SUMMARY
July 14, 2022

2022COA76

No. 21CA0223, *Nation SLP, LLC v. Bruner* — Courts and Court Procedure — Forum Non Conveniens — Final Judgment on the Merits — Issue Preclusion

A division of the court of appeals considers whether another jurisdiction's dismissal of an action on forum non conveniens grounds has a preclusive effect on a similar action brought in Colorado courts. The division concludes that, because a forum non conveniens dismissal is not a "final judgment on the merits," the doctrine of issue preclusion does not bar litigating the case in Colorado.

COLORADO COURT OF APPEALS **2022COA76**

Court of Appeals No. 21CA0223
Arapahoe County District Court No. 20CV31562
Honorable Frederick T. Martinez, Judge

Nation SLP, LLC,

Plaintiff-Appellant,

v.

Marc Bruner and Michael Caetano,

Defendants-Appellees.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division I
Opinion by JUDGE DAILEY
Berger and Tow, JJ., concur

Announced July 14, 2022

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¶ 1 Plaintiff, Nation SLP, LLC, appeals the district court's order dismissing, on "res judicata" grounds, its case against defendants, Marc Bruner and Michael Caetano. As a matter of first impression, we hold that dismissal of an action by a court in another jurisdiction on forum non conveniens grounds is not a judgment on the merits and, thus, does not have preclusive effect on a similar action in a Colorado trial court. Accordingly, we reverse and remand for further proceedings.

I. Background

¶ 2 This action arises from a dispute between investors and businesses created to develop oil and gas properties in Australia.

¶ 3 Around 2015, a group of investors held a number of exploration permits to develop the properties. Because they lacked the funds to develop the properties, they formed Nation SLP as a fundraising entity and created a number of interrelated businesses to manage the investment capital and the operation of the exploration permits.

¶ 4 In short, the related businesses were as follows:

- Paltar Petroleum (Paltar), the original owner of the oil and gas exploration permits;

- Nation Energy (Australia) Pty Ltd (Nation Australia);
- Paltar Nation Limited Partnership (Paltar Nation), which owned a majority interest in Nation Australia;
- Nation SLP, which owned a majority interest (79.5%) in Paltar Nation; and
- Nation Energy, Inc. (Nation Energy), which owned a majority interest in Nation SLP.

¶ 5 According to Nation SLP's complaint, Bruner (Chair and CEO of Paltar) and Caetano (President and CEO of Nation Energy and Manager of Nation Australia) manipulated memberships on, as well as the decisions of, the boards of directors of the various businesses associated with the oil and gas projects to cut Nation Energy and Nation Australia (and, by extension, Nation SLP) out of their share of the profits from the exploration projects.

¶ 6 But this was not the first time the parties had gone to court.

¶ 7 In 2017, John Hislop, founder, shareholder, and former director of Nation Energy and director of Nation Australia, filed suit in an Australian court on behalf of Nation Australia against Paltar and others, including Caetano. In that suit, Hislop alleged that the

defendants intentionally deprived Nation Australia of its contractual rights to earnings from six exploration permits.

¶ 8 That same year, while the Australian suit was pending, Hislop, individually and derivatively on behalf of Nation Energy, and David Siegel, a director of Nation Australia from July 2016 to June 2017, filed a complaint in the United States District Court for the District of Colorado (the federal suit) against Paltar Petroleum and several individuals (including, as pertinent here, Bruner and Caetano). In the federal suit, the plaintiffs alleged "massive fraud and racketeering, breaches of fiduciary duties, and other violations," including, as pertinent here, fraudulent concealment, resulting in loss of valuable assets belonging to Nation Energy. The federal district court dismissed the federal action on forum non conveniens grounds, in light of the pending Australian litigation, the defendants' consent to jurisdiction in Australia, and Australian law governing most of the claims.

¶ 9 No appeal was taken from the dismissal of the federal action, and Hislop later voluntarily dismissed his Australian case after an affiliate purchased contested assets in Paltar's bankruptcy proceedings.

¶ 10 Returning to the present action, Nation SLP alleged that Bruner and Caetano had fraudulently concealed their plans to exclude Nation SLP from earnings contracts. Bruner and Caetano moved to dismiss the case for several reasons. As pertinent here, the defendants argued that the federal court's dismissal of the prior action on forum non conveniens grounds barred the present suit under "res judicata" principles. The district court agreed.

¶ 11 Nation SLP now appeals.

II. Forum Non Conveniens and Issue Preclusion

¶ 12 Nation SLP contends that the district court erred by dismissing its case because the federal district court had previously dismissed a variation of the same case on forum non conveniens grounds. We agree.

¶ 13 At common law, forum non conveniens was an equitable doctrine under which a trial court had the discretion to dismiss an action when it concluded that a more appropriate forum lay elsewhere. *UIH-SFCC Holdings, L.P. v. Brigato*, 51 P.3d 1076, 1078 (Colo. App. 2002). Under the Colorado Citizens' Access to Colorado Courts Act, a court now must, in certain circumstances, and may,

in other circumstances, dismiss a case without prejudice on forum non conveniens grounds. *See* § 13-20-1004(1), (2), C.R.S. 2021.

¶ 14 The district court did not base its dismissal of the present case on the statute. Instead, it based its decision on the preclusive effect of the federal court's dismissal of an earlier case on forum non conveniens grounds.

A. Legal Standards

¶ 15 A court may rely on a determination made in a separate legal proceeding and bar parties from relitigating that matter under the doctrines of claim preclusion and issue preclusion. *See Smeal v. Oldenettel*, 814 P.2d 904, 907 (Colo. 1991) (discussing doctrines under their alternative names — that is, "res judicata" and "collateral estoppel," respectively — and noting that prior judgments are deemed conclusive of claims or issues if those doctrines apply).[1]

¶ 16 Claim preclusion "prevents the perpetual re-litigation of the same claim or cause of action. The goal of the doctrine is to

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[1] Indeed, the supreme court has noted that "the term res judicata has been a source of confusion," used, at times, "as a general umbrella term referring to all of the ways in which one judgment could have a binding effect on another." *Foster v. Plock*, 2017 CO 39, ¶ 14.

promote judicial economy by barring a claim litigated in a prior proceeding from being litigated again in a second proceeding." *Foster v. Plock*, 2017 CO 39, ¶ 12.

¶ 17 Issue preclusion, "on the other hand, prevents the re-litigation of discrete issues, rather than causes of action. Under this doctrine, once a particular issue is finally determined in one proceeding, parties to this proceeding are barred from re-litigating that particular issue again in a second proceeding, even when the actual claims for relief in the two proceedings are different." *Id.* at ¶ 13.

¶ 18 Issue preclusion is broader than claim preclusion in that it applies to claims for relief different from those litigated in the first action, but narrower in that it only applies to issues actually litigated. *Id.*

¶ 19 The district court dismissed the present action on "issue preclusion" grounds.[2]

¶ 20 Issue preclusion bars relitigation of issues if

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[2] Although the district court references both res judicata and issue preclusion, its order applies an issue preclusion analysis and relies on issue preclusion authorities.

(1) the prior proceeding was decided on a final judgment on the merits;

(2) the issue in the current proceeding is identical to the issue actually adjudicated in a prior proceeding;

(3) the party against whom issue preclusion is asserted had a full and fair opportunity to litigate the issue in the prior proceeding; and

(4) the party against whom issue preclusion is asserted was a party or in privity with a party in the prior proceeding.

Id. at ¶ 12.

¶ 21 The applicability of issue preclusion is a question of law that we review de novo. *Stanton v. Schultz*, 222 P.3d 303, 307 (Colo. 2010).

B. Preclusive Effect of Forum Non Conveniens Rulings

¶ 22 The district court correctly noted that Colorado's appellate courts have not yet addressed whether a dismissal on forum non conveniens grounds is given preclusive effect in subsequent proceedings.

¶ 23 Most of the jurisdictions that have considered the issue have, with varying exceptions, given preclusive effect to those types of

dismissals. *See Gas Sensing Tech. Corp. v. Ashton*, 795 F. App'x 1010, 1016 (10th Cir. 2020)[3] ("A plaintiff may not relitigate a *forum non conveniens* issue unless he can show some objective facts that materially alter the considerations underlying the previous resolution." (quoting *Villar v. Crowley Mar. Corp.*, 990 F.2d 1489, 1498 (5th Cir. 1993))); *see also Cotemar S.A. De C.V. v. Beaufort*, 190 F. Supp. 3d 577, 586 (E.D. La. 2016); *Amore ex rel. Ests. of Amore v. Accor, S.A.*, 484 F. Supp. 2d 124, 129 (D.D.C. 2007); *Ex parte Ford Motor Credit Co.*, 772 So. 2d 437, 441 (Ala. 2000); *Alcantara v. Boeing Co.*, 705 P.2d 1222, 1225-26 (Wash. Ct. App. 1985).[4]

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[3] Unpublished decisions are not precedential, but may be cited for their persuasive value, in federal court. *See* Fed. R. App. P. 32.1; 10th Cir. R. 32.1.

[4] According to one leading treatise, "[d]iscretionary refusals to exercise admitted jurisdiction on such grounds as abstention or forum non conveniens follow the same rules" as a dismissal for lack of jurisdiction or improper venue and "preclude relitigation of the precise issue of jurisdiction or venue that led to the initial dismissal." 18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 4436, Westlaw (3d ed. database updated Apr. 2022).

¶ 24 Some jurisdictions, however, have not. *See Trinity Inv. Tr., L.L.C. v. Morgan Guar. Tr. Co. of N.Y.*, No. 01C-03-005, 2001 WL 1221080, at *2 (Del. Super. Ct. Sept. 28, 2001) (unpublished opinion); *Wakehouse v. Goodyear Tire & Rubber Co.*, 818 N.E.2d 1269, 1275 (Ill. App. Ct. 2004); *United Cap. Ins. Co. v. Brunswick Ins. Agency*, 761 N.E.2d 66, 69 (Ohio Ct. App. 2001).

¶ 25 In its ruling, the district court relied on the weight of authority on the topic, and in particular on rationale from *Gas Sensing Technology Corp.*, which said, "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." 795 F. App'x at 1018 (quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980)).

¶ 26 There is much to be said for this position. *See* Note, *Cross-Jurisdictional Forum Non Conveniens Preclusion*, 121 Harv. L. Rev. 2178, 2180 (2008) ("[C]ourts have tended to take a pragmatic approach [to the cross-jurisdictional preclusive effect of forum non conveniens dismissals] that generally favors defendants. These courts have, by and large, rejected the argument that forum non

conveniens is an inherently forum-specific inquiry and therefore can never have binding force across jurisdictional borders.").

¶ 27 But it does not appear that that position is consistent with governing Colorado law. As noted above, Colorado law requires, among other things for issue preclusion, that "the prior proceeding was decided on a final judgment on the merits." *Foster*, ¶ 13.

¶ 28 In *Ex parte Ford Motor Credit Co.* — another case on which the district court heavily relied here — the Alabama Supreme Court acknowledged that a dismissal on forum non conveniens grounds "had not reached the stage" of a "final judgment on the merits." 772 So. 2d at 444. But, the court said, that was "irrelevant" to "whether it had reached a stage that could give rise to issue preclusion." *Id.*

¶ 29 None of the parties has argued that Colorado law does not apply. And we are bound by supreme court precedent. *See People v. Phillips*, 2012 COA 176, ¶ 59. Therefore, we must (under current case law) require a final judgment on the merits before we can give preclusive effect to rulings.

¶ 30 For issue preclusion purposes, a final judgment on the merits is one that "end[s] the particular action in which it is entered,

leaving nothing further for the court to do in order to completely determine the rights of the parties involved in the proceeding." *Nat'l Energy Res. Co. v. Upper Gunnison River Water Conservancy Dist.*, 142 P.3d 1265, 1282 (Colo. 2006) (quoting *In re Water Rights of Elk Dance Colo., LLC*, 139 P.3d 660, 668 (Colo. 2006)); *accord Schaden v. DIA Brewing Co.*, 2021 CO 4M, ¶ 46.

¶ 31 As noted above, a dismissal on forum non conveniens grounds is not a final judgment on the merits. *See, e.g.*, *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 432 (2007) ("A *forum non conveniens* dismissal 'den[ies] audience to a case on the merits'[;] it is a determination that the merits should be adjudicated elsewhere.") (citation omitted); *cf. In re Estate of Murphy*, 195 P.3d 1147, 1153 (Colo. App. 2008) ("It is well-settled in Colorado that a dismissal for lack of subject matter jurisdiction is not a judgment on the merits . . . ."); *Platte River Drive Joint Venture v. Vasquez*, 860 P.2d 599, 601 (Colo. App. 1993) (dismissal for lack of jurisdiction is not a "final judgment on the merits.").

¶ 32 Because a dismissal on forum non conveniens grounds is not a final judgment on the merits, it is not, under Colorado law, entitled to preclusive effect in subsequent proceedings.

Consequently, the district court erred by dismissing Nation SLP's complaint on issue preclusion grounds.[5]

¶ 33 Nonetheless, Caetano insists, the district court's order dismissing the present action against him, at least, can be affirmed on other grounds (i.e., independent analyses of forum non conveniens, statute of limitations, and personal jurisdiction issues). *See Laleh v. Johnson*, 2017 CO 93, ¶ 24 (recognizing that an appellate court can affirm a judgment on any grounds that are supported by the record, whether relied on or even considered by the trial court).

¶ 34 All these issues, however, are fact dependent, *see* § 13-20-1004 (listing forum non conveniens considerations); *Keller Cattle Co. v. Allison*, 55 P.3d 257, 261 (Colo. App. 2002) (statutes of limitations); *Archangel Diamond Corp. v. Lukoil*, 123 P.3d 1187, 1193 (Colo. 2005) (personal jurisdiction), and the district court

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[5] That does not, however, necessarily mean that Nation SLP is free and clear to litigate its case fully here. Upon proper motion, the district court could independently assess whether, under present circumstances, the matter should be litigated in Colorado or in some other, more convenient, forum.

dismissed the case prior to any discovery, summary judgment motions, evidentiary hearings, or trial.

¶ 35 Under the circumstances, we decline to rule on Caetano's contentions as matters of law and instead remand the case to the district court to consider them. *See People v. Blessett*, 155 P.3d 388, 397 (Colo. App. 2006) ("[R]esolution of defendant's assertion would require finding facts, which an appellate court generally may not undertake . . . .").

III. Disposition

¶ 36 The judgment of dismissal is reversed, and the case is remanded to the district court for further proceedings consistent with the views expressed herein.

JUDGE BERGER and JUDGE TOW concur.