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IN THE
COURT OF APPEALS OF INDIANA

BOWMAN, HEINTZ, BOSCIA, VICIAN, P.C., GLENN S. VICIAN, GERALD BOWMAN, GEORGE W. HEINTZ, JAMES D. BOSCIA, PAUL H. ELLISON, PHILLIP A. LAMERE, THOMAS A. BURRIS, JOSEPH A. BIEL, LORENA D. ARNOLD, and TIMOTHY ZAHORSKY,	)	
Appellants-Plaintiffs,	)	
vs.	)	No. 45A03-0706-CV-269
DAVID C. JENSEN, JOHN P. TWOHY, LOGAN C. HUGHES, EICHHORN & EICHHORN, and CLARENCE BORNS,	)	
Appellees-Defendants.	)	

[1] Although spelled "Toohy" elsewhere in the record, Appellees inform us that the proper spelling is "Twohy."

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable John R. Pera, Judge
Cause No. 45D10-0609-CT-171

December 31, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

The law firm of Bowman, Heintz, Boscia, Vician, P.C. ("Bowman Heintz"), Glenn S. Vician, Gerald E. Bowman, George W. Heintz, James D. Boscia, Paul H. Ellison, Phillip A. Lamere, Thomas A. Burris, Joseph A. Biel, Lorena D. Arnold, and Timothy Zahorsky (collectively, "the Bowman plaintiffs") appeal the trial court's denial of their motion to correct error following its dismissal without prejudice of their complaint against David C. Jensen, John P. Twohy, Logan C. Hughes, Eichhorn & Eichhorn ("Eichhorn") (collectively, "the Eichhorn defendants"), and Clarence Borns (collectively, "Appellees") pursuant to Indiana Trial Rule 12(B)(8). We affirm.

Issue

Did the trial court err in dismissing the Bowman plaintiffs' lawsuit pursuant to Trial Rule 12(B)(8)?

Facts and Procedural History

The relevant facts are undisputed.[2] In February 2003, in Lake Superior Court 5 ("Court 5"), Bowman Heintz filed a complaint against Borns, a former senior partner of its predecessor, alleging tortious interference with business relations and other claims. Eichhorn attorneys entered appearances on Borns's behalf and have continued to represent Borns in that action.

In April 2006, Special Judge Robert A. Pete of Court 5 granted Bowman Heintz's request for a protective order, pursuant to which the parties could designate as confidential those discovery materials containing trade secrets or proprietary or confidential information. By cover letter dated June 27, 2006, Bowman Heintz produced copies of its corporate tax returns, which it designated as confidential pursuant to the protective order. On July 25, 2006, Borns filed a motion to compel discovery, attached to which were a copy of the June 27 cover letter and a copy of Bowman Heintz's tax returns.

On August 9, 2006, Bowman Heintz filed an emergency motion to seal the tax returns and requested a contempt hearing, monetary damages, and attorney's fees relating to the enforcement of the protective order. Judge Pete granted the motion to seal that same day. On August 16, 2006, Borns filed a motion to substitute the June 27 cover letter for the tax returns.[3] On November 2, 2006, after a hearing and an in camera inspection of the tax

[2] Bowman Heintz and Eichhorn have a history of animosity dating back at least to 1999, which the Bowman plaintiffs recount in the statement of facts section of their appellate brief. We fail to see how these facts are "relevant to the issues presented for review" pursuant to Indiana Appellate Rule 46(A)(6). An appellate brief is not a proper forum in which to air past grievances and dirty laundry.

[3] In the motion to substitute, Eichhorn attorney Logan Hughes stated that the attachment of the tax returns to the motion to compel was inadvertent. Appellants' App. at 116.

returns, Judge Pete granted the motion to substitute. Five days later, the tax returns were removed from the court's file.

On September 25, 2006, the Bowman plaintiffs filed a four-count complaint against Appellees in Lake Superior Court 6 ("Court 6"), seeking damages and attorney's fees for injuries allegedly resulting from the Bowman Heintz tax returns being spread of record in the Court 5 action. Specifically, the Bowman plaintiffs alleged that Appellees violated various state and federal rules and statutes, engaged in abuse of process, invaded their privacy, and intentionally or recklessly inflicted emotional distress. The Eichhorn defendants and Borns filed motions to dismiss pursuant to Trial Rule 12(B)(8), asserting that the "same action [was] pending in another state court of this state[,]" namely, the contempt proceeding regarding the alleged discovery violation in the Court 5 action. On March 9, 2007, Judge John R. Pera of Court 6 granted the motions and dismissed the Bowman plaintiffs' complaint without prejudice. Judge Pera's order states that the matters raised in the Bowman plaintiffs' complaint should have been brought before Judge Pete in Court 5, "inasmuch as it was that Court which issued the Protective Order the [Appellees] are alleged to have violated." Appellants' App. at 13. The Bowman plaintiffs filed a motion to correct error, which Judge Pera denied. This appeal ensued.

Discussion and Decision

In *Cinergy Corp. v. St. Paul Surplus Lines Insurance Co.*, we explained,

> As a general principle, when an action is pending before one Indiana court, other Indiana courts must defer to that court's authority over the case. Courts

> observe such deference in the interests of fairness to litigants, comity between and among the courts of this State, and judicial efficiency.
>
> Trial Rule 12(B)(8) implements this principle by allowing dismissal of an action on the ground that the same action is pending in another Indiana court. Thus, the Rule prevents two courts from concurrently entertaining the same case. The determination of whether two actions being tried in different state courts constitute the same action depends on whether the outcome of one action will affect the adjudication of the other. That outcome determinative test requires that one of two contemporaneous lawsuits be dismissed where the parties, subject matter, and remedies are *substantially the same* in both actions.

785 N.E.2d 586, 590-91 (Ind. Ct. App. 2003) (footnote and citations omitted) (emphasis added), *trans. denied*. "We apply a de novo standard of review to the grant or denial of a motion to dismiss because the same action is pending in another court, inasmuch as it is a question of law." *Kentner v. Ind. Pub. Employers' Plan, Inc.*, 852 N.E.2d 565, 570 (Ind. Ct. App. 2006) (citing *Ind. & Mich. Elec. Co. v. Terre Haute Indus., Inc.*, 467 N.E.2d 37, 42 n.2 (Ind. Ct. App. 1984)), *trans. denied* (2007).[4]

The Bowman plaintiffs' arguments regarding the propriety of Judge Pera's dismissal of their complaint are inapposite, in that they fail to address the considerations mentioned in *Cinergy* and other cases dealing with Trial Rule 12(B)(8). Perhaps this reflects the Bowman plaintiffs' realization that the parties, subject matter, and remedies are substantially the same in both the Court 5 action and the Court 6 action, i.e., that the outcome of the contempt proceedings in the Court 5 action will affect the adjudication of the Court 6 action.

Bowman Heintz and Borns are parties to both actions, and Eichhorn represents Borns in the Court 5 action. The additional parties to the Court 6 action are Eichhorn and

[4] The standard of review in the Bowman plaintiffs' brief is based on Trial Rule 12(B)(6), which is irrelevant here.

individual attorneys of both Eichhorn and Bowman Heintz.[5] Although Eichhorn itself is not a party to the Court 5 action, its attorneys are subject to Judge Pete's inherent authority to issue monetary sanctions against them for discovery violations. *See Noble County v. Rogers*, 745 N.E.2d 194, 198 (Ind. 2001) (collecting cases).[6] It is axiomatic that attorneys, as well as parties, are bound by protective orders and often bear the consequences of any violations. Under these circumstances, we conclude that the parties to both actions are substantially the same for purposes of Trial Rule 12(B)(8).

The subject matter in both cases is identical: Appellees' alleged violation of the protective order in the Court 5 action. Likewise, the remedies requested in both cases are identical: monetary damages and attorney's fees. As the Eichhorn defendants correctly observe, "[a]ny monetary relief in the [Court 5] lawsuit for harm caused by the disputed conduct will necessarily reduce the relief available to Bowman Heintz in [the Court 6] suit since it cannot be compensated more than once for its injuries." Eichhorn Br. at 12. Stated differently, the outcome of the discovery donnybrook in the Court 5 action will affect the

[5] The Bowman plaintiffs argue that Court 5 does not currently have personal jurisdiction over the individual attorneys named as parties in the Court 6 action. For purposes of a Trial Rule 12(B)(8) dismissal, the pertinent question is whether the parties are substantially the same in both actions, not whether the court in the first action currently has personal jurisdiction over *all* the parties in the second action. Nevertheless, as for the Bowman Heintz attorneys, we note that "[a] party who seeks affirmative relief from a court voluntarily submits himself to the jurisdiction of the court[.]" *Sims v. Beamer*, 757 N.E.2d 1021, 1025 n.3 (Ind. Ct. App. 2001). In other words, as the Eichhorn defendants observe, "the Bowman Heintz attorneys seeking relief in this case may voluntarily submit themselves to the jurisdiction of the court in the underlying case where the disputed conduct occurred[,]" i.e., Court 5. Eichhorn Br. at 10.

[6] The Eichhorn defendants assert that Judge Pete's protective order "states that the unauthorized disclosure of confidential information 'shall render a party subject to proceedings for contempt of Court' and 'the Court will not establish any limits on the sanctions the Court may impose for any violations of its Order.'" Eichhorn Br. at 11. We note, however, that Judge Pete's protective order does not appear in the record before us, and we admonish the Eichhorn defendants not to quote from extra-record material in future appeals.

adjudication of the Court 6 action.[7] Consequently, we affirm Judge Pera's dismissal of the Bowman plaintiffs' complaint without prejudice pursuant to Trial Rule 12(B)(8).

Affirmed.

DARDEN, J., and MAY, J., concur.

[7] Contrary to the Bowman plaintiffs' suggestion, the validity of their claims in the Court 6 action is irrelevant in considering the propriety of the dismissal of their complaint.