

STATE OF MICHIGAN
COURT OF APPEALS

M-59 JOY, L.L.C.,

Plaintiff-Appellant,

v

BENINATI CONTRACTING SERVICES, INC.,

Defendant-Appellee.

UNPUBLISHED

April 19, 2011

No. 298310

Macomb Circuit Court

LC No. 2010-000072-CH

Before: GLEICHER, P.J., and SAWYER and MARKEY, JJ.

PER CURIAM.

Plaintiff M-59 Joy, L.L.C. (M-59), appeals as of right from the trial court's order granting summary disposition in favor of defendant Beninati Contracting Services, Inc. (Beninati), pursuant to MCR 2.116(C)(7) on the basis of res judicata. We affirm.

We review a trial court's application of a legal doctrine, such as res judicata, de novo as a question of law. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008). A trial court's decision regarding a motion under MCR 2.116(C)(7) is also reviewed de novo. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007). Summary disposition may be granted under MCR 2.116(C)(7) when a claim is barred because of a prior judgment. In reviewing such a motion, the substance of the complaint is accepted as true, unless contradicted by evidence submitted by the parties. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). If the pleadings or other evidence show that there is no genuine issue of material fact, a court may decide whether a claim is barred pursuant to MCR 2.116(C)(7) as a matter of law. *Holmes v Mich Capital Med Ctr*, 242 Mich App 703, 706; 620 NW2d 319 (2000).

We agree with the trial court that M-59's claims in this action are barred by the default judgment entered against M-59 in Beninati's prior action. We reject M-59's argument that its claims are permitted by MCR 2.203(E) because the trial court in the prior action denied its motion to amend to file a counter-complaint to bring claims for breach of contract, slander of title, negligent performance of the contract, and an equitable accounting. Although MCR 2.203(E) permits a party to pursue a claim in a separate action, even if it arises out of the same transaction involved in the prior action, the claim is still subject to the doctrines of collateral estoppel and res judicata. *Salem Industries, Inc v Mooney Process Equip Co*, 175 Mich App 213, 216; 437 NW2d 641 (1988).

The doctrine of res judicata bars a second action where “(1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first.”¹ *Washington*, 478 Mich at 418, quoting *Adair v Mich*, 470 Mich 105, 121; 680 NW2d 386 (2004).

With respect to the first element, there is no merit to M-59’s argument that the prior action was not decided on the merits because it ended in a default judgment. Res judicata applies to default judgments. *Schwartz v City of Flint*, 187 Mich App 191, 194; 466 NW2d 357 (1991). Further, the fact that M-59 appealed the default judgment² does not preclude it from being given res judicata effect. *Temple v Kelel Distrib Co*, 183 Mich App 326, 328; 454 NW2d 610 (1990); *City of Troy v Hershberger*, 27 Mich App 123, 127; 183 NW2d 430 (1970). There are other avenues of relief available to a party where a default judgment in a prior action is later reversed. See MCR 2.612(C)(1)(e). Because it is impermissible for M-59 to collaterally attack the default judgment in this appeal, we decline to consider its various challenges to the default judgment. *Temple*, 183 Mich App at 328; see also *People v Howard*, 212 Mich App 366, 369; 538 NW2d 44 (1995) (“collateral attack occurs whenever a challenge is made to a judgment in any manner other than through a direct appeal”). Given the default judgment in the prior action, the first element of res judicata is satisfied.

With respect to the second element of res judicata, we reject M-59’s argument that the dismissal of two other defendants in the prior action affects Beninati’s ability to invoke the doctrine of res judicata. The two parties to this action, M-59 and Beninati, were both parties in the prior action. Therefore, the second element of res judicata is satisfied.

With respect to the third element, Michigan takes a broad approach to res judicata. The doctrine applies to all claims arising from the same transaction that the parties, with reasonable diligence, raised or could have raised in the first action. *Washington*, 478 Mich at 418. “The test for determining whether two claims arise out of the same transaction and are identical for res judicata purposes is whether the same facts or evidence are essential to the maintenance of the two actions.” *Schwartz*, 187 Mich App at 194-195. Even if based on different kinds or theories of relief, the transactional test is satisfied if a single group of operative facts gives rise to the claimed relief. *Washington*, 478 Mich at 420. The factual grouping is analyzed under a pragmatic approach. *Id.* A court should consider whether the facts are related in time, space, origin, or motivation. *Id.*

Examined under these standards, the trial court did not err in finding that res judicata barred M-59’s action. Although not recognized by the trial court in its decision, the record

¹ Because the trial court relied only on the doctrine of res judicata to grant Beninati’s motion for summary disposition and we find no error in the trial court’s decision, it is unnecessary to consider M-59’s arguments based on collateral estoppel.

² M-59’s appeal of the default judgment is before this Court in Docket No. 296218. That appeal and this appeal have been submitted together for a decision from this Court.

reflects that the “failure of consideration” allegation that formed the basis for M-59’s breach of contract claim in this case was pleaded by M-59 as an affirmative defense to Beninati’s prior contract action. The trial court properly characterized the failure of consideration theory as an affirmative defense to Beninati’s contract action. MCR 2.111(F)(3)(a). A court is not bound by a party’s choice of labels for an action because this would put form over substance. *Johnston v City of Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989).

The trial court also correctly determined that the defense based on a failure of consideration was litigated by virtue of the default judgment in the prior case. The default settled the liability issue as to “well-pleaded allegations” in Beninati’s complaint with respect to the contract action. *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573, 578; 321 NW2d 653 (1982). Further, the default judgment settled the amount of Beninati’s contract damages. Because the same operative facts give rise to the contract dispute in both actions, the third element of res judicata was satisfied as to this claim. And because each of the other three claims arises out of the contract, res judicata was properly applied to bar all four claims.

We disagree with M-59’s argument that it can avoid the bar of res judicata by proceeding under a theory that Beninati had a continuing duty to perform. The default in the prior action established that performance was complete. In any event, M-59’s argument confuses the concept of a continuing duty with circumstances where there is a continuing effect of a breach of duty or other wrong. A continuing wrong is established by continuing wrongful acts, not by continual harmful effects from a completed act. *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 83; 592 NW2d 112 (1999) (tort action); see also *Terlecki v Stewart*, 278 Mich App 644, 655-657; 754 NW2d 899 (2008). Where the wrong is contractual in nature and the contract is capable of constant or continuous breaches of duty throughout the term of the contract, such as where a covenant of repair exists throughout the period of a lease, a party’s recovery for a breach of such a covenant will not bar a second suit for damages suffered from a continuing breach after the last recovery. *Plaza Investment Co v Abel*, 8 Mich App 19, 27; 153 NW2d 379 (1967); see also Restatement Judgments, 2d, § 26(1)(e).

Here, the operative facts for each of M-59’s claims arise from a contract that does not impose continuing duties, but rather a duty to perform specific services on property. M-59’s complaint also contains allegations that there was a failure of consideration due to nonperformance (breach of contract claim), that a construction lien was maliciously placed on the property and still exists (slander of title claim), that services were poorly and partly performed (negligence claim), and that Beninati removed valuable woods and timber without providing an accounting (equitable accounting claim). However, there is nothing in M-59’s complaint to indicate that its claims are based on circumstances that could not have been presented in the prior action. In paragraph 11 of its complaint, M-59 alleged that “as a direct and proximate result of Beninati’s actions and/or inaction, M-59 Joy, LLC has suffered and continues to suffer loss and damage.” The gravamen of M-59’s claims is that harmful effects of Beninati’s alleged wrongs continue, not the existence of further wrongs. Accordingly, M-59’s attempt to rely on continuing-duty principles to avoid the doctrine of res judicata is unavailing. The default judgment in the prior action settled whether Beninati breached any duty.

Finally, M-59 has not substantiated its position that the slander of title claim was not a proper subject of the prior action. M-59’s reliance on *Berkaw v Mayflower Congregational*

Church, 378 Mich 239; 144 NW2d 444 (1966), is misplaced because this case involves the application of res judicata, not collateral estoppel. Further, the concern in Restatement Judgments, 2d, § 24, comment (3)(d), involved successive wrongs, not whether the harmful effects of a wrong continue.

Moreover, a cause of action generally accrues when all elements have occurred and can be alleged in a complaint. *Jackson Co Hog Producers* 234 Mich App at 78. For purposes of applying res judicata in this case, the material question is whether M-59, with reasonable diligence, could have raised the slander of title claim in the prior action. *Washington*, 478 Mich at 418. Here, M-59 unsuccessfully moved to amend the pleadings in the prior action to add a counterclaim for slander of title. Even if there was some basis for M-59 to argue that the claim did not accrue before it filed its motion to amend in the prior action, it would have been reasonable to expect M-59 to at least present this argument to the trial court in support of the motion to amend. Limiting our review to the record, we find no factual issue that precluded summary disposition. *Holmes*, 242 Mich App at 706.

Because the slander of title claim arises out of the same operative facts that formed the basis for Beninati's claims, and M-59 has not established any claim that could not have been raised with reasonable diligence in the prior action, the third element of res judicata was established with respect to each claim. Therefore, we affirm the trial court's grant of Beninati's motion for summary disposition based on res judicata.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ David H. Sawyer
/s/ Jane E. Markey