STATE OF MICHIGAN

COURT OF APPEALS

RAYMOND VAN SULLEN and LOUISE VAN SULLEN,

Plaintiffs-Appellants,

v

MICHAEL P. KELLY, ELIZABETH L. KELLY, WILFRED L. KELLY, and CAROL S. KELLY,

Defendants-Appellees,

and

DANIEL J. CROMBEZ, CYNTHIA K. ROMANOWSKI, and D.J.C. & ASSOCIATES, d/b/a CENTURY 21 D.J.C. & ASSOCIATES.

Defendants.

UNPUBLISHED
June 25, 2002

No. 229681
Macomb Circuit Court
LC No. 00-002107-CZ

Before: Holbrook, Jr., P.J., and Gage and Meter, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order of the circuit court granting summary disposition in favor of defendants under MCR 2.116(C)(10). We affirm.

This appeal involves sixty-two acres of improved real property located in East China Township, Michigan. A mortgage on this property was held by First State Bank of East Detroit. A mortgage foreclosure sale was scheduled to be held on December 19, 1997. Plaintiffs allege that prior to the mortgage sale, plaintiff Raymond Van Sullen approached defendant Michael Kelly about purchasing the property. Plaintiffs alleged that a deal was reached in which Michael Kelly agreed to pay $121,000, the full balance of the mortgage note, as well as executing a land contract and a promissory note in the amount of $186,000.

Plaintiffs allege that after the deal was struck, Michael Kelly approached them and asked them to sign documents that Kelly represented were needed by the bank with respect to paying off the mortgage, and also to help the Kelly defendants secure further financing. Plaintiffs assert that these documents, which they signed without having read them, were in reality a quitclaim deed and a warranty deed for the property. Plaintiffs further allege that the deeds were witnessed

outside of their presence by defendants Crombez and Romanowski, and notarized by Romanowski. Plaintiffs assert that while the $121,000 was paid in satisfaction of the mortgage, none of the $186,000 has been paid, nor has the purported land contract ever been signed. Plaintiffs filed their complaint in May 2000 in the Macomb County Circuit Court, alleging fraudulent misrepresentation, conspiracy to commit fraud, innocent misrepresentation, and breach of contract. Plaintiffs also included a count for exemplary damages stemming from the "humiliation, outrage, and indignation" they say they have suffered.

On July 3, 2000, the Kelly defendants brought a motion to summarily dismiss plaintiffs' lawsuit or alternatively for a change of venue to St. Clair County, to release and discharge a lis pendens on the property, and for monetary sanctions. In support of their motion to dismiss, defendants argued that all of the issues raised in plaintiffs' complaint had also been raised and resolved in an earlier action in St Clair Circuit Court. Plaintiffs countered that their prior action was to quiet title, not for fraud. Plaintiffs characterized the alleged fraud as "after discovered," presumably indicating that the fraud was discovered after the earlier action had been filed. The alleged fraud was further identified as being "the later discovered fraudulent activities of Defendants with the new Defendants." The "new" defendants are Crombez, Romanowski, and D.J.C. & Associates. Plaintiffs alleged that D.J.C. had drafted the quitclaim and warranty deeds. The court granted the motion for change of venue, and denied without prejudice to renewal defendants' request for summary disposition, release of the lis pendens, and monetary sanctions.

Plaintiffs then filed a motion for rehearing of the change of venue, arguing that because the action was not to quiet title, and because the alleged fraud occurred in Macomb County, venue was improperly transferred. When ruling on the motion, the court reached beyond the venue issue to reconsider the denial of defendants' motion for summary disposition. Citing two cases from this Court[1] and MCR 2.119(F), the court first asserted that it had the power "to immediately correct any obvious mistakes it may have made in ruling on a motion." Accepting plaintiffs' assertion that they were not seeking to quiet title or specific performance of the alleged oral contract, and that any mention to the contrary in the complaint was an inadvertent mistake, the court struck those requests from the complaint. The court then ruled as follows:

> It is important to note plaintiff Raymond Van Sullen had previously filed a complaint arising out of this transaction in the St. Clair County Circuit Court (*Van Sullen v Kelly*, Case No. 1998-003410-CK, Hon. Daniel J. Kelly) seeking almost identical relief. Judge Kelly dismissed, with prejudice, plaintiff Raymond Van

[1] *Michigan Bank-Midwest v DJ Reynaert, Inc*, 165 Mich App 630; 419 NW2d 439 (1988); *Brown v Northville Regional Psychiatric Hospital*, 153 Mich App 300; 395 NW2d 18 (1986). The *Brown* Court had interpreted MCR 2.119(F) as follows:

> We read this provision governing rehearings as not restricting the discretion of the trial judge to reconsider motions where he later determines that he or his predecessor made a serious error, based on an intervening change in the law or otherwise. [*Brown, supra* at 309.]

The *Reynaert* Court cited with approval the foregoing interpretation. *Reynaert, supra* at 646.

Sullen's claims to enforce the alleged land contract and note in an Order dated December 6, 1999. An Opinion on Motion for Summary Disposition dated March 15, 2000 dismissed plaintiff Raymond Van Sullen's remaining claims of fraudulent inducement, unjust enrichment and fraud. These adjudications are binding on this Court.

In an attempt to "take a second bite from the apple" and avoid application of the doctrine of res judicata, plaintiffs now maintain defendants conspired to commit fraud with respect to obtaining their signatures on the deeds and that the claimed witnessing and notarization was a sham.

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[P]laintiffs' conspiracy claim is premised on an agreement between defendants to accomplish a legal act by unlawful means--i.e., the sale and transfer of the subject property by fraud. However, the St. Clair County Circuit Court previously determined plaintiff Raymond Van Sullen was not defrauded by defendants during the transaction:

> ["]Plaintiff admitted in his deposition that the defendants did not promise to sign a land contract and did not promise to sign a note.
>
> Plaintiff testified that he knew that the deed he had signed delivered title to Defendants and he did not have any discussions with the defendants regarding the transaction. Not only did Plaintiff admit that he fully understood that the deed conveyed his interest to Defendant, but Plaintiff's own admissions also demonstrate that Defendant did not represent that the deed was an application for a mortgage. Further, Plaintiff stated that he did not even know if Defendant Michael Kelly was even present when he signed the warranty deed. . . . Therefore, the Court finds that the Plaintiff is unable to establish fraudulent representation or reliance to support his claim.
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> Plaintiff has admitted through his deposition testimony that Defendants did not promise to sign a land contract and note, therefore, there is no genuine issue of material fact.

Therefore, lacking evidence of some other unlawful conduct by defendants, plaintiff's conspiracy claim must fail.

Significantly, plaintiffs' admission that they signed the Quit Claim and Warranty Deeds precludes a claim for relief based on the alleged sham witnessing and notarization thereof.

We review de novo the question of whether collateral estoppel and res judicata bars a claim, and a trial court's order granting a motion for summary disposition. See *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Husted v Auto-Owners Ins Co*, 213 Mich App 547, 555; 540 NW2d 743 (1995).

> A motion pursuant to MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim. MCR 2.116(C)(10) permits summary disposition when, except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to damages as a matter of law. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the opposing party and grant the benefit of any reasonable doubt to the opposing party. [*Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994).]

In the St. Clair case, plaintiffs alleged in their complaint that they had been defrauded when the Kelly defendants reneged on an oral agreement to sign a land contact and promissory note. According to the complaint, the alleged agreement called for plaintiffs to transfer the warranty deed to the property followed immediately by the signing of the contract and note. Nowhere in this complaint is it alleged that plaintiffs were unaware they were signing over the deed, nor does it allege that they were tricked into believing that they were signing some documents related to the mortgage and the procurement of additional financing. Indeed, it is clear from the St. Clair complaint itself that plaintiffs were then taking the position that they understood the nature of the documents they signed and delivered.

The St. Clair Circuit Court summarily dismissed plaintiffs' cause of action. In so doing, the court made two significant findings. First, based on Raymond Van Sullen's deposition, the court found that the Kelly defendants had not promised to sign either a land contract or a promissory note. Second, the court found that plaintiffs were aware of the nature of the documents they signed and they did not rely on false representations when signing them. According to the St. Clair Circuit Court, Raymond Van Sullen averred "that he knew that the deed he had signed delivered title to Defendants and he did not have any discussions with the defendants regarding the transaction." The St. Clair Circuit Court further concluded that "[n]ot only did Plaintiff admit that he fully understood that the deed conveyed his interest to Defendant, but Plaintiff's own admissions also demonstrate that Defendant did not represent that the deed was an application for a mortgage."

The St. Clair Circuit Court had to reach this second matter because plaintiffs had put it in issue by filing affidavits in which they claimed a lack of knowledge of the nature of the deeds and that they had been tricked into signing them.[2] The circuit court observed that the position taken in the affidavits was at odds with Raymond Van Sullen's deposition testimony. The court further correctly concluded that "[a] party may not vary or contradict his deposition testimony by a self-serving affidavit prepared after the fact that purports, without explanation, to contradict

[2] Plaintiffs attempted to file an amended complaint in which they raised the claim that they did not know of the nature of the deeds, and had been tricked into signing them by misrepresentations made by Michael Kelly. Apparently, the St. Clair Circuit Court did not allow the amendment.

deposition testimony." See *Downer v Detroit Receiving Hospital*, 191 Mich App 232, 233-234; 477 NW2d 146 (1991). There is nothing in the record before us indicating that Raymond Van Sullen tried to explain this significant factual shift. The clear import of the reasoning of the St. Clair Circuit Court is that no explanation was offered.

Accordingly, we conclude that collateral estoppel precludes relitigation of the issue of plaintiff's claim that he was tricked into signing the deeds and that he did not know what they were when he signed them. MCR 2.116(C)(7). The prior final judgment was valid, and the basis of that judgment is clear, definitive, and unequivocal. See *Ditmore v Michalik*, 244 Mich App 569; 625 NW2d 462 (2001).

As the Macomb Circuit Court correctly observed, plaintiffs' knowledge of the nature of the deeds and the lack of any misrepresentation is at the heart of their entire complaint. Plaintiff cannot establish either his claim for fraudulent misrepresentation or innocent misrepresentation because he cannot establish that Michael Kelly misrepresented the nature of the deeds. For the reasons stated by the Macomb Circuit Court, we conclude that plaintiffs' conspiracy claim should also be summarily dismissed. Plaintiffs' request for exemplary damages must also fail because it is premised on the notion that the alleged misrepresentations caused them to suffer humiliation, outrage, and indignation.

We also hold that plaintiffs' present lawsuit is barred by the doctrine of res judicata. A subsequent action is barred by res judicata "when (1) the prior action was decided on the merits, (2) the decree in the prior action was a final decision, (3) both actions involve the same parties or their privies, and (4) the matter in the second case was or could have been resolved in the first." *Id.* at 576. Contrary to plaintiffs' assertion, the addition of Crombez, Romanowski, and D.J.C. does not preclude the application of res judicata to the present action. The actions of these three defendants did not occur subsequent to the prior lawsuit, nor can their alleged actions be characterized as separate legal wrongs. Clearly, the prior and the present lawsuits are both based on the same cause of action. Further, any claim arising out of the alleged wrongdoing of Crombez, Romanowski, and D.J.C. existed at the time of the prior lawsuit, and could have been discovered with reasonable diligence. *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999) ("Michigan courts have broadly applied the doctrine of res judicata, [barring] . . . not only claims already litigated, but every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not.").

Finally, we reject plaintiffs' request for remand to determine an award of costs and attorney's fees.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Hilda R. Gage
/s/ Patrick M. Meter