

SUPREME COURT OF NEW HAMPSHIRE

Gray v. Kelly

161 N.H. 160 (2010) · Decided November 24, 2010

SUMMARY

The New Hampshire Supreme Court held that res judicata barred Jeffrey Gray’s claims for replevin and damages concerning personal property left at Teri Kelly’s residence. The court concluded that a domestic violence order requiring Gray to retrieve his belongings involved the same cause of action and was effective when rendered, despite the later expiration of the appeal period. The court affirmed dismissal as to Kelly but vacated and remanded dismissal as to Lisa Sorenson because the lower court had not addressed whether she was in privity with Kelly.

CASE DETAILS

COURT	Supreme Court of New Hampshire
WRITING FOR THE COURT	Duggan, J.; Dalianis, J.; Conboy, J.
JURISDICTION	New Hampshire
DECIDED	November 24, 2010
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Gray appealed the superior court's dismissal of his replevin and damages action based on res judicata and collateral estoppel. The Supreme Court affirmed the dismissal as to Kelly, vacated the dismissal as to Sorenson, and remanded for a determination of privity.
STANDARD OF REVIEW	The court reviews a ruling on a motion to dismiss by considering whether the allegations are reasonably susceptible of a construction permitting recovery. Because the dismissal rested on res judicata as a matter of law, review was de novo; the applicability of res judicata and collateral estoppel were affirmative defenses on which Kelly bore the burden of proof.
PRECEDENTIAL VALUE	Published New Hampshire Supreme Court opinion; precedential
PARTIES	Jeffrey Gray v. Teri E. Kelly, Lisa Sorenson

TOPICS

- res judicata
- family law procedure
- remedies
- statutory interpretation
- appellate procedure

PRACTICE AREAS

civil procedure

family law

remedies

statutory interpretation

appellate procedure

QUESTIONS PRESENTED

1. Whether the February 2006 domestic violence order had res judicata effect on Gray's later replevin and damages action.
2. Whether a default judgment can support claim preclusion even if it cannot establish collateral estoppel based on issues actually litigated.
3. Whether the trial court had authority to reconsider and reverse its earlier denial of Kelly's motion to dismiss.
4. Whether the February 2006 order became effective immediately when rendered or only after expiration of the appeal period.
5. Whether res judicata barred Gray's claims against Sorenson despite Sorenson's absence from the prior domestic violence proceeding.

HOLDINGS

1. Res judicata barred Gray from relitigating his property claim against Kelly because the domestic violence proceeding and the later action involved the same cause of action, the parties were the same, and the prior proceeding ended in a final judgment on the merits.
2. The court did not decide whether a default judgment can constitute collateral estoppel because, even assuming it cannot, the default judgment could constitute res judicata.
3. The trial court had authority to revisit and reverse its earlier ruling on the motion to dismiss after becoming aware that the earlier ruling might be incorrect.
4. The order became effective when rendered on February 7, 2006, and the thirty-day period for Gray to retrieve his property ran from that date. The order became final thirty-one days later, on March 10, 2006, because Gray did not appeal or obtain a stay.
5. The dismissal of Gray's claims against Sorenson was vacated and remanded because the record did not establish whether Sorenson was in privity with a party to the prior domestic violence proceeding.

KEY QUOTATIONS

"The doctrine of res judicata prevents parties from relitigating matters actually litigated and matters that could have been litigated in the first action." (161 N.H. at 164)

"We hold that the same type of relief is available in both cases and that res judicata precludes Gray from relitigating his claim." (161 N.H. at 165)

"Therefore, while filing a timely appeal prevents a judgment from becoming final, a judgment is nonetheless effective from the time it is rendered unless a party files an appeal or obtains a stay." (161 N.H. at 167)

FACTUAL BACKGROUND

Gray left personal property at Kelly's residence after moving out following their divorce. In a domestic violence proceeding brought by Kelly, the Salem Family Division ordered Gray to retrieve his belongings within thirty days and authorized Kelly to dispose of them if he failed to do so. Gray did not attend the hearing, did not appeal the order, and did not attempt to retrieve the property until after the thirty-day period had expired. He then filed an action seeking return of the property and damages, later adding a replevin claim and Sorenson as a defendant after learning that Kelly had transferred some property to Sorenson.

PROCEDURAL HISTORY

Following a February 2006 domestic violence proceeding, the Salem Family Division ordered Gray to retrieve his belongings from Kelly's residence within thirty days or Kelly could dispose of them. Gray later filed a superior court action seeking return of the property, damages, and replevin, and added Sorenson as a defendant after learning that Kelly had given her some of the property. The superior court initially denied Kelly's motion to dismiss but later reconsidered and dismissed the action on res judicata and collateral-estoppel grounds.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The trial court must determine in the first instance whether Sorenson was in privity with a party to the February 2006 domestic violence proceeding. The dismissal as to Kelly remains affirmed.

CASES CITED

- State v. Lake Winnepesaukee Resort, 159 N.H. 42, 45 (2009)
- McNair v. McNair, 151 N.H. 343, 352-54 (2004)
- In re Zachary G., 159 N.H. 146, 151 (2009)
- Morgenroth & Assoc's v. State, 126 N.H. 266, 269 (1985)
- In re Juvenile 2004-637, 152 N.H. 805, 808 (2005)
- Aubert v. Aubert, 129 N.H. 422, 426 (1987)
- Appeal of Univ. System of N.H. Bd. of Trustees, 147 N.H. 626, 629 (2002)
- Kalil v. Town of Dummer Zoning Bd. of Adjustment, 159 N.H. 725, 730 (2010)
- Monahan-Fortin Properties v. Town of Hudson, 148 N.H. 769, 771 (2002)
- Big League Entm't v. Brox Indus., 149 N.H. 480, 483 (2003)
- Walker v. Walker, 158 N.H. 602, 605 (2009)
- Osman v. Gagnon, 152 N.H. 359, 362 (2005)
- Route 12 Books & Video v. Town of Troy, 149 N.H. 569, 575 (2003)
- State v. Looney, 154 N.H. 801, 803 (2007)
- Rollins v. Rollins, 122 N.H. 6, 9-10 (1982)
- Sleeper v. Hoban Family P'ship, 157 N.H. 530, 533 (2008)

OPINION

DUGGAN, J.

DUGGAN, J. The plaintiff, Jeffrey Gray, appeals the granting of defendant Teri Kelly's motion to dismiss by the Superior Court (Nadeau, J.). We affirm in part, vacate in part and remand. *163 The record supports the following facts. Gray lived at Kelly's residence following his 2002 divorce until approximately August 2004, when he moved out. Gray, however, left some of his personal property at Kelly's home.

On February 7, 2006, the Salem Family Division (DalPra, M.) issued a final order in a domestic violence action filed by Kelly against Gray providing that "[Gray] shall retrieve his belongings from [Kelly's] residence in 30 days. His failure to do so shall result in [Kelly] being allowed to dispose of same." Gray did not attend this hearing, nor did he appeal the order.

The order became final on March 10, 2006, and the parties agree that Kelly did not dispose of any of Gray's property prior to that date. Gray made no attempt to retrieve his property until April 1, 2006. Gray then filed two separate actions against Kelly, both of which demanded the return of his property.

On April 3, 2006, he filed a domestic violence action in the Salem Family Division, but later agreed to dismiss the suit after the court determined it could not resolve any matters relating to his property. On April 17, 2006, he filed a civil action in superior court that is the subject of this appeal, alleging that Kelly wrongfully disposed of and refused to return his personal property.

He later amended the writ to add a count for replevin and to add his sister, Lisa Sorenson, as a defendant after he learned that Kelly gave Sorenson some of the property in question. Soon after filing suit, Gray filed for an ex parte attachment of Kelly's property, which the superior court granted.

However, the court vacated the attachment after a hearing "based on Master DalPra's order of 2/7/06." Then, in January 2008, Kelly filed her first motion to dismiss, which claimed that the parties had previously litigated Gray's property claims and that res judicata precluded further litigation. Gray contended that res judicata did not apply because the prior domestic violence proceeding and his current suit involved two different causes of action.

The court denied the motion "for the reasons contained in [Gray's] objection." In October 2009, the court held a trial management conference at which Kelly again argued that res judicata barred Gray's suit. The court requested that Kelly re-file her motion to dismiss, which Kelly did. She argued that Gray's claims were precluded by both res judicata and collateral estoppel.

The court granted Kelly's motion the next day because it "determine[d] that it should have granted the original motion." Gray then appealed. On appeal, Gray first argues that res judicata does not

preclude his suit because a “domestic violence action is fundamentally different from a replevin and damages action.” He also claims that collateral estoppel is inapplicable because he defaulted in the February 2006 domestic violence action, and, therefore, did not actually litigate ownership of his property.

In addition to arguing that his claims are not precluded, Gray contends that the trial court unsustainably exercised its discretion when it reversed its *164 initial decision to deny Kelly’s first motion to dismiss. Finally, he argues that the February 2006 order did not take effect until the expiration of the appeal period and he had thirty days from that time to retrieve his property.

Generally, when reviewing a trial court’s ruling on a motion to dismiss, we consider “whether the petitioner’s allegations are reasonably susceptible of a construction that would permit recovery.” *State v. Lake Winnepesaukee Resort*, 159 N.H. 42, 45 (2009). Kelly, however, moved to dismiss based exclusively upon res judicata and collateral estoppel. Both doctrines are affirmative defenses and Kelly bears the burden of proving that they apply.

McNair v. McNair, 151 N.H. 343, 354 (2004); *In re Zachary G.*, 159 N.H. 146, 151 (2009). Because the trial court determined that res judicata applied as a matter of law, our review is de novo. *Lake Winnepesaukee Resort*, 159 N.H. at 45.

We begin with the plaintiff’s argument that res judicata and collateral estoppel do not preclude his claim. In its most basic formulation, the doctrine of collateral estoppel bars a party to a prior action, or a person in privity with such a party from relitigating any issue or fact actually litigated and determined in the prior action. Res judicata, or “claim preclusion,” is a broader remedy and bars the relitigation of any issue that was, or might have been, raised in respect to the subject matter of the prior litigation.

McNair, 151 N.H. at 352-53 (quotation omitted). Gray contends that collateral estoppel does not apply because he did not appear at the February 2006 hearing on Kelly’s domestic violence action and the Salem Family Division final order was entered upon his default.

We need not address this argument, however, because even if a default judgment cannot constitute collateral estoppel, see *id.* at 353, a default judgment can constitute res judicata in subsequent litigation involving the same cause of action, *id.* “The doctrine of res judicata prevents parties from relitigating matters actually litigated and matters that could have been litigated in the first action.” *Morgenroth & Assoc’s v. State*, 126 N.H.

266, 269 (1985) (quotation omitted; emphasis added). The doctrine applies if three elements are met: (1) the parties are the same or in privity with one another; (2) the same cause of action was before the court in both instances; and (3) the first action ended with a final judgment on the merits.

In re Juvenile 2004-637, 152 N.H. 805, 808 (2005). Gray does not contest the first and the third elements. Accordingly, we must determine only whether the February 2006 *165 domestic violence action involved the same cause of action as the plaintiffs subsequent suit for replevin and damages.

As an initial matter, Gray asserts throughout his brief that the prior action in this litigation is the domestic violence action that he filed in April 2006 and then voluntarily dismissed in June 2006. The court in that case found that “it [could not] resolve the matters relating to property.” Accordingly, Gray claims that the court’s ruling has no preclusive effect because it did not adjudicate any of the property issues.

However, Gray’s argument is misplaced because the February 2006 order did make a final ruling regarding his property, and we consider only that order in determining whether Gray’s claims are precluded. Turning to the preclusive effect of the February 2006 order, we have defined the term “cause of action” as “the right to recover, regardless of the theory of recovery.” McNair, 151 N.H. at 353 (quotations omitted).

It “refers to all theories on which relief could be claimed on the basis of the factual transaction in question.” Aubert v. Aubert, 129 N.H. 422, 426 (1987) (quotation and brackets omitted). To determine whether Gray’s claim is precluded we must determine whether the type of relief available concerning property in a replevin action is available in a domestic violence action.

We hold that the same type of relief is available in both cases and that res judicata precludes Gray from re-litigating his claim. Replevin is a proceeding in which the plaintiff seeks to recover possession of personal property that has been taken from him. See 66 Am. Jur. 2d Replevin § 1 (2001). While Gray points out that the purpose of a domestic violence action is to determine whether domestic violence occurred, RSA 173-B:5 clearly provides authority for the court to grant other forms of relief, including resolving disputes regarding personal property.

See RSA 173-B:5,1(b)(3) (Supp. 2009). In this case, both actions are based on the same factual transaction — that is, the dispute concerning Gray and Kelly’s separation. See Appeal of Univ. System of N.H. Bd. of Trustees, 147 N.H. 626, 629 (2002) (explaining that we look to whether both causes of action arose from the same transaction or occurrence); see also Aubert, 129 N.H. at 426 (endorsing a liberal approach in determining what constitutes a cause of action).

While Gray may now assert a different legal theory, his claim still relies upon the same underlying facts. See Kalil v. Town of Dummer Zoning Bd. of Adjustment, 159 N.H. 725, 730 (2010) (rejecting the view that cause of action “is synonymous with the particular legal theory in which a party’s claim for relief is framed” (quotation omitted)). Gray also asserts that the Salem Family Division did not have the authority under RSA 173-B:5 to make an order regarding his property because he exclusively owned it and had no legal duty to support Kelly or *166her children.

“[T]his court is the final arbiter of the intent of the legislature as expressed in the words of a statute.

When construing a statute’s meaning, we first examine its language, and where possible, we ascribe the plain and ordinary meaning to words used.” *Monahan-Fortin Properties v. Town of Hudson*, 148 N.H. 769, 771 (2002) (citation omitted).

We do not interpret a statute in isolation, but construe it as part of the overall statutory scheme in order to effectuate its overall purpose and avoid an absurd or unjust result. *Id.*) see also *Big League Entm’t v. Brox Indus.*, 149 N.H. 480, 483 (2003).

The provision Gray relies upon specifically authorizes the court to grant the plaintiff “the exclusive right of use and possession of the household furniture, [or] furnishings... unless the defendant exclusively owns such personal property and the defendant has no legal duty to support the plaintiff or minor children.” RSA 173-B:5, 1(b)(3).

Therefore, for a court to make an order regarding the right to use or possess household property, it must make a determination regarding ownership of that property. The Salem Family Division made such a determination when it allowed Gray to “retrieve his belongings.” While the court provided that Gray could retrieve his property, it was also concerned for Kelly’s safety as it found that Gray had abused Kelly.

RSA chapter 173-B is primarily concerned with protecting domestic violence victims and their families, and when making a domestic violence order, the court has latitude in order to achieve this goal. See *Walker v. Walker*, 158 N.H. 602, 605 (2009) (explaining that the purpose of RSA chapter 173-B “is to preserve and protect the safety of the family unit for all family members by entitling victims of domestic violence to immediate and effective police protection and judicial relief” (quotations and ellipses omitted)).

Therefore, the Salem Family Division also inferentially determined that Kelly would best be protected if Gray was forced to remove his belongings from her home within thirty days. See *Big League Entm’t*, 149 N.H. at 483 (explaining we must interpret statutes as part of the overall statutory scheme).

The order also provided that “[a] police officer shall be present to keep the peace,” further indicating that the Salem Family Division was concerned for Kelly’s safety. Additionally, at the February 2006 hearing, Gray had the opportunity to litigate the disposition of his property. He relinquished that opportunity when he did not appear before the Salem Family Division.

See *Osman v. Gagnon*, 152 N.H. 359, 362 (2005) (noting that a valid judgment “finally negatives every defense that was or might have been raised” (quotation omitted)). While Gray now seeks compensatory damages, which *167he claims are unavailable in a domestic violence action, res

judicata bars a subsequent suit when, as here, the plaintiff seeks to “present... grounds or theories of the case not presented in the first action, or... to seek remedies or forms of relief not demanded in the first action.” *Aubert*, 129 N.H. at 426 (quotations omitted).

Therefore, we hold that *res judicata* bars the re-litigation of Gray’s claim. Gray next argues that the trial court unsustainably exercised its discretion in reversing its denial of Kelly’s motion to dismiss because Kelly did not present any new evidence or arguments. A trial court, however, has the authority to revisit an earlier ruling on a motion to dismiss if it becomes aware that the ruling may be incorrect.

See *Route 12 Books & Video v. Town of Troy*, 149 N.H. 569, 575 (2003). Gray also contends that the February 7, 2006 order did not become final until thirty days after the expiration of the appeal period — on April 9, 2006 — and that he asked Kelly to return his property on April 1. He argues that because a judgment does not become final until thirty-one days after the date of the trial court’s last order, see *SUPER*.

CT. R. 74, the order did not take effect until the conclusion of the appeal period. We have previously distinguished between the date on which a judgment is “rendered” and when it becomes “final.” See *State v. Looney*, 154 N.H. 801, 803 (2007).

In *Looney*, we quoted approvingly from a decision of the Texas Court of Appeals, which stated that “[t]he judgment becomes effective once it is ‘rendered.’ A judgment is ‘rendered’ when the matter submitted to the court for adjudication is officially announced either orally in open court or by memorandum filed with the clerk.” *Id.* (quotation and brackets omitted; emphasis added). “Superior Court Rule 74 provides that a decree does not go to final judgment if a timely appeal is taken to [the Supreme Court].” *Rollins v. Rollins*, 122 N.H.

6, 9 (1982) (emphasis added). Therefore, while filing a timely appeal prevents a judgment from becoming final, a judgment is nonetheless effective from the time it is rendered unless a party files an appeal or obtains a stay. See *Looney*, 154 N.H. at 803; see also *Rollins*, 122 N.H. at 10 (noting a losing party can obtain a stay of an order to prevent it from taking effect); *Sup.*

CT. R. 7-A cmt. (providing a procedural mechanism to stay the judgment of a lower tribunal that is not stayed by the filing of a timely appeal). We note that we have previously held that where a final order replaces a previously issued temporary order, the temporary order remains in effect during the pendency of any appeal unless the trial court specifically orders that the final order should remain in effect pending resolution of the appeal.

Rollins, 122 N.H. at 10. While, in appropriate cases, a trial court may order that a final order remain in effect *168 during the pendency of an appeal, the general rule remains that timely appealing a trial court’s final order stays it from taking effect. See *id.* Accordingly, the Salem Family Division order became effective on the date it was rendered — February 7, 2006.

Gray then had thirty days to appeal the order or request a stay. See SUPER. CT. R. 74. He did neither. Thus, the Salem Family Division order remained in effect during the period for filing an appeal. See Looney, 154 N.H. at 803; see also SUP. Ct. R. 7-A.

The order then became final thirty-one days after the Salem Family Division issued its order — on March 10, 2006 — because Gray failed to file a timely appeal. Because the Salem Family Division order was effective from the moment it was rendered and Gray did not appeal, the thirty-day window for Gray to collect his property also closed at that time. RSA chapter 173-B provides further support for this conclusion.

The entire statutory scheme is based upon providing immediate protection for victims of domestic violence. See, e.g., RSA 173-B:4 (2002) (providing for temporary ex parte relief). If we were to agree with Gray and hold that the Salem Family Division order did not take effect until the conclusion of the appeal period, trial courts would be unable to provide domestic violence victims with immediate and effective relief.

Moreover, the February 2006 domestic violence final order itself states, “THESE ORDERS ARE EFFECTIVE IMMEDIATELY AND REMAIN IN EFFECT FOR ONE YEAR.” Gray does not dispute that he was properly served with a copy of the order.

Accordingly, the restraining order itself put Gray on notice that the 30-day period began immediately and his argument is without merit. Finally, Gray argues that even if res judicata bars further litigation against Kelly, the trial court erred in dismissing his claim against Sorenson because she was not a party to the Salem Family Division domestic violence action.

Sorenson did not file a brief in this case and represented that she is in concurrence with Kelly’s brief. Kelly argues that we should also affirm Sorenson’s dismissal because Gray claims Sorenson will not return the same property that was the subject of the February 2006 order. While Sorenson was not a party to the Salem Family Division order, res judicata may apply if the parties are the same or in privity with one another.

See *Sleeper v. Hoban Family P’ship*, 157 N.H. 530, 533 (2008). However, the parties did not address, and the court below did not make any findings, regarding the issue of privity. Therefore, we vacate the trial court’s ruling on the motion to dismiss as it pertains to Sorenson, and remand to the trial court to determine the issue of privity in the first instance.

Affirmed in part; vacated in part; and remanded. Dalianis and CONBOY, JJ., concurred.