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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

FILED
FEB 28 2012
Court of Appeal - First App. Dist.
DIANA HERBERT
By ________ DEPUTY

PAUL KALRA, Plaintiff and Respondent, v. GREAT AMERICAN INSURANCE COMPANY, Defendant and Appellant.	A132597 (Contra Costa County Super. Ct. No. MSC0901819)

Appellant Great American Insurance Company (GAIC) appealed after the trial court granted respondent Paul Kalra's motion for judgment on the pleadings, and awarded Kalra $50,000 in damages on a surety bond that GAIC issued to a third party. GAIC argues that the trial court erred in applying the doctrine of collateral estoppel, based on findings made in a separate bankruptcy proceeding to which it was not a party. We agree and reverse.

I.
FACTUAL AND PROCEDURAL BACKGROUND[1]

This case arises from a dispute between Kalra (doing business as OnTime Financial) and Juan Villagrana (who is not a party to this appeal) relating to payment for

[1] As this appeal comes to us from the granting of a motion for judgment on the pleadings, the following facts are taken from the complaint, the answer, and the matters of which the trial court took judicial notice. (Code Civ. Proc., § 438, subds. (c)(1)(A), (d); *Shea Homes Limited Partnership v. County of Alameda* (2003) 110 Cal.App.4th 1246, 1254.)

23 vehicles. Kalra entered into an agreement with Villagrana (doing business as Villagrana's Auto Sales) in August 2007, to finance the payment for the vehicles, but Villagrana failed to pay for the vehicles, which had been purchased for $123,026. Villagrana was covered by an auto dealer's surety bond issued by appellant GAIC, pursuant to Vehicle Code section 11711.[2]

Kalra filed a complaint against Villagrana and GAIC in the trial court, alleging causes of action for breach of contract and fraud. Kalra also included a claim to enforce liability on the surety bond between Villagrana and GAIC. GAIC answered Kalra's complaint with a general denial (Code Civ. Proc., § 431.30, subd. (d)). Although few documents relating to Villagrana appear in the record on appeal, the register of actions reveals that Kalra obtained a default judgment against Villagrana.

Apparently at some point after the initiation of this lawsuit, Villagrana filed for bankruptcy, and Kalra obtained a judgment against him in bankruptcy court, following a trial in which both parties represented themselves. The bankruptcy court dismissed a cause of action alleging that Villagrana obtained money by false pretenses, false representation, or actual fraud. (11 U.S.C.A. § 523(a)(2)(A).) It found, however, that failing to give Kalra money amounted to "defalcation while acting in a fiduciary capacity" (11 U.S.C.A § 423(a)(4)), and that Villagrana also caused "willful and malicious injury" through conversion of property (11 U.S.C.A. § 423(a)(6)), which meant that Villagrana's debt was not excepted from discharge through bankruptcy. The court ordered judgment against Villagrana in the amount of $80,038. GAIC was not a party to the bankruptcy proceeding.

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[2] The statute provides, in part: "If any person (1) shall suffer any loss or damage by reason of any fraud practiced on him or fraudulent representation made to him by a licensed dealer or one of such dealer's salesmen acting for the dealer, in his behalf, or within the scope of the employment of such salesman and such person has possession of a written instrument furnished by the licensee, containing stipulated provisions and guarantees which the person believes have been violated by the licensee . . . then any such person shall have a right of action against such dealer, his salesman, and the surety upon the dealer's bond, in an amount not to exceed the value of the vehicle purchased from or sold to the dealer." (Veh. Code, § 11711, subd. (a).)

Kalra thereafter filed in this action a motion for judgment on the pleadings on his cause of action against GAIC to enforce liability on the surety bond, on the ground that GAIC was barred by the doctrine of collateral estoppel from relitigating claims for fraud against Villagrana. GAIC opposed the motion, arguing that liability on the bond had not been established, because the bankruptcy court had not found that Villagrana committed fraud, and because the doctrine of collateral estoppel did not apply here.

Following a hearing, the trial court granted Kalra's motion. It found that the bankruptcy court's findings regarding defalcation and conversion were equivalent to a finding of constructive fraud (Civ. Code, § 1573), which triggered GAIC's liability under Vehicle Code section 11711, subdivision (a)(1), a finding that GAIC does not directly challenge for purposes of this appeal. The trial court further found that GAIC was bound by that finding, under the doctrine of collateral estoppel. Judgment was thereafter entered against GAIC, which was ordered to pay $50,000[3] in damages, $4,232 in prejudgment interest, and $557 in costs, for a total of $54,789. GAIC timely appealed.

II.
DISCUSSION

A. Standard of Review.

The granting of a motion for judgment on the pleadings is subject to independent review. (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 515.) "Motions for judgment on the pleadings are usually made by defendants. In such instances the motion is the equivalent of a general demurrer, and on appeal from the judgment the appellate court will assume the truth of all facts properly pleaded in the complaint. [Citation.]" (*Sebago, Inc. v. City of Alameda* (1989) 211 Cal.App.3d 1372, 1379.) Where, as here, a plaintiff files a motion for judgment on the pleadings, this is "the equivalent of a demurrer to an answer, and the standard of review is obverse: the appellate court will

[3] The amount awarded in damages ($50,000) represented the full amount of the bond, an amount that was set by the trial court after briefing that is not included in the record on appeal. Although GAIC challenges the finding that it was liable to Kalra, it does not otherwise dispute the amount of damages set by the trial court.

assume the truth of all facts properly pleaded in the answer and will disregard the controverted allegations of the complaint. [Citations.]" (*Id.* at p. 1380.)

B. Collateral Estoppel.

GAIC argues that the trial court erred in granting Kalra's motion for judgment on the pleadings, because the doctrine of collateral estoppel does not apply here. " ' "Collateral estoppel is one aspect of the broader doctrine of res judicata . . . . 'Where res judicata operates to prevent relitigation of a cause of action once adjudicated, collateral estopped operates . . . to obviate the need to relitigate issues already adjudicated in the first action . . . . The purposes of the doctrine are said to be "to promote judicial economy by minimizing repetitive litigation, to prevent inconsistent judgments which undermine the integrity of the judicial system, [and] to protect against vexatious litigation." ' " ' [Citation.] The doctrine of collateral estoppel has traditionally 'been applied to give conclusive effect in a collateral court action to a final adjudication made by a court in a prior proceeding.' [Citations.]" (*California Physicians' Service v. Aoki Diabetes Research Institute* (2008) 163 Cal.App.4th 1506, 1519.)

" 'Collateral estoppel precludes relitigation of issues argued and decided in prior proceedings. [Citation.] The doctrine applies 'only if several threshold requirements are fulfilled. First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding.' " (*Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 943.)

GAIC focuses almost exclusively on the fifth requirement, and argues that the requisite privity had not been shown to support granting a motion for judgment on the pleadings. We agree. It is undisputed that GAIC was not a party to the bankruptcy proceeding. The trial court found that GAIC was nevertheless bound by the bankruptcy court's order, because it was in privity with Villagrana.

" '[T]he word "privy" has acquired an expanded meaning. The courts, in the interest of justice and to prevent expensive litigation, are striving to give effect to judgments by extending "privies" beyond the classical description. [Citation.] The emphasis is not on a concept of identity of parties, but on the practical situation.' [Citation.] ' "Privity is essentially a shorthand statement that collateral estoppel is to be applied in a given case; there is no universally applicable definition of privity." [Citation.] The concept refers "to a relationship between the party to be estopped and the unsuccessful party in the prior litigation which is 'sufficiently close' so as to justify application of the doctrine of collateral estoppel." ' [Citation.]" (*California Physicians' Service v. Aoki Diabetes Research Institute*, *supra*, 163 Cal.App.4th at p. 1521.) Even where a party is in privity with another, this "is not in itself sufficient to warrant application of collateral estoppel, unless the fundamental principle of fairness underlying the doctrine will be served by its application." (*Bailey v. Safeway, Inc.* (2011) 199 Cal.App.4th 206, 213.)

As for whether a surety is in privity with a principal for purposes of collateral estoppel, we first observe that "[i]t is well established that a judgment against a principal is not binding in a separate action against a surety." (*All Bay Mill & Lumber Co. v. Surety Co.* (1989) 208 Cal.App.3d 11, 17 (*All Bay*) (and cases cited therein).) The Restatement Third of Suretyship and Guaranty is in accord. (Rest.3d Suretyship and Guaranty, § 67(2) & com. b, pp. 271-272 [judgment against principal other than by default, confession, or stipulation, creates rebuttable presumption of principal's obligation in subsequent action against secondary obligor].)

Respondent Kalra acknowledges the rule set forth in the long line of cases holding that a surety is not bound by a judgment in a prior action against a principal,[4] but states that it is "contrary to the collateral estoppel doctrine." We see no basis to depart from settled case law, and declare that GAIC was in privity with Villagrana as matter of law. Respondent correctly asserts that this court should consider whether appellant GAIC had the same financial interest in the prior adjudication, and whether GAIC had a strongly shared interest in the determination made in the prior action. (*California Physicians' Service v. Aoki Diabetes Research Institute*, *supra*, 163 Cal.App.4th at p. 1523.) However, he cites nothing in the record to support his assertion that "there was absolutely no divergence of interests between Villagrana and GAIC at the bankruptcy proceeding." He faults appellant for relying on cases that do not specifically mention collateral

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[4] The *All Bay* court quoted extensively (208 Cal.App.3d at pp. 17-18) from an 1859 California Supreme Court opinion: "In the case of official bonds, the sureties undertake, in general terms, that the principal will perform his official duties. *They do not agree to be absolutely bound by any judgment obtained against him for official misconduct, nor to pay every such judgment*. They are only held for a breach of their own obligations. It is a general principle, that *no party can be so held without an opportunity to be heard in defense*. This right is not divested by the fact, that another party has defended on the same cause of action and been unsuccessful. As the sureties did not stipulate that they would abide by the judgment against the principal, or permit him to conduct the defense, and be themselves responsible for the result of it, *the fact that the principal has unsuccessfully defended, has no effect on their rights*." (*Pico v. Webster* (1859) 14 Cal. 202, 204, italics added; see also *Kane v. Mendenhall* (1936) 5 Cal.2d 749, 751; *Mahana v. Alexander* (1927) 88 Cal.App. 111, 122 [case illustrated "the fallacy of the proposition that a surety on a suretyship bond may be bound by a judgment obtained in an action for a breach of the original contract against the principal alone, where the surety himself is not a party to the record in such action"].)

estoppel, but provides no legal authority of his own for the proposition that GAIC and Villagrana were in privity *as a matter of law*.[5]

All Bay, supra, 208 Cal.App.3d 11, is instructive. In that case, plaintiff lumber company tried to collect on a contractor's license bond issued by a surety to a construction company, after the construction company failed to pay for building supplies provided by the lumber company. (*Id.* at p. 14.) The lumber company sued the construction company and the surety in the same action, the construction company did not answer the complaint, and the court entered a default judgment against the construction company. (*Id.* at p. 17.) Following a court trial on the lumber company's cause of action to recover from the surety, the trial court found that the lumber company had failed to establish that the construction company had established a violation of the Contractors' State License Law (Bus. & Prof. Code, § 7000 et seq.), entitling it to relief on the surety bond. (*All Bay* at pp. 14-15.)

Division Three of this court affirmed the judgment, finding that substantial evidence supported the trial court's findings. (*All Bay, supra*, 208 Cal.App.3d at pp. 14-17.) The lumber company argued that the default judgment against the construction company was binding on its surety to the extent that it showed that the construction company violated the Contractors' State License Law. (*All Bay* at p. 17.) The appellate court disagreed, citing a line of cases standing for the proposition that "a judgment against a principal is not binding in a separate action against a surety." (*Ibid.*) The court further concluded that the doctrine of collateral estoppel did not prevent the surety from separately litigating whether the construction company violated the Contractors' State License Law, notwithstanding the construction company's default. (*All Bay* at p. 18,

[5] Kalra directs us to a trial brief that GAIC filed in a *separate* action involving the parties, where GAIC argued that collateral estoppel barred Kalra from presenting claims for fraud based on findings made in a bankruptcy proceeding. First, it is unclear how the trial court ruled on the issue in the separate case. Second, we note that GAIC made this argument in a *trial brief*. It is thus clear that the parties in the prior litigation anticipated a trial on the merits, and there is no indication that GAIC argued that the collateral estoppel issue was appropriate for decision on the pleadings alone.

fn. 3.) The court observed that, whereas collateral estoppel generally applies to bar a party from relitigating an issue where there are two separate lawsuits, in *All Bay*, there was "only one lawsuit," and the two defendants were entitled to litigate separately the issue of their liability. (*Ibid.*)

At the hearing on Kalra's motion for judgment on the pleadings, GAIC relied on *All Bay* in arguing that a judgment against a principal is not binding on the surety. The trial court stated that *All Bay* was distinguishable, because it involved two separate claims in the same lawsuit, whereas this case involves two separate actions, an argument that respondent repeats on appeal. However, *All Bay* itself observed that "*it is irrelevant whether the judgment was obtained in a previous action* or by default in the same action brought against the surety. In both cases, *the surety must be given an opportunity to be heard in defense*." (*All Bay, supra*, 208 Cal.App.3d at p. 18, italics added; see also *National Technical Systems v. Superior Court* (2002) 97 Cal.App.4th 415, 417-418 [surety not bound by judgment in prior action against principal, where surety was not a party].)

Kalra suggests that this case is also distinguishable from *All Bay* for an additional reason, because here he relied on a judgment following a contested trial, whereas plaintiff in *All Bay* attempted to rely on a default judgment. (208 Cal.App.3d at p. 17.) We have no doubt that the judgment obtained in the bankruptcy proceeding will play a role in the resolution of this case, after further discovery is conducted. (*National Technical Systems v. Superior Court, supra*, 97 Cal.App.4th at p. 422 [although prior judgment not binding on surety, evidence from prior trial may be admissible in subsequent action]; Rest.3d Suretyship and Guaranty, § 67, com. b, p. 272 ["[I]t would be inequitable to bind a secondary obligor conclusively by a judgment to which it was not a party, yet it is not unfair to presume the validity and correctness of the judgment against the principal obligor."].) We conclude, however, that it was inappropriate to grant a motion for judgment on the pleadings.

III.
DISPOSITION

The judgment is reversed, and the case is remanded to the trial court for proceedings consistent with this opinion. Appellant shall recover its costs on appeal.

Sepulveda, J.

We concur:

Ruvolo, P. J.

Rivera, J.

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