IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs October 8, 2008

GEORGE H. NASON, INDIVIDUALLY & AS TRUSTEE OF THE CHURCH STREET REALTY TRUST v. C & S HEATING, AIR, & ELECTRICAL, INC. AND O'BRIEN HEATING & AIR, INC.

Appeal from the Circuit Court for Williamson County
No. 07286 Jeffrey S. Bivins, Judge

No. M2008-00476-COA-R3-CV - Filed April 29, 2009

Plaintiff appeals summary judgment granted on claims for breach of contract, unjust enrichment and entitlement to quantum meruit relief. The trial court dismissed the complaint based on the doctrine of collateral estoppel finding Plaintiff's claims or rights to the same property were finally adjudicated in federal court. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and RICHARD H. DINKINS, J., joined.

George H. Nason, Franklin, Tennessee, Pro Se.

Ronald H. Bice, Jr., Nashville, Tennessee, for the appellees, C & S Heating, Air & Electrical, Inc. and O'Brien Heating & Air, Inc.

OPINION

Background

On July 29, 2002, the United States Attorney for the Middle District of Tennessee filed a verified complaint pursuant to 18 U.S.C.A. § 981(a)(1) instituting an in rem civil forfeiture action against real property owned by Appellant George Nason and located at 179 8th Avenue North in Davidson County.[1] On September 9, 2002, the United States District Court for the Middle District of Tennessee issued a warrant and summons for the arrest of the property and ordered that notice of

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[1] The complaint alleged that the real property was involved in transaction(s) violating 18 U.S.C.A. §§ 1956 and 1957 (money laundering and property transactions derived from specified unlawful activities) and was derived from or constituted proceeds traceable to a violation of 18 U.S.C.A. § 1344 (bank fraud).

the forfeiture be given. All persons claiming an interest in or a right against the arrested property were required to file a verified statement of interest within 30 days of service of the complaint or published notice and to file an answer within 20 days. *See* Fed. R. Civ. P. Supp. Rule C(6)(a) (2002).[2] Statements of interest must describe the person's interest in the property that supports his right to defend the action or demand its restitution. *Id*.

Before the forfeiture action was filed, Mr. Nason contracted with the Appellees, C & S Heating, Air, & Electrical, Inc. and O'Brien Heating & Air, Inc., to perform electrical work and heating and air conditioning repairs to the property. Both companies filed answers and verified statements of interest to perfect their mechanics' and materialmen's liens on the property on October 15, 2002.[3] O'Brien Heating & Air claimed a lien in the amount of $144,275, and C & S Heating's claim against the property was for $408,670.

The record shows that the United States Marshals Service attempted to serve Mr. Nason with notice of the forfeiture and arrest warrant on October 7, 2002, and again on November 19, 2002, at his last known address. Constructive notice of the action was published in *The City Paper* on September 26, October 3, and October 10, 2002, and notice was posted at the defendant real property on September 27, 2002. On May 19, 2003, the district court ordered an interlocutory private judicial sale of the property. Notice of the sale was published on June 30, July 7, and July 14, 2003, in *The City Paper*. The property was sold on September 30, 2003, for $2 million. C & S Heating agreed to settle its claim for $335,109.40, and O'Brien Heating & Air settled its claim for $118,306.60.

Days before the sale of the property, Mr. Nason filed a motion for summary judgment arguing that notice of the forfeiture proceedings was insufficient and that he was entitled to any remaining balance following the sale of the property and payment of creditors. The court denied the motion because Mr. Nason lacked standing under Rule C(6) to challenge the subject forfeiture procedures since he did not file a verified statement of interest and answer. The court issued a decree of forfeiture on April 20, 2005, declaring that Mr. Nason's interest in the defendant property and substitute res was forfeited to the United States "with no right, title or interest existing in any other party" and that it served as the final judgment in the forfeiture action.

On May 1, 2007, Mr. Nason filed a complaint in the circuit court for Williamson County against Appellees alleging breach of contract, unjust enrichment, and entitlement to quantum meruit relief. Mr. Nason alleged that C & S Heating stopped working on the property prior to completing the contracted work and that the parties later agreed that the amount owed for work already performed was $174,000, not the full contract amount C & S Heating claimed in its lien. Mr. Nason

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[2] In 2000, Rule C was amended to expand the availability of in rem jurisdiction in civil forfeiture proceedings brought based on the violation of a federal statute. 12 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, FEDERAL PRACTICE AND PROCEDURE § 3221 (2d ed. Supp. 2008).

[3] Mechanics' and materialmen's liens preserve and provide notice of contractors' or subcontractors' claims for unpaid labor and materials provided for the improvement of real property. *See* Tenn. Code Ann. §§ 66-11-102, -111, and -145.

argued that, by accepting the $335,109.40 settlement, C & S Heating breached its contract with Mr. Nason and received an overpayment of $161,109.40 resulting in its unjust enrichment. In his claim against O'Brien Heating & Air, Mr. Nason alleged that O'Brien completed the work pursuant to the contract and that he made a partial payment of $45,000. Mr. Nason argued that O'Brien Heating & Air breached its contract by filing a lien for the full amount owed under the contract without crediting him for the partial payment and that the $45,000 overpayment unjustly enriched O'Brien. Mr. Nason sought to be reimbursed for the excess amounts paid to Appellees. Appellees moved for summary judgment based on the doctrine of collateral estoppel or estoppel by judgment, arguing that Mr. Nason was denied relief in the federal court proceedings because he failed to timely raise his claim to the property and objections to the sale and settlement of Appellees' liens. In support of their summary judgment motion, Appellees attached copies of the relevant filings and orders in the underlying forfeiture action, including a February 25, 2004 memorandum and order denying Mr. Nason's motion for summary judgment in which the court examined Mr. Nason's procedural attack and standing. The trial court granted Appellees' motion and dismissed Mr. Nason's complaint based on the doctrine of collateral estoppel. We affirm.

Standard of Review

Pursuant to Tenn. R. Civ. P. 56.04, summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Summary judgments do not enjoy a presumption of correctness on appeal. *BellSouth Adver. & Publ'g Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003). In reviewing a summary judgment, this court must make a fresh determination that the requirements of Tenn. R. Civ. P. 56 have been satisfied. *Hunter v. Brown*, 955 S.W.2d 49, 50 (Tenn. 1997). We consider the evidence in the light most favorable to the non-moving party and resolve all inferences in that party's favor. *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002). When reviewing the evidence, we must determine whether factual disputes exist. If a factual dispute exists, we must determine whether the fact is material to the claim or defense upon which the summary judgment is predicated and whether the disputed fact creates a genuine issue for trial. *Byrd v. Hall*, 847 S.W.2d 208, 211 (Tenn. 1993); *Rutherford v. Polar Tank Trailer, Inc*., 978 S.W.2d 102, 104 (Tenn. Ct. App. 1998). The moving party must negate an element of the opposing party's claim or "show that the nonmoving party cannot prove an essential element of the claim at trial." *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1, 9 (Tenn. 2008).

A trial court's decision of whether a subsequent lawsuit is barred by the principles of res judicata or collateral estoppel presents a question of law that this Court reviews de novo with no presumption of correctness. *In re Estate of Boote*, 198 S.W.3d 699, 719 (Tenn. Ct. App. 2005); *Morris v. Esmark Apparel, Inc.*, 832 S.W.2d 563, 566 (Tenn. Ct. App. 1991).

Analysis

The trial court found that the subject matter of and issues related to Mr. Nason's breach of contract claims, namely the real property located at 179 8th Avenue North, were the same as those

previously litigated by the parties in federal court. Mr. Nason was therefore estopped to file the action in state court based on the doctrine of collateral estoppel.

Collateral estoppel and its companion doctrine, res judicata, "promote finality in litigation in order to conserve judicial resources and to relieve litigants from the cost and vexation of multiple lawsuits." *State ex rel. Cihlar v. Crawford*, 39 S.W.3d 172, 178 (Tenn. Ct. App. 2000). Although both legal principles have preclusionary effects, res judicata and collateral estoppel are not the same. Res judicata, or claim preclusion, bars a second suit on the same cause of action between the same parties and is inapplicable here. *See Lee v. Hall*, 790 S.W.2d 293, 294 (Tenn. Ct. App. 1990). Collateral estoppel, or issue preclusion, bars the same parties or their privies from relitigating in a second suit issues that were actually raised and determined in the former suit. *Massengill v. Scott*, 738 S.W.2d 629, 631 (Tenn. 1987); *Crawford*, 39 S.W.3d at 178-79. "Once an issue has been actually or necessarily determined by a court of competent jurisdiction, the doctrine of collateral estoppel renders that determination conclusive on the parties and their privies in subsequent litigation, even when the claims or causes of action are different." *Crawford*, 39 S.W.3d at 178-79 (citing *Massengill*, 738 S.W.2d at 631). Collateral estoppel applies to issues of law and fact. *Id*. at 179. "The estoppel of a judgment or decree extends to all matters material to the decision of the case which the parties exercising reasonable diligence might have brought forward at the time." *Collins v. Greene County Bank*, 916 S.W.2d 941, 946 (Tenn. Ct. App. 1995) (citing *McKinney v. Widner*, 746 S.W.2d 699, 705 (Tenn. Ct. App. 1987)). "A plaintiff may not reserve a theory which supports his action for a second lawsuit." *Id*.

A party defending on the basis of collateral estoppel has the burden of proving (1) that the issue to be precluded is identical to the issue decided in the first suit; (2) that the issue was actually litigated and decided on the merits in the first suit; (3) that the underlying judgment was final; (4) that the party against whom estoppel is asserted was a party or is in privity with a party to the first suit; and (5) that the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue now sought to be precluded. *Patton v. Estate of Upchurch*, 242 S.W.3d 781, 787 (Tenn. Ct. App. 2007).

Through the filings and orders attached in support of their motion for summary judgment, Appellees demonstrated that the same issues regarding Mr. Nason's standing and entitlement to any balance or funds remaining after the sale of the subject property were previously decided in a final judgment by the district court. Faced with the Appellees' defense of collateral estoppel, Mr. Nason maintains on appeal the same position he took in the trial court: that collateral estoppel cannot apply to him since he was affirmatively denied standing in the forfeiture action in federal court and was therefore not a party to previous litigation. We find this argument to be without merit.

The long-standing general rule is that issue preclusion cannot be invoked against one who did not participate in the prior litigation. *See Baker by Thomas v. General Motors Corp.*, 522 U.S. 222, 237 n.11 (1998); *Barnett v. Milan Seating Sys.*, 215 S.W.3d 828, 835 (Tenn. 2007); *Crawford*, 39 S.W.3d at 179. However, there are exceptions to the general rule, particularly when a nonparty has a duty to participate in the underlying action. *See, e.g., Taylor v. Sturgell*, 128 S. Ct. 2161, 2172-

73 (2008); 18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE § 4452 (2d ed. 2002).

In this case, the district court found that Mr. Nason had the necessary standing under Article III[4] but did not have the requisite statutory standing to challenge the forfeiture because he failed comply with Rule C(6) after sufficient constructive notice of the action was given. Mr. Nason's inability to proceed as a party to the forfeiture action was a problem of his own making. Several attempts were made to personally serve Mr. Nason with notice in addition to the published notices. Despite Mr. Nason's belief that the breach of contract claims do not arise from or relate to the forfeiture action, the time to challenge the validity of Appellees' liens and claimed interest in the property was during the civil forfeiture action. Mr. Nason cannot now assert his position on a claim that was settled between the Appellees and the government and approved in a final order of the district court by filing a second suit, regardless of whether the first action was in rem or in personam. Examination of the previous action shows that Mr. Nason had a full and fair opportunity to litigate the issues he now seeks to raise but failed to timely act to use that opportunity when he failed to file an answer or statement of interest. Balancing the concerns of judicial efficiency and fairness to the parties, we find that Mr. Nason is subject to preclusion by collateral estoppel since he could have become a party to the prior litigation. *See* 18A Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE § 4448 (2d ed. 2002); RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).

Conclusion

We have determined that the rights and interests pertaining to the real property at issue in this case were adjudicated in a previous action and that Mr. Nason is collaterally estopped to assert claims of breach of contract, unjust enrichment, and quantum meruit. Moreover, we find that Mr. Nason failed to dispute any genuine issue of material fact and that summary judgment was properly granted. Judgment of the circuit court is affirmed in all respects. Costs of appeal are assessed against Appellant George Nason for which execution may issue if necessary.

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ANDY D. BENNETT, JUDGE

[4]The district court stated in its memorandum and order: "To contest the forfeiture action, Nason must have Article III standing required for any action brought in federal court, and statutory standing under Rule (C)(6), Supplemental Rules for Certain Admiralty and Maritime Claims. *See United States v. $515,060.20 in U.S. Currency*, 152 F.3d 491, 497 (6th Cir. 1998) (citing *526 United States v. Currency $267,961.07*, 916 F.2d 1104, 1107 (6th Cir. 1990))."