RENDERED: JULY 17, 2020; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000934-MR

LAW-WAL, LLC;
RACERS PIT STOP GRILLE, LLC;
MEREDITH L. LAWRENCE, INDIVIDUALLY;
AND MEREDITH L. LAWRENCE,
AS LLC MEMBER — APPELLANTS

v.

APPEAL FROM GALLATIN CIRCUIT COURT
HONORABLE JAMES R. SCHRAND, II, JUDGE
ACTION NO. 17-CI-00061

AMBER WALLACE HOWELL, CO-EXECUTOR
OF THE ESTATE OF ROBERT R. WALLACE; AND
ROBERT JASON WALLACE, CO-EXECUTOR OF
THE ESTATE OF ROBERT R. WALLACE — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; GOODWINE AND MAZE, JUDGES.

MAZE, JUDGE: LAW-WAL, LLC; Racers Pit Stop Grille, LLC; and Meredith Lawrence (collectively, "Lawrence") appeal from a summary judgment entered by the Gallatin Circuit Court dismissing his claims against Robert R. Wallace, individually and as an alleged member or owner of the LLCs. Lawrence asserts the current claims against Wallace were not precluded by *res judicata* or issue preclusion because the claims accrued after entry of the judgment in a prior civil action. However, we agree with the trial court that the issues raised in the current action are identical to those which were raised or could have been raised in the prior action, and that the prior judgment on the merits precludes re-litigation of those issues. Hence, we affirm.

The relevant facts of this action were set forth in a prior appeal as follows:

> In September of 1998, Meredith L. Lawrence and Robert R. Wallace formed a limited liability company ("LLC") together. They named the company LAW/WAL LLC. In February of 2000, they formed a second LLC, Racers Pitstop Grill, LLC ("Racers"). Pursuant to the operating agreements, Lawrence and Wallace were the only members of the LLCs with each owning a fifty percent interest in each LLC.
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> Racers operated a gentlemen's club and a restaurant out of a building it leased from LAW/WAL. LAW/WAL operated a hotel in an adjacent building. LAW/WAL leased both buildings from Lawrence. In the early 2000s, the LLCs secured two loans from First Farmers Bank of Owenton ("Bank"). The first loan was in the amount of $1.2 million. Wallace and Lawrence

provided personal guarantees on this loan. The second loan was in the amount of $100,000.

In 2004, Lawrence and Wallace decided to cease doing business together because they could not agree on what type of businesses would be successful at their locations moving forward. Ultimately, Lawrence agreed to buy out Wallace's interests in both LLCs. On November 1, 2004, Wallace and Lawrence executed a written agreement titled "Contract for Sale and Purchase of All Interests of Robert R. Wallace in LAW/WAL, LLC and Racers Pit Stop, LLC" ("Sales Agreement"). Under the terms of the Sales Agreement, Lawrence agreed to pay Wallace $400,000 for his interests in the businesses. Payment was to be made as follows: 1) $40,000 upon execution of the Sales Agreement; and 2) the remaining $360,000 payable in nine equal installments of $40,000 plus interest at the then-current prime interest rate. The first installment for principal and interest was to be paid on November 1, 2005, with additional payments to be made each succeeding year until paid in full. Section 3 of the Sales Agreement contained a contingency provision. Under this provision, the agreement would become "null and void" if the Bank would not release Wallace's personal guarantees.

Lawrence made the initial $40,000 payment on November 1, 2004, the same day the parties executed the Sales Agreement. At the same time, he executed a promissory note in favor of Wallace for the balance of the purchase price. After receiving the initial payment and promissory note, Wallace relinquished all his ownership interests in the businesses to Lawrence.

Thereafter, Lawrence approached the Bank about releasing Wallace's personal guarantee; it refused to do so. Lawrence told Wallace about the Bank's decision approximately a week after they had signed the Sales Agreement. Wallace allegedly told Lawrence that he trusted Lawrence to make the payments to the Bank and would go through with the sales even without a release from the Bank.

Pursuant to the terms of the Sales Agreement, Lawrence was supposed to make the first of the nine $40,000 installment payments to Wallace on November 1, 2005. He failed to do so. As a result, in February of 2006, Wallace filed a civil lawsuit for breach of contract against Lawrence in Gallatin Circuit Court ("2006 Civil Action"). Lawrence filed an answer and counterclaim. In his counterclaim, Lawrence alleged that Wallace committed fraud in connection with the Sales Agreement by concealing business debts and fabricating assets. He also alleged that Wallace was aware that the manager of the two businesses was going to quit after the businesses were sold to Lawrence, but hid this fact from Lawrence. Lawrence further alleged that Wallace breached the contract by engaging in activities that harmed the two businesses contrary to a specific agreement and understanding between the parties at the time the businesses were organized. Several years of litigation ensued.

In 2007, while the 2006 Civil Action was still ongoing, the larger of the two notes to the Bank came due. Lawrence requested Wallace to assist in refinancing or otherwise renewing the note. Wallace refused on the basis that he no longer had an interest in the LLCs. Lawrence ultimately purchased both notes from the Bank. However, the Bank would not assign Wallace's personal guaranty to Lawrence. This had the practical effect of extinguishing Wallace's personal guarantee.

In March of 2009, as part of the 2006 Civil Action, Lawrence filed an amended counterclaim against Wallace. The amended counterclaim alleged tortious and intentional violation of Wallace's duty of good faith and fair dealing and intentional breach of fiduciary duty, related to Wallace's refusal to remain obligated on the LLCs' loans. The next month, on April 27, 2009, the parties and their counsel conducted a settlement conference at the office of Lawrence's then-attorney. Following day-long talks, the parties and their counsel ultimately executed a document styled "Memorandum of Full and Final Settlement" ("Settlement Agreement").

Therein, the parties agreed to resolve the 2006 Civil Action and modify their prior Sales Agreement. As part of the Settlement Agreement, Lawrence agreed to pay Wallace a total $175,000. The agreement set forth a payment schedule: 1) $100,000 was due by May 7, 2009; and (2) the remaining $75,000 by May 1, 2010. In return, Wallace again agreed to convey all of his interest in the two LLCs to Lawrence, effective November 1, 2004, and Lawrence again agreed to hold Wallace harmless and blameless for any of the businesses' debts. The Settlement Agreement further provided that the parties would file an agreed judgment and agreed order of dismissal in the 2006 Civil Action within sixty days. This clause specified that the agreed judgment "shall contain a full release by Wallace and Lawrence to the other for all claims related to these LLCs, which have been asserted or that could have been asserted by either party against each other."

Lawrence made the first payment of $100,000 as agreed. However, the parties did not file the agreed order of judgment and dismissal in a timely manner. Instead, according to Wallace, the parties agreed to leave the 2006 Civil Action open so that Lawrence's counsel could move to compel a fact witness, Donna Bond, Lawrence's former employee and bookkeeper, to provide additional deposition testimony. While Ms. Bond had previously been deposed, she had refused to answer some questions. Allegedly, Lawrence wanted the deposition completed with answers to these discreet questions because Ms. Bond had previously testified before a federal grand jury in connection with a criminal investigation of Lawrence's federal income taxes.

Even though the 2006 Civil Action had not been formally dismissed as specified by the Settlement Agreement, on May 1, 2010, Lawrence sent Wallace and his attorney a check for $75,000. The memo line of the check contained the following handwritten notation: "Settlement of Litigation Dispute C/A 06-CI00029 ONLY, Full & Final Payment." Even though Lawrence made the final payment pursuant to the terms of the

Settlement Agreement, for reasons that are not entirely clear from the record, the parties failed to seek an agreed judgment and order of dismissal from the trial court.

Although the 2006 Civil Action was technically still on the trial court's active docket, the parties did not make any additional filings. In April of 2011, the 2006 Civil Action came up for review pursuant to CR[1] 77.02(2). As required by the Rule, the trial court sent notices to the parties that the 2006 Civil Action would "be dismissed in thirty days for want of prosecution except for good cause shown." *Id.* The parties did not respond to the trial court's CR 77.02(2) notice. Accordingly, by order entered July 21, 2011, the trial court dismissed the 2006 Civil Action without prejudice; its only option under CR 77.02(2).

Following execution of the Settlement Agreement, Lawrence operated the LLCs without Wallace's involvement or financial assistance. During this time period, Lawrence repeatedly represented that he was the sole owner of the LLCs. This is confirmed in various filings with the Kentucky Secretary of State. Ultimately, Lawrence dissolved Racers in June of 2011. Later that same year, he sold LAW/WAL to Scott Vogeler. Documents associated with sale denote Lawrence as the sole owner. Subsequently, Vogeler filed bankruptcy on behalf of LAW/WAL. Lawrence repurchased LAW/WAL and its remaining assets out of bankruptcy.

Almost a full five years after execution of the Settlement Agreement, on or about April 22, 2014, Lawrence filed a new civil action against Wallace in Gallatin Circuit Court ("2014 Civil Action"). The new action, like the prior one, involved the sale of Wallace's interests in the LLCs to Lawrence. In his complaint, Lawrence took the position that Wallace was still a part owner of the LLCs. Even though Lawrence acknowledged the existence of the Settlement Agreement, he averred that it ended with only the

[1] Kentucky Rule of Civil Procedure [footnote in original].

"interests of Wallace's LLC personal property being purchased" by Lawrence. He further alleged that "no final accounting, settlement, dismissal of the civil suit or full and final releases were ever accomplished." To this end, Lawrence alleged that Wallace breached the LLCs' operating agreements because he failed to make capital contributions to the LLCs. Lawrence also alleged that Wallace was liable for fraud in the inducement, misrepresentation, unjust enrichment, breach of the covenant of good faith and fair dealing, and intentional infliction of emotional distress.

Citing the parties' prior Settlement Agreement, Wallace filed an answer in which he denied that he was liable to Lawrence. Wallace asserted that by virtue of the Settlement Agreement, he sold all his interest in the LLCs to Wallace and was not liable for any of the LLCs expenses or debts. Wallace also asserted a number of affirmative defenses. He also filed counterclaims against Lawrence seeking a declaratory judgment that the Settlement Agreement is an enforceable written document binding on both Wallace and Lawrence that barred Lawrence's new complaint against him. In the alternative, Wallace alleged related claims grounded in equitable estoppel, fraud, and breach of contract.

On the motion of counsel, the LLCs were permitted to join the 2014 Civil Action as intervening plaintiffs on the basis that their interests could be affected by the outcome of the litigation between Lawrence and Wallace. *See* CR 24.01. At that time, the LLCs did not allege any independent claims against Wallace [footnote omitted].

On December 1, 2015, Wallace filed what was styled as a "motion to enforce settlement agreement." Wallace asserted in his motion that the Settlement Agreement was a legally binding contract that precluded Lawrence from pursuing the claims set forth in the 2014 Civil Action. In his response, Lawrence countered that the Settlement Agreement was not enforceable and noted that the 2006 Civil Action was dismissed without prejudice. Lawrence also noted that "[i]nsofar as the

> motion to enforce may be considered a motion for summary judgment then CR 56 applies and discovery must be permitted." Even though Lawrence represented in his response that additional discovery was necessary before the trial court could treat Wallace's motion to enforce as one for summary judgment, Lawrence filed his own motion for summary judgment on December 30, 2015. Therein, Lawrence requested the trial court to grant him summary judgment on his claims against Wallace on the basis that there were no disputed issues of material fact.
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> Ultimately, the trial court construed Wallace's motion to enforce the Settlement Agreement as a motion for summary judgment. After reviewing the record, the court determined that there were no material issues of disputed fact with respect to the validity of the Settlement Agreement. The court pointed out that it was undisputed that Lawrence made the two payments required by the Settlement Agreement to Wallace who accepted them, and that Lawrence subsequently represented that he was the sole owner of the LLCs on a purchase contract and on a bankruptcy petition. As a matter of law, the trial court concluded that Lawrence waived any and all claims he could have brought against Wallace in connection with Wallace's ownership and sale of his interests in the LLCs. As a result, the trial court entered a final and appealable summary judgment order in favor of Wallace.

LAW/WAL LLC v. Wallace, No. 2016-CA-000358-MR, 2019 WL 103960, at *1-4 (Ky. App. Jan. 4, 2019).[2]

[2] On February 15, 2019, this Court granted Lawrence's motion to take judicial notice of the opinion entered in Appeal No. 2016-CA-000358-MR. On April 4, 2019, Lawrence filed a motion for discretionary review of that opinion. No. 2019-SC-000176-D. The motion for discretionary review was denied and the case was made final on December 13, 2019.

In the prior appeal, this Court held that the trial court did not err by granting summary judgment for Wallace. On April 14, 2017, while the appeal of the 2014 Civil Action was pending, Lawrence filed the current action against Wallace. Wallace moved for summary judgment, arguing that the claims were barred by the doctrine of *res judicata*. The trial court found that the doctrine of issue preclusion barred the action, as the same issues regarding the same debt had been actually litigated and decided in the prior action. The trial court subsequently denied the motion to alter, amend, or vacate the summary judgment. This appeal followed.

Lawrence argues that neither *res judicata* nor issue preclusion applies to the claims raised in the current action. The scope and elements of *res judicata* are set forth in *Yeoman v. Commonwealth, Health Policy Board*, 983 S.W.2d 459 (Ky. 1998) as follows:

> The rule of res judicata is an affirmative defense which operates to bar repetitious suits involving the same cause of action. The doctrine of res judicata is formed by two subparts: 1) claim preclusion and 2) issue preclusion. Claim preclusion bars a party from re-litigating a previously adjudicated cause of action and entirely bars a new lawsuit on the same cause of action. Issue 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. If the two suits concern the same controversy, then the

> previous suit is deemed to have adjudicated every matter which was or could have been brought in support of the cause of action.

Id. at 464-65 (cleaned up).

In the complaint in the current action, Lawrence asserts that, in 2016, Wallace defaulted on his guaranty obligations under the 2009 Settlement Agreement. The current action clearly arises from the same transactional nucleus as the 2014 Civil Action. The bank loans and guaranty raised in the current action are the same as those addressed in the prior action. As the trial court noted, the issues raised in the current action were actually litigated and decided on the merits in the 2014 Civil Action. Both Lawrence and the LLCs had the opportunity to fully litigate those issues in that action. Moreover, the trial court in the prior action found that Wallace had fully complied with his obligations under the 2009 Settlement Agreement. The trial court further noted that Wallace previously raised a contribution claim in the 2014 Civil Action. Given these findings, it would be impossible for Lawrence to establish that Wallace defaulted on the Settlement Agreement after entry of the summary judgment in the 2014 Civil Action.

Finally, Lawrence raises several other arguments against the application of *res judicata*. As found in the prior appeal, none of these arguments have merit. Wallace raised the defense of *res judicata* in this action, thus precluding a finding of waiver. Next, we find no basis to support Lawrence's

assertion that the Kentucky Limited Liability Company Act, KRS[3] 275.001 *et seq.*, permits successive claims based upon the same issues that were previously litigated in a prior action. And lastly, as noted above, *res judicata* precludes the re-litigation of claims or issues which were *or could have been brought* in support of the prior cause of action. *Yeoman*, 983 S.W.2d at 465. Thus, even if Lawrence did not expressly waive his claim for equitable contribution in the 2014 Civil Action, *res judicata* bars him from seeking to pursue that remedy now. Therefore, we conclude that the trial court properly granted summary judgment for Wallace based upon *res judicata* and issue preclusion.

Accordingly, we affirm the summary judgment entered by the Gallatin Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANTS:	BRIEF FOR APPELLEES:
B. Katy Lawrence Warsaw, Kentucky	Mark G. Arnzen Frank K. Tremper Covington, Kentucky

[3] Kentucky Revised Statute.