

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 15, 2015 Session

**TIM ELSWICK ET AL. v. ALEXANDER JACKSON D/B/A ALEXANDER
JACKSON CONCRETE**

**Appeal from the Circuit Court for Davidson County
No. 14C1914 Kelvin D. Jones, Judge**

No. M2015-00244-COA-R3-CV – Filed October 29, 2015

This case arises from a contract for home improvement services. After the work was completed and Homeowners failed to pay the contract price, Contractor filed a civil warrant and was awarded a judgment in general sessions court. Homeowners failed to timely appeal the judgment to circuit court. They subsequently filed a petition for writ of certiorari and supersedeas in circuit court contending Contractor was not duly licensed and the Home Improvement Contractor's Act prevented Contractor from recovering on the contract. Homeowners subsequently filed a complaint asserting a claim under the Tennessee Consumer Protection Act. The circuit court denied the petition for writ of certiorari and dismissed the complaint as res judicata. We affirm.

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

FRANK G. CLEMENT, JR., P.J., M.S., delivered the opinion of the Court, in which RICHARD H. DINKINS and THOMAS R. FRIERSON, II, JJ., joined.

Brian O. Bowhan, Smyrna, Tennessee, for the appellant, Tim Elswick.

Marian C. Fordyce, Nashville, Tennessee, for the appellant, Estate of Gerda Karin Faber.

George Christopher Holder, Murfreesboro, Tennessee, for the appellee, Alexander Jackson d/b/a/ Alexander Jackson Concrete.

OPINION

Gerda Faber and her adult son, Tim Elswick, (“Homeowners”)¹ entered into an oral contract with Alexander Jackson, d/b/a Alexander Jackson Concrete (“Contractor”), to pour a concrete driveway at Ms. Faber’s home. Homeowners made an initial partial payment and agreed that the balance owing would be paid upon completion of the work; however, Homeowners were not satisfied with the work and refused to pay the outstanding balance.

When Homeowners refused to pay the balance owing, Contractor sued Homeowners in general sessions court. Both Homeowners were duly served and provided with notice of the hearing; however, only Ms. Faber attended. Following a hearing, Contractor was awarded a judgment of \$15,893.27 on November 18, 2013. Homeowners did not file a timely appeal from the general sessions judgment.²

Six months later, on May 9, 2014, Homeowners filed a Petition for Writ of Certiorari and Supersedeas as well as a Complaint for Damages with the circuit court. Homeowners alleged in the petition that Contractor was not licensed to engage in home improvement; therefore, under the Home Improvement Contractor’s Act, Contractor was limited to recovering documented expenses proven by clear and convincing evidence.³ Homeowners subsequently filed a separate complaint in which they asserted a claim for deceptive trade practices under the Tennessee Consumer Protection Act (“TCPA”), Tenn. Code Ann. § 47-18-104, which was not raised as a defense in general sessions court. The petition and complaint were consolidated for future hearings.

Upon motion of Contractor, the circuit court dismissed the petition, ruling it an improper appeal from a valid final judgment. The court also granted Contractor’s motion to dismiss the complaint under Rule 12.02(6) of the Tennessee Rules of Civil Procedure, holding the TCPA claim to be precluded by res judicata. This appeal followed.

On appeal, Homeowners argue that the circuit court erred by denying their petition for writ of certiorari and in dismissing their TCPA claims under the doctrine of res judicata.

¹ During the course of litigation, Ms. Faber passed away and her estate was substituted as a party in interest.

² The record does not include the civil warrant and judgment from general sessions court. Moreover, the parties did not stipulate whether the judgment was based on the balance owing on the contract or for expenses proven in court.

³ The record does not reveal when Homeowners learned that Contractor did not have the license required under the Home Improvement Contractor’s Act, Tenn. Code Ann. § 62-6-501 et. seq. Nevertheless, this fact is not germane to the issues on appeal.

ANALYSIS

“Any party may appeal from a decision of the general sessions court to the circuit court of the county within a period of ten (10) days on complying with the provisions of this chapter.” Tenn. Code Ann. § 27-5-108(a)(1). It is undisputed that Homeowners did not file a timely appeal from the general sessions judgment. Therefore, they are time barred from pursuing an appeal from the judgment of the general sessions court.

After the time to appeal has passed, the only remedy available is by certiorari in lieu of appeal. *Fisher v. Cromwell Co., Inc.*, 556 S.W.2d 749, 749 (Tenn. 1977). “The writ of certiorari may be granted whenever authorized by law, and also in all cases where an inferior tribunal . . . has exceeded the jurisdiction conferred, or is acting illegally, when, in the judgment of the court, there is no other plain, speedy, or adequate remedy.” Tenn. Code Ann. § 27-8-101. However, certiorari is not available as of right, but is only to be granted under unusual or extraordinary circumstances. *Yousif v. Clark*, 317 S.W.3d 240, 244 (Tenn. Ct. App. 2010). Although writ of certiorari may lie as a substitute for appeal, *see* Tenn. Code Ann. § 7-8-102, it is only appropriate when appeal was defeated by: (1) the oppressive or erroneous act of the court; (2) the willful or negligent act of the clerk; (3) the contrivance or procurement by the opposing party; (4) inevitable accident; or (5) the blameless misfortune of the petitioner. *Uselton v. Price*, 292 S.W.2d 788, 792 (Tenn. Ct. App. 1956). Notably, neglect by the petitioner is not grounds for writ of certiorari. *Yousif*, 317 S.W.3d at 244.

Here, Homeowners did not appeal the general sessions court’s judgment within ten days, but sought a writ of certiorari in lieu of appeal. However, Homeowners failed to provide evidence that their appeal was defeated on any of the grounds described in *Uselton*. Instead, Homeowners attempt to justify their failure to appeal on their ignorance of appellate procedure and the fact that Mr. Elswick did not attend the general sessions hearing. Because these excuses amount to nothing more than inexcusable neglect by Homeowners, the circuit court did not err in denying the petition for writ of certiorari.

Homeowners also contend that the circuit court erred in dismissing their TCPA claims under the doctrine of res judicata. “The doctrine of res judicata . . . bars a second suit between the same parties or their privies on the same claim with respect to all issues which were, or could have been, litigated in the former suit.” *Jackson v. Smith*, 387 S.W.3d 486, 491 (Tenn. 2012). To successfully establish a res judicata defense, a party must show: (1) that the underlying judgment was rendered by a court of competent jurisdiction; (2) that the same parties or their privies were involved in both suits; (3) that the same claim or cause of action was asserted in both suits; and (4) that the underlying judgment was final and on the merits. *Id.* Our Supreme Court has opined that two suits are deemed the same “cause of action” for res judicata purposes where they arise out of the same transaction or a series of connected transactions. *Creech v. Addington*, 281 S.W.3d 363, 380 (Tenn. 2009). Further, the requirement “preclud[ing] relitigation of the

same cause of action is broader in its application than a mere determination of the questions involved in the prior action . . . and extends not only to matters actually determined, but also to other matters which in the exercise of due diligence could have been presented for determination in the prior action.” *Gerber v. Holcomb*, 219 S.W.3d 914, 918 (Tenn. Ct. App. 2006).

In this case, there is no dispute that elements (1), (2), and (4) have been met. Homeowners contend, however, that the TCPA claim is a separate cause of action from those previously litigated. Although the TCPA claim was not raised in the general sessions court, it arose out of the transaction that was the subject of litigation in the first action—the home improvement contract. Accordingly, the TCPA issue should have been raised in the general sessions court or appealed and heard de novo by the circuit court. Thus, because Homeowners failed to do so, the TCPA claim is barred by res judicata.

IN CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against Homeowners, Tim Elswick and Estate of Gerda Karin Faber.

FRANK G. CLEMENT, JR., JUDGE