

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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WILLIAM B. KOVACH,

Plaintiff/Counterdefendant-Appellant,

v

AJIT SHARMA and LORETTA SHARMA, also  
known as LORETTA KOVACH,

Defendant/Counterplaintiffs-  
Appellees.

and

PRAD MATHUR,

Defendant-Appellee.

UNPUBLISHED

September 24, 1999

No. 205358

Isabella Circuit Court

LC No. 94-008128 CH

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

PER CURIAM.

Plaintiff appeals as of right the order granting summary disposition in favor of defendants Ajit and Loretta Sharma pursuant to MCR 2.116(C)(5) on the ground that plaintiff's lack of a residential builders license prohibited his recovery for expenditures incurred in attempting to build a "Memorial House" on the Sharmas' property. Plaintiff also appeals as of right the order granting partial summary disposition in favor of the Sharmas pursuant to MCR 2.116(C)(7) on the ground that plaintiff's claims relating to events before April 12, 1993, were barred by res judicata. Additionally, plaintiff appeals as of right the order granting summary disposition in favor of defendant Mathur pursuant to MCR 2.116(C)(8) on the ground that plaintiff's fraud claims pertained to future promises and were not pleaded with the required particularity. We affirm in part, reverse in part, and remand.

Plaintiff first argues that the trial court erred by granting summary disposition of his fraud claim against defendant Mathur.<sup>1</sup> We disagree. The trial court properly ruled that a promise to perform an

action in the future cannot constitute actionable fraud. *Eerdmans v Maki*, 226 Mich App 360, 366; 573 NW2d 329 (1997). We note, however, that plaintiff alleged fraud in defendants' inducement of settling the previous litigation initiated by plaintiff. This type of fraud is intrinsic in nature. *Sprague v Buhagiar*, 213 Mich App 310, 314; 539 NW2d 587 (1995). An independent action at law to recover damages for intrinsic fraud is not recognized in Michigan. The remedy for intrinsic fraud is exclusively in a motion for relief from judgment pursuant to MCR 2.612(C). *Triplett v St Amour*, 444 Mich 170, 176; 507 NW2d 194 (1993). Plaintiff's fraud claims could have been dismissed on this basis.

Plaintiff next argues that the trial court's finding that plaintiff's claims that were based on events that occurred before April 12, 1993, were barred by res judicata. We disagree. 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. *Dart v Dart*, 224 Mich App 146, 156; 568 NW2d 353 (1997). Res judicata requires that: (1) the prior action was decided on the merits; (2) the decree in the prior action was a final 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. *Kosiel v Arrow Liquors Corp*, 446 Mich 374, 379; 521 NW2d 531 (1994).

Plaintiff's allegations regarding events up through April 12, 1993, were the same as those resolved in prior litigation, and plaintiff's voluntary dismissal of the prior litigation constituted a final decision on the merits. *Limbach v Oakland Bd of Rd Comm'rs*, 226 Mich App 389, 395; 573 NW2d 336 (1997). Moreover, the matters contested in the present matter with regard to his alleged expenditures and right to any property interests up to April 12, 1993, were resolved by way of the previous order of dismissal with prejudice. See *Kosiel, supra* at 379. Finally, regarding plaintiff's alleged expenditures and property rights, both the present case and plaintiff's previous lawsuit involved essentially the same parties; plaintiff and his daughter, defendant Loretta Sharma. The trial court properly determined that the claims relating to events that occurred before April 12, 1993, were barred by res judicata.

Plaintiff also argues the trial court's determination that MCL 339.2412; MSA 18.425(2412) required plaintiff to have a residential builders license to prevail against the Sharmas was plain error. We agree in part.

Residential builders are required by statute to be licensed. MCL 339.101 *et seq.*; MSA 18.425(1101) *et seq.*, *Utica Equipment Co v Ray W. Malow Co*, 204 Mich App 476, 479; 516 NW2d 99 (1994). A residential builder is defined as:

a person engaged in the construction of a residential structure . . . who, for . . . valuable consideration, . . . other than wages for personal labor only, . . . undertakes . . . the erection, construction, replacement, repair, alteration, or . . . improvement . . . of, a residential structure. [MCL 339.2401(a); MSA 18.425(2401)(a).]

A person may act in the capacity of a residential builder without a required builders license if the person is the owner of the property and is building for the person's own use and occupancy. MCL

339.2403(b); MSA 18.425(2403)(b). Because plaintiff was not the owner of the property on which he sought to construct, he was required to have a valid builders license.

MCL 339.2412; MSA 18.425(2412) provides:

[a] person . . . shall not bring or maintain an action in a court of this state for the collection of compensation for the performance of an act or contract for which a license is required by this article without alleging and proving that the person was licensed under this article during the performance of the act or contract.

The statutory prohibition of MCL 339.2412; MSA 18.425(2412) is all inclusive. *Utica Equipment, supra* at 478. This prohibition is not a defense that may only be asserted in certain situations. *Charles Featherly Construction Co v Property Development Group, Inc*, 400 Mich 198; 253 NW2d 643 (1977). Rather, it is a penalty that divests the unlicensed builder of the power to sue. *Id.* at 203. Although the statute’s prohibition against legal action may be a harsh penalty, it is clear and unambiguous on its face and must be enforced as written. *Utica Equipment, supra* at 204. Plaintiff did not have a residential builders license and was not the owner of the property on which he attempted to construct the “Memorial House.” Accordingly, the trial court properly determined that the statutory bright line rule prevented plaintiff from recovering for expenditures incurred in attempting to construct this structure. However, the trial court erred in its determination that § 2412 barred plaintiff’s breach of contract claims regarding certain alleged loans made to the Sharmas. Hence, we reverse that portion of the order granting summary disposition of plaintiff’s breach of contract claim against the Sharmas.

Affirmed in part, reversed in part, and remanded. Jurisdiction is not retained.

/s/ Michael J. Talbot

/s/ E. Thomas Fitzgerald

/s/ Jane E. Markey

<sup>1</sup> Plaintiff also asserts that the trial court erred by failing to address plaintiff’s “non-fraud” theories of recovery directed at Mathur. However, plaintiff’s claims of breach of contract and unjust enrichment did not pertain to Mathur.