

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Hon. Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2016-001691  
Case No. 2015-CP-23-06023

**RECEIVED**

MAY 18 2018

SC Court of Appeals

iStar Tara, LLC, ..... Respondent,

v.

Stevens Aviation, Inc., Greenville County,  
South Carolina, and City of Greenville,  
South Carolina, ..... Defendants,

Of whom

Stevens Aviation, Inc., is the ..... Appellant.

**RESPONSE OF APPELLANT IN OPPOSITION TO RESPONDENT'S  
MOTION TO DISMISS APPEAL AS MOOT**

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*Attorneys for Appellant Stevens Aviation, Inc.*

Appellant Stevens Aviation, Inc. ("Stevens Aviation") hereby provides this response (the "Response") in opposition to the Motion to Dismiss Appeal as Moot (the "Motion") filed on May 11, 2018 by Respondent iStar Tara LLC ("iStar"). As set forth below, the Motion should be denied.

## **I. INTRODUCTION**

This case involves Stevens Aviation's appeal of the dismissal of its counterclaims against iStar by the Circuit Court. In its Motion, iStar seeks dismissal of the appeal on the grounds that the counterclaims are barred as a matter of res judicata. The Motion is premised upon iStar's assertion that Stevens Aviation waived the counterclaims against iStar by failing to assert them in an Ohio foreclosure action iStar filed approximately nine months *after* it filed the South Carolina actions in which Stevens Aviation pled the counterclaims. iStar's argument is that the counterclaims are compulsory counterclaims deemed to have been adjudicated by the Ohio court's entry of judgment in the Ohio foreclosure action, with the concomitant effect of eliminating the counterclaims in the South Carolina cases as a matter of res judicata. This argument is legally flawed and incorrect. It is also wrong as a matter of policy.

Rule 13(a) of the South Carolina Rules of Civil Procedure, and Rule 13(a) of the Ohio Rules of Civil Procedure ("Ohio Rule 13(a)"),<sup>1</sup> both provide the following exception to the compulsory counterclaim rule,<sup>2</sup> "the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, . . .". Pursuant to this exception, Stevens Aviation was not required to assert the counterclaims in iStar's subsequent foreclosure action. Indeed, it would have been inappropriate for Stevens Aviation to reassert the

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<sup>1</sup> A copy of Rule 13 of the Ohio Rules of Civil Procedure is attached as Exhibit A to this Response.

<sup>2</sup> Both states' Rule 13(a) provides that certain counterclaims are deemed to be compulsory counterclaims, and must be asserted in the responsive pleading to the complaint.

counterclaims, which would have resulted in duplicate litigation of the same claims in different courts in different states.

## **II. BACKGROUND**

On October 2, 2015, iStar filed actions in both Greenville County and Spartanburg County upon its outstanding loans with Stevens Aviation and to foreclose its assignment of leasehold interests and its security interest in certain fixtures. The actions in the two counties were identical, except that the Greenville County action pertained to Stevens Aviation's leasehold interest at the Donaldson airport in Greenville, and the Spartanburg County action pertained to Stevens Aviation's leasehold interest at the Greenville-Spartanburg airport in Spartanburg County. Stevens Aviation filed its answer and counterclaims in each of these actions on December 1, 2015.

Recognizing that the two South Carolina actions involved a determination of the same issues and matters, the parties entered into the Consent Order filed on March 3, 2016 staying the Spartanburg County action until the completion of the Greenville County action.

iStar filed a motion to dismiss Stevens Aviation's counterclaims, and on April 26, 2016 the Circuit Court filed its Order Granting Plaintiff's Motion to Dismiss Counterclaims. Stevens Aviation filed a motion for reconsideration. On July 27, 2016, the Circuit Court filed an Order denying the motion. Stevens Aviation then filed the appeal now before this Court. The final briefs in the appeal before this Court were filed on or about April 27, 2017.

Meanwhile, on June 30, 2016, iStar filed and commenced an action in Montgomery County, Ohio, seeking to foreclose on leasehold interests of Stevens Aviation in Ohio. In its Complaint for Foreclosure (attached as Exhibit A to the Motion), iStar included claims on the same loan indebtedness which is the subject of the Greenville County and Spartanburg County actions

previously filed. Stevens Aviation answered the complaint, but did not repeat its counterclaims which were, and are, pending in South Carolina.

During this time, iStar also commenced foreclosure of its assignment of Stevens Aviation's leasehold interest in property located in Davidson County, Tennessee. Tennessee has a non-judicial foreclosure process, and iStar did not file, or need to file, a court action for its foreclosure on the Tennessee leasehold interest. The property was scheduled for sale two or more times, including for September 21, 2017; however, the sale has not yet occurred.

As shown in Exhibit C to iStar's Motion, the Ohio Court of Common Pleas filed its Final Decree and Judgment in Foreclosure on April 18, 2017. It includes findings on the loan indebtedness and iStar's right to foreclose upon its Ohio collateral. It does not in any respect address Stevens Aviation's counterclaims filed and still pending in the South Carolina cases.

### **III. ARGUMENT**

Pursuant to Ohio Rule 13(a), Stevens Aviation was not required to reassert – for a third time – its counterclaims against iStar in the Ohio case. Stevens Aviation had already alleged its counterclaims in the Greenville County and Spartanburg County actions filed by iStar. The counterclaims were the subject of the pending actions in South Carolina. Accordingly, the counterclaims are not waived. The Ohio court did not adjudicate, or in any way address, the counterclaims, and the doctrine of res judicata is not applicable to them. The Motion must be denied.

To establish res judicata, three elements must be shown: (1) the prior action was between the same parties; (2) the prior action involved the same subject matter; and (3) the issue was adjudicated in the prior action. *Sealy v. Dodge*, 289 S.C. 543, 347 S.E.2d 504 (1986) Res judicata bars *subsequent* actions by the parties when the claims arise from the same transaction or

occurrence that was the subject of a prior action between those parties. *Sub-Zero Freezer Co. v. R.J. Clarkson Co.*, 308 S.C. 188, 417 S.E.2d 569 (1992) (emphasis added). A litigant is barred from raising issues which were adjudicated in a *former* suit between the parties and issues which might have been raised in the *former* suit. *Eichman v. Eichman*, 285 S.C. 378, 329 S.E.2d 764 (1985) (emphasis added). See also *Riedman Corp. v. Greenville Steel Structures*, 308 S.C. 467, 419 S.E.2d 217 (1992); *Advance Int'l, Inc. v. N.C. Nat'l Bank*, 316 S.C. 266, 449 S.E.2d 580 (Ct. App. 1994).

Res judicata is premised on the issues having been raised and adjudicated in prior (“former”) litigation between the parties. The doctrine of res judicata is consistent with the compulsory claim exception in Rule 13(a) for claims already “the subject of another pending action.” Both res judicata and Rule 13(a) prevent duplicate or repeat litigation of the same claims between the parties.

Rule 13(a) was well explained by the Court in the decision *Union Paving Company v. Downer Corporation*, 276 F.2d 468 (9<sup>th</sup> Cir. 1960), in the context of Rule 13(a) of the Federal Rules of Civil Procedure, which was and is, in pertinent part, the same as Rule 13(a), SCRCP, and Ohio Rule 13(a).<sup>3</sup> In discussing the rule’s provision and purpose of dictating that some claims are compulsory, the Court stated that, “The apparent purpose of such compulsion is to prevent a multiplicity of lawsuits.” *Id.*, 276 F.2d at 470. The Court then went on to state that:

There is, however, an exception to this waiver rule. When the cause of action which would otherwise of necessity be pleaded as a compulsory counterclaim under Rule 13(a) is also the subject of pending litigation in another court – litigation which had been commenced before the instant action – waiver will not result from the failure to counterclaim the cause of action in question and the

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<sup>3</sup> Ohio Rule 13(a) was “patterned after the federal rule, and, with the exception of subdivision (J), is virtually identical to the federal rule.” *Dungan v. Bryant*, C.A. No. 3393, 1983 WL 3996 at \*2 (Ohio Ct. App. March 2, 1983).

failing party will not thereafter be barred by res judicata. . . . This exception enables a party to escape the waiver rule if he has already begun his action in another forum of his choosing.

*Id.*, at 470. *Accord, Dungan v. Bryant*, C.A. No. 3393, 1983 WL 3996 (Ohio Ct. App. March 2, 1983) (quoting *Union Paving Company v. Downer*).<sup>4</sup>

Pursuant to the Ohio Rule 13(a) exception, a party need not have filed its claim as a compulsory counterclaim in a subsequent action if the claim was “the subject of another pending action.” *White Cross Hospital Association of Ohio v. Weber*, NO. 80AP-965, 1981 WL 3166 at \*3 (Ohio Ct. App. April 30, 1981); and *Cicchini v. Galmish*, No. 2003CA00121, 2004 WL 1397612, at \*4 (Ohio Ct. App. June 23, 2004).<sup>5</sup>

iStar’s argument rests on the proposition that Stevens Aviation was required to assert the counterclaims in the Ohio action or lose them, *i.e.*, waive them, with the effect that the Ohio decision should be deemed to have adjudicated the counterclaims. This argument would disregard Ohio Rule 13(a) (and Rule 13(a), SCRCF). Stevens Aviation had already asserted the counterclaims the South Carolina actions, which were pending at the time of the commencement of the Ohio action, and are still pending. Stevens Aviation was not required to reassert the counterclaims in Ohio. The counterclaims were expressly excepted from being compulsory counterclaims in the Ohio action. Accordingly, they are not deemed adjudicated by the Ohio judgment.

Because the counterclaims were not adjudicated by the Ohio court, the Ohio judgment has no res judicata effect on the counterclaims. Res judicata applies only if the claims were adjudicated

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<sup>4</sup> Copies of the Ohio decisions cited herein are attached hereto, collectively, as Exhibit B to this Response.

<sup>5</sup> In South Carolina, the exception under Rule 13(a), SCRCF, yields the same result. *See Edwards v. Timmons*, 297 S.C. 314, 315-16, 377 S.E.2d 97, 98 (1988) (stating that a seller’s counterclaim for fraud was the subject of a pending action she filed to recover the same property, and thus not a compulsory counterclaim).

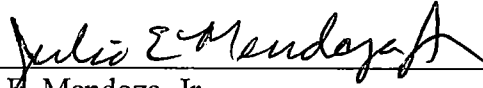
in the former case. *Sealy v. Dodge, supra.*; *Eichman v. Eichman, supra.*; *Riedman Corp. v. Greenville Steel Structures, supra.*; and *Advance Int'l, Inc. v. N.C. Nat'l Bank, supra.* That required element of res judicata does not exist in this case.

Notably, the exception in Rule 13(a) eliminating the need for the repeated assertion of counterclaims already pending in another case in another court, and the inapplicability of res judicata resulting from the exception, are consistent with judicial economy, comity and avoidance of duplicate litigation. *See Union Paving Company v. Downer Corporation, supra.* Stevens Aviation, having already asserted its counterclaims in the two South Carolina cases, should not have to reassert them and engage in simultaneous duplicate litigation of the same issues in other courts. iStar filed actions in South Carolina and Ohio, and may file action in Tennessee. Litigation of the same issues in each case could lead to inconsistent decisions on the same issues, and it would certainly lead to increased expense and time spent in the litigation. The exception in Rule 13(a) enables a party to avoid such an inefficient and expensive course of duplicate litigation.

#### **IV. CONCLUSION**

Res judicata does not apply to the counterclaims in this case, and the appeal is not moot. Stevens Aviation was not required to reallege the counterclaims in the Ohio case, by the exception to compulsory counterclaims in Ohio Rule 13(a), and the Ohio court did not adjudicate the counterclaims. The counterclaims are not eliminated by the Ohio decision. The Motion should be denied.

Respectfully submitted,



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*Attorneys for Appellant Stevens Aviation, Inc.*

May 18, 2018  
Greenville, South Carolina

# EXHIBIT A

### **RULE 13. Counterclaim and Cross-Claim**

**(A) Compulsory counterclaims.** A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

**(B) Permissive counterclaims.** A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

**(C) Counterclaim exceeding opposing claim.** A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

**(D) Counterclaim against this state.** These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against this state, a political subdivision or an officer in his representative capacity or agent of either.

**(E) Counterclaim maturing or acquired after pleading.** A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleadings.

**(F) Omitted counterclaim.** When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.

**(G) Cross-claim against co-party.** A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

**(H) Joinder of additional parties.** Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rule 19, Rule 19.1, and Rule 20. Such persons shall be served pursuant to Rule 4 through Rule 4.6.

**(I) Separate trials; separate judgments.** If the court orders separate trials as provided in Rule 42(B), judgment on a counterclaim or cross-claim may be rendered in accordance with the terms of Rule 54(B) when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

**(J) Certification of proceedings.** In the event that a counterclaim, cross-claim, or third-party claim exceeds the jurisdiction of the court, the court shall certify the proceedings in the case to the court of common pleas.

[Effective: July 1, 1970; amended effective July 1, 1971.]

# EXHIBIT B

1983 WL 3996

Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES  
FOR REPORTING OF OPINIONS AND  
WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,  
Ninth District, Lorain County.

JESSE C. DUNGAN Plaintiff-Appellant

v.

EUGENE BRYANT Defendant-Appellee

C.A. NO. 3393.

March 2, 1983.

APPEAL FROM JUDGMENT ENTERED IN THE  
COMMON PLEAS COURT COUNTY OF LORAIN,  
OHIO CASE NO. 89555 82.

**Attorneys and Law Firms**

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JEROME J. SAVOY, Attorney at Law, 333 Third St.,  
Elyria, OH 44035 for Defendant.

DECISION AND JOURNAL ENTRY

QUILLIN, J.

\*1 This cause was heard January 28, 1983, upon the record in the trial court, and the briefs. It was argued by counsel for the parties and submitted to the court. We have reviewed each assignment of error and make the following disposition:

Plaintiff-appellant Jesse C. Dungan appeals from the trial court's dismissal of his cause of action on the grounds that said cause was barred because it constituted a compulsory counterclaim which should have been brought in a previous case. We affirm.

FACTS

On May 1, 1979, plaintiff Jesse Dungan was operating his automobile in which his wife, Katherine Dungan, was a passenger. Plaintiff's automobile collided with that being driven by defendant-appellee Eugene Bryant.

Plaintiff and his wife subsequently filed suit in the Lorain County Court of Common Pleas against Bryant. Defendant counterclaimed against plaintiff for his damages and injuries, alleging plaintiff's negligence in the collision. Bryant also filed a third-party complaint against plaintiff for contribution as a joint-tortfeasor for the injuries sustained by Mrs. Dungan.

On February 24, prior to commencement of trial, plaintiff moved to dismiss without prejudice his claims against Bryant. The motion was granted without Bryant's approval. Trial was had and the jury returned a verdict in favor of Mrs. Dungan, the remaining plaintiff, on her complaint. The jury found adversely to Bryant on his counterclaim against Mr. Dungan, as well as on his third-party claim for contribution.

On April 27, plaintiff refiled his claim against Bryant, who then filed a motion to dismiss. On August 3, 1982, the lower court granted the motion to dismiss on the grounds that plaintiff's claim was a compulsory counterclaim under Civ. R. 13(A) and should have been pled in the previous litigation.

ASSIGNMENT OF ERROR

"The Court of Common Pleas by issuing an Order granting defendant-appellee's motion to dismiss pursuant to Rule 13(A) of the Ohio Rules of Civil Procedure violated the provisions of Civil Rule 41 and deprived plaintiff-appellant of his right to refile an action pursuant to Ohio Revised Code Section 2305.19."

Plaintiff alleges that the instant case is governed by Civ. R. 19.1(A) which provides, in part, that:

"(A) Persons to be joined. A person who is subject to service of process shall be joined as a party in the action, \*\*\*if he has an interest in or a claim arising out of the following situations:

\*\*\*\*

“(2) Personal injury or property damage to a husband or wife and a claim of the spouse for loss of services or expenses or property damage if caused by the same wrongful act;

“\*\*\*.

“If he has not been so joined, the court\*\*\*shall order that he be made a party upon timely assertion of the defense of failure to join a party as provided in Rule 12(B)(7). If the defense is not timely asserted, waiver is applicable as provided in Rule 12(G) and (H).\*\*\*.”

Plaintiff contends that because defendant did not object to the voluntary dismissal without prejudice of plaintiff's claims, defendant cannot now be heard to complain that he is being subjected to separate suits by the husband and wife on the same subject matter. *Layne v. Huffman* (1974), 43 Ohio App. 2d 53, *aff'd.* (1975), 42 Ohio St. 2d 287.

\*2 While we do not disagree with plaintiff's interpretation of Civ. R. 19.1 and its accompanying case law, we must conclude that Rule 19.1 is inapplicable to the facts of the instant case.

None of the cases relied upon by plaintiff applying Civ. R. 19.1 involved the existence of a compulsory counterclaim under Civ. R. 13(A) which requires that:

“A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, \*\*\*.”

Our Civ. R. 13 was patterned after the federal rule, and, with the exception of subdivision (J), is virtually identical to the federal rule. Thus, applying the same reasoning employed under the federal rules, Ohio courts

have held that if a party does not file a compulsory counterclaim under Ohio Civ. R. 13(A), he has waived his right to thereafter assert that claim. *Rosenberg v. Gattarello* (1976), 49 Ohio App. 2d 87; and *Broadway Mgmt., Inc. v. Godale* (1977), 55 Ohio App. 2d 49.

The purpose of the compulsory counterclaim rule is to prevent multiplicity of actions and to achieve resolution in a single lawsuit all disputes arising out of common matters. *CCMS Publishing Co., Inc. v. Dooley-Maloof, Inc.* (C.A. 10, 1981), 645 F.2d 33. This rule should be given a broad realistic interpretation to achieve that purpose. *Sue & Sam Mfg. Co. v. B-L-S Const. Co.* (C.A. 4, 1976), 538 F. 2d 1048.

Although a counterclaim is normally asserted by a defendant in his answer, it may be asserted by the plaintiff in his reply. *Index Fund, Inc. v. Hagopian* (D.C.S.D.N.Y., 1981), 91 FRD 599.

There can be no dispute that had Bryant filed his action against Jessie Dungan first, Dungan would be required to file a counterclaim or waive his action. Does it make any difference that when Bryant filed his action against Dungan in the form of a counterclaim, Dungan's action was already pending against Bryant in the form of an original complaint? We think not.

The exception in Civ. R. 13(A) that a counterclaim is not compulsory if at the time the action is commenced the counterclaim is “the subject of another pending action,” is of no avail to plaintiff. As stated in *Union Paving Co. v. Downer Corp.* (C.A. 9, 1960), 276 F. 2d 468, 470:

“The purpose of this exception is seemingly to prevent one party from compelling another to try his cause of action in a court not of the latter's choosing when the same cause of action is already the subject of pending litigation in another forum, one which was probably chosen by the owner of the cause of action concerned.”

Plaintiff argues that such a result would conflict with the court's order allowing him to dismiss his complaint against defendant without prejudice to refile. We disagree. Due to the posture of the case, plaintiff was required to refile his complaint, albeit as a counterclaim in the same action.

A contrary determination would result in the frustration of the intent underlying Civ. R. 13(A), i.e., to require that all claims between the parties to an action arising out of the same transaction or occurrence be litigated in one action, thus avoiding a multiplicity of lawsuits which "would involve a substantial duplication of effort and time by the parties and the court." *Great Lakes Rubber Corp. v. Cooper* (3d Cir., 1961), 286 F. 2d 631, at 634.

\*3 A dismissal without prejudice is merely a dismissal which does not operate as an adjudication upon the merits of the claim. This does not mean, however, that the voluntarily dismissed claim cannot be barred from being reasserted as a result of the operation of other procedural provisions. To hold otherwise would permit a defendant, who does not wish to have his compulsory counterclaim litigated in the same action as a claim against him, to defeat the mandatory provisions of Civ. R. 13(A) and preserve his counterclaim by simply filing his claim in the first action then voluntarily dismissing the claim without prejudice.

We likewise conclude that plaintiff's reliance upon the savings provisions of R.C. 2305.19 is misplaced. There is no suggestion that plaintiff's claim was not brought within the statute of limitations.

Accordingly, we find that the court did not err in holding that plaintiff's claims against defendant are now barred as a result of plaintiff's failure to set up said claims in the

previous action under the compulsory provisions of Civ. R. 13(A).

The assignment of error is overruled and the judgment is affirmed.

The court finds that there were reasonable grounds for this appeal.

We order that a special mandate, directing the County of Lorain Common Pleas Court to carry this judgment into execution, shall issue out of this court. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellant.

Exceptions.

MAHONEY, P. J., BAIRD, J. CONCUR

All Citations

Not Reported in N.E.2d, 1983 WL 3996

1981 WL 3166

Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES  
FOR REPORTING OF OPINIONS AND  
WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Tenth  
District, Franklin County.

The White Cross Hospital Association of Ohio dba  
Riverside Methodist Hospital, Plaintiff-Appellee,

v.

Larry A. Weber aka Larry  
Weber, Defendant-Appellant.

No. 80AP-965.

|  
April 30, 1981.

**Attorneys and Law Firms**

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Appellant.

DECISION

NORRIS, J.

\*1 This matter is before us on the appeal of defendant-appellant from a judgment rendered against him by a judge of the Franklin County Municipal Court on a cognovit note in case No. 411792.

On March 25, 1975, plaintiff White Cross Hospital filed in the municipal court a complaint and answer based upon a warrant of attorney and was awarded judgment in the amount of \$592.25 against defendant, based upon a cognovit note dated November 20, 1973.

On April 28, 1975, defendant filed a motion seeking to have the judgment set aside and the case transferred to the Common Pleas Court for Franklin County and the plaintiff required to set up its claim on the note

as a counterclaim in common pleas court case No. 74CV-10-3870. A copy of the complaint filed in that case was attached to the motion and indicates that the case was filed on October 17, 1974, by defendant and his wife, against plaintiff and a physician. The complaint alleged that the defendants in that case were negligent in the circumstances surrounding the birth of the Webers' baby on November 16, 1973, and that Weber had "incurred medical expenses in connection with the treatment of plaintiff Kathleen Weber because of the negligence of defendants" in the amount of \$1,500.

By entry dated May 2, 1975, the municipal court set aside the cognovit judgment and further provided that "in the interest of avoiding multiplicity of suits, the proceedings herein are hereby certified to the Franklin County Court of Common Pleas recommending consolidation with Case #74CV-10-3870."

On March 5, 1980, defendant filed a motion seeking summary judgment in the municipal court case. Attached to the motion were defendant's memorandum and exhibits which indicated that case No. 74CV-10-3870 had been dismissed on April 13, 1976, with leave of the common pleas court to the Webers to refile the case against the hospital; that on April 13, 1977, the Webers filed case No. 77CV-04-1562 in the common pleas court against the hospital only; that the complaint in that case contained allegations against the hospital which were almost identical to those contained in the complaint in case No. 74CV-10-3870; that case No. 77CV-04-1562 was dismissed on January 30, 1980, pursuant to Civ. R. 41(A) (2) with prejudice to all parties; and that the dismissal entry had not been approved for filing by counsel for the hospital. Defendant argued that the common pleas court had jurisdiction over all parties and that in dismissing case No. 77CV-04-1562, the court terminated "all claims either party may have had against the other as a result of said incident with prejudice to all parties."

Plaintiff, in its memorandum opposing defendant's motion for summary judgment, argued that, when the common pleas court had dismissed case No. 74CV-10-3870 without prejudice, plaintiff was free to pursue its claim in the municipal court case; that it had not filed its claim as a counterclaim in case No. 74CV-04-1562 and its claim had not otherwise been consolidated with that case; and that the dismissal with prejudice in case No. 77CV-04-1562 did not adjudicate plaintiff's claim.

\*2 On March 31, 1980, the municipal court overruled defendant's motion for summary judgment. Defendant then appealed to this court from that order, but we dismissed his appeal as premature, there not being an appealable order.

The municipal court case was then set for trial. The only transcript provided us does not include a record of any evidence that may have been heard, but does include this decision and order of the court:

"Oral motion of defendant to dismiss is overruled.

"Ruling upon jurisdiction: This Court resumed jurisdiction upon the dismissal of related actions in the Court of Common Pleas and asserted this jurisdiction in ruling upon the defendant's motion for summary judgment.

"Trial upon the merits, in response to motion of the plaintiff, is construed by this Court as a rehearing upon the issue of judgment rendered upon the cognovit filed on March 25, 1975.

"Accordingly, on the basis of the pleadings, judgment is rendered for the plaintiff in the amount of \$592.25, with costs as prayed for. To all of which, the defendant objects."

After the court announced its judgment, counsel for defendant renewed the arguments he had made with his motion for summary judgment, and also argued that plaintiff's claim was precluded because it had not been asserted as a compulsory counterclaim in either of the common pleas court cases.

Defendant propounds five assignments of error:

"I. The Franklin County Municipal Court erred when it failed to bar appellee's complaint, filed in Municipal Court Case #75-CV-F-411792 on March 25, 1975, as a compulsory counterclaim to appellant's complaint filed in the Franklin County Court of Common Pleas in case #74-CV-10-3870 on October 17, 1974, in violation of Rule 13(A), Ohio Rules of Civil Procedure.

"II. The Franklin County Municipal Court erred when it failed to rule that its 'certification' of the complaint filed in case #75-CV-411792 to the Franklin County Court of

Common Pleas divested it of jurisdiction and required the clerk of the Municipal Court to transfer said case to the Court of Common Pleas as made mandatory by R.C. 1901.22(G).

"III. The Franklin County Municipal Court erred when it failed to rule that because of its certification of case #75-CV-F-411792 to the Franklin County Court of Common Pleas and appellee's subsequent failure to file a counterclaim, that the dismissal of case #74-CV-10-3870, dismissed all actions between the appellant and the appellee.

"IV. The Franklin County Municipal Court erred when it failed to bar appellee's claim under the cognovit note as a compulsory counterclaim to appellant's complaint filed in case #77 CV-04-1562, as required by Rule 13(A), Ohio Rules of Civil Procedure.

"V. The Franklin County Municipal Court erred when it failed to rule that Judge Martin's dismissal of case #77 CV-04-1562 by the Court of Common Pleas of Franklin County, Ohio under Rule 41(A)(2) of the Ohio Rules of Civil Procedure barred appellee's claim as res judicata, since said dismissal was 'with prejudice to all parties.'"

\*3 Defendant also has filed a motion asking us to modify the record by including the records of common pleas court case Nos. 74CV-10-3890 and 77CV-04-1562. The motion is overruled for the reasons that these records were not before the trial court and they are not necessary to the resolution of this appeal.

The assignments of error are interrelated and will be considered together. In essence, defendant argues that plaintiff's claim represented by the cognovit note is barred due to plaintiff's failure to assert that claim as a compulsory counterclaim in either of the two suits filed by defendant against plaintiff in the common pleas court.

Civ. R. 13(A) reads in pertinent part as follows:

"A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim \* \* \*.

But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, \* \* \*.”

Under Civ. R. 13(A)(1), plaintiff need not have filed its claim as a compulsory counterclaim in the second action filed by defendant in the common pleas court if plaintiff's suit on the note was still pending before the municipal court, because if it was, then at the time defendant filed that second suit, plaintiff's claim “was the subject of another pending action.”

We note that, when the municipal court vacated its cognovit judgment and purportedly certified the case to the common pleas court, it recommended to the common pleas court that the case be consolidated with defendant's first common pleas court suit. Contrary to defendant's contention, this action by the municipal court did not divest the municipal court of jurisdiction in case No. 411792. Instead, that case remained open, pending its consolidation with the defendant's common pleas court case. In fact, the consolidation never took place, and the case was still pending before the municipal court when defendant's first common pleas court case was dismissed. Accordingly, plaintiff's claim “was the subject of another pending action” at the time defendant filed his second case in the common pleas court and plaintiff was therefore not required to assert its claim as a compulsory counterclaim in defendant's second common pleas court case.

The exception found in Civ. R. 13(A)(1) does not apply in our consideration of whether plaintiff was required to assert its claim as a compulsory counterclaim in defendant's first common pleas court case; plaintiff's municipal court case was filed subsequent to the filing of defendant's first common pleas court case.

Defendant maintains that plaintiff's claim was the subject of a compulsory counterclaim, since it arose out of the transaction or occurrence that was the subject of defendant's first common pleas court case.

The underlying purpose of the compulsory counterclaim rule is to enable the courts to settle all related claims in one action, thereby avoiding a wasteful multiplicity of litigation of claims arising from a single transaction or

occurrence. See: Wright and Miller, Federal Practice and Procedure (1971), Section 1409, page 36.

\*4 Avoiding a multiplicity of suits is a commendable public policy where the merits of claims arising out of a single transaction or occurrence can be adjudicated in one action. But, the compulsory counterclaim rule has no application where, as here, there is no adjudication on the merits in the principal action-it is simply dismissed at the request of the party bringing that action without prejudice to his refiling that same claim in the future-no claim has been adjudicated and a multiplicity of suits has not been avoided. A strict application of the compulsory counterclaim rule to bar plaintiff's claim under the circumstances of this case, would be illogical and unduly harsh. See Wright and Miller, Federal Practice and Procedure, supra, at Section 1417, page 98.

Accordingly, we hold that Civ. R. 13(A) has no application under the circumstances of this case, and it is therefore unnecessary for us to determine whether plaintiff's claim arose out of the transaction or occurrence that is the subject matter of defendant's claim in his first common pleas court case.

While defendant maintains that the municipal court erred in not completing a certification of the case to the common pleas court, he cites no authority for the municipal court to order such a certification. The municipal court is authorized to certify a case to the common pleas court only when a claim exceeds its jurisdiction. R.C. 1901.22; Civ. R. 13(J); see Robbins v. Jones (Ct. App.-1949), 56 Ohio Law Abs. 111, 90 N.E.2d 696. Although certification was not authorized, other remedies were available to defendant. For example, after the cognovit judgment was set aside in municipal court, he could have sought an order from the common pleas court to compel plaintiff to set up its claim in the first common pleas court case; the municipal court then would have been in a position to dismiss case No. 411792.

Defendant's motion and assignments of error are overruled, and the judgment of the municipal court is affirmed.

Motion overruled; Judgment affirmed.

REILLY and MOYER, JJ., concur.

**White Cross Hospital Association of Ohio v. Weber, Not Reported in N.E.2d (1981)**

1981 WL 3166

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**All Citations**

Not Reported in N.E.2d, 1981 WL 3166

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2004 WL 1397612

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,  
Fifth District, Stark County.

Gaetano Mattioli CICCHINI, Appellant

v.

Mary Ann GALMISH, Appellee.

No. 2003CA00121.

|  
Decided June 23, 2004.

**Synopsis**

**Background:** After judgment creditor filed certificates of judgment for lien on real property, real property owner filed action to quiet title and seeking declaration that certificates were invalid. The Court of Common Pleas, Stark County, No. 2002 CV 01938, entered judgment for creditor, and owner appealed.

**[Holding:]** The Court of Appeals, Batchelder, J., held that owner was not entitled to release of judgment liens.

Affirmed.

Appeal from Judgment Entered in the Court of Common Pleas, County of Stark, Ohio, Case No.2002 CV 01938.

**Attorneys and Law Firms**

William E. Walker, Jr., Attorney at Law, Canton, OH, for appellant.

Patrick J. O'Malley, and Robert E. Sweeney, Attorneys at Law, Cleveland, OH, for appellant.

A. William Zavarello, Attorney at Law, Akron, OH, for appellee.

**Opinion**

BATCHELDER, Judge.

\*1 ¶ 1 Appellant, Gaetano Mattioli Cicchini, appeals from the judgment of the Stark County Court of Common Pleas, which entered judgment in favor of Appellee, Mary Ann Galmish. We affirm.

I.

¶ 2 This appeal arises from Ms. Galmish's filing of certificates of judgment lien on certain real property owned by Mr. Cicchini, pursuant to a judgment rendered on August 26, 1997 in her favor by the Stark County Court of Common Pleas in a prior action.<sup>1</sup> In this judgment, the court journalized the jury verdict in Ms. Galmish's favor, which awarded her \$492,000.00 in compensatory damages, \$1,000,000.00 in punitive damages, and undetermined attorney fees. Thereafter, Ms. Galmish filed a motion for pre-judgment interest. Pursuant to a hearing on this motion, on October 15, 1997, the court issued a judgment entry that awarded Ms. Galmish pre-judgment interest on the compensatory damages.

¶ 3 On October 20, 1997, the court issued another judgment entry, awarding attorney fees equal to one-third of the total jury verdict, including compensatory and punitive damages, and applicable interest. Upon motion of Ms. Galmish for a judgment entry, the court issued another entry, awarding attorney fees in the amount of \$643,091.14.

¶ 4 On October 22, 1997, Ms. Galmish filed a certificate of judgment for lien that listed judgment in the amount of \$1,492,00 .00 with interest at the rate of ten percent per annum. This first certificate referenced the case number of the prior action. On December 3, 1997, Ms. Galmish filed a second certificate, which specified the attorney fee amount of \$643,091.14. This second certificate also listed this same case number. Over two and one-half years passed since the filing of this second certificate, and Mr. Cicchini had failed to make a payment.

¶ 5 On September 2, 2000, Ms. Galmish filed a third certificate. The third certificate referenced the case number of the prior action, and listed \$583.16 in costs. Additionally, a footnote on the certificate listed the amounts "\$492,000 plus ten percent (10%) interest[,]" representing the compensatory damages, and "\$1,000,000.00 plus attorney fees and ten percent (10%)

interest [.]” Mr. Cicchini made his first payment on December 22, 2000, and made six separate payments thereafter.

{¶ 6} Thereafter, Mr. Cicchini entered into agreements to sell the real property subject to the lien, but he could not proceed with the closing because the liens were not yet released. On January 5, 2002, Mr. Cicchini filed a complaint in the common pleas court that asserts claims for slander of title and quiet title, and seeks declaratory judgment that the certificates are invalid in whole or in part, as well as an injunction to halt Ms. Galmish's execution of the judgment liens. On August 14, 2002, pursuant to a status conference, the court issued an order that required the parties to submit uncontested facts and stipulations, briefs, and responses. In this order, the court noted that “by agreement of the parties, the [c]ourt will decide [the] issues based upon [the] briefs[.]”

\*2 {¶ 7} Pursuant to this order, Ms. Galmish filed a brief on the issues raised.<sup>2</sup> On September 30, 2002, Mr. Cicchini filed a partial motion for summary judgment, which sought judgment on both his quiet title claim and request for declaratory judgment. On October 21, 2002, Ms. Galmish filed a response in opposition to Mr. Cicchini's motion for partial summary judgment.

{¶ 8} In a judgment entry dated February 19, 2003, the trial court entered judgment in favor of Ms. Galmish. Specifically, the court found the following:

“(1) The remaining balance owed by [Mr.] Cicchini to [Ms.] Galmish on the judgment is \$51,353.49, plus \$14.07 per day until paid in full;

“(2) All judgment liens relating to Case No.1995CV00915 shall be released upon full payment of the judgment;

“(3) [Mr.] Cicchini's motion for partial summary judgment is hereby **OVERRULED**; and,

“(4) Based upon the Court's decision herein, [Ms. Galmish's] motion for summary judgment on the basis of statute of limitations, res judicata, and collateral estoppel are [sic.] **MOOT**.”

{¶ 9} It is from this decision entering judgment in Ms. Galmish's favor that Mr. Cicchini now appeals.

{¶ 10} Mr. Cicchini timely appealed,<sup>3</sup> asserting four assignments of error for review.<sup>4</sup> We address the first and second assignments of error together, for ease of review.

II.

A.

**First Assignment of Error**

“THE TRIAL COURT ERRED BY DENYING APPELLANTS' [sic.] MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST APPELLEE WHERE IT IS CLEAR THAT THE FIRST CERTIFICATE HAD BEEN FULLY PAID.”

**Second Assignment of Error**

[1] “THE TRIAL COURT ERRED BY DENYING APPELLANTS' [sic.] MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST APPELLEE WHERE IT IS CLEAR THAT THE THIRD CERTIFICATE DUPLICATED THE FULLY PAID FIRST CERTIFICATE.”

{¶ 11} In his first and second assignments of error, Mr. Cicchini contends that the trial court erred when it denied his motion for partial summary judgment. Specifically, Mr. Cicchini avers that (1) the first certificate had been fully paid, and that the court should have deemed this judgment lien released, and (2) the third certificate “duplicated” the first certificate that he alleges has been fully paid. Mr. Cicchini's averments lack merit.

{¶ 12} An appellate court reviews a denial or grant of summary judgment de novo, applying the same standard used by the trial court. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241; *Klingshirn v. Westview Concrete Corp.* (1996), 113 Ohio App.3d 178, 180, 680 N.E.2d 691. Any doubt is to be resolved in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12, 467 N.E.2d 1378. Pursuant to Civ.R. 56(C), summary judgment is proper if:

“(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence

that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.” *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

\*3 The party seeking summary judgment initially bears the burden of informing the trial court of the basis for the motion and identifying portions of the record demonstrating an absence of genuine issues of material fact as to the essential elements of the non-moving party's claims. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264. The movant must point to some evidence in the record of the type listed in Civ.R. 56(C) in support of the motion. *Id.*

{¶ 13} Once this burden is satisfied, the non-moving party has the burden, as set forth in Civ.R. 56(E), to offer specific facts showing a genuine issue for trial. The non-moving party may not rest upon the mere allegations and denials in the pleadings, but must instead point to or submit some evidentiary material that shows that a genuine dispute over the material facts exists. *Id.* See, also, *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735, 600 N.E.2d 791. In its review of a granting of summary judgment, an appellate court “review[s] the same evidentiary materials that were properly before the trial court at the time it ruled on the summary judgment motion.” *Am. Energy Servs., Inc. v. Lekan* (1992), 75 Ohio App.3d 205, 208, 598 N.E.2d 1315.

{¶ 14} In this case, the trial court found that the single debt arising from the prior action, which happened to be represented by three separate certificates, was not yet extinguished. The Supreme Court of Ohio has noted that a cause of action exists “when the debt secured has been paid in full or tendered or all other legal conditions have been fulfilled, and plaintiff is entitled to the release or satisfaction demanded or refused.” *Cotofan v. Steiner* (1959), 170 Ohio St. 163, 165-166, 163 N.E.2d 759. Thus, Mr. Cicchini's averment, that the first certificate should have been released, is contrary to law, and it would have been improper for the trial court to release any of the certificates of judgment lien arising from this debt.

{¶ 15} Mr. Cicchini also argues that the third certificate “duplicates” the first certificate in this case. We observe, however, that the third certificate actually lists a monetary

amount for costs, which is not listed on the first certificate. Furthermore, we agree with the trial court's reasoning regarding the claimed “duplicative” nature of the certificates:

“While the third [certificate] \* \* \* appears duplicative of the lien filed on October 22, 1997, it does state the interest as to the judgment with more specificity. Additionally, each of the judgment liens reference Case No.1995CV00915 as the underlying basis for the lien. There is one total amount owed on the judgment[.] \* \* \* Additionally, \* \* \* the balance owed on the debt \* \* \* is a matter of public record, capable of determination by anyone who requires the information.”

{¶ 16} Based upon the foregoing, we find that the trial court properly found in this case that Mr. Cicchini was not entitled to a release of the judgment liens until the single judgment was paid in full, since a balance remains on the debt. Thus, we conclude that Mr. Cicchini was not entitled to judgment as a matter of law, and that the trial court did not err when it granted judgment in Ms. Galmish's favor. See *Temple*, 50 Ohio St.2d at 327, 364 N.E.2d 267. Accordingly, Mr. Cicchini's first and second assignments of error are overruled.

B.

#### Third Assignment of Error

\*4 [2] “THE TRIAL COURT BY GRANTING [sic.] JUDGMENT IN FAVOR OF APPELLEE WHERE THERE WAS A DISPUTE OF FACT AS TO WHETHER THE SECOND CERTIFICATE OF LIEN HAD BEEN FULLY PAID.”

{¶ 17} In his third assignment of error, Mr. Cicchini contends that a genuine issue of fact remains as to whether the second certificate had been fully paid. Mr. Cicchini's contention lacks merit.

{¶ 18} Mr. Cicchini's argument, that an issue of fact remains, is puzzling. At no point during the proceedings before the trial court did Mr. Cicchini contest the issue of whether this second certificate was paid in full. In fact, Mr.

Cicchini consistently insisted that this second certificate be released, maintaining that all of [his] obligations \* \* \* to [Ms.] Galmish had been fully paid.” Generally, an issue that could have been raised in the trial court, but was not, cannot be considered for the first time on appeal, and is waived. See *Sekora v. General Motors Corp.* (1989), 61 Ohio App.3d 105, 112, 572 N.E.2d 184. More significantly, the parties had filed uncontested facts and stipulations with the trial court, and agreed to submit the case to the trial court for determination based upon these uncontested facts, stipulations, and briefs. Mr. Cicchini's third assignment of error is overruled.

C.

#### Fourth Assignment of Error

[3] “THE TRIAL COURT BY GRANTING [sic.] JUDGMENT IN FAVOR OF APPELLEE WHERE APPELLEE FAILED TO PRESENT A COUNTERCLAIM FOR A JUDGMENT IN HER FAVOR.”

{¶ 19} In his fourth assignment of error, Mr. Cicchini avers that the trial court improperly granted judgment in Ms. Galmish's favor, because Ms. Galmish's “claim” for unpaid amounts based upon the judgment liens in this case was not properly pled by Ms. Galmish before the trial court. Specifically, Mr. Cicchini argues that this “claim” should be considered a compulsory counterclaim, and that per Civ.R. 13 Ms. Galmish was required but failed to raise this claim for unpaid amounts in the form of a counterclaim. Mr. Cicchini's argument lacks merit.

{¶ 20} As noted above, the amount that Mr. Cicchini was ordered to pay on the underlying action, and the monetary balance remaining on the liens that Mr. Cicchini is still required to pay, arise not from the judgment from which Mr. Cicchini currently appeals, but from the trial court's previous order on the prior action. As such, Ms. Galmish had already obtained a judgment ordering the payment of this money already existed. Additionally, Civ.R. 13 provides that a party is not required to state a compulsory counterclaim if, at the time the action

was commenced, this claim was the subject of another pending action. Civ.R. 13(A)(1). Therefore, we fail to see how Ms. Galmish was required to file a claim for this amount previously adjudged to be owed by Mr. Cicchini. Accordingly, Mr. Cicchini's fourth assignment of error is overruled.

III.

[4] {¶ 21} Mr. Cicchini's first, second, third, and fourth assignments of error are overruled. The judgment of the Stark County Court of Common Pleas is affirmed.<sup>5</sup>

\*5 Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Stark, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

Exceptions.

BAIRD, P.J., and SLABY, J., concur.

All Citations

Not Reported in N.E.2d, 2004 WL 1397612, 2004 -Ohio- 3247

Footnotes

- 1 *Galmish v. Cicchini* (Aug. 26, 1997), Stark C.P. Case No.1995CV00915. In September 1997, Mr. Cicchini appealed this judgment from the prior action to the Fifth District Court of Appeals, and the court vacated the trial court judgment. This case was later transferred to this Court, and we reversed the trial court judgment and verdict. Pursuant to an appeal, the Supreme Court reinstated the trial court judgment. Thereafter, the trial court held proceedings regarding, inter alia, the determination of attorney fees, and issued a ruling in July 2001. Both parties appealed from this ruling, and both appeals were dismissed. Mr. Cicchini again attempted to appeal to the Ohio Supreme Court, and the Supreme Court dismissed this appeal.
- 2 The judgment from which Mr. Cicchini appeals reveals that the court construed this brief as a motion for summary judgment.
- 3 This case was transferred to this Court from the Fifth District Court of Appeals.
- 4 Mr. Cicchini has also filed motion to dismiss the appeal for lack of a final appealable order. Ms. Galmish has not responded to the motion. The motion is denied.
- 5 In her brief on appeal, Ms. Galmish requests that this Court charge Mr. Cicchini with payment of Ms. Galmish's attorney fees and costs, pursuant to App.R. 23. Ms. Galmish avers that this appeal instituted by Mr. Cicchini is a frivolous appeal. We cannot necessarily conclude that Mr. Cicchini's appeal did not present reasonable questions for review, and thus find that this appeal was not frivolous.

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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Hon. Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2016-001691  
Case No. 2015-CP-23-06023

**RECEIVED**  
MAY 18 2018  
SC Court of Appeals

iStar Tara, LLC, ..... Respondent,

v.

Stevens Aviation, Inc., Greenville County,  
South Carolina, and City of Greenville,  
South Carolina, ..... Defendants,

Of whom

Stevens Aviation, Inc., is the ..... Appellant.

**CERTIFICATE OF SERVICE**

I certify that I have served the foregoing Response of Appellant in Opposition to Respondent's Motion to Dismiss Appeal as Moot by depositing a copy of the same in the United States Mail on this 18th day of May, 2018, addressed to the following:

Rebecca K. Lindahl, Esquire  
Richard L. Farley, Esquire  
Lindsey L. Smith, Esquire  
Katten Muchin Rosenman LLP  
550 S. Tryon Street, Suite 2900  
Charlotte, NC 28202

Rivers S. Stillwell, Esquire  
Nelson Mullins Riley & Scarborough  
104 S. Main Street, Suite 900  
Greenville, SC 29601

  
Nexsen Pruet, LLC

Julio E. Mendoza, Jr.  
Member  
Admitted in SC

May 18, 2018

VIA HAND DELIVERY

RECEIVED

MAY 18 2018

SC Court of Appeals

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
1220 Senate Street  
Columbia, SC 29201

Re: *Stevens Aviation, Inc., Appellant v. iStar Tara LLC, Respondent;*  
Appellate Case No. 2016-001691

Dear Ms. Kitchings:

Enclosed please find the original and six copies of the Response of Appellant in Opposition to Respondent's Motion to Dismiss Appeal as Moot, with proof of service attached to the response, in the above-referenced appellate case. Also enclosed is an additional copy of the response, to provide a "clocked-in" copy of the document for my firm's files. Please file the response and provide a "clocked-in" copy to me.

Thank you for your assistance. Please do not hesitate to contact me if you need any further information.

With best regards,



Julio E. Mendoza, Jr.

Enclosure

cc: Rebecca K. Lindahl, Esquire  
Richard L. Farley, Esquire  
Lindsey L. Smith, Esquire  
Rivers S. Stilwell, Esquire

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- Charlotte
- Columbia**
- Greensboro
- Greenville
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The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
1220 Senate Street  
Columbia, SC 29201

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MAY 18 2018

SC Court of Appeals

56112-1