STATE OF MICHIGAN

COURT OF APPEALS

MIDWEST BUSINESS SOLUTIONS,

Plaintiff-Appellant,

v

MIDWEST BUSINESS SYSTEMS, INC., and LUTHER ELLIOTT,

Defendants-Appellees.

UNPUBLISHED
February 2, 1999

No. 204387
Wayne Circuit Court
LC No. 97-713825 CB

Before: Sawyer, P.J., and Bandstra and R. B. Burns*, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in favor of defendants. We affirm in part, reverse in part, and remand for further proceedings.

Plaintiff contends that the trial court erred in granting defendants' motion for summary disposition based on the doctrine of res judicata. We agree. "When reviewing a motion for summary disposition granted pursuant to MCR 2.116(C)(7), this Court must accept as true the plaintiff's well-pleaded allegations and construe them in a light most favorable to the plaintiff. The motion should not be granted unless no factual development could provide a basis for recovery." *Stabley v Huron-Clinton Metropolitan Park Authority*, 228 Mich App 363, 365; 579 NW2d 374 (1998). "The affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties, must be considered by the court when the motion is based on subrule (C)(1)-(7) or (10)." MCR 2.116(G)(5).

In *Bergeron v Busch*, 228 Mich App 618, 621; 579 NW2d 124 (1998), this Court discussed the doctrine of res judicata:

> The applicability of res judicata is a legal question that this Court reviews de novo. Michigan has adopted a broad application of res judicata that bars claims arising out of the same transaction that plaintiff could have brought but did not. The doctrine

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

> serves a two-fold purpose: to insure the finality of judgments and to prevent repetitive litigation. However, in order for the first action to bar the second, res judicata requires that: (1) the prior action was decided on the merits, (2) the matter contested in the second case was or could have been resolved in the first, and (3) both actions involved the same parties or their privies.

In *Admiral v Dep't of Labor*, 149 Mich App 344, 353; 386 NW2d 193 (1986), this Court noted that "the burden of showing that a judgment in another action is res judicata is on the party so contending." Defendants have failed to meet their burden.

The last requirement to establish res judicata requires that both actions involve the same parties or their privies. The prior action consisted of plaintiff and defendants as coplaintiffs versus Ford Motor Company, Dearborn Systems & Services Inc. ("DSSI") and Bhagwan Thacker. In the prior action, defendants did not litigate a claim against plaintiff, but rather, stood in the position of coplaintiffs. In *Cook v Kendrick*, 16 Mich App 48, 51; 167 NW2d 483 (1969), this Court stated:

> A judgment ordinarily settles nothing as to the relative rights and liabilities of the coplaintiffs or codefendants inter sese, unless their hostile or conflicting claims were actually brought in issue, litigated, and determined. [Citations omitted.]

Plaintiff and defendants' status as coplaintiffs in the prior action does not invoke the doctrine of res judicata to bar this complaint as the respective rights of coplaintiffs in the prior action were not brought in issue and litigated. *Cook, supra*, 16 Mich App 51. Defendants allege impropriety on the part of plaintiff by asserting that plaintiff is actually Thacker. Documentary evidence to support that assertion has not been provided in the lower court record. "This Court's review is limited to the record on appeal, we will not consider allegations not supported by the record presented." *Hawkins v Murphy*, 222 Mich App 664, 670; 565 NW2d 764 (1997). Accordingly, defendants have failed to meet their burden in demonstrating that res judicata applies. *Admiral, supra*, 149 Mich App 353.

Plaintiff also contends that the release executed in the underlying settlement agreement does not preclude this action. We agree.

In *Wyrembelski v St Clair Shores*, 218 Mich App 125, 127; 553 NW2d 651 (1996), this Court set forth the law relating to summary disposition on the basis of a release:

> Summary disposition of a plaintiff's complaint is proper where there exists a valid release of liability between the parties. MCR 2.116(C)(7). A release of liability is valid if it is fairly and knowingly made. The scope of a release is governed by the intent of the parties as it is expressed in the release.
>
> If the text in the release is unambiguous, we must ascertain the parties' intentions from the plain, ordinary meaning of the language of the release. The fact that the parties dispute the meaning of a release does not, in itself, establish an ambiguity. A contract is ambiguous only if its language is reasonably susceptible to more than one interpretation.

> If the terms of the release are unambiguous, contradictory inferences become "subjective, and irrelevant", and the legal effect of the language is a question of law to be resolved summarily. [Citations omitted.]

Review of the settlement agreement reveals that it unambiguously provides that there is a release between plaintiff and Ford, DSSI and Thacker in the prior action. While the release provides that there is a release of "each other," the release refers to the parties in groups, namely referring to plaintiff and defendants, on the one hand, and Ford Motor Company, DSSI and Thacker on the other hand. There is no language in the release to indicate that plaintiff agreed to release defendants, coplaintiffs in the prior action. Accordingly, the trial court erred in holding that the settlement agreement barred this action. *Wyrembelski, supra,* 218 Mich App 127.

Plaintiff also contends that the trial court erred in denying its motion to disqualify defendants' counsel. We disagree. Appellate courts review the decision to disqualify an attorney under the abuse of discretion standard. The conclusion that a conflict of interest exists is a question of fact and is reviewed under the clearly erroneous standard. *People v Doyle,* 159 Mich App 632, 640-641; 406 NW2d 893 (1987).

MRPC 1.9 Conflict of Interest: Former Client provides:

> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

In *Feaheny v Caldwell,* 175 Mich App 291, 308; 437 NW2d 358 (1989), the plaintiff argued that the defendants' law firm should be disqualified on conflict of interest grounds because an attorney of the law firm previously represented the plaintiff in a related matter. This Court disagreed as the plaintiff knew that the law firm represented the defendant, plaintiff's former employer. The plaintiff was represented briefly by an attorney of the law firm. However, this representation ceased prior to the law firm's representation of the defendant. Additionally, there was no evidence that the plaintiff imparted confidential information to the attorney regarding the subject matter of the lawsuit.

In the instant case, plaintiff knew of defendants' counsel's former representation. Presumably, plaintiff ceased its relationship with defendants' counsel prior to the filing of this lawsuit. Finally, plaintiff makes a blanket assertion of adverse interest, but has not provided any specifics to verify the allegation. The trial court did not abuse its discretion in denying the motion to disqualify defendants' counsel. *Doyle, supra,* 159 Mich App 640-641.

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

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ Robert B. Burns