

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 13-12756
Non-Argument Calendar

D.C. Docket No. 3:10-cv-00228-LC-EMT

CCB, LLC,
A Florida Limited Liability Company,
CHARLES B. BARNIV,
CYNTHIA BARNIV,
BRUCE G. WITKIND,

Plaintiffs-Appellants,

versus

BANKTRUST,
An Alabama Banking Corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Florida

(January 17, 2014)

Before MARCUS, PRYOR and KRAVITCH, Circuit Judges.

ON PETITION FOR REHEARING

PER CURIAM:

BankTrust petitions for rehearing of our earlier opinion in which we vacated the dismissal of a complaint filed against BankTrust by CCB, LLC, Charles and Cynthia Barniv, and Bruce Witkind. The district court dismissed the complaint based on res judicata following a judgment entered by a Florida court involving the same parties and the same financial transaction. We concluded that the decision of the Florida court, which was pending on appeal, was not a final judgment and did not bar the complaint that CCB, the Barnivs, and Witkind had filed in the district court. BankTrust cites in its petition Florida precedent holding that a state court judgment has preclusive effect notwithstanding a pending appeal. See Reese v. Damato, 44 Fla. 692, 33 So. 462 (1902). After a careful review of the petition and the record in this case, we grant the petition for rehearing filed by BankTrust, vacate our original decision issued on December 4, 2013, and substitute the following opinion.

CCB obtained a loan from BankTrust that was secured with guarantees from the Barnivs and Witkind. After CCB defaulted on the loan, BankTrust filed in a Florida court an action to foreclose on property purchased by CCB and to obtain judgments against CCB, the Barnivs, and Witkind. CCB, the Barnivs, and Witkind answered that they had been induced fraudulently to obtain the loan.

CCB, the Barnivs, and Witkind filed a complaint in the district court that repeated their allegations about being defrauded by BankTrust and alleged that BankTrust had violated federal and state racketeering and lending laws. The district court stayed the action in deference to the ongoing proceedings in the Florida court. See Colorado River Water Conserv. Dist. v. United States, 424 U.S. 800, 818–19, 96 S. Ct. 1236, 1247 (1976). We affirmed. CCB, LLC, v. BankTrust, No. 11-11459 (11th Cir. Aug. 23, 2011).

In March 2013, the Florida court entered summary judgment against CCB, and CCB appealed to the Florida District Court of Appeals. While that appeal was pending, the district court lifted its stay and dismissed the complaint filed by CCB based on res judicata.

We review de novo a dismissal based on res judicata. Lozman v. City of Riviera Beach, Fla., 713 F.3d 1066, 1069 (11th Cir. 2013). “Under res judicata, also known as claim preclusion, a final judgment on the merits bars the parties to a prior action from re-litigating a cause of action that was or could have been raised in that action.” In re Piper Aircraft Corp., 244 F.3d 1289, 1296 (11th Cir. 2001). “In considering whether to give preclusive effect to state-court judgments under res judicata . . . , the federal court applies the rendering state’s law of preclusion.” Lozman, 713 F.3d at 1074 n.6 (quoting Cmty. State Bank v. Strong, 651 F.3d 1241, 1263 (11th Cir. 2011)).

Under Florida law, a judgment entered by a court of competent jurisdiction has preclusive effect notwithstanding a pending appeal. The Supreme Court held in Reese v. Damato that an appeal does not affect the preclusive effect of a prior judgment unless an appellate court “tries the case de novo.” 44 Fla. at 698, 33 So. at 464. When the appellate court, “upon the record upon errors assigned, [exercises its] power to affirm, reverse, or modify the judgment appealed from, or to enter its own judgment upon the case made by the record alone,” that “does not have the effect of suspending or annulling the effect of the judgment from which it was taken so as to d[i]vest such judgment of its force as an estoppel.” Id. at 699, 33 So. at 464; see Fla. Dep’t of Transp. v. Juliano, 801 So. 2d 101, 105 (Fla. 2001) (“[A] judgment rendered by a court of competent jurisdiction, on the merits, is a bar to any future suit between the same parties or their privies upon the same cause of action, so long as it remains unreversed.” (quoting McGregor v. Provident Trust Co., 119 Fla. 718, 162 So. 323, 327 (1935))).

The district court correctly dismissed the complaint of CCB based on res judicata. The judgment of the Florida court barred CCB from relitigating the same controversy in the district court. The judgment “not only bar[red] issues that were raised [in the state court case], but it also preclude[d] consideration of issues that could have been raised but were not raised in [that] case.” Juliano, 801 So. 2d at 105.

We **AFFIRM** the dismissal of the complaint filed by CCB.

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

John Ley
Clerk of Court

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January 17, 2014

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 13-12756-AA
Case Style: CCB, LLC, et al v. BankTrust
District Court Docket No: 3:10-cv-00228-LC-EMT

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the CRIMINAL JUSTICE ACT must file a CJA voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for a writ of certiorari (whichever is later).

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Eleanor M. Dixon, AA at (404) 335-6172.

Sincerely,

JOHN LEY, Clerk of Court

Reply to: Djuanna Clark
Phone #: 404-335-6161

OPIN-1 Ntc of Issuance of Opinion