

Nos. 1-13-3011

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MARTIN H. FISHMAN and CHICAGO TITLE)	Appeal from the
AND TRUST COMPANY, as successor trustee to)	Circuit Court of
LaSalle Bank National Association, as successor)	Cook County
trustee to American National Bank and Trust Company,)	
under trust dated April 25, 1990, Trust No. 10900-08,)	
)	
Plaintiffs-Appellants,)	No. 07 L 6717
)	
v.)	
)	
BERTUCCI'S RESTAURANT CORPORATION,)	Honorable
CONNIE'S FOOD PRODUCTS, INC., and CONNIE'S)	Patrick J. Sherlock
PIZZA, INC.,)	Judge Presiding.
)	
Defendants-Appellees.)	

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

ORDER

¶ 1 *Held:* Plaintiff's claims seeking lost future rental payments, lost value of a restaurant building and attorney fees were barred as subject to the doctrines of judicial estoppel and *res judicata* where a final judgment was entered by this court in another district that involved the same underlying facts. Trial court correctly granted summary judgment to defendants.

¶ 2 This case, similar to the case in DuPage County that was the subject of a previous decision, *Fishman v. Fox River Commons Shopping Center, LLC*, 2012 IL App (2d) 120281-U

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(unpublished order under Supreme Court Rule 23) (*Fishman I*) involves a "long-running dispute" relating to a restaurant building in a shopping center located in Naperville. *Id.*, ¶ 2. This case involves several parties and obligations under two documents, a land lease and a building lease; the leases contain some interplay.

¶ 3 Plaintiffs, Martin H. Fishman and Chicago Title and Trust Company, as successor trustee to LaSalle Bank National Association, as successor trustee to American National Bank and Trust Company under trust dated April 25, 1990, Trust No. 10900-08, (collectively, Fishman) filed an action against defendants, Bertucci's Restaurant Corporation, Connie's Food Products, Inc., and Connie's Pizza, Inc., to recover lost future rental payments, lost value of a restaurant building and attorney fees. The trial court granted summary judgment in favor of defendants. The trial court ruled that the action was barred by this court's judgment in *Fishman I*. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶ 4 BACKGROUND

¶ 5 The underlying complaint in this appeal was filed in Cook County in 2007 against defendant, Bertucci's Restaurant Corporation (Bertucci's); a verified second amended complaint was filed on July 28, 2008 adding Connie's Food Products, Inc., and Connie's Pizza, Inc. (collectively, Connie's). Meanwhile, related litigation involving the same underlying facts was proceeding in DuPage County. There, four individual cases were eventually consolidated. On December 14, 2012, the Second District of this court entered a 52-page order in *Fishman I*.

¶ 6 Rule 23 provides that a party may cite an unpublished order but only "to support contentions of double jeopardy, *res judicata*, collateral estoppel or law of the case." S. Ct. Rule 23; see *County of Du Page v. Lake Street Spa, Inc.*, 395 Ill. App. 3d 110, 123 (2009) (explaining that a prior nonprecedential appellate decision in the same case represents the law of the case

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which is a permissible reason for citing it). Accordingly, since the instant appeal involves contentions of *res judicata* and collateral estoppel, as well as judicial estoppel, we shall include the relevant portions of our prior order describing the "saga" that began in 1990. *Fishman I*, ¶ 5. ¶ 7 *Fishman I* contained a detailed 21-page discussion of the factual and procedural background. To aid in an understanding of the issues in this appeal, we include portions of the prior discussion of that background, specifically the undisputed relevant facts. As we noted in *Fishman I*, "[t]he saga" began in 1990 when the owner of the shopping center, Fox River Commons, LLC (Fox River) leased a portion of the shopping center to an investor (who is not a party to this dispute). *Id.*, ¶ 5. Fox River is not a party to this appeal but in the DuPage County litigation it was a defendant, counterplaintiff-appellant. Fox River and the investor entered into a lease which provided that the investor would construct a building to be operated as a restaurant and would pay a monthly rent to Fox River (Land Lease). The investor constructed the building and initially operated its own restaurant there. In 1994, the investor leased the building to Bertucci's for the operation of a restaurant (Building Lease). In 1998, Fishman obtained an assignment of the leases. In 2000, Fishman assigned his interests to his trust. The current successors to the original investor are Martin Fishman and the land trust of which he is the beneficiary, for which Chicago Title Land Trust Company is the current trustee (collectively, Fishman).

¶ 8 Also in 2000, Bertucci's assigned its interest in the Building Lease to Connie's Pizza, Inc. In 2004, Connie's Pizza, Inc. assigned its interests in the Building Lease to Connie's Food Products, Inc.

¶ 9 Fox River was not a party to the Building Lease; however, the Building Lease contained a provision that any subletting or assignment required Fox River's prior written consent "which

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shall not be unreasonably withheld." The Land Lease contained a similar provision that any subletting or assignment required Fox River's approval "which shall not be unreasonably withheld." Fox River approved both the 2000 and 2004 assignments.

¶ 10 The subsequent events were summarized in our prior Rule 23 order:

"Over the course of several years, Connie's sought to extricate itself from its operations in the Building by assigning or subleasing its tenancy, but Fox River declined to allow any of the proposed replacement tenants. After several such attempts had failed, Connie's sued Fox River for breach of contract and tortious interference [Case No. 05 MR 620]. Fox River then filed an eviction suit against Connie's and Fishman [Case No. 05 LM 1813]. [These two lawsuits were consolidated, were the subject of an appeal in the second district, No. 2-07-0350, and were remanded to the DuPage County trial court on March 24, 2008.

Meanwhile, in September 2007,] Fishman then sued Fox River on much the same theories as Connie's had raised in its suit, but sought its own damages. The final suit in this quartet of lawsuits [in DuPage County] (all of which were eventually consolidated in the trial court) was a new eviction suit brought by Fox River solely against Fishman. The cases were tried in a [four-day] bench trial. The trial court found largely in favor of Fishman and Connie's and against Fox River, but it did not award the victorious parties all of the attorney fees they sought."

Fishman I, ¶ 3.

The trial court in the DuPage County litigation awarded damages to Fishman in the amount of \$628,196.93, and also required Fox River to return to Fishman a \$30,000 security deposit. Fox

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River appealed various aspects of the judgment in each of the consolidated cases, and Fishman cross-appealed the reduction of its attorney fee request.

¶ 11 In *Fishman I*, decided on December 14, 2012, the Second District modified one award of damages and vacated the award of attorney fees to Connie's, but otherwise affirmed the trial court's rulings. The Second District appellate court agreed with Fox River that the \$628,196.93 damage award to Fishman was a windfall that placed Fishman in a better position than it would have been in if the wrongful conduct by Fox River had never occurred. Accordingly, the court reduced the amount of Fishman's damages to \$288,795.48, plus the \$30,000 security deposit, for total damages of \$318,795.48. The damages awarded to Fishman constituted the amount of the rent Fishman would have received under the Building Lease, minus the rent that Fishman would have paid Fox River. Fishman was also awarded the reasonable attorney fees he incurred in the DuPage County litigation. Fishman collected on the judgment in full.

¶ 12 The *Fishman I* court also affirmed the trial court's award of damages to Connie's and affirmed its finding that Connie's was justified in stopping its rent payments after Fox River unreasonably refused to consent to the assignments. Additionally, the court affirmed the trial court's award of damages to Connie's amounting to a refund of the rent payments it did make to Fishman *after* Fox River unreasonably refused to consent to the assignments.

¶ 13 On May 21, 2013, in the Cook County litigation, Bertucci's filed a combined motion to dismiss pursuant to section 2-619.1 of the Code of Civil Procedure (735 ILCS 5/2-619.1 (West 2012)). On June 12, 2013, Connie's filed a motion for summary judgment pursuant to section 2-1005 of the Code of Civil Procedure (735 ILCS 5/2-1005 (West 2012)). Following a hearing on August 23, 2013, the trial court denied Bertucci's motion to dismiss but granted summary judgment to both Bertucci's and Connie's.

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¶ 14 As the trial court concluded, the appellate court in the Second District "put an end to this case." The trial court noted that in *Fishman I*, this court concluded that Fox River tortiously interfered with Connie's ability to assign the lease and through that tortious interference implicitly held that Connie's was no longer obligated to pay rents on the lease. As a consequence, the trial court concluded that neither Connie's nor Bertucci's could have been found to have breached the lease, nor would the indemnification provision in the Building Lease apply. The trial court further noted that Fishman's attorney fees were not incurred because of the actions of Connie's or Bertucci's but, rather, because Fox River tortiously interfered with the rights of the lessee's under the Building Lease. The trial court additionally noted that all of those attorney fees were awarded in the DuPage County case and that Fishman could not have a double recovery. As to the alleged loss of the building, the trial court noted that Fishman elected to give up his right to the building and could not hold Connie's or Bertucci's liable for any damages as a consequence of this decision. As to the alleged damages to property by Connie's, the trial court noted that, unless there was a default, the lessee was permitted to remove its belongings. There was no default and, in any event, as the trial court noted, Fishman recovered its security deposit in the DuPage County case. This appeal followed.

¶ 15 ANALYSIS

¶ 16 Jurisdiction

¶ 17 We first address Bertucci's and Connie's claim that we lack jurisdiction over Fishman's appeal of the trial court's August 9, 2012 order denying his motion for determination of major issue on count I of the second amended complaint. "Without a Rule 304(a) finding, a final order disposing of fewer than all the claims is not an appealable order and does not become appealable until all of the claims are resolved. [Citation.]" (Internal quotation marks omitted.) *In re Stasko*

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v. City of Chicago, 2013 IL App (1st) 120265, ¶ 28. Here, the trial court did not issue a Rule 304(a) finding as to the August 9, 2012 order denying Fishman's motion for summary determination. Contrary to Fishman's assertion, the trial court's August 23, 2013 order did not resolve all of the issues between the parties to this appeal. The fact that Bertucci's counterclaim against Connie's and its third-party claim against Fox River were not decided is not, as Fishman contends, "irrelevant." We agree with Connie's that the cases cited by Fishman are distinguishable. Those cases, in which the court determined that prior interlocutory orders could be considered, were not appeals under Rule 304(a). A reviewing court has jurisdiction "to review an interlocutory order that constitutes a procedural step in the progression leading to the entry of the final judgment from which an appeal has been taken." *Knapp v. Bulun*, 392 Ill. App. 3d 1018, 1023 (2009). The trial court issued a Rule 304(a) finding as to the August 23, 2013 order, but that finding does not confer jurisdiction on this court to consider the prior August 9, 2012 order since claims remain pending in this case. Our review is limited to the August 23, 2013 order in which the trial court granted summary judgment to Connie's and Bertucci's, and issued a Rule 304(a) finding.

¶ 18 Fishman's Claims in the Cook County Suit

¶ 19 In Count I of its verified second amended complaint, titled "Breach of Contract – Indemnification," Fishman seeks "unpaid rent" it claims was "due and owing," and also seeks to be indemnified for all of its attorney fees and expenses incurred in litigating defendants' alleged defaults under the Building Lease. Fishman relies on several provisions in the Building Lease including Article 15, an indemnification provision, which states in relevant part: "Lessee shall indemnify and hold harmless Lessor *** from and against any and all claims, demands, causes of action, suits, proceedings, liabilities, damages, losses, costs and expenses (collectively

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'Claims'), including attorneys' fees, caused by, incurred or resulting from its operation of or relating in any manner to the Premises." Fishman also relies on Article 18 which provides that the lessor can recover all attorney fees and expenses from the tenants of the building incurred in litigating the tenants' defaults. Fishman additionally relies on Article 21(c) which provides that any assignment of the Building Lease by Bertucci's does not relieve it of any of its obligations thereunder, which includes Articles 15 and 18. Fishman no longer seeks to recover its attorney fees against Connie in the DuPage County litigation which it has already recovered from Fox River.

¶ 20 In Count II of its complaint, Fishman seeks a declaratory judgment that defendants are liable, pursuant to Article 15 of the Building Lease, for the lost value of the building and the lost future rental payments.

¶ 21 Count III of Fishman's complaint is titled "Other Breaches of Contract." Fishman alleges that Connie's breached the Building Lease by damaging the building and removing Connie's personal property from the building when Connie's vacated.

¶ 22 Fishman's Claims Are Barred By *Res Judicata*

¶ 23 We review *de novo* a trial court's grant of summary judgment, as well as the legal issue of whether a claim is barred by *res judicata*. *Agolf, LLC v. Village of Arlington Heights*, 409 Ill. App. 3d 211, 217-18 (2011). "Under the doctrine of *res judicata*, a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the same parties or their privies on the same cause of action." *Id.* (citing *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 334 (1996)). *Res judicata* is an equitable doctrine designed to prevent a multiplicity of lawsuits between the same parties where the facts and issues are the same. *Severino v. Freedom Woods, Inc.*, 407 Ill. App. 3d 238, 244 (2010) (citing *Murneigh v. Gainer*,

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177 Ill. 2d 287, 299 (1997)). The doctrine of *res judicata* is based on public policy interests of judicial economy and finality of litigation. *In re Liquidation of Legion Indemnity Corp.*, 373 Ill. App. 3d 969, 974 (2007). "*Res judicata* bars not only what was actually decided in the first action, but also whatever *could have been decided*." (Emphasis added.) *In re Liquidation of Legion Indemnity Corp.*, 373 Ill. App. 3d 969, 974 (2007) (citing *Hudson v. City of Chicago*, 228 Ill. 2d 462, 467 (2008)).

¶ 24 For *res judicata* to apply, three requirements must be satisfied: (1) a final judgment on the merits rendered by a court of competent jurisdiction; (2) the existence of an identity of cause of action; and (3) identical parties or their privies in both actions. *Hudson*, 228 Ill. 2d at 467.

Fishman contends that it did not sue Connie's or Bertucci's in DuPage County on the claims being asserted here and that *res judicata* does not apply because the issues and the parties in this Cook County litigation are different from those in the Du Page County litigation. We disagree.

¶ 25 Fishman relies on the case of *LP XXVI, LLC v. Goldstein*, 349 Ill. App. 3d 237 (2004) in support of his contention that the DuPage County litigation and the Cook County litigation do not come within the "identity of cause of action" requirement. *Goldstein* involved an action for a deficiency judgment against the guarantor of a note secured by a mortgage, brought subsequent to a mortgage foreclosure action. *Id.* The *Goldstein* court held that, under the transactional test, the prior mortgage foreclosure action and the action against the guarantor did not involve the same cause of action for purposes of *res judicata*. *Id.* We reject Fishman's bare assertion that "[t]he same result should obtain here." As the *Goldstein* court explained:

"It is also settled that, upon default, the mortgagee is allowed to choose whether to proceed on the note or guaranty or to foreclose upon the mortgage.

These remedies may be pursued consecutively or concurrently. [Citation.] Here,

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foreclosure on the mortgage was chosen as the first action; thereafter, plaintiff was entitled to proceed upon the guaranty. [Citation.] More specifically, a mortgage foreclosure expressly has been held not to bar a subsequent suit on a guaranty. * * * [Citations.] *** [A] suit on a personal guaranty is expressly allowed where a previous mortgage foreclosure and sale resulted in a deficiency. In such a situation, *res judicata* will not bar the subsequent suit on the guaranty contract." (Internal quotation marks omitted." *LP XXVI, LLC v. Goldstein*, 349 Ill. App. 3d at 241-42.

Goldstein is distinguishable and Fishman's reliance on the case is misplaced.

¶ 26 The Illinois Supreme Court, in *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290 (1998), adopted the transactional test as the exclusive test for making the determination. The court reasoned that the transactional approach is more pragmatic than the alternative "same evidence" test. Under the transactional approach, "a claim is viewed in 'factual terms' and considered coterminous with the transaction, regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; * * * and regardless of the variations in the evidence needed to support the theories or rights." *Id.* at 309 (quoting Restatement (Second) of Judgments § 24, cmt. a at 197 (1982)). "[S]eparate claims will be considered the same cause of action for purposes of *res judicata* if they arise from a single group of operative facts, regardless of whether they assert different theories of relief." *Id.* at 311.

¶ 27 Here, Fishman's claims arise from a single group of operative facts, as addressed in *Fishman I*, regardless of his asserted theory of relief against defendants under the Building Lease. Fishman is precluded from seeking more damages in Cook County under the doctrine of

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res judicata. See *American National Bank & Trust Co. v. Steiner*, 235 Ill. App. 3d 1101, 1105-06 (1991) (holding that the doctrine of *res judicata* precluded a party from recovering attorney fees and costs that could have been sought in another action where the facts, pleadings, issues, applicable law, and the relief sought in both cases were nearly identical). We conclude that Bertucci's and Connie's are entitled to summary judgment based on the doctrine of *res judicata*.

¶ 28 Fishman's Claims Are Barred By Judicial Estoppel

¶ 29 Assuming *arguendo* that the doctrine of *res judicata* is inapplicable because the Building Lease designated Cook County as the parties' chosen forum, Fishman and Connie's were aligned differently in the DuPage County litigation, or Fishman did not sue Bertucci's in the DuPage County litigation, summary judgment for defendants would nonetheless be in order based on the equitable doctrine of judicial estoppel.

¶ 30 "The doctrine of judicial estoppel postulates that a party who assumes a particular position in a legal proceeding is estopped from assuming a contrary position in a subsequent legal proceeding. [Citations]." (Internal quotation marks omitted.) *Gambino v. Boulevard Mortgage Corp.*, 398 Ill. App. 3d 21, 59 (2009). "The purpose of the doctrine is to promote the truth and to protect the integrity of the court system by preventing litigants from deliberately shifting positions to suit the exigencies of the moment. [Citations]." (Internal quotation marks omitted.) *Id.* Five elements are necessary for the application of judicial estoppel; "the party to be estopped must have (1) taken two positions, (2) that are factually inconsistent, (3) in separate judicial or quasi-judicial proceedings, (4) intended for the trier of fact to accept the truth of the facts alleged, and (5) have succeeded in the first proceeding and received some benefit from it. [Citations.]" *Id.*

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¶ 31 Those elements are satisfied here. Regarding the first four elements, Fishman has taken two positions that are factually inconsistent in the Cook County and DuPage County litigation that were intended for the trier of fact to accept. Specifically, in this case, Fishman takes the position that Connie's caused all of his damages; in the DuPage County litigation, Fishman took the position that Fox River caused all of his damages. Fishman alleges here that Connie's should have performed under the Building Lease and that Connie's was the proximate cause of Fishman's injury. Yet, in the DuPage County litigation, Fishman took the position that Fox River breached the Land Lease and made Connie's performance under the Building Lease "impossible." Also in this case, Fishman claims that Connie's conduct caused him to lose the building, while in the DuPage County litigation, Fishman took the position that Fox River concocted a scheme to seize the building from Fishman. Regarding the fifth element, Fishman succeeded in the first proceeding and received some benefit from it.

¶ 32 As Connie's aptly notes, Fishman's contradictions remain evident in this appeal where Fishman asserts that Fox River "had nothing whatsoever to do with *** the loss of his Building." Yet, in his amended verified complaint in the DuPage County litigation, Fishman alleged that Fox River and its agent "were and are wrongfully motivated by their desire to cause a default by Connie's in order to enable Fox River to obtain the Building." Fishman also alleged there that "although [Fox River and its agent] could legitimately obtain their goal of taking over the Property and the Building for their own use by simply buying out the Connie's tenancy in purchasing the Building from the Plaintiffs, they have instead devised and carried out a malicious and bad faith scheme to damage Plaintiffs and eliminate their rights and property interest." In the DuPage County litigation, Fishman alleged that Fox River and its agent were liable for "all of Plaintiff's damages" and, more importantly, that they "rendered impossible"

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Connie's performance under the Building Lease. However, here, Fishman asserts in his brief that "it was the defaults of Connie's, as Lessee, that caused all of Fishman's problems."

¶ 33 Pursuant to the doctrine of judicial estoppel, Fishman's action against Connie's and Bertucci's is barred. Apart from the fact that this court previously agreed with Fishman that the lessee's performance under the Building Lease was "rendered impossible" by Fox River, Fishman's claim that "Fox River's breaches of the Land Lease were separate and distinct from the breaches of the Building Lease by Connie's and Bertucci's" is flatly incorrect and ignores the interplay between the two leases.

¶ 34 Defendants have also argued that Fishman has been fully compensated and is now seeking a "windfall recovery." In view of our decision that Fishman's cause of action is barred, we need not address defendants' contentions that Fishman has already been fully compensated for his damages by Fox River, other than noting our agreement.

¶ 35 **CONCLUSION**

¶ 36 For the foregoing reasons, we affirm the order of the circuit court of Cook County granting summary judgment in favor of defendants.

¶ 37 Affirmed.