2015 IL App (1st) 140918-U

SECOND DIVISION
October 27, 2015

No. 14-0918

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

TUNICA PHARMACY, INC. and PACE COMMUNICATIONS SERVICES CORP.,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellants,	)	
v.	)	No. 09 CH 16541
MARYLAND CASUALTY COMPANY,	)	
Defendant-Appellee.	)	Honorable Kathleen M. Pantle Judge Presiding

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JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Pierce and Justice Neville concurred in the judgment.

ORDER

¶ 1 *Held*: Plaintiffs are collaterally estopped from litigating whether coverage exists under an insurance policy. The federal court's judgment in the case precludes revisiting the issue here because plaintiffs were in privity with the party that fully litigated the issue in the federal case.

¶ 2 Following a settlement in an Illinois class action case, the defendant-insurer secured a declaration from a federal court that the injury suffered by the class was not covered by the policy. Plaintiffs filed this case arguing that they should be entitled to recover from the insurer because the injury is covered by the policy under Illinois law. Plaintiffs contend that they are not bound by

the federal judgment because they were not parties to the case. The trial court ruled in favor of defendant, finding that plaintiffs were collaterally estopped from litigating the coverage issue here and that they were bound by the federal court's determination on the issue. We affirm.

¶ 3 BACKGROUND

¶ 4 From April 2003 to April 2005 non-party Express Products, Inc. was insured by defendant Maryland Casualty Company. One of the matters for which Maryland agreed to provide indemnity was for damages Express Products became legally obligated to pay as a result of "personal and advertising injury." During the period it was insured by Maryland, Express Products sent 41,064 unsolicited faxes to various recipients. Cumberland Mutual Fire Insurance insured Express Products under, for all relevant purposes, identical policies for two other years during which more unsolicited faxes were sent. The Telephone Consumer Protection Act (47 U.S.C. § 227 (eff. Dec. 22, 2010)) makes it unlawful to send unsolicited advertisements via fax under certain circumstances. See 47 U.S.C. § 227(b)(1)(C). The Act permits an unwitting recipient to pursue a private right of action in state court for up to $500 for each violation. 47 U.S.C. § 227(b)(3).

¶ 5 In 2004, a company known as Business Pro Communications, Inc. initiated a class action suit against Express Products in Lake County, Illinois for its violations of the Act. Plaintiffs were members of the class. Maryland Casualty provided a defense for Express Products in the case, but allowed Express Products to retain independent counsel and control the defense because it anticipated potential conflicts since it intended to stand on its coverage defenses. Maryland Casualty then filed a declaratory judgment action in the United States District Court for the Eastern District of Pennsylvania seeking a finding that the policy did not entitle Express Products to

coverage. While both of those cases were pending, plaintiffs filed this case seeking a declaration that, once the class action case was resolved, Maryland would have a duty to indemnify Express Products and pay the judgment.

¶ 6 Express Products settled with the class for $7,999,996.00 while both of the declaratory judgment actions were pending. Part of the settlement agreement was that the class would not seek to enforce the judgment against Express Products individually and that it would only seek to recover on the insurance policies. A condition of the settlement was that plaintiffs' counsel would represent Express Products at no cost in the attempts to recover against Maryland Casualty and that plaintiffs and Express Products would cooperate fully with one another in those endeavors.

¶ 7 Express Products, then being represented by plaintiffs' counsel, moved for judgment on the pleadings in the federal case arguing that it was entitled to judgment as a matter of law for Maryland Casualty's failure to join necessary parties as plaintiffs. The district court denied the motion and thereafter entered summary judgment in Maryland Casualty's favor finding that there was no coverage. In reaching its judgment, the district court applied Pennsylvania law. The court found that the application of Pennsylvania law was proper because Pennsylvania had the most significant contacts with the coverage dispute. The court concluded that, under the terms of the policy, Maryland Casualty had no duty to indemnify Express Products for an "advertising injury." *Maryland Casualty Company v. Express Products, Inc.*, No. 09-857, 2011 WL 4402275, *17 (E.D. Pa. Sept. 22, 2011). Express products did not timely appeal and, once they did file a notice of appeal, it was dismissed for lack of jurisdiction. *Maryland Casualty Co. v. Express Products, Inc.*, 529 F. App'x. 245, 252-53 (3d Cir. 2013).

¶ 8 While this case was pending, plaintiffs filed a separate action in Lake County against

Cumberland Mutual Fire Insurance Company. Cumberland was Express Products' other insurer during the period covered by the class action suit. Cumberland is similarly situated with Maryland Casualty in that both were prevailing parties in the federal case and that plaintiffs have sought judgment against each, arguing that the federal judgment does not preclude their pursuit of the class action damages. The Lake County court held that plaintiffs' claims were barred and its judgment was affirmed by the Second District Appellate Court. *Pace Communications Services Corp. v. Express Products, Inc.*, 2014 IL App (2d) 131058, ¶ 49 (PLA denied at 23 N.E. 3d 1202 Jan. 28, 2015).

¶ 9 In this case, the circuit court held that principles of claim preclusion and issue preclusion defeat plaintiffs' claims against Maryland Casualty. In the circuit court, and likewise here, plaintiffs argue that their claims are not barred by the federal judgment because they were not parties to that case. Plaintiffs contend that the federal judgment is void under Pennsylvania law and that, even if it were not, it would not have any preclusive effect on them.

¶ 10 ANALYSIS

¶ 11 Summary judgment is appropriate when the pleadings, depositions, admissions and affidavits, viewed in a light most favorable to the nonmovant, fail to establish a genuine issue of material fact, thereby entitling the moving party to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2012); *Progressive Universal Insurance Co. of Illinois v. Liberty Mutual Fire Insurance Co.*, 215 Ill. 2d 121, 127-28 (2005). If disputes as to material facts exist or if reasonable minds may differ with respect to the inferences drawn from the evidence, summary judgment may not be granted. *Associated Underwriters of America Agency, Inc. v. McCarthy*, 356 Ill. App. 3d 1010, 1016-17 (2005). We review the grant of summary judgment *de novo*.

Cook v. AAA Life Insurance Co., 2014 IL App (1st) 123700, ¶ 24.

¶ 12 At the outset we note that the trial court thoroughly and accurately explained in its order why Maryland Casualty was entitled to summary judgment. The Second District Appellate Court's opinion (*Pace Communications*, 2014 IL App (2d) 131058) also addresses all of the issues raised by plaintiffs here and we agree with the court's analysis and rationale which applies equally to Maryland Casualty here as it did to Cumberland there. The insurers' respective legal positions are identical. We nonetheless write further to explicitly address plaintiffs' arguments and to perhaps provide some additional insight on the issues raised.

¶ 13 No one contests that Pennsylvania law applies for purposes of assessing the preclusive effect of the federal judgment. Plaintiffs argue that, under Pennsylvania law, when a tort claimant is not joined in a declaratory judgment coverage case between a tortfeasor-insured and its insurer, the judgment is void. But plaintiffs' position relies solely on applying Pennsylvania state law and does not account for the application of the *Erie* Doctrine. In a diversity case, (as this coverage dispute was) the question of joinder is one of federal law. *General Refractories Co. v. First State Insurance Co.*, 500 F.3d 306, 321 (3d Cir. 2007). Under federal procedural law—which must be applied under the *Erie* Doctrine—a judgment is not void for not joining a tort claimant in a coverage dispute. See generally *Liberty Mutual Insurance Co. v. Treesdale, Inc.*, 419 F.3d 216 (3d Cir. 2005); Fed. R. Civ. P. 19.

¶ 14 Additionally, plaintiffs cannot now challenge the propriety of the district court's decision to deny their attempted intervention. Plaintiffs attempted to join the coverage action and their motion was denied. The denial of a motion to intervene is immediately appealable. *B.H. by Pierce v. Murphy*, 984 F.2d 196, 199 (7th Cir. 1993); Fed. R. App. P. 4. Plaintiffs did not appeal

and instead allowed the coverage case to go to a final judgment on the merits. No appeal was properly taken from that judgment by any party. Plaintiffs are not entitled to collaterally attack the propriety of the district court's ruling on their right to intervene when they could have, but did not, appeal that issue. The district court's judgment is not void based upon the court's refusal to allow plaintiffs into the case.

¶ 15 The proper focus in this case is on issue preclusion—collateral estoppel—and whether plaintiffs are precluded from revisiting an issue that was decided in the federal case. Under Pennsylvania law, collateral estoppel applies if four elements are present: (1) an issue decided in a prior action is identical to the one presented in a later action; (2) the prior action resulted in a final judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party to the prior action, or is in privity with a party to the prior action; and (4) the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior action. *Columbia Medical Group, Inc. v. Herring & Roll, P.C.*, 829 A.2d 1184, 1198 (Pa. Super. Ct. 2003). The doctrine of collateral estoppel is a broader concept than *res judicata*. *Day v. Volkswagenwerk Aktiengesellschaft*, 464 A.2d 1313, 1318 (Pa. Super. Ct. 1983). It operates to prevent a question of law or an issue of fact from being relitigated in a subsequent suit once it has been litigated and adjudicated finally in a court of competent jurisdiction. *Id*.

¶ 16 The *issue* for which preclusion is sought is whether the injury as established in the class action is covered by the Maryland Casualty policy. There is no question: (1) that the issue presented here is identical to the question presented in the federal case. Both cases ask for a judicial declaration of whether the class action injury is within the scope of the insurance policy; or (2) that a final judgment on the merits exists in the prior case. The district court entered summary

judgment for Maryland Casualty (*Maryland Casualty Company v. Express Products, Inc.*, No. 09-857, 2011 WL 4402275, *17 (E.D. Pa. Sept. 22, 2011)) and no appeal was properly taken from that decision (*Maryland Casualty Co. v. Express Products, Inc.*, 529 F. App'x. 245, 252-53 (3d Cir. 2013)); only (3) whether plaintiffs were in privity with Express Products for purposes of the federal case; and (4) whether plaintiffs had a fair opportunity to litigate the coverage issue are arguable bases that might prevent the application of issue preclusion.

¶ 17 There is no prevailing definition of "privity" which can be applied automatically to all cases. *Day*, 464 A.2d at 1317. Privity requires such an identification of interest of one person with another as to represent the same legal right. *Catroppa v. Carlton*, 998 A.2d 643, 647 (Pa. Super. Ct. 2010). Privity will be found for purposes of collateral estoppel when the two parties' preexisting substantive legal relationship is sufficiently representative that it is deemed appropriate to bind one party to the result of an issue litigated by the other. *Nationwide Mutual Fire Insurance Co. v. George V. Hamilton, Inc.*, 571 F.3d 299, 310-12 (3d Cir. 2009) (applying Pennsylvania law). Collateral estoppel can be applied in cases where the party in the present case was represented in the prior litigation by a party who acted in a representative capacity to the party in the present litigation. *Myers v. Kim*, 55 Pa. D. & C. 4th 93, 99 (Com. Pl. 2001).

¶ 18 The fact that plaintiffs are tort claimants with an interest in insurance proceeds is not alone the reason that they are in privity with the insured, Express Products. The terms of the class action settlement and the practical reality of how these events unfolded are what officially undermine plaintiffs' arguments. There was a clear representative relationship. Plaintiffs agreed that they would not pursue the assets of Express Products and that it would be *their own* obligation to pursue the insurers for recovery. Plaintiffs agreed that class counsel would "undertake, at no

cost to [Express Products], the defense" in the federal declaratory judgment case, and plaintiffs undertook the obligation to recover the judgment against Maryland Casualty. After specifically acknowledging that the coverage cases were pending, the parties went on to agree that "*The Class* will pursue recoveries against Cumberland Mutual and Maryland" and that "*the Class* *** will pursue and attempt to recover the judgment." (Emphasis added.) Although never becoming named parties, plaintiffs took full control of the federal case. And, as a hallmark of parties that are in privity, the parties agreed to "cooperate fully with one another" in the coverage actions and agreed that Express Products must provide assistance to plaintiffs in the litigation. This is important. It demonstrates that plaintiffs were in control of the federal case and they needed a contractual promise that Express Products would "provide assistance and information" in the coverage action. It is unquestionable that Express Products was sufficiently representative of plaintiffs' interests to bind plaintiffs to the result of issues litigated in that case. Other than one having its name on the case, plaintiffs and Express Products were, for all legal and practical purposes, the same. The privity inquiry must be flexible enough to acknowledge the realities of parties' relationships. *Myers*, 55 Pa. D. & C. 4th at 101.

¶ 19 The settlement terms were all agreed to by plaintiffs. Plaintiffs could have demanded a full assignment of rights in return for a settlement. Any shortcoming in the settlement agreement is a result of plaintiffs' conscious choices on how to proceed to recompense their injury. Plaintiffs obviously had strong incentive to fully litigate the coverage matter because plaintiffs themselves agreed upon settling the class action that insurance proceeds were the only source of recovery. And they agreed that it would be their responsibility to attain those proceeds. Plaintiffs cannot now argue that they are not bound by the federal judgment because they never obtained an outright

formal assignment. The federal coverage action was pending at the time the class action settlement was entered and plaintiffs could have, should have, and attempted to, account for how they would move forward to attain recovery.

¶ 20 This case, like the *Pace Communications* case in the Second District, is simply a collateral attack on the federal judgment with which plaintiffs are unsatisfied. Because we find that plaintiffs are collaterally estopped from re-litigating the coverage issue, we need not address plaintiffs' arguments seeking a declaration that their claims are covered by the relevant policy under Illinois law.[1,2]

¶ 21 CONCLUSION

¶ 22 Based on the foregoing, we affirm the judgment of the Circuit Court of Cook County.

¶ 23 Affirmed.

[1] Maryland Casualty filed a motion to strike section III of plaintiffs' brief which deals with the merits of whether the injuries suffered by the class are covered by the insurance policy. That motion was taken with the case. We now agree with Maryland Casualty's position because the application of collateral estoppel is fully dispositive of the parties' claims, yet the motion is denied as moot.

[2] Maryland Casualty also filed a motion for leave to cite supplemental authority. We did not consider the supplemental authority in reaching our decision as the motion was filed too late. That motion is denied.