2012 App (4th) 110553-U

Filed 1/23/12

NO. 4-11-0553

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

STANTON W. GROTENHUIS, Assignee of Casey State Bank,	)	Appeal from
	)	Circuit Court of
Plaintiff-Appellant,	)	Clark County
v.	)	No. 10L13
MARK R. SAVOREE,	)	
Defendant-Appellee.	)	Honorable
	)	Tracy W. Resch,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justice Knecht concurred in the judgment.
Presiding Justice Turner specially concurred in the judgment.

ORDER

¶ 1 *Held*: Where plaintiff had filed a prior lawsuit against defendant based on the same cause of action and operative facts as alleged in this lawsuit, plaintiff's claim was barred by the doctrine of *res judicata* and the trial court correctly granted defendant's motion to dismiss.

¶ 2 Plaintiff, Stanton W. Grotenhuis (Stan), appeals the trial court's order dismissing his complaint filed against defendant, Mark R. Savoree. Stan filed a lawsuit seeking recovery of $1 million based on Savoree's personal guaranty of a promissory note executed by Ronin Automotive, Inc. Savoree filed a motion to dismiss Stan's complaint, asserting that the lawsuit was barred by the doctrine of *res judicata*. Initially, the court disagreed and denied defendant's motion. However, upon reconsideration, the court granted Savoree's motion and dismissed the lawsuit, finding the issues raised in the current suit were "at the core of the cause of action" in the previous suit. We

affirm.

¶ 3 I. BACKGROUND

¶ 4 At one time, prior to these lawsuits, Savoree was the sole shareholder of four different corporations which operated four different automobile dealerships, each financed by Casey Sate Bank (Bank). Stan was the past president of the Bank and was a close friend of Savoree. In February 2007, Savoree entered into a contract to sell all four dealerships, including the stock, cash, and assets of the four corporations to Ronin Automotive, Inc., for $5 million. The sole shareholders of Ronin were Kevin and Marjorie Beyrer. Savoree and Kevin met with Brad Wolfe at the Bank regarding this sale. Wolfe prepared a loan proposal, which included Savoree pledging collateral and executing a personal guaranty on Ronin's loans.

¶ 5 The closing of the sale occurred on March 1, 2007. The financing included three separate loans to Ronin from the Bank: (1) Loan No. 102744 for $1.5 million, secured by assignments of certificates of deposit (CDs) from three of the corporations; (2) Loan No. 102745 for $1 million, secured by assignment of a CD and personal guaranty of Savoree (this is the loan at issue in the instant lawsuit); and (3) Loan No. 102746 for $2.5 million, secured by guaranty of Savoree in the amount of $1.5 million and guaranties, security agreements, and "UCC's" by three dealerships. The closing also included the Beyrers' execution of a stock-purchase agreement and a loan agreement. Savoree's guaranty at issue here specifically provided that it applied to the $1 million loan "and any extensions, renewals[,] or replacements thereof." Neither Savoree's guaranty nor the assignment of his CD mentioned a stock-purchase agreement or a loan agreement.

¶ 6 In January 2008, the Bank issued four more notes to Ronin and/or the Beyrers personally. According to Wolfe's testimony at trial, the additional loans were made for the purpose

of satisfying Ford Motor Company's approval of the Beyrers as dealers. No additional money was issued, as the loans were merely restructured to demonstrate different equity arrangements. Wolfe testified that the new notes were replacements of the old notes. Savoree was not present during any of the restructuring meetings. One of the new loans (No. 103580), in the amount of $971,500.52, was issued to the Beyrers personally. The note on this loan stated that it relied upon Savoree's $1 million CD, No. 21799, as security. The note did not specifically state that this was a renewal or replacement of any previously issued note.

¶ 7 In March 2008, Ronin and the Beyrers defaulted on the loans. The Bank filed a lawsuit against Savoree, Ronin, the dealerships, and the Beyrers seeking judgment on six different notes in Clark County case No. 08-L-04. The defendants all confessed judgment as to their respective notes and the court entered judgment on each. The judgment that is relevant to the issues presented in this lawsuit was entered in the amount of $981,981.69 against the Beyrers on loan No. 103580. Immediately after the judgment was entered, the Bank took the proceeds of Savoree's CD No. 21799.

¶ 8 In April 2008, Savoree filed a motion to vacate the judgment against him. Also at that time, Stan was substituted as the party plaintiff as the Bank's assignee. The trial court granted Savoree's motion to vacate. He filed an answer to the count alleged against him (count IV regarding an old 2006 loan (No. 102433)), two affirmative defenses, and a counterclaim seeking the return of the CD. In August 2008, Stan filed a first-amended complaint adding two counts against Savoree. One sought judgment on Savoree's March 2007 guaranty of Ronin's $2.5 million loan (loan No. 102746) and the other was based on Savoree's November 2005 guaranty of a $150,000 loan to one of the dealerships.

¶ 9 In August 2009, the trial court conducted a bench trial. As part of his evidence, Savoree testified that Wolfe's original proposal in March 2007 required him to sign a $1 million guaranty. Mark testified that he and Wolfe discussed the matter and Wolfe had agreed to amend Savoree's personal guaranty since Savoree was going to have no control over the Beyrers' operation of the dealerships. Though Wolfe had agreed to restrict Savoree's guaranties, new documents were never prepared and Savoree nevertheless signed the original versions. Wolfe denied that he and Savoree had agreed that his guaranties were temporary Further, though Wolfe wanted Savoree to sign new guaranties on the restructured loans, Savoree refused because the disputed issues on amending the original guaranties remained. After considering the testimony and arguments of counsel, the court entered judgment against Savoree as follows: (1) a $777,907.16 judgment on the old 2006 loan (No. 102433); (2) a $1.8 million judgment on the $1.5 million Ronin guaranty; and (3) a $106,055.65 judgment on the 2005 guaranty of the $150,000 loan to one of the dealerships.

¶ 10 On appeal, Savoree argued that his guaranties were unenforceable because their validity was conditioned on terms upon which he and the Bank had agreed in February 2007, but the Bank never satisfied. This court held that Savoree could not look beyond the four corners of the guaranties in order to demonstrate that the terms should have been something other than what appeared in the contract. The "plain language unambiguously states they did not have any conditions and thus do not raise a question of the parties' intent." *Grotenhuis v. Savoree*, No. 4-10-0092, slip order at 21 (October 14, 2010) (unpublished order under Supreme Court Rule 23).

¶ 11 Second, Savoree argued that the $1.5 million Ronin guaranty was only for the $2.5 million loan to Ronin dated March 1, 2007, not for the $1,895,000 loan in January 2008. Stan had claimed the January 2008 loan was an extension, renewal, or replacement of the original loan. This

court affirmed the trial court on this issue and held that the manifest weight of the evidence indicated that the January 2008 $1,895,000 loan to Ronin was a replacement for the March 2007 $2.5 million loan and thus, Savoree's guaranty was still valid. *Grotenhuis*, No. 4-10-0092, slip order at 25.

¶ 12 Third, Savoree proposed a similar argument with regard to his $1 million guaranty that was secured by his $1 million CD, claiming that his guaranty cannot be extended to the January 2008 loans. We held that the manifest weight of the evidence demonstrated that the CD should have been applied only to Ronin's debt, not the Beyrers' personal debt, as Ronin was the only borrower listed on the $1 million Savoree guaranty. *Grotenhuis*, No. 4-10-0092, slip order at 26. We remanded the cause for the trial court to determine the value of the CD as of September 1, 2009, with the interest accrued and ordered that Stan apply that amount against the outstanding judgments entered against Savoree. *Grotenhuis*, No. 4-10-0092, slip order at 26. In effect, this court ordered Stan to apply the $1 million dollar CD that had been posted as security for Savoree's $1 million personal guaranty of Ronin's loan to any outstanding judgments entered against Ronin, not the Beyrers.

¶ 13 In December 2010, Stan filed a complaint against Savoree, the only defendant, in this case, Clark County case No. 10-L-13. Stan alleged that Savoree executed a $1 million guaranty to the Bank for the benefit of Ronin, wherein Savoree guaranteed payment to the Bank on Ronin's note and "any extensions, renewals[,] or replacements thereof." The guaranty was secured by Savoree's $1 million CD. Stan further alleged that in January 2008, Ronin executed a note in the amount of $1.8 million, which the Bank considered to be an extension, renewal, or replacement of the March 2007 note. In March 2008, the Bank obtained a judgment against Ronin on the $1.8 million note and applied the $1 million CD to the amounts owed the Bank. In light of this court's decision, the Bank

wrongfully applied the CD to the amounts owed by the Beyrers, not Ronin. Thus, Stan sought a judgment in the amount of $1 million against Savoree as the amount he had personally guarantied on Ronin's debt, plus attorney fees and costs.

¶ 14 In January 2011, Savoree filed a motion to dismiss pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2010)), claiming the doctrine of *res judicata* barred Stan's action, since it was either decided or could have been decided in the prior litigation. Savoree claimed that Stan's petition for rehearing filed with this court constituted an admission that his collection actions related to his guaranty or the CD were already litigated and that his only recourse was a petition for leave to appeal to our supreme court.

¶ 15 In response, Stan claimed no request had been made in the prior case for a judgment against Savoree based on his $1 million guaranty "as it had been satisfied through the application of the certificate of deposit that stood as security." Stan asserted in his response to Savoree's motion to dismiss: "Only after the appellate court directed Stan to apply this security to judgments entered against [Savoree] based on other indebtedness, including his $[1.5 million] unsecured guaranty, did the $[1 million] guaranty become unsatisfied. Once this occurred, which was well after the trial of [No.] 08-L-4, it became necessary for Stan to bring this suit against [Savoree] to collect on his $1 [million] guaranty."

¶ 16 In February 2011, the trial court conducted a hearing on Savoree's motion to dismiss. After considering the parties' respective positions, the court took the matter under advisement, and on March 1, 2011, issued a written decision denying Savoree's motion to dismiss. The court found the $1 million guaranty was "not the basis for any claim" in the prior lawsuit, stating: "None of the findings made by the appellate court bring the validity of the guaranty into question or cast doubt

upon its enforceability."

¶ 17 Savoree filed a motion to reconsider. At a hearing, the parties again argued their respective positions and the trial court took the matter under advisement. On June 3, 2011, the court issued a written order, changing its prior decision on Savoree's motion to dismiss. Citing *LP XXVI, LLC v. Goldstein*, 349 Ill. App. 3d 237 (2004), the court found that, because Stan "elected to bring an original cause of action against all of the parties, including Mark Savoree," he should have included a cause of action on the guaranty at issue in order to avoid the effects of *res judicata*.

¶ 18 The trial court held: "Once having elected to sue Mark Savoree, the plaintiff could not hold back for later litigation one action which was at the core of the cause of action sued upon in cause No. 08-L-4." The court further determined that the clause in the guaranty, which provided that Savoree would not assert any defense, including *res judicata*, available to the borrower, did not bar him from asserting *res judicata* as his defense as a guarantor. The court granted Savoree's motion to dismiss. This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 A section 2-619 motion to dismiss admits the legal sufficiency of a plaintiff's allegations but asserts the existence of an affirmative matter, such as *res judicata*, sufficient to defeat the claim presented. *Winters v. Wangler*, 386 Ill. App. 3d 788, 792 (2008). This court's standard of review from a dismissal pursuant to section 2-619 based upon the doctrine of *res judicata* is *de novo*. *Morris B. Chapman & Associates v. Kitzman*, 193 Ill. 2d 560, 565 (2000).

¶ 21 *Res judicata* precludes the relitigation of claims previously decided. *National Recovery Limited Partnership v. Pielet*, 306 Ill. App. 3d 686, 688 (1999). The elements that must be satisfied to invoke *res judicata* are (1) there was a final judgment on the merits rendered by a

court of competent jurisdiction; (2) an identity of a cause of action exists; and (3) the parties or their privies are identical in both actions. *Hudson v. City of Chicago*, 228 Ill. 2d 462, 467 (2008). It is only where all three elements are satisfied that the prior action can be deemed to be conclusive as to all of the issues that were, or properly could have been, raised in that action. *People ex rel. Burris v. Progressive Land Developers, Inc.*, 151 Ill. 2d 285, 294 (1992) (the doctrine of *res judicata* extends not only to those claims actually decided but also to those issues that could have been decided in the first action).

¶ 22 The first and third elements have been met here. There was a final adjudication on the merits in the first lawsuit and the parties are identical in both. Only the second element is at issue. In order to determine whether the second element is met, *i.e.*, whether there is an identity of the cause of action, Illinois courts apply the transactional test, not the same-evidence test. *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 310 (1998). With regard to the adoption of the appropriate test, our supreme court noted:

> "[T]he same evidence test is not determinative of identity of cause of action. Instead, pursuant to the transactional analysis, separate 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. [Citation.] Of course, under the transactional analysis, the nature of the evidence needed to prove the claims at issue remains relevant for purposes of demonstrating that the claims arise from the same group of operative facts. Unlike the same evidence test, however, 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. See *Restatement (Second) of Judgments* § 24, Comment b, at 199." *River Park*, 184 Ill. 2d at 311.

"A cause of action is defined by the facts which give a plaintiff a right to relief." *Rein v. Noyes*, 172 Ill. 2d 325, 338 (1996).

> " 'While one group of facts may give rise to a number of different theories of recovery, there remains only a single cause of action. "If the same facts are essential to the maintenance of both proceedings or the same evidence is needed to sustain both, then there is identity between the allegedly different causes of action asserted and *res judicata* bars the latter action." ' " *Rein*, 172 Ill. 2d at 338, quoting *Progressive Land*, 151 Ill. 2d at 295, quoting *Morris v. Union Oil Co.*, 96 Ill. App. 3d 148, 157 (1981).

Thus, a court's determination of whether the second element of the *res judicata* test has been met is strictly a fact-driven analysis.

¶ 23 The Second District applied the above principles in *LP XXVI*. See *LP XXVI*, 349 Ill. App. 3d at 239-42. In that case, the defendant Goldstein and other nonparties had executed a promissory note to the plaintiff in the amount of $1,050,000. The note was secured by a mortgage on certain real property. *LP XXVI*, 349 Ill. App. 3d at 238. In addition, Goldstein had executed a personal guaranty. The primary obligors defaulted and the plaintiff filed suit in a Cook County action to foreclose on the real property. *LP XXVI*, 349 Ill. App. 3d at 239. The property was

eventually sold at a sheriff's sale, leaving a deficiency of just over $74,000. A few years later, the plaintiff sued Goldstein in a Lake County lawsuit to recover the deficiency amount. *LP XXVI*, 349 Ill. App. 3d at 239.

¶ 24 Goldstein filed a motion to dismiss the lawsuit, claiming the action was barred by *res judicata* since the issue was or could have been decided in the Cook County foreclosure action. The trial court agreed with Goldstein and dismissed the complaint. *LP XXVI*, 349 Ill. App. 3d at 239. The plaintiff appealed, contending *res judicata* did not apply since the foreclosure action was an *in rem* proceeding and the deficiency-judgment action was an *in personam* proceeding. *LP XXVI*, 349 Ill. App. 3d at 240. The appellate court agreed with the plaintiff and reversed the trial court, finding that the two proceedings were sufficiently distinct and supported separate causes of action without implicating *res judicata* principles. *LP XXVI*, 349 Ill. App. 3d at 242.

¶ 25 The appellate court noted that "[a]t first blush, a transactional analysis may appear to lead to the conclusion that the action on the guaranty is the same cause of action as the mortgage foreclosure, because the note, mortgage, and guaranty were all executed concurrently and, apparently, as components of a related deal." *LP XXVI*, 349 Ill. App. 3d at 240-41. However, the fact that each was executed within minutes of each other did not override the fact that each instrument contemplated a distinct purpose and represented a distinct transaction. *LP XXVI*, 349 Ill. App. 3d at 241. The court stated: "[N]othing in this action touches upon the subject matter of the Cook County action, namely, the property that was the subject of the mortgage foreclosure." *LP XXVI*, 349 Ill. App. 3d at 241. The court held: "[T]his action is separate and distinct from the Cook County action, and the principle of *res judicata* is inapplicable to the facts of this case." *LP XXVI*, 349 Ill. App. 3d at 241.

¶ 26 Unlike *LP XXVI*, in this case, we do not have before us a mortgage foreclosure action as one of the actions brought. It is true that a foreclosure suit, an *in rem* proceeding, contemplates a legally distinct remedy from an *in personam* proceeding on a guaranty. Instead, we have before us for consideration, two *in personam* lawsuits filed, both seeking to adjudicate Savoree's liability under the guaranties he had personally provided to assure the Bank that, should there be any shortfall in the security provided, he would make the Bank whole. Thus, the distinction between *LP XXVI* and this case centers on the fact that Savoree is not relying on a separate and wholly distinct action, like a foreclosure action, as a bar to the current lawsuit filed against him. A foreclosure action does not adjudicate a guarantor's rights and liabilities. *Citicorp Savings of Illinois v. Ascher*, 196 Ill. App. 3d 570, 574 (1990). Those two actions, property foreclosure and a suit on a personal guaranty, may be "pursued consecutively or concurrently." *Farmer City State Bank v. Champaign National Bank*, 138 Ill. App. 3d 847, 852 (1985). Rather, Savoree claims that the prior lawsuit and the current lawsuit both contemplate the entry of judgments upon the defaulted notes and both address Savoree's liability for those deficiencies based on the guaranties he executed as part of the related series of loans.

¶ 27 In the prior lawsuit, the Bank sought to recover damages it suffered as a result of the loan defaults. Recovery sought in this case is based on the same defaulted loans. Both lawsuits involved a single core of operative facts. Both lawsuits involved the same transactions. Evidence was presented in the first trial of Savoree's $1 million guaranty of Ronin's loan and the $1 million CD posted as security for that guaranty. Thus, the pivotal question for *res judicata* purposes is whether the issues raised in this lawsuit could have been determined in the prior lawsuit. The answer is yes.

¶ 28 We agree with Stan that the issue raised in this case, *i.e.*, Savoree's liability on his $1 million guaranty, was not specifically raised in the prior lawsuit. However, "[t]he principle that *res judicata* prohibits a party from later seeking relief on the issues which might have been raised in the prior action also prevents a litigant from splitting a single cause of action into more than one proceeding." *Rein v. Noyes*, 172 Ill. 2d 325, 339 (1996). That is, the doctrine it is not only about what issues were actually adjudicated, but about what issues *could have been* adjudicated based on the same set of operative facts. The claims at issue here arose at the same time as the claims at issue in the prior litigation.

¶ 29 Savoree's $1 million guaranty, as well as the CD used as security for the guaranty, were underlying facts at issue in the first lawsuit. The guaranty was not a new discovery, nor was it the discovery of a new obligation. The Bank and Stan were aware of the extent of Savoree's exposed liability toward Ronin's debt. Stan, as assignee of the Bank, sued Savoree personally in the first lawsuit when he sought recovery on the amounts owed from the various parties in the related series of loans. Stan could have pursued *all* available sources for payment, including Savoree's $1 million guaranty, toward the amount of outstanding debt it was owed by the various parties and upon the making of the various loans. In fact, the first lawsuit proceeded to trial with Savoree as the only defendant, as the others had previously confessed judgment. The only issue before the trial court was Savoree's liability to the Bank. Savoree had filed a counterclaim seeking the return of his CD which had been applied to the Beyrers' note. As such, the issue of the propriety or validity of Savoree's $1 million guaranty, which was secured by this CD, could have been fully adjudicated at that trial.

¶ 30 Stan now claims the Bank did not sue specifically on this piece of commercial paper (that being the $1 million personal guaranty signed by Savoree). However, based on the above

principles, the opportunity to do so has been lost under the doctrine *res judicata*. Therefore, we hold that the judgment entered in Stan's prior lawsuit was an absolute bar to subsequent actions involving the same claims or demands. Because the issue raised in the case *sub judice* arises out of the same operative facts as the issues raised in the prior lawsuit, Stan could have litigated and resolved this claim there. Having failed to do so, he is barred by *res judicata* from attempting to raise and litigate it now.

¶ 31 We further find that the language of the guaranty itself regarding Savoree's agreement to waive a defense of *res judicata* does not alter our decision. We agree with the trial court that the pertinent language of the guaranty addresses waiver of the defenses of the borrower, not the guarantor. As a result, Savoree did not waive his right to raise *res judicata* as a defense in an action brought against him as a guarantor.

¶ 32 III. CONCLUSION

¶ 33 For the foregoing reasons, we affirm the trial court's judgment dismissing Stan's complaint against Savoree as barred by the doctrine of *res judicata*.

¶ 34 Affirmed.

¶ 35 PRESIDING JUSTICE TURNER, specially concurring:

¶ 36 While I agree with the majority *res judicata* bars Grotenhuis's current litigation, I write separately to emphasize Savoree's liability on the $1 million guaranty was specifically addressed by this court in case No. 4-10-0092, which was the appeal from case No. 08-L-4. Although Grotenhuis did not seek to enforce the $1 million guaranty in that case, Savoree filed a counterclaim against the Bank, to which Grotenhuis was an assignee, that sought the return of the CD that was security for the $1 million guaranty. *Grotenhuis*, slip order at 7. The trial court denied their counterclaim, and this court affirmed the denial (*Grotenhuis,* slip order at 26). On appeal, Savoree argued the $1 million guaranty was only for the $1 million loan to Ronin dated March 1, 2007, and Stan asserted the Beyrers' January 2008 $971,500.52 loan was an extension, renewal, or replacement of the March 1, 2007, $1 million loan to Ronin. *Grotenhuis*, slip order at 26. This court found that, even if the Beyrers' $971,500.52 loan was a replacement loan, the $1 million guaranty did not apply to it because the language of the $1 million guaranty limited it to the listed borrower, which was Ronin, not the Beyrers. *Grotenhuis,* slip order at 26. While this court found the CD should not have been taken and applied to the Beyrers' $971,500.52 note, we concluded Savoree was not entitled to the CD's return because he had outstanding judgments against him in favor of the Bank. *Grotenhuis,* slip order at 26. Stan filed a petition for rehearing, asserting this court's decision had effectively reduced Savoree's $2.5 million in guaranties to $1.5 million. He also argued this court should direct the trial court to apply the CD to the judgment on the $1,895,000 Ronin note based on the $1 million guaranty and then allow him to collect the remaining $895,000 based on the $1.5 million guaranty. Thus, as Savoree alleges, Stan's petition for rehearing acknowledged this court's order addressed the validity of the $1 million guaranty.