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COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
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THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

ERIC WALLACE,

Defendant/Appellant/Cross-Appellee,

vs.

DAVID J. FOGELSON, and CORINNE FOGELSON,
Husband and wife,

Plaintiffs/Appellees/Cross-Appellants,

Court of Appeals Case No.:
35086

District Court Case No.:
D-1329-CV-2010-02239

And Consolidated cases

ERIC WALLACE'S REPLY TO FOGELSONS'S ANSWER BRIEF TO WALLACE'S BRIEF-IN-CHIEF

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Appellant Eric Wallace replies to Plaintiffs-Appellees David J. Fogelson and Corrine Fogelson's Answer Brief to Wallace's Brief-In-Chief pursuant to Rule 12-213(C) of the Rules of Appellate Procedure as follows:

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I. **SUMMARY OF REPLY**:

Eric Wallace incorporates the authorities and arguments offered by Mark Bozzone's Brief-In-Chief and Reply as though fully set forth herein, and adds the following points in Reply to Fogelson's Response:

It is disingenuous to assert the conduct underlying the Fogelsons First and Second Lawsuits was not the same. It is exactly the same conduct as exemplified by the respective Judgments; the compensatory damages ($165,111.00) alleged in both cases are identical. See Wallace Brief-in Chief, sections B(iii) and (iv).

As a practical matter, the Fogelsons made a tactical decision to take a judgment, in this case a default judgment, against Wallen Development, Inc. or Developments by Wallen LLP, exclusively, with full knowledge the companies may be insolvent. There is no viable argument that the Fogelsons could not have stated claims against Eric Wallace and Mark Bozzone in the First Lawsuit if they chose to. That is self-evident because the conduct attributed to them is the same conduct alleged in both suits. (See Judgments). Simply put, the Fogelsons were content taking a judgment against the entities alone.

The Fogelsons do not offer authority restricting their ability to have filed a single action against the entities *and* principals. They have that right. In fact, they have that obligation under both the Uniform Arbitration Act (44-7A-1 NMSA, et seq.) and Rules of Civil Procedure 1-018 through 1-020 NMRA. Fogelsons could easily have named all the alleged tortfeasors in a single action. Pursuant to the Uniform Arbitration Act, the Fogelsons should have properly filed a Complaint setting out their claim to relief, and moved to Compel Arbitration. It was improper to file a Complaint to Compel Arbitration, then proceed to Judgment on a Complaint never served. (See 44-7A-6 NMSA: "an application for judicial relief under the Uniform Arbitration Act must be

made by motion to the court and heard in the manner provided by law or rule of court for making and hearing motions").

Including the principals would have effectively consolidated these parallel claims, avoided wasting limited judicial resources, and avoided risk of fragmented, duplicative, and inconsistent judgments. Upon filing, the Fogelsons could have moved to compel arbitration in accordance with the Act, whether it be against the entities alone or all parties. And, by including the principals, put them on notice of the allegations of personal liability, thus compelling them to appear, whether it be to participate or move to bifurcate/stay.

At some point after taking the default judgment against the Wallen entities (presumably when Fogelsons' counsel began to feel that collecting the entire Judgment could be difficult), Fogelsons began exploring other collection options.

At that juncture, the Fogelsons could have (i.e., should have) moved to set aside their default judgment and amended the Complaint to include the entities' principals[1]. Despite that option, Fogelsons made another tactical decision to move forward with a second parallel lawsuit against the entities' principals. In other words, they took a chance and rolled the dice hoping to get a duplicate award which might be easier to collect. Despite having partially collected on the First Judgment, Fogelsons were ultimately awarded a dual/duplicative judgment based on the identical conduct, albeit under inconsistent principals of agency. Eric Wallace maintains this lawsuit was barred and the Judgment, now the second Judgment, amounted to an impermissible double-recovery.

Fogelsons argue the entities' principals (Eric Wallace and Mark Bozzone) were not in privity with the entities, and that their double-recovery is somehow legitimized or permitted because the First Judgment was (1) only partially collected and/or (2) was consistent with the Purchase

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[1] As the Court will recall, on April 13, 2012, Eric Wallace moved to set aside the $363,539.00 Judgment entered against Defendants Wallen Development and Developments by Wallen in case D-1329-CV-2009-01472 as a part of his Motion to Dismiss. His motion was denied.

Agreement's arbitration clause or the New Mexico Uniform Arbitration Act. None of these arguments are tenable. The authority cited by the Fogelsons affirms Eric Wallace and Mark Bozzone (the Wallen principals) were in privity with the companies such that the doctrines of res judicata and collateral estoppel apply. Likewise, there is no authority within the contract or Act authorizing a secondary parallel action and duplicate judgment, or precluding adjudication in a single action. Such suits are specifically prohibited. Both the action and award run afoul of established authorities and are properly dismissed.

a. Fogelsons' Response is premised on an erroneous assertion that they could not have named Eric Wallace and Mark Bozzone in their First Lawsuit.

The Fogelsons' Response is premised on the erroneous assertion that Eric Wallace and Mark Bozzone could not be named in/joined in the Fogelsons First Lawsuit. (See Response, Section III(A), pg. 11). That statement, albeit without support, is repeated throughout the Response. It is an incorrect statement of law as evidenced by the Fogelsons inability to provide any legal support or authority for that contention. All controlling authority holds contrary. See Rules 1-018 to 1-020 NMRA; Uniform Arbitration Act; *Campos v. Homes by Joe Boyden, LLC*, 140 N.M. 122, 140 P.3d 543 (N.M. App. 2006).

The Campos case is seemingly dispositive of this case as it affirms that the Fogelson's could have named Eric Wallace and/or Mark Bozzone in the First Lawsuit. Thus, obviating the need for this Second [parallel] Lawsuit and the duel judgment/award.

Campos is based on similar facts: Ray and Rosario Campos (among others) purchased residential lots subdivided by Defendant Homes by Joy Boyden. Prudential Southwest was the real estate broker. Plaintiffs sued Defendants in tort and contract (see para. 2) after their homes were constructed and upon discovering that an undeveloped area bordering their lots was going to be developed with residences contrary to Prudential's representation that the area was city land that

would remain open. Boyden moved to dismiss or compel arbitration. The district court ruled that Plaintiffs' claims did not fall within the scope of the arbitration provision and denied the motion. The ruling was affirmed on appeal:

> "Plaintiffs' claims are based an alleged misrepresentation as to the nature of adjoining land made in anticipation of the sale of real estate to Plaintiffs. Plaintiffs are not suing on a written warranty. Plaintiffs are not suing because of anything Defendants did as the builder, nor are they suing because of a defect in the real property on which the homes are built. The unmistakable tenor of the contract documents is that arbitration was required of claims for defects in need of repair or replacement. The Boyden Defendants have not presented evidence that the parties intended the arbitration provision to cover claims for misrepresentation of the type claimed by Plaintiffs in their complaint. Under the facts of this case, the rule calling for a broad interpretation of arbitration provisions cannot be applied to favor the Boyden Defendants' argument. The most reasonable construction of the contract documents is that the arbitration provision was intended to apply to the resolution of home construction-related problems and not to representations made to prospective purchasers in the context and under the circumstances of this case. We therefore hold that the district court was correct in reading the arbitration provision as it did." (Id., para. 13)

The procedural composition and holding in Campos is consistent with Rules 1-018 (Joinder of Claims and Remedies), 1-019 (Joinder of Persons Needed for Just Adjudication) and 1-020 (Permissive Joinder of Parties) NMRA, and the Uniform Arbitration Act (see below). The fatal flaw in the Fogelsons' argument is that perceived limitations of an arbitration clause limit the scope of litigation. They do not. A single lawsuit should properly have been filed whereupon the Fogelsons could have moved to compel arbitration. Campos exemplifies that the Fogelsons' two lawsuits could have been consolidated into a single action. It is worthwhile to note the Court in the Fogelsons First Lawsuit was never presented with the issue of whether the Fogelsons had a right to compel arbitration against the entities under a Complaint framed in Contract, Fraud and Unfair Practices, as these claims were not a part of the Complaint to Compel Arbitration.

b. <u>The Uniform Arbitration Act (44-7A-1 NMSA, et seq.) and Rules of Civil Procedure (Rules 1-018 through 1-020 NMRA) obligated the Fogelsons to file a single action against the Wallen entities and Eric Wallace/Mark Bozzone, whereupon the Court should property have determined whether Arbitration was appropriate.</u>

The Fogelsons' argument relating to arbitration is internally inconsistent and contrary to the Uniform Arbitration Act (44-7A-1 NMSA, et seq.) and Rules of Procedure for the District Courts (Rules 1-018 through 1-020 NMRA). There seems no dispute that the arbitration clause which was the subject of the Fogelsons' First Lawsuit is governed by the New Mexico Uniform Arbitration Act. See Agreement, para. 6: "The arbitration will be conducted in accordance with the provisions of the New Mexico Uniform Arbitration Act." The scope of issues subject to arbitration is set forth in the May 25, 2008 Purchase Agreement as follows:

> In the event that a dispute arises between Seller[2] and Purchasers ***in any way relating to or arising from the construction, including quality of construction of the Home either prior to or after closing or the terms and provisions of this Agreement***, Purchasers and Seller agree to resolve the dispute exclusively though binding arbitration. ... *This provision is binding upon Seller and Purchasers and their respective successors and assigns.* (Id., para. 6)

Certainly, arbitration provisions are given broad interpretation. (*K.L. House Constr. Co. v. City of Albuquerque*, 91 N.M. 492, 576 P.2d 752 (N.M. 1978). However, the interpretation is bound by principals of contract interpretation and the Court has discretion to determine whether the gravamen of an action is subject to contractual arbitration or based in tort such that the claim falls outside the purview of an arbitration provision. (See *Campos*)

As noted above, the Fogelson's first argument (see Response, pg's 11 and 12) is that they could not name Eric Wallace in the First Lawsuit because he wasn't specifically named in the arbitration clause. No legal support is proffered to support that contention, and *Campos* demonstrates they could have. In addition to *Campos*, the Uniform Arbitration Act provides that the Fogelsons could have filed a single action against the entities and principals (44-7A-6 NMSA) then moved to compel arbitration (44-7A-8 NMSA; also see Rules 1-018 to 1-020 NMRA). The

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[2] Defined as Wallen Development, Inc. or Developments by Wallen LLP. See Purchase Agreement: "Wallen Development Inc. or Developments by Wallen LLP, whose address is 1005 21st Street SE, Rio Rancho, New Mexico 87124 ("Seller")"

Court has discretion to send some, or all, of the matter to arbitration; matters not subject to arbitration are properly reserved for the Court. (See 44-7A-7(d) NMSA; *Campos v. Homes by Joe Boyden, LLC*, 140 N.M. 122, 140 P.3d 543 (N.M. App. 2006); *Shaw v. Kuhnel & Associates*, 102 N.M. 607, 698 P.2d 880 (N.M. 1985), decided under former statutes).

The Fogelson's Complaint to Compel Arbitration (exhibit A to Request for Judicial Notice) is framed in a single cause of action for breach of contract. In this case, it doesn't appear that Judge Eichwald was presented with a Complaint asserting breach of contract, fraud and violation of the trade practices act as asserted by Fogelsons: "[Fogelsons] filed a complaint in arbitration against Wallen … for breach of contract, fraud and unfair practices." (Response, page 1). No such Complaint is part of the record in either Fogelson's First or Second Lawsuit, although the Arbitration Judgment clearly reflects the causes alleged. One wonders whether an amended complaint was presented to the arbitrator and not served, or whether the Arbitration Judgment simply exceeds the claims outlined in the Complaint. These, of course, are issues not before this Court.

Eric Wallace points out that the Judgment entered in the Fogelsons' First Lawsuit may likely be deemed to exceed the scope of arbitration by including tort damages (i.e., fraud[3]) because these claims do not "arise from the construction." (See *Campos*, supra).

Interestingly, the Fogelsons have taken inconsistent positions about the inclusive nature of the arbitration clause. In effect, Fogelsons claim, on one hand, with no support, that they could not have named Eric Wallace and/or Mark Bozzone in the Fogelsons' First Lawsuit because they were

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[3] Arbitration Judgment, exhibit A to Judgment Confirming Arbitration Award: "***Defendants have committed fraud against Plaintiffs by intentionally receiving payments from Plaintiffs, refusing to complete construction and sale of the property described in the purchase agreement, refusing to return the monies paid by Plaintiffs, demanding payment of additional funds from Plaintiffs two weeks before going out of business, and converting the monies tendered by Plaintiffs for their benefit instead of returning the funds to Plaintiffs***."

not identified in the arbitration clause. Yet, at the same time, they overtly included causes of action and damage claims which appear outside the scope of their arbitration agreement. There is no way to reconcile Fogelsons' capricious interpretation and application of the contract except to realize the argument was conjured retrospectively in disregard to the Act and applicable Rules of Procedure.

c. <u>The Fogelsons' First Judgment found Eric Wallace acted within the scope of his corporate authority. As such, Eric Wallace was in privity and had a common interest in the companies he organized, funded, managed and oversaw, just like a corporation and its shareholders.</u>

Eric Wallace anticipated the Fogelsons' argument claiming the company and principals lacked privity. See Brief-in-Chief, page 13, et seq.: Fogelsons appear poised to argue against claim preclusion based on prong two: "*Identity of parties or privies in the two suits*".

Eric Wallace and cited extensive authority demonstrating the existence of privity between the entities and Eric Wallace (officer, shareholder, etc.) for purposes of establishing res judicata and collateral estopple. Eric Wallace agrees that "privity" is that relationship between two parties which is sufficiently close so as to bind them both to an initial determination, at which only one of them was present. (See *Rex, Inc. v. Manufactured Housing Committee of State of N.M., Manufactured Housing Div., 119 N.M. 500, 892 P.2d 947 (N.M. 1995).* It is having substantially the same interest. *Boyd Estate ex rel. Boyd v. U.S.* 2015-NMCA-018, 344 P.3d 1013, certiorari denied 345 P.3d 341.

Privity has been found in many circumstances: Stock holders are privies of a corporation, *Williams v. Pacific Royalty Co.*, 247 F.2d 672 (10th Cir. 1957); an insurer/insured are privies, *Mid-Century Ins. Co. v. Varos*, 96 N.M. 572, 632 P.2d 1210 (N.M. Ct. App. 1981), grantor/grantees are privies, *Myers v. Olson*, 100 N.M. 745, 676 P.2d 822 (N.M. 1984), principals/agents are privies, *State v. Mills*, 23 N.M. 549, 169 P. 1171 (N.M. 1917), etc.

The Fogelsons cite *DeFlon v. Sawyers*, 2006-NMSC-025, 137 P.3d 577, for the proposition that privity does not exist. The *DeFlon* case suggests the exact opposite finding.

In *DeFlon*, Diane DeFlon sued her former employer, Danka Corporation, in the U.S. District Court for sex discrimination and violation of the Equal Pay Act. She also alleged two state law claims for negligent retention and supervision and intentional infliction of emotional distress. All the counts were based primarily on the actions of Danka employees. The Federal case was dismissed on summary judgment.

DeFlon subsequently filed a state court action for intentional infliction of emotional distress, intentional interference with a contract, defamation, prima facie tort and civil conspiracy directly against the Danka employees. The trial court dismissed finding the doctrines of res judicata and collateral estoppel barred Plaintiff's claims. DeFlon appealed the dismissal of two claims: intentional interference with a contract and civil conspiracy. The Court of Appeals affirmed the dismissal.

The Supreme Court reinstated finding the Danka employees, who were allegedly acting outside the scope of their authority, were not in privity with Danka Corporation. The Court's rationale was essentially that the intentional interference with a contract claim could not have been asserted against the company because parties to a contract cannot bring an action for tortious interference with an existing contract against each other. (Id. Para. 6).

This case involves completely opposite facts. Fogelsons' First Lawsuit found the corporation liable for breach of contract, fraud and violation of the unfair trade practices act. That finding was based on the conduct allegedly committed by Eric Wallace and Mark Bozzone who, by implication, were acting within the scope of their corporate authority. Otherwise, the corporation would not have been liable for their actions. (See Wallace Brief-in-Chief, page 14-15) DeFlon

suggests that under these facts, in other words where a principal is acting within his/her authority, "privity" does exist. Applying DeFlon's findings, the Fogelsons' Second Lawsuit was barred.

d. Fogelsons acknowledge the dual awards rendered constitute a duplicate award but incorrectly assert the double-award is permissible because the First Judgment was only partially collectible.

Fogelsons acknowledge the duel compensatory damage awards of $165,111.00 rendered in the Fogelsons' First and Second Lawsuit are duplicative compensatory damage awards. (See Response, page 25 and 26). In a curious turn, they claim the awards do not constitute an impermissible double-recovery because the Fogelsons' have only been able to collect $40,000 of the award rendered in the Fogelsons' First Lawsuit. (Id., pg. 29). The argument, of course, disregards the fact they have already received $40,000 toward the First Judgment, have a valid and potentially collectible Judgment for the balance of the First Judgment ($463,891.73 deficiency), and maintain a separate valid Judgment (i.e., the subject Judgment) against Eric Wallace and Mark Bozzone compensating the same alleged pecuniary losses. Quite simply, the argument flouts a century of established legal principals in this State.

i. *Sanchez v. Clayton* does not sanction the Fogelsons' double-recovery.

The Fogelsons place a great deal of reliance on *Sanchez v. Clayton*, 1994-NMSC-064, 117 N.M. 761, 877 P.2d 567, (See Response, section D, pages 25-29) suggesting it sanctions their double-recovery. In Sanchez, Steve Sanchez and Donald Sandoval filed a Federal Civil Rights Action against Highlands University, then a subsequent civil action against Carl Clayton and Servicemaster West for civil conspiracy, tortious interference with employment contract and breach of contract. Sanchez and Sandoval attempted to join Clayton and Service Master to the Federal suit. Clayton and Service Master successfully resisted the joinder claiming they were not under color of state law such that there was no federal jurisdiction over them in the civil rights case. The Federal

action was resolved by settlement, whereupon a separate State court action was filed. The trial court dismissed the State Complaint based its finding the second suit sought double-recovery citing *Vaca v. Whitaker*, 86 N.M. 79, 519 P.2d 315 (N.M. Ct.App. 1974). The Supreme Court reversed with instructions allowing the civil suit to proceed if Sanchez/Sandoval can establish a cause of action for nominal or compensatory damages, and allowing additional punitive damages if such a showing was made.

Sanchez reaffirms that it is impermissible to recover duplicative damages: "we agree that a claim for the same damages against any other person is extinguished regardless of the theories upon which the respective claims for relief are based." (Id. 764). The Fogelsons acknowledge the totality of their compensatory damage claim is $165,111.00, of which at least $40,000 has been collected. That invalidates the Fogelsons Second Judgment, at least in part, as a matter of law, because the Second Judgment is for the same damages. Moreover, it also calls into question the $165,111.00 punitive damage award rendered in the Fogelsons First Lawsuit, which was rendered jointly and severally against Eric Wallace and Mark Bozzone. Sanchez states: "punitive damages against two or more defendants must be separately determined." (Id. Page 572).

Based on the *Sanchez*, the compensatory damage award in Fogelsons' Second Lawsuit impermissibly failed to credit Eric Wallace for the monies the Fogelsons' collected, and invalidates the punitive damage award.

II. ORAL ARGUMENT

Appellant Eric Wallace respectfully incorporates and renews his request for oral argument.

WHEREFORE, Appellant Eric Wallace respectfully submits that this lawsuit, the Fogelsons' Second Lawsuit, was barred under the doctrines of claim preclusion and issue preclusion and should properly have been summarily dismissed. The lawsuit constituted an impermissible claim premised solely on the damage claims previously awarded to the Fogelsons pursuant to the

Court's March 11, 2010 Judgment of $363,539.60. The September 3, 2015 Second Amended Judgment is in impermissible double-recovery for Fogelsons.

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AFFIDAVIT OF SERVICE

I, Robert Koeblitz, being duly sworn upon oath or affirmation, hereby declares under penalty of perjury that I Emailed the foregoing Reply to the following people or entities at the addresses indicated on this 29th day of August, 2016.

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