

No. 1-12-1249

**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

---

|   |   |                   |
|---|---|-------------------|
| PRECISE INDUSTRIAL SERVICES, INC., SPEEDY | ) | Appeal from the   |
| REDI-MIX HOLDINGS, INC., CORDIA FORTE,    | ) | Circuit Court of  |
| EDWARD FORTE,                             | ) | Cook County.      |
|   | ) |                   |
| Plaintiffs-Appellants,                    | ) |                   |
|   | ) | 11 L 7378         |
| v.  | ) |                   |
|   | ) |                   |
| FIRST PERSONAL BANK,                      | ) | Honorable         |
|   | ) | Thomas R. Mulroy, |
| Defendant-Appellee.                       | ) | Judge Presiding.  |

---

PRESIDING JUSTICE NEVILLE delivered the judgment of the court.  
Justices Sterba and Hyman concurred in the judgment.

**ORDER**

¶ 1 *Held:* The doctrine of *res judicata* bars a subsequent action based on the same set of operative facts as the earlier action because successful prosecution of the later action would nullify the earlier judgment.

¶ 2 Plaintiffs, Precise Industrial Services, Inc. (Precise), Speedy Redi-Mix Holdings, Inc. (Speedy), Cordia Forte and Edward Forte (the Fortes), filed a complaint against the

defendant, First Personal Bank (Bank), alleging malicious prosecution and fraud. The trial court granted the Bank's motion to dismiss, finding that plaintiffs' fraud action was barred by the doctrine of *res judicata*.

¶ 3 We find that the facts in plaintiffs' 2011 fraud complaint grew out of the same set of operative facts as the facts in the Bank's 2006 complaint for breach of contract and replevin. Because the Bank's 2006 action and the plaintiffs' 2011 action are based on the same set of operative facts, the plaintiffs' 2011 action is barred by the doctrine of *res judicata*. Accordingly, we affirm the decision of the trial court.

¶ 4 Background

¶ 5 In April 2002, Precise and Speedy, as co-lessees, executed a Master Lease Agreement (master lease) with IFC Credit Corporation (IFC), the lessor of 15 Mack trucks the lessees intended to use in their construction and cement businesses. Edward Forte signed the master lease as CEO of Precise and Speedy and Cordia Forte signed as president of Precise and Speedy. Edward Forte also signed a personal guaranty guaranteeing all indebtedness, liabilities and obligations under the master lease. The specific identification of the trucks and financing terms were contained in seven separate documents labeled "Trac Lease Schedules." The terms of the trac lease schedules were incorporated by reference into the master lease (the master lease and the trac lease schedules will be referred to as the leases). On June 28, 2002, IFC and the Bank executed a Lease Receivables Sales Supplement whereby the Bank purchased Precise's and Speedy's lease receivable account from IFC. On July 30, 2004, Precise executed a note for a \$200,000 loan from the Bank.

- ¶ 6 On March 29, 2006, the Bank filed an amended complaint against Precise, Speedy, Cordia and Edward Forte for replevin and damages because they failed to make payments under the leases and the note. The Bank obtained an order of replevin for possession of the trucks.
- ¶ 7 On February 15, 2007, the trial court entered a default judgment against Speedy, Precise and the Fortes for failure to answer or otherwise plead. On March 29, 2007, the court entered an order of judgment against all parties in the amount of \$334,720.33, for the balance of the money owed, plus court costs of \$412.20.
- ¶ 8 On July 3, 2008, Precise, Speedy and the Fortes filed a section 2-1401 petition to vacate the default judgment. In the petition, Precise, Speedy and the Fortes alleged that the Bank and or IFC had altered the original leases and had engaged in "suspected fraud." Specifically, they alleged that "[U]pon reason and belief, [First Personal Bank] and/or IFC, by and through their agents, forged Cordia Forte's signature and fraudulently altered the residual value of the trucks. \*\*\* The original agreed-upon terms included a one dollar residual value (and not a \$28,000 residual value)." According to Precise, Speedy and the Fortes, they did not raise the defense of fraud prior to the trial court's entry of the default judgment because they were "unaware of this meritorious defense as it is newly discovered evidence."
- ¶ 9 On April 2, 2009, the trial judge held a hearing and denied the section 2-1401 petition, but allowed Precise, Speedy and the Fortes to file a motion for an evidentiary hearing. Precise, Speedy and the Fortes filed their motion for an "evidentiary hearing and for enforcement of satisfaction of the judgment" in which they incorporated by reference their section 2-1401 petition, but the trial court denied the motion on May 7, 2009, and reaffirmed its denial of

the section 2-1401 petition. Precise, Speedy and the Fortes made an oral motion to reconsider the denial of the section 2-1401 petition on July 7, 2009, but the court ruled that the motion was untimely. Precise, Speedy, and the Fortes also filed a motion to reconsider the denial of the motion for an evidentiary hearing, which the trial court denied on July 7, 2009.

¶ 10 On August 6, 2009, Precise, Speedy and the Fortes filed a notice of appeal from the trial court's July 7, 2009, order which denied their motions to reconsider the petition to vacate the default judgment and to grant an evidentiary hearing. The appellate court dismissed the appeal on March 3, 2010, for want of prosecution, because Precise, Speedy and the Fortes failed to file the record on appeal within the time prescribed by Supreme Court Rule 326. Ill. S. Ct. R. 326 (eff. Feb. 1, 1994).

¶ 11 On July 15, 2011, the plaintiffs filed a two count complaint against the Bank. In count I, plaintiffs alleged that the Bank engaged in malicious prosecution in relation to the 2006 complaint. In count II, the fraud count, plaintiffs alleged that the Bank falsely stated that it would agree to a \$1 residual value in the lease, that the Bank knew that such statement was false because copies of the trac lease schedules show a residual value of \$28,000, that they never signed the trac lease schedules, and that they have sustained damages because of the Bank's false statement.

¶ 12 The Bank filed a motion to dismiss pursuant to section 2-619(a)(4), (5), and (9) of the Code of Civil Procedure (Code). 735 ILCS 5/2-619(a)(4), (5), and (9) (West 2010). The Bank argued in its motion to dismiss that plaintiffs' complaint should be dismissed because the

2006 complaint did not terminate in plaintiffs' favor, plaintiffs' claim for fraud was barred by the statute of limitations and the complaint was barred by the doctrine of *res judicata*.

¶ 13 Plaintiffs voluntarily dismissed their malicious prosecution claim. But plaintiffs argued that their fraud claim was not barred by the doctrine of *res judicata* because they did not sustain any damages until the Bank began its collection action on the March 29, 2007, judgment, that the judgment obtained by the Bank was based on the "fraudulent residual value" of the trucks at \$28,000 as opposed to the \$1 that plaintiffs had agreed to, and that the Bank was already made whole from the payments that were made under the lease and the proceeds from the sale of the trucks.

¶ 14 The trial court found that plaintiffs' fraud count was barred by the doctrine of *res judicata* and granted the Bank's motion to dismiss. The plaintiffs timely filed their notice of appeal pursuant to Supreme Court Rule 303. Ill. S. Ct. R. 303 (eff. May 30, 2008).

¶ 15 Analysis

¶ 16 Here, the trial court granted the Bank's motion to dismiss based on section 2-619 of the Code. 735 ILCS 5/2-619 (West 2010). A section 2-619 motion to dismiss admits the legal sufficiency of the complaint but asserts affirmative matters that avoid or defeat the allegations contained in the complaint. *Bjork v. O'Meara*, 2013 IL 114044, ¶ 21. Circuit court orders granting a motion to dismiss based on section 2-619 are subject to *de novo* review. *Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343, 352 (2008).

¶ 17 Plaintiffs contend that the trial court erroneously held that their fraud action was barred by the doctrine of *res judicata*. Under the doctrine of *res judicata*, a final judgment on the

merits rendered by a court of competent jurisdiction bars any subsequent cause of action between the parties involving the same cause of action. *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 302 (1998). The doctrine of *res judicata* applies to all matters that were offered to sustain or defeat the claim in the prior action, as well as to all matters that could have been offered for that purpose. *Arvia v. Madigan*, 209 Ill. 2d 520, 533 (2004). The purpose of *res judicata* is to promote judicial economy by requiring parties to litigate, in one case, all rights arising out of the same set of operative facts and to prevent the unjust burden that would result if a party could be forced to relitigate what is essentially the same case. *River Park, Inc.*, 184 Ill. 2d at 319.

- ¶ 18 For the doctrine of *res judicata* to apply, three requirements must be met: (1) there must be a final judgment on the merits rendered by a court of competent jurisdiction; (2) there must be an identity of the cause of action; and (3) there must be an identity of parties or their privies. *River Park, Inc.*, 184 Ill. 2d at 302.
- ¶ 19 Plaintiffs do not dispute that there was a final judgment on the merits rendered by a court of competent jurisdiction or that there is an identity of the parties and their privies. Plaintiffs deny any identity of the facts in the Bank's 2006 action and plaintiffs' 2011 action.
- ¶ 20 In order to determine whether there is an identity of the cause of action between two cases, Illinois courts apply the "transactional test." *River Park, Inc.*, 184 Ill. 2d at 311. Under this test, separate claims are considered the same cause of action for purposes of the doctrine of *res judicata* if they arise from a single set of operative facts, regardless of whether they assert different theories of relief. *River Park, Inc.*, 184 Ill. 2d at 311. The transactional test permits

claims to be considered part of the same cause of action even if there is not a substantial overlap of evidence, so long as they arise from the same transaction. *River Park, Inc.*, 184 Ill. 2d at 311.

¶ 21 In the 2006 litigation, when the plaintiffs defaulted on their leases, the Bank brought suit against the plaintiffs for replevin and damages and attached the leases to their complaint as an exhibit. In the 2011 action, the plaintiffs alleged that the Bank engaged in fraud in the execution of the same leases that were the subject of the Bank's 2006 action. We find that the plaintiffs' 2011 fraud action is based on the same leases that gave rise to the Bank's 2006 replevin and contract action. Therefore, since the 2006 and 2011 actions involve the same leases, they arose from the same set of operative facts, and there is an identity of the cause of action.

¶ 22 Plaintiffs contend that they could not have asserted a claim for fraud as a counterclaim in the 2006 action nor could they have brought a separate action contemporaneous with the Bank's action because they had not yet suffered any damages and they had to allege damages in order to plead a cause of action for fraud. Plaintiffs concede, however, that they could have raised fraud as an affirmative defense to the Bank's 2006 action, but they argue that they did not know of the Bank's fraudulent acts prior to the entry of the judgment on March 29, 2007.

¶ 23 The Bank responds that plaintiffs' allegation that the terms of the lease were altered was available to them as a defense in the 2006 action because the leases they allegedly altered were attached to the Bank's complaint as an exhibit.

¶ 24 The doctrine of *res judicata* bars claims based on facts that would have constituted a

counterclaim or defense in the earlier proceeding where successful prosecution of the later action would either nullify the earlier judgment or impair the rights established by the earlier action. *Kosydor v. American Express Centurion Services, Corp.*, 2012 IL App (5th) 120110, ¶ 19; *Ross Advertising, Inc. v. Heartland Bank and Trust Co.*, 2012 IL App (3d) 110200, ¶ 30.

¶ 25 The Bank's 2006 action against the plaintiffs was a breach of contract action based on the leases which plaintiffs allege were altered. The leases were attached to the Bank's complaint as an exhibit. Thus, the Bank placed plaintiffs on notice that the leases were at issue in the lawsuit and provided plaintiffs with copies of the leases and with an opportunity to examine the leases during the 2006 proceeding. Therefore, because plaintiffs had copies of the leases and an opportunity to examine the leases for forgeries, plaintiffs could have plead fraud as a counterclaim (735 ILCS 5/2-608 (West 2010)), or they could have raised fraud as an affirmative defense in the 2006 action. See *Jordan v. Knafel*, 378 Ill. App. 3d 219, 229 (2007) (fraud is a defense to a claim for breach of contract); *Illinois State Bar Ass'n Mutual Insurance Co. v. Coregis Insurance Co.*, 355 Ill. App. 3d 156, 165 (2004) (fraud is a basis for rescission of a contract).

¶ 26 Here, if plaintiffs were permitted to succeed on their 2011 action, it would nullify the judgment rendered in the 2006 action. See *Kosydor*, 2012 IL App (5th) 120110, ¶ 19. Moreover, to allow plaintiffs to litigate the 2011 fraud action, would offend the purpose behind the doctrine of *res judicata* which is to promote judicial economy. See *River Park, Inc.*, 184 Ill. 2d at 319.

¶ 27 Therefore, because plaintiffs' allegations of fraud in their 2011 fraud complaint could have been plead as a counterclaim or an affirmative defense in the Bank's 2006 action, and because a judgment in plaintiffs' favor in this case would effectively nullify the judgment in the 2006 action, the doctrine of *res judicata* bars the plaintiffs from raising fraud in the 2011 action.

¶ 28 Finally, we note that the trial court entered a default judgment in the Bank's 2006 action, and that plaintiffs sought to vacate the 2006 judgment with a section 2-1401 petition (735 ILCS 5/2-1401 (West 2010)). We also note that plaintiffs' 2011 fraud action alleges the same facts that plaintiffs raised in their section 2-1401 petition. The plaintiffs' section 2-1401 petition was dismissed by the trial court and plaintiffs filed a notice of appeal with this court. But plaintiffs failed to file the record on appeal within the time prescribed by Rule 326 (Ill. S. Ct. R. 326 (eff. Feb. 1, 1994)), and this court dismissed plaintiffs' appeal for want of prosecution on March 3, 2010.

¶ 29 The goal of plaintiffs' section 2-1401 petition and the goal of plaintiffs' 2011 fraud action was to avoid the legal effect of the leases. The plaintiffs had an opportunity in the 2006 action to raise the issue they attempted to raise in the section 2-1401 petition and are now attempting to raise in the 2011 fraud complaint. Because the Bank's 2006 breach of contract action and the plaintiffs' 2011 fraud action involve the same leases, the two actions arose out of the same set of operative facts and are barred by the doctrine of *res judicata*. Accordingly, we find that the trial court did not err when it dismissed plaintiffs' 2011 fraud complaint based on the doctrine of *res judicata*.

1-12-1249

¶ 30

### Conclusion

¶ 31 We find that plaintiffs' 2011 fraud action is based on the same set of operative facts as the Bank's 2006 contract and replevin action. Accordingly, the plaintiffs' 2011 fraud action is barred by the doctrine of *res judicata*.

¶ 32 Affirmed.