STATE OF MICHIGAN

COURT OF APPEALS

BRENDA BOGUE,

Plaintiff-Appellant,

v

MICHIGAN POLICE EQUIPMENT COMPANY,

Defendant-Appellee.

UNPUBLISHED
July 22, 2008

No. 278710
Eaton Circuit Court
LC No. 06-001315-CK

Before: Saad, C.J., and Fort Hood and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendant's motion for summary disposition on res judicata grounds. For the reasons set forth in this opinion, we reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff, a former employee of defendant, claimed that she was constructively discharged due to a hostile work environment created by a coworker. The parties agreed to submit the matter to alternative dispute resolution (ADR). In December 2001, they reached a settlement agreement. The agreement did not dispose of plaintiff's claims but required a polygraph examiner to administer examinations to named individuals to determine the prevailing party. In the event plaintiff was found to be the prevailing party, defendant would pay her damages in a stipulated amount. That agreement was never implemented and plaintiff filed suit in 2003, alleging claims for violation of the Michigan Civil Rights Act, MCL 37.2101 *et seq.*, and tortious interference with contractual relationship or business relations as a result of her loss of employment. The parties agreed to settle that case. Although the parties did not execute a formal settlement agreement, counsel agreed first to try to resolve the matter in accordance with the 2001 settlement agreement and, if a prevailing party could not be determined by the polygraph examinations, then the matter would again be submitted to ADR.

Polygraph examinations were administered to plaintiff and one of the named defendants and ostensibly resulted in a finding that plaintiff was the prevailing party. Plaintiff subsequently filed suit in 2006, alleging breach of contract for defendant's failure to honor the terms of the 2001 settlement agreement. The trial court dismissed the action, finding that plaintiff could have included a claim based on the 2001 settlement agreement in the 2003 case and, because she did not, the claim was barred.

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). The trial court's application of the doctrine of res judicata is also reviewed de novo. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007).

"As a general rule, res judicata will apply to bar a subsequent relitigation based upon the same transaction or events . . . ." *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 380; 596 NW2d 153 (1999). The doctrine "bars relitigation of claims actually litigated and those claims arising out of the same transaction that could have been litigated." *Huggett v Dep't of Natural Resources*, 232 Mich App 188, 197; 590 NW2d 747 (1998), aff'd 464 Mich 711 (2001). "For the doctrine to apply (1) the former suit must have been decided on the merits, (2) the issues in the second action were or could have been resolved in the former one, and (3) both actions must involve the same parties or their privies." *Energy Reserves, Inc v Consumers Power Co*, 221 Mich App 210, 215-216; 561 NW2d 854 (1997).

The first and third elements do not appear to be in dispute. The 2003 case was voluntarily dismissed with prejudice, and a voluntary dismissal with prejudice serves as res judicata for all claims that were or could have been raised in the first action. *Limbach v Oakland Co Bd of Co Rd Comm'rs*, 226 Mich App 389, 396; 573 NW2d 336 (1997); *ABB Paint Finishing, Inc v Nat'l Union Fire Ins Co of Pittsburgh*, 223 Mich App 559, 562-563; 567 NW2d 456 (1997). Further, plaintiff and defendant were adverse parties in the prior action.

The focus of the dispute is on the second element. "Res judicata bars relitigation of claims actually litigated and those claims arising out of the same transaction that could have been litigated." *Huggett*, *supra* at 197. "The test for determining whether two claims arise out of the same transaction and are identical for res judicata purposes is whether the same facts or evidence are essential to the maintenance of the two actions. A comparison of the grounds asserted for relief is not a proper test." *Jones v State Farm Mut Auto Ins Co*, 202 Mich App 393, 401; 509 NW2d 829 (1993) (citations omitted), mod on other grounds by *Patterson v Kleiman*, 447 Mich 429, 433-434; 526 NW2d 879 (1994).

The 2003 case arose out of plaintiff's employment and her constructive discharge due to a coworker's harassment and defendant's failure to take appropriate remedial measures. Resolution of that claim depended on whether plaintiff was subjected to a hostile or offensive work environment and whether her employer, having adequate notice of the problem, failed to take steps to correct it. The 2006 case arose not out of the 2001 settlement agreement per se but out of the settlement of the 2003 suit. The parties never implemented the 2001 settlement agreement, causing plaintiff to file the 2003 case on the substantive claims that gave rise to the 2001 ADR. The parties then agreed to settle the 2003 case by first attempting to implement the 2001 settlement agreement. Thus, the 2001 settlement agreement was incorporated by reference as part of the settlement of the 2003 case and plaintiff filed the 2006 case to enforce that part of the 2003 settlement agreement. Resolution of that claim depends on whether the parties had a binding settlement agreement and whether it was fulfilled by either party. Further, it is not possible to include a claim to enforce an agreement to settle a pending lawsuit in the complaint forming the basis of the lawsuit; such a claim does not exist until the suit has been filed and settled. Although it is true that the 2001 presuit settlement agreement was in existence in 2003, a claim to enforce it did not arise out of the same transaction (hostile work environment leading to constructive discharge) giving rise to the 2003 suit. The 2001 settlement could have been

litigated only as a defense to plaintiff's complaint – that the 2003 case was barred by disposition of the claim before commencement of the action. MCR 2.116(C)(7). Therefore, the trial court erred in concluding that the 2006 complaint was barred by res judicata.

Plaintiff further argues that in addition to improperly granting defendant's motion, the trial court erred in denying her cross-motion for summary disposition. The court did not deny the motion, but rather declined to reach it because it found that defendant was entitled to judgment based on res judicata. Because we have not been presented with all facts necessary to determine whether plaintiff was entitled to judgment on her complaint, we decline to address this issue. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994); *Carson Fischer Potts & Hyman v Hyman*, 220 Mich App 116, 119; 559 NW2d 54 (1996).

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

/s/ Henry William Saad
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello