

STATE OF MICHIGAN
COURT OF APPEALS

VENTURE FUNDING, LTD., GROWTH
REALTY, INC., and EUGENE I. SCHUSTER,

UNPUBLISHED
June 17, 2003

Plaintiffs-Appellants,

v

COMERICA BANK, LARRY H. SCHUPBACH,
and WILLIAM G. OSBACH,

No. 238046
Wayne Circuit Court
LC No. 01-124868-CZ

Defendants-Appellees.

Before: Owens, P.J., and Bandstra and Murray, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(7). We affirm.

We agree with plaintiffs that the trial court erred in granting summary disposition based on res judicata, because the present claims do not arise out of the same transaction as the counterclaims alleged by plaintiffs Schuster and Venture Funding, Ltd. ("VFL"), which were dismissed with prejudice in a prior action.

Res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical. 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 involved the parties or their privies.

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. [*Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999) (citations omitted).]

"The test for determining whether two claims arise out of the same transactions and are identical for res judicata purposes is whether the same facts or evidence are essential to the maintenance of the two claims." *Jones v State Farm Mut Automobile Ins Co*, 202 Mich App 393, 401; 509 NW2d 829 (1993), mod on other grounds *Patterson v Kleiman*, 447 Mich 429,

433-435 (1994). If the two actions rely on different facts or different proofs would be required, res judicata does not apply. *VanDeventer v Michigan Nat'l Bank*, 172 Mich App 456, 464; 432 NW2d 338 (1988); *Eaton Co Bd of Co Rd Comm'rs v Schultz*, 205 Mich App 371, 376; 521 NW2d 847 (1994).

In the present case, the dismissed counterclaims were based on alleged assurances made by Comerica's representatives that the loan would be open-ended, i.e., that the counterplaintiffs were only required to make interest payments until they were able to make principal payments at an unspecified time in the future, and Comerica's breach of the agreement when it demanded payment prematurely. In contrast, plaintiffs' present claims depend on plaintiffs' ability to prove defendants' trading of Mego Financial and Mego Mortgage stock, the collection of confidential information concerning those companies from Schuster for the purpose of defendants' trading of those stocks, defendants' refusal to allow plaintiffs to sell the stocks, and the reason for defendants' refusal, i.e., their own financial interests in the stocks and the reduction in share price that would have resulted if large blocks of the stocks had been sold as plaintiffs desired. These alleged facts are not the same as those on which the prior counterclaims were based. Accordingly, because the claims do not arise out of the same transaction, res judicata does not apply.

Nevertheless, we conclude that defendants were entitled to summary disposition on the basis of the releases executed by plaintiffs.¹ This Court will affirm where the trial court reaches the right result for the wrong reason. *Phinney v Perlmutter*, 222 Mich App 513, 532; 564 NW2d 532 (1997).

In exchange for Comerica's forbearance with regard to the defaulted loan, plaintiffs signed agreements that included the following language:

BORROWER AND PLEDGOR IN EVERY CAPACITY, INCLUDING, BUT NOT LIMITED TO, AS SHAREHOLDERS, PARTNERS, OFFICERS, DIRECTORS, INVESTORS AND/OR CREDITORS OF BORROWER, OR ANY ONE OR MORE OF THEM, HEREBY WAIVE, DISCHARGE, AND FOREVER RELEASE BANK, BANK'S EMPLOYEES, OFFICERS, DIRECTORS, ATTORNEYS, STOCKHOLDERS AND SUCCESSORS AND ASSIGNS, BOTH IN THEIR INDIVIDUAL AND REPRESENTATIVE CAPACITIES, FROM AND OF ANY AND ALL CLAIMS, CAUSES OF ACTION, DEFENSES, COUNTERCLAIMS OR OFFSETS AND/OR ALLEGATIONS BORROWER GUARANTOR MAY HAVE OR MAY HAVE MADE OR IS BASED ON FACTS OR CIRCUMSTANCES ARISING AT ANY TIME UP THROUGH AND INCLUDING THE DATE OF THIS AGREEMENT, WHETHER KNOWN OR UNKNOWN, AGAINST ANY OR ALL OF BANK, BANK'S EMPLOYEES, OFFICERS, DIRECTORS, ATTORNEYS, STOCKHOLDERS AND SUCCESSORS AND ASSIGNS.

¹ Contrary to plaintiffs' assertions, Growth Realty, Inc. was a signatory to the releases executed on November 9, 1999, and March 31, 2000.

Plaintiffs concede that the releases are unambiguous, but contend that they are unenforceable because they were secured by fraud. Plaintiffs argue that the allegations of their complaint, which the court was required to accept as true for purposes of considering defendants' motion for summary disposition, set forth a scenario for invalidating the releases.

Initially, we note that plaintiffs' complaint fails to allege with particularity any circumstances of fraud pertaining to the releases. Rather, the only allegation that purportedly refers to the releases is:

Comerica, through Schupbach and Osbach, without disclosing its/their active financial interest in the stock, affirmatively and fraudulently induced some, one or all Plaintiffs to enter into a series of additional agreements and transactions involving forbearance, waiver, grants of additional security, new financing or the like between November 1997 and the present.

This allegation is insufficient to meet the requirement in MCR 2.112(B)(1) that allegations of fraud must be stated with particularity.

Additionally, plaintiffs failed to present evidence of fraud in response to defendants' motion. When a party seeks to avoid the terms of a release, that party must prove by a preponderance of the evidence that the release should be set aside. *Binard v Carrington*, 163 Mich App 599, 603; 414 NW2d 900 (1987). In response to a motion for summary disposition based on a release, a party may not rely on mere allegations, but must present evidence in support of its contention that the release is invalid. *Id.*, 603-604; MCR 2.116(G)(4). In this case, plaintiffs presented no evidence in support of their contentions that defendants engaged in fraud with respect to the releases. As in *Binard*, plaintiffs failed to sustain their burden in attacking the release.

Plaintiffs contend that summary disposition was premature because discovery was not complete. However, a party opposing a motion for summary disposition on the ground that discovery is incomplete must at least assert that a dispute does indeed exist on a material fact and support the allegation by some independent evidence. *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000), citing *Bellows v Delaware McDonald's Corp*, 206 Mich App 555, 561; 522 NW2d 707 (1994). "An unsupported allegation which amounts solely to conjecture does not entitle a party to an extension of time for discovery, since under such circumstances discovery is nothing more than a fishing expedition to discover if any disputed material fact exists between the parties." *Pauley v Hall*, 124 Mich App 255, 263; 335 NW2d 197 (1983). Here, plaintiffs failed to present any evidence showing that there was a dispute concerning fraud with regard to the releases. Having failed to do so, plaintiffs were not entitled to additional time for a "fishing expedition."

Affirmed.

/s/ Donald S. Owens
/s/ Richard A. Bandstra
/s/ Christopher M. Murray