

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

No. 03-E-0106

**In the Matter of the Liquidation
of The Home Insurance Company**

**FILING REGARDING EXHIBITS 1 AND 2 TO LIQUIDATOR'S OBJECTION TO
CLAIMANT OSIJO'S MOTION TO RECOMMIT**

Roger A. Sevigny, Insurance Commissioner, as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), hereby submits Exhibits 1 and 2 which were inadvertently not attached to the Liquidator's Objection to Claimant Osijo's Motion to Recommit dated November 25, 2009.

Respectfully submitted,

ROGER A. SEVIGNY, COMMISSIONER OF
INSURANCE OF THE STATE OF NEW
HAMPSHIRE, SOLELY AS LIQUIDATOR OF
THE HOME INSURANCE COMPANY,

By his attorneys,

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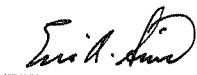


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Certificate of Service

I hereby certify that a copy of the foregoing Filing Regarding Exhibits 1 and 2 to Liquidator's Objection to Claimant Osijo's Motion to Recommit was mailed, first class mail postage prepaid, to those on the attached Service List and to the Claimant on November 30, 2009.



Eric A. Smith

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

In the Matter of the Liquidation of
The Home Insurance Company
Docket No. 03-E-0106

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THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

BEFORE THE COURT-APPOINTED REFEREE
 IN RE THE HOME INSURANCE COMPANY IN LIQUIDATION
 DISPUTED CLAIMS DOCKET

In Re Liquidator Number: 2009-HICIL-44
 Proof of Claim Number: CLMN711647
 Claimant Name: Adebowale O. Osijo
 Claimant Number: CDV-2007-745
 Policy or Contract Number:
 Insured or Reinsured Name:
 Date of Loss: 10-07-1988

ORDER ON THE MERITS

Mr. Osijo has filed a proof of claim making a third party claim against Home as insurer of Housing Resources Management, Inc. ("HRM"). Mr. Osijo asserts that he is entitled to litigate in this forum his personal injury action against HRM. The Liquidator argues that Mr. Osijo is precluded from litigating his personal injury claims in this forum because he has litigated those claims in the California courts and the doctrines of res judicata and collateral estoppel apply.

RELEVANT FACTS

Mr. Osijo was shot while in the course of his employment as a security guard at Acorn Apartments on October 7, 1988. Mr. Osijo sued HRM, the management company for Acorn Apartments. That suit, *Osijo v. Housing Resources Management, Inc., et al.*, Case No. C-649881, Superior Court of California, Alameda County, was filed on or about April 6, 1989. Mr. Osijo hired Ann Michell-Langsam to represent him in that suit.

On July 25, 1991, a private mediation was held regarding Mr. Osijo's claims against HRM. During the mediation Mr. Osijo signed a settlement agreement. On July 26, 1991, Mr. Osijo told his attorney to disavow the settlement agreement. On July 30, 1991, counsel for HRM sent a settlement check in the amount of \$250,000 to Attorney Michell-Langsam. On August 15, 1991, counsel for HRM filed a motion to enforce the settlement. A hearing on the motion to enforce was held on September 5, 1991. The motion to enforce was granted by the Superior Court of California in an Order dated October 10, 1991. In that Order the Court found that there had been a settlement between the parties. The Order to enforce settlement was affirmed by the California Court of Appeals by Order dated July 16, 1992. Final judgment was entered in the matter by the California Superior Court on November 3, 1992.

In 2007, Mr. Osijo filed a Motion to Set Aside Enforcement Order and to Nullify Settlement Agreement. One basis for that motion was Mr. Osijo's assertion that he had learned new information regarding the

behavior of Attorney Michell-Langsam and counsel for the Home at the time of the settlement. The California Superior Court denied Mr. Osijo's motion by Order dated June 21, 2007. That denial was affirmed by the California Court of Appeal on July 8, 2008.

In the interim, Mr. Osijo has filed various other lawsuits seeking to undo the settlement reached on July 25, 1991. Among those other lawsuits are suits filed directly against the Home in *Osijo v. The Home Insurance Company*, F042329 (Cal. Ct. App. September 7, 2004) and *Osijo v. Sevigny*, F049063 (Cal.Ct.App. December 12, 2006). In addition, Mr. Osijo has brought claims against his counsel and others.

LEGAL ANALYSIS

The issue before the Referee is whether Mr. Osijo can litigate his claim against Home, as insurer of HRM in this proceeding or whether the decisions of the California Courts in previously filed litigation preclude Mr. Osijo's claims.

This case is governed by the laws of California. Accordingly, California law determines the application of res judicata and collateral estoppel.

Res judicata describes the preclusive effect of a final judgment on the merits. Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them. Specifically, res judicata or claim preclusion means "a final judgment, rendered upon the merits by a court having jurisdiction of the cause, is conclusive of the rights of the parties and those in privity with them, and is a complete bar to new suit between them on the same cause of action." *Burdette v. Carrier Corp.*, 71 Cal. Rptr.3d 185, 196 (Cal.Ct.App. 2008), citations omitted. Collateral estoppel, or issue preclusion, "precludes relitigation of issues argued and decided in prior proceedings." *Mycogen Corp. v. Monsanto Co.*, 51 P.3d 297, 302 (Cal. 2002).

In this case, Mr. Osijo asserts that he is entitled to litigate the issue of whether Attorney Michell-Langsam had the authority to settle his claims against HRM. Mr. Osijo asserts that this is a question not addressed by the California Courts. The Referee disagrees. The Superior Court of California determined that there had been a settlement between Mr. Osijo and HRM. The Superior Court entered an order enforcing the settlement. See Exhibit I to Liquidator's Section 15 Submission. That Order was affirmed by the California Court of Appeals. See Exhibit J to Liquidator's Section 15 Submission. The Superior Court of California ultimately entered judgment pursuant to its Order of October 10, 1991. See Exhibit K to Liquidator's Section 15 Submission. The Superior Court's Order required Attorney Michell-Langsam to proceed with the actions necessary to complete the settlement, including cashing the settlement check and distributing the settlement funds. By doing so, she was following the Court's Order. It is based on that Order that Attorney Michell-Langsam had authority to carry out the settlement.

Res judicata precludes Mr. Osijo from relitigating his claims in this forum. All of the elements of res judicata exist. First, the Alameda County Superior Court enforced the settlement in 1992. Prior to entering that judgment, the California Court of Appeal affirmed the Order and the California Supreme

Court denied review. Therefore, the Order of the Superior Court is a final one. The judgment by the Alameda County Superior Court is also a judgment on the merits. The Superior Court enforced the settlement between Mr. Osijo and HRM. There were no additional issues to be determined. In addition, the parties to the HRM action are either the same or in privity. Mr. Osijo is clearly a party to both actions. Any claim against Home in this proceeding is dependent upon the same claim against HRM, its insured. Therefore, HRM and the Home are in privity with one another. Finally, the cause of action against HRM and the cause of action in the proof of claim are the same.

Mr. Osijo contends that he should be able to proceed with this action because of the acts of Attorney Michell-Langsam. Mr. Osijo asserts that she did not have the right or permission to accept and distribute the settlement funds. Mr. Osijo also alleges that his counsel was "in cahoots" with counsel for HRM regarding the settlement and for that reason he should be able to relitigate his claims. Finally Mr. Osijo alleges that he did not know of some of these facts until after the decision of the California Courts in 1992.

Mr. Osijo's assertions do not provide the basis for further litigation in this forum. First, the Court orders enforcing the settlement gave Attorney Michell-Langsam permission to complete the settlement. In fact, the orders required her to undertake actions to complete the settlement, regardless of whether Mr. Osijo agreed or cooperated by signing the settlement check and executing a release. Attorney Michell-Langsam was ordered by the Court to undertake the actions necessary to complete the claim. For the reasons set forth above, res judicata applies to these claims.

In addition, even if Mr. Osijo learned new facts regarding his attorney's behavior, he is collaterally estopped from raising them in this forum now. The California Courts have indicated that collateral estoppel prevents relitigation of issues argued and decided in prior proceedings if: (1) the issue sought to be precluded from relitigation is identical to that decided in a former proceeding; (2) the issue was actually litigated in the former proceeding; (3) the issue was decided in the former proceeding; (4) the decision in the former proceeding was final and on the merits; and (5) the party against whom preclusion is sought was a party or in privity with a party in the former proceeding. See *Hernandez v. Pomona*, 207 P.3d 506, 513 (2009).

The issue presented in this forum, however stated, is the same as has been considered by the California Courts: whether there was an enforceable settlement in the underlying case. The Court of Appeal specifically found that the parties have fully performed under the terms of the settlement agreement. That was a final decision. In fact, Mr. Osijo has acknowledged that Home paid \$250,000. The California courts have issued a final decision enforcing the settlement. Mr. Osijo was party to the case in which that decision was issued. All elements of collateral estoppel exist.

In addition, to the extent there are issues raised by Mr. Osijo in this matter which are not identical to the issues raised in the prior litigation, res judicata still applies. Res judicata precludes splitting a cause of action or relitigation of the same cause of action on a different legal theory or seeking different relief. See *Mycogen*, 51 P.3d at 302. Even if Mr. Osijo had articulated arguments which he did not raise in *Osijo*

v. Housing Resources Management, Inc., they are all related to whether the settlement agreement signed on July 25, 1991 is enforceable.

Mr. Osijo argues that his claims must move forward in this venue because *Osijo v. The Home Insurance Company* Nos. F042329, F043325 (Cal.Ct.App. 5th Dist. Sept. 7 2004) and *Osijo v. Sevigny* F049063 (Cal.Ct.App. Fifth Dist. Dec. 12, 2006) were dismissed by the California Court of Appeal for lack of subject matter jurisdiction based on the Merrimack County Superior Court Order in the Liquidation proceeding. The Referee disagrees. First, in those cases, the California Court of Appeals reached judgments in favor of other parties, not Mr. Osijo. In *Osijo v. The Home Insurance Company* the Court of Appeal determined that the settlement was legally binding. In *Osijo v. Sevigny* the Court affirmed judgment for parties other than Mr. Osijo and did not find the settlement was obtained through fraud and conflicts of interest. The decisions reached the merits of Mr. Osijo's claims. They also have preclusive effect on this litigation. In fact, the California Court of Appeals has specifically stated that "[i]ssue preclusion bars relitigation of the conflict-of-interest claim..." *Osijo v. Sevigny* F049063, page 13(Cal.Ct.App. Fifth Dist. Dec. 12, 2006). Exhibit O to Liquidator's Section 15 Submission.

Finally, Mr. Osijo argues that he has a due process right to a hearing on his claims against HRM in this forum. Under California law, Mr. Osijo must have had a full and fair opportunity to present his claim. See *Roos v. Red* 30 Cal.Rptr.3d 466 (Cal.Ct.App. 2005). In that case, Mr. Red appealed from a judgment entered upon a verdict against him for wrongful death. Mr. Red asserted that he had the right to relitigate the issue of liability for the claims. However, the Court found that the doctrine of collateral estoppel applied to factual findings made by the federal bankruptcy court in a discharge proceeding in which the bankruptcy court specifically found respondents' wrongful death claims were not discharged because the claims were the result of Mr. Red's willful and malicious conduct. The Appellate Court found that Mr. Red did not demonstrate that bankruptcy law precluded the application of collateral estoppel or that the application of the doctrine was unfair or unsound.

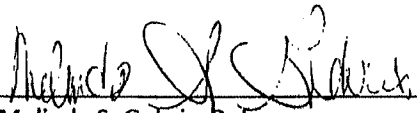
In its discussion, the Court noted situations in which application of collateral estoppel would be so unfair as to undermine the confidence in the validity of the prior proceeding. Examples included situations in which the party had no incentive to vigorously litigate the issue in the prior action, and when the judgment in the prior action is inconsistent with previous judgments for the defendant on the matter. *Id.* at 452. None of the instances described by the Court exist here. Mr. Osijo has been litigating the validity of the settlement reached in 1991 since then. He has had the opportunity to be heard by the Superior Court of California in the original suit in the hearing on the motion to enforce. Mr. Osijo provided a copy of the transcript of that hearing. Mr. Osijo had the opportunity to oppose the motion. He also sought to reopen the issue in 2007. In addition, he has brought several other actions related to the settlement in the California Courts. Applying collateral estoppel does not violate Mr. Osijo's right of due process.

CONCLUSION

For the reasons set forth above, the Referee finds that Mr. Osijo has had full and fair opportunity to litigate the issues raised in his proof of claim in matters he filed in the California courts. Mr. Osijo's claims in this matter are precluded by res judicata and collateral estoppel.

So ordered.

November 5, 2009
Dated


Melinda S. Gehris, Referee

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

BEFORE THE COURT-APPOINTED REFEREE
IN RE THE HOME INSURANCE COMPANY IN LIQUIDATION
DISPUTED CLAIMS DOCKET

In Re Liquidator Number: 2009-HICIL-44
Proof of Claim Number: CLMN711647
Claimant Name: Adebowale O. Osijo
Claimant Number: CDV-2007-745
Policy or Contract Number:
Insured or Reinsured Name:
Date of Loss: 10-07-1988

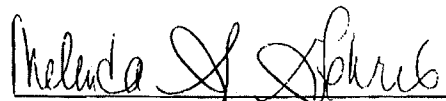
ORDER ON CLAIMANT'S MOTION FOR CLARIFICATION

The Claimant has filed a motion for clarification. In that motion, he requests that the Referee make certain factual findings. Mr. Osijo also requests that the Referee provide a copy of a motion for permission to cash check, or order the Liquidator to produce a copy of that motion. The Liquidator opposes the motion stating that Mr. Osijo is seeking to reargue matters already addressed.

The Referee has issued a decision on the merits. That decision did not include factual findings on the issues raised in the motion for clarification because those factual findings were not necessary to the Referee's decision. In addition, review of the motion sought by the Claimant is also not necessary to the Referee's decision. Claimant's motion is denied.

So ordered.

11/17/09
Dated _____


Melinda S. Gehris, Referee