Sherron Associates Loan Fund V v. Galaxy Gaming Corp.

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UNPUBLISHED OPINION

The trial court entered a default judgment in favor of respondent Loan Fund V. Later, when it appeared that the corporate existence of Loan Fund V had been dissolved, the court permitted amendment of the complaint to add respondent Sherron Associates as a judgment creditor. Because the amendment of the complaint to add Sherron Associates did not occur in compliance with CR 59 or 60, the judgment adding Sherron Associates as a judgment creditor must be reversed.

FACTS

Sherron Associates Loan Fund V, a limited liability company, was formed in April 1997 with 20 members. Its purpose was to invest in Mars Hotel, a casino development project in Spokane. Loan Fund V invested $825,000 in the hotel project. Robert Saucier, developer of the Mars Hotel, personally guaranteed the investment. About a year later, the Mars Hotel closed its doors and filed for bankruptcy. Loan Fund V sought reimbursement from Saucier by filing an action in Spokane County Superior Court to enforce his personal guarantee on the loan. In 1998, the Spokane County Court entered judgment against Saucier in an amount over $913,000. Saucier left the state and Loan Fund V was unable to collect on the judgment despite numerous attempts.

At that time, the managing member of Loan Fund V was CES Properties, Inc., a company owned by C. Edward Springman. In December 2001, CES Properties and all but one of the other original members signed letters in which they abandoned all interest in Loan Fund V. The remaining original member was GCA Investments, Inc., a company controlled by Guy C. Alloway.

For some reason, Springman continued to act on behalf of Loan Fund V. He filed a request to voluntarily dissolve Loan Fund V on May 6, 2002. The Secretary of State officially filed a certificate of cancellation for Loan Fund V on May 14, 2002.

Springman continued to make attempts to collect the 1998 Spokane judgment on behalf of Loan Fund V. Acting through Springman, Loan Fund V moved to "domesticate" the Spokane judgment in Clark County, Nevada in September 2003, and obtained a Nevada judgment accomplishing this objective. Saucier was examined in Nevada in July 2004 as a judgment debtor on the Nevada judgment. Eventually, however, Saucier discovered that Loan Fund V no longer had a formal existence.

Loan Fund V attempted to restore itself to active status by asking the Washington Secretary of State to rescind the certificate of cancellation nunc pro tunc on the basis that it had happened through a clerical error.[1] In March 2006 the Attorney General of Washington denied this request on behalf of the Secretary of State, stating that it lacked statutory authority to rescind a voluntary certificate of cancellation in the manner requested.[2]

In April 2006, Saucier moved to vacate the Nevada judgment on grounds that Loan Fund V had been cancelled and therefore lacked the capacity to sue at the time it commenced the Nevada action. Loan Fund V responded that it should still be regarded as an active company because the cancellation was unauthorized and had occurred "as a result of a simple good faith clerical error."[3]

Alternatively, Loan Fund V claimed that the Spokane judgment now belonged to Springman's company, respondent Sherron Associates. According to this theory, Springman effectuated a transfer of all the abandoned Loan Fund V membership interests to GCA Investments before dissolution rendered Loan Fund V nonexistent. Then, in October 2002, Sherron Associates took the Spokane judgment back from GCA Investments as part of a general assignment of assets.[4] Notwithstanding these arguments, the Nevada court granted Saucier's motion to void the judgment in June 2006: "the domesticated judgment should be and is hereby voided ab initio."[5]

Meanwhile, in June 2005, Loan Fund V had also filed the present lawsuit in King County Superior Court against Saucier and a number of his companies that were alleged to be his alter egos. Saucier's companies all have some form of the name "Galaxy Gaming".[6] The complaint by Loan Fund V asserted that Saucier had used his Galaxy Gaming companies to shelter his personal assets and make himself judgment-proof. The complaint sought to hold these companies liable on the 1998 Spokane judgment against Saucier.[7] Neither Saucier nor the Galaxy Gaming defendants appeared to contest the action. The King County Superior Court granted the requested relief by entering a default judgment in favor of Loan Fund V on December 9, 2005.[8] The court entered an amended judgment a month later for a total of over $1.7 million, the amount of the original Spokane judgment plus interest.[9]

Loan Fund V immediately began collection efforts by filing and serving writs of garnishment on several Washington casinos that transacted business with Galaxy Gaming of Washington. The casinos contacted Saucier about the garnishment. Shortly thereafter, the Galaxy Gaming companies named in the complaint appeared and moved to vacate the default judgment and dismiss the case with prejudice.

At this point, the King County litigation began to resemble the Nevada litigation. The Galaxy companies contended that relief from the King County default judgment should be granted under CR 60(b) because Loan Fund V had been dissolved since the certificate of cancellation was filed in 2002, and it lacked the capacity to initiate and prosecute the King County litigation. Loan Fund V moved to amend the complaint to join Sherron Associates as a party plaintiff and judgment creditor on the

basis that it was the ultimate assignee of the Spokane judgment and hence the real party in interest in the litigation. The Galaxy companies responded that there was no evidence of a valid assignment of the judgment, so joining Sherron Associates as an assignee would be improper. The companies also argued that Loan Fund V had not met the criteria set forth in CR 59 and CR 60 for amendment of a final judgment. Notwithstanding these arguments, on April 27, 2006 the court granted Loan Fund V's motion to amend the complaint to join Sherron Associates as a plaintiff. Holding that the amendment related back to the time of filing the complaint, the court also added Sherron Associates as a judgment creditor on the default judgment.

Loan Fund V made a motion asking the court to restore it to active status as a corporation. The court denied this motion. This decision, which has not been appealed, left Sherron Associates as the only judgment creditor available to collect the judgment.

Still pending was the motion by the Galaxy companies to vacate the judgment under CR 60. They argued that the judgment could not be allowed to stand for a number of reasons, including allegedly defective service. On July 18, 2006, the trial court voided the judgment as to most of the Galaxy Gaming companies that had been named as defendants, based on lack of personal jurisdiction due to defective service. The remaining defendants were Galaxy Gaming of Washington, LLC, a New Mexico company; Robert Saucier; and Galaxy Gaming Corporation, a Washington corporation. Having taken note of the Nevada court's decision, the trial court sought and received additional briefing on the effect of the Nevada decision and whether Sherron Associates should be allowed to proceed as a judgment creditor. The court reaffirmed its July 18 order on August 4, 2006, and thereby allowed the default judgment to stand as to the three remaining defendants with Sherron Associates as the judgment creditor.

The two remaining Galaxy Gaming companies appeal. Robert Saucier joins in the appeal.

RES JUDICATA

Appellants claim the trial court should have found the King County collection lawsuit barred by res judicata because all of the claims raised were or could have been litigated in the original Spokane action.

Tempering the doctrine of res judicata is the commonsense observation that "one cannot say that a matter should have been litigated earlier if, for some reason, it could not have been litigated earlier; thus, res judicata will not operate if a necessary fact was not in existence at the time of the prior proceeding". Kelly-Hansen v. Kelly-Hansen, 87 Wn. App. 320, 330-31, 941 P.2d 1108 (1997). The purpose of the King County lawsuit was to establish the Galaxy Gaming companies as Saucier's alter egos so that the Spokane judgment could be collected from them. Supporting the lawsuit were allegations that Saucier himself was unresponsive to collection efforts and that he had created the Galaxy companies to shield himself from liability. Appellants do not demonstrate that these facts

were known before entry of the Spokane judgment such that the alter ego theory could have been proved in that litigation. Because the appellants have not shown that the two suits arose out of the same facts, res judicata does not bar the King County lawsuit.

NONEXISTENT PLAINTIFF

Sherron Associates now acknowledges that Loan Fund V no longer exists as a corporate entity and had dissolved itself before filing this lawsuit. Galaxy and Saucier contend that the default judgment in King County must be declared void ab initio because a trial court lacks jurisdiction over a lawsuit initiated by a nonexistent plaintiff.

Although there is a certain intuitive appeal to the theory that a court lacks jurisdiction when the named plaintiff in a case is nonexistent, appellants have not cited any authority to support it, and they have not developed it to the point of saying whether it was personal jurisdiction or subject matter jurisdiction that the trial court lacked. Loan Fund V did exist when it obtained the Spokane judgment against Saucier in 1998. Appellants do not contend that the Spokane judgment is invalid or defective in any way. If Loan Fund V cannot collect that judgment from Saucier's alter egos, perhaps some other entity can. The death of a plaintiff does not necessarily end a lawsuit. Dead corporations may have successors just as dead people do. Indeed, the idea that Sherron Associates is the successor to Loan Fund V and hence the real party in interest, is the basis upon which the trial court allowed the joinder of Sherron Associates. Under the circumstances here, we conclude that Loan Fund V's nonexistence does not necessarily amount to a jurisdictional defect that would make the default judgment void for lack of jurisdiction. However, we do recognize that Loan Fund V, lacking formal existence and authority to litigate, was not a proper plaintiff and may not now enforce the judgment. If there is any entity able to enforce the judgment, it can only be Sherron Associates.

ASSIGNMENT

Appellants contend Sherron Associates cannot enforce the Spokane judgment because there is no proof that Sherron Associates is an assignee of the judgment. Sherron Associates responds that it became an assignee of Loan Fund V's assets, including the judgment, by means of correspondence between Guy C. Alloway and C. Edward Springman before Loan Fund V was cancelled. Alloway wrote to Springman in December 2001, offering to take over all the abandoned membership interests in Loan Fund V. Springman signed a provision representing that he was consenting to the transfer, voting for Alloway's company to be the new managing member, and abandoning his own interest.[10] In this way, all assets belonging to Loan Fund V allegedly became Alloway's for a time, then were transferred to Sherron Associates. According to Sherron Associates, the transfer occurred in October 2002 when Springman (as president of Sherron Associates) wrote to Alloway proposing, "You will abandon your interest in the LLC and I will take it over since you do not have the time to pursue the management of the LLC."[11] This letter bears Alloway's signed agreement to the proposal. The letters between Alloway and Springman do not specifically mention assignment of any corporate assets or

the Spokane judgment, but Sherron Associates maintains that they constitute a layman's documentation of the assignment.

Neither party cites relevant legal authority explaining how to decide whether a valid assignment occurred. We conclude it is an issue we need not decide. Even if Sherron Associates is the true heir of Loan Fund V's assets and holds a valid assignment of the Spokane judgment, the trial court erred in allowing amendment of the King County default judgment to add Sherron Associates as a judgment creditor.

AMENDMENT OF THE COMPLAINT AND JUDGMENT

Once a final judgment is entered disposing of all claims and all parties, it may not be reopened except under a statute or court rule that authorizes relief from judgment. Typically, such authority is found only in CR 59 or 60. Rose v. Fritz, 104 Wn. App. 116, 120, 15 P.3d 1062 (2001); Kemmer v. Keiski, 116 Wn. App. 924, 933, 68 P.3d 1138 (2003).

Sherron Associates claims that the court's order adding Sherron Associates as a judgment creditor should be upheld because it was consistent with CR 17 and CR 21. CR 17(a) provides that no action shall be dismissed "on the ground that it is not prosecuted in the name of the real party in interest" until a reasonable time has been allowed for the real party to join. CR 21 provides that parties may be dropped or added by order of the court "at any stage of the action and on such terms as are just." CR 21 is one of several civil rules under which a trial court has "broad authority" to manage the scope of litigation. 3A Karl B. Tegland, Washington Practice: Rules Practice 456 (5th ed. 2006). Seen in this light, CR 21's phrase allowing a new party to be added "at any stage of the action" suggests that a new party can be added even as late as the stage at which the court is considering a motion to vacate a default judgment. We conclude, however, that such an expansive interpretation would conflict with the principles discussed in Rose v. Fritz. None of the cases relied upon by Sherron Associates as authority for joinder of a real party in interest under CR 17 (and relation back of such joinder under CR 15) involve circumstances where joinder was allowed after entry of a final judgment. CR 17 and CR 21 do not authorize the reopening of a final judgment and therefore they do not authorize the amendment that occurred here.

The default judgment that was entered against Saucier and the Galaxy companies in favor of Loan Fund V was a final judgment. Following Rose v. Fritz, we conclude the trial court erred by permitting joinder of Sherron Associates as a plaintiff and judgment creditor when there was no attempt to reopen the judgment in compliance with the requirements of CR 59 or CR 60. The second amended judgment in favor of Sherron Associates must be reversed, and Sherron Associates must be dismissed from the King County lawsuit resolved by the judgment. Whether such dismissal should be with or without prejudice has not been briefed and accordingly we make no comment on that issue.

The appellants also challenge the validity of the service of process on Galaxy Gaming Corporation

and Galaxy Gaming of Washington, LLC, the two remaining Galaxy defendants. Respondents concede that Loan Fund V cannot enforce the judgment. We have now held that Sherron Associates is likewise unable to enforce the judgment. Because there is no party to the King County lawsuit that can enforce the judgment, for purposes of resolving the merits of this appeal it is a moot question whether the Galaxy defendants were properly served.

ATTORNEY FEES

Galaxy Gaming of Washington, LLC, contends that it is entitled to attorney's fees as a prevailing party under the long-arm statute:

In the event the defendant is personally served outside the state on causes of action enumerated in this section, and prevails in the action, there may be taxed and allowed to the defendant as part of the costs of defending the action a reasonable amount to be fixed by the court as attorneys' fees.

RCW 4.28.185(5). Such an award is discretionary. State v. O'Connell, 84 Wn.2d 602, 606-07, 528 P.2d 988 (1974) (Supreme Court exercised its discretion to deny a request for attorney's fees where there was nothing to indicate that the length or expense of the litigation was affected by the location of the forum). One basic principle is that "a prevailing defendant should not recover more than an amount necessary to compensate him for the added litigative burdens resulting from the plaintiff's use of the long-arm statute." Scott Fetzer Co. v. Weeks, 114 Wn.2d 109, 120, 786 P.2d 265 (1990). Appellant Galaxy Gaming of Washington, LLC, has not demonstrated that it has been subjected to burdens and inconveniences that would have been avoided had the matter been litigated in New Mexico. Nor does the record suggest any reason to believe the company has incurred added litigative burdens by defending this action in Washington. We exercise our discretion to refuse the request for an award of fees.

Reversed.

1. Clerk's Papers at 172 (Letter to Secretary of State, March 13, 2006).

2. Clerk's Papers at 175 (Letter from Attorney General, March 16, 2006).

3. Clerk's Papers at 280 (Loan Fund V's Opposition to Saucier's Motion for Void, May 2, 2006).

4. Clerk's Papers at 281.

5. Clerk's Papers at 336 (Clark County Amended Order, June 21, 2006).

6. Clerk's Papers at 444 (Loan Fund V's Complaint, June 27, 2005).

7. Clerk's Papers at 448.

8. Clerk's Papers at 662-63 (Judgment, December 9, 2005).

9. Clerk's Papers at 670-72 (Amended Judgment, January 9, 2006).

10. Clerk's Papers at 909.

11. Clerk's Papers at 911.