

THOMAS S. TOWE and)
AMBASSADOR REALTY &)
INVESTMENT CORPORATION,)
)
Plaintiffs/Appellants,)
)
VS.)
)
JEFFREY S. BROCK,)
)
Defendant/Appellee.)

Davidson Chancery
No. 95-1856-III

Appeal No.
01A01-9602-CH-00084

FILED

July 26, 1996

**Cecil W. Crowson
Appellate Court Clerk**

IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

APPEAL FROM THE CHANCERY COURT OF DAVIDSON COUNTY
AT NASHVILLE, TENNESSEE

HONORABLE ROBERT S. BRANDT, CHANCELLOR

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ATTORNEYS FOR DEFENDANT/APPELLEE

AFFIRMED

HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:

SAMUEL L. LEWIS, JUDGE
WILLIAM C. KOCH, JR., JUDGE

THOMAS S. TOWE and)	
AMBASSADOR REALTY &)	
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JEFFREY S. BROCK,)	
)	
Defendant/Appellee.)	

OPINION

The captioned Plaintiffs have appealed from the judgment of the Trial Court dismissing their suit against the captioned defendant for breach of contract on grounds of res judicata (decided in a previous action).

The complaint is based upon a “contract for Sale of Real Estate” dated May 24, 1994, whereby Jeffrey S. Brock agreed to sell certain described real estate to “Ambassador Realty or assigns” on terms set out in the contract, and the prayers of the complaint are for specific performance or damages. In addition to the usual provisions of such contracts, the subject contract contained the following:

Ambassador will maintain possession and control of property with all rights of possession and renovation, lease or sub-let etc., for the sum of \$446.00 per month, payable to Brock until the new financing closes on or before 12 mo. from date of this contract.

Defendant Brock filed a “Motion for Judgment on the Pleadings/Summary Judgment” on the grounds that Towe was not a party to the contract and res judicata supported by certified documents evidencing the following prior proceedings:

On December 30, 1994, Defendant Brock initiated in General Sessions Court an unlawful detainer suit against Thomas S. Tow (sic) seeking possession of the property

described in the contract. On January 19, 1995, the General Sessions Court entered judgment as follows:

It is hereby ordered and adjudged that the Plaintiff(s) be restored to the possession of the within described property for which a Writ of Possession may issue, and be awarded judgment against the Defendant(s) for \$2,234.95 and costs of suit, for which execution may issue.

The record contains no evidence of an appeal from the General Sessions, however, it contains evidence of the following proceedings in Circuit Court: On March 10, 1995, an “answer and counterclaim” was filed in Circuit Court under the caption *Jeffrey S. Brock, Plaintiff v. Thomas S. Towe and Ambassador Realty & Investment Corporation*. (It should be noted at this point that the General Sessions warrant and judgment involved only Brock and Tow, and Ambassador Realty & Investment Corporation was added to the caption and joined in the answer and counterclaim as both Defendant and counter claimant.)

The answer denied any liability of “the Defendants” as alleged in the General Sessions warrant and the counterclaim sought specific performance of or damages for breach of a “Contract for Sale of Real Estate” executed on May 24, 1994, between Brock as seller and Ambassador Realty & Investment Corporation as buyer.

It appears that the answer of Ambassador was not in order because it was not the defendant in the General Sessions case which had been appealed. Towe (Tow) had reason to file an answer because he was a party to that case. As a defendant in the case on appeal, Towe had a right to file a counterclaim but no standing to assert any right arising from a contract to which he was not a party. Ambassador had no standing to join in the answer or counterclaim because it was not a party to the appeal then pending in Circuit Court.

On April 4, 1995, the Circuit Court entered the following order:

) No. 95C353
) BROCK, JEFFREY S.,
)
) Plaintiff,
)
) V.
)
) TOW, THOMAS S., ET AL,
)
) Defendant.

ORDER OF DISMISSAL

It Appears to the Court that this cause has not been set for trial within forty-five (45) days.

Therefore, in accordance with Rule 19(b) of Local Rules of Practice of the Courts of Record of Davidson County and Rule 41.02 Tennessee Rules of Civil Procedure this appeal should be dismissed.

It is therefore, ORDERED that the judgment of the General Sessions Court is hereby made a judgment of the Circuit Court.

Further, the costs of this cause are assessed to the Appellant, and/or its surety for which execution may issue, if necessary.

Entered this 4th day of April, 1995.

(S) WALTER C. KURTZ
Judge

cc:

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AMBASSADOR REALTY AND
CORP. INVESTMENT

Local Rule 19 of the Davidson County Courts of record reads as follows:

RULE 19. GENERAL SESSIONS APPEALS IN CIRCUIT COURT

(a) It shall be the duty of the parties and/or their attorneys to determine when a case appealed from the General Sessions Court is filed with the Circuit Court Clerk.

(b) The case shall be set for trial within forty-five (45) days. If the case is not set within forty-five (45) days, the case will be dismissed or remanded to the General Sessions Court as may be appropriate. Before the case is dismissed or remanded, the clerk shall give notice to the parties of the court's proposed dismissal or remand.

(c) The signature of an attorney or party to an appeal from General Sessions Court shall constitute a certificate under T.R.C.P. 11.

T.R.C.P. Rule 41.02 provides in pertinent part as follows:

Involuntary Dismissal - Effect Thereof. - (1) For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant.

(3) Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this Rule 41, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.

It appears that the action of the Circuit Court was based upon the failure of the parties (Tow and Brock) to schedule a hearing on the appeal within 45 days as required by Local Rule 19. The counterclaim, which was filed in Circuit Court was not subject to dismissal under Rule 19 which applied only to General Sessions Appeals. Moreover, the order of the Circuit Court, quoted above, did not dismiss the appeal or the case, but entered the same judgment as that of the General Sessions Court, i.e., for Brock against Towe (Tow) for possession and rent. There was no disposition of the counterclaim based upon the contract between Brock and Ambassador.

Reverting to the proceedings in Chancery Court in the present case, the judgment from which this appeal is prosecuted states:

Before the Court is the amended motion of the defendant, Jeffrey S. Brock, for judgment on the pleadings and/or summary judgment. Based upon the motion, response, and briefs and arguments of counsel, the Court is of the opinion that the motion is well-taken, and should be granted, for the reason that the prior dismissal of the Plaintiffs' case in *Jeffrey*

S. Brock v. Thomas S. Tow and Ambassador Realty and Investment Corporation, Case No. 95C-353, Circuit Court of Davidson County (appeal of General Sessions case No. 95 GT 1), acts as a bar to this suit under the doctrine of res judicata.
IT IS THEREFORE ORDERED:

1. That this action be dismissed.

From the above summary of Circuit Court proceedings, it is clear that there was no “prior dismissal of the Plaintiffs case in *Jeffrey S. Brock v. Thomas S. Towe and Ambassador Realty and Investment Corporation*. There was a judgment in favor of the Plaintiff Brock against the Defendant Towe (Tow) for possession and rent, but no judgment as to the counterclaim of Ambassador and Towe for specific performance and damages.

Res judicata bars a second suit between the same parties on the same cause of action in respect to all issues which were or could have been litigated in the former suit. *A. L. Kornman Co. v. Metropolitan Government of Nashville*, 216 Tenn. 205, 391 S.W.2d 633 (1965); *New York Life Ins. Co., v. Nashville Trust Co.*, 200 Tenn. 513, 292 S.W.2d 749 (1956). *Scales v. Scales*, Tenn. App. 1978, 564 S.W.2d 667.

Res judicata applies to judgments of the General Sessions Court. *Clay v. Barrington Motor Sales, Inc.*, Tenn. App. 1992, 832 S.W.2d 33, and to General Session judgments appealed to Circuit Court *Madyun v. Ballard*, Tenn. App. 1989, 783 S.W.2d 946.

There are cases where a judgment in favor of one party necessarily concludes rights asserted in a counterclaim. Suits and countersuits arising from vehicle collisions are in this class. However, the rules may not apply where the claim and counterclaim are not such that judgment on one would not necessarily conclude the other.

Res judicata does not apply in the present case because the former judgment did not dispose of the counterclaim which was distinct and separate from the possessory action that was adjudicated. Judgment might have been rendered for Ambassador on its claim for

specific performance of the sale even though judgment was rendered for Brock against Towe (Tow) in the unlawful detainer case on appeal from General Sessions Court.

Although the judgment of the Circuit Court does not support the defense of res judicata, this record indicates that the countersuit of Towe and Ambassador remains undisposed of before the Circuit Court. As such it would support a plea of “Other Action Pending” or “Former Suit Pending.” *Jackson v. Jackson*, 3 Tenn. Cas. (3 Shannon) 18, 2 Leg. Rep. 275 (1878); History of a Lawsuit, Eighth Edition § 185, p. 233.

Since this defense was not presented to the Trial Court, and the Plaintiffs did not have an opportunity to respond to it, it would not be in order for this Court to rule upon its factual merits.

For the reasons stated, the judgment of the Chancery Court is reversed and vacated. Costs of this appeal are taxed against the Defendant Jeffrey S. Brock. The cause is remanded to the Trial Court for further proceedings.

REVERSED AND REMANDED

HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:

SAMUEL L. LEWIS, JUDGE

WILLIAM C. KOCH, JR., JUDGE