THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2017-0102, Peter Terry & a. v. Chicago Title Insurance Company, the court on September 29, 2017, issued the following order:

Having considered the briefs and record submitted on appeal, we conclude that oral argument is unnecessary in this case. See Sup. Ct. R. 18(1). We affirm.

The plaintiffs, Elaine Terry and Cathleen Barnett, as representatives of a class, appeal the order of the Superior Court (Abramson, J.) denying their motion to enforce a consent decree and motion for contempt. They argue that the trial court erred in ruling that their motions were barred by res judicata.

The record shows that the plaintiffs were named as class representatives in an action filed in 2006. The complaint alleged that the defendant, Chicago Title Insurance Company, overcharged homeowners for title insurance when the owners refinanced their properties within three years of the date on which the defendant issued a prior policy. On June 6, 2007, the parties settled the case, and on November 15, 2007, the trial court issued a consent decree certifying the class for purposes of settlement. The court's decree required the defendant to make certain payments to the class and to file a new rate with the New Hampshire Insurance Department by March 14, 2008. The defendant paid as required but inadvertently neglected to file the new rate until October 27, 2009. On November 18, 2009, the parties agreed that, for the purpose of setting insurance rates, the filing would be deemed to have occurred on February 15, 2008, thirty days before it would have become effective. On July 22, 2015, more than five years later, the plaintiffs moved for a finding of contempt, based upon the defendant's delayed rate filing. On October 7, 2015, the trial court denied the motion, ruling that it was subject to the three-year statute of limitations in RSA 508:4. The plaintiffs did not appeal.

On May 26, 2016, the plaintiffs moved to enforce the consent decree, and on August 26, 2016, moved for a finding of contempt, again based upon the defendant's delayed rate filing. The trial court denied both motions, concluding that they were precluded by the October 7, 2015 order.

The applicability of res judicata is a question of law that we review de novo. Sleeper v. Hoban Family P'ship, 157 N.H. 530, 533 (2008). Res judicata precludes the litigation in a later case of matters actually decided, and matters that could have been litigated, in an earlier action between the same parties for the same cause of action. Id.

In their 2015 contempt motion, the plaintiffs alleged that the defendant violated the consent decree by failing to file the agreed rate language until October 27, 2009, and that this delay proximately caused them damages. They made the same allegations to support their 2016 motions. On appeal, they argue that the causes of action differed because their 2016 motions were based upon the theory that the defendant breached the parties' 2009 letter agreement, a theory that was not included in their 2015 motion. However, "[r]es judicata will bar a second action even though the plaintiff is prepared to present evidence or grounds or theories of the case not presented in the first action." Id. The defendant's alleged breach of the 2009 letter agreement could have been litigated with the 2015 contempt motion. Moreover, the plaintiffs concede in their brief that their theory based upon the 2009 letter agreement "boils do[w]n to being the same as . . . a theory based on violation of the consent decree."

The plaintiffs also argue that in 2015, their evidence of damages was only preliminary, whereas in 2016, their evidence was conclusive. Thus, they assert, in 2015, they were seeking an order requiring the defendant to produce evidence of damages, whereas in 2016, they were seeking a "final compensation order." However, we have noted that "[i]t is immaterial that in trying the first action [the plaintiffs were] not in possession of enough information about the damages, past or prospective." Finn v. Ballentine Partners, LLC, 169 N.H. 128, 148-49 (2016). Moreover, "res judicata precludes a second action based upon the same factual occurrence even if the plaintiff[s] plan[ ] to seek remedies [they] did not assert in the first action." Id. at 148. We conclude that the plaintiffs' 2016 motions constitute the same cause of action as their 2015 motion for purposes of res judicata. See Sleeper, 157 N.H. at 533.

We have considered the plaintiffs' remaining arguments, and have concluded that they do not warrant further discussion. See Vogel v. Vogel, 137 N.H. 321, 322 (1993).

Because we affirm the trial court's res judicata ruling, we need not address the arguments in the defendant's cross-appeal that the order should be affirmed on alternative grounds, or its request to correct claimed errors in the event of remand. Accordingly, the plaintiffs' motion to dismiss the defendant's cross appeal is moot.

Affirmed.

Dalianis, C.J., and Hicks, Lynn, and Hantz Marconi, JJ., concurred.

Eileen Fox,
Clerk