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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

JAMES P. McCASHIN II,

Plaintiff and Appellant,

v.

IRA GENE DERDIGER et al.,

Defendants and Respondents.

B263160

(Los Angeles County
Super. Ct. No. SC121094)

APPEAL from a judgment of the Superior Court of
Los Angeles County. Craig D. Karlin, Judge. Reversed.

Benedon & Serlin, Gerald M. Serlin and Melinda W.
Ebehar for Plaintiff and Appellant.

Hollins & Levy, Byron S. Hollins, Laura M. Levy, Adam L.
Robinson, and Natalie Lahiji for Defendants and Respondents.

Plaintiff and appellant James P. McCashin II (James) appeals from the summary judgment in favor of defendants and respondents Ira Gene Derdiger (Ira) and Derdiger & Cohen LLP (collectively respondents) in this legal malpractice case, following an underlying divorce proceeding. We find this case is not barred by retraxit or res judicata or the “settle and sue” doctrine and that James was not required to produce at this time expert evidence on the standard of care. Accordingly, we reverse the summary judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Factual History

James, who is a licensed attorney, married Stamatia Tina McCashin (Tina) in 1982. In 1983, they jointly purchased a family residence in Pacific Palisades (the community residence). In 2006, 23 years after they married, Tina petitioned for divorce. At the outset of the divorce proceeding, James and Tina disputed whether the down payment for the purchase of the community residence was James’s separate property.

In 2006, James and Tina sold the community residence for \$4,250,000. After payment of the outstanding mortgage, the net proceeds from the sale were \$2,990,684.87. The net proceeds were divided equally between James and Tina, with the exception of \$90,000 that was used to pay bills, and \$869,406.63 that was placed in a joint account at Washington Mutual Bank (which

later became J.P. Morgan Chase Bank) in their names to pay taxes, with any residual sum to be held pending the final outcome of the divorce proceeding (the joint account). In or around April 2007, with the consent of James and Tina, the funds in the joint account were used to pay taxes, leaving a balance of \$314,609.77, which was accruing interest.

Thereafter, between 2009 and 2011, nearly all of the funds from the joint account were withdrawn, allegedly by Tina, without James's knowledge. In October 2011, James made a settlement proposal to Tina that included his offer to waive more than \$414,220.48 she owed him, partly for allegedly misappropriating the funds in the joint account, in exchange for her waiver of spousal support. Tina rejected the offer. In August 2012, Tina's attorney sent a letter to respondents contesting James's positions regarding various property interests. In March 2013, Tina's attorney made a global settlement offer, which James rejected.

On or about September 13, 2013, after James had retained new counsel, a judgment was entered in the divorce proceeding pursuant to a 33-page stipulated settlement entered into by James and Tina (the stipulated judgment). Section 2(a)(1) of the stipulated judgment provides: "The Court finds that the parties **have sold** their former family residence located at . . . , and **divided the net sales proceeds equally.**" Section 8 of the

stipulated judgment provides that James and Tina “waived all rights to reimbursement or credit” except as otherwise provided for in the judgment, including all “rights to reimbursement or credit of any kind or character whatsoever that either party may have or claim to have against the other party or the community.” The stipulated judgment included an award of \$400,000 to James to be paid by Tina. The stipulated judgment also provided at section 4, entitled “***Property Awarded to [James]***,” that “all right, title and interest in the following property, including the parties’ community interest, is awarded to [James]: [¶] . . . [¶] (f) [¶] . . . [¶] (ii) All right, title and interest in any [and] all future proceeds, if any, resulting from a potential legal malpractice lawsuit against prior counsel for [James]. . . . [¶] (1) The parties stipulate that if [James] initiates an action and collects money from [Ira] or his legal malpractice carrier, one-half of the proceeds, after one half of the reasonable attorneys fees, costs and expenses shall be credited against the \$400,000 that [Tina] owes to [James].” The stipulated judgment provides for extensive mutual releases, and states that the trial court finds the stipulated judgment to be “final and binding” and that it “supersedes and replaces any previous agreements” between James and Tina.

Procedural History

In July 2013, James sued respondents for legal malpractice, breach of fiduciary duty and two causes of action for breach of contract (one pertaining to failure to perform agreed services and the other for return of consideration). In the operative first amended complaint (FAC), James alleged that respondents opened the joint account but, despite representations to the contrary, respondents did not ensure that the account was “restricted” such that two signatures would be required for withdrawals. The FAC also alleged that Ira directed the bank to send all monthly statements to his office, but respondents failed to examine the statements. Had respondents been examining the monthly statements, they would have discovered that unauthorized withdrawals were being made from the joint account, which was eventually depleted. Respondents and James were unaware of the withdrawals until March or April 2011. The FAC seeks damages in the form of the missing funds, \$330,924.98 plus interest. Respondents filed an answer asserting numerous affirmative defenses, including res judicata and collateral estoppel.

Respondents filed a motion for summary judgment or, in the alternative, for summary adjudication of issues on the grounds that James could not prove the elements of causation or damages for each of his claims and that his claims were barred by

the doctrines of retraxit and “settle and sue.” James filed opposition to the motion and both parties filed evidentiary objections.¹

The trial court granted the motion for summary judgment and issued a 12-page order explaining the basis for its ruling. The court found that the undisputed facts showed that the funds in the joint account were derived from the sale of the community residence and were covered by the “final and exhaustive settlement agreement” that became the stipulated judgment. The undisputed evidence showed that the stipulated judgment was intended to cover all disputes between James and Tina, including the missing funds, and therefore the stipulated judgment constituted res judicata and retraxit regarding any further claims over the funds. The court also found that James failed to present expert evidence showing that respondents had breached their legal and fiduciary duties.

James filed this appeal.

DISCUSSION

James contends the trial court misapplied the doctrine of res judicata to his claims against respondents based on its

¹ In a minute order, the trial court stated that “Objections are as ruled upon in the attached orders.” No such attached orders are included in the appellate record. The parties do not specify how the court ruled on the evidentiary objections, nor do they make any arguments regarding evidentiary objections or rulings.

mistaken “belief that Tina took the money [from the joint account] and that James and Tina had litigated and settled that issue as part of their divorce action.” (Bolding omitted.) We agree with James that res judicata or retraxit does not bar his lawsuit against respondents, nor does the “settle and sue” doctrine. We also conclude that James was not required to present expert evidence at this point on the standard of care issue.

I. Standard of Review

We review a grant of summary judgment de novo. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) We affirm the summary judgment if it is correct on any legal ground applicable to the case. (*Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1071.) A defendant moving for summary judgment may meet its burden either by showing that one or more elements of a cause of action cannot be established or by showing that there is a complete defense thereto. (Code Civ. Proc., § 437c, subd. (p)(2).) Once the moving party’s burden is met, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of material fact. (*Ibid.*) “[T]he moving parties’ papers are strictly construed, while those of the opposing party are liberally construed. A summary judgment is a drastic procedure to be used with caution, and doubts as to the propriety of granting the motion are resolved in favor of the party opposing the motion.

[Citation.] An appellate court will reverse a summary judgment if any kind of a case is shown.” (*Classen v. Weller* (1983) 145 Cal.App.3d 27, 43.)

II. Retraxit and Res Judicata

James argues that the trial court erred in finding that his lawsuit against respondents is barred as matter of law by the doctrines of retraxit and res judicata.

“A retraxit is a judgment on the merits preventing a subsequent action on the dismissed claim. . . . ‘It has been frequently held that a judgment or order dismissing an action, based upon a stipulation or agreement of the parties settling and adjusting the claim or cause of action in suit and providing for the dismissal is a bar to another action for the same cause.’

[Citation.] . . . ‘[A] dismissal with prejudice [is] a retraxit constituting a decision on the merits invoking the principles of res judicata.’” (*Rice v. Crow* (2000) 81 Cal.App.4th 725, 733–734.) A retraxit invokes the principles of res judicata. (*Id.* at p. 734; *Alpha Mechanical, Heating & Air Conditioning, Inc. v. Travelers Casualty & Surety Co. of America* (2005) 133 Cal.App.4th 1319, 1331.)

The doctrine of res judicata consists of two different aspects. First, it precludes parties or their privies from relitigating a cause of action that has been finally determined by a court of competent jurisdiction, an aspect of res judicata

traditionally referred to as “res judicata” or “claim preclusion.” (*Rice v. Crow, supra*, 81 Cal.App.4th at p. 734.) Second, any issue necessarily decided in such litigation is conclusively determined as to the parties or their privies if it is involved in a subsequent lawsuit as to the parties on a different cause of action, an aspect of res judicata known as “collateral estoppel” or “issue preclusion.” (*Ibid.*) “A privy is one who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritance, succession, or purchase. [Citation.]” (*Id.* at p. 735.) “A nonparty alleged to be in privity must have an interest so similar to the party’s interest that the party acted as the nonparty’s “virtual representative” in the first action.” (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 826.)

We agree with James that respondents are not in privity with Tina because they were not her “virtual representative” in the divorce action and James’s claims against them do not derive from any of the claims he had against Tina in the divorce proceeding. This is so because James’s claims against Tina and his claims against respondents do not involve the same primary right. James’s primary right with respect to Tina involved his rights to real and personal property, while his primary right with respect to respondents involved his right to be free of negligence by his attorneys. James is not suing respondents in place of Tina

for allegedly withdrawing the funds, but because respondents never bothered to look at the bank statements between April 2007 and March 2011, and thus failed to discover the looting of the joint account in time to minimize the loss. The issues of negligence and breach of contractual or fiduciary duties owed by respondents were never litigated between Tina and James in the divorce proceeding.

Respondents argue that James waived his right to prove any reimbursements or credits which were to be satisfied out of the funds from the joint account when he signed the stipulated judgment. In other words, according to respondents, regardless of whether they were negligent or breached a duty toward James, the damages he seeks from their alleged misdeeds are the missing funds from the joint account. Since James waived both his right to recovery of those funds from Tina and his right to a determination that the funds belonged to him in any amount, the stipulated judgment operates as a retraxit and precludes James from trying to prove now what he refused to litigate earlier.

But the stipulated judgment, by its terms, constitutes a waiver of James's claims *only* against Tina. The stipulated judgment makes no mention of the joint account, the missing funds, or the reason for Tina's \$400,000 payment to James. Respondents rely on James's testimony that the \$400,000 was a negotiation of "everything in the 33 pages and all the matters

that had gone on before this about all the different monetary issues, disputes, set-offs, restitution, presumptions of assets, and her employment and all the other claims in the action.” But James’s testimony mentions only Tina, not respondents. If anything, it creates a triable issue of fact on respondents’ assertion that the stipulated judgment resolves for all purposes the issue of the missing funds. (See *Classen v. Weller, supra*, 145 Cal.App.3d at p. 43 [we must liberally construe opposing party’s papers].)

Moreover, the stipulated judgment expressly contains a carve-out provision anticipating James’s lawsuit against respondents for malpractice. Thus, even assuming both that Tina took the missing funds and that the stipulated judgment resolved the question of the stolen funds between James and Tina, res judicata does not preclude James from pursuing his separate causes of action against respondents, because the issue of respondents’ alleged negligence was never addressed, let alone, necessarily decided by the stipulated judgment.

III. Settle and Sue

Respondents argue that James cannot prove causation or damages under the “settle and sue” doctrine.

This doctrine “involves a former client suing after litigation has been settled. Depending on whether the disgruntled client was the plaintiff or the defendant in the antecedent lawsuit, the

basis of the claim is that the settlement was less than it should have been, or more than it had to be, by reason of the negligence of the party's attorney.” (*Moua v. Pittullo, Howington, Barker, Abernathy, LLP* (2014) 228 Cal.App.4th 107, 114.) In such a case, a plaintiff must try the underlying case within the malpractice case (case within a case) and prove that, absent the defendant's negligence, the plaintiff would have achieved a better result. (*Marshak v. Ballesteros* (1999) 72 Cal.App.4th 1514, 1518.)

But here, James does not assert that respondents committed any negligent act in the settlement of the underlying divorce case. Indeed, respondents were no longer James's attorneys at the time he executed the stipulated judgment. Rather, James's lawsuit against respondents is based on their alleged mismanagement of the joint bank account, acts which preceded the settlement by years. Respondents are being sued for their own alleged direct torts and breaches of contract, not as proxies for any claims James may have had against Tina. Thus, James is not required to try a case within a case or to show that he would have received a better outcome in the divorce proceeding.

Furthermore, regarding damages, the stipulated judgment anticipates that James may sue respondents for malpractice and provides that any proceeds he receives are his separate property. Because we do not find that as a matter of law James is

precluded from seeking damages against respondents, it is not our concern at this stage whether or to what extent he will be able to prove damages against respondents.

IV. Expert Evidence

The trial court also granted summary judgment on the ground that James failed to present expert evidence on the issue of whether respondents' actions fell below the standard of care.² But as James points out, respondents never discussed or analyzed whether their conduct fell below the applicable standard of care. Respondents' separate statement of facts does not identify any material issue of fact as to whether they met the standard of care, nor does it assert that James did not possess and could not reasonably obtain evidence on this element. Because respondents never made a prima facie showing of the nonexistence of a triable issue of fact on the breach of the standard of care, the burden never shifted to James to present evidence on this issue. Accordingly, summary judgment should not have been granted on this basis.

² The trial court applied this reasoning to all of James's causes of action, finding that his two breach of contract causes of action were duplicative of his negligence causes of action.

DISPOSITION

The summary judgment is reversed. James is entitled to recover his costs on appeal.

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_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT