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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

CLIVE CUSSLER et al.,

Plaintiffs and Appellants,

v.

CRUSADER ENTERTAINMENT, LLC,

Defendant and Respondent.

B232177

(Los Angeles County  
Super. Ct. No. BC440326)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Susan Bryant-Deason, Judge. Affirmed.

Greenberg Glusker Fields Claman & Machtinger, Bertram Fields, Elisabeth A.  
Moriarty and Caroline S. Heindel for Plaintiffs and Appellants.

O'Melveny & Myers, Marvin S. Putnam and Jessica L. Stebbins for Defendant  
and Respondent.

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## INTRODUCTION

Appellant Clive Cussler seeks a declaratory judgment stating that he is entitled to recover \$8,571,429 from respondent Crusader Entertainment, LLC (Crusader) pursuant to a contract between the parties (the Agreement).<sup>1</sup> Cussler contends that under the Agreement Crusader was required to pay him \$20 million for the rights to produce two motion pictures based on two of Cussler's novels. He further alleges Crusader only paid him approximately \$11.5 million, leaving a balance of \$8,571,429. The trial court sustained Crusader's demurrer to Cussler's First Amended Complaint without leave to amend and entered a judgment of dismissal on the grounds that this action is barred under the doctrines of res judicata and collateral estoppel. We affirm the judgment.

In a previous case, Cussler pursued a breach of contract cause of action against Crusader. Cussler sought to recover the same amount—\$8,571,429—as he does in this suit, under the same contract, against the same defendant, on the same substantive legal ground, namely that Crusader failed to pay him the full \$20 million allegedly due under the Agreement. The jury returned a verdict in Crusader's favor on Cussler's breach of contract cause of action and the trial court entered judgment for Crusader. Cussler appealed to this court and argued that he was entitled to a judgment in the amount of \$8,571,429. In an unpublished opinion, we rejected Cussler's numerous arguments regarding this issue and affirmed the judgment with respect to Cussler's breach of contract cause of action. (*Clive Cussler et al. v. Crusader Entertainment, LLC* (Mar. 3, 2010, B208738) [nonpub. opn.] (*Cussler I*)). Cussler then filed a petition for review with the California Supreme Court, which was denied.

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<sup>1</sup> Sahara Gold, LLC, Clive Cussler Enterprises, and Sandecker, RLLP, which are owned by Cussler and his children, are also plaintiffs and appellants. We shall refer to Mr. Cussler and his associated entities in the singular as "Cussler." Crusader's current name is Bristol Bay Productions.

Under the doctrine of res judicata, Cussler's declaratory relief action is barred. In the previous action, Cussler's efforts to obtain a judgment on his breach of contract cause of action were rejected by the jury, the trial court, this court and the California Supreme Court. Cussler cannot resurrect his failed breach of contract cause of action as a declaratory relief claim. The matter has been fully litigated and Cussler has lost.

## **BACKGROUND**

### *1. The Agreement*

Cussler is the author of a series of novels featuring the character of Dirk Pitt. The Agreement, dated May 9, 2001, contemplated that Crusader, a film producer, would produce a series of films based on Cussler's Dirk Pitt novels.

The Agreement gave Crusader the irrevocable option to purchase from Cussler the film rights to the novel Sahara and a second novel to be designated by Crusader, as well as the right to purchase additional Cussler novels. It further provided that, if certain conditions were satisfied, Crusader was obligated to pay Cussler \$20 million in seven annual installments for the film rights to Sahara and a second novel.

Before the Agreement was signed, Cussler approved a screenplay (the Approved Screenplay) for the film Sahara. The Agreement provided that Crusader would not change the Approved Screenplay "without Cussler's written approval exercisable in his sole and absolute discretion."

The Agreement also prohibited Cussler from disseminating any news stories or articles, books, or other publicity regarding the subject matter of the contract without Crusader's approval.

### *2. The Conflicts Between Cussler and Crusader During the Development of the Film Sahara*

In November 2001, Crusader exercised its initial option to acquire from Cussler the film rights to Sahara and a second novel. As described in detail in *Cussler I*, the relationship between the two parties grew increasingly acrimonious. In Cussler's view, Crusader made unacceptable changes to the screenplay and was developing a film that was not a quality product. Crusader's perspective was different. The company

contended that Cussler was unreasonably withholding his approval of changes to the screenplay. Crusader also alleged that Cussler was breaching the Agreement by making derogatory statements to the press about the film.

In April 2005, the film Sahara was released. It was not a commercial success. Crusader did not make a second film pursuant to the Agreement.

3. *Payments by Crusader to Cussler*

Crusader paid Cussler four of the seven annual payments due under the Agreement for the first two films. These payments were each approximately \$2,857,142, for a total of \$11,428,571. The parties dispute whether Crusader still owes Cussler the balance of the \$20 million sum stated in the Agreement, which is \$8,571,429.

4. *The Pleadings in the First Action*

In January 2004, before the film Sahara was released, Cussler commenced a lawsuit (the First Action) against Crusader by filing a complaint in Los Angeles County Superior Court. In his operative pleading, the third amended and supplemental complaint, Cussler set forth five causes of action, including a breach of contract claim. Cussler alleged that Crusader breached the contract by, inter alia, defaulting on its obligations due under the Agreement at the time (the fifth and sixth payments) and by denying any future obligation to pay Cussler sums due under the contract (the seventh payment).

In its operative pleading, the fourth amended and supplemental cross-complaint, Crusader alleged, inter alia, that Cussler breached the implied covenant of good faith and fair dealing by exercising his approval rights of the screenplay for Sahara in bad faith. Crusader also asserted a declaratory relief cause of action, wherein it sought a declaration that it was relieved of any obligation under the Agreement “to make any payment for the rights to the ‘Second Picture.’ ”

5. *The Trial and Verdict in the First Action*

One of the main issues at trial in the First Action was Cussler’s claim that he was entitled to recover \$8,571,429 in damages as a result of Crusader’s alleged breach of contract. In his opening statement and closing argument, Cussler asserted this claim.

On May 15, 2007, the jury returned a special verdict. The jury found that Crusader breached the Agreement, but also found that Cussler did not sustain any damages. The jury thus effectively rejected Cussler's breach of contract cause of action. It further found that Cussler breached the implied covenant of good faith and fair dealing and, as a proximate result, Crusader incurred \$5 million in damages. The jury rejected the remaining causes of action asserted by Cussler and Crusader against each other.

The jury also answered "Yes" to Question No. 60, which stated: "Based on your decisions on the parties' claims, should Crusader Entertainment be obligated to pay Cussler for the 'second picture' under the parties['] agreement?" The trial court considered this question "advisory" in nature.

6. *Post-Trial Proceedings and Judgment in the First Action*

On July 3, 2007, Crusader dismissed its cause of action for declaratory relief with prejudice. As stated *ante*, Crusader had sought a declaration that it was not obligated to pay Cussler for the rights to a second film.

On July 6, 2007, Cussler filed a motion to include Question No. 60 in the judgment. In this motion, Cussler argued that the jury's response to Question No. 60 entitled Cussler to a judgment in the amount of \$8,571,429.

Shortly thereafter, on July 18, 2007, Cussler filed a motion for leave to amend his third amended and supplemented complaint to conform to proof. Cussler sought to add allegations in his declaratory relief cause of action. Specifically, Cussler sought a declaration that Crusader owed Cussler \$8,571,429 under the contract.

On January 3, 2008, the trial court denied Cussler's motion to include Question No. 60 in the judgment and Cussler's motion to amend his pleading. In its order denying the motions, the trial court stated: "The transcript of the 4/30/07 proceedings clearly shows that Question [No.]60 was intended to be advisory in nature and was included as part of Crusader's cross-claim for declaratory relief. [Citation.] [Cussler] cannot now contend that the jury's response to Question [No.] 60 is tantamount to a judgment for \$8,571,429."

On January 9, 2008, Cussler filed a proposed judgment that included the jury's answer to Question No. 60 and an award of \$8,571,429 to Cussler. However, on February 14, 2008, the trial court rejected the proposed judgment as an improper motion for reconsideration.

The court also stated in its order: "Plaintiffs are not entitled to \$8,571,429. Plaintiffs pleaded this amount as breach of contract damages, and it was tried and rejected by the jury's verdict of May 15, 2007. Crusader's post-verdict dismissal of its declaratory relief claim does not undo or alter the jury's verdict, or entitle plaintiffs to an award of \$8,571,429. There is no authority for the Court to change the jury's award of damages. Plaintiffs' request to award them \$8,571,429 in the judgment is denied[.]"

On May 15, 2008, the trial court entered a judgment in the First Action. The judgment provided that Cussler "shall take nothing" from Crusader. It further provided that Crusader shall recover \$5 million in damages, plus costs and interest from Cussler.

#### 7. *Cussler I*

Both Cussler and Crusader appealed the judgment in the First Action. Based on the jury's response to Question No. 60 and Crusader's dismissal of its declaratory relief cause of action, Cussler argued that the trial court erred by not awarding him \$8,571,429 in damages pursuant to his breach of contract cause of action.

On March 3, 2010, we issued the opinion in *Cussler I*. In that opinion, we rejected Cussler's many arguments relating to his breach of contract claim for \$8,571,429. We also held, however, that Cussler's alleged conduct was not a breach of the implied covenant of good faith and fair dealing as a matter of law. Accordingly, we reversed the trial court's judgment with respect to the \$5 million award to Crusader and the trial court's finding that Crusader was the prevailing party. We otherwise affirmed the judgment and remanded the case so that the trial court could determine whether there was a prevailing party and, if so, whether that party was Cussler or Crusader.

Both Cussler and Crusader filed petitions for review in the California Supreme Court. On June 9, 2010, both petitions were denied.

8. *Procedural History In This Case*

On June 24, 2010, Cussler filed a complaint for declaratory relief against Crusader. The complaint alleged that a controversy existed between the parties regarding whether \$8,571,426 was still due under the Agreement.

Crusader filed a demurrer to the complaint on the grounds that it did not state facts sufficient to constitute a cause of action because the lawsuit was barred by res judicata and collateral estoppel. The trial court sustained the demurrer with 10 days leave to amend.

On December 17, 2010, Cussler filed a first amended complaint for declaratory relief (FAC). The FAC was based on the same material allegations as the complaint. The only relief sought was a judgment declaring Cussler was “entitled to the balance of contract payments totaling \$8,571,426,” plus interest and costs.

The trial court sustained Crusader’s demurrer to the FAC without leave to amend, and then entered a judgment of dismissal. Cussler filed a timely notice of appeal.<sup>2</sup>

**DISCUSSION**

1. *Cussler’s Declaratory Relief Action is Barred Under the Doctrine of Res Judicata*

“ ‘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 (*Mycogen*).) “Under the doctrine of res

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<sup>2</sup> On March 21, 2011, in an unsigned minute order, the trial court sustained Crusader’s demurrer to the FAC without leave to amend. The order also stated “this action is dismissed.” On the same date, the trial court issued a signed order sustaining Crusader’s demurrer to the FAC without leave to amend. This order, however, did not state anything about a “dismissal” of the action. On April 7, 2011, Cussler filed a notice of appeal of the March 21, 2011, signed order. On May 5, 2011, the trial court entered a judgment of dismissal. Cussler filed a notice of entry of judgment on May 11, 2011. We deem the notice of appeal as filed immediately after the entry of judgment, which makes it timely. (Cal. Rules of Court, rule 8.104(d)(2).)

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.” (*Id.* at pp. 896-897.)

Res judicata promotes judicial economy by precluding the splitting of a single cause of action. (*Mycogen, supra*, 28 Cal.4th at p. 897.) “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.” (*Ibid.*)

California courts determine whether a plaintiff is pursuing the same “cause of action” for purposes of claim preclusion by using the primary right theory. (*Mycogen, supra*, 28 Cal.4th at p. 904; *Gamble v. General Foods Corp.* (1991) 229 Cal.App.3d 893, 898 (*Gamble*).) This 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.” (*Crowley v. Kattleman* (1994) 8 Cal.4th 666, 681 (*Crowley*).)

“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 cause of action, one not being determinative of the other.’ ” (*Crowley, supra*, 8 Cal.4th at pp. 681-682.)

Here, it is undisputed that Cussler is suing the same party he did in the First Action, namely Crusader. It is also undisputed that Cussler’s breach of contract cause of action in the First Action was decided on the merits, and was not dismissed on a purely procedural ground. The only disputed element of res judicata is whether Cussler’s breach



of contract cause of action in the First Action and his declaratory relief cause of action in this lawsuit are based on the same primary right.

The primary right at issue in Cussler's breach of contract claim was his alleged right to recover \$8,571,426 from Crusader pursuant to the Agreement. This exact same primary right is at issue in Cussler's declaratory relief cause of action. Likewise, Crusader's alleged corresponding primary duty and alleged wrongful act are the same here as they were in the First Action. Merely because Cussler has altered his legal theory and seeks an equitable instead of a legal remedy makes no difference. The cause of action is the same.

The present case is very similar to *Mycogen*. There, in an initial lawsuit, the plaintiff alleged that the defendant breached a contract between the parties by failing to allow the plaintiff to exercise an option to license certain technology. The plaintiff sought and obtained a judgment for declaratory relief and specific performance. (*Mycogen, supra*, 28 Cal.4th at p. 894.) In a subsequent action, the plaintiff sued the defendant for breach of the same contract and sought damages as a remedy. (*Id.* at p. 895.) The California Supreme Court held that the plaintiff's second suit was barred under the doctrine of res judicata. (*Id.* at p. 899.)

This case is the mirror image of *Mycogen*. Instead of seeking declaratory relief in the first action, Cussler seeks such relief in the second.<sup>3</sup> But under the present facts this is a distinction without a difference. Like the plaintiff in the *Mycogen* case, Cussler attempted to assert the same primary right in two successive lawsuits, one for breach of contract and another for declaratory relief. This he cannot do. Cussler's second suit is barred under the doctrine of res judicata.

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<sup>3</sup> Cussler's declaratory relief claim is problematic at this time because such relief is generally only available prospectively. (5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 868, p. 284.) "[W]here there is an accrued cause of action for an actual breach of contract or other wrongful act, declaratory relief may be denied." (*Baldwin v. Marina City Properties, Inc.* (1978) 79 Cal.App.3d 393, 407.)

Cussler argues that to prove claim preclusion, Crusader must show Cussler's cause of action was "necessarily decided" in the First Action. The present action, Cussler contends, is not barred by claim preclusion because the jury did not necessarily decide that he lost his primary right to recover \$8,571,429. This argument confuses claim preclusion with issue preclusion. Although an issue must be "necessarily decided" in a previous suit for issue preclusion (collateral estoppel) to apply, this element is not required for claim preclusion. (Cf. *Noble v. Draper* (2008) 160 Cal.App.4th 1, 11 [contrasting claim and issue preclusion].) Cussler's reliance on *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815 is misplaced because *Vandenberg* addressed collateral estoppel, not claim preclusion. (*Id.* at pp. 824, 828).

2. *Crusader is Not Estopped from Asserting Res Judicata*

Cussler argues Crusader is estopped from asserting the defense of res judicata because Crusader successfully opposed Cussler's post-trial motion to amend his complaint to add a declaratory relief cause of action in the First Action. We reject this argument. In his motion, Cussler was not attempting to add a different "cause of action" for purposes of res judicata, based on a different primary right. Rather, he was trying to amend his complaint to assert a "cause of action" (i.e., primary right) that was already rejected by the jury. Cussler was thus not denied his day in court on his claim for \$8,571,429. He had his day in court and he lost.

Cussler cites *United Bank & Trust Co. v. Hunt* (1934) 1 Cal.2d 340 (*United Bank*) to support his position. In *United Bank*, in a previous action, the defendant successfully opposed the plaintiffs' attempt to amend their complaint *before* trial. (*Id.* at p. 344.) By doing so, the defendant barred the plaintiffs from presenting some of their claims on the merits in the trial in the previous action. (*Ibid.*) This case is distinguishable from *United Bank* because Cussler's claim that he was entitled to recover \$8,571,429 was presented to the jury and adjudicated against him. (Cf. *Gamble, supra*, 229 Cal.App.3d at pp. 902-903 [Distinguishing from *United Bank* and holding that the defendant was not estopped from asserting a res judicata defense despite its successful opposition to the plaintiff's motion to add a cause of action in the previous action].)

Cussler's reliance on *Lunsford v. Kosanke* (1956) 140 Cal.App.2d 623 is also misplaced. There, in the first case, the defendant induced the trial court to rule that the "complaint was so defective that no evidence could be received under it." (*Id.* at p. 628.) The final judgment in the first case was not on the merits. (*Ibid.*) As we have stated, the same is not true here.

3. *Crusader's Dismissal of Its Declaratory Relief Cause of Action in the First Action Has No Relevance to Whether Cussler's Declaratory Relief Action is Barred Under the Doctrine of Res Judicata*

One of Cussler's arguments in his appeal of the judgment in the First Action was that Crusader's dismissal of its declaratory relief action was a retraxit and a judgment on the merits in favor of Cussler. Cussler argued that since Crusader's declaratory relief cause of action alleged that Cussler was not entitled to the balance of contract payments, the dismissal of that cause of action with prejudice was a "binding determination" that Cussler is entitled to the balance of the contract payments.

In addressing this argument, we reviewed legal principles regarding res judicata and related doctrines. We concluded the discussion with this statement: "When these principles are applied to this case, Cussler's argument falls apart. Under the doctrine of res judicata, Crusader's dismissal of its declaratory relief cause of action bars *Crusader* from asserting a cause of action based on the same primary right or relitigating the same issue in a *subsequent action*, but has no effect on *Cussler's* causes of action against Crusader *in this action*."

Cussler has misconstrued this statement as authorizing the current action. He contends that the current case is the "subsequent action" referred to in this statement. It is not. The "subsequent action" we were speaking of was an action *Crusader* might contemplate. We only mentioned a potential subsequent action in dicta to illustrate just how far afield Cussler's argument was. Cussler was claiming that Crusader's dismissal of its declaratory relief cause of action somehow affected Cussler's breach of contract cause of action *in the First Action*.

In any case, nothing we stated in our discussion of Cussler's retraxit argument in *Cussler I* saves his current lawsuit. For the reasons we have explained, Cussler's declaratory relief action is barred.

4. *Collateral Estoppel*

Because we uphold the judgment based on the doctrine of res judicata, we do not reach the issue of whether Cussler's declaratory relief action is also barred under the doctrine of collateral estoppel.

**DISPOSITION**

The judgment is affirmed. Respondent is awarded costs on appeal.

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KITCHING, J.

We concur:

CROSKEY, Acting P. J.

ALDRICH, J.