STATE OF MICHIGAN

COURT OF APPEALS

SHIRLEY MANICA, individually and d/b/a ACINAM CLEANING, INC.,

Plaintiff-Appellant,

v

TOWER CLEANING SYSTEMS, INC.,

Defendant-Appellee.

UNPUBLISHED
July 22, 1997

No. 190351
Oakland Circuit Court
LC No. 95-502167-CK

Before: Gribbs, P.J., and Holbrook, Jr., and J.L. Martlew,* JJ.

PER CURIAM.

Plaintiff appeals as of right from the order of the trial court granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7) on the basis that plaintiff's lawsuit was barred by the doctrine of res judicata. We reverse.

Defendant Tower Cleaning Systems, Inc., a Pennsylvania corporation, sold commercial office cleaning franchises. Viking Sales and Marketing, Inc., was a subfranchisor of Tower, which sold individual franchises in certain areas of Michigan. In January 1994, plaintiff Shirley Manica entered into a Tower Cleaning franchise agreement with Viking through its agent Richard B. Scanlan. ACINAM Cleaning, Inc., was Manica's Tower franchise.

By the terms of the franchise agreement, plaintiff was entitled to rescind the contract and receive a refund of her purchase price if Viking failed to provide her with an agreed-upon $10,000 gross monthly income. When Viking failed to perform as provided by the franchise agreement, three separate law suits were eventually filed by plaintiff. In August 1994, plaintiff filed her first lawsuit against both Tower and Viking, alleging a breach of contract. On motions of Tower and Viking for summary disposition, the trial court held that plaintiff had failed to allege an agency relationship between Viking and Tower, and therefore summary disposition in favor of Tower was appropriate because of a lack of contractual privity between Tower and plaintiff. As to Viking, the court noted a compulsory arbitration

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

clause in the parties' franchise agreement, and therefore referred plaintiff's claims against Viking to arbitration.

In June 1995, plaintiff filed her second circuit court complaint solely against Viking, alleging that Viking had sold her the franchise in violation of Michigan's Franchise Investment Law (MFIL), MCL 445.1501 *et seq.*; MSA 19.854 *et seq*. The apparent purpose of this lawsuit was for the trial court to enter a consent judgment between plaintiff and Viking. The consent judgment provided that Viking would repay plaintiff the purchase price of $26,180 in monthly installments. The consent judgment also served as "a final resolution of all claims between the parties to the Franchise Agreement of January 29, 1994."

In the meantime, plaintiff had sought assistance from the attorney general regarding her claims against Tower and Viking. In March 1995, the attorney general sent a Notice of Intended Action and Opportunity to Cease and Desist to Viking and Tower pursuant to MCL 445.1535(2); MSA 19.854(35)(2), charging them with various violations of the MFIL. The attorney general notified plaintiff that if Viking and Tower were found liable for violations of the franchise law they would be required, "among other things, to pay a substantial civil penalty and provide restitution to all persons who purchased the business opportunity." However, the attorney general warned plaintiff that she might not receive the relief that she had requested, which apparently was the return of her purchase money. Lastly, the attorney general assured plaintiff that she would be contacted by letter when the matter was concluded.

On approximately June 13, 1995, the attorney general, Viking, and Tower executed an Assurance of Discontinuance, pursuant to MCL 445.1535(2); MSA 19.854(35)(2), in which Viking and Tower agreed to stop selling franchises in Michigan in violation of the MFIL, and further provided that Tower and Viking would pay a civil penalty of $10,000 and provide an opportunity for rescission to all franchisees who were sold franchises in violation of the franchise investment law. At about the same time, the attorney general sent a letter informing plaintiff of the Assurance of Discontinuance and instructed her to contact Viking and Tower if she felt that she could benefit under the terms of the agreement. Upon receipt of the letter—which plaintiff claimed was after she and Viking entered into their consent judgment—plaintiff moved for modification of the consent judgment to preserve her rights under the Assurance of Discontinuance. The trial court denied plaintiff's motion.

In August 1995, plaintiff filed the current and third lawsuit against defendant Tower, alleging that she was an intended third-party beneficiary of the Assurance of Discontinuance executed by defendant and the attorney general. Plaintiff alleged that she was entitled to rescission of her franchise, because she "was one of the franchisees who was sold a franchise using disclosure documents not in compliance with the provisions of the Michigan Franchise Investment Law." Therefore, plaintiff advanced that she was entitled to her purchase price, with 12% yearly interest, and reasonable attorney fees and court costs in accordance with MCL 445.1531; MSA 19.854(31).

Defendant Tower moved for summary disposition pursuant to MCR 2.116(C)(7) on the basis that plaintiff's action was barred by the doctrine of res judicata. Defendant argued that the order of

summary disposition in its favor in the first lawsuit, which established that defendant was not in contractual privity with plaintiff, and the consent judgment entered into by plaintiff and Viking in the second lawsuit, operated to preclude all claims that plaintiff might have against defendant under the Assurance of Discontinuance. Plaintiff opposed defendant's motion for summary disposition, arguing that res judicata did not bar her claim for remedies under the Assurance of Discontinuance, because defendant was not a party to the consent judgment, the Assurance of Discontinuance was not in existence at the time she entered into the consent judgment with Viking, and defendant had been dismissed as a party to the first lawsuit. In sum, plaintiff argued that the current lawsuit was merely a third-party beneficiary action brought pursuant to MCL 600.1405; MSA 27A.1405 to realize her rights under the Assurance of Discontinuance, and did not involve any claims arising from the parties' franchise agreement.

At the motion hearing, the trial court found that defendant's dismissal from the first lawsuit on the basis of a lack of contractual privity did not bar plaintiff's current lawsuit because plaintiff's rights under the Assurance of Discontinuance presented different issues to be resolved. With regard to the consent judgment between plaintiff and Viking, the court found that, although plaintiff was not a party to the Assurance of Discontinuance, she was an intended third-party beneficiary "because of the language in paragraph 3C that respondent would offer rescission to all franchisees who were sold franchises using disclosure documents not in compliance with the law." The court further found that the current lawsuit and the consent judgment involved the same issues for purposes of res judicata because plaintiff was entitled to "the exact same payments" under both the consent judgment and the Assurance of Discontinuance. Thus, the court held that res judicata precluded plaintiff's third-party beneficiary claim. Plaintiff now brings this appeal.

On appeal, plaintiff argues that the trial court erred in finding that the consent judgment between plaintiff and Viking barred her third-party beneficiary claim against Tower under the Assurance of Discontinuance. We agree and reverse. This Court reviews a summary disposition determination pursuant to MCR 2.116(C)(7) de novo as a question of law. *Lindsey v Harper Hospital*, 213 Mich App 422, 425; 540 NW2d 477 (1995).

Res judicata bars a subsequent action between the same parties or their privies when the evidence or essential facts are identical. *Husted v Auto-Owners Ins Co*, 213 Mich App 547, 556; 540 NW2d 743 (1995). The consent judgment that resulted from plaintiff's second lawsuit against Viking did not operate to bar the current lawsuit against defendant Tower. Indeed, because it had been determined in plaintiff's first lawsuit that no contractual privity existed between plaintiff and defendant Tower, defendant is collaterally estopped from attempting to relitigate that issue. See, e.g., *Kowatch v Kowatch*, 179 Mich App 163, 168-169; 445 NW2d 808 (1989). Thus, the consent judgment and the current lawsuit do not involve the same parties or privies. Moreover, because the consent judgment resolved plaintiff's rights under the franchise agreement, while the current lawsuit involves plaintiff's rights under the Assurance of Discontinuance, it cannot be said that the same issues are being litigated. Accordingly, plaintiff's present action against defendant Tower is not res judicata.

The remaining issue to be determined is whether the trial court was correct to the extent that it held that plaintiff was an intended third-party beneficiary of the Assurance of Discontinuance. We find no error. Given that the question of whether a plaintiff is entitled to assert third-party beneficiary status necessarily involves an examination of the intent of the contracting parties, as reflected in the unambiguous language of their contract, the issue of third-party beneficiary status is one of law for the court to decide. See *Griffin Manufacturing Co v Mitshkun*, 233 Mich 640, 642; 207 NW 814 (1926); *Angelo Iafrate Co v Detroit and Northern Sav and Loan Ass'n,* 80 Mich App 508; 264 NW2d 45 (1978).

The rights of third-party beneficiaries are governed by MCL 600.1405; MSA 27A.1405, which provides in part:

> Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.
>
> (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise has undertaken to give or to do or refrain from doing something directly to or for said person.

Under the terms of the Assurance of Discontinuance, Viking and Tower promised to offer rescission to all franchisees who purchased their franchises under noncomplying disclosure documents. Plaintiff was clearly included in this class of franchisees. *Rhodes v United Jewish Charities of Detroit,* 184 Mich App 740, 744; 459 NW2d 44 (1990), criticized on other grounds 444 Mich 441 (1993). Although the implicit effect of the prior consent judgment was to rescind the parties' franchise agreement, the Assurance of Discontinuance provides plaintiff with certain remedies in addition to rescission that were not available under the consent judgment, i.e., a higher interest rate, court costs, and reasonable attorney fees.[1] Thus, as a matter of law, we hold that plaintiff was an intended third-party beneficiary of the Assurance of Discontinuance, and that she is entitled to pursue her remedies under its terms.

Reversed.

/s/ Roman S. Gribbs
/s/ Donald E. Holbrook, Jr.
/s/ Jeffrey L. Martlew

[1] The Assurance of Discontinuance alleged that Tower and Viking had violated certain provisions of § 8 of the MFIL, and further provided for certain penalties and remedies. Paragraph 3C of the Assurance of Discontinuance provided, in pertinent part:

> They [Tower and Viking] shall forthwith, but no later than thirty (30) days from the date of signing this Assurance, offer rescission to all franchisees who were sold franchises using disclosure documents not in compliance with the provision of the Michigan Franchise Investment Law. They will provide the Attorney General with copies of the rescission offers. The rescission offers will recite the provisions of section 31 of the Michigan Franchise Investment Law.

Section 31 of the MFIL provides, in pertinent part:

> (1) A person who offers or sells a franchise in violation of section 5 or 8 is liable to the person purchasing the franchise for damages or rescission, with interest at 6% per year from the date of purchase until June 20, 1984 and 12% per year thereafter and reasonable attorney fees and court costs. [MCL 445.1531(1); MSA 19.854(31)(1).]