[Cite as *Franciscan Communities, Inc. v. Rice*, 2024-Ohio-4796.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF OHIO

FRANCISCAN COMMUNITIES, INC., ET AL.,

Plaintiffs-Appellants,

v.

JASON RICE, ET AL.,

Defendants-Appellee.

No. 113640

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: October 3, 2024

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-18-897283

Appearances:

Hahn Loeser & Parks LLP, Christina T. Hassel, and Aaron S. Evenchik, *for appellants*.

Mills, Mills, Fiely & Lucas, LLC, Laura L. Mills, and Pierce C. Walker, *for appellee*.

SEAN C. GALLAGHER, J.:

{¶ 1} Plaintiffs-appellants Franciscan Communities, Inc., and Franciscan Communities, Inc., II (collectively "Franciscan" or "appellants"), appeal the trial court's decision to deny their motion for setoff. The motion sought to have the

amount of a verdict rendered in favor of defendant-appellee Armatas Construction, Inc. ("Armatas"), on a counterclaim for unjust enrichment treated as a setoff against a verdict rendered in favor of appellants on a breach-of-contract claim, which related to two separate contracts that were entered with defendant Aventis Development Co., LLC ("Aventis").[1] Upon review, we find no abuse of discretion or reversible error and affirm the trial court's decision.

{¶ 2} Initially, we find that the trial court's January 16, 2024 order, which ruled on Franciscan's "motion for prejudgment and post judgment interest and set-off of Armatas verdict," is a valid final, appealable order and that we have jurisdiction to hear the appeal.[2] Although the trial court stated it was issuing a "nunc pro tunc entry" for an earlier order entered on January 11, 2024, "[t]he substance of the judgment entry determines whether the judgment actually constitutes a *nunc pro tunc* entry or was incorrectly identified as such." *LaCourse v. LaCourse*, 2023-Ohio-972, ¶ 9 (6th Dist.). Here, the trial court referenced its journal entry dated January 12, 2024, in which the trial court had "vacated" the January 11, 2024 order following an oral motion that sought to correctly identify which parties are subject to prejudgment interest and to remove individual defendants who were not found liable at trial. Thus, the initial order ceased to exist and the new order that was issued changed the parties from the initial order, which was a substantive change.

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[1] Aventis is not a party to this appeal.

[2] The parties submitted supplemental briefs on the issue pursuant to order of this court.

Although the new entry was incorrectly identified as being nunc pro tunc, the court had authority under Civ.R. 60(B) to vacate the initial order upon the oral motion and to reenter judgment. Accordingly, we find that this appeal was timely filed from the January 16, 2024 order and is properly before us.[3]

{¶ 3} In this lawsuit, the trial court granted Franciscan's motion for summary judgment in part on August 17, 2022. The trial court granted summary judgment in favor of Franciscan and against Armatas and Aventis on count two of the third amended complaint for breach of contract, which pertained to two separate contracts referred to as the memory care building ("MCB") contract and the life enrichment center ("LEC") contract. As the trial court recognized, the MCB contract and the LEC contract were the prime contracts executed with Aventis for two construction/development projects. Apart from the primary contracts, Aventis and its primary subcontractor, Armatas, entered into their own general contractor-subcontractor agreements, one for each project.

{¶ 4} In ruling on Franciscan's motion for summary judgment, the trial court found that "there is no direct privity of contract between Franciscan and Armatas." However, the trial court found "Franciscan is a third-party beneficiary to the two [contractor-subcontractor] agreements between Aventis and Armatas" because those agreements incorporated the same rights and duties as the prime contracts between Franciscan and Aventis. Therefore, the trial court concluded that

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[3] Although appellants also state that there was a then-pending motion for sanctions and attorney fees, that was an ancillary matter.

"Armatas is to be found jointly and severally liable for any breach of contract claim." The trial court found that summary judgment against Aventis and Armatas for breach of the MCB contract and of the LEC contract was warranted, with exact damages to be proven at trial.[4]

{¶ 5} The trial court also granted summary judgment in Franciscan's favor as to Armatas's counterclaim for breach of contract upon finding "[t]here is no direct privity of contract between Franciscan and Armatas in this case, and Armatas has not provided any evidence . . . to demonstrate that Armatas is a third-party beneficiary as to prime contracts between Franciscan and Aventis." The trial court proceeded to deny summary judgment in Franciscan's favor as to Armatas's claim of unjust enrichment. The trial court found "an express agreement does not exist between Franciscan and Armatas, and Armatas is not a third-party beneficiary to the prime contract between Franciscan and Aventis. However, it is yet to be determined whether or not Armatas is nonetheless entitled to compensation for any labor, work, or material provided" for the two projects. Additionally, the trial court denied Franciscan's motion for summary judgment with regard to other claims and counterclaims.[5]

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[4] The trial court found several material breaches had occurred but found that whether there was a breach of either contract as a result of defective construction was a matter for the jury to decide and that the amount of compensatory damages was to be proven at trial.

[5] The trial court granted Franciscan's subsequent motion for summary judgment on count four of Armatas's first amended counterclaim.

{¶ 6} Other rulings were made in the course of the proceedings, and the case eventually proceeded to a jury trial in July 2023. Franciscan did not plead setoff or seek an offset as to a potential award. On July 25, 2023, the trial court entered a journal entry reflecting the jury verdict. Relative to this appeal, the jury returned a verdict in favor of Franciscan for breach of contract and awarded damages in the amount of $1,488,007 on the MCB contract and $966,258 on the LEC contract. The jury returned a verdict in favor of Armatas on its counterclaim against appellants for unjust enrichment, and the jury awarded Armatas damages in the amount of $165,447 on that counterclaim. Additionally, the jury ruled in favor of all defendants on several other claims that were tried; and the jury ruled in favor of Franciscan on several other counterclaims. Franciscan did not challenge the jury's verdict. A motion for sanctions/attorney fees remained pending that was later denied upon a remand from this court.

{¶ 7} On July 26, 2023, Franciscan filed their "motion for prejudgment and postjudgment interest and set-off of Armatas verdict." Franciscan requested an order from the trial court setting off the amount of the verdict for Armatas on its unjust enrichment claim against the verdict for Franciscan. After vacating an initial order, on January 16, 2024, the trial court issued a new order that granted the motion as related to prejudgment and postjudgment interest, but denied the motion "as it relates to plaintiffs' request for set-off of the Armatas verdict" and stated "the 7/20/2023 verdict is maintained in the entirety." This appeal followed.

{¶ 8} Under the sole assignment of error, appellants challenge the trial court's decision to deny their motion for setoff, claiming the trial court should have offset the damages award rendered by the jury for Armatas on its counterclaim against a larger award rendered by the jury for appellants.

{¶ 9} It is important to recognize that prior to the jury's verdict, appellants did not affirmatively plead or otherwise request a setoff in relation to the claims or raise the issue of offset of potential awards. Rather, it was not until after the jury decision, which was never challenged, that appellants filed their motion. For the reasons discussed below, we find no error in the trial court's decision to maintain the verdict in its entirety and to deny appellants' motion as related to setoff.

{¶ 10} "'A set-off, whether legal or equitable, must relate to cross demands in the same right, and when there is mutuality of obligation.'" *Witham v. S. Side Bldg. & Loan Assn. of Lima, Ohio*, 133 Ohio St. 560, 562 (1938), quoting *Andrews v. State ex rel. Blair, Supt. of Banks*, 124 Ohio St. 348 (1931), paragraph five of the syllabus; *see also Monea v. Lanci*, 2011-Ohio-6377, ¶ 104 (5th Dist.). Setoff, in the traditional sense, is a "'right which exists between two parties, each of whom under an independent contract owes a definite amount to the other, to setoff their respective debts by way of mutual deduction.'" *Waverly City School Dist. Bd. of Edn. v. Triad AR, Inc.*, 2018-Ohio-4748, ¶ 40 (4th Dist.), quoting *Lewis v. United Joint Venture*, 691 F.3d 835, 839 (6th Cir.2012), and *Witham* at 562. In this respect, "Ohio courts require setoff to be affirmatively pleaded; the legal right to setoff stems

from the parties' contractual agreements, which can be waived if not timely asserted." *Yousef v. Yousef*, 2019-Ohio-3656, ¶ 18 (8th Dist.).

{¶ 11} The Supreme Court of Ohio has also recognized the doctrine of equitable setoff as between judgments, which are somewhat different from claims not reduced to judgment. *Montalto v. Yeckley*, 143 Ohio St. 181, 183 (1944). Under the doctrine of equitable setoff, "[o]ne judgment may be set off against another *at the court's discretion*, which must be exercised in accordance with sound principles of equity jurisprudence." (Emphasis added.) *Id.*, citing *Diehl v. Friester*, 37 Ohio St. 473 (1882); *Barbour v. Natl. Exchange Bank*, 50 Ohio St. 90 (1893).

{¶ 12} In early cases, it was observed that "'[t]he practice of setting off one judgment against another, *between the same parties, and due, in the same rights*, is ancient and well established.'" (Emphasis added.) *Montalto* at 182-183, citing *Holmes v. Robinson*, 4 Ohio 90 (1829). However, it also was recognized that there is no legal right to have judgments set off against each other and that a setoff of judgments is within the inherent power of the court and to be exercised at the court's discretion. *Diehl* at 476. As stated in *Diehl*, "[a] motion that one judgment be set off against another is an appeal to the equitable power of the court" and is "to be granted or refused upon consideration of all the facts . . . ." *Id.* at paragraph two of the syllabus. Nonetheless, "where the setoff is sought by motion, the matter so far rests in the discretion of the court that the refusal of an order for such set-off will not be reviewed on error." *Id.* at 476, citing *Chipman v. Fowle*, 130 Mass. 352 (1881). Likewise, as stated in *Barbour*, "[t]he practice of thus setting off one

judgment against another is addressed to the discretion of the court; and being discretionary, the propriety of its exercise cannot be questioned on appeal." *Id.* at 98.

{¶ 13} In this case, appellants failed to timely seek, and were not entitled to, a setoff in the traditional sense. There was no contractual agreement between Franciscan and Armatas, the counterclaim for unjust enrichment arose from noncontractual dealings, and there are distinctions in the parties involved. Furthermore, despite their arguments otherwise, appellants have not established that the requested setoff relates to cross demands in the same right, and when there is mutuality of obligation. Appellants also waived the issue of offset of the award because no objection or error was raised during trial, and the issue was not otherwise preserved for appeal. It has long been recognized that "failure to timely advise a trial court of possible error, by objection or otherwise, results in a waiver of the issue for purposes of appeal." *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121 (1997); *see also Cook v. JSO Holdings, L.L.C.*, 2015-Ohio-4675, ¶ 13 (8th Dist.). Additionally, appellants did not challenge the jury's verdict or appeal from the jury's decision.

{¶ 14} Nevertheless, in their motion, appellants referenced the equitable doctrine of setoff between judgments and argued that "the judgment rendered in Armatas's favor should be treated as a set-off against the much larger damages award in favor of Franciscan." Appellants have not cited to any recent case in which the Supreme Court of Ohio has addressed this concept. They also do not cite any case involving similar circumstances to this matter, and the cases upon which they

rely are readily distinguishable. It is not for this court to expand the doctrine. Further, even if we assume that appellants properly sought a setoff of one judgment against another in this case, the trial court cannot be said to have committed reversible error by declining to exercise its equitable power or denying the requested setoff.

{¶ 15} Although we understand the concerns raised in this matter, we are not persuaded by appellants' arguments and are unable to find an abuse of discretion or reversible error occurred. Accordingly, we overrule appellants' sole assignment of error.

{¶ 16} Judgment affirmed.

It is ordered that appellees recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, JUDGE

EMANUELLA D. GROVES, P.J., and
FRANK DANIEL CELEBREZZE, III, J., CONCUR