

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
December 10, 2008 Session

**MARK SAROFF v. ARNOLD G. COHEN, ET AL.**

**Appeal from the Chancery Court for Knox County  
No. 170390-1 Jon Kerry Blackwood, Chancellor**

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**No. E2008-00612-COA-R3-CV - FILED FEBRUARY 25, 2009**

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Client filed suit against his former attorney and law firm, asserting a claim for conversion for failure to produce his client file after he terminated them as counsel and seeking a declaratory judgment that a deed of trust entered into by the parties was unenforceable. The trial court granted the attorney and firm's motion to dismiss on the conversion claim, holding that the client failed to state a claim upon which relief could be granted and failed to allege an intent to convert his property. The trial court granted the attorney and firm's motion to dismiss on the declaratory judgment claim, holding that client failed to join necessary parties and that a prior suit was pending on the matter. Finding that the entirety of the client's file was produced, we affirm the dismissal of the conversion claim. Finding that the issues raised in this matter can be resolved in a pending suit, we affirm the trial court's dismissal of the declaratory judgment claim.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed**

RICHARD H. DINKINS, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P. J., M.S., and FRANK G. CLEMENT, JR., J. joined.

John A. Lucas, Alcoa, Tennessee, for the appellant, Mark Saroff.

George F. Legg and Douglas L. Rose, Knoxville, Tennessee, for the appellees, Arnold G. Cohen and Leibowitz & Cohen.

**OPINION**

Mark Saroff filed a complaint against his former law firm, Leibowitz & Cohen (the "firm"), and his former attorney, Arnold Cohen, in the Chancery Court for Knox County on August 24, 2007, asserting a claim for conversion of files and invoices that they failed to produce at his request, for a declaratory judgment on the parties' obligations under a deed of trust, and for slander of title. Mr. Cohen and the firm filed a motion to dismiss for failure to state a claim, for failure to join necessary parties, and on the basis of a prior suit pending. The trial court granted the motion to dismiss the conversion and slander of title claims and the request for a declaratory judgment and denied Mr.

Saroff's request for injunctive relief. Mr. Saroff appeals the dismissal of the conversion and declaratory judgment claims. Finding no error in the action of the trial court, we affirm the dismissal of this case.

## **I. Factual History**

During the time that Mr. Cohen served as Mr. Saroff's attorney, the two parties entered into a number of business transactions. On January 8, 1993, the parties entered into three separate agreements:

1. Deed of Trust Note ("Note") in the amount of \$57,000 to be payable in two years on January 8, 1995. The Note also references outstanding legal fees owed by Mr. Saroff of \$38,500.
2. Agreement ("Agreement"), which memorialized Mr. Cohen's representation of Mr. Saroff and the payment of fees. The Agreement included a clause that stated that Mr. Cohen would earn a "special bonus legal fee" of \$28,500, upon the occurrence of certain conditions.
3. Deed of Trust ("Deed of Trust"), which conveyed to the trustees certain real property to secure payment of the Note and the legal fees.

Mr. Saroff did not pay the Note in full when it became due on January 8, 1995.

On May 1, 1997, the parties executed a Modification of Deed of Trust, which increased the amount of the principal indebtedness of the Deed of Trust to \$160,000. This increase was to secure payment of an additional \$45,000 in future legal fees claimed by Mr. Cohen.

In November of 2000, Mr. Cohen wrote Mr. Saroff to advise him that he had been unable to represent him on a particular matter for a long time due to the fact that there was a delinquency on the Note. Mr. Cohen nevertheless continued to represent and to bill Mr. Saroff for legal services rendered on other matters.

On January 22, 2004, Mr. Cohen sent Mr. Saroff a statement of amounts that Mr. Cohen claimed were owed to him. The total amount was \$407,089.10, including \$189,373.64 on the Note, \$67,508.80 for a "special bonus legal fee"<sup>1</sup>, and \$150,206.66 in legal fees. At this point, Mr. Cohen stopped representing Mr. Saroff. On June 29, 2004, Mr. Cohen sent Mr. Saroff an invoice for services allegedly rendered on his behalf in 2003 and 2004. Mr. Saroff received the invoices for these services, however, most were lost due to a fire at Mr. Saroff's office.

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<sup>1</sup> This amount is the original \$28,500 "special bonus legal fee" stipulated to in the Agreement, plus interest.

On May 31, 2005, Mr. Cohen sent a Notice of Default letter to Mr. Saroff declaring a default of the Note. On or about February 27, 2006, the parties signed and executed a Forbearance Agreement. The Forbearance Agreement included language that would toll the running of the statute of limitations on a default under the Note and the Deed of Trust until January 1, 2008. The Forbearance Agreement also provided Mr. Saroff a right of first refusal to purchase the Note or the Deed of Trust at the same terms as any offer received by Mr. Cohen.

On June 30, 2006, Mr. Cohen received an offer for the Note and the Deed of Trust; he entered into a Note Purchase Agreement with Kenn Davin for \$560,000, despite this amount being \$152,910.90 more than the amount Mr. Cohen claimed owing under the Note in his January 22, 2004 letter. The Note Purchase Agreement acknowledged Mr. Saroff's right of first refusal pursuant to the Forbearance Agreement and stated that if Mr. Saroff did not exercise this right, Mr. Davin would be required to purchase the Note and Deed of Trust. That same day, Mr. Cohen gave notice to Mr. Saroff of the Note Purchase Agreement and of his right of first refusal.

On or about July 20, 2006, Mr. Saroff deposited \$28,000 with the East Tennessee Title Insurance Agency and tendered a proposed escrow agreement to Mr. Cohen. Mr. Cohen did not accept the escrow agreement, and did not sell the Note and Deed of Trust to Mr. Saroff. The Note and Deed of Trust were not sold to Mr. Davin pursuant to the Note Purchase Agreement.

On July 13, 2007, Mr. Saroff's new counsel requested that Mr. Cohen deliver a statement of amounts due, accompanied by supporting documentation. On July 18, 2007, Mr. Cohen responded that the amount due pursuant to the loan, interest and legal fees was less than \$560,000, however, since Mr. Saroff had exercised his right of first refusal pursuant to the Forbearance Agreement, the amount owed was \$560,000, the terms of Mr. Davin's offer.

On July 20, 2007, Mr. Saroff requested that Mr. Cohen deliver copies of his client files, including fee statements, that were generated during Mr. Cohen's representation of Mr. Saroff. Mr. Saroff's attorney made this request again on August 3 and August 22, 2007; Mr. Cohen's counsel replied that they were reviewing the file.

## **II. Procedural History**

On August 24, 2007, Mr. Saroff filed this suit against Mr. Cohen and his law firm. Mr. Saroff's complaint sought a claim for conversion because Mr. Cohen refused to deliver client files generated during Mr. Cohen's representation of Mr. Saroff; the relief sought was an injunction. Mr. Saroff's complaint also sought a declaratory judgment that he was not indebted to Mr. Cohen for \$560,000 and that the Deed of Trust securing the alleged indebtedness was unenforceable as the statute of limitations had run.

Mr. Cohen and the firm eventually informed Mr. Saroff that the files would be ready for delivery on September 11, 2007. The files were not delivered on this date, and Mr. Saroff filed a motion for mandatory injunction on September 12, 2007, asking the court to order Mr. Cohen to

deliver the files and to account for any missing files. Mr. Cohen and the firm began producing some files on September 12 or 13, at Mr. Cohen's deposition on November 1, 2007, and then for some time afterward.

At his deposition held in connection with the motion for injunction, Mr. Cohen refused to produce the invoices for services rendered, stating that they were not part of the client file and that he was under no obligation to produce them.

Mr. Cohen and the firm filed a Rule 12 motion to dismiss on September 28, 2007, and amended on December 10, 2007, seeking dismissal of all causes of action for failure to state a claim upon which relief could be granted; failure to join a party under Rule 19, Tenn. R. Civ. P., and Tennessee's Uniform Declaratory Judgments Act; and on the basis of a prior suit pending. The prior suit referred to was filed on March 26, 2007, by Design One Building Systems, Inc. (the "Design One suit") to declare and enforce a mechanic's and materialmen's lien on property owned by Mr. Saroff; the complaint alleged that Design One provided building materials and services for improvement to the property and that Mr. Saroff had failed to pay the balance due to Design One. Mr. Cohen and the firm were also named as defendants in that matter because the property at issue was the real property listed as collateral under the Deed of Trust. Design One alleged that, as a result of the Deed of Trust, Mr. Cohen and the firm received a beneficial interest in the property upon which the lien attached and was sought to be enforced. Mr. Cohen and the firm filed a cross-claim in the Design One lawsuit against Mr. Saroff asserting their rights under the Note and Deed of Trust.<sup>2</sup>

On December 26, 2007, Mr. Saroff filed a motion to compel, seeking a court order to require Mr. Cohen to deliver all the invoices for legal services allegedly performed, and an accounting of the amounts that Mr. Cohen claimed Mr. Saroff allegedly owed to him under the Deed of Trust.

A hearing was held on January 7, 2008, regarding Mr. Saroff's motions to compel and for an injunction, and the motion to dismiss; the court heard evidence relating to the motion for injunction. On January 11, 2008, the court entered an order granting the motion to dismiss on the conversion claim, stating that Mr. Saroff had received all files to which he was entitled and that Mr. Saroff failed to allege in his complaint an "intent" to convert his client files. The court also granted the motion to dismiss the declaratory judgment claim, stating that (1) the trustees of the Deed of Trust were necessary parties who were not joined to the proceedings and (2) that a prior suit was pending regarding the disposition of the Deed of Trust. On January 16, 2008, Mr. Saroff filed a motion to alter or amend, asking leave to amend the complaint to specifically allege intent on the conversion claim and requesting a reversal on the dismissal of the declaratory judgment claim to consolidate it with the Design One suit. The court denied this motion on February 15, 2008.

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<sup>2</sup> In his reply brief, Mr. Saroff states that Mr. Cohen and the firm "have now filed a cross-claim against Mr. Saroff in the mechanic's lien case raising the issues raised by Count II of [Mr. Saroff's] Complaint (the declaratory judgment claim)."

## STATEMENT OF THE ISSUES

On appeal, Mr. Saroff raises the following issues.

1. Whether the trial court erred in considering extrinsic evidence when granting the motion to dismiss on the conversion claim.
2. Whether the trial court erred by not requiring Mr. Cohen and the firm to turn over invoices for legal services rendered, which were part of the client files.
3. Whether the trial court erred in finding that the trustees of the Deed of Trust were necessary parties and in denying Mr. Saroff's request for leave to amend his complaint.
4. Whether the trial court erred in dismissing the declaratory judgment claim based on the doctrine of prior suit pending.

## STANDARD OF REVIEW

A “review of findings of fact by the trial court in civil actions shall be *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise.” Tenn. R. App. P. 13(d); *Kendrick v. Shoemake*, 90 S.W.3d 566, 570 (Tenn. 2002). We review the trial court's conclusions of law under a *de novo* standard, with no deference to the conclusions made by the lower court. *Kendrick*, 90 S.W.3d at 569-70; *Southern Constructors, Inc. v. Loudon County Bd. Of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

## ANALYSIS

### I. Conversion Claim

Mr. Saroff asserts that the trial court's dismissal of his conversion claim was error because the trial court improperly considered extrinsic evidence, erroneously ruled that all the client files had been released, incorrectly held that he failed to allege “intent” in his complaint, and improperly rejected his request to amend the complaint, as an alternative to dismissal. Mr. Cohen and the firm assert that the trial court properly dismissed Mr. Saroff's cause of action because he failed to allege an intent on their part to convert his property and because all client files to which he is entitled had been produced.

#### *Consideration of Evidence Outside the Pleadings*

A trial court should review only the complaint, and any exhibits attached in accordance with Tenn. R. Civ. P. 10.03, when considering a motion to dismiss, and matters outside the pleadings should not be considered. *Trau-Med of America, Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 696 (Tenn.

2002); *Marceaux v. Thompson*, 212 S.W.3d 263, 266 (Tenn. Ct. App. 2006); *Pendleton v. Mills*, 73 S.W.3d 115, 120 (Tenn. Ct. App. 2001). However, the trial judge has the discretion “whether or not to receive matters outside the pleading on a motion to dismiss for failure to state a claim.” *Hixson v. Stickley*, 493 S.W.2d 471, 473 (Tenn. 1973). If a trial court does consider materials outside the pleadings, then Tenn. R. Civ. P. 12.02 provides that “the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.” Tenn. R. Civ. P. 12.02; *Hixson*, 493 S.W.2d at 473; *Pendleton*, 73 S.W.3d at 121.

In ruling on the motion to dismiss, the trial court’s January 11, 2008, Memorandum and Order stated “[a]lthough a motion to dismiss a complaint under Rule 12 of the Tennessee Rules of Civil Procedure tests the legal sufficiency of the complaint, Plaintiff (sic) proof on the issue of the mandatory injunction established that the client’s files had been returned, with the possible exception of the invoices or bills.” The trial court thus considered evidence in connection with the motion for injunction when dismissing the conversion claim and, since this information is outside the pleadings, we treat the trial court’s Rule 12 dismissal as an order granting summary judgment.

#### *Trial Court’s Finding That The File Had Been Returned*

Mr. Saroff asserts that the trial court erred in dismissing his claim because the legal invoices are a part of his client file that were required to be produced after Mr. Cohen and the firm were terminated as his counsel. Mr. Cohen and the firm assert that the invoices are not part of the client file required to be turned over and that Mr. Saroff is attempting to circumvent the discovery process whereby he could obtain the invoices through proper discovery requests if relevant to an underlying suit.

Summary judgment is appropriate where a party establishes that there is no genuine issue as to any material fact and that a judgment may be rendered as a matter of law. Tenn. R. Civ. P. 56.04; *Stoval*, 113 S.W.3d at 721. Moreover, it is proper in virtually all civil cases that can be resolved on the basis of legal issues alone, *Byrd v. Hall*, 847 S.W.2d at 210; *Pendleton*, 73 S.W.3d at 121; however, it is not appropriate when genuine disputes regarding material facts exist. Tenn. R. Civ. P. 56.04. The party seeking a summary judgment bears the burden of demonstrating that no genuine disputes of material fact exist and that the party is entitled to judgment as a matter of law. *Godfrey*, 90 S.W.3d at 695. To be entitled to summary judgment, the moving party must affirmatively negate an essential element of the non-moving party’s claim or show that the moving party cannot prove an essential element of the claim at trial. *Martin v. Norfolk Southern Railway Co.*, 271 S.W.3d 76 (Tenn. Nov. 14, 2008).

Summary judgments do not enjoy a presumption of correctness on appeal. *BellSouth Adver. & Publ’g Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003). This court must make a fresh determination that the requirements of Tenn. R. Civ. P. 56 have been satisfied. *Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1977). We consider the evidence in the light most favorable to the non-moving party and resolve all inferences in that party’s favor. *Stovall v. Clarke*, 113 S.W.3d 715, 721 (Tenn. 2003); *Godfrey v. Ruis*, 90 S.W.3d 692, 695 (Tenn. 2002). When reviewing the

evidence, we first determine whether factual disputes exist. If a factual dispute exists, we then determine whether the fact is material to the claim or defense upon which the summary judgment is predicated and whether the disputed fact creates a genuine issue for trial. *Byrd v. Hall*, 847 S.W.2d 208, 214 (Tenn. 1993); *Rutherford v. Polar Tank Trailer, Inc.*, 978 S.W.2d 102, 104 (Tenn. Ct. App. 1998).

The facts relating to the conversion claim are undisputed. During the January 7 hearing on the motion for injunction, both sides were afforded the opportunity to present proof to the trial court. Both sides agreed that the only issue to be resolved was whether to classify the invoices as billing records belonging to Mr. Cohen and the firm or as documents belonging to Mr. Saroff as part of his client file.<sup>3</sup> Mr. Cohen testified that Mr. Saroff's entire client file was released to him, and that the legal invoices were withheld because they were not part of the client file. Mr. Cohen also admitted that some invoices were originally stored in Mr. Saroff's client file, but then moved to another file specifically created for invoices. Mr. Saroff's attorney stated that the only remaining documents yet to be produced were the invoices to which Mr. Saroff alleged he was entitled.

Finding that no genuine issue of material fact exists as to the property claimed to have been converted, we now determine whether Mr. Cohen and the firm were entitled to the dismissal of Mr. Saroff's conversion claim as a matter of law.

Mr. Saroff does not cite any authority to support his argument that legal invoices are part of a client's file. The only rule of law upon which this Court believes Mr. Saroff's argument could be based is the former attorney's responsibilities found under Tennessee Rule of Professional Conduct Rule. 1.16.

Tennessee Rule of Professional Conduct Rule 1.16(d) states that:

Upon termination of the representation of a client, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, including:

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<sup>3</sup> During an objection to the direct examination of Mr. Cohen, the trial court had the following colloquy with both parties' counsel to clarify the conversion issue:

THE COURT: And I believe it's your position that these invoices - - correct me if I'm wrong, your position is that these invoices are part of your accounts receivable or are your law firm's, business firm's.

[Defendants' Counsel]: Right, sir, precisely.

[Plaintiff's Counsel]: And it's our position that the invoices are part of the client file. So that crystalizes the issue.

(2) promptly surrendering papers and property of the client and any work product prepared by the lawyer for the client and for which the lawyer has been compensated...

Tenn. Rules of Prof'l Conduct R. 1.16(d)(2). Thus, for Mr. Saroff to be entitled to the invoices, the documents must either be his paper or property or a work product prepared by Mr. Cohen for Mr. Saroff.

During direct examination by Mr. Saroff's counsel, Mr. Cohen testified about the documents withheld from Mr. Saroff:

Q. ...just to be clear, the invoices that we're talking about are not pure law firm records such as your list of all your accounts receivable or an aging report, these are actually documents that were generated showing the time that you spent, the amount that you were billing, what you were doing it for, and you had actually sent those to Mr. Saroff, previously?

A. That's correct.

Q. I want you to look, please, at Exhibit 9, sir. This is a list of what you call...Cohen and Leibowitz & Cohen files that have not been turned over; is that correct? These are the ones that you're calling your law firm records?

A. Yes, sir.

Q. And the item number 5 there, the billings, fee and debt computations, that's the ones that would contain the copies of the invoices that were sent to Mr. Saroff?

A. Yes.

On cross examination by his counsel, Mr. Cohen addressed the production of Mr. Saroff's client file and the withholding of the invoices:

Q. ...did you review all of the files that you had in your office relating to representation of Mr. Saroff?

A. Yes, sir.

Q. And did you turn those client files over to me for delivery to [plaintiff's counsel]?

A. Yes, sir.

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Q. And did you also maintain in your office, Mr. Cohen, various business files of the firm of Leibowitz & Cohen?

A. Yes, sir.

Q. And did you indicate to [plaintiff's counsel] what business files that you retained in your office that you did not turn over?

A. Yes, we did that.

Q. Now, in the general course of business, do you keep your account receivable records actually in the client file?

A. Did not in this case and in many other cases. It varies from client to client, quite frankly.

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Q. Have you made a thorough search of all of the files in your office up to this point to determine whether or not there are any other client files that should be turned over?

A. I've certainly tried to. I think I have.

Mr. Cohen's testimony reveals that all documents determined to be part of Mr. Saroff's client file were turned over to him and that the invoices were withheld because they were accounts receivable business files and property of the law firm.

We agree that the invoices are property of the law firm. See *Ryan v. Surprise*, 2003 WL 22071005 (Tenn. Ct. App. Aug. 27, 2003) (where a plaintiff who was suing his former attorney for legal malpractice sought production of the law firm's billing records through discovery requests). The invoices were accounts receivable records generated for the purpose of memorializing the cost to the client of legal services rendered and were maintained in the general course of business. The invoices did not become part of the client file simply because they were placed in the client's file. In addition, the invoices are not considered work product because they were not prepared for the benefit of Mr. Saroff; rather the invoices were generated for the benefit of Mr. Cohen and the firm to ensure payment of legal services rendered.

Mr. Saroff further alleges that the invoices "form the basis of [Mr. Cohen's and the firm's] claim against [Mr. Saroff] which they seek to enforce pursuant to the Note and Deed of Trust...[The invoices] are highly relevant to this suit and should have been turned over." Rule 26, Tenn. R. Civ. P., allows discovery through the "production of documents," Tenn. R. Civ. P. 26.01, and holds that "[p]arties may obtain discovery regarding any matter, not privileged, which is *relevant* to the subject matter involved in the pending action..." Tenn. R. Civ. P. 26.02 (emphasis added). Thus, the proper method of obtaining invoices relevant to a lawsuit is through a discovery request, not a motion for an injunction. See *Ryan v. Surprise*, 2003 WL 22071005.

Inasmuch as the invoices are not part of the client file, we find, as did the trial court, that the entirety of Mr. Saroff's client file has been turned over to him. As such, Mr. Cohen and the firm are entitled to summary judgment as a matter of law since they are no longer in possession of the property at issue in Mr. Saroff's conversion claim.

The other errors raised by Mr. Saroff in regard to the conversion claim include the trial court's finding that his complaint lacked an allegation of "intent" and the court's denial of his alternative request to amend the complaint to specifically allege intent. Since we have found the

client file which served as the basis of the claim to have been produced in full, these two issues have been rendered moot.

## II. Declaratory Judgment Claim

Mr. Saroff asserts that the trial court erred in dismissing the declaratory judgment claim on the basis of a prior suit pending and for failure to join necessary parties in this action. Mr. Cohen and the firm contend that the Design One suit includes all parties to the present suit and that the proper adjudication of that suit will require these parties to resolve the issues raised by Mr. Saroff in the present matter.<sup>4</sup> Finding that the issues raised in this matter can be resolved in the Design One suit, we affirm the trial court's dismissal of the declaratory judgment claim. Our affirmance of the trial court on this ground renders our consideration of the alternative ground of failure to join necessary parties unnecessary.

The question of the propriety of dismissal based on a prior suit pending is a legal question; thus, the trial court's dismissal will be reviewed *de novo* with no presumption of correctness. *West v. Vought Aircraft Indus.*, 256 S.W.3d 618, 623 (Tenn. 2008). "In Tennessee a suit is subject to plea in abatement<sup>5</sup> where there is pending another suit on the same subject matter." *Cockburn v. Howard Johnson, Inc.*, 385 S.W.2d 101, 102 (1964). The prior suit pending doctrine is based upon the "common-law rule prescribing that a person 'shall not be ... twice vexed for one and the same cause.'" *West*, 256 S.W.3d at 622 (quoting *Sperry's Case*, (1591) 77 Eng. Rep. 148, 148 (Exch.)). "[A] party could have an action barred on procedural grounds if there was a prior suit pending against him in the same jurisdiction for the same cause of action." *Id.* In *Cockburn v. Howard Johnson, Inc.*, 385 S.W.2d 101 (1964), the Tennessee Supreme Court held that:

there are four essential elements to a defense of prior suit pending: 1) the lawsuits must involve identical subject matter; 2) the lawsuits must be between the same parties; 3) the former lawsuit must be pending in a court having subject matter jurisdiction over the dispute; and 4) the former lawsuit must be pending in a court having personal jurisdiction over the parties.

*Id.* at 623 (citing *Cockburn*, 385 S.W.2d at 102). "[T]o determine whether the same subject matter is involved in both suits, a court must consider whether a judgment in the first suit would bar litigation of an issue in the second suit under *res judicata* principles." *Fidelity & Guar. Life Ins. Co. v. Corley*, 2003 WL 23099685 at \*4 (Tenn. Ct. App. Dec. 31, 2003).

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<sup>4</sup> "[W]hen two courts have concurrent subject matter jurisdiction, the first court to acquire jurisdiction over a particular case takes exclusive jurisdiction to end the matter." *Summers v. Ryan*, 2007 WL 161037 at \*5 (Tenn. Ct. App. Jan. 23, 2007).

<sup>5</sup> "The Tennessee Rules of Civil Procedure replaced 'pleas in abatement' with 'motions for dismissal.' See Tenn. R. Civ. P. 7.03, 41.02." *Roy v. Diamond*, 16 S.W.3d 783, 789 (Tenn. Ct. App. 1999).

Three of the four elements set forth by the *Cockburn* court to establish the defense of prior suit pending have been met. The Design One suit not only includes all the parties in the current matter as well as the trustees of the Deed of Trust, necessary parties to the present suit. The court in the Design One suit has subject matter jurisdiction over the issues raised in the present case and personal jurisdiction over all necessary parties. The remaining question is whether the current and prior lawsuits “involve identical subject matter.”

Mr. Saroff states that the prior suit “involves the issue of the priority of the Deed of Trust *vis a vis* a mechanic’s lien,” and that the present matter differs because it deals with “an effort to force Mr. Cohen to deliver Ms. Saroff’s client files to him, and an action for a declaratory judgment that Mr. Saroff does not owe the Defendants any money and that they therefore do not have a valid, enforceable claim or lien.” Mr. Cohen and the firm argue that the issue of Mr. Saroff’s client file is irrelevant to the declaratory judgment claim and that the prior suit will adjudicate “all rights between the Plaintiffs and Defendants...respecting the declaratory judgment action” because, in the prior lawsuit, Mr. Cohen and the firm “are required to establish the validity of their deed of trust and the extent of any indebtedness secured thereby.”

In the present matter, Mr. Saroff is seeking a declaratory judgment that Mr. Cohen and the firm are owed no money and that the Deed of Trust is invalid. However, as Mr. Cohen and the firm have contended, the validity of the Deed of Trust and the indebtedness thereunder must be established in the Design One case in order for them to properly assert their lien on the property. Mr. Saroff concedes in his Reply Brief filed in this appeal that the cross-claim filed by Mr. Cohen and the firm in the prior suit includes “the issues raised by Count II (the declaratory judgment claim) of [Mr. Saroff’s] Complaint in [the present case].” The Design One suit involves issues that will resolve those raised here by Mr. Saroff.<sup>6</sup> As such, we find that claims asserted in the Design One suit and the current suit involve the same subject matter and a judgement in that suit as to the validity of the Deed of Trust and indebtedness would be *res judicata*.<sup>7</sup> The trial court properly dismissed the declaratory judgment claim on the basis of the prior suit.

Mr. Saroff asserts that if this Court affirms the trial court’s finding that the prior suit defense applied, the trial court still erred in not consolidating the two suits. Mr. Cohen and the firm assert that consolidation would serve no purpose as Mr. Saroff can still raise the issues in the prior suit.

Rule 42.01, Tenn. R. Civ. P., states that “[w]hen actions involving a common question of law or fact are pending before a court, the court may order all the actions consolidated or heard jointly, and may make such orders concerning proceedings therein as may tend to avoid unnecessary costs

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<sup>6</sup> At oral argument, counsel for Mr. Cohen and the firm acknowledged that the issues raised by Mr. Saroff under the declaratory judgment claim were not *res judicata* as a result of the trial court’s dismissal of the cause of action. Counsel stated that, because the issues were not adjudicated on the merits, Mr. Saroff did not lose his right to raise the same issues in the Design One suit.

<sup>7</sup> The invoices which Mr. Saroff seeks are subject to discovery and production in the Design One suit, in accordance with the Tennessee Rules of Civil Procedure.

or delay.” Tenn. R. Civ. P. 42.01. “The use of the term ‘may’ in the initial portion of this Rule clearly gives the trial court discretion as to whether the facts of a particular case merit consolidation of cases of that type.” *Van Zandt v. Dance*, 827 S.W.2d 785, 787 (Tenn. Ct. App. 1991). “[T]he consolidation of actions is not a matter of right, but rests in the sound discretion of the court, and its discretion in ordering or refusing consolidation will not be interfered with unless abused.” *Id.*

The Tennessee Supreme Court addressed the abuse of discretion standard in *Eldridge v. Eldridge*, 42 S.W.3d 82 (Tenn. 2001) stating that:

Under the abuse of discretion standard, a trial court's ruling “will be upheld so long as reasonable minds can disagree as to propriety of the decision made.” A trial court abuses its discretion only when it “applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining.” The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court.

*Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001) (internal quotations omitted).

Mr. Saroff argues that “there was no reason not to consolidate this case with the other pending suit,” but this does not constitute an abuse of discretion. Mr. Saroff acknowledges that the judge in this case is also the judge presiding in the Design One suit. In making its decision not to consolidate the claims, the court was aware of the issues raised in the present matter as well as issues to be resolved in the prior suit. The trial court’s decision was not based on an “incorrect legal standard” or “against logic or reasoning.” We find that the trial court did not abuse its discretion in refusing to consolidate the cases.

### **III. Conclusion**

For the reasons set forth above, the decision of the Chancery Court is AFFIRMED. Costs are assessed against Mr. Saroff, for which execution may issue if necessary.

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RICHARD H. DINKINS, JUDGE