STATE OF MICHIGAN

COURT OF APPEALS

TAMARA HARMON,

Plaintiff-Appellant,

v

CITY OF DETROIT, MAYOR OF DETROIT, GLORIA ROBINSON, ED RAGO, and GARY DENT,

Defendants-Appellees.

UNPUBLISHED
March 9, 2001

No. 217820
Wayne Circuit Court
LC No. 97-711880-NZ

Before: Talbot, P.J., and O'Connell and Cooper, JJ.

PER CURIAM.

In this discrimination case brought under the Michigan Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548 (101) *et seq.*, and the Michigan and United States Constitutions, we affirm in part and reverse in part the summary dismissal of plaintiff's claim under MCR 2.116(C)(7).

Plaintiff, at all times relevant to this lawsuit, worked for defendant City of Detroit in the Community Economic Development Department (CEDD). In 1994, defendant mayor proposed the merger of the CEDD with the city's planning department. Plaintiff's job was eliminated as part of the merger of these departments. Thereafter, plaintiff was offered, and accepted under protest, a lower ranking position within the merged department and a large reduction in pay. She later filed a grievance under her rights in the civil service rules. Her grievance progressed through the administrative process, and after an adverse decision by the civil service commission (commission), plaintiff brought the grievance before the Wayne Circuit Court as an action for superintending control.

While the superintending control action was pending, plaintiff filed the instant action in Wayne Circuit Court alleging race, gender, and age discrimination and violation of the Michigan and United States Constitutions. Both the superintending control action (superintending action) and the instant action arose out of the elimination of plaintiff's job, her subsequent demotion, and defendants' failure to promote plaintiff into certain positions within and without the department for which she was allegedly qualified.

On October 16, 1997, defendant filed a brief in support of its motion for summary disposition, pursuant to MCR 2.116(C)(10), alleging that there were no genuine issues of

material fact. In that brief, defendant raised the issue of plaintiff's impermissible failure to join claims, MCR 2.203(A)(1). Defendant requested that the judgment in the superintending action merge the claims presented in plaintiff's second law suit.[1]

On December 17, 1997, the superintending action was summarily disposed of in a lengthy opinion where the judge took note of the parallel claim. The trial court judge in that case went on to query whether the judgment would operate as a bar to recovery in the separate action, which is the subject of this appeal. However, in granting defendant's MCR 2.116(C)(10) motion, the judge necessarily incorporated the commission's findings of fact into his decision. The commission had previously found that plaintiff's demotion was proper, was in accordance with the city's civil service rules, and that there was no evidence that promotions were being made for improper reasons.

On November 20, 1998, the trial judge in the instant case granted defendants' motion for summary disposition. In its ruling, the court indicated that plaintiff would be unable to prove the essential facts of her discrimination claim, based on the December 17, 1997 order, and that summary disposition was appropriate. The court further indicated that res judicata barred the instant claim and would preclude any of plaintiff's claims which arose after the December 17, 1997 ruling. Plaintiff now appeals the lower court's decision.

We review de novo the application of a preclusion doctrine because it represents a question of law. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999). Res judicata bars a subsequent action between the same parties when evidence or facts vital to the action are identical to those that were essential in a prior action. *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999), reh den 461 Mich 1205; 602 NW2d 576 (1999), cert den __ US __; 120 S Ct 1418; 146 L Ed 2d 311 (2000). Michigan follows a broad rule of res judicata and bars not only claims actually litigated but also those arising from the same transaction that reasonably diligent parties could have raised but did not. *Id*. at 586. The doctrine requires that: (1) the prior action was decided on the merits; (2) the decree in the prior action was a final decision; (3) the matter contested in the instant case was or could have been resolved in the first; and (4) both actions involved the same parties or their privies. Kosiel *v Arrow Liquors Corp*, 446 Mich 374, 379; 521 NW2d 531 (1994), on remand 211 Mich App 550; 536 NW2d 567 (1995), lv den 452 Mich 853; 549 NW2d 343 (1996); *Baraga County v State Tax Comm*, 243 Mich App 452, 455; __ NW2d __ (2000).

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[1] Moreover, prior to defendant's motion for summary judgment in the superintending action, defendants notified plaintiff in the instant action of their intent to argue that plaintiff's claims needed to be merged. Defendants provided this notification on May 27, 1997, in their answer to plaintiff's complaint and affirmative defenses. Plaintiff cites *Rogers v Colonial Federal Savings & Loan Assoc of Grosse Pointe Woods*, 405 Mich 607, 624; 275 NW2d 499 (1970) in her brief for the proposition that the "purpose [of the GCR 203.1 waiver provision] is to encourage a defendant to assert, by motion, an objection to plaintiff's non-joinder in the first suit when the defect can be cured." However, it is at least noteworthy that defendants presented their affirmative defenses in the instant action prior to their motion for summary disposition and before the trial court's ruling in the superintending action. Thus, the defect could still have been cured.

Plaintiff first contends that the defense of res judicata is unavailable to defendants in this case because they did not object to plaintiff's failure to join her claims in the superintending action. Plaintiff argues that under MCR 2.203(A)(2)[2], defendants were required to object to plaintiff's failure to join her claims in order to preserve the defense of res judicata in the later suit. However, plaintiff's argument is unsupported in the record.

In the brief in support of defendant's motion for summary disposition in the superintending action, dated October 16, 1997, defendant stated:

> In addition, plaintiff has ingeniously filed a second lawsuit arising out of the plaintiff's demotion in which she alleges violations of the Elliott-Larsen Civil Rights Act and the U.S. and Michigan Constitutions. Plaintiff's second lawsuit violates MCR 2.203(A)(1) as an impermissible failure to join claims. Therefore, pursuant to MCR 2.203(A)(2) the judgment issued in the instant complaint shall merge the claims presented in plaintiff's second lawsuit.[3]

By its plain language, MCR 2.203(A)(2) allowed a defendant to raise the failure to join all claims "in a pleading, by motion, or at a pretrial conference." Moreover, defendants are not required to actively seek to have a plaintiff's claims joined under this rule. Rather, it is the plaintiff's responsibility to "join every claim that the pleader has against that opposing party" which arises out of the same transaction or occurrence. MCR 2.203(A). A defendant's obligation is simply to object to the failure to join "in a pleading, by motion, or at a pretrial conference." MCR 2.203(A)(2). Thus, we find that because defendant city adequately objected to plaintiff's failure to join her claims, defendants did not waive the defense of res judicata.

We are further convinced that res judicata properly applies to this case. Although plaintiff contends that the same parties were not involved in both cases, we find that the defendant city in the superintending case, the City of Detroit, was in privity with the named parties in the instant action. Privity may be found where a relationship such as principal and agent, master and servant, or indemnitor and indemnitee exists. *Baraga County*, *supra*, 243 Mich App at 456; Viele *v DCMA*, 167 Mich App 571, 580; 423 NW2d 270, mod 431 Mich 898 (1988). Defendant city, being the employer of all the named parties in this suit, has the same

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[2] MCR 2.203(A)(2) was eliminated from the court rules by an amendment which took effect on June 1, 1999. The comments to the current rule indicate that part of the reason the rule was modified was to "facilitate operation of the common law doctrine of res judicata…."

[3] In a response to plaintiff's complaint in the instant action, dated May 27, 1997, defendant's affirmative defenses stated:

> Plaintiff's claims are barred in whole or in part due to failure to join them in a related civil matter.…Defendant's hereby give notice that, should discovery support them, Defendants intend to rely on such other Affirmative and Special Defenses as may appear applicable including, but not limited to…that Plaintiff's claims are barred by the doctrine of…res judicata….

interests and relationship to plaintiff in the superintending action as defendants have in the instant action. Thus, we conclude that privity exists.

Moreover, we believe that the December 17, 1997 order in the superintending action was a final decision on the merits of plaintiff's first claim. An order granting summary disposition can operate to bar a subsequent claim on the ground of res judicata because summary disposition operates as a judgment on the merits of a plaintiff's claim. *Capital Mortgage Corp v Coopers & Lybrand*, 142 Mich App 531, 536; 369 NW2d 922 (1985). The December 17, 1997 grant of summary disposition to defendant city was therefore a final decision on the merits of plaintiff's superintending control claim.

We also conclude that plaintiff could have brought the instant claim when she brought her claim for superintending control. This Court has stated that an action for superintending control is not an appeal. *Fort v Detroit*, 146 Mich App 499, 503; 381 NW2d 754 (1985). Further, our Supreme Court has noted that "[b]ecause the Legislature has not provided for appeal from municipal civil service boards, review is by complaint for superintending control." *In re Payne*, 444 Mich 679, 687; 514 NW2d 121 (1994) (citations omitted). Also in *Payne*, our Supreme Court opined that "[d]ecisions of municipal civil service commissions are reviewed through original actions for superintending control." *Id.* The implication in the above cases supports our conclusion that multiple claims could have been brought. Given that a superintending control action is an original action commenced by filing a complaint, there is no impediment to joining all of plaintiff's claims in one complaint. Thus, plaintiff's claims could have been brought in the superintending action.

In finding that plaintiff's claims could have been brought in the superintending action, this Court notes that plaintiff did not have an opportunity to present claims arising after the December 17, 1997 order. Res judicata does not serve as a bar to these subsequent claims. See *Pierson Sand & Gravel*, *supra*, 460 Mich at 380. However, we conclude that plaintiff's claims, prior to the December 17, 1997 order, arose out of the same transaction and are therefore barred by the doctrine of res judicata. Indeed, plaintiff does not contend that her discrimination claims, which are based on the elimination of her job, her subsequent demotion, and the failure to promote her, arise out of different occurrences than her civil service grievance. Rather, plaintiff asserts that res judicata cannot apply to this case because the parties were not the same in both cases and the defense was not preserved. As previously discussed, these arguments are without merit and do not preclude the operation of res judicata in this case. Thus, we affirm the dismissal of plaintiff's claims arising before December 17, 1997 and remand the case for consideration of plaintiff's claims arising after that date.

Affirmed in part and reversed in part. Remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Peter D. O'Connell
/s/ Jessica R. Cooper