STATE OF MICHIGAN

COURT OF APPEALS

LYNN B. GRIFFIN,

Plaintiff-Appellant,

v

REGIER EQUIPMENT COMPANY, INC.,

Defendant-Appellee.

UNPUBLISHED
August 6, 1999

No. 205686
Eaton Circuit Court
LC No. 96-000542 CZ

Before: Fitzgerald, P.J., and Doctoroff and White, JJ.

PER CURIAM.

In this contract dispute, plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(7). The trial court's grant of summary disposition was based on its finding that a judgment involving the same equipment contract and parties was rendered by a Nebraska state court in December 1996 and that, therefore, plaintiff's claims in the instant case were barred by res judicata. We affirm.

A motion for summary disposition pursuant to MCR 2.116(C)(7) on the basis of res judicata is reviewed de novo as a question of law. *Florence v Dep't of Social Services*, 215 Mich App 211, 214; 544 NW2d 723 (1996); *Husted v Auto-Owners Ins Co*, 213 Mich App 547, 555; 540 NW2d 743 (1996), aff'd 459 Mich 500 (1999). When reviewing a motion for summary disposition pursuant to MCR 2.116(C)(7), this Court must accept the plaintiff's well-pleaded allegations as true, and examine any pleadings, affidavits, or documentary evidence submitted by the parties in the light most favorable to the nonmoving party. *Stamps v City of Taylor*, 218 Mich App 626, 630; 554 NW2d 603 (1996). The motion should be granted if the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact. *Id.*

The doctrine of res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical. *Eaton County Bd of County Road Comm'rs v Schultz*, 205 Mich App 371, 375; 521 NW2d 847 (1994). Michigan has adopted a broad application of the doctrine of res judicata, which bars not only claims actually litigated in the prior action, but all claims arising out of the same transaction that the parties, exercising reasonable diligence, could have raised in

the prior action, but did not. *Limbach v Oakland County Bd of County Road Comm'rs,* 226 Mich App 389, 396; 573 NW2d 336 (1997). Thus, application of the doctrine of res judicata requires that (1) the first action be 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. *ABB Paint Finishing, Inc v National Union Fire Ins,* 223 Mich App 559, 562-562; 567 NW2d 456 (1997). The doctrine is "a manifestation of the recognition that interminable litigation leads to vexation, confusion, and chaos for the litigants, resulting in the inefficient use of judicial time." *ABB Paint, supra* at 562, quoting *Schwartz v Flint,* 187 Mich App 191, 194; 466 NW2d 357 (1991). Michigan courts must respect the res judicata effect of a judgment from another jurisdiction. *Jones v State Farm Ins Co,* 202 Mich App 393, 406; 509 NW2d 829 (1993), mod on other grounds, *Patterson v Kleiman,* 447 Mich 429, 433 n 3, 434 n 6 (1994).

The Nebraska action and the instant action involve the same parties,[1] and the parties do not dispute that the Nebraska action was decided on its merits. Thus, the only issue before us is whether the matter being litigated in the instant case was, or could have been, resolved in the Nebraska litigation. When deciding whether a matter could have been resolved in the first case, Michigan courts include "every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at that time." *Van Pembrook v Zero Mfg Co,*146 Mich App 87, 100-101; 380 NW2d 60 (1985), quoting *Carter v Southeastern Michigan Transp Auth,* 135 Mich App 261, 264; 351 NW2d 920 (1984). "The test for determining whether two claims are identical for res judicata purposes is whether the same facts or evidence are essential to the maintenance of the two claims," *Huggett v Dep't of Natural Resources,* 232 Mich App 188, 197; 590 NW2d 747 (1998), not whether the grounds asserted for relief are the same, *Jones, supra* at 401.

Under Nebraska law, relitigation of those matters actually litigated and those which might have been litigated is generally precluded. See *Vann v Norwest Bank Nebraska,* 256 Neb 623; 591 NW2d 574 (1999), which notes:

> Under the traditional rule of res judicata, sometimes called claim preclusion, any rights, facts, or matter in issue directly adjudicated or necessarily involved in the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot be litigated by the parties and privies.
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> We have also stated that *except in special cases, the plea of res judicata applies not only to points upon which the court was actually required by the parties to form an opinion, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time.* However, as explained in 50 C.J.S. Judgment § 758 at 310-11 (1997), this rule does not mean that the prior judgment is
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> > conclusive of matters not in issue or adjudicated, and which were not germane to, implied in, or essentially connected with, the actual issues in the case, although they may affect the ultimate rights of the parties and might

> have been presented in the former action, and is not applicable to issues the trial of which rests within the discretion of the court.
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> [*Vann, supra,* 256 Neb at 626-627 (emphasis added) (citations omitted).]

In the instant case, the same facts and evidence that were essential to the resolution of the Nebraska action are also at issue here. In the Nebraska case, defendant alleged that plaintiff breached the security agreement by failing to pay the installment that was due. Defendant further alleged that all conditions precedent to its right to recover had occurred or had been performed. Plaintiff responded by raising Uniform Commercial Code issues regarding the public sale and maintained that defendant had accepted the collateral as a discharge of any of plaintiff's "alleged obligations" to defendant. The Nebraska court's opinion focused on the issues raised by plaintiff in his answer and concluded that judgment should be entered as requested by defendant.

In his complaint in this case, plaintiff alleged breaches of warranty and violations of the Michigan Consumer Protection Act.[2] These issues could have been raised as defenses or counterclaims in the Nebraska suit. If the Nebraska court had found that plaintiff had rightfully withheld payment on the equipment because of defendant's breaches, then the conditions precedent to defendant's right to recover the deficiency would not have been met. Therefore, the two actions involved the same transaction (the retail installment contract and sales agreement for the equipment) and the same facts (relating to which party breached the contract). The trial court was correct in concluding that plaintiff's "cause of action is not independent of the deficiency award, it goes to the very heart of whether defendant was entitled to a deficiency. It goes to the issue of whether plaintiff breached the contract." Under Michigan law:

> [A]lthough Michigan has no compulsory counterclaim rule, it does not follow that any claim that could have been, but was not, raised as a counterclaim in an earlier action can be raised in a second action and withstand a res judicata attack. The lack of a Michigan compulsory counterclaim rule means that simple failure to raise a counterclaim may not be used later as a defense when that same claim is brought in a separate action. *But if allowing the later claim would be inconsistent with the outcome of the earlier case, the doctrine of res judicata – and not any compulsory counterclaim rule – can act to preclude the second action. Thus, in a contract action, if plaintiff sues defendant for failure to pay the purchase price and wins, the original defendant should be precluded from suing the original plaintiff later on the grounds that the goods were defective* (at least if that alleged fact was known at the time of the original litigation). Granting relief in the second case would undermine the judgment in the first case, which necessarily rested on the proposition that the plaintiff was entitled to the purchase price, which in turn rests on the proposition that the plaintiff had performed properly under the contract. [2 Martin, Dean & Webster, Michigan Court Rules Practice, pp 37-38. (Emphasis added).]

Further,

> [I]f P sues for the purchase price and wins, the trier of fact must have determined the conditions necessary for the claim – including proper performance under the contract – in P's favor. Therefore, in a later action by D against P on the contract for defective goods, collateral estoppel would bar relitigation of the point; it would be taken as established that the goods were not defective. Since that point would be critical for the original defendant's claim in the second action, the original defendant would lose. . . .
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> Note the slightly different procedural effects of res judicata – bar and merger – and collateral estoppel. Res judicata is a defense to an entire claim and can be used to defeat it directly under MCR 2.116(C)(7). Collateral estoppel removes certain fact issues from a case. Those issues may or may not be determinative of the merits of the entire case. If they are, there is a basis for a motion for summary disposition under MCR 2.116; if they are not, the second action proceeds with certain facts taken as established, much as in the case of admissions that do not dispute all of the issues in a case. [*Id.* at 45-46.]

Thus, we conclude that the claims plaintiff raised in the instant case could have been raised in the Nebraska action. Accordingly, the trial court properly concluded that plaintiff's claims in the instant case were barred by res judicata.

Plaintiff argues that res judicata does not apply because he was not able to raise the Michigan claims due to a choice of law provision in the retail sales agreement and sales contract. Although plaintiff did not raise this specific issue below, we will address it because he did advance the general argument that the Nebraska court was somehow precluded from applying Michigan law.

The contract provided that Michigan law would govern all matters relating to the contract's validity, effect, and enforcement. This choice of law provision has no effect on the application of res judicata because plaintiff did not raise the instant claims as defenses or counterclaims to the action in Nebraska. Although plaintiff contends that he would have been precluded from asserting the claims in Nebraska had he raised them, he cites no authority for that assertion. While the choice of law provision required that Michigan law govern all matters relating to the validity, effect, and enforcement of the contact, it did not require that claims regarding such issues be litigated in a Michigan court. The trial court properly applied the doctrine of res judicata in the instant case to bar the claims that plaintiff failed to raise as defenses or counterclaims in the Nebraska suit.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Martin M. Doctoroff
/s/ Helene N. White

[1] The Nebraska suit was brought by Regier against plaintiff, while plaintiff brought the instant case against two defendants, Regier and AGCO, the manufacturer of the equipment. After the trial court heard defendants' motion for summary disposition in the instant case, plaintiff and AGCO notified the court that they had reached a settlement, and subsequently stipulated to AGCO's dismissal with

prejudice. Thus, in the end, the Michigan and Nebraska suits involved the same parties, and plaintiff has not explained why AGCO's involvement in the case is significant to the issues presented on appeal.

[2] Assuming arguendo that the MCPA claim could not have been brought in Nebraska, a point plaintiff argues but does not support with authority, or that the claim is not barred by res judicata or collateral estoppel, this claim should have been dismissed, nevertheless, on the basis of plaintiff's deposition testimony that the equipment at issue was purchased by plaintiff's corporation for business purposes. *Zine v Chrysler Corp*, __ Mich App __; __ NW2d __ (Docket Nos. 199594, 209281, issued 6/18/99); *Jackson County Hog Producers v Consumers Power Co*, 234 Mich App 72, 85-86; 592 NW2d 112 (1999). The MCPA requires that the good, property, or service at issue "be primarily for personal, family, or household purposes." MCL 445.902(d); MSA 19.418(d). Plaintiff's deposition testimony on this point is unrefuted, thus dismissal on the basis that no genuine issue of material fact remained would have been appropriate.