

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

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THRESITA DIETRICH and THE DIETRICH  
FAMILY IRREVOCABLE TRUST,

UNPUBLISHED  
June 12, 2008

Plaintiffs-Appellants,

v

RICHARD K. STEPHENS, 718 NOTRE DAME,  
L.L.C., 718 NOTRE DAME MTG, L.L.C., and  
MANUFACTURERS FINANCIAL  
CORPORATION,

No. 278453  
Oakland Circuit Court  
LC No. 2006-078629-CK

Defendants-Appellees.

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Before: Whitbeck, P.J., and O'Connell and Kelly, JJ.

PER CURIAM.

Plaintiffs appeal by right from an order dismissing their various claims against defendants as barred by res judicata. We vacate the trial court's grant of summary disposition and remand this case to the circuit court for further proceedings.

Plaintiff<sup>1</sup> is the successor-in-interest to the Dietrich Family Irrevocable Trust ("Trust"). On May 4, 2004, the Trust agreed to sell to defendant Richard K. Stephens ("Stephens") certain commercial property located at 718 Notre Dame Avenue in Grosse Pointe. The Trust executed a promissory note on June 4, 2004 ("Note") with 718 Notre Dame MTG, LLC ("MTG"), an entity incorporated by Stephens.<sup>2</sup> Under the Note, MTG agreed to pay the Trust a series of 12 consecutive interest-only monthly payments, with the balance of the Note (\$265,000) due 30 days after the last interest payment. Although defendant 718 Notre Dame, LLC, a separate entity

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<sup>1</sup> All references to plaintiff in the singular are to Theresita Dietrich.

<sup>2</sup> Apparently, there was a previous promissory note executed May 4, 2004. Defendants indicate that plaintiff asserted claims under both notes. However, plaintiff's brief only asserts claims arising under the June 4, 2004 note. Accordingly, we address only those claims related to the June 4, 2004 note.

also incorporated by Stephens, obtained title to the property, the parties agree that MTG is obligated under the Note.<sup>3</sup>

The Trust initially brought suit in Wayne Circuit Court alleging nonpayment of the monthly interest payments. The parties entered into a settlement agreement in November 2004, and the trial court dismissed the case on February 18, 2005, based on the agreement. Under the terms of the settlement agreement, MTG agreed to “bring current” the past due Note payments, to pay late fees for the three late payments, and to continue making the monthly payments required under the terms of the Note.

On May 27, 2005, plaintiff filed an action against MTG and Stephens in United States District Court for the Eastern District of Michigan, alleging that they were again in default on payments due under the Note and “[t]hat defendants have refused to make any payments since January 2005 despite repeated requests.” Plaintiff also alleged in the complaint that “Plaintiff has accelerated the promissory note because of failure of payment” and that \$220,416.65 was presently due. The federal district court concluded that plaintiff’s claims were barred by res judicata and granted summary disposition to defendants. Plaintiff appealed to the Sixth Circuit.

During the pendency of that appeal, plaintiff filed a claim in Oakland Circuit Court, again alleging that defendants “failed and refused to make any further payments since January 2005 in spite of repeated requests that they make said payments” and requesting \$216,513.89 due under the Note. Defendants requested summary disposition under MCR 2.116(C)(6) (another pending claim) and (C)(7) (res judicata). The trial court denied summary disposition under (C)(6), noting that the Wayne Circuit Court and Federal District Court claims were “concluded,” but granted summary disposition under (C)(7), finding that the claims had been brought in the federal case. Plaintiff requested reconsideration, arguing that the claim for unpaid principal was not barred because the claim was not ripe at the time the federal complaint was filed. The trial court denied reconsideration, reasoning:

Plaintiffs’ argument is contradicted by their complaint in the federal lawsuit, where they alleged that the principal on the note was due and brought a breach of contract claim on the full amount owed. Plaintiffs fail to explain why res judicata should not apply where they erroneously asked a court in a prior action to adjudicate a claim that was not ripe. Under the language of the doctrine, Plaintiffs’ claim for the principal of the note is barred because it was raised in their federal court complaint and the federal court action was decided on the merits.

Plaintiff then filed the instant appeal.

We review de novo the grant or denial of a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Whether res judicata bars a subsequent

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<sup>3</sup> We take no position as to whether Stephens may be personally liable under the Note and settlement agreement.

suit is a question of law that we also review de novo. *Pierson Sand and Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999). “Res judicata bars a subsequent action between the same parties where the facts or evidence essential to the action are identical to those essential to a prior action.” *Chestonia Twp v Star Twp*, 266 Mich App 423, 429; 702 NW2d 631 (2005). The doctrine bars both claims actually litigated in the previous action and “those claims arising out of the same transaction that the parties, by exercising reasonable diligence, could have litigated but did not.” *Id.*

In the present case, whether the trial court properly granted summary disposition to defendants depends solely upon whether the claim for unpaid principal was before the District Court. The outcome of this appeal is complicated by the fact that while this appeal was pending, the Sixth Circuit reversed the District Court and remanded the federal case for further proceedings, holding:

Although it is true that the facts that gave rise to the Trust’s state court action originated in the same promissory note that [plaintiff] now seeks to enforce in federal court, [plaintiff’s] federal court claims arise from a set of facts that were not yet in existence at the time of the state court settlement—namely, MTG’s post-settlement defaults. [*Dietrich v Stephens*, 252 Fed Appx 12, 13-14 (CA 6, 2007).]

The federal claim that the trial court deemed “concluded” has been revived. However, it is unclear from the record what claims are presently before the District Court.

Plaintiff’s original pleading in the District Court clearly states a claim for the principal. However, as noted by the Sixth Circuit, although plaintiff had asserted in her complaint that she accelerated the Note, “the note does not contain a clause allowing the Trust to recover the full balance of the note upon default.” *Id.* at 14, n 5. Thus, plaintiff’s claim for unpaid principal had not ripened at the time the federal complaint was filed—a fact recognized and considered by the trial court in its opinion regarding reconsideration. Although we have previously held that res judicata does not bar claims that are not yet ripe at the time a complaint was filed, *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14-16; 672 NW2d 351 (2003), as framed by the trial court’s order, the true question is whether the statement of an unripe claim in a party’s complaint is sufficient to constitute “actual litigation” for the purposes of res judicata. We decline to answer this question at the present time, however, because the pending federal litigation may render the outcome moot.

Although the claim for unpaid principal was not ripe at the time of the filing of the complaint, the claim was ripe at the time of remand. The District Court may find that the principal claim is already before it. Alternatively, plaintiff may choose to amend her petition to include the now-ripe claim. On the other hand, the District Court may find that because the unpaid principal claim was unripe at the time of filing, it is not properly before the court, or plaintiff may not amend her pleadings to include the claim.<sup>4</sup> Until the federal litigation is

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<sup>4</sup> Indeed, at the time this opinion was issued, the case had been remanded to the District Court for  
(continued...)

resolved, there are too many possibilities as to what may or may not come before the District Court for the trial court to determine what issues are precluded by res judicata. Accordingly, the trial court should stay this matter pending the conclusion of the federal claim, when it can be determined what claims were before the federal district court.

For the reasons outlined in this opinion, we vacate the trial court's grant of summary disposition and remand the case for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Peter D. O'Connell

/s/ Kirsten Frank Kelly

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seven months, and the time for amendment may have passed.