STATE OF MICHIGAN

COURT OF APPEALS

LANDMARK CONTRACTING COMPANY, Plaintiff-Appellant,	UNPUBLISHED August 4, 2009
v	No. 285779 Oakland Circuit Court
ATLANTIS DEVELOPMENT COMPANY, INC. and RAAD ASMAR, a/k/a ROBERT ASMAR, Defendants-Appellants.	LC No. 2007-087045-CK

Before: Talbot, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

The trial court granted summary disposition in defendants' favor because in a previous arbitration proceeding filed by Plaintiff, Landmark Contracting Company, against defendant, Atlantis Development Company, Landmark failed to join defendant Raad Asmar, a defendant named in the present case, and because res judicata precluded the present case. We reverse and remand.

This case arises out of construction at the St. George Caldean Catholic Church in Shelby Township. Defendant Atlantis Development, Inc., the general contractor for the project, entered into a subcontract with plaintiff Landmark Contracting, Inc., on November 7, 2002, to perform underground work on the project. Defendant Asmar is the agent and president of Atlantis and signed the contract in that capacity.

However, a dispute arose between Landmark and Atlantis over the amount Atlantis owed Landmark for the work it performed. Landmark sued Atlantis for breach of contract and filed a demand for arbitration on June 13, 2002. Landmark received an arbitration award on January 5, 2006, in the amount of $261,767.02, which was confirmed in a judgment entered in Macomb Circuit Court on July 24, 2006.[1]

Subsequently, Landmark filed a complaint against defendants in Oakland Circuit Court alleging defendants violated the Michigan Builder's Trust Fund Act (MBTFA), MCL 570.151, *et*

[1] The judgment provided for additional interest for a total award of $267,970.54.

seq., by not paying money owed to Landmark that was paid to defendants from the church. Landmark noted in its complaint that it obtained a judgment against Atlantis in the amount of $261,767.02. Landmark's complaint alleged in part:

> 3. That Defendant Raad (Robert) Asmar (ASMAR) is an individual who is the President and agent for Atlantis . . .
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> * * *
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> 11. ATLANTIS was paid by the Owner, the Chaldean Catholic Church of the USA (St. Joseph Chaldean Catholic Church) in the amount of over $10,000,000.
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> 12. The payment by the Chaldean Catholic Church of the USA (St. Joseph Chaldean Catholic Church) to ATLANTIS constitutes a trust fund for the benefit of the labor and material suppliers to the Project, St. George Chaldean Catholic Church with ATLANTIS' President and agent, Raad (Robert) Asmar, as the trustee in accordance with the Michigan statute MCLA 570.151 et sec. [sic]
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> 13. The failure of ASMAR to pay LANDMARK, the beneficiary of the trust fund is a breach of the trust subjecting ASMAR To [sic] criminal sanctions as provided in the Michigan statute.
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> 14. LANDMARK has a civil remedy for the failure of ASMAR to pay LANDMARK from the trust.
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> 15. The failure of ASMAR to pay LANDMARK caused damage to LANDMARK in the amount of $261,767.02 plus interest at the statutory rate from July 24, 2006.
>
> WHEREFORE, Plaintiff Landmark Contracting Company, Inc., prays that this Honorable Court will find in its favor against Defendant ASMAR in the amount of $261,767.02 plus interest, costs and attorney's fees.

Defendant Raad moved for summary disposition, arguing that pursuant to MCR 2.203(A)[2] he was entitled to summary disposition because Landmark failed to join him in the arbitration action against Atlantis. Defendants also argued that res judicata precluded the suit. In response, Landmark argued that Asmar was not a party to the breach of contract action, that

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[2] This compulsory joinder court rule states:

> In a pleading that states a claim against an opposing party, the pleader must join every claim that the pleader has against that opposing party at the time of serving the pleading, if it arises out of the transaction or occurrence that is the subject matter of the action and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction.

the MBTFA claim had not yet ripened at the time of the prior action, and that the imposition of a trust under the law creates liability in any corporate officer who received money and failed to ensure that subcontractors were paid.

A hearing was held on the motion on May 14, 2008. The court held that res judicata applied because the same parties or their privies were involved in both actions, the first action was decided on the merits, and the MBTFA claim could have been litigated in the prior action. The court also found that the MBTFA claim arose out of the same transaction or occurrence as the original breach of contract arbitration because it was based on the failure of Atlantis to pay Landmark after the church had paid Atlantis. The court ruled that the action under the MBTFA was precluded by the compulsory joinder rule in MCR 2.203(A).

Landmark argues that the trial court erred by granting summary disposition in favor of Asmar on the ground that Landmark's claim under the MBTFA is precluded by res judicata or the compulsory joinder rule. This Court reviews both applications of res judicata and decisions on motions for summary disposition de novo as questions of law. *Wayne Co v Detroit*, 233 Mich App 275, 277; 590 NW2d 619 (1998).[3]

The trial court erred in granting summary disposition for Asmar on the ground that he was not joined in the Macomb County action against Atlantis. Res judicata—not the joinder rules—was the proper analytical tool for deciding whether plaintiff was estopped from filing a subsequent suit against Asmar. The analysis of the facts under res judicata indicates that Landmark may file a separate action against Asmar for alleged MBTFA violations because his individual liability under the act is not in privy with the interests of the company.

The trial court ruled that Landmarks' claims against Asmar in the present case should have been joined with Landmark's claim against Atlantis. However, MCR 2.203(A) was not the correct ground for dismissing this case in Asmar's favor. The correct question that should have been raised and decided by the trial court was whether plaintiff's claim was barred by the doctrine of res judicata.

"Michigan law defines res judicata broadly to bar litigation in the second action not only of those claims actually litigated in the first action, but *also claims arising out of the same transaction that the parties, exercising reasonable diligence, could have litigated but did not*." *Peterson Novelties, Inc v City of Berkeley*, 259 Mich App 1, 11; 672 NW2d 351 (2003) (Emphasis added). In *Rogers v Colonial S & L*, 405 Mich 607, 618; 275 NW2d 499 (1979),

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[3] We initially note that both defendant Atlantis and defendant Asmar are named as defendants in the complaint in the present case. However, a review of the complaint reveals that Landmark is only seeking damages from defendant Asmar in his individual capacity in this action. Additionally, contrary to Asmar's assertion in his brief, Landmark is not seeking to get a "double recovery." Rather, Landmark is simply seeking to be paid for the work it performed as a subcontractor on the project. Landmark is seeking in this action to be paid the amount of the judgment rendered in the arbitration action.

overruled on other grounds in *Al-Shimmari v Detroit Medical Center*, 477 Mich 280; 731 NW2d 29 (2007), our Supreme Court noted that MCR 2.203(A) is "grounded on the same general policy considerations as the doctrine of res judicata." However, this does not put the rule in a category as a defense in subsequent actions. As will be demonstrated, whether a party is barred from bringing a *subsequent* action in a separate suit against a party is a determination to be made within the analytical framework of res judicata. As plainly noted above in *Peterson Novelties, supra*, 259 Mich at 11, res judicata is the rule that bars "claims arising out of the same transaction that the parties, exercising reasonable diligence, could have litigated but did not."

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).

In this case, requirements one and two are satisfied here because a judgment was entered in Landmark's favor against Atlantis on July 24, 2006. Additionally, the third requirement, that the present case could have been resolved in the Atlantis lawsuit, is also satisfied because it stems from the same facts alleged by Landmark in this case: that defendants failed to pay it the money it was owed after the church paid Atlantis for the work done by Landmark. Clearly, this action could have been brought in the Macomb County action against Atlantis.

The critical inquiry then is whether Asmar, individually, was the same party or privy to Atlantis. "Regarding private parties, a privy includes a person so identified in interest with another that he represents the same legal right, such as a principal to an agent, a master to a servant, or an indemnitor to an indemnitee." *Peterson Novelties, supra* at 12-13. "In order to find privity between a party and a nonparty, Michigan courts require "both a substantial identity of interests and a working or functional relationship . . . in which the interests of the non-party are presented and protected by the party in the litigation." *Id.*, quoting *Phinisee v Rogers*, 229 Mich App 547, 553-554; 582 NW2d 852 (1998).

In *Wildfong v Fireman's Fund Ins Co*, 181 Mich App 110, 114; 448 NW2d 722 (1989), the plaintiffs Edwin and Loula Wildfong, filed an action on behalf of their company, Wildfong Aluminum Products, against its insurance company. The action was later settled at the direction of the Wildfongs, but the plaintiffs then filed a separate action against the insurer in their individual capacity alleging similar claims. *Id.* On appeal, the plaintiffs argued that the trial court erred in granting the defendants' motion for summary disposition because "the first action against defendants was brought by the family-owned corporation and was settled by plaintiffs in their corporate, not individual capacities, they remained free to file a second lawsuit . . . ." *Id.* at 114-115. The *Wildfong* Court noted:

> Where a person brings an action or is sued in his individual right, a judgment rendered for or against him is not operative under the doctrine of res judicata in a subsequent action brought by or against the same person in a representative capacity. Similarly, a judgment rendered in an action in which one of the parties appears in a representative capacity is not operative under the doctrine of res judicata in a subsequent action involving the same party in his individual right. *These rules have been denied application, however, where a party to one action in his individual capacity and to another action in his representative capacity is*

> *in each case asserting or protecting his individual rights.* [*Id.* at 115, quoting *Howell v Vito's Trucking and Excavating Co,* 368 Mich 37, 43; 191 NW2d 313 (1971).]

In this case, it is undisputed that Asmar was not named as a party in the arbitration action against Atlantis. More importantly though, even if he had been named as a representative member of Atlantis in that action, the claim asserted in this case is a claim against defendants' *individual* liability. As will be demonstrated below, an action under the MBTFA may be maintained against individual officers of a contractor that has violated the act. Asmar's potential individual liability also demonstrates that his private interest was not represented in the breach of contract action against Atlantis.

Again, privity exists when the interests of the non-party are presented and protected by the party in the litigation. *Peterson Novelties, supra* at 13. Atlantis' company liability on a breach of contract claim does not present Asmar's individual liability interests under the MBTFA. The trial court erred by granting summary disposition in favor of Asmar on the ground that res judicata precluded the present action.

Although the MBTFA is a penal statute, this Court in *DiPonio Constr Co v Rosati Masonry Co,* 246 Mich App 43, 48; 631 NW2d 259 (2001), stated the following on the civil penalty allowed under the penal statute:

> The builders' trust fund act is a penal statute that does not expressly provide a civil cause of action. However, our Supreme Court has long recognized a civil cause of action for violation of the provisions of the act. In *B F Farnell Co v Monahan,* 377 Mich 552, 555; 141 NW2d 58 (1966), the Court cited the longstanding principle that when a statute provides a beneficial right but no civil remedy for its securance, the common law on its own hook provides a remedy, thus fulfilling law's pledge of no wrong without a remedy." The Court therefore recognized a "common-law remedy" in favor of those aggrieved by a contractor or subcontractor's violation of the act. *Id.* at 557. The Court has twice reaffirmed that decision. *In re Certified Question,* 411 Mich 727, 732; 311 NW2d 731 (1981); *National Bank of Detroit v Eames & Brown, Inc,* 396 Mich 611, 620-621; 242 NW2d 412 (1976).

The MBTFA imposes a trust on funds paid to contractors and subcontractors for products and services provided under construction contracts. MCL 570.151. An individual officer of a contractor or subcontractor on a construction project may be found liable for the diversion of contract funds contrary to the provisions of the MBTFA. *People v Brown,* 239 Mich App 735, 740-741; 610 NW2d 234 (2000). The statute provides in its entirety:

> Sec. 1. In the building construction industry, the building contract fund paid by any person to a contractor, or by such person or contractor to a subcontractor, shall be considered by this act to be a trust fund, for the benefit of the person making the payment, contractors, laborers, subcontractors or materialmen, and the contractor or subcontractor shall be considered the trustee of all funds so paid to him for building construction purposes.

> Sec. 2. Any contractor or subcontractor engaged in the building construction business, who, with intent to defraud, shall retain or use the proceeds or any part therefore, of any payment made to him, for any other purpose than to first pay laborers, subcontractors and materialmen, engaged by him to perform labor or furnish material for the specific improvement, shall be guilty of a felony in appropriating such funds to his own use while any amount for which he may be liable or become liable under the terms of his contract for such labor or material remains unpaid, and may be prosecuted upon the complaint of any persons so defrauded, and, upon conviction, shall be punished by a fine of not less than 100 dollars or more than 5,000 dollars and/or not less than 6 months nor more than 3 years imprisonment in a state prison at the discretion of the court.
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> Sec. 3. The appropriation by a contractor, or any subcontractor, of any moneys paid to him for building operations before the payment by him of all moneys due or so to become due laborers, subcontractors, materialmen or others entitled to payment, shall be evidence of intent to defraud. [MCL 570.151-153.]

According to *Brown, supra* at 741, an officer or employee of a corporation can be held liable under the MBTFA.

> [I]t is beyond question that a corporate employee or official is personally liable for all tortuous or criminal acts *in which he participates*, regardless of whether he was acting on his own behalf or on behalf of the corporation. *Attorney General v Ankersen*, 148 Mich App 524, 557; 385 NW2d 658 (1986). This rule of law has been used by this Court to extend criminal liability to corporate employees when they, *personally*, caused their corporation to act unlawfully. [*Id.* at 739-740; Emphasis added.]

In this case, it is undisputed that Asmar is a "corporate employee"—in some capacity, and subject to potential individual liability under the MBTFA. However, in granting Asmar summary disposition, the trial court did not rule on the merits of Landmark's underlying claim under the MBTFA. Instead, the trial court erroneously ruled on procedural grounds that plaintiff failed to properly join Asmar in a previous action against Atlantis.

We reverse the order granting summary disposition in favor of Asmar and remand the case to the trial court for further proceedings. Jurisdiction is not retained.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra