Not Reported in P.3d, 101 Wash.App. 1072, 2000 WL 1146853 (Wash.App. Div. 1)
NOTE: UNPUBLISHED OPINION, SEE RCWA 2.06.040

Court of Appeals of Washington, Division 1.
Douglas SWERLAND and Scott Swerland, individually and on behalf of their marital communities, Appellants,
v.
Paragon Capital Corporation, a foreign corporation; George LEVINE and Jane Doe Levine, husband and wife, together with their marital community, Respondents.
No. 44636-3-I.
Aug. 7, 2000.

Appeal from Superior Court of King County, Docket No. 97-2-15721-8, judgment or order under review, date filed 10/21/1998; Carol Schapira, Judge.
Paul E. Brain, Tousley Brain, Michael J. Layton, Short Cressman & Burgess, Seattle, WA, for appellant(s).
William J. Murphy, Cairncross & Hempelmann, PS, Seattle, WA, for defendant(s).
Harry H. Schneider, Jr., Perkins Coie, Seattle, WA, **David S. Smith**, Smith Campbell & Paduano, New York, NY, for respondent(s).

Unpublished Opinion

COLEMAN
***1** Douglas and Scott Swerland, officers and controlling shareholders in SAVI, Inc., sued Paragon Capital Corp. and its chairman, George Levine, claiming that they had incurred losses as a result of Paragon's withdrawal from a proposed public offering (IPO) of SAVI's common stock. The Swerlands alleged that they loaned SAVI money to fund expenses related to the offering in reliance on Levine's representations that Paragon would underwrite the IPO. The Superior Court dismissed the suit, finding that a prior New York judgment determined that Paragon had the right to withdraw from the IPO, notwithstanding Levine's representations, and did not incur any liability because of its actions. We hold that the trial court properly applied the New York judgment under the constitutional mandate of full faith and credit, and we affirm.
FACTS
In January 1997, SAVI began negotiations with Paragon concerning a proposed public offering of its common stock. In order to provide SAVI with sufficient operating capital to fund expenses related to the IPO, the Swerlands loaned SAVI $225,000, anticipating that the money would be repaid out of funds raised through the IPO. In April 1997, SAVI and Paragon entered into a letter of intent (LOI) describing basic terms for the proposed offering. Douglas Swerland, SAVI's president, signed the LOI on behalf of SAVI. The LOI specifically provided that the proposal was not binding unless a number of additional conditions were met, including the execution of a 'firm commitment' underwriting agreement, and that either party could withdraw from the transaction.
If the Company decides not to proceed with the Proposed IPO for any reason, or if the Underwriter decides not to proceed with the Proposed IPO because of a breach by the Company of its representations, warranties, or covenants in this letter or in the Underwriting Agreement or as a result of adverse changes in the affairs of the Company, the Company will be obligated to reimburse the Underwriter for its accountable expenses up to the sum of Seventy-Five Thousand Dollars ($75,000), inclusive of amounts theretofore paid pursuant to paragraph 6(b) of this letter. If the Underwriter decides not to proceed with the Proposed IPO for any other reason the Company will only be obligated to reimburse the Underwriter for its accountable expenses up to the sum of Fifty Thousand Dollars ($50,000), inclusive of amounts theretofore paid pursuant to paragraph 7(b) of this letter.
The following month, Douglas Swerland signed a termination letter on behalf of SAVI, confirming that the parties had agreed not to proceed with the proposed offering. In consideration of the agreement, Paragon returned $25,000 that SAVI had advanced for IPO-related expenses and the parties executed broad mutual releases discharging all claims against each other, including claims arising from the LOI.

Shortly afterward, however, SAVI repudiated the release and returned the $25,000. Paragon then commenced a declaratory judgment action in New York, pursuant to a forum-selection provision in the LOI, claiming that it was entitled to withdraw from the transaction and that it had not incurred any liability under the LOI or otherwise.

***2** SAVI and the Swerlands sued Paragon and Levine in Washington, alleging that Levine misrepresented Paragon's commitment to the SAVI proposal by indicating that the firm would complete the transaction despite the terms of the LOI. The complaint also alleged that in March 1997, SAVI learned that Levine had misrepresented Paragon's track record and that Paragon's IPO for another Washington company, Tuscany, Inc., had not been successful. The complaint sought damages for the debts SAVI incurred in anticipation of the IPO, including the Swerlands' loans. Based on these claims, SAVI opposed the declaratory judgment action in New York, arguing that Paragon's liability flowed from the representations Levine made before SAVI entered into the LOI. The court rejected this argument, finding that under the LOI, neither party was bound to complete the IPO until a further agreement was executed. The court concluded that any representations Levine made before the agreement were 'totally merged {in} and superseded' by the LOI, which clearly gave Levine and Paragon the right not to proceed with the offering. The court also held that the mutual release in the termination letter was valid and ruled that Paragon had not incurred any liability under the LOI or otherwise.

Following the entry of judgment in the New York action, SAVI stipulated to a dismissal with prejudice of its claims against Levine. SAVI's claims against Paragon were previously dismissed on the ground that venue was improper. Paragon and Levine then moved for summary judgment, arguing that the New York judgment barred the Swerlands' claims because the Swerlands were in privity with SAVI in the previous action. The Superior Court granted the motion, and the Swerlands appeal.

DISCUSSION

Article IV, section 1 of the Constitution provides: 'Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.' Pursuant to this clause, Congress enacted 28 U.S.C. section 1738, which provides: 'Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such state, Territory or Possession from which they are taken.' The Supreme Court has stated that under this mandate, a final judgment in one state, rendered by a court with jurisdiction over the subject matter and parties governed by the judgment, controls in other states to the same extent as in the state where it was rendered. [FN1] *Baker v. General Motors Corp.,* 522 U.S. 222, 233, 118 S.Ct. 657, 139 L.Ed.2d 580 (1998). In *Durfee v. Duke,* 375 U.S. 106, 109, 84 S.Ct. 242, 11 L.Ed.2d 186 (1963), the Court stated that full faith and credit 'generally requires every State to give to a judgment at least the res judicata effect which the judgment would be accorded in the State which rendered it.' Thus, courts must generally look to the local law of the state where a judgment was rendered to determine its preclusive effect. [FN2] *See Riley v. New York Trust Co.,* 315 U.S. 343, 62 S.Ct. 608, 86 L.Ed. 885 (1942); Restatement (Second) Conflict of Laws sec. 94-95 (Rev.1988).

FN1. The Swerlands suggest that the full faith and credit doctrine does not apply because the court that entered the declaratory judgment did not have personal jurisdiction over them. But there is no question that the New York court properly exercised jurisdiction over SAVI, the defendant in the action. Nor do the Swerlands argue that the court lacked jurisdiction over the subject matter of the suit. Under the full faith and credit

clause, a valid, final judgment 'qualifies for recognition throughout the land.' *Baker,* 522 U.S. at 233.

FN2. The Swerlands assert that this court should analyze the preclusive effect of the New York judgment under Washington law, citing *Lee v. Ferryman,* 88 Wn.App. 613, 945 P.2d 1159 (1997). In *Lee,* Division Two held that an Oregon judgment barred a subsequent suit in Washington, citing Washington, Oregon, and federal law. *See Lee,* 88 Wn.App. at

621-25. The court began its analysis, however, by recognizing that under the constitutional mandate of full faith and credit, a valid sister state judgment 'controls in other states to the same extent as it does in the state where rendered.' *Lee,* 88 Wn.App. at 620 (citing *Riley v. New York Trust Co.,* 315 U.S. 343, 349, 62 S.Ct. 608, 86 L.Ed. 885 (1942)). Unlike the situation here, the parties in Lee did not contend that the prior judgment had less preclusive effect under Washington law, and in fact, the court concluded that Washington law barred the second action. Thus, Lee does not support the proposition that a judgment may be given less preclusive effect than in the state where it was rendered.

***3** Under New York law, the doctrine of claim preclusion bars future litigation between the same parties with regard to the same transactions or series of transactions, as well as litigation by those who were in privity with the parties to the prior action. *Bayshore Family Partners, L.P. v. Foundation of Jewish Philanthropies,* 704 N.Y.S.2d 631, 633 (2000). New York extends privity to persons who are successors to a property interest, those who controlled the prior action, and those whose interests were represented by a party to the action. [FN3] *Bayshore,* 704 N.Y.S.2d at 633 (quoting *Watts v. Swiss Bank Corp.,* 27 N.Y.2d 270, 277 (1970)). Here, the Swerlands are officers and founding shareholders of SAVI, controlling approximately 60 percent of the company's stock. SAVI and the Swerlands commenced this suit shortly before SAVI filed a response in the New York action, and SAVI's New York pleadings incorporate the Swerlands' allegations in this case. The plaintiffs' attorney in the instant suit represented SAVI in the New York proceedings, and the Swerlands were closely involved in SAVI's defense in New York, providing much of the evidence in support of SAVI's claims. Given the close relationship between the Swerlands and SAVI and the explicit representation of their claims in the New York proceedings, we conclude that the Swerlands were in privity with SAVI and may be bound by the prior judgment.

FN3. Washington law also binds both the parties to the litigation as well as persons in privity with the parties and extends privity to persons whose interests are represented by a party or are in actual control of the

litigation. *Woodruff v. Coate,* 195 Wash. 201, 210-14, 80 P.2d 555 (1938); see *Mutual of Enumclaw Ins. Co. v. State Farm Mut. Auto. Ins. Co.,* 37 Wn.App. 690, 693, 682 P.2d 317 (1984); *LaHue v. Keystone Inv. Co.,* 6 Wn.App. 765, 779-80, 496 P .2d 343 (1972).

"{O}nce a claim is brought to a final conclusion, all other claims arising out of the same transactions or series of transactions are barred even if based upon different theories or if seeking a different remedy." *Santiago v. Lalani,* 681 N.Y.S.2d 577 (1998) (quoting *Joem Int'l Ltd. v. Swedwall, Inc.,* 627 N.Y.S .2d 51 (1995)). Here, both the present suit and the declaratory judgment action arose out of the same series of transactions leading to Paragon's proposal to underwrite a public offering of SAVI's common stock. The Swerlands' complaint relies on the same factual basis as SAVI's New York defense, allegations that SAVI and the Swerlands relied on Levine's representations that Paragon would complete the proposed offering notwithstanding the terms of the LOI. Paragon's right to withdraw from the IPO, despite Levine's representations, was also at issue in the declaratory judgment action, and the court found that any representations by Levine had merged into the LOI, in which the parties clearly agreed that they would not be bound by the proposal. Thus, the court concluded that Levine and Paragon were entitled to withdraw from the transaction and that the firm had incurred no liability as a result of this decision. Because the present suit directly challenges the rights of the parties under the prior judgment, it cannot be maintained. [FN4] *See Henry Modell & Co. v. Minister, Elders & Deacons of the Reformed Protestant Dutch Church,* 68 N.Y.2d 456, 461-62 & n. 2 (1986). We conclude the trial court did not err in finding that the suit was barred, and we affirm.

FN4. We note that we would reach the same result under Washington law. In applying the doctrine of claim preclusion, our courts consider: (1) {w}hether rights or interests

established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts. *Kuhlman v. Thomas,* 78 Wn.App. 115, 122, 897 P.2d 365 (1995) (quoting *Rains v. State,* 100 Wn.2d 660, 664, 674 P.2d 165 (1983)); *see Philip A. Trautman, Claim and Issue Preclusion in Civil Litigation in Washington,* 60 Wash.L.Rev. 805, 814-15 (1984) (citing *Tacoma Mill Co. v. Northern Pac. Ry. Co.,* 102 Wash. 95, 172 P. 812 (1918)).

Wash.App. Div. 1,2000.
Swerland v. Levine
Not Reported in P.3d, 101 Wash.App. 1072, 2000 WL 1146853 (Wash.App. Div. 1)
END OF DOCUMENT