

STATE OF MICHIGAN
COURT OF APPEALS

PHIL SIMON ENTERPRISES,

Plaintiff-Appellant,

v

HURAND & HURAND,

Defendant-Appellee.

UNPUBLISHED

March 3, 1998

No. 203066

Kalamazoo Circuit Court

LC No. 96-002301-CZ

Before: McDonald, P.J., and Sawyer and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant's motion for summary disposition. We affirm.

On November 29, 1962, PBJ Co., Inc. (hereinafter PBJ), which merged with plaintiff corporation in 1990, entered into an agreement to lease, for twenty years, to Donut Systems, Inc. (hereinafter DSI) a ten thousand square foot premises in the township of Portage, Kalamazoo County. The lease agreement provided that the lessee could, upon giving a written notice within ninety days before the expiration of the running lease term, exercise its options of extending the lease under the same terms for six terms of ten years each. DSI exercised its first option and extended the lease until June 1993. By a letter dated April 10, 1991, defendant, representing itself as successor-in-interest to DSI, advised plaintiff that it would exercise its remaining five options of extending the lease, under the same terms, for a total of fifty years.

Thereafter, PBJ instituted a suit in equity to bring about the reformation of the lease and increase the rental amount. Following a bench trial, the trial court dismissed PBJ's action with prejudice on the basis that the doctrine of laches precluded PBJ from prevailing in the action. The trial court, in addressing PBJ's argument that the lease had lapsed because DSI's assignment of its lease interest had been oral and that defendant, therefore, did not possess the requisite legal interest to effectuate notice for the extension of the lease term, only stated that this issue had not been timely raised and, therefore, could not be considered. Upon appeal, this Court affirmed and, inter alia, ruled that, while the trial court did not abuse its discretion in denying plaintiff's motion to amend its complaint, "amendment of the

complaint would have been futile.” See *PBJ Co, Inc v Donut Sys, Inc*, unpublished memorandum opinion of the Court of Appeals (Docket No. 168452, issued May 5, 1995). Our Supreme Court denied PBJ's application for leave.

On July 29, 1996, plaintiff, as successor-in-interest to PBJ, filed the instant suit against defendant to determine interests in and to recover possession of the real property in question. Plaintiff averred that defendant possessed no valid interest in the lease because DSI's oral assignment of the real property lease interest to defendant had been ineffective as violative of the statute of frauds. Plaintiff further averred that the lack of an effective assignment rendered defendant's notice to exercise the lease agreement's five successive ten-year extension terms improper; moreover, plaintiff claimed that it had received no subsequent notices to exercise the lease agreement's extension periods from either DSI or defendant. Defendant, subsequently, filed its motion for summary disposition arguing, inter alia, that plaintiff's claim was barred under the doctrine of res judicata and that plaintiff lacked standing to contest the validity of the oral assignment of interest in real property. During the motion hearing, plaintiff indicated that PBJ's motion for amendment of its complaint in the first action was premised on the same issue as plaintiff's complaint in the instant action, i.e., since defendant was not a successor-in-interest to DSI but merely an assignee of an invalid oral assignment of interest in real property, defendant's notice for an extension of the lease, under the same terms, was ineffective and its interest in the real property nonexistent. The trial court granted defendant's motion for summary disposition on the basis of res judicata, finding that this Court's unpublished memorandum opinion constituted a prior judgment as to the issue presented by plaintiff.

Plaintiff alleges that the trial court erred in granting defendant's motion for summary disposition on the basis of res judicata or collateral estoppel. We agree but affirm because the trial court reached the right result, albeit for the wrong reason. See *In re Powers*, 208 Mich App 582, 591; 528 NW2d 799 (1995). Rulings on res judicata and motions for summary dispositions are reviewed de novo. *Energy Reserves Inc v Consumers Power Co*, 221 Mich App 210, 216; 561 NW2d 854 (1997). MCR 2.116(C)(7) provides that summary disposition may be granted in favor of the defendant if the claim is barred as a result of a prior judgment. The applicable standard of review under MCR 2.116(C)(7) requires us to accept all plaintiff's well-pleaded allegations as true and to construe them most favorably to the plaintiff. *Jones v State Farm Mut Auto Ins Co*, 202 Mich App 393, 396; 509 NW2d 829 (1993).

In the case at bar, the trial court concluded that this Court's determination that PBJ's amendment of its complaint would have been futile, see *PBJ Co, Inc, supra*, constituted a prior judgment or decision of plaintiff's present issue. However, this Court's determination, in the first action, that any amendment would prove futile represents dicta in that this Court had, immediately preceding, ruled that the trial court's denial of PBJ's motion to amend did not constitute an abuse of discretion. Because this Court's unnecessary comment could not be given a res judicata effect barring plaintiff from raising this claim in the instant suit, we hold that the trial court erred in granting defendant's motion for summary disposition on this basis. See *Eaton Co Bd of Rd Comm'rs v Schultz*, 205 Mich App 371, 382; 521 NW2d 847 (1994) (Reilly, J., concurring); see also *Whirlpool Corp v Civil Rights Comm*,

425 Mich 527, 539; 390 NW2d 625 (1986) (Archer, J., dissenting); and *Cree Coaches, Inc v Panel Suppliers, Inc*, 384 Mich 646, 650; 186 NW2d 335 (1971) (dicta lacks the force of adjudication).

However, affirmance of the trial court's grant of defendant's motion for summary disposition is alternatively supported by plaintiff's lack of standing to assert the defense of the statute of frauds, MCL 566.106; MSA 26.906, as to the validity of DSI's oral assignment of its leasehold estate interest to defendant. The statute of frauds is a personal defense available only to parties to a contract. *Hill v GMAC*, 207 Mich App 504, 510; 525 NW2d 905 (1994). Plaintiff's claim was premised on the argument that defendant possessed no valid interest in the lease agreement because DSI's oral assignment of its real property lease interest to defendant had been ineffective or invalid as violative of the statute of frauds. Therefore, despite the trial court's error, we hold that reversal is not required.

Last, defendant requests imposition of sanctions under MCR 7.216(C), arguing that plaintiff's appeal is vexatious. We disagree because our review of plaintiff's brief and the facts as outlined in the record does not lead us to believe that plaintiff's appeal was deficient to the extent of triggering the sanctions allowed under subrule (C). Therefore, defendant's request for sanctions is denied.

Affirmed.

/s/ Gary R. McDonald

/s/ David H. Sawyer

/s/ Joel P. Hoekstra