

No. 1-10-2056

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(3)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PULASKI-ROOSEVELT CURRENCY EXCHANGE, INC.,)	Appeal from the
)	Circuit Court of
)	Cook County.
Plaintiff-Appellant,)	
)	
v.)	09 L 14878
)	
CHICAGO TRANSIT AUTHORITY, a municipal corporation,)	Honorable
)	Kathy Flanagan,
Defendant-Appellee.)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Hoffman and Justice Karnezis concurred in the judgment.

ORDER

- ¶ 1 *HELD: Res judicata* bars a party from initiating a new lawsuit to litigate a claim it could have litigated in a prior lawsuit, even when the claim did not arise before proceedings to execute the judgment in the prior lawsuit.
- ¶ 2 Pulaski-Roosevelt Currency Exchange, Inc. (PRCE) sued the Chicago Transit Authority (CTA) for conversion of more than \$200,000 in cash CTA investigators allegedly

took from PRCE when they executed a warrant to search PRCE's premises. The CTA moved to dismiss the lawsuit as *res judicata*, based on the CTA's prior suit against PRCE for breach of contract. The trial court found that the contract action provided PRCE a forum in which it could have fully litigated its claim for conversion. Therefore, the trial court granted the CTA's motion to dismiss the lawsuit. Because we agree with the trial court, we affirm.

¶ 3

BACKGROUND

¶ 4

In October 2005, PRCE ordered customer passes and transit fare cards from the CTA. The CTA sent the cards and a bill for the value of the cards, which totaled \$87,945. PRCE did not pay the bill. In July 2007, the CTA sued PRCE for breach of contract. PRCE did not respond to the complaint. The trial court entered a default judgment in favor of the CTA for the amount billed.

¶ 5

In December 2007, an investigator for the CTA, working on a criminal case, obtained a warrant to search PRCE's premises for bank statements, cellular telephones, and records of dealings between PRCE and the CTA. When CTA investigators executed the search warrant, they also seized cash and a number of unsold CTA fare cards. The CTA petitioned for an order to permit it to take more than \$90,000 from the cash its investigators seized during the search. The CTA alleged in the petition that its investigators seized \$103,605 in bills, plus an undetermined amount in coins.

¶ 6

In response to the CTA's motion, PRCE alleged that the CTA's investigators seized \$338,236.37 when they executed the warrant. PRCE supported the allegation with its daily balance sheets and an affidavit from one of its managers to show how PRCE calculated the

loss. The CTA responded with affidavits from its investigators, who swore that they and the other investigators who seized the cash accounted for all of the cash taken, and none of the investigators stole any money. The CTA alleged that its investigators took a total of \$104,740.40, which went into a bank account so that the court could decide how to distribute the money. The judge ordered the bank to retain in escrow the amount the CTA claimed, \$90,606.90, and to return to PRCE the amount in the escrow account that exceeded the CTA's claim, and that excess came to \$14,133.50.

¶ 7 The trial court set the matter for an evidentiary hearing on the conflicting allegations concerning the amount the investigators took from PRCE. After several continuances, the matter came on for hearing on July 23, 2009, with both parties to present evidence concerning the amount of cash the CTA seized in December 2007. PRCE's counsel, Robert Habib, asked for a further continuance because his primary witness, a manager for PRCE, had an operation on the day of the hearing. Habib told the court that the witness knew about the scheduling conflict about a week before the hearing, but she did not inform Habib about her unavailability until the night before the hearing.

¶ 8 Habib said that if the judge continued the hearing, Habib would use accounting records and the manager's testimony to prove that the CTA took more than \$300,000 from PRCE. Because the CTA put in the bank account only \$104,740.40, it retained more than \$200,000 apart from the bank account, and because that amount exceeded PRCE's debt, the CTA had no right to turnover of any of the funds in the bank account. The CTA's attorney, Robert Morrissey, answered that it had no access to any funds from PRCE aside from the

\$90,606.90 that remained in the bank account, and the CTA could not access those funds without a court order. This discussion followed:

"THE COURT: [PRCE claims] that there was an excessive amount over and above the judgment that we want back

MR. MORRISSEY: Maybe that's a civil complaint in another courtroom.

* * *

THE COURT: [PRCE is] saying we had a lot of extra cash that was seized that we want back. *** We're talking about a conversion.

*** We get this all the time. *** You have a judgment for \$20,000 so you go out and seize a car or a Ferrari that's worth \$100,000. *** The difference between the amount of the judgment that's been satisfied and the value of the Ferrari is conversion and that's what I'm hearing from you. ***

MR. HABIB: Yes, your Honor.

* * *

THE COURT: Okay. If I enter an order for an amount for the judgment, that's your turnover?

MR. MORRISSEY: Right. You would enter an order turning

over the money and we'd refund any excess to [PRCE].

* * *

*** Just give me the turnover order and let him file a complaint for the other – whatever missing money. ***

* * *

*** He files a separate complaint in another room in the courthouse and it's a trial.

THE COURT: No. You don't have to have a trial. We can do it here. We do conversions.

This is a case of your turnover on your judgment and we amend your judgment and your post judgment proceedings for turnover so that we then come in with a count for conversion ***.

* * *

I would hear it. *** What you do is you come back with leave to file another count.

* * *

MR. HABIB: I would still ask the Court to grant the motion to continue."

¶ 9

The court denied the motion for a continuance, but stayed the order for the turnover of funds for 21 days to give PRCE the opportunity to move to vacate the turnover order and

prove that the CTA took far more cash than it reported. In its written order the court directed the bank to give the CTA \$82,005.27 (the reduced amount reflected the CTA's recovery of fare cards from PRCE), and to give PRCE "the remaining funds."

¶ 10 PRCE did not move to vacate or appeal or challenge the turnover order in any way. Instead, on December 4, 2009, PRCE filed a complaint for conversion. In the complaint, PRCE repeated the allegations that it made in its response to the CTA's motion for turnover of the escrow account. That is, PRCE claimed that the CTA investigators who executed the search warrant in 2007 actually seized \$338,236.37. PRCE acknowledged that it had received from the bank a partial repayment, but \$233,495.85 remained outstanding.

¶ 11 The CTA moved to dismiss the complaint as *res judicata*. The trial court entered a judgment in favor of the CTA. PRCE now appeals. We affirm.

¶ 12 ANALYSIS

¶ 13 On appeal, PRCE advances three arguments for reversal: (1) *res judicata* does not apply; (2) the CTA agreed to allow PRCE to file a new complaint for conversion; and (3) fundamental fairness requires us to permit PRCE to pursue its cause of action. We review *de novo* the dismissal of a lawsuit as *res judicata*. *Matejczyk v. City of Chicago*, 397 Ill. App. 3rd 1, 7 (2009).

¶ 14 The doctrine of *res judicata* bars a lawsuit if (1) a court of competent jurisdiction entered a final judgment in a prior case (2) between the same parties (3) for the same cause of action. *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 302 (1998). The bar of *res judicata* extends to all matters that the court in the first case could have decided. *River*

Park, 184 Ill. 2d at 302. PRCE concedes that the trial court, in an earlier case, entered a final judgment on the CTA's breach of contract claim and its claim for turnover of the funds in the escrow account. PRCE also concedes that the case involved the same parties as its claim for conversion. PRCE argues only that the case did not involve the same cause of action, and the trial court lacked jurisdiction to order the relief PRCE now seeks.

¶ 15 In the breach of contract action, in response to the CTA's motion for a turnover order, PRCE presented affidavits and records to support its allegation that the CTA took \$338,236.37 from PRCE when its investigators executed the search warrant. The CTA submitted affidavits to rebut PRCE's allegations. The parties prepared for an evidentiary hearing on PRCE's allegations. The court at the hearing clarified that it had authority to order the CTA to remit to PRCE any amounts it took from PRCE in excess of the amount PRCE owed the CTA. The court specified that it had jurisdiction to hear PRCE's claim for conversion.

¶ 16 The claim raised in PRCE's response to the motion for turnover of funds matches the claim it raised in its complaint for conversion. Thus, the two cases involved the same claim.

¶ 17 PRCE contends that *res judicata* cannot bar its complaint for conversion because the trial court in the breach of contract case lacked jurisdiction to hear the claim for conversion. PRCE cites no case or law that supports its assertion that the court that heard the motion for turnover lacked jurisdiction to consider PRCE's claim for conversion. The trial court here correctly held that the trial court in the earlier case could have decided PRCE's claim for conversion, so *res judicata* bars PRCE's complaint, unless an exception to the doctrine

applies.

¶ 18 *Res judicata* does not bar a new claim if the parties agreed to permit claim-splitting or the adverse party acquiesced therein. *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 341 (1996). PRCE argues that the CTA agreed that PRCE could split its claim and file a separate suit for conversion after the court disposed of the funds the CTA admitted it took from PRCE. At the hearing on the motion for turnover and PRCE's response, the CTA suggested PRCE could "file[] a separate complaint in another room in the courthouse and it's a trial." But the court immediately responded, " No. *** We can do it here. We do conversions." The court invited PRCE to "come in with a count for conversion" in the postjudgment proceedings. We do not find the CTA's suggestion of a new lawsuit sufficient to constitute acquiescence to such a lawsuit, especially because the court immediately indicated that the lawsuit then before the court provided a proper forum for PRCE's conversion claim. See *Airtite v. DPR Ltd. Partnership*, 265 Ill. App. 3d 214, 219 (defendant acquiesced in claim-splitting when it failed to participate in arbitration of initial claim); *Saxon Mortgage, Inc. v. United Financial Mortgage Corp.*, 312 Ill. App. 3d 1098, 1110 (2000) (defendant permitted two suits to proceed separately without objection).

¶ 19 Courts also will not apply *res judicata* to bar a new lawsuit if the plaintiff clearly and convincingly shows that the policies favoring preclusion of a second action are overcome for an extraordinary reason. *Rein*, 172 Ill. 2d at 341. PRCE argues that application of *res judicata* here infringes on its right to a full remedy for the excessive taking by CTA investigators. See *Weisman v. Schiller, DuCanto & Fleck*, 314 Ill. App. 3d 577, 581 (2000).

PRCE had a right to a full remedy in the contract action, and if its witnesses had appeared in court for the scheduled hearing and had adequately proved that the CTA took \$338,236.37, as alleged in the response to the motion for turnover and in the complaint for conversion, the trial court would have ordered the CTA to refund to PRCE the amount PRCE sought in the conversion complaint. We see no fundamental unfairness in requiring PRCE to litigate its conversion claim in the same proceedings the CTA initiated as a breach of contract suit.

¶ 20 In conclusion, after PRCE responded to the CTA's turnover petition with allegations that the CTA took more than \$300,000 from PRCE, PRCE had an opportunity, in the course of the contract litigation, to litigate fully the issue of how much cash the CTA took from PRCE. The trial court had jurisdiction to order the CTA to return to PRCE any excessive amounts PRCE could prove the CTA took. But PRCE decided not to litigate the claim, in part because its manager, its primary witness, failed to come to court on the day set for the evidentiary hearing on PRCE's allegations. The final judgment entered in the contract case bars PRCE from relitigating its claim that the CTA took excessive amounts of cash from PRCE when CTA investigators executed the search warrant. The CTA's passing comment during the hearing did not show that it agreed not to raise *res judicata* as a bar to new litigation on PRCE's claim. Fundamental fairness does not require the circuit court to provide a second opportunity for PRCE to prove its claim that CTA investigators took \$338,236.37 in cash when they executed the search warrant for PRCE's premises. Accordingly, we affirm the trial court's judgment.

¶ 21 Affirmed.