

No. 1-10-1989

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

FIFTH DIVISION
March 25, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ILLINOIS STATE BAR ASSOCIATION MUTUAL)	Appeal from the
INSURANCE COMPANY,)	Circuit Court of
)	Cook County
Plaintiff-Appellant,)	
)	No. 09 CH 15447
v.)	
)	Honorable
ERIKA LOBATOS-SYPEREK, Not Individually, but as)	Mary Anne Mason,
Special Representative of TERRY G. O'DONNELL,)	Judge Presiding.
Deceased; REAL ESTATE LAWYERS GROUP, P.C., an)	
Illinois Professional Corporation; and BABUBHAI)	
PATEL, M.D.;)	
)	
Defendants-Appellees.)	

JUDGE EPSTEIN delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

ORDER

HELD: Where the appellate court previously ordered plaintiff-insurer to defend its insureds in a particular matter, *res judicata* barred the relitigation of that same issue in a collateral proceeding between the same parties or their privies.

Plaintiff, Illinois State Bar Association Mutual Insurance Company (ISBA), appeals the involuntary dismissal of its complaint pursuant to section 2-619 of the Illinois Code of Civil Procedure

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(735 ILCS 5/2-619 (West 2008)). Plaintiff maintains the trial court erroneously held that, *inter alia*, *res judicata* bars the instant litigation. For the reasons below, we affirm.

BACKGROUND

In 2004 plaintiff filed a lawsuit (ISBA I) against its insureds (Terry G. O'Donnell, Lindsay C. Mosher, and Real Estate Lawyers Group, P.C. (RELG)), claiming no duty to defend them in a lawsuit by Babubhai Patel (Patel Litigation). The trial court defaulted O'Donnell and RELG for failing to appear or file a responsive pleading. Plaintiff then moved for summary judgment claiming:

“[T]here is no duty to defend or provide coverage to O'Donnell, Mosher or RELG where, as here, Patel's amended complaints are nothing more than a transparent attempt to trigger insurance coverage by characterizing allegations of fraudulent and intentional conduct under the guise of 'negligent' activities. The plain language of ISBA Mutual's policy defining 'wrongful act' demonstrates that Patel does not allege any type of 'wrongful act' in performance of professional services. Theft is indisputably a voluntary act of misconduct.

WHEREFORE, the plaintiff, ILLINOIS STATE BAR ASSOCIATION MUTUAL INSURANCE COMPANY, prays that this Court enters judgment in its favor and finds and declares the rights of the parties as follows:

A. The Illinois State Bar Association Mutual Insurance Company has no duty or obligation to defend Terry G. O'Donnell[, Mosher, and RELG] in connection with the action of Babubhai Patel, M.D. in the Circuit Court of Cook County, Illinois under Cause No. 04 CH 16330 [the Patel Litigation].”

The trial court disagreed, holding:

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“1. The court denies ISBA Mutual’s Motion for Summary Judgment.

2. The court enters judgment against ISBA Mutual ~~holding that ISBA Mutual has a duty to defend Terry O’Donnell, Lindsay Mosher and Real Estate Lawyers Group, PC~~ as to the third Amended Complaint of Dr. Patel in cause No. 04 CH 16330.

3. ~~This is a final order there is no just reason to delay enforcement.”~~

Plaintiff moved for reconsideration and/or clarification of the order, claiming, inter alia:

“The Order of April 4, 2007[,] reads, ‘The Court enters judgment against ISBA Mutual as to the Third Amended Complaint of Patel in Cause No. 04 CH 16330.’ *** This Order states that judgment is entered against ISBA Mutual but it does not state for whom judgment is entered therefore, it is an invalid final judgment order. This order should specifically state that the only Defendant for whom judgement is entered is Mosher. As explained below, Mosher is the only defendant capable of having a judgment entered in her favor.

On February 15, 2004, a default judgment was entered against O’Donnell and Real Estate Lawyers. *** Neither O’Donnell nor Real Estate Lawyers has filed an appearance or answer in the present action. A default judgment is appropriate relief for failure to appear. [Citation.] Failure to answer subjects a defendant to a default judgment. [Citation.] Default judgment is the act that terminates the litigation and decides the dispute. [Citation.] It is not a prerequisite that a default judgment be preceded by a order of default; default and judgment may be simultaneously entered. [Citation.] ISBA Mutual has obtained a default against O’Donnell and Real Estate Lawyers therefore, the litigation between them is terminated and the dispute has been decided in favor of ISBA Mutual. Thus, this Court’s

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Order of April 4, 2007[,] can not [sic] grant judgment against ISBA Mutual and in favor of either O'Donnell or Real Estate Lawyers.”

The trial court declined to vacate or clarify its ruling. Plaintiff's position in the motion reconsider was either abandoned on appeal or rejected by this court's unpublished order affirming the trial court:

“Defendants O'Donnell, Mosher and the Real Estate Lawyers Group, (the attorneys) are insureds under the professional liability policy issued by ISBA Mutual. They were sued by Patel, a former client, who the attorneys represented in two lawsuits against him by the Illinois Department of Public Aid and the United States Drug Enforcement Administration.

* * *

Five months after the declaratory judgment action was filed, Patel *** filed the first of three amended complaints in the underlying lawsuit against the attorneys, all of which alleged negligence. Default judgments were ultimately entered against the attorneys in the underlying case. ISBA Mutual filed a motion for summary judgment in the declaratory judgment action [ISBA I] claiming that it had no duty to defend the attorneys against Patel's third amended complaint because Patel was bound by his initial verified complaint which only alleged claims that were excluded from the insurance policy. Treating the motion for summary judgment as opposed, the circuit court denied ISBA Mutual's motion for summary judgment, entered summary judgment against the ISBA finding that it had a duty to defend under the policy and denied its motion for reconsideration or clarification. [Footnote.] ISBA filed this timely appeal. For the reasons that follow, we affirm the judgment of the circuit court.

* * *

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After reviewing the record on appeal we hold that the circuit court correctly held that plaintiff had a duty to defend the attorneys under the insurance policy. We agree with the circuit court that the allegations in the complaint fall within, or potentially within, the policy's coverage for negligence in rendering 'services and acts taken as a "trustee" or any other similar activity.' We therefore hold that the circuit court properly entered summary judgment against ISBA Mutual, rejected its motion for reconsideration and dismissed the declaratory judgment action."

Plaintiff did not file a petition for rehearing and the supreme court denied plaintiff leave to appeal.

In April 2009 plaintiff filed the instant lawsuit against RELG, Patel, and a representative of the now deceased Terry O'Donnell. Plaintiff maintained it was not required to defend O'Donnell's estate or RELG in the still pending Patel Litigation. RELG was defaulted again for failing to appear or file a responsive pleading. O'Donnell's representative joined Patel's motion to dismiss plaintiff's complaint, arguing plaintiff's claims are barred by ISBA I. See Ill. §. Ct. R. 23(e) (eff. January 1, 2011) (allowing unpublished appellate court orders to be cited in support of *res judicata* claims). Plaintiff responded and filed a motion for judgment on the pleadings. The trial court denied plaintiff's motion and dismissed the complaint pursuant to section 2-619(a)(9). Plaintiff now appeals, claiming no duty to defend O'Donnell's estate in the Patel Litigation.

ANALYSIS

"A motion for judgment on the pleadings tests the sufficiency of the pleadings by determining whether the plaintiff is entitled to the relief sought by his complaint. [Citation.] The motion requires the trial court to examine the pleadings and determine whether there is an issue of

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fact or whether the controversy can be resolved as a matter of law.” *Pekin Insurance Co. v. Allstate Insurance Co.*, 329 Ill. App. 3d 46, 49 (2002). “A motion to dismiss, pursuant to section 2-619 of the Code, admits the legal sufficiency of the *** complaint, but asserts an affirmative defense or other matter that avoids or defeats the plaintiff[’s] claim. [Citation.] Section 2-619 motions present a question of law, and we review rulings thereon *de novo*.” *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). We also review the disposition of motions for judgment on the pleadings *de novo*. *Pekin*, 329 Ill. App. 3d at 49. “We may affirm on any basis appearing in the record, whether or not the trial court relied on that basis or its reasoning was correct.” *Atanus v. American Airlines, Inc.*, 403 Ill. App. 3d 549, 554 (2010).

Res judicata bars the relitigation of identical causes of actions between identical parties or their privies. *Thornton v. Williams*, 89 Ill. App. 3d 544, 546 (1980).

“Under the doctrine of *res judicata*, if a former suit was between the same parties and involved the same cause of action, the judgment in the former suit is conclusive not only as to all questions actually decided but as to all questions which might properly have been litigated and determined in that action.” *Id.*

“It is well established that the doctrines of *res judicata* and collateral estoppel apply only where there is a *final* judgment, and that a nonfinal order does not bar a subsequent action.” (Emphasis added.) *Arnold Schaffner, Inc. v. Goodman*, 73 Ill. App. 3d 729, 732 (1979). It is undisputed here that plaintiff’s complaint and ISBA I are premised on the same issue and involve the same parties or a privy. Plaintiff maintains, as part of its pleading as well as its motion for judgment on the pleadings, that it has no duty to defend O’Donnell’s estate in the Patel Litigation because of the default in ISBA I. “[T]he

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doctrine of *res judicata* was intended to be used as a shield, [however,] not a sword.” *Thornton*, 89 Ill. App. 3d at 548. Nevertheless, “default judgments are always *res judicata* on the ultimate claim or demand presented in the complaint.” *Housing Authority for La Salle County v. YMCA of Ottawa*, 101 Ill. 2d 246, 254 (1984). “The entry of a default does not [alone, however,] constitute a judgment; rather, it is an order precluding the defaulting party from making any further defenses regarding liability. It is simply ‘an interlocutory order that in itself determines no rights or remedies.’ ” *Wilson v. Teloptic Cable Construction Co.*, 314 Ill. App. 3d 107, 111 (2000).

“The default judgment is the act that terminates the litigation and decides the dispute. [Citation.] It is final if it grants the plaintiff relief and either resolves the case entirely or is final as to one party or cause of action and is certified in accord with the requirements of Supreme Court Rule 304(a). [Citations.] Moreover, a default judgment comprises two factors: (1) a finding of the issues for the plaintiff; and (2) an assessment of damages.” *Id.*

The ISBA I order relied on by plaintiff provides:

- “1. Plaintiff’s Motion for Default Judgment against O’Donnell and Real Estate Lawyers Group is granted;
2. A Default Judgment is entered against Defendant Terry O’Donnell and Real Estate Lawyers Group, P.C.
3. Defendant Lindsay Mosher has 14 days, to and including March 1, 2005[,] to file her appearance and answer.
4. This matter is set for status March 22, 2005[,] at 9:45 am.”

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This order is clearly not a final default judgment. It did not resolve the entire litigation nor did it contain a 304(a) finding. Such a nonfinal order is not *res judicata*. *Arnold Schaffner*, 73 Ill. App. 3d at 732 (“A ruling which is not a final order does not in any manner affect or determine any subsequent proceeding.”). The appellate outcome of ISBA I does, on the other hand, bar this litigation.

It is well settled that “[o]nce a litigation is prosecuted to an appellate court and questions of law are decided, all questions relating to the same subject matter which were open for consideration and could have been presented are *res judicata*.” *Pedigo v. Johnson*, 130 Ill. App. 3d 392, 396 (1985).

This court unequivocally held in ISBA I that:

“plaintiff ha[s] a duty to defend the attorneys [O’Donnell, Mosher, and RELG] under the insurance policy. We agree with the circuit court that the allegations in the [Patel C]omplaint fall within, or potentially within, the policy’s coverage for negligence in rendering ‘services and acts taken as a “trustee” or any other similar activity.’ We therefore hold that the circuit court properly entered summary judgment against ISBA Mutual, rejected its motion for reconsideration and dismissed the declaratory judgment action.” (Emphasis added.)

The instant litigation is an impermissible collateral attack on that judgment. The law is clear in Illinois:

“when a court has properly acquired jurisdiction and is authorized to hear and adjudge, and its judgment ‘being thus entered by authority of law, no matter how erroneous it may be, or even absurd -- though it be made in palpable violation of the law itself, and manifestly against the evidence -- is, nevertheless, binding upon all

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whom the law says shall be bound by it, that is, upon all parties and privies to it, until it is reversed in a regular proceeding for that purpose. While it remains a judgment, it cannot be inquired into, nor its regularity questioned, in any collateral proceeding.’

*** The doctrine of *res judicata* is not dependent upon the correctness of the judgment, or of the verdict or finding on which it is based. *** The doctrine of *res judicata* is that a cause of action finally determined between the parties on the merits, by a court of competent jurisdiction, cannot be relitigated by the same parties or those in privity with them in a subsequent proceeding before the same or any other tribunal, except as the judgment or decree may be brought before a court of appellate jurisdiction for review in the manner provided by law.” *People v. Kidd*, 398 Ill. 405, 409-10 (1947).

As plaintiff does not challenge the validity of the final ISBA I judgment or the jurisdiction of the rendering court, plaintiff’s current claims are *res judicata*. We affirm the dismissal of plaintiff’s complaint and the denial of plaintiff’s motion for judgment on the pleadings. ISBA I conclusively establishes plaintiff’s duty to defend O’Donnell in the Patel Litigation. We need not and do not reach the other grounds raised by parties and the trial court.

CONCLUSION

This litigation is an impermissible collateral attack on the final judgment in ISBA I. We affirm the dismissal of plaintiff’s complaint and the denial of plaintiff’s motion for judgment on the pleadings.

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Affirmed.