

34866

RECEIVED FEB 13 2009

FEB 12 '09 10:33
pb

IN THE CIRCUIT COURT OF BRAXTON COUNTY, WEST VIRGINIA

LLOYD'S INC., a West Virginia
business corporation,
Plaintiff,

v.

CHARLES R. LLOYD,
Defendant.

Case No. 07-C-76
Judge Richard A. Facemire

ORDER

This matter is before the Court upon the Defendant, Charles R. Lloyd's Motion to Dismiss, and the Plaintiff, Lloyd's Inc.'s, Motion to Amend Complaint. The Court, after reviewing the pleadings, and the proposed findings of fact and conclusions of law submitted by the parties, shall GRANT the Defendant's Motion to Dismiss, and DENY the Plaintiff's Motion to Amend Complaint. The Court makes the following findings of fact and conclusions of law:

1. August 17, 2007, the Plaintiff, Lloyd's Inc., filed it's complaint. In the complaint, the Plaintiff asserts that the Defendant, Charles R. Lloyd, performed bookwork for the Plaintiff, which has been operating as a hardware store since at least late 1996. The Plaintiff alleges that while performing bookwork for Lloyd's Inc., the Defendant, applied monies belonging to Lloyd's Inc. to another obligation of Lloyd's that the accounting records show had already been satisfied. The complaint includes counts for unjust enrichment and conversion.
2. In Braxton County civil action 04-C-39, *William Lloyd v. Braxton Lumber Co. Inc., Charles R. Lloyd and Charles R. Lloyd, II*, William Greg Lloyd, the sole shareholder of the Plaintiff in this case, Lloyd's Inc., alleged that the Defendant, Charles R. Lloyd had forged minutes of a Braxton Lumber Company board meeting. These issues are not a part of the instant case, however, in response to William Greg Lloyd's claims

against the Defendant, the Defendant filed a counter-claim in case 04-C-39 against William Greg Lloyd and against the Plaintiff in this case, Lloyd's Inc. In that counter-claim, Charles R. Lloyd sought payment of a \$132,000 note, as well as unpaid rent, as the hardware store is located on property owned by Charles R. Lloyd.

3. The Plaintiff now contends that payments it made on the note, were misapplied by Charles R. Lloyd. The Plaintiff attempted to argue during the first trial that Charles R. Lloyd had misapplied the Plaintiff's payments, and that those payments should serve as an offset to the \$132,000 note.
4. The Court did not permit the Plaintiff to present these arguments at trial in the prior case. The Court granted Charles R. Lloyd's motion for judgment as a matter of law regarding the \$132,000 note, and the issue was not given to the jury for deliberation.
5. The Defendant now argues that the Plaintiff's claims in the instant case should be barred by the doctrine of *res judicata*. Before the prosecution of a lawsuit may be barred by the doctrine of *res judicata*, three elements must be satisfied. First, "there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings." Second, "the two actions must involve either the same parties or persons in privity with those same parties." Finally, "the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action." Syl. Pt. 1, *Antolini v. West Virginia Division of Natural Resources*, 647 S.E.2d 535 (2007), quoting Syl. Pt. 4, *Blake v. Charleston Area Med. Ctr., Inc.*, 498 S.E.2d 41 (1997).

6. The Court believes that the issues raised in this case are barred by *res judicata*, and meet the three criteria set forth in the case law. A final judgment was entered in case 04-C-39 resolving Charles R. Lloyd's counterclaim on the \$132,000 note. The parties in both cases are the same. While the cause of action in this case is not precisely the same as that in the prior case, it could have been resolved had it been properly presented in the prior action.
7. "An adjudication by a court having jurisdiction of the subject-matter and the parties is final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties might have litigated as incident thereto and coming within the legitimate purview of the subject-matter of the action. It is not essential that the matter should have been formally put in issue in a former suit, but it is sufficient that the *status* of the suit was such that the parties might have had the matter disposed of on its merits. An erroneous ruling of the court will not prevent the matter from being *res judicata*." Syl. Pt. 1, *Conley v. Spillers*, 301 S.E.2d 216 (1983), quoting Syl. Pt. 1, *Sayre's Adm'r v. Harpold*, 11 S.E. 16 (1890) and Syl. Pt. 1, *In re Estate of McIntosh*, 109 S.E.2d 153 (1959).
8. The Plaintiff contends that it was prohibited from making its case regarding the misapplied funds in the prior case. The Court did bar the Plaintiff from arguing to the jury that Charles R. Lloyd misapplied funds. The Court did this because the Plaintiff did not raise this issue until after the jury trial was well underway and the Defendant was arguing for judgment as a matter of law.
9. In the prior case, there was some testimony elicited to support Plaintiff's claim that the Defendant misapplied funds, and as the Plaintiff notes, it raised the argument in

it's response to Charles R. Lloyd's motion for summary judgment in the prior case. However, the issue was never squarely and properly put before the Court, it was only raised on the periphery, which is why the Court did not address the issue at the first trial.

10. The Plaintiff had ample opportunity to amend the pleadings prior to trial, and the Court believes that the Plaintiff was required to amend the pleadings prior to the first trial, pursuant to Rule 13 of the West Virginia Rules of Civil Procedure. Rule 13(a) states, "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." In the first case, Charles R. Lloyd's counter-claims dealt with the money Lloyd's Inc. owed him, and the complaint in this case is dealing with the handling of that same debt. All issues regarding that debt should have been raised prior to the trial in case 04-C-39.
11. The Plaintiff has filed a Motion for Leave to File an Amended Complaint. In that motion, the Plaintiff is seeking to add Lloyd Stave Co. as a defendant to this action. The Plaintiff alleges that the monies that were misappropriated or misapplied by Charles R. Lloyd are in the possession of either the Defendant or Lloyd Stave Co., which is solely owned by Charles R. Lloyd.
12. Adding Lloyd Stave Co. does not alter the factual allegations in the complaint, which should have been plead in case 04-C-39. Again, if Lloyd's Inc. believed that Lloyd Stave Co. had improperly applied payments by Lloyd's Inc., on it's debt to Charles R.

Lloyd, then Lloyd Stave Co. should have been joined as a party in the original action. Lloyd Stave Co. is solely owned by Charles R. Lloyd, and could have been added in the original case. Even if the Court were to allow the amendment, the same *res judicata* arguments would apply to the amended complaint, and the amended complaint would ultimately be dismissed.

Therefore, it is hereby ORDERED, ADJUDGED, and DECREED:

1. The Defendant's Motion to Dismiss shall be GRANTED, and this case shall be DISMISSED and stricken from the docket.
2. The Plaintiff's Motion for Leave to file Amended Complaint shall be DENIED.
3. The Court shall note and preserve all parties' objections and exceptions to the Court's rulings.
4. This is a Final Order, and any party aggrieved by this Order may file a petition for appeal with the West Virginia Supreme Court of Appeals.
5. The Clerk of this Court shall provide copies of this Order to counsel for the Plaintiff, Kenneth Webb, Jr.; and counsel for the Defendant, Stephen B. Farmer.

It is accordingly so ORDERED.

ENTERED this the 11th day of February, 2009.

Entered: 2-11-09

Richard A. Faceaire
Richard A. Faceaire, Judge

STATE OF WEST VIRGINIA
COUNTY OF BRAXTON, to-wit:

I, J.W. Morris, Circuit Clerk, do hereby certify that the foregoing is a true and accurate copy of an Order of record in my office in _____

Order Book No. _____ at page _____ as taken from the records
Given Under My Hand this 12 day of Feb 2009

J.W. Morris
CIRCUIT CLERK