

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**BARNEY ASHNER HOMES, INC.,
ET AL.**

APPELLANTS,

**v.
FARMERS BANK & TRUST, N.A.,
ET AL.**

RESPONDENTS.

DOCKET NUMBER WD73292

DATE: October 11, 2011

Appeal From:

Jackson County Circuit Court
The Honorable Joel F. May, Judge

Appellate Judges:

Division Two: Thomas H. Newton, Presiding Judge, Cynthia L. Martin, Judge and Gary D. Witt, Judge

Attorneys:

John M. Duggan and Deron A. Anliker, Overland Park, KS, for appellants.

Jacqueline M. Sexton, Lynn W. Judkins and Cory L. Adkins, Kansas City, MO, for respondents.

MISSOURI APPELLATE COURT OPINION SUMMARY

**MISSOURI COURT OF APPEALS
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APPELLANTS,

v.

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No. WD73292

Jackson County

Before Division Two: Thomas H. Newton, Presiding Judge, Cynthia L. Martin, Judge and Gary D. Witt, Judge

Appellants appeal a judgment dismissing their petition on the grounds that the trial court could not exercise authority over the parties due to the prior filing of identical claims in another case in Kansas, which resulted in an improper splitting of the cause of action.

AFFIRMED IN PART AND REVERSED IN PART.

Division Two holds:

In this action ("the Missouri Action"), the Appellants filed suit against the Respondents seeking legal and equitable relief with respect to certain notes and guarantees concerning mortgages and other contractual obligations. Prior to the Missouri Action, the Appellants had been joined as third-party defendants in an action in Kansas ("the Kansas Action"). In the Kansas Action, the Appellants (as third-party defendants) asserted counterclaims and cross-claims which were in most respects identical to the claims they brought as plaintiffs in the Missouri Action.

The trial court, in the case at bar, granted Respondents' Motion to Dismiss on the grounds that the Kansas and Missouri Actions were identical, and the Appellants' claims were prohibited under the first-filed rule and the prohibition against splitting a cause of action. Further, Appellants' equitable claims were dismissed as moot. Appellants appeal.

While termed a motion to dismiss, the trial court considered matters outside the pleadings, which converted the Motion to Dismiss into a motion for summary judgment. The arguments made by Respondents that the first-to-file rule and the doctrine of claim-splitting precluded the court from proceeding on the cause are essentially arguments that Appellants failed to state a claim upon which relief may be granted. Before a motion to dismiss may be converted to summary judgment, Rule 55.27(a) requires that notice be given to all parties and all parties must be given a reasonable opportunity to present all material pertinent to the motion. Such notice was not given here and the judgment cannot stand.

Also, while Respondents attempted to raise an affirmative defense in their answer, the mere verbiage that "Plaintiff's fail to state a claim upon which relief can be granted" is not sufficient as a matter of law to raise an affirmative defense, as facts must be plead to support the legal assertion. Summary judgment cannot be sustained on grounds not properly raised in the pleadings.

Appellants do not challenge on appeal the trial court's finding that their claims for equitable relief are moot.

Accordingly, the court's dismissal of the equitable counts (Counts Eight through Ten) is affirmed and the court's dismissal of the remaining counts (Counts One through Seven) is hereby reversed.

Opinion by Gary D. Witt, Judge

October 11, 2011

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