STATE OF MICHIGAN

COURT OF APPEALS

BETTER INTEGRATED SYSTEMS, INC., Petitioner-Appellee,	UNPUBLISHED March 22, 2016
v	No. 325001 Tax Tribunal
DEPARTMENT OF TREASURY, Respondent-Appellant.	LC No. 03-364358

Before: GLEICHER, P.J., and MURPHY and OWENS, JJ.

PER CURIAM.

Respondent Department of Treasury (Department) appeals as of right the order of the Michigan Tax Tribunal (MTT) granting petitioner Better Integrated Systems, Inc., summary disposition under MCR 2.116(C)(7) (res judicata/collateral estoppel) and MCR 2.116(C)(10) (no genuine issue of material fact). This case was brought by petitioner after the Department issued a final assessment against petitioner for taxes due under the Single Business Tax Act (SBTA), MCL 208.1 *et seq*.,[1] for tax years 2004 through 2007. The crux of this dispute is whether petitioner operated as a Professional Employer Organization (PEO), as contended by the Department, requiring inclusion of certain compensation in petitioner's tax base, or whether petitioner merely operated as a Payroll Service Company (PSC), as contended by petitioner, making it unnecessary to include such compensation in its tax base.[2] We reverse and remand for additional proceedings consistent with this opinion.

[1] The SBTA was repealed for tax years that began after December 31, 2007. 2006 PA 325; MCL 208.151 *et seq*. However, the repeal did not affect the enforcement of the tax for previous years. MCL 208.153 ("The obligation of taxpayers and the state for taxes levied or collected on business activity on or before December 31, 2007 is affirmed.").

[2] The SBTA provided the following with respect to the reporting of compensation by PEOs:

> For tax years that begin after December 31, 2003, for purposes of determining compensation of a professional employer organization, compensation includes payments by the professional employer organization to the officers and employees of an entity whose employment operations are managed by the professional employer organization. Compensation of the entity whose

I. FACTUAL BACKGROUND

This case began in 2008 when the Department conducted an audit of petitioner as well as petitioner's two sister companies, Beacon Enterprises, Inc., and Beacon Industrial Staffing, Inc. (the Beacon companies). All three companies were owned by the same individual, Vincent Manzo. The audit concluded, on the basis of examining each company's contracts with its clients, known as client service agreements (CSAs), that all three companies were PEOs and had been improperly characterizing themselves as PSCs, requiring that significant compensation be added to each company's tax base. The Department issued each company a tax bill to reflect the difference in taxes paid and taxes owed. Once penalties and interest were added, petitioner's final tax bill from the Department was for $1,225,569. Each company disputed the findings of the audit and its tax bill and requested an informal conference. In the present case, as opposed to the Beacon cases, the Department issued a final assessment against petitioner before any informal conference took place. Therefore, petitioner filed this action in the MTT challenging that final assessment and requesting an informal conference. The MTT held this case in abeyance so that an informal conference could take place. In preparation for the informal conferences, petitioner and the Beacon companies obtained affidavits from Manzo, the companies' certified public accountant (CPA), and from several company employees. These affidavits were submitted by petitioner and the Beacon companies relative to their informal conferences. The hearing officer in each informal conference upheld the findings of the audit, and the Department issued a final assessment against each company reflecting the amount of

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> employment operations are managed by a professional employer organization does not include compensation paid by the professional employer organization to the officers and employees of the entity whose employment operations are managed by the professional employer organization. As used in this subsection, "professional employer organization" means an organization that provides the management and administration of the human resources and employer risk of another entity by contractually assuming substantial employer rights, responsibilities, and risk through a professional employer agreement that establishes an employer relationship with the leased officers or employees assigned to the other entity by doing all of the following:
>
> (a) Maintaining the right of direction and control of employees' work, although this responsibility may be shared with the other entity.
>
> (b) Paying wages and employment taxes of the employees out of its own accounts.
>
> (c) Reporting, collecting, and depositing state and federal employment taxes for the employees.
>
> (d) Retaining the right to hire and fire employees. [Former MCL 208.4(4).]

taxes due. The Beacon companies then filed actions in the MTT challenging their assessments, and petitioner filed an amended petition in the present action.

The Department and the Beacon companies moved for summary disposition in their respective cases, and the MTT held the instant case in abeyance pending the outcome in those cases. The Department argued in the Beacon cases, and the MTT agreed, that the affidavits could not be considered because of the parol evidence rule and that a determination of whether the Beacon companies were PEOs or PSCs depended entirely on an interpretation of those entities' CSAs. The MTT then looked at the plain language of the CSAs and determined that, based on the language, the Beacon companies were PEOs. The MTT granted summary disposition in favor of the Department on that basis and upheld the final assessments that the Department had issued against each of the Beacon companies. Each of the Beacon companies then appealed to this Court. We consolidated the appeals and reversed the judgment of the MTT, holding that the parol evidence rule could not be invoked by a stranger to the contract and that the MTT had erred in not considering the affidavits. *Beacon Enterprises, Inc v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued December 3, 2013 (Docket Nos. 308170 and 308171), unpub op at 5. This Court remanded the case to the MTT for it to consider the affidavits filed by the Beacon companies. *Id.* On remand, the MTT considered the affidavits of Manzo, the CPA, and of other employees, which set forth factual averments favorable to a conclusion that the Beacon companies and petitioner operated as PSCs. The MTT concluded that, because the Department had submitted no evidence to contest those affidavits, the affiants' statements governed resolution of the cases, and it granted summary disposition to the Beacon companies, canceling the final assessments that the Department had issued.

The MTT then lifted the order of abeyance, and petitioner's case proceeded forward. The Department filed a motion seeking permission to take depositions of the affiants who had executed the affidavits upon which the MTT had relied in deciding the Beacon cases. Petitioner filed a response and a motion for summary disposition, arguing, on the basis of res judicata, collateral estoppel, and judicial estoppel, that the Department was precluded from conducting any further discovery or from mounting a defense in this case. Petitioner argued that the Department was barred from challenging the credibility of the affiants because it had chosen not to do so in the Beacon cases and had represented that its only argument against those affidavits was the parol evidence rule, an argument that this Court had rejected. Petitioner argued that because it was submitting the same affidavits in this case that it had submitted in the Beacon cases, because the language of its CSAs was identical to that of the Beacon companies' CSAs save for the fact that it was between different parties, and because all three companies shared a common owner, the Department was prohibited from defending this action, given the doctrines of res judicata and collateral and judicial estoppel. The Department responded by arguing that the present case concerned a different matter with different parties and different factual issues. The Department presented evidence in the form of filings petitioner had submitted in a federal court case as well as filings with certain state and federal government agencies. In all of these filings, petitioner made statements consistent with it being a PEO as opposed to a PSC.

The MTT agreed with petitioner and concluded that res judicata and collateral estoppel precluded the Department from defending its assessment in this action or from introducing additional evidence challenging the credibility of the affiants. The MTT ruled that, because petitioner and the Beacon companies shared a common owner, petitioner was in privity with the

Beacon companies. The MTT further determined that because the material language in petitioner's CSAs was the same as the material language in the Beacon companies' CSAs, with the exception of party names and dates, the same claims and issues were present in this case. On the matter of collateral estoppel, the MTT concluded that the credibility of the affiants could not be challenged in this case because their credibility was an issue of fact that had already been litigated and resolved in the Beacon cases and that mutuality of estoppel existed because petitioner would have been bound had the Beacon cases been decided differently. On the doctrine of res judicata, the MTT ruled that because the same audit was at issue in this case as was at issue in the Beacon cases, this matter could have been determined in those cases. The MTT granted petitioner summary disposition under MCR 2.116(C)(7) predicated on the doctrines of res judicata and collateral estoppel. Finally, the MTT found, on the basis of its res judicata and collateral estoppel analysis, that no genuine issue of material fact existed, MCR 2.116(C)(10), further entitling petitioner to summary disposition. The MTT entered an order granting petitioner summary disposition and canceling the Department's assessment issued against petitioner. The MTT did not address petitioner's judicial estoppel argument.[3]

II. STANDARD OF REVIEW

"This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999) (citation omitted). Likewise, the application of res judicata is a question of law that is reviewed de novo. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999). "Whether a party's claim is collaterally estopped is an issue of law that [this Court] also review[s] de novo," *VanVorous v Burmeister*, 262 Mich App 467, 476; 687 NW2d 132 (2004), as is the application of judicial estoppel, *Spohn v Van Dyke Pub Schs*, 296 Mich App 470, 479; 822 NW2d 239 (2012).[4]

III. ANALYSIS

A. RES JUDICATA

"Res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical." *Sewell v Clean Cut Mgt, Inc*, 463 Mich 569, 575; 621 NW2d 222

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[3] Originally, the MTT had also granted summary disposition in favor of petitioner pursuant to MCR 2.116(C)(9) (failure by Department to state a valid defense); however, the MTT agreed with the Department's argument in a motion for reconsideration that MCR 2.116(C)(9) did not constitute an appropriate ground for summary disposition. The remaining arguments posed by the Department in its reconsideration motion were rejected by the MTT.

[4] We note that petitioner argues, absent citation of authority, that we are deprived of jurisdiction with respect to unpreserved issues raised by the Department on appeal. This argument is entirely meritless, and we have jurisdiction to address all of the Department's appellate arguments pursuant to MCR 7.203(A).

(2001) (quotation marks and citation omitted). "Under the doctrine of res judicata, a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action." *Wayne Co v Detroit*, 233 Mich App 275, 277; 590 NW2d 619 (1998) (quotation marks and citation omitted). The doctrine precludes litigation of a second action when "(1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies." *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999). "[T]he burden of proving the applicability of the doctrine of res judicata is on the party asserting it." *Baraga Co v State Tax Comm*, 466 Mich 264, 269; 645 NW2d 13 (2002).

As compared to the typical scenario in which a defendant seeks to employ res judicata to obtain summary dismissal of a claim brought by a plaintiff against the defendant, petitioner here invoked the doctrine offensively, successfully arguing that res judicata barred the Department's ability to mount a defense to the petition. In *Eyde v Meridian Charter Twp*, 118 Mich App 43, 50; 324 NW2d 775 (1982), this Court, citing *Prawdzik v Heidema Bros*, 352 Mich 102; 89 NW2d 523 (1958), observed that "[t]he doctrine of res judicata not only bars a plaintiff from splitting his cause of action, but also bars the defendant from attacking a judgment because of new defenses to the plaintiff's claim[.]" In addressing a res judicata issue, our Supreme Court in *Banks v Billups*, 351 Mich 628, 635; 88 NW2d 255 (1958), similarly stated that "[i]f a party fails in making a full presentation of his case, whereby the judgment has passed against him, he cannot be permitted to make a better showing in a new suit." Accordingly, even in the unique procedural posture of our case, res judicata is potentially applicable.[5]

There is no dispute that the first action, the Beacon cases, was decided on the merits pursuant to two final judgments entered by the MTT after remand from this Court. Thus, the applicable questions become whether this action involved the same parties or their privies as the Beacon cases and whether the matter in this action could have been resolved in the Beacon cases.

With respect to "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, Inc v City of Berkley*, 259 Mich App 1, 12-13; 672 NW2d 351 (2003). A privy can also include "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." *Id.* at 13. Petitioner was not in a principal/agent, master/servant, or indemnitor/indemnitee relationship with the Beacon companies. Nor did petitioner acquire an interest in the Beacon judgments through inheritance, succession, or purchase.

The MTT concluded that petitioner and the Beacon companies were in privity by virtue of the fact that they were commonly owned and controlled by the same individual and were

[5] We do acknowledge that, although petitioner was is the position of a plaintiff in commencing the case in the MTT, it was the Department that initiated proceedings in general by conducting the audit and assessing the tax.

functionally interrelated. In *Hills & Dales Gen Hosp v Pantig*, 295 Mich App 14, 20-21; 812 NW2d 793 (2011), this Court noted that "[a] corporation is its own 'person' under Michigan law, an entity distinct and separate from its owners, even when a single shareholder holds ownership of the entire corporation[,]" and the "law presumes that parent and subsidiary corporations constitute separate legal entities." (Citations omitted.) Simply because petitioner and the Beacon companies were sister companies and were all owned or controlled by the same person did not necessarily mean that petitioner was in privity with the Beacon companies.

The MTT, in concluding that petitioner was in privity with the Beacon companies, relied on an opinion issued by the United States Court of Appeals for the Sixth Circuit, which divided the concept of privity into the following three categories: (1) a successor in interest to a party that was subject to a judgment; (2) a nonparty who actually controlled the original suit in which a judgment was entered; and (3) a nonparty who was adequately represented by a party in the previous litigation. *Becherer v Merrill Lynch, Pierce, Fenner & Smith, Inc*, 193 F3d 415, 422 (CA 6, 1999). The MTT focused on the second category, where a nonparty controlled the original suit, with a brief allusion to the third category. This Court in *Dearborn Hts Sch Dist No 7 v Wayne Co MEA/NEA*, 233 Mich App 120, 127; 592 NW2d 408 (1998), cited *Becherer* in the context of collateral estoppel analysis, stating that "a nonparty to an earlier proceeding will be bound by the result if that party controlled the earlier proceeding or if the party's interests were adequately represented in the original matter." However, there is nothing in the record to indicate that petitioner, in particular and through the functioning of its corporate structure, controlled the Beacon cases. Regardless, assuming privity existed on the basis of nonparty control or on the basis that petitioner, as a nonparty in the Beacon cases, was adequately represented by the Beacon companies, reversal is still required because the matter contested in the instant case was not and could not have been decided in the Beacon cases.

The simple procedural posture of this case precluded the Department from having petitioner's tax liability determined earlier in the Beacon cases, given that the MTT had held the instant case in abeyance while deciding the Beacon cases, subsequently lifting the abeyance order so petitioner's case could proceed. Further, the claims and issues existing between the Department and petitioner did not stem from the same transactions in the Beacon cases. "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." *Jones v State Farm Mut Auto Ins Co*, 202 Mich App 393, 401; 509 NW2d 829 (1993). While it may be true that the affidavits petitioner submitted as evidence in this case are the same affidavits that the Beacon companies submitted in their cases, and even though the language in the CSAs executed by petitioner and its clients may be comparable to the language in the CSAs employed by the Beacon companies, the simple and inescapable fact remains that petitioner's CSAs, interactions, and operations with its clients necessarily constituted transactions different and apart from those involved in the Beacon cases. Petitioner's particular tax liability relative to the PEO/PSC question was not decided in the Beacon cases, nor could it have been decided, as the case was held in abeyance. Although the ultimate substantive analysis by the MTT of the issues here might perhaps result in the same outcome as that reached in the Beacon cases, the Department is entitled to have the instant case litigated on the merits, with the opportunity to present arguments and evidence that were not proferred in the Beacon cases. Had the Department been successful in the Beacon cases, petitioner would have likewise been entitled to fully litigate the PEO/PSC tax issue on the merits.

B. COLLATERAL ESTOPPEL

"Collateral estoppel bars relitigation of an issue in a new action arising between the same parties or their privies when the earlier proceeding resulted in a valid final judgment and the issue in question was actually and necessarily determined in that prior proceeding." *Leahy v Orion Twp*, 269 Mich App 527, 530; 711 NW2d 438 (2006). Unlike res judicata, which precludes relitigation of claims, see *Bennett v Mackinac Bridge Auth*, 289 Mich App 616, 629; 808 NW2d 471 (2010) (stating that res judicata is also known as claim preclusion), collateral estoppel prevents relitigation of issues, *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001) (stating that collateral estoppel or issue preclusion, bars relitigation of an issue), which presumes the existence of an issue in the second proceeding that was present in the first proceeding.

The issue in the Beacon cases was whether the *Beacon companies* were PEOs or PSCs, not whether petitioner was a PEO or PSC. The question whether petitioner was a PEO or PSC was not actually and necessarily determined in the Beacon litigation; therefore, collateral estoppel did not apply.

C. JUDICIAL ESTOPPEL

The MTT did not rule on petitioner's argument under the doctrine of judicial estoppel, but petitioner is free to argue, and does argue, that the doctrine provides an alternative basis to affirm the MTT's decision. The doctrine of judicial estoppel provides that "a party who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding." *Opland v Kiesgan*, 234 Mich App 352, 362; 594 NW2d 505 (1999) (quotation marks and citation). There must be some indication that the court in the prior proceeding accepted the party's position as true. *Id.* First, the Department did not present a *successful* argument in the Beacon cases. Second, contrary to petitioner's argument, the Department never conceded that the affidavits or affiants relied on by petitioner were credible; rather, the Department's assault on those affidavits via reliance on the CSAs simply failed. Third, and finally, the Department is not advocating an inconsistent position in this case as compared to the Beacon cases, but is simply trying to bolster its position with additional arguments and evidence. The doctrine of judicial estoppel did not apply.

D. MCR 2.116(C)(10)

The MTT stated that its reason for granting petitioner summary disposition under MCR 2.116(C)(10) was because of its analysis on the issues of res judicata and collateral estoppel. Aside from reflecting a gross misunderstanding of MCR 2.116(C)(10),[6] the MTT's analysis of the two doctrines was erroneous, as explained above. The MTT did not independently address

[6] Summary disposition on the basis of collateral estoppel or res judicata falls under the umbrella of MCR 2.116(C)(7), not (C)(10). *Lichon v American Universal Ins Co*, 435 Mich 408, 427 n 14; 459 NW2d 288 (1990).

whether there was a factual dispute between the parties. To the extent that petitioner argues that we should affirm on the basis of MCR 2.116(C)(10), properly analyzed, we disagree. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). If evidence before the Court is conflicting, summary disposition is improper. *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997). The evidence is conflicting regarding whether petitioner was a PEO or a PSC. The affidavits of petitioner's owner, CPA, and employees all effectively asserted that petitioner was a PSC. However, the Department introduced evidence suggesting that in past federal court filings and in various other state and federal filings, petitioner made statements consistent with it being a PEO, such as statements in a federal court case that a party was its employee and in federal tax filings indicating that petitioner had over 600 employees and not the four or five claimed here. Therefore, conflicting evidence existed and granting petitioner summary disposition under MCR 2.116(C)(10) would not have been improper.

Furthermore, summary disposition under MCR 2.116(C)(10) would have been premature. The Department had requested taking the depositions of the affiants who had signed the affidavits that petitioner relied upon. Generally, "summary disposition is premature if granted before discovery on a disputed issue is complete." *Dep't of Social Servs v Aetna Cas & Surety Co*, 177 Mich App 440, 446; 443 NW2d 420 (1989). The depositions could potentially undermine the affiants' claims, thereby having a direct bearing on whether petitioner was a PSC or a PEO. See *State Treasurer v Sheko*, 218 Mich App 185, 190; 553 NW2d 654 (1996) (summary disposition is premature if discovery stands a fair chance of uncovering factual support for opposing summary disposition). Petitioner's argument that all the necessary factual issues pertinent to this case were resolved in the Beacon cases is erroneous, as the Department has expanded and seeks to further expand the factual inquiry. The fact that the Department was unsuccessful in the litigation brought by the two Beacon companies did not mean that it was precluded from defending the suit brought by petitioner to the fullest extent possible. The Department's decision not to conduct additional discovery in the Beacon cases did not bar it from conducting fuller discovery in this case or from changing its litigation tactics from those used in the Beacon cases.

IV. CONCLUSION

The MTT erred in granting summary disposition in favor of petitioner. We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. Having fully prevailed on appeal, the Department is awarded taxable costs under MCR 7.219.

/s/ Elizabeth L. Gleicher
/s/ William B. Murphy
/s/ Donald S. Owens