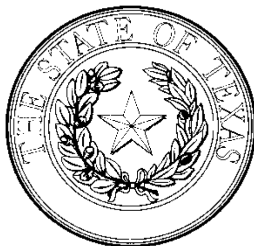
Opinion issued December 15, 2011.



In The

Court of Appeals

For The

First District of Texas

NO. 01-10-01151-CV

MARK MCSHAFFRY, Appellant

V.

LBM-JONES ROAD, L.P., LBM-JONES ROAD, G.P., INC., LEE GITTLEMAN, WDJ MANAGEMENT, L.L.C. & GERALD PETER JACOB, Appellee

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On Appeal from the 125th Judicial District Court
Harris County, Texas
Trial Court Case No. 2010-00130A

MEMORANDUM OPINION ON REHEARING

McShaffry appeals a summary judgment entered in favor of LBM-Jones Road, L.P., LBM-Jones Road, G.P., Inc., Lee Gittleman, WDJ Management, L.L.C., and Gerald Peter Jacob (collectively, "LBM"). At trial, LBM moved for

summary judgment on the basis of the res judicata and collateral estoppel effect of a county court judgment involving these parties and subject matter.

Appellant Mark McShaffry has moved for rehearing. We grant rehearing, withdraw our opinion and judgment of October 27, 2011, and issue the following in their stead. Our disposition of the case remains unchanged. We conclude that McShaffry briefed the res judicata issue but does not address any error in the judgment based on collateral estoppel. The trial court's summary judgment can stand on the issue that McShaffry did not brief. We further conclude that the trial court properly granted summary judgment on res judicata grounds. We therefore affirm.

Background

LBM leased commercial property on Jones Road to Zephyr Fallbrook Partners, L.P. ("Zephyr") for the purpose of operating a pizza restaurant. Mark McShaffry, David Gerow and Jonathan Brindsen signed the lease as guarantors in the event of a default. In a separate contribution agreement, McShaffry, Brindsen and Gerow agreed to certain obligations and rights as partners of Zephyr. Zephyr became insolvent and defaulted on its lease obligations to LBM.

In January 2007, LBM sued Zephyr in Harris County Civil Court No. 3 for breach of the lease agreement and sued Gerow, McShaffry and Brindsen as guarantors on the lease. Although all defendants appeared and answered the

suit, McShaffry and Gerow did not appear for trial. At that bench trial, the county court heard testimony from Gerald Jacob, a principal in the company that manages and leases property on behalf of LBM. Jacob testified about the status of the leased property and the damages for a default under the lease. The county court then entered a final judgment in favor of LBM for $675,563.37, holding Gerow and McShaffry jointly and severally liable as guarantors on the lease. The final judgment dismissed Zephyr and Brindsen from the lawsuit.

Pursuant to a settlement agreement, LBM assigned Brindsen the county court judgment. After efforts to collect the judgment from McShaffry were unsuccessful, the court appointed a receiver to collect the county court judgment.

In April 2010, McShaffry filed this lawsuit in district court. McShaffry claimed that LBM: (1) interfered with the contribution contract between McShaffry, Brindsen and Gerow by settling with Brindsen and assigning the county court judgment to him; and (2) engaged in fraud by providing false testimony at trial. Specifically, McShaffry asserted that LBM had settled with Brindsen and then, pursuant to the settlement agreement, agreed to participate in a "sham" trial in the county court and assign the resulting judgment to Brindsen.

LBM moved for summary judgment on the basis of res judicata and collateral estoppel, contending that McShaffry's suit presented an impermissible collateral attack on the county court judgment. McShaffry responded that res

judicata did not bar his claims because his claims against LBM did not accrue until after the county court had entered a judgment against him. The trial court granted summary judgment in favor of LBM.

Discussion

Standard of Review

An appellate court reviews de novo a trial court's ruling on a summary judgment motion. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding,* 289 S.W.3d 844, 848 (Tex. 2009). To succeed on a summary judgment motion under Texas Rule of Civil Procedure 166a(c), a movant must establish that there is no genuine issue of material fact so that the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *KPMG Peat Marwick v. Harrison Cnty. Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). A defendant moving for summary judgment on an affirmative defense must prove each element of its defense as a matter of law, leaving no issues of material fact. *Garza v. Exel Logistics, Inc.*, 161 S.W.3d 473, 475 n.10 (Tex. 2005). Res judicata and collateral estoppel are affirmative defenses. TEX. R. CIV. P. 94.

To conclusively establish a matter, the movant must show that reasonable minds could not differ as to the conclusion to be drawn from the evidence. *City of Keller v. Wilson,* 168 S.W.3d 802, 816 (Tex. 2005). The evidence is reviewed in the light most favorable to the non-movant, crediting favorable evidence if

reasonable jurors could and disregarding contrary evidence unless reasonable jurors could not. *Fielding*, 289 S.W.3d at 848 (citing *City of Keller,* 168 S.W.3d at 827). When, as here, a trial court's order granting summary judgment does not specify the grounds relied upon, we affirm the summary judgment if any of the summary judgment grounds is meritorious. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 873 (Tex. 2000).

Analysis

When multiple grounds for summary judgment exist and the trial court does not specify the ground on which it granted summary judgment, an appellant must negate on appeal all possible grounds. *Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 473 (Tex. 1995); *Ellis v. Precision Engine Rebuilders, Inc.*, 68 S.W.3d 894, 898 (Tex. App.—Houston [1st Dist.] 2002, no pet.). If the appellant fails to negate each possible ground upon which the judgment may have been granted, an appellate court must uphold the summary judgment. *See Ellis*, 68 S.W.3d at 898. An appellant also may assert a general complaint that the trial court erred in granting summary judgment. *See Malooly Bros., Inc. v. Napier*, 461 S.W.2d 119, 121 (Tex. 1970). McShaffry, however, makes no such assertion.

LBM moved for summary judgment against McShaffry on the grounds of res judicata and collateral estoppel. Res judicata and collateral estoppel are independent affirmative defenses. Because the order granting summary judgment

did not specify the particular grounds on which it was rendered; McShaffry must defeat each of these grounds. *See Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex. 1989).

Res judicata has been used as a broad term for the related concepts of claim preclusion (res judicata) and issue preclusion (collateral etoppel). *Barnes v. United States Parcel Serv., Inc.*, No. 01-09-00648-CV, 2010 WL 6808024, at *4 (Tex. App. Houston—[1st Dist.] June 23, 2011); *see Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 628 (Tex. 1992). However, within this doctrinal umbrella there are two distinct legal theories—namely res judicata and collateral estoppel. *Barr*, 837 at 628. Res judicata prevents the relitigation of a claim or cause of action that has been finally adjudicated in a prior lawsuit. *Id*. Collateral estoppel, or issue preclusion, prevents relitigation of a fact issue resolved in a prior dispute. *Id.* Although claim preclusion and issue preclusion are related concepts, each provides a distinct affirmative defense. Therefore, McShaffry must negate on appeal both grounds upon which the trial court's judgment may have been granted.

We conclude that McShaffry has not briefed the alternative ground of collateral estoppel. *See Williams v. Crum & Forster Commercial Ins.*, 915 S.W.2d 39, 42–43 (Tex. App.—Dallas 1995) (noting that issue is waived when appellant fails to cite legal authority in support of issue, as required by rules of appellate procedure, and thereby affirming summary judgment because appellant had not

properly challenged each ground asserted in support of summary judgment), *rev'd on other grounds*, 955 S.W.2d 267 (Tex. 1997). McShaffry confines his appeal to res judicata, asserting that "[t]he trial court erred in granting Appellees' res judicata Motion for Summary Judgment because McShaffry did not have a claim against Appellees until after the trial court entered a Judgment resolving all claims against all parties in the previous lawsuit." McShaffry offers no legal analysis, argument, citations to the record, nor any authorities to support his contention on appeal that his claims are not barred by collateral estoppel. *See* TEX. R. APP. P. 38.1(h). Because the trial court could have granted summary judgment on the basis that McShaffry's claims were barred by either res judicata or collateral estoppel, and McShaffry did not brief the collateral estoppel ground, we must affirm the summary judgment. *See Ellis*, 68 S.W.3d at 898; *Iglesia Hispana Nueva Vida Houston, Inc. v. Rosin*, No. 01-06-00048-CV, 2007 WL 1633723, at *3 (Tex. App.—Houston [1st Dist.] June 7, 2007, no pet.) (mem. op.) (affirming summary judgment on collateral estoppel because appellant did not address it as possible ground for trial court's summary judgment ruling); *McIntyre v. Wilson*, 50 S.W.3d 674, 681–82 (Tex. App.—Dallas 2001, pet. denied) (upholding summary judgment because trial court could have granted summary judgment on ground that appellant failed to adequately brief, by offering no discussion on issue, making passing reference to ground in other issues, and citing generally to law review article).

Nonetheless, we conclude that the trial court properly granted summary judgment based on res judicata. Res judicata prevents parties and those in privity with them from relitigating a case that a competent tribunal has adjudicated to finality. *Ingersoll–Rand Co. v. Valero Energy Corp.*, 997 S.W.2d 203, 206 (Tex. 1999). Res judicata bars claims or defenses that could have been litigated in the earlier suit but were not. *Id.* at 206–07. "The doctrine is intended to prevent causes of action from being split, thus curbing vexatious litigation and promoting judicial economy." *Id.* at 207. Under the doctrine of res judicata, a party is precluded from litigating a claim in a pending action if: (1) in a previous action, a court of competent jurisdiction rendered a final determination on the merits of a claim; (2) the parties that litigated the prior claim are identical to or in privity with the parties litigating the pending claim; and (3) the pending claim (a) is identical to the prior claim or (b) arises out of the same subject matter as the prior claim and could have been litigated in the previous action. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010); *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 652 (Tex. 1996).

Judgments—except judgments void for lack of jurisdiction—are not subject to collateral attack; they may only be challenged on direct attack by appeal. *Browning v. Placke*, 698 S.W.2d 362, 363 (Tex. 1985). A collateral attack, unlike a direct attack, seeks to avoid the effect of a judgment in a later proceeding not

instituted for the purpose of modifying or vacating the judgment, but instituted in order to obtain some relief that the judgment currently stands as a bar against. *Henderson v. Chambers*, 208 S.W.3d 546, 550 (Tex. App.—Austin 2006, no pet.) (holding that wife's suit based on fraud claim was collateral attack on prior judgment); *see Kendziorski v. Saunders*, 191 S.W.3d 395, 408 (Tex. App.—Austin 2006, no pet.) ("A collateral attack . . . 'is an attempt to avoid the effect of a judgment in a proceeding brought for some other purpose.'") (quoting *Employers Cas. Co. v. Block*, 744 S.W.2d 940, 943 (Tex. 1988)). "[T]he prohibition against collateral attack extends to claims that false swearing or fraud of a party to the judgment renders it voidable." *In re Cantu*, 961 S.W.2d 482, 486 (Tex. App.—Corpus Christi 1997, no writ) (citing *Glenn v. Dallas Cnty. Bois D'Arc Island Levee Dist.*, 268 S.W. 452 (Tex. 1925); *Kaphan v. Fid. & Deposit Co. of Md.*, 564 S.W.2d 459, 462 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.)).

McShaffry sued LBM alleging that LBM interfered with a contract between McShaffry, Brindsen and Gerow by settling with Brindsen and assigning the county court judgment to him. McShaffry also alleged that LBM engaged in fraud by procuring false testimony in the county court. According to McShaffry, Brindsen paid LBM to settle the breach of commercial lease claim in exchange for LBM's participation in a county court trial. LBM then assigned the resulting judgment to Brindsen so that Brindsen could obtain more money from

McShaffry than he could have under their agreement. In all material respects, McShaffry's claims in this case attack the judgment against him in the county court, because each of them stems from allegations that LBM obtained perjured testimony, with Brindsen's help, in the earlier suit. McShaffry was a party to the suit, but chose not to appear at the trial. McShaffry's claims present a collateral attack on the county court judgment: they are in substance claims that the county court proceedings were intrinsically fraudulent. But he makes no showing that he could not raise have raised these claims before the county court, during the proceeding to which he was a party. *See Browning v. Prostok*, 165 S.W.3d 336, 346 (Tex. 2005) (holding that bondholders' claims that directors fraudulently undervalued company in earlier bankruptcy proceeding were intrinsic to bankruptcy court's order and collateral attack on the judgment); *see also Henderson*, 208 S.W.3d at 550 (holding that wife's suit based on claims her ex-husband and lawyers fraudulently mischaracterized property was collateral attack on prior judgment). Because McShaffry's claims represent an attack on the integrity of the county court proceedings—proceedings that involved the same nucleus of operative facts and to which he was a party—his claims present an impermissible collateral attack and are res judicata.[1] *See Browning*, 165 S.W.3d at 346; *see also Henderson*, 208 S.W.3d at 550.

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[1] Although the parties did not raise the issue, we note that judgments from

county courts are not always accorded the same common-law finality as judgments from other courts. Section 31.004 of the Texas Civil Practice and Remedies Code abrogates the general common law rules of res judicata and collateral estoppel for county courts, justice courts, and small claims courts. *C/S Solutions, Inc., v. Energy Maint. Servs. Group, LLC*, 274 S.W.3d at 310; *see Houtex Ready Mix Concrete & Materials v. Eagle Constr. & Envtl. Serv.*, 226 S.W.3d 514, 519 (Tex. App. Houston—[1st Dist.] 2006, no pet.).

The statute provides:

> (a) A judgment or a determination of fact or law in a proceeding in a lower trial court is not res judicata and is not a basis for estoppel by judgment in a proceeding in a district court, except that a judgment rendered in a lower trial court is binding on the parties thereto as to recovery or denial of recovery.
>
> . . .
>
> (c) For the purposes of this section, a 'lower trial court' is a small claims court, a justice of the peace court, a county court, or a statutory county court.

TEX. CIV. PRAC. & REM. CODE ANN. § 31.004(a),(c) (West 2008). Texas courts have interpreted this statute to mean that res judicata and collateral estoppel only bar claims "actually litigated" in courts of limited jurisdiction. *C/S Solutions, Inc.*, 274 S.W.3d at 310. Nonetheless, prior county court judgments are binding as to recovery or denial of recovery; section 31.004 does not preclude the res judicata effect of a county court judgment on matters actually tried. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 31.004. Because McShaffry's suit attacks matters actually tried in an effort to avoid the recovery obtained against him, section 31.004 does not bar the res judicata defense asserted here.

Conclusion

We conclude that the trial court's judgment, as based on collateral estoppel grounds, was not challenged on appeal; the judgment may stand on this basis alone. Further, the trial court properly granted summary judgment based on the affirmative defense of res judicata. Accordingly, we affirm the judgment of the trial court.

Jane Bland
Justice

Panel consists of Chief Justice Radack and Justices Bland and Huddle.