STATE OF MICHIGAN

COURT OF APPEALS

VOLUNTEERS OF AMERICA MICHIGAN, INC.,

Plaintiff/Counter Defendant-Appellant,

v

GIANNETTI CONTRACTING CORPORATION,

Defendant/Counter Plaintiff-Appellee.

UNPUBLISHED
November 20, 2007

No. 270889
Oakland Circuit Court
LC No. 2006-071810-CK

Before: Wilder, P.J., and Cavanagh and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order dismissing its breach of contract claim as barred by res judicata and declaring Oakland County an improper venue. We reverse the ruling of the trial court and remand for further proceedings consistent with this opinion.

Defendant was a contractor for plaintiff on a project in Pontiac, Michigan. A dispute arose between the two parties and the claim was submitted to arbitration pursuant to the terms of their contract. Ultimately, the arbitrator issued an award and a judgment was filed in that case. Bowen Paving, Inc. (Bowen) was a subcontractor of defendant who had placed a lien on plaintiff's property for payment it was owed under its contract with defendant. During the arbitration, plaintiff entered into a settlement agreement with Bowen that, in part, assigned to plaintiff Bowen's right to sue defendant for $30,000 if Bowen did not sue within six months of the settlement date. Bowen did not sue and plaintiff ultimately filed the instant action against defendant for breach of contract in its representative capacity as Bowen's assignee.

Plaintiff claims on appeal that the trial court erred in granting summary disposition to defendant because res judicata does not apply. We agree. We review de novo a trial court's decision to grant or deny summary disposition. *Monat v State Farm Ins Co*, 469 Mich 679, 682; 677 NW2d 843 (2004). When reviewing summary disposition granted under MCR 2.116(C)(7), "the court may consider all affidavits, pleadings, and other documentary evidence, construing them in the light most favorable to the nonmoving party." *Alcona Co v Wolverine Environmental Production, Inc*, 233 Mich App 238, 246; 590 NW2d 586 (1998). We also review de novo whether res judicata applies to a particular case as a question of law. *Stoudemire v Stoudemire*, 248 Mich App 325, 332; 639 NW2d 274 (2001).

To apply res judicata, three prerequisites must be met: there must be "a prior decision on the merits; the issues must have been resolved in the first case either because they were actually litigated or because they might have been presented in the first action; and both actions must be between the same parties or their privies." *Sloan v Madison Heights*, 425 Mich 288, 295; 389 NW2d 418 (1986). Defendant had the burden of proving the applicability of res judicata to plaintiff's claim. *Baraga Co v State Tax Comm*, 466 Mich 264, 269; 645 NW2d 13 (2002).

Plaintiff concedes that the first case resulted in an arbitration award. Arbitration awards are generally res judicata for a specific case. *Hopkins v Midland*, 158 Mich App 361, 370; 404 NW2d 744 (1987). Accordingly, we find that there is a final decision on the merits and the first prerequisite was met.

The second prerequisite is that the issues involved in the present claim must have been actually litigated or potentially presented. The evidence does not support a finding that the claims were actually litigated. The arbitration award makes two explicit references to Bowen, both in respect to plaintiff's payment of $30,000 in exchange for the lien release. Nothing in the record suggests that Bowen's right to payment under its contract with defendant or the assignment to plaintiff in the settlement agreement, which had yet to vest, were presented in the arbitration. Absent any evidence that Bowen's breach of contract claim was actually litigated, defendant must prove that the claims might have been presented.

Claims that arise from the same transaction that the parties, exercising reasonable diligence, could have raised but did not, are barred by res judicata. *Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004). Neither Bowen nor plaintiff had the ability to bring the claim before the arbitrator. Bowen did not have the power to intervene in the arbitration and Bowen's assignment of the claim to plaintiff did not become effective until well over a month after the arbitration hearings began in July 2006. With Bowen unable to bring its breach of contract claim before the arbitrator and plaintiff having no claim it could raise, the issues were neither actually litigated nor able to be presented.

The third prerequisite is that both actions involve the same parties. Plaintiff concedes that it and defendant are the same parties involved in the arbitration, but argues that it is bringing the current claim in a representative capacity as Bowen's assignee and, therefore, is not precluded from litigating the breach of contract claim. See *Ward v DAIIE*, 115 Mich App 30, 36-37; 320 NW2d 280 (1982).

Here, plaintiff is suing defendant in its representative capacity as Bowen's assignee for breach of contract. As Bowen's assignee, plaintiff acquired the rights and stands in the shoes of Bowen. *Professional Rehabilitations Assoc v State Farm Mut Auto Ins Co*, 228 Mich App 167, 177; 577 NW2d 909 (1998). Bowen would not be bound by the arbitration award and therefore res judicata does not apply. Bowen and plaintiff also are not privies. "To be in privity is to be so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert." *Adair, supra* at 122. Nothing in the record evidences that plaintiff represented Bowen's legal rights under its contract with defendant at the arbitration. Accordingly, the parties in both actions are not the same. Accordingly, it was error for the trial court to dismiss plaintiff's action under the doctrine of res judicata.

We next address the trial court's alternative ground for dismissal that venue was improper. We review a trial court's ruling on improper venue for clear error. *Massey v Mandell*, 462 Mich 375, 379; 614 NW2d 70 (2000). A decision is clearly erroneous if we are left with the definite and firm conviction that a mistake has been made. *Id*. We also review de novo a trial court's statutory interpretation regarding venue. *Colucci v McMillin*, 256 Mich App 88, 93-94; 662 NW2d 87 (2003). In reviewing statutory language, this Court's goal is to determine the legislative intent as reasonably inferred from the words used in the statute. *Massey*, *supra* at 379-380. If the language in the statute is clear and unambiguous, "the statute speaks for itself and there is no need for judicial construction." *Id*. In that situation, "the proper role of the court is to apply the terms of the statute to the circumstances in a particular case." *Id*.

For a contract dispute, proper venue is determined under MCL 600.1621. See *id*. at 389. MCL 600.1621(a) provides as follows:

> Except for actions provided for in sections 1605, 1611, 1615, and 1629, venue is determined as follows:
>
> (a) The county in which a defendant resides, has a place of business, or conducts business, or in which the registered office of a defendant corporation is located, is a proper county in which to commence and try an action.

Defendant correctly stated that under the statute, venue is proper in Macomb County where it is located. Based on the language of the statute, however, it is not the only county where venue is proper. Venue is also proper in a county where defendant conducts business. The issue then is whether defendant had sufficient contacts to be considered conducting business in Oakland County. We find this case analogous to *Shock Bros, Inc v Morbark Industries, Inc*, 97 Mich App 616; 296 NW2d 125 (1980). In *Shock Bros*, we held that venue was proper in Macomb County even though the defendant's business was located in Isabella County. *Id*. at 618-619. The defendant's agents had contracted with plaintiff in Macomb County, contracted for and delivered equipment in Macomb County, and serviced malfunctioning equipment in Macomb County. *Id*. at 619. The defendant's transaction with the plaintiff was "material and significant to the conduct of defendant's business." *Id*. at 619-620.

In the present case, defendant contracted with at least three parties who were Oakland County residents. It provided its contracting services for a job located in Oakland County. Its subcontract with Bowen, an Oakland County resident, was for work to be performed in Oakland County. From these facts, defendant conducted significant contracting business in Oakland County and venue was proper there. "It would be inequitable indeed for a seller to actively solicit and generate sales in one county then seek to change venue when suits arising from these sales contracts are brought in that county by emphasizing the isolated nature of the contacts." *Id.* at 620. Applying this standard, the trial court clearly erred in holding that venue was improper in Oakland County.

Given our conclusion that the trial court erred in granting summary disposition in favor of defendants, we need not address plaintiff's remaining issues on appeal.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood