STATE OF MICHIGAN

COURT OF APPEALS

ROBIN E. ODEN,

Plaintiff-Appellant,

v

JONATHON B. PUB,

Defendant-Appellee.

UNPUBLISHED
July 28, 2000

No. 209319
Wayne Circuit Court
LC No. 96-648708-NZ

Before: Hood, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Plaintiff appeals by delayed leave granted the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7). We reverse.

On April 30, 1996, plaintiff filed suit in federal court alleging violations of the federal public accommodations law, title II of the Civil Rights Act of 1964, 42 USC 2000a *et seq*. On December 6, 1996, plaintiff filed suit in Wayne Circuit Court alleging racial discrimination in violation of the Elliot-Larsen Civil Rights Act, MCL 37.2101 *et seq*; MSA 3.548(101) *et seq*. The federal and state actions were based on the same transaction. Defendant moved for summary disposition in the federal action, and plaintiff moved to amend his complaint to add the state claim. An order entered that provided that plaintiff's motion to amend the complaint was granted, and the federal action was voluntarily dismissed with prejudice by the parties. Defendant then moved for summary disposition in state court pursuant to MCR 2.116(C)(7) and (C)(10), arguing that res judicata precluded the continuation of the state action due to the dismissal with prejudice in federal court. Defendant also asserted that plaintiff could not satisfy his burden in demonstrating racial discrimination. The trial court held that res judicata barred the state action and granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(7) without reaching the issue of the merits of plaintiff's racial discrimination claim.

Plaintiff argues that the voluntary dismissal of the federal action does not bar plaintiff's state action based on res judicata. We agree. "The affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties, must be considered by the court when the motion is based on subrule (C)(1)-(7) or (10)." MCR 2.116(G)(5). When reviewing a dispositive motion based on MCR 2.116(C)(7), we must accept as true the plaintiff's

well-pleaded allegations and construe them in a light most favorable to the plaintiff. *Stabley v Huron-Clinton Metropolitan Park Authority*, 228 Mich App 363, 365; 579 NW2d 374 (1998). We review summary disposition determinations de novo. *Id*.

In *Bergeron v Busch*, 228 Mich App 618, 620-621; 579 NW2d 124 (1998), this Court discussed the doctrine of res judicata:

> The applicability of res judicata is a legal question that this Court reviews de novo. Michigan has adopted a broad application of res judicata that bars claims arising out of the same transaction that plaintiff could have brought but did not. The doctrine serves a two-fold purpose: to ensure the finality of judgments and to prevent repetitive litigation. However, in order for the first action to bar the second, res judicata requires that (1) the prior 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 involved the same parties or their privies. [Citations omitted.]

The burden of demonstrating that a judgment in another action is res judicata is on the party so contending. *Admiral v Dep't of Labor*, 149 Mich App 344, 353; 386 NW2d 193 (1986).

In *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 384; 596 NW2d 153 (1999), our Supreme Court held that when federal claims are dismissed prior to trial, the "federal court clearly would have dismissed the state claims if there are no exceptional circumstances that would give the federal courts cause to retain supplemental jurisdiction." However, the Court also held that the federal court could retain supplemental jurisdiction over state claims under exceptional circumstances. *Id*. at 386. Exceptional circumstances include the defendant's failure to direct the court's attention to the weakness of the federal claim prior to a substantial investment of time, the supplemental claim invokes a question of significant federal policy, the supplemental claims were significantly addressed prior to dismissal of the federal claims, and the case is prepared for trial. *Id*. Therefore, where all federal claims are dismissed prior to trial and no exceptional circumstances exist that would give the federal court grounds to retain supplemental jurisdiction over the state claims, then it is clear that the federal court would not have exercised its supplemental jurisdiction over the remaining state claims. *Id*. at 387. Accordingly, res judicata will not bar a state proceeding involving the state claims where the federal court has not exercised supplemental jurisdiction over the state claims. *Id*.

In the present case, there is no indication that exceptional circumstances were presented. There is no evidence that any judicial resources were expended on the consideration of the state claims. Rather, review of the record reveals that the state claim was added just prior to the dismissal of the action. In fact, the state claim was allowed to be included in the amended complaint in the same order that voluntarily dismissed the federal claim. Because the federal

claims were dismissed prior to trial and exceptional circumstances have not been identified, res judicata does not act to bar this state litigation. *Pierson, supra*.

Reversed and remanded. We do not retain jurisdiction.[1]

/s/ Harold Hood
/s/ David H. Sawyer
/s/ Mark J. Cavanagh

[1] We note that the trial court did not reach the remaining issue of defendant's challenge to plaintiff's ability to prove the elements of his claim. Accordingly, we do not address the issue although the trial court is free to do so on remand.