STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM G. WIZINSKY and ELIZABETH M. WIZINSKY,

Plaintiffs-Appellants,

v

WIXOM MEADOWS INVESTMENT LIMITED PARTNERSHIP; FULTON PINES DEVELOPMENT, INC.; RONALD A. SELBET; MORRIS WEISS; EDITH DOVITZ, MATTHEW SCHWARTZ; MAX WARREN; GEORGE BAHARAL; THOMAS SCHWARTZ; JACOB KELMAN; WILLIAM SCHWARTZ; WILLIAM GENNA; KENYAN DEVELOPMENT CORPORATION,

Defendants-Appellees.

UNPUBLISHED
September 23, 2004

No. 248441
Oakland Circuit Court
LC No. 02-039798-CB

Before: Fitzgerald, P.J., and Neff and Markey, JJ.

PER CURIAM.

Plaintiffs appeals by right from the trial court's order granting defendants summary disposition pursuant to MCR 2.116(C)(7). Plaintiffs' claims against defendants, who were involved in a project to build a twenty-one unit condominium development, included an allegation that defendants violated plaintiffs' rights under the Americans with Disabilities Act, 42 USC 12101, *et seq*. ("ADA"), and breached a settlement agreement the parties entered into regarding the removal of the lis pendens on the property. We reverse in part, affirm in part, and remand.

The first issue is whether the trial court erred in granting defendants summary disposition regarding plaintiffs' ADA claim on the grounds that res judicata barred plaintiffs' ADA claim. Reviewing the trial court's decision to grant summary disposition de novo, *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 582; 640 NW2d 321 (2001), we find no error.

Where a motion for summary disposition is brought under MCR 2.116(C)(7) based on res judicata, we accept as true the plaintiffs' well-pleaded allegations and construe them in favor of the plaintiffs, unless defendant's affidavits, or other appropriate documentation specifically contradict the allegations. *Horace v Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998);

Patterson v Kleiman, 447 Mich 429, 434 n 6; 526 NW2d 879 (1994). Likewise, the applicability of res judicata is a question of law that is reviewed de novo on appeal. *Stoudemire v Stoudemire*, 248 Mich App 325, 332; 639 NW2d 274 (2001).

Plaintiff William Wizinsky, an architect and contractor, entered into various agreements with defendants Genna and Timely Construction to form a joint venture for a condominium development on property located in Wixom, plaintiff William Wizinsky. After assigning defendant Genna and Timely Construction his rights, title, and interest in the purchase agreement on the parcel, he discovered that he would not be designing and constructing the development and would not be receiving a barrier-free condominium unit to house his ailing mother as agreed. After learning that defendant Genna and Timely Construction had entered into various agreements with defendant William Schwartz and others to develop the property, plaintiff William Wizinsky filed a lawsuit against Timely Construction in Oakland Circuit Court on February 4, 1997, alleging breach of contract, fraud and misrepresentation, and unjust enrichment based on its failure to honor its 1995 agreements and its subsequent dealings with other architects and construction companies. As a result, plaintiff William Wizinsky placed a lis pendens on the property. He entered into a settlement agreement on May 5, 1997 wherein he agreed to remove the lis pendens in exchange for $26,000 and a barrier-free condominium unit for his mother. The case then proceeded to trial and plaintiff William Wizinsky received a money judgment in the amount of $579,014.56.

On April 9, 2002, plaintiffs William Wizinsky and Elizabeth Wizinsky (William's mother) filed a second lawsuit in Oakland Circuit Court alleging, among other claims, a claim under the ADA for employment discrimination and for breach of plaintiffs' settlement agreement. Defendants subsequently moved for summary disposition arguing, in part, that res judicata and the applicable period of limitations barred plaintiffs' claims. The trial court agreed with defendants and dismissed the 2002 lawsuit on those grounds.

The doctrine of res judicata bars a second, subsequent action when (1) the prior action was decided on the merits, (2) the decree in the prior action was a final decision, (3) both actions involve the same parties or their privies, and (4) the matter in the second case was or could have been resolved in the first. *Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004); *Ditmore v Michalik*, 244 Mich App 569, 576; 625 NW2d 462 (2001). Michigan courts broadly apply the doctrine to bar both claims that have already been litigated and those arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not. *Adair*, *supra* at 121, citing *Dart v Dart*, 460 Mich 573, 586, 597 NW2d 82 (1999).

"The test for determining whether two claims arise out of the same transaction and are identical for res judicata purposes is whether the same facts or evidence are essential to the maintenance of the two actions." *Jones v State Farm Mut Automobile Ins Co*, 202 Mich App 393, 401; 509 NW2d 829 (1993), modified on other grounds by *Patterson*, *supra* at 433 n 3, 434 n 6.

Plaintiffs' ADA claim arises from the fact that plaintiff William Wizinsky, despite having contracted with defendant Genna to design and construct the condominium development, was excluded from performing and receiving compensation for those services after defendants Genna and Timely Construction entered into separate agreements with another company. Because this

same fact formed the basis for all of plaintiffs' claims in the 1997 lawsuit, the claims arise from the same transaction and, therefore, could have been brought in the 1997 lawsuit.

Further, plaintiffs' assertion that they did not discover the motive for plaintiff William Wizinsky's exclusion until during the 1997 trial is belied by his statement to the court that he recognized his ADA claim before trial and that defendant William Genna's trial testimony "confirmed" his "position of discrimination." His statement indicates that well before the first trial, he suspected that the reason he was excluded from the project was because of his disabilities. Thus, had plaintiffs exercised reasonable diligence as the standard requires, they could have brought their ADA claim in the 1997 lawsuit. Accordingly, we conclude that the trial court correctly ruled that the doctrine of res judicata bars their ADA claim.

The next issue is whether the trial court erred in granting defendants summary disposition on the grounds that res judicata bars plaintiffs' claim for breach of the settlement contract. Reviewing this issue de novo, we conclude that the court erred in dismissing this claim.

Res judicata did not bar plaintiffs' claim for breach of the settlement agreement because the facts or evidence necessary to support that claim are not the same as the facts or evidence necessary to support plaintiffs' original claims. As noted in Issue I, the doctrine of res judicata bars a second, subsequent action when, among other factors, the matter in the second case was or could have been resolved in the first. *Adair, supra* at 121. Again, Michigan courts broadly apply the doctrine to bar not just claims already litigated, but also "every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Dart, supra* at 586.

As set forth in issue I, the test for determining whether two claims arise from the same transaction for res judicata purposes is whether the same facts or evidence are essential to the maintenance of the two actions. *Jones, supra* at 401. Because the alleged breach of the 1997 settlement contract involves facts and evidence distinct from those pertaining to the original joint venture between plaintiff William Wizinsky and defendants Genna and Timely Construction in 1995, plaintiffs' claim for breach of the settlement contract does not arise from the same transaction as plaintiffs' original claims. A reviewing court should consider the time, space, origin and motivation of the facts supporting the claim, *Adair, supra* 125, citing 46 Am Jur 2d, Judgments § 533, p 801, and should further consider whether the result of the facts constitutes a violation of one right by a single wrong. *Id*., § 534, p 803.

Here, the facts supporting plaintiff William Wizinsky's original claims involve his initial 1995 agreements with defendant Timely Construction, the breach of those agreements, and his subsequent exclusion from the development of the project, denial of compensation and loss of unit 21. In contrast, the facts that support plaintiffs' claim for breach of the settlement contract involve defendant Timely Construction's failure to cooperate with plaintiff William Wizinsky in ensuring that unit 21 would a handicapped unit for plaintiff Elizabeth Wizinsky. Because there are two different contracts at issue entered into years apart and because those contracts create different rights and obligations, the breach of those contracts constitutes two legal wrongs. Thus, it cannot be said that the claim for breach of the 1997 settlement agreement constitutes the same transaction as the claim for breach of the 1995 joint venture agreements.

Further, the mere fact that plaintiff William Wizinsky could have sought leave to amend his original complaint before trial to allege a breach of the settlement agreement is not dispositive because defendants failed to establish that plaintiffs' claim for breach of the settlement agreement arose from the same transaction as the claims originally filed in 1995. To conclude otherwise is to ignore long-established precedent requiring the claims to have arisen from "the same transaction." Accordingly, because plaintiffs' claim for breach of the settlement contract did not arise from the same transaction as plaintiffs' original claims, the trial court erred in concluding that res judicata barred plaintiffs' breach of the settlement agreement claim.

The next issue is whether the trial court erred in dismissing plaintiffs' ADA claim on the grounds that the claim was time-barred. Reviewing the issue de novo, we find no error.

The relevant statute of limitations is found in MCL 600.5805(10), which provides as follows:

> The period of limitations is 3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property.

Claims accrue "at the time the wrong upon which the claim is based was done regardless of the time when damage results." MCL 600.5827. Nevertheless, on appeal plaintiffs suggest that the discovery rule applies to ADA claims. Under the discovery rule, which Michigan adopted in 1963 and which our Supreme Court has applied in a variety of actions, including medical malpractice, products liability and negligent misrepresentation, *Boyle v General Motors Corp*, 250 Mich App 499, 502-503, 655 NW2d 233 (2002), rev'd on other grounds 468 Mich 226 (2003), a plaintiff's cause of action accrues when he discovers or, through the exercise of reasonable diligence, should have discovered that he has a possible cause of action. *Johnson v Caldwell*, 371 Mich 368, 379; 123 NW2d 785 (1963), superseded by statute as stated in *Moll v Abbott Laboratories*, 444 Mich 1, 12, n 16; 506 NW 2d 816 (1993).

Here, although plaintiffs note that federal courts have applied the discovery rule to civil rights cases, citing *Whaley v Saginaw Co*, 941 F Supp 1483 (ED Mich, 1996), they have not cited any Michigan cases where the rule was applied to civil rights claims. Mindful of the purposes of statutes of limitation, which are to encourage plaintiffs to pursue claims diligently and to protect defendants from having to defend against stale and fraudulent claims, *Lemmerman v Fealk*, 449 Mich 56, 65; 534 NW2d 695 (1995), and in light of the Legislature's language in MCL 600.5827 that the claim accrues when the wrong is committed, we conclude that the discovery rule does not apply to an ADA claim brought in state court.

Further, because any alleged wrong based on his disabilities was committed when plaintiff William Wizinsky was excluded from constructing and designing the condominium complex in November and December of 1995, and because plaintiffs did not file their ADA claim in state court until April 9, 2002, the three-year period of limitations had expired. Accordingly, the trial court correctly concluded that plaintiffs' ADA claim is time-barred.

The next issue is whether the trial court erred in dismissing plaintiffs' claim for breach of the settlement agreement on the grounds that it was time-barred. Reviewing the issue de novo, *Armstrong supra*, we conclude that the trial court did err in dismissing this claim.

"'[A]n agreement to settle a pending lawsuit is a contract and is to be governed by the legal principles applicable to the construction and interpretation of contracts.'" *Michigan Mutual Ins Co v Indian Ins Co*, 247 Mich App 480, 484; 637 NW2d 232 (2001), quoting *Walbridge Aldinger Co v Walcon Corp*, 207 Mich App 566, 571; 525 NW2d 489 (1994). Pursuant to MCL 600.5807(8), the limitation period for breach of contract claims is six years. Because the settlement agreement could not have been breached before it was created on May 5, 1997, and because plaintiffs filed the instant lawsuit on April 9, 2002, within six years of the agreement's creation, their claim for breach of the settlement agreement was brought within the relevant six-year period of limitations. Accordingly, we conclude that the trial court erred in concluding that the statute of limitations barred plaintiffs' claim for breach of the settlement agreement.

We affirm the trial court's grant of summary disposition of plaintiffs' ADA claim, but we reverse its grant of summary disposition of plaintiffs' breach of settlement agreement claim. We remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Janet T. Neff
/s/ Jane E. Markey