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NO. COA12-358
NORTH CAROLINA COURT OF APPEALS

Filed: 6 November 2012

RAYMOND E. VELLINES,
Plaintiff,

v.

Currituck County
No. 10 CVS 248

LORI A. CHILDREE and SUSAN ULMER,
CO-EXECUTRICES OF THE ESTATE OF
DONALD L. VELLINES, DECEASED,
Defendants.

Appeal by plaintiff from order entered 24 October 2011 by
Judge Jerry R. Tillett in Currituck County Superior Court.
Heard in the Court of Appeals 30 August 2012.

*Hornthal, Riley, Ellis & Maland, LLP, by M. H. Hood Ellis,
for plaintiff appellant.*

*Trimpi & Nash, LLP, by John G. Trimpi, for defendant
appellees.*

McCULLOUGH, Judge.

Raymond E. Vellines ("plaintiff") appeals the trial court's
grant of summary judgment in favor of Lori A. Childree and Susan
Ulmer, co-executrices of the estate of Donald L. Vellines
(together "defendants"). For the following reasons, we affirm.

I. Background

On 6 May 1999, plaintiff executed a Deed Of Gift conveying title in fee simple to property described as "Lot 18 in Section Five, Block K, Water View Shores" in Currituck County, North Carolina (the "beach property") to his son Donald L. Vellines ("Don"). The deed was recorded on 7 June 1999, in Book 466, Page 221 of the Currituck County Registry.

Plaintiff alleged that this conveyance was the result of his fear that, having lost his wife in 1998, he might also lose his property as a result of an accident or other unforeseen incident. Plaintiff further alleged that because of his fear, he met with Virginia attorney William O'Brien, now Judge O'Brien, and his three sons, Don, Larry Vellines ("Larry"), and Bert Eugene Vellines ("Bert"), at which time it was agreed that plaintiff would convey the beach property to Don to hold for plaintiff and return to plaintiff when plaintiff was ready to receive it back. Judge O'Brien then prepared the deed.

In 2006, plaintiff requested that the beach property be returned. Don refused. As a result of Don's refusal, plaintiff initiated a civil action in the Circuit Court of the City of

Virginia Beach. In the complaint, plaintiff sought the return of all property delivered to Don, including the beach property. Plaintiff further alleged that the beach property was held by Don in a constructive trust for the benefit of plaintiff.

During a hearing held 24 November 2008 before the Honorable Fredrick B. Lowe, Judge Presiding, plaintiff and Don agreed to a settlement in open court. Regarding the beach property, the settlement provided that:

Lot 18, Section Five, Block K, Water View Shores. That property is going to be conveyed to Bert Eugene Vellines at a price to be determined by an appraisal that's going to be done here very quickly. By Wednesday of this week, Donald Vellines will give the names of two real estate appraisers to Mr. Geroe. They will select one of those, have the property appraised and Mr. Donald Vellines will receive half the value of that appraisal, a closing to occur within 30 days.

The settlement further required Don to return other property alleged to be held by Don for the benefit of plaintiff to plaintiff and provided that "[t]here's to be no further transfers, no further litigation of this matter, and each of the parties will mutually release the other from any cause of action claim that's now existing at the present time." Both Don and plaintiff said they understood and accepted the agreement.

Much of the property held by Don was returned to plaintiff, but closing on the beach property did not occur within the 30-day period specified in the settlement.

Subsequent to the settlement and expiration of the 30-day closing period, the matter came back on for a hearing in the Circuit Court of the City of Virginia Beach on 30 January 2009. At the hearing, plaintiff contended that he did not understand the terms of the settlement and that he did not want the settlement. Bert further testified that he did not enter into the agreement. After hearing from all parties, the Virginia court entered an order affirming and ratifying the agreement between plaintiff and Don as set forth in the transcript of 24 November 2008, except to the extent that it purported to bind Bert. The order also removed the matter from the docket except for Don's cross claim for declaratory relief. From the transcript of the hearing on 30 January 2009, it is clear that the settlement between plaintiff and Don was valid. However, Bert was free to pursue any continued litigation on the matter and the matter would remain pending on the court's docket as to Bert.

On 20 March 2009, upon motion by Don, the Virginia court entered orders nonsuiting Don's cross-claims for declaratory relief against Bert and Larry.

Don later filed a motion to dismiss the case on the grounds that the matters between him and plaintiff were settled by the order entered 30 January 2009 and the matters between him and the remaining defendants in the Virginia action were nonsuited. The matter came on for hearing on 17 July 2009. At the hearing, Bert tried to enforce the terms of the settlement after assuming plaintiff's rights. Don however refused on the grounds that the 3-day closing period specified in the settlement had expired.

On 18 December, the Circuit Court of the City of Virginia Beach entered an order dismissing the action and removing it from the docket. Plaintiff filed this action against Don in Currituck County Superior Court on 21 May 2010, seeking to have a constructive trust imposed upon the beach property. However, Don died on 15 June 2010 before he was served the complaint. An amended complaint was filed 2 September 2010, substituting defendants for Don. Defendants filed motions to dismiss and an answer on 3 November 2010. On 14 September 2011, defendants filed a motion for partial summary judgment.

The motions came on for hearing during the 3 October 2011 Civil Session of Dare County Superior Court, the Honorable Jerry R. Tillett, Judge Presiding. Both parties presented materials in addition to the pleadings which were received by the trial court. On 24 October 2011, the trial court filed an Order Granting Partial Summary Judgment in Currituck County Superior Court. The order further dismissed the complaint and action with prejudice. Plaintiff timely appealed to this Court.

II. Analysis

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.'" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007) (citations and quotations omitted)). "If the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal. [Thus,] [i]f the correct result has been reached, the judgment will not be disturbed even though the trial court may not have assigned the correct reason for the judgment entered." *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989).

On appeal, plaintiff contends that to the extent the trial court granted summary judgment on the grounds that his complaint failed to state a claim to impose a constructive trust, his action was barred by the doctrine of *res judicata*, or he was estopped from challenging the validity of a settlement, the trial court erred. After a complete review of the record, we find that summary judgment was proper on the ground of *res judicata*, and therefore, we affirm.

"Under the doctrine of *res judicata* or 'claim preclusion,' a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privies." *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004). "For *res judicata* to apply, a party must show that the previous suit resulted in a final judgment on the merits, that the same cause of action is involved, and that both [the party asserting *res judicata* and the party against whom *res judicata* is asserted] were either parties or stand in privity with parties." *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 413-14, 474 S.E.2d 127, 128 (1996) (internal quotation marks and citation omitted).

In the present case, the second and third requirements for *res judicata* are not in dispute. First, there is an identity

between the causes of action in the prior Virginia case and the present case where plaintiff is suing to regain the beach property. See *Rodgers Builders v. McQueen*, 76 N.C. App. 16, 23, 331 S.E.2d 726, 730 (1985) ("A party is required to bring forth the whole case at one time . . . ; thus, a party will not be permitted . . . to reopen the subject of the . . . litigation with respect to matters which might have been brought forward in the previous proceeding."). Second, although Don is not the defendant in the present action, the defendants are the co-executrices of Don's estate and are in privity with Don. See *Whitacre P'ship*, 358 N.C. at 36, 591 S.E.2d at 893 ("In general, privity involves a person so identified in interest with another that he represents the same legal right." (internal quotation marks and citation omitted)).

Where the second and third requirements for *res judicata* are satisfied, the determination of whether *res judicata* prevents this action from proceeding beyond summary judgment depends on whether there was a final judgment on the merits in the prior Virginia action.

Here, the prior action was dismissed by the Virginia trial court without reference as to whether the dismissal was with prejudice or without prejudice. If North Carolina law governed

the effect and validity of the Virginia judgment the dismissal would operate as an adjudication upon the merits. See N.C. Gen. Stat. § 1A-1, Rule 41(b) (2011) ("Unless the court in its order for dismissal otherwise specifies, a dismissal under this section and any dismissal not provided for in this rule . . . operates as an adjudication upon the merits.") However, "the validity and effect of a judgment of another state must be determined by reference to the laws of the state wherein the judgment was rendered[.]" *Marketing Systems v. Realty Co.*, 277 N.C. 230, 234, 176 S.E.2d 775, 777 (1970); see also *Boyles v. Boyles*, 59 N.C. App. 389, 391, 297 S.E.2d 405, 406 (1982) *aff'd*, 308 N.C. 488, 302 S.E.2d 790 (1983); *Dansby v. Insurance Co.*, 209 N.C. 127, 183 S.E. 521 (1936).

Under Virginia law, there is no clear answer as to how Virginia courts treat a dismissal that does not specify whether it is with prejudice or without prejudice. Yet, we find it instructive that in *Virginia Concrete Co. v. Board of Sup'rs*, the Supreme Court of Virginia recognized these divergent results and stated that "[m]uch depends on the stage of the proceedings at which the order was entered and the reason for its entry." 197 Va. 821, 826 n.1, 91 S.E.2d 415, 419 n.1 (1956). The court also noted that it is advised that when a case is dismissed for

"reasons not affecting the merits of the case, the order should recite that the dismissal is without prejudice" *Id.* (internal quotation marks and citation omitted).

Considering the stage of the proceedings and the reason for the entry of dismissal in the Virginia action, and considering the fact that the order did not specify that the dismissal was without prejudice, we conclude that the Virginia court's dismissal was with prejudice and a final judgment on the merits.

In the Virginia action, the dismissal of the case was ordered based upon Don's motion to dismiss after all the issues between him and plaintiff had been determined by a valid settlement agreement entered into in open court on 24 November 2008. As recited in open court, the settlement agreement provided that Don would return property to plaintiff that plaintiff had earlier conveyed to Don, including the beach property. Specifically concerning the beach property, closing was to occur within 30 days. Furthermore, the settlement agreement provided that plaintiff and Don "mutually release[] [each] other from any cause of action claim that[] [was] existing at the . . . time."

It is evident from the record of the Virginia proceedings and the subsequent order that the settlement agreement entered

into between plaintiff and Don was valid. First, at the 30 January 2009 hearing, the judge stated, "to the extent that this agreement reflects the agreement made by and between [plaintiff] and [Don], it is valid." Second, by order entered following the 30 January 2009 hearing, the settlement was affirmed and ratified. Moreover, it appears that the agreement was entered into in good faith, as all property held by Don, besides the beach property, was returned to plaintiff in accordance with the terms of the settlement. The fact that plaintiff chose to rely on the performance of a third party not bound by the terms of the settlement is of no consequence in determining the validity of the settlement since it was a risk that plaintiff chose to bear.

In addition to affirming and ratifying the settlement agreement, the order entered 30 January 2009 removed the case from the Virginia docket except as it pertained to Don's cross claims for declaratory relief against Bert and Larry. After Don's cross claims for declaratory relief against Bert and Larry were nonsuited, Don filed a motion to dismiss the Virginia action on 15 July 2009. The Circuit Court of the City of Virginia Beach then dismissed the case on 18 December 2009.

Where there was a valid and binding settlement between

plaintiff and Don that determined all issues between the parties and released each from any future claims then existing, we find that the dismissal of the Virginia action following the settlement was a dismissal with prejudice. Therefore, *res judicata* is applicable and the trial court did not err by entering summary judgment in defendant's favor.

Plaintiff asserts additional arguments in support of his claim that the trial court erred by entering summary judgment in defendant's favor. However, having determined that summary judgment in favor of defendants was proper on ground of *res judicata*, we do not address plaintiff's remaining arguments.

III. Conclusion

For the reasons discussed above, we affirm the order of the trial court.

Affirmed.

Judges HUNTER, JR. (Robert N.) ERVIN concur.

Report per Rule 30(e).