

REVERSE and REMAND; and Opinion Filed June 7, 2018.



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-17-00889-CV

**LAURIE SOLOMON, Appellant
V.
ANTHONY STONE, Appellee**

**On Appeal from the County Court at Law No. 4
Collin County, Texas
Trial Court Cause No. 004-00111-2017**

MEMORANDUM OPINION

Before Justices Bridges, Brown, and Boatright
Opinion by Justice Brown

Laurie Solomon appeals the trial court's take-nothing judgment in favor of Anthony Stone on his affirmative defense of res judicata. In two issues, Solomon challenges the trial court's determination that res judicata applies. Because Stone did not establish that the prior judgment was a final determination on the merits, we reverse and remand.

In her original petition filed in the county court at law, Solomon alleged she entered into an oral contract with Stone under which he was to make repairs to her rental property. According to Solomon, Stone's work was shoddy. She asserted claims for breach of contract and negligence. Stone answered with a general denial.

The case was set for a bench trial on June 22, 2017. The day before trial, Stone amended his answer to include the affirmative defense of res judicata. The next day, before trial began,

Stone argued Solomon's claims were barred by res judicata. He asserted that "the same facts, the same everything, pertaining to this matter was heard on October the 20th of 2016" in a Collin County justice court. Stone offered a copy of the justice court judgment for record purposes. It lists Solomon as the plaintiff and Stone as the defendant and states:

DIRECTED VERDICT
CAUSE No. 01-SC-16-00240

On this 20th day of October 2016, came to be heard the above entitled and numbered cause, and came both parties of record in person, and announced ready for trial. After the Plaintiff presented his case and rested [sic]. The court granted a Directed Verdict in favor of the Defendant. The case is dismissed without prejudice.

This decision may be appealed within 21 (TWENTY-ONE) days from the date of this letter.

Stone argued to the county court judge that the justice court directed a verdict for him which Solomon did not appeal. Solomon, who represented herself in justice court but was represented by counsel in county court, argued that her prior case was dismissed without prejudice. She indicated the justice court took that action to allow her to refile her case in county court because her damages were more than \$10,000. *See* TEX. GOV'T CODE ANN. § 27.031(a)(1) (West Supp. 2017). The county court found that res judicata applied and rendered a take-nothing judgment for Stone on that express ground.

In her first issue, Solomon contends the trial court erred in dismissing her claims on the basis of res judicata because the county court's judgment was not a prior final determination on the merits. In response, Stone cites no legal authority in his appellate brief. He merely argues that Solomon should have appealed the justice court judgment and asks us to affirm. We agree with Solomon.

Stone bore the burden to prove the affirmative defense of res judicata. *See Cole v. Gwendolyn Parker, Inc.*, No. 05-13-01655-CV, 2015 WL 4626750, at *5 (Tex. App.—Dallas Aug. 4, 2015, no pet.) (mem. op.). Res judicata bars the relitigation of claims that have been finally

adjudicated or could have been litigated in the prior action. *Engelman Irrigation Dist. v. Shields Bros., Inc.*, 514 S.W.3d 746, 750 (Tex. 2017). A party relying on the affirmative defense of res judicata must prove (1) a prior final determination on the merits by a court of competent jurisdiction; (2) identity of parties or those in privity with them; and (3) a second action based on the same claims as were or could have been raised in the first action. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010); *see* TEX. R. CIV. P. 94. We review de novo the trial court's conclusion of law that res judicata applied under the undisputed facts. *See Fulgham v. Fischer*, 349 S.W.3d 153, 157 (Tex. App.—Dallas 2011, no pet.). We will not reverse a trial court's conclusion of law unless it is erroneous as a matter of law. *Id.* at 158.

Although the record does not contain Solomon's justice court pleadings, Solomon does not dispute that the same issues were before the justice court and the county court. The only issue before us is whether Stone proved a prior final determination on the merits by a court of competent jurisdiction. We conclude he did not because a dismissal without prejudice is not a determination on the merits for res judicata purposes. *See Christensen v. Chase Bank USA, N.A.*, 304 S.W.3d 548, 554 (Tex. App.—Dallas 2009, pet. denied); *see also Epps v. Fowler*, 351 S.W.3d 862, 869 (Tex. 2011) (plaintiff remains free to refile same claims seeking same relief after nonsuit without prejudice); TEX. R. CIV. P. 500.2(l) (“Dismissed without prejudice’ means a case has been dismissed but has not been finally decided and may be refiled.”).

While the justice court judgment states that the court granted a directed verdict for Stone, the justice court did not order that Solomon take nothing. Instead, it dismissed her case without prejudice. Express decretal language in a judgment controls over recitals. *State v. Brownlow*, 319 S.W.3d 649, 653 (Tex. 2010). Where there appears to be a discrepancy between the judgment's recitals and decretal, a trial court's factual recitals, which precede the decretal portions of the judgment, do not determine the rights and interests of the parties. *Nelson v. Britt*, 241 S.W.3d 672,

676 (Tex. App.—Dallas 2007, no pet.). Stone did not meet his burden to prove the justice court judgment was a final determination on the merits. The trial court’s conclusion that Solomon’s claims were barred by res judicata is erroneous as a matter of law. We sustain Solomon’s first issue and need not reach her second issue.

We reverse the trial court’s judgment and remand for further proceedings.

/Ada Brown/

ADA BROWN
JUSTICE

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

LAURIE SOLOMON, Appellant

No. 05-17-00889-CV V.

ANTHONY STONE, Appellee

On Appeal from the County Court at Law
No. 4, Collin County, Texas
Trial Court Cause No. 004-00111-2017.
Opinion delivered by Justice Brown,
Justices Bridges and Boatright
participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** and this cause is **REMANDED** to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that appellant Laurie Solomon recover her costs of this appeal from appellee Anthony Stone.

Judgment entered this 7th day of June, 2018.