Filed 10/27/16 Lim v. Eden Marketing Corp. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

BRADFORD LIM, Plaintiff and Appellant, v. EDEN MARKETING CORPORATION et al., Defendants and Respondents.	B268268 (Los Angeles County Super. Ct. No. BC582348)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael Johnson, Judge. Affirmed.

Bradford Lim, pro. per., for Plaintiff and Appellant.

Kim, Park, Choi & Yi, Tony K. Kim and Michael Y. Yi for Defendants and Respondents.

Plaintiff Bradford Lim, representing himself, appeals from the judgment of dismissal following the trial court's order sustaining the demurrer of defendants Eden Marketing Corporation (Eden), Kyung W. Pak (Pak), and Peter Park (Park) without leave to amend on the ground the complaint was barred by the doctrine of res judicata. We affirm.

BACKGROUND

First Action

This is the second lawsuit filed by Lim against Pak and Park for the same debt. The first ended in a judgment of dismissal, affirmed in an unpublished opinion filed January 21, 2015 (B255771) by Division Three of this District.

As stated in that opinion, "Lim is the assignee of U.S. Portable Energy Corporation (US Portable). US Portable apparently sold quantities of butane to an entity known as Sunmax, LLC (Sunmax). Although Sunmax initially made payments to US Portable, it ultimately fell behind on its obligations, and owes US Portable nearly $100,000 for butane it received. [¶] Lim was assigned US Portable's rights to proceed against Sunmax on the debt. On March 18, 2013, Lim, acting in pro. per., brought suit against Sunmax, seeking to recover the unpaid amounts. Lim also brought suit against the individual defendants, Pak and Park, alleging that they were liable for Sunmax's breaches — either by means of Park's personal guaranty, or as alter egos of Sunmax."

In affirming the trial court's ruling sustaining Pak and Park's demurrer without leave to amend, Division Three held that Lim failed to allege sufficient facts to show that Sunmax was an alter ego of Pak and Park: "Assuming, without deciding, that Lim sufficiently alleged unity of interest

and ownership between Sunmax and Pak, we conclude that Lim failed to sufficiently allege the second element . . . '. . . that adherence to the fiction of the separate existence of the corporation would sanction a fraud or promote injustice. [Citation.] The test for this requirement is that if the acts are treated as those of the corporation alone, it will produce an unjust or inequitable result. [Citation.]' . . . [¶] . . . While Lim alleges that Sunmax received butane from US Portable without paying for it, he *at no point* alleges that Pak or Park *actually received or benefitted from* that butane, and it would therefore be inequitable to allow them to avoid paying for it. He does not allege that Pak and/or Park were the actual purchasers of the butane, using Sunmax only as a shell. He does not allege that the butane, or the profits from it, were improperly transferred to Pak and/or Park. To be sure, there is some suggestion — fleshed out in Lim's briefing but not his complaint — that Pak and Park 'converted assets' from Sunmax to Pak or Eden Marketing, a corporation allegedly owned by Pak. Indeed, Lim argues, in his reply brief, that 'one of the essences of alter ego' in this case is that it 'could be very easy' for Pak to convert the assets of Sunmax to Eden Marketing. But there is no allegation that any conversion of assets related to the US Portable transactions at issue in this case. Moreover, any allegation of conversion of assets to Eden Marketing is simply irrelevant; Lim did not name Eden Marketing as a defendant in this case and does not allege that Eden Marketing is an alter ego of Sunmax (or Pak). In the absence of any allegation that it would be inequitable to respect the individual existence of Sunmax, Lim's allegations of alter ego necessarily fail."

Division Three also held that Lim's allegations against Park for breach of a personal guarantee were insufficient: "In his first amended complaint, Lim alleged a cause of action against Park for breach of oral personal

guaranty. Park's demurrer to this cause of action was sustained on the basis that California does not recognize a cause of action for breach of an *oral* guaranty. (Civ. Code, §§ 2787, 2793; see also Civ. Code, § 1624, subd. (a)(2).) Impliedly conceding the correctness of this ruling, Lim attempted to solve the problem by changing the title of the cause of action from breach of oral personal guaranty to breach of oral contract. In the operative complaint, Lim combined his causes of action for breach of contract against Sunmax and breach of personal guaranty against Park in a single cause of action for breach of oral contract. In the cause of action, Lim specifically alleges that Park 'personally promised he would take responsibility of the amount [owed] for the products if his company, Sunmax, become something wrong.' Lim specifically alleged that this was an 'oral promise.' As such, to the extent the cause of action for breach of oral contract seeks to pursue Park on his oral guaranty, it is again a cause of action for breach of an oral guaranty, which cannot be pursued in California. [Citation.]"

Division Three affirmed the judgment of dismissal. Lim did not petition for review, and the decision is final.

The Current Action

The current action was initiated on May 20, 2015, when Lim (still acting in pro. per.) filed a complaint against Pak, Park, and Eden.[1] In the complaint, Lim referred to his first action, apparently believing that the earlier opinion suggested ways he could reframe his lawsuit. He alleged that

---

[1] Lim initially had a co-plaintiff, Jin Ree. Ree had been declared a vexatious litigant and failed to comply with the prefiling requirements before filing the complaint. Therefore, the trial court dismissed him as a plaintiff, and he is not a party to this appeal.

he filed the current action "by considering the details in the Opinion of the Court of Appeal and the facts discovered newly after" the appeal.

Attempting to correct the deficiencies noted in the prior opinion, he alleged causes of action for breach of written contract (rather than oral contract as in the first case), common counts (account stated and goods sold and delivered), conversion, and "violation of corporate law." In addition to Pak and Park, he named Eden as a defendant.

As to the breach of contract, he alleged that Park orally agreed to pay Sunmax's debt to US Portable, but "this new complaint will not handle [the] oral agreement owing to statute of limitation [for] breach of oral agreement. [¶] On the contrary, Park emailed [Lim] a written promise to pay as seen in Exhibit 5. However, so far, Defendants have never paid." Lim attached a copy of an email (in Korean with English translation) dated December 21, 2012, in which Park referred to ongoing litigation regarding Sunmax which delayed payment. "However, because I told you I would start the payment to you from January of next year, I will let you know how much we can pay you."

Further, Lim re-alleged his alter ego theory, adding facts designed to show, according to the compliant, that "adherence to the fiction of [the] separate existence of Sunmax LLC would sanction fraud and promote injustice." The purportedly newly discovered facts were that Pak, who owned 98 percent of Sunmax and Eden, used Park (who owned 2% of Sunmax) as his front man in defrauding US Portable. He then closed Sunmax, converted its assets for himself and Eden, and began running the same type of business with Eden as he had with Sunmax, in the same location once occupied by Sunmax, leaving Sunmax as an empty shell business.

Demurrer

Defendants demurred to the complaint on the ground, inter alia, that it was barred by the doctrine of res judicata or collateral estoppel, and asked the trial court to take judicial notice of the first action, including the appellate opinion affirming the judgment of dismissal.

Lim opposed the demurrer. He argued that he had fashioned his new complaint in compliance with "the opinions and implied suggestions of the Court of Appeal."

Ruling

The trial court sustained the demurrer without leave to amend. The court ruled that Lim was pursuing the same relief as in the first action, and that the current action was barred by res judicata.

DISCUSSION

Lim argues that his complaint was framed "pursuant to the opinions and implied suggestions of the Court of Appeal," and that, as such, the trial court erred in sustaining defendants' demurrer without leave to amend. However, he misunderstands the effect of the prior final judgment under the doctrine of res judicata.

"'As generally understood, "[t]he doctrine of res judicata gives certain *conclusive effect* to a *former judgment* in subsequent litigation involving the same controversy." [Citation.] The doctrine "has a double aspect." [Citation.] "In its primary aspect," commonly known as claim preclusion, it "operates as a bar to the maintenance of a second suit between the same parties on the same cause of action. [Citation.]" [Citation.] "In its secondary aspect," commonly known as collateral estoppel, "[t]he prior judgment . . .

'operates'" in "a second suit . . . based on a different cause of action . . . 'as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action.' [Citation.]" [Citation.] "The prerequisite elements for applying the doctrine to either an entire cause of action or one or more issues are the same: (1) A claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding. [Citations.]'" [Citation.]" (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 797 (*Boeken*).)

In the present case, we are concerned with claim preclusion under the doctrine of collateral estoppel. As explained in *Boeken*, "To determine whether two proceedings involve identical causes of action for purposes of claim preclusion, California courts have 'consistently applied the "primary rights" theory.' [Citation.] Under this theory, '[a] cause of action . . . arises out of an antecedent primary right and corresponding duty and the delict or breach of such primary right and duty by the person on whom the duty rests. "Of these elements, the primary right and duty and the delict or wrong combined constitute the cause of action in the legal sense of the term . . . ."' [Citation.] [¶] 'In California the phrase "causes of action" is often used indiscriminately . . . to mean *counts* which state [according to different legal theories] the same cause of action . . . .' [Citation.] But for purposes of applying the doctrine of res judicata, the phrase 'cause of action' has a more precise meaning: The cause of action is the right to obtain redress for a harm suffered, regardless of the specific remedy sought or the legal theory (common law or statutory) advanced. [Citation.] As we explained in *Slater v.*

Blackwood [(1975) 15 Cal.3d 791, 795]: '[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." (*Boeken*, *supra*, 48 Cal.4th at pp. 797-798.)

In the instant case, collateral estoppel clearly bars Lim's action against Pak, Park, and Eden. First, Lim seeks redress for the same harm as in the prior lawsuit – compensation for Sunmax's failure to pay its debt to US Portable. Thus, although Lim has reframed his legal theories, he is asserting the same primary right as in the first case, and the same cause of action for purposes of collateral estoppel.

Second, the judgment against Lim in the first case is final. Third, Lim – the party against whom the doctrine of collateral estoppel is being asserted – is the same party who filed the first lawsuit. We note, of course, that although Pak and Park were defendants in the prior case, Eden was not. But that Eden was not a party to the prior case does not defeat its right to claim preclusion. "[B]ecause the estoppel need not be mutual, it is not necessary that the earlier and later proceedings involve the identical parties or their privies. Only the party *against whom* the doctrine is invoked must be bound by the prior proceeding.' [Citation.]" (*Roos v. Red* (2005) 130 Cal.App.4th 870, 879.)

In short, all the elements of collateral estoppel are met. The final judgment against Lim in the first action bars the current action against Pak, Park and Eden. Thus, the trial court properly sustained the defendants' demurrer without leave to amend.

DISPOSITION

The judgment of dismissal is affirmed. Defendants shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

MANELLA, J.

COLLINS, J.