

STATE OF MICHIGAN
COURT OF APPEALS

PATRICIA A. WEATHERLY,

Plaintiff-Appellant,

v

DAVID J. WEATHERLY and ARLOA S.
WEATHERLY, a/k/a ARLOA TOKARSKI,

Defendants-Appellees.

UNPUBLISHED

October 6, 2009

No. 287513

Genesee Circuit Court

LC No. 06-084474-CZ

Before: Murray, P.J., and Markey and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. Facts and Proceedings¹

Plaintiff Patricia Weatherly and defendant David Weatherly (Weatherly) had been married and had two children, but were divorced in 1991.² Weatherly apparently is a renowned martial arts expert. By 2006, the children had reached majority and Weatherly had fallen behind in child support, owing over \$70,000. Under the judgment of divorce, he was required to pay half of all uninsured medical, dental, optical, and pharmaceutical expenses. In 2003, Weatherly met defendant Tokarski and they allegedly became romantically involved, though they never married. Tokarski was also interested in martial arts, and had a business background. She opened a martial arts studio in Fenton, and Weatherly agreed to teach there two days per week. Her business flourished, but his continued to struggle financially. Tokarski loaned Weatherly money for his business, but his automobile was repossessed and eventually he closed his business with many outstanding debts. He then worked at Tokarski's studio as an independent

¹ Our recitation of the facts is based upon our independent review of the deposition and other evidence. Neither parties' brief adequately cites to the record as required by MCR 6.212(C)(7).

² Genesee Circuit Court Docket No. 90-165978-DM.

contractor. She did not pay him much money, but bought a car he could use and paid for other “perks.”

In 2006, plaintiff decided to pursue Weatherly for reimbursement of medical expenses she had paid. On July 19, 2006, the hearing referee found Weatherly owed some money, but only for bills incurred after January 2004. Making him pay older bills, the referee found, would be “inequitable due to the age of the bills and the prejudice to the Defendant.” The order that entered was not appealed. Plaintiff then filed the present action, seeking unpaid child support, “delinquent medical expenses,” and rescission of “fraudulent conveyance of business and personal assets.” Her complaint alleged that Weatherly and Tokarski together owned the business, and that it was fraudulently put in Tokarski’s name alone for the purpose of evading child support obligations, in violation of MCL 566.19.³ Defendants moved for summary disposition, arguing that plaintiff was collaterally attacking the earlier judgment concerning the children’s medical expenses, and that the claim for medical expenses was barred by res judicata. As for the allegation of fraudulent transfer, defendants argued that even if the correct statute had been pleaded, plaintiff presented no evidence that any transfer ever took place between Weatherly and Tokarski. In support of their position, defendants attached Tokarski’s affidavit, in which she stated that no assets or interests in assets have ever been transferred from Weatherly to Tokarski, nor were any of their mutual business transactions made with an intent to hinder, delay, or defraud any creditor of Weatherly.

The trial court granted defendants’ motion for summary disposition, concluding that the request for medical expenses was barred by res judicata because it had been previously decided and not appealed. As for the fraudulent transfer allegations, the trial court held that plaintiff relied on a repealed statute and that plaintiff failed to present any documentary evidence establishing a genuine issue of material fact. The trial court also granted defendants’ motion for attorney fees, awarding \$5,800.

II. Analysis

This Court reviews de novo a trial court’s decision to grant or deny a motion for summary disposition. *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although substantively admissible evidence submitted at the time of the motion must be viewed in the light most favorable to the party opposing the motion, the non-moving party must come forward with at least some evidentiary proof, some statement of specific fact upon which to base his case. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999); *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

Our Supreme Court stated in *Adair v Michigan*, 470 Mich 105, 121; 596 NW2d 153 (1999) (citation omitted):

³ As defendants pointed out, MCL 556.19 was repealed and replaced by MCL 566.34, which is substantively the same. It would have been a simple matter of amendment to correct the statute number.

The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action. The doctrine bars a second, 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. This Court has taken a broad approach to the doctrine of res judicata, holding that it bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not.

Although plaintiff argues that Tokarski is a stranger to the divorce action, and that the alleged fraudulent transfer underlying her new claims makes res judicata inapplicable, there is no indication that the hearing referee based her decision on the extent of Weatherly's assets. Instead, the hearing referee upheld the original provision that Weatherly pay half of the medical expenses, excluding only those bills she determined were so old it would be inequitable to require him to pay at this point. Moreover, whether Weatherly had hidden any of his assets was an issue that could have been litigated even without Tokarski in the suit. Tokarski, of course, has no obligation to pay medical expenses incurred by plaintiff's children. Thus, all the issues that could be litigated in this matter were decided by the hearing referee; adding a party to the claim seems to be merely an attempt to avoid res judicata. And, had the issue been raised as it could have been, given the allegations, Weatherly would have been in privy with Tokarski.

The trial court also correctly held that plaintiff presented no evidence establishing a fraudulent transfer of assets between Weatherly and Tokarski. Fraud must be proven by clear and convincing evidence and must never be presumed, although it may be established by circumstantial evidence. *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 457-458; 559 NW2d 379 (1996). The plaintiff must show both a transfer of assets and a fraudulent intent. *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 659; 513 NW2d 441 (1994). Under the UFTA, a "[t]ransfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease and creation of a lien or other encumbrance." MCL 566.31(1).

Plaintiff asserts that Weatherly transferred his name and reputation to Tokarski. The evidence plaintiff presents includes an advertisement for Tokarski's studio and the studio's webpage, both of which state, "Train with Chief Master Dave Weatherly," and other web sites indicating Weatherly can be reached at World Martial Arts Academy, that he "operates the World Martial Arts Academy," that Weatherly is "head of World Martial Arts Academy," and that World Martial Arts Academy is "owned" by him. Certainly, Tokarski is using Weatherly's name and reputation, but he cannot very well "transfer" it in the way of being able to walk away. Even if he had, plaintiff has no evidence of fraudulent intent or that there were any improper transfers. Defendant's assertions that Weatherly is completely unable to profitably run a studio on his own are undisputed by plaintiff, but irrelevant. Plaintiff's assertions that Weatherly takes only a minimal paycheck to avoid paying more child support is contrary to Tokarski's testimony that she pays support for him and contrary to the records showing payments have been made.

Tax costs to defendant having prevailed in full. MCR 7.219.

Affirmed.

/s/ Christopher M. Murray

/s/ Jane E. Markey

/s/ Stephen L. Borrello