

STATE OF MICHIGAN
COURT OF APPEALS

TRACY ALLEN, f/k/a/ TRACY MCKINNEY,

Plaintiff-Appellant,

v

BRODY-BILT CONSTRUCTION CO., INC.,
BRODY-BILT & SONS CONST. INC.,
MORTON BRODY, MICHAEL L. BRODY,
AND VLAD BRODY,

Defendants-Appellants.

UNPUBLISHED
December 18, 2003

No. 241716
Wayne Circuit Court
LC No. 02-208073-CK

Before: Wilder, P.J., and Griffin and Cooper, JJ.

PER CURIAM.

Plaintiff Tracy Allen appeals as of right the circuit court's order granting defendants' motions for summary disposition pursuant to MCR 2.116(C)(7). We affirm.

Plaintiff contracted with Brody-Bilt Construction Co., Inc. (Brody-Bilt), for a home remodeling project. Apparently, Brody-Bilt neglected to properly install the booster fans in the furnace and the heat registers. After numerous conversations with defendants without redress, plaintiff filed a breach of contract action against Brody-Bilt in the small claims division of the district court. Brody-Bilt subsequently removed the action to the civil division.

On May 8, 2001, plaintiff filed an amended complaint against Brody-Bilt with the district court for breach of contract, breach of express warranty, and violation of the Michigan Consumers Protection Act, (MCPA), MCL 445.901 *et seq.* Notably, plaintiff's complaint did not name Brody-Bilt & Sons Const. Inc. (Brody-Bilt & Sons), as a defendant. At the final settlement conference, the attorney for Brody-Bilt entered a voluntary default with the district court because he was informed that the company was ceasing operations. Thereafter, plaintiff requested that judgment also be entered against Brody-Bilt & Sons because it was the continuation, successor, transferee, and/or assignee of Brody-Bilt. The district court held that default could not be entered against Brody-Bilt & Sons because plaintiff failed to file a motion to add or substitute it as a party in the action. A judgment of \$9,690.36 was entered against Brody-Bilt.

Plaintiff subsequently filed a complaint in circuit court against Brody-Bilt, Brody-Bilt & Sons, Morton Brody, Michael Brody, and Vlad Brody. In her complaint, plaintiff alleged account stated regarding the unsatisfied district court judgment, fraud and deceit, and violation of

the MCPA for engaging in unfair, unconscionable, and deceptive acts and practices. Defendants filed motions for summary disposition pursuant to MCR 2.116(C)(6), (7), (8), and (10). The circuit court granted defendants' request for summary disposition.

On appeal, plaintiff argues that the circuit court erroneously granted defendants' request for summary disposition. We disagree. A circuit court's ruling on a motion for summary disposition is subject to review de novo on appeal.¹

While the circuit court failed to articulate the specific subsection it relied upon in granting defendants' motions, the court noted that plaintiff had simply re-filed the lawsuit and was suing for the "identical action" that she had brought in district court. Thus, we find that summary disposition was decided on res judicata grounds, MCR 2.116(C)(7). In a motion for summary disposition pursuant to MCR 2.116(C)(7), we consider the pleadings, affidavits, depositions, admissions, and documentary evidence submitted by the parties.² "The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant."³

Plaintiff maintains that res judicata is inapplicable in this case because the claims she raised in the circuit court could not have been brought in the earlier district court action. "Michigan has adopted a broad application of res judicata that bars claims arising out of the same transaction that plaintiff could have brought but did not."⁴ This Court has held that "in order for the first action to bar the second, res judicata requires that (1) the prior action was decided on the merits, (2) the matter contested in the second case was or could have been resolved in the first, and (3) both actions involved the same parties or their privies."⁵

Here, the district court action concluded with a default judgment against Brody-Bilt. It is well settled that a prior default judgment is a decision on the merits.⁶ Therefore, contrary to plaintiff's claim on appeal, the default judgment entered by the district court was a judgment on the merits for purposes of res judicata.

Further, the fact that plaintiff's district court and circuit court claims were not identical fails to negate the circuit court's decision. Res judicata applies both to claims actually raised in the prior action and to "every claim arising out of the same transaction which the parties, exercising reasonable diligence, could have raised but did not."⁷ The record shows that plaintiff

¹ *Maskery v U of M Bd of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003).

² MCR 2.116(G)(5); *Kerbersky v Northern Michigan Univ*, 458 Mich 525, 529; 582 NW2d 828 (1998).

³ *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

⁴ *Bergeron v Busch*, 228 Mich App 618, 620-621; 579 NW2d 124 (1998).

⁵ *Id.* at 621.

⁶ *Schwartz v Flint*, 187 Mich App 191, 194; 466 NW2d 357 (1991).

⁷ *Limbach v Oakland Co Bd of Comm'rs*, 226 Mich App 389, 396; 573 NW2d 336 (1997),
(continued...)

received letters from both Brody-Bilt & Sons and Brody-Bilt. Each of these letters were on the companies' respective letterhead. Indeed, plaintiff attached copies of these letters to her district court complaint. Plaintiff's allegations of fraud and deceit and a resulting violation of the MCPA in the circuit court were based on defendants' alleged intent to mislead plaintiff into believing they were the same company. Because plaintiff had evidence of the alleged fraud and deceit before she filed or amended her district court complaint, we conclude that the circuit court claims arose out of the same transaction and that plaintiff could have raised these claims at the same time by exercising reasonable diligence.⁸

To the extent plaintiff argues that res judicata is inapplicable because the district court lacked subject-matter jurisdiction to consider her circuit court claims under MCL 600.8301, we disagree. MCL 600.8301(1) states that "[t]he district court has exclusive jurisdiction in civil actions when the amount in controversy does not exceed \$25,000.00." Plaintiff requested judgment in excess of \$25,000 in her circuit court complaint. However, the amount in controversy in this case does not prevent the application of res judicata under MCR 2.116(C)(7) because, exercising reasonable diligence, plaintiff could have brought all of her claims against defendants at one time in circuit court.⁹ Unlike the plaintiff in *Zink v Weingarden*,¹⁰ in this case plaintiff specifically chose to bring and maintain her action in district court.

Plaintiff also argues that her circuit court claims could not have been brought in district court because the district court lacked subject-matter jurisdiction under MCL 600.3620. Pursuant to MCL 600.3620(1), "[w]henever any creditor of a corporation seeks to charge the directors, trustees or other superintending officers of such corporation, or the stockholders thereof, on account of any liability created by law, he may bring an action in the circuit courts to enforce such liability." In her circuit court complaint, plaintiff alleged that Morton Brody, Michael Brody, and Vlad Brody were liable for plaintiff's district court judgment as individuals and shareholders, operators, officers, and/or agents of Brody-Bilt and Brody-Bilt & Sons. Again, we conclude that any jurisdiction created by MCL 600.3620 does not prevent the application of res judicata in this case, because, exercising reasonable diligence, plaintiff could have brought all of her claims against defendants at one time in circuit court.¹¹ When the district court granted leave to amend the complaint, plaintiff had the opportunity to add Brody-Bilt & Sons, Morton Brody, Michael Brody, and Vlad Brody as defendants, but failed to do so.

Although not specifically disputed by plaintiff, we also find that both actions involved the same parties or their privies. "In its broadest sense, privity has been defined as mutual or successive relationships to the same right of property, or such an identification of interest of one person with another as to represent the same legal right."¹² In *Wildfong*, this Court found that

(...continued)

quoting *Sprague v Buhagiar*, 213 Mich App 310, 313; 539 NW2d 587 (1995).

⁸ See *id.*

⁹ See *Limbach, supra* at 396.

¹⁰ 168 Mich App 211, 271 n 3; 423 NW2d 622 (1988).

¹¹ See *Limbach, supra* at 396.

¹² *Wildfong v Fireman's Fund Ins Co*, 181 Mich App 110, 115; 448 NW2d 722 (1989) (citation (continued...))

individuals and “their family owned corporation are sufficiently related so as to fulfill the privity requirement in the doctrine of res judicata.”¹³ Plaintiff alleged that Morton Brody, Michael Brody, and Vlad Brody owned and operated Brody-Bilt and Brody-Bilt & Sons. Accepting as true plaintiff’s allegations that Brody-Bilt and Brody-Bilt & Sons are family-owned corporations, defendants are sufficiently related to fulfill the privity requirement.¹⁴

Accordingly, we find that the circuit court properly granted defendants’ motion for summary disposition.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Richard Allen Griffin
/s/ Jessica R. Cooper

(...continued)

omitted).

¹³ *Id.* at 116.

¹⁴ *Id.* at 116.