2016 IL App (4th) 150578-U

NO. 4-15-0578

FILED
July 29, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

ROSS E. McNEIL and LESLIE K. McNEIL, Plaintiffs-Appellees, v. MILORAD P. KETCHENS, Defendant-Appellant.	))))))))	Appeal from Circuit Court of Champaign County No. 10L17 Honorable Jeffrey B. Ford, Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Knecht and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court reversed the trial court's judgment and remanded with directions after finding plaintiffs' trespass claim was barred by the doctrine of *res judicata*.

¶ 2 Plaintiffs, Ross E. McNeil and Leslie K. McNeil, and defendant, Milorad P. Ketchens, had a long-running dispute over who owned a narrow wedge-shaped piece of a driveway in Urbana, Illinois. In January 2010, the McNeils filed a complaint, setting forth a single trespass count and seeking compensatory and punitive damages. In April 2015, the trial court found Ketchens trespassed on the McNeils' property and awarded $2,400 in compensatory damages and $240,000 in punitive damages to the McNeils.

¶ 3 On appeal, Ketchens argues (1) the McNeils engaged in improper claim-splitting and their trespass claim is barred by the doctrine of *res judicata* and (2) the trial court erred in ordering him to pay $240,000 in punitive damages. We reverse and remand with directions.

¶ 4 I. BACKGROUND

¶ 5 As the parties are familiar with the facts of this litigation, and as they have made several trips to this court, we set forth only those facts necessary for the resolution of the issues on appeal. This litigation centers around the ownership of certain property, a narrow, wedge-shaped piece of a driveway, referred to as Tract A, at 609 West Stoughton Street in Urbana.

¶ 6 The McNeils were married in 1987. Their son, Spencer, was born in 1988, and their daughter, Sheena, was born in 1991. They purchased and moved into the residential property at 609 West Stoughton Street in 1988 and have continued to reside there during the history of this litigation. Milorad Ketchens, a physician, owns the residential property at 613 West Stoughton Street.

¶ 7 A. Case No. 98-CH-235

¶ 8 In December 1998, the McNeils filed a two-count civil complaint against Ketchens in case No. 98-CH-235. Count I sought a declaratory judgment that Ketchens was not the owner of Tract A. Count II sought a judgment quieting title to the McNeils on the theory that they had acquired Tract A by their purchase of 609 West Stoughton Street. The McNeils amended the complaint to add count III, which sought a declaratory judgment that they had acquired Tract A by adverse possession for 20 years.

¶ 9 In a bench trial, the trial court found the McNeils had not acquired the title to Tract A by their purchase of 609 West Stoughton Street and they had not carried their burden of proving adverse possession for 20 years. Also, because the court found the McNeils lacked an ownership interest in Tract A, it concluded they lacked standing to seek a declaratory judgment that Ketchens was not the owner of Tract A.

¶ 10 On appeal, this court affirmed in part and reversed in part. *McNeil v. Ketchens*

(*McNeil I*), 397 Ill. App. 3d 375, 403, 931 N.E.2d 224, 246 (2010). We affirmed the judgment with respect to count II, reasoning that because the legal description in the deed to the McNeils did not include Tract A, they could not have acquired Tract A by virtue of that deed. *McNeil I*, 397 Ill. App. 3d at 377, 931 N.E.2d at 227. We reversed as to counts I and III, concluding the McNeils are the legal owners of Tract A, in fee simple absolute, by adverse possession. See *McNeil v. Ketchens* (*McNeil II*), 2011 IL App (4th) 110253, ¶ 10, 964 N.E.2d 66.

¶ 11 On May 26, 2010, the supreme court denied leave to appeal (*McNeil v. Ketchens*, 236 Ill. 2d 556, 932 N.E.2d 1031 (2010)), and on July 8, 2010, this court issued our mandate. In February 2011, the trial court entered a judgment order, declaring Ketchens was not the owner of Tract A, the McNeils had not acquired Tract A by deed, and the McNeils had acquired Tract A by adverse possession. The court also entered judgment against the McNeils and in favor of unknown owners and nonrecord claimants on count II and entered a default judgment in the McNeils' favor and against unknown owners and nonrecord claimants on counts I and III of the amended complaint. This court affirmed the trial court's judgment. *McNeil II*, 2011 IL App (4th) 110253, ¶ 31, 964 N.E.2d 66.

¶ 12 B. Case No. 10-L-17

¶ 13 In January 2010, the McNeils filed a complaint in case No. 10-L-17, setting forth a single trespass count. They alleged Ketchens parked an automobile on Tract A on January 4, 1998, and when asked by Leslie to remove it, he refused to do so. From that time until the filing of the complaint, Ketchens kept the automobile on Tract A. Because Ketchens had not been given permission and had no authority to park or keep the automobile on Tract A, the McNeils alleged they suffered damages, including the loss of use of part of Tract A, mental anguish, and emotional distress. The McNeils sought compensatory damages in the amount of $54,780 as

well as punitive damages

¶ 14 In June 2010, Ketchens filed a motion to dismiss pursuant to section 2-619 of the Code of Civil Procedure (Procedure Code) (735 ILCS 5/2-619 (West 2010)). He argued the McNeils' complaint was barred under the doctrine of *laches* and by the five-year statute of limitations for a trespass claim.

¶ 15 In July 2010, the McNeils responded, noting the compensatory damages sought in the complaint were calculated for the five-year period from January 22, 2005, through the filing of the complaint on January 22, 2010. They argued that because Ketchens did not remove his car until June 1, 2010, the case involved a continuing trespass, and Illinois law permits recovery of damages for the five-year period preceding the filing of the complaint. In August 2010, the trial court denied Ketchens' motion to dismiss.

¶ 16 In December 2014, Ketchens filed a motion for summary judgment pursuant to section 2-1005 of the Procedure Code (735 ILCS 5/2-1005 (West 2014)). Ketchens argued the McNeils' trespass claim should have been included in case No. 98-CH-235 and was thus barred by the doctrine of *res judicata* and the rule against claim-splitting. In January 2015, the McNeils filed their response, stating they were required to determine the validity of their title to the land before they could seek damages for the trespass.

¶ 17 In February 2015, the trial court denied the motion for summary judgment. Thereafter, the court conducted a bench trial. Ross McNeil testified he had lived at 609 West Stoughton Street since 1988. He stated the residence had a garage in the back and a driveway leading up to it. On January 4, 1998, Ketchens placed his car in the driveway. Ketchens stated he would not remove the car and ended the conversation by telling Ross to "sue me." Ross called the police, but the police stated Ketchens had paperwork indicating he owned the

driveway. Ross stated he and Leslie contacted attorneys and city officials to try and clear up the dispute.

¶ 18 Ross testified to additional confrontations with Ketchens. Once, Ketchens came over, took the cover off the car, revved the engine, and flashed the lights to, as Ross contended, "try to get us to come out and confront him." Construction spending on the house had to be curtailed because of attorney fees incurred in litigating the dispute. Also, Ketchens' car interfered with the McNeils' ability to work on their house. They had to expend extra effort to take debris around to the backyard to place it in a Dumpster, which could not be placed out front because of the car.

¶ 19 Ross stated he and his wife stopped inviting people to the house because of Ketchens' car and it impacted their relationships with their children. Ross stated the dispute also affected his relationship with Leslie, as he spent two or three years sleeping on the couch. Ross stated they filed suit in 1998 and hoped "we would get this thing solved in short order." He stated the date of this court's opinion in *McNeil I* was January 6, 2010. Ketchens moved the car on June 1, 2010.

¶ 20 Spencer McNeil testified Ketchens' car was a "constant presence" in his life and it was "always a place to be avoided." He avoided having people come over to the house because "it was too uncomfortable having to explain why there was someone else's car in your drive." Spencer stated his mother gradually gave up gardening, especially in the front of the house. He once made a drawing for Mother's Day involving Leslie's car back in the driveway and titled "Fantasy Tomorrow Morning." Spencer testified he crossed out the word "Fantasy" in 2003 because he thought the case was over and his mother's car would be back in the driveway the next day.

¶ 21 Sheena McNeil testified that when she was a child and a teenager, she was not allowed to play in the front yard because of Ketchens' car. She stated it was frustrating to have to explain the situation to people and it "made our whole living situation kind of stressful."

¶ 22 Leslie McNeil testified she returned home on January 4, 1998, to find Ketchens covering his car parked in the McNeils' driveway. Leslie exited the car and argued with Ketchens, who refused to move his car. Leslie stated the Ketchens would videotape her if she was out front. She stated the Ketchens would walk by and "taunt" her and tell her not to damage the car. She quit going out into the garden and stopped inviting people to the house. In one instance, Ketchens came over to move the car. Once he did so, Leslie took a lawn chair and sat in the vacated spot. Ketchens returned and "pulled up right against [her]." Ketchens' wife then drove a different car across the neighbor's yard and into the driveway behind Leslie.

¶ 23 Milorad Ketchens testified he lived at 613 West Stoughton Street. In 1994 or 1995, Ketchens learned from a surveyor that a 13-foot "sliver of land" had been taken off his deed at some point and put on the deed for 611 West Stoughton Street. As a result, Ketchens' property was being taxed for 63 frontage feet when it should have been 13 feet less. The survey also indicated a near identical piece of land to the east of 611 West Stoughton Street was deeded to nobody. Ketchens contacted an attorney, and eventually he received a quitclaim deed.

¶ 24 In January 1998, Ketchens parked his car on Tract A. He refused to move the car after Leslie asked him to do so. Periodically, Ketchens checked on the vehicle to make sure it would start and was not damaged. He stated his wife videotaped him when he went to start the car to have proof if anything happened. He believed he had rights in Tract A when he first parked his car on it.

¶ 25 The trial court took judicial notice of this court's decisions in case No. 98-CH-

235. Christine Gunther, an accountant with Smith Apartments, testified regarding rental costs for parking spaces. She stated the average rental value of a parking spot in the area of West Stoughton Street was approximately $40 per month until 2013.

¶ 26 In April 2015, the trial court issued its judgment order. The court found the McNeils showed "remarkable restraint" in regard to Ketchens' trespass and the nearly 17-year "legal nightmare." In contrast, the court found Ketchens hid his intentions from the McNeils for over a year, "scheming to obtain Tract A." The court found the McNeils more credible than Ketchens. The court held the McNeils proved Ketchens' acts were intentional and the evidence showed he trespassed on the McNeils' property by placing his vehicle on Tract A.

¶ 27 The trial court noted the McNeils did not put on any evidence of compensatory damages. However, Ketchens' witness, Christine Gunther, provided evidence of the going rate for parking on private property. The court awarded compensatory damages of $2,400.

¶ 28 As to punitive damages, the trial court found Ketchens' actions were intentional, willful and wanton, and included a conscious disregard for the McNeils in his attempt to obtain ownership of Tract A. The court also found the evidence presented "shocked the conscience" and it was "hard to believe that [Ketchens] could not realize that the totality of his actions could affect Plaintiffs' family as it did." The court stated, in part, as follows:

> "[Ketchens'] actions basically controlled Plaintiffs' lives each and every day with regard to such things as to where they could go on their property, what recreational activities they could be involved in, how they spent their time (researching titles and law), who they had contact with and who they would now invite into their home. Plaintiffs, in wanting to do the right thing and not

get in trouble with the law, became prisoners in their own home."

The court found Ketchens' "intentional and reprehensible conduct in regards to his control over Plaintiffs needs to be punished to deter others from acting in a similar way." The court awarded the McNeils $240,000 in punitive damages.

¶ 29 In May 2015, Ketchens filed a motion to modify or vacate the judgment, arguing the $240,000 in punitive damages was "grossly excessive." In June 2015, the trial court denied the motion. This appeal followed.

¶ 30 II. ANALYSIS

¶ 31 Ketchens argues the trial court's judgment should be reversed in whole or in part because the McNeils, by failing to include their trespass claim in case No. 98-CH-235, engaged in improper claim-splitting and are barred by the doctrine of *res judicata*. We agree.

¶ 32 " 'The doctrine of *res judicata* provides that 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.' " *Hudson v. City of Chicago*, 228 Ill. 2d 462, 467, 889 N.E.2d 210, 213 (2008) (quoting *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 334, 665 N.E.2d 1199, 1204 (1996)). "Three requirements must be satisfied for *res judicata* to apply: (1) a final judgment on the merits has been rendered by a court of competent jurisdiction; (2) an identity of cause of action exists; and (3) the parties or their privies are identical in both actions." *Hudson*, 228 Ill. 2d at 467, 889 N.E.2d at 213. "*Res judicata* bars not only what was actually decided in the first action but also whatever could have been decided." *Hudson*, 228 Ill. 2d at 467, 889 N.E.2d at 213. Whether a claim is barred under the doctrine of *res judicata* is a question of law, which we review *de novo*. *Arvia v. Madigan*, 209 Ill. 2d 520, 526, 809 N.E.2d 88, 93 (2004).

¶ 33 Our supreme court has also examined the policy against claim-splitting, stating "[t]he principle that *res judicata* prohibits a party from later seeking relief on the basis of 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*, 172 Ill. 2d at 339, 665 N.E.2d at 1206. "The rule against claim-splitting, which is an aspect of the law of preclusion, prohibits a plaintiff from suing for part of a claim in one action and then suing for the remainder in another action." *Rein*, 172 Ill. 2d at 340, 665 N.E.2d at 1206. The rule is based "on the premise that litigation should have an end and that no person should be unnecessarily harassed with a multiplicity of lawsuits." *Rein*, 172 Ill. 2d at 340, 665 N.E.2d at 1207.

¶ 34 The supreme court noted the rule against claim-splitting may be "relaxed where there has been an omission due to ignorance, mistake or fraud, or where it would be inequitable to apply the rule." *Rein*, 172 Ill. 2d at 341, 665 N.E.2d at 1207. Under the Restatement (Second) of Judgments § 26(1) (1982), *res judicata* principles do not bar a second action if:

> " '(1) the parties have agreed in terms or in effect that plaintiff may split his claim or the defendant has acquiesced therein; (2) the court in the first action expressly reserved the plaintiff's right to maintain the second action; (3) the plaintiff was unable to obtain relief on his claim because of a restriction on the subject-matter jurisdiction of the court in the first action; (4) the judgment in the first action was plainly inconsistent with the equitable implementation of a statutory scheme; (5) the case involves a continuing or recurrent wrong; or (6) it is clearly and convincingly shown that the policies favoring preclusion of a second action are

overcome for an extraordinary reason.' " *Hudson*, 228 Ill. 2d at 472-73, 889 N.E.2d at 216 (quoting *Rein*, 172 Ill. 2d at 341, 665 N.E.2d at 1207).

¶ 35 Initially, we note the McNeils argue Ketchens has waived any reliance on the doctrine of *res judicata* by failing to raise it in the trial court. "*Res judicata* is an affirmative defense, which a defendant forfeits if not raised." *Schloss v. Jumper*, 2014 IL App (4th) 121086, ¶ 18, 11 N.E.3d 57. Here, however, Ketchens raised the issues relating to *res judicata* and claim-splitting in his motion for summary judgment, and the trial court addressed them in its ruling. Thus, Ketchens has not forfeited this defense. See *Salazar v. State Farm Mutual Automobile Insurance Co.*, 191 Ill. App. 3d 871, 876, 548 N.E.2d 382, 385 (1989) (stating an affirmative defense may be raised in a motion for summary judgment and may be considered even if not raised in the defendant's answer).

¶ 36 As we now consider the doctrine of *res judicata*, the McNeils do not contest a final judgment on the merits was rendered in *McNeil I* or that the parties are identical in both actions. However, they do argue no common operative facts are involved.

¶ 37 Illinois courts look to whether the claims arise from the same transaction in determining whether claims are barred by *res judicata*. *Rodgers v. St. Mary's Hospital of Decatur*, 149 Ill. 2d 302, 312, 597 N.E.2d 616, 621 (1992). The transactional test provides "the assertion of different kinds or theories of relief still constitutes a single cause of action if a single group of operative facts give rise to the assertion of relief [Citations.]" (Internal quotation marks omitted.) *Rodgers*, 149 Ill. 2d at 312, 597 N.E.2d at 621. What constitutes a "transaction" is " 'to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and

whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.' " *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 312, 703 N.E.2d 883, 893 (1998) (quoting Restatement (Second) of Judgments § 24, at 196 (1982)).

¶ 38 In the case *sub judice*, the same operative facts at issue in case No. 98-CH-235 involving declaratory judgment, quiet title, and adverse possession claims were also at issue in the current trespass claim in case No. 10-L-17. The McNeils were well aware of the dispute over the ownership of Tract A and Ketchens' trespass thereon since January 1998. While it is true the McNeils' original and amended complaints in case No. 98-CH-235 did not mention Ketchens' car, it, along with the resulting trespass, had been there for nearly 12 months before the first complaint was filed. As stated, the doctrine of *res judicata* "extends not only to what was actually decided in the original action, but also to matters which could have been decided in that suit." *Rein*, 172 Ill. 2d at 334-35, 665 N.E.2d at 1204. Nothing in the law prevented the McNeils from joining a trespass count in their complaint in case No. 98-CH-235. See *Hermes v. Fischer*, 226 Ill. App. 3d 820, 822, 827, 589 N.E.2d 1005, 1007 (1992) (affirming the granting of summary judgment in favor of the plaintiffs on quiet title, ejectment, and trespass claims based on adverse possession). The trial court in case No. 98-CH-235 could have determined who had superior title, if a trespass occurred, and compensatory and punitive damages for the trespass. We find there is identity of cause of action in the two cases that bars the McNeils from recovery under the theory of *res judicata*.

¶ 39 The McNeils argue that, even if the two cases are based on the same operative facts, the exception for continuing torts (here, a continuing trespass), applies. Generally, *res judicata* does not apply where "the wrong suffered by the plaintiff is of a recurrent or ongoing nature." *Altair Corp. v. Grand Premier Trust & Investment, Inc.*, 318 Ill. App. 3d 57, 63, 742

N.E.2d 351, 356 (2000). Moreover, "[t]he doctrine of *res judicata* does not bar claims for continuing conduct complained of in the second lawsuit that occur after judgment has been entered in the first lawsuit." *D'Last Corp. v. Ugent*, 288 Ill. App. 3d 216, 222, 681 N.E.2d 12, 17 (1997). Here, however, the McNeils' claim in case No. 10-L-17 is based on a continual course of conduct which occurred before judgment in case No. 98-CH-235 was entered, and thus, those claims are barred by the doctrine of *res judicata*. Given our ruling, we reverse the trial court's judgment in favor of the McNeils and remand the cause for the court to enter judgment in favor of Ketchens.

¶ 40 III. CONCLUSION

¶ 41 For the reasons stated, we reverse the trial court's judgment and remand with directions.

¶ 42 Reversed and remanded with directions.