STATE OF MICHIGAN

COURT OF APPEALS

GEOFFREY M. HARRISON,

Plaintiff-Appellant,

v

GREAT LAKES BEVERAGE COMPANY,

Defendant-Appellee.

UNPUBLISHED
May 20, 2004

No. 245801
Wayne Circuit Court
LC No. 02-202580-NO

Before: Wilder, P.J. and Hoekstra and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition in defendant's favor under MCR 2.116(C)(7). We affirm.

Plaintiff first argues that the trial court erred in holding that his claim was barred by the res judicata rule. We disagree.

We review de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7) to determine whether the moving party was entitled to judgment as a matter of law and whether res judicata is applicable. *Rinas v Mercer*, 259 Mich App 63, 67; 672 NW2d 542 (2003). "Under MCR 2.116(C)(7), we must accept the well-pleaded allegations of the nonmoving party as true and construe them most favorably to the nonmoving party." *Michelson v Voison*, 254 Mich App 691, 694; 658 NW2d 188 (2003).

Res judicata bars a subsequent action when (1) the first action was decided on the merits, (2) the matter contested in the subsequent action was or could have been resolved in the first action, and (3) both actions involve the same parties or their privies. *Sewell v Clean Cut Management, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001). Michigan law defines res judicata broadly to bar litigation in a subsequent action not only of those claims actually litigated in the first action, but also claims arising out of the same transaction that the parties, exercising reasonable diligence, could have litigated but did not. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 11; 672 NW2d 351 (2003).

This case is the third plaintiff brought against defendant, his former employer, for claims related to defendant's employment termination in 1994.[1] In this case, plaintiff alleged injurious falsehood arising out of a sexual harassment complaint against plaintiff by an employee of one of defendant's customers in 1991. Plaintiff argues that it was not until the summer of 2001 that he discovered that the complainant's statement was fabricated. But plaintiff's deposition testimony taken in his previous actions against defendant indicates that defendant should have known of the alleged fraud in 1996 at the latest, and, had he exercised reasonable diligence, he could have amended his complaint in the first action to add the injurious falsehood claim. Having reviewed the record on appeal, having taken plaintiff's well-pleaded allegations as true and having construed them in plaintiff's favor as the nonmoving party, we conclude that the trial court correctly ruled that plaintiff's claim was barred by res judicata.

Plaintiff contends that his due diligence was thwarted by defendant's fraud. Where fraud is pleaded, such fraud only prevents application of the res judicata rule where that fraud is extrinsic rather than intrinsic. *Sprague v Buhagiar*, 213 Mich App 310, 313-314; 539 NW2d 587 (1995). An example of extrinsic fraud is fraud relating to the filing of a return of service, as opposed to intrinsic fraud, such as perjury, discovery fraud, fraud in the inducement of settlements or of underlying contracts. *Id.* at 314. The sole remedy for intrinsic fraud is for a plaintiff to file a motion for relief from judgment under MCR 2.612(C). *Id.* Here, even taking plaintiff's allegations as true, the fraud alleged is intrinsic, and thus does not bar the application of res judicata.

Plaintiff next argues that the trial court erred in making findings of fact in deciding his motion for reconsideration. We agree, but because the trial court properly granted summary disposition in defendant's favor, this error does not warrant reversal.

A trial court may not make findings of fact in deciding a motion for summary disposition. *Jackhill Oil Co v Powell Production, Inc*, 210 Mich App 114, 117; 532 NW2d 866 (1995). Here, the trial court stated that, at best, the evidence showed that one of defendant's customers fabricated the 1991 sexual harassment complaint, and defendant innocently relied on it. But the trial court should have accepted plaintiff's allegation as true and was precluded from finding that someone other than defendant was responsible for the fabrication. Nonetheless, the trial court properly granted summary disposition in defendant's favor on the basis of res judicata and did not err in denying plaintiff's motion for reconsideration. We may affirm a trial court's correct

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[1] Plaintiff appealed the trial court's grant of summary disposition in favor of defendant to this Court in each previous case, and this Court affirmed the trial court in both cases; our Supreme Court denied plaintiff leave to appeal in each case. See *Harrison v Great Lakes Beverage Co*, unpublished opinion per curiam of the Court of Appeals, issued August 31, 1999 (Docket No. 205494); *Harrison v Great Lakes Beverage Co*, unpublished opinion per curiam of the Court of Appeals, issued November 6, 2001 (Docket No. 224626).

decision, even if the trial court's reasons for reaching that decision differ from our reasons for affirming it. *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 643; 591 NW2d 393 (1998).

Affirmed.

/s/ Kurtis T. Wilder
/s/ Joel P. Hoekstra
/s/ Kirsten Frank Kelly