

OPP

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DISTRICT COURT
CLARK COUNTY NEVADA

FREDRICK RIZZOLO a/k/a RICK RIZZOLO)
)
Plaintiff,)
vs.)
)
KIRK HENRY, an individual, AMY HENRY, an)
individual, DOE individuals I through XX, and)
ROE CORPORATIONS I through XX,)
)
Defendants.)
_____)

Case No.: 2:12-cv-02043-LRH-VCF

**OPPOSITION TO MOTION TO
DISMISS**

COMES NOW, Plaintiff, FREDRICK RIZZOLO a/k/a RICK RIZZOLO, by and through
his attorney of record, SIGAL CHATTAH, ESQ., of the LAW OFFICES OF SIGAL
CHATTAH, who hereby files this Opposition to Defendant's motion to dismiss.

ARGUMENT

STATEMENT OF FACTS

On October 2, 2001, Kirk and Amy Henry filed a lawsuit arising out of injuries sustained during a September 20, 2001 incident which was styled *Kirk and Amy Henry v. The Power Company, Inc. et al.*, Clark County District Court for the State of Nevada, Case No.: A440740. Rick Rizzolo was individually named as a Defendant in said lawsuit on June 26, 2002.

On August 8, 2006, The Power Company, Inc. and Rick Rizzolo entered into the Settlement Agreement with Kirk and Amy Henry in *Case No.: A440740*. In the Settlement Agreement, The Power Company, Inc. and Rick Rizzolo agreed to pay \$10,000,000 to Kirk and Amy Henry with \$1,000,000 due immediately and the remainder to be paid from the proceeds of the sale of the Crazy Horse Too at the time of the closing, consistent with the terms of the foregoing guilty plea agreements.

The Settlement Agreement further provided that “[a]lthough it is anticipated that the NINE-MILLION DOLLARS (\$9,000,000) will be paid from the proceeds of the sale, the obligation to make said payment upon the closing is not contingent upon the realization of net proceeds from the sale sufficient to make the NINE-MILLION DOLLARS (\$9,000,000) payment.” *Id.*

The Settlement Agreement also provided that “the issuance of said draft is not, nor is it to be construed as an admission of liability on the part of any release but is a compromise, settlement, accord and satisfaction, and discharge of loss, damages, claims, actions, causes of action, suits, and liability which are each and all uncertain, doubtful and disputed. *Id.*

Two months prior to entry of the Settlement Agreement on Case No.: A440740, on June 2, 2006, The Power Company, Inc., entered into a guilty plea agreement with the United States

1 government for the crime of conspiracy to participate in an enterprise engaged in racketeering
2 activity in violation of Title 18, United States Code, Section 1962(d). *United States v. The*
3 *Power Company, Inc.*, USDC Case No. 2:06:-cr-00186.

4 As part of its guilty plea, The Power Company, Inc. agreed to make restitution in the
5 amount of \$10,000,000 to Kirk and Amy Henry with \$1,000,000 due immediately upon the
6 entry of the Power Company's guilty plea and the remainder due and to be paid from the
7 proceeds of the sale of the Crazy Horse Too at the time of the closing. *Id.*

8 Based on the abovementioned guilty plea agreements and the Settlement Agreement,
9 District Court Judge Philip M. Pro entered the Judgment and Commitment Order against Rick
10 Rizzolo on January 26, 2007. USDC Case No. 2:06:-cr-00186.

11 Rick Rizzolo's Judgment and Commitment Order ordered that he pay restitution to Kirk
12 Henry in the amount of \$10,000,000. The Judgment and Commitment Order further provides
13 that "[t]he restitution amount is payment jointly and severally with the Co-Defendant Power Co.
14 Inc." *Id.*

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16 On September 7, 2007, the Henrys entered into a Petition and Settlement Agreement,
17 Stipulation for Entry of Order of Forfeiture and Order. Said Settlement Agreement would have
18 placed the Henrys at the top of the "pay-out" list had there been a sale of the asset in accordance
19 with the Parties contemplated intent and the \$30 million US Dollar price tag.

20 In short, Kirk and Amy Henry agreed to abandon their interest in the sale of the Crazy
21 Horse Too to the United States Government, allowing the United States Government to forfeit
22 the property, in consideration that Kirk and Amy Henry would be the first to receive any
23 proceeds of the sale. On May 7, 2008, the United States government filed and distributed in the
24 criminal case a proposed First Amended Order of Forfeiture, reducing Kirk and Amy Henry
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1 from first position to fifth position. Kirk and Amy Henry objected to the First Amended Order
2 of Forfeiture. On June 24, 2008, the proposed First Amended Order of Forfeiture was entered in
3 the criminal case, as an order acknowledging the Henrys' abandonment of their interest in the
4 Crazy Horse Too.

5 On October 15, 2008, a Second Amended Order of Forfeiture was entered in the criminal
6 case acknowledging the abandonment of the Henrys' interest in the Crazy Horse Too and their
7 fifth position as payment from the proceeds of the sale of the Crazy Horse Too.

8 Furthermore, due to the fact that the Federal Marshals refused to make the mortgage
9 payments on the seized property (the building wherein The Crazy Horse Too was located), on
10 February 28, 2011, District Court Judge Philip M. Pro ordered that Canico Capital Group, LLC
11 conduct a non-judicial foreclosure sale of the Crazy Horse Too.

12 On July 1, 2011, the Crazy Horse Too was sold to Canico Capital Group, LLC at the non-
13 judicial foreclosure sale for \$3 million. Kirk and Amy Henry did not receive any proceeds from
14 the sale of the Crazy Horse Too.

15 On September 1, 2011, District Court Judge Timothy Williams in the case of *Kirk and*
16 *Amy Henry v. The Power Company, Inc. et al.*, Clark County District Court for the State of
17 Nevada, *CCDC Case No. A440740*, entered a Judgment on behalf of Kirk and Amy Henry
18 against Rick Rizzolo and The Power Company, Inc. in the amount of \$9,000,000.

19 The judgment in *Case No. A440740* provided the following "On July 26, 2006, Plaintiffs
20 entered into a Settlement Agreement with Defendant Rick Rizzolo in the amount of \$10 million.
21 Defendant Rick Rizzolo paid \$1 million upon execution of the Settlement Agreement.
22 Defendant Rick Rizzolo was obligated to pay the remaining \$9 million upon the closing of the
23 sale of the Crazy Horse Too. The Crazy Horse Too was sold by foreclosure sale on July 1, 2011,
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1 and did not net the proceeds required to satisfy the \$9,000,000 judgment against Defendants. As
 2 such, Defendant Rick Rizzolo is obligated to make the remaining payment of the settlement to
 3 Plaintiffs. Since the initial \$1 million payment referenced above, Defendant Rick Rizzolo has
 4 failed to make any further payments to Plaintiffs under the Settlement Agreement. In light of the
 5 foregoing, Defendant Rick Rizzolo is now in breach of the Settlement Agreement and Plaintiffs
 6 are entitled to a judgment in their favor for all remaining amounts due under the Settlement
 7 Agreement.” *Id.*

8 **LEGAL STANDARD**

9 “When reviewing dismissal of a complaint, we accept the allegations of the complaint as true
 10 and construe them in the light most favorable to the plaintiff.” *Love v. United States*, 871 F.2d
 11 1488, 1491 (9th Cir.1989). Dismissal of a complaint is improper “unless ‘it appears beyond
 12 doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him
 13 to relief.’ ” *Id.*, quoting *Gibson v. United States*, 781 F.2d 1334, 1337 (9th Cir.1986), *cert.*
 14 *denied*, 479 U.S. 1054 (1987).

16 **A. RIZZOLO IS NOT SUBSTANTIVELY BARRED BY ISSUE PRECLUSION IN** 17 **THIS MATTER**

18 A prior judgment does not extinguish a plaintiff's claim to the extent that the plaintiff was
 19 unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the
 20 first action because of the limitations on the subject matter jurisdiction of the courts or
 21 restrictions on their authority to entertain multiple theories or demands for multiple remedies or
 22 forms of relief in a single action, and the plaintiff desires in the second action to rely on that
 23 theory or to seek that remedy or form of relief. *Victa v. Merle Norman Cosmetics, Inc.*, 19 Cal.
 24 App. 4th 454, 461, 24 Cal. Rptr. 2d 1 (1993).

1 In Nevada, issue preclusion requires that (1) an issue be identical, (2) the initial ruling was
 2 final and on the merits, (3) the party against whom the judgment is asserted was a party or in
 3 privity with a party in the prior case, and (4) the issue was actually and necessarily litigated.

4 Issue preclusion is based upon the sound public policy of limiting litigation by preventing
 5 a party *who had one full and fair opportunity to litigate an issue from again drawing it into*
 6 *controversy*. This doctrine ends litigation and lends stability to judgments, thus inspiring
 7 confidence in the judicial system. The party seeking to assert a judgment against another has the
 8 burden of proving the preclusive effect of the judgment. [*Emphasis added*]. Bower v. Harrah's
 9 Laughlin, Inc., 215 P.3d 709 (2009)

10 **1. The 2001 Lawsuit Had Nothing To Do With The Settlement Agreement**
 11 **Entered in 2005 and Was Never Actually and Necessarily Litigated.**

12 The most important matter that this Court needs to be apprised of is that the 2001 case
 13 was a Personal Injury Case. It had nothing to do with the Settlement Agreement. The causes of
 14 action alleged in the 2001 Case that Defendants rely on to substantiate an Issue Preclusion claim
 15 include the following:

- 16 1. Assault and Battery
- 17 2. Intentional Infliction of Emotional Distress
- 18 3. Conversion
- 19 4. Loss of Consortium

20 The issue of Impossibility of the Settlement Agreement was never litigated. In order for
 21 the Affirmative Defenses to have been litigated in the Settlement Agreement, Judge William's
 22 had to have decided whether those issues were litigated on the merits. No such Arguments were
 23 presented, heard or made. Judge William's summarily decided on a Motion to Reduce the
 24 Settlement to a Judgment. The merits of the Judgment or the Settlement were never decided on,
 25 which is the impetus of the Appeal in the State Court.

1 Ultimately, what is left for this Court to determine regarding the substantive nature of
 2 issue preclusion is whether Mr. Rizzolo had the opportunity to litigate the merits of the
 3 Settlement Agreement and the impossibility of the performance thereof in September, 2011. The
 4 hearing in September, 2011 was not to determine the merits of the Settlement Agreement and
 5 whether its performance was probable or whether there were defenses to it. The Motion was to
 6 Reduce it to Judgment regardless of the merits behind it; and Judge Williams, ultimately reduced
 7 it to Judgment, precluding Rizzolo from ever litigating the merits of it, and therefore
 8 substantively issue preclusion does not attach.

9 **B. PLAINTIFF’S IMPOSSIBILITY DEFENSE IS NOT PROCEDURALLY BARRED**
 10 **BY THE DOCTRINE OF ISSUE PRECLUSION BECAUSE AN APPEAL IS**
 11 **PENDING AS TO ITS VALIDITY.**

12 “A verdict and judgment cannot be pleaded in bar, nor do they operate by way of
 13 estoppel whilst the case in which they are rendered is pending on appeal.” *Sherman v. Dilley*
 14 (1867) 3 Nev 21. In *Sherman* the court observed that had defendant's counsel shown to the trial
 15 court that a former decree, relied upon as conclusively settling an issue material also in the
 16 second proceeding, was on appeal at the time the second case was tried, and objected to the
 17 introduction of the record in that case upon that ground, it would doubtless not have been
 18 admitted. *Id.*

19 In addition to citing *Sherman v. Dilly* (3 Nev. 22) the court in *Ketchum v. Thatcher*, 12
 20 Mo. App. 185, 188 (1882) also cited with approval; *Woodbury v. Bowman* (13 Cal.
 21 634), (“where a suit is pending in the supreme court on appeal, the judgment below is suspended
 22 for all purposes, and it is not evidence upon the question at issue even between the parties.”)
 23 and *Stone v. Spillman* (16 Texas, 432) (holding that answer setting up that the defendant held the
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1 property under a will, and that a judgment against his right so to hold it had been appealed from,
2 presented a meritorious defense that the appeal suspended all proceedings until it was decided.)

3 The September, 2011, Judgment in state Court had not even contemplated whether the
4 Settlement Agreement was viable or not. Judge William's simply reduced the Judgment to The
5 Nevada state trial court denied Plaintiff's impossibility defense; however, Plaintiff has appealed
6 the decision. See Henry v. Rizzolo et al., Supreme Court Case No. 59329. Thus, the decision
7 cannot be given preclusive effect while appeal is pending.
8

9 **CONCLUSION**

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11 It is clear that Plaintiff is not barred by Issue Preclusion both on a substantive argument
12 on the merits of the case and on the procedural bar that this matter cannot be denied while an
13 appeal is pending. Therefore Defendants' Motion to Dismiss must be denied.

14 Dated this 8th day of February, 2013.

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16 LAW OFFICES OF SIGAL CHATTAH

17
18 /S/ Chattah

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20 Nevada Bar No.: 8264

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22 5875 S. Rainbow Blvd. #204

23 Las Vegas, Nevada 89118

24 Attorney for Plaintiff

25 Rick Rizzolo

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that service of the foregoing was served on the 8th day of February, 2013 via the Court's CM/ECF electronic filing system addressed to all parties on the e-service list.

/s/ Chattah
An Employee of the Law Offices of Sigal Chattah