

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

BODY POWER, INC.,	:	APPEAL NO. C-080155
	:	TRIAL NO. A-9308903
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
JOSEPH B. MANSOUR,	:	
	:	
L.M., INC,	:	
	:	
and	:	
	:	
INF ENTERPRISES, INC.	:	
	:	
Defendants-Appellants.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Defendants-appellants, Joseph B. Mansour, L.M., Inc., and INF Enterprises, Inc. (collectively “Mansour”), appeal a judgment of the Hamilton County Court of Common Pleas in favor of plaintiff-appellee, Body Power, Inc. We reverse the trial court’s judgment.

This case has a long, tortured history. In October 1993, Body Power sued Mansour, seeking damages and the appointment of a receiver for business assets that Mansour had allegedly concealed or misappropriated. The trial court subsequently appointed a receiver as asked for in the complaint. Following a bench trial, the court

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

granted judgment in favor of Body Power, which then began trying to collect on its judgment.

Mansour appealed. This court reversed the trial court's judgment and remanded the case for further proceedings.² Subsequently, the trial court granted summary judgment in favor of Mansour.

Mansour then filed a motion asking the court to enforce the summary judgment and to return the business assets to his control. In 1999, the court overruled the motion, stating that the cause had been dismissed as a result of the summary judgment in Mansour's favor, and that there was "no case pending and no judgment which can be enforced." But the court did not issue a final appealable order with respect to that decision until 2006.

Mansour appealed that judgment to this court. We reversed, holding that the trial court had the authority to enforce its judgment. We remanded the case to the trial court "for enforcement of the summary judgment to the extent necessary to properly allocate the business assets, if any remain."³

After the remand, Mansour filed numerous procedural motions, which the trial court overruled. The court held two hearings relating to the business assets. Mansour presented evidence of the business's value. The receiver testified that the business assets had been sold or taken by other creditors, and that no assets remained in the receivership. The trial court entered judgment in favor of Body Power. It stated that "after considering all the testimony, the Court determined that Joseph B. Mansour failed to prove that any assets from this lawsuit still exist. Therefore, the Court cannot allocate any assets since none have been proven to still exist." This appeal followed.

² *Body Power v. Mansour* (Feb. 16, 1996), 1st Dist. No. C-950281.

³ *Body Power v. Mansour* (May 16, 2007), 1st Dist. No. C-060847.

Mansour presents four assignments of error, which we address out of order. In his second assignment of error, Mansour contends that the trial court erred in failing to dismiss Body Power as a party and substituting its sole officer, Michael Fry, as the real party in interest. He argues that because Body Power had its articles of incorporation cancelled and they were never reinstated, it lacked standing to appear as a corporation. He further argues that Fry, as its sole officer, could be held personally liable under R.C. 1701.97. This assignment of error is not well taken.

A corporation that has had its articles of incorporation cancelled continues to exist only for the limited purpose of winding up its affairs. For any other action, it is effectively “dead.”⁴ But R.C. 1701.88(B) specifically provides that “[a]ny claim existing or action or proceeding against it may be prosecuted to judgment[.]” Thus, completing already pending litigation falls within the concept of winding up the corporation’s affairs, and the corporation remains a viable party for that litigation.⁵ Consequently, Body Power remained the real party in interest.⁶ The trial court did not err in overruling Mansour’s motion to substitute Fry as a party, and we overrule Mansour’s second assignment of error.

In his third assignment of error, Mansour contends that the trial court erred by denying him leave to file a compulsory counterclaim. He argues that he had originally failed to raise the counterclaim due to oversight, inadvertence, or excusable neglect. This assignment of error is not well taken.

⁴ R.C. 1701.88(A); *Cincinnati v. York Masons Bldg. Assn.*, 1st Dist. Nos. C-080003 and C-080019, 2008-Ohio-4271, ¶125.

⁵ *State ex rel. Falke v. Montgomery Cty. Residential Dev., Inc.* (1988), 40 Ohio St.3d 71, 74, 531 N.E.2d 688; *Land O’Lakes, Inc. v. Nationwide Tanks, Inc.*, 12th Dist. No. CA2005-11-486, 2006-Ohio-4327, ¶37-40.

⁶ See Civ.R. 17(A); *Shealy v. Campbell* (1985), 20 Ohio St.3d 23, 24, 485 N.E.2d 701; *W. Clermont Edn. Assn. v. W. Clermont Local Bd. of Edn.* (1980), 67 Ohio App.2d 160, 162, 426 N.E.2d 512.

Civ.R. 13(F) provides that “[w]hen a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.” The moving party has the burden to explain, with particularity, why that party’s motion for leave to amend should be granted.⁷ The decision whether to grant or deny such a motion lies within the trial court’s discretion.⁸

Nevertheless, a court should grant leave to amend to add a counterclaim when “justice so requires.” The primary consideration should be whether there will be actual prejudice because of the delay. Where a party, by an amended pleading, may set forth a claim upon which relief can be granted and tenders the amendment timely and in good faith, the denial of leave to file the pleading is an abuse of discretion.⁹

In its original 1993 complaint, Body Power had alleged that Mansour and his associated corporations had fraudulently transferred assets to thwart its ability to collect its judgment in a breach-of-contract suit against L.M., Inc. Body Power asked for damages and the appointment of a receiver to take control of the companies’ assets and to run the companies while the lawsuit was pending. In 2007, Mansour filed a proposed amended answer and counterclaim, in which he sought to recover damages for Body Power’s failure to return his assets based on the trial court’s award of summary judgment in his favor. He also asserted a cause of action for abuse of process.

Even if we assume these counterclaims were compulsory counterclaims under Civ.R. 13(A), Mansour waited to file them 14 years after Body Power had filed its complaint and after years of legal meandering, including three appeals. We cannot say

⁷ *Restaurant Developers Corp. v. Peterson Group, Inc.*, 8th Dist. No. C-85926, 2005-Ohio-5448, ¶16.

⁸ *Id.*; *Chase Manhattan Mort. Group v. Urquhart*, 12th Dist. Nos. CA2004-04-098 and CA2004-10-271, 2005-Ohio-4627, ¶17.

⁹ *ABN Amro Mtge. Group, Inc. v. Evans*, 8th Dist. No. 90499, 2008-Ohio-4223, ¶14-15.

that his motion for leave to file the counterclaims was timely. Further, he never actually explained why his counterclaims could not have been filed with his original answer or why it had taken him so long to assert them. We believe that it would have been highly prejudicial to permit him to assert these counterclaims at that late stage of the proceedings. Under the circumstances, we cannot hold that the trial court's decision denying him leave to amend was so arbitrary, unreasonable, or unconscionable as to connote an abuse of discretion.¹⁰ We overrule Mansour's third assignment of error.

In his fourth assignment of error, Mansour argues that the trial court erred in overruling his motion for findings of fact and conclusions of law under Civ. R. 52. Even if the trial court erred in failing to grant the motion, Mansour was not prejudiced because the basis for the court's ruling was clear from the record, and an adequate basis exists for us to conduct our review.¹¹ Consequently, we overrule Mansour's fourth assignment of error.

In his first assignment of error, Mansour contends that the trial court erred in "denying the reasonable value of the business and property after Mansour produce[d] uncontroverted, undisputed evidence of the value." He argues that his business assets were taken and put into receivership based on a judgment that this court ultimately reversed. He was granted summary judgment, and, therefore, he claims that he was entitled to receive the value of those assets. We agree.

Unfortunately, our remand was not artfully worded. But we also stated in our previous decision that "this was a case involving the appointment of a receiver and a dispute over the ownership of business assets[;] the mere termination of the lawsuit in

¹⁰ See *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 218, 450 N.E.2d 1140; *Restaurant Developers Corp.*, supra, at ¶16.

¹¹ See *Information Leasing Corp. v. Chambers*, 152 Ohio App.3d 715, 2003-Ohio-2670, 789 N.E.2d 1155, ¶74; *Domestic Linen Supply & Laundry Co. v. Kenwood Dealer Group, Inc.* (1996), 109 Ohio App.3d 312, 328, 672 N.E.2d 184.

favor of Mansour did not necessarily effectuate the proper allocation of those assets. If Mansour was entitled to possession of certain assets as a result of the termination of Body Power's lawsuit, he was also entitled to enforcement of the summary judgment." This is the law of the case to which the trial court must adhere. It is without authority to extend or vary that mandate.¹²

Body Power took the business assets based on its original judgment that this court later reversed. Those assets have apparently been sold, or at least they were never returned to Mansour. He is entitled to the value of those assets and to the proceeds of any sale.

Consequently, we sustain Mansour's first assignment of error. We reverse the trial court's judgment and remand the case to the trial court to determine the value of the assets that were originally put into the receivership. If the assets themselves cannot be returned, then the court should award Mansour the value of those assets.

A certified copy of this Judgment Entry shall constitute the mandate, which shall be sent to the trial court under App. R. 27. Costs shall be taxed under App.R. 24.

SUNDERMANN, P.J., HILDEBRANDT and CUNNINGHAM, JJ.

To the Clerk:

Enter upon the Journal of the Court on November 26, 2008

per order of the Court _____
Presiding Judge

¹² *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3-4, 462 N.E.2d 410; *Hamilton Cty. Bd. of Commrs. v. Cincinnati*, 154 Ohio App.3d 504, 2003-Ohio-5089, 797 N.E.2d 1027, ¶26-27.