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Mendenhall v. Tassinari, 133 Nev. Adv. Op. 78 (Oct. 5, 2017)

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CIVIL PROCEDURE: APPELLATE JURISDICTION

Summary

The Court determined that after a final judgment, pursuant to an Offer of Judgment under NRCP 68[2] offer is entered, both claim preclusion and the terms of the offer apply when a party seeks to relitigate claims. This is true even if the claim arises from facts discovered during the offer's ten-day irrevocable acceptance period.

Factual and Procedural History

This appeal from the district court involves two cases. The First Action arose from an agreement formed by Brownstone Gold Town LLC, and Brownstone Gold CV, LLC (the Brownstone Entities), and Robert Mendenhall and Sunridge Corporation (the Appellants). Appellants agreed to contribute real property for the development of a hotel, casino, and convention space in exchange for a 27 percent membership interest. The Brownstone entities were to contribute $1,500,000 in exchange for a 2.7 percent membership interest, and other unnamed nonparty investors (the Other Investors) were to contribute $7,000,000 in exchange for a 12.6 percent membership interest. The terms were recorded on a Term Sheet, which included signature blocks for four parties: (1) American Vantage Brownstone, LLC (AVB), (2) the Brownstone Entities, (3) appellants Mendenhall and Sunridge Corporation, and (4) the Other Investors.

The Brownstein entities acquired plans, surveys, approvals, and land use entitlements; but the appellants failed to contribute the promised property. The Brownstein Entities sued, alleging the appellants had breached the Term Sheet. Before the trial began, the Appellants offered the Brownstein Entities a $1,200,000 offer of judgment (the Offer). The Offer stated that it "was in settlement of all claims *or those asserted or that could have been asserted on behalf of each of them against one another.*"[3]

Additionally, the offer stated: "Acceptance of this Offer of Judgment would fully discharge and release any and all claims as alleged, *or that could have been alleged*, …including, but not limited to, those asserted in the Complaint *as well as any related or potential claims* that could be asserted in this action against one another."[4]

During the Offer's ten-day irrevocable period, Ronald Tassinari, one of respondent AVB's corporate officers, testified during deposition that he fraudulently signed the Term Sheet on behalf of the Other Investors, despite representations made to appellants that non-party investors existed who would contribute the required amount of capital.

Appellants filed a request to amend their answer to add a third-party claim against respondents and assert counterclaims against the Brownstein entities. The appellants' proposed amended pleading alleged that Tassinari had deceived appellants into believing that other third-party investors existed. Appellants argued that the new claims arose from the same set of facts and transactions as those in the original complaint. Nonetheless, the Brownstone Entities accepted the offer of judgment and upon entering the judgment, the court dismissed the First Action with prejudice.

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[1] By Rebecca L. Crooker.
[2] Nev. R. Civ. Pro. 68.
[3] Emphasis in the original
[4] Emphasis in the original

Appellants subsequently commenced the Second Action by filing a complaint alleging that the respondents committed fraud. Respondents then filed, and were granted, a motion to dismiss. The district court found that (1) the First Action's order of dismissal was a valid, final judgement; and (2) the claims in the Section Action were based upon the same claims as the First Action, or could have been brought in the first action, and were thus barred by the doctrine of claim preclusion; and (3) respondents were privies of the Brownstone entities. Appellants appealed directly to this Court.

Discussion

The appellants argued that (1) respondents were not privies of the Brownstone Entities; (2) the claims in the Second Action were not based on the same cause of action as the First Action, and were not "brought in the first case because the district court did not consider them," thus claim preclusion did not apply; (3) the Second Action's fraud claims were permissive, not compulsory; and (4) the fraud claims could not have been asserted in the First Action because appellants discovered the alleged fraud during the Offer's ten-day irrevocable period, barring their ability to bring the claims.

The Court stated that when the district court considers matters outside of the pleadings, a motion to dismiss "shall be treated as one for summary judgment and disposed of as provided in Rule 56"[5].

Claim preclusion applies

A three-part test exists for determining whether claim preclusion applies.[6] The factors include "whether (1) the parties or their privies are the same, (2) the final judgment is valid, and (3) the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case."[7]

The parties or their privies are the same

Nevada recognizes privity under an "adequate representation" analysis, only for persons representing a litigant's interest.[8] Additionally, "contemporary courts…have broadly construed the concept of privity, far beyond its literal and historic meaning, to include any situation in which the relationship between the parties is sufficiently close to supply preclusion."[9] The United States Court of Appeals for the Ninth Circuit now recognizes that privity encompasses a relationship in which "there is substantial identity between parties, that is, when there is a sufficient commonality of interest."[10] The common interpretation recognizes that privity cannot be clearly defined, and, therefore, the facts and circumstances of each case must be closely scrutinized.[11]

The Court found that appellants were parties to both the First and Second Actions, and respondents were privies of the Brownstone Entities in the first action. Tassinari signed the Term Sheet acting as a corporate officer of AVB, and both respondents and the Brownstein entities had their legal rights breached by appellants' failure to provide the property. Additionally, fraud in the inducement is an affirmative

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[5] Nev. R. Civ. Pro. 12(b); Thompson v. City of N. Las Vegas, 108 Nev. 435, 438, 833 P.2d 1132, 1134 (1992).
[6] *See* Five Star Capital Corp. v. Ruby, 124 Nev. 1048, 1054, 194 P.3d 709, 713 (2008), *holding modified on other grounds by* Weddell v. Sharp, 131 Nev., Adv. Op. 28, 350 P.3d 80 (2015).
[7] *Id*.
[8] Alcantara v. Wal-mart Stores, Inc., 130 Nev. 252, 261, 321 P.3d 912, 917 (2014).
[9] Vets North, Inc. v. Libutti, No. CV-01-7773-DRHETB, 2003 WL 21542554, at *11 (E.D.N.Y. Jan. 24, 2003).
[10] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 322 F.3d 1064, 1081–82 (9th Cir. 2003).
[11] *See* Rucker v. Schmidt, 794 N.W.2d 114, 118 (Minn. 2011); Clemmer v. Hartford Ins. Co., 587, P.2d 1098, 1102 (Cal. 1978), *overruled on other grounds by* Ryan v. Rosenfeld, 395 P.3d 689 (Cal. 2017).

defense to a breach of contract claim, which appellants would have been able to use as a defense in the First Action, and which they seemingly realized when filing a motion to amend the First Action's pleadings.

The final judgment is valid

As a matter of first impression, the Court held that that "an order based on an accepted offer of judgment under NRCP 68 constitutes a final judgment for purposes of claim preclusion."

The Second Action is based on the same claims or any part of them that were or could have been brought in the First Action

Claim preclusion applies where "the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case";[12] claims are barred in subsequent actions if they are "based on the same set of facts and circumstances as in the [initial action]."[13] In this case, both claims were based on the same set of facts underlying the Term Sheet: the Brownstein Entities alleged a breach of contract based on the conditions set forth in the Term Sheet, and the appellants' claims in the Second Action are based on the same happenings as the First Action. The appellants' motion to amend demonstrates that all claims could have been brought in the First Action.

The claims were not permissive counterclaims

Despite appellants' argument that the claims in the Second Action had not matured at the time of the responsive pleading and were therefore permissive, the Court disagreed. NRCP 13(a)[14] instructs that "a claim is compulsory if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim," and that "[a] pleading shall state [any compulsory claim] which at the time of serving the pleading the pleader has against any opposing party[.]" The identification of a transaction or occurrence requires an examination of whether the pertinent facts of the claims are "so logically related that the issues of judicial economy and fairness mandate that all issues be tried in one suit."[15] Both claims here arose out of the signing of the Term Sheet, and are so logically related that fairness and judicial economy mandated that they be tried in one suit.

While the appellants were correct that compulsory claims have a maturity exception, "a claim matures when the holder thereof is entitled to a legal remedy"[16] or when it accrues. The appellants' claim had matured, as they were entitled to a legal remedy and their claims had already accrued. Tassinari's fraudulent signature happened prior to the complaint being filed, therefore appellants' claims had matured.

An exception does exist for claims acquired after the responsive pleadings, when a party does not know of a claim until after its pleading. However, lack of knowledge due to negligence or lack of due diligence does not constitute an after-acquired claim. Appellants had the Term Sheet with Tassinari's fraudulent signature for nearly seven years prior to the deposition, and due diligence should have shown identical signatures on two of the signature blocks. Therefore, appellants' claims were compulsory and no exception applied.

No formal barrier existed that prevented appellant's claims in the First Action

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[12] *Five Star* at 1054, 194 P.3d at 713.
[13] *Id*. at 1055, 194 P.3d at 714.
[14] Nev. R. Civ. Pro. 13(a).
[15] *See* United States v. Aquavella, 615 F.2d 12, 22 (2d Cir. 1979).
[16] Stoller Fisheries, Inc. v. Am. Title Ins. Co., 258 N.W.2d 336, 342 (Iowa 1977); Harris Cty. V. Luna-Prudencio, 294 S.W.3d 690, 698 (Tex. App. 2009).

Appellants argued that the Offer's ten-day irrevocable period imposed a formal barrier which is an exception to claim preclusion, and the Restatement (Second) of Judgments[17] does provide for an exception where "[t]he judgment in the first action was plainly inconsistent with the fair and equitable implementation of a statutory…scheme…" However, the exception applies only where "[t]he adjudication of a particular action…in retrospect appear[s] to create such inequities in the context of a statutory scheme as a whole that a second action to correct the inequity may be called for…"[18]

Here, appellants possessed the ability to seek relief by filing a motion under NRCP 60(b).[19] Because the appellants allegedly discovered facts that could have affected the offer of judgment, NRCP 60(b) existed to provide relief and allow the district court to evaluate their claims. The Restatement's exception did not apply because the "adjudication of their case in retrospect does not 'create such inequities in the context of a statutory scheme as a whole that a second action to correct the inequity may be called for…'"[20] For these reasons, the claims in the Second Action were barred.

The terms in the Offer foreclose the claims in the Second Action

Although claim preclusion barred the claims in the Second Action, consent decrees do have the ability to alter judgments. Consent decrees, being contractual, are interpreted in accordance with contract principles.

Here, the Offer's terms indicate a desire to preclude the parties raising further claims. The Offer settled "'all claims between *and among*' the parties 'or those asserted *or that could have been asserted* on behalf of each of them against one another'… These included, 'but [were] not limited to, those [claims] asserted in the [c]omplaint *as well as any related or potential claims that could [have] be[en] asserted in [the first] action* against one another.' (Emphasis added)." This language is supported by the purpose behind NRCP 68 offers of judgment, which is to encourage settlement between parties.

Appellants' claims in the Second Action were based on the allegations that Tassinari acted on behalf of the Brownstone Entities and AVB when committing fraud, and appellants argued in the motion to amend the pleadings that the secondary claims ar[o]se out of the same set of facts set forth in the [c]omplaint." Should ambiguity exist, the Court construes ambiguity against the drafters of the Offer, in this case, the appellants.

The appellants drafting of the Offer and including such broad scope evinces the parties' intent to preclude the type of claims arising in the Second Action. Appellants had an opportunity for relief, which they failed to pursue, therefore the NRCP 68 order entered by the district court stands.

Conclusion

Claim preclusion bars the appellants' claims in the Second Action, and the broad terms selected by the parties in the offer of judgment evidence the parties' intent to bar these claims. Therefore, the district court's order dismissing the Second Action is affirmed.

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[17] Restatement (Second) of Judgments § 26(1)(d) (Am. Law Inst. 1982).
[18] *Id*. at cmt. e.
[19] Nev. R. Civ. Pro. 60(b).
[20] Restatement (Second) of Judgments § 26(1)(d) cmt. e (Am. Law Inst. 1982).