SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. Henley Graves
Resident Judge

SUSSEX COUNTY COURTHOUSE
ONE THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947
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January 6, 2005

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RE: Best Drywall, Inc. V. Garey Feeheley and GDF Enterprises
C.A. #03C-04-005

Date Submitted: December 20, 2004

Dear Counsel:

On, December 20, 2004, oral arguments were presented by counsel regarding Defendant's Motion to Dismiss Best Drywall's (hereinafter "Best") action for unjust enrichment, fraud and breach of fiduciary duty. This is the Court's reasoning for the decision granting the Motion to Dismiss as to Defendant Gary Feeheley (hereinafter "Feeheley") and denying the Motion to Dismiss as to Defendant GDF Enterprises (hereinafter "GDF").

Feeheley was employed by the Plaintiff Best Drywall from 1981 through 1997. Until 1990, Feeheley served as the company's vice-president. Thereafter he operated as the day-to-day manager of the company's operations. On December 24, 1997, Feeheley was terminated without cause for consistently exhibiting a bad attitude and disagreement with the company's president, Charles Carmack. He was reengaged on December 27, 1997 after requesting that his bonuses from 1996 and 1997 be paid to him. Upon rejoining the company, Feeheley executed Bonus and

non-competition agreements. Feeheley continued with the company and earned bonuses for 1996-1997.

Sometime in the spring of 2000, Best began to suspect that Feeheley was engaged in misconduct related to the operation of the company. The Plaintiff alleges that Feeheley misused his position with Best to siphon off projects, resources, employees and profits to a personal enterprise. Feeheley was terminated on June 5, 2000 for gross misconduct and covertly operating a competing business. Discovery revealed that on April 21, 2000, Feeheley asked a Best Drywall secretary to alter paperwork, particularly invoices, to read GDF Enterprises instead of Best Drywall. The secretary informed Charles Carmack of the incident shortly thereafter. The secretary reported that Feeheley made the same request once more before his termination. An investigative report requested by Best, issued in October 2000, found that Feeheley had misused Best employees, materials and funds for his own benefit.

In July 2000, Best filed suit in Chancery Court seeking injunctive relief to enforce the non-competition agreement with Feeheley. The action also sought compensatory damages for the already existing violations of the agreement. After failing to obtain enforcement of the non-competition agreement, the case became dormant. The action was dismissed on October 18, 2001 for lack of prosecution. This action was filed on April 4, 2003 in Superior Court.

The judicial doctrine of res judicata ensures that a final judgment upon the merits of a case rendered by a court of appropriate jurisdiction may be used to bar a future suit on the matter by the same party, or his privies.[1] Public policy warrants a definite end to litigation, and res judicata ensures that a defendant need not worry about being dragged into court continuously

[1]*See Epstein v. Chatham Park, Inc.,* 153 A.2d 180, 184 (Del. Super. 1959).

over the same dispute.[2] Res judicata provides the plaintiff with his rightful opportunity to present his claim and obtain a judgment in the forum of his choosing, so that "he may have one day in court but not two."[3]

Res judicata is currently applied with a transactional focus, barring claims presented by the same parties if the claim raised in the latter adjudication derives from the same set of facts set forth in the initial litigation.[4] Despite the actual number of legal theories or requests for relief based on a claim, the Plaintiff shall be restricted to one opportunity to present his legal claims against a defendant per transaction. If a "claim asserted in the [first] Court, transactionally defined, is identical to the claim asserted in [the second] Court, even though the substantive theory of recovery asserted by [the plaintiff] in the two courts is different, the claim has been split and must be dismissed in [the second] Court, unless there was a valid reason for the splitting."[5]

The rule against claim splitting is an aspect of the doctrine of res judicata.[6] Splitting a cause of action indicates the separation of a claim into two or more parts.[7] The disfavor of claim splitting in the judicial system arises from the belief that a plaintiff should present all evidence and theories of recovery relating to a particular transaction in one action against a defendant.[8] Otherwise, defendants would be faced with "a multiplicity of suits and their attendant

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[2]*See id* (holding that res judicata has utmost importance in preventing vexatious litigation and promoting judicial stability).

[3]*See Malone Freight Lines, Inc. v. Johnson Motor Lines, Inc.*, 148 A.2d 770, 775 (Del. 1959).

[4]*See Maldonado v. Flynn*, 417 A.2d 378, 381 (Del. Ch. 1980).

[5]*See id.* at 382.

[6]*See Maldonado*, 417 A.2d at 382-83.

[7]*See White v. Metzer*, 159 A.2d 788 (Del. Super. 1960).

[8]*See Maldonado,* 417 A.2d at 382 .

harassment. An equally compelling consideration is one founded on public policy: piecemeal litigation of a single cause of action is contrary to the orderly administration of justice."[9] Res judicata bars a second action when a plaintiff has had a ""full, free and untrammeled opportunity to present his facts" but has neglected to present some of them or has failed to assert claims which should in fairness have been asserted. . ."[10] Therefore, res judicata acts as a bar to "claims that were actually raised [as well as] to those that might have been raised."[11] This principle will not be used, however, against a plaintiff whose claim was precluded in the former court for jurisdictional reasons.[12]

To determine whether a claim has been impermissibly split, a Court must look to the facts of each case, and decide if the two claims arise out of the same transaction and whether the Plaintiff could have properly presented his latter claim for relief in the previous action.[13] "Upon such a [finding], the plaintiff to prevent dismissal must then show that there was some impediment to the presentation of his entire claim for relief in the prior forum."[14] This burden is placed on the Plaintiff because "[i]f a plaintiff splits his claim and saves a theory of recovery for

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[9]*See Webster v. State Farm Mutual Automobile Ins. Co.*, 348 A.2d 329, 331 (Del. Super. 1975).

[10]*See id. quoting Coca-Cola v. Pepsi-Cola Co.*, 172 A. 260, 262 (Del. Super. 1934). Best Drywall has referred to *Cantor Fitzgerald, L.P. v. Chandler* to argue that fairness requires that this case be heard in Superior Court. However, *Cantor Fitzgerald* involved an action where the defendants "failed to prove that those claims asserted in [the present action] ought in fairness to have been brought in the [prior] action." *See Cantor Fitzgerald, L.P. v. Chandler*, 1998 Del. Ch. LEXIS 134, at *19. Fairness is a consideration in a res judicata inquiry, in both the Plaintiff's right to bring his claim, as well as the Defendant's right to be free of incessant litigation of the same matter. In this instance, fairness requires that Best Drywall not be permitted to bring a claim that they could and should have fairly raised in the Chancery forum.

[11]*See RSS Acquisition, Inc. v. Dart Group Corp.,* 1999 Del. Super. LEXIS 591, at *10.

[12]*See Maldonado*, 417 A.2d at 383.

[13]*See id.*

[14]*See Maldonado*, 417 A.2d at 383-84.

another forum, he assumes the risk that he will not be able to present it in the other forum because the first adjudication will be res judicata to all subsequent litigation."[15]

As Justice Quillen aptly stated in *RSS Acquisition, Inc. v. Dart Group Corporation*, there are five requisites that must be met before res judicata is applied.

1. The court making the prior adjudication must have had jurisdiction over the subject matter of the suit and of the parties to it.
2. The parties to the prior action were the same as the parties, or their privies, in the pending case.
3. The prior cause of action was the same as that in the present case, or the issues necessarily decided in the prior action were the same as those raised in the pending case.
4. The issues in the prior action were decided adversely to the contentions of the plaintiffs in the pending case.
5. The prior decree is final.[16]

These requirements are satisfied by the facts of this case. First, the Chancery Court has the authority to award damages for fraud, unjust enrichment, and breach of fiduciary duty as a corollary award to injunctive relief. Best argues that after it lost the injunctive relief, Chancery Court was not the appropriate forum to litigate the damages claims. But, if Chancery did not retain jurisdiction, the Delaware Code provides for its transfer to Superior Court.[17] However, Best Drywall did nothing. It did not attempt to prosecute the claims in Chancery. It did not seek to transfer the case. Best Drywall's inaction in the Chancery action precludes its complaint being heard before this Court. Second, Gary Feeheley was a party to the first and second actions. GDF was not a named party in the first action. Therefore, res judicata does not apply to it, and it shall remain in the case. But res judicata may be applied as to Feeheley. Third, the case was

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[15]*See id.* at 384.

[16]*See RSS Acquisition*, 1999 Del. Super. LEXIS 591, at *11 *quoting Epstein*, 153 A.2d at 184.

[17]*See* 10 Del. C. § 1902.

dismissed by Chancellor Chandler on October 18, 2001 for a failure to prosecute. Generally, a dismissal under Rule 41(e) of the Chancery Court Rules qualifies as a final adjudication of the merits.[18] Therefore, the case was decided finally and against Best Drywall. Therefore, the central question in this inquiry becomes whether the first and second actions contain the same central facts and questions to trigger res judicata.

What constitutes a common nucleus of operative facts is

> to be determined pragmatically, giving weigh [sp] to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage. . .among the factors relevant to a determination whether the facts are so woven together as to constitute a single claim are their relatedness in time, space, origin, or motivation, and whether, taken together, they form a convenient unit for trial purposes. Though no single factor is determinative, the relevance of trial convenience makes it appropriate to ask how far the witnesses or proofs in the second action would tend to overlap the witnesses or proofs relevant to the first. If there is a substantial overlap, the second action should ordinarily be held precluded. But the opposite does not hold true; even when there is not a substantial overlap, the second action may be precluded if it stems from the same transaction or series. . . That a number of different legal theories casting liability on an actor may apply to a given episode does not create multiple transactions and hence multiple claims. This remains true although the several legal theories depend on different shadings of the facts, or would emphasize different elements of the facts, or would call for different measures of liability or different kinds of relief.[19]

The facts of this case indicate that under the transactional application of res judicata, the claim presented before this Court could and should have been presented to Chancery Court in 2000.

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[18] *See O'Donnell v. Nixon Uniform Serv., Inc.,* 2003 Del. Super. LEXIS 184 at *14.

[19] *See DeRamus v. Redman*, 1986 Del. Super. LEXIS 1381, at *16-18 *quoting* RESTATEMENT (SECOND) JUDGMENTS § 24 (b)-(c).

On July 31, 2000, Best Drywall initiated an action for equitable relief in Chancery Court. Its claim requested an injunction against future competition by Gary Feeheley and his enterprise, as well as damages arising from Feeheley's past violations of the non-competition agreement. The complaint alleged that Feeheley was terminated from Best Drywall for gross misconduct and for covertly operating a competing business.[20] It acknowledged that the ownership and operation of GDF by Feeheley was a violation of the agreement.[21] It requested that the Chancery Court "award damages to Plaintiff for losses occasioned by Plaintiff's violation of the Agreement, including, without limitation, the amount of bonus compensation paid Defendant since the execution of the agreement."[22]

Chancellor Chandler dismissed the action on October 18, 2001 for want of prosecution. A dismissal by the Chancery Court for lack of prosecution is a dismissal with prejudice, unless specified otherwise.[23]

This action was filed with the Superior Court on April 4, 2003. The complaint alleged three claims against Feeheley and GDF: fraud, unjust enrichment, and breach of fiduciary duty. The Plaintiffs allege that these claims arise out of the actions taken by Feeheley while employed with Best, whereas the focus of the Chancery action was his post-employment conduct. The Defendant's initial motion to dismiss yielded an order requiring further discovery. The additional information obtained provided the missing details necessary to determine whether res judicata should bar this action.

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[20] *See* Best Drywall Cmplt., of 7/31/2000, at ¶ 7.
[21] *See id.* at ¶ 12.
[22] *See id.* at ¶ 14(D).
[23] *See* Del. Ch. Ct. R. 41 (e).

The fact that Best Drywall sought money damages in Chancery Court for breach of the agreement including compensation for the bonuses paid during the employment clearly indicate that notice of pre-firing breaches by Feeheley and the attendant damages existed at the time of that action. The two actions arose out of a common nucleus of operative facts and should have been presented together at one time. Having satisfied all the elements of res judicata, the burden now shifts to Best to show that there was some impediment to the presentation of the entire claim for relief in the prior forum.

Best contends that they could not have brought these claims against Feeheley or GDF in 2000 because the fraudulent activities at issue were concealed so that Best would not learn the nature and extent of Feeheley's actions until after the Chancery Court dismissal. But, discovery in this matter has yielded several key dates that indicate this is incorrect. First, the affidavit of a Best employee, Amanda Acierno, indicated that Charles Carmack, the company president, knew that Feeheley was improperly manipulating Best property, employees and work projects to create revenue for his own company on the side. The president was informed of these activities before Feeheley was fired from Best and before the Chancery action was filed. Second, an investigatory report was issued in October 2000, a year prior to the dismissal of the Chancery action, which alerted Best to Feeheley's use of its employees and materials "for his own benefit." Third, in their Superior Court complaint, Best acknowledges that Feeheley was terminated for the various violations that form the basis of the Superior Court action.[24] The fact that Feeheley was terminated in June 2000 for the violations presented to this Court indicates that Best had knowledge of the same upon filing the Chancery action. The claims and evidence presented here,

[24] *See* Best Complaint of 4/4/2004 at ¶¶ 10-44.

were available and known to Best in 2000, formed the grounds for Feeheley's dismissal and therefore, should have been presented to the Chancery Court in the action for money damages sustained by Best as a result of Feeheley's misconduct.

In 2000, Best had the grounds and the information to pursue unjust enrichment, breach of fiduciary duty and fraud claims against Feeheley in Chancery Court. The information Best had at its disposal at the time of Feeheley's termination and soon thereafter, with the publication of the investigative report, provided the grounds for the claims to be pursued in the Chancery action. The failure to prosecute their action in that forum precludes their ability to do so here. GDF was not a party to the first action, therefore res judicata shall not apply to it. The Motion to Dismiss GDF is DENIED. The Motion to Dismiss Gary Feeheley from this action is GRANTED.

Very truly yours,

T. Henley Graves

THG/jfg
oc: Prothonotary