

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

No. 03-E-0106

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

**LIQUIDATOR'S OBJECTION TO CLAIMANT
OSIJO'S "SUBJECT MATTER JURISDICTION CHALLENGE"**

Roger A. Sevigny, Insurance Commissioner, as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), hereby objects to the "Subject Matter Jurisdiction Challenge" ("Challenge") filed by claimant Adebowale O. Osijo MBA ("Claimant"). Claimant's purported subject matter jurisdiction challenge does not actually question the subject matter jurisdiction of the New Hampshire courts, is either waived or barred by the recent order of the New Hampshire Supreme Court, is precluded by the 2008 judgment of the California Court of Appeal, and in any event has no merit because the Order of Liquidation did not affect the jurisdiction of the California courts.

1. In the Challenge, Claimant attacks the New Hampshire Supreme Court's Order dated September 13, 2012 ("Order") (Challenge Ex. F). The Order affirmed the denial of Claimant's claim on the ground that it is barred by the res judicata effect of the 1992 California judgment enforcing the 1991 settlement of the claim and of the 2008 California judgment denying Claimant's motion to set the earlier judgment aside. The Supreme Court denied Claimant's motion for rehearing and issued its mandate on October 17, 2012.

2. The Claimant now contends for the first time that, in light of the Order of Liquidation for Home entered by this Court on June 13, 2003 (Challenge Ex. A), the California courts lacked subject matter jurisdiction over his 2007 motion to set aside the earlier judgment. Based on this premise, he asserts that the California trial court's denial of the motion (Challenge

Ex. B) and the California Court of Appeal's judgment (Challenge Ex. C) are void and cannot serve as a basis for res judicata. There are numerous problems with this argument.

A. Claimant Does Not Challenge The Jurisdiction Of The New Hampshire Courts, So His Argument Is Both Waived And Precluded By The Order.

3. As an initial matter, Claimant's contention has been waived or is barred by the res judicata effect of the Order. The Claimant is not attacking the subject matter jurisdiction of the New Hampshire courts but of the California courts. Accordingly, the general rule that subject matter jurisdiction may be raised late in a case is irrelevant.¹ This Court had unquestioned jurisdiction to address Claimant's claim against Home. The Claimant did not raise his argument that the 2008 California judgment could not be relied on for lack of subject matter jurisdiction before the Referee or this Court or the Supreme Court. The argument accordingly was waived. Cf. Supreme Court Rule 16(3); State v. Porter, 144 N.H. 96, 100-101 (1999) (rules regarding preservation of questions are not relaxed for pro se litigant). Now that the mandate has issued and Claimant's claim is concluded by the Order, the argument is barred by res judicata. The three requirements of that doctrine are satisfied: the parties are the same; the same cause of action is presented; and the first action ended in a final judgment on the merits. See Hansa Consult of N.A., LLC v. Hansaconsult Ingenieurgesellschaft mbH, 163 N.H. 46, 49-50 (2011). The Order thus precludes Claimant from attacking the denial of his claim on any ground that was or could have been raised, including the issue asserted here. See id. at 49 ("Res judicata prevents the parties from relitigating matters actually litigated and matters that could have been litigated in the first action.") (citation omitted; emphasis added).

¹ See Hemenway v. Hemenway, 159 N.H. 680, 684 (2010) ("A party may challenge subject matter jurisdiction at any time during the proceeding, including on appeal, and may not waive it.") (citation and quotation omitted).

B. Claimant's Attack On The 2008 California Judgment Is Precluded By The Res Judicata Effect Of That Judgment.

4. The Claimant's argument is also barred by the res judicata effect of the 2008 California judgment. Challenge Ex. C. Contrary to Claimant's assertion, he may not collaterally attack that judgment at any time based on a claim that subject matter jurisdiction was lacking. A judgment generally precludes the parties from litigating the question of the court's subject matter jurisdiction in subsequent litigation. See Restatement (Second) of Judgments § 12 (1982); Travelers Indemn. Co. v. Bailey, 557 U.S. 137, 152-54 (2009); Peery v. Superior Court, 219 Cal.Rptr. 882, 886 (Cal. App. 1985) (where party had notice and the opportunity to be heard and participated in proceeding, the "general rule" is that "such party is normally bound by the judgment, and estopped from attacking it collaterally, unless certain exceptional circumstances exist").² New Hampshire cases allowing collateral attacks on foreign judgments based on lack of personal or subject matter jurisdiction are not on point because they involved default judgments. See Brito v. Ryan, 151 N.H. 635, 636 (2005); Gettler-Ryan, Inc. v. Kashulines, 130 N.H. 15, 16 (1987); Paragon Homes, Inc. v. Gagnon, 110 N.H. 279, 280 (1970). See also Restatement (Second) of Judgments § 12, comment f. This is not a case of a plaintiff seeking to enforce a California default judgment against a New Hampshire defendant, but of a California plaintiff attempting to avoid a litigated California judgment in his own action. The Claimant invoked the jurisdiction of the California courts by filing his motion to vacate the earlier judgment based upon asserted lack of subject matter jurisdiction (although on another theory), and the California Court of Appeal held that it had jurisdiction. Challenge Ex. C at 6-13. In these circumstances,

² Claimant's reliance on the Restatement (First) of Judgments (1942) is misplaced given that the Restatement (Second) of Judgments issued in 1982. Further, the cases he cites do not involve collateral attacks; the jurisdictional issues were raised in direct appeals. In re the Marriage of Oddino, 65 Cal.Rptr.2d 566, 569-70 (Cal. 1997) (petition for review to California Supreme Court); Thaddeus Keiffer v. Bechtel Corp., 76 Cal.Rptr.2d 827, 828 (Cal. App. 1998) (reply brief on appeal).

Claimant is estopped from challenging the jurisdiction of the California courts. Cf. Leighton v. Davis, 119 N.H. 115, 116 (1979) (defendant whose counsel entered a general appearance in Maine court may not collaterally attack personal jurisdiction of Maine court).

5. The exceptions commonly invoked to permit collateral attack under the Restatement (Second) of Judgments are not present here: the subject matter of the personal injury action was not so plainly beyond the California court's jurisdiction that entertaining the action was a manifest abuse of authority; allowing the judgment to stand does not substantially infringe the authority of another tribunal; and the judgment was not rendered by a court lacking the capability to make an adequately informed determination as to its own jurisdiction so that as a matter of procedural fairness the party should belatedly be allowed to attack subject matter jurisdiction. See id. § 12(1)-(3). This is particularly the case where Claimant invoked the California court's jurisdiction; the fact of the Order of Liquidation was known to both the Claimant and the California court at the time of its judgment, see Challenge Ex. C at 2 n. 2³; and Claimant attacked the subject matter jurisdiction of the California court at that time (on a different theory), see Challenge Ex. C at 6-13. The Claimant is precluded from attacking the California judgment again in New Hampshire.

C. Claimant's Challenge Fails Because The Order Of Liquidation Does Not Apply To The HRM Action And, In Any Event, Does Not Affect The Jurisdiction Of The California Courts.

6. If the Court were to reach it, Claimant's new contention has no merit for two reasons. First, the Order of Liquidation did not affect the jurisdiction of the California courts to act on the motion to vacate because it does not apply to the personal injury action. Claimant filed the motion to vacate the earlier judgment enforcing the settlement in his personal injury

³ The California Court of Appeal referred to its 2004 and 2006 judgments dismissing Claimant's claims against Home and the Liquidator based on the Order of Liquidation in the 2008 judgment. Challenge Ex. C at 2 n. 2, citing the decisions attached as Challenge Exs. D and E.

against Housing Resources Management, Inc. (“HRM”). See Challenge Exs. B and C. The Order of Liquidation did not enjoin that action because it did not enjoin proceedings against Home’s insureds such as HRM. The injunctive provisions of the Order of Liquidation only abate or enjoin actions against Home, the Liquidator, and related persons. Challenge Ex. A ¶¶ (m), (n). Home and the Liquidator were never parties to the action against HRM. The provision in the Order of Liquidation concerning insureds merely stayed proceedings against insureds then being defended by Home for six months so insurance guaranty funds could assume the defense in an orderly fashion. See RSA 404-B:18; Challenge Ex. A ¶ (y). The temporary stay expired on December 19, 2003. See the Order dated December 31, 2003 attached hereto as Exhibit 1. It thus was in effect only from June to December 2003, long after the 1992 judgment enforcing the settlement and long before Claimant filed his motion to set aside in 2007. Accordingly, even if the Order of Liquidation could have jurisdictional implications, it had no effect on the judgments on which the Supreme Court relied in holding the Claimant’s claim was precluded.

7. Second, the Order of Liquidation does not affect the subject matter jurisdiction of the California courts. The Order of Liquidation does not deprive courts of jurisdiction. It acts as a matter of comity, in effect asking that courts refrain as a matter of judicial discretion from entertaining actions against Home or the Liquidator or that they temporarily stay cases against insureds. This is clear from the two California Court of Appeal decisions relied on by Claimant, which dismissed actions as against Home and the Liquidator based only on the “permissive” or “discretionary” doctrine of comity, after considering that California insurer insolvency statutes, like New Hampshire’s, provide for determination of claims against insolvent insurers in a single forum. See Challenge Ex. D at 9-10 (affirming dismissal of claims against Home and its administrator Risk Enterprise management); Ex. E at 14-15 (affirming dismissal of claim against the Liquidator). The Order of Liquidation did not deprive the California courts of jurisdiction to

act on Claimant's motion to vacate the earlier judgment enforcing the settlement in the personal injury action.

CONCLUSION

For these reasons, the Liquidator requests that the Challenge be denied.

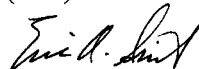
Respectfully submitted,

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November 8, 2012

Certificate of Service

I hereby certify that a copy of the foregoing Objection to Claimant Osijo's "Subject Matter Jurisdiction Challenge" was mailed, first class mail postage prepaid, to those on the attached Service List and to the Claimant on November 8, 2012.



Eric A. Smith

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ORDER

In an Order dated June 13, 2003, paragraph (y), the Court invoked a stay for a period of six months from the date of the order and such time as the Court may determine on all actions or proceedings against an insured of The Home in which The Home has an obligation to defend the insured (the "Temporary Stay"). On December 11, 2003, the Court extended that Temporary Stay until December 19, 2003. Following a Status Conference on December 19, 2003, the Temporary Stay expired on December 19, 2003 and was not extended.

So Ordered.

Dated: 12/21/03



Kathleen A. McGuire,
Presiding Judge