Miglin v. Mellon
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6 UNITED STATES DISTRICT COURT
7 DISTRICT OF NEVADA
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MARILYN MIGLIN,	)	
Plaintiff,	)	2:08-CV-01013-LRH-PAL
v.	)	
JAMES JOSEPH "TED" MELLON,	)	ORDER
Defendant.	)	

Before the court is Defendant James Joseph "Ted" Mellon's Motion to Dismiss (#53[1]). Plaintiff Marilyn Miglin has filed an opposition (#57) to which Defendant replied (#58). Defendant has also filed a "Supplement to Motion to Dismiss" (#59) and a "Second Supplement to Motion to Dismiss" (#60).

I. Facts and Procedural History[2]

This diversity action arises out of Plaintiff's investment in a medical device designed to eradicate and improve spider veins. Dr. Dennis P. Gordon invented and patented the device, and Advanced Medical Products, Inc. ("AMP") later purchased the patent.

Plaintiff and Defendant became friends in 1999, and in February of 2000, Plaintiff first

[1]Refers to the court's docket entry number.

[2]Because the court considers this case on a motion to dismiss, the court takes the complaint's allegations as true. *Simon v. Hartford Life, Inc.*, 546 F.3d 661, 664 (9th Cir. 2008).

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learned of the medical device from Defendant. Several months later, Defendant told Plaintiff that AMP needed five million dollars of additional capital to develop and promote the device. Defendant told Plaintiff that if she invested $2,500,000, he would invest the remaining amount needed. Defendant further advised Plaintiff that AMP would use the money to pay Dr. Gordon for the patent and to promote and produce the device. Plaintiff agreed to invest the money and subsequently did so.

In 2006, Plaintiff discovered that, despite their agreement, Defendant had not invested any money in AMP. In addition, she learned that Defendant had personally withdrawn over $900,000 from her investment in the company.

On April 19, 2007, Plaintiff received a letter from Defendant demanding that Plaintiff (1) pay him $3,500,000 for his stock in AMP and (2) pay a promissory note given to him by AMP.

As a result of this conduct, on August 31, 2007, Plaintiff initiated this action in the state court of Illinois, alleging that Defendant defrauded her in both her initial investment and in the allocation of her subsequent investments. Defendant later removed the case to the U.S. District Court for the Northern District of Illinois, and on July 17, 2008, the case was transferred to the District of Nevada.

II. Discussion

Defendant argues dismissal is appropriate because Plaintiff's claims are barred by the doctrines of claim and issue preclusion and by the applicable statute of limitations. The court will address each of these arguments below.

A. Legal Standard

Before the court considers Defendant's substantive arguments, the court must resolve the parties' dispute over whether the court can consider matters outside the pleadings without converting the motion to dismiss into a motion for summary judgment. In particular, Defendant seeks to admit judicial records from the Eighth Judicial District Court in Clark County, Nevada.

The records stem from four separate lawsuits later consolidated into a single action. Each of the suits concerned the creation and attempted sale of the medical device at issue in this case.

"When ruling on a Rule 12(b)(6) motion to dismiss, if a district court considers evidence outside the pleadings, it must normally convert the 12(b)(6) motion into a Rule 56 motion for summary judgment, and must give the nonmoving party an opportunity to respond." *United States v. Ritchie*, F.3d 903, 907 (9th Cir. 2003) (citations omitted). However, the court may consider certain materials without converting the motion to dismiss into a motion for summary judgment. *Id.* at 908 (*citing Van Buskirk v. CNN*, 284 F.3d 977, 980 (9th Cir. 2000); *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir. 1994)). Such materials include documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice. *Id.*

Courts may take judicial notice of adjudicative facts that are "not subject to reasonable dispute." Fed. R. Evid. 201(b). A fact is not subject to reasonable dispute, and is thus subject to judicial notice, only where the fact is either "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). If matters of public record meet the requirements of Rule 201(b), then the court may consider the documents without converting the motion to dismiss into a motion for summary judgment. *Ritchie*, 342 F.3d at 909.

"Court orders and filing are the type of documents that are properly noticed under [Rule 201(b)]." *Neilson v. Union Bank of Cal.*, 290 F. Supp. 2d 1101, 1112 (C.D. Cal. 2003). In particular, courts may take judicial notice of proceedings of other courts if those proceedings have a "direct relation to matters at issue." *United States ex rel. Robinson Rancheria Citizens Council v. Borneo*, 971 F.2d 244, 248 (9th Cir. 1992) (citations omitted). Nonetheless, the court can only take judicial notice of these documents for the "limited purpose of recognizing the 'judicial act' that the order represents on the subject matter of litigation." *Neilson*, 290 F. Supp. 2d at 1112 *(quoting United States v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994)).

As the documents filed in the Eighth Judicial District Court are directly related to the matters at issue in this case, the court will take judicial notice of the documents. The court notes that it notices these documents for their existence and not for the truth of any disputed facts recited therein.

Because the court takes judicial notice of the records, the court would ordinarily review Defendant's motion under the standard applicable to a motion to dismiss. However, Plaintiff argues that because Defendant filed his answer on January 4, 2008, he cannot now file a motion to dismiss for failure to state a claim. In the Ninth Circuit, where a party files a Rule 12(b)(6) motion to dismiss after filing an answer, the court may consider the motion to dismiss as a motion for judgment on the pleadings pursuant to Rule 12(c) and 12(h)(2). *Aldabe v. Aldabe*, 616 F.2d 1089, 1093 (9th Cir. 1980). The court will do so here.

Rule 12(c) of the Federal Rules of Civil Procedure provides, "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). "Judgment on the pleadings is proper when there are no issues of material fact, and the moving party is entitled to judgment as a matter of law." *General Conference Corp. of Seventh Day Adventists v. Seventh Day Adventist Congregational Church*, 887 F.2d 228, 230 (9th Cir. 1989) (citing Fed. R. Civ. P. 12(c)). "The motion for a judgment on the pleadings only has utility when all material allegations of fact are admitted or not controverted in the pleadings and only questions of law remain to be decided by the district court." 5C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1367 (3d. Ed. 2004). "In ruling on a motion for judgment on the pleadings, district courts must accept all material allegations of fact alleged in the complaint as true, and resolve all doubts in favor of the non-moving party." *Religious Tech. Ctr. v. Netcom On-Line Comm. Servs., Inc.,* 907 F.Supp. 1361, 1381 (N.D. Cal. 1995).

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B. Claim Preclusion

Defendant argues the doctrine of claim preclusion bars Plaintiff from asserting her fraud claims against Defendant. "A valid and final judgment on a claim precludes a second action on that claim or any part of it." *Univ. of Nev. v. Tarkanian*, 879 P.2d 1180, 1191 (D. Nev. 1994) (citation omitted).[3] In Nevada, for claim preclusion to apply, the following requirements must be satisfied: (1) the parties or their privies to the two actions are the same; (2) the first action resulted in a valid final judgment; 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. *Five Star Capital Corp. v. Ruby*, 194 P.3d 709, 713 (Nev. 2008).

The court finds that, as to the parties now before the court, the Nevada state court action did not result in a final judgment on the merits triggering the application of claim preclusion. Of the four suits later consolidated, it appears that the only suit to which Defendant was a party was the suit filed by Dr. Gordon against Plaintiff, Defendant, and several others. The state court records indicate that in early September of 2003, before the cases were consolidated, the court granted Defendant's motion to dismiss and dismissed Dr. Gordon's claims against Defendant *without* prejudice. "Dismissal without prejudice is a dismissal that does not operate as an adjudication upon the merits, and thus does not have a res judicata effect." *Cotter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 397 (1990) (internal quotation marks and citation omitted). Accordingly, the prior state court action does not preclude Plaintiff from asserting her claims against Defendant.[4]

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[3]Federal courts must "give the same preclusive effect to a state-court judgment as another court of that State would give." *Sunkist Growers v. Fisher*, 104 F.3d 280, 283 (9th Cir. 1997). Accordingly, here, the court applies the preclusion law of the State of Nevada.

[4]The court recognizes that the consolidated state court action was ultimately dismissed with prejudice pursuant to a settlement agreement and that dismissal of an action with prejudice pursuant to a settlement agreement amounts to a final judgment on the merits. *See Lawrence v. Steinford Holding B.V. (In re Dominelli)*, 820 F.2d 313, 316-17 (9th Cir. 1987) (citation omitted); *see also Phillbotts v. Blasdel*, 10 Nev. 19 (1874) (holding that where the attorneys stipulated to the dismissal with prejudice of a cause of action, that

C. Statute of Limitations

Defendant also argues dismissal is warranted because the applicable statute of limitations bars Plaintiff's claims. While the parties dispute whether Nevada or Illinois law governs the statute of limitations, the court need not resolve this dispute at this time.[5] Under either the Nevada or Illinois statute of limitations, accrual of a fraud claim occurs when the plaintiff knows or reasonably should know of the fraud. *See Hernandez v. Childers*, 736 F. Supp. 903, 911 (N.D. Ill. 1990) (citation omitted) ("The limitations period commences 'when plaintiff knows or reasonably should know of the injury and knows or reasonably should know that the injury was wrongfully caused.'"); *Howard v. Howard*, 239 P.2d 584, 589 (Nev. 1952) ("[T]he statute of limitation commence[s] to run from the date of the discovery of facts which in the exercise of proper diligence would have enabled the plaintiff to learn of the fraud.") Moreover, in both Illinois and Nevada, "the question of what constitutes sufficient knowledge to place a party under an affirmative duty to discover the fraud or mistake is normally a jury question." *Sierra Diesel Injection Serv. v. Burroughs Corp.*, 651 F. Supp. 1371, 1373 (D. Nev. 1987); *see also Roe v. Jewish Children's Bureau*, 790 N.E.2d 882 (Ill. App. Ct. 2003) (finding that determination of when plaintiffs were on notice of misrepresentation should be determined by finder of fact).

Here, although the fraud at issue primarily stems from events that occurred in 2000, the

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cause of action could not be brought again). Nonetheless, as Defendant had been dismissed before the state court cases were consolidated, Defendant was not a party to the settlement agreement or the resulting dismissal.

Finally, the court notes that in the motion to dismiss, Defendant briefly argues that the doctrine of collateral estoppel requires the court to dismiss Plaintiff's complaint. However, the lack of a final judgment on the merits equally forecloses the application of issue preclusion here. *See Five Star Capital Corp.*, 194 P.3d at 713 (noting a final decision on the merits is among the requirements for the application of issue preclusion); *see also Duncan v. United States (In re Duncan)*, 713 F.2d 538, 544 (9th Cir. 1983) ("[A] dismissal without prejudice is generally not considered an adjudication on the merits of a controversy and this is not entitled to preclusive effect.")

[5]Indeed, it would be difficult for the court to determine which state's law applies based on the information and arguments now before it. The Illinois District Court's removal order indicates that a stock purchase agreement containing a choice of law provision may govern this dispute. However, neither party has submitted the agreement at this time.

parties dispute when Plaintiff was on notice of the facts supporting her fraud claims. Because the court will need to consider disputed facts to determine when Plaintiff was on notice of the alleged fraud, resolution of this issue is not appropriate on a motion to dismiss. Defendant is free to re-assert his statute of limitations arguments and present evidence in support thereof on a motion for summary judgment or at trial.

IT IS THEREFORE ORDERED that Defendant's Motion to Dismiss (#53) is DENIED.

IT IS SO ORDERED.

DATED this 3rd day of November, 2009.

LARRY R. HICKS
UNITED STATES DISTRICT JUDGE