

STATE OF MICHIGAN
COURT OF APPEALS

PIO ZAMMIT,

Plaintiff-Appellant,

v

MEADOWBROOK INSURANCE CARRIER and
CITY OF NEW BALTIMORE,

Defendants-Appellees.

UNPUBLISHED
November 2, 2004

No. 248776
Macomb Circuit Court
LC No. 2002-004157-NZ

Before: Whitbeck, C.J., and Jansen and Bandstra, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order granting summary disposition in favor of defendants. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff brought this action asserting that the city violated its zoning ordinance by issuing plaintiff's neighbor a permit to construct a garage. Defendants moved for summary disposition, asserting that the doctrine of res judicata barred this action where plaintiff had filed a similar lawsuit in 2000 that was dismissed on statute of limitation grounds. The trial court found that the substantive issues were addressed in the prior action, and granted defendants' motion.

Res judicata bars a subsequent action between the same parties when the facts or evidence essential to the action are identical to those essential to a prior action. *Sewell v Clean Cut Mgt, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001). The doctrine applies to both facts and law. *Jones v State Farm Mut Automobile Ins Co*, 202 Mich App 393, 401; 509 NW2d 829 (1993). The applicability of res judicata is a question of law that is reviewed de novo on appeal. *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004).

Res judicata 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 second case was or could have been resolved in the first; and (4) both actions involved the same parties or their privies. *Baraga County v State Tax Comm*, 466 Mich 264, 269; 645 NW2d 13 (2002); *Peterson Novelty, Inc v City of Berkley*, 259 Mich App 1, 10; 672 NW2d 351 (2003).

The test to determine whether the two actions involve the same subject is whether the facts are identical in both actions or whether the same evidence would sustain both actions.

Adair, supra at 123-124. If the same facts or evidence would sustain both, the two actions are the same for the purpose of res judicata. *Id.* Res judicata bars litigation in the second action not only of those claims actually litigated in the first action, but claims arising out of the same transaction that the parties, exercising reasonable diligence, could have litigated, but did not. *Id.* at 121. A second proceeding is not barred if there are changed or new facts. *Labor Council, Michigan Fraternal Order of Police v Detroit*, 207 Mich App 606, 608; 525 NW2d 509 (1994).

The trial court did not err in finding that the second action was barred by res judicata. Compared with the earlier action, plaintiff has again raised nearly the same claims arising out of the same transaction, i.e., the city's approval of his neighbor's construction of a garage. With reasonable diligence, plaintiff could have brought all of his claims in the prior case.

We affirm.

/s/ William C. Whitbeck

/s/ Kathleen Jansen

/s/ Richard A. Bandstra