

STATE OF MICHIGAN
COURT OF APPEALS

HOUDINI PROPERTIES, L.L.C.,

Plaintiff-Appellant,

v

CITY OF ROMULUS,

Defendant-Appellee.

UNPUBLISHED

June 13, 2006

No. 266338

Wayne Circuit Court

LC No. 05-504139-CZ

Before: Schuette, P.J., and Bandstra and Cooper, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's grant of summary disposition in favor of defendant and the denial of plaintiff's request to file an amended complaint. We affirm.

Plaintiff first argues that the trial court erred in granting summary disposition in favor of defendant under MCR 2.116(C)(6), based on its failure to join all claims as required by MCR 2.203(A). We review de novo a trial court's decision on a motion for summary disposition under subrule (C)(6). *Fast Air, Inc v Knight*, 235 Mich App 541, 543; 599 NW2d 489 (1999).

MCR 2.203(A) provides that, for compulsory joinder to apply, "the pleader must join every claim that the pleader has against th[e] opposing party at the time of serving the pleading, if it arises out of the transaction or occurrence that is the subject matter of the action and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction." Here, the transaction or occurrence that precipitated plaintiff's civil action was the denial of a use variance by defendant's zoning board of appeals. "[A]ctions arise from the same transaction or occurrence only if each arises from the identical events leading to the other or others." *Ross v Onyx Oil & Gas Corp*, 128 Mich App 660, 669; 341 NW2d 783 (1983), quoting *Armco Steel Corp v Dep't of Treas*, 111 Mich App 426, 437; 315 NW2d 158 (1981), aff'd 419 Mich 582; 358 NW2d 839 (1984). Stated a different way, two claims arise out of the same transaction if "the same facts or evidence are essential to the maintenance of the two actions." *Jones v State Farm Mut Auto Ins Co*, 202 Mich App 393, 401; 509 NW2d 829 (1993). Plaintiff's contention that the actions are distinguishable based on the type of relief asserted is without merit because, despite plaintiff's assertion of different "theories of liability," "proof of the same facts or evidence as required to sustain the previous action is necessary in this action." *Jones, supra* at 401-402. Because plaintiff's constitutional claims arise directly from defendant's denial of the use variance, the actions filed by plaintiff were required to be joined in accordance with MCR 2.203(A).

Plaintiff presents a convoluted argument that a claim of appeal is not defined within MCR 2.110(A) as a pleading and therefore does not require joinder under MCR 2.203(A). However, our Supreme Court has reasoned that a claim of appeal from a zoning decision is a pleading. *Macenas v Village of Michiana*, 433 Mich 380, 387; 446 NW2d 102 (1989) (“[o]nce pleadings are filed in the circuit court which constitute a claim of appeal from a decision by a zoning board of appeals . . . the circuit court acts as an appellate court”). As further noted by our Supreme Court, “[i]f a proper appeal to circuit court is filed, a ‘cause of action’ is stated. . . .” *Macenas, supra* at 388. Moreover, plaintiff’s argument would defeat the purpose of MCR 2.203, which provides for liberal joinder of actions “to achieve trial convenience and economy in judicial administration. . . .” *Kubiak v Hurr*, 143 Mich App 465, 477; 372 NW2d 341 (1985).

Plaintiff contends the trial court erroneously granted summary disposition under MCR 2.116(C)(6) because when a ruling was issued by the trial court on the appeal the matter was no longer pending and, therefore, two actions did not exist simultaneously. On February 11, 2005, plaintiff filed the civil action in circuit court. On August 26, 2005, the trial court issued an order affirming the decision of the zoning board of appeals. On September 16, 2005, plaintiff filed an application for leave to appeal to this Court the trial court’s decision. On October 19, 2005, the trial court granted summary disposition in favor of defendant in the civil action. Plaintiff contends that the trial court’s ruling on the appeal of the zoning board’s decision terminated that action and permitted the civil action to proceed without conflict. Plaintiff is incorrect. This Court has held that “pendency of an appeal abates a second action between the same parties on the same subject matter in the trial court.” *Darin v Haven*, 175 Mich App 144, 151; 437 NW2d 349 (1989).

Plaintiff next argues that the trial court improperly relied on the unpublished case of *Sammut v City of Birmingham*, unpublished opinion per curiam of the Court of Appeals, issued January 4, 2005 (Docket No. 250322) to support its grant of summary disposition in favor of defendant. Contrary to plaintiff’s assertion, the trial court recognized that *Sammut* was of no precedential value, asserting it was only “applicable” to the facts and circumstances of the case. Further, the trial court noted that it relied on MCR 2.203(A) in the determination of its ruling. Considering the trial court’s indication that it reviewed the pleadings and applicable court rules in addition, we conclude that the trial court’s determination is sufficiently supported by the record and that the trial court only used the unpublished case as persuasive authority, which it was free to do. *Steele v Dep’t of Corrections*, 215 Mich App 710, 714-715 n 2, 715; 546 NW2d 725 (1996).

Plaintiff next argues that the trial court improperly granted summary disposition in favor of defendant under MCR 2.116(C)(7), based on res judicata. We review de novo a trial court’s decision on a motion for summary disposition under subrule (C)(7) to determine whether the moving party was entitled to judgment as a matter of law. *Stoudemire v Stoudemire*, 248 Mich App 325, 332; 639 NW2d 274 (2001). We also review de novo the applicability of the doctrine of res judicata as a question of law. *Id.*

“Res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical.” *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999). “A second action is barred when (1) the first action was decided on the merits, (2) the matter in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies. *Id.* “Michigan courts have broadly applied the doctrine of res judicata,” and

“have barred, not only claims already litigated, but every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not.” *Id.* “The test to be applied to determine if the subject matter of a second action is the same as that in a prior action is whether the facts are identical in both actions, or whether the same evidence would sustain both actions.” *In re Koernke Estate*, 169 Mich App 397, 399; 425 NW2d 795 (1988). “If the same facts or evidence would sustain both, the two actions are considered the same for purposes of res judicata.” *Id.*

Plaintiff’s subsequent civil action here was barred by the trial court’s prior affirmation of the decision of defendant’s zoning board of appeals. The parties do not dispute that the ruling on the appeal was a determination on the merits or that they were involved in both actions. Moreover, the matters raised in this subsequent civil action could have been resolved in the initial appeal. Notably, although plaintiff contends that it could have procured new or additional evidence through discovery in the civil action, it does not avoid the fact that the same evidence involved in the appeal would be used to prove allegations contained in the subsequent lawsuit. In addition, plaintiff’s application for the zoning variance included arguments pertaining to the constitutional issues raised by plaintiff in its subsequent lawsuit, arguments the circuit court on appeal from the zoning decision was statutorily authorized to consider, MCL 125.585(11)(a). Because this subsequent lawsuit relied on the same facts and evidence as the appeal regarding the denial of a zoning variance, the two actions are considered the same for purposes of res judicata and summary disposition in favor of defendant under MCR 2.116(C)(7) was appropriate.

Plaintiff next argues that the trial court erred in denying its motion to amend the complaint. We review for an abuse of discretion a trial court’s decision whether to grant leave to amend a complaint. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). Leave to amend a complaint should be freely granted by a trial court whenever justice so requires, but leave may be denied if amendment would be futile. *Hakari v Ski Brule, Inc*, 230 Mich App 352, 355; 584 NW2d 345 (1998).

“An amendment is futile where, ignoring the substantive merits of the claim, it is legally insufficient on its face.” *Id.*, quoting *Gonyea v Motor Parts Fed Credit Union*, 192 Mich App 74, 78; 480 NW2d 297 (1991). Because the trial court’s grant of summary disposition in favor of defendant was based on the failure to join the actions and the doctrine of res judicata, amendment of the complaint was futile.

Additionally, “[a]n amendment is futile where the paragraphs or counts the plaintiff seeks to add merely restate, or slightly elaborate on, allegations already pleaded.” *Dowerk v Oxford Charter Twp*, 233 Mich App 62, 76; 592 NW2d 724 (1998). Plaintiff’s proposed amended complaint does not vary substantially from the initial pleading. Plaintiff merely provides greater elaboration regarding road conditions and inability to access the property in the second complaint. The counts raised in both pleadings primarily comprise a “takings” issue, with greater emphasis in the second action regarding the impact on plaintiff’s property from defendant’s closure or failure to maintain surrounding access roads. Accordingly, it comprises the same allegations and issues raised by plaintiff in the initial pleading regarding its inability to reasonably use the property and is merely an expansion upon the initial claims, not the provision of a new issue or legal theory.

Finally, plaintiff contends the trial court's ruling that amendment of its complaint was "futile" was not a sufficiently particularized reason and therefore requires reversal. Contrary to plaintiff's assertion, Michigan courts have held that a determination of "futility" is a sufficiently particularized basis to deny amendment. See *Ben P. Fyke & Sons, Inc. v. Gunter Co.*, 390 Mich 649, 656; 213 NW2d 134 (1973); *Amburgey v. Sauder*, 238 Mich App 228, 247; 605 NW2d 84 (1999). Accordingly, the trial court did not err in denying plaintiff's motion to amend its complaint.

We affirm.

/s/ Bill Schuette
/s/ Richard A. Bandstra
/s/ Jessica R. Cooper