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**Exempted from Fees
(Gov. Code § 6103)**

16 SUPERIOR COURT OF CALIFORNIA
17 CITY AND COUNTY OF SAN FRANCISCO
18

19 CALIFORNIA ATTORNEYS,
20 ADMINISTRATIVE LAW JUDGES AND
HEARING OFFICERS IN STATE
21 EMPLOYMENT, GLEN GROSSMAN,
MARK HENDERSON, GEOFFREY SIMS,
22 and DOES 1-500,

23 Petitioners/Plaintiffs,

24 v.

25 ARNOLD SCHWARZENEGGER, et al.,

26 Defendants/Respondents.
27

CASE NO. CPF-09-509205

**NOTICE OF LODGING OUT-OF-STATE
CASES IN SUPPORT OF RESPONDENTS'
BRIEF RE: EXCLUSIVE CONCURRENT
JURISDICTION**

**Date: April 15, 2009
Time: 9:30 a.m.
Dept.: 301**

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913000.1

- 1 -

NOTICE OF LODGING OUT-OF-STATE CASES IN SUPPORT OF RESPONDENTS' BRIEF RE: EXCLUSIVE CONCURRENT JURISDICTION

1 Attached hereto are true and correct copies of out-of-state cases in support of
2 Respondents' Brief Re: Exclusive Concurrent Jurisdiction:

3 Exhibit 1: *Cruz v. FTS Construction, Inc.* (2006) 140 N.M. 284, 142 P.2d 365

4 Exhibit 2: *Estates in Eagle Ridge, LLP v. Valley Bank & Trust* (2005) 141
5 P.3d 838

6 Exhibit 3: *In re Gaebler's Estate* (Mo. 1952) 248 S.W.2d 12

7 Exhibit 4: *Ras Family Partners, LP v. Onnam Biloxi, LLC* (Miss. 2007) 968
8 So. 2d 926

9
10 Dated: March 30, 2009

11 KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
12 A Law Corporation

13 By: 

14 David W. Tyra
15 Kristianne T. Seargeant
16 Attorneys for Defendants/Respondents
17 ARNOLD SCHWARZENEGGER, as Governor of the
18 State of California; DAVID GILB as Director of the
19 Department of Personnel Administration
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EXHIBIT 1



Court of Appeals of New Mexico.
 Terri CRUZ, Plaintiff-Appellant,
 v.
 FTS CONSTRUCTION, INC., Fred P. Sanchez, In-
 dividually, Fred P. Sanchez d/b/a FTS Construction,
 and Nathan Sanchez, Individually, Defendants-
 Appellees.
No. 25,708.

June 29, 2006.

Certiorari Granted, No. 29,938, Aug. 23, 2006.

Background: After purchaser obtained magistrate court judgment, which was later appealed, against vendor for defects in her newly constructed house, she filed instant action alleging further defects on claims of negligence, fraud, and unfair trade practices, among others. Vendor moved for summary judgment under the "priority jurisdiction" doctrine. The District Court, Valencia County, John W. Pope, D.J., dismissed the complaint. Purchaser appealed.

Holdings: The Court of Appeals, Pickard, J., held that:

- (1) purchaser was barred from bringing second suit under doctrine of priority jurisdiction;
- (2) purchaser could not refile magistrate's court action in district court to avoid jurisdictional limits; and
- (3) dismissal of suit did not violate purchaser's equal protection and due process rights.

Affirmed.

West Headnotes

11 Appeal and Error 30 ↪ 893(1)

30 Appeal and Error

30XVI Review

30XVI(F) Trial De Novo

30k892 Trial De Novo

30k893 Cases Triable in Appellate

Court

30k893(1) k. In General. Most Cited

Cases

Appeal and Error 30 ↪ 919

30 Appeal and Error

30XVI Review

30XVI(G) Presumptions

30k915 Pleading

30k919 k. Striking Out or Dismissal.

Most Cited Cases

In reviewing trial court's grant of defendant's motion to dismiss, reviewing court accepts all of the plaintiff's facts as true, and reviews de novo the question of law whether the district court properly applied the law to those facts.

21 Courts 106 ↪ 475(1)

106 Courts

106VII Concurrent and Conflicting Jurisdiction

106VII(A) Courts of Same State

106VII(A)1 In General

106k475 Pendency and Scope of Prior

Proceeding

106k475(1) k. In General. Most

Cited Cases

Purchaser was barred from bringing district court action against vendor on claims of breach of warranty regarding defects in her newly constructed home by prior suit in magistrate's court, which was on appeal, against vendor including some of the same claims of defects but limited to damages of \$7500 under court's jurisdictional limit, given that both suits arose out of breach of warranty claims on purchaser's home, both suits were against builder, magistrate's court was court of competent jurisdiction, and purchaser chose to have her claims in the first-filed action limited to the jurisdictional limits of the magistrate's court. West's NMSA § 35-3-3.

31 Courts 106 ↪ 475(1)

106 Courts

106VII Concurrent and Conflicting Jurisdiction

106VII(A) Courts of Same State

106VII(A)1 In General

106k475 Pendency and Scope of Prior

Proceeding

106k475(1) k. In General. Most

Cited Cases

The elements of priority jurisdiction are: (1) the two suits must involve the same subject matter or the same cause of action, (2) the two suits must involve the same parties, (3) the first suit must have been filed in a court of competent jurisdiction in the same state, and (4) the rights of the parties must be capable of adjudication in the first-filed action.

[4] Courts 106 ⚡ 475(1)

106 Courts

106VII Concurrent and Conflicting Jurisdiction

106VII(A) Courts of Same State

106VII(A)I In General

106k475 Pendency and Scope of Prior

Proceeding

106k475(1) k. In General. Most

Cited Cases

The policy rationales behind the doctrine of priority jurisdiction are to avoid conflicts that might arise between courts if they were free to make contradictory decisions or awards relating to the same controversy, and to prevent vexatious litigation and multiplicity of suits, which are similar to those behind res judicata to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.

[5] Courts 106 ⚡ 475(1)

106 Courts

106VII Concurrent and Conflicting Jurisdiction

106VII(A) Courts of Same State

106VII(A)I In General

106k475 Pendency and Scope of Prior

Proceeding

106k475(1) k. In General. Most

Cited Cases

“Priority jurisdiction” serves the same purpose as res judicata, but operates where there is not a final judgment and instead there is a pending case.

[6] Justices of the Peace 231 ⚡ 141(2)

231 Justices of the Peace

231V Review of Proceedings

231V(A) Appeal and Error

231k141 Appellate Jurisdiction

231k141(2) k. Jurisdiction Dependent

on Jurisdiction of Lower Court in General. Most

Cited Cases

A district court hearing an appeal from the magistrate court is bound by the lower court's jurisdictional limits and that, if the magistrate court lacked jurisdiction, the district court would also lack jurisdiction. West's NMSA § 35-3-3.

[7] Courts 106 ⚡ 24

106 Courts

106I Nature, Extent, and Exercise of Jurisdiction in General

106k22 Consent of Parties as to Jurisdiction

106k24 k. Of Cause of Action or Subject-

Matter. Most Cited Cases

Parties cannot generally create or confer subject matter jurisdiction by consent.

[8] Justices of the Peace 231 ⚡ 75(1)

231 Justices of the Peace

231IV Procedure in Civil Cases

231k75 Removal of Cause to Court of Record

231k75(1) k. In General. Most Cited Cases

Purchaser of home could not refile her magistrate's court suit against vendor for breach of warranty in district court to avoid the jurisdictional monetary limit of \$7500, on grounds that she later discovered that the extent of her damages were much greater than anticipated, even though in forcible entry and detainer actions a plaintiff could file suit for possession in justice of the peace court and later, file action for damages in district court, given that in forcible entry and detainer action damages continued to accrue as long as defendant was wrongfully in possession, and such action was governed by special statute. West's NMSA § 35-10-1.

[9] Constitutional Law 92 ⚡ 3452

92 Constitutional Law

92XXVI Equal Protection

92XXVI(C) Civil Actions and Proceedings

92k3452 k. Jurisdiction. Most Cited Cases
(Formerly 92k249(2))

Constitutional Law 92 ⚡ 3962

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3962 k. In General. Most Cited

Cases
(Formerly 92k305(4.1))

Courts 106 475(1)

106 Courts
106VII Concurrent and Conflicting Jurisdiction
106VII(A) Courts of Same State
106VII(A)1 In General
106k475 Pendency and Scope of Prior Proceeding
106k475(1) k. In General. Most

Cited Cases
Dismissal of purchaser's breach of warranty suit in district court on grounds of priority jurisdiction, after she previously obtained judgment on breach of warranty claims against vendor in magistrate's court, did not violate purchaser's equal protection and due process rights, given that purchaser had opportunity to fully litigate her claims in forum of her choosing and obtained favorable judgment. U.S.C.A. Const.Amend. 14.

****366** The Law Firm of Alexander D. Crecca, P.C., Alexander D. Crecca, Albuquerque, NM, for Appellant.

Ray A. Padilla, P.C., Ray A. Padilla, Brett J. Olsen, P.C., Brett J. Olsen, Albuquerque, NM, for Appellees.

***285 OPINION**

PICKARD, Judge.

{1} This case involves two lawsuits—one that is presently pending before the district court on de novo appeal from the magistrate court and one (the action on appeal here) that was originally filed in the district court. We examine a doctrine most recently articulated in Valdez v. Ballenger, 91 N.M. 785, 786, 581 P.2d 1280, 1281 (1978), which we term “priority jurisdiction.” The purpose of the doctrine is to prevent the same lawsuit from being litigated twice. We hold that under the circumstances of this case, the district court did not err in dismissing Plaintiff’s complaint under the doctrine of priority jurisdiction.

Rejecting several additional arguments made by Plaintiff, we affirm the district court’s dismissal, and we clarify that Plaintiff’s complaint should have been dismissed without prejudice to her right to recover in the other proceeding pending in district court.

FACTS AND PROCEDURAL BACKGROUND

{2} Plaintiff entered into a contract to purchase a newly constructed house from Defendants. In 2001, Plaintiff filed a pro se complaint in magistrate court, alleging that Defendants had failed to “repair major cracks” in the house and had failed to finish a block wall on the premises. Plaintiff prevailed in magistrate court and was awarded a judgment of \$7,500 plus costs, which was the largest amount the magistrate court had jurisdiction to award at that time. See NMSA 1978, § 35-3-3(A) (amended effective July 1, 2001, to raise jurisdictional limit from \$7,500 to \$10,000). Defendants then filed a notice of appeal, invoking their right to a de novo trial in the district court. See N.M. Const. art. VI, § 27 (providing for de novo appeal to the district court from inferior courts). That appeal is still pending in the district court.

{3} Nine months after Defendants appealed to the district court, Plaintiff filed a separate action—the case on appeal here—in district court. The new case was assigned to a different division of the Valencia County District Court. The new complaint also related to Defendants’ construction of Plaintiff’s house and alleged negligence, negligent misrepresentation, fraud, unfair trade practices, breach of the duty of good faith, prima facie tort, and emotional distress. Plaintiff’s position is that the house has developed new problems, which she was unaware of at the time she filed the complaint in magistrate court, and that these problems will be far ***286 **367** more costly to repair than she could have anticipated at that time. Defendants strongly disagree with this assertion.

{4} After more than two years of litigation, Defendants filed a “Motion to Dismiss and for Summary Judgment.” In that motion, Defendants argued that the complaint should be dismissed under a doctrine that they termed “prior exclusive jurisdiction.” Alternatively, Defendants argued on the merits that Plaintiff’s claims failed as a matter of law. The district court denied the “summary judgment portion” of Defendants’ motion as untimely. The court determined that Defendants’ argument regarding “prior

exclusive jurisdiction” raised jurisdictional issues that should be addressed despite the untimeliness of the motion.

{5} After briefing and argument, the district court dismissed the complaint and entered the following four conclusions of law:

1. A judgment entered by the Magistrate Court is final even if appealed.

2. The fact that the District Court is rendering an independent decision on an appeal from a judgment entered by the Magistrate Court does not mean that the matter is not an appeal, as the District Court is still bound by the jurisdiction of the magistrate court.

3. It is in the same manner that the Court of Appeals reviews matters of law de novo from the District Court, that the District Court reviews matters de novo from the Magistrate Court.

4. The Defendants['] position that this cause of action must be abated and dismissed in favor of Defendants' appeal from the judgment entered by the ... Magistrate Court ... is well taken.

{6} On appeal, Plaintiff makes four arguments: (1) the district court misapplied the doctrine of “prior exclusive jurisdiction” because its elements were not satisfied in this case; (2) the district court erred in dismissing the complaint because *Sanchez v. Reilly*, 54 N.M. 264, 267, 221 P.2d 560, 562 (1950), specifically permits Plaintiff to file a new complaint in district court despite the prior magistrate court proceedings; (3) the dismissal infringed on Plaintiff's constitutionally protected right of access to the courts; and (4) the de novo appeal to the district court “annulled” the magistrate court judgment.

DISCUSSION

1. The District Court Did Not Err in Dismissing the Complaint Under the Doctrine of Priority Jurisdiction

[1] {7} Plaintiff argues that the district court erred in dismissing the complaint because the elements of the doctrine that the court applied were not satisfied. Because the case was disposed of on a motion to dis-

miss, we will accept all of Plaintiff's facts as true, and we will review de novo the question of whether the district court properly applied the law to those facts. See *R & R Deli, Inc. v. Santa Ana Star Casino*, 2006-NMCA-020, ¶ 2, 139 N.M. 85, 128 P.3d 513. We hold that the district court did not err in dismissing the complaint.

{8} In their motion to dismiss, Defendants asserted that Plaintiff's complaint should be dismissed under the doctrine of “prior exclusive jurisdiction.” Defendants cited *Valdez*, 91 N.M. at 786, 581 P.2d at 1281, which reads as follows:

Generally, a second suit based on the same cause of action as a suit already on file will be abated where the first suit is entered in a court of competent jurisdiction in the same state between the same parties and involving the same subject matter or cause of action, if the rights of the parties can be adjudged in the first action.

Id. (internal quotation marks and citation omitted).

{9} For the sake of clarity, we begin by noting that *Valdez* does not use the term “prior exclusive jurisdiction.” In fact, we have found no published New Mexico case that uses that term. “Prior exclusive jurisdiction” appears to be a doctrine that would not be applicable in this case because it applies only to in rem actions. See *Black's Law Dictionary* 1231 (8th ed.2004) (defining the doctrine as “[t]he rule that a court will not assume in rem **jurisdiction** over property that is already under the **jurisdiction** of another court of **concurrent jurisdiction**”); see also *287*368 *State Eng'r of Nev. v. S. Fork Band of the Te-Moak Tribe of W. Shoshone Indians of Nev.*, 339 F.3d 804, 809 (9th Cir.2003) (stating that prior **exclusive jurisdiction** means that “when a court of competent **jurisdiction** has obtained possession, custody, or control of particular property, that possession may not be disturbed by any other court.”(internal quotation marks and citation omitted)).

{10} Rather, the rule stated in *Valdez* refers to the doctrine of “priority jurisdiction.” See, e.g., *Long v. McKinney*, 897 So.2d 160, 172 (Miss.2004) (“[T]he principle of priority jurisdiction is that where two suits between the same parties over the same controversy are brought in courts of concurrent jurisdiction, the court which first acquires jurisdiction retains ju-

risdiction over the whole controversy to the exclusion or abatement of the second suit[.]” (internal quotation marks and citation omitted)). The doctrine exists in various forms in other jurisdictions, although it sometimes has different names. *See, e.g., Plant Insulation Co. v. Fibreboard Corp.*, 224 Cal.App.3d 781, 274 Cal.Rptr. 147, 150-52 (Ct.App.1990) (referring to similar doctrine as “**exclusive concurrent jurisdiction**” and noting that that doctrine is also similar to statutory plea in abatement, which may be maintained under circumstances where, if first action were carried to final judgment, res judicata would be a complete bar to second action); *Twp. Oil Co. v. State Bank of Fraser*, 162 Mich.App. 737, 413 N.W.2d 94, 95 (1987) (noting a court rule that codifies the doctrine and referring to the doctrine as a “plea of abatement by prior action”).

{11} This doctrine is not well developed in New Mexico, and we have found only three New Mexico cases that discuss it in any more than passing fashion. *See Valdez*, 91 N.M. at 786-87, 581 P.2d at 1281-82 (stating and applying the doctrine); *Burroughs v. U.S. Fid. & Guar. Co.*, 74 N.M. 618, 621, 397 P.2d 10, 12 (1964) (stating the doctrine but finding no basis for reversal because the doctrine was not jurisdictional and had not been raised below), *overruled on other grounds by Quintana v. Knowles*, 113 N.M. 382, 387, 827 P.2d 97, 102 (1992); *State ex rel. Kermac Nuclear Fuels Corp. v. Larrazolo*, 70 N.M. 475, 482-83, 375 P.2d 118, 123-24 (1962) (stating the doctrine but holding that, although trial court perhaps should have abated the suit, its failure to do so was not grounds for a writ of prohibition).

{12} *Valdez*, which is the only New Mexico case to actually apply the doctrine, arose out of a car accident where numerous people were injured. 91 N.M. at 786, 581 P.2d at 1281. Ballenger sued Valdez and Hall in Bernalillo County. *Id.* Then, Valdez sued Ballenger in Torrance County, and Hall joined this second action as a plaintiff. *Id.* Our Supreme Court held that the Torrance County action should be abated and that Valdez and Hall should assert their claims as counterclaims in the Bernalillo County action. *Id.* at 786-87, 581 P.2d at 1281-82. The Court clarified that the appropriate procedure was to dismiss the Torrance County action without prejudice to the rights of the parties to proceed in the Bernalillo County action. *Id.* at 787, 581 P.2d at 1282.

[2][3] {13} The elements of priority jurisdiction as articulated in *Valdez* can be broken down as follows: (1) the two suits must involve the same subject matter or the same cause of action, (2) the two suits must involve the same parties, (3) the first suit must have been filed in a court of competent jurisdiction in the same state, and (4) the rights of the parties must be capable of adjudication in the first-filed action. *Id.* at 786, 581 P.2d at 1281. We hold that all of these elements are satisfied in this case.

{14} With regard to the first element, Plaintiff argues that the subject matter of the present case is different from the subject matter of the first case because new claims and new “theories of law” were added in the present action. We disagree with this argument, and instead we agree with courts from other jurisdictions that have chosen to ask whether the two suits arise out of the same transaction. *See, e.g., Plant Insulation Co.*, 274 Cal.Rptr. at 152 (holding that the doctrine is applicable where “the first and second actions arise from the same transaction” (internal quotation marks and citations omitted)). We believe this is the appropriate standard because our test for res judicata, which also requires that the two cases involve*288 **369 the “same cause of action,” uses a transactional analysis. *See Cagan v. Vill. of Angel Fire*, 2005-NMCA-059, ¶ 19, 137 N.M. 570, 113 P.3d 393.

[4][5] {15} It makes sense to use the same standard for priority jurisdiction that we use for res judicata because the policy rationales behind the two doctrines are so similar. The policy rationales behind the doctrine of priority jurisdiction are to “avoid[] conflicts that might arise between courts if they were free to make contradictory decisions or awards relating to the same controversy, and [to] prevent[] vexatious litigation and multiplicity of suits.” *Plant Insulation Co.*, 274 Cal.Rptr. at 150; *see also* 1 Am.Jur.2d *Abatement* § 6 (2005) (“The purpose of the defense of abatement by reason of another action pending is to protect a party from harassment by having to defend several suits on the same cause of action at the same time.”). The policy rationales behind the doctrine of res judicata are similar: “The underlying principle behind res judicata is to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and [,] by preventing inconsistent decisions, encourage reliance on adjudication.” *Cordova v. Larsen*, 2004-NMCA-087, ¶ 23, 136 N.M. 87, 94 P.3d 830 (internal quotation marks and

citation omitted). Thus, priority jurisdiction serves the same purpose as res judicata, but operates where there is not a final judgment and instead there is a pending case.

{16} We now evaluate the two cases pursuant to the transactional analysis. First, we do not agree with Plaintiff that mere changes in legal theory sufficiently distinguish this case from the previous case. See Apodaca v. AAA Gas Co., 2003-NMCA-085, ¶ 78, 134 N.M. 77, 73 P.3d 215 (reiterating the transactional test for res judicata and noting that “a mere change in a legal theory does not create a new cause of action” (internal quotation marks and citation omitted)); Twp. Oil Co., 413 N.W.2d at 95 (holding that abatement was properly applied to dismiss case even though the plaintiff had claimed more damages in the second action).

{17} Second, in the recent case of Brooks Trucking Co. v. Bull Rogers, Inc., 2006-NMCA-025, ¶¶ 16-18, 139 N.M. 99, 128 P.3d 1076 (*Brooks*), we held that res judicata did not bar a subsequent lawsuit where the operative facts underlying the second lawsuit were not in existence when the first suit was brought. Plaintiff appears to make a similar argument in this case when she alleges that the magistrate court complaint was for breach of warranty in connection with Defendants' failure to build a wall and failure to repair minor, cosmetic cracks in the walls of the house, whereas the district court complaint involved wider cracks that were indicative of structural damage. Even assuming that these differences could support the idea that there were two different transactions, which we doubt, the documents Plaintiff submitted below indicate that she knew of structural damage prior to the filing of the magistrate court complaint and knew that the jurisdictional limit of the magistrate court would preclude recovering damages sufficient to repair all the problems. More importantly, however, the operative facts for both cases are the same, and thus this is not a case like *Brooks*. Here, Plaintiff's allegations in both lawsuits relate to the same transaction-Defendants' alleged faulty building of the house, which purportedly caused the foundation to subside and caused cracks and other structural damage. Thus, we hold that the first element of priority jurisdiction is satisfied.

{18} With regard to the second element, that the two cases involve the same parties, Plaintiff argues that

the parties in this case are different because three defendants have been added. Plaintiff's original suit named only FTS Construction. In this case, Plaintiff added FTS Construction, Inc., Fred Sanchez, and Nathan Sanchez. In response to Plaintiff's argument that this case involves different parties, Defendants argue that all of the new defendants are in privity with the original defendant. Plaintiff does not dispute this statement in her reply brief and does not provide any additional argument with regard to the question of whether the two actions involve the same parties. See Delta Automatic Sys., Inc. v. Bingham, 1999-NMCA-029, ¶ 31, 126 N.M. 717, 974 P.2d 1174 (holding that the appellant's failure to respond to *289 **370 an argument in the answer brief “constitute[d] a concession on the matter”). We also note that Plaintiff's amended complaint in this action alleges that (1) Fred Sanchez is the president and qualifying contractor for FTS Construction, (2) both corporate defendants are liable for the actions of Fred and Nathan Sanchez under a theory of agency or respondeat superior, and (3) FTS Construction, Inc. is liable for the actions of FTS Construction and the other two defendants on a theory of successor liability. Under these circumstances, and in the absence of any response to the contrary from Plaintiff, we agree that the new defendants are in privity with FTS Construction. Thus, we hold that both actions involve the same parties for purposes of priority jurisdiction. See Lytwyn v. Fry's Elecs., Inc., 25 Cal.Rptr.3d 791, 805 n. 10 (Ct.App.2005) (relying on privity principles from preclusion cases in case involving priority jurisdiction), review granted and opinion superseded by 28 Cal.Rptr.3d 3, 110 P.3d 1218 (2005). (Although *Lytwyn* is technically not citable under California's rules, it has been found persuasive on another issue in a case that notes the opinion was withdrawn in order to rule on the retroactivity of “Proposition 64,” which was the other issue addressed in the *Lytwyn* case. See Chamberlan v. Ford Motor Co., 369 F.Supp.2d 1138, 1150 & n. 6 (N.D.Cal.2005).)

[6] {19} With regard to the third element of priority jurisdiction, that the first suit was filed in a court of “competent jurisdiction,” Plaintiff argues that the present action should not be dismissed in favor of the first case (which is presently on de novo appeal in the district court), because the magistrate court was not a “court of competent jurisdiction” and thus the district court sitting on appeal is also not “competent.” Plaintiff argues that both courts are “without subject matter jurisdiction over [P]laintiff's new damages and

new claims.” We agree with Plaintiff that a district court hearing an appeal from the magistrate court is bound by the lower court's jurisdictional limits and that, if the magistrate court lacked jurisdiction, the district court would also lack jurisdiction. See State v. Haar, 100 N.M. 609, 611, 673 P.2d 1342, 1344 (Ct.App.1983). However, we disagree with Plaintiff that either court lacks jurisdiction under the circumstances of this case.

{20} At the time that Plaintiff commenced her action in magistrate court, that court had jurisdiction “in civil actions in which the debt or sum claimed does not exceed seven thousand five hundred dollars (\$7,500), exclusive of interest and costs.” See § 35-3-3 (amended effective July 1, 2001 to raise jurisdictional limit from \$7,500 to \$10,000). Plaintiff's argument appears to be that, because she now believes her damages to exceed \$7,500, the magistrate court and the district court sitting on appeal lack subject matter jurisdiction over her first action. We disagree.

{21} We find this issue to be similar to the issue of federal diversity jurisdiction under 28 U.S.C. § 1332 (2000). This statute permits diversity jurisdiction where the statute's “amount in controversy” and citizenship requirements are satisfied. It is well established that these requirements are measured at the time the suit is filed:

Satisfaction of the [28 U.S.C.] § 1332(a) diversity requirements (amount in controversy and citizenship) is determined as of the date that suit is filed—the “time-of-filing” rule. Events occurring subsequent to the institution of suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction.... Federal diversity jurisdiction is not lost by post-filing events that change or disturb the state of affairs on which diversity was properly laid at the outset.

Wolde-Meskel v. Vocational Instruction Project, 166 F.3d 59, 62 (2d Cir.1999) (internal quotation marks and citations omitted).

{22} We think that, as with diversity jurisdiction, the magistrate court's jurisdiction must be measured at the time of filing. The primary reason for our holding is the concern that it would prove unworkable to adopt a rule that could cause jurisdiction to come and go during the course of a lawsuit, based on the dollar

amount that the plaintiff happened to be claiming at the time. Cf. 13B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure § 3608, at 452 (1984) (noting that the diversity jurisdiction time-of-filing rule is a “policy *290 **371 decision” that provides stability and minimizes abuses of jurisdictional rules and repeated challenges to subject matter jurisdiction).

[7] {23} While we are aware of the general rule that parties cannot create or confer subject matter jurisdiction by consent, see, e.g., Chavez v. County of Valencia, 86 N.M. 205, 209, 521 P.2d 1154, 1158 (1974), we are also of the view that, by bringing suit in the magistrate court, Plaintiff acknowledged that she was willing to dispose of her claims for \$7,500 or less. Under Section 35-3-3(A), the magistrate court's jurisdiction is dependant upon the dollar amount of the “debt or sum claimed.” Obviously, the plaintiff is the only party who is in a position to decide whether or not to “claim” a sum of more than \$7,500. Accordingly, Plaintiff cannot now avoid the effects of the previous litigation (which was brought in the forum of Plaintiff's choice and resulted in a judgment in her favor) by claiming that the magistrate court has been ousted of subject matter jurisdiction due to her current claim that her damages exceed that court's jurisdictional limit. Because any other rule would prove unworkable, we hold that the magistrate court's jurisdiction under Section 35-3-3 must be measured at the time suit is filed.

{24} We understand Plaintiff's argument that due to later-discovered damages, she cannot obtain complete recovery if she is left with only the de novo appeal, in which the district court will be bound by the magistrate court's jurisdictional limit. We are not persuaded by this argument. We are again informed by the analogous doctrine of res judicata. A plaintiff cannot avoid the application of res judicata where he or she brought a prior suit on the same cause of action in a court with a jurisdictional limit. See Anaya v. City of Albuquerque, 1996-NMCA-092, ¶ 7, 122 N.M. 326, 924 P.2d 735 (indicating that New Mexico follows the Restatement (Second) of Judgments § 24 (1982) for res judicata purposes); Restatement (Second) of Judgments § 24, cmt. g (“The plaintiff, having voluntarily brought his action in a court which can grant him only limited relief, cannot insist upon maintaining another action on the claim.”); see also Vincent v. Clean Water Action Project, 939 P.2d 469,

473-74 (Colo.Ct.App.1997) (collecting cases standing for the proposition that where the plaintiff chooses the initial forum, he or she will not be heard to complain that the chosen forum could not afford complete relief due to jurisdictional limitations). Thus, we hold that the magistrate court and the district court hearing the appeal are courts of “competent jurisdiction” for purposes of priority jurisdiction in this case.

{25} We also note that the cases Plaintiff appears to cite in support of her argument that the magistrate court and the district court sitting on appeal lack jurisdiction are not on point. Rather, these cases for the most part recite the familiar rule that a district court hearing a de novo appeal is bound by the jurisdictional limits of the inferior court that rendered the judgment from which appeal was taken. See Rojas v. Kimble, 89 Ariz. 276, 361 P.2d 403, 406 (1961) (holding that where inferior court properly dismissed action for lack of jurisdiction, district court on appeal also lacked jurisdiction, even though case could have been brought under district court's original jurisdiction); Thornily v. Pierce, 10 Colo. 250, 15 P. 335, 336 (1887) (holding that where the plaintiff on appeal from an inferior court recovered more than he could have in the inferior court, the court hearing the appeal should have either dismissed the case or required the plaintiff to remit the extra money); Stacy v. Mullins, 185 Va. 837, 40 S.E.2d 265, 266, 268 (1946) (dismissing case without prejudice and stating that “the appeal from the [inferior court] is a continuation of the original case, and on the appeal the warrant cannot be amended to make a case of which the [inferior court] would not have had jurisdiction”). The other cases cited by Plaintiff are similarly unhelpful. See Lewis v. Baca, 5 N.M. 289, 296-97, 21 P. 343, 344 (1889) (stating that a party on de novo appeal from the probate court has a right to a jury trial in appropriate circumstances); Gillett v. Richards, 46 Iowa 652 (1877).

{26} With regard to the last element of priority jurisdiction, that “the rights of the parties can be adjudged in the first action,” Plaintiff merely reiterates her argument that *291 **372 the district court on appeal lacks subject matter jurisdiction and cannot make her “whole.” We have already rejected this argument and, in the absence of any additional arguments by Plaintiff on this point, we need not speculate as to what circumstances might defeat this element of pri-

ority jurisdiction. We hold that the final element of the doctrine is satisfied in this case. See Robertson v. Carmel Builders Real Estate, 2004-NMCA-056, ¶ 25, 135 N.M. 641, 92 P.3d 653 (“The burden is on the appellant to clarify how the trial court erred.”).

{27} Having determined that all the elements of priority jurisdiction are satisfied in this case, we hold that the district court did not err in dismissing the complaint under that doctrine. Because the district court's order does not specify whether the dismissal is with or without prejudice, we clarify that the dismissal should be considered without prejudice to Plaintiff's right to recover in the de novo appeal that is currently pending before the district court. See Valdez, 91 N.M. at 787, 581 P.2d at 1282 (remanding for the district court to dismiss without prejudice to the right to recover in the first-filed action).

{28} Before we reach Plaintiff's remaining arguments, we wish to clarify two issues regarding priority jurisdiction that were not properly addressed by the parties in this case. First, it appears from the record that Defendants argued, and the district court believed, that the doctrine was jurisdictional. Contrary to Defendants' arguments, the doctrine is not jurisdictional in New Mexico. See Burroughs, 74 N.M. at 621, 397 P.2d at 12 (stating that the doctrine “would seem to apply” under the facts of the case but affirming the trial court's refusal to dismiss the complaint because there was “no question of jurisdiction” in the case and the doctrine had not been raised below).

{29} Second, because the doctrine is not jurisdictional, it may be an affirmative defense that could be waived if not timely raised, although we expressly do not decide the point. Cf. People ex rel. Garamendi v. Am. Autoplan, Inc., 20 Cal.App.4th 760, 25 Cal.Rptr.2d 192, 197 (1993) (stating that the doctrine is “similar to an affirmative defense” and that “[p]rior to an appropriate pleading [invoking the doctrine], the trial court in the second action properly exercises its jurisdiction”). However, we cannot say that Defendants have waived their priority jurisdiction argument in this case, because Plaintiff never alerted the trial court to the fact that the doctrine is not jurisdictional and never asserted that Defendants' arguments should be considered waived because they were not timely raised. Nor does Plaintiff make these arguments on appeal. Under these circumstances, we

hold that the trial court did not err in dismissing Plaintiff's complaint under the doctrine of priority jurisdiction. See *Hall v. Hall*, 114 N.M. 378, 384, 838 P.2d 995, 1001 (Ct.App.1992) (noting that absent extraordinary circumstances, we do not raise arguments for appellants).

2. Sanchez Does Not Permit Plaintiff to Re-file Her Case in District Court

{8} {30} Plaintiff next argues that *Sanchez*, 54 N.M. 264, 221 P.2d 560, specifically permits her to file in district court, despite her earlier suit in magistrate court, because she determined after filing suit in magistrate court that her damages exceeded that court's jurisdictional limit. Because *Sanchez* is distinguishable, and because the portion of the case on which Plaintiff relies is dicta, we reject Plaintiff's argument.

{31} In *Sanchez*, the plaintiff brought a forcible entry and detainer action in the justice of the peace court. *Id.* at 265, 221 P.2d at 561; see *State v. Ramirez*, 97 N.M. 125, 126, 637 P.2d 556, 557 (1981) (stating that magistrate courts used to be called justice of the peace courts). The justice of the peace court ordered restitution of the property and awarded the plaintiff \$200 in damages, which it found to be the rental value of the premises from the date the defendant took possession to the date of judgment. *Sanchez*, 54 N.M. at 265, 221 P.2d at 561. The defendant appealed to the district court, which tried the case de novo. *Id.* The district court ordered restitution of the property and awarded \$200 in damages, but also awarded statutory double damages from the date of the justice of the peace court judgment to the date the *292 **373 defendant actually vacated the premises. *Id.* at 265-66, 221 P.2d at 561.

{32} Our Supreme Court held that a district court hearing a de novo appeal of an inferior court judgment is bound by the jurisdictional limits of the inferior court. *Id.* at 266, 221 P.2d at 562. Thus, the Court held that despite the statute expressly allowing the type of double damages the district court awarded, the district court lacked jurisdiction to award any damages in excess of the inferior court's jurisdictional limit. *Id.* at 266-67, 221 P.2d at 562. Then, the Court stated the following dicta on which Plaintiff in this case relies:

[T]he district court can render judgment for no

greater amount than could the justice of the peace. If a plaintiff desires, he may sue in the justice court for possession alone and, where the damages at the beginning, or later through delay in trial, seem likely to exceed jurisdiction of the justice of the peace, sue separately for such damages in the district court.

Id. at 267, 221 P.2d at 562. Plaintiff argues that this dicta permits her to have filed her second suit in district court. She analogizes her case to *Sanchez*, stating that "through delay, subsequently occurring damages[,] and subsequent discovery, ... [P]laintiff became aware that her damages did exceed the jurisdictional limits of the magistrate court."

{33} We think Plaintiff reads too much into *Sanchez*. The dicta on which Plaintiff relies, referring as it does to an initial suit for "possession alone," specifically contemplates a suit for forcible entry and detainer, which is significantly different from Plaintiff's suit. There is a special statutory procedure for bringing suits for forcible entry and detainer in the magistrate court and appealing to the district court. See NMSA 1978, §§ 35-10-1 to -6 (1968, as amended through 1975). Moreover, the nature of such a suit is that damages will continue to accrue as long as the defendant is wrongfully in possession of the property. See § 35-10-5(A)(1) (stating that the measure of damages on appeal to the district court is "the actual value of the rent due until entry of judgment by the magistrate court and double the value of all rent accrued thereafter until entry of judgment in the district court"). Thus, it makes sense that our Supreme Court would clarify the method by which a plaintiff can get compensation for damages that accrue "through delay in trial."

{34} We think the dicta on which Plaintiff relies is limited to suits for forcible entry and detainer. While Plaintiff does allege either newly occurring or newly discovered damages, her suit is not analogous to a suit for forcible entry and detainer, where damages necessarily continue to accrue as long as the defendant remains in wrongful possession. Thus, we disagree with Plaintiff that the dicta in *Sanchez* can be read to encompass any situation where additional damages become apparent after a suit has been commenced or litigated in an inferior court.

{35} In addition, we do not think that the dicta in *Sanchez* can be used to overcome the doctrine of pri-

ority jurisdiction. We note that Larrazolo, 70 N.M. 475, 375 P.2d 118, which appears to have been the first New Mexico case to state the doctrine of priority jurisdiction, was published approximately twelve years after *Sanchez*. Other courts of appeals have held that to the extent that two supreme court cases appear to produce inconsistent results, the later one would control. See Hoffman v. Mem'l Hosp. of Iowa County, 196 Wis.2d 505, 538 N.W.2d 627, 629 (App.1995) (“When decisions of the [Wisconsin Supreme Court] appear to be inconsistent, we follow that court’s most recent case.”). Thus, we reject Plaintiff’s argument that *Sanchez* affirmatively permits her district court suit.

3. The District Court’s Dismissal of Plaintiff’s Complaint Did Not Deprive Her of Due Process or Equal Protection

[9] {36} Plaintiff next argues that the district court violated her constitutional rights in dismissing her complaint. Plaintiff appears to rest this argument on her contention that the district court was the only court that could make her whole and that she thus has a constitutional right to “full and fair litigation” of all her “claims and damages” before the district court. The cases cited by Plaintiff do not support her argument. See**374 *293 Boddie v. Connecticut, 401 U.S. 371, 374, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971) (“[G]iven the basic position of the marriage relationship in this society’s hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship, due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.”); Trujillo v. City of Albuquerque, 1998-NMSC-031, ¶ 21, 125 N.M. 721, 965 P.2d 305 (“Access to the courts encompasses the ability of a party to have access to the judiciary to resolve legal claims. Nevertheless, such access is not boundless. A right of access to the courts does not guarantee the continued existence of a cause of action or remedy.”(internal citations omitted)); Jiron v. Mahlab, 99 N.M. 425, 427-28, 659 P.2d 311, 313-14 (1983) (holding statute requiring plaintiffs to submit medical malpractice case to the Medical Review Commission prior to filing in district court unconstitutional as applied to particular plaintiff who filed in district court first in order to be able to serve process on the defendant who was about to leave the country).

{37} Plaintiff has not cited any case that would support her argument that a litigant has a constitutional right to have her claims heard for a second time in a different court, after fully litigating her case in the forum of her choice and obtaining a favorable judgment, simply because she now claims more damages. Accordingly, we reject Plaintiff’s constitutional arguments.

4. The Finality or Lack Thereof of the Magistrate Court Judgment Does Not Change the Result

{38} Finally, Plaintiff disputes the district court’s conclusion that the magistrate court judgment was final despite the pending de novo appeal. However, Plaintiff does not explain how this conclusion prejudiced her, what effect (if any) it has on the district court’s dismissal of the present case on the ground of priority jurisdiction, or how the decision otherwise constitutes reversible error. Thus, we need not address Plaintiff’s argument. See Deaton v. Gutierrez, 2004-NMCA-043, ¶ 30, 135 N.M. 423, 89 P.3d 672 (“In the absence of prejudice, there is no reversible error.”(internal quotation marks and citation omitted)).

{39} Moreover, we do not see how the finality or non-finality of the magistrate court judgment would make any difference to the outcome of this appeal. As we stated previously, a final judgment triggers res judicata analysis, while a pending case is subject to priority jurisdiction analysis. In either case, the result is the same: Plaintiff’s complaint was properly dismissed.

CONCLUSION

{40} We affirm the district court’s dismissal of Plaintiff’s complaint. We reiterate that the dismissal should be considered without prejudice to Plaintiff’s right to proceed in the other action currently pending in the district court.

{41} **IT IS SO ORDERED.**

WE CONCUR: CYNTHIA A. FRY and CELIA FOY CASTILLO, Judges.
N.M.App.,2006.
Cruz v. FTS Construction Inc.

142 P.3d 365
140 N.M. 284, 142 P.3d 365, 2006 -NMCA- 109
(Cite as: 140 N.M. 284, 142 P.3d 365)

140 N.M. 284, 142 P.3d 365, 2006 -NMCA- 109

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EXHIBIT 2

H

Colorado Court of Appeals,
Div. IV.
ESTATES IN EAGLE RIDGE, LLLP, a Colorado
limited liability partnership; Terry D. Hamilton; and
Sharon M. Hamilton, Plaintiffs-Appellants,

v.

VALLEY BANK & TRUST, a Colorado banking
corporation, Defendant-Appellee.

No. 03CA2270.

July 28, 2005.

Rehearing Denied Sept. 22, 2005.

Certiorari Denied Aug. 28, 2006.

Background: Mortgagors brought action against mortgagee seeking to set aside foreclosure sale on deed of trust. The Denver District Court, Larimer County, Daniel J. Kaup, J., granted mortgagee's motion for partial summary judgment, and mortgagors appealed.

Holdings: The Court of Appeals, Loeb, J., held that:
(1) notices of foreclosure proceedings were legally sufficient and did not violate due process, though they did not contain mortgagors' current address, where they contained mortgagors' address provided in deed of trust;
(2) mortgagee did not violate mortgagors' due process rights by not making a reasonable effort to locate their most current mailing address;
(3) error identifying wrong district court in order authorizing foreclosure sale did not deprive order of authority; and
(4) order authorizing foreclosure sale was not void under the rule of priority of jurisdiction.

Affirmed.

West Headnotes

[1] Constitutional Law 92 4417

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)19 Tort or Financial Liabilities
92k4415 Liens, Mortgages, and Security Interests92k4417 k. Enforcement; Proceedings. Most Cited Cases
(Formerly 92k300(2))**Mortgages 266 335**

266 Mortgages

266IX Foreclosure by Exercise of Power of Sale

266k335 k. Right to Foreclose. Most CitedCases

Notices of foreclosure proceedings on deed of trust were legally sufficient and did not violate due process, though they did not contain mortgagors' current address, where deed of trust provided that mortgagors would be provided notices at a stated address unless mortgagors designated a different address in writing, mortgagors did not provide mortgagee with their current address in accordance with deed of trust, and mortgagee utilized address stated in deed of trust. U.S.C.A. Const.Amend. 14; West's C.R.S.A. § 38-38-101(1)(a); Rules Civ.Proc., Rule 120(a).

[2] Constitutional Law 92 3881

92 Constitutional Law

92XXVII Due Process

92XXVII(B) Protections Provided and Deprivations Prohibited in General

92k3878 Notice and Hearing

92k3881 k. Notice. Most Cited Cases

(Formerly 92k309(1))

Proper notice of an action is an elementary and fundamental requirement of due process. U.S.C.A. Const.Amend. 14.

[3] Constitutional Law 92 3881

92 Constitutional Law

92XXVII Due Process

92XXVII(B) Protections Provided and Deprivations Prohibited in General

92k3878 Notice and Hearing

92k3881 k. Notice. Most Cited Cases

(Formerly 92k251.6)

Notice, in order to comply with due process, must be made in a reasonable manner so as to convey the required information. U.S.C.A. Const.Amend. 14.

[4] Constitutional Law 92 ↪ 3865

92 Constitutional Law

92XXVII Due Process

92XXVII(B) Protections Provided and Deprivations Prohibited in General

92k3865 k. In General. Most Cited Cases

(Formerly 92k251.5)

Process which is a mere gesture is not due process. U.S.C.A. Const.Amend. 14.

[5] Constitutional Law 92 ↪ 4417

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)19 Tort or Financial Liabilities

92k4415 Liens, Mortgages, and Security Interests

92k4417 k. Enforcement; Proceedings. Most Cited Cases

(Formerly 92k300(2))

Mortgages 266 ↪ 335

266 Mortgages

266IX Foreclosure by Exercise of Power of Sale

266k335 k. Right to Foreclose. Most Cited Cases

The notice provisions of rule governing procedures for obtaining a court order authorizing a foreclosure sale on a deed of trust comport with due process and, thus, must be strictly complied with by one seeking foreclosure under a power of sale through the public trustee. U.S.C.A. Const.Amend. 14.; Rules Civ.Proc., Rule 120.

[6] Mortgages 266 ↪ 97

266 Mortgages

266III Construction and Operation

266III(A) General Rules of Construction

266k97 k. Application to Mortgages in General. Most Cited Cases

Courts interpret a deed of trust using basic principles

of contract interpretation.

[7] Contracts 95 ↪ 147(2)

95 Contracts

95II Construction and Operation

95II(A) General Rules of Construction

95k147 Intention of Parties

95k147(2) k. Language of Contract.

Most Cited Cases

The intent of the parties to a contract is to be determined primarily from the language of the instrument itself.

[8] Contracts 95 ↪ 147(2)

95 Contracts

95II Construction and Operation

95II(A) General Rules of Construction

95k147 Intention of Parties

95k147(2) k. Language of Contract.

Most Cited Cases

Contracts 95 ↪ 152

95 Contracts

95II Construction and Operation

95II(A) General Rules of Construction

95k151 Language of Instrument

95k152 k. In General. Most Cited Cases

Written contracts that are complete and free from ambiguity will be found to express the intention of the parties and will be enforced according to their plain language.

[9] Mortgages 266 ↪ 335

266 Mortgages

266IX Foreclosure by Exercise of Power of Sale

266k335 k. Right to Foreclose. Most Cited

Cases

Records containing addresses of parties that must be provided in a motion for an order authorizing a foreclosure sale include the deed of trust. Rules Civ.Proc., Rule 120(a).

[10] Constitutional Law 92 ↪ 4417

92 Constitutional Law

92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)19 Tort or Financial Liabilities
92k4415 Liens, Mortgages, and Security Interests
92k4417 k. Enforcement; Proceedings. Most Cited Cases
(Formerly 92k300(2))

Mortgages 266 ↪ 335

266 Mortgages
266IX Foreclosure by Exercise of Power of Sale
266k335 k. Right to Foreclose. Most Cited Cases
Mortgagee who initiated foreclosure proceedings on deed of trust did not violate mortgagors' due process rights by not making a reasonable effort to locate their most current mailing address, where, by the notice provision in the deed of trust, the parties agreed on a procedure for notifying one another of changes to their respective mailing addresses, mortgagors did not follow such provision, and under rule on foreclosures mortgagee was not required to go beyond notice provision in the parties' agreement. U.S.C.A. Const.Amend. 14; Rules Civ.Proc., Rule 120.

[11] Mortgages 266 ↪ 348

266 Mortgages
266IX Foreclosure by Exercise of Power of Sale
266k348 k. Judgment or Order for Sale. Most Cited Cases
Order authorizing foreclosure sale on deed of trust was not false and fraudulent and entered without authority because it was not entered by the district court which mortgagee erroneously identified on the caption of the proposed order; court entering order had the power to correct a clerical error in the order, use of the wrong district court in the caption of the order was a clerical error that did not affect its validity, magistrate of the court entering the order corrected the error by issuing an amended order authorizing sale nunc pro tunc, and venue was not a jurisdictional consideration as a foreclosure action could be filed in any county. Rules Civ.Proc., Rules 60(a), 120(f).

[12] Pleading 302 ↪ 4

302 Pleading
302I Form and Allegations in General
302k4 k. Entitling Pleadings. Most Cited Cases
Colorado law looks to the substance of a pleading and not to the form of its caption.

[13] Courts 106 ↪ 475(10)

106 Courts
106VII Concurrent and Conflicting Jurisdiction
106VII(A) Courts of Same State
106VII(A)1 In General
106k475 Pendency and Scope of Prior Proceeding
106k475(10) k. Enforcement of Liens and Mortgages. Most Cited Cases
Under the rule of priority of jurisdiction, order authorizing foreclosure sale was not void because the trial court lacked subject matter jurisdiction to enter it in light of pending proceeding that mortgagee had initiated in another district court, where the other district court sent mortgagee two letters notifying it that its documents were incomplete for lack of a proper order of hearing, mortgagee then abandoned and voluntarily chose not to pursue the proceeding in the other district court, mortgagee instead filed a foreclosure proceeding in the trial court that issued order authorizing foreclosure sale, other district court dismissed its proceeding when mortgagee did not rest proceeding for a hearing, and, thus there was no risk of inconsistent decisions or duplicative lawsuits.

[14] Mortgages 266 ↪ 572

266 Mortgages
266X Foreclosure by Action
266X(P) Review
266k572 k. Presentation and Reservation in Lower Court of Grounds of Review. Most Cited Cases
Mortgagors preserved for appellate review issue of whether trial court issuing order authorizing foreclosure sale on deed of trust lacked subject matter jurisdiction to enter order in light of pending proceeding that mortgagor had initiated in another district court, where mortgagors raised such issue in the trial court in their motion for reconsideration, and, after oral argument, Court of Appeals directed the parties to file supplemental briefs on the issue.

[15] Courts 106 ↪ 475(1)

106 Courts

106VII Concurrent and Conflicting Jurisdiction

106VII(A) Courts of Same State

106VII(A)1 In General

106k475 Pendency and Scope of Prior Proceeding

106k475(1) k. In General. Most

Cited Cases

The exercise of **concurrent jurisdiction** is controlled by the principle of priority, which is sometimes referred to as the rule of **exclusive concurrent jurisdiction**.

[16] Courts 106 ↪ 475(1)

106 Courts

106VII Concurrent and Conflicting Jurisdiction

106VII(A) Courts of Same State

106VII(A)1 In General

106k475 Pendency and Scope of Prior Proceeding

106k475(1) k. In General. Most

Cited Cases

The rule of **exclusive concurrent jurisdiction**, also known as the principle of priority, is based on the public policies of preventing a conflict of decisions of two courts of **concurrent jurisdiction** and avoiding unnecessary duplication and multiplicity of suits.

[17] Courts 106 ↪ 475(1)

106 Courts

106VII Concurrent and Conflicting Jurisdiction

106VII(A) Courts of Same State

106VII(A)1 In General

106k475 Pendency and Scope of Prior Proceeding

106k475(1) k. In General. Most

Cited Cases

The rule of priority of jurisdiction is most often applied where one court has already assumed jurisdiction over an action and there is a danger of inconsistent rulings when a second action is filed in another state court with concurrent jurisdiction.

*839 Paul Grant, Englewood, Colorado, for Plaintiffs-Appellants.

Sherman & Howard, L.L.C., Joseph J. Bronesky, Denver, Colorado, for Defendant-Appellee.

LOEB, J.

Plaintiffs, Estates in Eagle Ridge, LLLP, Terry D. Hamilton, and Sharon M. Hamilton, appeal the summary judgment in which the *840 district court concluded that notice to plaintiffs of foreclosure proceedings initiated by defendant, Valley Bank & Trust, was sufficient and that an order authorizing sale was valid. We affirm.

In 2000, Eagle Ridge, by its general partner Terry D. Hamilton, executed, as grantor, a deed of trust for certain property to the Larimer County public trustee for the benefit of Valley Bank to secure a \$1,430,193 promissory note executed by Eagle Ridge and the Hamiltons. The deed of trust listed 2629 Redwing Road, Ste. 370, Ft. Collins, CO, as the address for Eagle Ridge and the Hamiltons.

In July 2001, after plaintiffs failed to make payments of interest and principal on the note, Valley Bank commenced public trustee foreclosure proceedings, pursuant to § 38-38-101, et seq., C.R.S.2004, by sending to the public trustee a notice of election and demand for sale, a notice of right to cure and right to redeem, and other documents as required by statute. Valley Bank also sent copies of the notices to Eagle Ridge at the Redwing Road address.

In August 2001, Valley Bank instituted a C.R.C.P. 120 action in Larimer County to obtain the necessary court order authorizing sale of the property, pursuant to § 38-38-105, C.R.S.2004. The same day, Valley Bank sent to the public trustee the motion for order authorizing sale, the notice for a C.R.C.P. 120 hearing, the certificate of mailing and posting, and the proposed order authorizing sale. Valley Bank sent copies of all its filings to plaintiffs at the Redwing Road address.

After failing to adhere to Larimer County's requirements concerning an order for hearing under C.R.C.P. 120, Valley Bank voluntarily decided not to pursue an order authorizing sale in the Larimer County C.R.C.P. 120 proceeding. Instead, Valley Bank filed another C.R.C.P. 120 action in Denver District Court in September 2001 and sent to the public trustee and to plaintiffs at the Redwing Road ad-

dress, copies of the new motion for order authorizing sale, notice regarding C.R.C.P. 120 hearing, certificate of mailing and posting, and proposed order authorizing sale.

All the pleadings filed in Denver District Court except one had a correct caption that identified that court as having jurisdiction over the C.R.C.P. 120 case. The one exception was the proposed order authorizing sale, which mistakenly listed Larimer County on the top of the caption.

Plaintiffs did not file a response to Valley Bank's C.R.C.P. 120 motion to authorize sale. A Denver District Court magistrate entered the order authorizing sale on October 15, 2001. The Larimer County public trustee then conducted a sale of the property.

In April 2002, plaintiffs filed this action in Larimer County to set aside the order authorizing sale, alleging that, because of the erroneous caption, the order was fraudulently entered by a magistrate who was not sitting on the Larimer County District Court.

Valley Bank then moved in Denver District Court, pursuant to C.R.C.P. 60(a), to correct the order to reflect the proper venue in the caption. The magistrate granted the motion and entered an amended order authorizing sale with a nunc pro tunc date of October 15, 2001.

Valley Bank then moved for partial summary judgment in this action, arguing that the error in the caption of the Denver District Court order was inconsequential and did not affect the validity of the order. Plaintiffs filed a cross-motion for summary judgment, arguing that the sale of the property was void because Valley Bank had not provided proper notice of the foreclosure.

The court denied Valley Bank's motion for partial summary judgment because of an issue of material fact regarding Valley Bank's knowledge of the change of plaintiffs' address. The court also denied plaintiffs' cross-motion for summary judgment, ruling that the error in the caption of the order authorizing sale was a clerical error that did not create a substantive defect in the foreclosure process.

Valley Bank subsequently filed a second motion for

partial summary judgment, arguing that, pursuant to the notice provision in the deed of trust, Valley Bank's notice to plaintiffs of the C.R.C.P. 120 proceeding was sufficient as a matter of law. The court *841 granted Valley Bank's motion. Plaintiffs moved for reconsideration of the summary judgment order, which the court denied. This appeal followed.

I. Timeliness of Appeal

Preliminarily, we address and reject Valley Bank's assertion that we should re-examine a previous order by a division of this court denying its motion to dismiss this appeal on the ground that plaintiffs' notice of appeal was not timely filed.

Valley Bank's motion to dismiss argued, inter alia, that plaintiffs failed to file their notice within the forty-five days allotted by C.A.R. 4(a). Plaintiffs filed their notice of appeal on November 24, 2003, forty-nine days after the trial court's October 6, 2003 order denying their motion for reconsideration under C.R.C.P. 59.

The motions division of this court ordered plaintiffs to show cause why the appeal should not be dismissed. After both parties responded, the division discharged the order to show cause and denied Valley Bank's motion to dismiss.

Pursuant to C.A.R. 4(a), "[u]pon a showing of excusable neglect, the appellate court may extend the time for filing the notice of appeal by a party for a period not to exceed thirty days from the expiration of the time otherwise prescribed by this section (a)."

We interpret the division's order as extending the time for filing the notice of appeal because of excusable neglect, and, thus, we perceive no basis for re-examining the timeliness of the appeal.

II. Notice of Foreclosure

[1] Plaintiffs contend that the district court erred in granting Valley Bank's second motion for partial summary judgment because the notices of the foreclosure proceedings were legally insufficient and, thus, violated plaintiffs' rights to due process. We are not persuaded.

Orders granting summary judgment are reviewed de novo. *Vail/Arrowhead, Inc. v. Dist. Court*, 954 P.2d 608 (Colo.1998). Entry of summary judgment is proper only if there is a clear showing that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The burden to so demonstrate is upon the movant. C.R.C.P. 56(c); *Aspen Wilderness Workshop, Inc. v. Colo. Water Conservation Bd.*, 901 P.2d 1251 (Colo.1995).

In granting summary judgment, the district court concluded as follows:

1. The Bank provided sufficient Notice of foreclosure proceedings, including its application for an Order Authorizing Sale under C.R.C.P. 120, as required by the Deed of Trust and Colorado law.
2. The Bank had no knowledge of the address at which Notice of foreclosure proceedings could be sent to Plaintiff Estates in Eagle Ridge LLLP, once it vacated the address listed in the Deed of Trust.
3. Colorado law allows a Notice to be sent to the address given in the Deed of Trust, despite the existence of any knowledge of a new address.

Plaintiffs contend that the court erred in each of these three conclusions. We conclude that the court properly granted summary judgment based on its first stated conclusion above, and, accordingly, we need not address the propriety of the court's second and third conclusions.

In Colorado, creditors may commence a foreclosure on a deed of trust through the office of the public trustee. The procedural requirements for a public trustee foreclosure are set forth in § 38-38-101, et seq., C.R.S.2004. In addition, C.R.C.P. 120 outlines the procedure, including notice requirements, for obtaining a court order authorizing sale, which the creditor must obtain prior to the public trustee sale, pursuant to § 38-38-105.

[2][3][4] Proper notice of an action is an elementary and fundamental requirement of due process. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950). Notice must be made in a reasonable manner

so as to convey the required information. Process which is a mere gesture is not due process. *Mullane v. Cent. Hanover Bank & Trust Co.*, supra, 339 U.S. at 315, 70 S.Ct. at 657.

[5] The notice provisions of C.R.C.P. 120 comport with due process and, thus, must be strictly complied with by one seeking foreclosure*842 under a power of sale through the public trustee. *Dews v. Dist. Court*, 648 P.2d 662 (Colo.1982); *Valley Dev. at Vail, Inc. v. Warder*, 192 Colo. 316, 557 P.2d 1180 (1976).

[6][7][8] We interpret a deed of trust using basic principles of contract interpretation. *Kirk v. Kitchens*, 49 P.3d 1189, 1192 (Colo.App.2002). The intent of the parties to a contract is to be determined primarily from the language of the instrument itself. Written contracts that are complete and free from ambiguity will be found to express the intention of the parties and will be enforced according to their plain language. *Kirk v. Kitchens*, supra.

[9] C.R.C.P. 120(a) requires a creditor to provide in its motion for an order authorizing sale the name and last known address, "as shown by the records of the moving party," of the grantor of the deed of trust, of the current record owner of the property to be sold, of any person believed or known to be personally liable on the indebtedness secured by the deed of trust, and of anyone else who has an interest in the property. Such records include the deed of trust. See *Motlong v. World Sav. & Loan Ass'n*, 168 Colo. 540, 544, 452 P.2d 384, 386 (1969)(notices of foreclosure mailed to debtor at address given in the deed of trust were all that is required under C.R.C.P. 120); *Watkins v. Booth*, 55 Colo. 91, 132 P. 1141 (1913)(proper notice mailed by public trustee to address given in the deed of trust). C.R.C.P. 120(b) requires notice of the proceeding and any hearing date to be served on all persons listed in the motion at the addresses stated in the motion.

Section 38-38-101(1)(f), C.R.S.2004, requires a creditor, once it has gathered the most recent addresses in its records, to provide the public trustee with "[a] list specifying the names and addresses to which all notices required by this article shall be mailed, which may be amended or supplemented in writing prior to the dates required for the mailing of such notices." Section 38-38-101(9), C.R.S.2004, in

turn, requires the public trustee to mail "all notices" pursuant to article 38 to the "names and addresses set forth on the list ... as required by [§ 38-38-101(1)(f)]."

Here, in the deed of trust, the parties agreed that Valley Bank would provide all notices to plaintiffs at the Redwing Road address unless plaintiffs designated a different address in writing. Specifically, the deed of trust provides:

Notices. Any notice required to be given under this Deed of Trust, including without limitation any notice of default and any notice of sale shall be given in writing, and shall be effective when delivered ... or, if mailed, when deposited in the United States mail, as first class, certified or registered mail postage prepaid, directed to the addresses shown near the beginning of this Deed of Trust. Any party may change its address for notices under this Deed of Trust by giving formal written notice to the other parties, specifying that the purpose of the notice is to change the party's address.

The record shows, and neither party disputes, that plaintiffs no longer resided at the Redwing Road address when Valley Bank instituted the C.R.C.P. 120 foreclosure proceedings. It is also undisputed that plaintiffs did not comply with the notice provision in the deed of trust by providing to Valley Bank, in writing, a notice of change of address. Valley Bank thus utilized the Redwing Road address to serve its C.R.C.P. 120 motion and notice and to provide the public trustee with plaintiffs' most current address, pursuant to § 38-38-101(1)(a).

We conclude that the plain language of the deed of trust expresses the parties' intentions concerning notice and changes of address and that Valley Bank's adherence to the deed of trust's notice provision complied with the notice requirements of C.R.C.P. 120(a) and, thus, did not violate plaintiffs' due process rights.

The notice provision in the deed of trust specified the parties' agreement that notice could be sent to plaintiffs' address in the deed of trust unless plaintiffs gave formal written notice to Valley Bank of a change of address for purposes of notice under the deed of trust. A written notice of change of address pursuant to that provision would have constituted part of Valley

Bank's records under C.R.C.P. 120(a), because the notice provision effectively established the parties' agreement as to what records Valley *843 Bank would have to consult to determine plaintiffs' address for purposes of C.R.C.P. 120. Cf. *Kirk v. Kitchens, supra* (unambiguous deed of trust will be held to express intention of the parties as to prepayment penalties and will be enforced according to its plain language).

We also find it instructive, although not determinative, that the Colorado State Real Estate Commission has approved for purposes of C.R.C.P. 120, a form deed of trust with a substantially similar notice provision to that agreed to by the parties here. See *Colorado Real Estate Manual* ch. 25, at 200-08 (2004).

Accordingly, we conclude that the notice provision in the deed of trust, and Valley Bank's compliance with that provision, comported with the requirements of C.R.C.P. 120(a).

[10] Nevertheless, plaintiffs contend that Valley Bank violated their due process rights by not making a reasonable effort to locate their most current mailing address. We are not persuaded.

Here, by the notice provision in the deed of trust, the parties agreed on a procedure for notifying one another of changes to their respective mailing addresses. Plaintiffs did not follow these procedures. We perceive nothing in C.R.C.P. 120 that required Valley Bank to go beyond the notice provision in the parties' agreement to locate a new address for plaintiffs. See *Kurtz v. Ripley County State Bank*, 785 F.Supp. 116, 118 (E.D.Mo.1992)(the burden is not on the bank to keep track of debtor's ever changing address), *aff'd*, 972 F.2d 354, 1992 WL 163588 (8th Cir.1992); see also *WTF0, Inc. v. Braithwaite*, 899 S.W.2d 709, 720 (Tex.App.1995)(all that is required is constructive notice of foreclosure).

Accordingly, we perceive no due process concerns where plaintiffs' claim of insufficient notice arises out of their own failure to comply with the change of address requirements in the deed of trust. See *Klingbeil v. State*, 668 P.2d 930, 933 (Colo.1983)(a university student whose permanent address was out-of-state bore the responsibility to give the traffic officer an address where notice of license suspension would reach him or leave a forwarding address with

the university; the plaintiff “cannot now blame the state for insufficient notice arising out of his own irresponsibility when the state complied with the procedural protections provided by statute”); *see also* Ward v. Douglas County Bd. of Commr's, 886 P.2d 310, 312 (Colo.App.1994)(no due process violation where nondelivery of a notice denying the taxpayer's request for property tax abatement was “attributable to taxpayer's own failure to give the [board] an address where a mailed notice would reach him or to leave a forwarding address with the postal service”).

Because we conclude that, as a matter of law, the trial court properly entered summary judgment for Valley Bank on the ground that Valley Bank's compliance with the notice provision in the deed of trust comported with due process and C.R.C.P. 120, we need not consider plaintiffs' arguments challenging the court's other bases for its summary judgment order.

III. Validity of Order Authorizing Sale

[11] Plaintiffs also contend that the court erred in determining that the order authorizing sale was valid. Plaintiffs argue that the order signed by the Denver District Court magistrate on October 15, 2001, was “false and fraudulent” and entered without authority because it was not entered by the Larimer County District Court, the venue which Valley Bank erroneously identified on the caption of the proposed order. We are not persuaded.

[12] Colorado law looks to the substance of a pleading and not to the form of its caption. Hawkins v. State Comp. Ins. Auth., 790 P.2d 893, 894 (Colo.App.1990)(“A pleading or court document should not stand or fall on the appellation it is given by a litigant. It is the substance of a document that should control, rather than the title by which it is denominated.”).

Moreover, under C.R.C.P. 60(a), courts have the power to correct a clerical error in an order: “Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion *844 of any party and after such notice, if any, as the court orders.”

Here, we conclude the use of “Larimer County” in the caption of the order was a clerical error that did

not affect its validity. *See Hawkins v. State Comp. Ins. Auth.*, *supra*. Upon Valley Bank's C.R.C.P. 60(a) motion, the Denver District Court magistrate corrected the clerical error by issuing an amended order authorizing sale, nunc pro tunc.

Further, the mistake did not affect the jurisdiction or authority of the Denver District Court. Pursuant to C.R.C.P. 120(f), venue is not a jurisdictional consideration because a C.R.C.P. 120 foreclosure action may be filed in any county. The Denver magistrate was not purporting to act for the Larimer County District Court by signing the order. Rather, the magistrate was properly acting for the Denver District Court in a C.R.C.P. 120 proceeding properly filed in that court.

IV. Concurrent Jurisdiction

[13] Finally, plaintiffs contend the order authorizing sale is void because the Denver District Court lacked subject matter jurisdiction to enter it in light of the pending Larimer County proceeding. Valley Bank argues that, because it voluntarily chose not to pursue the Larimer County proceeding, the Denver District Court was not prohibited from entering the order. We agree with Valley Bank.

[14] Initially, we reject Valley Bank's argument that plaintiffs did not preserve this issue for appellate review. Plaintiffs raised the issue in the trial court in their motion for reconsideration, and after oral argument, we directed the parties to file supplemental briefs on the issue. Accordingly, we conclude the issue is properly before us.

[15][16] The exercise of **concurrent jurisdiction** is controlled by the principle of priority, which is sometimes referred to as the rule of **exclusive concurrent jurisdiction**. *See* Utils. Bd. v. Southeast Colo. Power Ass'n, 171 Colo. 456, 468 P.2d 36 (1970); Martin v. Dist. Court, 150 Colo. 577, 579, 375 P.2d 105, 106 (1962)(“the court first acquiring jurisdiction of the parties and the subject matter has exclusive jurisdiction, which perhaps more accurately should be denominated as a ‘priority of jurisdiction’ ”); *see also* 20 Am.Jur.2d Courts § 91 (2d ed.2004). This rule is based on the public policies of preventing a conflict of decisions of two courts of concurrent jurisdiction and avoiding unnecessary duplication and multiplicity of suits. *See* Pub. Serv. Co. v. Miller, 135 Colo.

575, 577, 313 P.2d 998, 999 (1957); Hursch v. Hursch, 492 P.2d 860, 861 (Colo.App.1971)(not published pursuant to C.A.R. 35(f)); *see also Plant Insulation Co. v. Fibreboard Corp.*, 224 Cal.App.3d 781, 787, 274 Cal.Rptr. 147, 150 (1990)(the rule of **exclusive concurrent jurisdiction** is established and enforced not so much to protect the rights of parties as to protect the rights of courts to coordinate **jurisdiction** to avoid conflict of **jurisdiction**, confusion, and delay in the administration of justice).

[17] As pertinent here, the rule of priority of jurisdiction is most often applied in Colorado where one court has already assumed jurisdiction over an action and there is a danger of inconsistent rulings when a second action is filed in another state court with concurrent jurisdiction. *See, e.g., Utils. Bd. v. Southeast Colo. Power Ass'n, supra; Pub. Serv. Co. v. Miller, supra; M & G Engines v. Mroch*, 631 P.2d 1177 (Colo.App.1981). In such circumstances, the supreme court has recognized that the second action should be suspended or stayed rather than dismissed for lack of jurisdiction. *See Wiltgen v. Berg*, 164 Colo. 139, 145, 435 P.2d 378, 381 (1967); *Martin v. Dist. Court, supra*, 150 Colo. at 581, 375 P.2d at 107.

Here, the record shows that Valley Bank filed documents in Larimer County District Court in August 2001 to commence a C.R.C.P. 120 proceeding. The clerk of that court sent Valley Bank two letters notifying it that its documents were “incomplete” for lack of a proper order of hearing. The record further reflects that Valley Bank then abandoned its efforts in Larimer County and did not take any further action in that court. Instead, it filed a C.R.C.P. 120 proceeding in Denver in September 2001, and the Denver court entered an order authorizing sale in October 2001. In January 2002, the Larimer County District Court ordered that the C.R.C.P. 120 proceeding in that court would *845 be dismissed without prejudice unless it was reset for hearing, and in February 2002, the court dismissed it. The record does not reflect that plaintiffs sought to stay or suspend the C.R.C.P. 120 proceeding filed in Denver.

Under these circumstances, we conclude the rule of priority of jurisdiction did not divest the Denver District Court of jurisdiction to enter the order authorizing sale. There was no risk of inconsistent decisions or duplicative lawsuits because Valley Bank had abandoned its efforts to obtain an order authorizing

sale from the Larimer County Court and, indeed, had not even filed the necessary documentation to allow it to obtain such an order from that court. *Cf. People ex rel. Maddox v. Dist. Court*, 198 Colo. 208, 211-12, 597 P.2d 573, 575 (1979)(Arapahoe County District Court not required to defer to the exclusive jurisdiction of the Denver Juvenile Court where the juvenile court never took jurisdiction of the case because the appropriate documentation was not filed to transfer jurisdiction to that court). Thus, the policy reasons for the rule are not implicated here. Accordingly, the Denver District Court had jurisdiction to enter the order authorizing sale in the C.R.C.P. 120 proceeding filed in that court.

Because of our resolution of this issue, we need not consider Valley Bank's alternative argument that the rule of priority of jurisdiction is inapplicable to C.R.C.P. 120 proceedings.

The judgment is affirmed.

Judge CASEBOLT and Judge RUSSEL concur.
Colo.App.,2005.

Estates in Eagle Ridge, LLLP v. Valley Bank & Trust
141 P.3d 838

END OF DOCUMENT

EXHIBIT 3

C

St. Louis Court of Appeals, Missouri.
 In re GAEBLER'S ESTATE.
 HAEFNER et ux.
 v.
 GAEBLER'S ESTATE.
 No. 28290.

April 15, 1952.

*13 Not to be reported in State Reports.

Proceeding in the matter of the estate of Amelia B. Gaebler, deceased, wherein Wilbur G. Haefner and Neva Haefner, his wife, filed a claim in the nature of an action for money had and received. The Circuit Court, St. Louis County, Amandus Brackman, J., on appeal from probate court, sustained motion to dismiss the cause and the claimants appealed. The Court of Appeals, Anderson, J., held that circuit court was not shown to have assumed full jurisdiction of case in prior action and that probate court had jurisdiction to hear and determine the claim.

Judgment reversed and cause remanded.

West Headnotes

[1] Executors and Administrators 162 ↪ 256(4)**162 Executors and Administrators****162VI Claims Against Estate****162VI(D) Disputed Claims****162k256 Review**

162k256(4) k. Presentation in Lower Court or Tribunal of Grounds of Review. Most Cited Cases

(Formerly 162k265(4))

Where motion to dismiss claim against estate of decedent raised question of jurisdiction of court over subject matter, and issue thus raised was tried to court which sustained motion, no motion for new trial was necessary to preserve ruling of court for review. V.A.M.S. §§ 510.310, 512.160; Rules of Supreme Court, rule 3.23.

[2] Courts 106 ↪ 475(1)**106 Courts****106VII Concurrent and Conflicting Jurisdiction****106VII(A) Courts of Same State****106VII(A)1 In General**

106k475 Pendency and Scope of Prior Proceeding

106k475(1) k. In General. Most Cited Cases

When a court of competent jurisdiction becomes possessed of a cause, its authority continues, subject only to authority of a superior court, until matter is finally and completely disposed of, and no court of concurrent jurisdiction may interfere with its action.

[3] Courts 106 ↪ 475(1)**106 Courts****106VII Concurrent and Conflicting Jurisdiction****106VII(A) Courts of Same State****106VII(A)1 In General**

106k475 Pendency and Scope of Prior Proceeding

106k475(1) k. In General. Most Cited Cases

In applying rule that when a court of competent jurisdiction becomes possessed of a cause, its authority continues, subject only to authority of a superior court, until matter is finally and completely disposed of, the proper test is whether there is a prior action between same parties involving same subject matter, and whether court in which prior suit is pending has jurisdiction to render particular relief sought in subsequent action.

[4] Courts 106 ↪ 475(1)**106 Courts****106VII Concurrent and Conflicting Jurisdiction****106VII(A) Courts of Same State****106VII(A)1 In General**

106k475 Pendency and Scope of Prior Proceeding

106k475(1) k. In General. Most Cited Cases

Until court in which action is first filed assumes full

jurisdiction, a court of concurrent jurisdiction in which second action is brought which involves same parties and same subject matter has jurisdiction to proceed with trial.

[5] Courts 106 ↪ 475(2)

106 Courts

106VII Concurrent and Conflicting Jurisdiction

106VII(A) Courts of Same State

106VII(A)1 In General

106k475 Pendency and Scope of Prior Proceeding

106k475(2) k. Probate Proceedings, Administration, Distribution, and Settlement of Estates. Most Cited Cases

On motion to dismiss claim against estate of a decedent filed in probate court on ground that an action based upon same facts and involving same parties and seeking same relief was filed in circuit court prior to filing of claim in probate court, movant had burden of showing facts which would support finding that probate court was without jurisdiction because circuit court had in prior action assumed full jurisdiction of case.

[6] Appeal and Error 30 ↪ 901

30 Appeal and Error

30XVI Review

30XVI(G) Presumptions

30k901 k. Burden of Showing Error. Most Cited Cases

On appeal there is a presumption that decision of lower court was correct, which presumption casts upon appellant burden of showing error, and such burden is met by showing that facts do not support judgment.

[7] Action 13 ↪ 64

13 Action

13IV Commencement, Prosecution, and Termination

13k64 k. Proceedings Constituting Commencement. Most Cited Cases

An action is not pending unless and until process is issued on petition filed.

[8] Process 313 ↪ 5

313 Process

313I Nature, Issuance, Requisites, and Validity

313k3 Necessity and Use in Judicial Proceedings

313k5 k. Institution of Action or Proceeding. Most Cited Cases

A court does not assume full jurisdiction of cause until service of process is obtained.

[9] Courts 106 ↪ 475(2)

106 Courts

106VII Concurrent and Conflicting Jurisdiction

106VII(A) Courts of Same State

106VII(A)1 In General

106k475 Pendency and Scope of Prior Proceeding

106k475(2) k. Probate Proceedings, Administration, Distribution, and Settlement of Estates. Most Cited Cases

Where action was filed in circuit court based on same facts which were involved in claim filed by plaintiff against estate of decedent, and evidence did not show when action was filed, and it did not appear that writ of summons was issued or served in action, and circuit court did not have a necessary party before it when claim was filed, circuit court was not shown to have assumed full jurisdiction of case in prior action and probate court had jurisdiction to hear and determine claim.

[10] Courts 106 ↪ 472.4(4)

106 Courts

106VII Concurrent and Conflicting Jurisdiction

106VII(A) Courts of Same State

106VII(A)1 In General

106k472 Exclusive or Concurrent Jurisdiction

106k472.4 Probate Courts

106k472.4(2) Decedents' Estates, Administration of

106k472.4(4) k. Claims and Proceedings Against Estates and Representatives. Most Cited Cases

(Formerly 106k472(4))

Under allegations to effect that claimants executed promissory note to decedent, that decedent authorized third party to collect principal and interest on note, that claimants paid amount due on note to third party

who surrendered note to claimants, and that claimants made second payment to decedent when decedent advised claimants that third party refused to turn over money paid by claimants, and that second payment was made under mistake of fact and without consideration, under which allegations claimants prayed for reimbursement of amount of second payment from estate of decedent, probate court had jurisdiction to hear and determine claim, as against contention that relief sought was only cognizable in court of equity.

[11] Implied and Constructive Contracts 205H
🔑24

205H Implied and Constructive Contracts
205HI Nature and Grounds of Obligation
205HI(B) Money Received
205Hk24 k. Money Wrongfully Obtained.

Most Cited Cases

(Formerly 264k8 Money Received)
Where one obtains money of another by compulsion, extortion, oppression or fraud, an action for money had and received will lie to recover it.

[12] Payment 294 🔑85(1)

294 Payment
294V Recovery of Payments
294k85 Mistake of Fact
294k85(1) k. In General. Most Cited Cases

An action for money had and received will lie to recover money paid under influence of mistake of fact.

[13] Implied and Constructive Contracts 205H
🔑15.1

205H Implied and Constructive Contracts
205HI Nature and Grounds of Obligation
205HI(B) Money Received
205Hk15 Consideration or Purpose for Which Money Was Received
205Hk15.1 k. In General. Most Cited

Cases

(Formerly 205Hk15, 264k6(1) Money Received)
An action for money had and received will lie to recover money paid where there is no consideration for payments.
Mattingly, Boas & Richards and Robert E. Brauer, St. Louis, for appellants.

Frank Landwehr, Grover C. Sibley, St. Louis, for respondent.

ANDERSON, Judge.

This is an appeal by Wilbur G. Haefner and Neva Haefner from a judgment of the Circuit Court of St. Louis County dismissing their claim filed in the Estate of Amelia B. Gaebler, deceased. The claim was originally filed in the Probate Court of St. Louis County. The facts, as they appear from the transcript on appeal, which includes the records and proceedings of the Probate Court and the Circuit Court, are as follows:

The claim was filed in the Probate Court of St. Louis County on December 22, 1948, and was in the nature of an action for money had and received. In substance, it was alleged in said claim that on April 1, 1941, claimants, who were husband and wife, executed and delivered to Amelia B. Gaebler their promissory note for the sum of \$4,800, with interest at five per cent. per annum, payable semi-annually, which note was secured by a deed of trust on real estate owned by said claimants. It was further alleged that Amelia B. Gaebler placed said note in the possession of Joseph F. Koehr, with full authority in said Koehr to collect the principal and interest due thereon; that claimants paid the full amount due on said note, principal and interest; that receipts for said payments were executed by said Koehr; and that said note was surrendered to said claimants.

It was further alleged that subsequent to April 1, 1944, Amelia B. Gaebler, acting by and through her agent Edward L. Kuhs, advised claimants that her agent Joseph F. Koehr had failed and refused to turn over to her the amounts paid by claimants on said note, and that they thereupon made a second payment to said Amelia B. Gaebler of the principal and interest due on said note. It was then alleged that the second payment was made under a mistake of fact and without consideration. The prayer was that said claim be allowed in the sum of \$4,800, and costs.

On December 29, 1949, Irma G. Hill, the executrix of the estate of Amelia B. Gaebler, deceased, filed in the Probate Court her motion to dismiss said claim. The grounds of said motion were that the Probate Court was without jurisdiction to hear and determine said claim, because (1) a suit, based upon the same facts,

was filed in the Circuit Court of the City of St. Louis prior to the filing of said claim in the Probate Court; and (2) because it appears on the face of said claim and said amended petition that claimants were seeking to have set aside certain alleged payments on certain notes because of alleged mistake of fact and fraud practiced upon them, which grounds of recovery could only be tried in a court of equity. It was alleged in said motion that said suit was originally filed against Joseph F. Koehr, and that on April 19, 1948, Amelia Gaebler was, by an amended petition, made a party defendant.

Attached to said motion, as an exhibit, was a copy of the amended petition in cause *14 No. 3967-D of the Circuit Court of the City of St. Louis, entitled 'Wilbur G. Haefner and Neva Haefner, his wife, plaintiffs, v. Joseph F. Koehr and Amelia B. Gaebler.' By said petition it was alleged that on April 1, 1941, plaintiffs executed and delivered to defendant Amelia B. Gaebler, through her agent Joseph F. Koehr, their note for \$4,800, payable April 1, 1944, with interest at the rate of five per cent. per annum, and that said note was secured by a deed of trust on plaintiffs' real estate located at 8544 North Broadway in the City of St. Louis; that it was thereafter agreed by said parties that the interest and principal payments on said note could and should be made through defendant Joseph F. Koehr; that thereafter and prior to April 1, 1944, the defendant Amelia Gaebler permitted defendant Joseph F. Koehr to act as her agent in the collection and surrender of said notes, and placed same in his possession with full authority to collect the principal and interest due on said notes; that plaintiffs paid to the said Amelia Gaebler the full amount due, together with interest, and upon payment of each interest note same was surrendered to plaintiffs by the defendant Joseph Koehr.

It was further alleged that subsequent to April 1, 1944, defendant Amelia Gaebler advised plaintiffs that defendant Koehr had failed and refused to pay to her the principal amount, \$4,800, paid by plaintiffs, and at said time falsely represented that defendant Joseph F. Koehr had not been authorized to act for her in the collection of said notes, and stated that as far as she was concerned defendant Joseph F. Koehr was agent for plaintiffs; that said defendant Amelia Gaebler, after making said false representations, threatened to foreclose the mortgage above mentioned, and that by reason of said false representa-

tions and threats, plaintiffs were induced to execute an extension note by the terms of which they agreed to again pay the principal sum which had been collected by the defendant Amelia Gaebler by and through her agent, Joseph F. Koehr.

It was further alleged that thereafter, and while acting under said false representations, plaintiffs instituted a suit against defendant Joseph F. Koehr to recover the sums which had been paid to him for defendant Amelia Gaebler; that by taking the depositions of Amelia Gaebler and her agent, Edward L. Kuhs, plaintiffs discovered that said Amelia Gaebler had falsely represented that Joseph F. Koehr was not acting as her agent in the collection of said interest notes and principal note; and that said depositions were taken on the 17th day of June, 1947, and on March 4, 1948.

It was further alleged that there was no consideration for the second payment of \$4,800, and that same was made under a mistake of fact induced by the fraudulent representations of the defendant Amelia Gaebler, and that in equity and in good conscience said defendant should not be permitted to retain said funds.

The prayer of the petition was for judgment against both defendants in the sum of \$4,800, together with costs.

On May 9, 1950, the Probate Court entered the following order:

'Now on this 9th day of May, 1950, and during the May Term, 1950, of this court, after duly considering the law and the evidence heretofore submitted to the court on the 11th day of November, 1949, on the motion of the executrix to dismiss the claim of Wilbur G. Haefner and Neva Haefner, his wife, the court finds that said claimants have a cause of action pending in the Circuit Court of the City of St. Louis based on this claim and by reason thereof, the court lacks jurisdiction to entertain the claim.

'It is therefore ordered, adjudged and decreed that the claim be and the same is hereby dismissed for lack of jurisdiction, at the cost of the claimants.'

From the above order of dismissal the claimants, on June 20, 1950, appealed to the Circuit Court of St. Louis County. When the case reached the Circuit

Court the executrix again moved to dismiss said cause. The grounds of said motion were identical with those relied on the motion to dismiss theretofore filed in the Probate Court. This motion was by the court sustained, on the ground 'that the St. Louis Circuit Court *15 first obtained and has exclusive jurisdiction over the subject matter of the litigation.' Thereafter, in due time, claimants appealed from the judgment of dismissal.

[1] Appellants assign as error the action of the trial court in sustaining the motion to dismiss filed by the executrix. Respondent contends that we are precluded from considering said assignment for the reason that appellants failed to file a motion for new trial after the trial court made its finding. There is no merit to this contention. The motion to dismiss raised a question of the court's jurisdiction over the subject matter, and the issue thus raised was tried to the court. Under such circumstances, no motion for new trial was necessary to preserve the court's ruling for review. See Sections 512.160 and 510.310, RSMo 1949, V.A.M.S.; Supreme Court Rule 3.23; and Crispon v. St. Louis Public Service Co., 361 Mo. 866, 237 S.W.2d 153.

[2] It is a well established rule that when a court of competent jurisdiction becomes possessed of a cause, its authority continues, subject only to the authority of a superior court, until the matter is finally and completely disposed of; and no court of concurrent jurisdiction may interfere with its action. State ex rel. Sullivan v. Reynolds, 209 Mo. 161, 107 S.W. 487, 15 L.R.A., N.S., 963; Julian v. Commercial Assur. Co., 220 Mo.App. 115, 279 S.W. 740; 21 C.J.S., Courts, § 492, p. 745.

This rule rests upon comity and the necessity of securing proper and orderly administration of justice to prevent vexation, oppression, harassment and unnecessary litigation. Any other rule would result in a multiplicity of suits and create unseemly, expensive and dangerous conflicts in the securing and execution of judgments. State ex rel. Sullivan v. Reynolds, 209 Mo. 161, 107 S.W. 487, 15 L.R.A., N.S., 963; Myers v. Superior Court, 75 Cal.App.2d 925, 172 P.2d 84; Simmons v. Superior Court, 96 Cal.App.2d 119, 214 P.2d 844, 19 A.L.R.2d 288; Schaefer v. Milner, 156 Kan. 768, 137 P.2d 156; Gay, Hardie & Co. v. Brierfield Coal & Iron Co., 94 Ala. 303, 11 So. 353; Kusick v. Kusick, 243 Wis. 135, 9 N.W.2d 607; Ex

parte Burch, 236 Ala. 662, 184 So. 694; Morris v. McElroy, 23 Ala.App. 96, 122 So. 606; State ex rel. Cook v. Madison Circuit Court, 193 Ind. 20, 138 N.E. 762; First M. E. Church v. Hull, 225 Iowa 306, 280 N.W. 531; Maclean v. Speed, Circuit Judge for Wayne County, 52 Mich. 257, 18 N.W. 396; 15 C.J., Courts, sec. 583, p. 1136; 21 C.J.S., Courts, § 492, p. 747; 14 Am.Jur., Courts, sec. 243, p. 435.

[3] In applying the rule above mentioned the proper test is: (1) whether there is a prior action between the same parties involving the same subject matter; and (2) whether the court in which the prior suit is pending has jurisdiction to render the particular relief sought in the subsequent action. Where the prior jurisdiction has terminated or is inadequate to afford the necessary relief, the assumption of jurisdiction by another court is permissible. 21 C.J.S., Courts, § 492, p. 753.

[4] It has also been held that until the court in which suit is first filed assumes full jurisdiction, a court of concurrent jurisdiction in which the second action is brought has jurisdiction to proceed with the trial. Jurisdiction is acquired by the issuance and service of process, and in case of conflict of jurisdiction priority is determined by the date of service of process. State ex rel. Davis v. Ellison, 276 Mo. 642, 208 S.W. 439; State ex rel. Fromme v. Harris, Mo.App., 194 S.W.2d 932; De Brincat v. Morgan, Cal.App.2d 7, 36 P.2d 245; Craig v. Hoge, 95 Va. 275, 28 S.E. 317; Union Mutual Life Ins. Co. v. University of Chicago, C.C., 6 F. 443; Owens v. Ohio Cent. Railroad Co., C.C., 20 F. 10; Louisville Trust Co. v. City of Cincinnati, 76 F. 296, 22 C.C. A. 334; Foley v. Hartley, C.C., 72 F. 570; Wilmer v. Atlanta & R. Airline Railway Co., 30 Fed.Cas. p. 73, No. 17,775; Schuehle v. Reiman, 86 N.Y. 270; United States v. Lee, D.C., 84 F. 626.

State ex rel. Davis v. Ellison, supra, was a certiorari proceeding to quash the record of the Kansas City Court of Appeals. On December 17, 1915, Birdie Taubman filed suit for divorce against Edwin M. Taubman in the Circuit Court of Adair County. Summons was issued and served on defendant on December 20, 1915. On December 17, *16 1915, Edwin M. Taubman filed suit for divorce against Birdie in the Circuit Court of Lafayette County. Summons was issued and served on Birdie on December 18, 1915. The Kansas City Court of Appeals issued its writ of prohibition against the judge of the

Lafayette County Circuit Court prohibiting him from proceeding with the husband's suit. The Supreme Court quashed the record of the Kansas City Court of Appeals, holding that since service was first had in the husband's suit, the Circuit Court of Lafayette County was the first to acquire jurisdiction. The court said [276 Mo. 642, 208 S.W. 439]:

'It may be conceded for the purpose of this case, without thereby announcing a definite rule on the subject, that Birdie Taubman by her hasty hegira to Adair county acquired such a residence there as to authorize her to institute the divorce suit in the circuit court of that county. It follows, as a necessary implication from her right to institute the suit, that the court was thereby empowered to entertain it. Thus empowered, its jurisdiction of the subject-matter was established. This, however, is but one of the essentials necessary to confer upon the court complete and exclusive jurisdiction. The other essential is service upon the person against whom the proceeding is directed in such manner as the statute may require. Present these two essentials and the jurisdiction of the court is complete. (Citing cases.) In the absence of the first essential, the court is without power to proceed in any manner; in the absence of the second, its power is held in abeyance and cannot be exercised until it is present.

'Let it be conceded that the filing of the suit was a few hours earlier in the circuit court of Adair county than that in the circuit court of Lafayette county, actions for divorce being within the judicial purview of these courts, each upon the filing of the suit therein acquired jurisdiction of the subject-matter. There remained to be supplied the essential of the service of process necessary to draw the person within the power of the court. This was had upon Birdie Taubman in the suit instituted by her husband on December 18, 1915. Service was not had upon Edwin M. Taubman in the suit instituted by his wife until December 20, 1915. The circuit court of Lafayette county was as a consequence of this prior service, clothed with complete and exclusive jurisdiction. Thus parolled, no court was authorized by extraordinary writ to interfere with the exercise of its powers. There is never room for prohibition in the presence of complete jurisdiction. The circuit court of Lafayette county should therefore have been permitted to hear and determine the suit instituted therein by Edwin M. Taubman, and the action of the Court of

Appeals, in attempting to deprive it of this power, was without warrant.'

[5][6] The question for decision in the case at bar is whether or not sufficient facts appear in the record to justify the trial court's finding that it was without jurisdiction for the reason that the Circuit Court of the City of St. Louis had in a prior suit assumed full jurisdiction of the case. Respondent, being the movant, had the burden of showing facts which would support such a finding; and, while it is true, as contended by respondent, that on appeal there is a presumption that the decision of the lower court was correct, which presumption casts upon the appellant the burden of showing error, that burden is met by showing that the facts do not support the judgment.

[7][8][9] The transcript shows that the only evidence before the trial judge at the time he considered the respondent's motion was a copy of an amended petition filed in the circuit court action. From that petition it appears that a suit was brought in the Circuit Court of the City of St. Louis by Wilbur G. Haefner and Neva Haefner against Joseph F. Koehr and Amelia Gaebler on the cause of action stated in the claim filed in the Probate Court. It does not appear when the suit was filed, nor does it appear that a writ of summons was ever issued or served in said cause. These facts *17 were necessary to be shown before the court was justified in sustaining respondent's motion. A suit is not pending unless and until process is issued on the petition filed. Julian v. Commercial Assur. Co., 220 Mo.App. 115, 279 S.W. 740. And a court does not assume full jurisdiction of a cause until service of process is obtained. State ex rel. Davis v. Ellison, 276 Mo. 642, 208 S.W. 439. It does not appear that the cause of action was ever revived against Mrs. Gaebler's personal representative. Absent such revival, the Circuit Court of the City of St. Louis did not have jurisdiction to grant the relief sought in the Probate Court. The Circuit Court did not have a necessary party before it. In our opinion, the trial court erred in holding that it did not have jurisdiction on the ground that the Circuit Court of the City of St. Louis had the exclusive right to dispose of the controversy.

[10][11][12][13] There is no merit to the contention that the Probate Court did not have jurisdiction because the relief sought was only cognizable in a court of equity. The action stated in appellants' claim was

one at law for money had and received. Schaper v. Smith, Mo.App., 56 S.W.2d 820; Doerner v. St. Louis Crematory & Mausoleum Co., Mo.App., 80 S.W.2d 721; Mt. Olive & St. Louis Coal Co. v. Slevin's Estate, 56 Mo.App. 107; 4 Am.Jur., Assumpsit, sec. 20, p. 508. Where one obtains money of another by compulsion, extortion, oppression or fraud, an action for money had and received will lie to recover it. 4 Am.Jur., Assumpsit, sec. 23, p. 513. The action will also lie to recover money paid under the influence of a mistake of fact. 4 Am.Jur., Assumpsit, sec. 24, p. 514; or where there is no consideration for the payment, 4 Am.Jur., Assumpsit, sec. 27, p. 517.

On the facts presented, the trial court erred in sustaining the motion to dismiss. The judgment is reversed and the cause is remanded to the trial court for further proceedings not inconsistent with the views herein expressed.

BENNICK, P. J., and HOLMAN, J., concur.
Mo.App. 1952
In re Gaebler's Estate
248 S.W.2d 12

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EXHIBIT 4

C

Supreme Court of Mississippi.
 RAS FAMILY PARTNERS, LP and Ray A. Sims
 v.
 ONNAM BILOXI, LLC.
 Onnam Biloxi, LLC
 v.
 RAS Family Partners, LP and Ray A. Sims.
 Nos. 2006-IA-00976-SCT, 2006-IA-01414-SCT.

Nov. 15, 2007.

Background: Landlord filed a lawsuit against tenant in the Circuit Court, Harrison County, seeking declaration that the contracts between the parties were no longer binding. Tenant filed a lawsuit against landlord in the Chancery Court, Harrison County, that sought specific performance of lease agreement and damages. Landlord filed a motion in the Chancery Court to transfer the action to the Circuit Court, and tenant filed a motion in the Circuit Court to transfer the action to the Chancery Court. Both motions were denied, and both parties appealed.

Holdings: After granting interlocutory appeal, the Supreme Court, *Diaz*, P.J., held that:

(1) Circuit Court was a court of competent **jurisdiction**, and

(2) complaint filed by landlord in Circuit Court had **priority jurisdiction** over complaint filed by tenant in Chancery Court.

Chancery Court order reversed and remanded; Circuit Court order affirmed and remanded.

West Headnotes

[1] Appeal and Error 30 ↪893(1)30 Appeal and Error30XVI Review30XVI(F) Trial De Novo30k892 Trial De Novo30k893 Cases Triable in Appellate

Court

30k893(1) k. In General. Most CitedCases

Jurisdiction is a question of law which the Supreme Court reviews de novo.

[2] Courts 106 ↪475(1)106 Courts106VII Concurrent and Conflicting Jurisdiction106VII(A) Courts of Same State106VII(A)1 In General106k475 Pendency and Scope of Prior Proceeding106k475(1) k. In General. MostCited Cases

The principle of **priority jurisdiction** presupposes that the first court in which suit is filed is a court of competent **jurisdiction**.

[3] Courts 106 ↪475(1)106 Courts106VII Concurrent and Conflicting Jurisdiction106VII(A) Courts of Same State106VII(A)1 In General106k475 Pendency and Scope of Prior Proceeding106k475(1) k. In General. MostCited Cases**Declaratory Judgment 118A ↪276**118A Declaratory Judgment118AIII Proceedings118AIII(B) Jurisdiction and Venue118Ak276 k. Concurrent and Conflicting Jurisdiction. Most Cited Cases

The Circuit Court was a court of competent jurisdiction, for the purpose of proceeding to determine whether the Circuit Court or Chancery Court had jurisdiction over dispute between landlord and tenant; landlord's complaint sought a declaratory judgment that the parties' contracts were no longer binding, declaratory judgment actions were "jurisdictionally neutral," and landlord also sought damages for breach of contract, which was a legal remedy, over which the Circuit Court had jurisdiction.

[4] Courts 106 ↪141

106 Courts

- 106III Courts of General Original Jurisdiction
- 106III(B) Courts of Particular States
- 106k141 k. Mississippi. Most Cited Cases

Equity 150 ↪ 1

150 Equity

- 150I Jurisdiction, Principles, and Maxims
- 150I(A) Nature, Grounds, Subjects, and Extent of Jurisdiction in General
- 150k1 k. Nature and Source of Jurisdiction.

Most Cited Cases

Generally speaking, circuit courts are courts of law and chancery courts are courts of equity. West's A.M.C. Const. Art. 6. §§ 156, 159.

[5] Courts 106 ↪ 141

106 Courts

- 106III Courts of General Original Jurisdiction
- 106III(B) Courts of Particular States
- 106k141 k. Mississippi. Most Cited Cases

Courts 106 ↪ 161

106 Courts

- 106IV Courts of Limited or Inferior Jurisdiction
- 106k161 k. Courts Limited as to Jurisdiction.

Most Cited Cases

Chancery courts are courts of limited jurisdiction, while circuit courts are courts of general jurisdiction.

[6] Courts 106 ↪ 141

106 Courts

- 106III Courts of General Original Jurisdiction
- 106III(B) Courts of Particular States
- 106k141 k. Mississippi. Most Cited Cases

If one issue is properly before the circuit court it has jurisdiction to decide all issues.

[7] Courts 106 ↪ 32

106 Courts

- 106I Nature, Extent, and Exercise of Jurisdiction in General
- 106k31 Jurisdiction to Be Shown by Record

106k32 k. In General. Most Cited Cases

To determine whether a court has subject matter jurisdiction, the Supreme Court looks to the face of the complaint, examining the nature of the controversy and the relief sought.

[8] Courts 106 ↪ 474

106 Courts

- 106VII Concurrent and Conflicting **Jurisdiction**
- 106VII(A) Courts of Same State
- 106VII(A)1 In General
- 106k474 k. **Priority of Jurisdiction.**

Most Cited Cases

Complaint filed by landlord in Circuit Court had **priority jurisdiction** over complaint filed by tenant in Chancery Court, where landlord's complaint was filed nearly one month before tenant's complaint.

[9] Courts 106 ↪ 475(1)

106 Courts

- 106VII Concurrent and Conflicting Jurisdiction
- 106VII(A) Courts of Same State
- 106VII(A)1 In General

106k475 Pendency and Scope of Prior Proceeding

106k475(1) k. In General. Most Cited Cases

Where two suits between the same parties over the same controversy are brought in courts of concurrent jurisdiction, the court which first acquires jurisdiction retains jurisdiction over the whole controversy to the exclusion or abatement of the second suit.

[10] Courts 106 ↪ 474

106 Courts

- 106VII Concurrent and Conflicting **Jurisdiction**
- 106VII(A) Courts of Same State
- 106VII(A)1 In General
- 106k474 k. **Priority of Jurisdiction.**

Most Cited Cases

To determine which court first acquired jurisdiction, the Supreme Court looks at the date the initial pleading is filed, provided process issues in due course.

*927 Lawrence Cary Gunn, Hattiesburg, attorney for appellants.

Megan Marthine Barber Conner, John G. Corlew,

Jackson, Katherine A. Smith, attorneys for appellee.

Before DIAZ, P.J., CARLSON and RANDOLPH, JJ.

DIAZ, Presiding Justice, for the Court.

¶ 1. The dispute in these consolidated cases centers around an agreement between Onnam Biloxi, LLC, RAS Family Partners, LP, and Ray A. Sims. This Court is asked to determine whether jurisdiction is proper in either chancery or circuit court. Finding that jurisdiction was proper in circuit court, we affirm the circuit court's order denying the motion to transfer and reverse the chancery court's order denying same.

FACTS

¶ 2. RAS Family Partners, LP, agreed to lease ten acres of land on the Biloxi Bay to Onnam Biloxi, LLC, for casino development. Ray A. Sims is the managing partner of RAS, and he also contracted with Onnam to sell his shares of stock in another corporation that owns land adjacent to the proposed casino development. Both the lease and stock sale agreements were subject to certain contingencies, which included approval of the site by the Mississippi Gaming Commission; obtaining a gaming license and other necessary permits; approval of the building plan by the City of Biloxi; a hazardous substances inspection; and the negotiation of a tidelands lease.

¶ 3. The closing of the lease and stock sale was to take place on September 30, 2005. On August 29, 2005, Hurricane Katrina devastated the Gulf Coast region, impeding the conditions precedent to the agreements. In a letter dated November 1, 2005, RAS and Sims notified Onnam that “[a]ll agreements between RAS Family Partners and Onnam Biloxi [had] expired by their own terms.”

¶ 4. On November 30, 2005, Onnam filed suit in federal court against RAS and Sims. RAS then filed a separate suit against Onnam in the Circuit Court of Harrison County on December 27, 2005, seeking a declaratory judgment that the contracts were no longer binding as well as damages for breach of contract and malicious filing of a *lis pendens* notice. RAS amended its circuit court complaint to include Sims as a plaintiff on February 27, 2006.

¶ 5. Onnam's federal suit was dismissed on January 24, 2006, pursuant to a provision in the lease agreement, which designated state court as the chosen forum. Onnam then filed suit that same day *928 against RAS and Sims in the Chancery Court of Harrison County, seeking specific performance of the lease agreement and damages from Sims for breach of the stock sale agreement.

¶ 6. Onnam filed a motion in the circuit court action to transfer to chancery court, while RAS and Sims filed a motion in the chancery court action to transfer to circuit court. Both motions were denied, and this Court granted both of the interlocutory appeals that followed.

¶ 7. The parties ask us to determine the appropriate **jurisdiction**, specifically whether the circuit court has **priority jurisdiction**.

STANDARD OF REVIEW

[1] ¶ 8. Jurisdiction is a question of law which this Court reviews de novo. Trustmark Nat'l Bank v. Johnson, 865 So.2d 1148, 1150 (Miss.2004). We use this same standard of review when examining a ruling on a motion to transfer from chancery court to circuit court, or vice-versa. ERA Franchise Systems, Inc. v. Mathis, 931 So.2d 1278, 1280 (Miss.2006).

DISCUSSION

¶ 9. RAS and Sims argue that the circuit court has **priority jurisdiction** because they were the first to file suit. Onnam, on the other hand, argues that the chancery court has proper **jurisdiction** because (1) the suit involves a purely equitable matter which properly belongs in chancery court, and (2) **priority jurisdiction**, even if applicable, does not preclude the circuit court from considering a motion to transfer.

[2] ¶ 10. “The principle of **priority jurisdiction** presupposes that the first court in which suit is filed is a court of competent **jurisdiction**.” Harrison County Dev. Comm'n v. Daniels Real Estate, Inc., 880 So.2d 272, 276 (Miss.2004), *overruled on other grounds by City of Jackson v. Estate of Stewart*, 908 So.2d 703, 711 (Miss.2005). Accordingly, we address the issues in the following order: (1) whether the circuit court

could have subject matter **jurisdiction** over the case at all; and (2) if so, we then determine **priority jurisdiction** by examining in which court the suit was first filed.

I. Whether the Circuit Court is a Court of Competent Jurisdiction.

[3][4][5][6][7] ¶ 11. Generally speaking, circuit courts are courts of law and chancery courts are courts of equity. *See* Miss. Const. art. 6, § 159 (granting chancery courts jurisdiction over “all matters in equity”); Miss. Const. art. 6, § 156 (granting circuit courts “original jurisdiction in all matters civil and criminal in this state not vested by this Constitution in some other court”). However, chancery courts are courts of limited jurisdiction, while circuit courts are courts of general jurisdiction. *IP Timberlands Operating Co. v. Denmiss Corp.*, 726 So.2d 96, 112 (Miss.1998) (citing *Hall v. Corbin*, 478 So.2d 253 (Miss.1985)). Therefore, “if one issue is properly before the circuit court it has jurisdiction to decide all issues.” *Id.* at 111. To determine whether a court has subject matter jurisdiction, we look to the face of the complaint, examining the nature of the controversy and the relief sought. *Durant v. Humphreys County Mem'l Hosp./Extended Care Facility*, 587 So.2d 244, 250 (Miss.1991); *Hood v. Dept. of Wildlife Conservation*, 571 So.2d 263, 266 (Miss.1990). If the complaint seeks legal relief, even in combination with equitable relief, the circuit court can have proper subject matter jurisdiction. *IP Timberlands Operating Co.*, 726 So.2d at 111.

¶ 12. RAS's and Sims's complaint seeks a declaratory judgment that the contracts are no longer binding as well as damages *929 for breach of contract and malicious filing of a *lis pendens* notice. The request for declaratory judgment does not affect our analysis as declaratory judgments are “jurisdictionally neutral.” *Burnette v. Hartford Underwriters Ins. Co.*, 770 So.2d 948, 952 (Miss.2000). Breach of contract actions, on the other hand, are better suited for circuit court. *Southern Leisure Homes, Inc. v. Hardin*, 742 So.2d 1088, 1089 (Miss.1999).

¶ 13. The complaint also requests damages for the alleged breach of contract and malicious filing. While chancery courts may certainly award legal and punitive damages as long as chancery jurisdiction has attached, damages are traditionally considered a legal

remedy. *Id.* at 1090. Because the complaint seeks legal remedies, the circuit court is a court of competent jurisdiction.

¶ 14. Onnam counters that the paramount claim is the equitable remedy of specific performance, and therefore, the case properly belongs in chancery court. As discussed above, the complaint clearly seeks legal remedies. Additionally, Onnam stipulated to the circuit court's jurisdiction in its answer and cross-complaint, acknowledging that “[t]his Court has jurisdiction of the parties and subject matter.” Finally, Onnam's cross-complaint, which is nearly identical to its complaint filed with the chancery court, seeks a legal remedy in the form of damages for breach of contract. This argument is therefore without merit.

II. Whether the Circuit Court has Priority Jurisdiction.

[8] ¶ 15. Because the circuit court is a court of competent **jurisdiction**, we next determine whether the circuit court has **priority jurisdiction**.

[9][10] ¶ 16. The “first to file” or “race to the courthouse” rule is well-established in Mississippi case law: “[w]here two suits between the same parties over the same controversy are brought in courts of concurrent jurisdiction, the court which first acquires jurisdiction retains jurisdiction over the whole controversy to the exclusion or abatement of the second suit.” *Scruggs, Millette, Bozeman & Dent, P.A. v. Merkel & Cocke, P.A.*, 804 So.2d 1000, 1006 (Miss.2001) (quoting *In re Petition of Beggiani*, 519 So.2d 1208, 1210 (Miss.1988)). To determine which court first acquired jurisdiction, we look at “the date the initial pleading is filed, provided process issues in due course.” *Scruggs*, 804 So.2d at 1006 (quoting *Huffman v. Griffin*, 337 So.2d 715 (Miss.1976)).

¶ 17. The circuit court complaint was filed on December 27, 2005, and the chancery court complaint was filed on January 24, 2006. Because the chancery complaint was filed nearly a month after the first pleading in circuit court, the circuit court has **priority jurisdiction**.

¶ 18. The chancellor found that **priority jurisdiction** did not apply because: (1) the summonses were served on the same date; and (2) Sims was not a party to the circuit court action until after the chancery ac-

tion had been filed. These facts are of no matter. First, **priority jurisdiction** attaches as long as process issues “in due course.” *Id.* The summons for the circuit court action was served January 26, 2006, and thus, service of process was accomplished within the 120-day time frame required under Mississippi Rule of Civil Procedure 4(h). Second, Sims was added as a party through an amended complaint which was filed before a responsive pleading was served. Under Mississippi Rule of Civil Procedure 15(c) this amendment relates back to the date of the original complaint.

CONCLUSION

¶ 19. Because the case was filed first in the circuit court, and because the circuit *930 court is a court of competent jurisdiction, this case properly belongs in that court. The chancery court's order denying the motion to transfer is reversed, and Case Number 2006-IA-00976-SCT is remanded to the chancery court with directions to transfer that case to the Harrison County Circuit Court, Second Judicial District. The circuit court's order denying the motion to transfer is affirmed, and Case Number 2006-IA-01414-SCT is remanded to the circuit court for further proceedings consistent with this opinion.

¶ 20. **NO. 2006-IA-00976-SCT: REVERSED AND REMANDED. NO. 2006-IA-01414-SCT: AFFIRMED AND REMANDED.**

SMITH, C.J., WALLER, P.J., EASLEY, CARLSON, GRAVES, RANDOLPH AND LAMAR, JJ., CONCUR. DICKINSON, J., NOT PARTICIPATING.
Miss., 2007.
RAS Family Partners, LP v. Onnam Biloxi, LLC
968 So.2d 926

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PROOF OF SERVICE

I, Bao Xiong, declare:

I am a citizen of the United States and employed in Sacramento County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 400 Capitol Mall, 27th Floor, Sacramento, California 95814. On March 30, 2009, I served a copy of the within document(s):

NOTICE OF LODGING OUT-OF-STATE CASES IN SUPPORT OF RESPONDENTS' BRIEF RE: EXCLUSIVE CONCURRENT JURISDICTION

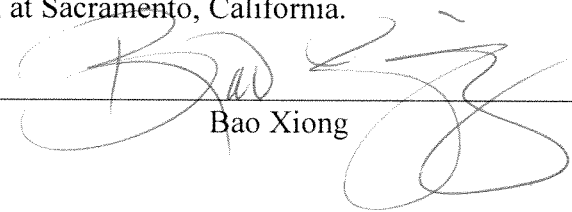
- by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

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I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on March 30, 2009, at Sacramento, California.



Bao Xiong