

STATE OF MICHIGAN
COURT OF APPEALS

DOROTHY M. KETTLER, a/k/a DOROTHY M.
COOLEY,

UNPUBLISHED
March 3, 2000

Plaintiff-Appellant,

v

No. 212736
Otsego Circuit Court
LC No. 98-007600 CZ

RUTH SENA FLEMING, MARY LEN COOLEY,
MICHELLE ANN CONRAD, JEAN COOLEY,
a/k/a/ JEAN BLACK, and ELLIOT BLUMBERG,

Defendants-Appellees.

Before: Zahra, P.J., and White and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals as of right from an Otsego Circuit Court order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(8). We affirm.

This case arises out of a prior probate proceeding commenced by defendants Ruth Sena Fleming, Mary Len Cooley, and Jean Black-Cooley against plaintiff Dorothy M. Kettler (a/k/a Dorothy M. Cooley), who was the personal representative of the estate of Raymond Cooley. Defendant Michelle Ann Conrad was the decedent's granddaughter and joined the other defendants in a motion to remove plaintiff as the personal representative of the estate. Plaintiff alleged that defendants Fleming, Cooley, Black-Cooley and Conrad (hereafter referred to as the family defendants) and their attorney, Elliot Blumberg, acted improperly in the probate court proceedings concerning the estate of Raymond Cooley.

We review de novo dismissals granted pursuant to MCR 2.116(c). *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999); *Wayne Co v Detroit*, 233 Mich App 275, 277; 590 NW2d 619 (1998). Counts I through III of plaintiff's complaint were asserted against the family defendants and Count IV was asserted against attorney Blumberg. The trial court dismissed Counts I through III of plaintiff's complaint because they amounted to an attempt to re-litigate the probate court proceedings. Count IV was dismissed for failure to state a claim.

We find that Counts I through III of plaintiff's complaint were barred under principles of res judicata. Count I alleged that defendant Black-Cooley made fraudulent misrepresentations to the probate court and breached the divorce mediation agreement she executed with the decedent. Count II alleged that the family defendants made fraudulent misrepresentations to the probate court in an effort to remove plaintiff as a fiduciary and that the probate court committed certain procedural errors. In Count III, plaintiff alleged that defendant Black-Cooley's fraud before the probate court caused plaintiff wrongfully to incur costs and fees for which plaintiff sought recovery.

Under principles of res judicata, a subsequent action is barred between the same parties when the facts or evidence essential to the action are identical to those essential to a prior action. *Dart v Dart*, 224 Mich App 146, 156; 568 NW2d 353 (1997). The elements of res judicata are (1) a prior action that was decided on the merits, (2) a decree in the prior action that was a final decision, (3) a matter contested in a second case that was or could have been resolved in the first, and (4) both actions involve the same parties or their privies. *Kosiel v Arrow Liquors Corp*, 446 Mich 374, 379; 521 NW2d 531 (1994); *King v Michigan Consolidated Gas Co*, 177 Mich App 531, 535; 442 NW2d 714 (1989).

The probate action giving rise to plaintiff's claims was decided on its merits and resulted in a final decision. Further, both the probate action and the instant action involved the same parties. We recognize that plaintiff proceeded as a representative of the decedent's estate when she appeared before the probate court and in the present action, plaintiff proceeds in her individual capacity. Nevertheless, plaintiff seeks in the present case to contest the results of the probate proceedings and to vindicate her right to represent and manage the assets of the decedent's estate. We therefore conclude that any right or interest that plaintiff seeks to enforce in the present case relates directly to the rights and interests asserted or defended by plaintiff in her representative capacity in the probate action. Thus, we find that the probate action and the instant action involved the same parties or their privies. Accordingly, plaintiff's claims are barred by principles of res judicata if the issues contested in the instant case were actually resolved or could have been resolved in the probate action.

Res judicata bars litigation not only of claims actually litigated in a prior proceeding but also claims arising from the same transaction that the parties, exercising reasonable diligence, could have litigated but did not. *Dart v Dart* 460 Mich 573, 586; 597 NW2d 82 (1999). The record reflects that plaintiff contested the proceeding brought by the family defendants in the probate court. Plaintiff should have also challenged in the probate court the veracity of defendant's many alleged misrepresentations that are asserted in this action. The probate court was in the best position to assess the validity of such claims. We therefore find that Counts I through III of plaintiff's complaint assert claims that were or should have been asserted in the probate proceedings.

Plaintiff also argues that where a prior proceeding is attacked by allegations of fraud, a subsequent action is not barred by res judicata. Under the fraud exception to res judicata, a prior judgment may only be attacked on grounds of extrinsic fraud. *Sprague v Buhagiar*, 213 Mich App 310, 313; 539 NW2d 587 (1995). Extrinsic fraud is fraud that arises outside the facts of the case. *Id.* Extrinsic fraud must be distinguished from intrinsic fraud, which is defined as fraud within the cause of action itself. *Id.* at 314. Examples of intrinsic fraud include perjury, discovery fraud, fraud in the

inducement, and fraud in executing an underlying contract. *Id.* Plaintiff's claims are founded on allegations of intrinsic fraud, which purportedly mislead the probate court to erroneous results. Accordingly, plaintiff's claims remain barred under principles of res judicata. *Triplett v St Amour*, 444 Mich 170, 176; 507 NW2d 194 (1993). Accord *Daoud v De Leau*, 455 Mich 181, 200-203; 565 NW2d 639 (1997) (applying res judicata to bar subsequent circuit court action based on alleged fraud in prior divorce case). Plaintiff's only remedy to this alleged fraud was to seek appellate review of the probate court proceedings.

Finally, plaintiff argues that the trial court erred in finding that Count IV failed to state a claim on which relief could be granted. A trial court order granting summary disposition under MCR 2.116(C)(8) is reviewed de novo. *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 253; 571 NW2d 716 (1997). All factual allegations in support of the claim are accepted as true, as well as any reasonable inferences or conclusions, and are construed in the light most favorable to the nonmoving party. *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998).

Count IV alleged that Elliot Blumberg misrepresented certain facts before the probate court. The trial court found that the allegations of fraud in Count IV were properly the subject of an appeal, rather than for an action in the circuit court. The court also found that plaintiff failed to allege the existence of an attorney-client relationship, and therefore dismissed Count IV for failure to state a claim. Again, we find no error.

Claims of intrinsic fraud perpetrated by probate counsel should have been raised before the probate court and in any appeal from the probate court's final determination. To the extent that Count IV can be construed to allege malpractice by Blumberg, the trial court properly concluded that plaintiff failed to state a claim. In order to establish a cause of action for legal malpractice, a plaintiff must establish (1) the existence of an attorney-client relationship, (2) negligence in the legal representation of the plaintiff, (3) that the negligence was a proximate cause of an injury, and (4) the fact and extent of the injury alleged. *Barrow v Pritchard*, 235 Mich App 478, 483-484; 597 NW2d 853 (1999). Count IV does not allege that plaintiff and Blumberg ever formed an attorney-client relationship.

Plaintiff contends that the absence of an attorney-client relationship was not fatal to her claim. Plaintiff argues that the effect of Count IV was to allege that Elliot Blumberg violated Michigan Rules of Professional Conduct 1.2(c) (prohibiting the counseling of fraudulent conduct), 1.8(j) (prohibiting an attorney from obtaining a proprietary interest in the subject matter of litigation), and 1.9(b) (prohibiting conflicts of interest).

Our review of Count IV reveals that plaintiff alleged only that defendant Blumberg violated MRPC 1.2(c). Moreover, plaintiff fails to note MRPC 1.0(b), providing that an attorney's failure to comply with the rules of professional conduct "do not . . . give rise to a cause of action for enforcement of a rule or for damages caused by failure to comply with an obligation or prohibition imposed by a rule." Count IV simply does not state a cognizable cause of action.

Affirmed.

/s/ Brian K. Zahra

/s/ Helene N. White

/s/ Joel P. Hoekstra