

RENDERED: DECEMBER 21, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000253-MR

BAUMANN PAPER CO., INC.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 16-CI-03648

RUTH WILLOUGHBY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, NICKELL AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: Baumann Paper Co., Inc. appeals from an order of the Fayette Circuit Court granting Ruth Willoughby's motion for judgment on the pleadings. The trial court ruled that a salary continuation agreement (SCA) and salary continuation agreement resolution (Willoughby Resolution), together, constituted a binding and enforceable contract and Baumann Paper breached that

contract. The trial court awarded Willoughby \$37,500 for payments due from November 2014 to December 2016 as well as continued payments of \$1,562.50 a month for an additional 157 months beginning in January 2017. We conclude that offensive non-mutual collateral estoppel precludes Baumann Paper from litigating whether the SCA is an enforceable contract and affirm.

Because the trial court granted Willoughby's motion for judgment on the pleadings, there was no discovery. Consequently, our factual review is limited to Willoughby's allegations in the complaint and Baumann Paper's answer.

Willoughby began her employment with Baumann Paper in 1979 and worked for the company until her retirement in November 2014. In 1987, Baumann Paper discontinued the company's pension plan and provided other retirement options to its employees. Among these options were a 401(k) plan, a profit sharing plan, and an SCA. When Willoughby retired in November 2014, she sought the benefits as set forth in the SCA. After Baumann Paper contended that the SCA was not a binding agreement, on October 3, 2016, Willoughby filed an action against Baumann Paper for breach of contract, unjust enrichment, and fraud.

Willoughby attached to her complaint the Willoughby SCA and the Willoughby Resolution. The SCA was signed by Willoughby and Mitchell Baumann, Baumann Paper's secretary. The SCA states that upon Willoughby's retirement from Baumann Paper, she would receive "one hundred eighty (180)

months of payments as long as she retired after the age of 65 and was in Baumann Paper's continuous employ." The SCA further stated that the benefits were offered as an inducement for Willoughby to remain employed at the company. The complaint alleges that Willoughby continued to be employed by Baumann Paper until she was over the age of seventy. The complaint further alleges that with Willoughby's consent, a life insurance policy on Willoughby was taken out for the purpose of funding the SCA. The Willoughby Resolution approving the SCA details a Board of Directors' meeting held on August 12, 1987.

Baumann Paper answered the complaint denying that the SCA constituted an enforceable contract. It denied that Mitchell Baumann was an agent of Baumann Paper and that there was a Board of Directors' meeting held on August 12, 1987.

When Willoughby filed her action, another former Baumann Paper employee, Kenneth Holland, had filed an action against Baumann Paper seeking to enforce the provisions of an SCA signed by him and Mitchell Baumann containing terms identical to the Willoughby SCA which was also allegedly approved of by corporate resolution at the August 12, 1987 Board of Directors' meeting. Baumann Paper asserted that the Holland SCA was not a binding contract because it was not signed by Baumann Paper's President, Fred Baumann, and asserted that no Board of Directors' meeting was held on August 12, 1987.

After discovery, the trial court ruled Baumann Paper was entitled to summary judgment as a matter of law on all claims and dismissed Holland's complaint with prejudice. Holland appealed.

This Court held that the SCA constituted a valid contract and remanded to the trial court for further proceedings regarding whether Holland suffered a disability, and, if so, his damages. Baumann Paper requested and was granted discretionary review by the Kentucky Supreme Court. While Holland's case was pending in the Supreme Court, the trial court in this case issued its order granting Willoughby's motion on the pleadings

Subsequently, the Supreme Court issued its opinion in *Baumann Paper v. Holland*, 554 S.W.3d 845 (Ky. 2018). We summarize the facts of that case from the Court's opinion.

Holland's employment with Baumann Paper began in 1971 and ended in September 2013, after he took a Family Medical Leave Act (FMLA) absence due to heart complications and his physician determined he could not return to work. *Id.* at 847. Baumann Paper offered, and Holland accepted, early retirement in September 2013. *Id.*

After Holland retired, he sent Baumann Paper a letter demanding the disability income benefits as provided for in the SCA. *Id.* As here, Baumann Paper maintained the SCA was not binding because Mitchell Baumann did not

have authority to sign the SCA and it denied that there was a Board of Directors' meeting on August 12, 1987 in which the SCA was approved by corporate resolution. Holland filed a complaint against Baumann Paper for breach of contract, quantum meruit, unjust enrichment, conversion, and fraud.

The Supreme Court affirmed this Court's holding that the SCA was binding. It held the signature of Baumann Paper's president was not required to satisfy the Statute of Frauds. The Court reasoned that although the SCA lacked the president's signature, the corporate resolution which detailed the SCA and the SCA signed by Mitchell Baumann, as secretary, were separate writings that formed the memorandum of contract required. *Id.* at 848.

The Supreme Court also rejected Baumann Paper's argument that Mitchell Baumann did not have authority to bind the corporation to the SCA. The Court held that Mitchell Baumann "had, at the very least, implied authority to bind the corporation." *Id.* at 849. The Court concluded:

Here, there is evidence that the secretary had the implied authority to sign the SCA when her position in the corporation is combined with the corporate resolution that approved the SCA. Therefore, the SCA and the corporate resolution combine to form a binding agreement between Holland and Baumann Paper regarding the SCA.

Id.

Despite the Supreme Court's ruling, Baumann Paper argues the trial court erred when it granted a judgment on the pleadings prior to any discovery. Under the doctrine of offensive non-mutual collateral estoppel, we disagree.

In *Napier v. Jones By & Through Reynolds*, 925 S.W.2d 193, 196 (Ky.App. 1996) (quoting *City of Louisville v. Louisville Professional Firefighters Ass'n*, 813 S.W.2d 804, 807 (Ky. 1991), the Court noted the distinction between collateral estoppel and res judicata.

[U]nder the doctrine of *res judicata*, a judgment 'on the merits' in a prior suit involving the same parties or their privies bars a second suit on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, such a judgment precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit.

Kentucky has "abandoned the mutuality requirement of *res judicata* in adopting non-mutual collateral estoppel, applicable when at least the party to be bound is the same party in the prior action." *Moore v. Commonwealth*, 954 S.W.2d 317, 319 (Ky. 1997).

Collateral estoppel may be used defensively by the defendant or offensively by the plaintiff. *Revenue Cabinet, Com. of Ky. v. Samani*, 757 S.W.2d 199, 201 (Ky.App. 1988). In this case, the question is whether offensive non-mutual collateral estoppel precludes Baumann Paper from disputing that the Willoughby SCA is a binding contract. To apply, non-mutual collateral estoppel

requires the following elements to be present: “(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; [and] (4) a prior losing litigant.”

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

Offensive non-mutual collateral estoppel is not one without criticism. In *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 329, 99 S.Ct. 645, 650, 58 L.Ed.2d 552 (1979), the Court suggested that “offensive use of collateral estoppel does not promote judicial economy in the same manner as defensive use does.” It pointed out that a potential plaintiff might “adopt a ‘wait and see’ attitude, in the hope that the first action by another plaintiff will result in a favorable judgment.” *Id.*, 439 U.S. at 330, 99 S.Ct. at 651. The Supreme Court also noted that offensive non-mutual collateral estoppel may be unfair to a defendant sued in the first action for only small or nominal damages and, therefore, who was without incentive to defend the first action vigorously. *Id.* In recognition of these concerns, we have previously held that the application of collateral estoppel is “best served on a case-by-case basis as opposed to an automatic imposition of a doctrine.” *Samani*, 757 S.W.2d at 202. In the final analysis, the court must ask whether it is just and fair to apply offensive non-mutual collateral estoppel. *Id.*

Applying the stated law to this case, we first examine whether there are identical issues presented here and in *Holland*. No doubt, there is.

The general rule is that a judgment in a former action operates as an estoppel only as to matters which were necessarily involved and determined in the former action, and is not conclusive as to matters which were immaterial or unessential to the determination of the prior action or which were not necessary to uphold the judgment.

Sedley v. City of W. Buechel, 461 S.W.2d 556, 558 (Ky. 1970). The terms of the Willoughby SCA and the Holland SCA are identical and the corporate resolutions adopting the SCAs are likewise identical.

The remaining requirements for application of offensive non-mutual collateral estoppel are likewise present. We now have the benefit of the Supreme Court's decision that is final and binding.¹ The third requirement also disfavors Baumann Paper's attempt to avoid application of the doctrine. As it readily admits, it was provided the opportunity to conduct discovery in Holland's case and exhausted the means of appellate review available. Finally, Holland's case was decided against Baumann Paper.

There is nothing unfair or unjust about precluding Baumann Paper from continuing to deny existence of a contract entered into with its employee to provide compensation upon retirement when the Kentucky Supreme Court has decided otherwise. Willoughby did not await the result of Holland's case prior to

¹ While we agree with Baumann Paper that application of the doctrine was inappropriate until Holland's case was finally decided by the Supreme Court, that issue is moot.

filing her action. Moreover, the stakes were not less in Holland's case than in Willoughby's case. As noted, Baumann Paper vigorously defended against Holland's action.

We note that in Holland's case the Supreme Court remanded to the trial court for findings regarding Holland's disability and whether the contract was breached. Here, no remand is required. Willoughby's entitlement to benefits under the SCA arises because she worked for Baumann Paper continuously from December 1979 until she retired in November 2014, when she was over seventy years of age. In its answer, Baumann Paper admits those allegations in the complaint are true. According to the terms of the SCA, Willoughby is entitled to the benefits awarded.

For the reason stated, the order granting Willoughby's motion for judgment on the pleadings is affirmed.

ALL CONCUR.

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