Third District Court of Appeal

State of Florida

Opinion filed October 10, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-1494
Lower Tribunal No. 14-11220

National Collegiate Student Loan Trust 2007-3,
Appellant,

vs.

Delvis De Leon,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Mavel Ruiz, Judge.

Sessions, Fishman, Nathan & Israel, LLC, and Jocelyn C. Smith and Dayle Van Hoose (Tampa), for appellant.

Debt Defense Law, and Bruce B. Baldwin, for appellee.

Before SCALES, LINDSEY and LOBREE, JJ.

SCALES, J.

Appellant, plaintiff below, National Collegiate Student Loan Trust 2007-3 ("lender"), appeals a final summary judgment entered in favor of appellee, defendant

below, Delvis De Leon ("borrower"). Because the res judicata doctrine is inapplicable in this case, we reverse the summary judgment and remand for further proceedings.

I. Relevant Background

In 2007, borrower obtained a $25,000 student loan from lender. In 2009, borrower filed a Chapter 7 bankruptcy proceeding in the United States Bankruptcy Court for the Southern District of Florida. While lender was a scheduled creditor in borrower's bankruptcy case, lender did not file a proof of claim or initiate an adversarial proceeding regarding the loan in the bankruptcy case. In September 2009, the bankruptcy court granted borrower a discharge of certain of his debts, but the discharge order made clear that "most student loans" are not subject to discharge.

In April 2014, after borrower had defaulted on the loan, lender brought the instant action against borrower alleging borrower was in breach of his loan agreement. Borrower answered lender's complaint asserting, as affirmative defenses, lender's lack of standing, expiration of the statute of limitations, and res judicata. Borrower's res judicata defense was premised upon borrower's earlier Chapter 7 discharge of "all debts in the bankruptcy estate." Shortly before trial was scheduled to begin in the case, borrower sought summary judgment based on his res judicata defense. On June 21, 2018, the trial court entered an order granting borrower's summary judgment motion. In its order, the trial court concluded:

> Pursuant to *The Educational Research Institute, Inc. v. Rickard* [sic], 924 So. 2d 40 (Fla. 3d DCA 2006), Defendant's 2009 federal bankruptcy, in which Plaintiff was a creditor on express notice but filed no proof of claim, precludes the relitigation of the claims that could have been raised in the context of the bankruptcy proceedings.

Lender appealed the order and the September 18, 2018 final summary judgment entered pursuant to the order.[1] We reverse.

II. Analysis[2]

Borrower argues, as he did below, that, irrespective of the dischargeability of the student loan, lender *could have* brought an adversary proceeding in that Chapter 7 bankruptcy action both to liquidate the amount owed and to confirm the debt's dischargeability. Borrower argues that, because lender did nothing in the bankruptcy action regarding the debt, the doctrine of res judicata precludes lender's instant action to recover the debt.[3] The entirety of borrower's argument is premised upon

[1] On July 23, 2018, lender filed its notice of appeal, appending the June 21, 2018 summary judgment order to its notice. Notwithstanding the filing of this notice of appeal, several months later (on September 18, 2018), the trial court entered the challenged final summary judgment. While lender's notice of appeal might have been premature, because the appeal was not dismissed prior to the entry of the final order, the trial court retained jurisdiction to enter the September 18, 2018 final summary judgment. See Fla. R. App. P. 9.110(l).

[2] A trial court's ruling that res judicata precludes a subsequent lawsuit is a legal determination that we review *de novo*. United Auto. Ins. Co. v. Law Offices of Michael I. Libman, 46 So. 3d 1101, 1103 (Fla. 3d DCA 2010).

[3] "The doctrine of res judicata provides that a final judgment or decree on the merits rendered by a court of competent jurisdiction is conclusive of the rights of the parties and their privies, and constitutes a bar to a subsequent action or suit involving the

the following sentence from this Court's decision in Education Resources Institute, Inc. v. Rickard, 924 So. 2d 40, 41 (Fla. 3d DCA 2006): "Under the federal law of res judicata, a final judgment on the merits of an action precludes the re-litigation of claims that were previously raised *or could have been raised* in a former action." (Emphasis added).

Borrower, though, seizes on this language in the abstract without appreciating the distinguishing facts of Rickard. Rickard, like borrower, filed for bankruptcy protection, scheduling the creditor's student loan debt in his bankruptcy estate. Unlike our case, the Rickard creditor filed a counterclaim in the bankruptcy action seeking to liquidate the amount of damages Rickard owed under the student loan. Id. Rickard unsuccessfully sought to dismiss the counterclaim, and the bankruptcy court subsequently entered a final judgment that found only that the student loan debt was non-dischargeable; the final judgment was silent on the creditor's counterclaim. Id. While Rickard appealed the judgment, the creditor neither filed a cross-appeal nor sought rehearing or clarification of the judgment. Id. The creditor simply filed, years later, a new state court action seeking to liquidate the damages, precisely as it had done in the bankruptcy proceedings. Id.

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same cause of action or subject matter." ICC Chemical Corp. v. Freeman, 640 So. 2d 92, 92 (Fla. 3d DCA 1994).

We affirmed the trial court's summary judgment for Rickard, concluding that, "[a]lthough the bankruptcy court did not specifically address [the creditor's] counterclaim in its final judgment, [the creditor] cannot now pursue *the identical claim it raised* in the bankruptcy proceeding. . . ." Id. (Emphasis added).

In Rickard's bankruptcy proceedings the creditor had both raised, and affirmatively pursued to judgment, the identical claim it sought to pursue later in the creditor's state court action. Thus, the doctrine of res judicata applied in Rickard to prevent Rickard's creditor from again asserting that exact same claim in the subsequent state court action. See Pearce v. Sandler, 219 So. 3d 961, 967 (Fla. 3d DCA 2017) (stating that "a judgment on the merits will . . . bar a subsequent action between the parties on the same cause of action").

The differences between this case and Rickard are as profound as they are dispositive. Unlike the creditor in Rickard, in borrower's bankruptcy proceedings, lender raised no claim, sought no relief, and pursued no remedy. And, unlike in Rickard, the bankruptcy court in this case entered no final judgment purporting to dispose of a claim asserted by lender. Res judicata is limited to a question "actually litigated and decided." Sewell v. Collee, 132 So. 3d 1186, 1188 (Fla. 3d DCA 2014) quoting Dep't of Transp. v. Bailey, 603 So. 2d 1384, 1387 (Fla. 1st DCA 1992). Although in its final order the bankruptcy court generally noted that student loans are not discharged in a Chapter 7 bankruptcy case, the record reflects that the

bankruptcy court was not presented with a question to decide regarding the subject student loan. Therefore, we conclude the res judicata doctrine is inapplicable.

III. Conclusion

In borrower's bankruptcy proceedings, lender did not assert, and the bankruptcy court did not adjudicate, a claim related to borrower's student loan debt. Therefore, lender's instant claim against the borrower is not precluded by the doctrine of res judicata.[4] We reverse the final summary judgment for borrower and remand for further proceedings.

Reversed and remanded.

[4] We express no opinion on any other defense borrower might have to lender's claim.