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Kirsch v. Traber, 134 Nev. Adv. Op. 22 (Apr. 5, 2018)

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CIVIL APPEAL: FINAL JUDGMENT

Summary

The Nevada Supreme Court, applying the Restatement (Second) of Judgments definition of “final judgment,” held that it was proper for the district court to accord preclusive effect to a subsequent final judgment from a foreign court.

Background

Galectin Therapeutics, Inc. (Galectin) is incorporated in Nevada and headquartered in Georgia. The directors of Galectin commenced a “stock promotion scheme” which published glowing reviews of Galectin in third-party publications. News of the scheme became public.

Several shareholders filed shareholder derivative actions against Galectin’s directors in the United States District Court for the District of Nevada. Appellant Siu Yip was a named plaintiff in one federal case, which was consolidated with the other federal cases and transferred to the Northern District of Georgia.

After the federal cases were filed, appellant Michael Kirsch filed the instant suit in Clark County district court against Galectin’s directors (Respondents). In Kirsch’s complaint, he conceded that he did not make a demand on Galectin’s board of directors prior to filing suit. He alleged that such a demand would be futile. Siu Yup intervened in Kirsch’s suit.

Respondents moved to dismiss Kirsch’s complaint pursuant to NRCP 23.1. NRCP 23.1 requires a plaintiff to either make a demand upon the directors prior to filing suit or to plead facts showing that “such a demand would have been futile.” The district court noted that the allegations made in the complaint were “not the best,” but still not enough to merit dismissal. Kirsch was granted leave to amend his complaint. The district court sua sponte stayed the case pending a decision in the parallel shareholder derivative action filed in federal court. The federal action was dismissed in an order.²

Again, Respondents moved to dismiss Kirsch’s suit. This time, armed with a federal court’s order of dismissal. The Nevada district court granted the motion to dismiss because the parties were identical between the cases, the issue of demand futility was identical, and the federal court’s dismissal was a final order. Kirsch and Siu Yup filed appeal from the order of dismissal.

Discussion

Under the doctrine of issue preclusion, a Nevada court defers to a foreign court’s final judgment when the same litigants previously litigated the same issue before the foreign court. However, the Nevada court does not defer to the foreign court’s final judgment if it contravenes a final judgment previously entered by a Nevada court. Here, the question is whether a Nevada district court’s order denying a motion to dismiss constituted a final judgment on the issue of demand futility. Simply put, it did not.

¹ By Landon Littlefield.

² See *In re Galectin Therapeutics, Inc. Derivative Litig.*, No. 1:15-CV-208-SCJ, 2015 WL 12806566 (N.D. Ga. Dec. 30, 2015).

Nevada defines “final judgment” as set forth in section 13 of the Restatement (Second) of Judgments

Respondents urged the Court to apply the following definition of “final judgment”: a judgment “that disposes of all the issues presented in the case, and leaves nothing for the future consideration of the court . . .” Appellants point to the definition in the Restatement (Second) of Judgments, which provides that “‘final judgment’ includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect.”

In *Tarkanian*, the Court quoted the Restatement (Second) of Judgments for the proposition that “[f]or the purposes of issue preclusion . . ., ‘final judgment’ includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect.”³ Accordingly, the court affirmed its “long-standing reliance on the Restatement (Second) of Judgments in the issue and claim preclusion context.”⁴ According to that definition, a judgment is final if it is “sufficiently firm” and “procedurally definite.”⁵

The district court’s order denying respondents’ motion to dismiss was not a final judgment

Applying the Restatement’s definition, the Court concluded that the Nevada district court’s order was not a “final judgment” on the issue of demand futility. On the one hand, there is only one factor suggesting that the order of denial could be considered a “final judgment” as to the issue of demand futility: The parties were fully heard. On the other hand, there are numerous factors that militate against the order being a final judgment on the issue of demand futility. First, an order denying a motion to dismiss is not subject to appeal.⁶ Second, the district court’s decision was not supported with a reasoned opinion.⁷ In fact, it was dismissed without explanation.

Further, the district court’s statements during the hearing indicate that it did not intend to fully resolve the issue of demand futility.⁸ First, the district court suggested that the complaint’s allegations were lacking when it described the allegations as “conclusory.” Second, the district court suggested its decision was tentative when it stated, “[t]he allegations . . . are not the best I’ve ever seen, but they are not enough to merit dismissal *at this point*.” (Emphasis added.) Third, the district court intended to revisit the issue when it advised Kirsch to “beef up” the complaint. Together, these statements show that the district court did not intend to fully resolve the demand futility issue. As such, the order was not a final judgment.

Conclusion

The district court’s order reserved the demand futility issue for future determination, thus it was not “final judgment.” Accordingly, the district court was correct in holding that its prior order did not prohibit from according preclusive effect to the federal court’s order. The Court affirmed.

³ Univ. of Nev. v. Tarkanian, 110 Nev. 581, 599, 879 P.2d 1180, 1191 (1994).

⁴ Alcantara v. Wal-Mart Stores, Inc., 130 Nev. at 261 & n.3, 321 P.3d at 917 & n.3 (listing Nevada cases that have relied on the Restatement (Second) of Judgments in the issue and claim preclusion context).

⁵ Restatement (Second) of Judgments § 13 (Am. Law Inst. 1982)

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at cmt. b.