Action on the same cause of Action.

The Defendant did not invite the dismissal, nor was the dismissal