

STATE OF MICHIGAN
COURT OF APPEALS

CONSECO FINANCE SERVICING
CORPORATION,

Plaintiff-Appellant,

v

BOBIT MANUFACTURED HOME SALES,
LTD., BOBIT MANUFACTURED HOUSING,
and DAN MORRIS,

Defendants-Appellees.

UNPUBLISHED
December 4, 2003

No. 241631
Bay Circuit Court
LC No. 00-003021-CK

Before: Cooper, P.J., and Markey and Meter, JJ.

PER CURIAM.

Plaintiff Consecro Finance Servicing Corporation appeals as of right the trial court's order dismissing the case. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

In May 1998 Charles Prescott and Patricia Prescott, who are not parties to this case, purchased a manufactured home from defendants Bobit Mobile Home Sales, Ltd. and Bobit Manufactured Housing (hereinafter Bobit). The Prescotts executed an installment contract that listed themselves as the purchasers, Bobit as the seller, and Green Tree Financial Servicing Corporation, the predecessor of Consecro, as the assignee. The security agreement contained an arbitration clause that provided that any and all claims arising from the transaction would be resolved by binding arbitration. Apparently, the Prescotts hired non-participating defendants Northlands Construction & Excavating, Inc., Northland Construction & Excavating, Inc., (hereinafter Northland), and Joseph Terry McClellan, the owner of Northland, to construct the foundation upon which the home was to be placed. Difficulties ensued, and at some point Northland converted the Prescotts' down payment of \$40,000 for its or Bobit's own use. The home was never set upon the constructed foundation, and no payments were made to Consecro on the Prescotts' account.

In January 2000 Consecro filed the instant suit in Bay Circuit Court naming as defendants Bobit, Dan Morris, the president of Bobit, Northland, and McClellan. The complaint alleged breach of contract against Bobit and Morris, breach of contract against Northland and McClellan, unjust enrichment against Northland and McClellan, and conversion against Bobit and Morris.

In February 2000 the Prescotts filed suit in Jackson Circuit Court naming as defendants Conseco, Bobit, and Northland.¹ The trial court granted Conseco's motion to compel arbitration. The Prescotts, Conseco, Bobit, and Morris executed an agreement to arbitrate in that case. The agreement provided that all claims arising out of the purchase of the home would be submitted to arbitration. Conseco did not participate in the arbitration hearing; however, the remainder of the signatories to the arbitration agreement were present. The arbitrator issued a decision and made the following findings of fact. The foundation constructed by Northland was in proper condition to receive the home as of November 19, 1998. Bobit was obliged to proceed immediately to install the home on the site. Bobit breached the contract. The Prescotts were justified in terminating the agreement and suing Bobit for breach of contract. Conseco, as the successor of Green Tree, was charged with all claims and defenses which the Prescotts had against Bobit. The payment of \$43,000 for the construction of the foundation, if chargeable against the Prescotts, would be chargeable back to Bobit as consequential damages for breach of contract, and consequently, would be set-off against any recovery Conseco might be entitled to against the Prescotts. The arbitrator dismissed all claims made by Conseco, and awarded the Prescotts \$24,111 against Bobit.²

Conseco moved for summary disposition in the instant case seeking to compel arbitration of its claims. In response, Bobit maintained that all relevant issues could have been resolved in the arbitration proceeding, and sought summary disposition pursuant to MCR 2.116(I)(2). The trial court denied Conseco's motion and dismissed the case, concluding that the action was barred by res judicata and/or collateral estoppel. The retail contract and security agreement, to which Conseco was a party by virtue of its status as successor to Green Tree, contained an arbitration provision. Subsequently, Conseco signed a second agreement to arbitrate. That agreement provided that all claims relating to the Prescotts' purchase of the home would be submitted to arbitration. Finally, the trial court concluded that Conseco's failure to include a claim for arbitration in its complaint in the instant matter constituted a waiver of the right to demand arbitration.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

Res judicata bars a subsequent action between the same parties when the facts or evidence essential to the action are identical to the facts or evidence in a prior action. *Dart v Dart*, 460 Mich 573, 586; 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 case; 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). We review the applicability of the doctrine of res judicata de

¹ *Prescott v Conseco, et al*, Jackson Circuit Court Docket No. 00-00726-CH.

² The Attorney General-Manufactured Home Division brought an action against Bobit. Bobit agreed to make restitution in the amount of \$42,000 to the Prescotts. The Prescotts received payment in January 2001.

novo. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999).

Conseco argues that the trial court erred by dismissing this case. We disagree and affirm the trial court's decision.³ Conseco bases its argument in part on the fact that Northland never agreed to arbitrate in the Jackson Circuit Court action and thus could not have been compelled to participate in the arbitration proceeding. *Ehresman v Bultynck & Co, PC*, 203 Mich App 350, 353-354; 511 NW2d 724 (1994). The arbitrator's decision noted that Northland had been dismissed for non-service from the Jackson Circuit Court suit prior to the arbitration proceeding. Conseco sought arbitration in the Jackson Circuit Court case in spite of the fact that Northland did not sign the arbitration agreement. Moreover, in its motion for summary disposition filed in the instant case Conseco admitted that it was not pursuing its claims against Northland. The fact that Northland failed to sign the agreement to arbitrate does not mandate a conclusion that the trial court erred by dismissing the case.

Contrary to Conseco's assertion, the trial court did not dismiss this matter based on Conseco's failure to file a cross-claim in the Jackson Circuit Court action. Rather, the trial court focused on the arbitration provision in the retail contract and security agreement and the agreement to arbitrate. The Prescotts, Bobit, and Conseco executed an agreement to arbitrate. "Res judicata applies to quasi-judicial administrative decisions." *Wayne Co v Detroit*, 233 Mich App 275, 277; 590 NW2d 619 (1998). The claims raised in the arbitration proceeding were decided on the merits,⁴ and the arbitrator's decision was final. See *Dearborn Heights School Dist No 7 v Wayne Co MEA/NEA*, 233 Mich App 120, 129; 592 NW2d 408 (1998). The arbitration agreement provided that any and all claims arising out of the purchase of the home would be submitted to arbitration. Conseco was aware that it had claims against Bobit because it had alleged those claims in the instant matter. However, Conseco simply chose to not participate in the arbitration proceeding. Conseco could have raised the identical claims against Bobit in the arbitration proceeding. The same facts or evidence would have sustained Conseco's claims in both actions. *Huggett v Dep't of Natural Resources*, 232 Mich App 188, 197-198; 590 NW2d 747 (1998). Conseco could have raised the claims notwithstanding the fact that both Conseco and Bobit were named as defendants in the Jackson Circuit Court case. A controversy existed between Conseco and Bobit; therefore, the instant action involved the same parties for purposes

³ The trial court's decision states that dismissal is justified pursuant to the doctrine of res judicata and/or the doctrine of collateral estoppel; however, the trial court seems to rely primarily on the doctrine of res judicata as support for its decision.

⁴ The fact that the Jackson Circuit Court action was the second action to be commenced is of no moment. *Brownridge v Michigan Mut Ins Co*, 115 Mich App 745, 750-751; 321 NW2d 798 (1982).

of the doctrine of res judicata. See *York v Wayne Co Sheriff*, 157 Mich App 417, 426-427; 403 NW2d 152 (1987). The trial court correctly concluded that the instant matter was precluded by res judicata and properly dismissed the case.

Affirmed.

/s/ Jessica R. Cooper

/s/ Jane E. Markey

/s/ Patrick M. Meter