



Nunu v. Del Lago Estates Property Owners Association

2003 | Cited 0 times | Court of Appeals of Texas | April 10, 2003

MEMORANDUM OPINION

Paul E. Nunu ("Nunu") appeals the trial court judgment awarding Del Lago Estate Property Owners Association ("Del Lago") damages and attorney's fees for his violation of restrictive covenants. Del Lago filed suit in 1989 against Nunu to enforce the restrictive covenants of the Del Lago Estates Subdivision. Nunu, an attorney who owned property in the subdivision, had placed a mobile home and related structures on his property in violation of the restrictions. Del Lago sought declaratory relief that the restrictions were valid, and sought to enjoin Nunu's continuing violation of the restrictions. Del Lago also requested unpaid maintenance dues, damages and attorney's fees as authorized by the Property Code. The district court found the restrictions valid. On September 12, 1990, the trial court severed Del Lago's claim for attorney's fees and damages from the main cause. The judgment declaring the restrictions valid was affirmed by this Court in *Nunu v. Del Lago Estates Property Owners Ass'n*, No. 09-90-201-CV (Tex. App.--Beaumont 1992, writ denied) (not designated for publication).

Del Lago obtained a permanent injunction against Nunu's continued violation of the restrictive covenants. Nunu was found in contempt of court for failure to comply with the trial court's order, and was ordered confined. He filed a habeas corpus petition with the Texas Supreme Court. The Court struck a reimbursement condition in the contempt order, but otherwise denied his petition and remanded him to the custody of the sheriff. See *In Re Nunu*, 960 S.W.2d 649 (Tex. 1997). Nunu eventually obeyed the trial court's order and was discharged from contempt.

Nunu raises the defenses of res judicata and collateral estoppel. His argument is that the claims and issues here were actually litigated in the declaratory, injunctive, and contempt litigation, the relief was explicitly or impliedly denied, and Nunu was fully discharged by court order. Nunu contends that Del Lago, having failed to appeal the discharge from contempt, is precluded from further litigation of its claims for damages and attorney fees.

Res judicata, or claim preclusion, prevents litigation of claims that have been finally adjudicated, or that arise out of the same subject matter and that could have been litigated in the prior action. See *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 631 (Tex. 1992). The elements of res judicata are as follows: a prior, final judgment on the merits by a court of competent jurisdiction; an identity of parties or those in privity with them; and a second action based on the same claims that were raised or could have been raised in the first action. See *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 652 (Tex. 1996). Collateral estoppel, or issue preclusion, prevents a party from relitigating a particular fact



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issue the party litigated and lost in an earlier suit. See *Quinney Electric, Inc. v. Kondos Entertainment, Inc.*, 988 S.W.2d 212, 213 (Tex. 1999). Collateral estoppel promotes judicial efficiency, protects parties from multiple lawsuits, and prevents inconsistent judgments. *Sysco Food Servs., Inc. v. Trapnell*, 890 S.W.2d 796, 801 (Tex. 1994). Generally, the doctrine "applies when the issue was fully and fairly litigated in the previous action and was essential to the judgment in the previous action." *Quinney Electric, Inc.*, 988 S.W.2d at 213.

The question presented is whether the claims for damages and attorney's fees were litigated or could have been litigated in the prior proceedings. In support of his argument that these issues were previously litigated, Nunu points to the following:

1. During the show cause hearing in the contempt proceeding Del Lago's counsel asked that costs, attorney's fees and damages be imposed;
2. In Del Lago's response to Nunu's motion for summary judgment in this case, Del Lago asserted: "The Association also sought the recovery of its attorney's fees solely in connection with its efforts to enforce the July 23, 1990, Summary Judgment"; and
3. In Del Lago's response to Nunu's motion for summary judgment in this case, Del Lago states:

The Association agrees that the fact issue of whether Nunu complied with the Restrictive Covenants following the entry of the Summary Judgment and the Order of Contempt was fully and fairly litigated in the contempt proceedings. Nunu was clearly found to have violated the Restrictive Covenants, and, therefore, the Summary Judgment and Order of Contempt, and this issue cannot be re-litigated.

Nunu argues that his discharge from contempt bars Del Lago's recovery of damages and attorneys' fees here.

While a civil contempt proceeding is auxiliary to the main cause in that it proceeds out of the original action, it is essentially an independent proceeding involving new issues. Contempt orders cannot be appealed; they are reviewed by petition for writ of habeas corpus in cases of confinement, or by petition for writ of mandamus where no confinement is involved. See *Cadle Co. v. Lobingier*, 50 S.W.3d 662, 671 (Tex. App.--Fort Worth 2001, pet. denied).

The purpose of the contempt proceeding here was to enforce the trial court's orders, not to litigate the substantive right of Del Lago to collect assessments, monetary damages and attorney's fees as prayed for in the severed case. The order of discharge from contempt established that Nunu had purged himself from the contempt and was entitled to have the court's contempt order vacated. The trial court did not make any other orders affecting the substantive rights of the parties. The damage and attorney's fee claims had been severed into a separate cause number.



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In the contempt proceeding, a separate claim was made by Del Lago for attorney's fees and costs incurred "in connection herewith." In a civil contempt action occasioned by a willful disobedience of a court order, an award of attorney's fees may be authorized as part of the fine to be levied on the defendant. See *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718, 18 L.Ed.2d 475, 87 S.Ct. 1404 (1967). No award of attorney's fees was made in the contempt action. However, no claim was made in that proceeding for statutory attorney's fees as authorized by section 5.006 of the Property Code. See *Gorman v. Countrywood Property Owners Ass'n*, 1 S.W.3d 915, 918 (Tex. App.--Beaumont 1999, pet. denied). Del Lago made that claim in the original action, but that claim was severed by the trial court into this cause. The claim formed the basis of the trial court's award in this case, but the pleading was not a part of the contempt proceedings. Further, in the contempt proceedings, no evidence was introduced for the purpose of quantifying any claim for attorney's fees or damages, and nothing indicates the claims asserted here were tried by consent in the contempt action. Compare *Dickerson v. DeBarbieris*, 964 S.W.2d 680, 688-89 (Tex. App.--Houston [14th Dist.] 1998, no pet.). The Texas Supreme Court has stated that res judicata does not preclude litigation of claims that a trial court explicitly severs from an action. See *Van Dyke v. Boswell, O'Toole, Davis & Pickering*, 697 S.W.2d 381, 384 (Tex. 1985). See also *Inman v. O'Donnell*, 722 S.W.2d 16, 18 (Tex. App.--Dallas 1986, no writ). In *Van Dyke v. Boswell*, the Court held that actual litigation of an issue occurs when an issue is properly raised by pleadings or otherwise, is submitted for determination, and is determined. *Van Dyke*, 697 S.W.2d at 384. We conclude the severed claims are not barred by res judicata or collateral estoppel. Nunu asserts no other grounds attacking the judgment of the trial court.

Appellee has moved this Court to take judicial notice of the court records in other proceedings. The request for judicial notice is made in connection with Del Lago's motions to dismiss and for sanctions. Appellant opposes the motion but does not challenge the accuracy of the records. We grant the judicial notice request.

Appellee's motion to dismiss is based on the pendency of appellant's bankruptcy petition at the time the notice of appeal was filed here. But the automatic stay was lifted by the bankruptcy court to permit the litigation and the appeal of this case in state court. Appellee also asks this Court to sanction appellant pursuant to Rule 45 of the Texas Rules of Appellate Procedure for bringing a frivolous appeal. Although we have discretion to award damages for a frivolous appeal, and although we have found Nunu's issues unconvincing, we decline to impose sanctions at this time because the circumstances are not sufficiently egregious. See *Angelou v. African Overseas Union*, 33 S.W.3d 269, 282 (Tex. App.--Houston [14th Dist.] 2000, no pet.). Appellee's motions to dismiss and for sanctions are denied.

The judgment of the trial court is affirmed.

AFFIRMED.



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