STATE OF MICHIGAN

COURT OF APPEALS

DEBORAH G. FRAZIER,

Plaintiff-Appellant,

v

CITY OF WARREN,

Defendant-Appellee.

UNPUBLISHED
May 30, 1997

No. 192194
Macomb Circuit Court
LC No. 95-003241-CL

Before: Holbrook, Jr., P.J., and MacKenzie and Murphy, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7) and denying plaintiff's motion for summary disposition. We affirm.

In an earlier action, plaintiff filed a complaint against defendant, her employer, for alleged violations of the Michigan Whistle-blowers' Protection Act, MCL 15.362; MSA 17.428(2). While that litigation was pending, the parties agreed to binding arbitration. Following an arbitration hearing, the arbitrator issued an opinion denying all of plaintiff's claims. The parties then stipulated to entry of an order confirming the arbitration opinion and decision and entry of judgment. Plaintiff made no effort in the earlier action to vacate the award, and judgment was entered pursuant to the parties' stipulation.

Plaintiff then filed her complaint in the instant action seeking to vacate the arbitrator's award in the earlier case. Plaintiff claimed that the arbitrator exceeded his powers and exhibited a manifest disregard of the law. Both parties filed cross motions for summary disposition, and the trial court denied plaintiff's motion and granted defendant's motion, stating that any challenge to the award should have been made in the prior lawsuit, and that the instant action was an untimely attempt to collaterally attack the judgment in the prior case.

On appeal, plaintiff contends that the trial court erred in granting summary disposition in favor of defendant because the time limit for seeking to vacate the award under MCR 3.602 was inapplicable and because the arbitrator exceeded his powers and exhibited a manifest disregard of the law. We disagree. Although the trial court did not specify which ground for summary disposition it was relying upon, the court's reference to plaintiff's attempt to attack the judgment of the prior action suggests that

it was relying upon MCR 2.116(C)(7) in granting defendant's motion. In reviewing such a motion, we must accept as true plaintiff's well-pleaded allegations. *Gortney v Norfolk & Western R Co*, 216 Mich App 535, 538-539; 549 NW2d 612 (1996). We must "examine any pleadings, affidavits, depositions, admissions, and documentary evidence submitted by the parties in a light most favorable to the nonmovant." *Id.* A motion for summary disposition under MCR 2.116(C)(7) should be granted where the pleadings show that a party is entitled to judgment as a matter of law or if the affidavits or other proofs show that there is no genuine issue of material fact. *Id*. A trial court's order granting such a motion is reviewed de novo on appeal. *Peters v Dep't of Corrections*, 215 Mich App 485, 486; 546 NW2d 668 (1996).

We note initially that the issue of whether the arbitrator exceeded his powers and exhibited a manifest disregard of the law is not preserved for appeal because it was never addressed by the trial court. "[A]ppellate review is limited to issues decided by the trial court." *Bowers v Bowers*, 216 Mich App 491, 495; 549 NW2d 592 (1996). Here, the trial court granted defendant's motion because it stated that plaintiff's action was "an untimely attempt to collaterally attack the arbitration award and subsequent judgment." The trial court did not reach the merits of plaintiff's argument that the arbitrator exceeded his powers by exhibiting a manifest disregard of the law. Therefore, we need not review this unpreserved issue.

We hold that the trial court properly granted summary disposition in favor of defendant because plaintiff's action is barred by res judicata. "The doctrine of res judicata bars a subsequent action between the same parties when the facts or evidence essential to the maintenance of the two actions are identical." *Richardson v DAIIE*, 180 Mich App 704, 707-708; 447 NW2d 791 (1989). In order to apply the doctrine of res judicata, the following requirements must be met: "(1) the prior action must have been decided on its merits; (2) the issues raised in the second case must have been resolved in the first; and (3) both actions must have involved the same parties or their privies." *Id.* at 708.

Plaintiff filed the instant action seeking to vacate the arbitration award after the entry of judgment confirming the award in the earlier action. There is no question that both actions involve the same parties. The prior action was decided on its merits because judgment was entered by stipulation of both parties. The order stipulated to by the parties and which was entered by the trial court provided that the action was dismissed in its entirety and with prejudice, and that a judgment of no cause of action as to all of plaintiff's claims was being entered and that such judgment was final for purposes of appeal. This Court has held that even an order that is silent on its face as to prejudice is presumed to be a disposition on the merits. *In re Koernke Estate*, 169 Mich App 397, 400; 425 NW2d 795 (1988). Plaintiff has offered no basis for rebutting that presumption in the instant case.

Finally, as to the requirement that the issues raised in the second case must have been resolved in the first, this Court has stated that res judicata "bars litigation in the second action of claims that were actually litigated in the prior case as well as claims arising out of the same transaction which plaintiff could have brought." *Richardson*, supra, 180 Mich App 708. There is no question in the instant case that plaintiff could have contested the award in the earlier action in any number of ways, either by filing a

motion to vacate as permitted by MCR 3.602(J), or by objecting to defendant's motion to enter judgment confirming the award rather than stipulating to entry of judgment.

Therefore, since the prior action was decided on its merits, since plaintiff could have sought to vacate the award in the earlier action, and since both actions involve the same parties, res judicata bars this action and the trial court correctly granted defendant's motion for summary disposition. In light of this, it is unnecessary for us to reach the issue of whether plaintiff was required to seek to vacate the award within the time limits established by MCR 3.602.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Barbara B. MacKenzie
/s/ William B. Murphy