Filed 8/31/17 Turner v. Moeini CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

DOUGLAS TURNER, Plaintiff and Appellant, v. PIERRE MOEINI et al., Defendants and Respondents.	B271295 (Los Angeles County Super. Ct. Nos. BC566344, LC097846)

APPEAL from judgment and order of the Superior Court of Los Angeles County, Russell S. Kussman, Judge (Retired) and Rick Brown, Judge. Affirmed.

Douglas G. Turner, in pro. per., for Plaintiff and Appellant.

Law Offices of Henry N. Jannol, Henry N. Jannol and Tracey P. Hom, for Defendants and Respondents.

Plaintiff and appellant Douglas Turner appeals from a judgment of dismissal of his complaint following an order sustaining a demurrer without leave to amend and a postjudgment order of sanctions in favor of defendants and respondents Pierre Moeini and Harte, LLC. A prior action between the same parties ended in a stipulated settlement and dismissal of the action. In the instant case, the trial court found the complaint was barred by the doctrine of claim preclusion. On appeal, Turner contends: (1) the prior proceeding did not involve the same claims; (2) Turner did not release his claims in the settlement; (3) Harte was not a party to settlement; and (4) he can amend the complaint to allege fraud or misconduct related to the actions of the receiver in the prior case. We conclude the proceedings in the two cases arise from the same facts and harm, Harte was a party to the settlement, Turner settled his claims in the prior action, and he is barred from relitigating them. Turner has not shown on appeal that he can amend the complaint to allege a cause of action for fraud. The judgment and order of sanctions are therefore affirmed.

FACTS AND PROCEDURAL BACKGROUND

Turner I

Turner is an attorney. Moeini owns a used car business. In 2006, Turner and Moeini formed Harte to purchase the White Harte Pub in Los Angeles. Turner and

Moeini each owned fifty percent of the business, but no operating agreement was ever prepared. Turner and Moeini also purchased the real property for the business as tenants in common. In December 2010, Turner loaned money to Moeini in exchange for a car lease. Under the loan agreement, Harte was required to make monthly lease payments of $759.89, and Moeini would reimburse Turner by paying him $380 per month.

The business relationship between Turner and Moeini deteriorated. On July 18, 2012, Turner filed a complaint against Moeini and Harte arising out of the loan. (*Turner v. Moeini* (Super. Ct. L.A. County, 2012, No. LC097846) (*Turner I*).) Turner sought damages for breach of contract against Moeini for refusing to repay the loan, and a declaration that Harte was obligated to make monthly car lease payments of $759.89 until the expiration of the lease in November 2014.

Moeini filed a cross-complaint for breach of contract, breach of fiduciary duty, usury, negligence, and appointment of an independent member. In addition to facts about the loan, Moeini alleged Turner had breached their contract and his fiduciary duties related to management of the business by failing to work as promised, taking funds from Harte without advance authorization, paying employees in cash, and fraternizing with female staff members. They could not agree on the management of the business. Harte and Moeini each filed an answer to the complaint.

A customer of the pub named Nicolas Supancic filed an action against Moeini, Moeini's wife, and Turner for civil rights violations stemming from an incident over a service dog that Supancic had brought to the pub. (*Supancic v. Moeini* (Super. Ct. L.A. County, 2012, No. BC495121) (*Supancic*).) Supancic alleged Moeini ejected him from the pub and insulted him in the street.

Moeini filed an amended cross-complaint in *Turner I* on December 21, 2012, alleging breach of contract, breach of fiduciary duty, negligence, and appointment of an independent member. Turner filed an answer.

On February 20, 2013, Turner and Harte filed a cross-complaint in *Turner I* against Moeini and his wife for fraud, constructive fraud, intentional and negligent infliction of emotional distress, breach of fiduciary duty, negligence, and an accounting. Moeini and his wife filed a demurrer to the cross-complaint, which the trial court sustained with leave to amend as to Moeini and without leave to amend as to his wife.

On March 14, 2013, Moeini filed a motion to appoint an independent member of Harte. Turner opposed the motion on behalf of himself and Harte. The trial court denied the motion. On its own motion, the trial court set an order to show cause as to appointment of a receiver or dissolution of the business. Turner and Harte objected to the appointment of a receiver. They argued that Harte should be dissolved, with Turner allowed to purchase Moeini's interest. Moeini also opposed the order to show cause. He sought to be

appointed as the manager of Harte or the winding up member. Alternatively, Moeini argued that a receiver must be appointed on a limited basis. On May 14, 2013, Turner and Harte filed a cross-complaint in *Supancic* against Moeini for indemnity.

On July 10, 2013, the trial court ordered Harte dissolved. The court ordered Turner to prepare a proposed dissolution decree with provisions to purchase Moeini's interest, or alternatively, designating Moeini to wind up the business. Otherwise, the court would appoint a receiver. Turner objected to the appointment of a receiver again and sought to be appointed as the member to wind up the business. Moeini agreed that a receiver would destroy the business, because it did not have sufficient revenue to pay the cost of a receiver. In the alternative, Moeini nominated Kevin Singer to be appointed as the receiver based on his experience in the restaurant industry.

A hearing was held on August 15, 2013. There was additional discussion about the dissolution of Harte and the appointment of a receiver. The trial court issued an order to show cause and a temporary restraining order regarding rents, issues, and profits. The court ordered the parties to give any legal reason why a receiver should not be appointed to take charge of the estate, effects, and business of Harte, collect the debts and property, and pay the outstanding debts, divide the funds and other property the remained between its members, take possession of Harte's assets, manage its business and property, protect the property

rights of Harte's members, and take charge of the winding up and dissolution of Harte as ordered by the trial court.

On August 19, 2013, Turner and Harte filed an amended cross-complaint against Moeini for fraud, constructive fraud, intentional infliction of emotional distress, breach of fiduciary duty and negligence. Among other allegations, Turner alleged Moeini failed to make payments under the loan agreement, misreported gross sales and cash sales, and prevented Turner from performing his management duties.

Turner filed additional objections to the appointment of a receiver and Moeini responded. On September 18, 2013, the trial court appointed Singer as receiver for the limited purpose of marshaling funds and making authorized distributions.

On September 30, 2013, the trial court heard an ex parte application concerning excessive letters to the receiver. The trial court found the problems were largely caused by Turner. The court amended the receiver's orders to give the receiver authority to keep track of time spent addressing Turner's inquiries and communications. Costs for the receiver's time for those activities would come out of Turner's share of the business.

Turner filed a motion to vacate the order appointing the receiver. He accused Singer of being an agent of Moeini and argued that selling the business without the underlying real property would require negotiation with the lender and

the leaseholder. Turner provided a broker's opinion of the fair market value of the real property.

On December 6, 2013, Singer filed a request to be discharged. Singer recommended the trial court impose injunctions to govern the business. Singer's reports showed that the business was losing money and could not afford a receiver. He documented funds that Turner withdrew from the business in violation of the court's previous injunction. On December 9, 2013, Turner filed objections to Singer's reports and all fees claimed by the receiver on the ground that the appointment of the receiver was void or unwarranted. He sought to have Singer replaced with a certified public accountant.

After a hearing on December 19, 2013, the trial court denied the motion to vacate the order appointing the receiver. The court sustained Moeini's demurrer to the amended cross-complaint as to all causes of action except the cause of action for breach of fiduciary duty, and granted Moeini's motion to strike allegations of punitive damages. The trial court clarified the receiver's duty was to wind up and dissolve Harte. In light of the clarification, the receiver withdrew his request to be discharged. The receiver was to provide a plan for dissolution by January 30, 2014. On January 13, 2014, Singer filed a motion for orders authorizing the sale of Harte's assets, establishing a claims procedure for creditors, and dissolving Harte. On January 30, 2014, the trial court noted the actions being taken and continued the matter to March.

A voluntary settlement conference was held on February 21, 2014. The parties agreed to a stipulated settlement as follows in pertinent part: "Settlement amount $220,000 [¶] Additional Terms of Settlement: Car Payments on Jag. 2011 to continue until the $220,000 is paid or November 2014 whichever comes first. Defendants to provide indemnity agreement [and] security interest agreement. Plaintiff to execute a Grant Deed as to his interest at 22456 Ventura Blvd., Woodland Hills, CA 91364 and assign his interest in Harte, LLC. The parties to cooperate and agree not to disparage each other. Payment to be made within 180 days. [¶] This is a settlement of [t]he complaint and all cross claims or actions. [¶] The complaint against all defendants. All parties in the above entitled action hereby stipulate that the case, including any cross claims or actions, is settled as set forth above and ask the court [¶] to dismiss the entire case as of this date and retain jurisdiction under Civil Procedure Section 664.6 to enforce the terms of the settlement. [¶] All parties waive the provisions of Civil Code section 1542." The settlement agreement was signed by Turner, Moeini, and Moeini's attorneys. Judge Bert Glennon ordered the complaint and any cross actions dismissed pursuant to the stipulation and vacated all future dates.

Turner withdrew $3,000 from Harte's bank account. On February 27, 2014, Moeini brought an ex parte application to prevent further withdrawals. The trial court issued an order finding the sale of the business and real

property was effective February 21, 2014. The court credited $3,000 paid toward the purchase amount of $220,000 under the settlement agreement and ordered Turner not to transfer or remove funds from Harte accounts pending further order or written agreement of the parties. The exchange of money and documents would be accomplished through an escrow company within 180 days as indicated in the settlement agreement. Each party was ordered to pay half of the escrow expenses and fees. In addition, the trial court reopened the case for the limited purpose of allowing the receiver to file his final accounting pursuant to stipulation of the parties.

On May 15, 2014, the receiver filed a motion to approve the receiver's final accounting, approve final compensation and reimbursement of costs, exonerate bonds, approve and ratify the receiver's actions and transactions, and retain jurisdiction regarding the receivership. Singer noted that Moeini had not taken the management fee of $7,000 per month, which had been approved by the trial court and which the receiver believed Moeini was entitled to receive for the time that Moeini operated the business during the receivership estate. As a result, Singer believed Moeini was entitled to a credit toward the balance of the receiver's fees and expenses that Turner should be responsible for paying.

Singer stated that he had incurred fees and expenses of $30,301.19. He had been paid $14,474.07 from the business operations. He was owed fees and expenses of $15,827.12. He had not been told of the settlement. Turner refused to pay his share of fees and expenses, insisting the costs were

Harte's responsibility. Singer requested the court order Moeini to pay Turner's share of the receiver's fees and expenses from the payments that Moeini was obligated to make under the settlement agreement.

After a hearing in *Supancic* on May 22, 2014, at which Turner appeared and argued, the trial court approved a good faith settlement between Supancic, Moeini, and Harte.

On June 3, 2014, Turner filed objections to the receiver's motion. He argued that the receiver's fees should be paid from the business assets in the receiver's possession. He also argued that he was immune from orders for which Harte was responsible, the receivership was a sham to benefit Moeini, the receiver had handled cash receipts improperly, and Moeini had agreed to indemnify him.

The receiver filed a reply responding to Turner's arguments. In particular, he stated that his fees and expenses should have been accounted for in the settlement. He was not asking the court to change the settlement terms, but to have Turner pay the receivership fees and expenses from the proceeds of the sale of the business. If the court ordered Turner to pay the fees and expenses, the receiver could attach the sale proceeds of the business, which was easier and more direct than trying to pursue Turner for payment in continual legal proceedings that would also cause the receiver to return to court to apply for additional fees.

A hearing was held on June 16, 2014. There is no reporter's transcript of the hearing in the appellate record.

The trial court approved and settled the receiver's final accounts and report as presented. The court approved the receiver's fees and expenses through the hearing date in the amount of $30,301.19. The receiver was ordered to pay himself $509.93 from the balance of funds in the receivership trust accounts. The court found Turner was responsible for payment of $15,150.50 of the receiver's fees and expenses from the balance of the funds in the receivership trust account. The court ordered Moeini to pay Turner's share out of the escrow account prior to the closing of escrow. The court retained jurisdiction over claims which might arise concerning the receivership estate. The receiver was discharged and the receivership estate was terminated. If the settlement agreement was not completed by August 30, 2014, Turner was ordered to immediately pay the amount owed to the receiver. The receiver's request for supplemental fees and expenses of $2,058.50 was also granted.

Turner filed a motion for reconsideration based on the timing of the sale of Harte, the tax deduction for receivership fees and costs, and the court's intent to divide the fees and costs. He argued that he should be credited with half the amount of the fees and costs. The receiver opposed the motion and sought an additional $1,500 in supplemental fees. Moeini also opposed the motion. Turner filed a reply arguing that the order reopening the case was void, as well as all subsequent orders. A hearing was held on September 4, 2014, for which there is no reporter's transcript in the

appellate record. The trial court denied the motion and ordered Turner to pay sanctions of $1,500 to the receiver. The court also ordered Turner to pay attorney fees of $1,750 to Moeini.

On September 8, 2014, Turner filed a notice of appeal from the February 27, 2014 order allowing the receiver to file his final accounting, the June 16, 2014 order awarding fees and costs to the receiver, the September 5, 2014 order awarding fees and costs to the receiver, and any orders after February 21, 2014 in excess of the trial court's jurisdiction.

Moeini deposited the settlement funds in escrow and signed the escrow instructions. He provided a written agreement to indemnify Turner for any claim, action, liability, loss, damage or suit arising from liabilities, damages and costs that Turner may suffer as a result of claims, demands, costs or judgments against Moeini or Harte, as long as the claims did not involve misconduct, actions or omissions by Turner. In addition, Moeini agreed to indemnify Turner in case of any action taken by Wells Fargo against Turner personally concerning the loans for the real property. No indemnity was provided for any action related to Supancic, his attorney, or the *Supancic* lawsuit. Turner must give Moeini ten days notice of any claim and Moeini shall defend, protect and save Turner harmless from the claim or any loss or liability resulting from it.

On September 10, 2014, Moeini filed a motion pursuant to Code of Civil Procedure section 664.6 to enforce the settlement agreement and require Turner to sign escrow

instructions, grant deed, and documents to transfer Turner's interest in Harte. Moeini requested that the trial court approve the indemnity agreement and security agreement provided.

On September 18, 2014, Turner filed an ex parte application to have Moeini and Harte make lease payments in arrears on his car and all lease payments prior to the close of escrow. The trial court denied the motion.

A hearing was held on October 10, 2014. No reporter's transcript is part of the record on appeal. Turner and Singer stipulated to the amount of $2,200 for the receiver's supplemental fees and expenses. Turner represented to the trial court that he would withdraw his appeal and sign the documents listed in Moeini's motion to enforce the settlement agreement. The trial court continued Moeini's ex parte application for an order to have the documents signed by the court clerk. If Turner complied, the matter would automatically be off calendar and no appearances would be required. On October 15, 2014, escrow closed and Turner received the proceeds of the escrow with copies of the documents. The case summary for *Turner I* reflects that a notice of default on appeal was filed on December 1, 2014.

Turner II

On December 11, 2014, Turner filed the complaint in the instant action (*Turner II*) against Moeini and Harte for breach of contract, breach of fiduciary duty and an

accounting based on the loan agreement and the business operations of the pub, including the obligation to pay rent. He alleged that Moeini became the sole member and owner of Harte on October 15, 2014. He sought damages for payments due on the loan from April 15, 2012, until the date of judgment. He sought rent payments due from Harte beginning in January 1, 2012. He alleged that Harte, as tenant, failed to indemnify him, as landlord, as required under the commercial lease. Moeini breached his fiduciary duty by diverting Harte's sales, failing to account for cash sales, and not making Harte's financial records available to him. Turner has been damaged in an amount that has not been ascertained and he is entitled to an accounting. The complaint does not refer to the receiver or the settlement of *Turner I*.

On January 16, 2015, Moeini and Harte filed a demurrer on the grounds of issue and claim preclusion. They filed a motion to strike and a request for judicial notice of the pleadings in *Turner I*, the appointment of the receiver, settlement, and the order finding they entered into a good faith settlement in *Supancic*. They filed notices of the related cases.

Turner opposed the demurrer on the ground that he did not release Moeini or Harte from any legal obligations in the prior action. His claims for rent owed by Harte and for indemnity based on the commercial lease were new, so could not be barred by issue or claim preclusion. His claim for breach of fiduciary duty in *Turner I* survived the prior

demurrer, and his cause of action for an accounting had never been adjudicated. Dismissing the action without prejudice and without adjudicating any issue had avoided preclusion of any claim.

Turner filed a motion for summary judgment in *Supancic*, which was granted on March 9, 2015. The case was dismissed. Supancic filed a notice of appeal from the judgment.

On May 14, 2015, Moeini and Harte filed a motion in *Turner I* pursuant to Code of Civil Procedure section 664.6 to enforce the settlement entered into on February 21, 2014. They asked the trial court to enter judgment based on the settlement agreement and order Turner to pay sanctions for filing a sham pleading in *Turner II*. Turner opposed the motion, and Moeini and Harte filed a reply. Turner also opposed Moeini and Harte's motion to consolidate *Turner II* with *Turner I*. On June 24, 2015, the trial court found the cases were related and *Turner I* was the lead case.

A hearing was held on the demurrer on December 29, 2015. The trial court found that the claims in *Turner II* related to the same facts and circumstances that gave rise to the earlier case, which were the subject of the settlement agreement reached between the parties on February 21, 2014, resolving the case and dismissing all claims by all parties. The settlement operated as a bar to either party reinstituting litigation on the claims that were the subject of the prior lawsuit, or which could have been raised or litigated in the prior lawsuit. The trial court sustained the

demurrer without leave to amend. The trial court denied the motion to enforce the settlement without prejudice, because it was unnecessary. The court continued the motion for sanctions to February 4, 2016, to allow Turner to respond.

Turner opposed the request for sanctions. Moeini and Harte filed a reply. On February 4, 2016, Moeini and Harte filed an ex parte application to dismiss *Turner II*, which the trial court granted. The trial court continued the hearing on the issue of sanctions. On February 24, 2016, a hearing was held on the issue of sanctions against Turner. No reporter's transcript has been made part of the record on appeal. The minute order reflects that the trial court imposed sanctions of $5,490 against Turner and payable to Moeini and Harte for filing *Turner II* based on the same facts as *Turner I*, which settled in February 2014.

On March 11, 2016, the trial court entered a written order ordering Turner to pay sanctions in the amount of $5,490 based on filing a frivolous and bad faith complaint in *Turner II*. On March 25, 2016, Turner filed a notice of appeal from the February 4, 2016 judgment of dismissal and the March 11, 2016 order of sanctions.[1]

On June 7, 2016, this appellate court affirmed the judgment in favor of Turner in *Supancic*. (*Supancic v. Turner* (June 7, 2016) B263896 [nonpub. opn.].)

---

[1] Turner makes no argument on appeal regarding the sanctions order. We consider the issue waived.

DISCUSSION

Standard of Review

"On appeal from an order of dismissal after an order sustaining a demurrer, the standard of review is de novo: we exercise our independent judgment about whether the complaint states a cause of action as a matter of law. [Citation.] First, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Stearn v. County of San Bernardino* (2009) 170 Cal.App.4th 434, 439 (*Stearn*).) "We accept as true all properly pleaded material factual allegations of the complaint and other relevant matters that are properly the subject of judicial notice, and we liberally construe all factual allegations of the complaint with a view to substantial justice between the parties. [Citation.] We also consider any exhibits to the complaint. [Citation.]" (*Glen Oaks Estates Homeowners Assn. v. Re/Max Premier Properties, Inc.* (2012) 203 Cal.App.4th 913, 919 (*Glen Oaks*).) "Then we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.]" (*Stearn, supra,* at pp. 440-441.) "We do not, however, assume the truth of contentions, deductions, or conclusions of law. [Citation.]" (*Id.* at p. 441.)

"When the trial court sustains a demurrer without leave to amend, we review that decision for abuse of discretion. [Citation.] We will reverse for abuse of discretion if we determine that there is a reasonable

possibility the plaintiff can cure the pleading by amendment. [Citation.]" (*Glen Oaks*, *supra*, 203 Cal.App.4th at p. 919.)

Claim Preclusion

Turner contends that *Turner I* and *Turner II* do not involve the same causes of action. Specifically, he did not allege a claim for unpaid rent or a breach of the commercial lease indemnity provision in *Turner I*. He also contends that the causes of action in Turner I were alleged against Moeini, while the causes of action in *Turner II* are alleged against Harte. We conclude that Harte was a party to *Turner I*, the claims arose from the same facts and could have been litigated in *Turner I*, and Turner is therefore barred from raising the claims in *Turner II*.

The doctrine of res judicata has two aspects—claim preclusion and issue preclusion. (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824 (*DKN Holdings*); *Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 797 (*Boeken*).) "*Claim preclusion* 'prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them.' [Citation.] Claim preclusion arises if a second suit involves (1) the same cause of action (2) between the same parties [or those in privity with them] (3) after a final judgment on the merits in the first suit. [Citations.] If claim preclusion is established, it operates to bar relitigation of the claim altogether." (*DKN Holdings*, *supra*, at p. 824; accord, *Mycogen Corp. v.*

Monsanto Co. (2002) 28 Cal.4th 888, 896 (*Mycogen*).) The bar applies if the cause of action could have been brought, whether or not it was actually asserted or decided in the first lawsuit. (*Busick v. Workmen's Comp. Appeals Bd.* (1972) 7 Cal.3d 967, 974.) The doctrine promotes judicial economy and avoids piecemeal litigation by preventing a plaintiff from "'"splitting a single cause of action or relitigat[ing] the same cause of action on a different legal theory or for different relief. [Citation.]"'" (*Mycogen*, at p. 897.)

"'Two proceedings are on the same cause of action if they are based on the same "primary right." [Citation.] The plaintiff's primary right is the right to be free from a particular injury, regardless of the legal theory on which liability for the injury is based. [Citation.] . . . [¶] An injury is defined in part by reference to the set of facts, or transaction, from which the injury arose.' (*Federation of Hillside & Canyon Assns. v. City of Los Angeles* (2004) 126 Cal.App.4th 1180, 1202-1203.)" (*Crosby v. HLC Properties, Ltd.* (2014) 223 Cal.App.4th 597, 603.) "'[T]he "cause of action" is based upon the harm suffered, as opposed to the particular theory asserted by the litigant. [Citation.] Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief. "Hence a judgment for the defendant is a bar to a subsequent action by the plaintiff based on the same injury to the same right, even though he presents a different *legal ground* for relief." [Citations.]' Thus, under the primary rights theory, the determinative factor is the harm suffered.

When two actions involving the same parties seek compensation for the same harm, they generally involve the same primary right. (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 954.)" (*Boeken*, *supra*, 48 Cal.4th at p. 798.)

"'The primary right must also be distinguished from the *remedy* sought: "The violation of one primary right constitutes a single cause of action, though it may entitle the injured party to many forms of relief, and the relief is not to be confounded with the cause of action, one not being determinative of the other."' [Citations.]" (*Villacres v. ABM Industries Inc.* (2010) 189 Cal.App.4th 562, 577 (*Villacres*).)

"Res judicata bars not only issues that were raised in the prior suit but related issues that could have been raised." (*Villacres*, *supra*, 189 Cal.App.4th at p. 569.) """The doctrine of res judicata rests upon the ground that the party to be affected, or some other with whom he is in privity, has litigated, or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation of his opponent. Public policy and the interest of litigants alike require that there be an end to litigation."' [Citation.] '[R]es judicata benefits both the parties and the courts because it "seeks to curtail multiple litigation causing vexation and expense to the *parties* and wasted effort and expense in *judicial administration.*"' (*Mycogen*[, *supra*,] 28 Cal.4th [at p.] 897.)" (*Villacres, supra,* at p. 575.)

"""If the matter was within the scope of the action, related to the subject matter and relevant to the issues, so that it *could* have been raised, the judgment is conclusive on it . . . . The reason for this is manifest. A party cannot by negligence or design withhold issues and litigate them in consecutive actions. Hence the rule is that the prior judgment is res judicata on matters which were raised or could have been raised, on matters litigated or litigable. . . .""" [Citation.] [¶] 'The fact that different forms of relief are sought in the two lawsuits is irrelevant, for if the rule were otherwise, "litigation finally would end only when a party ran out of counsel whose knowledge and imagination could conceive of different theories of relief based upon the same factual background." . . . ". . . [U]nder what circumstances is a matter to be deemed decided by the prior judgment? Obviously, if it is actually raised by proper pleadings and treated as an issue in the cause, it is conclusively determined by the first judgment. But the rule goes further. If the matter was within the scope of the action, related to the subject-matter and relevant to the issues, so that it could have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged . . . . '. . . [A]n issue may not be thus split into pieces. If it has been determined in a former action, it is binding notwithstanding the parties litigant may have omitted to urge for or against it matters which, if urged, would have produced an opposite result. . . .""" [Citation.]" (*Villacres, supra,* at p. 576.)

The causes of action alleged in *Turner II* are within the scope of the prior action, related to the subject matter of the cross-complaints and relevant to the issues raised in the cross-complaints. The cross-complaints filed by the parties in *Turner I* arose out of the operation and management of Harte. Turner alleged a cause of action for an accounting, to which a demurrer was sustained without leave to amend, and he alleged Moeini breached his fiduciary duties as the managing member. Turner agreed to settle *Turner I* by accepting payment for his share of the business, the underlying real property, and a resolution of the lease and indemnity issues. He waived the protection of Civil Code section 1542 for unknown claims that would materially affect his decision to enter into the settlement.[2] Harte's payment of rent to the owners of the real property was one of the management details encompassed in Turner's claim for breach of fiduciary duties, or it was one that could have been brought, and it was resolved by the parties' settlement.

Similarly, Turner's claim in *Turner II* for breach of the indemnity provision of the commercial lease arises out of the same facts and issues settled in *Turner I*. He has not shown that he is seeking relief through his indemnity claim for any harm other than the relief that he sought, or could have

---

[2] Civil Code section 1542 provides, "A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor."

sought, in *Turner I*. The settlement agreement addressed the issue of indemnity, including liability for a bank loan and any damages assessed in *Supancic*. Moeini executed an indemnity agreement, which he presented to the trial court for approval and Turner received through escrow in *Turner I*. Turner is barred from raising the same indemnity claims again in this case.

Claims Released by Settlement

Turner contends that he did not release any of his claims in the settlement agreement, and despite the settlement agreement, he was free to file another lawsuit to bring his claims again. This is incorrect.

The parties expressly settled in writing the complaint and all cross claims. All parties in the action stipulated that the complaint, including any cross claims or actions, was settled as set forth in the settlement agreement. The parties asked the court to dismiss the case and retain jurisdiction under Civil Procedure Section 664.6 to enforce the terms of the settlement. Under Civil Code section 1542, a general release does not extend to unknown claims which would have materially affected the settlement, but all parties waived the provisions of Civil Code section 1542.

"A court-approved settlement acts as a final judgment on the merits for the purposes of res judicata." (*Consumer Advocacy Group, Inc. v. ExxonMobil Corp.* (2008) 168 Cal.App.4th 675, 694 (*Consumer Advocacy Group*).) "Under

California law, a 'judgment entered without contest, by consent or stipulation, is usually as conclusive a merger or bar as a judgment rendered after trial.' (7 Witkin, Cal. Procedure (5th ed. 2008) Judgment, § 372, p. 996; accord, *Victa v. Merle Norman Cosmetics, Inc.* (1993) 19 Cal.App.4th 454, 460–461; *De Weese v. Unick* (1980) 102 Cal.App.3d 100, 105.)" (*Needelman v. DeWolf Realty Co., Inc.* (2015) 239 Cal.App.4th 750, 759; *Consumer Advocacy Group, supra*, at p. 694.)

Turner cannot relitigate claims within the scope of the stipulated settlement. He has already had the opportunity to litigate the same claims in a court of competent jurisdiction. All of his claims arise from the same facts and the same harm, which could have been raised in *Turner I* or were specifically addressed and settled in the stipulated judgment. Claims that could have been litigated in *Turner I* are now barred.

Parties to Settlement

Turner contends for the first time on appeal that Harte was not a party or an intended beneficiary of the settlement in *Turner I*. This is not accurate. Harte was a defendant in *Turner I* and filed an answer. Harte was also a cross-complainant because Turner filed a cross-complaint in *Turner I* against Moeini for breach of fiduciary duty on behalf of himself and Harte. The settlement agreement expressly stated that all parties in the action were

stipulating that the case, including any cross claims or actions, was settled as set forth in the settlement agreement. Turner and Moeini were the sole members of Harte and the only individuals who could execute an agreement binding Harte. They signed the agreement stating that all parties were settling the action. The settlement agreement provided for Turner to sell his ownership interest in Harte to Moeini. The case was dismissed as to all parties, including Harte, based on the settlement agreement, without any objection by Turner. It is clear that Turner and Moeini intended Harte to be a party to the action and the settlement agreement, and the case was settled and dismissed as to Harte.

Fraud

For the first time on appeal, Turner contends that he entered into the settlement agreement based on fraud or improper conduct between Moeini and the receiver. He has failed to demonstrate that he can amend the complaint to allege fraud related to the settlement agreement or the receiver's actions.

To state a cause of action for fraud, or deceit, one must plead facts sufficient to show: (1) a misrepresentation, such as a false representation, concealment, or nondisclosure; (2) knowledge of falsity; (3) an intent to induce reliance on the misrepresentation; (4) actual and justifiable reliance; and (5) resulting damage. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638 (*Lazar*).) Concealment is a species of fraud

or deceit. (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 868.) To allege concealment, one must plead facts establishing: (1) suppression of a material fact; (2) a duty to disclose the suppressed fact; (3) an intent to defraud; (4) lack of knowledge of the suppressed fact by plaintiff; (5) action or inaction taken by plaintiff as a result of the suppressed fact; and (6) resulting damage. (*Ibid.*) Heightened pleading standards apply to fraud claims and require the plaintiff to set forth specifically how, when, where, to whom and by what means the defendant made the underlying false representations. (*Lazar, supra,* at p. 645.)

To the extent that Turner contends he entered into the settlement agreement as a result of fraud or collusion between Moeini and the receiver, he has not shown that he can amend the complaint to allege a cause of action on this basis. The receiver was not present when the settlement was negotiated or signed, and he was not aware that the case had settled. Turner stated that he and Moeini agreed to settle the case to get rid of the receiver. He has not shown that he could allege that he signed the agreement as a result of fraud by Moeini or improper conduct.

To the extent that Turner objects to actions taken by the receiver, the receiver's interpretation of the trial court's instructions, and the trial court's orders in connection with the receiver, Turner agreed to settle the case and did not appeal the trial court's rulings. His objections have been waived. He has not shown on appeal that he can amend the

complaint in *Turner II* to state a cause of action for fraud based on the receiver's actions or the court's rulings in connection with the receiver.

DISPOSITION

The judgment and order awarding sanctions are affirmed. Respondents Pierre Moeini and Harte, LLC, are awarded their costs on appeal.

KRIEGLER, Acting P.J.

We concur:

BAKER, J.

DUNNING, J.*

* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.