

STATE OF MICHIGAN  
COURT OF APPEALS

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OLIVER W. ROSE and PATRICIA L. ROSE,

Plaintiffs-Appellants,

v

TOMMY SCOTT and W. JUNE SCOTT,

Defendants-Appellees.

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UNPUBLISHED  
September 5, 2006

No. 267686  
Oakland Circuit Court  
LC No. 2004-061134-CK

Before: Jansen, P.J., and Murphy and Fort Hood, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting summary disposition in favor of defendants on the basis of res judicata in this action involving the sale of a nursery business and alleged breach of contracts associated with the sale for failure to make full payment. Plaintiffs filed an earlier suit on the same grounds against defendants, Stephanie Sanger, and Jeffrey Herczeg, and defendants' res judicata argument in the case at bar was predicated on the previous action. We reverse.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). The applicability of res judicata presents a question of law that we likewise review de novo on appeal. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999). Despite plaintiffs' argument to the contrary, summary disposition pursuant to the doctrine of res judicata is properly raised and considered under MCR 2.116(C)(7)(claim barred by prior judgment). *Beyer v Verizon North, Inc*, 270 Mich App 424; \_\_\_ NW2d \_\_\_ (2006) (“[T]he instant case is barred under res judicata and therefore should be dismissed under MCR 2.116(C)(7).”); *Sprague v Buhagiar*, 213 Mich App 310, 313-314; 539 NW2d 587 (1995). Under MCR 2.116(C)(7), this Court must consider not only the pleadings, but also any affidavits, depositions, admissions, or other documentary evidence filed or submitted by the parties. *Horace v City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998). The contents of the complaint are to be accepted as true unless contradicted by the documentary evidence. *Sewell v Southfield Public Schools*, 456 Mich 670, 674; 576 NW2d 153 (1998). This Court shall consider the documentary evidence in a light most favorable to the nonmoving party. *Herman v Detroit*, 261 Mich App 141, 143-144; 680 NW2d 71 (2004). If there is no relevant factual dispute, whether a plaintiff's claim is barred under a defense set forth in MCR 2.116(C)(7) is a question of law for the court to decide. See *Huron Tool & Engineering Co v Precision Consulting Services, Inc*, 209 Mich App 365, 377; 532

NW2d 541 (1995). If a factual dispute exists, however, summary disposition is not appropriate. *Id.*

The parties do not agree regarding whether the “order as to disbursement of court escrowed funds”<sup>1</sup> entered in the first lawsuit was a stipulated order or a litigated order, and they disagree concerning whether the “order regarding motion to set aside plaintiffs’ levy and for relief from judgment against Tommy Scott and W. June Scott”<sup>2</sup> entered in the first suit effectively vacated the disbursement order. We conclude that the relief order effectively rendered all previous legal documents and orders associated with the action null and void with respect to defendants, including the disbursement order. However, the relief order itself, of course, remains intact and constitutes a disposition of the action as to defendants.

The relief order provides, in part, “Pursuant to MCR 2.507(H) and MCR 2.612(B)[,] the pleadings, stipulated orders and Consent Judgment prepared by and/or approved by Bruce G. Hartrick on behalf of Plaintiffs and prepared and/or approved by Robert Bassel, counsel for Defendants, be set aside as to Tommy Scott and W. June Scott.” MCR 2.507(H) provides:

An agreement or consent between the parties or their attorneys respecting the proceedings in an action, subsequently denied by either party, is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party’s attorney.

MCR 2.612(B) provides:

A defendant over whom personal jurisdiction was necessary and acquired, but who did not in fact have knowledge of the pendency of the action, may enter an appearance within 1 year after final judgment, and if the defendant shows reason justifying relief from the judgment and innocent third persons will not be prejudiced, the court may relieve the defendant from the judgment, order, or proceedings for which personal jurisdiction was necessary, on payment of costs or on conditions the court deems just.

Considering that the relief order set aside not only the consent judgment and stipulated orders, but also the pleadings, and when viewed in the context of MCR 2.507(H) and MCR 2.612(B), the only sound legal conclusion is that the relief order vacated all matters related to defendants, including the disbursement order. Indeed, in defendants’ motion for relief and attached supporting affidavits, they claimed that they were never served with the summons and complaint, that they had no notice that the action was against them personally, that they did not

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<sup>1</sup> Hereinafter referred to as the “disbursement order.” The disbursement order provides, in pertinent part, that “the debts of Tommy Scott and W. June Scott are satisfied by entry of this Opinion and Order.”

<sup>2</sup> Hereinafter referred to as the “relief order.”

participate in the litigation, and that they did not agree to nor sign any consent judgment or stipulated orders.

We cannot view the relief order as setting aside everything except for the disbursement order as argued by defendants. Such a conclusion would be legally illogical. Defendants' argument hinges on the fact that the relief order speaks of setting aside "stipulated" orders; therefore, because the disbursement order was not a stipulated order, the disbursement order survived. On its face, the disbursement order does not have the characteristics typical of a stipulated order, and it appears to be a litigated order. Unfortunately, we do not have the entire lower court record relative to the first lawsuit, which could certainly have aided in determining whether the order was litigated or stipulated through possible reference to a motion, notice of hearing, and to any actual hearing by way of the docket entries.<sup>3</sup> We do note that the relief order references "stipulated orders" in the plural, which suggests that the parties viewed the disbursement order as a stipulated order, considering that no reference is made in the appellate briefs to any other order that would have constituted a second stipulated order.<sup>4</sup> Regardless, assuming that the disbursement order was not a stipulated order, and thus not expressly referenced in the relief order, the relief order is all-encompassing as it sets aside the pleadings relative to defendants, the consent judgment, and at least the one stipulated order that accompanied the consent judgment. Without the pleadings, consent judgment, and stipulated order, there is no foundation or basis for the disbursement order; it cannot, on its own, remain legally intact. We cannot say in one breath that defendants' liability under the consent judgment and pleadings was satisfied pursuant to a valid and surviving disbursement order while also stating that no consent judgment or pleadings exist with regard to defendants. If the action lacks a judgment and pleadings because of a service and notice failure, there can be no disbursement order. The question then becomes whether res judicata precludes the current litigation under these unique circumstances.

In general, res judicata bars a subsequent action between the same parties when the facts or evidence essential to the action are identical to those essential to a prior action. *Sewell v Clean Cut Management, Inc.*, 463 Mich 569, 575; 621 NW2d 222 (2001). The purposes of res judicata are to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and encourage reliance on adjudication. *Pierson, supra* at 380. Res judicata requires that (1) the prior action was decided on the merits, (2) the decree in the prior action was a final

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<sup>3</sup> We note that at oral argument plaintiffs' counsel presented documents from the first action that indicated that the disbursement order was indeed the result of a stipulation, and defendants did not argue that the documents were inaccurate. But we agree with defendants' position that the documents were not part of the lower court record in this action and should not be considered. Clearly, if the disbursement order was a stipulated order, the relief order vacated the disbursement order.

<sup>4</sup> There is a "stipulated order regarding procedures to disburse auction sale proceeds," which is part of the same document containing the consent judgment, but, unless one considers the disbursement order a stipulated order, there is no mention by defendants of a second stipulated order.

decision, (3) the matter contested in the second case was or could have been resolved in the first, and (4) both actions involved the same parties or their privies. *Baraga Co v State Tax Comm*, 466 Mich 264, 269; 645 NW2d 13 (2002); *Kosiel v Arrow Liquors Corp*, 446 Mich 374, 379-380; 521 NW2d 531 (1994); *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 10-11; 672 NW2d 351 (2003); *Ditmore v Michalik*, 244 Mich App 569, 576; 625 NW2d 462 (2001). The burden of establishing the applicability of res judicata is on the party asserting the doctrine. *Baraga County, supra* at 269.

Taking into consideration the first two elements of res judicata, there was a consent judgment entered in the first action, and this would constitute a final decision or adjudication on the merits. *Schwartz v Flint*, 187 Mich App 191, 194; 466 NW2d 357 (1991)(res judicata applies to consent and default judgments as well as litigated judgments). The consent judgment, however, was set aside with regard to defendants; therefore, we cannot conclude that there was a final adjudication on the merits by way of the consent judgment. The only court decision or ruling that survived the first action with respect to defendants was the relief order itself, and that order does not constitute a final decision on the merits. The relief order is akin to an order granting summary disposition on the basis of a procedural flaw,<sup>5</sup> as opposed to a substantive ruling. Summary disposition based on substantive grounds constitutes a determination on the merits, but summary disposition based on procedural grounds does not constitute an adjudication on the merits. *Verbrughe v Select Specialty Hosp – Macomb Co, Inc*, 270 Mich App 383; \_\_\_ NW2d \_\_\_ (2006); *The Mable Cleary Trust v The Edward-Marlah Muzyl Trust*, 262 Mich App 485, 510; 686 NW2d 770 (2004).

Additionally, and again by analogy, the relief order can be viewed as a voluntary dismissal of the claims against defendants, MCR 2.504(A), where plaintiffs fully agreed with setting aside the pleadings, consent judgment, and orders with respect to defendants when responding to defendants' motion to set aside levy and for relief from judgment. In fact, it appears that plaintiffs prepared the relief order. Plaintiffs only challenged the setting aside of the levy as to Sanger's ¼ interest in the property. MCR 2.504(A) provides that a voluntary dismissal is without prejudice unless stated otherwise. A review of the relief order, which effectively set aside or vacated the action with regard to defendants, reveals no pronouncement that the action against defendants was vacated with prejudice. A dismissal without prejudice is not an adjudication on the merits. *Yeo v State Farm Fire & Cas Ins Co*, 242 Mich App 483, 484; 618 NW2d 916 (2000).<sup>6</sup> Unfortunately, defendants simply could have obtained an order setting aside the levy with respect to their interests in the property on the basis that their obligations under the consent judgment were satisfied pursuant to the disbursement order; however, defendants instead sought and allowed entry of an order that swept away the entire action against them, and the

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<sup>5</sup> MCR 2.116(C)(3) provides for summary disposition when “[t]he service of process was insufficient.”

<sup>6</sup> We also note that MCR 2.102(E)(1) provides that, where a defendant has not been served with process by the time the summons has expired, the action is deemed dismissed without prejudice.

order failed to vacate the action with prejudice.<sup>7</sup> Under these circumstances, we hold that res judicata does not bar the second suit, and the trial court erred in granting summary disposition in favor of defendants.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen  
/s/ William B. Murphy  
/s/ Karen M. Fort Hood

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<sup>7</sup> It is also arguable that, in light of the expansive nature of the relief order, defendants cannot even be deemed “parties” or “privies” to the prior action, thereby precluding application of the doctrine of res judicata.