IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

3137 WILLOW CREEK ROAD, LLC, *Plaintiff/Appellant/Cross-Appellee*,

v.

GNM COMPANIES, LLC, et al., *Defendants/Appellees/Cross-Appellants,*

KEITH SMITH EXCAVATION, LLC, KEVIN LOLLAR ELECTRIC, LLC, and PEHL CONTRACTING, INC., *Defendants/Appellees.*

No. 1 CA-CV 21-0366
FILED 9-15-2022
AMENDED PER ORDER FILED 9-21-2022

Appeal from the Superior Court in Yavapai County
No. P1300CV202000542
The Honorable Michael P. McGill, Judge

AFFIRMED IN PART, VACATED IN PART

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MEMORANDUM DECISION

Judge Brian Y. Furuya delivered the decision of the Court, in which Presiding Judge David D. Weinzweig and Judge Jennifer M. Perkins joined.

F U R U Y A, Judge:

¶1 3137 Willow Creek Road, LLC ("Owner") appeals from the superior court's dismissal of its complaint against GNM Companies, LLC, Keith Smith Excavation, LLC, Kevin Lollar Electric, LLC, and others (collectively, the "Subcontractors"). GNM Companies, LLC cross appeals the court's issuance of Arizona Rule of Civil Procedure ("Rule") 54(c) finality language and argues the doctrines of preclusion should have barred Willow Creek's complaint. For the following reasons we affirm in part and vacate in part.

FACTS AND PROCEDURAL HISTORY

¶2 This case arises from two construction contracts; one between Owner and Decca Multi-Family Builders, Inc. ("General Contractor"), the general contractor that Owner hired to build an apartment complex in Prescott; and a second contract between the General Contractor and 41 subcontractors ("Subcontractors") hired by the General Contractor.

¶3 In October 2017, Owner filed a third-party complaint and counterclaims against the General Contractor and Subcontractors in Yavapai County Superior Court, alleging tort and contract claims. Those claims were consolidated in November 2018 ("First Action").

¶4 Sixteen months later, in March 2020, Owner moved for leave to amend its complaints and counterclaims, hoping to add a third-party indemnity claim against the Subcontractors based on an indemnity clause in the contracts between the General Contractor and Subcontractors. The superior court denied that motion in June ("June 2020 Order") for procedural and substantive reasons, including because:

(1) "the requested amendments would cause undue delay,"

(2) "the requested amendments are futile," and

(3) "the terms of the indemnity clause relied upon do not provide a cause of action for indemnity to [Owner] for its own first party damages."

¶5 A week later, Owner filed a second lawsuit against the Subcontractors ("Second Action"), asserting the third-party indemnity claim it unsuccessfully sought to add in the First Action. The Second Action was assigned to the same judge hearing the First Action.

¶6 The Subcontractors moved to dismiss the Second Action, arguing it was barred by claim preclusion, law of the case, and claim splitting. The superior court granted the motion, dismissing the Second Action with prejudice because (1) Owner had no cause of action under the indemnity clause, and (2) the court reached the merits of that claim in the First Action. The court explained in May 2021 ("May 2021 Minute Entry") "that the issues raised in [the Second Action] are generally identical to those raised in [the First Action]," and that "the issues raised in the [Second Action] were previously adjudicated by the court" in the June 2020 Order.

¶7 Over the Subcontractors' objection, the superior court included Rule 54(c) finality language. Owner timely appealed, and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") §§ 12-120.21(A)(1) and -2101(A)(1).

DISCUSSION

¶8 Owner argues that the superior court erroneously dismissed its third-party indemnity lawsuit against the Subcontractors. The Subcontractors counter that the court should not have included Rule 54(c) finality language when granting their motions to dismiss the Second Action because it was barred under preclusion doctrine. Claim Preclusion is a question of law reviewed de novo.[1] *See Phoenix Newspapers, Inc. v. Dep't of Corr., State of Ariz.*, 188 Ariz. 237, 240 (App. 1997).

¶9 We affirm because the Second Action was barred by claim preclusion. But we also vacate the superior court's finding in its dismissal order that Owner's third-party indemnity claims are no longer pending in the First Action, to make clear that Owner retains the right to appeal denial of its motion for leave to amend in the First Action.

I. Because the Court Denied Owner's Motion to Amend on the Merits, the Second Action Was Precluded.

¶10 "[A] final judgment on the merits bars further claims by parties or their privies based on the same cause of action." *Corbett v. ManorCare of Am., Inc.*, 213 Ariz. 618, 624 ¶ 13 (App. 2006) (quoting *Montana v. United States*, 440 U.S. 147, 153 (1979)). "For [claim preclusion] to apply, there must have been prior litigation involving the parties who are present in the second lawsuit." *Norriega v. Machado*, 179 Ariz. 348, 351 (App. 1994).

¶11 Arizona courts have discretion to grant or deny leave to amend and are generally directed to "allow amendments liberally." *Tumacacori Mission Land Dev., Ltd. v. Union Pac. R.R. Co.*, 231 Ariz. 517, 519 ¶ 4 (App. 2013). But leave to amend may be denied "when the proposed amendment is futile." *Yes on Prop 200 v. Napolitano*, 215 Ariz. 458, 471 ¶ 40 (App. 2007), citing *Walls v. Ariz. Dep't of Pub. Safety*, 170 Ariz. 591, 597 (App. 1991) (affirming leave to amend would be futile where the amended pleading could be defeated by a motion for summary judgment).

¶12 Arizona courts have not reached the issue of when denial of a motion for leave to amend represents a final judgment on the merits and triggers claim preclusion. Other courts have reached the issue and found that denial of leave to amend has preclusive effect if leave was denied on the merits. *See e.g.*, *Hatch v. Trail King Indus., Inc.*, 699 F.3d 38, 45–46 (1st Cir.

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[1] Consistent with more modern usage, we use the term "claim preclusion" where possible instead of res judicata. *See Tumacacori Mission Land Dev., Ltd. v. Union Pac. R.R. Co.*, 231 Ariz. 517, 519 ¶ 6 n. 4 (App. 2013).

2012); *Curtis v. Citibank, N.A.*, 226 F.3d 133, 139 (2d Cir. 2000); *Arrigo v. Link*, 836 F.3d 787, 799 (7th Cir. 2016); *King v. Hoover Grp., Inc.*, 958 F.2d 219, 222–23 (8th Cir. 1992); *Johnson v. SCA Disposal Servs. of New England, Inc.*, 931 F.2d 970, 975–76 (1st Cir. 1991) ("It is widely accepted that appeal is the plaintiff's only recourse in such a situation."). The purposes of the preclusion doctrines are to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Hawkins v. State, Dep't of Econ. Sec.*, 183 Ariz. 100, 103 (App. 1995). To hold that denial of a motion for leave to amend does not represent a final judgment when evaluating applicability of claim preclusion would defeat these purposes.

¶13 The superior court denied Owner's motion to amend partly on the merits in its June 2020 Order, reasoning "the requested amendments are futile," and "the terms of the indemnity clause relied upon do not provide a cause of action for indemnity to [Owner] for its own first party damages." Owner is precluded from asserting the identical claim in a new lawsuit. *Corbett*, 213 Ariz. at 624 ¶ 13; *Norriega*, 179 Ariz. at 351.

¶14 We also conclude, however, that Owner still has a direct appeal on its motion for leave to amend, but only after a final judgment is entered in the First Action. For that reason, we vacate the superior court's ruling that "the same issues are not pending in the [First Action]."

II. Rule 54(b) Finality.

¶15 Owner argues our supreme court's recent decision in *Banner Univ. Med. Ctr. Tucson Campus, LLC v. Gordon*, 252 Ariz. 264 ¶ 10 (2022) requires that a judgment contain Rule 54(b) finality language for claim preclusion to apply. We are not persuaded. *Banner* did not consider whether claim preclusion applies to denial of leave to amend on the merits. Beyond that, Owner never sought Rule 54(b) finality in the First Action and instead immediately filed the Second Action. Permitting such conduct would allow parties to circumvent our rule against piecemeal appeals at the cost of the parties' and judicial resources. *See Musa v. Adrian*, 130 Ariz. 311, 312 (1981). Rule 54(b) is itself a compromise between our rule against piecemeal appeals and the "desirability of having a final judgment in some situations with multiple claims or parties." *Davis v. Cessna Aircraft Corp.*, 168 Ariz. 301, 304 (App. 1991).

III. Untimely Attorneys' Fees and Costs.

¶16 Owner reasserts arguments that some of the Subcontractors' applications for attorneys' fees and costs were untimely. The superior court considered Owner's arguments and expressly rejected them, finding that "the Court did not notify the parties that the judgment would be final" and that the requests for fees were not untimely. Rule 54(g)(2) places the timing of fee requests within the court's discretion. *See also Aztar Corp. v. U.S. Fire Ins. Co.*, 223 Ariz. 463, 479 ¶ 60 (App. 2010). Even if the fee requests were untimely, the court "does not abuse its discretion by summarily overruling objections to an untimely" application of fees and costs after ruling on the merits. *See Nat'l Broker Assocs., Inc. v. Marlyn Nutraceuticals, Inc.*, 211 Ariz. 210, 218 ¶ 38 (App. 2005). Here, the court acknowledged that while the applications for fees and costs were "not filed within twenty days of the decision," they were nevertheless timely based on the court's conduct and discretion. Owner has not shown this was prejudicial or an abuse of discretion.

¶17 Owner argues that Rule 54(c) language is not a requirement under Rule 54(g) and (f) to trigger the 20-day filing requirement. But this does not restrict the court from considering its own actions when determining whether to address applications for fees and costs on their merits.

¶18 Finally, Owner argues the court cannot extend the time to file applications for fees or costs without specifying a new deadline. Owner does not provide legal authority to support this claim, nor do we know of any. *See Nat'l Broker Assocs., Inc.*, 211 Ariz. at 218 ¶ 38 ("Under [Rule 54(f) and (g)], the trial court has the discretion to extend the time for filing the claims."). So, we deem this argument waived. *See Ritchie v. Krasner*, 221 Ariz. 288, 305 ¶ 62 (App. 2009).

IV. Attorneys' Fees and Costs on Appeal.

¶19 Owner and the Subcontractors request award of their respective attorneys' fees on appeal pursuant to A.R.S. § 12-341.01(A) and ARCAP 21. Although the Subcontractors have prevailed in this appeal, there is much still undecided in the litigation as a whole and neither side has clearly prevailed, where the entire case is concerned. Therefore, in our discretion, we decline to award attorneys' fees at this stage, leaving that issue to the superior court on remand, pending the outcome of the litigation. *See Eans-Snoderly v. Snoderly*, 249 Ariz. 552, 559 ¶ 27 (App. 2020).

However, we award the Subcontractors their costs on appeal upon their compliance with ARCAP 21.

CONCLUSION

¶20 We affirm the superior court's dismissal of the Second Action but vacate its finding that Owner's third-party indemnity claims are no longer pending in the First Action, to make clear that Owner retains a right to appeal the denial of its motion for leave to amend in the First Action after final judgment is entered in that case.