

STATE OF MICHIGAN
COURT OF APPEALS

CAROLYN AVERY,

Plaintiff-Appellant,

v

DENNIS BENKE, LINDA JONES, and
ELEANORE M. HANDLOSER,

Defendants,

and

ELIAS MUAWAD and JACK EICHENLAUB,

Defendants-Appellees.

UNPUBLISHED

August 17, 2006

No. 268107

Wayne Circuit Court

LC No. 05-520686-CZ

CAROLYN AVERY,

Plaintiff-Appellant,

v

DENNIS BENKE, LINDA JONES, and
ELEANORE M. HANDLOSER,

Defendants-Appellees,

and

ELIAS MUAWAD and JACK EICHENLAUB,

Defendants.

No. 268108

Wayne Circuit Court

LC No. 05-520686-CZ

Before: Whitbeck, C.J., and Hoekstra and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of all defendants. We affirm in part, reverse in part, and remand. These consolidated appeals are being decided without oral argument pursuant to MCR 7.214(E).

On November 27, 2001, defendant Eleanore Handloser executed a quitclaim deed conveying her Allen Park property to herself and plaintiff as joint tenants with full rights of survivorship. In 2003, Handloser filed an action against plaintiff alleging that the deed was void due to lack of consideration and undue influence. The court entered an order allowing alternative service on plaintiff by posting and mailing the summons and complaint to an address in Warren. When plaintiff did not respond, Handloser entered a default and obtained a default judgment, which was entered on April 2, 2004.

On July 12, 2004, plaintiff filed a motion to set aside the default judgment in the 2003 action. Plaintiff alleges that while that motion was pending, Handloser conveyed the property to herself and her niece and nephew (defendants Linda Jones and Dennis Benke, respectively) by quitclaim deed, dated July 14, 2004. On December 5, 2004, the property was sold for \$160,000 to third parties who are not involved in the present action. On January 26, 2005, the court entered an order setting aside the default judgment in the 2003 action because it appeared that personal jurisdiction of plaintiff had not been obtained.¹

Plaintiff filed this action on July 15, 2005, against Handloser, Benke, and Jones, as well as Handloser's attorney, Elias Muawad and the processor server in the 2003 case, Jack Eichenlaub. Plaintiff filed a first amended complaint in October 2005, at which time the 2003 action was no longer pending. Plaintiff's amended complaint includes six counts, styled as "Fraud, Fraudulent Conversion and Theft of Real Estate" (count I), "Fraud; Abuse of Process" (count II), "Civil Conspiracy" (count III), "Slander of Title" (count IV), "Fraudulent Rescission" (count V), and "Breach of Contract" (count VI).

Defendants Muawad and Eichenlaub filed a motion for summary disposition, citing MCR 2.116(C)(8). Their arguments addressed only the first two counts. Defendants Handloser, Benke, and Jones filed a concurrence in the motion.

At the hearing on the motion, the court inquired whether plaintiff had appealed the default judgment that was entered in the 2003 action. After plaintiff's counsel stated that no appeal had been filed, the court stated:

Well, that is the proper remedy in this course case. If Carolyn Avery takes issue with the ultimate outcome of the underlying case, delayed application for leave to

¹ On appeal, defendants Benke, Jones, and Handloser make assertions and present exhibits concerning the 2003 action, including a September 20, 2005 order dismissing that case without prejudice. However, none of these documents were presented in the lower court and, therefore, are not properly before this Court. MCR 7.210(A); *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990).

appeal from this Court to judgment that was entered and recorded with the Register of Deeds is the proper procedure.

There's no legal basis for any of the claims against the Defendants. The Court will grant Summary Disposition and award costs of \$1,000.

On appeal, plaintiff argues that the trial court's determination that the proper remedy for her claims was to appeal the default judgment in the 2003 action, which had been set aside, has no basis in law. Plaintiff maintains that she is not alleging that the trial court erred in entering the default judgment, but that defendants obtained it "under false pretenses."

Defendants Benke, Jones and Handloser assert that the trial court's ruling that dismissal of plaintiff's present action was warranted because plaintiff never appealed the default judgment in the 2003 action is correct under the doctrine of res judicata. We disagree.

Res judicata "bars a subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been resolved in the first." *ANR Pipeline Co v Dep't of Treasury*, 266 Mich App 190, 213; 699 NW2d 707 (2005). Here, there was no basis in the record for concluding that the prior action was decided on the merits after the default judgment was set aside. Thus, the requisite elements for res judicata are not present.

Defendants Benke, Jones, and Handloser further argue that the trial court's ruling was correct because of the prohibition on collateral attacks of a court's orders and judgments. However, we do not characterize plaintiff's claims as an attack on a prior order or judgment. Indeed, the default judgment was set aside by the court in the 2003 action. Cf. *Edwards v Meinberg*, 334 Mich 355; 54 NW2d 684 (1952).

Thus, we do not agree with defendants that res judicata or the prohibition on collateral attacks provide a basis for upholding the trial court's ruling. The trial court erred to the extent that it relied on these principles to dismiss plaintiff's action.

We will consider, however, whether the grounds presented in defendant Muawad and Eichenlaub's motion for summary disposition provide alternative bases for affirmance.

We conclude that dismissal of count I, "Fraud, Fraudulent Conversion and Theft of Real Estate," was appropriate. Defendants argued, and plaintiff agreed, that there is no recognized cause of action for "theft of real estate" and "fraudulent conversion." Where a complaint pleads a cause of action that has not been recognized by Michigan courts, dismissal is proper. See, e.g., *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 476; 666 NW2d 271 (2003). Although count I also asserted "fraud," and defendants Muawad and Eichenlaub challenged that aspect of the claim, plaintiff failed to argue it. Moreover, plaintiff's complaint did not identify any misrepresentations made by any of the defendants to plaintiff. The requirements for fraudulent misrepresentation include that the defendant made a misrepresentation with the intention that the plaintiff would act upon it and that the plaintiff acted in reliance upon it. *Bergen v Baker*, 264 Mich App 376, 382; 691 NW2d 770 (2004). Although plaintiff's complaint alleges that some of the defendants made misrepresentations to obtain the order for alternate service, it does not

allege reliance by plaintiff. Therefore, we affirm the trial court's dismissal of count I with respect to all defendants.²

With respect to count II, "Fraud; Abuse of Process," the parties agree that in order to prevail, plaintiff must establish "(1) an ulterior purpose and (2) an act in the use of process which is improper in the regular prosecution of the proceeding." *Friedman v Dozorc*, 412 Mich 1, 30; 312 NW2d 585 (1981). The gravamen of the tort is not the wrongful procurement of legal process. *Id.* at n 18; see also *Three Lakes Ass'n v Whiting*, 75 Mich App 564, 573-574; 255 NW2d 686 (1977). As early as *Spear v Pendill*, 164 Mich 620, 623; 130 NW 343 (1911), the Court recognized that the action lies for the improper use of the process after it had been issued, not for maliciously causing it to issue. In the present case, plaintiff did not adequately plead a claim of abuse of process. The alleged wrongful acts occurred in obtaining the process, not in subsequently using it for a collateral objective. Thus, dismissal of count II with respect to all defendants was also proper.

Defendants Muawad and Eichenlaub's motion for summary disposition did not address the remaining counts of the complaint, and the remaining counts therefore are not encompassed within the concurrence to that motion filed by defendants Benke, Jones, and Handloser. We therefore reverse the trial court's sua sponte dismissal of these remaining claims.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Joel P. Hoekstra

/s/ Kurtis T. Wilder

² We disagree with plaintiff's argument that dismissal of her claims against Benke, Jones, and Handloser denied her due process because these defendants did not file their own motion for summary disposition, but instead only filed a concurrence to the motion filed by defendants Muawad and Eichenlaub. Due process requires adequate notice and a chance to respond to a motion for summary disposition. See *Lawrence v Dep't of Corrections*, 81 Mich App 234, 237-239; 265 NW2d 104 (1978), and *Haji v Prevention Ins Agency, Inc*, 196 Mich App 84, 88-90; 492 NW2d 460 (1992) (Corrigan, J., concurring). The concurrence provided plaintiff with notice that defendants Handloser, Benke, and Jones sought summary disposition for the same reasons raised by defendants Muawad and Eichenlaub, and plaintiff had a fair opportunity to respond to those arguments. Her right to due process was not violated simply because defendants Handloser, Benke, and Jones did not file a separate motion.