COPY

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2008-CA-01937

P. GAYLE MOORMAN

APPELLANT

VS.

GEORGE T. CROCKER

APPELLEE

APPELLANT'S REPLY BRIEF

APPELLANT REQUESTS ORAL ARGUMENT

Counsel For Appellant
R. Stewart Guernsey
P.O. Box 167
Water Valley, MS 38965
662-473-0091

TABLE OF AUTHORITIES

IN THE SUPREME COURT OF MISSISSIPPI

P. Gayle Moorman — Appellant

vs. — Cause #2008-CA-01937

George T. Crocker — Appellee

Appellant's Reply Brief

Comes now Appellant P. Gayle Moorman, by counsel, and files her Reply Brief herein and, for cause, will show:

Introduction

This appeal from the Circuit Court of the Second Judicial District of Yalobusha County concerns a series of transactions between friends.[1] Of particular import are two car loans from Appellee to Appellant, one dated January 16, 2006, and the second, in the form of a co-signature, on or about April 26, 2006.

On or about December 9, 2006, Mr. Crocker repossessed the Nissan he co-signed for by "self-help repossession." A series of taunting phone calls followed, so in December, 2006, Ms. Moorman caused to be filed a Complaint For Protective Order, Reformation of Chattel Mortgages, Promissory Notes and Car Title and For Additional Relief. This Complaint was filed in Chancery in the same venue, and was followed by an Amended Complaint prior to Defendant's Answer.

[1] Please note that Appellant accepts Appellee's characterization of the relationship as friendship only and retracts imputations of romantic intentions by Appellee.

/

In his Answer and Counterclaim, et al, Crocker alleges a Breach of Covenant, Complaint For Money Loaned and For Money Paid by Defendant/Counter-Plaintiff For the Plaintiff/Counter-Defendant. At page 48 (RE), Crocker references an agreement "attached hereto as Exhibit 'A'."

The attached Exhibit, (RE, 52), relates to the "first loan" of January 16, 2006. In candor, it appears that Counter-Plaintiff intended to attach a similar record of the "second loan" of April 26, 2006, but no such exhibit was attached.

Hence, by Exhibit to his Counter-Complaint, Mr. Crocker specifically pled his assertion in Chancery that $2,000. Was owed him for the "first loan." It is therefore, beyond question that the first two of the Four Identities required by Mississippi law on res judicata were met by the filing of a subsequent lawsuit regarding the "first loan."

On March 20, 2007, an Agreed Mutual Protective Order was entered in the Chancery suit. The Agreed Order specifically mandates "all parties shall return all property belonging to the party opposite except the Nissan Altima, ["second loan"] which shall be transferred by execution of all pertinent documents by P. Gail Moorman to George Crocker."

Nevertheless, Crocker filed a Justice Court suit against Moorman, after the entry of the Agreed Order, seeking repayment for the "first loan," or a part thereof. Judgment was granted and the cause was timely appealed to Circuit. Moorman filed a Motion to Dismiss or For Summary Judgment on the grounds of res judicata, placing into evidence Crocker's "Exhibit," a letter of settlement offer specifically addressing the "first loan" vehicle and the Agreed Mutual Protective Order of the Chancery Court.

After argument, the Court denied the motion. Moorman moved for trial setting, or Rule 54 designation. The Courts granted the Rule 54 designation and the case was timely appealed.

The two questions before this Court are: Did the Circuit Court err in denying Ms. Moorman's Motion to Dismiss or, in the alternative, for summary judgment? And, Did the Circuit Court err in denying trial de novo?

Argument

1) Res Judicata

It is the clear law of this state, cited at MRCP 10 (c) that: "A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." (Emphasis supplied). Therefore, there can be no debate that Exhibit "A," asserting a $2,000 "deficiency" was pled by Counter-Plaintiff in Chancery.

The assertions of Appellee Crocker notwithstanding, the identities of subject matter and cause of action are undoubtedly met, since the exact same debt was pled in Chancery and later in Justice/Circuit Courts. Appellee Crocker concedes the identity of parties. While making valiant efforts to distinguish a protective order from a simultaneously brought claim for repayment, it was Crocker who brought the claim on the "first loan" against Moorman. Crocker misstates the facts at his Brief, p. 10, "The lawsuit did not involve in any way the 1997 Acura that is the subject of this appeal." It was by his Exhibit in his counterclaim that the Identity of the character of parties is firmly established.

There can be no cavil. The four identities are met.

a) Finality of Judgment

In a desperate, (but creative), argument, Crocker asserts that the Agreed Mutual Protective Order is not a final judgment. He cites proper authority for the proposition that there must be a final judgment for res judicata to apply. With this proposition, Appellant agrees.

Thereafter, however, Crocker asserts no authority in support of his argument that the Agreed Mutual Protective Order is not a final judgment herein. Without authority cited on point, this Court may not even consider the argument. See Grenada Living Center, LLC v. Coleman, 961 So. 2d 33, 37 (MS. 2007), citing Grey v. Grey, 638 So. 2d 488, 491 (Miss. 1994).

Nevertheless, let us put the argument to rest. UCCR 5.03 CONSENT JUDGMENTS MUST BE APPROVED AND SIGNED BY BOTH COUNSEL is explained by its title. At R.E. 105, that requirement was met. Please note that Approval For Entry was the caption above counsel's signatures.

MCRP 58 ENTRY OF JUDGMENT permits any document which "fully adjudicates the claim as to all parties and which has been entered as provided in MRCP 79 (a) shall, in the absence of prejudice to a party, have the force and finality of a judgment even if it is not properly filed."

By certifying this approval for entry and by consenting to the terms of the "Order," Defendant/Counter-Plaintiff, by counsel, has put himself under the more

liberal rule of UCCR 5.03, (to include, for example, the deletion of the requirement of taxing costs found in UCCR 5.02).

Additionally, and in the alternative, the Chancellor's Agreed Mutual Protective Order does dispose of all claims as to the "first loan." It requires that all parties return any property belonging to the opposite party. This broad phrase could, within ten (10) days of entry of the Judgment, have been corrected or clarified under MRCP 59, or within six (6) months for the reasons cited under MRCP 60 (b) (1-3). However, Counter-Plaintiff sought no such clarification. Nor did he seek to re-raise the issue in Chancery.

Instead, he filed a new action in Justice Court. This proliferation of law suits is the very evil which the doctrine of res judicata seeks to prevent. See Brown v. Felson, 442 US 127, 131 (1979).

Further, assuming as shown above that the Four Identities have been met, "the parties will be prevented from re-litigating all issues tried in the prior lawsuit, as well as all matters which should have been tried in the prior suit." Little v. V&G Welding Supply, Inc., 704 So. 2d 1336, 1337 (Miss. 1997). [Emphasis added]. This is because res judicata "reflects the refusal of the law to tolerate a multiplicity of litigation." Id.

If that were not enough, Crocker, by counsel, further mentioned the claim in settlement negotiations. (RE, 111). It was he who offered an exchange of items "as part of any settlement." By implication, he there confesses that the Agreed Order was a

settlement. Settlements, of course, are favored by the Courts. See Parmley v. 84 Lumber Co., 911 So. 2d 569 (Miss. App. 2005), and are not set aside lightly.

Finally, Crocker asserts that his counterclaims in Chancery are still "open." (Brief, p. 11). Why then did he not bring them in Chancery?

The answer, Moorman asserts, is that Crocker knew full well that the Chancellor, having approved a settlement once, would have thrown Crocker out of court post-haste. While we do not have the benefit of the Circuit Court's full analysis, it appears that the difference between the two loans was established to his satisfaction by Crocker, but the exhibited pleading as to the "first loan" was not sufficiently pointed out by Moorman. It is however, clearly in the Court record.

b) Trial de Novo

Without waiving or abridging arguments made in Appellants' Brief-in-Chief, Ms. Moorman believes that his Court will render on grounds of res judicata. She does specifically incorporate the argument in her prior brief by reference.

Appellee does make an interesting point as to URCCC 5.04 and its requirement of designation of trial as de novo or on the record. However, he apparently skipped over URCCC 5.01 and 5.07, which seem to settle the issue with or without the proper form.

Also, he is hoist with his own petard. He never raised the issue at trial and so may not now. Wilburn v. Wilburn, 991 So. 2d 1185 (Miss. 2008), et al cited at Appellee's Brief, p. 12.

Nor did Appellee read the Court's Order in which it specifically denied Ms. Moorman a trial de novo. Thereafter, the Court certified the Judgment under MRCP 54.

CONCLUSION

An attorney lives and dies by the integrity of his agreements. In this matter, Plaintiff sought a Protective Order and other relief. Defendant counterclaimed, as was his right. An Agreed Order was entered, each party taking less than he or she wanted. The settlement was properly entered.

As part of the Counter-Claim, Counter-Plaintiff sought repayment for two car loans. The text of the Counter Complaint names one car loan and the Exhibit, fully a part of the pleading for all purposes, sought repayment for the other. Counter-Plaintiff specifically negotiated for settlement as to both loans. He then agreed to accept a compromise, getting much of what he wanted as to the more expensive car in exchange for no relief on the "first loan."

The Agreed Order, which in retrospect could certainly have been clearer, announced the "accommodation" of claims in broad terms. The Court itself or either party could have sought clarification. Neither party, (nor the Court), took that route.

Instead, Defendant filed a new suit seeking additional relief for which he had already filed a claim. This he may not do because of the doctrine of res judicata.

In his Judgment, the Circuit Judge found that "Defendant has failed to show any connection between the present case...and a previous case between the Parties in the Chancery Court..."(RE, 115).

The Honorable Jurist had the record before him, including both the Exhibit to the Counter-Complaint and the later "settlement letter," from Defendant's counsel to Plaintiff's counsel. He is, of course, charged with knowledge of MRCP 10. Apparently, the Judge did not scrutinize the record to see that the Exhibit to the Chancery Counter-Complaint involved the same transaction before him. Apparently, Ms. Moorman's counsel did not make that connection clear. Dismissal and Summary Judgment were denied, as well as Ms. Moorman's prayers for cost and attorney fees.

For all of the above reasons, this Court must now give Ms. Moorman the relief to which she is entitled, including attorney fees and costs. To do anything less would be equivalent to inviting the type of "claim-splitting" and "multiplicity of litigation" eschewed by this Court.

Any result less than reversal and rendering with instructions to the Circuit Court to award costs and attorney fees under MRCP 56 rewards, or at least tolerates, the practice of settling cases with one's "fingers crossed." This is particularly true where, as here, the specific claim raised again was both pled and negotiated by Appellee.

Therefore, Appellant P. Gayle Moorman, by counsel, prays that this Court will reverse and render the Circuit Court's denial of her Motion to Dismiss or For Summary Judgment, and remand with instructions for the Circuit Court to award attorney fees pursuant to MRCP 56.

And Appellant seeks general relief. Respectfully Submitted this 14 day of October, 2009.

P. GAYLE MOORMAN

BY: R. Stewart Guernsey

R. Stewart Guernsey
MBA#[redacted]
PO Box 167
Water Valley, MS 38965
662-473-0091