



Missouri Court of Appeals  
Southern District

Division One

JEFF A. GREGORY,	)	
	)	
Plaintiff-Appellant,	)	
	)	
vs.	)	No. SD31592
	)	
STATES RESOURCES CORP.,	)	<b>Opinion filed:</b>
	)	<b>February 17, 2012</b>
Defendant-Respondent.	)	

APPEAL FROM THE CIRCUIT COURT OF CEDAR COUNTY

Honorable James R. Bickel, Circuit Judge

**REVERSED AND REMANDED**

Jeff A. Gregory ("Plaintiff") appeals the judgment that dismissed with prejudice his claim against States Resources Corporation ("Defendant"). Plaintiff argues, among other things, that the trial court erred in finding Plaintiff's claim was barred by Rule 55.32(a) because Plaintiff had not asserted his claim as a counterclaim in a previous action between the parties ("the prior action").<sup>1</sup> We agree. Because no adjudication on the merits resulted from that previous action, the trial court misapplied the law in determining that Plaintiff's claim was barred by Rule

<sup>1</sup> Unless otherwise indicated, all Rules references are to Missouri Court Rules (2011).

55.32(a). As a result, we reverse the trial court's judgment and remand the matter for further proceedings.

## **Factual and Procedural Background**

### *The Prior Action*

In 2006, Plaintiff purchased a vehicle. His promissory note for the purchase price and a corresponding security interest in the vehicle were subsequently assigned to Defendant. After Plaintiff quit making payments on the note, Defendant repossessed the vehicle and sold it. The vehicle sold for less than the amount due on the note, so Defendant sued Plaintiff in the prior action to recover the deficiency. The prior action was disposed of prior to trial when the trial court granted summary judgment in favor of Defendant.

Plaintiff successfully appealed that grant of summary judgment in *States Res. Corp. v. Gregory*, 339 S.W.3d 591 (Mo. App. S.D. 2011) ("*Gregory I*"). Plaintiff's successful claim on appeal was that Defendant was not entitled to judgment as a matter of law because Defendant failed to prove that it provided sufficient notice of its intent to sell the vehicle as required by § 400.9-614.<sup>2</sup> *Id.* at 595. After we reversed the judgment and remanded the case, Plaintiff requested leave to amend his answer to include a counterclaim he averred he "first learned of during the summary judgment process." Before the trial court could rule on that request, Defendant voluntarily dismissed its suit.

### *The Present Action*

After Defendant voluntarily dismissed the prior action, Plaintiff filed his petition in the instant case, seeking, on behalf of himself and others similarly situated, statutory damages under § 400.9-625 (along with compensatory and punitive damages) based on Defendant's failure to

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<sup>2</sup> Unless otherwise indicated, all statutory references are to RSMo Cum. Supp. 2006.

provide sufficient notice of disposition of collateral as required by §§ 400.9-613 and 400.9-614.<sup>3</sup> Defendant responded by filing a motion to dismiss, or in the alternative, for summary judgment, with supporting suggestions that argued Plaintiff's claim "must be dismissed because it is a compulsory counter-claim that [Plaintiff] was required to bring in response to [Defendant's voluntarily dismissed petition in the prior action]."

Defendant allegedly attached to its alternative motion several exhibits consisting of, among other things, the following documents from the prior action: the petition, the answer, the request for leave to file counterclaims, the release of garnishment, and the voluntary dismissal.<sup>4</sup> After hearing argument on Defendant's motion, the trial court concluded "that Plaintiff's Count I<sup>5</sup>] (alleging that Defendant gave insufficient notice concerning the disposition of Plaintiff's collateral) should have been brought as [a] compulsory counter-claim in a previous lawsuit between these same two parties[,] and dismissed Plaintiff's petition with prejudice, citing Rule 55.32(a).<sup>6</sup> This appeal timely followed.

### **Standard of Review**

"When the parties introduce evidence beyond the pleadings, a motion to dismiss is converted to a motion for summary judgment." *Xavier v. Bumbarner & Hubbell*

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<sup>3</sup> In counts II and III, Plaintiff also sought, solely on his own behalf, a return of the money Defendant had obtained from him by means of a garnishment action based on the trial court's judgment in the prior action. Defendant's response stated Defendant had returned all of the funds it had successfully garnished from Plaintiff. In arguing the matter before the trial court, it appears (although no transcript has been filed) that Plaintiff acknowledged Defendant's return of the garnished funds and dismissed the counts (II and III) related to that claim. Thus, only Plaintiff's claim for statutory damages under § 400.9-625 is relevant to this appeal.

<sup>4</sup> Said exhibits were neither included in the record nor deposited with this court.

<sup>5</sup> Based upon Plaintiff's voluntary dismissal of counts II and III, the trial court "[did] not rule on Defendant's [m]otion as it relates to" those counts.

<sup>6</sup> Although the trial court's judgment is worded in a way that suggests it granted relief based on Defendant's motion to dismiss, it apparently relied on the pleadings in the prior action (materials beyond the face of the petition) in reaching its decision as those pleadings were purportedly attached to the motion. Defendant's position is that the trial court properly resolved the matter by relying on what occurred during the prior action. As a result, we will treat the matter as having been resolved by summary judgment. We note, however, that if nothing had been attached to the motion and it had been treated solely as a motion to dismiss, our review of the ruling would still be *de novo*. See *Lynch v. Lynch*, 260 S.W.3d 834, 836 (Mo. banc 2008) (the granting of a motion to dismiss is subject to *de novo* review).

*Anesthesiologists*, 923 S.W.2d 428, 430 (Mo. App. W.D. 1996). Our review of the grant of a motion for summary judgment is *de novo*. *Golden Valley Disposal, LLC, v. Jenkins Diesel Power, Inc.*, 183 S.W.3d 635, 639 (Mo. App. S.D. 2006). Furthermore, "[t]he appellate court must review the 'record in the light most favorable to the party against whom judgment was entered[.]'" and "[t]he non-moving party is accorded all reasonable inferences from the record." *Adamson v. Innovative Real Estate, Inc.*, 284 S.W.3d 721, 728 (Mo. App. S.D. 2009) (quoting *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo banc 1993)). "The key to summary judgment is the undisputed right to judgment as a matter of law, not simply the absence of a fact question." *Gregory I*, 339 S.W.3d at 595 (quoting *Zerebco v. Lolli Bros. Livestock Market*, 918 S.W.2d 931, 934 (Mo. App. W.D. 1996)). "Summary judgment is an extreme and drastic remedy and we exercise great caution in affirming it because the procedure cuts off the opposing party's day in court." *Gregory I*, 339 S.W.3d at 595.

### **Analysis**

Plaintiff presents two points on appeal. His first asserts the trial court misapplied the law in determining that his claim for damages was barred by Rule 55.32(a). His second claims Defendant "should have been estopped from raising the defense of claim preclusion" because Plaintiff was prevented from raising the claim only by Defendant's voluntary dismissal. Because we agree with Plaintiff's first point, and find it dispositive, we do not address his second claim.

Rule 55.32(a), entitled "Compulsory Counterclaims[.]" provides, with certain exceptions not applicable here, that

A pleading shall state as a counterclaim any claim that at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

"Failure to assert a compulsory counterclaim forever bars a claimant from having the claim heard." *Shinn v. Bank of Crocker*, 803 S.W.2d 621, 630 (Mo. App. S.D. 1990). In other words, "[t]he compulsory counterclaim rule is simply the codification of the principles of res judicata and collateral estoppel." *Joel Bianco Kawasaki Plus v. Meramec Valley Bank*, 81 S.W.3d 528, 532 (Mo. banc 2002). These doctrines prevent parties from asserting, in subsequent lawsuits, claims that either were or should have been asserted in prior lawsuits. See *Kesterson v. State Farm Fire & Cas. Co.*, 242 S.W.3d 712, 715 (Mo. banc 2008). But "[r]es judicata only applies after a final judgment has been rendered." *Spino v. Bhakta*, 174 S.W.3d 702, 707 (Mo. App. W.D. 2005).

A voluntary dismissal, under most circumstances, is not a final judgment on the merits, and so does not have preclusive effect. See, e.g., *O'Reilly v. City of Hazelwood*, 850 S.W.2d 96, 98 (Mo. banc 1993); *L.S.L. Sys., Inc. v. Monsanto Corp.*, 723 S.W.2d 939, 940-41 (Mo. App. E.D. 1987). See also *Comp & Soft, Inc. v. AT&T Corp.*, 252 S.W.3d 189, 195 (Mo. App. E.D. 2008) (holding that a "dismissal actually adjudicates nothing"). When an appeal is involved, a decision affirming the trial court's judgment has preclusive effect, but a reversal does not. See *In re Delany's Estate*, 258 S.W.2d 613, 616 (Mo. banc 1953).

The situations present in *Norton v. Bohart*, 16 S.W. 598 (Mo. 1891), and *Gardner v. Missouri State Highway Patrol Superintendent*, 901 S.W.2d 107 (Mo. App. W.D. 1995), are instructive. In *Norton*, the plaintiff received a judgment in her favor, from which the defendant appealed. 16 S.W. at 602. The appellate court reversed, and on remand, the plaintiff voluntarily dismissed her action. *Id.* When the plaintiff subsequently re-filed her claim, the defendant moved to dismiss it as barred by *res judicata*. *Id.* The trial court denied the motion, and our high court found no error "because there was no final judgment in the former suit adjudicating

the rights of the parties as presented in this action." *Id.*; accord *Interstate Realty & Inv. Co. of Louisiana, Inc. v. Bibb County, Georgia*, 293 F. 721, 722 (5th Cir. 1923).

In *Gardner*, a highway patrol officer challenged his termination from employment by filing a Petition for Review of Agency Decision in the circuit court which asserted that the colonel who approved his termination did not review all of the evidence before doing so. 901 S.W.2d at 111. The circuit court reversed the termination and sent the matter back to the Patrol, which again terminated the officer -- this time doing so only after the colonel reviewed all of the evidence presented in connection with the original termination. *Id.* On appellate review, the Western District held that the circuit court's reversal of the termination did not bar by *res judicata* a subsequent termination of that employee based on the same allegations. *Id.* at 118-19. In doing so, it specifically noted that "the effect of a remand is 'to preclude finality for that adjudication, and hence, the effect of *res judicata*.'" *Id.* at 119 (quoting *Petrie v. LeVan*, 799 S.W.2d 632, 636 (Mo. App. W.D. 1990)).

As in *Norton* and *Gardner*, there was never a final adjudication of the prior claim. On appeal, we held that the documents submitted in support of Defendant's motion for summary judgment did not, as a matter of law, demonstrate that Defendant was entitled to a judgment in its favor. *Gregory I*, 339 S.W.3d at 598. We therefore reversed the judgment and remanded the case for further proceedings. *Id.* Because of that reversal and remand, there was no final judgment for *res judicata* purposes. See *Gardner*, 901 S.W.2d at 119. Defendant's subsequent dismissal of the prior action was without condition or explanation and specifically stated that it was "without prejudice[.]" A dismissal without prejudice also has no preclusive effect. *O'Reilly*, 850 S.W.2d at 98 (citing Rule 67.03 and holding that a claim that the voluntarily-dismissed first suit constituted either *res judicata* or collateral estoppel had no merit).

The case of *Mahoney v. Doerhoff Surgical Serv., Inc.*, 807 S.W.2d 503 (Mo. banc 1991), cited by Defendant in support of its argument that our previous appeal did constitute a final adjudication on the merits, is distinguishable because it involved a significantly different procedural history. In *Mahoney*, the trial court dismissed without prejudice a medical malpractice action based on the plaintiffs' failure to file the health care affidavit required by § 538.225. 807 S.W.2d at 505. Instead of seeking leave to file the required affidavit, the plaintiffs appealed the dismissal on the ground that the statute was unconstitutional. *Id.* at 505-06. The defendants moved to dismiss the appeal for lack of a final judgment because the dismissal was without prejudice. *Id.* Our supreme court disagreed, holding that because the plaintiff elected not to plead further, the dismissal "amount[ed] to a determination that the plaintiff has no action. In such a case, the judgment of dismissal--albeit without prejudice--amounts to an adjudication on the merits and may be appealed." *Id.* at 506 (citation omitted).

Without the required health care affidavit, the action in *Mahoney* could not continue. In the instant case, the only thing that prevented the prior action from going forward was Defendant's voluntary dismissal without prejudice. That voluntary dismissal did not constitute a determination that Defendant "ha[d] no action." *Id.* Our intervening appellate opinion also did not prevent the action from continuing as we reversed the judgment and remanded the matter for further proceedings.

Defendant cites *Mahoney*, correctly, for the proposition that a dismissal without prejudice may become *res judicata* "of what the judgment actually decided." 807 S.W.2d at 506. The difference here is that Defendant's voluntary dismissal of the prior action decided nothing. *Comp & Soft, Inc.*, 252 S.W.3d at 195 ("The Supreme Court of Missouri instructs us that dismissal actually adjudicates nothing. It merely serves as a mechanism for the termination of

litigation rather than adjudication of the issues") (citation omitted). The *Mahoney* decision does not help Defendant.

Finally Defendant argues that Plaintiff is precluded from asserting his claim because he was tardy in seeking to assert it in the prior action. In so arguing, Defendant relies on cases that hold a trial court has discretion to deny a request to amend pleadings. These cases are also of no help to Defendant because Defendant dismissed its action before the trial court could rule on the request.

The prior action was not resolved by a final judgment on the merits. As a result, Plaintiff's claim was not barred by Rule 55.32(a), and the trial court misapplied the law in dismissing Plaintiff's action with prejudice. Point I is granted. Point II is denied as moot. The judgment of the trial court is reversed, and the case is remanded for further proceedings consistent with this opinion.

Don E. Burrell, Presiding Judge

Rahmeyer, J. - Concurs

Lynch, J. - Concurs

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Division I