

STATE OF MICHIGAN
COURT OF APPEALS

CITIZENS BANKING COMPANY,

Plaintiff-Appellant,

v

AMD SOUTHFIELD MICHIGAN LIMITED
PARTNERSHIP, a/k/a MRI OF SOUTHFIELD, and
MOBILE DIAGNOSTECH, INC, and ADVANCED
MEDICAL DIAGONSTICS,

Defendants-Appellees.

UNPUBLISHED

August 26, 1997

No. 193909

Oakland Circuit Court

LC No. 96-511352-CK

Before: MacKenzie, P.J., and Neff and Markey, JJ.

PER CURIAM.

In this breach of contract action, plaintiff appeals as of right from an order granting summary disposition in favor of defendants. We reverse.

In 1986, AMD Southfield Michigan Limited Partnership (“AMD”) entered into an agreement to lease a Magnetic Resonance Imaging (“MRI”) scanner for a period of sixty-six months. Ultimately, the lease was assigned to plaintiff. In 1994, plaintiff filed a complaint for claim and delivery against AMD and its partners, Mobile Diagnostech (“Mobile”) and Advanced Medical Diagnostics (“Advanced Medical”). Plaintiff alleged that AMD had no right to possession of the equipment because it had not made any payments since the lease expired in November of 1991. Pursuant to MCR 3.105(H)(6), plaintiff sought the fair market value of the equipment. The parties agreed to submit the valuation issue to the trial court for a “binding determination.” Judgment was entered in favor of plaintiff in the amount of \$190,500, plus taxes.

The instant case commenced in 1996 when plaintiff filed a complaint against AMD, Mobile, and Advanced Medical for breach of contract and “failure to pay account stated.” The complaint alleged that AMD had failed to make all of its monthly lease payments. Plaintiff sought \$475,003.55, plus interest, costs, and fees. The trial court held that plaintiff’s claims were barred by the doctrine of res judicata and granted summary disposition in favor of defendants pursuant to MCR 2.116(C)(7).

On appeal, plaintiff argues that the trial court's decision should be reversed because defendant failed to object to nonjoinder of the breach of contract claim in the first action. Generally, a defendant who fails to object to nonjoinder waives the use of the defense of splitting the cause of action in a subsequent proceeding. MCR 2.203(A)(2); *Rogers v Colonial Federal Savings & Loan Ass'n*, 405 Mich 607, 626; 275 NW2d 499 (1979). However, "[t]his rule does not affect...the prohibition against relitigation of a claim under a different theory." MCR 2.203(A)(2). Therefore, the critical inquiry here is whether plaintiff improperly split its cause of action by raising the same claim under a different theory. See *Eaton Co Bd of Co Rd Comm'rs v Schultz*, 205 Mich App 371, 380-381, n 5; 521 NW2d 847 (1994).

The test to determine whether two actions involve the same claim is whether the facts are identical in both actions or whether the same evidence would sustain both lawsuits. *Schwartz v Flint*, 187 Mich App 191, 194-195; 466 NW2d 357 (1991). Here, although both cases involved the 1986 lease, plaintiff's claims were not identical for purposes of the prohibition against claim-splitting. In the prior proceeding, plaintiff alleged that AMD unlawfully retained possession of the MRI scanner following expiration of the lease. In this case, on the other hand, plaintiff asserts that AMD failed to make all of the required monthly payments during the term of the lease. Thus, the facts and evidence necessary to sustain the first action involved the pre-expiration period while the instant case involves facts pertaining to the period after the lease expired.

Defendants argue that the claims were identical because both cases involved claims for damages arising after November of 1991. Although plaintiff cited different expiration dates in each complaint, it appears that the parties mutually agreed to accept the latter date in the first action. Moreover, it is clear from the pleadings that plaintiff sought damages accruing after the expiration of the lease in the first action, whereas the instant case pertains to AMD's conduct during the term of the lease.

Defendants next argue that plaintiff's claim is barred because the breach of contract issue was actually litigated in the first lawsuit. We disagree. In responding to plaintiff's complaint for claim and delivery, defendants asserted that the equipment lease was fully satisfied in November of 1991 when the amount owed became equal to AMD's security deposit. Causes of action and defenses are not interchangeable for purposes of res judicata. *Eaton Co Bd of Co Rd Comm'rs*, *supra*, p 376. Moreover, plaintiff never actually responded to AMD's assertion regarding the issue of default. Rather, plaintiff argued that the only issue to be decided was the fair market value of the equipment.

Defendants also rely on MCR 3.105(H)(1)(c) in support of their contention that the default issue was actually litigated in the prior proceeding. That rule provides that a judgment in a claim and delivery action must include a determination regarding the "amount of any unpaid debt." However, a plaintiff is not required to join the underlying claim for debt. Pursuant to MCR 3.105(C)(4), such a claim "may be joined as a separate count" if the action is based on a security agreement. (Emphasis supplied.) See 4 Martin, Dean & Webster, Michigan Court Rules Practice, p 118. Although defendants have the option to require joinder under MCR 2.203(A), that did not occur in the instant case. Therefore, defendants' reliance on MCR 3.105(H)(1)(c) is misplaced.

Next, defendants argue that plaintiffs should be collaterally estopped from raising the breach of contract issue. Collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in that proceeding. *McMichael v McMichael*, 217 Mich App 723, 727; 552 NW2d 688 (1996). Defendants contend that the issue of default was actually and necessarily litigated because the judgment in the prior proceeding was entered under a provision in the lease giving AMD the right to purchase the equipment provided that they were not in default. We disagree. The lease provides that the lessor's failure to require strict performance of any provision "shall not waive or diminish" the lessor's rights to demand strict performance unless the lessor waives such rights in a written instrument. There is nothing in the record suggesting that such a waiver occurred. Thus, plaintiff can sue for default regardless of whether AMD exercised its contractual option to purchase.

Defendants' reliance on the doctrine of judicial estoppel is also without merit. The doctrine of judicial estoppel precludes a party as a matter of law from successfully and unequivocally adopting a legal position in conflict with one taken in the same or related litigation. *Michigan Gas Utilities v Public Service Comm*, 200 Mich App 576, 583; 505 NW2d 27 (1993). As noted, the equipment was valued as of July 29, 1992. Therefore, plaintiff is not taking a position in conflict with one taken in the first action. Although plaintiff's attorney made a statement indicating that the lease was satisfied, it does not appear that counsel's fleeting remark during oral argument was intended to constitute an admission with regard to the issue of default.

Finally, defendants argue that the trial court's decision should be affirmed pursuant to the doctrines of equitable estoppel, waiver and laches. Defendants make essentially the same argument with regard to each of these doctrines. According to defendants, plaintiff should not be allowed to raise the issue of default because it waived consideration of that issue in the first action. We disagree. Although the parties resolved that the only issue to be decided in the prior proceeding was the fair market value of the equipment, it does not appear that plaintiff intentionally waived its right to litigate the question of whether AMD failed to make all of the required monthly payments. Nor does it appear that plaintiff intentionally or negligently induced AMD into believing that the issue had been waived. Plaintiff simply did not respond to AMD's assertion that the equipment lease was fully satisfied.

Nor does it appear that defendants would be prejudiced by allowing the instant case to proceed. From the start of this dispute, AMD continually asserted its intention to purchase the MRI scanner. The first action involved a determination regarding the fair market value of the equipment. There is no evidence in the record suggesting that the trial court's decision with regard to that issue would have been different had plaintiff raised the issue of default within the context of the prior proceeding. Moreover, it would be neither fair nor just to allow defendants to assert the doctrine of laches based on the loss of evidence where they are solely responsible for such loss.

Reversed.

/s/ Barbara B. MacKenzie

/s/ Janet T. Neff

/s/ Jane E. Markey