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ALVIN DEE DAVID, Plaintiff/Appellant, v. ROBERT GOLDBERG, JOHN DOE # 1, JOHN DOE # 2, GILES COUNTY, TENNESSEE, KENNETH BEVIL, Individually and as Deputy Sheriff for Giles County Tennessee, and DAVID MILLER, Individually and as Deputy Sheriff for Giles County, Tennessee, Defendants/Appellees.

Appeal No. 01-A-01-9301-CV-00031

COURT OF APPEALS OF TENNESSEE, MIDDLE SECTION, AT NASHVILLE

1993 Tenn. App. LEXIS 418

June 16, 1993, Filed

PRIOR HISTORY: [*1] APPEALED FROM THE CIRCUIT COURT OF GILES COUNTY AT PULASKI, TENNESSEE. No. 8911. THE HONORABLE JIM T. HAMILTON, JUDGE

DISPOSITION: REVERSED AND REMANDED

COUNSEL: For Plaintiff/Appellant: TRACY W. MOORE, MOORE & PEDEN, 29 Public Square, P. O. Box 981, Columbia, Tennessee 38402-0981.

JUDGES: CANTRELL, TODD, KOCH, JR.

OPINION BY: BEN H. CANTRELL

OPINION

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This is an action for damages against multiple defendants for depriving the plaintiff of his property without due process of law, for breach of a lease-purchase agreement, and for converting the plaintiff's personal property. The Circuit Court of Giles County dismissed the action against the key defendant holding that the principles of res judicata barred the action. Because we find that the judgment supporting the res judicata plea is not final and does not involve all the same causes of action that are involved in this case, we reverse the lower court's order.

I.

In August of 1990, the plaintiff, Alvin Dee David, a resident of Giles County, Tennessee, entered into a lease-purchase agreement with Goldberg's Trucking of North Fond du Lac, Wisconsin. The agreement covered a 1980 International Harvester truck, and Mr. David agreed to pay the lessor twenty percent of [*2] the gross revenue earned through the use of the vehicle. Mr. Goldberg agreed to provide the insurance, the vehicle registration and permits for an additional twenty-five percent of the gross. At the end of two years Mr. David had the option to purchase the truck for one dollar.

On December 3, 1990, Mr. Goldberg, d/b/a Goldberg Trucking, filed an action for replevin in the Circuit Court of Fond du Lac County, Wisconsin alleging that Mr. David had abandoned the truck in Pulaski, Tennessee. That same day the court issued an order to the Sheriff of Giles County, Tennessee, ordering him to replevy the truck from Mr. David. Mr. David alleges that two of Mr. Goldberg's employees immediately drove from Wisconsin to Pulaski with the order from the Wisconsin court and persuaded two sheriff's deputies to execute the order. In addition to taking the truck, they also took some of Mr. David's personal property.

Mr. David also alleges that Mr. Goldberg knew the truck had not been abandoned but was in Tennessee because the trailer had a broken spring and the Tennessee authorities refused to allow it to be used.

Based on these allegations Mr. David sued Mr.

Goldberg and others in Giles County [*3] for depriving him of his property without due process, for breaking the lease-purchase agreement, and for converting the personal property in the truck.

Mr. Goldberg filed a motion to dismiss under Rule 12.02 of the Tennessee Rules of Civil Procedure raising the defense of res judicata. The parties stipulated the record from the Wisconsin case. In addition to the portions of the proceedings to which we have already referred, the record contains a default judgment against Mr. David and a final judgment of possession entered on February 7, 1991. The record also shows that on February 8, 1991, Mr. David filed an answer and a counterclaim disputing the grounds for the replevin and seeking \$ 100,000 in damages. The final entry in the record from the Wisconsin court is an answer to the counterclaim filed in February 1991 by Mr. Goldberg. The answer contains a motion to dismiss.

Based on this record, the Circuit Court of Giles County sustained the plea of res judicata and dismissed Mr. David's action.

II.

We think the circuit court erred in granting the motion to dismiss. Aside from the procedural questions raised by allowing the defense of res judicata to be put forward by [*4] motion to dismiss, *see Usrey v. Lewis*, 553 S.W.2d 612, 614 (Tenn. App. 1977), and the substantive question of whether the Wisconsin judgment is void because of the court's obvious lack of jurisdiction over the thing sought to be replevied,¹ we think the Wisconsin judgment cannot be given preclusive effect because it is not final and it does not involve all the causes of action asserted in Mr. David's complaint. "To support a plea of res judicata, it must be shown that the judgment in the prior case was 'final' and concluded the

rights of the party against whom it is asserted . . . it is also necessary to show that both cases involve the same cause of action." *Scales v. Scales*, 564 S.W.2d 667, 670 (Tenn. App. 1977) (citations omitted); *see also Goeke v. Woods*, 777 S.W.2d 347, 349 (Tenn. 1989); *C.O. Christian & Sons Co., Inc. v. Nashville P.S. Hotel, Ltd.*, 765 S.W.2d 754, 756 (Tenn. App. 1988). The Wisconsin court entered a judgment giving possession to Mr. Goldberg but, so far as this record shows, Mr. David's counterclaim is still pending.

1 Replevin is essentially a local action -- in Tennessee, at least. *Miles v. Securities Inv. Co.*, 171 Tenn. 417, 418, 104 S.W.2d 823, 823 (1937). "Jurisdiction over a local action depends on jurisdiction in rem over the thing which is directly involved in the decision sought." 20 *Am.Jur.2d Courts Sec. 121* (2d ed. 1965).

[*5] In addition Mr. David's complaint includes a claim for conversion of his personal property in the truck when it was repossessed by Mr. Goldberg's agents and the Giles County officers. This claim is independent of any of the issues raised in the Wisconsin case which concerned only the right to possession of the truck.

Accordingly, the judgment of the court below is reversed and the cause is remanded to the Circuit Court of Giles County for further proceedings. Tax the costs on appeal to the appellee.

BEN H. CANTRELL, JUDGE

CONCUR:

HENRY F. TODD, PRESIDING JUDGE

WILLIAM C. KOCH, JR., JUDGE