

STATE OF MICHIGAN
COURT OF APPEALS

PAUL R. ERVIN, JR.,

Plaintiff-Appellant,

v

THOMAS D. TRIMMER, GREG McCARTNEY,
CHARLES NEFF, THADEUS FIGAC, DAVID
NEWHOUSE, PHILIP NEWHOUSE, MARY
DAHLKE, JOHN OCHMAN, SB VORA,
BIOCAPITAL LLC, WILLIAM HENRY, LARRY
EILER, SANDY EILER, JIM ARTHURS,
RICHARD LANE, and GENESIS
BIOVENTURES, INC.,

Defendants-Appellees.

UNPUBLISHED
December 6, 2005

No. 255379
Washtenaw Circuit Court
LC No. 04-000024-CB

Before: Smolenski, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition based on MCR 2.116(C)(6) and dismissing plaintiff's complaint due to a prior filed case between the parties. We affirm.

This case arises out of the operation of Biotherapies, Inc. (BI). BI's primary business operations dealt with research and development of technologies related to the diagnosis and treatment of cancer, including discovery of a possible cure for breast cancer. BI, however, was not successful financially and multiple lawsuits were brought to determine whose conduct was responsible for the downfall of the company.

On December 1, 2003 Thomas Trimmer and many minority shareholders of BI filed a lawsuit against Paul R. Ervin, Jr., three other members of the Ervin family alleged to be in control of the company, and BI. That lawsuit alleged shareholder oppression, a shareholder's derivative action, and a breach of fiduciary duties. The minority shareholders requested accountings and distribution of the remaining assets of the company.

Subsequently, on January 12, 2004, plaintiff, the majority shareholder of the company, filed a complaint, pro se, requesting a restraining order and other relief. The defendants in the

2004 complaint were comprised of all the plaintiffs of the 2003 complaint as well as Genesis Bioventures, Inc. (GBI), Jim Arthurs, and Richard Lane. The 2004 complaint alleged that the conduct of BI's minority shareholders with GBI and other related businesses detrimentally affected the business of BI, and thereby financially harmed plaintiff individually, BI, and shareholders of BI.

Both cases were assigned to the same trial court. After a hearing in March 2004, the trial court was going to consolidate both cases but, upon objection by plaintiff to that action, instead granted summary disposition in favor of defendants pursuant to MCR 2.116(C)(6).

A trial court's decision to grant summary disposition under MCR 2.116(C)(6) is reviewed de novo. *Fast Air, Inc v Knight*, 235 Mich App 541, 543; 599 NW2d 489 (1999). MCR 2.116(C)(6) states that grounds for summary disposition exist when "[a]nother action has been initiated between the same parties involving the same claim." MCR 2.116(C)(6). That rule, however, does not require that all parties and issues be identical. *JD Chandler Roofing Co, Inc v Dickson*, 149 Mich App 593, 598; 386 NW2d 605 (1986). Rather, the "'complete identity of the parties is not necessary', and the two suits 'must be based on the same or substantially the same cause of action.'" *Id.*, quoting *Ross v Onyx Oil & Gas Corp*, 128 Mich App 660, 666-667; 341 NW2d 783 (1983). The court rule is not operative, however, when the prior suit is no longer pending at the time the motion for summary disposition is decided. *Fast Air, supra* at 545.

The principle question to be decided in both of the underlying cases relates to the operations of BI and what or whose conduct operated to harm the financial viability of the company as well as how the remaining assets of BI should be distributed. The 2003 case was filed by minority shareholders against the corporation, the majority shareholder, and three other shareholders who were alleged to be persons in control of the corporation.

The 2004 case was filed by the majority shareholder against all of the named plaintiffs in the 2003 case as well as GBI, which was closely tied to BI at one time with many business agreements, GBI's principle, and a key employee of a subsidiary company that was initially owned by both BI and GBI. While the specific facts related to each parties' conduct will be distinct, it appears that all facts must be analyzed together in an effort to determine the principle issue of both cases, which is what and whose conduct affected the business of BI.

Based on the substantial similarity in the causes of action and the closely related parties, we hold that the trial court properly granted summary disposition to defendants pursuant to MCR 2.116(C)(6).

Plaintiff also suggests on appeal that summary disposition is not proper because the 2003 case was dismissed in January 2005. Plaintiff's suggestion is without merit. The trial court's order granting summary disposition in the instant case was issued on April 19, 2004. The dismissal of the prior case occurred on January 27, 2005. That provided plaintiff with over nine months to file a counter claim in the prior case and thereby keep the case active allowing his own claims to be heard.

Further, plaintiff suggests that the trial court improperly granted summary disposition because another motion had been filed with the court requesting its disqualification or recusal.

The motion concerning the trial court's disqualification was not before the trial court at the time this motion for summary disposition was heard. Therefore, the trial court did not address the issue of disqualification or recusal during the hearing or in its order that has been appealed. An issue not addressed by the trial court is not properly presented on appeal. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512-513; 667 NW2d 379 (2003). Accordingly, plaintiff's suggestion that the trial court's decision was improperly based on plaintiff's request for disqualification is not properly presented on appeal.

Affirmed.

/s/ Michael R. Smolenski
/s/ Bill Schuette
/s/ Stephen L. Borrello