

Bernstein v. Allstate Ins. Co.

Court of Appeal of California, Second Appellate District, Division Two

May 22, 1981

Civ. No. 61291

Reporter

119 Cal. App. 3d 449 *; 173 Cal. Rptr. 841 **; 1981 Cal. App. LEXIS 1758 ***

PAUL BERNSTEIN, Plaintiff and Appellant, v.
ALLSTATE INSURANCE COMPANY,
Defendant and Respondent

Subsequent History: [***1] A petition for a rehearing was denied June 11, 1981, and appellant's petition for a hearing by the Supreme Court was denied July 15, 1981.

Prior History: Superior Court of Los Angeles County, No. C 318627, Leon Savitch, Judge.

Disposition: The order of dismissal in case No. C-318627, the subject of the present appeal, is affirmed.

Core Terms

dismissal order, willful failure, discovery order, res judicata, trial court, discovery

Case Summary

Procedural Posture

In an action to enforce an insurance policy, plaintiff insured appealed from a judgment of the Superior Court of Los Angeles County (California) dismissing the insured's action against defendant insurer. The insured contended that a prior default judgment did not preclude the action.

Overview

The insured brought an action against the insurer alleging that the insurer failed to defend the insured in a related action. The trial court dismissed the action after the insured failed to comply with a discovery order. The insured filed another action

alleging the same cause of action. The trial court concluded that the prior action was res judicata and dismissed the action again. The insured contended that the first dismissal was without prejudice. The court affirmed the judgment. The court held that the prior judgment barred the second action because the insured's failure to obey the discovery order of the trial court resulted in a dismissal on the merits of the action.

Outcome

The court affirmed the judgment dismissing the insured's action against the insurer.

LexisNexis® Headnotes

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

Civil Procedure > Discovery & Disclosure > General Overview

HNI[[↓](#)] Dismissal, Involuntary Dismissals

A dismissal for failure to obey a court's discovery orders has the effect of a judgment on the merits against a plaintiff. The persistent refusal of a party to make discovery results in a presumption, as a matter of law, that the asserted causes of action are without merit.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

Plaintiff, who had had a previous action against defendant dismissed for wilful failure to comply with a discovery order, brought a second action against the same defendant alleging basically the same issues as in the original action. The trial court sustained defendant's demurrer, without leave to amend, on the ground that the judgment in the original action was res judicata as to all issues in the subsequent action. (Superior Court of Los Angeles County, No. C 318627, Leon Savitch, Judge.)

The Court of Appeal affirmed. The court held that dismissal of the first action for wilful failure to comply with the discovery order barred the subsequent action. The court also held that plaintiff could not avoid the consequences of dismissal of the first action, even though the failure to comply with the discovery order was due to the wilful refusal of plaintiff's attorney, and not of plaintiff himself. (Opinion by Beach, J., with Roth, P. J., and Fleming, J., concurring.)

Headnotes

CA(1)[

Judgments § 76—Res Judicata—Judgment as Merger or Bar—Dismissal of Prior Action for Failure to Make Court Ordered Discovery.

--A dismissal for failure to obey a court's discovery order has the effect of a judgment on the merits against a plaintiff; the persistent refusal of a party to make discovery results in a presumption, as a matter of law, that the asserted cause of action is without merit. Thus, the trial court properly sustained defendant's demurrer, without leave to amend, to a complaint by plaintiff who had had a prior action against defendant dismissed when he had failed to furnish answers to defendant's interrogatories as ordered by the court. The judgment in the original action was res judicata as

to all issues in the second, where plaintiff, an insured, made basically the same allegations as in the original complaint that defendant insurance company had neither tendered a defense nor agreed to pay the amount of damages for which plaintiff had been held liable following an automobile collision. Moreover, plaintiff could not avoid the consequences of dismissal of the first action, even though the failure to comply with the discovery order was due to wilful refusal by this attorney. Plaintiff was bound by the acts or omissions of his lawyer-agent whom he freely chose.

Counsel: David S. Sperber for Plaintiff and Appellant.

Lynberg & Nelsen and Judith Gold for Defendant and Respondent.

Judges: Opinion by Beach, J., with Roth, P. J., and Fleming, J., concurring.

Opinion by: BEACH

Opinion

[*450] [**841] Appeal from order of dismissal of plaintiff's complaint on the ground of res judicata. Affirmed.

Background:

In May 1976, plaintiff filed an action against defendant (case No. C-159619) for its failure to tender a defense or to pay the amount of damages for which plaintiff was held liable following an automobile collision involving an automobile not owned by plaintiff and driven by him without the owner's permission. Plaintiff had sought recovery under [*451] an automobile insurance policy issued to him by defendant. In February 1978, the trial court ordered dismissed the complaint based on willful failure to furnish answers to [***2] certain interrogatories propounded by defendant, as ordered by the court. On appeal, this court (Div. Five) affirmed the order of dismissal.

Thereafter, in April 1980, plaintiff again sued defendant (case No. C-318627), making basically the same allegations as those contained in the original complaint. The trial court sustained defendant's demurrer, without leave to amend, on the ground that the judgment in the original action was res judicata as to all issues in the second action. This appeal by plaintiff followed.

Issue on Appeal:

The only issue before us is whether the dismissal of the first action for willful failure to comply with the discovery order barred the subsequent action.

[**842] Discussion:

CA(1) [↑] (1) **HNI** [↑] A dismissal for failure to obey a court's discovery orders has the effect of a judgment on the merits against a plaintiff. (*Kahn v. Kahn* (1977) 68 Cal.App.3d 372, 383 [137 Cal.Rptr. 332].) As the court stated in *Kahn*, "[The] persistent refusal of a party to make discovery results in a presumption, as a matter of law, that the asserted causes of action are without merit." (*Ibid.*)

With respect to plaintiff's argument that the dismissal of his complaint [***3] against defendant was based on the willful failure of plaintiff's *attorney*, not plaintiff himself, to comply with the court-ordered discovery, it should be borne in mind that plaintiff "voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent." (*Link v. Wabash Railroad Co.* (1962) 370 U.S. 626, 633-634 [8 L.Ed.2d 734, 740, 82 S.Ct. 1386].) Any other notion would be totally inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent (*id.* at p. 634 [8 L.Ed.2d at p. 740]), and would allow litigants or their counsel to turn a deaf ear to the processes of the court with impunity, thus precluding effective judicial administration at the trial court level (*Kahn v. Kahn*, *supra*, 68 Cal.App.3d at p. 383).

[*452] The order of dismissal in case No. C-318627, the subject of the present appeal, is affirmed.

End of Document