NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

LINDA KERPER Appellant v. TRAVELERS HOME AND MARINE INSURANCE COMPANY Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2488 EDA 2013

Appeal from the Order August 8, 2013
In the Court of Common Pleas of Bucks County
Civil Division at No(s): 2012-00077

BEFORE: PANELLA, J., LAZARUS, J., and JENKINS, J.

MEMORANDUM BY PANELLA, J. **FILED JUNE 25, 2014**

Appellant, Linda Kerper, appeals from the trial court's order dismissing her amended complaint with prejudice. The trial court found that Kerper's amended complaint was barred by *res judicata*. We affirm.

On January 5, 2012, Kerper filed a complaint against Appellee, Travelers Home and Marine Insurance Company ("Travelers"), for breach of contract and bad faith. Kerper's complaint was in response to Traveler's failure to comply with the terms of her insurance contract after Travelers stopped payments to Kerper when she refused to submit herself to Traveler's requested medical examination. Travelers filed an answer with the trial court as well as a motion for judgment on the pleadings, which the trial

court granted. On October 12, 2012, the trial court granted Traveler's motion, granting judgment on the pleadings.

On February 27, 2013, Kerper filed an amended complaint seeking payment of the medical bills from the same insurance policy. Travelers objected to the amendment complaint and filed preliminary objections asserting that Kerper was seeking the exact same claim as it did in January 2012. The trial court agreed and dismissed the amended complaint with prejudice on the basis that it was barred by *res judicata*. This timely appeal followed.

Preliminarily, we note that the trial court found Kerper's issues waived for failure to comply with Rule 1925(b). Specifically, the trial court found that Kerper did not file her Rule 1925(b) statement within the mandated 21 days, ***see*** Pa.R.A.P. 1925(b)(2), and that "[s]he also failed to serve the undersigned." Trial Court Opinion, 11/18/13, at 4.

The trial court's first contention, that the statement was not filed within 21 days, is incorrect. A review of the docket sheets indicates that the trial court's order directing the filing of the Rule 1925(b) statement was entered on September 13, 2013, but the Rule 236 notice for the order was entered on the docket on September 16, 2013. Kerper filed her Rule 1925(b) statement of record in the lower court on October 4, 2013—within 21 days of the Rule 236 notice. ***See Greater Erie Indus. Development Corp. v. Presque Isle Downs, Inc.***, 88 A.3d 222, 226 (Pa. Super. 2014) (en banc).

Rule 1925(b) also requires that Kerper serve a copy of the statement with the trial judge. ***See*** Pa.R.A.P. 1925(b)(1). If an appellant fails to serve the trial judge pursuant to his or her order, the appellant waives all issues on appeal. ***See Forest Highlands Cmty. Ass'n v. Hammer***, 879 A.2d 223, 228 (Pa. Super. 2005). Here, as noted, the trial judge asserts that Kerper failed to serve her a copy.[1] After careful review of the record, we find that Kerper has provided no proof of service that the trial judge was properly served with Kerper's Rule 1925 statement. Kerper's filing of the concise statement with the Prothonotary on October 4, 2013, does not excuse the requirement that trial judge be personally served. ***See id***. Because of Kerper's failure to personally serve the trial judge we find that Kerper has failed to preserve her issues on appeal.

Even if Kerper had properly preserved her appellate issues we would find that the trial court did not abuse its discretion in dismissing Kerper's amended complaint. We begin by noting our well-settled standard of review:

> In determining whether the trial court properly sustained preliminary objections, the appellate court must examine the averments in the complaint, together with the documents and exhibits attached thereto, in order to evaluate the sufficient of the facts averred. The impetus of our inquiry is to determine the legal sufficient of the complaint and whether the pleading would permit recover if ultimately proven. This court will reverse the trial court's decision regarding preliminary objection only where

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[1] Indeed, the Honorable Diane E. Gibbons wrote in her order that "[p]etitioner is further DIRECTED to serve a copy of the Statement upon the undersigned . . . ." Order, 9/13/13, at 1.

> there has been an error of law or abuse of discretion. When sustaining the trial court's ruling will result in the denial of claim or a dismissal of suit, preliminary objections will be sustained only where the case is free and clear of doubt.

Floors, Inc. v. Altig, 963 A.2d 912, 915 (Pa. Super. 2009).

The doctrine of *res* judicata holds that "[a] final judgment upon the merits by a court of competent jurisdiction bars any future suit. . . ." ***Mintz v. Carlton House Partners, Ltd.***, 595 A.2d 1240, 1245 (Pa. 1991) (quoting ***Stevenson v. Silverman***, 208 A.2d 786, 788 (Pa. 1965)).[2] It bars the future litigation of issues raised and, in addition, arguments which might be raised in the future suit. ***See Neotzel v. Glasgow, Inc.***, 487 A.2d 1372, 1376 (Pa. Super. 1985). The doctrine is designed to conserve limited judicial resources, establish certainty in judgments, and protect the party relying upon the judgment from vexatious litigation. ***See Yamulla Trucking & Excavating Co., Inc. v. Justofin***, 771 A.2d 782, 784 (Pa. Super. 2001).

The doctrine of *res judicata* requires that the two actions possess the following common elements: 1) identity of the thing sued upon; 2) identity of the cause of action; 3) identity of the parties: 4) identity of the capacity of the parties. ***See Kelly v. Kelly***, 887 A.2d 788, 791 (Pa. Super. 2005); ***Matternas v. Stehman***, 642 A.2d 1120, 1123 (Pa. 1994). The identity of

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[2] A dismissal in the context of the grant of a motion for judgment on the pleadings is on the merits and constitutes a final order. ***See Brown v. Cooney***, 442 A.2d 324, 326 (Pa. Super. 1982) (noting the "dismissal of an action for failure to state a claim is a final judgment on the merits").

the two causes of action may be determined "by considering the acts complained of and the demand for recovery as well as the identity of the witnesses, documents and facts alleged." ***Kelly***, 887 A.2d at 792. ***See also Dempsey v. Cessna Aircraft Co.***, 653 A.2d 679, 681 (Pa. Super. 1995) (en banc). "If the acts or transaction giving rise to causes of action are identical, there may be sufficient identity between two actions for the summary judgment in the first action to be *res judicata* in the second. ***Dempsey***, 653 A.2d at 681 (citing 10 Standard Pa. Practice 2d, Judgments § 65:50).

In determining if the identity of the causes of action are similar we look to the identity of the witnesses, documents, and facts alleged. ***See Kelly***, 887 A.2d at 792. We also look to see if the same evidence is necessary to prove each action and whether both actions seek compensation for the same damages. ***See id***. As such, a party cannot, by varying the form of action of adopting a different method of presenting her case, escape the operation of the principle that the same cause of action shall not be twice litigated. ***See id***.

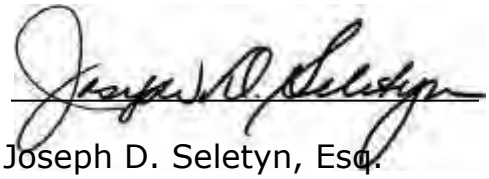
We first note that the judgment on the pleadings issued on October 12, 2012, operates as a final judgment on the merits of the case. (***Kerper I***). Turning now to the second complaint that was dismissed (***Kerper II***) we would find that it is without question that the identity of the parties is the same between both suits. We also would find that the other three

requirements needed to satisfy the *res judicata* doctrine are present in ***Kerper II***. Kerper contends that because the initial complaint was filed for relief under § 1796 of the Pennsylvania Motor Vehicle Financial Responsibility Law and the second was filed under § 1716 of the same law, they are separate causes of action that are not barred by *res judicata*.

However, we have noted that changing the form of action does not excuse a party's second claim from the doctrine of *res judicata*. Like ***Kerper I***, ***Kerper II*** seeks relief from the same insurance policy that resulted from the same accident. Both cases involve the claim of recovering costs from the same medical expenses and requires the same evidence used in ***Kerper I***. As such, we would find that the trial court did not abuse its discretion in granting Travelers preliminary objections and finding that ***Kerper II*** barred by *res judicata*.

Order affirmed. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/25/2014