

STATE OF MICHIGAN
COURT OF APPEALS

MATTHEW A. FORGACH,

Plaintiff-Appellant,

v

LEE A. STACEY,

Defendant-Appellee.

UNPUBLISHED

March 13, 2008

No. 274592

Oakland Circuit Court

LC No. 2006-076700-CB

Before: Whitbeck, P.J., and Owens and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendant's motion for summary disposition. We affirm in part, reverse in part, and remand for further proceedings.

I. FACTS

Plaintiff worked as an insurance agent for Acordia of Michigan, Inc., a corporation offering insurance brokerage and other services. Defendant was Acordia's managing director, and acted as plaintiff's supervisor in that capacity. Plaintiff and Acordia came to a disagreement concerning the extent to which plaintiff was entitled to retain insurance commissions from customers plaintiff regarded as his own. Defendant, on behalf of Acordia, terminated plaintiff's employment. In an earlier action, Acordia sued plaintiff for the funds in question. Plaintiff filed a countercomplaint, alleging that Acordia tortiously interfered with plaintiff's business expectancies in connection with "his own personal clients in his Book . . . in addition to other sales with other life insurance companies."

Plaintiff subsequently filed this action against defendant, alleging that defendant tortiously "interfered with [plaintiff's] business relationships and/or expectancies with Allianz and [plaintiff's] personal clients in his Book as well as [plaintiff's] business relationships and/or expectancies of continued employment with Acordia including, but not limited to, new business and renewal policies."

Shortly before the first case went to case evaluation, plaintiff moved the trial court to adjourn the case evaluation on the ground that the instant case should be consolidated with it. Acordia resisted on the ground that the actions were closely related and should have been joined earlier. Plaintiff offered reasons for delaying his action against defendant, but the trial court

ordered that case evaluation proceed without delay. The court added, “At this juncture, we’re going to try two separate cases.”

Plaintiff and Acordia ultimately accepted the case evaluation, thus closing that case. But when plaintiff sought to proceed with this action against defendant, defendant moved for summary disposition on the ground that res judicata barred the action. The trial court agreed, and granted defendant’s motion.

II. STANDARD OF REVIEW

This Court reviews both applications of res judicata and decisions on motions for summary disposition de novo as questions of law. *Wayne Co v Detroit*, 233 Mich App 275, 277; 590 NW2d 619 (1998). “Under the doctrine of res judicata, ‘a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action.’” *Id.*, quoting Black’s Law Dictionary (6th ed, 1990), p 1305. “The doctrine operates where the earlier and subsequent actions involve the same parties or their privies, the matters of dispute could or should have been resolved in the earlier adjudication, and the earlier controversy was decided on its merits.” *Id.* The doctrine applies “to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.” *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 11; 672 NW2d 351 (2003) (internal quotation marks and citations omitted). “If the same facts or evidence would sustain both, the two actions are the same for the purpose of res judicata.” *Id.*

III. ANALYSIS

Plaintiff insists that the doctrine does not apply, on the ground that he had no pleading mechanism for bringing defendant into the earlier case. Although plaintiff’s status as a defendant/counterplaintiff in the earlier suit, plus his lack of any allegation that defendant shared in responsibility for any damages sought by Acordia in that case, left plaintiff without the option of bringing defendant into that case as a counter-, cross-, or third-party defendant, see MCR 2.203 and MCR 2.204, plaintiff was free to file a separate action against defendant and seek to have that case consolidated with the earlier one. See MCR 2.505(A) and MCR 2.207.

The record discloses that plaintiff announced the intention to pursue such consolidation, but the closest he came to doing so was unsuccessfully moving the trial court to adjourn the case evaluation of the earlier case. In denying that motion, the trial court was not promising to proceed with the instant action regardless of the outcome of that case evaluation, but was merely determining that case evaluation would proceed as scheduled, unaffected by the new case. Plaintiff was thus not in fact prevented from bringing defendant into the earlier case through the

expedient of consolidating otherwise separate actions, but was instead only prevented from delaying the case evaluation of the earlier action.¹

Of course, the outcome of case evaluation was at that time uncertain. Had plaintiff not been satisfied with the relief thus offered, he had the option of rejecting the evaluation. Had plaintiff then wished to raise the possibility of consolidation of the instant and earlier cases anew, he had the option of doing so. Instead, plaintiff, along with Acordia, accepted the case evaluation, thus both closing the earlier case, and bringing to bear any resultant preclusion doctrines. A settlement is a final judgment for purposes of triggering the doctrine of res judicata. See *Ditmore v Michalik*, 244 Mich App 569, 576; 625 NW2d 462 (2001). That doctrine now bars the instant action insofar as it overlaps the settled one.

There is substantial overlap between plaintiff's earlier counterclaim against Acordia and his instant claim against defendant. In particular, against Acordia plaintiff alleged tortious interference with business expectancy in connection with what he alleged were his own customers, and the identical allegation appears within plaintiff's instant complaint. But plaintiff now takes the additional step of asserting also that he had a business expectancy in a continued relationship with Acordia, and that defendant tortiously interfered with that relationship.

For purposes of the allegations of tortious interference with what plaintiff alleged in his earlier counterclaim were his own customers, there is perfect privity of relationship, and identity of interest, between the instant defendant, Acordia's agent with supervisory authority over plaintiff, and the original counterdefendant, Acordia itself. Acordia was ultimately responsible for any such tortious interference on defendant's part, through operation of respondeat superior, and thus had every incentive to defend on behalf of both. Again, if plaintiff felt that he needed to collect from defendant, in addition to Acordia, in connection with his claim of tortious interference with allegedly his own customers, he had the option of rejecting the evaluation. Having accepted it, plaintiff cannot now maintain against Acordia's agent the same claim over which plaintiff has settled with Acordia.

Nor did defendant waive the defense of res judicata. In responding to plaintiff's request to delay the case evaluation in the earlier action in the interests of consolidating the instant case with it, counsel for both Acordia and the instant defendant implied that defendant should not be brought into the earlier case because plaintiff delayed in attempting to do so. But counsel, speaking for Acordia, was resisting a motion to adjourn case evaluation and, as noted, no specific motion for consolidation was ever brought. Acordia did not waive defendant's defense of res judicata by opposing the adjournment of case evaluation in its own case. That defense thus remained available to defendant, as the trial court held.

But plaintiff's assertion that defendant tortiously interfered with his expectancy of a continued business relationship with Acordia is a facet substantially apart from the subject matter

¹ Moreover, to the extent that the trial court's ruling could be construed as foreclosing plaintiff's opportunity to involve defendant in that earlier case, that ruling was subject to appeal, interlocutory or otherwise, in that earlier case, not this one.

of the earlier litigation. Plaintiff was in no position to sue Acordia for tortious interference with his relationship with Acordia itself. Plaintiff's assertion that defendant tortiously interfered with his relationship with Acordia thus stands as a new theory of recovery, particular to the instant defendant, involving evidence apart from that involved in the earlier case, and over which Acordia would have had no incentive to defend in that instance. See *Everton v Williams*, 270 Mich App 348, 349-350; 715 NW2d 320 (2006).

For these reasons, the trial court correctly held that res judicata barred plaintiff from litigating against defendant the same claim of tortious interference with business expectancies in connection with customers plaintiff claimed as his own over which he settled with his and defendant's mutual employer in the earlier litigation. But it incorrectly extended the doctrine to bar plaintiff's claim of tortious interference against defendant in connection with plaintiff's relationship with Acordia itself. Therefore, we affirm the result below as it relates to plaintiff's claims of tortious interference with his business expectancies in connection with allegedly his own customers, but remand this case to the trial court with instructions to reinstate the claim of tortious interference in connection with plaintiff's relationship with Acordia.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Donald S. Owens
/s/ Bill Schuette