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NO. 688316-1

COURT OF APPEALS
DIVISION ONE
OF THE STATE OF WASHINGTON

SUK H. KIM and EMERALD CITY SPA, INC., d/b/a PALACE SPA,

APPELLANTS,

v.

JUNG UNG KIM,

RESPONDENT.

BRIEF OF APPELLANTS

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I. INTRODUCTION

This appeal addresses whether a party may repeatedly sue a defendant in small claims court based on the same facts in order to prevent the defendant from being assisted by counsel or whether the subsequently filed lawsuits are barred by the doctrine of *res judicata*.

II. ASSIGNMENTS OF ERROR

2.1 Assignments of Error.

2.1.1 Did the Superior Court err when it held that *res judicata* did not bar respondents from bringing a complaint identical to a complaint previously filed and dismissed?

2.1.2 Did the Superior Court err when it held that a subsequent lawsuit arising out of the same facts and circumstances as previously dismissed lawsuits were not barred by *res judicata* because different elements of damage were sought in the subsequent lawsuit?

2.2 Issues Pertaining to Assignments of Error.

2.2.1 Is a defendant in small claims court protected by the doctrine of *res judicata* from serial lawsuits based on identical facts and brought on the same legal basis?

2.2.2 Are claims arising out of the same facts and circumstances as a prior lawsuit that was dismissed barred by *res judicata* where the plaintiff seeks a different or additional element of damages in the subsequent lawsuit?

III. STATEMENT THE CASE

This appeal seeks review of a judgment entered on May, 1, 2012 by the Superior Court of Washington for King County in case number 12-2-07698-7 KNT, which in turn was an appeal from the judgment of the District Court/South Division Renton Courthouse, cause number 114-04180. CP 75; CP 67. This was the fifth small claims case filed against the Appellants by the Respondents. CP 67; RP p. 4, Ins 13-25; p. 5, Ins 1-2. All of the cases arose out of the same facts and circumstances. RP p. 3, Ins 24-25; p. 4, Ins 8-9, 23-25; p. 9, Ins 1-2, 8-14..

Appellant Emerald City Spa is in the business of operating a day spa in Federal Way, Washington known as the Palace Spa. CP 2. Appellant Suk H. Kim is an owner and officer of Emerald City Spa. CP 2. A dispute arose between the Appellants and the Respondent, Jung Ung Kim, related to an agreement made in September 2009 (the "Agreement") under which Respondent was permitted to operate a food service inside Palace Spa. CP 3.

The Agreement, which the parties referred to as a lease, was written partly in English and partly in Korean. CP 3. By its own terms, the Agreement was to expire on September 30, 2010 unless an extension option was properly exercised by Jung Ung Kim. CP 3. Appellants claimed that the option was not properly exercised. CP 3. After September 30, 2010 Jung Ung Kim was denied access to the spa. CP 3.

On October 6, 2010 the Respondent filed a small claims lawsuit in the King County District Court against the Appellants ("Case 1"), cause number 104-2772. CP 3; CP 59. The claim alleged "[u]nlawful eviction, changed the lock[,] [c]laiming plaintiff's gross sales in the amount of \$5,000.00 for the month of October 2010." CP 3; CP 59. The hearing on this case was delayed pending the appeal in a second case. CP 3.

On November 16, 2010 the Respondent filed a second small claims lawsuit ("Case 2"), cause number 104-3142, alleging the same facts and asserting the same claim as Case 1¹. Case 2²

¹ "Unlawful eviction and changed the lock. Claiming plaintiff's gross sales in the amount of \$5,000.00 for the month of November 2010." CP 61.

² "Unlawful eviction and changed the lock. Claiming plaintiff's gross sales in the amount of \$5,000.00 for the month of December 2010." CP 63.

sought an additional \$5,000 in damages for a second month of lost sales. CP 4; CP 61. At the hearing on January 3, 2011 the court entered an award in favor of Jung Ung Kim. CP 4. The award was appealed and the decision reversed by the King County Superior Court. On remand to the District Court the case was dismissed on the merits. CP 4; RP p. 4, Ins 13-22.

On January 24, 2011 the Respondent filed a third small claims lawsuit ("Case 3") cause number 114-1738, alleging the same facts and claim as Case 2 and seeking an additional \$5,000 in damages for a third month of lost sales. CP 4; CP 63. Subsequently, Case 1, Case 2, and Case 3 were all denied on the merits by the District Court. CP 4.

On August 23, 2011 the Respondent filed a fourth small claims lawsuit ("Case 4"), cause number 114-3427, alleging the same grounds for relief as Case 3³ and sought an unspecified amount in damages for "equipments and [p]erishable food and sauces." CP 4; CP 65. The claimant in Case 4 failed to appear on the date set for hearing and the lawsuit was dismissed by the District Court. CP 4.

³ "Defendants suddenly changed the door lock and evict Plaintiff. Claiming plaintiff's equipments and Perishable food and sauces held by defendants [sic]." CP 65.

On December 2, 2011 the Respondent filed the fifth small claims lawsuit (“Case 5”), cause number 114-4180, alleging identical grounds for relief as seen in Case 4⁴, and sought an unspecified amount in damages for “equipments and perishable food and sauces.” CP 4; CP 67.

At the hearing in the District Court the Appellants presented a copy of a Complaint for Injunctive Relief and Damages that had been filed by the Appellants seeking an injunction against the Respondent prohibiting the Respondent from filing any further small claims cases against the Appellants based on the doctrines of *res judicata* and collateral estoppel. CP 42, p. 5. Subsequently, the Superior Court entered the requested judgment. CP 69.

Notwithstanding the fact that Case 4 which stated an identical claim as Case 5, had previously been dismissed, the District Court on January 30, 2012, awarded damages to the Respondent on Case 5. CP 9. Appellants appealed the District Court’s decision to the Superior Court. CP 1.

On May 1, 2012 the Superior Court modified the trial court’s holding and held in part for Respondent, concluding:

⁴ “Defendant suddenly changed the door lock and evict Plaintiff. Claiming plaintiff’s equipments and perishable food and sauces held by defendants [sic].” CP 67.

“[T]he current claim by Respondents for the return of equipment and for reimbursement for lost food differs from prior claims for loss of gross sales. The current claim is therefore not barred.” (Emphasis added.)

CP 75.

On June 13, 2012 a motion for discretionary review was filed with the Superior Court. CP 77.

On August 17, 2012 Commissioner Mary Neel of the Court of Appeals ordered that under RAP 2.2(c), a superior court decision modifying a decision of small claims court is appealable and that the notice of discretionary review would be treated as a notice of appeal.

IV. ARGUMENT

4.1 Standard of Review.

The issues addressed in this appeal involve the application of the legal doctrine of *res judicata* and thus, are reviewable as questions of law. Barnett v. Buchan Baking Co., 45 Wn. App. 152, 724 P.2d 1077 (1986).

4.2 Res Judicata.

The Superior Court erred when it determined that the dismissal of four prior lawsuits did not bar Respondents from bringing a fifth lawsuit based on the same facts and circumstances.

A claimant may not split a single cause of action or claim. Such a practice would lead to duplicitous suits and force a defendant to incur the cost and effort of defending multiple suits. Landry v. Luscher, 95 Wn. App. 779, 782, 976 P.2d 1274 (DIV. III, 1973); Hardware Dealers Mutual Fire Ins. Co. v. Farmers Ins. Exchange et al., 4 Wn. App. 49, 50-51, 480 P.2d 226 (DIV. I, 1971). There are various criteria for determining whether the same cause of action is involved in the two suits: (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts. Rains v. State, 100 Wn.2d 600, 664, 674 P.2d 165 (1983) (prior judgment determined plaintiff's constitutional rights were not impaired and evidence necessary in both cases were identical, both arising out of the same transactional nucleus of facts); Kulman v. Thomas, 78 Wn.

App. 115, 122-123, 897 P.2d 365 (DIV. I, 1995) (prior cases predicated on employee reports of sexual harassment and evidence needed to support were identical, both arising out of the same transactional nucleus of facts); Pederson v. Potter, 103 Wn. App. 62, 72, 11 P.3d 833 (DIV. III, 2000) (both actions involved the same evidence and the infringement of the same right and arose from the same transactional nucleus of facts); see also Harris v. Jacobs et al., 621 F.2d 341, 343 (9th Cir., 1980).

The Washington Supreme Court, like the 9th Circuit of Appeals, has held that resurrecting the same claim in a subsequent action is barred by *res judicata* and a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. Hilltop Terrace Homeowners Ass'n v. Island County, 126 Wn.2d 22, 31, 891 P.2d (1995); see also United States v. ITT Rayonier, Inc., 627 F.2d 996, 1000 (9th Cir., 1980). Under the doctrine of *res judicata*, or claim preclusion, a prior judgment will bar litigation of a subsequent claim if the prior judgment has “a concurrence of identity with [the] subsequent action in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made.” Marshall v. Thurston County, 165 Wn. App. 346, 353 (2011).

Additionally, “in an instance of claim preclusion, all issues which might have been raised and determined are precluded.” Shoemaker v. City of Bremerton, 109 Wn.2d 504, 507, 745, P.2d 858 (1987). (emphasis added).

Here, the grounds for relief asserted in Case 5 are identical to the grounds asserted in Case 4, a case that was dismissed by the District Court. CP 5. The Superior Court’s holding that the type of damages sought in the fifth case (“return of equipment and for reimbursement for lost food”) “differs from prior claims for loss of gross sales”, disregards the fact that the complaint in the dismissed Case 4 was identical to the fifth case. Moreover, it is immaterial that a different element of damages was sought because the doctrine bars all claims that could have been part of the previously determined litigation. The claims asserted in Case 5 are barred.

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IV. CONCLUSION

For the reasons outlined above the judgment in this case should be reversed and the claims against the Appellants dismissed.

Respectfully submitted this 22nd day of January, 2013.

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Respondent.

PROOF OF SERVICE

I, Irene Norse, declare that I am a person over eighteen years of age, competent to be a witness and not a party to the above-entitled and enumerated cause.

On January 22, 2013 I caused to be served by ABC Legal Services and email a true and correct copy of Brief of Appellants and Proof of Service to:

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On January 22, 2013 I caused to be served by ABC Legal Services an original and copy of Brief of Appellants and Proof of Service to:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Bellevue this 22nd day of January, 2013.



Irene Norse