

IN THE SUPREME COURT OF OHIO

WASHINGTON MUTUAL BANK, FKA
WASHINGTON MUTUAL BANK, FA.,
Appellee,

v.

JACK K. BEATLEY, *et al.*,
Appellants.

08-1056

On Appeal from the
Franklin County Court of Appeals,
Tenth Appellate District

Court of Appeals
Case No. 06AP-1189

NOTICE OF CERTIFIED CONFLICT

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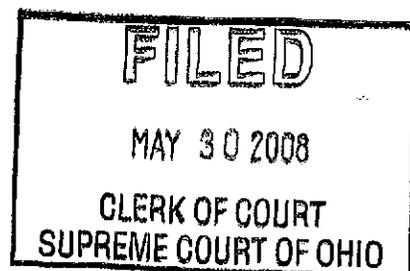
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Bank, fka, Washington Mutual Bank, FA



NOTICE OF CERTIFIED CONFLICT

Appellants Jack K. Beatley and 64 W. Northwood Avenue, LLC, hereby give notice to the Supreme Court of Ohio that on May 20, 2008, the Franklin County Court of Appeals, Tenth Appellate District, certified a conflict on a rule of law between its merit decision in *Washington Mut. Bank v. Beatley*, Franklin App. No. 06AP-1189, 2008-Ohio-1679, and the Ninth District Court of Appeals' decision in *Quality Internatl. Ents., Inc. v. IFCO Sys. N. Am., Inc.*, Summit App. No. 23131, 2006-Ohio-5883.

The May 20, 2008, Tenth District Court of Appeals' *Journal Entry* granting Appellants' motion to certify a conflict is attached hereto as Exhibit A. The May 20, 2008, Tenth District Court of Appeals' *Memorandum Decision* granting Appellants' motion to certify a conflict is attached hereto as Exhibit B.

Copies of the conflicting decisions of the Tenth District Court of Appeals' decision in *Washington Mut. Bank v. Beatley*, Franklin App. No. 06AP-1189, 2008-Ohio-1679, and the Ninth District Court of Appeals' decision in *Quality Internatl. Ents., Inc. v. IFCO Sys. N. Am., Inc.*, Summit App. No. 23131, 2006-Ohio-5883, are attached hereto as Exhibit C, and Exhibit D respectively.

The legal issue certified by the Tenth District Court is as follows:

When a trial court dismisses a plaintiff's action for lack of capacity to maintain an action, does R.C. 1703.29 prevent the plaintiff from appealing that decision?

Respectfully submitted,



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Counsel of record for Appellants
Jack K. Beatley and
64 W. Northwood Avenue, LLC

CERTIFICATE OF SERVICE

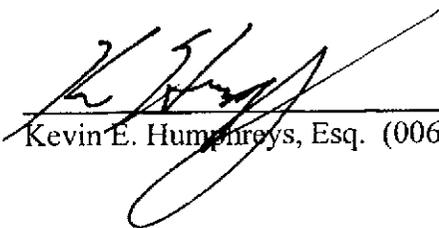
The undersigned hereby certifies that a copy of the foregoing Notice of Certified Conflict of Appellants Jack K. Beatley and 64 W. Northwood Avenue, LLC was deposited with the U.S. Postal Service for delivery via prepaid first class mail upon all parties entitled to service as identified below this 30th day of May, 2008:

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EXHIBIT A

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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO

2008 MAY 20 PM 3:26

CLERK OF COURTS

Washington Mutual Bank, fka,
Washington Mutual Bank, FA,

Plaintiff-Appellant,

v.

Jack K Beatley et al.,

Defendants-Appellees.

No. 06AP-1189

(C P C No 06CVE07-9086)

(REGULAR CALENDAR)

JOURNAL ENTRY

For the reasons stated in the memorandum decision of this court rendered herein on May 20, 2008, it is the order of this court that the motion to certify is granted. However, we do not agree with how appellees have framed the question to be certified. Instead of the question proposed by appellees, we certify the following question:

When a trial court dismisses a plaintiff's action for lack of capacity to maintain an action, does R.C. 1703.29 prevent the plaintiff from appealing that decision?

In conclusion, because our decision in the case at bar conflicts with the Ninth District Court of Appeals' decision in *Quality Internatl. Ents., Inc. v IFCO Sys. N. Am., Inc.*, Summit App. No. 23131, 2006-Ohio-51, on a rule of law, we grant appellees' motion.

KLATT, J., BROWN & FRENCH, JJ

By: William A Klatt
Judge William A. Klatt

EXHIBIT B

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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO
2008 MAY 20 PM 1:53
CLERK OF COURTS

Washington Mutual Bank, fka,
Washington Mutual Bank, FA,

Plaintiff-Appellant,

v.

Jack K. Beatley et al.,

Defendants-Appellees.

No. 06AP-1189
(C.P.C. No. 06CVE07-9066)

(REGULAR CALENDAR)

MEMORANDUM DECISION

Rendered on May 20, 2008

Roetzel & Andress, LPA, Thomas L. Rosenberg, Jessica L. Davis; and Kevin E. Humphreys, for appellee Jack K. Beatley.

Marc Dann, Attorney General, Michael L. Stokes and Kelly A. Borchers, for Amicus Curiae.

Taft, Stettinius & Hollister LLP, Gregory J. O'Brien; Jenner & Block LLP, John P. Wolfsmith, Matthew R. Devine; Lerner, Sampson & Rothfuss, and Pamela S. Petas, for appellant.

ON MOTION TO CERTIFY CONFLICT

KLATT, J.

{1} Defendants-appellees, Jack K. Beatley and 64 W. Northwood Avenue, LLC, have filed a motion to certify a conflict pursuant to App.R. 25(A) and Section 3(B)(4) of the Ohio Constitution. Plaintiff-appellant, Washington Mutual Bank, fka Washington

Mututal Bank, FA, has filed a memorandum in opposition to appellees' motion. For the following reasons, we grant appellees' motion.

{¶2} Section 3(B)(4), Article IV of the Ohio Constitution, gives the courts of appeals of this state the power to certify the record in a case to the Supreme Court of Ohio "whenever * * * a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals." Certification can be granted only where the judgments conflict upon the same question. *Johnson v. Indus. Comm.* (1939), 61 Ohio App. 535, 537. Before certifying a case to the Supreme Court of Ohio, an appellate court must satisfy three conditions: (1) the court must find that the asserted conflict is "upon the same question;" (2) the alleged conflict must be on a rule of law—not facts; (3) in its journal entry or opinion, the court must clearly set forth the rule of law that it contends is in conflict with the judgment on the same question by another district court of appeals. *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St.3d 594, 596. Such conflicts must be over questions that are still material to both judgments as to be dispositive of the cases. *Lyons v. Lyons* (Oct. 4, 1983), Franklin App. No. 82AP-949.

{¶3} Appellees contend that our decision in the case at bar is in conflict with the judgment of the Ninth District Court of Appeals in *Quality Internatl. Ents., Inc. v. IFCO Sys. N. Am., Inc.*, Summit App. No. 23131, 2006-Ohio-51 ("Quality International"). We agree.

{¶4} In *Quality International*, the Ninth District Court of Appeals dismissed an appeal on the grounds that the appellant lacked capacity to appeal because it had not complied with statutory licensing requirements for foreign corporations doing business in

Ohio. *Id.* at ¶12; R.C. 1703.29. In essence, the Ninth District Court of Appeals denied the appellant the right to appeal the trial court's determination that the appellant lacked the capacity to bring an action. In the case at bar, we denied appellees' motion to dismiss appellant's appeal despite appellees' assertion that R.C. 1703.29 prevented appellant from maintaining the appeal. Therefore, we permitted appellant to appeal the trial court's determination that the appellant lacked the capacity to bring an action. *Washington Mut. Bank v. Beatley*, Franklin App. No. 06AP-1189, 2008-Ohio-1679, at ¶7. Therefore, our decision in the present case is in conflict with *Quality International* on a rule of law.

{¶5} However, we do not agree with how appellees have framed the question to be certified. Instead of the question proposed by appellees, we certify the following question:

When a trial court dismisses a plaintiff's action for lack of capacity to maintain an action, does R.C. 1703.29 prevent the plaintiff from appealing that decision?

{¶6} In conclusion, because our decision in the case at bar conflicts with the Ninth District Court of Appeals' decision in *Quality International* on a rule of law, we grant appellees' motion.

Motion granted.

BROWN and FRENCH, JJ., concur.

EXHIBIT C

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C

Washington Mut. Bank v. Beatley

Ohio App. 10 Dist., 2008.

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

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

WASHINGTON MUTUAL BANK, fka, Washington Mutual Bank, FA, Plaintiff-Appellant,

v.

Jack K. BEATLEY et al., Defendants-Appellees.

No. 06AP-1189.

Decided April 8, 2008.

Appeal from the Franklin County Court of Common Pleas.

Roetzel & Andress, LPA, Thomas L. Rosenberg, Jessica L. Davis; and Kevin E. Humphreys, for appellee Jack K. Beatley.

Marc Dann, Attorney General, Michael L. Stokes and Kelly A. Borchers, for Amicus Curiae.

Taft, Stettinius & Hollister LLP, Gregory J. O'Brien; Jenner & Block LLP, John P. Wolfsmith, Matthew R. Devine; Lerner, Sampson & Rothfuss, and Pamela S. Petas, for appellant.

KLATT, J.

*1 ¶ 1 Plaintiff-appellant, Washington Mutual Bank, fka Washington Mutual Bank FA, appeals from a judgment of the Franklin County Court of Common Pleas that Northwood Avenue, LLC (collectively referred to as appellees). For the following reasons, we reverse that judgment and remand the matter for further proceedings.

¶ 2 On July 14, 2006, appellant filed a complaint for foreclosure in the Franklin County Court of Common Pleas against appellees. In the complaint, appellant alleged that it was the holder of a note and a mortgage securing such note and that the appellees had defaulted on payment of the note. Appellant requested judgment in the amount of the balance due on the note as well as foreclosure of the mortgage and sale of the property located at 64 W. Northwood Avenue in Columbus, Ohio.

¶ 3 In lieu of an answer, appellees filed a motion to dismiss appellant's complaint pursuant to Civ.R. 12(B)(1) and 12(B)(6). Appellees argued that appellant's name, "Washington Mutual Bank, fka Washington Mutual Bank FA," was an unregistered, fictitious name as defined in R.C. 1329.01. Appellees claimed that appellant's failure to register its fictitious name deprived it of standing to commence the present action because R.C. 1329.10(B) prohibits any person doing business under a fictitious name from commencing an action in Ohio courts in the fictitious name without first registering its fictitious name. Equating the lack of standing with a lack of jurisdiction, appellees argued that the trial court lacked subject matter jurisdiction over the case. Appellees further claimed that appellant failed to state a claim upon which relief could be granted because the trial court did not have jurisdiction over the case and, therefore, could not grant appellant any relief.

¶ 4 The trial court granted appellees' motion to dismiss the complaint. In its decision, the trial court held that a motion to dismiss for lack of standing is permissible under Civ.R. 12(B)(1). The trial court went on to consider

evidence beyond the allegations of the complaint to determine whether appellant had standing to commence this action. Specifically, appellees submitted an affidavit from one of its attorneys with its motion to dismiss. Attached to the affidavit were certified documents from the Ohio Secretary of State's Office. The documents state that the Secretary of State has no records of any Ohio corporation, foreign corporation, Ohio limited liability corporation, foreign limited liability corporation, Ohio limited partnership, foreign limited partnership, Ohio limited liability partnership, foreign limited liability partnership, trade name registration, or report of use of fictitious name, either active or inactive, known as Washington Mutual Bank or Washington Mutual Bank FA.

{¶ 5} Based on these documents, the trial court determined that Washington Mutual Bank and Washington Mutual Bank FA were fictitious names that had not been registered with the Secretary of State's office. Given appellant's failure to register its fictitious names, the trial court determined that appellant could not maintain this action. Although the exact basis of its decision is somewhat unclear, the trial court mentioned appellant's lack of standing as well as its lack of capacity to sue in dismissing appellant's complaint under Civ.R. 12(B)(1). The trial court also determined that because appellant lacked standing or capacity to sue, appellant failed to state a claim upon which relief could be granted. Accordingly, the trial court dismissed appellant's complaint based on both Civ.R. 12(B)(1) and 12(B)(6).

*2 {¶ 6} Appellant appeals and assigns the following error:

The trial court erred as a matter of law in granting defendants-appellees' Motion to Dismiss plaintiff-appellant's Complaint.

{¶ 7} Appellees have filed a motion to dismiss this appeal, arguing that appellant may not maintain this appeal because it is an unregistered foreign corporation. We disagree. In order to have standing to appeal, a party must be able to demonstrate a present interest in the subject matter of the litigation which has been prejudiced by the judgment appealed from. *McCarthy v. Lippitt*, Monroe App. No. 04-MO-1, 2004-Ohio5367, at ¶ 59; *GMAC Mtge. Co. v. Lewis*, Franklin App. No. 05AP-284, 2005-Ohio-5165, at ¶ 6; *Deutsche Bank Trust Co. v. Barksdale Williams*, Cuyahoga App. No. 88252, 2007-Ohio-1838, at ¶ 12. Appellant was a party in the trial court and it has a present interest in the subject matter of this litigation. Appellant's interest in the subject matter of the litigation was prejudiced by the trial court's dismissal of its complaint for foreclosure. Therefore, appellant has standing to pursue this appeal. Appellees' motion to dismiss is denied.

{¶ 8} Appellant appeals from the trial court's dismissal of its complaint. We first address the propriety of that dismissal pursuant to Civ.R. 12(B)(1). This rule permits dismissal where the trial court lacks jurisdiction over the subject matter of the litigation. The standard of review for a dismissal pursuant to Civ.R. 12(B)(1) is whether any cause of action cognizable by the forum has been raised in the complaint. *Milhoan v. Eastern Loc. School Dist. Bd. of Edn.*, 157 Ohio App.3d 716, 2004-Ohio-3243, at ¶ 10; *State ex rel. Bush v. Spurlock* (1989), 42 Ohio St.3d 77, 80. We review an appeal of a dismissal for lack of subject matter jurisdiction under Civ.R. 12(B)(1) *de novo*. *Moore v. Franklin Cty. Children Servs.*, Franklin App. No. 06AP-951, 2007-Ohio-4128, at ¶ 15; *Newell v. TRW, Inc.* (2001), 145 Ohio App.3d 198, 200.

{¶ 9} A trial court is not confined to the allegations of the complaint when determining its subject matter jurisdiction under Civ.R. 12(B)(1), and it may consider pertinent material without converting the motion into one for summary judgment. *Southgate Dev. Corp. v. Columbia Gas Transmission Corp.* (1976), 48 Ohio St.2d 211, paragraph one of the syllabus; *Moore*.

{¶ 10} The trial court's dismissal pursuant to Civ.R. 12(B)(1) appears to be based on appellant's lack of standing

or lack of capacity to sue. However, neither standing nor capacity to sue challenges the subject matter jurisdiction of a court in this context. *State ex rel. Tubbs Jones v. Suster* (1998), 84 Ohio St.3d 70, 77 (“Lack of standing challenges the capacity of a party to bring an action, not the subject matter jurisdiction of the court.”); *Country Club Townhouses-North Condominium Unit Owners Assn. v. Slates* (Jan. 24, 1996), Summit App. No. 17299 (“Capacity to sue or be sued does not equate with the jurisdiction of a court to adjudicate a matter; it is concerned merely with a party's right to appear in a court in the first instance.”); see, also, *Benefit Mtg. Consultants, Inc. v. Gencorp, Inc.* (May 22, 1996), Summit App. No. 17488 (“Capacity to sue is not jurisdictional.”). These issues are properly raised by a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted. See *Woods v. Oak Hill Community Med. Ctr., Inc.* (1999), 134 Ohio App.3d 261, 267 (noting that dismissal for lack of standing is a dismissal pursuant to Civ.R. 12[B][6]); *Bourke v. Carnahan*, Franklin App. No. 05AP-194, 2005-Ohio-5422, at ¶ 10 (“Elements of standing are an indispensable part of a plaintiff's case.”); *Kiraly v. Francis A. Bonanno, Inc.* (Oct. 29, 1997), Summit App. No. 18250 (affirming Civ.R. 12[B][6] dismissal of complaint for plaintiff's lack of capacity to sue).

*3 {¶ 11} Because standing and capacity to sue do not challenge the subject matter jurisdiction of a court, the trial court erred when it dismissed appellant's complaint on these grounds pursuant to Civ.R. 12(B)(1). Dismissal pursuant to this rule focuses on a court's subject matter jurisdiction over the claims raised in the complaint, not the standing or capacity of the plaintiff to bring those claims. Cf. *Moore*, quoting *Vedder v. Warrensville Hts.*, Cuyahoga App. No. 81005, 2002-Ohio-5567, at ¶ 15 (“The issue of subject-matter jurisdiction involves ‘a court's power to hear and decide a case on the merits and does not relate to the rights of the parties’ “). Our review of the record reveals no support for the proposition that the trial court lacked subject matter jurisdiction over this foreclosure action.

{¶ 12} The trial court also dismissed appellant's complaint for failure to state a claim upon which relief can be granted pursuant to Civ.R. 12(B)(6).“A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint.”*State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545, 548.In order for a trial court to grant a motion to dismiss for failure to state a claim upon which relief may be granted, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery. *Id.*, *O'Brien v. Univ. Community Tenants Union* (1975), 42 Ohio St.2d 242, syllabus. This court reviews a trial court's disposition of a motion to dismiss for failure to state a claim under Civ.R. 12(B)(6)de novo.*Stewart v. Fifth Third Bank of Columbus* (Jan. 25, 2001), Franklin App. No. 00AP-258.

{¶ 13} In contrast to the resolution of a Civ.R. 12(B)(1) motion, a trial court may consider only the statements and facts contained in the pleadings and may not consider or rely on evidence outside the complaint when resolving a Civ.R. 12(B)(6) motion to dismiss. *Estate of Sherman v. Millhon* (1995), 104 Ohio App.3d 614, 617;*New 52 Project, Inc. v. Proctor*, Franklin App. No. 07AP-487, 2008-Ohio-465, at ¶ 3 (court must limit its consideration to the four corners of the complaint when deciding a Civ.R. 12[B][6] motion to dismiss).

{¶ 14} In this case, the trial court relied on matters outside appellant's complaint to resolve appellees' motion to dismiss. The court relied on documents from the Secretary of State's office attached to an affidavit filed in support of appellees' motion to dismiss. Appellees argue that the trial court considered these documents solely for purposes of the Civ.R. 12(B)(1) analysis. We disagree. The trial court expressly considered these documents in its standing/capacity analysis. That analysis was also the basis of its decision to grant appellees' motion to dismiss pursuant to Civ.R. 12(B)(6).

{¶ 15} When a Civ.R. 12(B)(6) motion to dismiss presents matters outside the pleadings, the trial court may either exclude the extraneous matter from its consideration or treat the motion as one for summary judgment and dispose of it pursuant to Civ.R. 56. *Powell v. Vorys, Sater, Seymour & Pease* (1998), 131 Ohio App.3d 681, 684. A trial court may not, however, sua sponte convert a Civ.R. 12(B)(6) motion to dismiss into a motion for summary judgment and dispose of it without giving notice to the parties of its intent to do so. *Id.*; *State ex rel. Baran v. Fuerst* (1990), 55 Ohio St.3d 94, 97. Failure to notify the parties that the court is converting a Civ.R. 12(B)(6) motion to dismiss into one for summary judgment is, itself, reversible error. *Charles v. Conrad*, Franklin App. No. 05AP410, 2005-Ohio-6106, at ¶ 30.

*4 {¶ 16} The trial court effectively converted appellees' Civ. R. 12(B)(6) motion to dismiss into a motion for summary judgment by considering the documents appellees submitted with its motion. However, the court did not notify the parties of its intent to convert the motion to dismiss into a summary judgment motion. This failure is reversible error. *Id.*; *Chahda v. Youseff*, Cuyahoga App. No. 82505, 2004-Ohio-635, at ¶ 12; *Wickliffe Country Place v. Kovacs* (2001), 146 Ohio App.3d 293, 297-298; *Stewart*.

{¶ 17} The trial court erred when it dismissed appellant's complaint pursuant to both Civ.R. 12(B)(1) and 12(B)(6). Given this disposition, we need not address appellant's preemption arguments. Accordingly, appellant's assignment of error is sustained and the judgment of the Franklin County Court of Common Pleas is reversed. The matter is remanded for further proceedings consistent with law and this opinion

Appellees' motion to dismiss denied; judgment reversed and cause remanded.

BROWN and FRENCH, JJ., concur.

Ohio App. 10 Dist., 2008.

Washington Mut. Bank v. Beatley

Slip Copy, 2008 WL 928424 (Ohio App. 10 Dist.), 2008 -Ohio- 1679

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EXHIBIT D

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H

Quality Internatl. Ents., Inc. v. IFCO Sys. N. Am., Inc.

Ohio App. 9 Dist., 2006.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL
AUTHORITY.Court of Appeals of Ohio, Ninth District, Summit County.
QUALITY INTERNATIONAL ENTERPRISES, INC., Appellant

v.

IFCO SYSTEMS NORTH AMERICA, INC., Appellee.

No. 23131.

Decided Nov. 8, 2006.

Appeal from Judgment Entered in the Court of Common Pleas, County of Summit, Ohio, Case No. CV-2005-07-4110.

Steven W. Mastrantonio, Attorney at Law, for Appellant.

Stephen W. Funk and Paul W. Lombardi, Attorneys at Law, for Appellee.

*DECISION AND JOURNAL ENTRY****1** This cause was heard upon the record in the trial court and the following disposition is made:

SLABY, Presiding Judge.

{¶ 1} Appellant Quality International Enterprises (“QIE”) appeals the decision of the Summit County Court of Common Pleas in which the court dismissed QIE’s action against Appellee IFCO Systems North America, Inc. (“IFCO”). We dismiss QIE’s appeal on the grounds that it did not have the capacity to bring the appeal.

{¶ 2} QIE is a Delaware corporation that does business in both Ohio and Texas, and that has its principal place of business in Akron. It specializes in distributing wooden pallets and boxes. In 2003, QIE began doing business with IFCO Systems North America (IFCO), which produces pallets and boxes through one of its subsidiaries, Integral Pallet Holdings Operations (IPHO), located in Texas. IPHO sold pallets to Dell Computers (Dell) using QIE as an intermediary. QIE coordinated payment for the pallets. While QIE’s main office was in Ohio, it was maintaining a small office near Dell’s headquarters in Austin, Texas.

{¶ 3} In 2005, problems began to develop between QIE and IFCO. The end result was that QIE did not forward Dell’s payments on IFCO’s invoices. No one disputes that invoices remained unpaid, though there is a dispute as to how much money was involved and whether Dell had raised quality control concerns regarding IFCO’s products. IFCO’s subsidiary IPHO brought suit against QIE in Harris County, Texas, on July 15, 2005. On July 20, 2005, QIE filed suit against IFCO in Summit County, Ohio, on claims of breach of contract and interference with business relationships. On August 1, 2005, QIE was registered as a trade name with the Ohio Secretary of State, and the named agent was “Brasbob Enterprises, Inc.”

{¶ 4} IFCO did not file an answer to QIE’s complaint, and instead filed a motion to dismiss on October 11,

2005, on the grounds of forum non conveniens. IFCO argued that Texas was a more appropriate forum for two reasons: first, there was already litigation pending in Texas regarding these two parties, and second, all of the events giving rise to the Summit County litigation had taken place in Texas. QIE filed a timely response to IFCO's motion to dismiss on November 14, 2005. On December, 2005, IFCO filed a motion for leave to supplement its motion to dismiss, and informed the Summit County trial court that the Texas court had issued a default judgment after QIE's failure to respond to IFCO's complaint. QIE did not respond to this supplement, nor did it request leave to respond. Finally, on January 25, 2005, IFCO filed notice of newly discovered facts and a second motion for leave to supplement its original motion to dismiss. In this filing, IFCO informed the court that, on January 3, 2006, shortly before the trial court had held a hearing on IFCO's motion to dismiss, QIE had terminated its trade name with the Secretary of State, and no longer had the capacity to maintain the suit because it was not licensed or registered in the State of Ohio. See R.C. 1329.10 and R.C. 1703.29. QIE had never informed the trial court of its termination of the trade name. On January 31, 2006, the trial court found that there was no registered Ohio entity operating under the name of QIE, and granted IFCO's motion to dismiss on the grounds that QIE lacked the legal capacity to maintain the suit, and on the grounds of forum non conveniens.

*2 {¶ 5} QIE filed the instant appeal on March 2, 2006. On March 24, 2006, IFCO filed a motion to dismiss QIE's appeal on the ground that QIE lacked capacity to bring the appeal. IFCO argued that QIE did not seek licensure with the State of Ohio until after it had filed the notice of appeal. Therefore, IFCO argued, QIE could not maintain an appeal under RC 1703.29 because it was an unlicensed foreign corporation. This court denied IFCO's motion, stating that the motion was related to the merits of the appeal, which we would need to consider.

{¶ 6} In its appeal, QIE raised the following four assignments of error:

FIRST ASSIGNMENT OF ERROR

"The trial court erred as a matter of law by depriving QIE of the opportunity to respond to IFCO's Supplemental Motion to Dismiss per the requirements of Civ.R. 6 and Summit County Local Rule 7.14(A)."

SECOND ASSIGNMENT OF ERROR

"The trial court erred when it relied upon R.C. 1329.10 to dismiss QIE's claims against IFCO."

THIRD ASSIGNMENT OF ERROR

"The trial court erred by allowing IFCO to contest QIE's capacity to bring the Ohio action based upon QIE's filing status after [IFCO] had waived its defense pursuant to Ohio Civ.R. 9(A) and 12(H)."

FOURTH ASSIGNMENT OF ERROR

"The trial court abused its discretion in holding that Texas was the more convenient forum."

{¶ 7} QIE argues that the trial court prematurely decided the motion to dismiss based on new information contained in IFCO's supplemental motion, without giving QIE the opportunity to respond to the new information. It also argues that the trial court applied the wrong law to the motion to dismiss, that it permitted IFCO to raise issues it had waived, and that its decision to dismiss on the grounds of forum non conveniens was an abuse of dis-

cretion. We do not reach the merits of QIE's assignments of error because we find that QIE lacked capacity to bring this appeal. We therefore dismiss the appeal.

{¶ 8} QIE filed its notice of appeal on March 2, 2006. At that time QIE was not registered in any way with the Ohio Secretary of State. R.C. 1703.03 provides, in pertinent part, as follows: "No foreign corporation not excepted from sections 1703.01 to 1703.31 of the Revised Code, shall transact business in this state unless it holds an unexpired and uncanceled license to do so issued by the secretary of state." R.C. 1703.29(A) continues:

"The failure of any corporation to obtain a license under sections 1703.01 to 1703.31, inclusive, of the Revised Code, does not affect the validity of any contract with such corporation, but *no foreign corporation which should have obtained such license shall maintain any action in any court until it has obtained such license.*" (Emphasis added.)

At the time that QIE filed its appeal, it had not complied with the licensing requirement, and therefore could not maintain an appeal to this court.

{¶ 9} QIE cites *P.K. Springfield, Inc. v. Hogan* (1993), 86 Ohio App.3d 764, 621 N.E.2d 1253, in support of its contention that maintaining an action is separate from initiating an action, and that a corporation may initiate an action and then remedy the lack of licensure in order to maintain that action. However, the facts of *Hogan* do not bear out QIE's argument. In *Hogan*, the defendant raised cross-claims in its answer but was not a registered corporation licensed to do business under R.C. 1703.29(A). The appellate court found that the filing of a cross-claim constitutes "maintaining an action," which the statute clearly prohibits to an unlicensed foreign corporation. *Id.*, at 769. It held that "R.C. 1703.29(A) require[s] [the defendant] to obtain a license in order to maintain its cross-claim." *Id.*; see, also, *Monaco v. Ted Terranova Sales Inc.* (Aug. 28, 1984), 10th Dist. Nos. 83AP-351, 83AP-352, 83AP-526 (Corporation whose license was cancelled after events giving rise to cause of action transpired did not have capacity to sue unless licensed at time action was filed.) Therefore, the cross-claimant in *Hogan* was not permitted to maintain its action due to its lack of licensure.

*3 {¶ 10} QIE's argument with respect to capacity to raise this appeal also creates practical problems. Immediately upon filing an action, a party is maintaining that action. QIE's interpretation creates a distinction without a difference, and is untenable. If a corporation has not received the proper licensure prior to filing an appeal, it lacks the capacity to bring the appeal. The statutory requirement that a corporation register or become licensed in the State of Ohio encourages corporations to complete filing and registration before they can enjoy the full use of the court systems. It would defeat this purpose to allow corporations to ignore the filing requirements until after they have filed an appeal.

{¶ 11} QIE attempts to argue in its brief that IFCO has waived the capacity argument on appeal because it did not raise QIE's lack of licensure at the trial level. We draw a distinction between licensure and registration. "Licensure" refers to a foreign corporation's obtaining a license to operate in the State of Ohio, pursuant to RC 1703.03 and RC 1703.29. "Registration" refers to a corporation's filing its trade name or trademark with the Ohio Secretary of State pursuant to RC 1329.01. Whether IFCO drew the trial court's attention to QIE's lack of licensure at the time the original action was brought does not affect QIE's status at the time this appeal was filed, and IFCO cannot be said to have waived the issue. We cannot reach issues of waiver below when the party attempting to claim that there was waiver does not have any capacity to access the court system at the time its appeal is filed in this court. We therefore hold that R.C. 1703.29 requires that, to be considered competent to maintain an appeal, a foreign corporation must be licensed in Ohio at the time it commences that appeal.

{¶ 12} QIE's appeal is dismissed on the grounds that it lacked the capacity to appeal due to its failure to comply with the licensing requirements for foreign corporations doing business in Ohio.

Appeal dismissed.

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.

CARR, J. and MOORE, J., concur.

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