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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

LASERTONE CORPORATION, Plaintiff and Respondent, v. E.S.E. ELECTRONICS et al., Defendants and Appellants.	B238589 (Los Angeles County Super. Ct. No. BC401101)

APPEAL from a judgment of the Superior Court of Los Angeles County. Steven J. Kleifield, Judge. Affirmed.

Kaplan, Kenegos & Kadin, Jerry Kaplan, Joan Kenegos for Defendants and Appellants.

Law Offices of Martin F. Goldman, Martin F. Goldman for Plaintiff and Respondent.

The trial court judge who originally heard this case retired, and his successor issued an order granting a motion to enforce a settlement agreement. Appellants contend that the order enforcing the settlement agreement conflicted with a prior ruling made by the predecessor judge. We find that the order enforcing the settlement agreement was not barred by either the doctrine of res judicata or Code of Civil Procedure section 1008, and therefore we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Lasertone Corporation (Lasertone) shipped to defendants E.S.E. Electronics (ESE) and David Kazemi products valued at $207,171.74. The products were diverted by a third party affiliated with defendants. Defendants did not pay for the products and Lasertone brought suit for the open account balance.

The parties eventually stipulated to entry of judgment in favor of Lasertone in the amount of $257,187.54 (including interest, costs, and fees), with entry of judgment to be stayed, provided that defendants paid the sum of $120,000 to Lasertone, and further that defendants used "their best efforts to pursue their claim for recovery from all insurance policies and sources available to them, for the losses alleged to have been sustained by Defendants from and on behalf of the conduct of Federico Kimura aka Ovando in diverting the shipments of goods to Defendants from Plaintiff, and which created the open account balance claimed to be due by Plaintiff in the principal sum of $207,171.74." The parties' settlement agreement provided that defendants "execute all documents necessary to impose a first lien upon any recoveries sought by Defendant and shall agree to have any said recoveries issued to Defendants by a joint check made payable to Plaintiff, as a joint payee and Defendants and pay over to Plaintiff from the first proceeds of any recovery, an additional sum up to a total amount of $80,000.00."

Thus, Lasertone stood to recover a total of $200,000. Defendants paid the first $120,000. They also pursued litigation against their insurance carrier, and eventually obtained a settlement. Defendants' counsel informed plaintiff's counsel that he was in possession of an $80,000 check made payable to Lasertone, ESE, and defendants'

counsel the Law Offices of Kaplan Kanegos & Kadin (The Kaplan Firm). The Kaplan Firm, however, refused to turn over the check to Lasertone or its counsel.

Lasertone filed an "ex parte application for turn over order in aid of execution" pursuant to Code of Civil Procedure section 699.040. The application contended that the "appropriate order" would be for the trial court "to issue a turn over order, directing the Defendants to turn over, fully endorsed, the settlement check." Defendants opposed the ex parte application, arguing that Lasertone was not entitled to receive the full $80,000, but rather was entitled to receive only that amount less a 40 percent contingency fee of $32,000 that the Kaplan Firm incurred in obtaining the settlement against ESE's insurer. The claimed basis for charging attorney fees to Lasertone, a nonclient of the Kaplan Firm, was that the Kaplan Firm had an attorney's lien superior to the lien under the settlement agreement held by Lasertone; and that the "common fund theory" mandated that Lasertone, which benefited from the insurance settlement, pay for the costs of recovery.

Lasertone's ex parte application was heard by the Honorable John P. Shook on June 29, 2011. Judge Shook denied the application, finding: "Under the Common Fund Theory, the Kaplan Firm's legal work resulted in obtaining the $80,000.00, the Kaplan Firm is entitled to be paid its fees, and its client should not be forced to pay the entire fee. Rather, the Kaplan Firm's fees should be paid from the recovery. To allow otherwise would result in Lasertone receiving a windfall by receiving the entire $80,000.00 without incurring any costs in doing so. The Kaplan Firm is entitled to recover its $32,000.00 under the Common Fund Theory."

Over a month later, on August 10, 2011, Lasertone brought a "motion for enforcement of settlement" pursuant to Code of Civil Procedure section 664.6. The motion sought an order for entry of judgment in accordance with the terms of the parties' settlement agreement. In its moving papers, Lasertone asserted that defendants had actually recovered a gross sum of $135,000 (not $80,000) from its insurers. Lasertone contended that it should receive the full $80,000, plus fees and costs it expended seeking to enforce the settlement agreement. In opposition, defendants argued that Lasertone's

new motion was essentially the same as its earlier one, and that according to Judge Shook's prior ruling, the Kaplan Firm was entitled to deduct $32,000 from the $80,000 owing to Lasertone.

Meanwhile, Judge Shook had retired, and the Honorable Steven J. Kleifield had taken his spot in Department 53 and inherited the case. At the hearing, defendants' counsel acknowledged that they had received $135,000 in their settlement with the insurer. After hearing further argument, Judge Kleifield ordered that the hearing be continued, ordered that prior to the next hearing both parties brief the issue of how any new order would be impacted by Judge Shook's prior order, and further ordered that the Kaplan Firm file a declaration accounting for all fees and costs associated with the recovery of $135,000.

At the continued hearing, Judge Kleifield found that the terms of the settlement agreement dictated that Lasertone have a first lien on funds recovered in the insurance litigation, and that any fees owed to the Kaplan Firm were to be borne by defendants. Judge Kleifield further stated: "I recognize that Judge Shook made an order on a request for turnover which referred to the common fund doctrine. That was—number one, I don't think this court is bound by it; number two, it was done in a very different context than the context that we have here." After the hearing, the court issued an order finding that it was "not bound by Judge Shook's turnover order based on the common fund doctrine as the circumstances that order was based on are separate." It further ordered that judgment be entered for Lasertone against defendants in the amount of $80,000, with entry of judgment to be stayed. If the $80,000 was paid, judgment would not be entered.

Defendants transmitted $80,000 to Lasertone and then filed this appeal challenging Judge Kleifield's order.

DISCUSSION

Defendants' appeal is devoted to the argument that, regardless of whether Judge Shook's order was correct, the order was res judicata. According to defendants, Judge Kleifield was powerless to order that Lasertone should receive the full $80,000.

Defendants' reliance on the doctrine of res judicata is misplaced. "The doctrine of res judicata applies only when a final judgment on the merits has been rendered." (*Montegani v. Johnson* (2008) 162 Cal.App.4th 1231, 1238; *National Union Fire Ins. Co. v. Stites Prof. Law Corp.* (1991) 235 Cal.App.3d 1718, 1726.) "'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. . . . Under the doctrine of res judicata, if a plaintiff prevails in an action, the cause is merged into the judgment and may not be asserted in a subsequent lawsuit; a judgment for the defendant serves as a bar to further litigation of the same cause of action." (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896-897.) Judge Shook's June 29, 2011, order was not a final judgment on the merits; nor did Lasertone initiate a second suit seeking to relitigate matters already decided. Therefore, the doctrine of res judicata simply did not apply.

We thus turn to whether Code of Civil Procedure section 1008 (section 1008) prevented Judge Kleifield from ruling in favor of Lasertone. Section 1008 covers applications for reconsideration of court orders (§ 1008, subd. (a)) and renewals of previous motions (§ 1008, subd. (b)). It "applies to all applications to reconsider any order of a judge or court, or for the renewal of a previous motion, whether the order deciding the previous matter or motion is interim or final." (§ 1008, subd. (e).) The "stated purpose" of the statute "is to exclusively regulate *motions* to reconsider prior orders, and renewed, previously denied *motions*." (*Standard Microsystems Corp. v. Winbond Electronics Corp.* (2009) 179 Cal.App.4th 868, 887.) As crafted by the Legislature, the statute was not intended "to have *any* effect on the *court's* power to disregard, diverge from, abrogate, or otherwise render nugatory its previous orders." (*Ibid.*)

Was Lasertone's motion for enforcement of the settlement agreement an application for reconsideration of a court order subject to section 1008, subdivision (a), or a renewal of a previous motion subject to subdivision (b)? We determine that it was not either one. The ex parte application heard by Judge Shook was brought pursuant to Code of Civil Procedure section 699.040. It sought "turn over" of the $80,000 check "in aid of execution." As noted by both sides on appeal, the application was misguided—an order made pursuant to Code of Civil Procedure section 699.040 can arise only if a writ of execution has been issued (Code Civ. Proc., § 699.040, subd. (a)), and that had not occurred in this case. But, nevertheless, this flaw did not somehow transform the ex parte application into a motion for enforcement of settlement brought pursuant to Code of Civil Procedure section 664.6. Because Lasertone's motion for enforcement of the settlement was neither a motion for reconsideration nor a renewal of a previous motion, it was not barred by section 1008, and section 1008 did not prohibit Judge Kleifield from ruling in the manner he found appropriate.

Moreover, even if the scope of Judge Kleifield's jurisdiction had been potentially constrained by Judge Shook's prior order, Judge Kleifield's ruling still would not have been improper. As found by the court, the circumstances underlying the two motions were different. In addition to the motions being for different relief and being brought pursuant to different statutes, the facts at issue were not the same. The ex parte application was premised on the idea that defendants had received $80,000 from their insurer. However, briefing and oral argument on the motion for enforcement of settlement revealed that defendants had actually received $135,000—they just chose to have the settling insurer issue two checks, one for $80,000 and the other for $55,000.

Therefore, as noted by Judge Kleifield at oral argument, the payment of $80,000 to Lasertone would not have prevented payment to the Kaplan Firm of the attorney fees referenced by Judge Shook in his order. The excess of $55,000 would cover such fees. As also correctly decided by Judge Kleifield, Lasertone had the first lien on recovery from the insurance litigation up to $80,000, and any attorney fees owed to the Kaplan Firm should have been paid by its own clients, defendants.

Finally, Lasertone argues that Judge Kleifield erred by refusing to grant it an award of attorney fees in connection with the successful motion to enforce the settlement agreement. Lasertone contends that such an award was mandated by the terms of the parties' settlement agreement. Lasertone failed to file a notice of appeal, however. We therefore do not address this argument. (See Code Civ. Proc., § 906; *Estate of Powell* (2000) 83 Cal.App.4th 1434, 1439.)

DISPOSITION

The October 18, 2011, order is affirmed.

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BOREN, P.J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.