

STATE OF MICHIGAN
COURT OF APPEALS

JOYCELINE SWAIN,

Plaintiff–Appellant,

v

THE DETROIT BOARD OF EDUCATION,

Defendant–Appellee,

and

STATE TENURE COMMISSION,

Defendant.

UNPUBLISHED
October 29, 1996

No. 184061
LC No. 94-414267 CK

Before: Taylor, P.J., and Markey and N. O. Holowka,* JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court’s order granting summary disposition to defendant pursuant to MCR 2.116(C)(7) and (8). We affirm.

In September 1983, plaintiff was discharged from her employment as a high school business education teacher on the grounds of unsatisfactory performance. The State Tenure Commission ultimately upheld the discharge. Plaintiff’s appeal to the circuit court was dismissed in May 1988 because she failed to properly perfect the appeal. In early 1992, plaintiff filed a “Motion for Reinstatement of Appeal,” arguing that neither she nor her attorney had received notice of the circuit court’s dismissal. The circuit court denied plaintiff’s motion and plaintiff’s application for leave to appeal was denied by this Court, the Michigan Supreme Court, and the United States Supreme Court. Plaintiff then filed a new action in circuit court, claiming tort damages against defendant. The trial court

* Circuit judge, sitting on the Court of Appeals by assignment.

granted summary disposition of plaintiff's new claim ruling that the complaint failed to state a claim upon which relief could be granted and that the claim was barred by res judicata.

First, we find the trial court properly granted summary disposition because plaintiff's complaint was barred by res judicata. This doctrine bars a subsequent action between the same parties when the facts or evidence essential to the action are identical to those essential in the prior action. *Ozark v Kais*, 184 Mich App 302, 307; 457 NW2d 145 (1990). The prior action must have been resolved on the merits. *Badon v General Motors Corp*, 188 Mich App 430, 437; 470 NW2d 436 (1991). Also, the two actions must involve the same subject matter. Thus, the same facts or evidence must sustain both actions. *Jones v State Farm Mutual Ins Co*, 202 Mich App 393, 401; 509 NW2d 829 (1993).

Contrary to plaintiff's contention, a dismissal with prejudice for violation of a court rule is considered an adjudication on the merits. MCR 2.504(B)(3); *Makowski v Towles*, 195 Mich App 106, 108; 489 NW2d 133 (1992). Plaintiff's first lawsuit was dismissed because she failed to provide the court with the appropriate record within twenty-eight days of filing the claim of appeal as required by MCR 7.101(F). The dismissal was, therefore, on the merits. Further, there is no question that plaintiff seeks to litigate in the present lawsuit the exact subject matter raised in the previous action. That she asks for different relief does not prevent res judicata from barring the action. Accordingly, summary disposition pursuant to MCR 2.116(C)(7) was proper.

We also find the trial court properly determined that plaintiff's complaint failed to state a claim upon which relief could be granted. Count I fails to allege any tortious conduct by defendant. Count II states a claim against the State Tenure Commission only, which was dismissed as a defendant in the instant case for lack of subject matter jurisdiction. Plaintiff's pleadings are insufficient to state a claim against defendant and therefore summary disposition was also proper pursuant to MCR 2.116(C)(8).

Finally, we reject plaintiff's argument that the circuit court erred in making an issue of the delay between plaintiff's termination and the present complaint.¹ The record in this case does not persuade us that the age of the claim was relied upon by the court as a basis for summary disposition. Rather, the record clearly reflects that the court based its decision on res judicata and plaintiff's failure to state a claim.

Affirmed.

/s/ Clifford W. Taylor
/s/ Jane E. Markey
/s/ Nick O. Holowka

¹We also note that plaintiff's argument, that the initial dismissal was error because neither she nor her attorney had notice of the dismissal, is not relevant to this appeal. While this issue may have been proper on appeal from that order, plaintiff failed to persuade this Court, the Michigan Supreme Court, or the United States Supreme Court, of the necessity of such an appeal.

