STATE OF MICHIGAN

COURT OF APPEALS

NORTRU, INC.,

Plaintiff-Appellant,

v

FRANKENMUTH MUTUAL INSURANCE COMPANY and BUBOLZ, INC.,

Defendants-Appellees.

UNPUBLISHED
April 6, 1999

Nos. 204837; 204857
Ingham Circuit Court
LC Nos. 96-085103 CK;
96-634418 CK

Before: Murphy, P.J., and Gage and Zahra, JJ.

PER CURIAM.

In these consolidated appeals, plaintiff appeals as of right an order granting defendants summary disposition pursuant to MCR 2.116(C)(7). Plaintiff also challenges an order granting defendants' motion for change of venue. We affirm.

Plaintiff processes and recycles used waste oil. It purchased "used oil" from Ever-Clean, Inc. (Ever-Clean), which represented that the oil was free of polychlorinated biphenyl (PCB). After mixing the oil with other combustible materials, plaintiff discovered that the oil it purchased from Ever-Clean contained high levels of PCB, a toxin that plaintiff was incapable of treating. Plaintiff sustained alleged damages in the amount of $1.2 million. Ever-Clean was insured by defendant Frankenmuth Mutual Insurance Company (Frankenmuth), having purchased its policy through defendant Bubolz, Inc. (Bubolz), Frankenmuth's authorized agent.

Plaintiff filed suit against Ever-Clean in the United States District Court for the Eastern District of Michigan to recover damages it allegedly incurred as a result of Ever-Clean's delivery of the contaminated oil. Frankenmuth denied coverage and the duty to defend Ever-Clean in the federal litigation. Ever-Clean then filed suit against Frankenmuth in Ingham Circuit Court, seeking a declaratory judgment that Frankenmuth was obligated to defend and indemnify Ever-Clean in the federal litigation. Subsequently, plaintiff and Ever-Clean entered into a settlement agreement in the federal litigation, whereby, among other things, plaintiff became Ever-Clean's judgment creditor and received an assignment of Ever-Clean's claims. Approximately six months later, the Ingham Circuit Court ruled that the insurance policy between Frankenmuth and Ever-Clean was unambiguous and excluded from

coverage the damages sought to be recovered by plaintiff, and therefore granted summary disposition to Frankenmuth.

Plaintiff then filed a motion in Ingham Circuit Court, seeking to intervene as party plaintiff, to substitute counsel, to file a first amended complaint, and for reconsideration of the order granting Frankenmuth's motion for summary disposition. The court eventually granted plaintiff's motions to intervene and substitute counsel. However, the court denied plaintiff's motion to file an amended complaint, finding that it would be "extremely untimely," and denied plaintiff's motion for reconsideration of its grant of summary disposition to Frankenmuth, finding no palpable error.

On July 24, 1996, plaintiff filed a complaint against defendants Frankenmuth and Bubolz in Wayne County Circuit Court, alleging six counts. The first count was to recover, as Ever-Clean's judgment creditor, under the insurance policy. The other five counts, brought by plaintiff as the assignee of Ever-Clean's claims, were for promissory estoppel, intentional misrepresentation, negligent misrepresentation, innocent misrepresentation, and fraudulent concealment. Defendants successfully moved for change of venue to Ingham Circuit Court, where they filed motions for summary disposition on the basis of res judicata and collateral estoppel, which the court granted.

Plaintiff first contends that the trial court erred in granting defendants' motions for summary disposition with respect to plaintiff's claim for insurance coverage as Ever-Clean's judgment creditor on the basis of res judicata. The doctrine of res judicata bars relitigation of a claim where the same parties fully litigated a claim and a final judgment has resulted. *Andrews v Donnelly (After Remand)*, 220 Mich App 206, 209; 559 NW2d 68 (1996). The doctrine recognizes that interminable litigation leads to vexation, confusion, and chaos for the litigants, resulting in the inefficient use of judicial time. *ABB Paint Finishing, Inc v National Union Fire Ins Co of Pittsburgh, PA*, 223 Mich App 559, 562; 567 NW2d 456 (1997). Res judicata applies when (1) the first action was decided on its merits, (2) the matter being litigated in the second case was or could have been resolved in the first case, and (3) both actions involved the same parties or their privies. *Andrews*, *supra*. The applicability of res judicata is a question of law that this Court reviews de novo. *Husted v Auto-Owners Ins Co*, 213 Mich App 547, 555; 540 NW2d 743 (1995), lv gtd on other grounds 457 Mich 852 (1998).

Plaintiff argues that because it was not allowed to assert its own claim for coverage in the Ever-Clean action and because it was not in privity with Ever-Clean, the third requirement for application of res judicata is not met and its claim is therefore not barred. However, plaintiff was allowed to intervene in the earlier action. Although it was not allowed to file an amended complaint, it did file a motion for reconsideration of the court's decision with respect to whether the insurance policy covered damages such as were incurred in this case. The court considered the motion and found that it had committed no palpable error.

Moreover, plaintiff also was in privity with Ever-Clean. With regard to privity, the Michigan Supreme Court has stated:

> In its broadest sense, privity has been defined as "mutual or successive relationships to the same right of property, or such an identification of interest of one person with

> another as to represent the same legal right." *Petersen v Fee Int'l, Ltd,* 435 F Supp 938, 942 (WD Okla, 1975). This Court has also interpreted a privy as "one who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritance, succession or purchase." *Howell v Vito's Trucking & Excavating Co,* 386 Mich 37, 43; 191 NW2d 313 (1971). [*Sloan v City of Madison Heights,* 425 Mich 288, 295-296; 389 NW2d 418 (1986).]

We find that plaintiff "acquired an interest in the subject matter affected by the judgment" in this case by virtue of the consent judgment entered in the federal litigation. Thus, because plaintiff was in privity with Ever-Clean, the grant of summary disposition on the matter of coverage under the insurance policy is res judicata with respect to plaintiff's claim for coverage under the same policy.

Plaintiff next argues that it is not barred from bringing its misrepresentation claims because Bubolz was not a party to the prior litigation and because the facts necessary to prove the tort claims are different from the facts necessary to prove the coverage claim. Res judicata bars litigation in a subsequent action not only of those claims actually litigated in the first action, but also claims arising out of the same transaction which the parties, exercising reasonable diligence, could have litigated, but did not. *Limbach v Oakland Co Bd of Co Rd Comm'rs,* 226 Mich App 389, 396; 573 NW2d 336 (1997). 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. *Jones v State Farm Mut Automobile Ins Co,* 202 Mich App 393, 401; 509 NW2d 829 (1993). However, a comparison of the grounds asserted for relief is not a proper test. *Id.* We find that while plaintiff, as Ever-Clean's assignee, had alternative theories under which it sought reimbursement for its damages, it had but one cause of action. Furthermore, the evidence proffered in support of Ever-Clean's claim for coverage is evidence that necessarily would have been presented to sustain plaintiff's claims of misrepresentation. We note also that the policies behind the doctrine of res judicata, economy of judicial resources and finality of litigation, *Gose v Monroe Auto Equipment Co,* 409 Mich 147, 159; 294 NW2d 165 (1980), support our finding. Plaintiff became Ever-Clean's assignee and was aware of Ever-Clean's Ingham County litigation well before that court granted summary disposition to Frankenmuth, but plaintiff chose not to intervene until after the court had ruled. When plaintiff intervened and sought to file an amended complaint in this matter and the court denied its motion, plaintiff did not appeal, but attempted instead to file suit in a different court seeking the same relief sought by Ever-Clean in its Ingham County action. We thus conclude that res judicata bars plaintiff's instant misrepresentation claims.[1]

Plaintiff also contends that the court erred in granting defendants summary disposition on the basis of res judicata because defendants did not object to Ever-Clean's failure to bring the misrepresentation claims in the prior litigation, as required under MCR 2.203(A)(2). However, we find that rule inapplicable to the facts of this case. See *Bd of Co Rd Comm'rs for Co of Eaton v Schultz,* 205 Mich App 371, 380-381 n 5; 521 NW2d 847 (1994).

Finally, plaintiff argues that the Wayne Circuit Court improperly transferred venue of this case to Ingham Circuit Court. However, because we are affirming the trial court's grant of summary disposition

to defendants and because MCL 600.1645; MSA 27A.1645 precludes appellate relief based solely on improper venue, see *Grebner v Clinton Charter Twp*, 216 Mich App 736, 744; 550 NW2d 265 (1996), we decline to address the issue of venue.

Affirmed.

/s/ William B. Murphy
/s/ Hilda R. Gage
/s/ Brian K. Zahra

[1] Because we find that the trial court properly granted defendants summary disposition regarding plaintiff's misrepresentation claims on the basis of res judicata, we need not address plaintiff's arguments involving collateral estoppel.