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IN THE COURT OF APPEALS OF INDIANA

JAMES EITELJORG and STAN BHARTI,	)	
	)	
Appellants-Defendants,	)	
	)	
vs.	)	No. 49A05-0912-CV-679
	)	
RALPH LEAN,	)	
	)	
Appellee-Plaintiff.	)	

CERTIFIED INTERLOCUTORY APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Timothy W. Oaks, Judge
Cause No. 49D13-0703-PL-9245

July 27, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

In this interlocutory appeal, James Eiteljorg and Stan Bharti challenge the trial court's denial of their motion for summary judgment in an action brought by Ralph Lean seeking contribution from Eiteljorg and Bharti for violations of the Indiana Securities Law (ISL). On appeal, Eiteljorg and Bharti present two issues for our review, which we consolidate and restate as: Did the trial court err in denying their motion for summary judgment on their defense of claim preclusion?

We reverse and remand.[1]

On March 25, 2003, Charles Reed filed a state-law securities action in Hamilton County Circuit Court against Galaxy Online, Inc. (GOLI) and its officers and directors. On March 28, 2003, Paul Reinken filed a similar suit in Hendricks County Circuit Court. The Reed and Reinken suits were consolidated under Marion County Superior Court Cause No. 49D07-0307-PL-001375 on November 14, 2003. As pertinent to the parties to this action, Reed and Reinken alleged that Eiteljorg, Bharti, and Lean, as directors of GOLI, were liable for violating certain sections of the ISL in conjunction with the exchange by Reed and Reinken of their shares in Abacus Computer Services, Inc. for shares of GOLI.

After discovery and informal settlement discussions, Eiteljorg and Bharti participated in pre-trial mediation with Reed and Reinken on January 6, 2005. A settlement was not reached during the formal mediation session, but the parties continued to negotiate a settlement thereafter. Lean was not served with the Reed and Reinken lawsuits until March 8, 2005, two years after they were filed and after Eiteljorg and Bharti had already engaged in

[1] We heard oral argument in this matter on July 7, 2010, in Indianapolis. We commend counsel on the quality of their written briefs and oral advocacy.

mediation. Prior to Lean filing his answer to the complaint, Eiteljorg and Bharti entered into a settlement agreement with Reed and Reinken. A term of the settlement agreement provided for the discharge of any claims against Eiteljorg and Bharti for contribution or indemnity by any co-defendant in the Reed/Reinken lawsuit. Lean was a co-defendant in the action and was identified in the settlement agreement as a non-settling defendant.

On April 13, 2005, the parties to the settlement agreement submitted to the trial court a joint stipulation of dismissal with prejudice. Lean was served with a copy of the stipulation. The stipulation provided as follows:

> Plaintiffs, Charles D. Reed and Paul A. Reinken, (collectively the "Plaintiffs"), and Defendants, James Eiteljorg, Kenneth D. Taylor, and Stan Bharti (collectively the "Settling Defendants"), each by their respective counsel, stipulate to the Court that they have reached a settlement and compromise of all matters between and among them, and jointly move for and stipulate to the dismissal of the above-referenced actions, with prejudice, including all claims, defenses, crossclaims, counterclaims and third party claims as to the Settling Defendants only. This stipulation shall have no effect on and shall not cause dismissal as to any other Defendant or any other Third Party in the above-referenced matters.

Appellants' Appendix at 147. The stipulation of dismissal did not contain any language referencing a contribution bar. On April 19, 2005, the trial court signed a proposed order submitted by the parties to the settlement agreement and thereby approved the stipulation. In addition to language similar to that contained in the stipulation, the order contained language setting forth a contribution bar:[2]

[2] By way of background, we note that the ISL was modeled in relevant respect after the Federal Securities Act of 1933. Both the Federal Securities Act and the ISL provide for "contribution as in cases of contract" among co-defendants in securities cases. *Compare* 15 U.S.C. § 77K(f) *with* Ind. Code Ann. § 23-2-1-19(d) (West 2007) (repealed by P.L. 27-2007, Sec. 37, eff. 7/1/2008), now codified at Ind. Code Ann. § 23-19-5-9(e) (West, Westlaw through 2010 Public Laws approved and effective through 3/25/2010).

> All pending or potential claims in the nature of contribution or indemnification which could be filed against James Eiteljorg . . . or Stan Bharti by any other person or by any party to the above-referenced actions are extinguished, discharged, satisfied, barred and/or are otherwise deemed unenforceable.

Appellants' Appendix at 152. The order further directed entry of final judgment pursuant to Ind. Trial Rule 54(B) as to Eiteljorg and Bharti. It is undisputed that Lean was not provided with a copy of the proposed order prior to it being signed by the trial court.

After entry of the April 19 order, Eiteljorg and Bharti were dismissed from the action with prejudice. Lean remained a defendant in the Reed/Reinken lawsuit and moved forward with his defense to Reed and Reinken's claims against him. Lean did not, however, challenge the trial court's April 19 order.

As his defense to the action, Lean at all times maintained that as an outside director he was not liable to Reed and Reinken for the alleged securities violations. Ultimately, the trial court granted partial summary judgment in favor of Reed and Reinken and against Lean on the issue of Lean's liability. Lean appealed, and this court affirmed the trial court's grant of partial summary judgment in favor of Reed and Reinken. *See Lean v. Reed*, 854 N.E.2d 79 (Ind. Ct. App. 2006). Our Supreme Court granted transfer and likewise rejected Lean's affirmative defense that he was not liable under the ISL because he did not know, and in the

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Securities cases often involve multiple parties and result in partial settlements when some, but not all, of the parties settle. In such cases a contribution bar is used to facilitate partial settlements. There is no Indiana case addressing the propriety of a contribution bar in the context of a securities case. We therefore turn to Judge McKinney, who explained in *Harden v. Raffensperger Hughes & Co.*, 933 F.Supp. 763 (S.D. Ind. 1996), that a contribution bar "means that a defendant with contribution rights against other defendants who have settled their dispute with the plaintiff will be barred from seeking contribution from them." *Id*. at 765 n.1. Judge McKinney further noted, that "a court may approve as part of a settlement in multiparty cases an order barring claims for contribution unless prohibited from doing so by statute." *Id*. at 771. The validity and propriety of the contribution bar contained in the trial court's April 19 order in the Reed/Reinken lawsuit is not, however, before us.

exercise of reasonable care could not have known, of the facts that created his liability as a GOLI director. *See Lean v. Reed*, 876 N.E.2d 1104 (Ind. 2007). After the issue of Lean's liability was finally adjudicated, Lean settled with Reed and Reinken for $1.73 million.

On March 7, 2007, Lean filed the instant contribution action against Eiteljorg and Bharti. Eiteljorg and Bharti filed their motion for summary judgment on June 26, 2009. Eiteljorg and Bharti's motion for summary judgment presented a question of law regarding the preclusive effect of the trial court's April 19, 2005 order in the Reed/Reinken lawsuit and the propriety of Lean's collateral attack on that final judgment. Lean filed his motion in opposition to Reed and Reinken's motion for summary judgment on July 31, 2009. Eiteljorg and Bharti then filed a reply brief in support of their motion for summary judgment on August 19, 2009. The trial court did not hold a hearing on the motion for summary judgment but decided the case on the basis of the designated record. The relevant facts derive from the written record in the Reed/Reinken lawsuit. On October 15, 2009, the trial court entered its order denying Eiteljorg and Bharti's motion for summary judgment. Eiteljorg and Bharti now appeal.

Our standard of review on appeal from the denial of summary judgment is well-settled:

> Summary judgment is appropriate only where the evidence shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. A party seeking summary judgment bears the burden of making a prima facie showing that there are no genuine issues of material fact and that the party is entitled to judgment as a matter of law. A factual issue is "genuine" if it is not capable of being conclusively foreclosed by reference to undisputed facts. Although there may be genuine disputes over

> certain facts, a fact is "material" when its existence facilitates the resolution of an issue in the case.
>
> When we review a trial court's entry of summary judgment, we are bound by the same standard that binds the trial court. We may not look beyond the evidence that the parties specifically designated for the motion for summary judgment in the trial court. We must accept as true those facts alleged by the nonmoving party, construe the evidence in favor of the nonmovant, and resolve all doubts against the moving party. On appeal, the trial court's order granting or denying a motion for summary judgment is cloaked with a presumption of validity. A party appealing from an order granting summary judgment has the burden of persuading us that the decision was erroneous.
>
> A grant of summary judgment may be affirmed upon any theory supported by the designated evidence.

Van Kirk v. Miller, 869 N.E.2d 534, 539-40 (Ind. Ct. App. 2007) (citations omitted), *trans. denied*.

Eiteljorg and Bharti maintain that Lean's action is barred by the trial court's April 19, 2005 order in the Reed/Reinken lawsuit that contained the contribution bar. Specifically, Eiteljorg and Bharti argue that Lean's action is barred by res judicata. The doctrine of res judicata prevents the repetitious litigation of disputes that are essentially the same. *French v. French*, 821 N.E.2d 891 (Ind. Ct. App. 2005). The principle of res judicata is divided into two branches: claim preclusion and issue preclusion, also referred to as collateral estoppel. *Id*. Here, Eiteljorg and Bharti raise the issue of claim preclusion.

Claim preclusion applies where a final judgment on the merits has been rendered and acts as a complete bar to a subsequent action on the same issue or claim between those parties and their privies. *Id*. When claim preclusion applies, all matters that were or might have been litigated are deemed conclusively decided by the judgment in the prior action. *Dawson v. Estate of Ott*, 796 N.E.2d 1190 (Ind. Ct. App. 2003). The following four

requirements must be satisfied for a claim to be precluded under the doctrine of res judicata: (1) The former judgment must have been rendered by a court of competent jurisdiction; (2) the former judgment must have been rendered on the merits; (3) the matter now in issue was, or could have been, determined in the prior action; and (4) the controversy adjudicated in the former action must have been between the parties to the present suit or their privies. *Small v. Centocor, Inc.*, 731 N.E.2d 22 (Ind. Ct. App. 2000), *trans. denied*.

Eiteljorg and Bharti contend that all of the elements of claim preclusion have been satisfied. Lean responds, arguing that the final judgment entered in the Reed/Reinken lawsuit was not a judgment on the merits.[3] Lean asserts that he was denied due process in that he was not given notice of the contribution bar and was not given an opportunity to object or assert his position with respect thereto. Lean further argues that the judgment was not on the merits because his claim for contribution was not yet ripe as his liability had not yet been determined when the former judgment was entered.

Eiteljorg and Bharti concede that notice of the contribution bar was not formally presented to Lean by way of motion or other method and that there was no hearing on the issue of the contribution bar. In short, Eiteljorg and Bharti essentially concede that Lean was denied due process with respect to entry of the contribution bar. Nevertheless, Eiteljorg and Bharti maintain that the April 19 order in the Reed/Reinken action was a judgment on the merits because Lean took no action to challenge the court's entry thereof after it was entered. Lean does not dispute that he was provided with the court's judgment after it was entered.

[3] The parties do not meaningfully dispute the remaining elements of claim preclusion.

Lean maintains that his actions (or lack thereof) in response to the trial court's entry of judgment in the Reed/Reinken lawsuit are irrelevant to the matter at hand. Indeed, in his brief, Lean's focus is on the validity and wisdom of contribution bars. We reiterate, however, that such issue is not before us. We are herein concerned with the procedural posture of this case and find Lean's actions after the April 19 order to be dispositive.

In its April 19 order, the trial court in the Reed/Reinken lawsuit expressly entered a final judgment thereon pursuant to T.R. 54(B). That order was clear in terms of the contribution bar as against the remaining defendants in the action, one of whom was Lean.[4] Although Lean's liability had yet to be determined, the effect of the order as a bar to his potential right of contribution was unmistakable. Indeed, the contribution bar was significant in terms of the multi-party litigation before the court in the Reed/Reinken action and was at the core of the case in terms of facilitating settlement.

Despite the contribution bar contained in the April 19 order and the fact that the court directed entry of final judgment thereon, Lean sought no relief and took no action to challenge the court's judgment through a motion to correct error or a motion for relief from judgment. Further, Lean did not challenge the contribution bar in his appeal to this court or the Supreme Court. Lean sat on his rights to challenge that judgment, choosing instead to rely on his defense that he should not be liable for the securities violations. Even though Lean was not afforded the opportunity to be heard prior to entry of the final judgment, we cannot sanction his decision to sit silent upon its entry, especially when the effect of the

contribution bar was unmistakable. Lean cannot now, over four years later, collaterally attack the trial court's final judgment and contribution bar entered in the Reed/Reinken action, an action in which Lean was a party. By taking no action with regard to the trial court's judgment in that action, the court's order became a judgment rendered on the merits.

We do not intend to create a bright-line rule of procedure in dealing with contribution bars. It suffices to say, the facts of this case are unique. The designated evidence establishes that Lean's action seeking contribution is barred by res judicata. There being no genuine issues of material fact and given that Eiteljorg and Bharti are entitled to judgment as a matter of law, we conclude that the trial court erred in denying Eiteljorg and Bharti's motion for summary judgment. We therefore reverse the trial court's denial of summary judgment and hereby direct the trial court to enter summary judgment in favor of Eiteljorg and Bharti.

Judgment reversed and remanded.

KIRSCH, J., and ROBB, J., concur.

[4] As noted above, Lean had been served with the complaints, but had yet to file his answer when the trial court entered the order on April 19 approving of the settlement agreement, accepting the stipulation of the parties thereto, and establishing the contribution bar.