

STATE OF MICHIGAN
COURT OF APPEALS

HAYWOOD HARRISON, P.C., formerly known
as D. HAYWOOD & ASSOCIATES, P.C.,

Plaintiff-Appellant,

v

JOSEPH R. DELENE, MICHAEL A. DELENE,
and WILLIAM A. DELENE,

Defendants-Appellees.

UNPUBLISHED
May 21, 2009

No. 284509
Baraga Circuit Court
LC No. 07-005729-CH

Before: Whitbeck, P.J., and Davis and Gleicher, JJ.

PER CURIAM.

Plaintiff Haywood Harrison, P.C. appeals as of right the trial court's orders granting defendants Joseph R. Delene, Michael A. Delene, and William A. Delene (collectively, the Delene brothers) summary disposition. We affirm.

I. Basic Facts And Procedural History

In September 1997, Haywood Harrison obtained a judgment against its former legal clients, Richard and Nancy Delene, in the amount of \$122,297.31 in the Eaton Circuit Court.¹ In an effort to execute the judgment, Haywood Harrison obtained a sheriff's deed against certain real property owned by Richard and Nancy Delene for \$123,358.93. The sheriff's deed was recorded on June 14, 1999, at the Baraga County Register of Deeds (Liber 36, Pages 368-370). After obtaining the deed, Haywood Harrison learned that title to the property was clouded by four mortgages in favor of Wells Fargo Bank and delinquent property taxes. In an effort to protect its interest in the deeded property, Haywood Harrison paid \$77,038.96 in delinquent property taxes to prevent a scheduled forfeiture sale and paid Wells Fargo Bank \$25,000 to discharge the mortgages. The total amount paid in back property taxes and for discharge of the mortgages was \$102,038.96.

¹ *D Haywood & Assocs, PC v Delene*, Eaton Circuit Docket No. 97-750-CK, September 16, 1997.

In August 2000, Haywood Harrison filed a quiet title action in the Baraga Circuit Court to clear any cloud on the title to the property.² Judge Garfield Hood dismissed the case, finding that the procedure that Haywood Harrison used to obtain the sheriff's deed was invalid because Haywood Harrison failed to advertise the impending sheriff's sale in a publication printed within Baraga County.³ On appeal, this Court upheld Judge Hood's order, concluding that collateral estoppel did not apply because the Eaton County order was a stipulated order between the parties and not decided by the court.⁴ This Court also concluded that res judicata did not apply because the Eaton County order was not a final judgment on the merits because it allowed for modification by stipulations by the parties or further orders of the court and because it did not settle the rights of the parties nor dispose of any issues, except stating that the sale was adjourned.⁵ Last, this Court concluded that Haywood Harrison failed to comply with the MCL 600.6052 notice requirements.⁶

Haywood Harrison continued post-judgment collection of Richard and Nancy Delene, obtained another order to seize property, and scheduled a sheriff's sale for June 24, 2005. On June 17, 2005, Richard and Nancy Delene filed an action in the Baraga Circuit Court to stop the impending sheriff's sale.⁷ But Judge Hood refused to stop the sale, which proceeded as scheduled. At the sale, Richard and Nancy Delene's sons, the Delene brothers, purchased the property as high bidders at the sheriff's sale for \$168,300. A sheriff's deed was issued on September 27, 2006, and the deed was recorded on September 28, 2006, at the Baraga County Register of Deeds (Liber 206, Page 6100).

Haywood Harrison then filed a counterclaim in the June 2005 action filed by Richard and Nancy Delene, seeking to recover from Richard and Nancy Delene the \$102,038.96 paid for the delinquent taxes and discharge of mortgages. Haywood Harrison sought relief under the theories of equitable subrogation and unjust enrichment. Both parties filed competing motions for summary disposition. Judge Hood granted both motions in part and summarily dismissed the case. Haywood Harrison appealed the dismissal to this Court, which upheld the order.⁸ This Court first concluded that the trial court did not err in dismissing Haywood Harrison's equitable subrogation claim because Haywood Harrison was under no legal or equitable duty to make the payments.⁹ This Court then concluded that the trial court did not err in dismissing Haywood

² *D Haywood & Assocs, PC v Fox*, Baraga Circuit Docket No. 00-004832-CH, August 15, 2000.

³ See MCL 600.6052.

⁴ *D Haywood & Assocs, PC v Fox*, unpublished opinion per curiam of the Court of Appeals, issued October 21, 2004 (Docket No. 250574), slip op p 2, citing *Van Pembrook v Zero Mfg Co*, 146 Mich App 87, 103; 380 NW2d 60 (1985) (stating that collateral estoppel does not apply to consent judgments because "nothing is adjudicated between . . . parties to a consent judgment.").

⁵ *Id.* at slip op pp 2-3.

⁶ *Id.* at slip op p 3.

⁷ *Delene v D Haywood & Assocs, PC*, Baraga Circuit Docket No. 05-005461-CH, June 17, 2005.

⁸ *Delene v D Haywood & Assocs, PC*, unpublished opinion per curiam of the Court of Appeals, issued May 18, 2006 (Docket No. 267209).

⁹ *Id.* at slip op pp 2-3.

Harrison's unjust enrichment claim because the tax sale purchaser, not Richard and Nancy Delene, benefited from the payments that Haywood Harrison made.¹⁰ Haywood Harrison's application for leave to appeal to the Michigan Supreme Court was denied.¹¹

In September 2007, Haywood Harrison then filed this action against the Delene brothers, seeking again to recover the \$102,038.96 that it paid and certain personal property. In its four-count complaint, Haywood Harrison alleged theories of unjust enrichment, equity (constructive trust/equitable lien), claim and delivery, and conversion. More specifically, Haywood Harrison alleged that, in keeping with this Court's prior opinion, the Delene brothers were the proper party against which to bring its claims for unjust enrichment and equity. Haywood Harrison's claims for claim and delivery, and conversion were associated with certain personal property that it had placed on the property after it obtained the original sheriff's deed in June 1999. In August 1999, Haywood Harrison transported an electric welder/generator and a 17-foot canoe to the property and placed them in the garage located on the property for storage. Haywood Harrison also placed furniture and fixtures in the home located on the property. But, as stated, the Delene brothers purchased the property in June 2005 at the second sheriff's sale. Haywood Harrison then contacted William Delene to inquire when it could retrieve its personal property. William Delene allegedly confirmed that the personal property was still there, in good condition, and that the items would be available for pick-up after the redemption period ended in September 2006.

In November 2006, Haywood Harrison contacted William Delene to make arrangements to pick-up its personal property. However, William Delene told Haywood Harrison that the items were gone; allegedly, Richard Delene had stolen the property. Haywood Harrison claimed that the stolen items had an estimated value of \$8,700 and that it had suffered \$2,000 in damages for loss of use of the items. Haywood Harrison claimed its loss of the property was due to William Delene's unlawful detention of and refusal to return the property. Haywood Harrison further alleged that William Delene's conduct amounted to conversion because he had wrongfully assumed and exercised dominion over Haywood Harrison's personal property.

The Delene brothers moved for partial summary disposition under MCR 2.116(C)(7) and (C)(10), alleging that the doctrines of res judicata and collateral estoppel barred Haywood Harrison's unjust enrichment and equity claims. The Delene brothers argued that Haywood Harrison was merely seeking to relitigate the same issues that were already litigated in the prior action brought by Richard and Nancy Delene, with whom the Delene brothers were in privity. The Delene brothers further argued that they were bona fide purchasers and that there were no records on file at the Baraga County Register of Deeds pertaining to the litigation involving Haywood Harrison's claims for repayment. Therefore, according to the Delene brothers, a constructive trust/equitable lien could not exist against the property that they now owned when they did not contribute in any way to the underlying conduct that led to Haywood Harrison's payments. The Delene brothers asserted that Haywood Harrison's claims were frivolous.

¹⁰ *Id.* at slip op p 3, citing *First of America Bank-Oakland Macomb, NA v Brown*, 158 Mich App 76, 80; 404 NW2d 706 (1987) ("Under Michigan law, a purchaser at a sheriff's sale takes the property subject to all prior liens.").

¹¹ *Delene v D Haywood & Assocs, PC*, 476 Mich 869; 720 NW2d 317 (2006).

Haywood Harrison responded, arguing that neither res judicata nor collateral estoppel barred its claims. More specifically, Haywood Harrison argued that the in personam nature of its claim for unjust enrichment and the fact that the Delene brothers were not parties to the prior action meant that the Delene brothers were not in privity with Richard and Nancy Delene. In other words, Haywood Harrison argued, the Delene brothers' privity argument was without merit when Haywood Harrison was not asserting claims against the property but against the Delene brothers themselves for the benefits they personally received from Haywood Harrison's mortgage and tax payments. As asserted in its complaint, Haywood Harrison pointed out that this Court previously determined that the Delene brothers were the proper party against which to bring its claims for unjust enrichment and equity. Haywood Harrison also explained that it could not have added the Delene brothers as parties to the prior action because they did not acquire possession of the land until 15 months after the sheriff's sale. Haywood Harrison conceded that its original levy against the property may have been procedurally deficient, but that deficiency did not defeat Haywood Harrison's reasonable belief that it had an interest in the property at the time the payments were made. Last, Haywood Harrison argued that the Delene brothers' contention that they were bona fide purchasers without notice was without merit because they were the sons of Richard and Nancy Delene.

After hearing oral arguments on the motion, the trial court granted the Delene brothers' motion under MCR 2.116(C)(7). The trial court explained that its decision was "based on what the Court of Appeals has said in both of the cases that have gone up thus far," as well as the parties' briefs on the motion for partial summary disposition.

The Delene brothers then moved for summary disposition again, this time under MCR 2.116(C)(8) and (C)(10), seeking dismissal of Haywood Harrison's remaining claims of claim and delivery, and conversion. The Delene brothers argued that Haywood Harrison's claims were essentially bailment claims, and on this point, the Delene brothers argued that they never received nor were promised to receive any consideration from Haywood Harrison and that they never had physical or legal possession of the subject items of personal property. The Delene brothers noted that Haywood Harrison failed to describe the various items of furniture and fixtures with particularity. The Delene brothers also argued that even if they were bailees of the property, Haywood Harrison failed to allege that they were grossly negligent.

Haywood Harrison responded, arguing that, by restating Haywood Harrison's pleadings as bailment claims, the Delene brothers failed to assert any reason why the claims *actually* pleaded by Haywood Harrison should be dismissed. Haywood Harrison argued that it successfully pleaded claims for *claim and delivery* and *conversion*. More specifically, Haywood Harrison argued that it successfully pleaded and supported a claim for claim and delivery because it had the right to possession of its personal property, the Delene brothers unlawfully detained the property, which was under their control, and that Haywood Harrison suffered damages as a result. Haywood Harrison further argued that it successfully pleaded and supported a claim for conversion because the Delene brothers wrongfully exerted dominion over Haywood Harrison's personal property and refused to return the property on demand.

After hearing oral arguments on the motion, the trial court granted the Delene brothers' motion and dismissed the case. Specifically, the trial court's order stated, "For the reasons asserted by Defendants' counsel, summary disposition is hereby granted as to Defendants

Michael A. Delene and Joseph R. Delene pursuant to MCR 2.116(c)(8) [sic]. Summary disposition is hereby granted as to all Defendants pursuant to MCR 2.116(C)(10).”

Haywood Harrison now appeals.

II. Motions for Summary Disposition

A. Standard Of Review

Under MCR 2.116(C)(7), a party may move for summary disposition on the ground that a claim is barred by a prior judgment or other disposition of the claim before commencement of the action. Under MCR 2.116(C)(8), a party may move for summary disposition on the ground that the opposing party has failed to state a claim on which relief can be granted. And under MCR 2.116(C)(10), a party may move for summary disposition on the ground that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law.

Although review under MCR 2.116(C)(8) allows only consideration of the pleadings, our review under MCR 2.116(C)(7) and (10) also must include consideration of all documentary evidence submitted by the parties.¹² More specifically, under MCR 2.116(C)(7), the plaintiff’s well-pleaded factual allegations must be accepted as true and construed in the plaintiff’s favor, unless the movant contradicts them with documentation.¹³ Under MCR 2.116(C)(10), the moving party must specifically identify the undisputed factual issues and support its position with documentary evidence.¹⁴ The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party.¹⁵

We review de novo a trial court’s rulings on motions for summary disposition,¹⁶ a trial court’s application of res judicata,¹⁷ and the applicability of the doctrine of collateral estoppel.¹⁸

B. Res Judicata

1. Basic Principles

Haywood Harrison argues that the trial court erred when it found that the doctrine of res judicata barred Haywood Harrison’s claims for unjust enrichment and equity. Res judicata bars

¹² MCR 2.116(G)(5); *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999); *Johnson v Detroit*, 457 Mich 695, 701; 579 NW2d 895 (1998).

¹³ *Maiden*, *supra* at 119; *Smith v Kowalski*, 223 Mich App 610, 616; 567 NW2d 463 (1997); *Gortney v Norfolk & W R Co*, 216 Mich App 535, 538-539; 549 NW2d 612 (1996).

¹⁴ MCR 2.116(G)(3)(b); *Maiden*, *supra* at 120.

¹⁵ MCR 2.116(G)(4); *Maiden*, *supra* at 120.

¹⁶ *Tillman v Great Lakes Truck Ctr, Inc*, 277 Mich App 47, 48; 742 NW2d 622 (2007).

¹⁷ *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007).

¹⁸ *Minicuci v Scientific Data Mgmt, Inc*, 243 Mich App 28, 34; 620 NW2d 657 (2000).

a subsequent action between parties when the facts or evidence essential to the action are identical to those essential to a prior action.¹⁹ The doctrine applies to both facts and law.²⁰ More specifically, 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.²¹ The burden of establishing the applicability of res judicata is on the party asserting it.²²

2. Decision On The Merits

As the Delene brothers point out, Haywood Harrison appears to concede that this requirement is met; on page 2 of its brief on appeal, Haywood Harrison states: “After successful appeals, the Court’s Order [granting summary disposition and dismissing the action] arguably decided those prior claims on the merits.” Moreover, this Court has held that “a summary disposition ruling is the procedural equivalent of a trial on the merits that bars relitigation on principles of res judicata.”²³ Therefore, this requirement has been met.

3. Final Decree

Neither party disputes that the trial court’s prior order was a final decree that disposed of all the claims and adjudicated the rights and liabilities between Haywood Harrison and Richard and Nancy Delene.²⁴

4. Potential Prior Resolution Of Present Matter

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; if the same facts or evidence would sustain both, the two actions are the same for the purpose of res judicata.²⁵ If different facts or proofs would be required, res judicata does not apply.²⁶ Res judicata bars litigation in the second action not only of those claims actually litigated in the first

¹⁹ *Sewell v Clean Cut Mgt, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001); *Chestonia Twp v Star Twp*, 266 Mich App 423, 429; 702 NW2d 631 (2005).

²⁰ *Jones v State Farm Mutual Automobile Ins*, 202 Mich App 393, 401; 509 NW2d 829 (1993).

²¹ *Washington, supra* at 418; *Richards v Tibaldi*, 272 Mich App 522, 531; 726 NW2d 770 (2006).

²² *Baraga Co v State Tax Comm*, 466 Mich 264, 269; 645 NW2d 13 (2002).

²³ *Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 510; 686 NW2d 770 (2004).

²⁴ See MCR 7.202(6)(a)(i).

²⁵ *Adair v Michigan*, 470 Mich 105, 123-124; 680 NW2d 386 (2004), on rem 267 Mich App 583 (2005), vacated 474 Mich 1073 (2006), on rem 279 Mich App 507 (2008); *Huggett v DNR*, 232 Mich App 188, 197-198; 590 NW2d 747 (1998), aff’d 464 Mich 711 (2001); *In re Koernke Estate*, 169 Mich App 397, 399; 425 NW2d 795 (1988).

²⁶ *PT Today, Inc v Comm’r of Financial & Ins Services*, 270 Mich App 110, 146; 715 NW2d 398 (2006).

action, but claims arising out of the same transaction that the parties, exercising reasonable diligence, could have litigated but did not.²⁷ “The transactional test provides that the assertion of different kinds or theories of relief still constitutes a single cause of action if a single group of operative facts give rise to the assertion of relief.”²⁸

In the first proceeding, Haywood Harrison sought to recover from Richard and Nancy Delene the funds that it expended to pay the delinquent taxes and discharge the mortgages on the property once owned by Richard and Nancy Delene. Specifically, Haywood Harrison alleged entitlement to reimbursement under the theories of equitable subrogation and unjust enrichment. After dismissal of that case, Haywood Harrison then brought this second action, again seeking to recover the same funds from the Delene brothers and again alleging unjust enrichment and equity.

As the Delene brothers point out, both actions involved the same real estate, the payment of the same funds, the same motivation for Haywood Harrison making the payments, and the same motivation behind Haywood Harrison seeking recovery. In sum, the same set of operative facts gave rise to the assertion of relief in both actions. Therefore, this requirement has been met.

5. Same Parties Or Privies

Here, the prior proceeding involved claims between Haywood Harrison and Richard and Nancy Delene. The present action involved Haywood Harrison’s claims against the Delene brothers. Therefore, Haywood Harrison argues that the parties to the two actions are not the same. However, the parties to the second action need be only substantially identical to the parties in the first action, in that the rule applies to both parties and their privies.²⁹

Privity requires a substantial identity of interests and a relationship in which the interests of the nonparty were presented and protected by the litigant.³⁰ As to private parties, a privy includes a person so identified in interest with another that he represents the same legal right.³¹ It also includes one who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through one of the parties, as by inheritance, succession, or purchase.³²

²⁷ *Adair, supra* at 121.

²⁸ *Washington, supra* at 420 (quotation and citation omitted).

²⁹ *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 12; 672 NW2d 351 (2003).

³⁰ *ANR Pipeline Co v Dep’t of Treasury*, 266 Mich App 190, 214; 699 NW2d 707 (2005).

³¹ *Adair, supra* at 122; *Peterson Novelties, supra* at 12-13.

³² *Peterson Novelties, supra* at 13.

Here, the Delene brothers acquired an interest in the real property affected by the prior judgment when they purchased it at the sheriff's sale. And a buyer at a sheriff's sale takes the property subject to all prior rights and liens.³³ Therefore, this requirement has been met.

Accordingly, we conclude that the trial court did not err when it found that the doctrine of res judicata barred Haywood Harrison's claims for unjust enrichment and equity. Further, given our resolution of this issue, we need not address Haywood Harrison's claims under the doctrine of collateral estoppel.

C. Claim And Delivery And Conversion

Haywood Harrison argues that the trial court erred in dismissing its claims for claim and delivery, and conversion. "MCL 600.2920(1) provides that a civil action for 'claim and delivery' may be brought to recover possession of any goods or chattels that have been unlawfully taken or unlawfully detained and to recover damages attendant to the unlawful taking or detention." "The tort of conversion is defined as 'any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein.'"³⁴ Conversion is an intentional tort.³⁵

Here, when Haywood Harrison contacted William Delene after the sheriff's sale, William Delene told Haywood Harrison that it was welcome to come retrieve its personal property once the redemption period expired and the Delene brothers acquired full possession of the property. However, upon expiration of the redemption period, it was discovered that Haywood Harrison's personal property was gone. As averred in the Delene brothers' affidavits in support of summary disposition, they never had physical or legal possession of the personal property. Haywood Harrison offers no valid argument or evidence in support of its claim that any of the Delene brothers unlawfully took or detained Haywood Harrison's personal property, nor that they intentionally exerted wrongful dominion over the personal property.

Affirmed. The Delene brothers, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ William C. Whitbeck

/s/ Alton T. Davis

/s/ Elizabeth L. Gleicher

³³ *McKay v Kulburn*, 42 Mich 614; 4 NW 539 (1880); *First of America Bank-Oakland Macomb, NA*, *supra* at 80.

³⁴ *Head v Phillips Camper Sales*, 234 Mich App 94, 111; 593 NW2d 595 (1999), quoting *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992).

³⁵ *Mich Nat'l Bank v Mich Livestock Exchange*, 432 Mich 277, 282; 439 NW2d 884 (1989).