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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ENVIRONMENTAL WORLD WATCH,

Plaintiff and Appellant,

v.

CUMMINS ENGINE COMPANY, INC.,
et al.,

Defendants and Respondents.

B156548

(Los Angeles County
Super. Ct. No. BC188077)

APPEAL from the judgment of the Superior Court of Los Angeles County. J.
Stephen Czuleger, Judge. Affirmed.

Weinreb, Weinreb & Mandell, Robert J. Mandell; Casey, Gerry, Reed & Schenk,
Thomas D. Penfield and Jeremy Robinson, for Plaintiff and Appellant.

Morrison & Foerster, Michèle B. Corash, Peter Hsiao, Maria Chedid and Robin S.
Stafford for Defendants and Respondents.

* * * * *

Appellant Environmental World Watch appeals from a judgment entered in favor of respondents Cummins Engine Company, Inc., John Deere Construction Equipment Company, Detroit Diesel Corp., and Caterpillar, Inc., following a court trial. Appellant contends that the instant matter is not barred by principles of res judicata. We affirm.

FACTS AND PROCEDURAL BACKGROUND

We dealt with this matter previously on appeal from a demurrer in *Environmental World Watch v. Cummins Engine Co., Inc.* (Sept. 21, 1999, B128039 [nonpub. opn.]). The Honorable Edward A. Ferns granted respondents' demurrer on the basis that a stipulated judgment entered into between plaintiffs Mateel Environmental Justice Foundation (Mateel) and Pacific Justice Center (Pacific; collectively the Mateel plaintiffs), on the one hand, and respondents on the other (the stipulated judgment), was res judicata as to the present action. The Mateel action was filed in superior court in San Francisco, and the stipulated judgment was signed by the Honorable Everett A. Hewlett, Jr.

We disagreed with the trial court and reversed, finding that the principles of res judicata did not apply because the two actions arose out of different primary rights.

As more fully discussed in our previous opinion, appellant's first amended complaint (FAC) alleged that respondents violated California's Safe Drinking Water and Toxic Enforcement Act of 1989, Health and Safety Code section 25249.5, et. seq.,¹ also known as Proposition 65, and California Code of Regulations, title 22, section 12000 et seq., by selling diesel-fueled off-road equipment, which emit toxic air contaminants, without giving a clear and reasonable warning to the general public, residents of Los Angeles County. The Mateel plaintiffs focused on the issuance of statutory notices to workers standing near or using diesel equipment, while appellant's FAC focused on notices to members of the general public who may be in an affected area or who may consume water contaminated with diesel fuel. We concluded that the defense put forth by the respondents might differ

¹ All subsequent code section references are to the Health and Safety Code unless otherwise indicated.

substantially in both matters, and that the Mateel plaintiffs and appellant were not in privity with each other, and reversed the trial court's order sustaining the demurrer.

Appellant filed a second amended complaint (SAC),² adding causes of action for violation of section 25249.6 on behalf of residents of Orange County, Riverside County and San Bernardino County. The SAC also added a cause of action for violation of Business and Professions Code section 17200.

On March 17, 2000, the Honorable David A. Garcia, of the San Francisco County Superior Court, signed an order re: joint motion to modify judgment with respect to the Mateel action. The order stated: "Specifically, the Court finds that the Judgment, including the continuing mandatory injunction contained therein, includes and resolves all Proposition 65 claims under California Health & Safety Code §§ 25249.5 *et seq.* relating to potential occupational, environmental and consumer exposures to Covered Products, as that term is defined in the Judgment."

On July 3, 2001, appellant's and respondents' motions for summary judgment were denied by the Honorable Edward A. Ferns. Among other things, the trial court found that "[t]here is insufficient proof that this action is barred by res judicata. No authority has been provided that one plaintiff acting as a private attorney general may obtain an order which bars suit by another plaintiff acting as a private attorney general. Furthermore, there is no proof that the off-road diesel-powered engines covered by the Mateel judgment are the same ones at issue here." Respondents' subsequent writ of mandamus to this court was denied.

After a court trial, the Honorable Stephen Czuleger found in favor of respondents in a judgment issued on December 14, 2001. According to the statement of decision, the Mateel action was res judicata to the instant action because: (1) the issues in both actions are the same because the modified stipulated judgment stated that it was intended to address all environmental issues, and deposition testimony and pleadings in the Mateel action showed

² The record contains a copy of a SAC that does not show a file stamp, and we do not know the date it was filed. However, the trial court alluded to the SAC in its order on the subsequent motions for summary judgment, and we surmise that the SAC must have been filed after we reversed the trial court's order.

that the intent of the Mateel parties was to cover all environmental concerns arising from the sale of the subject diesel engines in California; (2) there was a final judgment in the Mateel action, and the trial court has no authority to enter orders that would change or modify those of the San Francisco Superior Court; and (3) the Mateel plaintiffs and appellant are in privity with each other because both parties sued as private attorneys general on behalf of the People of the State of California to vindicate the rights of the People under Proposition 65 against the same defendants and concerning the same diesel engines. Moreover, the court found that appellant did not need to receive notice of the modified judgment because the real party in interest, the People of the State of California, was represented by the Mateel plaintiffs. The court determined that appellant's recourse was to the San Francisco Superior Court.

This appeal followed.

DISCUSSION

I. Whether the doctrine of res judicata bars the current action

A. The elements of res judicata

Under the doctrine of res judicata, litigation of a claim is barred if: (1) the issues decided in the prior adjudication are identical to those presented in the later action; (2) there was a final judgment on the merits in the prior action; and (3) the party against whom res judicata is raised was in privity with the party to the prior adjudication. (*Lyons v. Security Pacific Nat. Bank* (1995) 40 Cal.App.4th 1001, 1015.)

B. Whether the issues are identical

1. Environmental vs. occupational exposure

In determining whether two actions are identical, the court looks to the pleadings and proof in each case. (*Wimsatt v. Beverly Hills etc. Internat., Inc.* (1995) 32 Cal.App.4th 1511, 1517.)

Appellant urges that the present litigation is distinct from the type of exposure complained of in the Mateel action, because this case concerns general ambient air quality

violations, resulting in environmental exposures, rather than the occupational exposures referenced in the consent decree in the Mateel matter. Citing California Code of Regulations, title 22, section 12601, appellant distinguishes between three types of exposures: (1) consumer product exposures; (2) occupational exposures; and (3) environmental exposures. California Code of Regulations, title 22, section 12601, subdivision (d) defines environmental exposure as: “an exposure which may foreseeably occur as the result of contact with an environmental medium, including, but not limited to, ambient air, indoor air, drinking water, standing water, running water, soil, vegetation, or manmade or natural substances, either through inhalation, ingestion, skin contact or otherwise. Environmental exposures include all exposures which are not consumer products exposures, or occupational exposures.” On the other hand, occupational exposure is defined as “an exposure, in the workplace of the employer causing the exposure, to any employee.” (Cal. Code Regs., tit. 22, § 12601, subd. (c).)

2. The pleadings

Our review of the Mateel complaint shows that it was aimed at protecting “those residents of California, who use, or who worked near, Defendants’ products, that such use, or working in such locations, would, and does, expose them to diesel engine exhaust and its constituents” The complaint alleges that the diesel industrial equipment exposes the users and others nearby to toxic chemicals. Furthermore, in its first claim for relief for violation of Proposition 65, the Mateel complaint alleges that respondents’ conduct knowingly and intentionally exposed California residents who use or who have used diesel industrial equipment to toxic chemicals. By contrast, our examination of the SAC, filed since our first nonpublished opinion, No. B128039, was issued, shows that its allegations are focused on the emission of chemicals into the ambient air, causing harm to the general public in Los Angeles, Orange, Riverside and San Bernardino Counties. For respondents’ failure to provide clear and reasonable warnings to each individual in the aforementioned counties, appellant sought civil penalties in the amount of \$2,500 per day for each violation.

The SAC does not change our previous position, expressed in our nonpublished opinion, No. B128039, that different primary rights are implicated because the individuals contemplated in the Mateel complaint are workers or users of the diesel equipment, while the present action concerns the general public.

Our review of the remedies agreed to by the Mateel parties show that they are directed specifically toward workers and users. The Mateel stipulated judgment states that “The Complaint alleges that Defendants have sold diesel engines or equipment containing diesel engines that emit diesel engine exhaust and its chemical constituents, thereby knowingly and intentionally exposing persons to chemicals known to the State of California to cause cancer and/or reproductive toxicity without first providing a clear and reasonable warning” The stipulated judgment required the respondents to provide Proposition 65 warnings either: (1) in the operator manual; or (2) on the equipment itself. Furthermore, each manufacturer of diesel engines was required to provide its customer with a warning. The stipulated judgment also provided for the dissemination of flyers to trade publications such as the Engineer News, California AFL-CIO News, and the California Builder and Engineer News. The stipulated judgment required the defendants to send out letters to the distributors and dealers as well as owners of the diesel engine equipment containing Proposition 65 warnings. Finally, the stipulated judgment required payment of plaintiffs’ fees in the amount of \$280,000.

Thus, none of the remedies contemplated in the stipulated judgment are designed to reach the general public, yet the stipulated judgment purports to protect the People of the State of California and releases the defendants from failure to warn for past and future exposures under Proposition 65.³ On the other hand, appellant’s SAC gives no indication of

³ The Mateel stipulated judgment contained a release that stated: “Plaintiffs, on behalf of the People of the State of California, release each Defendant . . . from any and all claims Plaintiffs or the People may have: (1) for past failure to warn any person exposed to diesel engine exhaust from a Defendant’s Covered Product; and/or (2) for failure to warn regarding future exposures to engine exhaust from a Defendant’s Covered Product provided and so long as Defendant has complied with the provisions of this Judgment. Compliance with the terms of this Stipulation and the Judgment by said Defendant resolves any issue, now and in the future, concerning compliance by said Defendant with the requirements of

the type of warning that should be provided to the general public, such as newspaper advertisements, commercial advertising, etc. On the pleadings alone, the issues appear to be different.

3. The impact of the modification of the stipulated judgment

According to appellant, after we reversed the Honorable Edward A. Ferns' grant of respondents' demurrer, respondents brought a motion for summary judgment based on the Mateel stipulated judgment and the modification.⁴ The Honorable Edward A. Ferns found that the action was not barred by res judicata; that "[n]o authority has been provided that one plaintiff acting as a private attorney general may obtain an order which bars suit by another plaintiff acting as a private attorney general. Furthermore, there is no proof that the off-road diesel-powered engines covered by the Mateel judgment are the same ones at issue here." After trial, however, the Honorable Stephen Czuleger relied heavily on the modified stipulated judgment to conclude that the issues were the same, because the modified stipulated judgment stated it intended to address all environmental issues; there was a final judgment in San Francisco, which the Los Angeles trial court could not modify; and the parties were in privity -- since both acted as private attorneys general. Moreover, the Honorable Stephen Czuleger found that appellant did not need notice of the modified judgment, and that its recourse was to the San Francisco court.

Respondents assert that the stipulated judgment was intended to cover all environmental exposures. The declaration of defense counsel Michele Corash, dated February 1, 2000, states that during her negotiations with the Mateel plaintiffs, she discussed the various exposures to diesel exhaust covered by the litigation, and that these

Proposition 65, the Unfair Competition Act, or other claims arising from failure to comply with Proposition 65 in connection with exposure to Covered Products." Furthermore, the stipulated judgment stated: "This Stipulation and that the Judgment cover all claims on behalf of the California general public arising from the alleged failure of . . . Defendant diesel engine equipment manufacturers to provide warnings under Proposition 65 for exposure to engine exhaust from Covered Products."

⁴ The motion for summary judgment is not contained in the record.

specifically included environmental exposures, as well as occupational and consumer exposures. The parties agreed that the Proposition 65 warnings should be directed toward the individuals who worked on or near the diesel equipment. Similarly, the declaration of Mateel counsel William Verick, dated February 1, 2000, stated that he intended that the notices cover “*all* exposures to exhaust from off-road diesel-powered equipment, be they occupational, environmental, or consumer exposures.” As a tactical matter, he decided that the settlement should include warnings to workers, who were the persons who were most likely to be exposed to the diesel fuel exhaust, rather than to others, to whom the exposure might not meet the Proposition 65 threshold. During the negotiations, the parties specifically identified environmental exposures as among those covered by the notices and the subsequent litigation. The declaration of Melvin Pearlston, dated February 1, 2000, counsel for the Pacific Justice Center, stated that the notices in the Mateel action alleged that the manufacturers had failed to warn individuals about exposure to chemicals and exhaust from off-road diesel-powered equipment. He also declared that it was his intention to include all exposures to exhaust from off-road diesel-powered equipment, be they occupational, environmental, or consumer exposures.

As previously discussed, the San Francisco trial court modified the stipulated judgment to state that it “includes and resolves all Proposition 65 claims under [§ 25249.5 et seq.] relating to potential occupational, environmental and consumer exposures to Covered Products, as that term is defined in the Judgment.”

We agree with the decision of the trial court. The record shows that the parties raised and discussed the issue of whether the stipulated judgment covered the environmental exposures of which appellant complains. “[A] former judgment is not a collateral estoppel on *issues which might have been raised but were not*; just as clearly it is a collateral estoppel on issues which were raised, *even though some factual matters or legal arguments that could have been presented were not.*” (*Bleek v. State Board of Optometry* (1971) 18 Cal.App.3d 415, 429; *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888 [where the same primary right is implicated -- breach of contract arising from a single breach -- alternate remedies must be requested in a single action or be forfeited].) Appellant’s

citation to *Bronco Wine Co. v. Frank A. Logoluso Farms* (1989) 214 Cal.App.3d 699, 711 for the proposition that issue identity must also include identity of remedy, is distinguishable. In that case, the court determined that the statutory scheme set forth in the Food and Agricultural Code did not contain the remedies available to a civil court in a breach of contract action. Here, the remedy of clear and reasonable warnings were available to both the appellant and Mateel plaintiffs.

Appellant cites to Civil Code section 3513 for the proposition that one cannot waive a law established for a public reason. In the same vein, when the issue is a question of law rather than of fact, the prior determination is not conclusive either if injustice would result or if the public interest requires that relitigation not be foreclosed. (*Arcadia Unified School Dist. v. State Dept. of Education* (1992) 2 Cal.4th 251, 257.) In this case, the public has been represented by the Mateel plaintiffs, who apparently believed that occupational exposure was of primary concern, and that it would be difficult, if not impossible, to obtain compliance with respect to the general public.

Although it would appear unfair to allow one plaintiff to purport to speak for the People of the State of California, and possibly forward the interest of only a select group, to the detriment of others, it would also be unfair for the respondents to be sued piecemeal on the same causes of action by parties purporting to represent different segments of society. Here, the record shows that the Mateel plaintiffs and respondents specifically raised the issue of environmental exposure during settlement negotiations, and that the stipulated judgment was designed to encompass all exposures: occupational, environmental, and consumer. Accordingly, we conclude that in the interests of justice, the exception to the application of collateral estoppel should not be applied.

C. Whether the parties are the same or in privity

Privity refers to a person so identified in interest with another that he represents the same legal right. (7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, § 392, p. 961.) Thus, the nonparty must have had an identity or community of interest with, and adequate representation by, the losing party in the first action; and the circumstances must have been

such that the nonparty should reasonably have expected to be bound by the prior adjudication. (*Lynch v. Glass* (1975) 44 Cal.App.3d 943, 948.) This expectation can occur where the unsuccessful party in the first action acted in a representative capacity for a nonparty. (*Id.* at p. 949.) In making its decision to apply collateral estoppel, the court must keep in mind the policies of protecting against vexatious litigation, furthering finality of litigation in which public interest is involved, or promoting the stability of adjudications in prior criminal actions. (*Id.* at p. 948.)

Thus, in *Miller v. Superior Court* (1985) 168 Cal.App.3d 376, even though the City of Los Angeles was not a party to a criminal case prosecuted against one of its police officers, and was not in privity with the officer, it was in privity with the People of the State of California as plaintiff in the criminal prosecution, because it had the same interest in prosecuting the officer. (*Id.* at p. 384.) The court held that the City was collaterally estopped from relitigating the issue of rape when the plaintiff brought an action for damages against the police officer and the City. (But cf. *Victa v. Merle Norman Cosmetics* (1993) 19 Cal.App.4th 454, 468 [plaintiff not in privity with Equal Employment Opportunity Commission where she knew of the case, and her counsel participated in its discovery proceedings, but she did not have ability to control or shape the judgment, which ultimately was prosecuted in the public interest, rather than in plaintiff's interest].)

Here, section 25249.7, subdivision (d) provides that an action may be brought by any person in the public interest after the person gives notice of the violation to the Attorney General, the district attorney, and the city attorney, where they have not commenced an action against such violation.

The Honorable Stephen Czuleger held that the Mateel plaintiffs and appellant were in privity with each other because they both sued as private attorneys general. It is true that the People of the State of California were represented by the Mateel plaintiffs, and later, appellant, as it attempted to pursue a representative action on behalf of the People of the State of California. Although privity does not exist in the strict sense in that the Mateel plaintiffs did not represent appellant Environmental World Watch, we conclude that appellant's interests were aligned with the interests of the Mateel plaintiffs. In this instance,

even though appellant was not given notice of the motion to modify the stipulated judgment, and appellant is not in privity with the Mateel plaintiffs in the strict sense of the word, considerations of public policy compel us to conclude that repetitive litigation would result in this case, especially since the same issues were addressed and considered in negotiation as specified in the modified stipulated judgment.

We conclude that appellant’s recourse is to intervene in the Mateel action. We note that at oral argument, respondents’ counsel conceded that appellant had standing to intervene.

DISPOSITION

The judgment is affirmed. Respondents to receive costs of appeal.

NOT FOR PUBLICATION.

_____, Acting P.J.

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We concur:

_____, J.

DOI TODD

_____, J.

ASHMANN-GERST