FILED
United States Court of Appeals
Tenth Circuit

AUG 8 1989

ROBERT L. HOECKER
Clerk

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

HOLD OIL CORPORATION,
a Florida corporation,

Plaintiff-Appellant,

vs.

ARKANSAS LOUISIANA GAS COMPANY
and ARKLA, INC., successor in
interest to Arkansas Louisiana
Gas Company, a Delaware
corporation,

Defendants-Appellees.

No. 89-7032
(D.C. No. 88-642-C)
(E.D. Okla.)

ORDER AND JUDGMENT*

Before LOGAN, SEYMOUR and BALDOCK, Circuit Judges.**

In Hold Oil Corp. v. Arkansas Louisiana Gas Co., No. 86-C-532-E (N.D. Okla. filed May 30, 1986), Hold Oil sued Arkla, successor in interest to Arkansas Louisiana Gas, for (1) breach of a gas purchase contract (Count I), (2) malicious, willful and tortious breach of a gas purchase contract (Count II), (3) breach

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

** After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause therefore is ordered submitted without oral argument.

of a settlement agreement (Count III), (4) breach of an agreement to transport gas (Count IV), (5) intentional and tortious breach of an agreement to transport gas (Count V), and (6) malicious, willful and wanton breach of an agreement to transport gas (Count VI). On November 2, 1987, Hold Oil, by amendment to its complaint, dismissed Counts IV-VI without prejudice. Thereafter, on April 22, 1988, the parties executed a settlement agreement. The statement of purpose contained in the agreement provided in pertinent part:

> WHEREAS, after balancing their hopes of prevailing in, against the possibility of losing, the aforesaid disputes and in order to resolve other controversies between the parties and to avoid further litigation, the parties have freely and voluntarily agreed to settle and compromise all aspects of their disputes upon the terms and conditions hereinafter set forth:

Rec. vol. I doc. 4, ex. F at 5 (emphasis added). Paragraph seven of the agreement further provided:

> In consideration of the premises, Seller and Buyer do hereby fully, finally and forever release, acquit and discharge each other, its successors, assigns, subsidiaries or affiliated corporations, from any and all liability and from any and all demands and causes of action of whatever kind or nature, which were asserted by Buyer or Seller in the Hold Proceeding.

Id. at 9 (emphasis added).

Despite the terms of the settlement agreement, Hold Oil then instituted this diversity action in the Eastern District of Oklahoma on October 31, 1988, again seeking damages against Arkla in three counts under the exact same legal theories asserted in Count IV-VI of its complaint in the prior litigation. Rec. vol. I doc. 1. The district court promptly awarded Arkla summary judgment on the basis of res judicata. Id. doc. 5. Hold Oil now appeals pursuant to 28 U.S.C. § 1291 asserting (1) its present claims are not identical to its former claims because the damages sought for the respective claims differ and (2) the settlement agreement released only the claims remaining after the amendment dismissing Counts IV-VI in the original complaint, or in the alternative, the settlement agreement is ambiguous and requires interpretation by a jury.

This court considers the grant of a summary judgment motion under the same standard employed by the district court. Gray v. Phillips Petroleum Co., 858 F.2d 610, 613 (10th Cir. 1988). Because a ruling on the motion involves purely legal determinations, our review is de novo. Goichman v. City of Aspen, 859 F.2d 1466, 1467 (10th Cir. 1988). Applying the summary judgment standard recently set forth in Missouri Pac. R.R. Co. v. Kansas Gas & Elec. Co., 862 F.2d 796, 798 (10th Cir. 1988), we reject Hold Oil's contentions and affirm the judgment of the district court.

Federal preclusion law applies in successive diversity actions. Petromanagement Corp. v. Acme-Thomas Joint Venture, 835 F.2d 1329, 1332-34 (10th Cir. 1988). The essential elements of res judicata are (1) a final judgment on the merits in a prior action, (2) an identity of the cause of action in the earlier and later suit and (3) an identity of parties or their privies in the two suits. Lee v. City of Peoria, 685 F.2d 196, 199 (7th Cir. 1982). "Where a second suit between the same parties or their privies is on the same cause of action, the final judgment in the prior action is conclusive as to all matters which were actually litigated as well as those which could have been litigated." Jarrett v. Gramling, 841 F.2d 354, 358 (10th Cir. 1988). Moreover, res judicata applies to final settlements and compromises between the parties because such agreements resolve the disputed claims. See Brooks v. Barbour Energy Corp., 804 F.2d 1144, 1146 (10th Cir. 1986); Torres v. Rebarchak, 814 F.2d 1219, 1223 (7th Cir. 1987).

In this instance, there can be no doubt that Hold Oil is barred from pursuing this action. The language of the settlement agreement is clear, unambiguous and construed as a matter of law. Under the terms of the settlement, Arkla was released from all claims which were asserted in the prior litigation. The settlement agreement does not distinguish between claims asserted in the initial complaint and the amended complaint, but rather expresses the parties intent to resolve all controversies between them and avoid further litigation. Hold Oil's attempt to differentiate its claims by altering the damages sought must fail because it easily could have sought such damages in its prior action. That it failed to do so is no excuse.

The judgment is AFFIRMED.

Entered for the Court

Bobby R. Baldock
Circuit Judge