No. 1-10-1619

FIRST DIVISION
FILED: March 14, 2011

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

AMERICAN FAMILY MUTUAL INSURANCE COMPANY, Plaintiff-Appellant v. MICHAEL P. McGRATH, JR., and MELISSA McGRATH, Defendants-Appellees.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY No. 09 CH 18334 HONORABLE MARTIN S. AGRAN, JUDGE PRESIDING.

JUSTICE HOFFMAN delivered the judgment of the court. Presiding Justice Hall and Justice Lampkin concurred in the judgment.

ORDER

Held: The circuit court's order dismissing the plaintiff's complaint was reversed, because the plaintiff's claim was not barred by *res judicata* or by the parties' settlement agreement.

The plaintiff, American Family Mutual Insurance Company, appeals from the circuit court's order dismissing its complaint against the defendants, Michael and Melissa McGrath, as barred by *res judicata* or foreclosed by the parties' previous settlement agreement. For the reasons that follow, we reverse the circuit

court's judgment and remand for further proceedings.

Before this litigation commenced, the defendants filed suit against the plaintiff, their insurer, seeking coverage for water damage to their home. The parties settled the matter by agreement. In August 2007, the defendants initiated a separate breach of contract action against the general contractor that built their home. In May 2008, the plaintiff brought its own action against the general contractor. The plaintiff's complaint against the general contractor raised the same allegations as had the defendants' complaint but further asserted that, since it had made payment on the claims to the defendants, it was entitled to an equitable subrogation of the defendants' claims against the contractor.

While its equitable subrogation complaint was still pending in the circuit court, the plaintiff filed the current cause of action, which was heard before a different circuit court judge. The plaintiff's one-count complaint in this case asserted that the defendants were contractually obligated to assign subrogation rights, that the defendants had been asked to do so, and that the defendants had failed to respond to the request. The complaint asserted that the defendants' failure to assign subrogation rights "breached their contractual obligation," and the complaint prayed that the court order specific performance of the contract. This

contractual subrogation suit was delayed pending the outcome of the equitable subrogation suit.

Although the record for this appeal does not include the entire record for the equitable subrogation suit, it does contain an order entered by the circuit court dismissing the plaintiff's complaint "in connection with Intervenor Michael P. McGrath Jr.'s *** Motion to Dismiss." This court later affirmed the circuit court's decision to dismiss the plaintiff's complaint for equitable subrogation, on the basis that "whatever right of subrogation [the plaintiff] acquired in this case by reason of its having paid [on the policy], it acquired pursuant to the subrogation provision of the [parties' insurance policy], not by virtue of any equitable or common law principle." *American Family Mutual Insurance Co. v. Northern Heritage Builders, LLC*, No. 1-10-0216, slip op. at 7 (Ill. App. October 12, 2010). After the circuit court dismissed the plaintiff's equitable subrogation claim, the defendants filed a motion to dismiss the complaint in this case pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2008)). The motion to dismiss argued both that the plaintiff's contractual subrogation claim was barred by *res judicata* and that, even if the claim were not barred, it was foreclosed by a release contained in the parties' settlement agreement. The circuit court agreed with both of the defendants' arguments and dismissed the

plaintiff's complaint. The plaintiff now appeals.

On appeal, the plaintiff asserts that the circuit court erred in granting the defendants' motion to dismiss under section 2-619 of the Code. A section 2-619 motion to dismiss admits, for purposes of the motion, the legal sufficiency of the complaint, but asserts an affirmative defense or other matter that avoids or defeats the claim. *Whetstone v. Sooter*, 325 Ill. App. 3d 225, 229, 757 N.E.2d 965 (2001). We review *de novo* a circuit court's decision to dismiss a complaint pursuant to section 2-619 of the Code. *Halverson v. Stamm*, 329 Ill. App. 3d 1206, 1215, 769 N.E.2d 1076 (2002).

To dismiss the plaintiff's complaint in this case, the circuit court relied alternatively on the doctrine of *res judicata* and on the idea that the parties' settlement agreement released the defendants from their contractual obligation to assign their claim to the plaintiff. We begin with the *res judicata* issue.

Section 2-619(a)(4) of the Code, which permits a court to dismiss an action on the ground that it is "barred by a prior judgment," incorporates the doctrine of *res judicata*. *Halverson*, 329 Ill. App. 3d at 1214-15. Under the doctrine, a final judgment on the merits is conclusive as to the rights of the parties and their privies, and bars any subsequent action between the same parties involving the same claim, demand, or cause of action.

Valdovinos v. Tomita, 394 Ill. App. 3d 14, 19-20, 914 N.E.2d 221 (2009). The bar extends not only to what was actually decided in the first action, but also to those matters that could have been decided. *Valdovinos*, 394 Ill. App. 3d at 20. For the doctrine of *res judicata* to apply, three requirements must be satisfied: (1) a final judgment on the merits rendered by a court of competent jurisdiction; (2) identity of causes of action; and (3) identity of parties or their privies. *Valdovinos*, 394 Ill. App. 3d at 20. The plaintiff does not dispute that the judgment dismissing its claim for an equitable subrogation was a final judgment on the merits rendered by a court of competent jurisdiction. Instead, the plaintiff focuses its argument on the latter two requirements for *res judicata*.

On the second requirement, the plaintiff contends that its complaint for equitable subrogation constituted a different cause of action than its current complaint for contractual subrogation. Our supreme court has explained that courts should determine whether two causes of action are the same for *res judicata* purposes by applying a "transactional test" that considers whether causes of action "arise from a single group of operative facts." *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 311-12, 703 N.E.2d 883 (1998). There can be little question that the two causes of action here--one for equitable subrogation of the defendants' water

damage claim and one for contractual subrogation of the same claim--arise out of the same operative facts. The plaintiff nonetheless argues that the two suits should be considered different for *res judicata* purposes because the theories for recovery, and required evidence, differ for each case. However, our supreme court has explained that the transactional test for *res judicata* will equate two causes of action with overlapping facts "regardless of whether they assert different theories of relief" and "even if there is not a substantial overlap of evidence." *River Park*, 184 Ill. 2d at 311-12. These statements from the supreme court directly refute the plaintiff's argument, and they lead us to conclude that the current contractual subrogation action and previous equitable subrogation action are identical for purposes of *res judicata*.

The final requirement for *res judicata*, identity of parties, is also met here. Although the plaintiff asserts that there is no identity of parties because neither defendant was "named *** as a party defendant" in the prior action, the plaintiff does not dispute the defendants' assertion that Michael McGrath was nonetheless a party to the prior action after he intervened in the action.

Notwithstanding the above points, the plaintiff argues alternatively that *res judicata* should not apply here because the defendants acquiesced in the splitting of the equitable and

contractual causes of action by failing to raise any objection to the splitting until the equitable cause of action had been dismissed. The defendants contend that the plaintiff has forfeited this argument for failing to raise it in the circuit court. However, the plaintiff argued below that the defendants "never raised [a claim splitting objection] *** until after [the judge in the equitable subrogation suit] made his final ruling," and that the defendants should not be able to "use [the equitable subrogation] decision as a sword to defeat this action, when they did not object to the jurisdiction of [the circuit court] to decide the contractual issues between the parties." Although the plaintiff did not refer the circuit court to the legal authority it now cites for this proposition, we conclude that the plaintiff pressed this argument sufficiently to avoid forfeiting it. Aside from their forfeiture argument, the defendants offer no response to the plaintiff's position that they acquiesced to the splitting of its equitable and contract actions.

The plaintiff draws its acquiescence theory from the supreme court's decision in *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 665 N.E.2d 1199 (1996). In *Rein*, our supreme court explained a limitation on *res judicata*:

> "The rule against claim-splitting has been relaxed where there has been an omission due to ignorance, mistake or fraud, or

> where it would be inequitable to apply the rule. [Citations]. Situations in which it would be inequitable to apply the rule are detailed in section 26(1) of the Restatement (Second) of Judgments (Restatement (Second) of Judgments § 26(1) (1980)). This section provides that the rule against claim-splitting does not apply to bar an independent claim of part of the same cause of action if: (1) the parties have agreed in terms or in effect that plaintiff may split his claim or the defendant has acquiesced therein ***. Restatement (Second) of Judgments § 26(1) (1980)." *Rein*, 172 Ill. 2d at 341.

As the plaintiff further points out, the comments to the Restatement (Second) of Judgments indicate that the above acquiescence language the supreme court adopted seems directed at precisely the situation we encounter here. Comment a to § 26(1) provides as follows:

> "Where the plaintiff is simultaneously maintaining separate actions based upon parts of the same claim, and in neither action does the defendant make the objection that another action is pending based on the same claim, judgment in one of the actions does not preclude the plaintiff from proceeding and obtaining judgment in the other action. The failure of the defendant to object to the splitting of the plaintiff's claim is effective as an acquiescence in the

splitting of the claim. See Illustration 1.

Illustration:

1. After a collision in which A suffers personal injuries and property damage, A commences in the same jurisdiction one action for his personal injuries and another for the property damage against B. B does not make known in either action his objection *** to A's maintaining two actions on parts of the same claim. After judgment for A for the personal injuries, B requests dismissal of the action for property damage on the ground of merger. Dismissal should be refused as B consented in effect to the splitting of the claim." Restatement (Second) of Judgments § 26(1) cmt. a (1980).

With no argument from the defendants that section 26(1) of the Restatement should not preclude their *res judicata* argument, we find persuasive the plaintiff's citation to the above authorities, and we conclude that, even though all three requirements of *res judicata* were met here, the doctrine of *res judicata* should not have been applied to this case. See also *Piagentini v. Ford Motor Co.*, 387 Ill. App. 3d 887, 898, 901 N.E.2d 996 (2009) (applying § 26(1) to hold that a defendant who failed to file a timely objection had acquiesced to claim splitting).

In dismissing the current complaint, the circuit court also relied on the idea that the plaintiff released the defendants from

their contractual obligation to assign their claim to the plaintiff when the parties settled their first litigation. On appeal, the plaintiff asserts that the circuit court misinterpreted the parties' settlement agreement, which the plaintiff argues did not affect its subrogation rights.

A release is a contract and, as such, is subject to the traditional rules of contract interpretation. *Farm Credit Bank of St. Louis v. Whitlock*, 144 Ill. 2d 440, 447, 581 N.E.2d 664 (1991). "The intention of the parties to a contract must be determined from the instrument itself, and construction of the instrument where no ambiguity exists is a matter of law." *Whitlock*, 144 Ill. 2d at 447.

"Illinois courts restrict the language of a general release to the things or persons to be released and refuse to interpret generalities to defeat a valid claim not then in the mind of the parties." *Farmers Automobile Insurance Association v. Kraemer*, 367 Ill. App. 3d 1071, 1074, 857 N.E.2d 691 92006); see also *Carlile v. Snap-on Tools*, 271 Ill. App. 3d 833, 838, 648 N.E.2d 317 (1995) ("A release cannot be construed to include claims not within the contemplation of the parties"). Thus, although it is true that, "[w]here both parties were aware of an additional claim at the time of signing [a general release], courts have given effect to the general release language of the agreement to release that claim as

well," (*Whitlock*, 144 Ill. 2d at 447), "determining whether particular language constitutes a general release is entirely a matter of construing that language" (*Gallagher v. Lenart*, 226 Ill. 2d 208, 236, 874 N.E.2d 43 (2007)).

Here, the parties' insurance contract contained the following provision regarding subrogation:

> "An insured may waive in writing before a loss all rights of recovery against any person. If not waived, we may require an assignment of rights of recovery for a loss to the extent that payment is made by us.
>
> If an assignment is sought, an insured must sign and deliver all related papers and cooperate with us." (Emphases omitted.)

The parties do not dispute that the plaintiff made no request for subrogation or assignment prior to the execution of the settlement agreement. That settlement agreement provides as follows, in pertinent part:

> "1. The McGraths instituted litigation *** seeking relief against [the plaintiff] for breach of contract of an insurance policy ***. ***
>
> 2. The [parties] desire to terminate, settle, release and compromise all claims for all damages, including but not limited to claims under 215 ILCS 5/155 (2008), and further

desire to waive any and all rights to appeal, on any issue, by either party. The [parties] hereby agree as follows:

* * *

1. Entirety of Agreement: This Release is the complete and entire agreement of [the parties] and may not be modified, changed, contradicted, added to, or altered in any way by any previous written or oral agreements ***. ***

* * *

3. Release by McGraths: In consideration of [the settlement] ***, the McGraths *** do hereby fully and finally release *** [the plaintiff] *** from and against any and all claims, demands, liabilities, damages, or causes of action, which were or could have been brought, arising out of [the claim and the lawsuit] ***. It is further agreed that *** the McGraths hereby waive any and all rights to appeal any part of the judgment from the lawsuit.

4. Release by American Family: In consideration for the McGraths' release *** of any and all claims *** arising out of [the claim and the lawsuit] against [the Plaintiff]. [*Sic*.] It is further agreed that in consideration for the above, [the plaintiff] hereby waives any and all rights to appeal any part of the judgment from the lawsuit.

5. Release and Settlement Not an Admission of Liability:

> The McGraths agree that the covenants and releases contained herein *** are not deemed or construed as admissions of liability *** but are construed as a compromise and settlement of the McGraths' allegations, claims, and causes of action, which were or could have been brought, arising out of [the claim and the lawsuit] and both the McGraths' and [the plaintiff's] right to appeal any judgment from the lawsuit."

The defendants interpret the above settlement language to encompass any claim for subrogation the plaintiff could have made with respect to the settled lawsuit. According to the defendants, the release "unambiguously and abundantly made it clear that the parties' intent was to release one another from *all liabilities* relative to the claim under the policy." (Emphasis in original.) We disagree. The actual wording of the release states an intent to settle "all claims for all *damages*" (emphasis added) relating to the defendants' insurance policy claim. The plaintiff here does not seek damages against the defendants, however; it seeks to subrogate itself to their right to collect damages from a third party.

Further, paragraphs three and four of the release, which set forth the scope of the release each party granted the other, describes the defendants' release very broadly, as foreclosing not only their right to appeal but also from bringing against the

plaintiff any "claims, demands, liabilities, damages, or causes of action, which were or could have been brought" relating to the claim. The plaintiff's part of the release agreement, on the other hand, very notably includes only its agreement not to appeal.

The distinction between the scope of the parties' releases is underscored again in the fifth paragraph, which emphasizes that the release is a settlement of "*the McGraths'* allegations, claims, and causes of action, which were or could have been brought" (emphasis added) and "*both the McGraths' and [the plaintiff's]* right to appeal" (emphasis added). Thus, again in this paragraph, the agreement uses very broad language to describe the defendants' release but conspicuously limits the plaintiff's release to cover only its right to appeal.

From the above release language, we agree with the plaintiff that the language of the release was, at least so far as it restricted the plaintiff, so narrowly drawn that it cannot be construed to encompass the plaintiff's preexisting contractual right to subrogation. Accordingly, we must reject the circuit court's conclusion that the settlement agreement bars the plaintiff's current claim for contractual subrogation.

For the foregoing reasons, because we reject both bases on which the circuit court dismissed the plaintiff's complaint, and because the defendants suggest no other basis for upholding the

dismissal, we must reverse the dismissal and remand the cause for further proceedings.

Reversed and remanded.