Filing # 132312567 E-Filed 08/09/2021 04:23:23 PM

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

MINTZ TRUPPMAN, P.A.

Petitioner,

v.

Case No: SC20-1225

COZEN O'CONNOR, PLC, et al.

Respondents

Ltr. Case Nos: 3D18-1976 & 3D18-1975
(Consolidated)

16-028473 CA 01 (21)

PETITION FOR DISCRETIONARY REVIEW OF A DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

APPENDIX TO PETITIONER'S INITIAL BRIEF

MINTZ TRUPPMAN, P.A.
Attorneys for Plaintiffs
1700 Sans Souci Boulevard
North Miami, FL 33181
Telephone: (305) 893-5506
tim@mintztruppman.com
2nd: charles@mintztruppman.com

By: /s/ Timothy H. Crutchfield
Timothy H. Crutchfield
Florida Bar No. 621617

RECEIVED, 08/09/2021 04:24:28 PM, Clerk, Supreme Court

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served on Charles C. Kline, Esq., Jason R. Domark, Esq. Reid Kline, Esq., Cozen O'Connor, Southeast Financial Center, Suite 3000, 200 South Biscayne Blvd., Miami, Florida 33131-2352, ckline@cozen.com, jdomark@cozen.com, rkline@cozen.com; Thomas Scott, Esq., Cole, Scott & Kissane, 9150 South Dadeland Blvd., Suite 1400, Miami, Florida 33156, Thomas.scott@csklegal.com, renee.nail@csklegal.com; Israel Reyes, Esq., The Reyes Law Firm, P.A., One Columbus Center, 1 Alhambra Plaza, Suite 1130, Coral Gables, Florida 33134, ireyes@reyeslawfirmpa.com; and Craig Greene, Esq., Kramer, Green, Zuckerman, Greene & Buchsbaum, P.A., 4000 Hollywood Blvd., Ste. 485-South, Hollywood, Florida 3320, cgreene@kramergreen.com by e-mail this 9th day of August, 2021.

MINTZ TRUPPMAN, P.A.
Attorneys for Plaintiffs
1700 Sans Souci Boulevard
North Miami, FL 33181
Telephone: (305) 893-5506
tim@mintztruppman.com
2nd: charles@mintztruppman.com

By: /s/ Timothy H. Crutchfield
Timothy H. Crutchfield
Florida Bar No. 621617

Third District Court of Appeal

State of Florida

Opinion filed June 17, 2020.
Not final until disposition of timely filed motion for rehearing.

Nos. 3D18-1976 & 3D18-1975
Lower Tribunal No. 16-28473

Cozen O'Connor, PLC and John David Dickenson, et al.,
Petitioners,

vs.

Mintz Truppman, P.A., etc.,
Respondent.

A Case of Original Jurisdiction—Prohibition.

Cozen O'Connor, and Charles C. Kline, Jason R. Domark and Reid Kline; Cole, Scott & Kissane, P.A., and Thomas E. Scott, for petitioners.

Mintz Truppman, P.A., and Timothy H. Crutchfield; Kramer, Green, Zuckerman, Greene & Buchsbaum, P.A., and Shawn R. Horwick and Craig M. Greene (Hollywood), for respondent.

Before FERNANDEZ, LOGUE and SCALES, JJ.

SCALES, J.

Petitioners Lexington Insurance Company ("Lexington") and Cozen O'Connor, PLC and John David Dickenson (together, "Cozen") filed separate petitions in this Court seeking certiorari and prohibition, after the trial court denied their motions to dismiss respondent's, Mintz Truppman, P.A.'s ("Mintz"), second amended complaint. We grant prohibition because, under the unique circumstances presented here, the circuit court lacks the subject matter jurisdiction to adjudicate Mintz's claims.

I. Background

A. The Underlying Claim, Removal to Federal Court, and Settlement at Mediation

After a broken pipe caused substantial water damage to the home of Lexington's insured, Daphne Query, Query engaged Mintz who, in 2014, filed a first-party action against Lexington in Miami-Dade County Circuit Court. Lexington removed Query's lawsuit to federal court. Query's first-party claim then was litigated in the United States District Court for the Southern District of Florida.

On June 13, 2016, the parties settled the property damage portion of Query's claim at mediation. The parties also agreed that Query was entitled to attorneys' fees, and that, if the parties were unable to amicably resolve the fee issue, the federal district court would adjudicate Query's claim for attorneys' fees as contemplated by

Local Rule 7.3.[1] Consistent with the parties' agreement, on July 1, 2016, the federal court dismissed the case, retaining jurisdiction to enforce the terms of the settlement and to determine the amount of the attorneys' fees due to Query.

After attempts to amicably resolve the fee dispute failed, on September 29, 2016, Query filed in the federal court her Verified Motion for Award of Attorneys' Fees and Non-Taxable Costs and Expenses (the "Motion") for the legal exertions of Mintz and a co-counsel.[2] In the Motion, Query asserted that "the parties attended mediation where Lexington agreed to pay Query $125,000, representing 100% of the property damage sustained from the plumbing loss at issue." Within the Motion, Mintz and its co-counsel set forth their total hours and their hourly rates for four attorneys in the two law firms who worked on Query's case. The Motion proposed a contingency risk multiplier of 2.0.[3] With the application of a 2.0 multiplier, Query's total demand for attorneys' fees in the Motion was $828,056.

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[1] Local Rule 7.3(b) provides a detailed mechanism for parties to a fee dispute in the Southern District to attempt to resolve their dispute amicably prior to submitting the dispute to the District Court for adjudication. Local Rule 7.3(a) details the requisites of the motion for fees, and prohibits the filing of the motion until after the parties have engaged in good faith efforts to resolve the dispute as prescribed in Local Rule 7.3(b).

[2] After Lexington removed the case to federal court, Mintz engaged the firm of Kramer, Green, Zuckerman, Greene & Buchsbaum, P.A. as co-counsel because of its experience in first-party insurance litigation in federal court.

[3] The Motion contained a total lodestar calculation of $414,028 for 688.3 hours of attorneys' time across the two law firms.

On October 21, 2016, Lexington filed its response to the Motion ("Lexington's Response"). Lexington's Response, prepared by Cozen, argued that Query should recover between $70,000 and $85,000 in fees. Lexington's Response characterized the parties' mediated settlement as a "partial" settlement, rebutting Query's assertion that she had received "100%" of her property damage claim in the mediation settlement. To support its rebuttal, Lexington attached as an exhibit to its response Mintz's pre-mediation demand letter (the "Pre-Mediation Demand") which, apparently, represented Query's total property damage claim as greater than $125,000.[4]

Query did not seek to strike Lexington's Response, nor did she raise with the federal court any contemporaneous mediation confidentiality objections directed toward Lexington's Response or the attached Pre-Mediation Demand.

B. The Federal Court's Determination

The federal court referred the Motion and Lexington's Response to a Magistrate Judge who, on February 7, 2017, issued his Report and Recommendations regarding Query's fee claim. The Magistrate Judge, after

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[4] By mutual assent of the parties, the Pre-Mediation Demand is not included in our record. The parties stipulate, though, that the Pre-Mediation Demand was a mediation communication as defined in section 44.403(1) of the Florida Statutes. In relevant part, section 44.403(1) defines a "mediation communication" as a "written statement . . . made during the course of a mediation, or prior to mediation if made in furtherance of a mediation." § 44.403(1), Fla. Stat. (2018).

reviewing all relevant submissions, determined Query was entitled to total lodestar attorneys' fees of $239,983. The Magistrate Judge declined to apply a multiplier, though, finding that Query did not meet any of the factors that warrant a multiplier.[5]

Query did not file objections to the Magistrate's Judge's Report and Recommendations. The federal court accepted the Magistrate Judge's recommendation and, on March 17, 2017, the federal court entered a Final Judgment on Fees and Costs, awarding Query a total of $259,502.81[6] in attorney's fees and costs, plus $9,465.14 in pre-judgment interest. Neither party appealed this Final Judgment, and the record indicates that, on March 28, 2017, Lexington paid Query in full, both her property damage settlement and the Final Judgment for fees and costs.

C. Mintz's Lawsuit Against Lexington and Cozen – the Instant Action Below

On November 3, 2016, two weeks after Cozen filed Lexington's Response in the federal court action, and well before the federal court entered the March 17, 2017 Final Judgment on Querty's fee claim, Mintz – no doubt in response to Lexington and Cozen's inclusion of the Pre-Mediation Demand in Lexington's Response –

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[5] See Standard Guar. Ins. Co. v. Quanstrom, 555 So. 2d 828, 834 (Fla. 1990).

[6] More specifically, the federal court awarded $239,983 for the work of four attorneys in the two law firms representing Query, $7,841.89 in taxable costs, and $11,677.92 in expert and travel costs.

filed the instant action in the Miami-Dade County Circuit Court. Mintz's second amended complaint – the operative complaint for our purposes – pleads ten counts, and each count seeks entitlement to damages or injunctive relief based on Mintz's principal assertion that Lexington and Cozen violated Florida's Mediation Confidentiality and Privilege Act ("the Act"), sections 44.401-44.406, by appending the Pre-Mediation Demand to Lexington's Response.[7]

The relevant provision of the Act, giving rise to a private cause of action, reads as follows:

> Any mediation participant who knowingly and willfully discloses a mediation communication in violation of s. 44.405 shall, upon application of any party to a court of *competent jurisdiction*, be subject to remedies, including:
>
> (a) Equitable relief.
>
> (b) Compensatory damages.
>
> (c) Attorney's fees, mediator's fees, and costs incurred in the mediation proceeding.
>
> (d) Reasonable attorney's fees and costs, incurred in the application for remedies under this section.

§ 44.406(1), Fla. Stat. (2018) (emphasis added).

[7] The counts in the second amended complaint are as follows: declaratory relief (Count I); breach of mediation contract (Counts II and III); conspiracy to violate the Act (Count IV); violation of section 44.405 of the Act (Count V); injunctive relief (Count VI); bad faith/unfair claims practices (Count VII); and, fraud in the inducement (Counts VIII, IX and X).

Both Lexington and Cozen filed all-embracing motions to dismiss Mintz's second amended complaint, and, in three unelaborated orders, the trial court denied the motions to dismiss. Lexington and Cozen then each timely filed separate petitions with this Court seeking certioarari relief and, in the alternative, prohibition. We consolidated the two petitions for all purposes.

II. The Petitions for Certiorari and Prohibition

In their petitions, Lexington and Cozen argue three distinct bases for intervention by this Court at this stage of the proceedings.[8] First, they argue that certiorari lies because Lexington and Cozen's decision to include the Pre-Mediation Demand as an exhibit to Lexington's Response – the act that forms the basis of all of Mintz's claims – is immunized by the litigation privilege. Thus, they argue, the trial court departed from the essential requirements of law by denying their motions to dismiss Mintz's complaint.

Second, Lexington and Cozen argue that they are entitled to certiorari relief because Mintz lacks the requisite standing under the Act to pursue its action. They assert that Mintz, as Query's attorney at the mediation, was a mediation participant, rather than a mediation party, and only a mediation party has a right to pursue

[8] Lexington and Cozen correctly recognize that an order denying a motion to dismiss a complaint is an interlocutory order that is not reviewable on appeal, and can be challenged only under extraordinary circumstances. See Scott v. Francati, 214 So. 3d 742, 748 (Fla. 1st DCA 2017).

remedies under section 44.406(1) of the Act for a purported breach of confidentiality.

Third, Lexington and Cozen argue that the gravamen of Mintz's state court action is to recover additional attorneys' fees to which Mintz asserts it is entitled for Mintz's representation of Query in the federal court case. Lexington and Cozen assert they are entitled to prohibition because the federal court has exclusive subject matter jurisdiction to adjudicate Query's fee claim and, in fact, the federal court has exercised such jurisdiction and rendered a final judgment on Query's fee claim.

III. Analysis

Because we agree with Lexington and Cozen that the lower court lacks the subject matter jurisdiction to adjudicate what is essentially Mintz's claim for additional fees in the federal court action, we grant them the relief of prohibition under this third theory. We do not reach, and we express no opinion on, Lexington and Cozen's separate certiorari claims; and we therefore dismiss, as moot, the petitions to the extent they seek certiorari relief.

A. Remedy of Prohibition and the Gravamen of Mintz's Second Amended Complaint

A party seeking a writ of prohibition must demonstrate "that a lower court is without jurisdiction or attempting to act in excess of jurisdiction." English v. McCrary, 348 So. 2d 293, 296 (Fla. 1977). In its briefing to this Court, Mintz describes its state court lawsuit as "an action for damages caused by the Petitioners'

violation of the Mediation Confidentiality and Privilege Act," and Lexington and Cozen concede that, pursuant to the Act's express terms, a Florida circuit court would *generally* have subject matter jurisdiction to adjudicate such a claim. As section 44.406(1) provides, a mediation participant, upon application of a party to a court of competent jurisdiction, is subject to any of several remedies, including damages and attorney's fees. But when determining whether prohibition lies to prevent a trial court from acting in excess of its jurisdiction, we look beyond how a plaintiff's claims are labeled and focus, rather, on the gravamen of the plaintiff's complaint. See Transp. Workers Union of Am., Local 291, AFL-CIO v. Cunningham, Case No. 3D20-216 at *2, 2020 WL 2176476 (Fla. 3d DCA May 6, 2020) (recognizing that, in determining whether prohibition will lie, "it is well-settled that courts must look to the nature and substance of the claim").

When we look beyond Mintz's characterization of its lawsuit, and focus on the "nature and substance" of Mintz's claims, it is clear that Mintz essentially is seeking, in each of the ten counts of its second amended complaint, additional fees for Mintz's representation of Query in the federal action – fees that Mintz sought in the Motion, but did not obtain in the federal court's Final Judgment. Irrespective of the labels Mintz places on the ten counts in its second amended complaint, we view the gravamen of Mintz's state court lawsuit as seeking to close the gap between Query's $828,056 fee demand filed in federal court and the considerably lower

award adjudicated in the federal court's Final Judgment. In sum, Mintz seeks to relitigate in state court a fee claim that the federal court determined with finality.

B. Collateral Estoppel Bars Re-Litigation in State Court of Mintz's Claims that were Adjudicated in Federal Court, therefore Warranting Prohibition

Collateral estoppel, or estoppel by judgment, is a judicial doctrine that generally prevents identical parties from relitigating issues that previously have been decided between them. See Mobil Oil Corp. v. Shevin, 354 So. 2d 372, 375 (Fla. 1977) ("Collateral estoppel has traditionally operated to preclude litigants from relitigating the same issue not only in the same, but as well as in a different forum."). The elements of collateral estoppel are: "1) the issue at stake is identical to the one involved in the prior litigation; 2) the issue has been actually litigated in the prior suit; 3) the determination of the issue in the prior litigation was a critical and necessary part of the judgment in that action; and 4) the party against whom the earlier decision is asserted had a full and fair opportunity to litigate the issue in the earlier proceeding." Baxas Howell Mobley, Inc. v. BP Oil Co., 630 So. 2d 207, 209 (Fla. 3d DCA 1993).

We have granted prohibition when a party seeks to litigate in state court a claim that already has received a final adjudication in federal court. In Carnival Corporation v. Middleton, 941 So. 2d 421 (Fla. 3d DCA 2006), an injured cruiseship passenger sued the cruise line in state court. The trial court dismissed the suit because the forum selection clause on the passenger's ticket required that the suit be

filed in federal court. Id. at 423. The federal court then dismissed the passenger's newly filed action because the passenger did not comply with a one-year limitations period, which was also reflected on the passenger ticket. Id. Rather than pursuing an appeal of the federal court's ruling, the passenger filed his negligence suit again in state court, raising several issues as to the legality of the one-year limitations period. Id. The trial court re-instated the passenger's negligence action. In granting the defendant cruise line's petition for prohibition, this Court concluded that, under the facts and circumstances of the case, the state trial court "was without jurisdiction to entertain the issues already disposed of in federal court," inasmuch as the federal court already had determined the adequacy of the limitations period. Id. at 424; see also E.J. DuPont de Nemours & Co. v. Melvin Piedmont Nursery, 971 So. 2d 897, 898 (Fla. 3d DCA 2007) (granting prohibition upon holding, consistent with Carnival Corp., that "the findings of a federal district court are binding on a state trial court under principles of collateral estoppel").

In the instant case, not only did the federal court – upon the parties' stipulation – expressly reserve jurisdiction in its July 1, 2016 dismissal order to determine the amount of Query's fee claim, it then adjudicated the issue and rendered the March 17, 2017 Final Judgment. That Final Judgment was not appealed. Just as in Carnival Corp. and Melvin Piedmont Nursery – cases in which we granted prohibition because the the federal court adjudicated, with finality, the claim presented to the

state court – here, the federal court made a final determination of the fees to which Query was entitled. While Mintz asserts that its state court claims are not identical to the fee claim adjudicated in the Final Judgment, when we look to the gravamen of the claims asserted in Mintz's second amended complaint – to Mintz's effort to augment the attorney's fee award already obtained in the federal court – we have little difficulty concluding that Lexington and Cozen have established each of the the four elements of collateral estoppel. As such, the circuit court lacks competent jurisdiction to adjudicate, and is therefore precluded from exercising jurisdiction over, the claims Mintz has pled. See Carnival Corp., 941 So. 2d at 424; Melvin Piedmont Nursery, 971 So. 2d at 898.[9]

IV. Conclusion

Mintz is collaterally estopped from pursuing its lawsuit in state court, because this suit's claims – damages for additional fees for representing Query in her property damage claim against Lexington – have already been adjudicated by the federal court. Prohibition therefore lies because, under the unique facts and circumstances of this case, the circuit court lacks jurisdiction to adjudicate the claims asserted in Mintz's second amended complaint. We grant Lexington and Cozen's

[9] While we do not condone Lexington and Cozen's apparent breach of mediation confidentiality, we conclude that its redress rested with the federal court.

petitions[10] seeking prohibition, direct the trial court to dismiss, with prejudice, Mintz's second amended complaint, and dismiss as moot the petitions to the extent they seek certiorari relief.

Petitions for prohibition granted; petitions for certiorari dismissed as moot.

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[10] While Lexington's petition is captioned "Petition for Writ of Certiorari," Lexington expressly adopted the arguments in Cozen's contemporaneously filed petition – including Cozen's collateral estoppel argument upon which we base our ruling – that sought certiorari and prohibition as alternate remedies. Additionally, both Mintz's response brief and Lexington and Cozen's consolidated reply brief address the collateral estoppel argument. Hence, although Lexington's petition does not specifically seek the remedy of prohibition, we nevertheless grant prohibition as to Mintz's claims against Lexington. See Florida Rule of Appellate Procedure. 9.040(c).