

STATE OF MICHIGAN
COURT OF APPEALS

GENESIS DEVELOPMENT CORPORATION,
PAUL NORMAN, and CHRISTINE NORMAN,

UNPUBLISHED
August 6, 1996

Plaintiffs-Appellants,

v

No. 182380
LC No. 94-47912

JAY A. BIELFIELD,

Defendant-Appellee.

Before: Griffin, P.J., and Bandstra and M. Warshawsky,* JJ.

PER CURIAM.

In this case of alleged misrepresentation and fraud, plaintiffs appeal as of right an order granting summary disposition in defendant's favor pursuant to MCR 2.116(C)(7). We affirm.

I

This case stems from a series of real estate agreements between plaintiff Genesis Development Corporation and Michael and Marion Ilitch. During negotiations for two parcels of property, defendant Jay Bielfield, the attorney representing the Ilitches, allegedly lied to Norman about the Ilitches' intent to build a "world class" home on the subject property. Further, plaintiffs aver that Bielfield wrongfully obtained deeds to the property by telling Norman that the Ilitches needed the deeds for "banking purposes" when, in fact, the Ilitches intended to record the deeds and resell the property. After the Ilitches obtained title to the property from Genesis Development, Genesis Development sued the Ilitches in Wayne County Circuit Court for breach of contract, fraud, and misrepresentation. In a ruling that was upheld by this Court, the Wayne County Circuit Court directed a verdict dismissing Genesis Development's fraud and misrepresentation claims. See *Genesis Development Corporation v Ilitch*, unpublished opinion per curiam of the Court of Appeals, Docket No. 176210.

* Circuit judge, sitting on the Court of Appeals by assignment.

In the present suit, Genesis Development, Paul Norman (the founder and sole shareholder of Genesis Development), and his wife, Christine, seek damages on account of the same statements by Bielfield that were the basis of the fraud and misrepresentation claims in Genesis Development's suit against the Ilitches. Based on the directed verdict in the Wayne County case, the trial court in the instant case granted summary disposition in defendant's favor on the grounds of res judicata, collateral estoppel, and equitable estoppel.

II

In reviewing a motion for summary disposition pursuant to MCR 2.116(C)(7), we accept plaintiff's well-pleaded allegations as true, *Shawl v Dhital*, 209 Mich App 321, 323; 529 NW2d 661 (1995); *Simmons v Apex Drug Stores, Inc*, 201 Mich App 250, 252; 506 NW2d 562 (1993), and examine any pleadings, affidavits, depositions, admissions, and documentary evidence submitted by the parties in a light most favorable to the nonmovant. MCR 2.116(G)(5); *Skotak v Vic Tanny Int'l, Inc*, 203 Mich App 616, 617; 513 NW2d 428 (1994). If the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the trial court must enter judgment without delay. MCR 2.116(I)(1); *Skotak, supra* at 617; *Nationwide Mutual Ins Co v Quality Builders, Inc*, 192 Mich App 643, 647-648; 482 NW2d 474 (1992).

III

On appeal, plaintiff Genesis Development contends that the trial court erroneously ruled that plaintiff Genesis Development's fraud claims were barred by the doctrine of collateral estoppel. We disagree. Collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties when a prior proceeding cumulated in a final judgment and the issue was actually and necessarily determined in the prior proceeding. *People v Gates*, 434 Mich 146, 154; 452 NW2d 627 (1990); *Porter v Royal Oak*, 214 Mich App 478, 485; 542 NW2d 905 (1995). Collateral estoppel applies only where the same parties or their privies are involved in both lawsuits. *Husted v Auto-Owners Ins Co*, 213 Mich App 547, 556; 540 NW2d 743 (1995); *APCOA, Inc v Treasury Dep't*, 212 Mich App 114, 120; 536 NW2d 785 (1995); see generally *Nummer v Treasury Dep't*, 448 Mich 534, 542; 533 NW2d 250 (1995).

Generally, mutuality of estoppel is a prerequisite to the application of collateral estoppel. *Duncan v State Hwy Comm*, 147 Mich App 267, 270; 382 NW2d 762 (1985). Mutuality is present if the litigants in a subsequent suit are bound by the judgment in the former suit. *Stolaruk Corp v Dep't of Transportation*, 114 Mich App 357, 362; 319 NW2d 581 (1982). A recognized exception to the mutuality requirement is that collateral estoppel may be raised defensively by a defendant with a "special relationship" to the litigants of a former suit, such as where defendant is the agent, servant, or employee of a litigant in the former suit. *Arim v General Motors Corp*, 206 Mich App 178, 194; 520 NW2d 695 (1994); *Couch v Schultz*, 176 Mich App 167, 170; 439 NW2d 296 (1989). Defensive collateral

estoppel may be raised if the liability of the defendant in the subsequent action is premised on the liability of a party who was exonerated in the previous action. *Id.* at 172-173.

In the present case, Genesis Development's fraud claims are identical to the fraud claims that were dismissed in the Wayne County lawsuit. Indeed, the present claims arise out of the same statements by Bielfield and are identical to the fraud claims Genesis Development brought in the former case. Because Genesis Development was a party to the former action, privity is clear and the only legitimate issue is whether defendant may use the doctrine of collateral estoppel defensively. We conclude that he can. Defendant, the personal attorney for the defendants in the former case, was representing the Ilitches when he made the alleged misrepresentation. Further, Genesis Development's attorney persistently claimed in the prior action that Bielfield was representing the Ilitches when he made the alleged statements. Therefore, defendant not only possesses a "special relationship" with the defendants of the former action, but his alleged liability is premised on the liability of his clients in the former action. Accordingly, the "special relationship" exception to mutuality of estoppel applies. See, e.g., *DePolo v Greig*, 338 Mich 703, 710; 62 NW2d 441 (1954). Further, we find that Genesis Development's claim that Bielfield was acting outside the scope of his representation of the Ilitches when making the representations at issue so directly contradicts to the position it took in the former trial that the doctrine of judicial estoppel precludes Genesis Development from advancing this argument. See *Lichon v American Universal Inc Co*, 435 Mich 408, 416; 459 NW2d 288 (1990).

IV

Next, plaintiffs Paul and Christine Norman claim that the trial court erred in granting summary disposition pursuant to the doctrine of res judicata. We disagree. Res judicata bars claims actually litigated in a prior action or such claims that arise out of the same transaction as the former action and could have been brought therein. *Rogers v Colonial Federal Savings & Loan Ass'n*, 405 Mich 607, 615; 275 NW2d 499 (1979); *Schwartz v City of Flint*, 187 Mich App 191, 194; 466 NW2d 357 (1991). As this Court held in *People v Jackson*, 213 Mich App 245, 249; 539 NW2d 758 (1995), res judicata applies when:

- (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.

See also *Husted*, supra at 556; *King v Michigan Consolidated Gas Co*, 177 Mich App 531, 535; 442 NW2d 714 (1989). "A person is in privity to a party if, after the judgment, the person has an interest in the matter affected by the judgment through one of the parties, such as by inheritance, succession, or purchase." *Husted*, supra at 556; *Stolarnk* supra at 362; see generally *Howell v Vito's Trucking & Excavating Co*, 386 Mich 37, 42; 191 NW2d 313 (1971); 46 Am Jur 2d, Judgments, § 538, p 694. As noted in Restatement of the Law, 2d, Judgments, §59:

(3) If the corporation is closely held, in that one or a few persons hold substantially the entire ownership in it, the judgment in an action by or against the corporation or the holder of ownership in it is conclusive upon the other of them as to the issues determined therein as follows:

(a) The judgment in an action by or against the corporation is conclusive upon the holder of its ownership if he actively participated in the action on behalf of the corporation, unless his interests and those of the corporation are so different that he should have the opportunity to relitigate the issue.

Paul Norman is the founder and sole shareholder of the closely held Genesis Development Corporation. Genesis Development and Genesis Real Estate are the Normans' primary source of income. It was through the Ilitches' association with Genesis Development that Bielfield made the alleged misrepresentations involved in this case. In fact, but for Paul Norman's association with Genesis Development the Normans would have had no knowledge of Bielfield's alleged misrepresentation. Also, Paul Norman actively participated in the Wayne County trial and Christine Norman (who sat behind the attorney for Genesis Development during the Wayne County trial) was clearly represented by the attorney for Genesis Development. For example, during closing argument, Genesis Development's attorney asked the jury "to give Mr. Norman and his wife and their company compensation." Accordingly, under the particular circumstances of this case, we find that both Paul Norman and his wife, Christine, are in privity with Genesis Development, a named plaintiff in the former lawsuit.

Furthermore, we conclude that plaintiff's misrepresentation claim could have been brought in the former lawsuit. Indeed, the misrepresentations the Normans claim as the basis for their action are the same statements Genesis Development claimed as the basis of its misrepresentation claim in the former action. Therefore, because the Normans are in privity with Genesis Development and their claims could have been brought in the prior litigation, the trial court correctly dismissed this case pursuant to the doctrine of res judicata.

Affirmed.

/s/ Richard Allen Griffin

/s/ Richard A. Bandstra

/s/ Meyer Warshawsky