Opinion issued July 28, 2016

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00058-CV

JAMIE GENENDER, Appellant

V.

LARRY KIRKWOOD AND USA STORE FIXTURES, LLC, Appellees

On Appeal from the 55th District Court
Harris County, Texas
Trial Court Case No. 2013-59766

CONCURRING AND DISSENTING OPINION

This suit represents appellant Jamie Genender's third suit on the same facts. In this suit, Genender appeals the trial court's summary judgment in favor of Larry Kirkwood and USA Store Fixtures, L.L.C. ("Store Fixtures") on her claims for

DTPA violations, fraud, unfair debt collection practices, and trespass arising out of her purchase of used shelving from Store Fixtures. The majority affirms the summary judgment on all claims except on Genender's fraud claim, which it remands for trial.

I believe the majority's opinion on Genender's fraud claim incorrectly construes Civil Practice and Remedies Code section 31.004(c) as preventing collateral estoppel from barring Genender's putative fraud claim when all ultimate issues of fact material to Genender's fraud claim were previously litigated to an adverse final judgment against Genender in county court. That statute provides that determinations of fact or law by a lower trial court are not the basis for res judicata or collateral estoppel in a trial in 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." TEX. CIV. PRAC. & REM. CODE ANN. § 31.004(a) (West 2015) (emphasis added). Denial of recovery *does* bar relitigation of the same ultimate issues of fact. Here, a binding prior judgment was rendered on the same ultimate issues of fact denying Genender recovery. The majority opinion, by undoing that judgment, writes the exception out of section 31.004. Therefore, while I join the majority opinion as to Genender's other claims, I respectfully dissent with respect to her fraud claim. I would affirm the summary judgment in favor of Store Fixtures as to all of Genender's claims.

Propriety of Summary Judgment

In five issues on appeal, Genender contends that the trial court erred in granting traditional summary judgment on her DTPA, fraud, and unfair debt collection claims. In a sixth issue, Genender contends that the trial court erred in granting a no-evidence summary judgment on her trespass claim.

Genender's *DTPA*, Fair Debt Collection and Trespass Claims

I agree with the majority that Genender's DTPA claims are time-barred, that she failed to state a claim under the Texas Debt Collection Act, and that she produced no evidence to support her trespass claim, so that the trial court properly granted summary judgment on those claims. *See* Slip Op. at 5–8, 12–14. I therefore join the majority opinion with respect to these issues.

I disagree, however, with the majority's reversal of the trial court's summary judgment on Genender's fraud claim. I would hold that this claim is barred by collateral estoppel.

Fraud

Store Fixtures moved for summary judgment on Genender's fraud claims, asserting that the county court's previous final judgment on her breach of contract claim served as res judicata on her fraud claim arising out of the same previously adjudicated facts that were essential to the county court's adverse judgment against her. In issue three, Genender contends that "the District Court erred in granting

summary judgment as to [her] fraud claim[,] as res judicata does not preclude a cause of action in one case because it could have been argued as an affirmative defense in another."

The majority, relying on Civil Practice and Remedies Code section 31.004(c) and case law construing it, agrees with Genender that her fraud claim survives to be tried in the district court after her contract claim, based on the same essential operative facts and seeking the same relief, was litigated to a final judgment in the county court. I would hold that Genender's fraud claim is barred by collateral estoppel, or issue preclusion, because the ultimate issues of fact essential to Genender's fraud claim have already been litigated to a final judgment against her in a court of record. Therefore, these ultimate issues may not be relitigated in a collateral proceeding on a different legal theory. To allow this practice is contrary to the purpose of the statute the majority reads as permitting it and is wasteful of legal and judicial resources.

A. Res Judicata, Collateral Estoppel, and Section 31.004

Res judicata, broadly speaking, is the generic name for a group of related concepts concerning the preclusive effect of judgments. *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 628 (Tex. 1992). "Res judicata, or claims preclusion, prevents the relitigation of a claim or cause of action that has been finally adjudicated, as well as related matters that, with the use of diligence, should have

been litigated in the prior suit." *Id.*; *Tex. Gen. Indem. Co. v. Tex. Workers' Comp. Comm'n*, 36 S.W.3d 635, 638 (Tex. App.—Austin 2000, no pet.). For res judicata to apply, the following elements must be present: (1) a prior final judgment on the merits by a court of competent jurisdiction; (2) the same parties in each action; and (3) a second action based on the same claims as were raised or could have been raised in the first action. *Igal v. Brightstar Info. Tech. Grp., Inc.*, 250 S.W.3d 78, 86 (Tex. 2008); *Citizens Ins. Co. v. Daccach*, 217 S.W.3d 430, 449 (Tex. 2007). This doctrine prevents splitting a cause of action in order to "bring all litigation to an end, prevent vexatious litigation, maintain stability of court decisions, promote judicial economy, and prevent double recovery." *Barr*, 837 S.W.2d at 629.

Also within the doctrine of res judicata as a generic concept is collateral estoppel, or issue preclusion, which "prevents relitigation of particular issues already resolved in a prior suit." *Id.* at 628. Collateral estoppel is narrower than res judicata. *Tex. Capital Sec. Mgmt., Inc. v. Sandefer*, 80 S.W.3d 260, 264 (Tex. App.—Texarkana 2002, pet. struck). "Collateral estoppel applies when an issue decided in the first action is actually litigated, essential to the prior judgment, and identical to an issue in a pending action." *Casa Del Mar Ass'n, Inc. v. Gossen Livingston Assocs., Inc.*, 434 S.W.3d 211, 219 (Tex. App.—Houston [1st Dist.] 2014, pet. denied). This doctrine prevents the relitigation of any ultimate fact issue previously litigated even though the subsequent suit brings different causes of

action. *Williams v. City of Dallas*, 53 S.W.3d 780, 785 (Tex. App.—Dallas 2001, no pet.). To establish collateral estoppel, a party must establish three factors: "(1) the facts sought to be litigated in the second action were fully and fairly litigated in the first action; (2) those facts were essential to the judgment in the first action; and (3) the parties were cast as adversaries in the first action." *Sysco Food Servs., Inc. v. Trapnell*, 890 S.W.2d 796, 801 (Tex. 1994); *Rexrode v. Bazar*, 937 S.W.2d 614, 617 (Tex. App.—Amarillo 1997, no writ).

Both res judicata and collateral estoppel have been partially abrogated by statutes for those situations in which, as here, the initial lawsuit is brought in a court of limited jurisdiction and the subsequent suit is brought in district court. This statutory exception to res judicata and collateral estoppel is codified in Civil Practice and Remedies Code section 31.004, which provides:

> 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.

TEX. CIV. PRAC. & REM. CODE ANN. § 31.004(a). A lower trial court includes a constitutional county court or a statutory county court. *Id.* § 31.004(c)

Under section 31.004(c), a party is not barred from pursuing a claim in district court after receiving a favorable or unfavorable judgment on *other* claims in county court, even when the two suits involve the same parties and issues. *See*

Kizer v. Meyer, Lytton, Alen & Whitaker, Inc., 228 S.W.3d 384, 391 (Tex. App.—Austin 2007, no pet.); *Webb v. Persyn*, 866 S.W.2d 106, 107 (Tex. App.—San Antonio 1993, no writ); *McClendon v. State Farm Mut. Auto Ins. Co.*, 796 S.W.2d 229, 231 (Tex. App.—El Paso 1990, writ denied). This is an exception to general estoppel rules. *McClendon*, 796 S.W.2d at 232; *see Kizer*, 228 S.W.3d at 391–92. Its purpose is "to preclude a judgment in a court of limited jurisdiction from controlling the results in a suit in a district court." *McClendon*, 796 S.W.2d at 232.

"In the situation where a litigant brings a lawsuit in a district court subsequent to filing suit in a court of limited jurisdiction, section 31.004 . . . modifies the common law so that 'res judicata bars only those claims that were *actually litigated* in the limited-jurisdiction court.'" *Kizer*, 228 S.W.3d at 391 (quoting *Wren v. Gusnowski*, 919 S.W.2d 847, 848–49 (Tex. App.—Austin 1996, no writ)) (emphasis added). An issue is "actually litigated" when it is properly raised, by the pleadings or otherwise, submitted for determination, and determined. *Van Dyke v. Boswell, O'Toole, Davis & Pickering*, 697 S.W.2d 381, 384 (Tex. 1985) (citing Restatement (Second) of Judgments § 27 cmt. d (1982)). "In other words, under section 31.004, res judicata does not bar unlitigated claims simply because they *could have* been litigated in the lower trial court." *Kizer*, 228 S.W.3d at 391 (emphasis added).

In *Kizer*, the Austin Court of Appeals began its analysis "by comparing the pleadings filed in each court" and stated, "If the pleadings in the district court allege claims not encompassed in the pleadings in the county court at law, then those new claims are not barred by res judicata and may be litigated in the district court." *Id.* Thus, in *Kizer*, the court of appeals held that, even though breach of warranty claims brought by Kizer in the county court at law and breach of contract claims in the district court "essentially complain about the same conduct . . . and likely seek, in large part, the same damages, the claims are distinct and require proof of different elements." 228 S.W.3d at 391–92. Accordingly, the majority in this case, following *Kizer*, concludes that Genender's fraud claim was not "actually litigated" in the county court action because "Genender's county court pleadings do not include a fraud claim, no fraud claim was submitted to the jury, and the jury did not determine whether fraud occurred," and she did not assert fraud in the county court case as a defense to Store Fixtures' breach of contract case. Slip Op. at 11. I believe the majority misconstrues both the language of section 31.004 and the holding in *Kizer*.

B. Analysis

The majority acknowledges that the "breach of contract claims in the county court at law and the fraud claims in the district court essentially *complain about the same conduct*—Store Fixtures' sale of defective fixtures and the representations made therewith—and likely *seek, in large part, the same damages*," but it concludes that these claims were not "actually tried" because the contract and fraud "claims are distinct and require proof of different elements." Slip Op. at 11–12 (emphasis added) (citing *Kizer*, 228 S.W.3d at 391–92). Accordingly, the majority concludes that, "pursuant to § 31.004(a) of the Civil Practices and Remedies Code, Genender's fraud claim is not precluded by the doctrine of res judicata," and it reverses the summary judgment "as it relates to Genender's fraud claims" and remands those claims for further proceedings. *Id.*

I disagree with this narrow reading of the term "actually litigated" to refer only to *claims* that were *named* in the pleadings in the previous court and *not* to the litigation of *ultimate issues of fact* that were litigated to denial of recovery—here, a take-nothing judgment in Store Fixtures' favor. *See Williams*, 53 S.W.3d at 785 (stating that collateral estoppel "prevent[s] the relitigation of any ultimate fact issue previously litigated even though the subsequent suit brings a different cause of action"). Section 31.004(c) provides that collateral estoppel will not bar a subsequent action "*except* that a judgment rendered in a lower trial court is binding

thereto as to recovery or denial of recovery." TEX. CIV. PRAC. & REM. CODE ANN. § 31.004(a) (emphasis added). Here, the proviso in section 31.004(a) was satisfied.

The record on appeal from the district court establishes that Genender litigated the facts essential to support each of the elements of her fraud claim before a jury as the basis for her breach of contract claim in the county court, and she received an adverse judgment. To support her breach of contract claim and defend against the breach of contract claim brought by Store Fixtures against her in the county court, Genender submitted evidence regarding representations by Store Fixtures as to the quality, make, consistency, and condition of the shelving and as to attributes that the shelving did not have, including, among other, representations that the shelving would be shipped complete and on time, would be "a six" or better in quality and appearance, and would be replaced if defective—the exact same allegations she now brings as DTPA and fraud claims in the district court.

Genender testified in the county court that she decided to buy used shelving from Store Fixtures "[b]ecause they represented that it was like new and less expensive for starting a business and it would get to me quicker," and she testified that Store Fixtures' representations on its website "played a big part, between the delivery and the condition of the shelving," in her deciding to enter the contract with Store Fixtures. In other words, in the county court, she argued fraudulent inducement to contract based on the same representations on which she bases her

fraud claim in the district court. She also testified in the county court that she asked Store Fixtures how long the processing and delivery would take and that both the quote she received and a statement from a Store Fixtures representative said five to six days. Genender also expected specific merchandise based on those communications, but she did not get the delivery at the expected time and the merchandise was not of the quality she expected.

In this suit in the district court, Genender again alleged that the delivery took longer and therefore these statements were fraudulent. In the county court, Genender also testified that she relied on Store Fixtures' website and on her conversation with the representative for what she expected to receive. Genender testified that the Store Fixtures employee represented that the quality of the shelving would be "an eight" on a scale of one to ten, and that he knew she needed the shelving by a particular date. The jury in the county court did not agree with Genender and found that she, and not Store Fixtures, had breached the contract.

After receiving this adverse judgment denying her recovery on her contract claim—which satisfied the proviso in section 31.004(a)—Genender alleges these same facts as fraudulent misrepresentations in her district court claim.

The elements of fraud are:

> (1) that a material representation was made; (2) the representation was false; (3) when the representation was made, the speaker knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) the speaker made the representation with the

> intent that the other party should act upon it; (5) the party acted in reliance on the representation; and (6) the party thereby suffered injury.

Italian Cowboy Partners Ltd. v. Prudential Ins. Co., 341 S.W. 3d 323, 337 (Tex. 2011). The facts going to the proof of each of those elements have already been found against her.

Here, although Genender did not plead fraud in the county court, every element of Genender's fraud claim was fully litigated before a jury and tried to an adverse final judgment in a court of record in which Genender was denied recovery. Thus, her fraud claim in the district court was barred by the common-law collateral estoppel doctrine. *See Sysco Food Servs.*, 890 S.W.2d at 801 (holding that to establish collateral estoppel, party must establish that "the facts sought to be litigated in the second action were fully and fairly litigated in the first action; (2) those facts were essential to the judgment in the first action; and (3) the parties were cast as adversaries in the first action").[1]

Although, in general, the common-law doctrine does not generally apply under section 31.004 when a case litigated in a lower trial court is relitigated in

[1] I also note that Genender's fraud claim would also have been barred from trial in the district court by the economic loss rule if it was not barred by collateral estoppel. That rule prevents recasting contract claims as fraud claims for purposes of seeking an additional recovery. *See Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 12–13 (Tex. 2007) ("The economic-loss rule . . . generally precludes recovery in tort for economic losses resulting from the failure of a party to perform under a contract."); *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986) ("When the injury is only the economic loss to the subject of the contract itself, the action sounds in contract alone.").

district court, Genender's fraud claim is barred from relitigation by the exception in section 31.004. This is so because, under its plain language, section 31.004 excepts from its bar to the assertion of res judicata and collateral estoppel any ultimate issue of fact actually litigated and essential to the judgment in a prior suit, regardless of whether the second suit brings the same cause of action, when *recovery* has been granted or denied based on those ultimate facts. *See Williams*, 53 S.W.3d at 785; *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 31.004(a); *Barr*, 837 S.W.2d at 629 (stating that res judicata prevents splitting cause of action in order to "bring all litigation to an end, prevent vexatious litigation, maintain stability of court decisions, promote judicial economy, and prevent double recovery"). If this were *not* the case, the proviso in section 31.004(a) would have no meaning. *See* TEX. GOV'T CODE ANN. § 311.021(2) (West 2013) ("In enacting a statute, it is presumed that . . . the entire statute is intended to be effective.").

I would hold, therefore, that because the ultimate issues of fact essential to proof of Genender's fraud claim were fully litigated to denial of recovery in the county court, this claim is barred by the doctrine of collateral estoppel from re-litigation in the district court under the exception to the bar of collateral estoppel in Civil Practice and Remedies Code section 31.004.

CONCLUSION

I would affirm the trial court's summary judgment in favor of Store Fixtures as to all of Genender's claims.

Evelyn V. Keyes
Justice

Panel consists of Chief Justice Radack and Justices Keyes and Higley.

Justice Keyes, concurring in part and dissenting in part.