2020 IL App (1st) 190760-U

No. 1-19-0760

Second Division
September 15, 2020



IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

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| RALPH SACKS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | |
| | ) | No. 14 CH 11726 |
| CSI PROPERTY ACQUISITION, LLC as INTERVENOR, | ) | |
| | ) | |
| | ) | Honorable |
| Defendant-Appellant. | ) | Michael Francis Otto, |
| | ) | Judge, presiding. |

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Lavin concurred in the judgment.

**O R D E R**

¶ 1 *Held*: The circuit court's order granting a turnover of assets is affirmed where it correctly concluded, by way of issue preclusion, that plaintiff's right to payment was superior to defendant's claimed secured lien rights.

¶ 2 This appeal involves the priority of secured lien rights between plaintiff, Ralph Sacks, and defendant, CSI Property Acquisition, LLC (CSI). CSI appeals from the circuit court's order granting Sacks's motion for turnover of payments secured by a settlement agreement. On appeal,

CSI argues that the circuit court erred in applying issue preclusion to find that its claimed secured lien rights were inferior to those of Sacks. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 In October 2011, Sacks and his partners sold their epoxy coating manufacturing company, Corro-Shield International, Inc., to Corro Acquisition Co., Inc. (Corro Acquisition), pursuant to a Share Purchase Agreement. The sale closed on October 17, 2011, with an effective date of September 30, 2011. Following the sale, Corro Acquisition merged with Corro-Shield International, Inc., with Corro-Shield International (Corro) becoming the named successor company. Based on the Share Purchase Agreement, Corro was required to pay Sacks $270,025.45 (his share of the retained earnings), which came due on April 30, 2012. In particular, section 2.07 of the Share Purchase Agreement states:

> "The Corporation will pay to the Vendors an amount equal to eighty-five percent (85%) of the Retained Earnings of the Corporation as shown on the Effective Date Financial Statements. The amount to be paid to the Vendors on account of the Retained Earnings will be paid to them as soon as the Effective Date Financial Statements are prepared and accepted by the Purchaser and the Vendors, to the extent of available cash and cash equivalents. Any residual balance owing to the Vendors on account of Retained Earnings will be paid to the Vendors on the last day of the sixth month following the Closing Date."

¶ 5 In October 2011, Corro Shield Industries, Inc., the parent company of Corro, entered into a loan agreement with HSBC Bank Canada (HSBC), with Corro as guarantor.[1] As consideration

[1] Corro Shield Industries, Inc., is not a party to this appeal.

for the loan, Sacks, as a creditor of Corro, entered into a debt subordination agreement with HSBC. The Subordination Agreement states that Sacks's rights will be junior to those of HSBC, except for "Excluded Obligations." The Subordination Agreement defines Excluded Obligations as:

> "(a) All obligations of the Company to pay all salary and other forms of employee compensation to the undersigned in an aggregate amount not to exceed $180,000 in any calendar year plus the payment of the benefits to which the undersigned is entitled to receive under the Employment Agreement dated as of September 30, 2011 between the Company and the undersigned, and (b) the Company's obligation to pay a dividend to the undersigned pursuant to Section 2.07 of that certain Share Purchase Agreement dated as of September 30, 2011, between Acquisition Co., CS International, the undersigned and Hugh McVey, provided that the Borrower is otherwise in full compliance with all of the terms and conditions of the loan and security documentation between the Borrower and you both before and after giving effect to the payment of such dividend."

¶ 6 Corro failed to pay Sacks his share of the retained earnings within six months as required. In 2014, Sacks filed a five-count complaint in the circuit court against Corro, alleging breach of contract, common law fraud, statutory fraud, and various other violations of Illinois law. He also sought a declaratory judgment related to a Non-Competition Agreement. The court found that Corro had violated the terms of the Share Purchase Agreement by failing to pay Sacks the retained earnings and awarded Sacks a judgment on his breach of contract claim in the total amount of $354,577.64, which was calculated as $270,025.45 in retained earnings, $83,804.06 in accrued interest, and $748.13 in court costs. The judgment became final on January 31, 2018, after Sacks voluntarily dismissed his remaining claims.

¶ 7 On February 12, 2018, HSBC assigned all of its rights and security interests with respect to Corro to 7032749 Canada, Inc., and Leonard Simak, who in turn transferred those rights to CSI pursuant to a Contribution Agreement. As such, CSI maintained the valid security interests from HSBC "without interruption or lapse." On May 8, 2018, CSI foreclosed its security interests in Corro's property in a public Uniform Commercial Code (UCC) Article 9 sale, which Sacks attended.

¶ 8 On March 23, 2018, Sacks instituted supplementary proceedings to collect on the December 2017 money judgment and issued third-party citations to discover assets belonging to Corro and HSBC. On May 7, 2018, CSI, which had not been a party in the underlying litigation, intervened. Sacks then filed a "Motion for Entry of an Order for Turnover of Funds" seeking the turnover of $42,069.93 held in Corro's checking account with First American Bank (First American Bank Turnover Motion).

¶ 9 On June 25, 2018, CSI filed a response arguing that Sacks was not entitled to a turnover because his secured lien rights were inferior to those of HSBC and, thus, also to those of CSI under the "first in time first in right" principle of law. Specifically, CSI contended its security interest in Corro's deposit accounts was perfected when HSBC filed a financing statement on November 2, 2011, whereas Sacks did not acquire a security interest in the accounts until the third-party citation was issued on April 25, 2018.

¶ 10 In his reply, Sacks asserted that "under the contractual terms of the Subordination Agreement, his rights to the dividends (*i.e.*, the retained earnings he left in the company) were never subordinated to the rights of HSBC and remained superior as specified in the Subordination Agreement."

¶ 11 Following a hearing on September 6, 2018, the circuit court granted Sacks's First American Bank Turnover Motion (First American Bank Turnover Order). The court found that Sacks's right to payment was included as an exception in the Subordination Agreement and, therefore, took precedence over CSI's collateral security interests. The court specifically stated:

> "The reason that [the First American Turnover Motion] is granted is that an assignee can have no greater right or interest than the [as]signor possesses. In the Debt Subordination Agreement … although there is a fair amount of legalese, it appears clear to the Court that the intention was that all of Mr. Sacks' rights as a creditor of Corro were subordinated to HSBC except for the excluded obligations, which included the company's obligation to pay a dividend pursuant to Section 2.07 of the Share Purchase Agreement.
>
> Having reviewed Judge Demacopoulos' order of December 14, 2017, it is clear to the court that the judgment she entered in Mr. Sacks' favor was for violation of Section 2.07 of the Share Purchase Agreement, and intervenor does not argue otherwise. Whereas here, the judgment, although counsel is certainly correct that the judgment lien did not arise until the judgment was entered, the HSBC and Sacks agreed that Corro-Shield's obligations under 2.07 were excluded from subordination.
>
> Given that, I do not see any basis in law … for concluding that HSBC's successor has rights superior to Mr. Sacks with respect to those funds."

The turnover order, entered on September 6, 2018, stated that "the court finds that there [are] no just reasons for delay of enforcement or appeal or both of this order." No appeal was taken from that order.

¶ 12 Through his third-party citations, Sacks also learned of a settlement agreement dated August 17, 2016, between Corro and Corvixx Polymers Corporation, Ryano Resins Inc., and

Gabriel Urbieta. Pursuant to this agreement, Corvixx agreed to pay Corro a total of $630,000 on a payment schedule. At the time of the citations, there were three installment payments of $125,000 remaining, due on January 1, 2019; January 1, 2020; and January 1, 2021.

¶ 13 On November 6, 2018, Sacks filed a "Motion for Entry of an Order for Turnover of Funds" (Corvixx Turnover Motion), seeking turnover of the remaining payments due to Corro by Corvixx under the settlement agreement. In his motion, Sacks asserted that, after taking into account the First American Bank turnover and interest, he is owed $341,009.89 before the judgment on his breach of contract claim would be satisfied.

¶ 14 On February 6, 2019, pursuant to court order, Corvixx deposited the January 1, 2019 payment of $125,000 with the clerk of the circuit court. CSI filed a response to the Corvixx Turnover Motion, making the same arguments—claiming superior lien rights—as it did in response to the First American Bank Turnover Motion. Sacks replied, arguing that the court's First American Bank Turnover Order precluded CSI from reasserting that it had a superior right to payment. Alternatively, Sacks argued that even if the court were to consider the merits of CSI's arguments, Sacks would prevail for the same reasons as before because his rights are superior by virtue of the Excluded Obligations section of the Subordination Agreement.

¶ 15 On March 14, 2019, following a hearing, the circuit court granted Sacks's Corvixx Turnover Motion (Corvixx Turnover Order) and ordered that the $125,000 held by the clerk and all future payments pursuant to the settlement agreement be paid to Sacks until his judgment against Corro was satisfied. In its oral ruling, the court stated that both the law of the case doctrine and collateral estoppel supported its decision to grant the Corvixx Turnover Motion. Like the court's First American Bank Turnover Order, the Corvixx Turnover Order contained language

pursuant to Supreme Court Rule 304(a), rendering the court's order final and appealable. This appeal followed.

¶ 16 II. ANALYSIS

¶ 17 At its core, the issue on appeal is whether issue preclusion stands as a bar to CSI's ability to litigate its superior rights claim to the Corvixx settlement agreement funds. In its March 14, 2019 ruling, the court, in granting the Corvixx Turnover Motion, reasoned that its decision was based on the law of the case doctrine, which required it to make the same ruling on the Corvixx Turnover Motion as it made in its prior ruling on the First American Turnover Motion. Further, the court stated that if the law of the case doctrine was inapplicable, it would nonetheless reach the same result based upon collateral estoppel. CSI contends that the circuit court erred when it applied issue preclusion principles to prevent it from pursuing a finding that its claimed secured lien rights to the Corvixx settlement funds are superior to those of Sacks. CSI argues that the circuit court erroneously applied issue preclusion to the Corvixx Turnover Motion because that proceeding presented different parties and different issues than in the First American Turnover Motion. Contrarily, Sacks contends that the court correctly ruled that issue preclusion, based on either law of the case doctrine or collateral estoppel, applied here and specifically asserts the inapplicability of the exceptions to collateral estoppel.

¶ 18 The law of the case, along with *res judicata* and collateral estoppel, are all three considered issue preclusion doctrines. *In re Christopher K.*, 217 Ill. 2d 348, 372 (2005). The applicability of these doctrines is a question of law; thus, our review is *de novo*. *Prospect Development, LLC v. Kreger*, 2016 IL App (1st) 150433, ¶ 21. We first examine those elements necessary for application of the law of the case doctrine.

¶ 19 Under the law of the case doctrine, a legal decision made at one stage of litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, becomes the law of the case for future stages of the same litigation, and the parties are deemed to have waived the right to challenge the decision at a later time. *Kazubowski v. Kazubowski*, 45 Ill. 2d 405, 413 (1970). Put another way, "a court's unreversed decision on a question of law or fact settles that question for all subsequent stages of the suit." *Norton v. City of Chicago*, 293 Ill. App. 3d 620, 624 (1997). The significant element to this doctrine is that there must have been a prior appeal. *Miller v. Lockport Realty Group, Inc.*, 377 Ill. App. 3d 369, 375 (2007) (recognizing "the necessary element of a prior appellate decision for application of the doctrine to occur"). "[T]he doctrine applies to questions of law and fact and encompasses a court's explicit decisions, as well as those decisions made by necessary implication." *American Service Insurance Co. v. China Ocean Shipping Co. (Americas), Inc.*, 2014 IL App (1st) 121895, ¶ 17. In practice, this doctrine typically applies where an appellate court has made a ruling on an issue of law and the parties are attempting to relitigate that issue in a subsequent appeal or where the parties failed to challenge a ruling on an issue of law in the prior appeal and, therefore, the appellate court implicitly upheld the ruling and foreclosed future litigation on it. See *Lurie v. Wolin*, 2017 IL App (1st) 161571, ¶ 27 (where this court found that law of the case doctrine may apply to jurisdictional rulings even where the first appellate decision is less than explicit on that issue). Here, there was no prior appeal of the First American Turnover Order. Thus, the law of the case doctrine is inapplicable.

¶ 20 Collateral estoppel, on the other hand, is applicable, and the circuit court correctly concluded that the doctrine prevented CSI from relitigating the issue of Sacks's rights. Collateral estoppel "promotes fairness and judicial economy by preventing relitigation of issues that have already been resolved in earlier actions." *Du Page Forklift Service, Inc. v. Material Handling*

*Services, Inc.*, 195 Ill. 2d 71, 77 (2001). Estoppel applies when a party participated in two separate and consecutive cases arising out of the same cause of action and some controlling factor or question material to the determination of both cases has been adjudicated by a court of competent jurisdiction against the party in the former suit. *Stathis v. First Arlington National Bank*, 226 Ill. App. 3d 47, 53 (1992). The following elements are required to establish collateral estoppel: "(1) the issue decided in the prior litigation is identical to the one presented in the current case, (2) there was a final adjudication on the merits in the prior case, and (3) the party against whom estoppel is asserted was a party to, or in privity with a party to, the prior litigation." *Pine Top Receivables of Illinois, LLC v. Transfercom, Ltd.*, 2017 IL App (1st) 161781, ¶ 8. Additionally, the party against whom the estoppel is asserted must have had a full and fair opportunity to litigate the issue in the earlier action and "an injustice must not be done to him under the circumstances of the later case." *Hayes v. State Teachers Certification Board*, 359 Ill. App. 3d 1153, 1162 (2005).

¶ 21 Here, the issue to be precluded is whether Sacks's rights to the Corvixx settlement funds are superior to those of CSI per the Excluded Obligations section of the Subordination Agreement with HSBC. The issue resolved in the prior First American Turnover Order was whether Sacks's rights to First American Bank checking account were superior to those of CSI per the Excluded Obligations section of the Subordination Agreement. These issues are identical. Both turn on whether satisfaction of Sacks's judgment falls under the Excluded Obligations in the Subordination Agreement. Thus, the first element – identity of issues – was met.

¶ 22 As to whether there was a final judgment on the merits, finality language was included in the court's First American Turnover Order, pursuant to Illinois Supreme Court Rule 304(a) (eff. March 8, 2016). Although there was opportunity, CSI did not appeal that ruling. Therefore, the second element was also met.

¶ 23 Finally, issue preclusion requires that the parties involved were the same. There can be no dispute that this element has been met. Sacks and CSI were the parties involved in both of the court's turnover orders.

¶ 24 Despite our conclusion that the issues and the parties are the same, we address CSI's contention, albeit made within the context of its law of the case doctrine argument, to the contrary. In that argument, CSI maintains that because the respondents in both proceedings were different, *i.e.*, First American Bank and Corvixx, and CSI's property interests were different, the cases were not the same.

¶ 25 CSI misperceives the nature of these proceedings. Pursuant to section 2-1402 of the Illinois Code of Civil Procedure, a judgment creditor may conduct an examination of a judgment debtor or any third party who might hold assets of the judgment debtor. 735 ILCS 5/2-1402 (West 2018); *Pyshos v. Heartland Development Co.*, 258 Ill. App. 3d 618, 623 (1994). In these proceedings, the relevant inquiries are (1) whether a judgment debtor is in possession of assets that should be applied to satisfy judgment, or (2) whether a third party is holding assets of the judgment debtor that should be applied to satisfy the judgment. *Shak v. Blom*, 334 Ill. App. 3d 129, 133 (2002). Once the judgment creditor discovers assets in the hands of a third party, the trial court may order the third party to deliver up those assets to satisfy the judgment. *Pyshos*, 258 Ill. App. 3d at 628.

¶ 26 First American Bank and Corvixx were merely third-party citation respondents in these post-judgment supplemental proceedings. See 735 ILCS 5/2-1402 (West 2018). The issue that is the subject of CSI's superior rights claims as against Sacks, the judgment creditor, has no bearing on whether either of the two respondents were holding assets of Corro, the judgment debtor. Rather, the issue subject to preclusion is whether those assets, having been discovered, were properly awarded to Sacks as opposed to CSI. The answer to that inquiry involved the same parties,

Sacks and CSI, and the same interpretation of the Subordination Agreement, irrespective of who any third-party citation respondents might be.

¶ 27 CSI maintains that the court erred in declining to use its discretion to reject application of estoppel here or in disallowing it to argue its superior lien position "under vastly different circumstances of the Corvixx Turnover Order as opposed to the First American Bank Turnover Order." We are hard-pressed to identify the vastly different circumstances to which CSI refers, and it has not enlightened us in that regard. Accordingly, we hold fast to our determination that collateral estoppel applies to bar CSI's relitigation of his superior rights claim to the Corvixx funds.

¶ 28 CSI further contends that the doctrine of issue preclusion should not be applied because it lacked the incentive to litigate the First American Bank Turnover Order. Courts may decline to apply issue preclusion, even where the elements have been met, if injustice would result. *In re Estate of Ivy*, 2019 IL App (1st) 181691, ¶ 38. One such reason is where the party lacked the incentive to litigate in the prior proceeding. "There must have been the incentive and opportunity to litigate, so that a failure to litigate the issue is in fact a concession on that issue." *Talarico v. Dunlap*, 177 Ill. 2d 185, 192 (1997). "Incentive to litigate might be absent, for instance, where the amount at stake in the first litigation was insignificant, or if the future litigation was not foreseeable." *Id.*

¶ 29 However, CSI failed to make this "lack of incentive" argument before the circuit court. It is axiomatic that arguments "not raised in the circuit court are waived and may not be raised for the first time on appeal." *Department of Transportation for and on Behalf of People v. GreatBanc Trust Company*, 2018 IL App (1st) 171315, ¶ 13. The purpose of this rule is to preserve judicial resources. *Id.* Despite filing both a response and a sur-response to the Corvixx Turnover Motion, CSI never presented this argument in the circuit court, and for that reason, this argument is waived.

¶ 30 In any event, we believe that CSI did have the incentive to litigate the priority of lien rights in this instance. CSI claims that it lacked the incentive to appeal in the prior proceeding because the amount at stake was minimal as compared to here and, additionally, because there are different kinds of property at issue. CSI cites to nothing in the record or in caselaw to support either claimed basis. Regardless, as to the latter, if there were different kinds of property at issue that could conceivably defeat application of the doctrine, or more specifically, the identity of interest element, we could perhaps find merit in CSI's argument. However, CSI has not demonstrated to us that such is the case. For that reason, we find the argument to be meritless.

¶ 31 As to the former basis, although relative, we disagree with CSI's position that the amount at stake made continued litigation worthless. Though the $42,000 contained in the First American Bank checking account was only a fraction of what was turned over by Corvixx, it was not such a small amount that would not incentivize CSI to appeal the court's final order. We are unable to locate any authority that mandates that the incentive in the two cases must be equal. Additionally, the future litigation was foreseeable as Sacks's judgment was not satisfied by the checking account turnover. In fact, CSI vigorously litigated the superiority of its lien rights before the circuit court as to the First American Bank Turnover Motion. CSI filed multiple memoranda and argued before the court during a hearing against turnover. Finally, CSI's counsel later claimed that after a "cost benefit analysis," CSI decided not to appeal the First American Bank Turnover Order. However, that reasoning does not demonstrate a lack of incentive and will not now preclude the application of issue preclusion. We find no error in the trial court's application of collateral estoppel.

¶ 32 Notwithstanding issue preclusion, CSI reprises an argument it first raised in the First American Bank turnover proceeding. Then and now, CSI contends that by ruling that Sacks' rights were superior to CSI's, the circuit court blatantly disregarded the principle "first in time first in

right" contained in the UCC and created a new exception to the priority scheme that would undermine "the foundation for billions of dollars in commercial financing in the United States." Relying on the UCC for support, CSI contends that the Subordination Agreement did not provide Sacks with superior lien rights.[2]

¶ 33 We need not reach this issue. It is settled law that no question which was raised or could have been raised in a prior appeal on the merits can be argued on a subsequent appeal. *Turner v. Commonwealth Edison Co*., 63 Ill. App. 3d 693, 698 (1978) (citing *Kazubowski v. Kazubowski*, 45 Ill. 2d 405, 413 (1970)). Where a question was open to consideration in a prior appeal and it could have been presented but was not, the question will be deemed waived. *Id*.

¶ 34 In response to Sacks's motion for turnover of funds in the First American Bank citation proceeding, CSI asserted that its rights to the Corro funds held by First American were superior to Sacks's. It was in that proceeding that CSI then asserted its "first in time first in right" claim. Although the court's order included 304(a) finality language, CSI took no appeal from the court's ruling. Having failed to present its argument in a prior available appeal, the issue is waived.

¶ 35 III. CONCLUSION

¶ 36 For the reasons stated, we affirm the judgment of the circuit court.

¶ 37 Affirmed.

[2] Under the UCC, a security interest is generally subordinate to the rights of a person that becomes a lien creditor before the security interest is perfected. 810 ILCS 5/9-317(a) (West 2018). Generally, a lien which is first in time has priority (*Home Federal Sav. and Loan Ass'n v. Cook*, 170 Ill. App. 3d 720, 724 (1988)) and is entitled to prior satisfaction out of the property it binds (51 Am. Jur 2d Liens, §52 (1970)).