

STATE OF MICHIGAN
COURT OF APPEALS

RICHARD LIPAN d/b/a
MAJESTIC CONSTRUCTION,

Plaintiff-Appellee,

V

KENN KRIEGISH,

Defendant-Appellant.

UNPUBLISHED
June 10, 2004

No. 241407
Saginaw Circuit Court
LC No. 01-040841-CK

Before: Smolenski, P.J., and Markey and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order granting plaintiff's motion for summary disposition. This appeal is being decided without oral argument pursuant to MCR 7.214(e). We affirm.

I. Facts and Proceedings

On October 28, 1997, plaintiff, a general contractor, and defendant, a sub-contractor, entered into a construction contract. Plaintiff claims that defendant failed to fully pay at least two suppliers for work performed on the construction project, despite the fact that checks were issued to defendant for the express purpose of paying these suppliers. Plaintiff further claims that instead of fully paying the suppliers, defendant made partial payments and retained the balance of the funds for his own purposes. Plaintiff alleges that as the result of defendant's improper retention of funds, he was forced to make additional payments totaling \$77,018.30 to the suppliers directly, and he now seeks reimbursement from defendant.

Before plaintiff could fully pursue his claim, defendant declared bankruptcy under chapter seven of the bankruptcy code, 11 USC 701 *et seq.*, and attempted to discharge the debt. Plaintiff then sought a declaratory judgment in bankruptcy court that the debt was non-dischargeable. Following a hearing, the bankruptcy court found that \$57,534.40 of the debt was non-dischargeable. The bankruptcy court expressly concluded that defendant had breached its statutorily created fiduciary duty under the Michigan Business Construction Fund Act

(hereinafter the “MBCFA”) to maintain a proper accounting, and that failing the proper accounting, defendant was guilty of defalcation.¹ Defendant appealed the judgment of the bankruptcy court to the United States District Court for the Eastern District of Michigan, which found that the findings of fact made by the bankruptcy court were not clearly erroneous and affirmed.

Plaintiff then brought the instant action in the Saginaw Circuit Court, alleging that defendant had violated the MBCFA and seeking a judgment of \$57,534.40 against defendant under the MBCFA. Plaintiff moved for summary disposition under MCR 2.116(C)(9) and MCR 2.116(C)(10) on the grounds that res judicata and collateral estoppel barred defendant from denying liability for this amount under the MBCFA, and that no genuine issues of material fact existed.

The trial court granted plaintiff’s motion for summary disposition under MCR 2.116(C)(10), relying on the doctrine of res judicata. This appeal ensued.

II. Standard of Review

We review de novo whether a trial court properly granted summary disposition. *Hinkle v Wayne County Clerk*, 467 Mich 337, 340; 654 NW2d 315 (2002).

III. Analysis

The trial court granted plaintiff’s motion for summary disposition on the grounds that the prior bankruptcy court judgment and the doctrine of res judicata would bar any of defendant’s defenses to liability under the MBCFA. We affirm the grant of summary disposition in favor of plaintiff, but for reasons different from those employed by the trial court.

The doctrine of res judicata determines the extent to which a prior judgment is given conclusive effect in subsequent litigation. See *Hackley v Hackley*, 426 Mich 582, 584; 395 NW2d 906 (1986). It has multiple purposes, such as relieving parties of the burdens of multiple lawsuits, conserving judicial resources, preventing inconsistent decisions, and promoting reliance on the finality of judgments. *Id.*

Res judicata applies when “(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 involve[] the same parties or their privies.” *Bergeron v Busch*, 228 Mich App 618, 621; 579 NW2d 124 (1998). In the instant case, the trial court correctly held that elements one and three are satisfied. The bankruptcy court decided on the merits that some portion of defendant’s debt was non-dischargeable because defendant had violated the MBCFA, and the district court affirmed this finding. Additionally, there is no dispute that the parties are identical in each cause

¹ Defalcation is “[t]he misappropriation of trust funds or money held in any fiduciary capacity.” Black’s Law Dictionary (5th ed). See also *In re Grzywacz*, 182 BR 176 (Bankr ED Mich, 1995) (stating that defalcation is a misappropriation of money), citing Black’s Law Dictionary (4th ed).

of action. Nevertheless, res judicata does not apply in this case because the bankruptcy court judgment affirmed by the district court does not represent a final judgment on the matter of defendant's liability under the MBCFA.

The record in the bankruptcy court establishes that the bankruptcy court expressly held that although defendant's debt was non-dischargeable because of defendant's inadequate accounting, entry of judgment in the amount determined non-dischargeable was not intended to be a money judgment. The bankruptcy court noted that the various contract defenses that defendant asserted were irrelevant to the bankruptcy proceeding and its determination that defendant was guilty of defalcation, and that, therefore, these issues were not litigated. As such, the contract defenses defendant asserted in this action were not and could not have been resolved in the bankruptcy proceeding. Accordingly, the trial court erred in finding that the doctrine of res judicata applied to establish defendant's liability under the MBCFA.

Nevertheless, because plaintiff was entitled to summary disposition on the basis of collateral estoppel, we affirm. This Court has consistently held that it "will not reverse a trial court's order if it reaches the right result for the wrong reason." *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 470; 628 NW2d 577 (2001).

For the doctrine of collateral estoppel to apply "(1) 'a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment'; (2) 'the same parties must have had a full [and fair] opportunity to litigate the issue'; and (3) 'there must be mutuality of estoppel.'" *Monat v State Farm Ins Co*, ___ Mich ___; 677 NW2d 843, 845-846 (2004), quoting *Storey v Meijer, Inc*, 431 Mich 368, 373 n 3; 429 NW2d 169 (1988). Also, the reviewing court must be able to "clearly, definitely, and unequivocally" ascertain the basis of the prior judgment. *Ditmore v Michalik*, 244 Mich App 569, 578; 625 NW2d 462 (2001), citing *People v Gates*, 434 Mich 146, 158; 452 NW2d 627 (1990).

The question whether defendant violated the MBCFA was fully litigated during the prior bankruptcy proceedings. The resolution of this issue was essential to the bankruptcy court's judgment because under the bankruptcy code, a debtor is prohibited from discharging debt incurred in violation of a fiduciary duty. 11 USC 523(a)(4). The bankruptcy court found that, on the construction project at issue, defendant, as a subcontractor under the MBCFA, was a trustee as to funds he received for the intended benefit of other subcontractors or suppliers, and that "[defendant] spent funds [he] received [from plaintiff] in relation to the Project for non-statutory purposes, [and, therefore,] violated the [MBCFA.]" *In re Kriegish*, unpublished order of the United States Bankruptcy Court for the Eastern District of Michigan, entered May 9, 2001 (Docket No. 00-20991). Defendant's claimed contract defenses are irrelevant to the finding that defendant violated its fiduciary duty under the MBCFA, and defendant is collaterally estopped from challenging this finding. Accordingly, the trial court properly awarded damages to plaintiff in the amount of \$57,146.40.

Defendant also contends that this case should not have been decided by the trial court but, instead, pursuant to MCR 8.111(D)(2), should have been assigned to another circuit court judge for decision. Defendant raised this issue in his pleadings but failed to properly preserve this argument below because he did not file a motion for reassignment of the case or otherwise obtain a trial court ruling on this matter. *Sallee v Auto Club Ins Ass'n*, 190 Mich App 305, 308; 475

NW2d 828 (1991). Arguments not raised before or addressed by the trial court are not preserved for review on appeal. *Miller v Inglis*, 223 Mich App 159, 168; 567 NW2d 253 (1997).

Affirmed.

/s/ Michael R. Smolenski

/s/ Jane E. Markey

/s/ Kurtis T. Wilder