STATE OF MICHIGAN

COURT OF APPEALS

FAIRWAYS DEVELOPMENT OF NORTHERN MICHIGAN, INC., and RESORT NORTH DEVELOPMENT COMPANY, INC.,

Plaintiffs-Appellants,

v

SPL OF BLOOMFIELD, LLC, and KURT LAFAVE,

Defendants-Appellees.

UNPUBLISHED
November 12, 2009

No. 286680
Emmet Circuit Court
LC No. 08-001203-CH

Before: Murphy, C.J., and Meter and Beckering, JJ.

MURPHY, C.J. (*dissenting*).

Because I conclude that all of the elements of res judicata were satisfied and that the trial court was thus correct in dismissing the case under MCR 2.116(C)(7), I respectfully dissent.

In the first lawsuit, Chestnut Hills Links, LLC, and Chestnut Hills Golf Club, Inc. (hereinafter collectively referred to as "Chestnut"), sued, among other defendants, Fairways Development of Northern Michigan, Inc., and Resort North Development Company, Inc. (hereinafter collectively referred to as "Fairways"), along with SPL of Bloomfield, LLC ("SPL"). The counts alleged were specific performance, quiet title, trespass, nuisance in fact, forcible entry and detainer, waste, tortious interference with contractual relations, slander of title, declaratory judgment, and breach of real estate broker's duty. The action concerned a golf course and surrounding development property (the "property"). Chestnut asserted that Fairways owned the property, that the property was subject to mortgages held by First Community Bank, that Fairways defaulted on the mortgages, that the property was foreclosed on, that a foreclosure sale had taken place, and that a sheriff's deed was issued to the bank after it submitted the highest bid. The bank later assigned its rights to National Sign & Signal, Inc. ("NSS").

There was a flurry of negotiations during the six-month redemption period arising out of an effort by Fairways to arrange for a sale of the property. Chestnut alleged that after a proposed sale with another party fell through, Chestnut entered into a purchase agreement with Fairways to buy the property two days before the redemption period was set to expire, with the proceeds upon closing to go to redeeming the property. However, when Chestnut and Fairways were in the process of closing on the sale, a letter was received indicating that SPL had redeemed the property. NSS had executed and recorded a certificate of redemption, which indicated that NSS

had received a sum from SPL in full redemption of the deed. Chestnut alleged that SPL lacked legal standing to redeem the property. SPL's position was that it did not intend to "redeem" the property, but rather it had just intended to purchase NSS's interest. The dispute apparently focused on the timing of the closing between Chestnut and Fairways and the timing of SPL's purchase or redemption from NSS, all in relation to the expiration date of the redemption period.

With respect to the specific performance claim, Chestnut sought an order precluding SPL and other named defendants from interfering with the closing on the property, along with an order requiring Fairways to perform its obligations under the purchase agreement and to close on the property. With respect to the quiet-title claim, Chestnut alleged that Fairways held legal and equitable title to the property and that, after consummation of the sale by court order, title to the property would rest with Chestnut. It is unnecessary to review the numerous additional counts alleged by Chestnut as they did not pertain to Fairways, except for the count seeking a declaratory judgment, which essentially reiterated the requests in the specific performance and quiet-title claims. In its answer and affirmative defenses, SPL claimed that legal and equitable title had vested in SPL. Motions for summary disposition were denied. In regard to a motion for summary disposition brought by SPL, Fairways responded that SPL's inequitable action of redeeming the property at the last minute merited an equitable extension of the redemption period.

Subsequently, Chestnut wished to voluntarily dismiss the action, and SPL was in agreement. They both agreed to a dismissal with prejudice, but Fairways objected to a dismissal with prejudice because it wanted to keep its avenues open for litigating title. Fairways, however, did not file a cross-claim against SPL, or seek leave to file such a claim, after learning of Chestnut's decision to dismiss. At the hearing on Chestnut's motion for voluntary dismissal, all the parties acknowledged that Fairways had, for the most part, sat back and allowed Chestnut to litigate the action and to incur the bulk of the litigation costs in battling the claims over ownership of the property even though Fairways had essentially aligned itself with Chestnut and against SPL. Counsel for Fairways, however, did indicate that Chestnut did not represent Fairways' interests and lacked standing to do so, but he later stated that Fairways "certainly . . . wanted to cooperate" with Chestnut "in any fashion that it could to accomplish the goal, which was to close [on] this property."[1] Counsel for Chestnut stated that Fairways "really ha[d] [not] done anything in this case." At no time during the suit did Fairways file or seek permission to file a claim, cross or otherwise, against SPL or any other party. At the hearing, Chestnut simply indicated that it wanted out of the suit because the litigation had become overwhelming as to time and costs.[2] Chestnut felt that Fairways should and was obligated to litigate the claims – "This is a fight between Fairways and SPL." Fairways' attorney pointed out that SPL had not

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[1] Later in the hearing, Fairways took the position that Chestnut filed the complaint in a fashion that was not what Fairways wanted, although Fairways went along with it because Chestnut was pursuing an action that would have allowed a closing.

[2] When the trial court asked counsel for Chestnut who would end up with the golf course, counsel replied, "Whoever." There was no agreement with regard to which party owned the property; Chestnut simply wanted out of the litigation.

filed any claim to quiet title against Fairways in the suit, even though "title should properly be in the last title, fee title holder's name, which would be [Fairways]. And, yet, there's a Quit Claim Deed out there . . . to SPL." Fairways argued that if SPL wanted finality, it should have filed a cross-claim against Fairways. But I note that Fairways did inform the court that SPL was the party in actual possession of the property. Counsel for Fairways also indicated that title had to be quieted, whether by way of cross or counter claims in the present action or in a new action. Fairways' counsel further stated, "I would suggest that the better route in this instance is to have a without prejudice or give 30 days or 40 days or whatever this Court deems is appropriate for the part[ies] to file counter claims or cross claims." Fairways, however, did not specifically request permission for it to file a cross-claim. Fairways additionally argued that nothing would be accomplished or resolved as to quieting title if there was a dismissal with prejudice; rather, it would cause the need to litigate the issue in the future, increasing the parties' costs and giving rise to potential res judicata arguments. Res judicata implications were bandied about at the hearing. The trial court finally ruled as follows:

> The Court will grant the Motion to Dismiss with prejudice. Implications of that, if any, will be determined, if necessary, in the future. And, no costs.[3]

Even though Fairways had challenged entry of the order dismissing the action with prejudice and was concerned about res judicata implications, Fairways chose not to appeal the trial court's ruling to this Court.

Before turning to the action at bar, I shall make a few observations regarding the underlying lawsuit filed by Chestnut. First, despite the fact that SPL was in actual possession of the property and that Fairways was of the opinion that Chestnut did not represent its interests, lacked standing to represent its interests, and filed the complaint in a fashion that Fairways found disagreeable, Fairways nonetheless did not bother to file a cross-claim against SPL to protect its own claim to an interest in the property. Second, while it is somewhat understandable that Fairways initially held off filing its own claim given that Chestnut's action requested relief that would recognize Fairways' interest in the property, I find it completely unreasonable for Fairways not to have immediately attempted to file a cross-claim against SPL after Chestnut first indicated that it wished to voluntarily dismiss the action against SPL, especially where a dismissal with prejudice was contemplated. Finally, despite the trial court's order dismissing the action with prejudice, which Fairways had fought against and which effectively left SPL in full possession of the property, and despite the fact that Fairways expressly recognized the potential res judicata effect of the order, Fairways did not appeal the ruling to this Court. It is reasonable to conclude that Fairways did not act diligently and sat on its rights relative to the first lawsuit.

Subsequently, Fairways filed the instant suit against SPL, alleging claims of quiet title as to real property, quiet title as to personal property, equitable relief, conversion, interference with contractual relations, civil conspiracy, and breach of contract. SPL filed a motion for summary disposition under MCR 2.116(C)(7), asserting that res judicata barred the action by Fairways. At

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[3] I note that a voluntary dismissal entered by order of the court operates as a dismissal without prejudice, "[u]nless the order specifies otherwise[.]" MCR 2.504(A)(2)(b).

the hearing on the motion, the parties acknowledged that SPL was and had been in possession of the property and was operating the golf course. The trial court ruled that the doctrine of res judicata applied, finding that there was a prior decision on the merits, where caselaw provided that a voluntary dismissal with prejudice acted as an adjudication on the merits, that Fairways and SPL were both parties in the prior suit, that Fairways was also a privy of Chestnut, and that the issues and matters in the instant suit could have been resolved in the first suit with the exercise of reasonable diligence. Finally, the trial court observed:

> Certainly Fairways could have filed a cross claim to assert that claim in their own name rather than tagging along with the then plaintiff, Chestnut . . ., as they did. [Fairways] chose not to do that, the case was dismissed and the court believes that the implications of that have been made clear today.
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> The present suit is barred by res judicata and the Court grants the motion for summary disposition.

On appeal to this Court, Fairways challenges the trial court's ruling, arguing that the elements of res judicata were not satisfied. I do not agree.

We review de novo a trial court's decision on a motion for summary disposition as well as the issue of whether the doctrine of res judicata bars a subsequent lawsuit. *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 686; 762 NW2d 529 (2008). With respect to a motion for summary disposition predicated on res judicata and brought under MCR 2.116(C)(7), the following principles apply:

> Under MCR 2.116(C)(7) (claim barred by prior judgment, i.e., res judicata), this Court must consider not only the pleadings, but also any affidavits, depositions, admissions, or other documentary evidence filed or submitted by the parties. The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. This Court must consider the documentary evidence in a light most favorable to the nonmoving party. If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide. If a factual dispute exists, however, summary disposition is not appropriate. [*RDM Holdings, supra* at 687 (citations omitted).]

In *Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004), our Supreme Court set forth the applicable test with respect to the doctrine of res judicata:

> The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action. The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first. *Sewell v Clean Cut Mgt, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001). This Court has taken a broad approach to the doctrine of res judicata, holding that it bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence,

could have raised but did not. *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999).

Additionally, the decree in the prior action must have been a final decision. *Richards v Tibaldi*, 272 Mich App 522, 531; 726 NW2d 770 (2006). "The burden of establishing the applicability of res judicata is on the party asserting the doctrine." *Id.*

Although the issue is not reached by the majority, I conclude that the underlying action was decided on the merits. A voluntary dismissal with prejudice constitutes a decision on the merits for purposes of res judicata. *Limbach v Oakland Co Rd Comm*, 226 Mich App 389, 395; 573 NW2d 336 (1997); *Mitchell v Dahlberg*, 215 Mich App 718, 724; 547 NW2d 74 (1996); *Larkin v Otsego Mem Hosp Ass'n*, 207 Mich App 391, 394; 525 NW2d 475 (1995); *In re Koernke Estate*, 169 Mich App 397, 400; 425 NW2d 795 (1988); *Brownridge v Michigan Mut Ins Co*, 115 Mich App 745, 748; 321 NW2d 798 (1982). Considering that Chestnut had alleged that Fairways rightfully held title to the property and had contracted to convey title to Chestnut, and given that SPL maintained that it held legal title to the property, the dismissal of Chestnut's quiet-title action with prejudice necessarily resulted in quieting title in favor of SPL. Furthermore, SPL was and is in possession of the property and operating the golf course, and the dismissal order effectively left SPL in legal possession of the property, considering that the trespass, forcible entry and detainer, quiet-title, and other claims were dismissed with prejudice. Additionally, I find that the trial court's order in the first suit that dismissed the action constituted a final decision for purposes of res judicata.

Jumping to the third element of res judicata, as reflected above in *Adair* and which element is also not reached by the majority, I find that the claims and issues raised by Fairways in the instant suit could and should have been raised and resolved in the first suit had Fairways actually exercised reasonable diligence or even proceeded with a semblance of being engaged in the suit.

With respect to the "same parties" element of res judicata, the majority states that, while SPL and Fairways were parties in both the first and second lawsuits, the doctrine of res judicata required SPL and Fairways to have been adversarial parties in the suits. The majority acknowledges that Fairways and SPL had certain adversarial interests in the prior suit, but ultimately neither party filed any claims against each other. Thus, according to the majority, SPL and Fairways were not sufficiently adversarial for purposes of applying res judicata. The majority then moves on to address the issue of whether Chestnut and Fairways were privies.

Requiring the parties to have previously held adversarial positions in order to satisfy the "same parties" element of res judicata is a principle reflected in and arising from older appellate decisions. *York v Wayne Co Sheriff*, 157 Mich App 417, 426-427; 403 NW2d 152 (1987); *Johnson v Bundy*, 129 Mich App 393, 401-402; 342 NW2d 567 (1984); *Eyde v Meridian Charter Twp*, 118 Mich App 43, 52-53; 324 NW2d 775 (1982); *Gomber v Dutch Maid Dairy Farms, Inc*, 42 Mich App 505, 511-512; 202 NW2d 566 (1972); *Cook v Kendrick*, 16 Mich App 48, 51-52; 167 NW2d 483 (1969).

In *York, supra* at 427, this Court found that res judicata was applicable, even though the matter at issue had not actually been litigated in a former suit involving the same parties, where "a controversy certainly existed between them" on the particular matter and should have been

pursued in the former action.[4] In *Gomber, supra* at 511, this Court indicated that codefendants having a controversy between them can satisfy the adverse-party requirement. I conclude that SPL and Fairways were adverse parties in the first suit as there was undoubtedly a controversy between them over property ownership, despite the fact that no claims were actually filed against each other. The majority rests its decision solely on the basis that no claims were filed by SPL and Fairways against each other. Respectfully, I cannot accept this reasoning. Fairways and Chestnut had executed a purchase agreement in regard to the property, and they were clearly aligned together in a battle against SPL relative to fee ownership rights in the property. Fairways chose not to file a cross-claim against SPL because it had the opportunity to ride the coattails of Chestnut, not because it lacked an interest adverse to SPL, and Fairways' decision to rely on Chestnut reflected that Fairways and SPL necessarily held adverse positions. Fairways challenged SPL's motion for summary disposition in the prior lawsuit, and it cannot reasonably be disputed that Fairways was not in agreement with SPL's claim that SPL was the legal and equitable owner of the property. Furthermore, Fairways certainly took a position adverse to SPL with respect to whether the dismissal should be with or without prejudice. Throughout the hearing on the motion for voluntary dismissal, Fairways referenced the competing claims to title as between itself and SPL. Additionally, the proposition that a claim actually had to be filed in order for the parties to be adverse would appear to directly conflict with that element of res judicata providing for its applicability where a party could have but did not raise a claim in the first suit. *Adair, supra* at 121. Res judicata is broadly applied in Michigan. *Id.* Importantly, the majority's ruling also creates tension and an irreconcilable conflict with the court rules, which I shall discuss below.

Moreover, even if Fairways and SPL were not technically adverse because no cross-claim was filed, application of res judicata is not necessarily precluded. In *Eyde, supra* at 52-53, this Court stated:

> We recognize that for res judicata to apply, both actions must involve the same parties or their privies. "The same parties" means adversarial parties. *Generally*, codefendants are not adversaries for the purposes of res judicata, even though a codefendant could have filed a cross-claim against the other defendant:
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> "A judgment ordinarily settles nothing as to the relative rights and liabilities of the co-plaintiffs or co-defendants *inter sese*, unless their hostile or conflicting claims were actually brought in issue, litigated, and determined."
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> The Eydes argue that since they were codefendants with the Township in *Eyde I*, and since codefendants are not normally adversarial parties, their present cause of action should not be barred by res judicata. A defendant generally has the

[4] While the parties were aligned as plaintiffs-defendants in the first suit, this Court conducted its analysis as if it had accepted the "argument that a court should look behind the formal pleadings in determining whether the parties were adverse parties in the former action." *York, supra* at 426-427. Here, if we look behind the formal pleadings, it is clear that Fairways and SPL held conflicting positions despite being aligned together as codefendants.

> election of either pleading a counterclaim or cross-claim or preserving it for a future independent suit.
>
> *Nevertheless*, given the special circumstances of this case, we find that the Eydes' action against the Township is barred. This is not the normal situation involving a claim or cross-claim. The *Eyde II* complaint does not set out a claim, but rather, sets out defenses, *i.e.*, theories to defeat the action for a referendum on the zoning of Shoals II. For purposes of the defense, the Township and its residents were the same party, and in fact, the Eydes argued in both actions that if the citizens were estopped from changing the zoning classification back to RR, the Township was also estopped, and vice-versa. Accordingly, any estoppel claims against one party constituted estoppel claims against the other party. [Citations omitted; emphasis added.]

Here, I conclude that Chestnut and Fairways were also essentially the same parties for purposes of a litigation theory, thereby making Fairways and SPL adverse parties, where Chestnut's complaint in the first suit pursued the theory that Fairways was the legal titleholder, which theory Fairways was in agreement. The theory, if successfully litigated, would have made the purchase agreement valid, legitimized a closing, and resulted in Chestnut's ownership of the property, all of which Fairways was in favor of accomplishing.

Additionally, we also have special circumstances because quiet-title actions are involved. MCR 3.411(H) provides:

> Except for title acquired by adverse possession, the judgment determining a claim to title, equitable title, right to possession, or other interests in lands under this rule, determines only the rights and interests of the known and unknown persons who are *parties to the action*, and of persons claiming through those parties by title accruing after the commencement of the action. [Emphasis added.]

As I indicated above, the dismissal of the first suit with prejudice, which suit included a quiet-title count along with trespass and similar claims that went to the issue of rightful possession, effectively vested title and the right to possession in SPL. Fairways was one of the *parties to the action*, and MCR 3.411(H), which says nothing about a party having to file a claim, dictates that the ruling dismissing the action determined the rights and interests of Chestnut, SPL, and Fairways, which were all parties to the action. Fairways cannot now re-litigate title and possession issues. The interplay between MCR 3.411(H) and the doctrine of res judicata was discussed in *Richards, supra.* In *Richards*, the defendants were not parties to a prior quiet-title action filed by the plaintiff, and the plaintiff subsequently filed a second quiet-title action because a dispute over ownership of the same property at issue in suit one developed between the plaintiff and the defendants. The plaintiff argued that res judicata barred any claim by the defendants in the second suit that they owned the property, contending that the defendants should have intervened in the first suit. *Id.* at 524-529. This Court held:

> We conclude that plaintiff's res judicata argument fails because, although it is arguable that the elements of res judicata in general are satisfied, application of MCR 3.411(H) does not allow for a conclusion that the prior judgment determined defendants' rights to the property where defendants were not parties in

> the earlier litigation and their asserted title did not accrue after commencement of that action. [*Id.* at 533.]

Although we are addressing a somewhat different situation in that MCR 3.411(H) suggests that a second quiet-title suit would be barred here even if one assumes that the "same parties" element of res judicata was not satisfied because of a lack of adversity, the conclusion that I draw from *Richards* is that MCR 3.411(H) must control when the court rule conflicts with the doctrine of res judicata. See *Rogers v Colonial Federal Savings & Loan Ass'n of Grosse Pointe Woods*, 405 Mich 607, 618; 275 NW2d 499 (1979), overruled on other grounds in *Al-Shimmari v Detroit Medical Ctr*, 477 Mich 280; 731 NW2d 29 (2007) (to the extent that a court rules encompasses, modifies, or mitigates the doctrine of res judicata, the court rule controls). Therefore, because Fairways was a "party" in the first quiet-title action, and because the dismissal order with prejudice necessarily and effectively determined title and the right to possession in favor of SPL, MCR 3.411(H) would not allow Fairways to re-litigate the issue in a new quiet-title action.

Furthermore, I note the language in MCR 2.203(E), which provides:

> A counterclaim or cross-claim must be filed with the answer or filed as an amendment in the manner provided by MCR 2.118. If a motion to amend to state a counterclaim or cross-claim is denied, the litigation of that claim in another action is not precluded unless the court specifies otherwise.

Accordingly, unless a court specified otherwise, where a party makes an attempt to file a counterclaim or cross-claim but is unsuccessful because the court denies the associated motion to amend, res judicata could not bar a second suit in which the claim was raised and pursued. It is only logical to conclude that if a party fails altogether to file a cross-claim or counterclaim, and fails to move to amend in order to state a cross-claim or counterclaim, even though by the exercise of due diligence such a claim could have been raised, MCR 2.203(E) would dictate that the claim cannot be presented in a second suit. Stated otherwise, the necessary corollary of MCR 2.203(E) is that a party cannot pursue a claim in a second suit where the party presenting the claim never bothered to bring it to the court's attention in the first suit in the form of a motion to add a cross or counter claim. This is so given that, under MCR 2.203(E), a party can raise a claim in a second suit only where the trial court denied an effort to raise the claim in the first suit. Indeed, the language of MCR 2.203(E) would be offended and rendered somewhat meaningless if a party were allowed to bring a claim in a second suit despite never seeking court permission to bring the claim in the first suit. The majority relies in part on the language in *Eyde*, *supra* at 52-53, wherein this Court stated, as indicated above, that "[a] defendant generally has the election of either pleading a counterclaim or cross-claim or preserving it for a future independent suit." The *Eyde* panel cites "GCR 1963, 203.2, 203.3" in support of the proposition. My review of GCR 1963, 203, reveals that the court rule at that time, 1982, did not contain the language now found in MCR 2.203(E), which pertains to the time for filing counterclaims and cross-claims. See also 1985 Staff Comment to MCR 2.203 (MCR 2.203 is patterned on GCR 1963, 203, but "Subrule [E] is a new provision setting the time for filing a counterclaim or cross-

claim"). Accordingly, I do not find it appropriate to place any reliance on the above-quoted statement from *Eyde* cited by the majority.[5]

Finally, the purposes for invoking the doctrine of res judicata are to relieve the parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and to encourage reliance on adjudication. *RDM Holdings*, *supra* at 692; *Richards*, *supra* at 530-531. Under the circumstances in this case, allowing Fairways to pursue the present suit would defeat the purposes behind res judicata. In support of its ruling, the majority states that, even though Fairways challenged SPL's motion for summary disposition in the first suit on the basis that equity demanded an extension of the redemption period, Fairways "*did not seek that as a remedy or separately move the court for that remedy*." *Ante* at 5 (emphasis in original). I view this reasoning as supporting not rejecting application of res judicata, especially given the purposes behind the doctrine, as Fairways should not be rewarded for its complete lack of diligence in the first suit by being given a new day in court in a second suit. Even if one finds that Fairways was somewhat diligent in the first suit when it suggested to the court in the hearing on the motion to dismiss that dismissal should be without prejudice or, alternatively, that time should be given to allow Fairways and SPL the opportunity to file cross-claims, Fairways evidently found no reason to appeal the court's ruling to this Court despite rejection of its arguments and being cognizant of res judicata implications.

In light of my analysis of the "same parties" element of res judicata and the other grounds given in support of applying the doctrine, it is unnecessary to address the issue of whether Fairways and Chestnut were privies.

I would affirm the trial court's ruling; therefore, I respectfully dissent from the opinion issued by the majority.

/s/ William B. Murphy

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[5] Fairways relies on language in *Cook*, *supra* at 51, wherein this Court, citing *Meister v Dillon*, 324 Mich 389; 37 NW2d 146 (1949), stated, "The fact that a codefendant could have filed a cross-claim does not bar by res judicata a later action against the codefendant on a cross-claim not filed." *Cook*, like *Eyde*, was also issued before MCR 2.203(E) took effect. Additionally, a review of *Meister* shows that court rules played no role in the Court's decision, issued in 1949; rather, existing caselaw was cited in support of the ruling. Moreover, a pertinent aspect of the ruling in *Meister* was that, if different subject matters are involved as to the two suits, res judicata would not bar holding off on filing a cross or counter claim until the second suit. *Meister*, *supra* at 393-397. Here, the relevant subject matter at issue is the same as it was in the first lawsuit, i.e., who holds title to the property and has the right of possession. Thus, Fairways was required to file its claim during the pendency of the first action, or at least request leave to file a claim.