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SUPERIOR COURT OF WA.
CHARLES G. RHODES

BY _____ DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF MASON

MATTHEW A. JOHNSON and AMY K.
JOHNSON, husband and wife and MARK
SCHOMAKER and KATHERINE SCHOMAKER,
husband and wife,

Plaintiffs,

vs.

LAKE CUSHMAN MAINTENANCE CO., a
Washington non-profit corporation,

Defendant.

Case No.: 23-2-00169-23

**MOTION TO STAY, CONSOLIDATE
OR DISMISS**

COMES NOW Defendant, Lake Cushman Maintenance Co., by and through its attorney Robert W. Johnson of the law office of Robert W. Johnson P.L.L.C. and moves the Court as to stay this action until the underlying lawsuit filed under Mason County Superior Court Cause No. 15-2-00335-0, to consolidate this case with 15-2-000335-0 and/or dismiss this action based upon res judicata arising out of the decree entered in Cause 15-2-00335-0.

ARGUMENT

Defendants object to plaintiffs filing a new lawsuit to demand arbitration of a CR 2A settlement agreement entered in *Johnson v. Lake Cushman Maintenance Co.*, Mason County

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1 Superior Court Cause No. 15-2-00335-0. The accepted manner to enforce a CR 2A settlement
2 agreement is through a motion to enforce being filed in Cause No. 15-2-00335-0. See § 2A.1
3 Introduction, 9 Wash. Prac., Civil Procedure Forms § 2A.1 (3d ed.) (motion to enforce the CR 2A
4 agreement in superior court); *In re Marriage of Pascale*, 173 Wash. App. 836, 840, 295 P.3d 805,
5 808 (2013) (motions regarding the enforceability of the CR 2A agreement); *In re Marriage of*
6 *Grimsley-LaVergne & LaVergne*, 156 Wash. App. 735, 739, 236 P.3d 208, 210 (2010) (Where the
7 CR 2A requirements are met, a motion to enforce a settlement is a commonly accepted practice.);
8 *Condon v. Condon*, 177 Wash. 2d 150, 157, 298 P.3d 86, 89 (2013) (Where a motion is made to
9 enforce a settlement agreement in the face of a CR 2A objection.)

10 The new complaint seeks to relitigate issues that were fully resolved in the prior litigation.
11 Plaintiffs previously amended complaint in Cause No. 15-2-00335-0, sought to compel LCMC to
12 pay a portion of the plaintiffs' property taxes, see Paragraph 3.6 of plaintiffs' amended complaint
13 and seventh cause of action, to compel compliance with governing documents. The Decree entered
14 in that action clearly states that "The rest and remainder of any and all other causes of action are
15 dismissed with prejudice."

16 The new complaint also seeks far more than an arbitration over the CR 2A settlement
17 agreement including:

- 18 1. A claim that plaintiffs be allowed to fence off the entire park easement and entrance
19 road and install a locked gate.
- 20 2. An appeal of a denial by LCMC to permit plaintiffs to fence off the park and access
21 road.
- 22 3. To require a certain level of maintenance of the park easement.

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1 5. Requiring LCMC to patrol the park and manage trespassers.

2 6. Requiring LCMC to pay a portion of plaintiffs' property taxes.

3 The Decree entered in the underlying action held that LCMC had exclusive rights as against
4 the plaintiffs to the park, and severely limiting plaintiffs right to use the park easement; only as any
5 other member of LCMC would use the park. The new complaint asserts plaintiffs have the right to
6 fence off the park behind a locked gate. The court should note that in the original litigation plaintiffs
7 attempted to fence off a small portion of the park which resulted in an injunction. The Decree at
8 paragraph 2 provides:

9 2. The foregoing easement is exclusive, in all respects, including it being exclusive as
10 **against any interest of the Plaintiffs**, but subject to the respective rights of Plaintiffs
11 and LCMC with respect to the Easement which are set forth in the attached Settlement
12 Agreement dated March 31, 2021 (Agreement) . . .

13 That CR 2A agreement that states:

14 **EXCLUSIVE NATURE OF EASEMENT:** The parties agree that the easement is exclusive
15 to LCMC, meaning only LCMC members are authorized to use it, except that the LCMC
16 irrevocably agrees to grant the Plaintiffs the following rights:

17 a. The right to retain and maintain at their cost the existing wooden fence and gate in its
18 current location ("fence and gate"), as shown on the survey by Holman and Associates dated
19 March, 2016.

20 b. The right to exclude other members of the association from using the area between the
21 fence and gate and the northern boundary of the Easement, except that the LCMC shall be
22 allowed shared access to the same area to the extent required under utility easements and
23 LCMC's governing documents. Plaintiffs shall provide LCMC a key if a lock is installed.

24 c. The right to retain and maintain at their cost the existing boathouse which encroaches
25 upon the easement The boathouse may not be expanded onto the Easement. It may be
maintained or rebuilt only in its present location and its current dimensions. Plaintiffs can
construct a new boathouse onto their own property outside the easement upon removal of
the existing boathouse. Any modification or new construction shall be subject to all state,
local regulations and LCMC governing documents and rules.

Likewise the CR 2A states:

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1 E. FUTURE PARK PROBLEMS: Plaintiffs understand and agree that LCMC has no
2 jurisdiction to enforce covenants, by-laws or rules against non-members of LCMC.
3 Plaintiffs shall rely on the Mason County Sheriff's Office to respond to complaints against
4 individuals using the Division 14 Park and Park Easement who are not members of LCMC
5 This does not prevent Plaintiffs from reporting problems to LCMC security. LCMC shall
6 cooperate with the Sheriff's Office in enforcing no trespassing on LCMC parks including the
7 park easement, or illegal activities. Nothing in this agreement shall relieve LCMC from its
8 responsibilities under the covenants.

9 Neither the Decree or CR 2A grant plaintiffs the right to fence off the park or require LCMC
10 to provide any level of maintenance, patrol the park, or pay taxes on the property. None of these
11 issues are, therefore, subject to arbitration under the CR 2A agreement. LCMC requests the court
12 dismiss the new complaint, require the plaintiffs to file a motion to arbitrate the CR 2A agreement
13 under the old cause, and not bring a new lawsuit where Res Judicata should bar all plaintiffs' new
14 claim. In the alternative, LCMC requests the court to consolidate this cause with Cause No. 15-2-
15 00335-0, so that the necessary parties, according to Plaintiffs' original claims in the underlying case
16 (City of Tacoma and Lake Cushman Company), would be parties to the new claims. Finally, LCMC
17 asks the court to dismiss all new claims based upon Res Judicata.

18 1. Motion to Stay Proceedings

19 The court has inherent power to stay its proceedings where the interest of justice so
20 requires. *King v. Olympic Pipeline Co.*, 104 Wash. App. 338, 350, 16 P.3d 45, 51 (2000), as
21 amended on reconsideration (Feb. 14, 2001). Under the priority of action doctrine, "the court which
22 first gains jurisdiction of a cause retains the exclusive authority to deal with the action until the
23 controversy is resolved." This rule applies where two actions share "identity" of certain elements.
24 Generally, courts look to whether the actions share identity of (1) subject matter, (2) parties, and (3)
25 relief. Id.

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1 While the general rule looks to these three elements, these elements are not to be applied
2 inflexibly. *State v. Stenson*, 132 Wash.2d 668, 705, 940 P.2d 1239 (1997). *King v. Olympic Pipeline*
3 *Co.*, 104 Wash. App. 338, 348, 16 P.3d 45, 50 (2000), as amended on reconsideration (Feb. 14,
4 2001) Rather, courts have looked beyond these elements, to the policy behind the doctrine. This
5 was seen in *State ex rel. Evergreen Freedom Foundation v. Washington Education Ass'n*, where
6 Division Two of this court stated that the underlying purpose of the three elements is to determine
7 whether the “identity” of the actions is “such that a decision in one tribunal would bar proceedings
8 in the other tribunal because of res judicata. *Bunch v. Nationwide Mut. Ins. Co.*, 180 Wash. App. 37,
9 41–42, 321 P.3d 266, 269 (2014).

10 2. Motion to Consolidate

11 CR 42: “When actions involving a common question of law or fact are pending
12 before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions;
13 it may order all the actions consolidated; and it may make such orders concerning proceedings
14 therein as may tend to avoid unnecessary costs or delay.” “CR 42(a) allows a court to consolidate
15 actions which involve a common question of law or fact. Consolidation is within the discretion of
16 the trial court and will be reversed only upon a showing of abuse and that the moving party was
17 prejudiced.” *Leader Nat'l Ins. Co. v. Torres*, 51 Wash.App. 136, 142, 751 P.2d 1252 (1988), aff'd,
18 *Leader Nat'l Ins. Co. v. Torres*, 113 Wash.2d 366, 779 P.2d 722 (1989). “CR 42(a) confers
19 substantial discretion on trial courts with respect to consolidation of common questions of law or
20 fact.” *W.R. Grace & Co. v. Dep't of Revenue*, 137 Wash.2d 580, 590, 973 P.2d 1011 (1999).

21 “When actions involving a common question of law or fact are pending before the court, it
22 may order a joint hearing or trial of any or all [of] the matters in issue in the actions; it may

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1 order all actions consolidated; and it may make such orders concerning proceedings therein
2 as may tend to avoid unnecessary costs or delay. The decision to consolidate actions is
3 within the discretion of the trial court. *Clark v. Pacificorp*, 118 Wn.2d 167, 179, 822 P.2d
4 162 (1991). The court's decision will be reversed only upon a showing of abuse and a
5 showing that the moving party was prejudiced.” *National Bank v. Equity Investors*, 86
6 Wn.2d 545, 561, 546 P.2d 440 (1976).

7 In the original cause, plaintiffs argued that Lake Cushman Company was a necessary party
8 under CR 19. They now attempt to exclude LCC from the new claim. As a necessary party
9 consolidation would bring LCC in to the new action.

10 3. Motion to Dismiss: Res Judicata

11 Res judicata bars the relitigation of claims determined by a final judgment, as well as
12 claims the plaintiff could or should have litigated in prior litigation. *Storti v. Univ. of Wash.*, 181
13 Wn.2d 28, 40, 330 P.3d 159 (2014) (emphasis added). Res judicata is designed to prevent
14 relitigation and to curtail multiplicity of actions by parties, participants, or privies who have had an
15 opportunity to litigate the same matter in a former action in a court of competent jurisdiction.
16 *Corbin v. Madison*, 12 Wash.App. 318, 323, 529 P.2d 1145 (1974), review denied, 85 Wash.2d
17 1005, 1975 WL 48230 (1975). The doctrine “prohibits the same parties from litigating a second
18 lawsuit on the same claim or any other claim” arising from the same transaction or series of
19 transactions “that could have been, but was not, raised in the first suit.” *Cook v. Brateng*, 180 Wn.
20 App. 368, 373, 321 P.3d 1255 (2014). “A matter should have been raised and decided earlier if it is
21 merely an alternate theory of recovery or an alternate remedy.” *Eugster v. Wash. State Bar Ass’n*,
22 198 Wn. App. 758, 790, 397 P.3d 131, review denied, 189 Wn.2d 1018 (2017). Likewise, a plaintiff


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1 cannot avoid the res judicata effect of an unfavorable judgment by refiling the same claims in a new
2 cause of action. Plaintiffs' new claims are barred since they were required to bring any new claims
3 in the old cause. The court stated in *Sound Built Homes, Inc. v. Windermere Real Estate/South,*
4 *Inc.*, 118 Wash. App. 617, 72 P.3d 788 (Div. 2 2003), as amended on denial of reconsideration,
5 (Oct. 7, 2003): "At bottom then, Sound Built's position is that a party can bring as many actions as
6 he or she has substantive legal theories, even if all theories involve the same facts, the same
7 evidence, and the same transaction. Based on the foregoing authorities, we reject this position."

8 *Karlberg v. Otten*, 167 Wash. App. 522, 535, 280 P.3d 1123, 1130 (2012) involved a quiet
9 title action. After obtaining title to a portion of the property, plaintiff sought to gain additional
10 property through a claim of adverse possession. In explaining the effects of res judicata, the court
11 stated: "The doctrine 'puts an end to strife, produces certainty as to individual rights, and gives
12 dignity and respect to judicial proceedings.' Allowing a claimant to split a single cause of action or
13 claim 'would lead to duplicitous suits and force a defendant to incur the cost and effort of defending
14 multiple suits.' The general rule is that "if an action is brought for part of a claim, a judgment
15 obtained in the action precludes the plaintiff from bringing a second action for the residue of the
16 claim." (Internal citations omitted.) The court should hold that all plaintiffs' claims, except
17 arbitrating the CR 2A, are barred by res judicata.

18 Dated this 7th day of September 2023.

19 
20 Robert W. Johnson WSBA 15486
21 Attorney for Defendant LCMC

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