

STATE OF MICHIGAN
COURT OF APPEALS

VEHICULAR WORKS, LLC, and ANGELA
MILTON,

UNPUBLISHED
January 17, 2003

Plaintiffs/Counter-Defendant-
Appellants,

V

COLLISION SHOPS OF AMERICA,

Defendant/Counter-Plaintiff-
Appellee.

No. 236605
Oakland Circuit Court
LC No. 00-026511-CZ

Before: Smolenski, P.J., and Wilder and Schuette, JJ.

PER CURIAM.

In this action for breach of contract, plaintiffs appeal as of right from the trial court's decision granting summary disposition to defendant pursuant to MCR 2.116(C)(7) and MCR 2.116(C)(10). We affirm.

I. Facts and Proceedings

On August 28, 1998, plaintiff Vehicular Works, L.L.C. and defendant entered into a license agreement for the operation of a franchise in Waterford known as "The Collision Shop." In this agreement, Vehicular Works, L.L.C., by its sole member, plaintiff Milton, agreed to pay defendant an initial licensing fee and additional weekly licensing fees based on the weekly net income of the franchise. On the same day, the parties entered into an additional agreement in which Vehicular Works, L.L.C., agreed to sublease the business premises in Waterford from defendant.

In January 1999, defendant sued Vehicular Works, L.L.C. in Oakland Circuit Court, case number 99-011867-CK, for breach of the license agreement because plaintiff had failed to pay licensing fees. That suit was dismissed the following year after the parties entered into a settlement agreement in March 2000 resolving the licensing fee dispute. In the settlement agreement, Milton personally guaranteed the payment of the license fees.

Defendant initiated the second lawsuit in August 2000 by suing plaintiffs in district court for non-payment of the rent owed pursuant to the sublease. Plaintiffs' defense in the second suit principally asserted that the settlement agreement in the prior lawsuit extinguished their

obligation to pay rent pursuant to the sublease, despite the fact that plaintiffs executed the settlement agreement in March and continued to pay rent for April, May, and half of June, 2000. Plaintiffs also filed a counterclaim alleging that defendant had breached the settlement agreement by forcing plaintiffs to pay rent. On September 8, 2000, the district court found in defendant's favor, entered a judgment of possession, and ordered that a writ of restitution would issue if plaintiffs did not pay defendant \$21,681.09 by October 8, 2000. The district court included the following language in the judgment: "This judgment may be superceded by action of the circuit court on case #99-011867 CK (or new action filed) without need to appeal."¹

Shortly thereafter, plaintiffs appealed the district court's judgment to the Oakland Circuit Court. While the appeal was pending before Judge Steven Andrews, plaintiffs filed the instant action in Oakland Circuit Court, which was assigned to Judge Rudy Nichols. In their three-count complaint filed on October 4, 2000, plaintiffs requested a declaratory judgment regarding their rights and responsibilities under the March 2000 settlement agreement (Count I), alleged that defendant had breached the settlement agreement by demanding that plaintiffs pay rent (Count II), and requested injunctive relief to prevent their eviction (Count III).

Defendant filed an answer and affirmative defenses to plaintiffs' complaint on October 16, 2000, but neither *res judicata* nor collateral estoppel were included in the list of affirmative defenses defendant filed. Two days after defendant filed its answer and affirmative defenses, the trial court granted plaintiffs' *ex parte* request for a temporary restraining order preventing plaintiffs' eviction from the premises. Approximately one week later, however, Judge Nichols denied plaintiffs' request for a preliminary injunction concerning this issue, opining that plaintiffs were essentially seeking a stay of the execution of the district court's judgment and that such relief was not appropriate.

On January 23, 2001, defendant filed a motion for leave to amend its answer and file a counterclaim, pursuant to MCR 2.118 and 2.203. Defendant claimed that plaintiffs had violated the settlement agreement by failing to pay the negotiated licensing fees. In the proposed counterclaim attached to defendant's motion, defendant stated, "At [the hearing requesting a temporary restraining order], the court noted that the same issues and parties presented in this lawsuit were currently pending before Judge Andrews by way of appeal."

Judge Andrews resolved the appeal by an opinion and order issued on January 25, 2001. In his opinion, he stated, "Both parties agree that the district court's decision to enter summary possession against them amounted to the grant of summary disposition on the issue of whether the settlement agreement removed [plaintiffs'] obligation to pay rent. . . . [T]he district court found that "there is no triable issue of fact" as to whether the settlement agreement concerned the sublease or the obligation to pay rent." On review, Judge Andrews concluded that the unambiguous settlement agreement was limited to the issue of the licensing fees and that plaintiffs' obligation to pay rent was not extinguished by the settlement agreement. In light of the integration clause included in the settlement agreement, Judge Andrews rejected plaintiffs'

¹ The transcript of the district court proceeding has not been provided to this Court, so its precise reasoning is unknown, although plaintiffs argue that the district court believed that it lacked jurisdiction to decide matters arising from the settlement agreement.

attempts to introduce parol evidence, including plaintiff Milton's affidavit, to support their understanding of the terms of the agreement. Judge Andrews also rejected plaintiffs' assertion that defendant's counsel had violated the rules of professional conduct by representing plaintiffs' interests in negotiations with the owner of the business premises because the parties' interests on that issue were not materially adverse. Finally, Judge Andrews rejected plaintiffs' claims of defects in service of process and the amount of rent due. Accordingly, he affirmed the decision of the district court.²

Two days after Judge Andrews issued his opinion, January 27, 2001, defendant filed a supplement to its motion to amend its answer and filed a new proposed counterclaim in which it requested past due licensing fees and future licensing fees according to the terms of the settlement agreement (Count I); damages for costs incurred enforcing the licensing agreement, as permitted by its terms (Count II); and injunctive relief to keep plaintiffs from committing waste or removing equipment from the premises (Count III). In the proposed counterclaim, defendant stated that "all of the issues raised by these parties were resolved in favor of [defendant] and against [plaintiffs]"; that "[defendant] has already prevailed on all of the issues between the parties"; and that plaintiffs' complaint "entailed precisely the same issues and parties as [were] pending in the appeal." Judge Nichols granted defendant's motion to file the counterclaim on February 14, 2001, and defendant filed the counterclaim, as proposed, on February 21, 2001.³

Defendant moved for summary disposition of plaintiffs' complaint pursuant to MCR 2.116(C)(10) on June 1, 2001, asserting that plaintiffs' claims were barred by res judicata and collateral estoppel. Defendant also requested summary disposition of its counterclaims on (C)(10) grounds. Plaintiffs opposed defendant's motion, claiming that the proper subrule for summary disposition was MCR 2.116(C)(7), and that pursuant to MCR 2.116(D)(2), defendant had waived the defenses of res judicata and collateral estoppel because they had not been asserted as affirmative defenses in defendant's responsive pleading. In the alternative, plaintiffs claimed these defenses were inapplicable. Plaintiffs also argued that summary disposition was not merited on defendant's counterclaims in light of plaintiffs' assertions in their answer to the counterclaim that defendant had fraudulently induced plaintiff to enter into the settlement agreement and that defendant's claim was barred by its own breach of the contract. In its reply to plaintiffs' answer, defendant claimed that because the appeal was still pending before Judge Andrews when it filed its affirmative defenses, it was not necessary to assert res judicata and collateral estoppel at that time.

The trial court found that, in fact, MCR 2.116(C)(7) was the proper basis for defendant's motion asserting res judicata and collateral estoppel as bars to plaintiffs' claims, but that defendant had failed to raise these affirmative defenses in its responsive pleading. However, the court noted that defendant had indicated in its counterclaim, which had been filed with permission pursuant to MCR 2.118, that the same claims between the same parties were the subject of prior litigation. Accordingly, the trial court found defendant's motion procedurally

² Plaintiffs sought leave to appeal Judge Andrews' decision to this Court, but plaintiffs' application was denied on April 25, 2001.

³ Judge Nichols also issued a preliminary injunction on February 14, 2001, as requested in Count III of defendant's counterclaim.

proper pursuant to MCR 2.116(D)(2). The court went on to conclude that plaintiffs' claims were barred by res judicata and collateral estoppel pursuant to MCR 2.116(C)(7) and that defendant was entitled to summary disposition on its counterclaims pursuant to MCR 2.116(C)(10) because plaintiffs had not submitted sufficient evidence to establish a material factual dispute.

Defendant submitted a proposed order implementing the trial court's decision on July 25, 2001, pursuant to MCR 2.602(B)(3). Plaintiffs objected to the proposed order, claiming that the trial court's decision did not require dismissal of their claims and that defendant's calculation of the unpaid licensing fees was incorrect because, in addition to the past due licensing fees, it accounted for an additional payment of \$450 per week for the balance of the term of the license agreement. Defendant filed a motion for entry of the judgment on August 8, 2001 and scheduled the hearing on the motion for August 15, 2001, seven days after the motion was filed. Notice of hearing was mailed to plaintiffs rather than delivered as required by MCR 2.119(C)(1)(b). Plaintiffs failed to appear for the August 15, 2001 hearing, at which the trial court entered the judgment requested by defendant. Plaintiffs then filed a motion to set aside the judgment on August 15, 2001, claiming that the defective service of the notice of hearing required that the judgment be set aside. The trial court denied that motion on August 22, 2001, finding that plaintiffs' objections lacked merit and the error in service was harmless under MCR 2.613(A). This appeal followed.

II. Standard of Review

This Court reviews de novo a trial court's grant or denial of a motion for summary disposition. *Terrien v Zwit*, 467 Mich 56, 61; 648 NW2d 602 (2002). Summary disposition may be granted pursuant to MCR 2.116(C)(7) when a "claim is barred because of . . . prior judgment . . . or other disposition of the claim before commencement of the action." MCR 2.116(C)(7). In reviewing a motion filed under this subrule, the Court accepts all of plaintiffs' well-pleaded factual allegations as true and construes all of the documentary evidence in plaintiffs' favor. *Brennan v Edward D Jones & Co*, 245 Mich App 156, 157; 626 NW2d 927 (2001).

Summary disposition is appropriate pursuant to MCR 2.116(C)(10) when there is no genuine issue of material fact. MCR 2.116(C)(10). After the moving party identifies the issues on which it asserts no genuine issue of material fact exists, the non-moving party must offer substantively admissible evidence showing that there is a genuine issue of material fact and may not rest on mere denials or allegations. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2002). The reviewing court must consider all of the offered evidence in a light most favorable to the non-moving party. *Id.* at 164.

III. Analysis

Plaintiffs claim that the trial court improperly granted defendant's motion because defendant failed to assert collateral estoppel and res judicata as affirmative defenses in their answer to plaintiff's complaint and that, in any event, the doctrines do not preclude plaintiffs' claims. Plaintiffs also claim on appeal that the trial court incorrectly based its grant of summary disposition on defendant's counterclaim on its conclusion that plaintiffs' claims were barred and that the trial court erroneously entered the judgment defendant submitted. We disagree.

With regard to whether defendant waived the affirmative defenses of res judicata and collateral estoppel, we find that although defendant did not raise these defenses in its responsive pleading, it did sufficiently assert them in its counterclaim, meeting the requirements of MCR 2.116(D)(2). That subrule provides that “[t]he grounds listed in subrule (C)(5), (6), and (7) must be raised in a party’s responsive pleading, unless the grounds are stated in a motion filed under this rule prior to the party’s first responsive pleading. Amendment of a responsive pleading is governed by MCR 2.118.” We note that rather than amending its answer, defendant filed a counterclaim. However, the defenses of res judicata and collateral estoppel were clearly identified in defendant’s counterclaim. Although MCR 2.111(F)(3) requires affirmative defenses to be stated under a separate and distinct heading, MCR 2.110(C)(3) provides that “[t]he court may treat a cross-claim or counterclaim designated as a defense, or a defense designated as a cross-claim or counterclaim, as if the designation had been proper and issue an appropriate order.” Therefore, we find no error in the trial court’s conclusion that defendant’s counterclaim properly raised the affirmative defenses of res judicata and collateral estoppel.

We also find that the trial court properly found that plaintiffs’ claims were barred by res judicata. As our Supreme Court reiterated in *Sewell v Clean Cut Management, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001),

Res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical. *Eaton Co Bd of Co Rd Comm’rs v Schultz*, 205 Mich App 371, 375; 521 NW2d 847 (1994). A second action is barred when (1) the first action was decided on the merits, (2) the matter contested 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.* at 375-376.

Michigan courts have broadly applied the doctrine of res judicata. They 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. *Gose v Monroe Auto Equipment Co*, 409 Mich 147, 160-163; 294 NW2d 165 (1980); *Sprague v Buhagiar*, 213 Mich App 310, 313; 539 NW2d 587 (1995).

In the present case, plaintiffs initially contest the first element of the res judicata analysis. They claim that because the district court action was a summary proceeding, it does not have res judicata effect. We disagree. In *Sewell*, summary proceedings were given res judicata effect. Additionally, “[a] judgment is considered to be a determination on the merits, and thereby triggers the doctrine of res judicata upon relitigation, even if the action was resolved by a summary or default judgment.” *Detroit v Nortown Theatre, Inc*, 116 Mich App 386, 392; 323 NW2d 411 (1982).

Plaintiffs also claim that the present suit involves claims not specifically decided in the district court proceeding, such as their claim that defendant breached the settlement agreement by forcing plaintiffs to pay rent. Plaintiffs were contractually obligated to pay rent, however, was the precise issue decided in defendant’s favor by the district court and affirmed by the circuit court. Additionally, on appeal Judge Andrews addressed plaintiffs’ claims that parol evidence

showed that they would not have to pay rent, despite the language of the settlement agreement.⁴ Moreover, as stated above, res judicata is given broad effect in Michigan, *Sewell, supra*, and even if the minute details of plaintiffs' complaint were not decided in the instant matter, it is clear that plaintiffs' claims were addressed in the prior suit. The facts and evidence in this suit are identical to those in the district court action. Therefore, we find that the trial court did not err by granting defendant summary disposition based on MCR 2.116(C)(7). Because we have decided that res judicata bars plaintiffs' suit, it is unnecessary for us to decide whether plaintiff's suit is barred by collateral estoppel as well.

Plaintiffs also contend that the trial court erroneously granted defendant summary disposition on its counterclaims pursuant to MCR 2.116(C)(10). Plaintiffs argue that they asserted valid defenses to the counterclaims in their answer and affirmative defenses, including defendant's substantial breach of the settlement agreement and fraud in the inducement, and that these defenses were supported by the affidavit of Angela Milton. Again, however, these defenses are connected with plaintiffs' theory that they did not have to pay rent following execution of the settlement agreement. The district court had already determined, as had the circuit court on appeal, that defendant could legitimately require plaintiffs to pay rent. Therefore, the trial court did not err by concluding that there was no genuine issue of material fact that would prevent summary disposition on defendant's counterclaims.

Finally, plaintiffs claim that the trial court erred by entering a judgment against plaintiffs because defendant's motion to enter the judgment was mailed seven days before the hearing rather than served by delivery as required by MCR 2.119(C)(1). The trial court, however, found that this service error was harmless pursuant to MCR 2.613(A) and denied plaintiffs' motion to set aside the judgment. We find no error in this decision. We review a trial court's decision on a motion for relief from judgment or order for abuse of discretion. *Yee v Shiawassee Co Bd of Commr's*, 251 Mich App 379, 404; 651 NW2d 756 (2002).

Here, the trial court determined that although defendant had improperly served its motion on plaintiffs, the error was harmless, in part because plaintiffs' objections to the judgment lacked merit. We agree that plaintiffs' objections would not have prevented entry of the judgment. First, granting defendant summary disposition on all of plaintiffs' claims does entitle defendant to dismissal of the suit against it, contrary to plaintiffs' first asserted objection. Second, plaintiffs have not demonstrated that the additional "flat" license fee, which we note defendant requested in its counterclaim, should not be added onto the overdue license fees. As stated in the settlement agreement on which defendant's counterclaim was based, "Commencing October 1, 2000 and for the balance of the term of the License Agreement, Vehicular shall pay a "flat" license fee in the amount of Four Hundred Fifty (\$450.00) Dollars per week." The license agreement provides that it lasts for "a term of ten (10) years from the date hereof unless sooner terminated as provided in this Agreement." Plaintiffs claim that the license agreement has

⁴ Plaintiff claims that the district court refused to address certain aspects of its counterclaim against defendant because the matter was being heard in circuit court. Because plaintiff has not provided a transcript of the proceedings in the district court, however, we cannot determine the scope of the district court's ruling or engage in meaningful analysis of this issue. Moreover, plaintiff does not assert that the district court erred by dismissing the action before it.

terminated because the business has been closed and the premises have been surrendered to defendant, but fail to demonstrate that the terms of the license agreement permit termination on this basis.

Affirmed.

/s/ Michael R. Smolenski

/s/ Kurtis T. Wilder

/s/ Bill Schuette