

TENTATIVE RULINGS—APRIL 13, 2007

To request a hearing on any matter on this calendar, you must call the Court at (209) 223-6360 by 4:30 p.m. today. Notice of the intention to appear must also be given to all other parties. If the clerk is not notified of a party's intention to appear, there will be no hearing and the tentative ruling becomes the order of the court.

Foyil v. Kieler: 04CV3542

Plaintiff's Motion to be Determined Prevailing Party

This matter is continued to June 8, 2007 at 2:00 p.m. in Department 1.

Richard Spaulding Construction v. Haynes: 06CV4491

Demurrer to Complaint

Defendants' demurrer is sustained without leave to amend.

Claim preclusion is when an issue previously litigated and determined is raised again in a subsequent action between the same parties on the same claim. (7 Witkin, Cal. Proc. (1997, 4th ed.), Judgment §285.) Claim preclusion is a complete bar to the subsequent lawsuit. Whereas, collateral estoppel (issue preclusion) applies when an issue previously litigated and determined is raised in a subsequent action between the same parties on a different claim. Issue preclusion is not a complete bar to the action, but it is effective as to all issues actually litigated between the parties in the former action. (*id.*)

In order to apply either claim or issue preclusion, the following elements must be present: (1) A claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the prior proceeding resulted in final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding. (*Pitzen v. Superior Court* (2004) 120 Cal.App.4th 1374.)

It is well established that the claim preclusion aspect of res judicata applies to small claims judgments. (*Pitzen, supra.*)

California law defines a cause of action by focusing on the primary right involved therein. (*Tensor Group v. City of Glendale* (1993) 14 Cal.App.4th 154.) If two actions involve the same injury to the plaintiff and the same wrong by the defendant, then the same primary right is at stake, regardless of whether the plaintiff pleads different theories of recovery, seeks different forms of relief, and/or adds new facts to support his or her recovery. (*id.*) Moreover, if the matter was within the scope of the subject matter of the action and was relevant to the issues that could have been raised, judgment is conclusive on it, despite the fact that it was not expressly pleaded or otherwise charged. (*id.*) A party cannot, by negligence or design, withhold issues in order to litigate them in consecutive actions. (*id.*) A prior judgment is conclusive on all matters raised or that could have been raised in said action. (*id.*; see also *Allstate Insurance Company v. Mel Rapton* (2000) 77 Cal.App.4th 901 (noting that generally a valid judgment in favor of a plaintiff merges any claim of the same cause of action in the judgment and precludes the plaintiff from maintaining any later suit on the same cause of action).) However, there is an exception to this rule in cases where the plaintiff could not have asserted the theory in the original forum because of subject matter jurisdictional limitations of the same. (*Le Parc Community Assn. v. WCAB* (2003) 110 Cal.App.4th 1161.)

Another aspect of the res judicata doctrine is the rule against splitting causes of action. (*Allstate, supra* (adding that in determining whether a cause of action was split, the relief sought by the injured party should not be confused with the cause of action, i.e. the violation of one primary right constitutes a single cause of action, though it may entitle the injured party to many forms of relief).) In other words, an entire claim cannot be divided and made the basis of several suits. (*Lekse v. Municipal Court* (1982) 138 Cal.App.3d 188.) A litigant cannot avoid the rule against

splitting causes of action by choosing as his first forum, a court of limited jurisdiction. (Allstate, supra.) Specifically, a plaintiff cannot split a cause of action and make it the basis of several suits in order to take advantage of small claims court jurisdiction and procedure. (id.; see also Lekse, supra (adding that the small claims court process cannot be used to enable plaintiffs to bring multiple lawsuits where only one cause of action is stated within the jurisdictional limits of the court).)

If a plaintiff brings a cause of action in small claims court, he is deemed to have waived any damages in excess of the jurisdictional limit. (Allstate, supra; see also Lekse, supra (noting that a small claims plaintiff, taking advantage of all of benefits of that court is deemed to have accepted all of its disadvantages as well).) Moreover, a final judgment in the small claims action will bar any subsequent proceeding on the same cause of action. (id.)

In the small claims action, the plaintiff raised the issue of nonpayment for excavation work performed. In that action, the court held:

The plaintiff never entered into an agreement or contract with the defendant. An owner has no personal liability towards laborers, material suppliers, or subcontractors with whom the owner has no contractual privity. This lack of contractual relationship bars the plaintiff from recovery and the plaintiff's claim is denied. (Judgment of September 26, 2006 in Case No. 06SC1968 [internal citations omitted].)

The Judgment does not mention any mechanic's lien filed by the plaintiff.

The cause of action/ primary right asserted in both actions are the same, i.e. the plaintiff is seeking to recover unpaid fees for excavation work performed on the defendants' property. As such, claim preclusion is the relevant theory to discuss. The plaintiff should have brought all claims in the small claims action.

The mechanic's lien in question is for \$10,000 (see mechanic's lien attached to the complaint). Thus, the lien is in excess of the jurisdictional amount of the small claims court. However, as noted herein above, by choosing the small claims forum, the plaintiff is deemed to have waived damages in excess of the jurisdictional amount. The plaintiff is attempting to split its cause of action. This is impermissible.

Therefore, the demurrer is sustained without leave to amend.

Defendants request attorney's fees, pursuant to C.C.P. §128.6. However, §218.6 is not the governing section; rather, §128.7 is the correct provision. §128.7 has certain procedural prerequisites for bringing a motion for sanctions. Defendants must comply with said procedures, if they wish to pursue their request for attorney's fees.

Defendants are to prepare an order in compliance with Rule 3.1312.

Ferretti v. Safeway: 06CV4427

Demurrer to Complaint

Defendant's demurrer is overruled in part and sustained in part with leave to amend.

Motion to Strike:

Defendant's motion to strike is denied. Defendant failed to set forth any authority or even state the grounds to support striking the portions of the complaint requested.

Uncertainty:

A demurrer is proper if the pleading is uncertain, ambiguous, or unintelligible. (C.C.P. §430.10, subd. (f).) The complaint must set forth facts with sufficient precision, clarity, and particularity that the defendant may be apprised of the nature, source, and extent of the cause of action. (Metzenbaum v. Metzenbaum (1948) 86 Cal.App.2d 750, 753 [internal citations omitted].)

However, a demurrer for uncertainty is strictly construed, even when the complaint is uncertain in some respects, because ambiguities may be cleared up in the ordinary course of discovery. (Khoury v. Maly's of California, Inc. (1993) 14 Cal.App.4th 612, 616 (see also Rutter, Civ. Proc. Before Trial, §7:85 (citing Khoury, supra, for the proposition that a demurrer for uncertainty will only be sustained when the complaint is so bad that the defendant cannot reasonably respond, i.e. that he cannot reasonably determine what issues must be admitted or denied, or what counts or claims are directed towards him).) A demurrer for uncertainty must distinctly specify how and why the pleading is uncertain and where said uncertainty appears, i.e. page and line number of the complaint. (Rutter, Civ. Proc. Before Trial, §7:88.)

In this instance, the defendant did not distinctly specify how and why the pleading was uncertain and where said uncertainty appears. Moreover, the complaint is not so uncertain that the defendant could not reasonably respond to the same. Therefore, the demurrer is overruled as to the ground of uncertainty.

Arbitration Award Bars Action:

Defendant states that when a collective bargaining agreement provides for a grievance and arbitration procedure, the procedure in the collective bargaining agreement is the employee's exclusive remedy for any action covered by the grievance and arbitration procedure and, therefore, the court does not have jurisdiction over the instant action.

Claim preclusion is when an issue previously litigated and determined is raised again in subsequent action between the same parties on the same claim. (7 Witkin, Cal. Proc. (1997, 4th ed.), Judgment §285.) Claim preclusion is a complete bar to the subsequent lawsuit. Whereas, collateral estoppel (issue preclusion) occurs when an issue previously litigated and determined is raised in a subsequent action between the same parties on a different claim. Issue preclusion is not a complete bar to the action, but it is effective as to all issues actually litigated between the parties in the former action. (*id.*)

In order to apply either claim or issue preclusion, the following elements must be present: (1) A claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the prior proceeding resulted in final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding. (Pitzen v. Superior Court (2004) 120 Cal.App.4th 1374.)

California law defines a cause of action by focusing on the primary right involved therein. (Tensor Group v. City of Glendale (1993) 14 Cal.App.4th 154.) If two actions involve the same injury to the plaintiff and the same wrong by the defendant, then the same primary right is at stake, regardless of whether the plaintiff pleads different theories of recovery, seeks different forms of relief, and/or adds new facts to support his or her recovery. (*id.*) Moreover, if the matter was within the scope of the subject matter of the action and was relevant to the issues that could have been raised, judgment is conclusive on it, despite the fact that it was not expressly pleaded or otherwise charged. (*id.*) A party cannot, by negligence or design, withhold issues in order to litigate them in consecutive actions. (*id.*) A prior judgment is conclusive on all matters raised or that could have been raised in said action. (*id.*; see also Allstate Insurance Company v. Mel Rapton (2000) 77 Cal.App.4th 901 (noting that generally a valid judgment in favor of a plaintiff merges any claim of the same cause of action in the judgment and precludes the plaintiff from maintaining any later suit on the same cause of action).) However, there is an exception to this rule when the plaintiff could not have asserted the theory in the original forum because of subject matter jurisdictional limitations of the same. (Le Parc Community Assn. v. WCAB (2003) 110 Cal.App.4th 1161.)

The same claims are not involved in this instance because the same primary rights are not at stake. The injury to the plaintiff in a wrongful termination action differs from the injury sustained in a malicious prosecution action. In a wrongful termination action, the injury is the loss of a job. In a malicious prosecution action, the wrong is the prosecution and the effects therefrom.

The next issue becomes whether issue preclusion (collateral estoppel) would bar the issues raised in the instant action). A labor arbitration award under a collective bargaining agreement may preclude the relitigation of identical issues in a subsequent civil lawsuit. (Kelly v. Vons Companies (1998) 67 Cal.App.4th 1329.) In order to apply collateral estoppel in subsequent civil lawsuits, the basic criteria for applying that doctrine must be met and the arbitration must be judicial in character. (id.)

In this case, the arbitration was judicial in character. However, the issue at the arbitration was, "Whether the suspension/termination of the Grievant, Mark Ferretti, was for just cause; and if not, what shall be the remedy?" The arbitrator found that the suspension/termination of the grievant, Mark Ferretti, was for just cause. The grievance was denied.

The complaint in this action is for malicious prosecution. Malicious prosecution is not an identical claim to the wrongful termination claim presented at the arbitration. Moreover, nowhere in the arbitration award is a malicious prosecution action discussed. Nor could it have been. The criminal trial of the plaintiff occurred after the arbitration hearing. Therefore, collateral estoppel would not apply to bar the instant action, as the issue of malicious prosecution was not actually litigated in the arbitration. While Defendant is correct that any claim of wrongful termination may be collaterally estopped, that issue is not before the court in the current complaint.

The "other action pending" is a petition to confirm arbitration award. The Court denied said petition without prejudice. However, said motion does not have a bearing on the complaint, as the arbitration award deals solely with the issue of wrongful termination.

Therefore, the demurrer is overruled on this ground.

ERISA:

Defendant contends that the court is without jurisdiction to hear the plaintiff's claims because he has made allegations under ERISA and, therefore, the matter belongs in federal court. The alleged claim under ERISA is contained in the punitive damage prayer, which states that the defendant terminated the plaintiff in order to "save the expense of paying his retirement and medical insurance expenses."

29 U.S.C. §1140 (part of ERISA) provides, in pertinent part:

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this title, section 3001 [29 USCS § 1201], or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this title, or the Welfare and Pension Plans Disclosure Act.

29 U.S.C. §1132 provides, in pertinent part:

(e)(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 101(f)(1) [29 USCS § 1021(f)(1)]. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

When a plaintiff brings a claim under both state law and ERISA, the state law claims survive only if the state courts have concurrent jurisdiction. (Johnson v. Trans World Airlines (1983) 149 Cal.App.3d 518.) A state has concurrent jurisdiction when the participant of the employee benefit plan brings an action to recover benefits due, to enforce his rights under the plan, or to clarify his rights to future benefits under the plan. (id. citing 28 U.S.C. §1132 (a)(1)(B).) A state court does not have concurrent jurisdiction when the plaintiff's complaint alleges that he was discharged for the purpose of depriving him employee benefits, which he seeks to recover as part of his damages. (Johnson, supra.)

In this instance, the plaintiff's complaint states that, "the true purpose behind the prosecution of Plaintiff was to terminate a 27-year employee and save the expense of paying his retirement and medical insurance payments." This language falls within the scope of ERISA. The federal courts have jurisdiction over said claim. Therefore, the demurrer is sustained with 20 days leave to amend on this ground.

Defendant is to prepare an order in compliance with Rule 3.1312.