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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

GEORGE BARAMILY, Plaintiff and Respondent, v. RANDALL M. AWAD, Defendant and Appellant.	B290378 (Los Angeles County Super. Ct. No. BC589518)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Elizabeth Allen White, Judge. Reversed and remanded with instructions.

Randall M. Awad, self-represented litigant; and Zaal Aresh for Defendant and Appellant. [*Retained*.]

George Baramily, self-represented litigant, Plaintiff and Respondent.

I. INTRODUCTION

Defendant Randall Awad took possession of a vehicle as collateral for a short-term loan, but then sold the vehicle before the loan repayment was due. The borrower, Ramy Baramily, the brother of the vehicle's registered owner, sued defendant for breach of the loan agreement and recovered the entire value of the vehicle, less the unpaid loan balance. Two years later, the registered owner, George Baramily,[1] successfully sued defendant in this action for conversion and theft, recovering the full value of the vehicle, plus treble damages.

On appeal, defendant contends, among other things, that the trial court erred because the second action was barred by the doctrine of res judicata. We agree and therefore reverse the judgment.

II. FACTUAL BACKGROUND[2]

The subject matter of this action is a 2000 Ferrari Modena 360 (the Ferrari). According to George, his brother Ramy purchased the Ferrari in 2006 and gave it to him as a gift in 2010. George registered the Ferrari in his name with the Department of Motor Vehicles (DMV) on March 18, 2010.

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[1] George and Ramy Baramily share the same last name. For ease of reference, we will use their first names.

[2] Because the facts stated in support of the underlying judgment are undisputed on appeal, the factual statement is taken from the attachment to the judgment.

Sometime prior to January 2012, George and Ramy took out a high-interest loan from Santa Monica Check Cashing (check cashing loan). To procure the loan, George voluntarily transferred possession of the Ferrari to the lender as collateral and gave the lender the pink slip.

To pay off the high-interest check cashing loan, Ramy then obtained an interest-free, $40,000 short-term loan from defendant in January 2012. The loan was memorialized in a January 31, 2012, short-term loan agreement. Among other things, the agreement provided that the loan balance was due and payable on or before the July 31, 2012, "[e]xpiration date." The agreement further provided that Ramy would transfer the "exclusive right" to possess the Ferrari to defendant for a period of six months or until the loan was repaid.[3] And, the agreement gave defendant the express right to sell the Ferrari in the event Ramy defaulted on his repayment obligation under the loan.

Defendant took possession of the Ferrari, but was never given authority by George to file a registered lien with the DMV. Nevertheless, on February 6, 2012, defendant filed a DMV certificate of title and unilaterally caused his name to be placed on title as a lienholder.

On May 30, 2012, defendant signed a DMV certificate of repossession asserting that he was the legal owner of the Ferrari based on the security interest created by the loan agreement. He also signed a DMV certificate of title in which he claimed to take

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[3] Ramy explained to defendant that the Ferrari was not registered in Ramy's name, but rather was registered under the name George Baramily, because "'Ramy was a nickname for George.'" But Ramy assured defendant that he, Ramy, was the owner of the Ferrari.

title by virtue of "'Repo,'" i.e., repossession. At the time he filed the certificates of repossession and title, defendant was not an authorized DMV lienholder. Because the loan agreement provided that Ramy had until July 31, 2012, to pay off the loan, he was not in default when defendant filed the May 30, 2012, DMV documents claiming ownership by repossession.

Once defendant procured DMV documents purporting to show his ownership of the Ferrari, he sold it to a third-party on June 23, 2012, for $60,500. Defendant claimed he did not attempt to collect on the loan after the sale because the loan obligation had been satisfied in full by the proceeds from the sale of the Ferrari.

At no time was George given notice that: there was a DMV lien on the Ferrari; defendant intended to repossess the vehicle; or the Ferrari had been sold.

III. PROCEDURAL BACKGROUND

A. *The Ramy Contract Action*

On July 26, 2012, Ramy filed a complaint asserting a single cause of action against defendant for breach of contract (the Ramy contract action), and defendant cross-complained for fraud, defamation, and promissory estoppel.[4] On February 24, 2014, the matter came on for a bench trial.

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[4] Although defendant included Ramy's July 12, 2012, breach of contract complaint and defendant's cross-complaint in his proposed exhibit list and booklet, they were not admitted in evidence at trial.

On March 21, 2014, the trial court entered a judgment in favor of Ramy on his breach of contract claim and against defendant on his cross-claims. The judgment provided, in pertinent part: "The [c]ourt f[inds], on [Ramy's] breach of contract cause of action, that the contract was prepared by defendant . . . and not modified by the parties. Under the terms and conditions of [the] contract defendant . . . loaned $40,000 to [Ramy] with no payment due until the maturity date of July 31, 2012. [Ramy] agreed to collateralize[] [the] loan with his brother George['s] vehicle, [the Ferrari,] and possession and [t]itle of [the Ferrari] were given to defendant . . . on the condition that [the Ferrari] and [t]itle be retu[r]ned to [Ramy] when the loan was paid back in full on or before the July 31, 2012[,] maturity date. The court also f[inds] that prior to the July 31, 2012[,] maturity date of the loan, [defendant] wrongfully and unlawfully added on the DMV records his name as a lienholder to [the Ferrari's] [t]itle, and failed to give adequate and proper [n]otice of repossession of [the] vehicle, as required by California law, and inappropriately sold [the] vehicle, which he did not have authority to sell, for the sum of $60,500, which vehicle should not have been sold. Accordingly, it is hereby ORDERED, ADJUDGED AND DECREED AS FOLLOWS: [¶] 1. On [Ramy's] action for breach of contract, the court finds in favor of [Ramy] and against [defendant]. [¶] 2. Defendant . . . is not entitled to any payment under the contract. [Ramy] shall recover from defendant . . . the sum of $20,500. [¶] 3. On [defendant's] [c]ross-[c]omplaint for [i]ntentional [m]isrepresentation; [d]efamation-[l]ibel on its face based on imputation of dishonesty; and [p]romissory [e]stoppel, the [c]ourt finds in favor of [Ramy] and against [defendant]. [¶] 4. [Ramy]

. . . shall recover from [defendant] cost of suit in the sum of $per memo including reasonable attorney's fees to be determined by noticed motion pursuant to [s]ection 1033[.]5 of the California Code of Civil Procedure and California Rules of the Court including [r]ule 870.2 in the sum of $per memo . . . . [¶] Attorney's fees and cost[s] to be added [to the judgment] after [n]oticed [m]otion and per [m]emorandum of [c]osts."

B. *George's Action*

On July 31, 2015, three years after his brother filed the Ramy contract action, George filed this action against defendant asserting five causes of action, including claims for conversion and civil damages for theft pursuant to Penal Code section 496, subdivision (c).[5] In support of his conversion and theft claims, George alleged that Ramy delivered the Ferrari to defendant "to hold and store as part of a loan agreement." According to George, defendant "wrongfully and unlawfully purported to sell [the Ferrari] to [a third party] . . . ."

On March 7, 2017, defendant filed a motion for judgment on the pleadings, arguing that George's complaint was barred by the doctrine of res judicata because it was based on the same cause of action as Ramy's contract action and involved the same subject matter—the Ferrari—such that George was in privity with Ramy in the contract action. George opposed the motion; and on May 9, 2017, the trial court issued an order denying it,

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[5] George also asserted causes of action against the DMV and the third-party purchaser. The causes of action against those defendants were dismissed prior to trial.

finding that George was not a party to Ramy's contract action or in privity with Ramy concerning that action.

On February 16, 2018, defendant filed a trial brief that asserted, among other things, a defense based on the doctrine of res judicata. On February 21, 2018, George filed a response to defendant's trial brief, arguing that the complaint was not barred.

On February 26, 2018, the court held a bench trial on George's conversion and theft claims. George's expert valued the Ferrari at $78,409 as of June 2012. He further determined that it would cost $799 per day to rent a Ferrari of the same make, model, and year in similar condition. In closing argument, defendant again asserted that George's claims were barred by res judicata.

On April 5, 2018, the trial court issued a statement of decision finding that George was entitled to a judgment in his favor. Notwithstanding defendant's assertion of the res judicata defense at trial, the statement of decision did not expressly address or rule upon that defense.

On May 7, 2018, the trial court entered judgment in favor of George in the amount of $313,636. The attachment to the judgment set forth the court's factual findings from the final statement of decision as set forth in detail above. The attachment also recited the following legal conclusions from the court's final statement of decision: "As for the second [c]ause of [a]ction for [c]onversion, [George] has established that he had the right to possession of the Ferrari and at no time gave [defendant] the right to file a [DMV] lien or repossess [the] Ferrari. [George] has established that [defendant] fraudulently filed a [DMV c]ertificate of [t]itle claiming to be a lienholder and then

fraudulently filed [a DMV a]pplication for [t]ransfer obtaining [t]itle by virtue of a claimed repossession. [¶] [George] seeks civil penalties in his [t]hird [c]ause of [a]ction for [c]ivil [d]amages pursuant to Penal Code [section] 496 . . . . [¶] . . . [¶] The court finds that the fair market value [of the Ferrari] is uncontroverted and awards [George] $78,409 for the value of the Ferrari. [¶] Penal Code [section] 496[, subdivision] (c) does provide for treble damages and attorney's fees and as such [George] is awarded the sum of $235,227 in treble damages and is awarded his costs and attorney's fees to be determined by way of a motion for attorney's fees. [¶] . . . [¶] Judgment is awarded in favor of [George] and against [defendant] in the sum of $313,636 plus costs and attorney's fees."

On May 30, 2018, defendant filed a notice of appeal from the judgment.

IV. DISCUSSION

A. *Standard of Review*

Generally, when the facts relevant to the trial court's determination of a res judicata defense are undisputed, we review that ruling de novo. (*Smith v. ExxonMobil Oil Corp.* (2007) 153 Cal.App.4th 1407, 1415 [where facts are undisputed, "de novo review is appropriate with respect to (both) the presence of the three elements essential to (res judicata)" and the "trial court's determination of the 'fairness' of applying (the doctrine)"]; *Roos v. Red* (2005) 130 Cal.App.4th 870, 878 [when facts are undisputed, "application . . . (of res judicata) is a question of law to which we apply an independent standard of review"].) Based

on our review of the record on the res judicata defense asserted at trial, we conclude that the facts relevant to that defense are undisputed and therefore allow for de novo review.

When a res judicata defense is determined in a trial, as opposed to on demurrer, the court's factual findings in support of that determination are reviewed for substantial evidence. (*Planning & Conservation League v. Castaic Lake Water Agen*cy (2009) 180 Cal.App.4th 210, 232.) Here, the trial court's tentative statement of decision did not address the res judicata defense asserted at trial and defendant did not timely object to that omission. Thus, there are no express factual findings on that defense to review for substantial evidence. Under such circumstances, we are required under the implied findings doctrine to presume the court made all implied findings necessary to support its implicit rejection of that defense which are supported by substantial evidence. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.)

B. *Legal Principles: Res Judicata*

"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 (*Mycogen*).) "A clear and predictable res judicata doctrine promotes judicial economy. Under this doctrine, all claims based on the same cause of action must be decided in a single suit; if not brought initially, they may not be raised at a later date. "'Res judicata precludes piecemeal litigation by splitting a single cause

of action or relitigation of the same cause of action on a different legal theory or for different relief.'" [Citation.] . . . [The doctrine] 'seeks to curtail multiple litigation causing vexation and expense to the parties and wasted effort and expense in judicial administration.'" (*Id.* at p. 897, italics omitted; see *Hamilton v. Asbestos Corp.* (2000) 22 Cal.4th 1127, 1145 [a plaintiff cannot split a cause of action into successive suits]; *Sutphin v. Speik* (1940) 15 Cal.2d 195, 202 ["If the matter was within the scope of the action, related to the subject-matter and relevant to the issues, so that it *could* have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged"].)

"'"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.)

C. *Analysis*

There is no dispute that the Ramy contract action resulted in a final judgment in Ramy's favor on the merits. Thus, we consider only whether the claims and issues raised in that prior

action were based on the same primary right[6] as the claims and issues in the present action and whether George, who was not a party to the first action, was in privity with a party, namely, Ramy.

1. Same Primary Right

"California's res judicata doctrine is based upon the primary right theory." (*Mycogen, supra*, 28 Cal.4th at p. 904.) The primary right theory "provides that a 'cause of action' is comprised of a 'primary right' of the plaintiff, a corresponding 'primary duty' of the defendant, and a wrongful act by the defendant constituting a breach of that duty. [Citation.] The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action. [Citation.] . . . [¶] As far as its content is concerned, the primary right is simply [*the plaintiff's right to be free from the particular injury suffered*.] [Citation.] It must therefore be distinguished from the *legal theory* on which liability for that injury is premised: 'Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief.' [Citation.] The primary right must also be distinguished from the *remedy* sought: 'The violation of one primary right constitutes a single cause of action, though it may entitle the injured party to many forms of relief, and the relief is not to be confounded with the

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[6] As we explain below, the issue of whether a claim raised in this action is identical to a claim litigated in the prior action is analyzed under the primary right theory, i.e., whether the two claims arise from the same primary right.

cause of action, one not being determinative of the other.' [Citation.]" (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 681-682, bracketed italics added.)

Defendant contends that the undisputed evidence before the trial court showed that he satisfied the first necessary element of his res judicata defense because the primary right upon which Ramy's contract action was premised was the same right underlying George's conversion and theft claims against him in this action. According to defendant, the "singular primary right" at issue in both actions was the right "to be free from the loss of the Ferrari." We agree.

The undisputed evidence demonstrates the primary right at issue in both actions was the same primary right, i.e., the right to be free from an unauthorized sale of the Ferrari. In Ramy's contract action, it was undisputed that: (1) Ramy *and George* agreed that defendant was entitled to possession of the Ferrari as collateral for the repayment of the short-term loan and that defendant was further entitled to sell that vehicle in the event Ramy defaulted on his repayment obligation under the loan; (2) defendant implicitly agreed to a contractual prohibition against selling the Ferrari, absent a default by Ramy; and (3) the sale of the Ferrari in June 2012, before any default, breached defendant's duty to refrain from selling the vehicle. It was also undisputed in the Ramy contract action that the injury that resulted from the unauthorized sale of the Ferrari was the loss of its value, which Ramy recovered in that action.

In this case, although George couched his claims in terms of conversion and theft—as opposed to breach of contract—the basic right, corresponding duty, and resulting injury asserted and litigated were the same as those previously asserted and litigated

in the Ramy contract action. For example, in his conversion claim, George conceded that defendant had a lawful right to possess the Ferrari as collateral for the loan, but asserted that, pursuant to the loan agreement, defendant had agreed not to sell the Ferrari absent a default by Ramy, i.e., defendant was under an affirmative contractual duty not to sell George's vehicle, a duty that extended to and benefited George directly. George further asserted that the sale of the Ferrari prior to any contractual default breached defendant's duty to George and caused him injury in the form of the loss of the value of the vehicle, a loss for which he sought and obtained a recovery in this action.

Similarly, in his claim for civil damages based on theft under Penal Code section 496, subdivision (c), George asserted that, although defendant lawfully possessed the Ferrari based on George's agreement to allow Ramy to use it as collateral for the loan, defendant's sale of the vehicle prior to any contractual default by Ramy violated defendant's duty to George not to liquidate the collateral prior to default and constituted an unlawful theft of the vehicle resulting in the loss of its value to George, which loss he sought to recover.

Thus, as to both the conversion and theft theories of recovery, the prohibition against the sale of the vehicle and the corresponding duty to refrain from doing so absent a default formed the gravamen of George's complaint against defendant. Likewise, the alleged injury from defendant's breach of that duty—the loss of the value of the Ferrari—was the same under both theories and, for purposes of the res judicata analysis, was identical to the injury asserted by Ramy in his contract action.

Because the undisputed evidence before the trial court demonstrated that the two actions were based upon the same primary right, corresponding duty, and resulting injury, we conclude that defendant established, as a matter of law, the essential primary right element of his res judicata defense.

2. Party in Privity

"'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. [Citation.]' (*DKN Holdings* [*LLC v. Faerber* (2015)] 61 Cal.4th [813,] 826.)" (*Cal Sierra Development, Inc. v. George Reed, Inc*. (2017) 14 Cal.App.5th 663, 672-673 (*Cal Sierra*).)

"In the context of a res judicata determination, 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 [citations] . . . .'"' (*Rodgers v. Sargent Controls & Aerospace* (2006) 136 Cal.App.4th 82, 90-91 . . . .) "'[T]he determination of privity depends upon the fairness of binding [a nonparty] with the result obtained in earlier proceedings in which it did not participate. [Citation.] "'Whether someone is in privity with the actual parties requires close examination of the circumstances of each case.'"'" (*Id*. at p. 91.) 'This requirement of identity of parties or

privity is a requirement of due process of law.' (*Clemmer v. Hartford Insurance Co*. (1978) 22 Cal.3d 865, 874 . . . .)" (*Consumer Advocacy Group, Inc. v. ExxonMobil Corp*. (2008) 168 Cal.App.4th 675, 689-690.)

"Thus, for purposes of privity, "'[t]he emphasis is not on a concept of identity of parties, but on the practical situation. The question is whether the non-party is sufficiently close to the original case to afford application of the principle of preclusion.'" (*Alvarez v. May Dept. Stores Co.* (2006) 143 Cal.App.4th 1223, 1236-1237 . . . .) Put another way, privity, "'as used in the context of res judicata or collateral estoppel, does not embrace relationships between persons or entities, but rather it deals with a person's relationship *to the subject matter of the litigation*.'" (*Cal Sierra, supra*, 14 Cal.App.5th at p. 674.)" (*Castillo v. Glenair, Inc.* (2018) 23 Cal.App.5th 262, 277.)

Defendant contends that the undisputed evidence at trial established, as a matter of law, that George was in privity with Ramy concerning the Ramy contract action. According to defendant, the general subject matter of the Ramy contract action—the Ferrari—was the same subject matter at issue in this action and Ramy's relationship to that subject matter as collateral for defendant's short-term loan was the same as George's interest, i.e., each of them had the same or similar interest in the prompt return of the vehicle upon timely repayment of the loan obligation.

We agree that, under the undisputed circumstances of this case, George's interest in and relationship to the subject matter of the Ramy contract action was sufficiently aligned with Ramy's as to make it fair to bind George to the result in that action. Here, both Ramy and George were originally indebted to Santa

Monica Check Cashing for the interest and principle amounts of the check cashing loan and they each relied on the Ferrari as collateral for that loan. To avoid the high-interest on the check cashing loan, Ramy took out the short-term loan from defendant, secured by the Ferrari. Based on the proceeds from that loan, both Ramy and George benefitted equally from the payoff of the check cashing loan; and both also benefitted from defendant's implied promise not to sell the Ferrari, absent a default on the loan obligation. Thus, when defendant sold the Ferrari prior to any default, both Ramy and George had the same interest in the first lawsuit based on that unauthorized sale—the recovery of the value of the loss of the Ferrari. That similarity of interest in the first action made Ramy a "virtual representative" of George in that action, and Ramy's recovery of the entire value of the loss of the Ferrari adequately vindicated George's interest in the loan collateral.[7]

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[7] In denying defendant's motion for judgment on the pleadings, the trial court concluded that because George did not acquire his interest in the Ferrari *after judgment was rendered* in favor of Ramy, he was not in privity with Ramy. The court reasoned that, "'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.' [Citations.] [¶] [([*Patel v. Crown Diamonds, Inc.*] (2016) 247 Cal.App.4th 29, 37-38 . . . .)]" As we discuss above, courts focus on considerations of fairness and due process when considering the issue of privity and have rejected the trial court's narrow interpretation of that term. (*See e.g. People ex rel. State of Cal. v. Drinkhouse* (1970) 4 Cal.App.3d 931, 937 [rejecting appellant's argument that they were not in privity because they were not grantees after judgment, and noting, "the word 'privy' has acquired an expanded meaning"];

Given the brothers' virtually identical interest in: the loan from defendant; the collateral securing that loan; and defendant's implicit agreement not to sell the collateral unless and until there was a default on the loan obligation, we conclude that George's relationship to the subject matter of the Ramy contract action was such that it placed him in privity with Ramy for purposes of applying the res judicata doctrine.

Citizens for Open Access etc. Tide, Inc. v. Seadrift Assn (1998) 60 Cal.App.4th 1053, 1074 [finding a nonsuccessor in interest to be in privity].)

V. DISPOSITION

The judgment is reversed and the matter is remanded to the trial court with instructions to enter a new judgment dismissing the action as barred by res judicata. Defendant is awarded costs on appeal.

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KIM, J.

We concur:

RUBIN, P. J.

MOOR, J.