2019 IL App (1st) 180802-U

No. 1-18-0802

Order filed August 23, 2019

Fifth Division

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

ADRENALINE SPORTS MANAGEMENT, INC.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 17 L 377
	)	
GREENLAYER, LLC, and SEAN KIA,	)	Honorable
	)	Thomas R. Mulroy, Jr.,
Defendants-Appellees.	)	Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Rochford and Justice Hall concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not abuse its discretion in dismissing plaintiff's complaint where there was another action pending between the same parties for the same cause. The circuit court likewise did not abuse its discretion in declining to apply judicial estoppel to prevent defendants from arguing that the two actions involve the same cause.

¶ 2 Adrenaline Sports Management filed a complaint against Greenlayer and Sean Kia alleging breach of contract and fraud. The circuit court dismissed the complaint under section 2-619(a)(3) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(3) (West 2018)) on the ground

that there was another action between the same parties for the same cause pending in Oregon. On appeal, Adrenaline contends that the two actions do not involve the same parties or the same cause. Adrenaline further argues that, even if the two actions involve the same parties and the same cause, the circuit court nevertheless erred in dismissing the Illinois complaint because (1) it was filed first, (2) Illinois is the more appropriate forum for resolving the parties' dispute, and (3) Adrenaline was unable to obtain complete relief in the Oregon proceedings. Alternatively, Adrenaline argues that Greenlayer should be judicially estopped from arguing that the Illinois and Oregon actions involve the same cause because it took the opposite position in response to Adrenaline's motion to dismiss the Oregon action. For the reasons that follow, we affirm.[1]

¶ 3 I. BACKGROUND

¶ 4 In July 2016, Adrenaline, an event management company located in Illinois, contracted with Greenlayer, an Oregon-based sports apparel company, to purchase custom shirts for one of Adrenaline's upcoming events. After Greenlayer delivered the shirts, Adrenaline refused to pay the full amount due under the contract, contending that the shirts did not conform to a previously approved prototype.

¶ 5 In December 2016, Greenlayer sent a demand letter to Adrenaline's president, Aaron Del Mar, indicating that Greenlayer intended to file suit against Adrenaline and Del Mar for breach of contract and fraud if Adrenaline did not pay the outstanding balance. The letter added that, if Adrenaline made full payment, Greenlayer would waive its claims and agree to a "full, mutual release." On January 9, 2017, Greenlayer emailed Del Mar a draft complaint that it planned to

[1] In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order.

file in the Circuit Court of Multnomah County, Oregon, if Adrenaline did not make full payment immediately. Del Mar responded the following day, asking whether Greenlayer would "be willing to sign a release if [Adrenaline] ma[d]e a payment this week," and stating that Adrenaline "could have a check in the mail [and] in [Greenlayer's] hands by Friday." According to Del Mar, "Adrenaline [wanted] to settle this matter as soon as possible and avoid a drawn out court battle."

¶ 6 The next day, however, Adrenaline filed a three-count complaint in the Circuit Court of Cook County against Greenlayer and Kia, an Illinois resident who worked for Greenlayer as a regional account executive. Count 1 alleged that Greenlayer breached the parties' contract by failing to deliver shirts that conformed to the approved prototype. Count 2 alleged that Greenlayer fraudulently misrepresented that it would deliver shirts in conformance with the prototype. And count 3 alleged that Kia fraudulently misrepresented that Adrenaline would not be responsible for shipping charges.

¶ 7 One day later, Greenlayer filed its own three-count complaint in Oregon against Adrenaline and Del Mar. Count 1 alleged that Adrenaline and Del Mar breached the parties' settlement agreement by filing the Cook County action. Count 2 alleged that Adrenaline breached the underlying contract by failing to pay the full amount due. And count 3 alleged that Del Mar fraudulently induced Greenlayer to ship additional shirts by failing to bring complaints about prior deliveries to Greenlayer's attention. Greenlayer later added a conversion claim, alleging that Adrenaline failed to return sample shirts to Greenlayer.

¶ 8 In May 2017, Adrenaline and Del Mar moved to dismiss the Oregon complaint, contending that they were not subject to personal jurisdiction in Oregon and that Adrenaline's

earlier-filed Illinois complaint involved the same cause between the same parties. In response to the latter contention, Greenlayer argued that the Oregon complaint was broader than the Illinois complaint because it included claims—namely, that Adrenaline and Del Mar breached the parties' settlement agreement and converted Greenlayer's property—that were factually and legally distinct from the breach-of-contract and fraud claims raised in the Illinois complaint. The Oregon court denied the motion to dismiss in September 2017.

¶ 9 In October 2017, Greenlayer and Kia moved to dismiss the Illinois complaint under section 2-619(a)(3), contending that it involved the same cause and the same parties as the Oregon action. Greenlayer and Kia argued that the breach-of-contract and fraud claims in Adrenaline's Illinois complaint arose from the "same dispute" as the breach-of-contract and fraud claims in Greenlayer's Oregon complaint. Moreover, although Kia was not a party to the Oregon action, he submitted an affidavit attesting that he would accede to personal jurisdiction in Oregon if Adrenaline asserted its fraud claim against him there. Thus, according to Greenlayer and Kia, "all of the parties in the Illinois action [could] litigate [their] dispute in Oregon" and "obtain complete relief."

¶ 10 Adrenaline responded that Greenlayer should be judicially estopped from arguing that the Illinois and Oregon suits involve the same cause because it took the opposite position in response to Adrenaline's motion to dismiss the Oregon complaint. Estoppel aside, Adrenaline argued that section 2-619(a)(3) did not permit dismissal of the Illinois complaint in favor of the Oregon complaint because the Illinois complaint was filed first. In any event, Adrenaline argued, the Illinois and Oregon actions were not limited to the same cause because the Illinois complaint asserted two fraud counts that were not at issue in the Oregon case and which could no longer be

raised by way of counterclaim or third-party complaint in that forum because the time for doing so under Oregon law had expired. Notably, however, Adrenaline did not argue that any third-party complaint against Kia would fail for lack of personal jurisdiction. Finally, Adrenaline argued that Illinois was a more appropriate forum for litigating the parties' dispute because, in its view, the relevant underlying events transpired in Illinois, the key witnesses were located in Illinois, and the parties' claims were governed by Illinois law.

¶ 11 The circuit court heard oral argument on the motion in December 2017. Although a transcript of the hearing is not included in the record on appeal, the parties represent that the circuit court either asked Adrenaline whether it could amend its pleadings in the Oregon litigation to add its fraud claims or instructed it to attempt to do so. A month later, in response, Adrenaline submitted an affidavit from its Oregon attorney stating that the Oregon case was scheduled for mandatory arbitration at the end of January and that "any attempt" to add Adrenaline's claims to those proceedings "would cause unnecessary delay and needlessly increase the cost of the Oregon Litigation."

¶ 12 On March 19, 2018, the circuit court dismissed Adrenaline's complaint pursuant to section 2-619(a)(3). The court's written order found that Adrenaline had not shown that it "is or was unable to add its claims" to the Oregon litigation. Adrenaline timely appealed.[2]

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[2] Greenlayer informs us that a final judgment was entered in its favor in the Oregon case in April 2018, and it notes that we may take judicial notice of that judgment. But Greenlayer has not provided any substantive details of the judgment (other than that it won), nor has either side discussed what effect, if any, the Oregon judgment has on the issues in this appeal. Because we do not address questions that the parties have not briefed, there is no need for us to take judicial notice of the Oregon judgment. See *NBD Highland Park Bank v. Wien*, 251 Ill. App. 3d 512, 521 (1993) (declining to take judicial notice of materials "not helpful to our present purpose").

¶ 13 II. ANALYSIS

¶ 14 To avoid duplicative litigation, section 2-619(a)(3) allows a circuit court to dismiss an action if "there is another action pending between the same parties for the same cause." 735 ILCS 5/2-619(a)(3) (West 2018); see *Zurich Insurance Co. v. Baxter International, Inc.*, 173 Ill. 2d 235, 243 (1996). The party seeking dismissal must demonstrate by clear and convincing evidence that the two actions involve the same parties and the same cause. *Performance Network Solutions, Inc. v. Cyberklix, Inc.*, 2012 IL App (1st) 110137, ¶ 29. Even if those threshold requirements are established, however, dismissal is not mandated. *Kellerman v. MCI Telecommunications Corp.*, 112 Ill. 2d 428, 447 (1986). Rather, the decision to dismiss an action under section 2-619(a)(3) is within the circuit court's discretion. *Id.* In exercising that discretion, the circuit court should consider the following factors: (1) comity; (2) the prevention of multiplicity, vexation, and harassment; and (3) the likelihood of obtaining complete relief in the foreign jurisdiction. *Id.*[3]

¶ 15 At the outset, Adrenaline contends that Greenlayer should be judicially estopped from arguing that the Illinois and Oregon actions involve the same cause because it previously argued, in response to Adrenaline's motion to dismiss the Oregon complaint, that the two actions did not involve the same cause. Judicial estoppel is an equitable doctrine that a trial court may apply in its discretion if a party has "(1) taken two positions, (2) that are factually inconsistent, (3) in separate judicial or quasi-judicial administrative proceedings, (4) intending for the trier of fact to accept the truth of the facts alleged, and (5) ha[s] succeeded in the first proceeding and received

[3] A fourth factor—the *res judicata* effect of a foreign judgment in the local forum—does not apply where, as here, the motion seeks to dismiss, rather than stay, a duplicative action because "after a dismissal, there is no remaining action to which *res judicata* principles can be applied." *Performance Network Solutions*, 2012 IL App (1st) 110137, ¶ 33.

some benefit from it." *Seymour v. Collins*, 2015 IL 118432, ¶ 37. It applies only to a party's "statements of fact and not to legal opinions or conclusions." *Pepper Construction Co. v. Palmolive Tower Condominiums, LLC*, 2016 IL App (1st) 142754, ¶ 66. Moreover, for judicial estoppel to apply, the party's conflicting factual assertions "must be totally inconsistent—the truth of one must necessarily preclude the truth of the other." *Id.* ¶ 68. We review a circuit court's decision not to apply judicial estoppel for an abuse of discretion. *Seymour*, 2015 IL 118432, ¶ 48.

¶ 16 We conclude that the circuit court did not abuse its discretion in declining to apply judicial estoppel to prevent Greenlayer from arguing that the two actions involve the same cause. Whether two actions involve the same cause within the meaning of section 2-619(a)(3) is a legal conclusion, not a factual assertion. Two actions are deemed to involve the same cause when they "arise out of the same transaction or occurrence" and "rest[ ] on substantially the same set of facts." (Internal quotation marks omitted). *Midas International Corp. v. Mesa, S.p.A.*, 2013 IL App (1st) 122048, ¶ 13. Greenlayer did not make factually inconsistent statements in the Oregon and Illinois proceedings about the transactions and occurrences underlying the parties' dispute, nor did it provide contradictory descriptions of the facts giving rise to the parties' claims. Rather, Greenlayer simply advanced (arguably) inconsistent legal positions based on those underlying facts. Judicial estoppel "does not apply" where a party's "positions were merely legally inconsistent." *People v. Jones*, 223 Ill. 2d 569, 598 (2006). Furthermore, Greenlayer's successive positions were consistent. In the Oregon case, Greenlayer argued that its complaint was broader than Adrenaline's Illinois complaint because it included not only claims stemming from the parties' contract dispute, but also distinct claims arising from the parties' subsequent settlement

agreement and Adrenaline's alleged conversion of Greenlayer's property. That argument does not contradict Greenlayer's later contention that the breach-of-contract and fraud claims in Adrenaline's Illinois complaint and the breach-of-contract claim in Greenlayer's Oregon complaint constitute the same cause.

¶ 17 We turn to the circuit court's decision to dismiss Adrenaline's complaint. Adrenaline asks us to apply a bifurcated standard of review, considering *de novo* whether section 2-619(a)(3)'s threshold requirements are satisfied, and reviewing the circuit court's application of the *Kellerman* factors for an abuse of discretion. It is well-established, however, that a circuit court's order dismissing an action under section 2-619(a)(3) is reviewed for an abuse of discretion. *Performance Network Solutions*, 2012 IL App (1st) 110137, ¶ 27. In *Hapag-Lloyd (America), Inc. v. Home Insurance Co.*, 312 Ill. App. 3d 1087, 1090 (2000), we explained that motions to dismiss under section 2-619(a)(3) are reviewed for an abuse of discretion because such motions are "inherently procedural" and require "the trial court to weigh several factors to determine if it is appropriate for an action to proceed." Adrenaline contends that section 2-619(a)(3)'s threshold requirements should be reviewed *de novo* because they do not depend on a trial court's weighing of factors. But *Hapag-Lloyd* itself reviewed the trial court's determination that the threshold requirements were satisfied for an abuse of discretion. See *id.* at 1095 (concluding that "the trial court abused its discretion when it found" the same parties requirement satisfied). Numerous other decisions are in accord. See *Midas International*, 2013 IL App (1st) 122048, ¶ 13; *Continental Casualty Co. v. Radio Materials Corp.*, 366 Ill. App. 3d 345, 347-48 (2006); *Northbrook Property and Casualty Insurance Co. v. GEO International Corp.*, 317 Ill. App. 3d 78, 81 (2000); *Kapoor v. Fujisawa Pharmaceutical Co.*, 298 Ill. App. 3d

780, 786-89 (1998). Adrenaline has not identified a single decision applying a bifurcated standard of review. We thus adhere to our well-settled precedent that a circuit court's order dismissing an action under section 2-619(a)(3) is reviewed for an abuse of discretion. Under that standard, we will reverse the circuit court's order only if it is "arbitrary, fanciful, or unreasonable, or when no reasonable person would take the same view." (Internal quotation marks omitted). *Performance Network Solutions*, 2012 IL App (1st) 110137, ¶ 27.

¶ 18 We conclude that the circuit court did not abuse its discretion in dismissing Adrenaline's complaint. First, the circuit court correctly concluded that the Illinois and Oregon actions involved the same parties. The requirement that two actions involve the same parties "does not mean that the parties to both litigations must be identical." *Hapag-Lloyd*, 312 Ill. App. 3d at 1091. "Rather, all that is necessary is that the litigants' interests are sufficiently similar, even though the litigants differ in name or number." *Id*. at 1092. Adrenaline argues that the actions do not involve the same parties because Kia is a party in only the Illinois suit and Del Mar is a party in only the Oregon suit. But the claims against Kia and Del Mar arise from actions that they allegedly undertook on behalf of Greenlayer and Adrenaline, respectively, and those entities are parties to both suits. "[A] party's relationship to another will bear directly on and weigh heavily in deciding whether we should find the parties to be the same" under section 2-619(a)(3). *Id*. at 1093. In light of Kia's relationship with Greenlayer and Del Mar's relationship with Adrenaline, any individual interests that Kia and Del Mar have in these suits are sufficiently similar to those of Greenlayer and Adrenaline, respectively, that section 2-619(a)(3)'s same parties requirement is satisfied. See *Continental Casualty*, 366 Ill. App. 3d at 347 (same parties requirement satisfied where named party "represent[ed]" unnamed party's "interests in the litigation, as its attorney-in-

fact and agent"); *Catalano v. Aetna Casualty & Surety Company of Illinois*, 105 Ill. App. 3d 195, 197 (1982) (separate suits brought by husband and wife satisfied same parties requirement because husband and wife shared "a mutual relationship" to the property at issue in both suits).

¶ 19 The Illinois and Oregon actions likewise involve the same cause. "Actions involve the same cause where the relief requested rests on substantially the same set of facts." *Midas International*, 2013 IL App (1st) 122048, ¶ 13. "The crucial inquiry is whether the two actions arise out of the same transaction or occurrence, not whether the legal theory, issues, burden of proof or relief sought materially differs between the two actions." (Internal quotation marks omitted). *Id.* Adrenaline argues that the Illinois and Oregon actions do not involve the same cause because the Illinois complaint includes two counts of fraud that require a different standard of proof and contain different elements than the breach-of-contract claim in Greenlayer's Oregon complaint. But as we just noted, differing legal theories and burdens of proof do not render two causes distinct for purposes of section 2-619(a)(3) if the claims nevertheless arise from the same transaction or occurrence and rest on substantially the same set of facts. That is the case here. Adrenaline's fraud claims allege that Greenlayer and Kia made misrepresentations during the parties' contract negotiations. Those claims thus arise from the same transaction and occurrence, and rest on substantially the same set of facts, as Greenlayer's claim that Adrenaline breached the parties' contract, even though the claims rest on different legal theories and require proof of different elements. See *Continental Grain Co. v. FMC Corp.*, 27 Ill. App. 3d 819, 825-26 (1975) (breach-of-contract claim and tort claim constituted same cause where both "arose out of a single transaction—a single contract"). The circuit court therefore did not abuse its discretion in concluding that the Illinois complaint involved the same cause as the Oregon complaint.

¶ 20 Nor did the circuit court abuse its discretion in determining that the *Kellerman* factors support dismissal of Adrenaline's duplicative complaint. First, allowing both actions to proceed would implicate "principles of comity" by creating the possibility that "the Illinois court could reach a result inconsistent with the [Oregon] court." *Continental Casualty*, 366 Ill. App. 3d at 348. That problem was particularly acute here, where the Oregon litigation had already survived a motion to dismiss, advanced to discovery, and was set for arbitration. Adrenaline argues that it was nevertheless improper for the circuit court to dismiss the Illinois action in favor of the Oregon action because the Illinois complaint was filed first. But "[t]he fact that one action is filed prior to the other is not determinative" under section 2-619(a)(3). *Illinois Central Gulf R.R. Co. v. Goad*, 168 Ill. App. 3d 541, 544 (1988) (citing *A.E. Staley Manufacturing Co. v. Swift & Company*, 84 Ill. 2d 245, 252 (1980)).

¶ 21 Adrenaline also argues that Illinois is a more appropriate forum for resolving the parties' dispute. Greenlayer, for its part, disputes this contention. The parties debate whether their contract called for performance in Illinois or Oregon, and whether their dispute is governed by Illinois or Oregon law. We need not decide these issues here, which the parties have only cursorily briefed. Whatever relationship the parties' dispute may have to Illinois, it is not "so strong that the trial court's dismissal could be considered an abuse of discretion." *Skipper Marine Electronics, Inc. v. Cybernet Marine Products*, 200 Ill. App. 3d 692, 697 (1990).

¶ 22 Next, the interest in preventing multiplicitous, vexatious, and harassing litigation also counsels in favor of dismissing Adrenaline's complaint. Adrenaline stresses that it filed the Illinois complaint before Greenlayer filed the Oregon complaint, but it was able to beat Greenlayer to the courthouse door only by lulling Greenlayer into complacency by expressing a

willingness to settle in response to Greenlayer's threat to sue. Adrenaline argues that the parties' settlement negotiations are inadmissible under Illinois Rule of Evidence 408, but that rule prohibits reliance on such negotiations only "when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction." Ill. R. Evid. 408(a). The rule does not prohibit the use of settlement negotiations for other purposes, including, as relevant here, to "negat[e] an assertion of undue delay" or "establish[ ] bad faith." Ill. R. Evid. 408(b). Adrenaline also urges us to ignore the evidence of the parties' settlement negotiations proffered by Greenlayer because, according to Adrenaline, the circuit court did not consider that evidence. But Greenlayer submitted the evidence as exhibits to its motion to dismiss, and nothing in the record suggests that the court did not consider the evidence in rendering its decision. Adrenaline further protests that Greenlayer's evidence is one-sided, but Adrenaline was free to present its own evidence to the circuit court, yet it failed to do so.

¶ 23 Finally, the likelihood that the parties could obtain complete relief in the Oregon proceedings also weighs in favor of dismissal. Adrenaline argues that it could not have obtained complete relief in Oregon because Kia was not subject to personal jurisdiction there. Adrenaline forfeited this argument by failing to raise it in the circuit court. See *Bank of New York Mellon v. Rogers*, 2016 IL App (2d) 150712, ¶ 32 (issues not raised in circuit court are forfeited and may not be raised for first time on appeal). Regardless, Kia submitted an affidavit in the circuit court attesting that he would submit to jurisdiction in Oregon if Adrenaline filed a third-party complaint against him. Adrenaline scoffs at that representation, but we see nothing in the record that calls its sincerity into question.

¶ 24 In the circuit court, Adrenaline argued that it was unable to obtain complete relief in the Oregon proceedings because the time for filing a counterclaim or third-party complaint had expired. But Adrenaline made no attempt to bring its claims in the Oregon litigation, despite being given the chance to do so by the circuit court. It instead submitted an affidavit from its Oregon lawyer attesting that it would be improperly dilatory to amend the Oregon pleadings at that time. The circuit court found that conclusory assertion insufficient to establish that Adrenaline was unable to assert its claims in the Oregon proceedings, and we do not find that determination arbitrary or unreasonable.

¶ 25 Adrenaline contends that it was error for the circuit court to even consider whether it was able to add its fraud claims to the Oregon litigation. It submits that the mere fact that it had not raised its claims in Oregon demonstrates that the Illinois and Oregon cases did not involve the same cause. But as we discussed above, two actions need not contain identical claims to be deemed the same cause. They need only present claims that arise from the same transaction or occurrence and rest on substantially the same set of facts. After concluding that the Illinois and Oregon actions involved the same cause between the same parties, the circuit court properly considered Adrenaline's ability to raise its claims in the Oregon proceedings when assessing the likelihood that the parties could obtain complete relief in that jurisdiction.

¶ 26 In sum, the circuit court did not abuse its discretion in concluding that the Illinois and Oregon actions involved the same parties and the same cause. Nor did the court abuse its discretion in determining that dismissal of the duplicative Illinois complaint was appropriate. Finally, we find no abuse of discretion in the circuit court's decision not to apply judicial

estoppel to prevent Greenlayer from arguing that the Illinois and Oregon actions involved the same cause.

¶ 27 III. CONCLUSION

¶ 28 For the foregoing reasons, we affirm the circuit court's order dismissing Adrenaline's complaint.

¶ 29 Affirmed.