

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

SAMUEL KARP,

Plaintiff-Appellant,

v

MICHIGAN NATIONAL BANK,

Defendant-Appellee.

---

UNPUBLISHED

February 27, 2001

No. 213703

Wayne Circuit Court

LC No. 95-514249-NZ

Before: Cavanagh, P.J., and Saad and Meter, JJ.

PER CURIAM.

Plaintiff appeals by right from an order granting summary disposition to defendant under MCR 2.116(C)(7) and (C)(10) in this case involving a complicated loan agreement. We affirm.

**I. Factual Background**

This case arose from a loan agreement between plaintiff's partnership and defendant to construct an office building in Auburn Hills. On February 4, 1987, Concorde Centre Venture ("Concorde"), a Michigan partnership, entered into a loan agreement with All American Insurance Company ("All American"). The Concorde partners were plaintiff and Armando and Nora Ongtengco. Under the agreement, Concorde was to obtain a loan from a construction lender to finance the construction of an office building, known as the Concorde Centre, and construct the building. When the building was completed, All American was to pay off the construction loan, provide five years of financing to Concorde on specified terms, and deed title to the building to Concorde. Plaintiff alleges that, as part of this agreement, Concorde was to pay commitment fees to All American on a periodic basis to keep the commitment open during the construction of the office building. The closing date on this loan between All American and Concorde was to be on or before August 27, 1989.

On May 22, 1987, defendant entered into a loan agreement with Concorde to finance the construction of the Concorde Centre. Under this loan agreement, defendant agreed to provide \$13 million for the construction of the building, which was to be secured by a mortgage. To this end, Concorde executed a real estate mortgage note, agreeing to repay defendant \$13 million plus interest. Plaintiff alleges that, under the loan agreement, defendant agreed to make periodic payments to All American on behalf of Concorde from a \$520,000 "hold back" contained in the loan agreement. Plaintiff alleges that, pursuant to § 1.03 of the loan agreement between

Concorde and defendant, All American was to pay off defendant's loan to Concorde when the construction of the office building was substantially complete and after a certificate of occupancy had been issued. In addition, Concorde executed a real estate mortgage note agreeing to repay defendant the borrowed amount of \$13 million plus interest. Concorde also executed and delivered to defendant a construction mortgage and security agreement. Further, Concorde entered into an assignment of lease and rents, assigning to defendant all rents, income, and profits of the property and all present and future leases pertaining to the property, as well as assigning to defendant the right to take possession of and perform all acts necessary for the operation and maintenance of the property. Finally, plaintiff and his two partners each executed and delivered to defendant a guaranty whereby they jointly and severally guaranteed repayment of the loan.

By the latter part of 1988, the construction of the Concorde Centre was completed, and a certificate of occupancy was issued. At the time of completion, the Concorde Centre was only partially pre-leased. Plaintiff alleges that the requirements of All American to pay off defendant's loan to Concorde had been met, but defendant did not call upon All American to pay off its loan, even though the All American loan remained open through August 27, 1989, provided that defendant paid the February 1989 commitment fee of \$130,000.

In his amended complaint, plaintiff alleges that on January 25, 1989, defendant sent a letter to Concorde falsely stating that a stipulation entered during arbitration between plaintiff and his partners had the effect of voiding All American's end loan commitment and that, as a result, Concorde and plaintiff were in default under the terms of defendant's loan agreement with Concorde. Plaintiff alleges that "[i]n fact, Concorde was not in violation of the All American loan agreement" and that he relied upon defendant's representations to his detriment.

Plaintiff further alleges that unknown to Concorde or plaintiff at the time, defendant's representative met with a senior vice president of All American's parent company on February 6, 1989 and falsely represented to Bell that the Concorde partnership was dissolved and that Concorde was in breach of All American's "end-loan commitment." However, a memo from Butler dated March 2, 1989 states that All American would stand behind its commitment and pay off defendant's construction loan if the Concorde partners signed the mortgage and defendant paid the scheduled \$130,000 extension fee. In his amended complaint, plaintiff also alleges that "[defendant] withheld this information from Concorde and plaintiff and falsely represented to them that the payment of the \$130,000 commitment fee to All American *would not* provide the continued option to finance to pay out [defendant's] construction loan and consequently [defendant] refused and did not pay the \$130,000 commitment fee called for in the All American Loan Agreement" [sic] [emphasis in original]. According to plaintiff, he did not learn about defendant's "false communications with All American until November of 1997, when the Bank finally produce[d] requested documents."

Plaintiff further alleges in his amended complaint that defendant used the claim that the "end-loan commitment" was void as the basis for refusing to make the \$130,000 payment to All American on February 27, 1989. Plaintiff alleges that when defendant failed to make the commitment fee payment, the agreement between All American and Concorde lapsed and became invalid. Thus, plaintiff alleges that defendant's failure to pay the commitment fee of

\$130,000 by the due date of February 27, 1989 denied plaintiff the opportunity to exercise his right to pay off defendant by entering into a permanent loan agreement with All American, resulting in plaintiff's breach of the construction loan agreement with defendant and the loan agreement with All American.

On April 3, 1989, defendant filed suit in Oakland Circuit Court against Concorde, plaintiff, and the Ongtengcos, jointly and severally, alleging that Concorde had defaulted on the terms of the loan agreement between defendant and Concorde. In the first count, defendant sought judgment against Concorde only in the amount of the balance owed on the debt, roughly \$10,315,333 plus interest. Defendant's second count was based upon the guaranty and sought judgment against plaintiff and the Ongtengcos, jointly and severally, in the same amount. In the third count, defendant sought to foreclose on the mortgage. In addition, defendant moved to appoint plaintiff as the receiver to collect rents and accounts and operate and maintain the property. Plaintiff filed his answer on April 18, 1989 but did not file any affirmative defenses or counterclaims.

On June 9, 1989, the parties to this litigation (defendant, Concorde, plaintiff, and the Ongtengcos) entered into a settlement agreement, resulting in the conveyance of title to the Concorde Center to defendant and the dismissal of defendant's lawsuit without prejudice, while allowing plaintiff, upon buying out his former partners, the opportunity to manage the property and pay off the debt. In pertinent part, the settlement agreement provided:

4.10 Consent Judgment: Concurrently herewith, the parties have agreed with respect to the Litigation that:

4.10.1 An order shall be entered dismissing the claims of Plaintiff against Concorde and Karp, without prejudice, but with the further proviso that upon an Execution Date (hereafter defined), a Consent Judgment in form attached as Exhibit 4.10, may be entered against Karp in the amount of \$1 million, or such lesser amount as is hereinafter provided. The consent judgment may be filed by Lender at any time after an Execution Date by filing an Affidavit that an Execution Date under the Settlement Agreement has occurred, and that Lender is entitled to file a motion to re-open the case, enter the Consent Judgment and fill in the appropriate amount thereof;

\* \* \*

4.11 Right to Execute Upon Consent Judgment. Lender [defendant] may not file, execute upon or exercise any of its rights and remedies against Karp under the Consent Judgment until the earlier to occur of the following events:

4.11.1 December 31, 1989 ("First Execution Date"), if by such date the Premises have not been leased to the extent of fifty (50%) percent of the total net rentable square footage. . . .

4.11.2 If the leasing requirements of 4.11.1 are met, then the First Execution Date shall have passed, and Lender shall not execute upon the Consent Judgment until December 31, 1990 ("Second Execution Date").

In addition, the settlement agreement provided that defendant was obligated to exercise reasonable business judgment in its review and approval of all proposed leases and rentals:

4.12. Control of the Premises. From and after date of conveyance of the Premises to Lender, which shall occur contemporaneously herewith, Lender shall have full control of the Premises and the unrestricted right to make all decisions relating thereto including the right to sell the Premises for any price or on any terms it desires. Concorde and/or Karp shall have the right to bring leasing opportunities to the attention of Lender. Lender shall not be required to accept any lease of the Premises and shall have sole and absolute discretion with respect to leasing of the Premises, and the amount to be expended on tenant improvements; provided, however, Lender shall exercise reasonable business judgment in connection with all leasing decisions.

The settlement agreement also set forth:

5.7 Full Settlement of Claims. It is the intention of the parties hereto that this Agreement shall, subject to the conditions hereof, constitute a full settlement and resolution of all pending issues and disputes between the parties as of the closing date, and also with respect to Lender's future relationship to the Premises.

Plaintiff alleges that immediately after the settlement agreement went into effect, defendant refused to cooperate with his efforts to lease the building, to regain title to the building, or to sell it. Specifically, plaintiff alleges that defendant selected its own leasing agent to take over the building, ignored prospective tenants recommended by plaintiff; refused to lease office space to plaintiff, "rekeyed" the building to restrict plaintiff's access to the building, and ignored purchase offers procured by plaintiff. Plaintiff thus alleges that "[b]ecause of the financial losses occasioned by the breaches and tortious acts of Defendant, and because of the entry of the consent judgment," he had to forego other business opportunities and suffered damages to his reputation and financial standing as a real estate developer. He further alleges that defendant damaged his credit record and interfered with his credit relationships with other lenders.

When plaintiff failed to meet the occupancy conditions and leasing requirements by the first execution date, defendant filed a motion for reinstatement of the case and the entry of a consent judgment in the amount of \$1 million on June 13, 1990. According to plaintiff, he entered a limited defense to defendant's motion, "claiming certain known breaches of the Settlement Agreement by the Bank, including fraudulent inducement to ent[er] the Settlement Agreement because of negligent representations made as to future performance by the Bank." Plaintiff contends that he did not raise, nor was he required to raise, any cause of action that he had independent of the consent judgment, especially claims that did not involve releases and waivers contained in the settlement agreement, or any causes of action that were unknown to him at the time.

Defendant then moved for summary disposition and immediate entry of the consent judgment. After defendant's motion for summary disposition was denied, an evidentiary hearing was held over the course of six days in 1992 and early 1993 to determine whether defendant was entitled to the entry of the consent judgment. According to plaintiff, defendant "acknowledged the limited nature of the proceedings and maintained that any claims that Karp had should properly be raised in another separate legal proceeding." Specifically, defendant, in its reply to Karp's answer to its motion for reinstatement of case and entry of consent judgment, stated that:

In other words, once MNB [defendant] files the affidavit (which it has done) there are no other conditions or defenses allowed to the entry of the Consent Judgment

*MNB suggests that if Karp truly believes that MNB has breached the Settlement Agreement, that [sic] Karp's only method of relief is a separate action seeking damages for such alleged breach.*

\* \* \*

*Moreover, as noted above, if Karp believes that MNB is in violation of this provision of the Settlement Agreement [¶ 4.12], he is able to bring a separate action claiming damages as a result of that breach. Such breach, if any exists, (again, which the bank denies) is not a proper legal defense to the entry of the Consent Judgment. [Emphasis provided.]*

Further, at the January 21, 1991 summary disposition hearing, defendant objected, on grounds of relevancy, plaintiff's introduction of testimony about defendant's fraudulent inducement regarding the settlement agreement:

Merely because the defendant [Karp] put something in its answer does not make it relevant to what the issues are. This Court makes the determination ultimately upon the testimony as to what the relevant issues are. . . .

\* \* \*

[T]he only issue here is whether the Bank and Mr. Karp performed the agreement. That's the issue. What went on beforehand, what the intention of the parties - I don't know what . . . Mr. Karp's intention was and I don't much care because it's irrelevant.

This is the agreement. Did we breach it or didn't we breach it? And if we breached it, is it an independent covenant or dependent covenant, that's the issue. What went on beforehand is totally irrelevant and there's been no testimony - in fact, the testimony that I've listened to has been exactly on. . . .

At the conclusion of the evidentiary hearing on February 22, 1993, the Oakland Circuit Court made the following findings of fact and conclusions of law:

We've spent an awful lot of time on this not only today but the entire time. Certainly it's been well briefed with numerous documents and exhibits. But actually, in this Court's opinion, it's a rather simple issue. And what it comes down to primarily is paragraph 4.12 in the settlement agreement entered into by the parties on June 9<sup>th</sup>, 1989. And that paragraph 4.12 gives the Bank full control of the office building and the right to make decisions relating thereto including the right to sell it at any time. Also it gives the right to the lender to exercise – this is the key word, reasonable business judgment – you can actually call it leasing decisions. Also it gives the Bank the right to not to be required to accept any lease of the premises, they have absolute sole and absolute discretion with respect to the leasing of the premises. And the amount to be expended on tenant improvements as provided . . .

[T]he Court applying the reasonable business judgment test doesn't find that it is unreasonable. That's what we're really coming down in the contract itself.

\* \* \*

I just find that the Bank did not make any unreasonable business operations with respect to the leasing decisions. Therefore, I'm finding as a matter of law that Michigan National Bank, the plaintiff, has a right under the terms of the settlement agreement to have a consent judgment entered in the amount of one million dollars against Mr. Samuel Karp.

On March 2, 1993, the court entered the consent judgment against plaintiff.

On May 18, 1995, plaintiff commenced the instant action by filing a five-count complaint in Wayne Circuit Court seeking \$12 million in damages, alleging breach of the settlement agreement, tortious interference with a prospective business advantage, fraud, commercial fraud, and breaches of express warranties. The claims related to defendant's actions with respect to the settlement agreement. On September 12, 1995, defendant moved for summary disposition under MCR 2.116(C)(7) and (C)(10).

The trial court issued an opinion on August 20, 1997, granting in part and denying in part defendant's motion for summary disposition on the basis of res judicata and collateral estoppel. The trial court granted defendant's motion for summary disposition regarding plaintiff's claim of breach of the settlement agreement, denied defendant's motion regarding plaintiff's claims of tortious interference with a prospective business advantage, fraud, and commercial fraud, and granted in part and denied in part defendant's motion regarding plaintiff's claim of breach of an express warranty.

On November 12, 1997, defendant moved for reconsideration of the trial court's October 29, 1997 order granting in part and denying in part defendant's motion for summary disposition under MCR 2.116(C)(7) and (10). The trial court granted defendant's motion for reconsideration and granted summary disposition of all plaintiff's remaining claims on the basis of res judicata.

Thereafter, plaintiff filed a motion requesting reconsideration of the trial court's opinion granting defendant's motion for summary disposition and seeking leave to file an amended complaint. Plaintiff claims that this motion was based upon the newly-made-available evidence contained in recently-produced documents that revealed defendant's interference with plaintiff's contractual relationship. As a result, plaintiff sought to amend his complaint to allege five additional causes of action regarding plaintiff's relationship with All American. The trial court denied plaintiff's motion for reconsideration and his motion for leave to amend the complaint.

## II. Res Judicata

Plaintiff first argues that the trial court erred when it determined that plaintiff's claims from his original complaint were barred by the doctrine of res judicata and therefore granted defendant's motion for summary disposition.

We review de novo a trial court's decision regarding a summary disposition motion. *Roberson v Occupational Health Centers of America, Inc*, 220 Mich App 322, 324; 559 NW2d 86 (1996). In reviewing a motion for summary disposition because the claim is barred under MCR 2.116(C)(7), the plaintiff's well-pleaded allegations are accepted as true, unless contradicted by documentary evidence, *Patterson v Kleiman*, 447 Mich 429, 434, n 6; 526 NW2d 879 (1994), and the appellate court examines the pleadings, affidavits, depositions, admissions, and documentary evidence submitted in the light most favorable to the nonmoving party. *Stamps v City of Taylor*, 218 Mich App 626, 630; 554 NW2d 603 (1996). If the pleadings show that a party is entitled to judgment as a matter of law, or if the proofs show that there is no genuine issue of material fact, then the trial court must enter judgment without delay. *Id*; MCR 2.116(I)(1).

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). In reviewing a motion under MCR 2.116(C)(10), a court considers the pleadings, affidavits, depositions, admissions, and other documentary evidence available to it in the light most favorable to the party opposing the motion. *Id*. A trial court may grant a motion for summary disposition if the affidavits or other documentary evidence show that there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

Moreover, the applicability of res judicata is a question of law that is reviewed de novo on appeal. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999).

Res judicata bars a subsequent action between the same parties if the evidence or essential facts are identical. *Dart v Dart*, 224 Mich App 146, 156; 568 NW2d 353 (1997), *aff'd* 460 Mich 573; 597 NW2d 82 (1999). Res judicata requires that: (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. *Id*; *Kosiel v Arrow Liquors Corp*, 446 Mich 374, 379; 521 NW2d 531 (1994). Res judicata applies to consent judgments. *Schwartz v Flint*, 187 Mich App 191, 194; 466 NW2d 357 (1992). If the same facts or evidence would sustain two actions, the actions

are the same for purposes of res judicata. *In re Koernke Estate*, 169 Mich App 397, 399; 425 NW2d 795 (1988).

While plaintiff purports to claim that the trial court erred when it concluded that all of his original claims were barred by res judicata, a close reading of plaintiff's appeal brief and reply brief leads us to conclude that plaintiff is not challenging the trial court's original opinion and order granting in part and denying in part defendant's motion for summary disposition but only the trial court's opinion and order granting defendant's motions for reconsideration and summary disposition. Indeed, plaintiff states that "the trial court's original ruling was correct" and thus indicates that the court got it right the first time when it granted defendant's motion for summary disposition regarding plaintiff's claims of breach of the settlement agreement and breach of express warranty to act in a commercially reasonable manner but denied its motion as to plaintiff's claims of tortious interference with a prospective business advantage, fraud, commercial fraud, and breach of express warranties to regain title and to act in good faith. Accordingly, the question becomes whether the trial court erred when it determined that these remaining claims were barred by res judicata.

We conclude that res judicata barred all of plaintiff's claims raised in the original complaint, including his claims of tortious interference with a prospective business advantage, fraud, commercial fraud, and breach of express warranties to regain title and to act in good faith. Indeed, the record indicates that the claims *were* in fact addressed by the Oakland Circuit Court. While plaintiff contends that the only issue actually litigated in the prior litigation was whether defendant was entitled to have a consent judgment in the amount of \$1 million entered against plaintiff under the terms of the settlement agreement, we conclude that all of plaintiff's present claims constituted an attempt to relitigate the defenses raised at the evidentiary hearing regarding the entry of the consent judgment. Indeed, a review of the record indicates that the Oakland Circuit Court ruled that defendant was entitled to a consent judgment under the terms of the settlement agreement because it found that "the Bank did not make any unreasonable business operations with respect to the leasing decisions." As defendant correctly points out, "[t]he entire gravamen of the [instant] Wayne County action is that the Bank first fraudulently induced Karp into signing the Settlement agreement [by stating that it would act reasonably under the settlement agreement], and then committed several breaches," as alleged in plaintiff's original complaint. The Oakland Circuit Court's finding that defendant did not breach the settlement agreement and that defendant acted in a commercially reasonable manner effectively disposed of all the claims that plaintiff raised in his original complaint. Ultimately, plaintiff's action in Wayne Circuit Court alleging breach of the settlement agreement, tortious interference with a prospective business advantage, fraud, commercial fraud, and breach of express warranties to regain title, to act in good faith, and to act in a commercially reasonable manner was an attempt to relitigate the Oakland Circuit Court's ruling that defendant did not breach the settlement agreement and to obtain an outcome inconsistent with the prior proceeding. Accordingly, res judicata barred plaintiff's claims. See *Gose v Monroe Auto Equipment Co*, 409 Mich 147, 160-163; 294 NW2d 165 (1980) (indicating that claims actually litigated in prior proceedings are barred by res judicata).

We note that the trial court did not rely on the fact that the claims had already been litigated in granting defendant summary disposition. Instead, the court relied on the fact that the



claims *could have been litigated* in the Oakland County proceeding. See *Sprague v Buhagiar*, 213 Mich App 310; 539 NW2d 587 (1995). While *Sprague* indeed purports to bar an action involving a counterclaim that could have been brought in a prior proceeding, see *id.* at 313, another panel of this Court reached a contrary conclusion in *Eaton Road Comm'rs v Schultz*, 205 Mich App 371; 521 NW2d 847 (1994). We need not address this conflict, however, in light of our conclusion that plaintiff's claims from his original complaint *actually were litigated* in the prior proceeding. While the trial court may have erroneously relied on the fact that the claims were not previously litigated but *could have been* litigated, we will not reverse a trial court if it reached the correct result for the wrong reasons. See *Phinney v Perlmutter*, 222 Mich App 513, 532; 564 NW2d 532 (1997).

Plaintiff contends that res judicata should not be held applicable to the instant case because there was no judgment on the pleadings. Plaintiff contends that the pleadings in the prior litigation in Oakland Circuit Court were never litigated, having been dismissed without prejudice and reinstated by motion for the purpose of entering a consent judgment. Plaintiff maintains that because the instant case involves the application of res judicata to a consent judgment, there was no determination on the merits of the issues being raised in the instant action. However, as defendant points out, there was an evidentiary hearing held over six days before the entry of the consent judgment; plaintiff made proposed findings of fact and conclusions of law that dealt with his claims raised in his original complaint, including his claims of tortious interference with a prospective business advantage, fraud, commercial fraud, and breach of express warranties to regain title and to act in good faith. Specifically, plaintiff claimed that defendant "did not exercise reasonable business judgment in its leasing efforts," that defendant "induced Karp into entering into executing the Settlement Agreement"[sic], that defendant interfered with his efforts to lease the building, and that defendant failed "to act in good faith." So even though, strictly speaking, there was "no judgment on the pleadings," it cannot be denied that the question whether defendant breached the settlement agreement was placed in issue and actually litigated in the prior action in Oakland Circuit Court. Accordingly, res judicata applied.

Plaintiff further argues that defendant waived its defense of res judicata by statements made in the prior litigation. As set forth earlier in this opinion, defendant maintained that because of the limited nature of the proceedings involving the entry of the consent judgment, plaintiff was allowed to raise any claims against defendant in a separate proceeding. The doctrine of judicial estoppel prevents a party who has successfully and unequivocally asserted a position in a prior proceeding from asserting an inconsistent one at a subsequent proceeding. *Lichon v American Universal Ins Co*, 435 Mich 408, 416; 459 NW2d 288 (1990); *Auto-Owners Ins Co v Harvey*, 219 Mich App 466, 474; 556 NW2d 517 (1996). We do not find the doctrine of judicial estoppel to be controlling in this case. Indeed, as set forth in the above cases, judicial estoppel applies if a party has *successfully* asserted a position in a prior proceeding. There is no indication from the record that the Oakland Circuit Court made a ruling with regard to defendant's argument that plaintiff could not raise certain defenses in the proceedings but was instead obligated to pursue them in independent actions. Accordingly, we cannot say that defendant *successfully* asserted a position in the prior proceeding, and judicial estoppel therefore did not apply.

### III. Collateral Estoppel

Next, plaintiff argues that the trial court erred when it granted summary disposition on the basis of collateral estoppel. Initially, the trial court, in granting in part and denying in part defendant's motion for summary disposition, ruled that "collateral estoppel precludes Karp from litigating his claims against MNB for breach of contract [breach of settlement agreement] and breach of a warranty to act in a commercially reasonable manner," but that collateral estoppel did not bar his "remaining claims" of tortious interference with a prospective business advantage, fraud, commercial fraud, and breach of warranties to regain title and to act in good faith. In granting defendant's motion for reconsideration and granting defendant's motion for summary disposition, the trial court ruled that plaintiff's "remaining claims" were barred by the doctrine of res judicata. In other words, the trial court left untouched its original ruling that collateral estoppel barred plaintiff's claims of breach of contract and breach of an express warranty to act in a commercially reasonable manner but did not bar his "remaining claims" of tortious interference with a prospective business advantage, fraud, commercial fraud, and breach of express warranties to regain title and to act in good faith. Thus, the issue is whether the trial court erred in granting summary disposition regarding plaintiff's claims of breach of contract and breach of an express warranty to act in a commercially reasonable manner on the basis of collateral estoppel.

However, as discussed earlier, plaintiff's appellate brief does not adequately challenge the trial court's original opinion and order granting in part and denying in part defendant's motion for summary disposition but instead adequately challenges only the court's opinion and order granting defendant's motions for reconsideration and summary disposition on the basis of res judicata. In effect, plaintiff has abandoned the issue.

Even if plaintiff had *not* abandoned the issue, we would nonetheless find no basis for relief. As stated in *People v Gates*, 434 Mich 146, 154, 156-158; 452 NW2d 627 (1990):

Collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties where the prior proceeding culminated in a valid, final judgment and the issue was (1) actually litigated, and (2) necessarily determined.

\* \* \*

In analyzing whether an issue was "actually litigated" in the prior proceeding, the Court must look at more than what has been pled and argued. We must also consider whether the party against whom collateral estoppel is asserted has had a full and fair opportunity to litigate the issue.

\* \* \*

An issue is necessarily determined only if it is "essential" to the judgment.

Here, the trial court, in its original opinion granting in part and denying in part defendant's motion for summary disposition, properly granted summary disposition to defendant

regarding plaintiff's claims of breach of the settlement agreement and breach of an express warranty to act in a commercially reasonable manner on the basis of collateral estoppel. As the trial court noted, plaintiff argued in the prior litigation in Oakland County that the consent judgment should not enter because defendant had breached the settlement agreement by failing to exercise reasonable business judgment. In his original complaint in the instant matter, plaintiff likewise alleged that defendant breached the settlement agreement by failing to exercise reasonable business judgment. Thus, as the trial court correctly found, the same issue had been presented to both courts.

Further, whether defendant breached the settlement agreement by failing to exercise reasonable business judgment was actually litigated in the prior proceeding. Indeed, the issue of defendant's alleged breach of the settlement agreement by failing to exercise reasonable business judgment was "necessarily determined" in the prior proceeding because it was "essential" to the entry of the consent judgment. Thus, the trial court did not err in granting summary disposition regarding plaintiff's claims of breach of the settlement agreement and breach of an express warranty to act in a commercially reasonable manner on the basis of collateral estoppel.

#### IV. The Amendments to the Complaint

Next, plaintiff argues that the trial court erred in denying plaintiff leave to amend his complaint. Plaintiff argues that justice required leave to amend because defendant's actions in obstructing discovery prevented him from learning about certain of defendant's wrongful actions until defendant was compelled to produce documents by a court order entered on October 29, 1997. This Court reviews the grant or denial of a motion for leave to amend pleadings for an abuse of discretion. *Horn v Dept of Corrections*, 216 Mich App 58, 65; 548 NW2d 660 (1996).

According to plaintiff, the relevant documents produced after the October 1997 order were memoranda showing that defendant misled plaintiff "concerning his rights under a stand-by commitment for end loan financing by All American" and that defendant interfered with plaintiff's agreement with All American. Specifically, in his amended complaint, which was dated February 6, 1998, plaintiff alleged twelve additional counts: (1) inducing breach of contract involving the loan agreement between Concorde and All American by defendant's alleged refusal to make the periodic payments to All American; (2) interfering with the contract involving the Concorde partnership agreement by inducing plaintiff to buy out his partners "on the false promise" that defendant would assist plaintiff in maintaining ownership of the Concorde Centre; (3) breach of contract involving the loan agreement between Concorde and defendant because of defendant's failure to make a payment that was due to All American, "thereby allowing the End Loan Commitment to lapse;" (4) interference with existing contractual relationships between Concorde and All American and between plaintiff and his Concorde partners by defendant's false assertions to the Concorde partners and representatives of All American that the "end-loan agreement" was no longer valid; (5) intentional interference with prospective economic advantage by defendant's wrongful interference with Concorde's economic relationship with All American and plaintiff's economic relationship with his Concorde partners; (6) negligent interference with prospective economic advantage involving plaintiff's future economic benefits arising from the Concorde Centre; (7) negligent misrepresentations inducing plaintiff to enter

into the settlement agreement; (8) fraud based upon “false promises” inducing plaintiff to enter the settlement agreement; (9) commercial fraud based upon the negligent misrepresentations inducing plaintiff to enter into the settlement agreement; (10) slander based on the false statement that defendant made to tenants of the Concorde Centre and lenders that defendant was going into bankruptcy; (11) fraud based upon defendant’s intentional misrepresentation to plaintiff in a letter dated January 25, 1989 that Concorde and plaintiff were in default of their loan agreement with defendant; and (12) breach of express warranties upon the execution of the settlement agreement.<sup>1</sup>

At the outset, we note that counts 1-6 and 10-11 in plaintiff’s amended complaint appear to be new claims alleging misconduct by defendant with respect to plaintiff’s relationship with All American, whereas counts 7-9 and 12 essentially overlap the claims made in plaintiff’s original complaint. Because the trial court properly granted defendant’s motion for summary disposition regarding plaintiff’s claims raised in his original complaint, it must now be determined only whether the trial court erred in not allowing plaintiff to amend his complaint to add counts 1-6 and 10-11.<sup>2</sup>

Defendant claims that by entering into the settlement agreement with defendant, plaintiff waived his right to file a suit against defendant pertaining to claims arising out of the construction loan. In pertinent part, the settlement agreement provides:

4.5 Release by Concorde and Karp of Lender. Concorde and Karp . . . hereby release and forever discharge Lender, its officers, employees, agents, servants, directors, successors and assigns from any and all claims, damages, liabilities, actions or causes of action of any kind, nature or description whatsoever, arising out of, or in any manner connected with the Loan, the Loan Documents, Lender’s administration of the Loan, or any and all other matters which are, could be or may be connected with the Loan, or the Loan Documents including the Guarantor Disputes.

As indicated by the language of the settlement agreement, the parties intended to resolve issues and disputes relating to plaintiff’s loan agreement with defendant. Counts 1 and 3 of the amended complaint pertain to defendant’s alleged breach of this loan agreement. Accordingly, counts 1 and 3 were barred by the settlement, and the trial court therefore did not abuse its discretion in refusing to allow them. Counts 2, 4-6, and 10-11, however, relate to actions apart from the loan agreement between plaintiff and defendant and therefore are not barred by the settlement agreement.

---

<sup>1</sup> We note that plaintiff filed a “corrected” amended brief on February 28, 1998. The corrected brief did not vary substantially from the brief dated February 6, 1998, although some of the counts were renumbered.

<sup>2</sup> We note that plaintiff’s appellate brief does not set forth any evidence that the newly-discovered evidence applied to counts 7-9 and 12 of the amended complaint. Moreover, even assuming, arguendo, that counts 7-9 and 12 of the amended complaint constituted new claims, it appears that they would be barred by the applicable statutes of limitation, as discussed *infra*.

Defendant, however, claims that counts 2, 4-6, and 10-11 of plaintiff's amended complaint were barred by the applicable statutes of limitation. See *James v Logee*, 150 Mich App 35, 37-38; 388 NW2d 294 (1986) (indicating a three-year statute of limitations for claims involving tortious interference with contractual relations or business relationships), *Wilson v Knight-Ridder Newspapers, Inc.*, 190 Mich App 277, 279; 475 NW2d 388 (1991) (indicating a one-year statute of limitations for slander claims), and *Kuebler v Equitable Life Assurance Society of the US*, 219 Mich App 1, 6; 555 NW2d 496 (1996) (indicating a six-year statute of limitations for fraud claims). As a response to defendant's argument, plaintiff contends only that statutes of limitation do not bar claims under circumstances involving fraudulent concealment of those claims. MCL 600.5855; MSA 27A.5855 provides:

If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

Plaintiff contends that defendant's opposition to discovery indicates that defendant sought to conceal discovery of its wrongful conduct to avoid liability. However, to toll the statute of limitations based on fraudulent concealment, a plaintiff must plead in the complaint the acts or misrepresentations that comprised the fraudulent concealment and must prove that the defendant committed affirmative acts or misrepresentations *that were designed to prevent subsequent discovery*. *Sills v Oakland General Hospital*, 220 Mich App 303, 310; 559 NW2d 348 (1996); *Witherspoon v Guilford*, 203 Mich App 240, 248; 511 NW2d 720 (1994). Here, plaintiff did not set forth in his complaint the acts that constituted the *fraudulent concealment of the claims*. In fact, plaintiff did not even mention the fraudulent concealment doctrine in his complaint. Accordingly, the claims were barred by the statute of limitations.<sup>3</sup> No error occurred in the trial court's failure to allow plaintiff to amend his complaint.

## V. Copying Costs

Finally, plaintiff argues that the trial court erred in requiring plaintiff to pay defendant certain costs for copying documents. "This Court reviews the circuit court's determination of the reasonableness of fees ordered for the production of documents for an abuse of discretion." *In re Document Fees*, 224 Mich App 665, 669; 569 NW2d 898 (1997).

Under an order compelling discovery, defendant was required to produce documents and plaintiff was required to reimburse defendant for the reasonable costs incurred to make copies of the documents. On November 14, 1997, defendant delivered eleven boxes of documents to plaintiff's counsel's office, along with a copying bill in the amount of \$9,555.43 for

---

<sup>3</sup> We note that even if counts 1 and 3 were not barred by the settlement agreement, they would nonetheless be barred by the applicable statutes of limitation.

reimbursement. Upon delivery, plaintiff's counsel, Alan Cooper, sent a letter to defendant's counsel, Douglas Bernstein, in which Cooper stated that he was disputing reimbursement because two weeks prior, when Cooper asked Bernstein for an estimate about the copying costs and whether the amount would exceed \$500, Bernstein told him that there were four boxes of documents and that the cost "probably would not" exceed \$500. According to plaintiff, if he had been told that there were eleven boxes and that the copying bill would be almost \$10,000, he would have asked to examine the documents to determine if he wanted them copied. Plaintiff additionally contends that the invoices were erroneous because defendant charged plaintiff for "Bates Numbering" and also required plaintiff to pay for defendant's own copies.

On December 12, 1997, the trial court, after hearing argument from counsel on plaintiff's motion to declare the copying costs unreasonable, ruled from the bench denying the motion. Considering the ninety requests for production of documents in litigation involving claimed damages of \$12 million, the trial court ruled that plaintiff could not have anticipated that the bill would be only \$500.

On appeal, plaintiff argues that he was overcharged at least \$4,295.81, consisting of charges for "Bates Numbering" that he did not request in the amount of \$1,325.27 and an additional \$2,970.54 for extra copies made for defendant. Plaintiff did not make a specific objection below, however, to "Bates Numbering"<sup>4</sup> and to extra copies made for defendant. Accordingly, he has not properly preserved this argument for appeal, and we therefore decline to review it. See *Garavaglia v Centra, Inc.*, 211 Mich App 625, 628; 536 NW2d 805 (1995). Plaintiff additionally contends that he should not have been required to pay for the copying costs because he believed that they would be only \$500. Plaintiff, however, agreed to reimburse defendant for copying costs, and we find no abuse of discretion in the trial court's ruling that plaintiff should have anticipated that the costs would far exceed \$500.

Affirmed.

/s/ Mark J. Cavanagh  
/s/ Henry William Saad  
/s/ Patrick M. Meter

---

<sup>4</sup> While plaintiff did state below that the costs included a "six cent numbering charge," he did not indicate below *why* this charge was unreasonable or that "Bates Numbering" had not been requested. Accordingly, the trial court did not address the specific issue now raised on appeal.