FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-5158

NEWBERRY SQUARE FLORIDA
LAUNDROMAT, LLC,

Appellant,

v.

JIM'S COIN LAUNDRY AND DRY
CLEANERS, INC., JAMES CUCCIA
and ANNA CUCCIA,

Appellees.

On appeal from the Circuit Court for Alachua County.
Donna M. Keim, Judge.

June 8, 2020

JAY, J.

Newberry Square Florida Laundromat, LLC ("Appellant"), appeals the trial court's order dismissing with prejudice its complaint against Jim's Coin Laundry and Dry Cleaners, Inc., and James and Anna Cuccia ("Appellees"), and barring it from filing any further complaints relating to the facts of the case. For the reasons that follow, we reverse.

I.

On May 5, 2018, Appellant filed a ten-count complaint against Appellees. Counts I-IV alleged fraud in the inducement against

each Appellee.[1] Counts V-VIII alleged deceptive and unfair trade practices, also against each Appellee. Lastly, counts IX and X alleged the breach of a non-compete agreement by James and Anna Cuccia, respectively.

According to the complaint's factual allegations, in January 2016, Appellant's principal and owner, Franklin Perez, learned that Jim's Coin Laundry—owned and operated by the Cuccias—was for sale. Perez, acting as Appellant's agent, contacted Patrick Lange, the transaction broker, who provided Perez a prospectus approved by the Cuccias and containing a number of positive written disclosures concerning the business. Perez had participated in multiple meetings with the Cuccias, during which the same advantageous disclosures were made, including that the washers and dryers in the laundromat were fully operational and would remain so for years to come; that the business was debt free and netted a healthy monthly profit; that the laundromat had several large commercial accounts, which would remain with the business after the sale; that there was room to increase revenue with proper advertising; that James Cuccia would mentor Perez for a year after the sale; and that the Cuccias would not compete with the laundromat business within a ten-mile radius. Those representations were material to Perez, since he informed the Cuccias he had no experience running a laundromat; he was a software engineer who was just temporarily out of work; and he anticipated he would not have much time to spend working long hours at the laundromat. In short, Perez was looking for a turnkey operation.

Upon receipt of the prospectus and before making an offer, Perez began to conduct his "due diligence" of the business by asking Lange a number of questions. Although Lange provided Perez with general information, he repeatedly urged Perez to make an offer first, and then conduct his "due diligence." Furthermore, on one particular occasion, he informed Perez that there was

[1] Patrick Lange was also named as a party defendant, but Appellant later voluntarily dismissed the counts that pertained to him.

another prospective buyer in New York who was prepared to make an offer if Perez did not submit his own offer by the next day.

As urged on by Lange, Appellant, through Perez, purchased the laundromat. After the sale, however, Perez discovered that there *was no* New York party standing in the wings, ready and willing to purchase the business. Furthermore, according to the allegations in the complaint, Perez discovered that the representations made by the Cuccias and Lange—to the effect that the laundromat business was set up to virtually run itself and earn the expected income—were false. The complaint set forth the specific misrepresentations and deceptions allegedly made by Appellees; asserted that Appellees knew the representations were false; and claimed that Appellant had spent tens of thousands of dollars in advertising, yet saw no growth in the business—contrary to the Cuccias' assurances.

In August 2018, Appellees filed their Motion to Dismiss Counts V, VI, and VIII—the deceptive and unfair trade practices counts. As its grounds for dismissal, the motion alleged that the transaction between the parties did not qualify as a consumer transaction. Notwithstanding their motion, however, on the same day, Appellees filed their Answer, Affirmative Defenses, Counterclaims, Third Party Claims, and Demand for Jury Trial.

Afterwards, on August 17, 2018, Appellees filed an Amended Motion to Dismiss Counts from Plaintiff's Complaint, which was addressed only to counts I-VIII.[2] Among the grounds advanced for dismissal of counts I, II, and IV—the fraud counts against James Cuccia, Anna Cuccia, and Jim's Coin Laundry, respectively—the Appellees argued that Appellant's claims for fraud in the inducement had previously been litigated in the Alachua County Circuit Court in 2016, when a second amended complaint filed by Franklin Perez against the Cuccias was dismissed with prejudice.

At the hearing on Appellees' amended motion to dismiss, the trial court, sua sponte, took judicial notice of the 2016 case and

[2] Shortly before the hearing on the motion, Appellant filed a notice of voluntary dismissal of counts III and VII relating to Patrick Lange as a defendant.

announced that it already had possession of the file. The court further noted that the parties to that cause of action were Frank Perez as the plaintiff, and the Cuccias as the defendants. The second amended complaint in that cause was dismissed by another judge, and, on appeal, this Court affirmed.[3]

During the hearing, Appellees acknowledged that the present complaint sets forth additional counts that were not included in the 2016 case. But they argued that the principle of res judicata stands for the proposition that a judgment on the merits rendered in a former suit between the same parties upon the same cause of action was conclusive not only as to every matter that was offered and received to sustain or defeat the claim, but also as to every other matter that might have been litigated and determined in that action. They also asserted that Appellant's claim was precluded by collateral estoppel, which "'bars relitigation of the same issue between the same parties which has already been determined by a valid judgment.'" *Kowallek v. Lee Rehm*, 183 So. 3d 1175, 1177 (Fla. 4th DCA 2016) (quoting *Zikofsky v. Mktg. 10, Inc.*, 904 So. 2d 520, 525 (Fla. 4th DCA 2005)). Appellees went on to address the other grounds raised for dismissal of counts I, II, and IV, as well as their grounds for dismissal of counts V, VI, and VIII alleging deceptive and unfair trade practices.

Appellant responded by pointing out that it had not been named as a party in any of the three complaints filed in the 2016 case. It also asserted that it was not "entirely clear" what the claim was based on in any version of the three previously filed complaints. Finally, Appellant requested, as a remedy, leave from the trial court to file an amended complaint.

Ultimately, the trial court granted Appellees' motion to dismiss, finding that in light of the previous litigation, the doctrine of collateral estoppel applied, even while acknowledging that the instant complaint had added additional counts which were not

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[3] *See Perez v. Cuccia*, 252 So. 3d 1287 (Fla. 1st DCA 2018) (affirming the dismissal with prejudice of the second amended complaint on the basis that Perez did not preserve for appeal his argument that the trial court should have permitted him to amend the complaint).

part of the complaints in the 2016 action. The court reasoned that the current action was "based on the same contract and the same underlying allegations of fraud in the inducement that were brought in the 2016 case, and all of that could have been litigated." The court opined it would not be appropriate to move forward in the case before it, given that it had "already proceeded and been dismissed with prejudice, ha[d] gone up on appeal, and ha[d] been affirmed on appeal." It added that Perez had brought suit previously "against the same defendants based on the same contract" and was "now seeking to bring essentially the same case in the name of the corporation he controls . . . Newberry Square Florida Laundromat, LLC," which, the court reiterated, would be inappropriate.[4]

Counsel for Appellant suggested that were he to be granted leave to amend, he could conduct research in order to discern if there were potential claims not associated with those brought in 2016. The trial court did not relent. Instead, it ruled that collateral estoppel also prevented Appellant from bringing any claims that could have been raised in the previous action.

As a result, the trial court entered its order on Appellees' motion to dismiss, granting the motion and dismissing counts I, II, IV, V, VI, and VIII of the complaint with prejudice and barring Appellant "from filing any further [c]omplaint in this case." Expressly omitted from the court's order are counts IX and X of the complaint alleging breach of the non-competition agreement by James and Anna Cuccia, respectively.

Appellant filed a motion for rehearing, asserting that by barring any future complaints, the trial court precluded Appellant from responding to Appellees' counterclaims. But most significantly, Appellant reemphasized Florida's policy of liberally

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[4] In reaching its decision, the trial court relied on *Kowallek* and *Zikofsky*. In *Kowallek*, the Fourth District affirmed the dismissal of a subsequent cause of action based on the doctrine of collateral estoppel. 183 So. 3d at 1177. In *Zikofsky*, it discussed the application of both res judicata and collateral estoppel. 904 So. 2d at 525-27. Neither decision controls the outcome of the instant appeal under the present circumstances.

permitting amendments—especially as it pertains to an initial amendment—unless it is found that the privilege to amend has been abused. The trial court summarily denied the motion for rehearing, and this appeal followed.

II.

"Florida Rule of Civil Procedure 1.190(a) provides that '[l]eave of court [to amend pleadings] shall be given freely when justice so requires.'" *Sorenson v. Bank of N.Y. Mellon as Tr. for Certificate Holders CWALT, Inc.*, 261 So. 3d 660, 662 (Fla. 2d DCA 2018) (second alteration in original). "Behind this rule is a '[p]ublic policy favor[ing] the liberal amendment of pleadings, and courts should resolve all doubts in favor of allowing the amendment of pleadings to allow cases to be decided on their merit.'" *Id.* at 663 (alterations in original) (citations omitted). Accordingly, "a trial court should grant leave to amend, rather than dismiss a complaint with prejudice, unless a party has abused the privilege to amend, an amendment would prejudice the opposing party, or the complaint is clearly not amendable." *Fla. Nat'l Org. for Women, Inc. v. State*, 832 So. 2d 911, 915 (Fla. 1st DCA 2002). If a pleader "'may be able to allege additional facts to support its cause of action or support another cause of action under a different legal theory' [the pleader] should be allowed to amend [its] complaint." *Id.* (alterations added) (citation omitted).

It is axiomatic that on a motion to dismiss, "the trial court must confine its review to the four corners of the complaint, draw all inferences in favor of the pleader, and accept as true all well-pleaded allegations." *Sobi v. Fairfield Resorts, Inc.*, 846 So. 2d 1204, 1206 (Fla. 5th DCA 2003) (citation omitted). "The question for the trial court . . . is simply whether, assuming all the allegations in the complaint to be true, the plaintiff would be entitled to the relief requested." *Cintron v. Osmose Wood Preserving, Inc.*, 681 So. 2d 859, 861 (Fla. 5th DCA 1996). Thus, "'[w]here a motion to dismiss . . . rests on facts outside the scope of the allegations contained in the complaint, the trial court commits reversible error in dismissing the complaint based on those extraneous matters.'" *Hewett-Kier Constr., Inc. v. Lemuel Ramos & Assocs., Inc.*, 775 So. 2d 373, 375 (Fla. 4th DCA 2000) (citation omitted).

An affirmative defense cannot be raised by a motion to dismiss if the motion requires the court "to consider matters outside the four corners of the complaint." *Attias v. Faroy Realty Co.*, 609 So. 2d 105, 106 (Fla. 3d DCA 1992); *see also Williams v. Gaffin Indus. Servs., Inc.*, 88 So. 3d 1027, 1029 (Fla. 2d DCA 2012) (observing that "'[e]ven a relatively straightforward affirmative defense, such as one based upon the statute of limitations, is not a basis for dismissal unless the complaint affirmatively and clearly shows the conclusive applicability of the defense'" (citation omitted)). Or, stated differently, "[a] motion to dismiss should not be granted on the basis of . . . defenses unless the . . . defenses appear on the face of the pleading." *Mettler, Inc. v. Ellen Tracy, Inc.*, 648 So. 2d 253, 255 (Fla. 2d DCA 1994) (alteration added). It follows then that if "the basis for res judicata or collateral estoppel does not appear on the face of the complaint, those grounds cannot be determined by way of a motion to dismiss." *Garnac Grain Co., v. Mejia*, 962 So. 2d 408, 410 (Fla. 4th DCA 2007).

In evaluating a motion to dismiss that alleges an action is barred by a previous adjudication—where there is no reference in the complaint to the prior action and no stipulation that documents from the earlier claim can be considered—the court's analysis is restricted to the allegations of the complaint.[5] Thus, in *Norwich v. Global Financial Associates*, 882 So. 2d 535 (Fla. 4th DCA 2004), where the plaintiff "did not mention or incorporate by reference the prior dissolution action in his complaint," the Fourth District held that "[w]hile the defenses of res judicata and collateral estoppel may be resolved through a motion for summary judgment, the trial court erred when it ventured outside the four

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[5] *See Sekula v. Residential Credit Sols., Inc.*, No. 6:15-cv-2104-Orl-31KRS, 2016 WL 4272203, at *2 (M.D. Fla. Aug. 15, 2016) ("In considering a motion to dismiss, unless the parties stipulate otherwise, the court is restricted solely to considering the allegations found within the four corners of the complaint. . . . The pleadings in this case do not mention the foreclosure case, and the Sekulas have not stipulated to the Court's consideration of any other documents. Accordingly, the issue of res judicata must be pleaded and proven as an affirmative defense." (citing *Livingston v. Spires*, 481 So. 2d 87, 88 (Fla. 1st DCA 1986))).

corners of the complaint, took judicial notice of the final judgment of dissolution of marriage, and dismissed the complaint with prejudice." *Id.* at 537. That is precisely what the trial court did in the present case. *See also Lowery v. Lowery*, 654 So. 2d 1218, 1219 (Fla. 2d DCA 1995) ("We must again note that a motion to dismiss is not to be used as a substitute for a motion for judgment on the pleadings or a motion for summary judgment. . . . Presumably the court's finding of res judicata was premised on [the defendant's asserted reliance on a statute], which bars suits against a discharged personal representative and his surety. We have reviewed the complaint and find that the statutory bar is not apparent on the face of the complaint. As such, a motion to dismiss was not the proper vehicle to assert this defense, or the defense of res judicata." (alteration added) (citations omitted)). [6]

Here, Appellant sought leave to amend its complaint with the goal of alleging different claims that could withstand the defenses of res judicata and collateral estoppel. This request was consistent with Florida law. "Florida courts have recognized that res judicata does not bar a second breach-of-contract action based on a subsequent breach." *Apple Glen Inv'rs, L.P. v. Express Scripts, Inc.*, 700 F. App'x. 935, 937 (11th Cir. 2017) (underscoring in original) (citing *U.S. Project Mgmt., Inc. v. Parc Royale E. Dev., Inc.*, 861 So. 2d 74, 76–77 (Fla. 4th DCA 2003)). In *Apple Glen*, the Eleventh Circuit observed that "the facts necessary to prove Apple Glen's

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[6] We take this opportunity to note that the amended motion to dismiss directed to Appellant's complaint was filed *after* Appellees filed their answer and affirmative defenses. Florida Rule of Civil Procedure 1.140(b) mandates that if defenses are raised by motion, "the motion must be served before the responsive pleading, except for judgment on the pleadings." HENRY P. TRAWICK, JR., FLA. PRACTICE & PROCEDURE § 10:1 (2019-2020 ed.) (footnote omitted); *accord Miller v. Marriner*, 403 So. 2d 472, 475 (Fla. 5th DCA 1981) (alteration added) (holding that rule 1.140(b) "clearly prohibits a motion raising [lack of jurisdiction over the person] after pleading"). Thus, Appellees' amended motion violated the edict of Rule 1.140(b)—because the amended motion was not "made before pleading." Appellant, however, did not raise this issue below.

previous and instant breach-of-contract claims [were] not identical" and "[a]lthough both claims require[d] proof of the same elements, Apple Glen alleged different facts" regarding the breach of a lease in each case. *Id.* (alterations added). Hence, the Eleventh Circuit held that the district court "properly determined that Apple Glen's current lawsuit was not barred by the doctrine of res judicata . . . ." *Id.* at 938 (underscoring in original); *see also Greiner v. De Capri*, 403 F. Supp. 3d 1207, 1225 (N.D. Fla. 2019) ("The doctrine of res judicata . . . is not applicable where the claims in the two cases concern different periods of time. . . . Claims arising subsequent to a prior action need not, and often perhaps could not, have been brought in that prior action; accordingly, they are not barred by res judicata regardless of whether they are premised on facts representing a continuance of the same course of conduct."(citations omitted) (internal quotation marks omitted)); *Woodward v. Woodward*, 192 So. 3d 528, 531 (Fla. 4th DCA 2016) ("The trial court erred in finding that res judicata barred the 2012 action. Because the facts and events that gave rise to the 2012 action are different from the 1996 action, identity of the cause of action is not present, and res judicata does not apply."); *Parker v. State Bd. of Educ. ex. rel. Fla. State Univ.*, 865 So. 2d 559, 560 (Fla. 1st DCA 2003) (holding that "[i]nasmuch as the 'across-the-board' claims in count one pertain to breaches of more than the agreement originally sued on, which were alleged to have taken place after the breaches that were the basis for the original action, we agree with appellant that those claims are not *res judicata*" (quoting *Parc Royale*, 861 So. 2d at 76)); *Parc Royale*, 861 So. 2d at 77 ("The enforceability of contracts is a bedrock principle of our society. When a contract has many provisions, an unsuccessful suit for breach of one provision should not act to bar all further suits for subsequent breaches of that contract.").

Moreover, for collateral estoppel to bar relitigation of the same issue,

> an identical issue must be presented in a prior proceeding; the issue must have been a critical and necessary part of the prior determination; there must have been a full and fair opportunity to litigate that issue; the parties in the two proceedings must be identical; and the issues must have been actually litigated.

Holt v. Brown's Repair Serv., Inc., 780 So. 2d 180, 182 (Fla. 2d DCA 2001). Thus, collateral estoppel "does not apply where unanticipated subsequent events create a new legal situation." *Krug v. Meros*, 468 So. 2d 299, 303 (Fla. 2d DCA 1985); *Univ. Hosp., Ltd. v. State, Agency for Health Care Admin.*, 697 So. 2d 909, 912 (Fla. 1st DCA 1997) (same). Nor does it apply to claims for wrongful acts that occur after the entry of the previous judgment. *Dorvil v. Nationstar Mortg. LLC*, No. 17-23193-CIV, 2019 WL 1992932, at *10 (S.D. Fla. March 26, 2019) ("Simply put, Defendant has failed to demonstrate that the exact issue Plaintiff complains about in this lawsuit – whether Defendant is liable for its alleged failures to honor the parties' post-judgment compromise and stop the foreclosure sale, which resulted in Plaintiff's home being irreversibly sold – was actually litigated and critical to any decision of the trial court in the underlying action or on appeal.").

III.

In light of the foregoing authorities, we hold that Appellant might be able to allege claims that differ in substance and in time from those claims that were alleged in the 2016 complaint. At the very least, Appellant should be afforded an opportunity to try. Further, as noted above, it appears that counts IX and X of the complaint were not explicitly dismissed and remain pending, as do Appellees' counterclaims. Therefore, the trial court erred in dismissing Appellant's initial complaint with prejudice and in barring it from filing any additional complaints in this case. Accordingly, we reverse the Final Order of Dismissal and remand the case with directions that the trial court grant Appellant leave to amend its complaint.

REVERSED and REMANDED with instructions.

MAKAR and BILBREY, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Robert W. Bauer of Bauer Law Group, P.A., Gainesville, for Appellant.

No appearance for Appellees.