

IN THE SUPREME COURT OF OHIO

BRIAN JARVIS, Executor : Case No: 2013-0118
Plaintiff-Appellee, : On Appeal from the
v. : Summit County Court of Appeals,
: Ninth Appellate District
FIRST RESOLUTION INVESTMENT : Court of Appeals
CORP., et al. : Case No. CA26042
:
Defendants-Appellants

Memorandum in Opposition to Cheek and Hockenberry's Motion to Dismiss

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MEMORANDUM

Facts

ACTION IN THE TRIAL COURT

FRIC's Complaint and Subsequent Default Judgment

First Resolution Investment Corp., ("FRIC") commenced this litigation by suing Sandra J. Taylor Jarvis ("Sandra") on Mar. 29, 2010 in the Summit Cty. Common Pleas Court for amounts due under the terms of a credit card arrangement.¹ FRIC then moved for² and, on May 12, 2010, the trial court granted FRIC a default judgment for "\$8,763.37, plus accrued interest in the amount of \$8,067.51 through April 28, 201, and further interest at 24.00%".³

Motion to Vacate

On June 28, 2010 Sandra moved to vacate the default judgment.⁴ On July 26, 2010, pursuant to a stipulated entry, the trial court vacated the judgment.⁵

Class Action Counterclaim and First Amended Class Action Counterclaim

On Aug. 26, 2010, Sandra filed her First Amended Class Action Counterclaim ("FACACC") naming FRIC, First Resolution Management Corp. ("FRMC"), Cheek Law Offices, LLC ("Cheek") and Attorney Pari Hockenberry ("Hockenberry") as counterclaim defendants.⁶ On Sept. 10, 2010, FRIC, FRMC, Cheek, and Hockenberry filed a joint Reply to the FACACC.⁷

¹ Transcript of Docket and Journal Entries for the Summit Cty. Common Pleas Ct., bearing certification dates of May 21, 2013 and Aug. 30, 2011, ("Doc.") at No. 1, FRIC's complaint Supplement 37-41 ("S").

² Doc. No. 6, FRIC's motion for default judgment, S. 239-245.

³ Doc. No. 4, journal entry granting FRIC a default judgment, S. 246.

⁴ Doc. No. 8, Sandra's motion to vacate, S 247-299.

⁵ Doc. No. 9, journal entry vacating default judgment, S. 300.

⁶ Doc. No. 19, FACACC, S. 43-98.

⁷ Doc. No. 23, S. 99-113.

FRIC’s dismissal

FRIC dismissed its claim against Sandra, without prejudice, under Civ. R. 41(A)(1)(a) on Sept. 10, 2010.⁸

ACTION IN THE SUPREME COURT

Notice of Appeal and Oral Argument

FRIC, FRMC, Cheek and Hockenberry filed a joint notice of appeal almost three (3) years ago, on Jan. 22, 2013. Oral Argument was conducted more than two (2) years ago on Nov. 20, 2013.

Suggestion of Death and Substitution of Parties

On Sept. 25, 2015, the undersigned filed a notice of Suggestion of Death because Sandra had died while this case pended in the Supreme Court, and on Oct. 30, 2015 the undersigned filed a Motion for Substitution of Parties.

On Nov. 13, 2015 this Court granted the Motion to Substitute Parties.

Motion to Dismiss Counts IV and V

On Nov. 13, 2015 FRIC and FRMC filed a Motion to Dismiss Counts IV and V of the Jarvis counterclaim. The motion filed by FRIC and FRMC invoked the provisions of R.C. 2305.21 and cited the following five (5) Supreme Court opinions: (1) *Chilcote v. Hoffman*, 97 Ohio St. 98 (1918); (2) *State ex rel Ahrens v. City of Cleveland*, 133 Ohio St. 423 (1938); (3) *City of Cincinnati v. Hafer*, 49 Ohio St. 60 (1892); (4) *Mayer v. Bristown*, 91 Ohio St.3 (2000); (5) *Robb v. Chagrin Lagoons Yacht Club, Inc.*, 75 Ohio St. 3d 264 (1996); and (5) *Lewis v. City of St. Bernard*, 157 Ohio St. 549 (1952). In addition, FRIC and FRMC’s Motion to Dismiss cited the following twelve (12) Court of Appeals Opinions: (1) *Witcher v. Fairlawn*, 113 Ohio App.3d 217 (9th Dist. 1996); (2) *Village of Oakwood v. Makar*, 11 Ohio App.3d 46 (8th Dist. 1983); (3) *Nations Credit v. Pheanis*, 102 Ohio App.3d 71 (2nd Dist. 1995); (4) *Motzer Dodge Jeep Eagle, Inc. v.*

⁸ Doc. No. 21.

Ohio Atty. Gen., 95 Ohio App.3d 183 (12th Dist. 1994); (5) *Estate of Cattano v. High Touch Homes, Inc.*, 6th Dist. Earle No. E-01-022, 2002-Ohio-2631; (6) *Mannix v. DCB Serv, Inc.*, 2nd Dist. Montgomery No. 19910, 2004-Ohio-6672; (7) *Thompson v. Jim Dixlon Lincoln Mercury, Inc.*, 12th Dist. Butler No. 82-11-0109 (April 27, 1983); (8) *Shumaker v. Hamilton Chevrolet, Inc.*, 184 Ohio App. 326 (4th Dist. 2009); (9) *McPhillips v. United States Tennis Assn. Midwest*, 11th Dist. Lake No. 2006-L-187, 2007-Ohio-3594; (10) *Chestnut v. Progressive Cas. Inc. Co.*, 166 Ohio App.3d 299, 2006-Ohio-2080 (8th Dist.); (11) *Ferron v. Dish Network, L.L.C.*, 195 Ohio App.3d 686 (2011 10th Dist.); (12) *Black v. Pheils*, 6th Dist. Wood No. WD-03-045, 2004-Ohio-4270.

On Dec. 30, 2015 this Court denied FRIC and FRMC's Motion to Dismiss.

On Dec. 29, 2015, Cheek and Hockenberry filed a Motion to Dismiss Counts IV and V of the Jarvis counterclaim. In addition to invoking R.C. 2305.21, Cheek and Hockenberry cited each and every Court of Appeals opinion that was cited in FRIC and FRMC's Motion to Dismiss and every Supreme Court opinion that FRIC and FRMC cited with the exception of *Robb v. Chagrin Lagoons Yacht Club, Inc.*, 75 Ohio St. 3d 264 (1996). Cheek and Hockenberry also cited *Yaklevich v. Kemp, Schaffer & Rowe Co. L.P.A.*, 68 Ohio St.3d 294 (1994) and *Joyce v. Columbus*, Ohio L. Abs. 649 (1936), neither of which were cited by FRIC and FRMC.

LAW AND ARGUMENT

Law of the Case Doctrine Requires the Denial of the Motion to Dismiss

Cheek and Hockenberry's Motion to Dismiss should be denied on the grounds of the law of the case. *State v. Davis*, 139 Ohio St.3d 122, 2014-Ohio-1615, 9 N.E.3d 1031, ¶27 ("The law-of-the-case doctrine provides that the 'decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels'").

This Court has already denied FRIC and FRMC's motion to dismiss. Cheek and Hockenberry's motion to dismiss relies on the same authorities that the motion to dismiss filed by FRIC and FRMC relied on. In short, the two motions are virtually indistinguishable and rely on identical authority. The law of the case exists to ensure consistency of results and to avoid endless litigation. *Columbus City Schools Bd. of Edn. V. Franklin Cty. Bd. of Revision*, 144 Ohio St.3d 128, ___ N.E.3d ___, 2015 Ohio-4304, ¶36 ("we have held that the law-of-the-case doctrine reflects a strong public policy to 'ensure consistency of results in a case, to avoid endless litigation by settling the issues'".)

Counts IV and V deal with injury to property and therefore survive Sandra's death

FRIC, with the assistance of Cheek and Hockenberry, sued Sandra for breach of a credit card contract. FRIC, with the assistance of Cheek and Hockenberry, took a default judgment against Sandra for more than \$17,000.00, well after the applicable statute of limitations had expired. The default judgment awarded FRIC 24% post-judgment interest despite the fact that FRIC, Cheek, and Hockenberry were told by the debt buyer they had purchased their claim against Sandra from, i.e., Unifund, that maximum rate of interest

they were entitled to was 5%.⁹ FRIC, Cheek and Hockenberry admitted that they had no copy of the credit card contract authorizing a rate of interest higher than the statutory rate.¹⁰ In fact Cheek and Hockenberry's Merit Brief p. 32 admits that FRIC was not entitled to an award of 24% interest based on the only "evidence" they ever possessed, i.e., credit card statements, "This is not so say that FRIC should have ultimately been awarded the prayed for interest rate solely on the basis of the credit card statements it attached to its complaint." Of course this concession ignores that fact that FRIC was awarded a default judgment giving it the 24% interest it now acknowledges it was not entitled to collect.

These actions constituted an injury to Sandra's property. Sandra filed Counts IV and V of her counterclaim to protect her property rights.

R.C. 2015.21 provides, "In addition to the causes of action which survive at common law, causes of action for . . . injuries to the person or property, . . . also survive; and such actions may be brought notwithstanding the death of the person entitled or liable thereto." Survivor statutes are remedial and therefore liberally construed. *Holiday Properties, Inc., v. Lawrie*. 9th Dist. Summit Nos. 21055 & 21133, 2003-Ohio-1136. ("Property' is a generic term embracing dominion or indefinite right of use, enjoyment, and disposition, which may be lawfully exercised over particular things or objects, animate or inanimate.") *Id.* FRIC, Cheek, and Hockenberry breached a duty they owed to Sandra which resulted in injury to her property.

⁹ S. 604, 727, and 831

¹⁰ Doc. No. 1, FRICs Complaint ¶4(a) and 4(d), S. 37.

CONCLUSION

The Motion to Dismiss should be denied. The law of the case governs the Motion to Dismiss and having already denied FRIC and FRMC's virtually identical Motion to Dismiss, Cheek and Hockenberry's Motion should also be denied. Moreover, Counts IV and V seek to vindicate property rights which survive Sandra's death.

Respectfully submitted,

s/ James F. Burke, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on this
8th day of January 2016, via regular U.S. mail to the following:

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