IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DAVID MONK, an individual; and WHITE RIVER FEED COMPANY, INC., a Washington corporation,	)	NO. 67503-6-I
	)	DIVISION ONE
Appellants,	)	UNPUBLISHED OPINION
v.	)	
KRISTINA A. DRIESSEN and JOHN DOE DRIESSEN, and the marital community composed thereof; and RYAN & DRIESSEN, INC. P.S.,	)	
Respondents.	)	FILED: October 15, 2012

Leach, C.J. — David Monk and White River Feed Company Inc. (collectively "Monk") appeal the summary dismissal of their claims against attorney Kristina Driessen. Driessen defended Monk against an attorney's lien filed by Richard Pierson in an earlier legal proceeding. Monk then sued Driessen for legal malpractice, alleging that her failure to assert counterclaims in response to Pierson's motion to enforce his attorney's lien barred Monk from asserting a subsequent tort action against Pierson. The trial court decided that neither CR 13 nor res judicata barred Monk's claims against Pierson and granted Driessen's motion for summary judgment. We agree and affirm.

FACTS

Attorney Richard Pierson represented David Monk in an inverse

condemnation lawsuit against the cities of Auburn and Kent.[1] Monk recovered $317,769 for damages, interest on the judgment, and attorney fees. The cities deposited this amount into the court registry.

In October 2008, Pierson filed an attorney's lien on the judgment. In December 2008, the trial court granted Monk's motion to disburse all but $65,880.00 of the award to Monk's other attorneys and Monk. In January 2009, Pierson moved to enforce the lien against the $65,880.00 that remained in the court registry. Monk then hired attorney Kristina Driessen to defend against the lien. After an evidentiary hearing on Pierson's motion, the court concluded that he had a valid lien and enforced it for $55,568.96.

In 2011, Monk sued Driessen for legal malpractice, arguing that her failure to assert certain tort claims[2] against Pierson in the lien foreclosure caused Monk to lose the opportunity to pursue those claims. Finding that nothing prevented Monk from asserting his claims against Pierson in a separate action, the trial court granted Driessen's summary judgment motion. Monk appeals.

---

[1] Monk originally alleged inverse condemnation, trespass to land, trespass to personal property, conversion, interference with contractual relations, negligence, business interruption, private nuisance, 42 U.S.C. § 1983 due process violation, and a tort claim for damage to silos, along with a request for injunctive relief. The court dismissed all but the inverse condemnation claim, which proceeded to trial.

[2] Monk alleges legal malpractice, violation of the Consumer Protection Act, chapter 19.86 RCW, and breach of fiduciary duty against Pierson.

STANDARD OF REVIEW

When reviewing an order granting summary judgment, we conduct the same inquiry as the trial court.[3] We will affirm summary judgment only when the "'pleadings, depositions, affidavits, and admissions, viewed in a light most favorable to the nonmoving party, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.'"[4]

ANALYSIS

We must decide if Driessen's failure to assert counterclaims in the attorney's lien proceedings prevents Monk from asserting them against Pierson in a separate lawsuit. Monk contends that these claims were compulsory counterclaims under CR 13(a) and that the trial court's decision in the lien foreclosure is res judicata, barring the assertion of these claims in a later lawsuit. He relies heavily on King County v. Seawest Investment Associates[5] to support both of these arguments.

First, Monk contends that Seawest stands for the proposition that any claim against an attorney arising out of services provided in a lawsuit must be asserted as a compulsory counterclaim to a motion to enforce an attorney's lien filed in the lawsuit. But we did not consider this issue in Seawest. Instead, we

---

[3] Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 144, 94 P.3d 930 (2004).

[4] Riehl, 152 Wn.2d at 144 (quoting Pulcino v. Fed. Express Corp., 141 Wn.2d 629, 639, 9 P.3d 787 (2000)).

[5] 141 Wn. App. 304, 315, 170 P.3d 53 (2007).

addressed a due process challenge to the procedure adopted by the trial court to decide the validity of an attorney's lien.

RCW 60.40.010, the statute authorizing attorney's liens on judgments, does not establish any procedure for enforcing the lien, leaving trial courts broad discretion to craft appropriate equitable remedies. Seawest objected to the trial court's decision to hold summary proceedings in the underlying action to decide a lien's validity. It argued that RCW 60.40.010 required adjudication of the lien in a separate action. We disagreed, finding that "[t]he trial court's decision to adjudicate the attorney's lien by the evidentiary hearing in this case was a tenable choice."[6] We took note of the time given to conduct discovery and otherwise prepare for the hearing. In response to Seawest's complaint that it did not assert certain claims it had against its former attorneys, we noted that the trial court provided it with the opportunity to assert these claims. We were not asked to decide and did not resolve whether those claims must be asserted in defense to the attorney's lien.

To support Monk's contrary reading of our decision, he quotes the following passage:

> The parties had three months, which was ample time, to conduct discovery and otherwise prepare for the evidentiary hearing. Finally, the hearing gave them ample opportunity to present evidence, bring counterclaims, and argue their theories of the

[6] Seawest, 141 Wn. App. at 315 (emphasis added).

> dispute. In short, Seawest was given an opportunity to contest the lien asserted by Graham & Dunn by raising whatever issues it chose to raise. While it now complains on appeal that it did not assert Consumer Protection Act, chapter 19.86 RCW, and other claims that it would have, there is nothing in the record to support the conclusion that it was denied the opportunity to assert such claims at the hearing.[7]

Monk argues that this language requires that his tort claims against Pierson be pleaded as compulsory counterclaims to the lien enforcement. But this cited language supported our conclusion that the procedure adopted by the trial court satisfied the requirements of due process, and nothing more. We said Seawest could not complain on appeal that the trial court did not consider possible counterclaims when the trial court provided Seawest with the opportunity to assert them, and Seawest chose not to. Thus, Seawest does not even address the permissive or compulsory nature of any counterclaim.

A review of the applicable court rules, CR 13(a) and CR 7(a) demonstrates that a party defending against its former attorney's lien enforcement motion in the original lawsuit need not assert any counterclaim to preserve the right to assert that claim later. CR 13(a) generally requires that

> [a] pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

---

[7] Seawest, 141 Wn. App. at 315 (emphasis added).

(Emphasis added.) CR 7(a) defines as "pleadings" a complaint, an answer, a reply to a counterclaim, an answer to a cross claim, a third party complaint, and a third party answer. With two exceptions not relevant to this decision, the rule prohibits any other pleading. Thus, a motion is not a pleading for purposes of CR 13(a), and the rule does not make compulsory any counterclaim to the relief requested in a motion.

Additionally, two state Supreme Courts have considered the same issue, both holding that CR 13(a) does not require a client to assert counterclaims in response to a motion to enforce an attorney's lien because the attorney is not an "opposing party." In Computer One, Inc. v. Grisham & Lawless P.A.,[8] the Supreme Court of New Mexico noted, "[A]ncillary participants in a lawsuit may find themselves at odds with each other, but not necessarily be 'opposing parties.'" The court stated,

> Given the grave consequences of [CR 13(a)], we think that rule is better served by a sense of certainty and predictability implicit in the notion that one must first be a "party" before one can be an "opposing party." And as this Court made clear in Bennett [v. Kisluk, 112 N.M. 221, 814 P.2d 89 (1991)], an attorney does not transform his former client into either, merely by taking steps to secure attorney fees in the same underlying proceeding.[9]

Relying on Computer One, the Supreme Court of Kansas, in a case with similar facts, held that an attorney's motion to enforce a lien for fees against a

[8] 2008-NMSC-038, 144 N.M. 424, 431, 188 P.3d 1175 (2008).
[9] Computer One, 144 N.M. at 431.

judgment in the case in which the fees were incurred does not transform the client into an "opposing party" for purposes of the compulsory counterclaim rule.[10]

Monk's res judicata claim also fails. "Res judicata, or claim preclusion, bars the relitigation of claims and issues that were litigated, or might have been litigated, in a prior action."[11] It generally applies where the subsequent action is identical with a prior action in four respects: (1) persons and parties, (2) cause of action, (3) subject matter, and (4) the quality of the persons for or against whom the claim is made.[12] But application of res judicata principles in this case is inconsistent with our determination that Monk's counterclaims against Pierson were permissive rather than compulsory. Division II previously recognized this inconsistency in the context of cross claims and held that res judicata does not bar the assertion of a claim that could have been asserted as a permissive cross claim under CR 13(g) but was not.[13] Similarly, if a counterclaim was permissive but not asserted in an earlier action, res judicata does not bar it in a later action.

Because we find that the court properly granted Driessen's motion for summary judgment on the CR 13 issue, we do not address Monk's remaining

---

[10] Tilzer v. Davis, Bethune & Jones, LLC, 288 Kan. 477, 486, 204 P.3d 617 (2009).

[11] Pederson v. Potter, 103 Wn. App. 62, 69, 11 P.3d 833 (2000).

[12] Schoeman v. New York Life Ins. Co., 106 Wn.2d 855, 858, 726 P.2d 1 (1986).

[13] Krikava v. Webber, 43 Wn. App. 217, 220-21, 716 P.2d 916 (1986).

contention that the court should have dismissed Driessen's affirmative defenses.

CONCLUSION

Because neither CR 13 nor res judicata bars Monk from bringing a malpractice action against Pierson, the court properly granted Driessen's motion for summary judgment. We affirm.

Leach, C.J.

WE CONCUR:

Spearman, J.

Becker, J.