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(2006-SC-000549-D)

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000133-MR

ERIC GARDNER — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 04-CI-02744

WALTER "WALLY" SKIBA, INDIVIDUALLY, AND IN HIS OFFICIAL CAPACITY AS DIRECTOR OF HUMAN RESOURCES OF THE LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT; PAM MILLER, INDIVIDUALLY, AND IN HER OFFICIAL CAPACITY AS MAYOR OF THE LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT; AND TERESA ISAACS, INDIVIDUALLY, AND IN HER OFFICIAL CAPACITY AS MAYOR OF THE LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: BUCKINGHAM, JOHNSON, AND TACKETT, JUDGES.

JOHNSON, JUDGE: Eric Gardner has appealed from a summary judgment entered by the Fayette Circuit Court on November 8, 2004, which dismissed his complaint against the appellees on the basis of res judicata. Having concluded that the judgment

relied upon as the basis for applying res judicata to Gardner's claims having been reversed by this Court was no longer binding, we reverse the summary judgment and remand this matter for further proceedings.

In this action, which was filed in the Fayette Circuit Court on July 6, 2004, Gardner alleged he was damaged by the appellees' conduct in violation of various statutes and he sought recovery under KRS[1] 446.070. Specifically, Gardner alleged that Walter "Wally" Skiba tampered with physical evidence and public records and committed official misconduct in filling the civil service position of Public Service Supervisor (PSS). Gardner further alleged that former Lexington Mayor Pam Miller and Mayor Teresa Isaacs, the current mayor, condoned and facilitated Skiba's wrongful conduct.

In 1998 Gardner filed three lawsuits against the Lexington-Fayette Urban County Government (LFUCG) and various government employees alleging claims of racial and religious discrimination and appealing various actions taken against him by the LFUCG Civil Service Commission (hereinafter referred to as the "1998 litigation"). In these three lawsuits, Gardner alleged, inter alia, that he had been discriminated against in the filling of the PSS position. More specifically, Gardner alleged that he was unlawfully denied promotion to the PSS

[1] Kentucky Revised Statutes

position when Skiba effected an “acting” appointment of an unqualified candidate despite Gardner’s presence at the top of a promotion list for the position. Gardner’s three lawsuits were consolidated for the purposes of trial.

Prior to the original trial date for the 1998 litigation, Gardner learned that Skiba allegedly had altered physical evidence concerning the PSS position and allegedly had directed a subordinate employee to shred documents pertaining to the filling of that position. Gardner sought and received a continuance of the trial date so he could pursue discovery concerning Skiba’s alleged wrongful conduct. Gardner did not move to amend his complaints in the 1998 litigation to assert any claim against Skiba or the other appellees as a result of the alleged wrongful conduct of alteration and destruction of documents.

The 1998 litigation was tried before a jury in the Fayette Circuit Court during the week of February 24, 2003, and the jury returned a verdict in favor of LFUCG in regard to all claims asserted by Gardner. The trial court entered a judgment on July 11, 2003, confirming the jury’s verdict, which Gardner appealed to this Court. On January 21, 2005, in an unpublished Opinion, this Court reversed the 2003 judgment and remanded the

1998 litigation to the Fayette Circuit Court for a new trial.[2]

Prior to the rendering of this Court's Opinion in Gardner's appeal of the 1998 litigation, Gardner filed the present action against the appellees. The appellees filed answers to the complaint and asserted the defense of res judicata as a bar to the action. The appellees then moved for summary judgment on the basis of their res judicata defense on October 14, 2004, and a hearing was held in the Fayette Circuit Court on October 24, 2004. Essentially, the appellees asserted that the allegations contained in Gardner's complaint arose from the same occurrence as the allegations asserted in the 1998 litigation and Gardner was precluded by the doctrine of res judicata from asserting in a subsequent lawsuit a new theory of recovery based on the same underlying facts as the 1998 litigation.[3]

Gardner asserted in the Fayette Circuit Court, as he does here, that res judicata was not a bar to the present suit because the causes of action asserted in the 1998 litigation did not have the same identity of claims or parties as the present action.[4] Additionally, he claims the trial court's summary judgment was not supported by the record. On November 8, 2004,

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[2] Gardner v. Lee, 2003-CA-002230-MR.

[3] See Travelers Indemnity Co. v. Moore, 304 Ky. 456, 201 S.W.2d 7 (1947).

[4] See Newman v. Newman, 451 S.W.2d 417 (Ky. 1970).

the trial court entered an order sustaining the appellees' motion for summary judgment and dismissed Gardner's complaint. Gardner moved the trial court to reconsider its order, and his motion was denied by an order entered on December 29, 2004. This appeal followed.

The doctrine of res judicata precludes a party from relitigating causes of action and facts or issues after a final judgment on the merits has been issued in a prior action.[5] "The doctrine of res judicata is formed by two subparts: 1) claim preclusion and 2) issue preclusion."[6] Claim preclusion bars a party from bringing a new lawsuit on a previously adjudicated cause of action, whereas "[i]ssue preclusion bars the parties from relitigating any issue actually litigated and finally decided in an earlier action. The issues in the former and latter actions must be identical. The key inquiry in deciding whether the lawsuits concern the same controversy is whether they both arise from the same transactional nucleus of facts."[7]

For both claim preclusion and issue preclusion to apply there must be a final judgment on the merits. However, as noted above, in this case the final judgment entered in the 1998 litigation against Gardner was reversed by this Court on January

[5] Yeoman v. Commonwealth, 983 S.W.2d 459 (Ky. 1998).

[6] Id. at 464-65.

[7] Id. at 465.

21, 2005. A judgment that is reversed on direct appeal is treated as though it never existed.[8] Thus, the reversal of the judgment from the 1998 litigation and the remand of that matter for a new trial prevent the judgment from having preclusive affect in the present action, and it cannot be the basis for barring this action.

The appellees assert that even after the reversal of the judgment in the 1998 litigation Gardner is still barred from bringing this action because he has impermissibly split his cause of action.[9] The rule against splitting causes of action in different lawsuits is a subsidiary of the doctrine of res judicata.[10]

> It is against the policy of the law to permit a plaintiff to split his cause of action and institute two or more actions for different parts thereof, and it is a well-established principle that where a plaintiff has filed suit and had trial upon a cause of action, the judgment rendered therein is a bar to another proceeding based upon the same cause of action[.][11]

However, "the rule does not require distinct causes of action, that is to say, distinct matters each of which would authorize by itself independent relief, to be presented in a single suit,

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[8] Clay v. Clay, 707 S.W.2d 352 (Ky.App. 1986).

[9] Travelers Indemnity, 201 S.W.2d at 9.

[10] Egbert v. Curtis, 695 S.W.2d 123 (Ky.App. 1985).

[11] Cassidy v. Berkovitz, 169 Ky. 785, 185 S.W. 129, 130 (1916).

though they exist at the same time and might be considered together" [citation omitted].[12] As our Supreme Court stated in Watts, by and through Watts v. K, S & H:[13]

> Theoretically, all of these claims could have been litigated in the same action, along with others that the fertile imagination of experience might devise. . . . A broad reading of that part of Egbert which states that 'res judicata (is) applicable not only to the issues disposed of in the first action, but to every point which properly belonged to the subject of the litigation in the first action and which in the exercise of reasonable diligence might have been brought forward at the time,' would foreclose all possible or potential claims against any known potential defendant not brought within the first litigation. Egbert, supra, at 124. The rule is simply not that broad, nor is it that simple to apply.

The Court then held that the rule against splitting a cause of action did not bar a subsequent dram shop claim even though the plaintiffs had previously prosecuted a negligence action, where both claims arose from a single automobile accident.

Our courts have generally barred separate suits brought for separate items of damages arising from a single cause of action.[14] However, the rule is not a bar where a

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[12] National Bond & Investment Co. v. Withorn, 281 Ky. 318, 136 S.W.2d 40, 42 (1940) (quoting McDonald v. Equitable Life Assurance Society of the United States, 269 Ky. 549, 108 S.W.2d 184, 185 (1937)).

[13] 957 S.W.2d 233, 238 (Ky. 1997).

[14] See Kirchner v. Riherd, 702 S.W.2d 33 (Ky. 1986) (noting that plaintiff may not seek recovery for property damage in one suit and personal injuries in another arising from a single automobile accident); Travelers Indemnity, 201

plaintiff asserts a separate and distinct cause of action in a subsequent action based on the same transaction or facts as a prior action.[15] Thus, we conclude that Gardner has asserted separate and distinct causes of action in the 1998 litigation and the present action and has not improperly split a single cause of action. The 1998 litigation sought recovery for alleged racial and religious discrimination in failing to promote Gardner. The case at bar, on the other hand, alleges that appellees committed various statutory violations and thereby damaged Gardner. The present case does not, however, concern a claim regarding the failure to promote Gardner to the PSS position.

Finally, the appellees assert that the continued litigation of this action is barred because Gardner is prohibited from amending his complaint in the 1998 litigation upon remand of that matter for a new trial or from consolidating this action with the 1998 litigation. They argue that a party who successfully obtains a new trial following an appeal is not

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S.W.2d at 7; Cassidy, 185 S.W. at 129; and Pilcher v. Ligon, 91 Ky. 228, 15 S.W. 513 (1891).

[15] See Watts, 957 S.W.2d at 238; Arnold v. K-Mart Corp., 747 S.W.2d 130 (Ky.App. 1988) (noting that prior suit for back pay not a bar to subsequent suit for wrongful termination); Newman v. Newman, 451 S.W.2d 417 (Ky. 1970) (noting that prior action to determine validity of a deed not a bar to subsequent suit for adverse possession); Hays v. Sturgill, 302 Ky. 31, 193 S.W.2d 648 (1946) (noting that prior suit to construe a deed not a bar to subsequent claim deed was invalid due to undue influence and mental incapacity); and National Bond, 136 S.W.2d at 42 (noting that action for damage to automobile and action for false arrest between the same parties not required to be in same lawsuit).

permitted to assert new issues upon retrial of the remanded action unless those issues could not, in the exercise of reasonable diligence, have been raised previously.[16]

The rule in Schrodt's Ex'r is based upon Section 134 of the now superceded Civil Code of Procedure which permitted the amending of pleadings for limited circumstances such as to add or strike a party, to correct a mistake, or to assert additional allegations material to the case. Section 134 is similar to the current CR[17] 15 which pertains to amended and supplemental pleadings. CR 15.01 provides that after the filing of a responsive pleading, a party may only amend a pleading with leave of the court or by the written consent of the adverse party. However, leave to amend shall be freely given and the trial court has broad discretion in allowing the amendment of pleadings.[18] Because Gardner has not attempted to amend his pleadings in the 1998 litigation to assert therein the causes of action asserted in the present action, whether he should be permitted to do so is not properly before us, and cannot be relied upon as a basis to bar the present action.

The trial court in granting the appellees' summary judgment motion found "that Gardner's complaint is barred by the

[16] Schrodt's Ex'r v. Schrodt, 189 Ky. 457, 225 S.W. 151 (Ky. 1920).

[17] Kentucky Rules of Civil Procedure.

[18] M.A. Walker Co., Inc. v. PBK Bank, Inc., 95 S.W.3d 70 (Ky.App. 2002).

Final Judgment in [the 1998 litigation] under the doctrine of res judicata." However, the reversal of that final judgment precludes it from having res judicata affect on the matters asserted in the present action. Whether Gardner should be allowed to amend his complaints in the 1998 litigation to assert the claims in the present action or whether the matters should be consolidated have not been properly addressed by the trial court, thus they are not ripe for our review. In light of our reversal of the judgment on the issue of res judicata, upon remand the trial court may address these other issues.

For the foregoing reasons, we reverse the judgment of the Fayette Circuit Court and remand this matter for further proceedings consistent with this Opinion.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR APPELLANT:

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BRIEF FOR APPELLEES:

Terry Sellars
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