

STATE OF MICHIGAN
COURT OF APPEALS

NATIONAL CITY BANK OF
MICHIGAN/ILLINOIS,

UNPUBLISHED
June 11, 2002

Plaintiff-Appellant,

v

EMPLOYEES LIFE COMPANY MUTUAL,

No. 227559
Oakland Circuit Court
LC No. 99-017285-NZ

Defendant-Appellant.

Before: Murphy, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant summary disposition on plaintiff's claims for wrongful conversion and unjust enrichment. We affirm.

I. Basic Facts and Procedural History

Plaintiff, an escrow agent for Stark Funeral Service (Stark), was responsible for certain pre-paid funeral funds, which were invested in annuities. At the direction of Joseph Italiano, plaintiff's agent, defendant converted those annuities to life insurance policies. Plaintiff argues that Italiano had no authority to request that conversion and that without plaintiff's or Stark's prior approval, defendant wrongfully surrendered the annuity contracts for life insurance policies, deducted the surrender charges and became unjustly enriched at Stark's and plaintiff's expense.

After receiving an assignment of rights from Stark, plaintiff sued defendant claiming conversion and unjust enrichment. The trial court granted summary disposition for defendant on the conversion and unjust enrichment claims, ruling that the doctrine of collateral estoppel barred relitigation of these issues. Whether Italiano had the authority, express or otherwise, to make the conversion and defendant's reliance were issues previously litigated and definitively determined in a prior lawsuit; *Stark Funeral Service v National City Bank of Michigan/Illinois*, unpublished opinion per curiam of the Court of Appeals, issued March 8, 2002 (Docket No. 226936). The facts necessary for resolution of the issues are identical to those involved in the prior case. We therefore rely on the facts set forth in this Court's prior opinion in *Stark Funeral Service, supra*.

II. Standard of Review

Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). Relying upon the doctrine of collateral estoppel, the trial court granted defendant's motion. However, the trial court did not specifically indicate upon which subrule it relied. MCR 2.116(C)(7) provides the proper basis for granting summary disposition pursuant to the doctrine of collateral estoppel. *Alcona Co v Wolverine Environmental Production, Inc*, 233 Mich App 238, 246; 590 NW2d 586 (1998). Consequently, we will review the order granting defendant summary disposition under MCR 2.116(C)(7). *Stoudemire v Stoudemire*, 248 Mich App 325, 332 n 2; 639 NW2d 274 (2001). In considering a motion under MCR 2.116(C)(7), "the court may consider all affidavits, pleadings, and other documentary evidence, construing them in the light most favorable to the nonmoving party." *Alcona, supra* at 246. Further, the "applicability of collateral estoppel is a question of law to be reviewed de novo." *McMichael v McMichael*, 217 Mich App 723, 727; 552 NW2d 688 (1996).

III. Collateral Estoppel

On appeal, plaintiff argues that the doctrine of collateral estoppel does not apply to bar relitigation of certain issues in this action first, because the instant case and the former litigation involve different parties, and second, the issues of conversion and unjust enrichment as between Stark and defendant were not actually litigated in the former case. Thus, plaintiff, as Stark's assignee, is not precluded from relitigating issues determined in the previous lawsuit. Plaintiff also argues that even if collateral estoppel barred relitigation of certain issues, summary disposition was improper because outstanding issues of fact remain. We disagree.

Collateral estoppel is a legal mechanism to preclude the relitigation of claims and thus prevent "vexation, confusion, chaos and the ineffective use of the judicial resources." *Eaton Co Bd of Rd Comm'rs v Schultz*, 205 Mich App 371, 377; 521 NW2d 847 (1994). To achieve its purpose:

[C]ollateral estoppel precludes relitigation of an issue in a different, subsequent action between the same parties or their privies when the earlier proceeding resulted in a valid final judgment and the issue in question was actually and necessarily determined in the prior proceeding. . . . Collateral estoppel bars relitigation of issues where the parties had a full and fair opportunity to litigate those issues in an earlier action. [*Dearborn Heights School Dist No 7 v Wayne Co MEA/NEA*, 233 Mich App 120, 124; 592 NW2d 408 (1998) (citations omitted).]; see also *Nummer v Treasury Dep't*, 448 Mich 534, 542; 533 NW2d 250 (1995).

For collateral estoppel to apply, "[t]he issues must be identical, and not merely similar." *Horn v Dep't of Corrections*, 216 Mich App 58, 62; 548 NW2d 660 (1996) (citation omitted.) That is, the "issue must have been essential to the resulting judgment; a finding upon which the judgment did not depend cannot support collateral estoppel." *Eaton, supra* at 377. (Citations omitted). In addition, the parties in the second action must be the same as, or in privity to, the

parties in the first action.” *Husted v Auto-Owners Ins, Co*, 213 Mich App 547, 556; 540 NW2d 743 (1995). For purposes of collateral estoppel:

A party is one who is directly interested in the subject matter and has a right to defend or control the proceedings and to appeal from the judgment. A person is in privity to a party if, after the judgment, the person has an interest in the matter affected by the judgment through one of the parties, such as by inheritance, succession or purchase. [*Id.* (citation omitted).]

Finally, for collateral estoppel to apply and preclude relitigation of issues, there must be mutuality of estoppel. *Nummer, supra*. Estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him. *Lichon v American Universal Ins Co*, 435 Mich 408, 427-428; 459 NW2d 288 (1990).

The ultimate issues in the case at bar are identical to those addressed in the prior action. The pending case requires a determination of whether defendant wrongfully converted the annuities without proper authorization and whether defendant was unjustly enriched thereby. In the previous case, Italiano’s authority to request the conversion and defendant’s reliance on that authority were issues necessary to the resolution of the third-party claims by plaintiff against defendant, see *Stark Funeral Home, supra* at 3, and were also actually litigated in the first case. An issue is “actually litigated” when placed into issue by the pleadings and submitted to the trier of fact for determination. *Kowatch v Kowatch*, 179 Mich App 163, 168; 445 NW2d 808 (1989). Where an action is resolved by summary disposition, the determination is considered to be on the merits thus triggering the doctrine of collateral estoppel on relitigation. *Detroit v Qualls*, 434 Mich 340, 356 n 27; 454 NW2d 374 (1990). Further, the resolution of those issues was essential to the judgment in the previous case.

In the prior litigation, this Court found that an agency relationship existed between plaintiff, the principal, and Italiano/PNN, the agent. *Stark Funeral Service, supra*. at 4-5:

The evidence showed that Italiano and PNN had broad authority in directing the National City escrow account investments. National City placed Italiano in a position where ELCO reasonably relied on his representations regarding investments, given National City’s past practices and the business relationships between the parties. *Id.* at 5.

Additionally, in *Stark Funeral Service, supra*, this Court stated, “If Italiano had actual authority or ELCO [defendant] reasonably relied on his apparent authority, then ELCO [defendant] committed no wrongdoing, and there is no justification for National City’s [plaintiff’s] claim” for unjust enrichment. *Id.* at 3.

The court in *Stark* determined that: (1) Italiano was plaintiff’s agent; (2) plaintiff clothed him with apparent authority to request the conversions; and (3) defendant reasonably relied on Italiano’s or PNN’s authority when converting the annuities. The court further determined that defendant did not engage in wrongful conduct by converting the annuities and that plaintiff’s claim for unjust enrichment failed. Because the issue of defendant’s wrongful conduct was litigated, necessarily determined, and resulted in a valid judgment in the first case, collateral

estoppel applies to those issues if the parties in the case at bar are the same as, or in privity to, the parties in the first action.

IV. Same Parties or Privies

Plaintiff argues that the parties in this case are not the same as, or in privity to, the parties in the first action. Although plaintiff admits that both Stark and itself were parties in the first action, plaintiff nevertheless contends that the same parties are not technically involved here because Stark never asserted the claim at issue against defendant and because it is suing defendant in a representative capacity. We do not agree.

First, by definition, plaintiff was a “party” to the first litigation. It was directly interested in the subject matter, had a right to defend or control the proceedings, and to appeal the judgment. *Husted, supra* at 556. The parties to the third-party suit in the prior litigation and the parties to the suit in the case sub judice are identical. Moreover, plaintiff had a full and fair opportunity in the prior litigation to litigate the issue of Italiano’s authority and defendant’s reliance thereupon.¹

Second, plaintiff’s argument that it is not the same party simply because it is bringing the claims in a representative capacity similarly lacks merit. In support, plaintiff cites *Ward v DAIIE*, 115 Mich App 30; 320 NW2d 280 (1982).² In *Ward*, the Court ruled that where a party brings an action or is sued in his individual right, a judgment rendered for or against him in a subsequent action brought by him in a representative capacity is not operative under the doctrine of res judicata. *Id.* at 37-38. The Court in *Ward* relied on *Howell v Vito’s Trucking and Excavating Co*, 386 Mich 37, 45; 191 NW2d 313 (1971), as support for its ruling. Recently, however, this Court ruled that “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, res judicata may still be applied.” *Stoudemire, supra* at 334-335, citing *Howell, supra* (emphasis added). See also *York v Wayne Co Sheriff*, 157 Mich App 417, 427; 403 NW2d 152 (1987). In the first case between the parties, plaintiff sought to hold defendant responsible for the losses that occurred because of the conversion. In effect, it was attempting to protect its own interests. After settling with Stark and paying the losses, it obtained an assignment, filed the instant action to once again try and hold defendant accountable for the losses and recoup the money that it paid to Stark. In essence, plaintiff seeks to protect its own interests. However, regardless of the shoes in which plaintiff now stands, this current lawsuit is simply another attempt to obtain a result identical to that sought in the prior litigation.

Third, we disagree with plaintiff’s argument that because Stark and defendant were not adverse on the issue of wrongful conversion or unjust enrichment in the first case and because that issue was not actually litigated between them, the parties in this litigation are not the same

¹ Although not at issue in this case, we note that in certain circumstances collateral estoppel can apply even where the parties are not identical as long as the issues are identical. *Schlumm v Terrence J O’Hagan, PC*, 173 Mich App 345; 433 NW2d 839 (1988).

² *Ward* is a res judicata case and not a collateral estoppel case. However, because collateral estoppel is corollary to res judicata, see *People v Hayden*, 205 Mich App 412, 415; 522 NW2d 336 (1994), it is appropriate to look to *Ward* for guidance.

for purposes of collateral estoppel. We disagree. In *York, supra* at 427, this Court clarified that, for res judicata purposes, the requirement that parties be adverse in the first action does not mean, contrary to plaintiff's belief, that the issue be actually litigated between them in the first action:

[T]he basic test as to whether parties were adverse parties in a former action is to determine if the parties had a controversy among themselves. *Although the issue of defendant[‘s] . . . individual liability for plaintiffs’ unpaid wages was not actually litigated in the former action, a controversy certainly existed between them.* Defendant[‘s] . . . order for plaintiffs to continue working after the layoff notice or face disciplinary action certainly created a controversy between the parties which plaintiffs should have pursued in the former action. . . .

* * *

The existence of this controversy between the parties in the former action, combined with the fact that defendant . . . was formally named as a defendant in the former action, leads us to conclude that the parties were adverse parties in the former action. Thus, we find that the present action against defendant . . . is between the same parties as were involved in the former action for purposes of the doctrine of res judicata. [*Id.* (citation omitted; emphasis added).]

According to *Ward*, parties are “adverse” if both parties were named in the former action and a controversy actually existed between them, which could have been litigated. In this case, Stark and defendant were both parties to the previous litigation and a controversy actually existed between them. Consequently, the doctrine of collateral estoppel applies to bar relitigation of whether Italiano had actual or apparent authority to request that defendant convert the annuities to life insurance policies and whether defendant reasonably relied on that authority. Because the prior resolution of these precise issues in defendant's favor is dispositive with respect to the wrongful conversion and unjust enrichment claims herein presented, we find that the trial court properly granted defendant summary disposition.

V. Genuine Issue of Material Fact

Finally, plaintiff argues that outstanding issues of fact remain even if collateral estoppel applies. We disagree. Plaintiff contends that as Stark's assignee, it could recover against defendant if Stark did not authorize plaintiff to convert the annuities or allow Italiano to do so has no merit. Plaintiff fails to explain or support this specific argument, and further, the argument ignores this Court's decision in *Stark Funeral Service, supra*. It is undisputed that plaintiff was Stark's agent and was ultimately responsible for the escrow funds. In *Stark Funeral Service, supra* at 3, this Court specifically found that if Italiano had actual authority or if defendant reasonably relied on Italiano's apparent authority, then defendant did not commit any wrongdoing. The Court in *Stark* then found that Italiano had apparent authority and that defendant reasonably relied on Italiano's representations regarding investments, “given National City's past practices and the business relationships between the parties.” *Id.* at 5. Thus, defendant was exonerated of any wrongdoing relative to the conversions. Any dispute between Stark and its agent, plaintiff herein, about authority to make decisions concerning the escrow funds has no bearing on defendant, which reasonably relied on Italiano's apparent authority to

convert the annuities to life insurance policies. Defendant only interacted with plaintiff and Italiano/PNN. There is no genuine issue of material fact. The trial court did not err by granting defendant summary disposition.

Affirmed.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly