

STATE OF MICHIGAN
COURT OF APPEALS

JEWEL CONSTRUCTION COMPANY, INC,

Plaintiff-Appellant,

v

GENOAK CONSTRUCTION COMPANY,

Defendant-Appellee.

UNPUBLISHED

October 12, 2006

No. 268070

Genesee Circuit Court

LC No. 04-079767-CK

Before: Fitzgerald, P.J., and Markey and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendant on the ground that plaintiff lacks standing to bring this breach of contract action. We affirm.

This case arises from a January 11, 2002, construction contract, as amended in writing on May 21, 2002, between defendant and the Joseph Construction Group (JIG). Defendant agreed to perform construction work on property being developed by JIG and agreed to finance this construction work through a series of loan and security agreements that included a mortgage on a 30-acre parcel of the real property under development.

JIG defaulted on the financing agreements. On July 30, 2003, defendant declared a default and declared the entire amount JIG owed for the construction work immediately due and payable. On August 6, 2003, JIG filed a chapter 11 bankruptcy petition. On May 13, 2004, the bankruptcy court lifted the automatic stay of 11 USC 362(a) with regard to the real property and personal property collateral.

Ultimately, the bankruptcy court granted JIG's "Motion for Authority to Enter into Modified Purchase Agreement for the Sale of Assets of Debtor Subject to Existing Liens, Interests, Encumbrances and Real Property Tax Claims to Vincent DiLorenzo and Larry Voelpel." In this motion, JIG proposed to quitclaim its interest in the 30-acre parcel to an "entity to be formed." It also proposed to transfer its personal property assets, including any contract rights under the construction contract, to DiLorenzo. The bankruptcy court's August 17, 2004, order provided that:

the Debtor is authorized to effectuate the sale of its assets pursuant to the terms and conditions as set forth within this Order to Vincent DiLorenzo and Larry Voelpel, or on behalf of an entity to be formed by them.

The August 17 order also stated that JIG was to cooperate in “effectuating the sale” of JIG’s assets pursuant to the terms of this Order and the Amended Asset Purchase Agreement (dated July 7, 2004) attached to this Order.” The amended asset purchase agreement identified the buyer as “Vincent DiLorenzo and Larry Voelpel, on behalf of an entity to be formed by them.”

On August 19, 2004, JIG executed a bill of sale that stated in pertinent part:

The Joseph Investment Group, LLC (“Seller”) sells, assigns, transfers and conveys to Vincent DiLorenzo, or an entity to be formed by him (“Buyer”), . . . free and clear of all liens, interests and encumbrances, the following described property:

All permits, licenses, sit plans, architectural drawings, contract rights, and all other items of personal property held by the Seller, both tangible and intangible, including any causes of action held by Seller against Buyer.”

* * *

It is expressly agreed and understood that this Bill of Sale is given pursuant to a certain Asset Purchase Agreement entered into July 7, 2004, and as amended by the Amended Asset Purchase Agreement of August 17, 2004, between Buyer and Seller (the “Purchase Agreement”) . . .

On the same date, JIG executed an “Assignment of Rights Under Permits and Licenses” as well as an “Assignment of Rights Under Condominium Bylaws of Emerald Watters” between JIG and “Vincent DiLorenzo and Larry Voelpel, on behalf of an entity to be formed by them.” Also on the same date JIG executed a quitclaim deed to Parcel I to Jewel Construction Company, Inc. Closing on the purchase occurred on August 20, 2004.¹

¹ On August 18, 2004, defendant filed a “Motion to Stay the August 2004 Sale Order Pending Appeal.” On September 30, 2004, the bankruptcy court entered an interim order granting defendant’s motion for stay pending appeal. But despite notice of defendant’s motion for stay pending appeal, JIG closed on the sale transaction on August 20, 2004. The foreclosure sale on defendant’s mortgage on Parcel I occurred on September 22, 2004. The statutory six-month redemption period expired on March 22, 2005, without anyone effectuating redemption. The interest plaintiff held in the property by way of its quitclaim deed was extinguished upon expiration of the redemption period. Indeed, in an August 1, 2005, ruling, the bankruptcy court stated that “This Court’s decision not to set aside the Foreclosure sale confirms title in Genoak pursuant to the foreclosure sale.”

On September 4, 2004, plaintiff Jewel Construction Company, Inc., filed this breach of contract action. In its answer to the complaint, defendant averred that plaintiff

took only a quit claim deed to Parcel I of Emerald Falls, the 30 acre parcel at issue in this dispute. They did not acquire any other assets. Vincent DiLorenzo and Larry Voelpel were consignments of rights under condominium bylaws of Emerald Watters, and Vincent DiLorenzo took a consignment of all other personal property collateral of debtor.

Defendant also stated the affirmative defense of lack of standing.

Defendant moved for summary disposition, arguing that DiLorenzo, and not plaintiff, received an assignment of contract rights from JIG and that plaintiff had no standing to assert DiLorenzo's rights. Plaintiff argued that it, as designee of DiLorenzo in the bankruptcy proceedings, had standing to assert DiLorenzo's rights. The trial court disagreed, finding it was undisputed that the contract rights were assigned to DiLorenzo and that DiLorenzo never assigned such rights to plaintiff. The court concluded that DiLorenzo is the real party in interest.

Summary disposition of all or part of a claim or defense may be granted when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). "The purpose of summary disposition is to avoid extensive discovery and an evidentiary hearing when a case can be quickly resolved on an issue of law. *Shepherd Montessori Ctr Milan v Ann Arbor Twp*, 259 Mich App 315, 324; 675 NW2d 271 (2003). But "a motion under MCR 2.116(C)(10) is generally premature if discovery has not closed, unless there is no fair likelihood that further discovery would yield support for the nonmoving party's position." *Townsend v Chase Manhattan Mortgage Corp*, 254 Mich App 133, 140; 657 NW2d 741 (2002); see also *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 25; 672 NW2d 351 (2003). When deciding a motion for summary disposition under subrule (C)(10), a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999); MCR 2.116(G)(5). Whether a party has standing to sue constitutes a legal question subject to de novo review. *Crawford v Dep't of Civil Service*, 466 Mich 250, 255; 645 NW2d 6 (2002).

"In order to have standing a party must have a 'legally protected interest that is in jeopardy of being adversely affected.'" *Bowie v Arder*, 441 Mich 23, 42; 490 NW2d 568 (1992). Here, there is no dispute that JIG assigned its personal property rights, including contractual rights, to DiLorenzo. It is also undisputed that there has not been any assignment of contractual rights from DiLorenzo to plaintiff. Under these circumstances, DiLorenzo is the proper party to assert a breach of contract claim against defendant. Plaintiff is neither a party nor an assignee to the construction contract that plaintiff alleges defendant breached, and plaintiff has cited no anticipated evidence that additional discovery could have uncovered that might establish a genuine dispute as to standing.

Rather, plaintiff relies on the bankruptcy court's reference to plaintiff as DiLorenzo's "designee" in the bankruptcy court's interim order to establish that it is a real party in interest with rights to prosecute a breach of contract claim against defendant. But the bill of sale and the

attendant documents, not the bankruptcy court's interim order, effectuated the transfer. The interim order merely referred to plaintiff as a "designee" of DiLorenzo and Voepel, meaning that plaintiff *could* have been the transferee of the personal property rights.² Because there is no dispute that JIG assigned its personal property rights to DiLorenzo, the trial court properly found that "DiLorenzo is the real party in interest here" and that plaintiff does not have standing to bring this breach of contract action.

Plaintiff relies on the same interim order of the bankruptcy court to argue that res judicata or collateral estoppel precluded the circuit court's ruling that plaintiff lacked standing since plaintiff was referred to as a "designee" in the interim order. 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 is no basis in the record for concluding that the bankruptcy court action decided the issue of plaintiff's standing to assert the contractual rights of JIG. Thus, the requisite elements for res judicata are not present.

The doctrine of collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding. *McMichael v McMichael*, 217 Mich App 723, 727; 552 NW2d 688 (1996). Here, the bankruptcy court merely referred to plaintiff as the apparent entity authorized to receive JIG's assets. Plaintiff was never assigned any of the personal property rights asserted in the complaint. The bankruptcy proceedings involved no litigation regarding what assets plaintiff received by way of transfer or assignment. Thus, defendant is not collaterally estopped from challenging plaintiff's standing to bring a breach of contract action against defendant.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Jane E. Markey

/s/ Michael J. Talbot

² Indeed, JIG transferred its interest in the *real* property to plaintiff.