Osarch v. Bai, 5 ROP Intrm. 327 (Tr. Div. 1995)
IN RE: LCHO D.O. NO. 02-F-06-94

BESEBES OSARCH
Appellant,

v.

NGIRAIBAI BAI
Appellee.

CIVIL ACTION NO. 359-94

Supreme Court, Trial Division
Republic of Palau

Decision and judgment
Decided: July 25, 1995

LARRY W. MILLER, Justice:

Besebes Osarch appeals the determination of the Land Claims Hearing Office awarding the land *Kliokl*, Tochi Daicho Lot No. 1076, in Ngarchelong State, to Ngiraibai Bai. Osarch contends that the LCHO erred (1) in awarding the land to Bai based on 39 PNC § 102(c) and (2) in failing to give preclusive effect to the judgment in *Osarch v. Kual* , Civil Action No. 76-87, *aff'd*, 2 ROP Intrm. 90 (1990). Bai concedes that the LCHO's reliance on § 102(c) was erroneous, but argues that the LCHO's determination was correct for other reasons.

It is plain that the LCHO should not have looked to 39 PNC § 102(c) in determining this matter. *Kliokl* is listed in the Tochi Daicho as the individual property of Irrung, Bai's adoptive father. The record is undisputed, however, that Irrung died in 1954, prior to the enactment of § 102(c) and to its predecessor, Palau District Code § 801(c). As such, § 102(c) has no application here. *Ngeltengat v. Ngiratecheboet*, 4 ROP Intrm. 240, 242 (1994).

The Court turns, therefore, to an examination of *Osarch v. Kual* , which Osarch contends is determinative of this matter. *Osarch v. Kual* was an action commenced by Osarch against two other defendants concerning the ownership of Tochi Daicho Lot No. 1097 which, like the land at issue in this case, was also listed as the individual property of Irrung. Bai intervened in that case, claiming ownership of Lot 1097. After a lengthy trial, the trial court entered judgment in favor of Osarch. That judgment was affirmed on an appeal filed by one of the other defendants.

⊥328 Osarch claims that the judgment in the prior action is determinative here through the doctrines of res judicata and collateral estoppel. The Court agrees with Bai that res judicata does not apply. Res judicata or claim preclusion deals with subsequent actions on the same claim. In the Court's view, a claim as to one piece of land, the lot at issue in the prior litigation, cannot be

considered the same as a claim to a different lot, the lot at issue here. [1] Though the issues as to the ownership of the two pieces of land turn out to be identical, that identity is properly considered, if at all, under the doctrine of collateral estoppel, or issue preclusion.

Subject to an exception discussed below, the general rule as to issue preclusion is stated in § 27 of the Restatement (Second) of Judgments:

> "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."

Two factual findings made in the prior litigation are potentially dispositive here. First, the trial court found that "Irrung told [Osarch] . . . that all his land will become the property of [Osarch] and his sisters, except one parcel which had to be returned . . ." Decision, October 21, 1988, at 3. Second, it found, based on Osarch's testimony, that Osarch had announced what Irrung had told him at Irrung's eldecheduch with "no challenge from anyone." *Id.* at 4.[2]

⊥329 There is no question that these two issues were "actually litigated and determined by a valid and final judgment". Bai questions, however, whether the determination of these issues -- to the extent they concern land other than Lot 1097 -- were "essential to the judgment". As Bai sees it, all that the trial court had before it was the question of who owned Lot 1097, and all that was "essential" was a determination as to that piece of land. While there is some surface appeal to this argument, the Court believes that the law is otherwise.

As explained in the Restatement, the rule denying preclusive effect to determinations not essential to the judgment serves to protect parties in circumstances where "the judgment is not dependent upon the determinations" in question and thus "may not ordinarily be the subject of an appeal by the party against whom they were made." Restatement (Second) of Judgments § 27 comment h. Here, however, it is plain that the factual determinations at issue were the basis for the judgment awarding Lot 1097 to Osarch and his family. Although Bai now asserts that the dispositions of Lot 1097 and Lot 1076 raise different issues, *see infra*, the record makes clear that no such distinctions were drawn in the earlier litigation. Both Osarch and Bai claimed Lot 1097 on the basis of sweeping, contradictory assertions that all of Irrung's lands belonged to each of them. The trial court's determination to accept Osarch's assertions regarding these lands, and to reject Bai's, could have been the subject of an appeal by Bai and, if found to be clearly erroneous or infirm for any other reason, could have resulted in a vacation or reversal of the trial court's judgment.

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[1] Indeed, if it were otherwise, then it might be argued that Osarch's claim to the land here was extinguished by the doctrine of merger by his failure to assert it in the prior litigation. *See* Restatement (Second) of Judgments § 18.

[2] Osarch also relies upon the trial court's finding that Bai was compensated after his mother's death and at Irrung's eldecheduch, and thus was "without any further claim against Irrung under Palauan custom." *Id.* at 7-8. The Court believes that Osarch's claim can and should be upheld without consideration of this additional issue.

Some guidance in this area is provided by *Landon v. Clark*, 221 F. 844 (2d Cir. 1915).[3] In an earlier case, Clark had sued for trespass on an 8.7 acre portion of a pond. Clark lost, the court finding separately that Landon's predecessor owned both the portion of land where the trespass had allegedly occurred and the other tracts which comprised the pond. Landon later brought a second action seeking to quiet title to the pond, relying on the prior judgment. The court found that, except for the 8.7 acre tract which was directly implicated in the trespass claim, the findings regarding ownership of the remaining portions of the pond were not necessary to the prior judgment and would not be given preclusive effect. Notably, however, the court went on to say that

⊥330 "if . . . title to the tract of 8.7 acres had been derived from the same common source, and had been dependent upon the existence or non-existence of the same fact or facts as the title to the remaining tracts, then the finding as to the title to the tract of 8.7 acres would have been conclusive as to the whole." 221 F. at 847.

This case is of the type distinguished by the *Landon* court. The trial court's finding that Osarch was the owner of Lot 1097 depended not on any finding peculiar to that lot but on its acceptance of Osarch's testimony regarding all of Irrung's lands. It is therefore appropriate to declare the findings in the prior action preclusive here.

Bai also relies on one of the exceptions to the general rule of issue preclusion contained in paragraph (5) of § 28 of the Restatement:

> "[R]elitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
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> * * *
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> (5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, [or] (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action . . ."

Comment g to this section explains:

> "There are instances in which the interests supporting a new determination of an issue already determined outweigh the resulting burden on the other party and on the courts. But such instances must be the rare exception and litigation to establish an exception in a particular case should not be encouraged. Thus it is important to admit an exception only when the need for a redetermination of the issue is a compelling one."

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[3] Although *Landon* is not available in the court library, it is discussed in detail in 1B MOORE'S FEDERAL PRACTICE ¶ 0.443[5.-1], and in an annotation at 133 ALR 840, 842.

In the Court's view, there is no compelling need here. The public interest is at best neutral; although land title determinations are obviously of profound importance to the Palauan people, there is also a strong public interest in ensuring that titles to land are not perpetually in doubt or subject to repetitive and potentially inconsistent adjudications. Nor, given the longstanding process of ⊥331 having the Land Commission and the Land Claims Hearing Office examine title to all Palauan lands, can it be said that the issues determined in the earlier litigation would not arise again. As noted above, both sides in the earlier action laid claim to all of Irrung's lands; it should have been foreseeable to each that the result of that action would govern the remaining lands not then at issue.

Bai argues finally that even if collateral estoppel does apply, the issues governing the proper disposition of Lot 1076 are different from those determined with respect to Lot 1097. He argues that Lot 1076, unlike Irrung's other lands, became his property through a homesteading program, and not through his membership in any clan or lineage. This distinction is irrelevant. [4] As the first page of *Osarch v. Kual* makes clear, Lot 1097, like Lot 1076, was listed in the Tochi Daicho as the individual property of Irrung. The judgment in *Osarch v. Kual* did not rely on any theory of clan or lineage reversion; it held simply that Irrung could -- and did -- dispose of his individual property through an oral will given effect at the eldecheduch after his death. There is no reason that the same conclusion should not be reached with respect to Lot 1076.

Indeed, it is for this reason that the collateral estoppel issue is arguably irrelevant. Although Bai suggests that the LCHO's determination can be upheld for reasons other than its erroneous reliance on 39 PNC § 102, the LCHO's own findings require a contrary conclusion. Even without regard to the prior litigation, the Court is still left with Osarch's uncontradicted testimony concerning the conduct of the eldecheduch, with the LCHO's express finding that Osarch "is found to be the nearest relative to Irrung and Irrung's property should be disposed of by him during the 'cheldecheduch'" (Finding of Fact #7), and with its recognition that "under Palauan custom, it is the function of the deceased man's nearest relatives within his lineage to attend to distribution of his property." *Id.*, quoting *Joshua v. Joshua* , 3 TTR 212, 216 (Tr. Div. 1966). Although the LCHO qualified these statements with the observation that "this does not apply to the land in dispute which was acquired by the decedent as a bona fide purchaser for value", *id.*, that conclusion was based on its concededly erroneous reliance on 39 PNC § 102(c). Once that statute ⊥332 is disregarded, the Court knows of no basis for concluding that Lot 1076 was not validly disposed of at Irrung's eldecheduch. *See Remengesau v. Sato*, 4 ROP Intrm. 230, 234-35 (1994) (upholding reliance on eldecheduch in determining disposition of individually-owned land prior to enactment of Palau District Code § 801). *Kubarii v. Olkeriil*, 3 ROP Intrm. 39, 41 (1991) (same). Thus, Osarch's claim should prevail irrespective of the application of collateral estoppel.

For all of the reasons set forth above, the LCHO's Adjudication and Determination is reversed, and it is directed to issue a certificate of title to Lot 1076 to appellant Besebes Osarch

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[4] Notably, although Bai discussed the history of Lot 1076, his claim to that land was ultimately based, like his claim to Lot 1097, on Irrung's alleged statement that "my properties will become your properties." LCHO Tr. at 34-35.

in accordance with his claim.