

RENDERED: MARCH 24, 2006; 2:00 P.M.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2005-CA-000587-MR

LYNDON PROPERTY INSURANCE COMPANY

APPELLANT

v.

APPEAL FROM MENIFEE CIRCUIT COURT  
HONORABLE BETH LEWIS MAZE, JUDGE  
ACTION NO. 04-CI-90010

MENIFEE COUNTY FISCAL COURT;  
HON. JAMES D. TRIMBLE, COUNTY  
JUDGE EXECUTIVE; RICK CRAIN;  
DAVID WELLS; GLEN MULLINS;  
BOB ROSS; AND JOE THOMAS

APPELLEES

OPINION  
VACATING AND REMANDING

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BEFORE: COMBS, CHIEF JUDGE; DYCHE AND KNOPF, JUDGES.

COMBS, CHIEF JUDGE: Lyndon Property Insurance Company ("Lyndon Property") has appealed from an order entered by the Menifee Circuit Court on March 23, 2005, that dismissed its complaint against the Menifee County Fiscal Court with prejudice. We are persuaded that the allegations raised by Lyndon Property against the fiscal court are not barred by the doctrine of collateral

estoppel. Therefore, we vacate and remand for further proceedings.

In early 2000, the Menifee County Fiscal Court undertook the renovation and construction of the Menifee County Courthouse. After a period of bidding, Capital City Fire Protection, Incorporated, ("Capital City") was awarded the contract to install a new sprinkler system. The appellant, Lyndon Property, executed a performance and payment bond in connection with the contract between Capital City and the Fiscal Court.

Before Capital City began work on the courthouse, it notified Lyndon Property that it would not be able to perform the contract. Lyndon Property notified the Fiscal Court of Capital City's default and expressed its intent to honor its obligations under the bond. Several days later, Lyndon Property tendered Kentucky Automatic Sprinkler Company ("KASCO") as a replacement contractor for the work. The Fiscal Court accepted KASCO as a substitute contractor, and Lyndon Property agreed to pay \$12,000.00 -- the difference in the cost for KASCO to complete the contract originally awarded to Capital City. KASCO performed its work under the sprinkler contract to the satisfaction of the Fiscal Court and was paid all amounts due under the contract -- except for a 10% retainage, which was to have been paid after the sprinkler contract work was complete.

In the course of completing its work under the sprinkler contract, KASCO had purchased materials from GEM fabrication ("GEM") but did not pay for them. GEM sued KASCO and Lyndon Property, claiming that KASCO was contractually liable for the debt and that Lyndon Property, as project surety, was required to assure KASCO's obligation to pay GEM's unpaid invoices. At this point, KASCO had become a defunct company. Lyndon Property defended the claims in the GEM action on the basis that it had bonded only the performance and payment obligation of the original sprinkler contract, Capital City -- but not the obligations of KASCO, the replacement contractor. Lyndon Property contended that it had completely satisfied its obligation under the bond by securing KASCO as a replacement contractor and by paying the \$12,000.00 difference in KASCO's contract price. Arguing that it was never a surety for KASCO, Lyndon Property claimed that it was not obligated to guarantee payment of KASCO's debts to its suppliers.

By order entered in the GEM action on August 28, 2003, the Menifee Circuit Court held that Lyndon Property as the project surety was liable to pay GEM's claims against KASCO. Lyndon Property filed its notice of appeal on September 3, 2003.

In January 2004, Lyndon Property filed this separate action to recover the remaining sprinkler contract retainage (totalling nearly \$6,000.00) held by the Fiscal Court. Pursuant

to the surety bond and subsequent tender agreement, Lyndon Property contended that the Fiscal Court had assigned the right to the retainage monies to Lyndon Property.

This Court affirmed the ruling of the trial court in the GEM action on October 12, 2004. Lyndon Property then paid GEM's claim in the amount of \$27,605.68 -- plus costs. Lyndon Property subsequently amended its complaint against the Fiscal Court to include an allegation that it was equitably subrogated to any and all claims of KASCO -- including its right to collect the unpaid retainage held by the Fiscal Court on the sprinkler contract.

Without answering, the Fiscal Court filed a motion to dismiss Lyndon Property's complaint. It claimed that the allegations raised in Lyndon Property's complaint were barred by the doctrine of collateral estoppel as a result of the prior litigation involving GEM. Following a hearing, the trial court entered an order dismissing Lyndon Property's complaint with prejudice. This appeal followed.

Lyndon Property argues on appeal that the trial court erred as a matter of law by dismissing its complaint. It contends that its complaint should not have been dismissed since it stated viable claims upon which relief could be granted and that the trial court erred by concluding that the doctrine of

collateral estoppel applied to support a summary dismissal of the complaint.

When considering the merits of a motion to dismiss a complaint under Kentucky Rules of Civil Procedure (CR) 12.02(f) for failure to state a claim, the trial court is not required to make factual findings. Dismissal of a complaint under this rule wholly involves a question of law. James v. Wilson, 95 S.W.3d 875, 883-84 (Ky.App. 2002). Consequently, our review is *de novo*.

Lyndon Property alleged in its complaint that it was entitled to collect the retainage held by the Fiscal Court based upon the assignment-of-funds provisions contained in its bond. Paragraph 4 of the executed bond provides as follows:

All contract proceeds payable to the Principal [the contractor], its heirs, successors, assigns, or trustee, including trustees in bankruptcy, are acknowledged by the Obligee [fiscal court], the Principal, and the Claimants, as herein defined, to be trust funds for the benefit of the Claimants or the Obligee herein designated or in the event of default, the Surety.

In addition, Paragraph 7 of the bond provides:

As an additional condition precedent to the Surety's completion obligation, the Obligee will make available to the Surety as the Work progresses, the unpaid balance of the "Contract price" **including all retainage or retained percentages held by the Obligee.** The term "Balance of Contract price" as used herein shall mean the total amount payable by the Obligee to the Principal, including

all retainages, under the Contract and any amendments thereto, less all amounts properly paid to the Principal. (Emphasis added.)

In its amended complaint, Lyndon Property alleged that it was equitably subrogated to KASCO's claims following resolution of the GEM action and its payment of KASCO's debt. Lyndon Property asserted that it was entitled to the contract retainage held by the Fiscal Court on this theory in addition to the contract provisions addressing assignment of funds.

Kentucky law recognizes recovery under each of these theories. Since Lyndon Property clearly stated legal and equitable claims upon which relief could be granted, dismissal on this basis was not proper.

We next consider whether the doctrine of collateral estoppel applies to preclude Lyndon Property's action against the Fiscal Court. The common law doctrine of collateral estoppel -- or issue preclusion -- bars the re-trial of an issue that has been fairly and completely resolved in a prior proceeding. It is an equitable doctrine expressing a policy to promote judicial economy and finality. In Moore v. Commonwealth, Cabinet for Human Resources, 954 S.W.2d 317 (1997), the Supreme Court of Kentucky discussed the close relationship between *res judicata* and collateral estoppel, noting that identity of parties is not a necessary element of

collateral estoppel. Thus, when an issue has been involved in two lawsuits, a person who was not a party to the first action may invoke collateral estoppel against a party to subsequent litigation (who **had** been involved in the earlier action) in order to bar re-litigation of that issue or claim. The Moore Court recounted the evolution of collateral estoppel from its antecedent, *res judicata*, as set forth earlier in Sedley v. City of West Buechel, Ky., 461 S.W.2d 556, 559 (1970). Moore summarized the Sedley holding and set forth the required elements of collateral estoppel:

Thus, the Court abandoned the mutuality requirement of *res judicata* in adopting non-mutual collateral estoppel, applicable when at least the party to be bound is the same party in the prior action. The essential elements of collateral estoppel to be gathered from *Sedley* are as follows:

- (1) identity of issues;
- (2) a final decision or judgment on the merits;
- (3) a necessary issue with the estopped party given a full and fair opportunity to litigate;
- (4) a prior losing litigant.

Id. at 319.

Lyndon Property argues that its action against the Fiscal Court presents different and distinct issues of fact and law from those previously adjudicated in the GEM litigation and that, therefore, this action is not barred by collateral estoppel. We agree.

The prior litigation pertained to whether Lyndon Property was obligated under the terms of its bond to GEM, a supplier of the replacement contractor. However, the sole issue presented in this action is whether Lyndon Properties is entitled to collect the retained funds allegedly owed to KASCO. Lyndon Properties argues that it paid to complete the sprinkler contract pursuant to the terms of the bond and accordingly became entitled through subrogation to stand in KASCO's shoes.

Lyndon Property's allegations against the Fiscal Court do not involve the re-litigation of **any** issue that the parties had a fair opportunity (or even a reason) to litigate in the earlier GEM action. The ultimate issue decided in that case had no impact whatsoever upon the Fiscal Court. Therefore, we conclude that the doctrine of collateral estoppel cannot be utilized as a basis to dismiss the complaint.

The judgment of the Menifee Circuit Court is vacated, and this matter is remanded for further proceedings.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kenneth A. Bohnert  
Scott A. Johnson  
Louisville, Kentucky

BRIEF FOR APPELLEE:

John A. Nefzger  
Frenchburg, Kentucky