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IN THE
COURT OF APPEALS OF INDIANA

Herco, LLC,
Appellant-Plaintiff,

v.

Auto-Owners Insurance Company,
Appellee-Defendant

April 7, 2021

Court of Appeals Case No. 20A-PL-1682

Appeal from the Lake Superior Court

The Honorable John M. Sedia, Judge

Trial Court Cause No. 45D01-1510-PL-77

May, Judge.

[1] Homeowners' Equity & Realty Corporation, LLC ("HERCO") appeals the trial court's order granting summary judgment in favor of Auto-Owners Insurance Company ("Auto-Owners"). HERCO raises one issue, which we revise and restate as whether the trial court erred when it ruled HERCO's complaint for breach of contract and bad faith was barred by res judicata. We affirm.

Facts and Procedural History

[2] HERCO owned an apartment building located at 2212-2218 West 12th Avenue in Gary. On April 27, 2012, an unknown person threw a Molotov cocktail into the apartment building, and the building caught fire. HERCO reported the loss to Auto-Owners later that day and boarded up the portions of the building not destroyed by the fire. Shortly thereafter, unknown persons vandalized and stole property from the building and HERCO reported this loss to Auto-Owners on July 10, 2012. Auto-Owners paid HERCO compensation for a portion of the losses, but the parties disagreed regarding the value of the lost property and the amount of compensation due to HERCO.

[3] On February 21, 2013, in Lake Superior Court ("First Suit"), HERCO filed a verified petition to appoint an umpire to complete insurance appraisal, as provided for in its insurance policy with Auto-Owners. On October 3, 2013, the Court appointed John Whiteleather as the umpire. Whiteleather assessed the actual cash value of damages to the apartment building arising out of the April 27, 2012, fire to be $435,000 and the business interruption loss due to the fire to be $36,000. Whiteleather also assessed the actual cash value of additional damages to the building through theft and vandalism to be $109,739 with a $10,000 business interruption loss. After the appraisal, HERCO filed a motion for judgment on the appraisal award. Auto-Owners paid the policy limit for the fire claim to HERCO, but Auto-Owners continued to contest coverage for the theft and vandalism. At a hearing on March 24, 2014, the trial

court set a bench trial and established deadlines for the parties to complete discovery and exchange witness and exhibit lists.

[4] From August 2014 to February 2015, HERCO's counsel was suspended from the practice of law for six months with automatic reinstatement,[1] and the case was stayed while HERCO's counsel served his suspension. On September 4, 2015, Auto-Owners filed a notice of intent to pay the balance of the appraisal award. Auto-Owners stated in the notice:

> 3. Following appraisal and supplemental payments, the only disputed or unpaid amounts are as follows:
>
> a. for alleged additional loss, reported after April 27, 2012: $109,739.
>
> b. for business interruption due to vandalism and theft from the additional alleged, reported loss: $10,000.
>
> Therefore the total amount of the appraisal award is $119,739. The disputed issue of coverage for this amount was set for a bench trial with the Court on October 21, 2015.
>
> 4. Rather than resolve these issues in the bench trial. Auto Owners has decided to pay the remaining balance of the appraisal award into Court. That will fully and finally conclude all issues between the parties relating to this matter. To save additional time and expense to the Court staff and to the parties, if Plaintiff and its counsel will cooperate, Auto Owners will pay

[1] *See In re Marshall*, 11 N.E.3d 911 (Ind. 2014).

> the remaining balance directly to the insured/Plaintiff and its counsel, and will file a Notice of Satisfaction of Appraisal Award with the Court. It is anticipated that Auto Owners will pay the remaining balance within fifteen (15) days or less, from the filing of this Notice.

(App. Vol. III at 147.) The bench trial scheduled for October 21, 2015, was subsequently vacated.

[5] On October 8, 2015, HERCO filed a second suit against Auto-Owners ("Second Suit"). HERCO alleged in the Second Suit that while the insurance policy required payment within thirty days, Auto-Owners breached the contract by not issuing payment until nearly two years after the appraisal award was entered. HERCO also alleged that Auto-Owners delayed payment in bad faith. HERCO did not properly effectuate service of the Second Suit on Auto-Owners because HERCO served Auto-Owners' registered agent at the same address HERCO used to serve Auto-Owners at the initiation of the First Suit and Auto-Owners' registered agent had moved in the interim.

[6] On December 23, 2015, the parties jointly filed a release and satisfaction of appraisal award in the First Suit. The release stated:

> Comes now Plaintiff, HERCO, by its authorized representative and its counsel, and Defendant, Auto Owners Insurance Company ("Auto Owners"), by counsel. Plaintiff notifies the Court and acknowledges that Defendant, Auto Owners has prior to this date, released, paid and satisfied in full the disputed Appraisal Award in this matter, to-wit, $119,739.00. Plaintiff acknowledges receipt of this amount, in full.

> WHEREFORE, all appraisal issues in this matter are now concluded and resolved, and the matter can be closed and removed from the Court's docket.

(Appellant's App. Vol. IV at 152.) The court approved the release and satisfaction, and the docket reflects, "Final Order entered 1-5-2016, Release and Satisfaction of Appraisal Award entered." (Appellee's App. Vol. II at 8.) HERCO's counsel did not reference the Second Suit while negotiating the release and satisfaction of the First Suit, and Auto-Owners did not become aware of the Second Suit until it effectively was served on February 25, 2016.

[7] On November 1, 2019, Auto-Owners filed a motion for summary judgment in the Second Suit arguing the suit was barred by HERCO's failure to comply with the terms of the insurance policy and by HERCO's inability to prove its bad faith claim. HERCO filed a response in which it argued the Second Suit was necessary for HERCO to recover the damages it incurred as the result of Auto-Owners' delay in paying the appraisal award. HERCO asserted that Auto-Owners' contested payment of the entire appraisal award was in bad faith and that this delay made HERCO unable to repair and rebuild the apartment building. Auto-Owners filed a motion to strike portions of HERCO's designated evidence regarding settlement of the First Suit. The trial court held a hearing on Auto-Owners' motion to strike on January 28, 2020, and Auto-Owners argued at the hearing that HERCO was attempting to use settlement of the First Suit to establish Auto-Owners' liability in the Second Suit, which is

prohibited by Indiana Rule of Evidence 408. The trial court granted Auto-Owners' motion to strike all references to settlement of the First Suit.

[8] The trial court then held a hearing on the motion for summary judgment on August 18, 2020. While not expressly mentioned in its memorandum in support of its motion for summary judgment, Auto-Owners argued at the hearing that the doctrine of res judicata barred the Second Suit. The court granted Auto-Owners' motion for summary judgment the following day on the ground that res judicata barred the Second Suit. In its order granting summary judgment, the trial court explained that HERCO's claims in the Second Suit "could easily have been raised" in the First Suit; "the parties were the same, the issue of delay was certainly ripe and could have been litigated, and both parties had the ability and incentive to do so." (Appellant's App. Vol. II at 21.)

Discussion and Decision

[9] Our standard of review of a trial court's order on summary judgment is well-settled.

> When reviewing the grant or denial of a motion for summary judgment, we apply the same standard as the trial court: whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. We grant summary judgment only if the evidence sanctioned by Indiana Trial Rule 56(C) [meets that standard]. Further, we construe all evidence in favor of the nonmoving party and resolve all doubts as to the existence of a material issue of fact against the moving party.

Anonymous Doctor A v. Foreman, 127 N.E.3d 1273, 1276-77 (Ind. Ct. App. 2019) (internal citations and quotation marks omitted).

[10] The legal doctrine of res judicata prevents a party from having a "second bite at the apple." *First American Title Ins. Co. v. Robertson*, 65 N.E.3d 1045, 1051 (Ind. Ct. App. 2016), *reh'g denied*, *trans. denied*. The doctrine "serves to prevent repetitious litigation of disputes [that] are essentially the same." *Hillard v. Jacobs*, 957 N.E.2d 1043, 1046 (Ind. Ct. App. 2011), *reh'g denied*, *trans. denied*, *cert. denied*, 568 U.S. 998 (2012). There are two forms of res judicata, claim preclusion and issue preclusion. *Id*. Claim preclusion bars a subsequent action if the matter was or might have been litigated and decided in a prior action. *Angelopoulos v. Angelopoulos*, 2 N.E.3d 688, 696 (Ind. Ct. App. 2013), *trans. denied*. A party arguing that a suit is barred by claim preclusion must prove the following four elements:

> (1) the former judgment must have been rendered by a court of competent jurisdiction; (2) the former judgment must have been rendered on the merits; (3) the matter now in issue was, or could have been, determined in the prior action; and (4) the controversy adjudicated in the former action must have been between the parties to the present suit or their privies.

Id. Similarly, issue preclusion prohibits "the subsequent litigation of a fact or issue that was necessarily adjudicated in a former lawsuit if the same fact or issue is presented in the subsequent lawsuit." *Id*. "Issue preclusion requires: (1) a final judgment on the merits in a court of competent jurisdiction, (2) identity of issues, and (3) the party to be estopped was a party or the privity of a party in

the prior action." *Sims v. Scopelitis*, 797 N.E.2d 348, 351 (Ind. Ct. App. 2003), *reh'g denied*, *trans. denied*.

[11] The parties in the First Suit and the Second Suit are the same, but HERCO cites *Huber v. United Farm Family Mutual Insurance Company*, 856 N.E.2d 713 (Ind. Ct. App. 2006), *trans. denied*, to argue that the release and satisfaction entered in the First Suit does not constitute a judgment on the merits. In *Huber*, an insured and his insurer could not agree on the value of a business destroyed by fire, and the insurer filed suit requesting appointment of an umpire to resolve the appraisal dispute. *Id*. at 715. The court appointed an umpire. *Id*. The insured began to suspect the umpire was not impartial and raised that concern before the court, but the court ordered the matter concluded after entry of the appraisal award. *Id*. at 716. The insured then filed a separate suit against the insurer alleging bad faith in that the insurer misrepresented the umpire as impartial when seeking his appointment. *Id*. We held the suit for bad faith was not barred by res judicata because the court in the first suit did not render judgment regarding the impartiality of the appraiser. *Id*. at 717. The court's involvement in the first suit was simply for the purpose of appointing an umpire. *Id*.

[12] *Huber* differs from the case at bar because HERCO and Auto-Owners continued to litigate the First Suit for years after entry of the appraisal award. The parties engaged in discovery and Auto-Owners contested whether its policy covered the theft and vandalism portion of the appraisal award. Thus, the release and satisfaction filed in the First Suit constitutes judgment on the merits by a court of competent jurisdiction for res judicata purposes. *See Richter v. Asbestos*

Insulating & Roofing, 790 N.E.2d 1000, 1002-03 (Ind. Ct. App. 2003) ("a dismissal with prejudice is conclusive of the rights of the parties and is res judicata as to any questions that might have been litigated"), *trans. denied*.

[13] HERCO also contends the issues in the two suits are different. We have explained:

> As to *res judicata*, a party is not allowed to split a cause of action, pursuing it in a piecemeal fashion and subjecting a defendant to needless multiple suits. However, two or more separate causes of action may arise from the same tortious act, and in such case a judgment on one action does not bar suit on the second. In this light, the most critical question for the application of *res judicata* is whether the present claim was within the issues of the first or whether the claim presents an attempt to split a cause of action or defense. It has generally been said that the test for making this determination is whether identical evidence will support the issues involved in both actions.

MicroVote General Corp. v. Ind. Election Com'n, 924 N.E.2d 184, 192 (Ind. Ct. App. 2010) (internal citations omitted).

[14] HERCO alleges in the Second Suit that Auto-Owners breached the insurance contract by not tendering payment within thirty days after entry of the appraisal award and that Auto-Owners continued to litigate the First Suit in bad faith after entry of the appraisal award. Breach of contract requires the plaintiff to prove the existence of a contract, breach of the contract by the defendant, and damages resulting from the defendant's breach. *Auto-Owners Ins. Co. v. C & J Real Estate, Inc.*, 996 N.E.2d 803, 805 (Ind. Ct. App. 2013). To prevail on a bad

faith claim, the plaintiff must prove the insurer: (1) made an unfounded refusal to pay policy proceeds; (2) caused an unfounded delay in making payment; (3) deceived the insured; or (4) exercised an unfair advantage over the insured to pressure the insured into settling its claim. *Id.* However, a bad faith claim "does not arise every time an insurance claim is erroneously denied." *Erie Ins. Co. v. Hickman by Smith*, 622 N.E.2d 515, 520 (Ind. 1993). An insurance company may dispute a claim in good faith, and "a good faith dispute about the amount of a valid claim or about whether the insured has a valid claim at all will not supply the grounds for a recovery in tort for the breach of the obligation to exercise good faith." *Id.*

[15] To prevail on its claims, HERCO will need to prove that the insurance contract clearly covered the full appraisal award and that Auto-Owners' continued litigation of the First Suit after entry of the appraisal award was unfounded. Auto-Owners did not concede liability in the First Suit. Auto-Owners decided to pay HERCO the remaining portion of the appraisal award "to forego further litigation regarding coverage[.]" (Appellee's Br. at 16.) HERCO will therefore need to rely on the same evidence used in the First Suit to prove it was entitled to the full appraisal award. HERCO's designation of the settlement of the First Suit in opposition to Auto-Owners' motion for summary judgment as evidence of Auto-Owner's liability for the theft and vandalism portions of the appraisal award demonstrates the connection between the First Suit and the Second Suit. Thus, the identity of the issues requirement is met. *See Small v. Centocor, Inc.*, 731 N.E.2d 22, 27 (Ind. Ct. App. 2000) (holding identity of the issues

requirement was met when claims of fraud and deceit against medical defendants were premised on the treatment and hospitalization of the plaintiff's father after medical malpractice action brought by the estate of plaintiff's father was dismissed with prejudice), *reh'g denied*, *trans. denied*.

[16] HERCO also asserts it could not bring the Second Suit until after Auto-Owners agreed to pay the full appraisal award because that is when the claims alleged in the Second Suit accrued. However, while HERCO cites several cases wherein bad faith and breach of contract claims were litigated post-appraisal, the cases do not establish that the agreement to pay or payment of an appraisal award is a prerequisite to suit. In the cases cited by HERCO, the bad faith and breach of contract claims were brought as part of an initial lawsuit because the appraisals were performed without the involvement of a court. *See Villas at Winding Ridge v. State Farm Fire & Cas. Co.*, 942 F.3d 824, 829 (7th Cir. 2019) (appraisal performed in accordance with policy provision and insured subsequently initiates suit alleging breach of contract and bad faith); and *Weidman v. Erie Ins. Group*, 745 N.E.2d 292, 296 (Ind. Ct. App. 2001) (same). Here, HERCO and Auto-Owners were already involved in the First Suit when the appraisal award was entered. HERCO could have pursued both a claim for judgment on the appraisal award and claims for bad faith and breach of contract in the First Suit by amending its complaint, but HERCO did not do so. *See Westfield Nat. Ins. Co. v. Nakoa*, 963 N.E.2d 1126, 1130 (Ind. Ct. App. 2012) (claims for bad faith and breach of contract asserted but not pursued in action for judgment on appraisal award), *trans. denied*. The issues in the First Suit and the Second Suit

are inextricably intertwined, and the trial court did not err in grating Auto-Owners' motion for summary judgment. *See Warren v. Warren*, 952 N.E.2d 269, 275 (Ind. Ct. App. 2011) (holding res judicata barred suit by children seeking to disinter their parents' remains because the issue of the disinterment and re-interment of parents' remains was litigated in previous suit).

Conclusion

[17] HERCO's Second Suit is barred by res judicata. HERCO's two suits involved the same parties; the First Suit was litigated in a court of competent jurisdiction, the Lake Superior Court; the settlement of the First Suit constitutes a judgement on the merits; and resolution of the central issue in the First Suit was necessary to determine whether HERCO could prevail in the Second Suit. Additionally, HERCO could have raised its breach of contract and bad faith claims in the First Suit but chose not to do so. Therefore, we affirm the trial court.

[18] Affirmed.

Kirsch, J., and Bradford, C.J., concur.