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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ERNEST J. FRANCESCHI, JR.,

Plaintiff and Appellant,

v.

HARRAH'S ENTERTAINMENT, INC.,
et al.,

Defendants and Respondents.

B234087

(Los Angeles County
Super. Ct. No. BC362245)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Louis Lavin, Judge. Affirmed.

Franceschi Law Corporation and Ernest J. Franceschi, Jr., in pro. per., for
Plaintiff and Appellant.

Stokes Roberts & Wagner, Maria C. Roberts, Ronald R. Giusso and
Shirley A. Gauvin for Defendants and Respondents.

Appellant Ernest Franceschi appeals a judgment dismissing his action against Respondent Harrah's Entertainment, Inc. (Harrah's) on the doctrine of res judicata. Prior to this judgment, a federal court in Nevada had heard Franceschi's same exact causes of action and dismissed them as claims upon which relief could not be granted as a matter of law. Franceschi argues that the federal court's *sua sponte* dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) without giving him an opportunity to respond was a denial of due process. In this action, the trial court determined that Franceschi had a full opportunity to litigate the case in both the Nevada federal district court and the Ninth Circuit, and the doctrine of res judicata prevents the case from being re-litigated in California. We conclude that the trial court's dismissal on the grounds of res judicata was not error. We therefore affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Franceschi counts cards; casinos prohibit this practice because it is assumed to give people who employ it an unfair advantage.¹ In July 2005, Franceschi was caught counting cards at Harrah's casino in Las Vegas. He was removed from the casino and prohibited from returning. Harrah's added Franceschi's name and photograph to a list of banned players, which is shared among the casinos. Franceschi visited Las Vegas four other times throughout the following year. Each time, he was marked as an unwelcome player and removed from each casino he visited.

¹ Card counters engage in a mathematical process that enables them to achieve better odds at playing blackjack. They attempt to know every card both in and out of the deck, which allows them to increase their chances of placing a favorable wager.

On November 21, 2006, Franceschi, an attorney appearing pro se, filed a complaint against Harrah's in Los Angeles Superior Court. He alleged that Harrah's California advertisements were misleading because they seemed to invite all people to gamble at its casinos without disclaiming that card counters were not allowed. The complaint alleged that Harrah's violated (1) the California Consumer Legal Remedies Act (CLRA)² and (2) the Unfair Competition Law (UCL)³ by not disclosing in its advertisements its practice of disallowing card counters, such as himself, from gambling at its casinos. He requested relief in the amount of expenses he paid to travel to Las Vegas, Nevada. He also sought injunctive relief which would require Harrah's to place lengthy disclosures, in its California advertisements, of its practice of not allowing card counters to gamble at its casinos. In 2007, Harrah's filed a motion to dismiss or to stay based on the doctrine of *forum non conveniens*, arguing that Nevada was a more appropriate forum. Ultimately, the Los Angeles Superior Court granted the motion and stayed the action.⁴

² The California Consumer Legal Remedies Act provides in part: "The following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer are unlawful: (9) Advertising goods or services with intent not to sell them as advertised." (Civ. Code, § 1770.)

³ The Unfair Competition Law provides in part: "[U]nfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising" (Bus. & Prof. Code, § 17200.)

⁴ Upon Harrah's first motion to dismiss or stay, the trial court denied the motion, and Harrah's filed a writ petition in this court. We entered an order notifying both parties of our intent to issue a peremptory writ of mandate directing the trial court to vacate its order denying the motion and grant Harrah's motion to dismiss based on

In February 2010, Franceschi filed an action in the federal district court in Nevada. He alleged the same exact causes of action he alleged in California along with a fraud cause of action. In June 2010, Harrah's filed a motion to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Harrah's argued that the federal court did not have subject matter jurisdiction because Franceschi had been unable to set forth an amount in controversy sufficient for the federal court to exercise diversity jurisdiction.

On January 3, 2011, the Chief Judge of the District Court filed an eleven-page opinion that denied Harrah's motion to dismiss based on a lack of subject matter jurisdiction, but dismissed the action *sua sponte* pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted. The eleven-page opinion discussed each cause of action in detail and determined that Franceschi's lawsuit was one in which there was no possibility of relief. The federal court noted that disallowing card counters from gambling in casinos was expressly allowed under Nevada law, and that Harrah's did not have a duty to notify the general public of their practice of disallowing card counters from their casinos. The federal court further noted that Franceschi, as an experienced card counter winning upwards of \$75,000 in an average weekend, did not meet the "reasonable consumer" test that governs CLRA and UCL claims.

forum non conveniens. The trial court did so, and Franceschi appealed from this dismissal. We reversed the judgment dismissing the action, and Harrah's subsequently filed another motion to dismiss or stay the action based on *forum non conveniens*. The trial court granted this motion and stayed the action in California. Franceschi sought writ review of that ruling but was denied.

After judgment was entered, Franceschi sought appellate review from the Ninth Circuit. On March 28, 2012, the Ninth Circuit affirmed the District Court’s dismissal. During his Ninth Circuit appeal, Franceschi only argued against the district court’s rationale that a casino did not have a duty to the general public to disclose its practice of banning card counters; he did not address or acknowledge the trial court’s second rationale that, as a card counter, Franceschi could not meet the “reasonable consumer” test. Because he did not address or acknowledge the district court’s second rationale, the Ninth Circuit held that he waived his challenge to the dismissal of his California statutory claims. Franceschi did not seek certiorari.

On January 10, 2011, the Los Angeles Superior Court, at a status conference, lifted the stay in anticipation of Harrah’s motion to dismiss. Harrah’s filed a motion to dismiss on the grounds of res judicata on March 18, 2011. The trial court granted the motion. Franceschi appeals from the judgment of dismissal.

ISSUE ON APPEAL

The sole issue in this appeal is whether the doctrine of res judicata precludes the litigation in California of Franceschi’s claims. We answer this question in the affirmative.

DISCUSSION

A motion to dismiss is reviewed for the existence of substantial evidence. (*Planning & Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, 232.) “ ‘Res judicata’ describes the preclusive effect of a final judgment on the merits. Res judicata, or claim preclusion, prevents relitigation of the

same cause of action in a second suit between the same parties or parties in privity with them.” (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896.) “A clear and predictable res judicata doctrine promotes judicial economy . . . [and] 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*.’ ” (*Id.* at p. 897.) “A federal judgment is as final in California courts as it would be in federal courts” (*Calhoun v. Franchise Tax Bd.* (1978) 20 Cal.3d 881, 887.)

“In determining the validity of a plea of res judicata three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?” (*Bernhard v. Bank of America* (1942) 19 Cal.2d 807, 813.)

Each element was established as a matter of law. The causes of action were the same in both California and Nevada,⁵ the district court dismissed the case on the merits by issuing an eleven-page opinion, and the parties are the same parties that were in the Nevada federal action. Franceschi now argues that the district court in Nevada was not a suitable forum for his case to have been heard because, he claims, he was denied due process by the court’s *sua sponte* dismissal of his action. The Ninth Circuit, rather than this Court, would be the appropriate forum in which to argue such a contention.

Franceschi, in fact, appealed the district court’s decision to the Ninth Circuit, which

⁵ Franceschi also brought a common law fraud claim in Nevada that he did not raise in California, but this does not alter the analysis for the purposes of this appeal.

affirmed the dismissal. Even if Franceschi was denied due process by the federal district court in Nevada, his appeal to the Ninth Circuit provided him with a full opportunity to be heard on the merits of the district court's dismissal. The Ninth Circuit ruled against Franceschi, and he now seeks another opportunity to litigate his case after receiving an unfavorable disposition in prior proceedings. This cannot be allowed.

The judgment of the Nevada federal district court was affirmed by a Ninth Circuit decision, and a federal judgment is as final in California as it is in federal courts. The Ninth Circuit's affirmance of the district court's judgment is binding on this Court: "Where the judgment in one suit becomes final through lapse of time or affirmance on appeal while an appeal is still pending in another court from judgment in the other action, the first final judgment may be brought to the attention of the court in which an appeal is still pending and relied on as *res judicata*." (*Domestic & Foreign Petroleum Co. v. Long* (1935) 4 Cal.2d 547, 562.) Every cause of action Franceschi brought in California was brought and dismissed in Nevada, and the Ninth Circuit on appeal affirmed the dismissal. The doctrine of *res judicata* bars Franceschi from litigating those same issues again in California.

DISPOSITION

The judgment of the trial court is affirmed. Harrah's shall recover its costs on appeal.

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CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

KITCHING, J.