NO. 12-16-00205-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

NATIONAL LAND RECORDS, LLC, APPELLANT	***§***	***APPEAL FROM THE 158TH***
V.	***§***	***JUDICIAL DISTRICT COURT***
PEIRSONPATTERSON, LLP AND DIGITAL DOCS, INC., APPELLEES	***§***	***DENTON COUNTY, TEXAS***

MEMORANDUM OPINION

National Land Records, LLC, (NLR) appeals from a summary judgment granted in favor of Peirson Patterson LLP and Digital Docs collectively referred to as (Peirson) in a contract case. In two issues, NLR challenges the trial court's summary judgment ruling and award of attorney's fees. We affirm.

BACKGROUND

According to the record, NLR and Peirson entered into an agreement for NLR to provide document recording services to Peirson. In January 2015, NLR sued Chase Manhattan Mortgage Corporation and JP Morgan Chase Bank NA (JPMC) for breach of contract and quantum meruit, alleging that JPMC, through its purported agent Peirson, contacted NLR on JPMC's behalf and arranged for recordation of documents related to JPMC's mortgage portfolios. NLR alleged that, in order to record the documents on behalf of JPMC, NLR agreed to advance or prepay county recording fees, eRecording fees, postage, courier fees, and abstracter's fees as needed. NLR further alleged that JPMC would pay an agreed service fee and reimburse NLR for expenses incurred in the recording process. In this first lawsuit, NLR did not sue Peirson. Rather, NLR alleged that JPMC had intentionally granted Peirson the authority to act on JPMC's behalf and

that Peirson was acting within the scope of its authority in securing recording services from NLR.

In February, the first lawsuit was removed to federal court and JPMC filed a motion to dismiss for failure to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6). NLR did not respond to the motion and, as a result, NLR was deemed unopposed to the motion. The federal court granted the motion.

NLR filed the instant lawsuit on March 23, and added Peirson as a defendant, but alleged the same facts, causes of action, and theory of liability. NLR alleged that it sent an itemized list of services and costs to Peirson, which totaled approximately $3.3 million and that Peirson paid approximately $2.8 million toward those invoices, leaving a balance owed of $485,497.75. NLR asserted causes of action for suit on sworn account, breach of contract, and quantum meruit.

On April 25, 2016, Peirson filed a Second Amended Answer, Affirmative Defenses and Counterclaims. On April 26, Peirson moved for summary judgment on its affirmative defense of res judicata. A week before the hearing on the motion for summary judgment, NLR amended its petition to remove JPMC as a defendant. The trial court granted partial summary judgment, ordering that NLR take nothing on its claims. Peirson subsequently nonsuited its counterclaims against NLR and the trial court entered final judgment on June 9. This appeal followed.

RES JUDICATA

In its first issue, NLR contends that the trial court erred in granting summary judgment, because Peirson failed to establish all of the elements of its affirmative defense of res judicata.

Standard of Review and Burden of Proof

An appellate court reviews a summary judgment de novo. ***Valence Operating Co. v. Dorsett***, 164 S.W.3d 656, 661 (Tex. 2005). In determining whether there is a fact issue precluding summary judgment on evidentiary grounds, evidence favorable to the nonmovant is taken as true and the reviewing court makes all reasonable inferences and resolves all doubts in the nonmovant's favor. ***Id***.

To prevail on a traditional summary judgment motion, the movant has the burden of proving that he is entitled to judgment as a matter of law and that there is no issue of material fact. TEX. R. CIV. P. 166a(c); ***Provident Life & Accident Ins. Co. v. Knott***, 128 S.W.3d 211, 215-16 (Tex. 2003). A defendant moving for summary judgment must either (1) disprove at

least one essential element of the plaintiff's cause of action, or (2) plead and conclusively establish each essential element of an affirmative defense. ***Cunningham v. Tarski***, 365 S.W.3d 179, 185-86 (Tex. App.—Dallas 2012, pet. denied).

Applicable Law

Under the "transactional" approach to res judicata, which Texas follows, a judgment in an earlier suit "precludes a second action by the parties and their privies, not only on matters actually litigated, but also on causes of action or defenses which arise out of the same subject matter and which might have been litigated in the first suit." ***Getty Oil v. Ins. Co. of N. Am.***, 845 S.W.2d 794, 798 (Tex. 1992) (quoting ***Barr v. Resolution Trust Corp***., 837 S.W.2d 627, 630 (Tex. 1992)); *see* ***Amstadt v. U.S. Brass Corp***., 919 S.W.2d 644, 653 (Tex. 1996). Res judicata has three elements: "(1) a prior final judgment 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 raised or could have been raised in the first action." ***Amstadt***, 919 S.W.2d at 652.

There is no definition of privity which can be applied to all cases involving the doctrine of res judicata. ***Benson v. Wanda Petroleum Co.***, 468 S.W.2d 361, 363 (Tex. 1971). "[T]he determination of who are privies requires careful examination into the circumstances of each case. . . ." ***Id***. "[P]rivity connotes those who are in law so connected with a party to the judgment as to have such an identity of interest that the party to the judgment represented the same legal right." ***Id***. Those in privity with a party may include persons who exert control over the action, persons whose interests are represented by a party, or successors in interest to a party. ***Getty Oil***, 845 S.W.2d at 800-01. It may also include persons who are vicariously responsible for the conduct of the party to the first suit. ***Id***. at 801 n.8.

Discussion

In this case, there appears to be no dispute that Peirson met its burden to prove the first and third elements of res judicata. The federal court's dismissal of the first law suit pursuant to Federal Rule 12(b)(6) for failure to state a claim is a judgment on the merits. *See* ***Federated Dep't Stores, Inc. v. Moitie***, 452 U.S. 394, 399, n.3, 101 S. Ct. 2424, 2428, 69 L. Ed. 2d 103 (1981). The claim that NLR brings against Peirson in the most recent lawsuit is the same as that asserted against JPMC in the first lawsuit, in which Peirson was only designated as JPMC's

agent. NLR attached identical invoices to its original petitions in both lawsuits. The allegedly unpaid invoices were issued to Peirson and not JPMC.

Nevertheless, NLR contends that Peirson and JPMC are not in privity. A week before the hearing on Peirson's motion for summary judgment in the instant case, NLR amended its petition removing JPMC as a defendant. It argues that, in the first suit, it alleged no contractual relationships with Peirson, whereas the second suit alleges a contract between NLR and Peirson. NLR further contends that in the first lawsuit, it did not allege that Peirson engaged in wrongful conduct as agent of JPMC. NLR also argues that Peirson cannot assert privity, because Peirson filed a counterclaim denying any agency relationship with JPMC.

In determining whether privity exists between the defendants in the first suit and those in the second, "[i]t is important to look to the claim that was litigated in the first suit as well as the relationship of the new defendant to the former one." ***Hammonds v. Holmes***, 559 S.W.2d 345, 347 (Tex. 1977). Here, the two lawsuits share the same operative facts, the same relationships, and the same claims. The second lawsuit added Peirson as a defendant, but NLR's petition in the second lawsuit virtually mirrors its petition in the first lawsuit. For example, in the first lawsuit, NLR alleged a vicarious agency relationship between JPMC and Peirson. In the second lawsuit, NLR continues to assert that Peirson engaged NLR to complete recordings on behalf of JPMC. Moreover, NLR provided copies of exactly the same invoices to both suits. The breach of contract and quantum meruit claims for which NLR seeks to recover against Peirson in the second suit are identical to those it sought to recover against JPMC in the first suit. The suit on sworn account arises out of the same facts and unpaid balance. NLR's claim in the suit against Peirson is entirely derivative of the claim it pursued in the first suit against JPMC. When parties are in a vicarious relationship, a judgment for the principal bars a later suit against the agent. *See* ***id***.; ***Soto v. Phillips***, 836 S.W.2d 266, 270 (Tex. App.—San Antonio 1992, writ denied). NLR's second suit arises from the same subject matter as the first suit and could have been litigated in the first suit. *See* ***Soto***, 836 S.W.2d at 269. Thus, the record demonstrates privity between JPMC and Peirson.

NLR, however, seeks to compare the facts of this case to the decision in ***Hammonds***. In ***Hammonds***, a husband and wife sued the Corsicana National Bank for wrongful foreclosure on their business property. ***Hammonds***, 559 S.W.2d at 346. On the plaintiff's own motion, the trial court dismissed their claim with prejudice. ***Id***. Four months later, the Hammonds filed a second

suit against the bank but also sued Zane Stites, the bank's president, and Ed Holmes, the bank's vice president and the trustee named in the deed of trust. ***Id***. at 346-47. The trial judge granted summary judgment for all defendants. ***Id***. at 346. The Texas Supreme Court found that the former judgment barred the second suit against the bank. ***Id***. at 347. There was no allegation in the second suit that Stites acted in any respect except as an employee and president of the bank. ***Id***. The court further found that there were no issues relating to Stites' liability that had not been litigated in the first suit. ***Id***. Therefore, the Hammonds' claim against Stites was barred by res judicata. ***Id***. However, the court found that Holmes, as trustee of the deed of trust, acted in a capacity other than as a bank employee because his position as trustee imposed upon him a "particular legal responsibility" to the grantor of the trust deed than that required of a bank employee. ***Id***. Consequently, the court found that summary judgment in favor of Holmes was not justified on the strength of the former judgment and the allegations of the pleadings alone, as the Hammonds' theory of recovery against Holmes might rest on a different basis than that alleged against the bank and its president. *See* ***id***.

In the court's view, Holmes' liability in the second lawsuit was not entirely derivative of the liability pursued against the bank in the first suit. *See* ***id***. In the instant case, unlike in ***Hammonds***, the basis for liability alleged against Peirson in the second lawsuit is entirely derivative of the liability pursued against JPMC in the first suit.

NLR also argues that Peirson cannot assert privity because it denied any agency relationship with JPMC in its counterclaim. The record indicates that Peirson pleaded a defense denying an agency relationship, in addition to their defensive plea of res judicata. Rule 48 of the Texas Rules of Civil Procedure provides as follows:

> A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses.

TEX. R. CIV. P. 48; *see* ***Lyons v. Lindsey Morden Claims Mgmt.***, 985 S.W.2d 86, 90 (Tex. App.—El Paso 1998, no pet.). Thus, Peirson's alternative defenses are not relevant to an analysis of the res judicata issue.

Accordingly, for the above reasons, we conclude that the trial court did not err by granting summary judgment on Peirson's affirmative defense of res judicata. *See* TEX. R. CIV. P.

166a(c); *see also* ***Knott***, 128 S.W.3d at 215-16; ***Cunningham***, 365 S.W.3d at 186. We overrule NLR's first issue.

ATTORNEY'S FEES

In its second issue, NLR insists the trial court abused its discretion in awarding Peirson $10,500 and $1,725 in attorney's fees related to two motions to compel and a motion for contempt.

Standard of Review

The standard of review regarding discovery sanctions is whether the sanctions are just under the circumstances. ***Trans-American Nat. Gas Corp. v. Powell***, 811 S.W.2d 913, 917 (Tex. 1991) (orig. proceeding). If a motion to compel is granted, the trial court shall require a party whose conduct necessitated the motion to compel to pay the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees. TEX. R. CIV. P. 215.1(d). "If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner." ***Id***.

Discussion

On September 24, 2015, Peirson served NLR with its First Set of Interrogatories, First Request for Admissions, and First Request for Production of Documents. NLR responded to the interrogatories and request for production, but Peirson was dissatisfied with the responses and filed a motion to compel pursuant to Rule 215. On November 20, Peirson served its Second Request for Admissions and Second Request for Production. When NLR's attorneys failed to respond to these discovery requests, Peirson filed a second motion to compel pursuant to Rule 215. On January 14, 2016, the trial court heard both motions to compel, but NLR's attorneys failed to attend the hearing. The trial judge marked "bench filed 1-14-16" on the affidavit of Peirson's attorney, which stated that (1) he is "familiar with the reasonable and customary fees charged by attorneys in litigation disputes in the Dallas—Fort Worth area[;]" (2) Peirson had "incurred reasonable and necessary attorneys' fees in the amount of $10,500.00 for [his] firm's time expended on this matter[;]" and (3) the fees incurred by Peirson were reasonable and necessary, and "based on invoices of actual billing hours entered into our billing software." The trial judge noted on the affidavit that an additional supplement was allowed by January 15. On

the afternoon of January 14, Peirson's attorney filed Peirson's bill history as a supplement to the affidavit.

The trial court granted the motions to compel, ordered NLR to produce discovery responses by February 15, and ordered NLR to pay $10,500 in reasonable expenses and attorney's fees. On April 6, the trial court found NLR in contempt and awarded Peirson an additional $1,725 in reasonable costs and attorney's fees.

NLR subsequently moved the trial court to reconsider or modify its contempt order. NLR argued that the discovery abuses in this case were attributable solely to its former counsel. The trial court partially granted that request, apportioning the amounts awarded in the contempt order equally between NLR and its counsel.

On appeal, NLR complains the "trial court abused its discretion by awarding attorneys' fees without legally sufficient evidence to calculate a reasonable fee." NLR characterizes the attorney's fee affidavit as conclusory and contends there is no evidence to support the attorney's fee award. In ***Garcia v. Gomez***, the only evidence of attorney's fees offered was as follows:

> I'm an attorney practicing in Hidalgo County doing medical-malpractice law/litigation. I have done it since 1984. For a usual and customary case like this [the] fees for handling it up to the point of dismissal, the reasonable and necessary attorney's fees for handling that is 12,200 dollars. . . .

319 S.W.3d 638, 641 (Tex. 2010). The supreme court held that "[w]hile the attorney's testimony lacked specifics, it was not, under these circumstances, merely conclusory. It was some evidence of what a reasonable attorney's fee might be in this case." ***Id.***; *see also* ***Sundance Minerals, L.P. v. Moore***, 354 S.W.3d 507, 514-15 (Tex. App.—Fort Worth 2011, pet. denied).

The affidavit offered in the instant case is, standing alone, more specific than the evidence offered in ***Garcia***. When considered with the promptly filed supplementary billing history, the evidence unquestionably supports the award of attorney's fees.

Nevertheless, NLR also complains that the record does not contain evidence as to the amount of attorney's fees reasonably incurred by Peirson in prosecuting the motion for contempt heard on April 6. As previously stated, the trial court awarded Peirson an additional $1,725 in attorney's fees based on this motion. However, NLR did not attend the contempt hearing and no record of the hearing has been brought forward. Without a reporter's record, we must presume

that the evidence is sufficient to support the trial court's judgment. *See* ***Simon v. York Crane & Rigging Co., Inc***., 739 S.W.2d 793, 795 (Tex. 1987).

Additionally, NLR maintains the trial court abused its discretion by not imposing the payment of all of the sanctions on its former attorney. NLR argues that the record shows that all the discovery abuse in this case was solely attributable to its former counsel.

The trial court considered Peirson's award of attorney's fees on three separate occasions. The first occurred during the January 14 hearing. The court again considered Peirson's award of attorney's fees when NLR filed its Motion to Vacate and Motion for Rehearing on January 19. The trial court denied the Motion to Vacate and Motion for Rehearing, but allowed NLR to set for rehearing the amount of reasonable costs and attorney's fees awarded at the January 14 hearing. On March 31, NLR's attorney filed a notice of withdrawal as counsel for NLR. According to the affidavit of NLR's chief executive officer, Christopher McLucas, NLR's attorney did not inform NLR that a hearing on Peirson's motion for contempt was rescheduled for April 6. Third, on April 6, the trial court considered Peirson's award of attorney's fees and increased the total amount to $11,475 in connection with granting Peirson's contempt motion.

On April 11, NLR learned that its attorneys failed to respond to discovery and attend several hearings, including two motions to compel, a motion to vacate, and the motion for contempt. On April 20, NLR's new attorneys moved the trial court to reconsider its order of April 6, and modify the amount of the fees awarded as sanctions and to impose their payment on NLR's former attorney. On May 23, the trial court partially granted NLR's motion, apportioning the responsibility for the payment of the sanctions one half to NLR's former attorneys and one half to NLR.

NLR's argument on appeal ignores the affidavit of Peirson's counsel, who attested that on February 17, 2016, he attended McLucas's deposition and when asked about the whereabouts of his counsel, McLucas stated that he did not know. In his affidavit, Peirson's counsel also stated that, at the deposition, he mentioned to McLucas that NLR's attorney "had not been involved in the matter and had been nonresponsive to emails and telephone calls."

A trial court may impose sanctions on a party when the party "is or should be aware of counsel's conduct[."] ***Powell***, 811 S.W.2d at 917. There is sufficient indication in the record that NLR should have been aware of its attorney's derelict performance. Accordingly, the trial

court's imposition of sanctions equally between NLR and its former attorneys was just under the circumstances. *See **id.***; *see also* TEX. R. CIV. P. 215.1(d). We overrule NLR's second issue.

DISPOSITION

Having overruled NLR's two issues, we ***affirm*** the trial court's judgment.

BILL BASS
Justice

Opinion delivered June 30, 2017.
Panel consisted of Worthen, C.J., Hoyle, J., and Bass, Retired J., Twelfth Court of Appeals, sitting by assignment.

(PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

JUNE 30, 2017

NO. 12-16-00205-CV

NATIONAL LAND RECORDS, LLC,
Appellant
V.
PEIRSONPATTERSON, LLP AND DIGITAL DOCS, INC.,
Appellee

Appeal from the 158th District Court
of Denton County, Texas (Tr.Ct.No. 15-02287-158)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that all costs of this appeal are hereby adjudged against the appellant, **NATIONAL LAND RECORDS, LLC,** for which execution may issue, and that this decision be certified to the court below for observance.

Bill Bass, Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Bass, Retired J., Twelfth Court of Appeals, sitting by assignment.