STATE OF MICHIGAN

COURT OF APPEALS

EMMET LAND COMPANY,

Plaintiff-Appellant,

v

HARBOR SPRINGS REAL ESTATE CORPORATION and GARY R. LEIGH,

Defendants-Appellees.

UNPUBLISHED
January 15, 2002

No. 224650
Wayne Circuit Court
LC No. 99-925902-CH

Before: Cavanagh, P.J., and Doctoroff and Jansen, JJ.

PER CURIAM.

Plaintiff Emmet Land Company appeals as of right from the trial court's order dismissing its complaint against defendants, Harbor Springs Real Estate Corporation (HSREC) and Gary R. Leigh. We affirm with respect to defendant HSREC, but reverse and remand for further proceedings with respect to defendant Leigh.

This case is the second of two circuit court actions filed in connection with a joint venture between Richard Lambert and Leigh, which involved forming a corporation, HSREC, for the purpose of buying two parcels of property. After a dispute arose between Lambert and Leigh, they terminated their business relationship pursuant to an agreement where, in part, Lambert allegedly received a consulting agreement for $50,000 from HSREC that was personally guaranteed by Leigh, who was to become the sole shareholder of HSREC.

In the first action, filed by Lambert against HSREC, the trial court, following a bench trial in 1997, found that HSREC had a valid contractual obligation for the $50,000 consulting fee, but dismissed the action based on Lambert's lack of standing. While an appeal was pending before this Court from the order of dismissal, plaintiff, as Lambert's assignee, filed the instant action in the Emmet Circuit Court against defendants, seeking the $50,000 consulting fee and other relief arising from the same contractual transaction underlying Lambert's earlier action.

On May 28, 1999, this Court reversed the trial court's determination that Lambert lacked standing in the first action and remanded for entry of judgment in favor of Lambert on his breach of contract claim and to address the merits of Lambert's claims for lost use of the $50,000

consulting fee and for costs and attorney fees.[1] This case was ultimately assigned to the same trial judge who presided over the first action.

Defendants thereafter moved for dismissal under MCR 2.116(C)(7), based on principles of res judicata and collateral estoppel. Defendants also cited MCR 2.116(C)(6) as an additional basis for dismissal and raised a claim under the statute of frauds with regard to one count of plaintiff's complaint. Defendants' motion was predicated on the trial court's ruling in the first action that Lambert lacked standing, but the trial court gave effect to this Court's May 28, 1999, decision in that case when dismissing the present matter. After hearing plaintiff's attorney's position that Leigh's liability, as a guarantor, was not decided in Lambert's action, the trial court ruled:

> I'm ordered by the Court of Appeals to enter judgment here for fifty thousand dollars, which I will do. And then there were costs and attorney fees. This whole case is moot by the action of the Court of Appeals in reversing me. The motion to dismiss is granted. . . . It can't be re-litigated.

On December 21, 1999, the trial court entered its order dismissing the present action against defendants.[2]

On appeal, plaintiff claims that the trial court erred in holding that the failure of its assignor, Lambert, to join Leigh in Lambert's action against HSREC, now bars plaintiff's present action to collect the debt from Leigh. Because plaintiff has not briefed the merits of the trial court's ruling to dismiss HSREC, in light of its stated intent at the hearing on defendants' motion to enter judgment in favor of HSREC in Lambert's earlier action, we deem this issue abandoned. *In re JS & SM*, 231 Mich App 92, 98-99; 585 NW2d 326 (1998).

In reviewing plaintiff's claim with regard to Leigh, we note that the trial court failed to identify the legal standard that it applied in dismissing the action. Given the basis for dismissal, we will treat the court's decision as having been based on MCR 2.116(C)(7), which permits summary disposition when "a claim is barred because of . . . prior judgment . . . or other disposition of the claim before commencement of the action." See, e.g., *McGoldrick v Holiday Amusements, Inc*, 242 Mich App 286, 289-290; 618 NW2d 98 (2000). We review de novo the trial court's grant of summary disposition to determine if Leigh was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

Before deciding whether dismissal was proper with respect to Leigh, we must determine the applicable legal doctrine with regard to the factual circumstances before us in connection with the two actions maintained by plaintiff and its assignor, Lambert. Because the trial court

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[1] *Leigh v Harbor Springs Real Estate Corp*, unpublished opinion per curiam of the Court of Appeals, issued May 28, 1999 (Docket No. 204605).

[2] We take judicial notice from our own internal records with respect to Lambert's pending appeal in Court of Appeals Docket No. 224504 that the trial court entered a judgment on remand in Lambert's action dated December 10, 1999, or before the dismissal of plaintiff's action against defendants. Cf. *In re Albert*, 383 Mich 722, 724; 179 NW2d 20 (1970); *LaGuire v Kain*, 185 Mich App 239, 246 n 4; 460 NW2d 198 (1990), rev'd on other grounds 440 Mich 367 (1990).

did not specify the legal basis for its decision, we will consider the parties' arguments on appeal with regard to both the court rules and the doctrine of res judicata to determine if the correct result was reached.

We reject defendants' joint argument that MCR 2.203 supports the trial court's order of dismissal with respect to Leigh. MCR 2.203 does not govern plaintiff's ability to file an action against Leigh, as an alleged guarantor of HSREC's debt, because Leigh was not a party in Lambert's lawsuit. The court rules governing necessary or permissive joinder of parties are MCR 2.205 and MCR 2.206. Because joinder was not compelled in Lambert's earlier suit, we conclude that the dispositive legal question, for purposes of determining whether the trial court's decision with respect to Leigh was correct, is the general doctrine of res judicata that was relied upon in defendants' joint motion for dismissal. However, we must examine that doctrine in light of the actual judgment that the trial court intended to enter and, in fact, entered in Lambert's action before entering its order dismissing plaintiff's action in the present case.

In Michigan, the doctrine of res judicata is broadly applied to claims already litigated, as well as "every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999). The 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." *Id.*

Giving due consideration to the general rule that a court speaks through its orders and judgments, *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 54; 436 NW2d 70 (1989), and having taken judicial notice from our own internal records that the trial court entered judgment in Lambert's case before dismissing the present case, we note that the first requirement for barring this action was satisfied. The material question, therefore, is whether Leigh, in his alleged capacity as a personal guarantor of HSREC's debt, stood in privity with HSREC for purposes of Lambert's prior action against HSREC.

In *Howell v Vito's Trucking & Excavating Co*, 386 Mich 37, 45; 191 NW2d 313 (1971), quoting from 46 Am Jur 2d, Judgments, § 525, p 678, our Supreme Court observed:

> Where a person brings an action or is sued in his individual right, a judgment rendered for or against him is not operative under the doctrine of res judicata in a subsequent action brought by or against the same person in a representative capacity. Similarly, a judgment rendered in an action in which one of the parties appears in a representative capacity is not operative under the doctrine of res judicata in a subsequent action involving the same party in his individual right. These rules have been denied application, however, where a party to one action in his individual capacity and to another action in his representative capacity is in each case asserting or protecting his individual rights.

Here, it is arguable that Leigh's liability as an alleged guarantor of HSREC's debt should have been litigated in Lambert's prior action against HSREC. However, Leigh's rights as an alleged guarantor are distinct from HSREC. A guaranty contract, like a surety contract, is a special kind of contract. *Bandit Industries, Inc v Hobbs Int'l, Inc (After Remand)*, 463 Mich 504, 511; 620 NW2d 531 (2001). "A personal guarantee for the debt of another can arise only where

such an intent is clearly manifest." *Id.* at 505. Given that Leigh's rights as an alleged guarantor were not decided in Lambert's action against HSREC and involve individual rights, we hold, as a matter of law, that the general rule that res judicata did not bar plaintiff's subsequent action against Leigh was applicable. *Howell*, *supra;* see also *Sloan v Madison Hgts*, 425 Mich 288, 295; 389 NW2d 418 (1986). Simply put, Leigh, in his alleged capacity as a guarantor, did not stand in privity to HSREC. Therefore, to the extent the trial court ordered dismissal based on a determination that plaintiff's claim against Leigh, as Lambert's assignee, could not be "relitigated," we reverse the order of dismissal.

We reject, however, plaintiff's claim that the case should be remanded for entry of a judgment against Leigh in the amount of HSREC's debt. We do not believe that this claim should be considered in this appeal. The effect of a judgment rendered against a principal debtor is not one based on principles of collateral estoppel or res judicata, but rather, concerns what evidence may be used to establish the existence and amount of the principal debtor's liability. See generally *P R Post Corp v Maryland Casualty Co*, 403 Mich 543, 551; 271 NW2d 521 (1978) (discussing surety liability)[3]; *Escambia Chemical Corp v Rocker*, 124 Ga App 434; 184 SE2d 31 (1971). To properly present to the trial court an issue whether there was factual support for its claim, plaintiff should have moved for summary disposition under MCR 2.116(C)(10), supported by the requisite substantively admissible evidence showing entitlement to judgment as a matter of law. See generally *Maiden*, *supra* at 120-121 (discussing the standards for a motion under MCR 2.116(C)(10)). Because this issue was not properly presented to the trial court and no unusual circumstances are present, we decline to address it. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). Moreover, without further development in the trial court, we are unable to determine on what basis, if any, Leigh might be able to defend

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[3] While similar, a guarantor is distinct from a surety:

> Difference between surety and guarantor. -- The words surety and guarantor are often used indiscriminately as synonymous terms; but while a surety and a guarantor have this in common, that they are both bound for another person, yet there are points of difference between them which should be carefully noted. A surety is usually bound with his principal by the same instrument, executed at the same time and on the same consideration. He is an original promisor and debtor from the beginning, and is held ordinarily to know every default of his principal. Usually the surety will not be discharged, either by the mere indulgence of the creditor to the principal, or by want of notice of the default of the principal, no matter how much he may be injured thereby. On the other hand, the contract of the guarantor is his own separate undertaking, in which the principal does not join. It is usually entered into before or after that of the principal, and is often founded on a separate consideration from that supporting the contract of the principal. The original contract of the principal is not the guarantor's contract, and the guarantor is not bound to take notice of its non-performance. The guarantor is often discharged by the mere indulgence of the creditor to the principal, and is usually not liable unless notified of the default of the principal. [*Palmer v Schrage*, 258 Mich 560, 565; 242 NW 751 (1932), quoting Brandt on Suretyship and Guaranty (3d ed), § 2).]

against a claim that he is personally liable for HSREC's debt, inasmuch as Leigh did not file an answer to the complaint and the merits of the personal guaranty claim have not been presented below. It would not be proper, or fair to defendant Leigh, for this Court to decide the issue on the merits where the issue was not presented to or decided by the trial court.

Next, we reject plaintiff's argument that collateral estoppel applies. We find it unnecessary to address the doctrine of collateral estoppel, inasmuch as this doctrine applies to issues actually and necessarily determined in a prior proceeding. *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001); *Dearborn Hgts School Dist No 7 v Wayne Co MEA/NEA*, 233 Mich App 120, 124; 592 NW2d 408 (1998). Leigh's liability as an alleged guarantor was not decided in Lambert's action. In any event, collateral estoppel, like res judicata, requires the same parties or their privities. *Ditmore*, *supra* at 577; *Dearborn Heights School Dist No 7*, *supra* at 124. Our determination that Leigh did not stand in privity with HSREC, in his capacity as a guarantor, is thus dispositive of this theory.

Further, we find it unnecessary to address plaintiff's argument concerning the doctrine of res judicata, which is predicated on the factual error in defendants' motion for dismissal concerning the status of Lambert's action. This issue is moot because it is clear from the record that this factual error was not the basis for the trial court's ruling. This Court generally will not decide moot issues. *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998). We further reject plaintiff's claim that reversal is warranted because it did not have an opportunity for a proper presentation of the theory relied on by the trial court to order dismissal. We find plaintiff's reliance on *Boje v Wayne Co General Hosp*, 157 Mich App 700, 709; 403 NW2d 203 (1987), is misplaced, given the record evidence that plaintiff had notice that the doctrine of res judicata was being relied upon as a basis for defendants' motion and an opportunity to address that doctrine within the proper factual context. We further note that plaintiff could have moved for rehearing or reconsideration if it believed that the trial court erred. MCR 2.119(F)(3). Thus, plaintiff was not deprived of an opportunity to address the relevant legal doctrine.

Next, given the parties' agreement that plaintiff is not pursuing the second count of its complaint, we find it unnecessary to address plaintiff's claim concerning defendants' defense in their motion for dismissal that this count was barred by the statute of frauds. The statute of frauds issue is moot. *B P 7*, *supra* at 359.

Lastly, considering that the trial court entered judgment in Lambert's action before ordering the dismissal in the case at bar, we find it unnecessary to decide whether summary disposition under MCR 2.116(C)(6) would have been proper. MCR 2.116(C)(6) applies when there is a pending action, which is the same or substantially the same, between the same parties. *Fast Air, Inc v Knight*, 235 Mich App 541, 545; 599 NW2d 489 (1999); *J D Candler Roofing Co, Inc v Dickson*, 149 Mich App 593, 598; 386 NW2d 605 (1986). In passing, we note that, even if Lambert's action is viewed as still pending when the trial court dismissed plaintiff's subsequent action, as Lambert's assignee, the result would be the same because only HSREC was the defendant in Lambert's action. To the extent that plaintiff suggests that it had some actionable claim remaining against HSREC, we decline to consider this issue. As previously noted, we deem any issue concerning the trial court's dismissal of HSREC abandoned because plaintiff did not brief it. *In re JS & SM*, *supra* at 98-99.

In sum, we affirm the trial court's order of dismissal with respect to HSREC, but reverse with respect to Leigh, in his alleged status as a guarantor of HSREC's debt, but express no opinion on the merits of plaintiff's cause of action. We remand for further proceedings regarding plaintiff's claim against Leigh, as an alleged guarantor. We do not find it necessary to reassign this case to a different judge on remand. We disagree with plaintiff that the trial court's remarks indicate impartiality or antagonism toward the parties. Further, reassignment would entail waste and duplication since this trial judge has presided over both related cases. *Feaheny v Caldwell*, 175 Mich App 291, 309-310; 437 NW2d 358 (1989).

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs under MCR 7.219(A), none of the parties having prevailed in full.

/s/ Mark J. Cavanagh
/s/ Martin M. Doctoroff
/s/ Kathleen Jansen