STATE OF MICHIGAN

COURT OF APPEALS

L.A. PLAZA, INC.,

Plaintiff-Appellant,

V

MIKHAIL HERMIZ, BONNA HERMIZ, and LEVAN PARTY STORE, INC., a/k/a LEVANS PARTY STORE, INC, d/b/a LEVAN WINE AND DELI SHOPPE,

Defendants-Appellees.

UNPUBLISHED
October 19, 2010

No. 293291
Wayne Circuit Court
LC No. 08-118369-CE

Before: HOEKSTRA, P.J., and FITZGERALD and STEPHENS, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting summary disposition to defendants under MCR 2.116(C)(7). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. SUMMARY OF THE FACTS

Plaintiff and defendants were adjoining owners of real property in Livonia. Defendants operated a retail convenience store; before their purchase of the store, the land had been used for a gas station.

In November 1995, plaintiff filed suit against multiple parties, including defendants. Plaintiff alleged that gasoline and other pollutants from defendants' property were contaminating its property. Plaintiff sought recovery from defendants under theories of nuisance, trespass, negligence, and violations of Part 201 of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.20101 *et seq.*, and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 USC 9601 *et seq*. Plaintiff's NREPA claim sought response activity costs. See MCL 324.20126a.

Plaintiff filed a second lawsuit against defendants in September 1997. In this lawsuit, which was not joined with the 1995 lawsuit, plaintiff sought injunctive relief, see MCL 324.20135, under Part 201 of the NREPA.

In May 1999, the parties reached a settlement agreement in the 1995 lawsuit. Pursuant to the agreement, the lawsuit would be dismissed without prejudice, but the statute of limitations for any claims that were or could have been sought by the parties for the remediation of contamination or the recovery of monetary damages was tolled. The agreement could be terminated by either party with 60 days advance written notice. On May 18, 1999, the trial court entered an order dismissing the 1995 lawsuit without prejudice.

Also on May 18, 1999, the trial court signed a consent judgment in the 1997 lawsuit, which required both parties to take remedial action. The consent judgment did "not resolve whether Defendants are liable to Plaintiff for the cost of the remedial activities undertaken by Plaintiff or for other damages."

In January 2007, the parties reached a settlement agreement in the 1997 lawsuit. Defendants agreed to pay $75,000 to plaintiff in exchange for the "dismissal of the remediation requirements in the Consent Judgment" and dismissal of the 1997 lawsuit with prejudice. The trial court, on the stipulation of the parties, entered a September 2007 order that "set aside" the 1999 consent judgment and dismissed the 1997 lawsuit with prejudice.

In May 2008, plaintiff sent defendants a notice of termination of the 1999 settlement agreement in the 1995 lawsuit. Two months later, in July 2008, plaintiff filed the present action against defendants. Plaintiff again alleged theories of nuisance, trespass, and negligence, and sought response activity costs under the NREPA and CERCLA. Defendants asserted the doctrine of res judicata as an affirmative defense.

Defendants moved for summary disposition under MCR 2.116(C)(7), (8), and (10). In response, plaintiff argued that its claims for response activity costs and other monetary damages in the 1995 and 2008 lawsuits could not have been brought in the 1997 lawsuit because the language of MCL 324.20135, under which plaintiff pursued its claim for injunctive relief in the 1997 lawsuit, limited the jurisdiction of the trial court. The trial court granted the motion for summary disposition under MCR 2.116(C)(7) based on res judicata.

II. STANDARD OF REVIEW

We review de novo a trial court's decision to grant a motion for summary disposition, as well as its application of res judicata. *Wayne Co v Detroit*, 233 Mich App 275, 277; 590 NW2d 619 (1998). When reviewing a motion for summary disposition under MCR 2.116(C)(7), a court must consider "[t]he affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties[.]" MCR 2.116(G)(5).

III. ANALYSIS

Res judicata "bars claims arising out of the same transaction that could have been litigated in a prior proceeding, but were not." *Sewell v Clean Cut Mgt, Inc*, 463 Mich 569, 576; 621 NW2d 222 (2001). For a party to successfully assert the doctrine of res judicata, it must show that "(1) the first action [was] decided on the merits, (2) the matter contested in the second case was or could have been resolved in the first, and (3) both actions involve the same parties or their privies." *Bd of Co Rd Comm'rs for Co of Eaton v Schultz*, 205 Mich App 371, 375-376; 521 NW2d 847 (1994). For purposes of res judicata, a voluntary dismissal with prejudice is

treated as a decision on the merits. *Limbach v Oakland Co Bd of Co Rd Comm'rs*, 226 Mich App 389, 395; 573 NW2d 336 (1997). Plaintiff does not dispute that the September 2007 order setting aside the May 1999 consent judgment was a dismissal on the merits of the 1997 lawsuit. Rather, plaintiff argues that its claims for response recovery costs and other monetary damages asserted in the 1995 lawsuit could not have been brought in the 1997 lawsuit or that the parties' agreements "trump" the doctrine of res judicata.

Plaintiff first argues that because it sought injunctive relief under MCL 324.20135 in the 1997 lawsuit and because the statute limits the jurisdiction of a trial court, the court adjudicating the 1997 lawsuit did not have jurisdiction to hear its claims for response recovery costs and other monetary damages. We disagree.

MCL 324.20135, known as the "citizens suit" provision, *Cairns v East Lansing*, 275 Mich App 102, 114; 738 NW2d 246 (2007), provides, in relevant part:

> (1) Except as otherwise provided in this part, a person, including a local unit of government on behalf of its citizens, whose health or enjoyment of the environment is or may be adversely affected by a release from a facility or threat of release from a facility . . . by a violation of this part or a rule promulgated or order issued under this part, or by the failure of the directors to perform a nondiscretionary act or duty under this part, may commence a civil action against any of the following:
>
> (a) An owner or operator who is liable under [MCL 324.20126] for injunctive relief necessary to prevent irreparable harm to the public health, safety, or welfare, or the environment from a release or threatened release in relation to that facility.
>
> (b) A person who is liable under [MCL 324.20216] for a violation of this part or a rule promulgated under this part or an order issued under this part in relation to that facility.
>
> (c) One or more of the directors if it is alleged that 1 or more of the directors failed to perform a nondiscretionary act or duty under this part.
>
> (2) The circuit court has jurisdiction in actions brought under subsection (1)(a) to grant injunctive relief necessary to protect the public health, safety, or welfare, or the environment from a release or threatened release. The circuit court has jurisdiction in actions brought under subsection (1)(b) to enforce this part or a rule promulgated or order issued under this part by ordering such action as may be necessary to correct the violation and to impose any civil fine provided for in this part for the violation. A civil fine recovered under this section shall be deposited in the fund. The circuit court has jurisdiction in actions brought under subsection (1)(c) to order 1 or more of the directors to perform the nondiscretionary act or duty concerned.

In construing a statute, we must look to the specific language of the statute. *Diamond v Witherspoon*, 265 Mich App 673, 684; 696 NW2d 770 (2005). If the statutory language is clear

and unambiguous, the statute must be enforced as written. *Id.* Here, MCL 324.20135(2) sets forth specific remedies that a trial court may order in actions brought pursuant to MCL 324.20135. However, nothing in the language of MCL 324.20135(2) suggests that when an action is filed pursuant to MCL 324.20135, the trial court's jurisdiction is limited to that "citizens suit" claim, such that a claim for response recovery costs or common-law claims for nuisance and trespass cannot be joined with it. We cannot read such a limitation into the statute. *Id.* at 685. Accordingly, we find no merit to plaintiff's claim that its claims for response recovery costs and other monetary damages could not have been resolved by the court that was presiding over its claim for injunctive relief under MCL 324.20135.

Plaintiff also claims that, even if the doctrine of res judicata applies, the parties' agreements "trump" the application of the doctrine. We disagree.

Res judicata applies to a consent judgment. *Begin v Michigan Bell Tel Co*, 284 Mich App 581, 599; 773 NW2d 271 (2009). "A consent judgment is in the nature of a contract, and is to be construed and applied as such." *Laffin v Laffin*, 280 Mich App 513, 517; 760 NW2d 738 (2008); see also *In re Lobaina Estate*, 267 Mich App 415, 418; 705 NW2d 34 (2005). "If no reasonable person could dispute the meaning of ordinary and plain contract language, the Court must accept and enforce contractual language as written, unless the contract is contrary to law or public policy." *Laffin*, 280 Mich App at 517. In the 1999 consent judgment entered in the 1997 lawsuit, the parties specifically agreed that "[t]his Consent Judgment does not address Plaintiff's claims against Defendants for response activity costs or any other damages, past or future, which are the subject of Plaintiff's claims in another lawsuit between the parties. . . ." We assume for purposes of this appeal that this language reflects a mutual understanding by the parties that the consent judgment did not foreclose plaintiff's ability to seek response recovery costs and other monetary damages in a separate action. Thus, as long as the consent judgment remained in place, defendants could not assert res judicata as a defense to claims by plaintiff for response recovery costs and other monetary damages.

However, in September 2007, by order of the trial court, and upon the stipulation of the parties, the 1999 consent judgment was "set aside." A judgment that has been set aside is a nullity. *Smith v MEEMIC Ins Co*, 285 Mich App 529, 532; 776 NW2d 408 (2009). Thus, when the 1999 consent judgment was set aside, it was as if it had never been entered. *Id.* at 533. Accordingly, the 1999 consent judgment cannot be considered in determining whether the parties had an agreement that could "trump" the doctrine of res judicata. We must therefore look to the September 2007 order that dismissed the 1997 lawsuit with prejudice. No language in that order, or even in the underlying settlement agreement, indicates that the parties intended that the dismissal of the 1997 lawsuit with prejudice would bar defendants from asserting res judicata in a subsequent suit by plaintiff for response recovery costs and other monetary damages. Plaintiff, had it so intended, should have required that language similar to that of the 1999 consent judgment be placed in the September 2007 order of dismissal.

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Cynthia Diane Stephens