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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

GIRYUNG CHANG, Plaintiff and Appellant, v. BALEUNSON LLC, Defendant and Respondent.	B278227 (Los Angeles County Super. Ct. No. BC617412)

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

Kevin H. Jang for Plaintiff and Appellant.

Littler Mendelson, Eugene Ryu and Jessica S. Kang, for Defendant and Respondent.

In 2011 Giryung Chang and her husband sold their struggling family market to Baleunson LLC, whose sole member is Chang's brother-in-law, Hwa Bum Shin (Shin). In 2014 Chang sued Shin and his wife, Lana D. Shin, alleging multiple wage-and-hour violations arising from her employment at the market (the Shin action).[1] The trial court granted the Shins' motion for summary judgment, ruling they were not Chang's employer. Chang then filed the instant lawsuit against Baleunson, alleging the same wage-and-hour claims. The trial court sustained Baleunson's demurrer to Chang's complaint without leave to amend based on the doctrine of res judicata, finding Baleunson was in privity with Shin, as Chang apparently conceded in her opposition to the demurrer. The court entered a judgment of dismissal. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Shin Action*

On November 19, 2014 Chang filed a complaint against the Shins alleging claims for unpaid wages, unpaid overtime wages, unpaid meal and rest periods, associated penalties and unfair business practices. Chang's claims arose from her work at Family Farm Market, a business Chang and her husband had owned and operated through an entity named Mex-Ko, Inc.[2] In August 2011, after the Changs defaulted on a loan secured by the market, the Shins purchased the market through Shin's

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[1] *Chang v. Shin et al.* (Super. Ct. L.A. County, 2014, BC564344).

[2] Donghyung Chang, Giryung Chang's husband, is Lana D. Shin's brother.

company, Baleunson.[3] Following the transaction, the Changs continued to operate the market without any involvement by the Shins.

Based on these undisputed facts, the trial court found the Shins had not been Chang's employers and granted their motion for summary judgment.[4] Judgment was entered in the Shins' favor and against Chang on April 22, 2016. Chang did not appeal the judgment.

2. *The Baleunson Action*

After losing the summary judgment motion, Chang filed this action asserting identical wage-and-hour claims against Baleunson. The new action was directed as a related case to the same judge who had presided over the Shin action. Baleunson

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[3] According to Chang, Baleunson purchased the market in a short sale; Shin contended Baleunson simply assumed the loan from the bank.

[4] Explaining its ruling, the trial court stated, "[T]he point that I was trying to make is that the plaintiff was not employed by these two individual defendants. There is no evidence that supports them as the employer of the plaintiff. I believe that it is undisputed that what took place here was essentially a transition in the operation of the market, from the company that the plaintiff and her husband owned to the Baleunson entity holding title to the market for their benefit. . . . [T]here weren't any other changes. The plaintiff even admitted that, that the operation of the market was the same before and after this transition in August 2011. . . . [T]he plaintiff operated the market before and after. The two individual defendants didn't come in and start calling the shots. They didn't start designating how the market should be run. It was still the plaintiff's operation. And under those circumstances, there just is not a wage-and-hour issue."

demurred to the complaint on the ground the action was barred by the doctrine of res judicata, as Baleunson was in privity with Shin, a fact Chang appeared to concede in her opposition to the demurrer. Noting the instant complaint "[was] identical to the Complaint in [the Shin action], except that the named defendant is Baleunson instead of the Shins," and Chang's concession Baleunson was in privity with Shin, the trial court sustained the demurrer and denied leave to amend. An order dismissing the complaint in its entirety was filed on August 26, 2016.

DISCUSSION

1. *Standard of Review*

A demurrer tests the legal sufficiency of the factual allegations in a complaint. We independently review the superior court's ruling on a demurrer and determine de novo whether the complaint alleges facts sufficient to state a cause of action or discloses a complete defense. (*Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1100; *Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42; *Ivanoff v. Bank of America, N.A.* (2017) 9 Cal.App.5th 719, 725 (*Ivanoff*).) We assume the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded and matters of which judicial notice has been taken. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 20; *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) We liberally construe the pleading with a view to substantial justice between the parties (Code Civ. Proc., § 452; *Gilkyson v. Disney Enterprises, Inc.* (2016) 244 Cal.App.4th 1336, 1340; see *Schifando*, at p. 1081 [complaint must be read in context and given a reasonable interpretation]); but, "[u]nder the doctrine of truthful pleading, the courts 'will not

close their eyes to situations where a complaint contains allegations of fact inconsistent with attached documents, or allegations contrary to facts which are judicially noticed.'" (*Hoffman v. Smithwoods RV Park, LLC* (2009) 179 Cal.App.4th 390, 400; accord, *Ivanoff,* at p. 726.)

Although a general demurrer does not ordinarily reach affirmative defenses, it "will lie where the complaint 'has included allegations that *clearly* disclose some defense or bar to recovery.'" (*Casterson v. Superior Court* (2002) 101 Cal.App.4th 177, 183; accord, *Ivanoff, supra,* 9 Cal.App.5th at p. 726; *Nolte v. Cedars-Sinai Medical Center* (2015) 236 Cal.App.4th 1401, 1406; *Favila v. Katten Muchin Rosenman LLP* (2010) 188 Cal.App.4th 189, 224.) "Thus, a demurrer based on an affirmative defense will be sustained only where the face of the complaint discloses that the action is necessarily barred by the defense." (*Casterson,* at p. 183; accord, *Ivanoff,* at p. 726; *Favila,* at p. 224.) "'Where the complaint is defective, "[i]n the furtherance of justice great liberality should be exercised in permitting a plaintiff to amend his [or her] complaint."'" (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 970-971.) "'[L]eave to amend should *not* be granted where . . . amendment would be futile.'" (*Ivanoff,* at p. 726, quoting *Vaillette v. Fireman's Fund Ins. Co.* (1993) 18 Cal.App.4th 680, 685; see generally *Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 373-374.)

2. *Principles of Claim and Issue Preclusion*

The doctrine of res judicata has two aspects—the familiar primary aspect of claim preclusion and a secondary aspect of issue preclusion, historically described as collateral estoppel. (See *DKN Holdings LLC. v. Faerber* (2015) 61 Cal.4th 813, 824 (*DKN Holdings*) ["To avoid future confusion, we will follow the example

of other courts and use the terms 'claim preclusion' to describe the primary aspect of the res judicata doctrine and 'issue preclusion' to encompass the notion of collateral estoppel. [Citation.] It is important to distinguish these two types of preclusion because they have different requirements."].) "*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." (*Id.* at p. 824; accord, *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896; *Ivanoff, supra*, 9 Cal.App.5th at p. 727.) 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. Workermen's Comp. Appeals Bd.* (1972) 7 Cal.3d 967, 974; *Ivanoff,* at p. 727; *Zevnik v. Superior Court* (2008) 159 Cal.App.4th 76, 82.) 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."""" (*Mycogen*, at p. 897, accord, *Ivanoff*, at p. 727.)

The secondary aspect of res judicata, issue preclusion, "prohibits the relitigation of issues argued and decided in a previous case even if the second suit raises a different cause of action. [Citation.] Under issue preclusion, the prior judgment conclusively resolves an issue actually litigated and determined in the first action." (*DKN Holdings, supra,* 61 Cal.4th at p. 824; accord, *Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788,

797; *Ivanoff, supra,* 9 Cal.App.5th at p. 727.) The doctrine applies "(1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party." (*DKN Holdings*, at p. 825.) The doctrine differs from claim preclusion in that it operates as a conclusive determination of issues; it does not bar a cause of action. (*Ibid*.) Also, unlike claim preclusion, "issue preclusion can be invoked by one not a party to the first proceeding" (*id.* at p. 826) and "operates 'as a shield against one who was a party to the prior action to prevent' that party from relitigating an issue already settled in the previous case" (*id.* at p. 827).

The party asserting claim or issue preclusion bears the burden of establishing the necessary prerequisites. (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341; *Vella v. Hudgins* (1977) 20 Cal.3d 251, 257; *Patel v. Crown Diamonds, Inc.* (2016) 247 Cal.App.4th 29, 40.) Our review is de novo. (*Ayala v. Dawson* (2017) 13 Cal.App.5th 1319, 1325; *City of Oakland v. Oakland Police & Fire Retirement System* (2014) 224 Cal.App.4th 210, 228.)

3. *Chang Is Not Estopped From Contesting Privity*

There is little question the instant lawsuit is barred if Baleunson and Shin are in privity within the meaning of the claim preclusion doctrine, as it alleges the same causes of action against Baleunson that were adversely decided against Chang in the Shin action. In fact, Chang does not dispute the two complaints are identical with the exception of the named defendants. However, Chang argues the trial court improperly prevented her from pursuing legitimate claims by ruling inconsistently on the issue of privity between Shin and Baleunson. According to Chang, the trial court granted summary judgment against her in the Shin

action because Baleunson—not Shin—owned the market and Shin, as a corporate agent, was not liable for the wage-and-hour violations of the corporation. Chang elected to abandon the lawsuit against Shin and instead file her claims against Baleunson. To reject her present lawsuit on the ground that Shin is in privity with Baleunson, Chang asserts, violates principles of equity and due process.

In sustaining Baleunson's demurrer the trial court relied on Chang's concession in her opposition to the demurrer that Baleunson is in privity with Shin. Chang did indeed make this assertion, and Baleunson argues she is judicially estopped from denying that fact on appeal. We disagree.

"'Judicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. [Citations.] The doctrine's dual goals are to maintain the integrity of the judicial system and to protect parties from opponents' unfair strategies. [Citation.] Application of the doctrine is discretionary.'" (*Koo v. Rubio's Restaurants, Inc.* (2003) 109 Cal.App.4th 719, 735, fn. omitted; accord, *State Farm General Ins. Co. v. Watts Regulator Co.* (2017) 17 Cal.App.5th 1093, 1102 (*State Farm*); see generally *New Hampshire v. Maine* (2001) 532 U.S. 742, 749-751 [121 S.Ct. 1808, 149 L.Ed.2d 968].)

Although "numerous decisions have made clear that judicial estoppel *is an equitable doctrine,* and its application, even where all necessary elements are present, is discretionary" (*MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.* (2005) 36 Cal.4th 412, 422), California courts invoke a familiar test to assess whether the doctrine should be applied in a particular circumstance. "The doctrine applies when

'(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.'" (*Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986-987; accord, *MW Erectors, Inc.,* at p. 422; *State Farm, supra,* 17 Cal.App.5th at p. 1102; *Minish v. Hanuman Fellowship* (2013) 214 Cal.App.4th 437, 449; *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183.)[5]

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[5] Courts closely scrutinize alleged admissions by counsel during advocacy for a client. A statement by a party's counsel may not be treated as a judicial admission if "it is made improvidently or unguardedly, . . . is in any way ambiguous . . . [or] lacks the gravity of a complete relinquishment of rights on the issue." (*Irwin v. Pacific Southwest Airlines* (1982) 133 Cal.App.3d 709, 714; accord, *Physicians Committee for Responsible Medicine v. KFC Corp.* (2014) 224 Cal.App.4th 166, 180 ["'an oral statement by counsel in the same action is a binding judicial admission if the statement was an unambiguous concession of a matter then at issue and was not made improvidently or unguardedly'"]; *People v. Kiney* (2007) 151 Cal.App.4th 807, 815 ["statements of counsel in argument are not deemed judicial admissions unless they have the formality of an admission or a stipulation"]; *Coats v. General Motors Corp.* (1934) 3 Cal.App.2d 340, 350 ["[m]ere incidental or ambiguous statements by counsel" will not be binding or admissible "where there is no such formality in the making of the statements as to indicate an intention that they should be taken as admissions"]; *People v. Darden* (1927) 87 Cal.App. 181, 182-183 [rejecting defendant's contention that prosecutor's statement when original criminal complaint was filed was a binding admission because that statement was "only so shown in a

Chang's concession plainly does not warrant application of judicial estoppel. Far from taking different positions, Chang has consistently asserted that Baleunson and Shin were in what she calls "employer privity," meaning, as best we understand, an alter ego theory that Shin, as the sole member of Baleunson, controlled the corporation and should be liable for its alleged wrongs. Chang admits she filed the Baleunson action only after the court granted summary judgment against her in the Shin action on the ground the Shins were not her employers.

Moreover, Chang was not successful in the Shin action. The judicial estoppel doctrine requires the party to be estopped to have prevailed in the prior action in which it asserted the inconsistent position: "[C]ourts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled.' [Citation.] Absent success in a prior proceeding, a party's later inconsistent position introduces no 'risk of inconsistent court determinations,' [citation], and thus poses little threat to judicial integrity." (*New Hampshire v. Maine, supra,* 532 U.S. at pp. 750-751; accord, *Minish v. Hanuman Fellowship, supra,* 214 Cal.App.4th at p. 453; *The Swahn Group, Inc. v. Segal* (2010) 183 Cal.App.4th 831, 849.)

In short, this case is not one of those "'rare instances'" where judicial estoppel should be applied to an unsuccessful litigant because he or she made "'an egregious attempt to

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running argument and does not rise to the dignity of a specific admission"].)

manipulate the legal system.'" (*Minish v. Hanuman Fellowship, supra,* 214 Cal.App.4th at p. 454.)

4. *Baleunson Has Failed To Demonstrate It Was in Privity with Shin*

Baleunson defends the trial court's finding it was in privity with Shin for purposes of claim preclusion by arguing Baleunson, as a limited liability corporation controlled by its sole member, Shin, played no role in the management or operation of the market. Neither the record nor relevant principles of law permit us to affirm the judgment on that ground.

As discussed, privity is a requirement of both claim and issue preclusion. "As applied to questions of preclusion, privity requires the sharing of 'an identity or community of interest,' with 'adequate representation' of that interest in the first suit, and circumstances such that the nonparty 'should reasonably have expected to be bound' by the first suit. [Citation.] 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, supra,* 61 Cal.4th at p. 826; see *Rodgers v. Sargent Controls & Aerospace* (2006) 136 Cal.App.4th 82, 91 ["'[t]he concept of privity . . . refers "to a mutual or successive relationship to the same rights of property, or to such an identification in interest of one person with another as to represent the same legal rights"'"].) "When a defendant's liability is entirely derived from that of a party in an earlier action, claim preclusion bars the second action because the second defendant stands in privity with the earlier one." (*DKN Holdings,* at pp. 827-828.) "'Whether someone is in privity with the actual parties requires close examination of the circumstances of each case.'" (*Rodgers*, at p. 91.)

The record before us does not justify the conclusion Baleunson is in privity with Shin within the meaning of the claim preclusion doctrine because their relationships with Chang and the market were fundamentally different.[6] The Shins defended the action against them in part by arguing they were not the owners of the market and Baleunson, as the owner or titleholder, was an indispensable party.[7] That argument recognized the principal reason for choosing a corporate structure: "Ordinarily a corporation is considered a separate legal entity, distinct from its stockholders, officers and directors, with separate and distinct liabilities and obligations. [Citation.] The same is true of a limited liability company (LLC) and its members and managers. (Corp. Code, §§ 17701.04, 17701.05, 17703.04, subd. (b).)" (*Curci*

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[6] The only case Baleunson cites to support its contention an LLC is in privity with its sole member for purposes of claim preclusion is an unpublished order of a federal district court in which the court found an employee's federal claim against his employer was barred by the municipal court's affirmance of his successful state administrative action. (See *Bo Vin Tran v. Le French Baker* (N.D. Cal. June 14, 1995, No. C-94-0482) 1995 U.S. Dist. Lexis 8371.) That ruling addressed whether the two actions asserted the same primary right, which, as in *DKN Holdings,* is not an issue in this case. (See *DKN Holdings, supra,* 61 Cal.4th at p. 825 ["[w]hether DKN's two lawsuits involve the same primary right is beside the point"].)

[7] The Shins argued in support of their motion for summary judgment: "The Changs were aware that Baleunson was the sole title holder of the Market, because they signed the bill of sale which transferred title to *only* Baleunson from Mex-Ko, Inc. . . . . Thus if it is true that the 'owner' of Family Farm Market is Plaintiff's 'employer,' Plaintiff had to name Baleunson as a party to the Complaint, but failed to do so."

Investments, LLC v. Baldwin (2017) 14 Cal.App.5th 214, 220; see *Kwok v. Transnation Title Ins. Co.* (2009) 170 Cal.App.4th 1562, 1570 ["[A]ppellants disregard the legal significance of a limited liability company. As members of the LLC, appellants never held an ownership interest in the property to which the LLC held title."].) Shin, as the sole member of the LLC, thus availed himself of the legal significance of that structure to defend against Chang's allegation he was her employer. He cannot now claim privity with Baleunson to defeat Chang's claim in this action. (See, e.g., *Seretti v. Superior Nat. Ins. Co.* (1999) 71 Cal.App.4th 920, 931 ["[The shareholders] suggest that privity could be achieved by allowing them to pierce the veil of their own corporation and substitute themselves in the place of [the corporation] as the named insured under the policy. Ignoring a corporation's separate existence is a rare occurrence, particularly where it is the shareholders who seek to pierce its veil, and the courts will do so only 'to prevent a grave injustice . . . .'"].)[8]

Baleunson's corporate structure precludes a finding it is in privity with Shin for purposes of claim preclusion under the circumstances shown in this record. Baleunson's potential liability is not derivative of Shin's. As the Supreme Court explained in *DKN Holdings*, "When a defendant's liability is entirely derivative from that of a party in an earlier action, claim preclusion bars the second action because the second defendant stands in privity with the earlier one. [Citations.] The nature of derivative liability so closely aligns the separate defendants'

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[8] Ironically, if the doctrine of judicial estoppel were to apply to this case, it would preclude Shin from now asserting he and Baleunson were "virtual representatives" of each other after he successfully argued the contrary position in the Shin action.

interests that they are treated as identical parties." (See *DKN Holdings, supra,* 61 Cal.4th at pp. 827-828.)

The trial court determined in the Shin action that the Shins had no role in the operation of the market, which was owned by Baleunson, not Shin. The record in this case does not contain the documentation related to the sale of the market or the terms under which the market would be operated. Nor did the trial court explore the obligations Baleunson, as the owner of the market, might owe Chang, as manager of the market, that Shin, as the sole member of the LLC, would not have had. At minimum, there is a possibility Baleunson, as the owner of the market, was legally Chang's employer (see Cal. Code Regs., tit. 8, § 1170, subd. 2(D) ["'[e]mploy' means to engage, suffer, or permit to work"]) and Chang, as a manager, was exempt from certain wage-and-hour provisions (*id.* at § 1170, subd. 1(A)(1)). These issues were not resolved in the Shin action because the Shins were not Chang's employers. They are certainly relevant to Baleunson's prospective liability.

Baleunson also incorrectly argues *DKN Holdings* held claim preclusion may be asserted by a non-party whose interests have been fully litigated in the earlier lawsuit. The Supreme Court expressly differentiated claim preclusion, which is not available to non-parties, from issue preclusion, which is: "Unlike claim preclusion, issue preclusion can be invoked by one not a party to the first proceeding. The bar is asserted against a party who had a full and fair opportunity to litigate the issue in the first case but lost. [Citation.] The point is that, once an issue has been finally decided *against* such a party, that party should not be allowed to relitigate the same issue in a new lawsuit. [Citations.] Issue preclusion operates 'as a shield against one

who was a party to the prior action to prevent' that party from relitigating an issue already settled in the previous case." (*DNK Holdings*, *supra*, 61 Cal.4th at pp. 826-827.) As discussed, issues related to Baleunson's status as an employer have not been litigated and are not necessarily congruent with Shin's.

Without question, the modern concept of privity has relaxed over time. (See *Cal Sierra Development, Inc. v. George Reed, Inc.* (2017) 14 Cal.App.5th 663, 672 ["courts are expanding the concept of privity beyond the classical definition to relationships "'sufficiently close to afford application of the principle of preclusion'"'].) Nonetheless, properly applying the concept of claim preclusion, on this record Baleunson has not carried its burden of establishing grounds for a finding of privity and a judgment in its favor.

DISPOSITION

The judgment is reversed. Chang is to recover her costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J. FEUER, J.*

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