

STATE OF MICHIGAN
COURT OF APPEALS

JOIE A. SLOTNICK,

Plaintiff-Appellant,

v

PETER P. DARROW and
MANN, LIPNICK AND DARROW, P.C.,
jointly and severally,

Defendants-Appellees.

UNPUBLISHED

June 18, 1999

No. 207490

Washtenaw Circuit Court

LC No. 95002500 NM

Before: Gribbs, P.J., and Kelly and Hood, JJ.

PER CURIAM.

Plaintiff appeals by right from the trial court's grant of summary disposition in defendants' favor. Plaintiff sued her divorce attorney for malpractice, alleging that due to his negligence she approved a settlement, concluding proceedings against her ex-husband, which failed to include critical terms of property division agreed to during final negotiations. Based on the denial of a motion to modify and amend the judgment of divorce, the trial court granted defendants' motion for summary disposition holding that plaintiff was collaterally estopped from litigating her present claim. We affirm.

Plaintiff Joie Slotnick was represented in her action for divorce by defendant attorney Peter Darrow. After significant negotiations, the parties to the divorce presented the trial court with the terms of a proposed property settlement and asked for approval of this agreement. After both plaintiff and her ex-husband indicated to the court, in the presence of counsel, that they understood and agreed to the settlement terms presented orally and in the written judgment of divorce, the court granted the divorce and signed and approved the judgment.

On July 2, 1993, plaintiff, through new counsel, brought a motion to modify and amend the judgment of divorce pursuant to MCR 2.612 (A)(1) and (C)(1)(a) and (f), on the grounds that it did not conform to the actual agreement of the parties. Plaintiff asserted in the motion that the judgment signed by the court omitted various property settlement provisions that the parties had agreed to. Plaintiff stated these provisions had been discussed in the presence of their attorneys immediately prior to the final court hearing. The trial court denied the motion, finding that plaintiff had failed to present sufficient

grounds under MCR 2.612 to grant relief from the judgment or to order a modification. The court held that the record affirmations of the parties at the hearing evidenced unequivocal agreement with the terms of the judgment then presented. A panel of this Court subsequently affirmed the denial of plaintiff's motion for relief from judgment.

Following this Court's ruling, plaintiff returned to the trial court and initiated the instant action alleging defendant's malpractice. Plaintiff asserted that defendant breached a duty of care by his failure to properly ensure that the final judgment of divorce reflected the parties' agreement, and by his failure to ensure that the true and complete agreement was orally placed on the record. Contending that plaintiff's malpractice claim was grounded on the question whether the judgment of divorce approved by the court reflected the agreement of the parties, defendant moved for summary disposition pursuant to MCR 2.116(C)(7) and (10). Defendant argued that this issue had been twice litigated before competent courts, both times adjudicated against plaintiff, and that she was thereby barred from relitigating the issue. The trial court granted defendant's motion for the reasons offered, and it is from this ruling that plaintiff appeals.

Plaintiff contends that collateral estoppel should not have been applied because defendant was not a party or privy to the earlier actions and no mutuality existed. She also contends that the issue presented in this action had not been determined in the previous litigation. We disagree.

We review de novo the grant of summary disposition under MCR 2.116(C)(7) and (10). *Horace v City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998); *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). We consider all pleadings, affidavits, depositions, admissions and other documentary evidence available to the trial court. *Horace, supra*; *Spiek, supra*, reviewing the record in the same manner as the trial court to determine whether the movant was entitled to judgment as a matter of law, *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 766 (1998). The applicability of collateral estoppel is a question of law which is also reviewed de novo. *Husted v Auto-Owners Ins Co*, 213 Mich App 547, 555; 540 NW2d 743 (1995).

Collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in that prior proceeding. *McMichael v McMichael*, 217 Mich App 723, 727; 552 NW2d 688 (1996). As an integral element of this rule, generally the parties in the second action must be the same as or privy to the parties in the first action. *APCOA, Inc v Dep't of Treasury*, 212 Mich App 114, 120; 536 NW2d 785 (1995). "A party is one who is directly interested in the subject matter and has a right to defend or to control the proceedings and to appeal from the judgment. A person is in privy to a party if, after the judgment, the person has an interest in the matter affected by the judgment through one of the parties, such as by inheritance, succession, or purchase." *Husted, supra*, 213 Mich App 556. An adjunct to the requirement regarding party identity, mutuality of estoppel is also generally required for application of collateral estoppel. *Lichon v American Universal Ins Co*, 435 Mich 408, 427; 459 NW2d 288 (1990). Mutuality exists if the party taking advantage of the earlier adjudication would have been bound by it. *Id.*, 428. Despite a modern national trend to abandon mutuality, the requirement is still applicable in this state. *Id.*

A growing number of exceptions to the mutuality requirement have recently arisen in the area of defensive use of collateral estoppel. See *Knoblauch v Kenyon*, 163 Mich App 712, 720; 415 NW2d 286 (1987). Determinative of the instant question is our decision in *Alterman v Provizer, Eisenberg, Lichtenstein & Pearlman, PC*, 195 Mich App 422; 491 NW2d 868 (1992). There, a client who unsuccessfully moved to have a settlement set aside on the ground that he was incompetent when he signed the agreement, later brought an action against his attorney alleging malpractice. The plaintiff based his malpractice claim on the assertion that his counsel allowed him to sign the settlement agreement while he was not competent. *Id.*, 424. Notwithstanding that the parties were not identical, no mutuality existed, and no traditional exception to mutuality requirement applied, we held the plaintiff collaterally estopped from relitigating the competence issue. *Id.*, 427. We find the issue now presented is identical to the issue twice previously determined and we therefore affirm the trial court's order notwithstanding that defendant did not precisely satisfy the traditional identity of parties requirements.

Affirm.

/s/ Roman S. Gibbs
/s/ Michael J. Kelly
/s/ Harold Hood