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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2007-2008

1061624

Little Narrows, LLC

v.

Robert B. Scott and Vicki Scott, d/b/a Re/Max Advantage South

Appeal from Jefferson Circuit Court
(CV-07-900767)

STUART, Justice.

Little Narrows, LLC, a real-estate-development company owned and operated by Isaac David, sued real-estate broker Robert Scott and his wife Vicki Scott, d/b/a Re/Max Advantage

South ("Re/Max"), in the Jefferson Circuit Court, alleging breach of contract and fraud. The Scotts moved the trial court for a change of venue to the Shelby Circuit Court and subsequently moved to dismiss the action on the basis that Little Narrows' action was based on the same facts and claims as an action already pending in the Shelby Circuit Court; in response to the Scotts' latter motion, the trial court dismissed Little Narrows' action with leave to file its claims as counterclaims in Shelby County. Little Narrows appeals the Jefferson Circuit Court's dismissal of its claims. We affirm.

I.

On March 3, 2005, Little Narrows entered into a real-estate listing agreement naming Re/Max as the listing agent for the sale of 73 lots in the Courtyard Manor subdivision in Shelby County; Isaac David's ex-wife, real-estate agent Patti David, is shown on the agreement as the listing agent. The purpose of the listing agreement was to give Patti David and her company, List With Us, Inc., the exclusive right to sell the lots in the Courtyard Manor subdivision. By Alabama law, real-estate agents such as Patti David, who are not licensed as real-estate brokers, must work under the direction of a

licensed real-estate broker. Patti David accordingly operated as a listing agent and salesperson under the authority of Robert Scott, a licensed real-estate broker. Section 34-27-34(a)(2), Ala. Code 1975, provides, in pertinent part:

> "A qualifying broker shall be held responsible to the [Alabama Real Estate] [C]ommission and to the public for all acts governed by this chapter of each salesperson and associate broker licensed under him or her and of each company for which he or she is the qualifying broker. It shall be the duty of the qualifying broker to see that all transactions of every licensee engaged by him or her or any company for which he or she is the qualifying broker comply with this chapter. Additionally, the qualifying broker shall be responsible to an injured party for the damage caused by any violation of this chapter by any licensee engaged by the qualifying broker."

On April 26, 2005, Re/Max and Little Narrows entered into an addendum to the listing agreement.[1] Pursuant to trade standards and the custom in the industry, separate listing agreements were also subsequently entered into with all the builders operating in Courtyard Manor.

At some time thereafter, the business relationship between Isaac David and Patti David deteriorated. Isaac David alleges that Patti David, and by extension her broker Robert

[1]Little Narrows alleges that both the listing agreement and the addendum are defective; however, that claim is irrelevant to the issue presented in this case.

Scott, failed to perform her duties in a professional manner by not properly staffing the Courtyard Manor sales office, by not complying with the decisions made by the lot owners and builders, and by not answering telephone calls and returning messages, among other things. Isaac David further alleges that he attempted to discuss these issues with Robert Scott, but that Scott refused to intervene in Patti David's operation of the sales office for Courtyard Manor.

Patti David agrees that her business relationship with her ex-husband Isaac David deteriorated; she, however, alleges that it deteriorated after he began making repeated and insistent demands that she engage in sexual relations with him. She alleges that after she continually refused to do so, Isaac David threatened that he and his companies, Little Narrows and The David Group, Inc., would breach the terms of the listing agreement and cease working with her and further cause the builders and other entities associated with Courtyard Manor to also cease working with her.

On February 8, 2007, Patti David and "List With Us, Inc., d/b/a Re/Max Advantage South" sued Isaac David, Little Narrows, The David Group, Pat Morton, Guy Martin, and

fictitiously named parties in the Shelby Circuit Court, alleging intentional interference with business or contractual relations, conspiracy, and breach of contract.[2] The named defendants subsequently moved to dismiss the action on the basis that Alabama law allows only licensed real-estate brokers -- not agents like Patti David -- to enter into listing agreements and to collect commissions. On April 26, 2007, Patti David filed an amended complaint clarifying that she was a real-estate agent operating under the authority of the licensed real-estate broker Robert Scott and his brokerage Re/Max, and that Re/Max was the party that was to actually receive the commissions on properties sold in Courtyard Manor. She also added a third-party-beneficiary claim alleging that she was the third-party beneficiary of the listing agreement and asserting claims of breach of contract, "intentional, willful, and wrongful violation of duty," and unjust enrichment.

On April 30, 2007, Little Narrows sued Robert Scott and his wife Vicki Scott, d/b/a Re/Max, in the Jefferson Circuit Court, alleging breach of contract and fraud and seeking a

[2]Morton works for Isaac David's businesses; Martin is an attorney who was representing Little Narrows.

declaration that there were no existing valid contracts between the parties. On May 10, 2007, the Scotts moved for a change of venue to the Shelby Circuit Court on the basis that the action in Jefferson County was based on the same facts and claims as those in Patti David's previously filed action in Shelby County. The Scotts also moved, pursuant to Rule 12(b)(6), Ala. R. Civ. P., to dismiss the complaint for failure to state a claim upon which relief could be granted.

Little Narrows opposed the Scotts' motions and also filed its own motions seeking to disqualify the Scotts' attorney and seeking a partial summary judgment. On June 8, 2007, the Jefferson Circuit Court denied the Scotts' motion for a change of venue and denied Little Narrows's motion to disqualify the Scotts' attorney. On June 29, 2007, the Scotts moved the Jefferson Circuit Court to dismiss or abate Little Narrows' action on the basis of § 6-5-440, Ala. Code 1975, which states:

> "No plaintiff is entitled to prosecute two actions in the courts of this state at the same time for the same cause and against the same party. In such a case, the defendant may require the plaintiff to elect which he will prosecute, if commenced simultaneously, and the pendency of the former is a good defense to the latter if commenced at different times."

On July 12, 2007, the Jefferson Circuit Court entered an order granting the Scotts' motion to dismiss or abate Little Narrows' action, stating:

> "It appears to the court that the issues are the same in both cases, that is, whether there was a valid agreement between [Re/Max] and Little Narrows, LLC. There are claims for damages by [Re/Max] and [Patti] David against Little Narrows, LLC, and claims for damages by Little Narrows, LLC, against Robert Scott and Vicki Scott, d/b/a [Re/Max]. All the claims arise out of the same transaction or events.
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> "This court finds that a decision in the Shelby County case would be res judicata on the issues in this case. Therefore, the claims in this case are compulsory counterclaims in the action in Shelby County.
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> "This action is dismissed with leave for plaintiff to file counterclaims in the Circuit Court of Shelby County, Alabama."

Little Narrows appeals.

II.

Little Narrows raises three issues; however, the only issue we ultimately must consider is whether the Jefferson County action and the Shelby County action are based on claims arising from the same facts and circumstances and asserted by the same parties so as to fall within the scope of § 6-5-440.[3]

[3]Little Narrows also raises the issue whether the Scotts' attorney should be disqualified. However, that attorney

We have previously stated that "[w]hen the facts underlying a motion filed pursuant to § 6-5-440 are undisputed, as is the case here, our review of the application of the law to the facts is de novo." Ex parte Metropolitan Prop. & Cas. Ins. Co., [Ms. 1060767, June 1, 2007] ___ So. 2d ___, ___ (Ala. 2007) (citing Greene v. Town of Cedar Bluff, 965 So. 2d 773, 779 (Ala. 2007)).

III.

In Ex parte Bremen Lake View Resort, L.P., 729 So. 2d 849, 851 (Ala. 1999), we stated:

> "This Court has held that the obligation imposed on a defendant under Rule 13(a), Ala. R. Civ. P., to assert compulsory counterclaims, when read in conjunction with § 6-5-440, Ala. Code 1975, which prohibits a party from prosecuting two actions for the same cause and against the same party, is tantamount to making the defendant with a compulsory counterclaim in the first action a 'plaintiff' in that action (for purposes of § 6-5-440) as of the time of its commencement. See, e.g., Ex parte Parsons & Whittemore Alabama Pine Constr. Corp., 658 So. 2d 414 (Ala. 1995); Penick v. Cado Systems of Cent. Alabama, Inc., 628 So. 2d 598 (Ala. 1993); Ex parte Canal Ins. Co., 534 So. 2d 582 (Ala. 1988). Thus, the defendant subject to the counterclaim rule

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withdrew while this case was pending on appeal and that issue is thus moot. Little Narrows has also argued that its motion for a partial summary judgment should have been granted; however, because we hold that this action was rightly dismissed pursuant to § 6-5-440, it is likewise unnecessary for us to consider that argument.

> who commences another action has violated the prohibition in § 6-5-440 against maintaining two actions for the same cause. We affirm the general rule expressed in these cases; to do otherwise would invite waste of scarce judicial resources and promote piecemeal litigation."

Thus, the question we must answer is whether the claims asserted by Little Narrows in the underlying action in Jefferson County are compulsory counterclaims that should have been asserted in the Shelby County action. Rule 13(a), Ala. R. Civ. P., defines "compulsory counterclaims" as

> "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."

Little Narrows argues that its claims cannot be considered compulsory counterclaims because, it argues, its claims are claims against the Scotts and the Scotts were not "opposing part[ies]" in the Shelby County action when this action was filed in Jefferson County. The Shelby County action, Little Narrows argues, is an action filed by a real-estate agent (Patti David) against Isaac David and his companies, including Little Narrows, clients of the licensed real-estate broker with whom she was working. It would have been impossible,

Little Narrows argues, for it to assert a counterclaim against the Scotts in the Shelby County action because, Little Narrows argues, the Scotts were not parties to that case.

This Court has not previously considered the issue that is now before us, that is, whether the term "opposing party" as used in Rule 13(a) should be read strictly to mean a named party who has asserted a claim against the prospective counterclaimant in the first instance. However, at least one federal circuit court has had opportunity to address this issue. In Transamerica Occidental Life Insurance Co. v. Aviation Office of America, Inc., 292 F.3d 384 (3d Cir. 2002), current United States Supreme Court Justice Samuel Alito wrote the following regarding Rule 13(a), Fed. R. Civ. P., which is identical to Rule 13(a):

> "For a claim to qualify as a compulsory counterclaim, there need not be precise identity of issues and facts between the claim and the counterclaim; rather, the relevant inquiry is whether the counterclaim 'bears a logical relationship to an opposing party's claim.' Xerox Corp. v. SCM Corp., 576 F.2d 1057, 1059 (3d Cir. 1978). The concept of a 'logical relationship' has been viewed liberally to promote judicial economy. Thus, a logical relationship between claims exists where separate trials on each of the claims would 'involve a substantial duplication of effort and time by the parties and the courts.' Id. Such a duplication is likely to occur when claims involve

the same factual issues, the same factual and legal issues, or are offshoots of the same basic controversy between the parties. See id.; Great Lakes Corp. v. Herbert Cooper Co., 286 F.2d 631, 634 (3d Cir. 1961). In short, the objective of Rule 13(a) is to promote judicial economy, so the term 'transaction or occurrence' is construed generously to further this purpose.

"This case, however, presents the question whether the rationales supporting a liberal reading of 'transaction or occurrence' in Rule 13(a) also apply to the term 'opposing party.' A narrow interpretation of 'opposing party' would lead us to read it strictly as a named party who 'asserts a claim against the prospective counter-claimant in the first instance.' First National Bank v. Johnson County National Bank & Trust Co., 331 F.2d 325, 328 (10th Cir. 1964); see also Cincinnati Milacron Industries, Inc. v. Aqua Dyne, Inc., 592 F. Supp. 1113 (S.D. Ohio 1984) (finding that Rule 13(a) did not permit the filing of a compulsory counterclaim against Cincinnati Milacron Industries, Inc. because it was not a party to the litigation against Milacron Marketing Company, a separate corporate entity from Cincinnati Milacron Industries, Inc.).

"This Court has not yet ruled on the issue, and there are very few cases interpreting 'opposing party' in other circuits. A few courts have found in similar cases, however, that an unnamed party may be so closely identified with a named party as to qualify as an 'opposing party' under Rule 13(a). In Avemco Insurance Co. v. Cessna Aircraft Co., 11 F.3d 998 (10th Cir. 1993), the Tenth Circuit recognized an insurer-subrogee, though not named as a party to the original litigation, to be an opposing party for Rule 13(a) purposes because of its close relationship with the named opposing party. Id. at 1001. ...

"The Second Circuit also found that a party not named in litigation may still be an opposing party for Rule 13 purposes in certain cases in which the party is functionally identical to the actual opposing party named in the litigation. In Banco Nacional de Cuba v. First National City Bank of New York, 478 F.2d 191 (2d Cir. 1973), the Second Circuit treated a party not named in the litigation as an opposing party after concluding that the parties were 'one and the same for the purposes of th[e] litigation.' Id. at 193 n. 1. The Court held that because the parties 'acted as a single entity' and because one was the alter ego of the other, both were 'opposing parties' within the meaning of Rule 13.

"In Rohm and Haas Co. v. Brotech Corp., 770 F. Supp. 928 (D.Del. 1991), Judge Roth observed that 'Rule 13(a) is not limited in its application to original parties.' Id. at 934. Although Rohm and Haas Co. involved a counterclaim brought against one original party in addition to others, Judge Roth reasoned that the counterclaim was compulsory because it was brought against parties related to the original party, which made their joinder appropriate. See id.

"In each of these cases, courts interpreted 'opposing party' broadly for essentially the same reasons that courts have interpreted 'transaction or occurrence' liberally -- to give effect to the policy rationale of judicial economy underlying Rule 13. Where parties are functionally equivalent as in Avemco, where an unnamed party controlled the litigation, or where, as in Banco Nacional, an unnamed party was the alter ego of the named party, they should be treated as opposing parties within the meaning of Rule 13.

"The doctrine of res judicata provides further support for this approach. Courts have recognized the close connection between Rule 13(a) and the

doctrine of claim preclusion. See, e.g., Publicis Communication v. True North Communications Inc., 132 F.3d 363, 365 (7th Cir. 1997) ('The definition of a compulsory counterclaim mirrors the condition that triggers a defense of claim preclusion (res judicata) if a claim was left out of a prior suit.'). While the Publicis court acknowledged that it is debatable whether Rule 13(a) is 'strictly an application of claim preclusion,' it noted that 'both the scope of the doctrine and its rationale are the same as those of claim preclusion, and most of the time the label is inconsequential.' Id. at 366. It is therefore noteworthy that in the claim preclusion context, where an earlier lawsuit establishes the rights or liabilities of a party, both the named party and those in privity with it are bound by the holding. See, e.g., CoreStates Bank, N.A. v. Huls America, Inc., 176 F.3d 187, 194 (3d Cir. 1999) (stating that claim preclusion applies to 'the same parties and their privities'); Martino v. McDonald's System, Inc., 598 F.2d 1079, 1083 (7th Cir. 1979) ('The principle of res judicata at issue here treats a judgment on the merits as an absolute bar to relitigation between the parties and those in privity with them....').

"....

"...[I]nsofar as Rule 13(a) embodies the scope and rationale of the doctrine of claim preclusion, it stands to reason that the term 'opposing party' in Rule 13(a) should mirror the understanding of the parallel actors in the res judicata context. Res judicata acts as a bar to relitigation of an adjudicated claim between parties and those in privity with them. See, e.g., CoreStates Bank, N.A. v. Huls America, Inc., 176 F.3d 187, 194 (3d Cir. 1999); Martino, 598 F.2d at 1083. The rationale is that if the adjudication of an action is binding on parties in privity with the parties formally named in the litigation, then any claims against parties in privity should be brought in the same action lest

> the door be kept open for subsequent relitigation of the same claims. This is the same reasoning that underlies Rule 13(a). Therefore, 'opposing party' in Rule 13(a) should include parties in privity with the formally named opposing parties."

292 F.3d at 389-93 (footnotes omitted). We have long held that "[f]ederal cases are authoritative in construing the Alabama Rules of Civil Procedure because the Alabama rules were patterned after the Federal Rules of Civil Procedure." Borders v. City of Huntsville, 875 So. 2d 1168, 1176 n. 2 (Ala. 2003). Applying the reasoning in Transamerica to the present case, we affirm the judgment of the trial court.

The undisputed facts of the case are that Patti David operated as an agent and salesperson under the auspices of Robert Scott's business, Re/Max, and that, as such, she operated under Scott's supervision and authority as her "qualifying broker." And, as Little Narrows itself states in its brief, "Alabama law prohibits a licensed sales agent from collecting commissions from any entity other than her qualifying broker ...." (Little Narrows' brief at p. 16.) Patti David's amended complaint against Little Narrows contains claims alleging breaches by Little Narrows of contractual obligations, allegedly owed to "Re/Max Advantage South and/or Robert Scott" under the listing agreement and the

addendum for which she seeks damages in her alleged capacity as a third-party beneficiary. The amended complaint also contains a count in tort for breaches of duties allegedly owed by Little Narrows directly to Patti David, although arising out of Little Narrows' contractual obligations to Scott.[4] Among other things, Patti David alleges that she would not be

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[4]In her amended complaint, Patti David quotes Pope v. McCrory, 575 So. 2d 1097, 1099 (Ala. 1991):

> "[W]here one party to a contract assumes a duty to another party to the contract and it is foreseeable that injury to a third party, not an original party to the contract, may occur upon a breach of the owed duty, the promisor owes a duty of care to all those within the foreseeable area of risk. The rationale behind our holding in Harris [v. Board of Commissioners of the City of Mobile, 294 Ala. 606, 320 So. 2d 624 (1975),] is explained by Professor Prosser:
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> > "'[B]y entering into a contract with A, the defendant may place himself in such a relation toward B that the law will impose upon him an obligation, sounding in tort and not in contract, to act in such a way that B will not be injured. The incidental fact of the existence of the contract with A does not [negate] the responsibility of the actor when he enters upon a course of affirmative conduct which may be expected to affect the interests of another person.'
>
> "W. Prosser, Law of Torts § 93 at 622 (4th ed. 1971)."

We express no opinion as to the viability of such claims.

entitled to any commissions unless Little Narrows pays the commissions it allegedly owes Scott under the listing agreement. We conclude that Patti David and the Scotts are in privity with each other and that there is a functional identity of interest between them in these two cases. Moreover, the claims asserted by and against them are based on the same facts and circumstances, and the claims asserted by Little Narrows in the Jefferson County action should have therefore been asserted as counterclaims in the Shelby County action. See Romar Dev. Co. v. Gulf View Mgmt. Corp., 644 So. 2d 462, 467 (Ala. 1994) ("Where the claim and the counterclaim allege respective breaches of the same contract, the counterclaim is compulsory.").[5]

IV.

Rule 13(a) requires a person against whom a claim has been asserted to state as a counterclaim any potential claims

[5]We further note that although the Shelby County action does not explicitly name the Scotts as parties, it is styled "List With Us, Inc., Doing Business as Re/Max Advantage South; and Patricia J. David v. Little Narrows, LLC; The David Group, Inc.; Isaac David; Pat Morton; Guy Vernon Martin, Jr.; and fictitious defendants Nos. 1 through 7," and the Jefferson County action is styled "Little Narrows, LLC v. Robert B. Scott and Vicki R. Scott d/b/a Re/Max Advantage South." (Emphasis added.)

he or she has against "any opposing party" if those claims arise out of the same transaction or occurrence that is the subject matter of the original claim. The failure to do so results in the waiver of those potential claims. In this case, Patti David asserted claims against Little Narrows, and Little Narrows then asserted, in a different venue, claims against the Scotts based on the same facts and circumstances. However, because the Scotts and Patti David have a functional identity of interests for purposes of this litigation, the Scotts are considered an "opposing party" for Rule 13(a) purposes and Little Narrows' claims against them should have been asserted as compulsory counterclaims in the action initiated by Patti David. Thus, Little Narrows, as the defendant subject to the counterclaim rule, violated the prohibition in § 6-5-440 against maintaining two actions for the same cause by filing its action in the Jefferson Circuit Court, and the trial court's order dismissing its case was proper. We affirm.

AFFIRMED.

Cobb, C.J., and Lyons, Bolin, and Murdock, JJ., concur.