

STATE OF MICHIGAN  
COURT OF APPEALS

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METRO COMMUNICATIONS, INC. and PETER  
SIAVRAKAS,

UNPUBLISHED  
May 24, 2005

Plaintiffs-Appellants,

v

No. 249171  
Wayne Circuit Court  
LC No. 95-518972-CK

DETROIT SMSA LTD PARTNERSHIP and  
AMERITECH MOBILE COMMUNICATIONS,  
INC.,

Defendants-Appellees.

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Before: Neff, P.J., and Owens and Fort Hood, JJ.

PER CURIAM.

Plaintiffs Metro Communications Company, Inc. (Metro) and Peter Siavrakas, Metro's sole shareholder, appeal as of right from the trial court's order granting defendants Ameritech Mobile Communications, Inc. (AMCI) and Detroit SMSA Limited Partnership (SMSA) summary disposition.<sup>1</sup> This action arises out of an agency agreement executed between Metro and AMCI, which AMCI entered into on behalf of SMSA. We affirm.

In 1984, AMCI and Metro signed the agreement under which Metro was authorized to distribute cellular radio service in the Detroit metropolitan area as an agent for AMCI. AMCI signed the agreement as a general partner of and on behalf of SMSA. After several years of apparently successful operations, the relationship between the parties deteriorated and several lawsuits arising out of the agreement were filed by the parties in multiple forums.

Among those lawsuits was a suit filed by AMCI and Ameritech against plaintiffs in federal court in June 1994, alleging that plaintiffs breached the agreement by continuing to use trademarks owned by AMCI and Ameritech after the expiration of the agreement. On June 30, 1995, plaintiffs filed the present suit asserting defendants breached the agreement, were unjustly

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<sup>1</sup> The parties have filed multiple suits against one another; so that the nomenclature throughout this opinion is clear, "plaintiffs" refers to the plaintiffs in the present action, i.e., Metro and Siavrakas. The term "defendants" refers to the defendants in the present action, i.e., AMCI and SMSA.

enriched by failing to pay commissions due under the agreement, and had tortiously interfered with plaintiffs' advantageous business relationships. The federal court in the trademark action granted final judgment to defendants in 1997. In 1998, Metro filed for bankruptcy in federal court and brought adversary proceedings against defendants. The federal court granted defendants summary disposition finding that Metro's claims for breach of contract and unjust enrichment were compulsory claims that should have been raised in the federal trademark action and, thus, were barred by res judicata. Subsequently, the state court in the present case granted defendants summary disposition finding that plaintiffs' claims were barred on the same ground.

Plaintiffs first contend the trial court erred in granting summary disposition regarding Siavrakas' claim that SMSA tortiously interfered with his advantageous business relationship with Metro; they assert that because SMSA was not a named party in the federal trademark action, SMSA was not an opposing party under FR Civ P 13(a). We disagree.

When a prior action has occurred in federal court, the applicability of the doctrine of res judicata is determined under federal law. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 380-381; 596 NW2d 153 (1999). Under federal law, compulsory counterclaims that are not asserted are thereafter barred. *Baker v Gold Seal Liquors, Inc*, 417 US 467, 469 n 1; 94 S Ct 2504; 41 L Ed 2d 243 (1974) (superceded on other grounds by statute). FR Civ P 13(a) defines compulsory counterclaims as "any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction." *Id.*

It appears that recent federal appellate decisions have interpreted "opposing party" broadly; a party need not be a named party to be an opposing party for purposes of Rule 13(a). See *Metro Life Ins Co v Kubichek*, 83 Fed Appx 425, 430-431 (CA 3, 2003) (counterclaim against employer should have been brought, despite its not being a party to the original interpleader action, because of close relationship between employer and ERISA plan administrator); *Avemco Ins Co v Cessna Aircraft Co*, 11 F3d 998, 1000-1001 (CA 10, 1993) (because insurer was the subrogee of rights of insured, insurer was barred from bringing subsequent indemnity action against codefendant of insured where codefendant filed a third-party complaint against insured and insurer failed to file compulsory counterclaim).<sup>2</sup>

A case that delves deeply into when parties are opposing is *Transamerica Occidental Life Ins Co v Aviation Office of America, Inc*, 292 F3d 384, 390-393 (CA 3, 2002). In *Transamerica*, a company, which was the assignee of the rights of the plaintiffs in the prior litigation and which controlled the prior litigation, was found to be an opposing party for purposes of FR Civ P 13(a) even though it was not a named party in the prior litigation. *Id.* at 391-392. After reviewing the

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<sup>2</sup> Although plaintiffs also cite a decision from the Tenth Circuit as supporting their position, *First Nat'l Bank v Johnson Co Nat'l Bank & Trust Co*, 331 F2d 325, 328 (CA 10, 1964), overruled *Liberty Nat'l Bank & Trust Co v Acme Tool Div of Rucker Co*, 540 F2d 1375, 1381 (CA 10, 1976), the Tenth Circuit's more recent decision in *Avemco, supra*, 11 F3d at 1000-1001, considers unnamed parties to be opposing parties at least in certain circumstances.

decisions of other courts, the court determined that opposing party should be interpreted broadly “to give effect to the policy rationale of judicial economy underlying Rule 13.” *Id.* at 391. The court noted that when parties are functionally equivalent – when an unnamed party controlled the litigation, or when an unnamed party was the alter ego of the named party – the parties should be treated as opposing parties for Rule 13(a) purposes. *Id.* It also concluded that because FR Civ P 13(a) was similar to the concept of res judicata, opposing parties under FR Civ P 13(a) should include those in privity with the formally named parties. *Id.* at 391-393. The Federal Rules of Civil Procedure are to be “construed and administered to secure the just, speedy, and inexpensive determination of every action.” FR Civ P 1. FR Civ P 13(a) “was designed to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters.” *Southern Constr Co v United States ex rel Pickard*, 371 US 57, 60; 83 S Ct 108; 9 L Ed 2d 31 (1962).

Here, the success of Siavrakas’ claim that SMSA tortiously interfered with his relationship with Metro was contingent on whether Metro breached its obligations under the agreement – a fact decided in the federal trademark action – because the breach might have justified AMCI’s refusal to pay Metro. *Winiemko v Valenti*, 203 Mich App 411, 418 n 3; 513 NW2d 181 (1994). Thus, Siavrakas’ tortious interference claim was logically connected to the federal trademark claims, and trying them together would have served the purpose of FR Civ P 13(a). *Southern Constr Co*, *supra* at 60. Moreover, plaintiffs were on notice of the identity of interests between AMCI and SMSA under the agreement. See *Transamerica*, *supra* at 392. Plaintiffs acknowledged in their complaint that SMSA was the real party in interest under the agreement, AMCI signed the agreement as a general partner of and on behalf of SMSA, the rights of AMCI and SMSA were indistinguishable under the agreement, AMCI was the managing partner of SMSA, and both AMCI and SMSA were affiliates of Ameritech. Plaintiffs knew SMSA was functionally equivalent to AMCI and should have counterclaimed against SMSA.

Even if SMSA’s interest was not sufficiently similar to that of AMCI’s to establish that SMSA was an opposing party, plaintiffs’ tortious interference claim was still compulsory because plaintiffs could have joined SMSA as an additional party pursuant to FR Civ P 13(h). FR Civ P 13(h) provides that “Persons other than those made parties to the original action may be made parties to a counterclaim . . . in accordance with the provisions of Rules 19 [compulsory joinder of a necessary party] and 20 [permissive joinder of parties].” As long as “at least one party against whom a counterclaim . . . is asserted was party to the original action, counterclaims may be asserted against additional third parties.” *Various Markets, Inc v Chase Manhattan Bank*, 908 F Supp 459, 471 (ED Mich, 1995). Because plaintiffs asserted this particular tortious interference claim in the instant case against defendants in general, defendants encompassed both AMCI and SMSA in the instant case, and AMCI was a party to the federal trademark action, plaintiffs could have and should have joined SMSA in connection with their compulsory counterclaim pursuant to FR Civ P 13(h). Plaintiffs’ claim that they were precluded from joining SMSA as a necessary party will be discussed *infra*.

Plaintiffs also assert that even if Rule 13(a) is interpreted broadly, defendants should be judicially estopped from arguing that SMSA was an opposing party in the federal trademark action because defendants asserted in that action that SMSA was not a real party in interest.

Judicial estoppel is a doctrine “intended to protect the courts from being manipulated by chameleonic litigants who seek to prevail, twice, on opposite theories.” *Opland v Kiesgan*, 234 Mich App 352, 364; 594 NW2d 505 (1999), quoting *Levinson v United States*, 969 F2d 260, 264 (CA 7, 1992). It must be cautiously applied. *Paschke v Retool Industries*, 445 Mich 502, 523; 519 NW2d 441 (1994). Michigan has adopted the “prior success” model of judicial estoppel, which requires that a party succeeded on a claim in a prior proceeding and that the claim in the prior proceeding was wholly inconsistent with the claim in the subsequent proceeding. *Id.* at 509-510. Plaintiffs have failed to establish either element here.

We note initially that although plaintiffs assert that they sought compulsory joinder of SMSA in the federal trademark action, they have failed to support their claim with citation to the record. A party may not assert a position then leave it to this Court to search for the factual support for the party’s claim. *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 388; 689 NW2d 145 (2004). Moreover, our de novo review of the record provided did not reveal a motion for compulsory joinder for the purposes of prosecuting plaintiffs’ counterclaims. Instead, plaintiffs apparently alternatively sought to dismiss the federal trademark action on the ground that SMSA was a necessary party to the trademark action and, because SMSA and Siavrakas were both citizens of Michigan, SMSA’s joinder would prevent the federal court from asserting diversity jurisdiction over the matter. Although plaintiffs have only provided this Court with two pages of defendants’ opposing brief, it is clear that defendants opposed SMSA’s joinder with respect to the trademark action in response to plaintiffs’ diversity jurisdiction argument. The federal court determined that it had federal question jurisdiction and declined to reach plaintiffs’ arguments with respect to diversity jurisdiction. Therefore, plaintiffs have failed to establish that defendants succeeded on the merits of their argument.

Moreover, the argument that SMSA was not a real party in interest to the trademark action was not wholly inconsistent with the argument here that AMCI and SMSA were functionally equivalent with respect to the tortious interference action. A real party in interest is one who by substantive law owns the claim asserted. *Hoffman v Auto Club Ins Ass’n*, 211 Mich App 55, 95; 535 NW2d 529 (1995). The claim asserted in the federal trademark action was for trademark infringement. That SMSA was the functional equivalent of AMCI under the agreement did not mean SMSA had a substantive right to enforce the trademarks. Therefore, because defendants’ assertions in the federal trademark action were not necessarily inconsistent with their claims in the case at bar, the “extraordinary remedy” of judicial estoppel was not appropriate. *Opland, supra* at 364.

Plaintiffs next assert that Siavrakas’ claim against SMSA was not a compulsory counterclaim because the federal court lacked subject matter jurisdiction over the claim.<sup>3</sup> This

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<sup>3</sup> Plaintiffs also assert that the trial court erred in holding in the alternative that Siavrakas failed to state a claim on which relief could be granted because the relationship between Siavrakas and Metro was not the type of relationship intended to be protected by the tort of interference with an advantageous business relationship. See *Pryor v Sloan Valve Co*, 194 Mich App 556, 560; 487 NW2d 846 (1992). Having concluded that the trial court correctly granted summary disposition on the basis of res judicata, we need not address this alternative basis for the trial court’s ruling,

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assertion is baseless. “Compulsory counterclaims in federal courts are ancillary or auxiliary to the main action or claim and derive their jurisdictional support from the main action or claim. Thus, no independent jurisdictional grounds are required to support a compulsory counterclaim.” 20 Am Jur 2d, Counterclaim, Recoupment, etc, § 90, pp 295-296 (internal citations omitted). The court in the federal trademark action had federal question subject matter jurisdiction over the initial claims. Because Siavrakas’ claim against SMSA was a compulsory counterclaim, the federal court had ancillary jurisdiction over it. *Baker, supra* at 469 n 1.

Plaintiffs next argue that the trial court, by not hearing oral arguments or ruling on the parties’ respective summary disposition motions until after the court in the federal trademark action issued its final judgment, violated their federal and state rights to due process; they claim that if the court had ruled before the final judgment in the federal trademark action, they would have known that their claims had to be filed in that forum. US Const, Am V; Const 1963, art 1, § 17. We disagree. Without a showing that someone acted with the intention to deprive someone of something, “or, at the very least, [made] a deliberate decision not to act to prevent a loss,” *Marlin v Detroit (After Remand)*, 205 Mich App 335, 339; 517 NW2d 305 (1994), quoting *Parratt v Taylor*, 451 US 527, 548; 101 S Ct 1908; 68 L Ed 2d 420 (1981) (Powell, J, Concurring), overruled on other grounds and concurring opinion adopted, *Daniels v Williams*, 474 US 327, 330-331; 106 S Ct 662; 88 L Ed 2d 662 (1986), an unconstitutional deprivation of property in violation of the right to due process cannot be established. *Marlin, supra* at 339-340. The loss of plaintiffs’ claims should not be attributed to the inaction of the trial court; instead, the fault lies with plaintiffs for failing to assert their claims at the proper time and in the proper forum.

Affirmed.

/s/ Janet T. Neff  
/s/ Donald S. Owens  
/s/ Karen M. Fort Hood

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especially in light of plaintiffs’ failure to address the substance of the trial court’s alternative ruling in their appellate brief. *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 175; 568 NW2d 365 (1997).