

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

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MICHAEL LODISH,

Plaintiff-Appellant,

v

JAMES D. CHEROCCI,

Defendant/Cross-Defendant-  
Appellee,

and

CHEROCCI COMPANIES, L.L.C., CAPITOL  
EQUITIES, L.L.C., and 72-52 INVESTMENT  
GROUP, L.L.C.,

Defendants-Appellees,

and

CITY OF PERRY,

Defendant/Cross-Plaintiff.

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Before: FORT HOOD, P.J., and TALBOT and MURRAY, JJ.

PER CURIAM.

Michael Lodish challenges the grant of summary disposition in favor of James D. Cherocci, Cherocci Companies, L.L.C., Capitol Equities, L.L.C., and the 72-52 Investment Group (hereinafter "Investment Group") based on res judicata. We affirm in part and reverse in part.

The primary asset of Investment Group was a 22-acre parcel of real estate for development. In June 2001, Lodish and Capitol were members of Investment Group and Cherocci functioned as its manager. In 2004, the manager of the Investment Group was changed to Cherocci Companies. Despite the management change, in 2005, Cherocci entered into a utility agreement with the city of Perry on behalf of the Investment Group for the installation of sanitary sewer and water lines leading to its property. The Investment Group also entered into a

contract with Capitol Building Company, Inc. for the installation of the utilities. When the utility agreement was not fulfilled, the city indicated that it would extend the deadline for completion only if a bond or irrevocable letter of credit was provided. The Investment Group sued Lodish for breach of contract, promissory estoppel, and violation of the Michigan Limited Liability Company Act<sup>1</sup> claiming that Lodish was obligated to pay his pro rata share of the ongoing expenses, property taxes, and financial contributions under the utility agreement, in addition to his share of the bond or letter of credit. The trial court granted summary disposition in favor of Lodish. Lodish, in turn, sued Investment Group, Cherocci, Cherocci Companies, and Capitol Equities seeking indemnification and asserting claims of minority member oppression, breach of contract and fraud.<sup>2</sup> The Investment Group, Cherocci, Cherocci Companies and Capital Equities were granted summary disposition, premised on the trial court's determination that res judicata barred Lodish's claims. This Court reviews a trial court's decision on a motion for summary disposition de novo.<sup>3</sup>

Res judicata bars a subsequent action 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 involve the same parties or their privies.”<sup>4</sup> Res judicata “bars not only claims actually litigated in the prior action, but every claim arising out of the same transaction which the parties, exercising reasonable diligence, could have raised but did not.”<sup>5</sup> “The parties to the second action need be only substantially identical to the parties in the first action, in that the rule applies to both parties and their privies.”<sup>6</sup> This Court has defined a “privy” as encompassing

a person so identified in interest with another that he represents the same legal right, such as a principal to an agent, a master to a servant, or an indemnitor to an indemnitee. . . . In order to find privity between a party and a nonparty, Michigan courts require both a substantial identity of interests and a working or functional relationship . . . in which the interests of the non-party are presented and protected by the party in the litigation.<sup>7</sup>

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<sup>1</sup> MCL 450.4302.

<sup>2</sup> The city of Perry was subsequently added as a defendant and Lodish brought a claim for declaratory relief against the city.

<sup>3</sup> *Brown v Brown*, 478 Mich 545, 551; 739 NW2d 313 (2007).

<sup>4</sup> *Estes v Titus*, 481 Mich 573, 585; 751 NW2d 493 (2008) (internal marks and citation omitted).

<sup>5</sup> *Sprague v Buhagiar*, 213 Mich App 310, 313; 539 NW2d 587 (1995).

<sup>6</sup> *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 12; 672 NW2d 351 (2003) (citation omitted).

<sup>7</sup> *Id.* at 12-13 (internal citations and quotations omitted).

In addressing the elements of res judicata, we note that it is undisputed that the first lawsuit was decided on the merits,<sup>8</sup> and that the Investment Group was a party in both lawsuits. We further find that Cherocci Companies as the manager and Capitol Equities as a member were privies of the Investment Group.<sup>9</sup> Similarly, Cherocci was in privity with the Investment Group in his capacity as both its former manager and as a member of both Capitol Equities and the Cherocci Companies.

Lodish argues that, as a member of the Investment Group, he is contractually entitled to indemnification for the attorney fees and costs he incurred in successfully defending against the first lawsuit. The primary point of contention is whether Lodish's indemnification claim was barred by res judicata because it could have been raised during the first lawsuit.<sup>10</sup> The Investment Group operating agreement provides, in relevant part:

To the extent that a Member, employee or agent of the Company has been successful on the merits or otherwise in defense of an action, suit or proceeding, such person shall be indemnified against actual and reasonable expenses, including attorneys fees, incurred by such person in connection with the action, suit or proceeding and any action, suit or proceeding brought to enforce the mandatory indemnification provided herein.<sup>11</sup>

Lodish contends that this language requires the Investment Group to indemnify him as he has met the condition by successfully defending against the first lawsuit.

“[T]he fundamental goal of contract interpretation is to determine and enforce the parties’ intent by reading the agreement as a whole and applying the plain language used by the parties to reach their agreement.”<sup>12</sup> “[A] ‘condition precedent’ is a fact or event that the parties intend must take place before there is a right to performance.”<sup>13</sup> The operating agreement indicates that in order to obtain indemnification a member must have successfully defended an earlier action. Lodish met the requisite preceding condition based on the resolution of the first lawsuit. The same subsection of the operating agreement also provides that members must be indemnified against expenses incurred in connection with “any action, suit or proceeding brought to enforce the mandatory indemnification provided herein,” lending further support to Lodish’s contention that the agreement specifically contemplates separate actions being brought for indemnification.

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<sup>8</sup> *Estes*, 481 Mich at 585.

<sup>9</sup> See *Peterson Novelties, Inc*, 259 Mich App at 12-13.

<sup>10</sup> *In re Koernke Estate*, 169 Mich App 397, 399; 425 NW2d 795 (1988) (citation omitted).

<sup>11</sup> Operating Agreement, § 8.2.

<sup>12</sup> *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527, 529; 740 NW2d 503 (2007).

<sup>13</sup> *Real Estate One v Heller*, 272 Mich App 174, 179; 724 NW2d 738 (2006) (citation omitted).

Based on the contractual language, as Lodish's indemnification claim against the Investment Group could not have been raised in the first lawsuit, the trial court erred in finding that res judicata barred this claim.

The trial court did not err in granting summary disposition on Lodish's claims for fraudulent representation and concealment against Cherocci. In the first lawsuit, Lodish attempted to bring a counterclaim for silent fraud against the Investment Group, which the trial court denied. Lodish contends that his current fraud claims cannot be dismissed based on res judicata as they involve a different party. The silent fraud claim was based in relevant part on allegations that the Investment Group concealed facts regarding whether it actually owned the property at the time Lodish became a member. In his lawsuit, Lodish's claims for fraudulent misrepresentation and concealment are based on statements allegedly made by Cherocci concerning whether a down payment on the property had been made after Lodish was a member of the Investment Group. Lodish was aware in the first lawsuit of evidence supporting his claims for fraudulent concealment and representations and he could have raised these claims in the first lawsuit.<sup>14</sup> Further, it was incumbent on Lodish to raise any other counterclaims he might have had in the initial lawsuit, as:

In a pleading that states a claim against an opposing party, the pleader must join every claim that the pleader has against that opposing party at the time of serving the pleading, if it arises out of the transaction or occurrence that is the subject matter of the action and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction.<sup>15</sup>

Lodish further asserted a claim for minority member oppression and breach of contract premised on the failure of Cherocci Companies to obtain a vote or written consent from members of the Investment Group before entering into contracts, retaining legal representation, commencing the initial lawsuit and in failing to disclose Cherocci's proprietary interest in Capitol Building. But Lodish fails to explain how these claims could not have been raised in the first lawsuit as he was aware that the Investment Group entered into the utility agreement and the related contract with Capitol Building. In the first lawsuit, the court specifically found that Lodish was denied the opportunity to make a determination regarding the contract with Capitol Building and was not afforded his right to vote on transactions involving conflicts of interest, and because "the manager indisputably failed to get the necessary consent of the members for the Utility Agreement, contract with [Capitol Building], or to initiate this lawsuit." Similarly, Lodish knew that the Investment Group retained counsel without member consent. As these counterclaims could have been raised in the initial lawsuit, the trial court properly determined they were barred by res judicata.

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<sup>14</sup> *Sprague*, 213 Mich App at 313.

<sup>15</sup> MCR 2.203(A).

Lodish also sought to pursue a claim for declaratory relief against the city, which was dismissed by stipulation of the parties. Before this Court, Lodish raises arguments pertaining to this issue only as it relates to his claim for indemnification against Cherocci. As there is no evidence that the city has actually filed an action against the Investment Group, any claim Lodish may have for indemnification has not accrued.<sup>16</sup> Because Lodish's claim is premature, the trial court did not err in granting summary disposition.

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

/s/ Karen M. Fort Hood  
/s/ Michael J. Talbot  
/s/ Christopher M. Murray

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<sup>16</sup> *Cliffs Forest Prods Co v Al Disdero Lumber Co*, 144 Mich App 215, 225; 375 NW2d 397 (1985) (citation omitted)