RENDERED: JULY 25, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001051-MR

TERRY FOSTER D/B/A
DADDIO'S PIZZA — APPELLANT

v.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE RODNEY BURRESS, JUDGE
ACTION NO. 04-CI-00903

FIRST FEDERAL LEASING; AND
MIDWEST LEASING GROUP — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; KELLER, JUDGE; HENRY, SENIOR JUDGE.

KELLER, JUDGE: Terry Foster d/b/a Daddio's Pizza ("Foster"), proceeding *pro se*, has appealed from the April 18, 2007, order of the Bullitt Circuit Court dismissing his claims against First Federal Leasing ("First Federal") and Midwest

Leasing Group ("Midwest Leasing") based upon the doctrines of *res judicata* and collateral estoppel. We affirm.

This is the second time an appeal from this particular action has been before the Court of Appeals. Foster's first appeal was dismissed, as it had been taken from an order that was not final or appealable. Rather than redraft the underlying factual and procedural history, we shall adopt the relevant portion from the first opinion and order:

> When the events leading to this litigation began, Foster - along with his wife, Karen - owned and operated a pizza restaurant in Lebanon Junction, Kentucky. In furtherance of this business, Foster agreed to buy a barbecue cooker from a salesman named Sherman Alex Ollie, who represented that he worked for a vendor named Hickory Equipment Company. To fund this purchase, Ollie contacted Midwest Leasing Group, who sent him a loan application for Foster to sign. Once signed, the application was sent by Midwest Leasing to First Federal for its approval as lessor and funding entity. First Federal approved the application and agreed to fund the purchase; the lease agreement was consequently assigned to First Federal at that time.
>
> On September 21, 1999, Foster signed the lease agreement for a particular "Kook-Rite-Kooker" and also signed a "Delivery and Acceptance Receipt" acknowledging that he had the equipment and was satisfied with it. It does not appear from the record that the cooker had actually been delivered or examined by Foster when he signed these documents, nor does it appear that he reviewed the documents before signing them. The record further reflects that Foster received phone calls from representatives of Midwest Leasing and First Federal during the following days, and that he confirmed to them that he had received the equipment and that it was satisfactory; he also gave First Federal permission to release the purchase funds to the vendor.

Eventually, Foster discovered that the new "Kooker" with which he was supposed to have been provided was instead a used demonstration model that Ollie had left uninstalled in an outbuilding behind the restaurant, and that the serial number thereon did not match the one in the lease agreement. On November 3, 1999, Foster finally informed First Federal of these facts, but was told that he was still obligated to make his lease payments on the equipment, and that his complaints should be directed to Ollie. However, any efforts by both parties to get Ollie to rectify the problem ultimately failed.

Foster's lease payments subsequently became increasingly delinquent and his lease was eventually referred to a collection attorney. The Fosters filed suit against Ollie and First Federal on January 21, 1998 alleging breach of contract, a violation of KRS[1] 367.170, fraud, and deceit. First Federal counterclaimed for breach of contract and requested as damages the entirety of the amount owed under the lease, as well as costs and attorney's fees. Prior to trial, the Fosters obtained a default judgment against Ollie, but the judgment was left unsatisfied. At trial, the trial court granted directed verdicts dismissing the Fosters' claims for breach of contract and fraud against First Federal; the court also granted a directed verdict on First Federal's breach of contract claim against the Fosters. Foster and his wife were consequently adjudged jointly and severally liable for the entire amount due under the lease and for costs and attorney's fees. The decision was affirmed on appeal by this court, and discretionary review was denied by the Kentucky Supreme Court.

On September 16, 2004, Foster filed another complaint – this time against First Federal and Midwest Leasing. The complaint alleged fraud and deceit by both defendants, in violation of KRS 367.170 and 367.381(2); conspiracy to defraud; defamation; and a violation of KRS 355.2A-201(1)(b). On October 11, 2004, First

[1] Kentucky Revised Statutes. (Footnote 2 in original.)

> Federal filed a motion to dismiss Foster's complaint pursuant to CR[2] 12.02(f) "for failure to state a claim upon which relief can be granted based upon the doctrines of res judicata and collateral estoppel." Specifically, First Federal argued that Foster's complaint did nothing more than repeat the allegations made in his first suit against the company; as these matters had already been fully litigated, the aforementioned doctrines prevented him from prosecuting the action again. Midwest Leasing did not file any pleadings with respect to the motion. On November 24, 2004, the trial court entered an order dismissing Foster's action with prejudice "based upon the doctrines of res judicata and collateral estoppel."

Foster v. First Federal Leasing, 2006 WL 1944020, 1-2 (Ky. App., July 14, 2006). The Court of Appeals did not address the merits of Foster's appeal, but rather determined that the order on appeal was not final as it did not adjudicate all of the rights of all of the parties. Specifically, the order did not address Midwest Leasing, a company that was not involved in the first lawsuit and had not been designated as being in privity with First Federal. Because the order was not made final pursuant to CR 54.02, the Court dismissed Foster's appeal. Foster did not seek review of the Court's opinion and order, which became final on September 18, 2006.

Foster quickly brought this Court's ruling to the attention of the circuit court by filing a motion to alter, amend, or vacate, or for a new trial, on July 18, 2006. In his motion, Foster requested that the circuit court make the November 24, 2004, order final and appealable. He also included a request that the circuit court consider the audio tape of the phone call between himself and Lois Berry from First Federal, which he contended exhibited signs of tampering. In response,

[2] Kentucky Rules of Civil Procedure. (Footnote 3 in original.)

First Federal and Midwest Leasing agreed that the November 24th order should be amended to show that it was final and appealable. Midwest Leasing also requested that the circuit court schedule a hearing on the issue of collateral estoppel regarding Foster's claims against it. On August 9, 2006, the circuit court opted to set a hearing pursuant to Midwest Leasing's request, but declined to make the first order final and appealable (by crossing out that portion of the suggested order). On the defendants' motion, the circuit court indicated that it would accept the testimony from the November 29, 2000, trial in Action No. 00-CI-00060 in lieu of live testimony. We note that Foster was represented by counsel during the earlier proceeding. The tendered trial testimony addressed the relationship between First Federal and Midwest Leasing. Specifically, Curt McRay, the owner of Midwest Leasing, testified that his company had an indemnity agreement with First Federal, as was standard in the industry.

The circuit court permitted the parties to submit proposed findings of fact and conclusions of law, and then entered an order on April 18, 2007, again dismissing Foster's claims. The circuit court first stated that Foster's claims against First Federal had been fully and finally adjudicated in the first action, where he was given the opportunity to litigate issues identical to the ones he raised in the second action. Therefore, his current claims against First Federal were barred by the doctrine of *res judicata*. As to Foster's claims against Midwest Leasing, the circuit court determined that Foster should have included those claims in his first action and was barred from bringing such claims in a later action.

Accordingly, the circuit court denied Foster's motion to alter, amend or vacate or for a new trial, granted Midwest Leasing's motion to dismiss based upon collateral estoppel, and dismissed all of Foster's claims against both First Federal and Midwest Leasing. The circuit court also awarded First Federal and Midwest Leasing their taxable costs against Foster. This appeal followed.

On appeal, Foster raises several issues, including arguments that his claims are not barred by the doctrines of *res judicata* or collateral estoppel, that his due process rights were violated when he was denied his right to a jury trial, and that newly discovered evidence supported his allegation that a cover-up had occurred. First Federal and Midwest Leasing argue that Foster's claims are barred and have requested that this Court impose CR 11 sanctions against Foster.

Because the resolution of this case concerns an issue of law, rather than an issue of fact, our review is *de novo*. *Western Kentucky Coca-Cola Bottling Co., Inc. v. Revenue Cabinet*, 80 S.W.3d 787, 790 (Ky. App. 2001).

We shall first address whether Foster's claims against First Federal are barred by the doctrine of *res judicata*. "The rule of res judicata is an affirmative defense which operates to bar repetitious suits involving the same cause of action." *Yeoman v. Commonwealth*, 983 S.W.2d 459, 464 (Ky. 1998). In *City of Louisville v. Louisville Professional Firefighters Ass'n, Local Union No. 345, IAFF, AFL-CIO*, 813 S.W.2d 804, 806 (Ky. 1991), the Supreme Court of Kentucky defined the doctrine as follows: "Under the doctrine of *res judicata* or 'claim preclusion,' a judgment on the merits in a prior suit involving the same

parties or their privies bars a subsequent suit based upon the same cause of action." The *City of Louisville* Court then cited to *Newman v. Newman*, 451 S.W.2d 417, 419 (Ky. 1970), in which the former Court of Appeals addressed the elements of *res judicata*:

> The general rule for determining the question of *res judicata* as between parties in actions embraces several conditions. First, there must be identity of the parties. Second, there must be identity of the two causes of action. Third, the action must be decided on its merits. In short, the rule of *res judicata* does not act as a bar if there are different issues or the questions of law presented are different.

City of Louisville, 813 S.W.2d at 806.

In the present case, the circuit court determined that Foster had been given a full opportunity to litigate identical claims against First Federal in his first lawsuit, which was decided on the merits when the circuit court granted directed verdicts in favor of First Federal. In reviewing the complaints filed in both actions, it is clear to this Court that Foster is raising the identical causes of action related to fraud in the lease agreement on the part of First Federal. Accordingly, we agree with the circuit court that the doctrine of *res judicata* acts as a bar to Foster's current action against First Federal.

Next we shall turn our attention to Foster's claims against Midwest Leasing. Although Midwest Leasing was not a party to Foster's first lawsuit, the circuit court determined Foster impermissibly split his cause of action by not bringing his claims against Midwest Leasing in his first action and dismissed his

claims based on the doctrine of collateral estoppel. We note that while there was testimony that an indemnity agreement existed between First Federal and Midwest Leasing, the circuit court did not make a specific finding that the two companies were in privity.

In *Newman*, the former Court of Appeals stated:

> [I]t has long been recognized that a party may not split his cause of action[;] therefore, if a cause of action should have been presented and the party failed to do so and the matter should again arise in another action, it will be held that the first action was res adjudicata [sic] as to all causes that should have properly been presented.

451 S.W.2d at 419. The Court went on to state:

> The rule that issues which have been once litigated cannot be the subject matter of later action is not only salutary but necessary in the administration of justice. The subsidiary rule that one may not split up his cause of action and have it tried piecemeal rests upon the same foundation. To permit it would not be just to the adverse party or fair to the court.

Id. citing *Hays v. Sturgill*, 302 Ky. 31, 193 S.W.2d 648, 650 (1946). The Court clarified this rule of law in *Gilbert v. Bowling Green Bank & Trust Co*., 460 S.W.2d 14, 15 (Ky. 1970):

> "Where the second action is upon a different claim, demand or cause of action, the established rule is that the judgment in the first action operates as an estoppel only as to the issues, points, or questions actually litigated and determined, and not as to matters not litigated in the former action, even though such matters might properly have been determined therein." 46 Am.Jur.2nd, Judgments, Sec. 418, pp. 586, 587. Kentucky adheres to that rule.

Next, we shall examine the doctrine of collateral estoppel, or issue preclusion. The Supreme Court of Kentucky described this doctrine in *Moore v. Commonwealth*, 954 S.W.2d 317, 319 (Ky. 1997) (citing *Sedley v. City of West Buechel*, 461 S.W.2d 556, 599 (Ky. 1970)), as follows:

> [A] person who was not a party to the former action nor in privity with such a party may assert res judicata *against* a party to that action, so as to preclude the relitigation of an issue determined in the prior action. The rule contemplates that the court in which the plea of res judicata is asserted shall inquire whether the judgment in the former action was in fact rendered under such conditions that the party against whom res judicata is pleaded had a realistically full and fair opportunity to present his case.

Continuing to rely on *Sedley*, the *Moore* Court listed the essential elements of collateral estoppel as:

> (1) identity of issues;
>
> (2) a final decision or judgment on the merits;
>
> (3) a necessary issue with the estopped party given a full and fair opportunity to litigate;
>
> (4) a prior losing litigant.

Moore, 954 S.W.2d at 319.

Applying these rules of law to the facts of the present action, we agree with the circuit court that Foster should have brought his claims against Midwest Leasing in his first lawsuit, as those claims concern the same causes of action he alleged in that action. Foster's claims alleged against Midwest Leasing were previously litigated in his suit against First Federal and found to be meritless.

Foster was afforded a full opportunity to litigate those issues in the earlier suit, despite his argument that the jury was not permitted to make a decision; the circuit court's decision to grant a directed verdict was a decision on the merits. Finally, Foster was a prior losing litigant. Therefore, Foster is not permitted to reassert his same claims against Midwest Leasing in a separate lawsuit.

First Federal and Midwest Leasing have requested that this Court impose CR 11 sanctions on Foster, based on what they describe as his blatant abuse of the legal system. They contend that Foster filed his complaint with the sole intention to harass them and their attorneys, and point out that Foster admitted that a number of attorneys refused to accept his case. CR 11 permits a court to impose sanctions upon an attorney or party who signs a pleading or motion that violates his certification that:

> to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Having considered the request and based upon our review of the record, including the circuit court's order awarding First Federal and Midwest Leasing their taxable costs, we decline to impose CR 11 sanctions on Foster.

For the foregoing reasons, the judgment of the Bullitt Circuit Court is affirmed.

ALL CONCUR.

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