STATE OF MICHIGAN

COURT OF APPEALS

DIANE LAKE, as Personal Representative of the Estate of CAROL DEAN, Deceased, and VICTORIA EVA ABDELLA,

Plaintiffs-Appellants,

v

KENNETH TESSMAR and ROBERT TESSMAR,

Defendants-Appellees.

UNPUBLISHED
July 3, 2001

No. 223020
Oakland Circuit Court
LC No. 98-004818-CK

VICTORIA ABDELLA, as Personal Representative of the Estate of CAROL DEAN, Deceased, and VICTORIA EVA ABDELLA,

Plaintiffs-Appellants,

v

KENNETH TESSMAR, ROBERT TESSMAR, and TESSMAR AND TESSMAR,

Defendants-Appellees.

No. 226522
Oakland Circuit Court
LC No. 99-016850-CK

Before: Sawyer, P.J., and Griffin and O'Connell, JJ.

PER CURIAM.

In these cases consolidated on appeal, plaintiffs appeal as of right from the trial court's separate grants of summary disposition under MCR 2.116(C)(7) and (10). In Docket No. 223020, we affirm in part, reverse in part and remand for further proceedings. In Docket No. 226522, we affirm in part, reverse in part and remand for further proceedings.

Plaintiffs Diane Lake, as personal representative of her sister Carol Dean, and Victoria Abdella filed suit against defendants Kenneth and Robert Tessmar on March 23, 1998, seeking to recover attorney fees incurred for various legal services provided by Dean[1] and Abdella.[2] Kenneth and Robert Tessmar are partners in the copartnership of Tessmar and Tessmar. The complaint alleged that defendants failed to reimburse plaintiffs for legal services performed by Dean and Abdella. After the trial court denied plaintiffs' motion to amend the complaint to include the copartnership of Tessmar and Tessmar[3] as a defendant, it granted summary disposition in favor of defendants. Plaintiffs subsequently filed a separate action against the copartnership of Tessmar and Tessmar on August 13, 1999. (Docket No. 226522).

On appeal, plaintiffs argue that the trial court erred in denying their motion to amend the complaint. Plaintiffs sought to amend the complaint to add the copartnership of Tessmar and Tessmar as a defendant. A partnership is deemed a separate and distinct entity in litigation. *George Morris Cruises v Irwin Yacht & Marine Corp*, 191 Mich App 409, 415; 478 NW2d 693 (1991); *Yenglin v Mazur*, 121 Mich App 218, 224; 328 NW2d 624 (1982).

We review a trial court's decision regarding the amendment of pleadings for an abuse of discretion. *Doyle v Hutzel Hospital*, 241 Mich App 206, 211-212; 615 NW2d 759 (2000). As our Supreme Court observed in *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 239; 615 NW2d 241 (2000), MCR 2.118(A)(2) provides that a court may allow a party to amend a pleading and "when justice requires, leave shall be given freely." Accordingly, a motion to amend generally should be granted unless one of the following circumstances exists:

> [1] undue delay, [2] bad faith or dilatory motive on the part of the movant, [3] repeated failure to cure deficiencies by amendments previously allowed, [4] undue prejudice to the opposing party by virtue of allowance of the amendment, [and 5] futility . . . . [*Id.* at 239-240 quoting *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 656; 213 NW2d 134 (1973) (internal quotation marks and footnote omitted) (ellipses in original).]

"[A] grant or denial of a motion to add a party . . . is governed by the same standard applicable to a motion to amend pleadings." *Waldorf v Zinberg*, 106 Mich App 159, 166; 307 NW2d 749 (1981). When denying a party's motion to amend, the trial court's reasons should be specifically set forth on the record. *Weymers v Khera*, 454 Mich 639, 659; 563 NW2d 647 (1997). Further, delay in itself will not justify a denial of a motion to amend. *Id.* To justify a

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[1] A review of the record reveals that Carol Dean and Kenneth and Robert Tessmar were first cousins. According to the complaint in Docket No. 223020, Dean died in May 1994.

[2] The claim concerning Victoria Abdella alleged that defendants were liable to her for legal services performed in relation to the acquisition of land referred to in the record as the Rothschild estate.

[3] According to the record, defendants Kenneth and Robert Tessmar are the sole partners in the copartnership of Tessmar and Tessmar.

denial of a motion to amend on the basis of delay, the party seeking the amendment must have acted in bad faith, or the party opposing the delay must demonstrate actual prejudice that would follow from an amendment. *Id.* Moreover, our Supreme Court has observed that the concept of prejudice includes the situation where the amendment prevents the opposing party from having a fair trial. *Id.*

A review of the trial court's reasoning in the instant case reveals that it denied plaintiffs' motion to amend in part because of the one-year delay between the initial filing of the complaint and the motion to amend. The trial court also voiced its concern that plaintiffs sought to add a new theory of recovery to their claim by adding the copartnership as a defendant. The following remarks of our Supreme Court in *Weymers, supra,* are therefore of guidance.

> We hold that a trial court may find prejudice when the moving party seeks to add a new claim or a new theory of recovery on the basis of the same set of facts, after discovery is closed, just before trial, *and the opposing party shows that he did not have reasonable notice, from any source, that the moving party would rely on the new claim or theory at trial.* [*Id.* at 659-660 (footnote omitted) (emphasis supplied); see also *Grzesick v Cepela,* 237 Mich App 554, 565; 603 NW2d 809 (1999).]

In our opinion, the trial court abused its discretion in denying plaintiffs' motion to amend the complaint because defendants did not show that the amendment would prejudice their right to a fair trial. *Sands, supra* at 239 n 6. Although plaintiffs brought their April 1999 motion to amend toward the close of discovery, the record reflects that trial was not scheduled until the fall of 1999. Further, defendants did not demonstrate that they were not provided "reasonable notice, from any source" that plaintiffs would seek to hold the copartnership liable at trial. *Id.* In contrast, the lower court record is replete with documentation referring to the copartnership's legal dealings with Dean. In our view, defendants were thus provided with reasonable notice that plaintiffs would seek to recover attorney fees from the copartnership, as well as from defendants individually.[4]

Plaintiffs also complain that the trial court erred in summarily dismissing Lake's claim on the basis of the statute of frauds because defendants failed to raise it as an affirmative defense. Plaintiffs correctly observe that the statute of frauds is an affirmative defense. MCR 2.111(F)(3)(a). A review of the record demonstrates that defendants did not raise the statute of frauds as an affirmative defense in their answer to the complaint as required by MCR 2.111(F). See *Harris v Vernier,* 242 Mich App 306, 311-312; 617 NW2d 764 (2000). Therefore the statute of frauds defense was waived and summary disposition on this basis was improper. *Cole v Ladbroke Racing Michigan, Inc,* 241 Mich App 1, 8; 614 NW2d 169 (2000); *Stanke v State Farm Mut Auto Ins Co,* 200 Mich App 307, 311-312; 503 NW2d 758 (1993).

[4] This documentation includes bills forwarded to the partnership by Dean, and documents pertaining to the land transaction Abdella was involved in that referred to the copartnership. Further, Kenneth Tessmar's affidavit, appended to defendants' February 19, 1999 motion for partial summary disposition, indicated that the copartnership routinely referred legal problems to Dean and the copartnership paid any ensuing legal bills.

However, the trial court granted summary disposition of Abdella's claim against defendants on an alternate basis. Specifically, the trial court concluded that Abdella's claim against defendants for legal services rendered with regard to the acquisition of the Rothschild estate could not proceed because privity of contract did not exist between Abdella and defendants.[5] We review a trial court's grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).[6] In *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999), our Supreme Court set forth the applicable standard for reviewing motions brought under MCR 2.116(C)(10).

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. [*Id.* (citations omitted).

The complaint alleged that defendants, in their individual capacities, authorized Dean to retain Abdella's services with regard to the acquisition of the Rothschild estate. On appeal, plaintiffs argue that genuine factual disputes existed that precluded summary disposition. Without expressing an opinion regarding the soundness of the trial court's reasoning, we affirm its decision.[7]

A review of the record in the light most favorable to plaintiff Abdella reveals that Dean was retained by the copartnership to assist in the acquisition of the Rothschild estate. For example, Abdella testified during her deposition that Dean asked her to assist in the acquisition of the Rothschild estate because Dean did not want to engage in a conflict of interest. Abdella further testified that she was asked by Dean to "work on the estate for Tessmar and Tessmar." In contrast, the record does not contain evidence to support Abdella's claim that Dean retained her services in the probate of the Rothschild estate on behalf of defendants' in their individual capacities. Rather, a review of the relevant documentation in the record demonstrates that the copartnership, as opposed to defendants in their individual capacities, acquired the Rothschild

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[5] The trial court further found that defendants were not liable to Abdella for legal fees because she engaged in a conflict of interest.

[6] Although defendants initially moved for summary disposition under MCR 2.116(C)(5) and (7), in an answer to plaintiff's motion in opposition to summary disposition, defendants argued that their motion was brought pursuant to MCR 2.116(C)(10). Further, the parties appended documentary evidence, depositions and affidavits to their respective motions. Because the trial court went beyond the pleadings in considering defendants' motion, we review its order as granting summary disposition pursuant to MCR 2.116(C)(10). *Tobin v Providence Hospital*, 244 Mich App 626, 634; 624 NW2d 548 (2001).

[7] "A decision granting summary disposition may be affirmed on the basis of reasoning different from the reasoning employed by the trial court." *Otero v Warnick*, 241 Mich App 143, 147 n 2; 614 NW2d 147 (2000).

estate.[8] Therefore the trial court's grant of summary disposition of plaintiffs' claim in Docket No. 223020 was proper.

Docket No. 226522

In Docket No. 226522, plaintiffs contend that the trial court erred in summarily dismissing their claim against the copartnership on the basis of res judicata. We agree.

A trial court's grant of summary disposition, as well as the applicability of the doctrine of res judicata, are questions of law reviewed de novo on appeal.[9] *Ditmore v Michalik*, 244 Mich App 569, 574; 625 NW2d 462 (2001). Our Supreme Court recently articulated the elements of the res judicata doctrine in *Sewell v Clean Cut Mgmnt, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001).

> Res judicata bars a *subsequent* action between the same parties when the evidence or essential facts are identical. A second action is barred 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. . . . Michigan courts have broadly applied the doctrine of res judicata. They have barred, not only claims already litigated, but every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not. [*Id*. quoting *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999) (emphasis supplied) (citations omitted).]

As our Supreme Court observed in *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 380; 596 NW2d 153 (1999), "[t]he doctrine of res judicata was judicially created in order to 'relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.' " *Id.* quoting *Hackley v Hackley*, 426 Mich 582, 584; 395 NW2d 906 (1986).[10] The doctrine of res judicata applies " ' not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but applies to every point which properly belonged to the subject of litigation, and *which the parties, exercising reasonable diligence, might have brought forward at the time*.' " *Pierson, supra* at 382, quoting *Hackley, supra* (emphasis supplied).

Assuming that the requisite elements are satisfied, in our opinion res judicata does not act to bar plaintiffs' action under the circumstances of this case. As we previously concluded, the trial court abused its discretion in denying plaintiffs' claim to add the copartnership as a party to

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[8] For instance, the report of sale of real estate and the deed of title regarding the Rothschild estate both clearly indicate that the copartnership, not defendants in their individual capacity, acquired the estate.

[9] A review of the trial court's decision reveals that summary disposition was granted on the basis of MCR 2.116(C)(7). Summary disposition under MCR 2.116(C)(7) is proper if the claim is barred as a matter of law. *Otero, supra* at 147.

[10] In turn quoting *Allen v McCurry*, 449 US 90, 94; 101 S Ct 411; 66 L Ed 2d 308 (1988).

the litigation. Plaintiffs instituted the present action against the copartnership on August 13, 1999, one month before the trial court issued its decision in Docket No. 223020. Significantly, plaintiffs did not file the instant case in an effort to relitigate issues already decided by the trial court, but did so only after the trial court denied their request to add the copartnership as a party in the prior litigation. Moreover, plaintiffs exercised reasonable diligence in seeking to amend the complaint to add the copartnership as a defendant in Docket No. 223020.

On these facts, we are not persuaded that summary disposition on the basis of res judicata was proper. As our Supreme Court observed in *Pierson, supra*, the doctrine of res judicata is designed to prevent parties from bringing multiple lawsuits and wasting judicial resources. *Pierson, supra* at 380. The facts in the case *sub judice* do not present such a scenario. Rather, the record is clear that plaintiffs properly attempted to add the copartnership as a party to the litigation in Docket No. 223020, but were precluded from doing so by the trial court. Keeping in mind that the doctrine of res judicata is "not a constitutional mandate that must be carefully construed to maintain its integrity, but only a tool created by the courts," *Pierson, supra* at 382, we conclude that it does not act to bar plaintiffs' claims against the copartnership.[11]

Finally, plaintiffs argue that the trial court erred in denying their motion to compel discovery with regard to the depositions of Robert and Kenneth Tessmar. We disagree.

We review the trial court's decision regarding discovery for an abuse of discretion. *In re Pott*, 234 Mich App 369, 373; 593 NW2d 685 (1999). It appears from the record that the trial court based its decision to deny plaintiffs' the opportunity to further depose Kenneth and Robert Tessmar on its concern that plaintiffs had already deposed Kenneth Tessmar, and had declined to depose Robert Tessmar at earlier stages of the litigation in Docket No. 223020. The trial court further reasoned that plaintiffs were afforded an adequate opportunity to question the brothers regarding the dealings of the copartnership at earlier stages of discovery. On this record, we find no abuse of discretion.[12]

In Docket No. 223020, we affirm in part, reverse in part and remand for further proceedings. In Docket No. 226522, we affirm in part, reverse in part and remand for further proceedings. On remand, the trial court shall consolidate plaintiffs' claims in Docket Nos. 223020 and 226522. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Richard Allen Griffin
/s/ Peter D. O'Connell

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[11] We are confident that allowing plaintiffs' claim to proceed in Docket No. 226522 will not circumvent the purposes underlying the doctrine of res judicata. See generally *Ozark v Kais*, 184 Mich App 302, 308; 457 NW2d 145 (1990).

[12] Plaintiffs also argue that the trial court erred in concluding that Dean did not have the authority to bind the partnership with regard to Abdella's legal services. Contrary to plaintiffs' assertions, the trial court did not decide this issue in dismissing plaintiffs' claim in Docket No. 226522. Therefore it is not properly before this Court for review. *Fast Air, Inc v Knight*, 235 Mich App 541, 549-550; 599 NW2d 489 (1999).