IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LOCKSMITH FINANCIAL CORPORATION, A BRITISH COLUMBIA CORPORATION,
Appellant,
vs.
VOIP-PAL.COM, INC., A NEVADA CORPORATION; AND NEW HORIZON TRANSFER, INC., A BRITISH COLUMBIA BUSINESS ENTITY,
Respondents.

No. 84267-COA

ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

Locksmith Financial Corporation appeals from a district court order granting a motion for summary judgment and denying its cross-motion for summary judgment in an action for equitable relief under a statutory securities action. Eighth Judicial District Court, Clark County; Joanna Kishner, Judge.

Throughout 2009 to 2013, Locksmith invested in respondent VOIP-Pal.com, Inc. (VOIP), largely in the form of cash loans to cover VOIP's operating expenses and business ventures.[1] The debt that VOIP owed to Locksmith was eventually converted into shares of VOIP common stock by agreement between the parties. Shortly after the conversion of debt to stock, and while the shares were still restricted from sell or transfer by federal law, VOIP's board of directors accused Locksmith of fraud and froze over 90 million of Locksmith's shares via resolution of the board. The resolution provided that the shares would remain frozen pending an

[1]We recount the facts only as necessary for our disposition.

investigation and report on the board's fraud claim. From the record, it appears no such report was ever made.

Once VOIP's board froze Locksmith's shares, Locksmith was unable to transfer or sell them, even when the stock would no longer be subject to federal restriction. At peak value, those shares were worth about $14 million. Locksmith sued both VOIP and its stock-transfer agent, New Horizon Transfer, Inc. (New Horizon), for multiple causes of action, including breach of contract, securities fraud, and breach of fiduciary duty. We refer to VOIP and New Horizon collectively as VP unless otherwise stated. Under its claim for breach of contract, Locksmith alleged that VP had "breached [its] obligations" by "stripping away Locksmith's lawful ownership of its 95,832,000 restricted shares by . . . refusing to provide clearance to the transfer agent for sale of Locksmith's [ ] restricted shares in [VOIP]." Under its breach of fiduciary duty claim, Locksmith claimed the individual members of VOIP's board "act[ed] in bad faith when they agreed to issue 95,832,000 restricted shares . . . and then later fr[oze] and [sought] to cancel the shares for no legitimate reason." Locksmith also claimed that the board had breached its fiduciary duty by committing securities fraud. VOIP counterclaimed for multiple causes of action, including fraud. This case is referred to in the parties' briefing as Case 1.[2]

Litigation between the parties went on for nearly five years, during which the value of Locksmith's stock plummeted to a small fraction of its peak value. Ultimately, the jury found against both Locksmith and VP on all claims, with one exception: the jury found that the individual members of VOIP's board of directors breached their fiduciary duty to

[2]Case 1 was captioned *Locksmith Financial Corporation et al v. VOIP-Pal et al*, case no. A-15-807745-C.

Locksmith and awarded Locksmith $355,000 in damages.[3] A full record of Case 1 was not provided by the parties, so it is unclear which of Locksmith's allegations—the alleged securities fraud, the board's freeze of Locksmith's stock, or both—were the bases for the jury's finding of breach of fiduciary duty. However, the jury did not find that VOIP had committed securities fraud as an independent cause of action against the company.

Shortly after trial, Locksmith asked New Horizon to transfer Locksmith's shares of VOIP stock. From the record, this appears to be the first time Locksmith affirmatively sought transfer of its stock. New Horizon was slow to respond but ultimately deferred to VOIP, letting Locksmith know a response would eventually be coming from VP's counsel. Locksmith's attorney reached out to VP's attorney to ask about its request to transfer its stock. Through counsel, VP expressly refused to transfer, claiming that Locksmith had already litigated the transfer of its stock at trial, so VP was under no obligation to transfer the stock post-trial.[4]

Once again unable to access its stock, Locksmith swiftly filed another lawsuit against VOIP and New Horizon, this time seeking only equitable remedies under a statutory cause of action for breach of the duty of an issuer of stock to register a transfer.[5] *See* NRS 104.8401; NRS 104.8403. Eventually, each party moved for summary judgment, making arguments of both law and public policy. At the time of the hearing

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[3]The record does not provide why $355,000 was awarded, so exactly what this amount represents is unclear.

[4]We note that there is nothing in the record to support that Locksmith did not retain ownership of its shares of stock following the conclusion of Case 1.

[5]The trial court judge in Case 2 was not the same as in Case 1.

the district court orally granted summary judgment in favor of VP after finding that Locksmith's claims were precluded because transfer of its stock was litigated during Case 1 under its breach of contract claim. The public policy arguments raised by the parties were not addressed in either the district court's oral ruling or written order, nor was the effect of the jury finding that VOIP's board had breached their fiduciary duty.

In its order, the district court focused on the following four factual findings: (1) in the complaint for Case 1, under the breach of contract claim, Locksmith's allegations included that VP had "sought to 'strip Plaintiff's lawful ownership of the shares by freezing and seeking to cancel the shares'"; (2) NRS 104.8403, which is one of the statutes forming the basis for Locksmith's claims for equitable relief in Case 2, was included in Case 1 as Jury Instruction No. 52; (3) during discovery for Case 2, the founder of Locksmith, Richard Kipping, stated in his deposition "it's pretty obvious that the two cases are based on the same transaction"; and (4) Locksmith's counsel made statements at trial about transferability, including that "perhaps the most important [right] a shareholder has is the right to sell or transfer their stock." The district court's order also denied Locksmith's motion for summary judgment, finding that Locksmith failed to meet its evidentiary burden. This appeal followed.

Locksmith raises two issues on appeal: (1) the district court committed legal error by granting summary judgment in favor of VP because Locksmith's claims for failure to transfer were not precluded by the previous litigation in Case 1; and (2) the district court committed legal error when it denied Locksmith's motion for summary judgment. We agree that VP did not meet its burden to show that Locksmith's claims in Case 2 were precluded as a matter of law by litigation in Case 1. Yet we disagree that it

was legal error to deny summary judgment to Locksmith on its claims as genuine disputes remain. We address each issue in turn.

We review de novo a district court's order granting or denying summary judgment. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment requires this court to view all evidence in the light most favorable to the nonmoving party. *See id.* If there are no genuine disputes of material fact, and the "moving party is entitled to judgment as a matter of law," then this court will affirm the district court's grant of summary judgment. *Id.* (internal quotation marks omitted). The party asserting an affirmative defense, such as claim preclusion, bears the burden of proof as to that defense. *See Nev. Ass'n Servs., Inc. v. Eighth Judicial Dist. Court*, 130 Nev. 949, 955, 338 P.3d 1250, 1254 (2014). Whether claim preclusion operates to bar an action presents a question of law that we review de novo. *See Boca Park Martketplace Syndications Grp., LLC v. Higco, Inc.*, 133 Nev. 923, 925, 407 P.3d 761, 763 (2017).

Claim preclusion is a "policy-driven doctrine . . . designed to promote finality of judgment and judicial efficiency by requiring a party to bring all related claims against its adversary in a single suit, on penalty of forfeiture." *Rock Springs Mesquite II Owners' Ass'n v. Raridan*, 136 Nev. 235, 238, 464 P.3d 104, 107 (2020) (internal quotation marks omitted). This court applies a three-part test to determine whether claim preclusion applies: "(1) the parties or their privies are the same, (2) the final judgment is valid, and (3) the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case." *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1054, 194 P.3d 709, 713 (2008). The test for determining whether claims, or any part of them, are barred in a subsequent action is if they are "based on the same set of facts and

circumstances as the [initial action.]" *Id.* at 1055, 194 P.3d at 714. Claim preclusion applies to all grounds of recovery that were, or could have been, brought in the first case. *Id.* at 1055, 194 P.3d at 713.

In this case, it is undisputed that the first and second prongs of the *Five Star* test were satisfied—the parties are the same in Case 2 and Case 1, and neither party disagrees that the judgment in Case 1 was a valid, final judgment. The dispute, however, concerns the third prong of the test: whether Locksmith's claims in Case 2 were litigated, or could have been litigated, in Case 1.

As to the third prong, Locksmith asserts there are three reasons VP is not entitled to summary judgment as a matter of law: (1) when viewed in the light most favorable to Locksmith as the nonmoving party, the record shows that some of the facts and arguments presented to the district court by VP were misleading and should not have been treated as conclusive as they ultimately were; (2) VP's post-trial refusal to transfer Locksmith's shares may be a completely new wrongdoing by VP, and therefore a new claim; and (3) the district court failed to consider whether Locksmith's public policy argument could be a viable exception to claim preclusion. We agree that VP failed to meet its burden to satisfy the third prong and conclude that summary judgment in its favor was inappropriate.

The evidence supporting VP's motion for summary judgment was not sufficient to establish claim preclusion as a matter of law

The district court's order set forth four reasons as to why claim preclusion prevents Locksmith from pursuing its claims in Case 2. We address the district court's finding regarding the similarity of the claims in Cases 1 and 2 below and address the other factual findings in turn.

First, the court found the inclusion of Jury Instruction 52 supported VP's argument that there was factual commonality between

Cases 1 and 2. We note that jury instructions are not claims and are used only to instruct the jury on the law of the case. *See* NRS 16.110(1); *see also Rock Springs*, 136 Nev. at 238, 464 P.3d at 107. Jury instructions are not used to obtain actions for declaratory relief but are instead intended to "summarize the contours of the law that a jury will apply to the facts." *Rock Springs*, 136 Nev. at 238, 464 P.3d at 107 (citing Nevada Jury Instructions—Civil, 2011 Edition Disclaimer and Information, at iii). Jury instructions may help "ensure that the jury reach[es] its conclusion using the elements" of the alleged cause of action, but a jury instruction does not "become a binding judicial declaration on the parties'" obligations. *Id.* at 238-39, 464 P.3d at 107-08. As such, this court is "unwilling to suppress parties from *proposing jury instructions that may help clarify the law for the jury out of fear that doing so would preclude future claims*." *Id.* at 241, 464 P.3d at 109 (emphasis added). Therefore, in this case, the district court erred in relying on the jury instruction to support claim preclusion.

Second, the district court relied on VP's representation that Kipping, the founder of Locksmith, admitted that the factual basis for Case 1 and Case 2 were the same during his deposition when he said, "it's pretty obvious that the two cases are based on the same transaction." But VP took this statement out of context. Kipping's quote was given while counsel for VP was asking Kipping to compare the physical complaint in Case 1 against the physical complaint in Case 2, paragraph-by-paragraph, to point out the factual similarities between the claims. At the relevant time, Kipping was asked to compare paragraph 24 from the previous complaint to paragraph 28 in the current complaint. In both paragraphs the transactions at issue were exclusively the debt-to-stock convertible loan agreements. There was no mention of VP's freeze via resolution, nor its

later refusal to transfer, in either paragraph. In fact, Kipping denies in his deposition that the transferability of Locksmith's stock was even at issue in Case 1, and at no point did he make the admission that VP represented to the district court that he had made. Therefore, Kipping's deposition testimony does not support that Locksmith's claims in Case 2 were litigated in Case 1.

Third, to the extent that the district court relied on the arguments of Locksmith's counsel at trial in Case 1 to prove claim preclusion in Case 2, those arguments cannot establish claim preclusion because the arguments were neither claims nor evidence of claims presented to the jury. Indeed, the jury in Case 1 was expressly told so in Jury Instruction No. 13: "Statements, arguments and opinions of counsel are not evidence in the case." Thus, the jury in Case 1 was not free to infer a claim that appears to be almost exclusively supported by Locksmith counsel's arguments and opinion alone. Thus, in this instance, counsel's arguments cannot do not necessarily support a finding of claim preclusion.

When considered in sum and viewed in the light most favorable to Locksmith, the evidence that VP relied on to support its motion for summary judgment was insufficient to prove that Locksmith's claims in Case 2 were precluded as a matter of law. As such, VP failed to meet its burden and summary judgment in its favor was inappropriate.

VP's post-trial request to transfer may be a distinct cause of action

The district court also found that Locksmith's unsuccessful breach of contract claim in Case 1 precluded its equitable claims in Case 2. Locksmith argues that its claims in Case 2 were never ripe for litigation in Case 1 because it did not ask VP to transfer its stock until after the judgment was rendered in Case 1. Locksmith argues that VP's post-trial,

permanent denial of transfer was a distinct act of wrongful conduct and so its claims in Cases 1 and 2 are distinct.

As supporting authority, Locksmith cites to *Lawlor v. National Screen Services*, where the United States Supreme Court overturned the Third Circuit Court of Appeals' affirmance of a trial court's grant of summary judgment based on a 1942 and a 1949 lawsuit, both arising from the same wrongful conduct. 349 U.S. 322 (1955). Writing for the court, Chief Justice Warren stated that "both suits involved essentially the same course of wrongful conduct" but the course of wrongful conduct alone is "not decisive" when determining if claim preclusion applies. *Id.* at 327-28 (internal quotation marks omitted). As an example, Chief Justice Warren provided that "an abatable nuisance" can "frequently give rise to more than a single cause of action." *Id.* In response, VP argues the facts in *Lawlor* are distinguishable, and that a careful reading of the case shows that "in essence, the *Lawlor* Court concluded that the two actions lacked sufficient factual commonality – i.e., they did not share enough *operative* facts to justify preclusion."

Broadly speaking, the three-part test for claim preclusion found in *Five Star* is rooted in the Restatement (Second) of Judgments. *G.C. Wallace, Inc. v. Eighth Judicial Dist. Court*, 127 Nev. 701, 707, 262 P.3d 1135, 1139 (2011). The Restatement (Second) of Judgments provides the following example to show the limits of claim preclusion as an affirmative defense when a defendant is accused of the same course of wrongful conduct:

> When a person trespasses daily upon the land of another for a week, although the owner of the land might have maintained an action each day, such a series of trespasses is considered a unit up to the time when action is brought. Thus if in the case stated the landowner were to bring suit on January

> 15, including in his action only the trespass on January 10, and obtain a judgment, he could not later maintain an action for the trespasses on January 11 through January 15.

Restatement (Second) of Judgments § 24, comment (d) (1982).

Locksmith's claim in Case 2 is comparable to the example in the Restatement in that it seemingly could not have been litigated during Case 1. The initial freeze via resolution by VOIP's board took place in 2014. VP's permanent refusal to transfer Locksmith's stock occurred post-trial, in late 2019. As such, VP's permanent refusal to transfer could not have been litigated in Case 1.[6] Further, while the district court found that Locksmith had failed to prove its breach of contract claim, the district court did not address the effect of the jury finding for Locksmith on its breach of fiduciary duty claim. Arguably, after Case 1 concluded, VP's failure to respond to Locksmith's request to transfer its stock may have been inconsistent with the jury's verdict in Case 1, giving rise to a new cause of action in Case 2. If so, Locksmith's claim is analogous to Chief Justice Warren's example of an abatable nuisance in *Lawlor*: VP does not dispute it has a duty to

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[6]VP argues that even if we should conclude that Locksmith's claims in Case 2 were not litigated in Case 1, the issue of transferability was litigated in Case 1 and therefore Locksmith's claims in Case 2 are barred based on the doctrine of issue preclusion. But, as we explain below, VP has not established that it acted in conformity with the jury's verdict on the breach of fiduciary duty claim in Case 1 when it denied Locksmith's request to transfer the stock post-trial. So, VP has not shown that it is entitled to summary judgment as a matter of law based on its alternative argument of issue preclusion. Furthermore, the district court did not decide this issue. *See 9352 Cranesbill Tr. V. Wells Fargo Bank, N.A.*, 136 Nev. 76, 82, 459 P.3d 227, 232 (2020) (declining to address an issue that the district court did not resolve).

transfer or that Locksmith's stock was and is transferable—it merely continues to refuse to transfer.

The full litigation record of Case 1 was not provided by either party, but the operative facts leading to these two claims appear to be distinct. In Case 1, VP's freeze via resolution was apparently meant to be temporary because it followed an allegation of fraud that was to be investigated. Also, it occurred when Locksmith's stock was still restricted from transfer under federal law, and before Locksmith ever sought to transfer or sell its stock. Comparatively, in Case 2, the refusal to transfer was permanent, it followed lengthy and expensive litigation where VP was not the prevailing party, it occurred after Locksmith's stock was no longer restricted from transfer under federal law, and it occurred because Locksmith requested the transfer of its stock. The two cases also appear to differ on the claims of VP's wrongful conduct. In Case 1, the jury found the wrongful conduct to be a breach of fiduciary duty. In Case 2, the alleged wrongful conduct was a breach of duty by an issuer of stock under NRS 104.8401 and NRS 104.8403 by failing to transfer the stock of its shareholder.

VP offers no argument that Locksmith's shares are not transferable. Nor does VP point to anything in the record to suggest that it was or is relieved of its statutory duty to transfer Locksmith's stock. Thus, because the two cases appear from the record to be factually distinct, and because VP may have disregarded the jury's finding by refusing to transfer Locksmith's stock post-trial, we cannot conclude that litigation in Case 1 precluded Locksmith's claims in Case 2 as a matter of law. Because VP has not met its burden to prove claim preclusion as a matter of law, we conclude that summary judgment was inappropriate.

A genuine dispute of material fact remains as to whether the balance of equities and public policy favor Locksmith

Locksmith argues that affirming the order granting VP's motion for summary judgment would result in an untenable situation where Locksmith still has ownership of VP stock, was cleared of fraud and all other allegations by the jury, but can still never realize any value from its property via transfer. Locksmith urges this court to consider how pernicious this outcome would be on the public policy of Nevada, as our laws recognize stock as the personal property of its holder and invests the holder with certain statutory rights. *See* NRS 78.240, NRS 78.235(1). VP argues that the public policy behind claim preclusion, which favors fairness to defendants and respect for the finality of judicial decisions, overcomes Locksmith's public policy arguments.

The Restatement (Second) of Judgments articulates the limitations on the use of tests and formulas when evaluating claim preclusion:

> Underlying the standard is the need to strike a delicate balance between, on the one hand, the interests of the defendant and of the courts in bringing litigation to a close and, on the other, the interest of the plaintiff in the vindication of a just claim.

Restatement (Second) of Judgments § 24, comment (b) (1982). This policy is reflected in Nevada's own caselaw, as our supreme court has concluded that "[c]laim preclusion does not bar independent actions for equitable relief because the exceptional circumstances justifying equitable relief also justify deviation from the doctrine of claim preclusion." *Doan v. Wilkerson*, 130 Nev. 449, 454, 327 P.3d 498, 502 (2014), *superseded by statute,* NRS 125.150(3), *on other grounds, as recognized by Kilgore v. Kilgore*, 135 Nev. 357, 364-65, 449 P.3d 843, 849 (2019).

Locksmith raised *Doan* at summary judgment to argue that even if VP can prove claim preclusion, the unjust result of VP failing to transfer Locksmith's stock would be an exceptional circumstance justifying equitable relief. This argument was not addressed in the record by the district court. Assuming without concluding that further discovery would allow VP to prove claim preclusion as a matter of law, a genuine dispute of material fact remains as to whether allowing VP to effectively control Locksmith's ownership of the stock is an exceptional circumstance permitting a trial on equitable remedies.[7] And, therefore, the district court's decision to apply claim preclusion to summarily preclude Locksmith from pursuing equitable remedies was in error.

A genuine dispute of material fact remains as to whether Locksmith met its own evidentiary burden for summary judgment

Locksmith argues that VP's failure to rebut the assertion that the stock was transferable and that there was a duty to transfer are sufficient to show that the district court's denial of its motion for summary judgment was legal error. But Locksmith brings his claims in Case 2 under a statute that also imposes burdens on the party seeking transfer. *See* NRS 104.8401(1)(a)-(g). It is not clear what evidence Locksmith provided to the district court to prove that it satisfied its burden. Thus, a genuine dispute of material fact remains as to whether Locksmith can prove its eligibility to seek transfer and we agree with the district court that Locksmith is not entitled to summary judgment as a matter of law.

Accordingly, we

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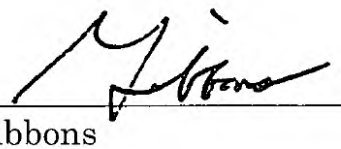
[7]As to VP's argument that, on balance, the policy behind claim preclusion prevails, Locksmith is seeking exclusively equitable relief, and "[a] judicial declaration in Case 2 will not undermine the finality of the jury's verdict in Case 1." *Rock Springs*, 136 Nev. at 240, 464 P.3d at 109.

REVERSE the order granting VP summary judgment, AFFIRM the order denying summary judgment to Locksmith, and REMAND for proceedings consistent with this order.[8]



_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

cc: Hon. Joanna Kishner, District Judge
Law Office of Michael E. Smith, Esq., P.C.
Lex Tecnica LTD
Alverson Taylor & Sanders
Eighth District Court Clerk

[8]Insofar as the parties have raised any other arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.