STATE OF MICHIGAN

COURT OF APPEALS

TRAVERSE VICTORIAN ASSISTED LIVING LLC,

Plaintiff-Appellant,

v

DEBRA A. BANTON and COUNTRY PLEASURES ASSISTED LIVING INC.,

Defendants-Appellees.

UNPUBLISHED
August 13, 2020

No. 349377
Grand Traverse Circuit Court
LC No. 2019-034876-CK

Before: MURRAY, C.J., and CAVANAGH and SWARTZLE, JJ.

PER CURIAM.

Plaintiff, Traverse Victorian Assisted Living LLC ("Traverse"), appeals as of right the trial court's order granting summary disposition under MCR 2.116(C)(7). It is uncontested that plaintiff was involved in a prior lawsuit that was resolved by a final decision on the merits. Furthermore, we agree with the trial court that the matter contested in the present lawsuit could have been resolved in the prior one, and both actions involved the same parties or their privies. Accordingly, for the reasons more fully explained here, we affirm.

I. BACKGROUND

This case arises from business disputes surrounding the operation of several assisted-living facilities. Plaintiff owns a facility in Traverse City, at which it provides residents with room, board, and personal care. Defendant Debra Banton and her husband, Wayne Banton, who were formerly part-owners of plaintiff, operated plaintiff's facility under contract through their company, Banton Business. Plaintiff filed two separate lawsuits relevant to this appeal. It resolved the first lawsuit by entering into a mediation-settlement agreement. Only three months after the dismissal of the first lawsuit, plaintiff filed the second lawsuit, which the trial court resolved by granting summary disposition to defendants on res-judicata grounds. Because application of the doctrine of res judicata necessarily requires an understanding of the first lawsuit giving rise to the dismissal of the second lawsuit, this opinion will discuss the first lawsuit in some detail.

A. THE FIRST LAWSUIT

In July 2018, several parties filed a lawsuit against Debra, Wayne, and Banton Business (the "first lawsuit"). The plaintiffs in the first lawsuit included William Clous, Ronald Clous, Traverse, and Water's Edge Assisted Living, LLC ("Water's Edge").[1] In the first lawsuit, the plaintiffs brought claims against the defendants for breach of two promissory notes, breach of two management agreements, and breach of fiduciary duties.

Regarding their claims for breach of the two promissory notes, the plaintiffs alleged that Debra and Wayne were payors on a promissory note owed to William in the amount of $725,842.87, and were payors on a promissory note owed to Ronald in the amount of $138,044.52; that the balance of the notes were due and owing; and that Debra and Wayne had failed to make payment on the notes, despite repeated demands for payment.

Regarding their claims for breach of the two management agreements, the plaintiffs alleged that Water's Edge and Banton Business entered into a management agreement in December 2011, and that Traverse and Banton Business entered into a management agreement in February 2013. The plaintiffs alleged that Banton Business breached those management agreements by failing to submit to Water's Edge and Traverse (1) annual budgets for operations and capital improvements; (2) deposits, check registers, and financial statements; and (3) year-end financial statements. The plaintiffs also alleged that the actions of Banton Business constituted gross negligence in the operation of the two facilities, triggering an indemnification clause in the management agreements.

In addition, the plaintiffs alleged that the management agreement between Banton Business and Traverse required Banton Business to seek bids, negotiate, and make recommendations to Traverse for a service provider of "Supervised Personal Care" for residents at Traverse's facility, but did not authorize Banton Business to enter into any agreements with a service provider. The plaintiffs alleged that, despite its lack of authority to do so under its management agreement with Traverse, Banton Business executed several service agreements for personal-care services to be rendered at Traverse's facility, and did so without Traverse's approval.

Regarding their claims for breach of fiduciary duties, the plaintiffs alleged that Debra and Wayne held a combined 25% membership interest in both Traverse and Water's Edge, and that they were the sole members of Banton Business during the time period that Banton Business operated the facilities of Traverse and Water's Edge. Plaintiffs alleged that Debra, Wayne, and Banton Business had fiduciary duties to Traverse and Water's Edge and that they were required to discharge their responsibilities in good faith, with loyalty, and with ordinary skill or care, in the best interests of Traverse and Water's Edge.

Regarding Water's Edge, the plaintiffs alleged that Debra, Wayne, and Banton Business committed "serial fiduciary breaches" and "intentionally represented and omitted to disclose material facts" with regard to the management of Water's Edge, causing damage to that business.

[1] For clarity, because several of the parties in the first lawsuit shared the same last name, we will refer to the parties by their first names.

Regarding Traverse, the plaintiffs alleged that Debra breached her fiduciary duties because she "exceeded her authority by executing service agreements" between Traverse and Bay Home Health Care, LLC ("Bay Home"), without the approval of Traverse. Specifically, the plaintiffs referred to three service agreements between Bay Home and Traverse that Debra executed in 2016 and 2017. The plaintiffs alleged that Debra's daughter, Megan Elsenheimer,[2] was a member of Bay Home, and that the agreements that Debra authorized between Traverse and Bay Home presented a "clear potential conflict of interest" requiring that William and Ronald, as voting members of Traverse, had the right to vote on the service agreements before their approval.

The plaintiffs attached to their complaint the two promissory notes; the two management agreements; service agreements between Traverse and Bay Home, signed by Debra and Elsenheimer; and the operating agreement describing the formation, structure, and operations of Traverse. The claims regarding the breach of the two promissory notes involved only the individual plaintiffs and individual defendants—Traverse, Water's Edge, and Banton Business were not parties to those claims. The claims regarding the breach of the two management agreements involved only the corporate plaintiffs and corporate defendants—William, Ronald, Debra, and Wayne were not parties to those claims. The claims regarding the breach of fiduciary duties involved the corporate plaintiff and all three defendants—William and Ronald were not parties to those claims.

During the course of discovery in the first lawsuit, the plaintiffs issued a subpoena to Country Pleasures Assisted Living, Inc. ("Country Pleasures"), another company that operated an assisted-living facility.[3] Through this third-party discovery request, the plaintiffs sought a variety of financial records from Country Pleasures, all relating to the "Michigan waiver program." Specifically, the plaintiffs subpoenaed the following records:

> Please produce copies of any and all banking records, tax filings/returns, copies of all resident leases/agreements, 1099s, service contracts, bids for services, estimates for services, financial statements, and documents relating to [the] Michigan waiver program, relating to the operations of Country Pleasures Assisted Living, Inc. from December 15, 2011 to the present.
>
> Please produce any and all documents, financial records, inventory lists, invoices, contracts, bid estimates, proofs of payments, receipts, 1099s, communications (including emails), financial statements, or other documents in your possession and control relating to Bay Home Health Care, LLC from December 15, 2011 to the present.

[2] We note in passing that the trial court judge, Hon. Kevin Elsenheimer, shares the same last name with Megan. This matter was addressed briefly in the trial-court proceedings, and Judge Elsenheimer confirmed that he was not related to the individual.

[3] At the hearing on defendants' motion for summary disposition in this lawsuit, defendants' counsel stated that Country Pleasures was "wholly owned" by Debra and Wayne.

The defendants moved to quash the subpoena, claiming that it was overbroad and irrelevant to the claims brought in the first lawsuit. The plaintiffs responded to the motion to quash, arguing that the defendants were charging Traverse more for the personal services provided by Bay Home than defendants were charging Country Pleasures for those same services, and arguing that the defendants were wrongfully diverting goods and services intended for Traverse to the benefit of Country Pleasures. The trial court declined to quash the subpoena, and Country Pleasures produced various documents to the plaintiffs. In addition, the plaintiffs issued discovery requests to the defendants, seeking a variety of documents related to the operations of Bay Home, including communications between the defendants and either Bay Home or Elsenheimer. The defendants produced various documents to the plaintiffs in response to that discovery request.

In December 2018, the parties settled the first lawsuit by entering into a mediation-settlement agreement. In that agreement, Traverse agreed to release the Bantons from "any and all claims as set forth in the pleadings" filed in the first lawsuit. More specifically, the agreement stated:

> 1. Wayne & Debra Banton shall transfer and assign free and clear of all claims[,] liens and encumbrances all of their interest in and to the following entities[:]
>
> a. Water's Edge Assisted Living, LLC
>
> b. Senior Care Facilities, LLC
>
> c. Traverse Victorian Assisted Living, LLC
>
> d. Briar Hill Motel, LLC (collectively 'Entities') to the party to be designated by William F. Clous.
>
> 2. The parties hereto agree to mutually release each other from any and all claims as set forth in the pleadings including without limitation any claim for payment under the promissory notes as defined in the Complaint.
>
> 3. Plaintiffs shall cause Defendants' related entity to be released from all guarantees made for any obligation of the Entities and cause the mortgage on the premises commonly referred to as Country Pleasures, to be released by the Entites [sic] lenders and hold them harmless from any of the obligations of the entities. Said mortgage referred to herein is the mortgage conveyed to secure the debt of the Entities only, and shall not include Defendants' first mortgage.
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> 4. Plaintiffs agree to release Bay Home Health Care from any claims up to the date of this Agreement except those claims* related to payments and funds owed to the Plaintiffs for Residents under the Michigan Waiver Program or the like and any claim related to Bay Home Health's obligations under its agreements with the Plaintiffs.
>
> *accruing after June 30, 2018

In accordance with the parties' mediation-settlement agreement, the trial court entered an order dismissing the first lawsuit with prejudice.

B. THE SECOND LAWSUIT

Approximately three months after the dismissal of the first lawsuit, plaintiff filed the present lawsuit against Debra and Country Pleasures (the "second lawsuit"). In the second lawsuit, plaintiff brought claims against these defendants for breach of contract, unjust enrichment, "money had and received," common-law conversion, and statutory conversion.[4]

In its complaint in the second lawsuit, plaintiff alleged that, in 2013, it retained the services of Bay Home and Elsenheimer. Plaintiff alleged that it provided room and board to the residents at its assisted-living facility, and it hired Bay Home to provide personal-care services to those residents.[5] Some of the residents of the assisted-living facility paid for their own care. Others received subsidies from the state of Michigan through what plaintiff referred to as the "Michigan Waiver program." According to plaintiff, it agreed to pay Bay Home for the personal-care services that its employees provided to the residents of Traverse's facility. Essentially, plaintiff reimbursed Bay Home the hourly rate that it paid its employees, plus one dollar per hour, with specified adjustments made for payments made by the state through the waiver program.

Plaintiff alleged that all of the payments made by the state were originally directed to Country Pleasures, which then credited or disbursed the funds to plaintiff and Water's Edge, to the extent that Bay Home provided personal services to residents of those facilities. In 2017, the state began to direct the waiver payments to Bay Home, rather than Country Pleasures. Plaintiff alleged various irregularities in how Bay Home and Country Pleasures handled the payments made by the state, and alleged that defendants conspired to retain or misdirect funds that belonged to plaintiff.

In lieu of filing an answer to the complaint, Debra and Country Pleasures filed a motion for summary disposition under MCR 2.116(C)(7) and (C)(8). Debra and Country Pleasures raised four grounds to support dismissal of the claims brought by plaintiff in the second lawsuit: waiver and release of claims, res judicata, collateral estoppel, and failure to state a claim upon which relief could be granted. The trial court ruled that plaintiffs' claims were barred by the doctrine of res judicata and entered summary disposition in favor of defendants. Given this, the trial court declined to address the other grounds for dismissal.

This appeal followed.

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[4] At the hearing on defendants' motion for summary disposition in this lawsuit, defendants' counsel represented that plaintiffs also filed a separate lawsuit against Bay Home and Elseinheimer, in another county, addressing similar causes of action. The separate lawsuit (assuming one exists) is not before us in this appeal.

[5] Although the complaint in the second lawsuit is replete with references to Bay Home, that entity was not a named defendant in the lawsuit.

II. ANALYSIS

On appeal, plaintiff argues that its claims in the second lawsuit are not barred by the doctrine of res judicata because the second lawsuit is between different parties and is based on "separate and distinct arguments, facts, and transactions than the prior suit."

A. STANDARD OF REVIEW

This Court reviews de novo whether the doctrine of res judicata bars a subsequent action. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999). We also review de novo a trial court's decision to grant or deny summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Summary disposition may be granted under MCR 2.116(C)(7) when a claim is barred because of a "prior judgment . . . or other disposition of the claim before commencement of the action." In reviewing a motion filed under this subrule, this Court accepts plaintiff's well-pleaded factual allegations as true and construes all the documentary evidence in plaintiff's favor. *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 10 n 8; 672 NW2d 351 (2003).

B. RES JUDICATA

"The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action." *Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004). "Res judicata requires that (1) the prior action was decided on the merits, (2) the decree in the prior action was a final decision, (3) the matter contested in the second case was or could have been resolved in the first, and (4) both actions involved the same parties or their privies." *Peterson Novelties*, 259 Mich at 10. Michigan courts apply the doctrine of res judicata broadly to bar a second lawsuit raising "not only claims already litigated, but every claim arising from the same transaction that the parties, exercising reasonable diligence, could have litigated but did not." *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999). "The test to be applied to determine if the subject matter of a second action is the same as that in a prior action is whether the facts are identical in both actions, or whether the same evidence would sustain both actions. If the same facts or evidence would sustain both, the two actions are considered the same for purposes of res judicata." *Estate of Koernke*, 169 Mich App 397, 399; 425 NW2d 795 (1988).

In this case, the trial court held, and the parties do not contest, that the first lawsuit was resolved by a final decision on the merits. Therefore, we need consider only whether the matter contested in this lawsuit "was or could have been resolved in the first," and whether both actions involved "the same parties or their privies." See *Peterson Novelties*, 259 Mich App at 10.

The trial court concluded that the claims advanced in this lawsuit could have been resolved in the first lawsuit: "This action is based on the same set of transactions, occurrences, operative facts, and legal questions that were related to the first matter." On appeal, plaintiff argues that the trial court erred in reaching this conclusion because "this case is based upon separate and distinct agreements, facts, and transactions than the prior suit." Plaintiff argues that this lawsuit involves a claim for breach of a contract through which Debra and Country Pleasures agreed to provide personal-care services at plaintiff's facility. Plaintiff argues that, in contrast, the prior lawsuit

involved a claim for breach of a management agreement that specifically precluded Debra or Banton Business from providing personal-care services at plaintiff's facility.

Plaintiff's argument misses the mark. The trial court did not conclude that plaintiff's claims in this lawsuit were *actually* resolved in the first lawsuit. Instead, the trial court concluded that plaintiff's claims in this lawsuit *could have been* resolved in the first lawsuit. In the prior matter, plaintiff served extensive discovery requests, seeking records from Country Pleasures regarding its administration of subsidy payments from the state through the waiver program, which payments were intended to reimburse plaintiff for personal-care services provided to residents at its facility. This discovery was directed at matters involved in the prior lawsuit and now this one. Moreover, the mediation-settlement agreement in the first lawsuit specifically named Country Pleasures and released a mortgage related to its assisted-living facility, as part of plaintiff's agreement to settle the first lawsuit. Based on this record, it is apparent that plaintiff could have raised and resolved in the first lawsuit its claims that Debra and Country Pleasures improperly handled waiver payments made by the state.

Plaintiff counters that the mediation-settlement agreement in the first lawsuit expressly preserved the claims that it asserted in this lawsuit. In support, plaintiff points to the language of the mediation-settlement agreement that expressly reserves claims against Bay Home, accruing after June 30, 2018, "related to payments and funds owed to the Plaintiffs for Residents under the Michigan Waiver program or the like and any claim related to Bay Home Health's obligations under its agreements with the Plaintiffs." This argument is unpersuasive, given that Bay Home is not a defendant in this lawsuit. The reservation of claims that plaintiff may have against Bay Home does not preserve plaintiff's claims against Banton and Country Pleasures. If anything, by preserving claims against Bay Home and not Country Pleasures, but including matters related to Country Pleasures in the mediation agreement, the agreement further confirms that plaintiff could have raised and resolved its claims against Country Pleasures in the first lawsuit.

Turning to the final factor, we consider whether both lawsuits involved "the same parties or their privies." See *Peterson Novelties*, 259 Mich at 10. The trial court held that "both actions involve the same parties or people in privity with them." Plaintiff does not contest the fact that it was a named plaintiff and Debra was a named defendant in both lawsuits. The present claims between these parties, which could have been brought earlier by plaintiffs, are clearly barred by res judicata.

Plaintiff instead focuses its arguments on appeal on Country Pleasures, which was not a named defendant in the first lawsuit. It is undisputed that Country Pleasures is a corporate entity separate from its owners, Debra and Wayne. For operation of res judicata, however, "perfect identity of the parties is not required, only a substantial identity of interests that are adequately presented and protected by the first litigant." *Adair v Michigan*, 470 Mich 105, 122; 680 NW2d 386 (2004) (cleaned up). "The parties to the second action need be only substantially identical to the parties in the first action, in that the rule applies to both parties and their privies." *Peterson Novelties*, 259 Mich App at 12. "In order to find privity between a party and a nonparty, Michigan courts require 'both a substantial identity of interests and a working or functional relationship . . . in which the interests of the non-party are presented and protected by the party in the litigation.' " *Id*. at 13, quoting *Phinisee v Rogers*, 229 Mich App 547, 553-554; 582 NW2d 852 (1998). " 'To be in privity is to be so identified in interest with another party that the first litigant represents the

same legal right that the later litigant is trying to assert.' " *Moses v Dep't of Corrections*, 274 Mich App 481, 503; 736 NW2d 269 (2007), quoting *Adair*, 470 Mich at 122.

Although we recognize that Country Pleasures was not a defendant in the original lawsuit that plaintiff brought against Debra, Wayne, and Banton Business, res judicata bars those claims that could have been brought by plaintiff against Country Pleasures with reasonable diligence, because Debra and Wayne are indisputably the sole owners of Country Pleasures. Plaintiff alleges that Debra used Country Pleasures to conspire with Bay Home to redirect or misappropriate funds owing to plaintiff. There has been no assertion by plaintiff that Debra and Wayne were not in actual control of Country Pleasures and its actions at all times pertinent to plaintiff's claims in this lawsuit. Based on the record in this case, the trial court did not err in concluding that Debra and Country Pleasures were in privity with one another, regarding the provision of personal-care services at plaintiff's facility. The record demonstrates that Debra and Country Pleasures had "both a substantial identity of interests and a working or functional relationship" in which the interests of Country Pleasures were "presented and protected by" Debra, as a party in the first litigation. See *Peterson Novelties*, 259 Mich App at 13. Plaintiff's claims against Country Pleasures, like those against Debra, are barred by res judicata.

Affirmed. Defendants, having prevailed in full, may tax costs under MCR 7.219(F).

/s/ Christopher M. Murray
/s/ Mark J. Cavanagh
/s/ Brock A. Swartzle