IN THE SUPREME COURT OF THE STATE OF NEVADA

JACK ARDEN FERGUSON, AN INDIVIDUAL; AND PETER B., INC., A NEVADA CORPORATION,
Appellants
vs.
LANDMARK HOMES AND DEVELOPMENT, INC., A NEVADA CORPORATION; SANTERRA, LLC, A NEVADA LIMITED LIABILITY COMPANY; JAMES BAWDEN, INDIVIDUALLY; JOHN SERPA, INDIVIDUALLY; SIERRA GATEWAY VENTURES, LLC, A NEVADA LIMITED LIABILITY COMPANY; RENO DEVELOPMENT, INC., A NEVADA CORPORATION; CONTE DEVELOPMENT, INC., A NEVADA CORPORATION; STEPHEN CONTE, AN INDIVIDUAL; SILVER STAR ASSOCIATES, INC., A NEVADA CORPORATION; STRAND ASSOCIATES, INC., A NEVADA CORPORATION; NICK PAVICH, AN INDIVIDUAL; PAVICH & ASSOCIATES, INC., A NEVADA CORPORATION; WILLIAM MILLER, AN INDIVIDUAL; CHRISTOPHER JUDSON, AN INDIVIDUAL; JAMES BILLINGSLEY, AN INDIVIDUAL; JOHN MACKAY, AN INDIVIDUAL; AND IAN POWER, AN INDIVIDUAL,
Respondents.

No. 49038

FILED

MAY 21 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

JACK ARDEN FERGUSON, AN INDIVIDUAL; AND PETER B., INC., A NEVADA CORPORATION,
Appellants,
vs.
LANDMARK HOMES AND

No. 49561

09-12615

DEVELOPMENT, INC., A NEVADA CORPORATION; SANTERRA, LLC, A NEVADA LIMITED LIABILITY COMPANY; JAMES BAWDEN, AN INDIVIDUAL; JOHN C. SERPA, AN INDIVIDUAL; LOU BORREGO, AN INDIVIDUAL; SIERRA GATEWAY VENTURES, LLC, A NEVADA LIMITED LIABILITY COMPANY; RENO DEVELOPMENT, LTD., A NEVADA CORPORATION; CONTE DEVELOPMENT, INC., A NEVADA CORPORATION; SILVER STAR ASSOCIATES, INC., A NEVADA CORPORATION; AND STRAND CAPITAL, INC., A NEVADA CORPORATION,
Respondents.

ORDER OF AFFIRMANCE

These are consolidated appeals from two district court orders granting motions to dismiss. Second Judicial District Court, Washoe County; Robert H. Perry, Judge. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

Appellants Jack Arden Ferguson and Peter B., Inc. (collectively Ferguson) filed for bankruptcy relief under Chapter 11 of Title 11 of the United States Code. On April 2, 2003, Ferguson entered into an agreement to sell real estate owned in Verdi, Nevada (the Verdi property) to respondent Landmark[1] for $11 million. On May 28, 2003, the United

[1]We refer to the following respondents collectively as Landmark: Landmark Homes and Development, Inc.; Santerra, LLC; James Bawden; Lou Borrego; and John Serpa.

States Bankruptcy Court for the District of Nevada (the Bankruptcy Court) entered an order approving the sale (the Sale Order), wherein it stated that Landmark was a "good faith purchaser in accordance with 11 U.S.C. § 363(m)." The Bankruptcy Court dismissed Ferguson's bankruptcy on June 10, 2003.

On January 20, 2004, Ferguson initiated an adversary proceeding in Bankruptcy Court. Ferguson alleged that the defendants, who were essentially the same as the respondents in the instant appeal, entered into a "bid-rigging" scheme to buy the Verdi property for less than it should have sold for at the bankruptcy auction, and hid the agreement from the Bankruptcy Court. The defendants moved for dismissal or, in the alternative, for the Bankruptcy Court to exercise its discretion to abstain. Ferguson opposed the motion, citing 11 U.S.C. § 363(n) as giving the bankruptcy court jurisdiction to retain and rule on the case. Ferguson then filed a motion to amend his complaint so as to include rescission based upon his prior pleaded legal theories and avoidance of the sale of the Verdi property based upon 11 U.S.C. § 363(n).

On June 14, 2004, the Bankruptcy Court issued its order granting the motion to abstain. Ferguson moved for reconsideration, arguing in part that if the Bankruptcy Court abstained, any new action he would be forced to file in another court would be time-barred by the one-year statute of limitations imposed by FRCP 60(b). On August 5, 2004, the Bankruptcy Court denied Ferguson's motion for reconsideration.

On October 24, 2005, Ferguson filed his first complaint for damages in the Second Judicial District Court of Nevada (the 2005 Case). The claims included in Ferguson's complaint were largely the same as those included in the adversary complaint, including the claims rooted in

11 U.S.C. § 363(n). Respondent Sierra Gateway[2] moved to dismiss the 2005 Case, arguing that the 11 U.S.C. § 363(n) claims were time-barred by the one-year statute of limitations and that the remainder of Ferguson's claims were barred by claim preclusion based on the Sale Order. On January 31, 2007, the district court granted the motion to dismiss the 2005 Case for failure to state a claim upon which relief may be granted. The district court found that Ferguson's 11 U.S.C. § 363(n) claims were barred by the FRCP 60 one-year statute of limitations and that Ferguson's state law claims were barred pursuant to claim preclusion based on the Sale Order.

On January 11, 2006, Ferguson filed a second complaint for damages in the Second Judicial District Court of Nevada (the 2006 Case). In the complaint, Ferguson named essentially the same defendants as those in the 2005 Case. The facts and the state law-based claims largely mirrored those in the adversary complaint and the 2005 Case, with the exception of the 11 U.S.C. § 363(n) claims, which Ferguson omitted. Sierra Gateway moved to dismiss the 2006 Case on the basis of claim preclusion resulting from the Sale Order. On May 9, 2007, the district court dismissed the 2006 Case with prejudice for failure to state a claim upon which relief may be granted, noting that the claims were barred by claim preclusion based on the order from the 2005 Case.

Ferguson appeals both district court decisions. Relying on In re American Paper Mills of Vermont, Inc., 322 B.R. 84 (Bankr. D. Vt.

---

[2]We refer to the following respondents collectively as Sierra Gateway: Sierra Gateway Ventures, LLC; Reno Development, Inc.; Conte Development, Inc.; Silver Star Associates, Inc.; and Strand Capital, Inc.

2004), Ferguson contends that the district court erred in the 2005 Case when dismissing his 11 U.S.C. § 363(n) claims as untimely because the one-year statute of limitations applies only to 11 U.S.C. § 363(n) actions looking to avoid or rescind bankruptcy orders approving sales of assets, and not to 11 U.S.C. § 363(n) claims seeking damages.[3] Ferguson further argues that claim preclusion does not apply to his 2005 Case because the district court improperly relied on In re Clinton Street Food Corp., 254 B.R. 523 (Bankr. S.D.N.Y. 2000). Finally, Ferguson argues that claim preclusion does not bar his 2006 Case claims. Because we conclude that the district court did not abuse its discretion in dismissing Ferguson's cases for failure to state a claim upon which relief may be granted, we affirm the judgments of the district court. The parties are familiar with the facts, and we do not recount them except as pertinent to our disposition.

Standard of review

On appeal, an order granting a motion to dismiss for failure to state a claim faces a rigorous standard of review because this court must construe the pleadings liberally and accept factual allegations in the complaint as true. Blackjack Bonding v. Las Vegas Mun. Ct., 116 Nev.

---

[3]Ferguson also argues that the district court erred in dismissing his 11 U.S.C. § 363(n) claims as untimely for the alternative reasons that (1) even if the one-year limitation applies, his state court actions relate back to his timely filed adversary action; (2) the doctrine of equitable tolling should apply; and (3) 11 U.S.C. § 108(c) extends the limit by two years. We conclude that not only did Ferguson waive these arguments by failing to raise them below, Barrett v. Baird, 111 Nev. 1496, 1500, 908 P.2d 689, 693 (1995), overruled on other grounds by Lioce v. Cohen, 124 Nev. ____, ____, 174 P.3d 970, 980 (2008), but they are also without merit.

1213, 1217, 14 P.3d 1275, 1278 (2000). This court must also draw all inferences in favor of the nonmoving party. Id. A complaint should be dismissed only if it appears beyond a doubt that the plaintiff could not prove a set of facts which, if true, would entitle it to relief. Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. ____, ____, 181 P.3d 670, 672 (2008) (citing Blackjack Bonding, 116 Nev. at 1217, 14 P.3d at 1278). Further, when a statute of limitations defense "appears from the complaint itself, a motion to dismiss is proper." Kellar v. Snowden, 87 Nev. 488, 491, 489 P.2d 90, 92 (1971). The burden falls to the plaintiff to prove its claims are not time-barred. Id.

The 2005 Case

The claim preclusive effect of a federal judgment is determined by federal law. See Blonder-Tongue v. University Foundation, 402 U.S. 313, 324 n.12 (1971); Clark v. Columbia/HCA Info. Servs., 117 Nev. 468, 481, 25 P.3d 215, 224 (2001). Trustee's rights and powers of sale over the assets of a bankrupt estate are defined by 11 U.S.C. § 363. A sale order entered pursuant to 11 U.S.C. § 363 is a final order for the purposes of claim preclusion. See In re Clinton Street Food Corp., 254 B.R. 523, 530 (Bankr. S.D.N.Y. 2000). "This rule promotes the important public policy favoring the finality of orders transferring ownership of bankruptcy estate assets." Id. at 530-31. Once a sale order is entered, and the time for appeal has passed, claim preclusion prohibits the parties to the order from directly or collaterally attacking the order via a new lawsuit. See Matter of Met-L-Wood Corp., 861 F.2d 1012, 1016 (7th Cir. 1988). Further, because an 11 U.S.C. § 363 proceeding is in rem, it is final as to the entire world. Clinton St., 254 B.R. at 531 (citing Met-L Wood, 861 F.2d at 1017). Section 363(n) provides an exception to the rule of finality for claim

preclusion purposes. In re Int'l Nutronics, Inc., 28 F.3d 965, 970 (9th Cir. 1994).

Section 363(n) provides that:

> The trustee may avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or may recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys' fees, or expenses incurred in avoiding such sale or recovering such amount. In addition to any recovery under the preceding sentence, the court may grant judgment for punitive damages in favor of the estate and against any such party that entered into such an agreement in willful disregard of this subsection.

Thus, the trustee has the power to seek avoidance of a sale or damages if the sale was infected by bid-rigging or fraud. Nutronics, 28 F.3d at 968. Section 363(n) actions are subject to FRCP 60(b), which imposes a one-year limitation on the filing for relief based on "fraud . . . misrepresentation, or other misconduct of an adverse party." Id. at 969 (quoting FRCP 60(b)). The statute of limitations begins to run from the date the bankruptcy court issues the sale order. See id. at 969.

Despite Ferguson's arguments to the contrary, we conclude that the district court in the 2005 Case did not err when it found that Ferguson's 11 U.S.C. § 363(n) claims were barred by the one-year statute of limitations. As pleaded, Ferguson demanded rescission in his 2005 Case complaint, along with damages. We note that the one-year statute of limitations began running on May 28, 2003, when the Bankruptcy Court issued the Sale Order. Therefore, by waiting until October 24, 2005, to assert his 11 U.S.C. § 363(n) claims in state court, Ferguson allowed the

one-year statute of limitations to run. We conclude that these claims are now time-barred.

Further, we conclude that the district court did not err by deciding that Ferguson's state law-based claims were barred by claim preclusion based on the Sale Order. Ferguson's state law claims are all based on the alleged bid-rigging agreements between the respondents. As such, we conclude that Ferguson's state law claims are merely attempts to collaterally attack the Bankruptcy Court's Sale Order and to avoid the one-year statute of limitations. Because attempts to set aside sale orders may be done either pursuant to 11 U.S.C. § 363 or pursuant to FRCP 60(b), In re CHC Industries, Inc., 389 B.R. 767, 775 (Bankr. M.D. Fla. 2007),[4] we conclude that the district court properly dismissed the state law-based claims in the 2005 Case on the basis of claim preclusion.[5]

The 2006 Case

Pursuant to the doctrine of claim preclusion, a "valid and final judgment on a claim precludes a second action on that claim or any part of it." University of Nevada v. Tarkanian, 110 Nev. 581, 599, 879 P.2d 1180, 1191 (1994). Claim preclusion bars all grounds for recovery that either were or could have been asserted. Five Star Capital Corp. v. Ruby, 124 Nev. ____, ____, 194 P.3d 709, 713 (2008). A three-part test is used to

---

[4]We note that we have considered Ferguson's argument that CHC Industries is not good law and find it without merit.

[5]Furthermore, Ferguson's attempt to distinguish his case from In re Clinton Street Food Corp., 254 B.R. 523, 530-32 (Bankr. S.D.N.Y. 2000), fails because the district court applied the law as noted by Clinton, not its reasoning.

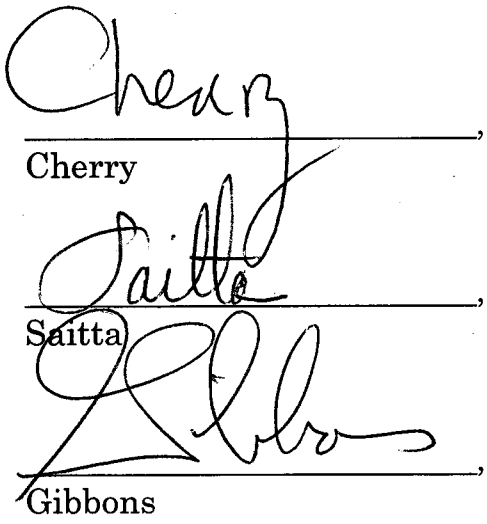
determine whether claim preclusion applies: "(1) the parties or their privies are the same, (2) the final judgment is valid, and (3) the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case." Id. (footnote omitted).

We conclude that the district court properly dismissed the 2006 Case as barred by claim preclusion based on the 2005 Case. As to the first factor, Ferguson, Landmark, and Sierra Gateway were all parties in both cases. With regard to the second factor, the order dismissing the 2005 Case for failure to state a claim pursuant to NRCP 12(b)(5) was a valid, final order because it was decided on the merits. Zalk-Josephs Co. v. Wells Cargo, Inc., 81 Nev. 163, 170, 400 P.2d 621, 624 (1965). Finally, the issues in the 2006 Case were based on those raised in the 2005 Case. While Ferguson did not assert his 11 U.S.C. § 363(n) claims in the 2006 Case, he brought essentially the same state law-based claims on the same issue—damages arising from the alleged bid-rigging. Compare Dermody v. City of Reno, 113 Nev. 207, 214, 931 P.2d 1354, 1359 (1997) (noting that claim preclusion applied in part because the issues were identical since both cases raised the same claim of inverse condemnation on the same issue of damages), with Pulley v. Preferred Risk Mut. Ins. Co., 111 Nev. 856, 858-59, 897 P.2d 1101, 1103 (1995) (noting that issues were not identical, in part, because one case involved a contract action and the other involved a tort action).

Accordingly, because we conclude that Ferguson's 11 U.S.C. § 363(n) claims are time-barred pursuant to the applicable one-year statute

of limitations and its state law claims are barred pursuant to claim preclusion in light of the Sale Order and the 2005 Case, we

ORDER the judgments of the district court AFFIRMED.



_____, J.
Cherry

_____, J.
Saitta

_____, J.
Gibbons

cc: Hon. Connie J. Steinheimer, District Judge
Hon. Robert H. Perry, District Judge
Laurie A. Yott, Settlement Judge
Hardy Law Group
McDonald Carano Wilson LLP/Reno
Robison Belaustegui Sharp & Low
Washoe District Court Clerk