STATE OF MICHIGAN

COURT OF APPEALS

BRANDON ASSOCIATES, individually and derivatively on behalf of EYL ASSOCIATES LIMITED PARTNERSHIP,

Plaintiff-Appellant,

v

CASTLE MANAGEMENT, ROBERT E. MOON and STEVEN L. MORRIS,

Defendants-Appellees.

UNPUBLISHED
November 18, 2004

No. 247192
Oakland Circuit Court
LC No. 2002-043642-CB

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

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition to defendants under MCR 2.116(C)(7) and (10). We reverse.

This case concerns whether plaintiff has a legal limited partnership interest in the Michigan limited partnership EYL Associates Limited Partnership and thus has standing to bring this derivative action against defendants. In 1989, the general partners were Eric Yale Lutz, Steven Morris, and Robert Moon; the limited partners were Eric Yale Lutz, the Eric Yale Lutz Irrevocable Trust, plaintiff, Steven Morris, Robert Moon, and Sinai Hospital of Detroit. Eric Lutz was the managing general partner. Plaintiff pledged its beneficial interest in the partnership to Diamond Savings & Loan Company ("Diamond") as security for a loan to Lutz. Lutz averred that as the managing partner, he consented to plaintiff's pledge of its beneficial interest. Lutz also averred that plaintiff's legal limited partnership interest was not pledged or transferred.

When Lutz defaulted on the loan, a foreclosure sale was held. The Irving A. August Revocable Living Trust purchased the collateral for $50,000. Plaintiff alleges that, as a result of the purchase, the Irving A. August Revocable Living Trust obtained a 62.5 percent interest of the cash-flow distributions from the partnership. Plaintiff further alleges that the Irving A. August Revocable Living Trust assigned fifty percent of its cash-flow interest to plaintiff. Lutz resigned as managing general partner after filing for bankruptcy in March 1996. Defendants Moon and Morris became the managing general partners. They assigned their general partnership interests to defendant Castle Management. According to plaintiff, Castle is an entity consisting solely of Morris and Moon.

In late 1999, August and Lutz brought suit against defendants for breach of contract, fraud, embezzlement, conversion, and breach of fiduciary duty, and sought an accounting, the removal of defendants as managing partners, and other relief. The parties submitted their dispute to arbitration. Plaintiff sought to intervene claiming that it was a real party in interest under MCR 2.201(B) because it had a twenty percent legal interest and twenty-five percent beneficial interest in the partnership. The arbitrator denied plaintiff's motion, reasoning that plaintiff was not a party to the arbitration agreement and, thus, had no right to participate. The arbitrator further ruled that plaintiff's beneficial interest in the partnership arose solely through August.

The arbitrator concluded that neither August nor Lutz had standing under the partnership agreement and dismissed the case. Specifically, the arbitrator found that because neither August nor Lutz obtained the consent of the managing partner to transfer a general partnership interest as required by the agreement, the only interest transferred to the bankruptcy trustee was a beneficial interest; that August only acquired a beneficial interest in the partnership and did not have a legal partnership interest as the transferee of Lutz; and that a holder of a beneficial interest did not have standing to bring any claims pursuant to article VII of the partnership agreement. August and Lutz moved for reconsideration, which was denied. Defendants moved the circuit court to enforce the arbitration award, which was granted.

In the meantime, plaintiff began the instant action alleging embezzlement and fraud for failing to make cash-flow distributions, breach of fiduciary duties, self-dealing, conversion of funds, and breach of contract. Defendants moved for summary disposition under MCR 2.116(C)(7), (8) and (10). The trial court granted the motion, concluding that the partnership agreement did not permit a limited partner to transfer a beneficial interest, the foreclosure sale resulted in a complete transfer of plaintiff's partnership interest, and plaintiff lacked standing to sue. The court further concluded that even if plaintiff had standing, it was barred by res judicata and collateral estoppel because the asserted claims were resolved by arbitration.

I

Plaintiff first argues that the trial court erred in granting defendants summary disposition under MCR 2.116(C)(10) on the basis that plaintiff did not retain an interest in the partnership and, thus, did not have standing to bring this action. Because we find that plaintiff retained a legal interest in the partnership, we conclude that the trial court erred.

This Court reviews a trial court's decision to grant summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Mino v Clio School Dist*, 255 Mich App 60, 67; 661 NW2d 586 (2003). Summary disposition should be granted when there is no genuine issue concerning any material fact and the moving party is entitled to judgment as a matter of law. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999); *J & J Farmer Leasing, Inc v Citizens Ins Co of America*, 260 Mich App 607, 612; 680 NW2d 423 (2004). "Standing is the legal term used to denote the existence of a party's interest in the outcome of the litigation; an interest that will assure sincere and vigorous advocacy." *Allstate Ins Co v Hayes*, 442 Mich 56, 68; 499 NW2d 743 (1993) (internal citations omitted). In this case, the question of standing turns on whether plaintiff had an interest as a limited partner at the time it brought this action.

The partnership agreement does not prohibit a limited partner from transferring a beneficial interest. Section 7.1 of the agreement merely prohibits limited partners from assigning their interests without written consent of the managing general partner. And Lutz indicated that, as the managing general partner, he consented to plaintiff's pledge. Moreover, the partnership here is a limited partnership governed by the Michigan Revised Uniform Limited Partnership Act, MCL 449.1101 *et seq*. This act provides, in pertinent part, that, "[e]xcept as provided in the partnership agreement . . . a partnership interest is assignable in whole or in part." MCL 449.1702. And the partnership agreement here defines partnership interest as "[a] Partner's proportionate interest in the *ownership of the Partnership* and its Cash Flow, capital, profits, losses and/or distributions. . . " §1.8(T). Plaintiff's claim that it did not pledge its entire interest in the partnership as collateral is supported by the security agreement. Moreover, Shelley Korash, plaintiff's managing partner, averred that from 1989 through 2000, plaintiff was listed as a limited partner with a twenty percent interest on the partnership's tax returns. This indicated that defendants recognized plaintiff's continuing legal interest in the partnership.

As plaintiff additionally argues, the parties to the Diamond loan and security agreement understood that plaintiff was only pledging its beneficial, and not its legal, partnership interest. Although defendants rely on August's deposition testimony in the arbitration proceeding in which he claimed that he received plaintiff's entire interest in the partnership, August was not a party to the loan and security agreement, and thus his deposition testimony is not relevant to an understanding of the parties' intent of that agreement. In contrast, Lutz, who was a party to the loan and security agreement, averred in his affidavit that plaintiff pledged only a beneficial interest, and that it did not pledge its legal limited partnership interest.

Defendants counter, however, by arguing that the partnership agreement did not allow plaintiff to transfer only a beneficial interest in the partnership.[1] Defendants note that § 2.5 of the agreement provides that each partner owns an undivided interest in the partnership. Relying on § 7.8, defendants further contend that the partnership agreement gives only general partners the right to subdivide their interest in the partnership. However, § 7.8 does not specifically

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[1] Plaintiff argues that defendants are barred by statute from raising as a defense plaintiff's alleged "breach" of the agreement thirteen years after plaintiff pledged its beneficial interest in the partnership. *An action to recover damages* for breach of contract must be brought within six years of the time the claim first accrues. MCL 600.5807(8). Assuming for the sake of argument that a breach occurred, defendants are not pursuing an action to recover damages for breach of contract; therefore, they are not barred by statute from raising the breach of contract issue as a *defense*. *Id.* This conclusion is supported by the public policy that statutes of limitation are designed to promote. Statutes of limitation prevent stale claims and protect defendants from prolonged fear of litigation. *Frankenmuth Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998), citing *Witherspoon v Guilford*, 203 Mich App 240, 247; 511 NW2d 720 (1994). Statutes of limitation promote judicial economy and defendants' rights. *Burton v Reed City Hosp*, 259 Mich App 74, 83; 673 NW2d 135 (2003), citing *Stephens v Dixon*, 449 Mich 531, 534; 536 NW2d 755 (1995). Moreover, our Supreme Court has indicated that some defenses may not be barred by the expiration of a period of limitation where the claim against the defendant is timely. *Mudge v Macomb Co*, 458 Mich 87, 107; 580 NW2d 845 (1998).

prohibit the conveyance of a beneficial interest in the partnership. Further, contrary to defendants' assertion, the maxim "*expressio unius est exclusio alterius*" is not applicable here because a transfer is expressly allowed by § 7.1.[2] See *Bradley v Saranac Bd of Ed*, 455 Mich 285, 298; 565 NW2d 650 (1997). Even if the pledge were not permitted by § 7.1, plaintiff would not lose its partnership interest because § 7.1 states that the attempted pledge "shall be null and void and ineffective for all purposes." Therefore, plaintiff maintained its legal limited partnership interest, and granting summary disposition to defendants was improper. *Ritchie-Gamester, supra* at 76.

II

We also agree that the trial court erred in dismissing plaintiff's action on the basis of res judicata and collateral estoppel.

The applicability of res judicata is a question of law that is reviewed de novo on appeal. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999); *Shuler v Michigan Physicians Mutual Liability Co*, 260 Mich App 492, 510; 679 NW2d 106 (2004). The applicability of collateral estoppel is also a question of law that is reviewed de novo. *Minicuci v Scientific Data Mgt, Inc,* 243 Mich App 28, 34; 620 NW2d 657 (2000).

Res judicata bars a subsequent action between the same parties when the facts or evidence essential to the action are identical to those essential to a prior action. *Sewell v Clean Cut Management, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001). 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; and (4) both actions involved the same parties or their privies.[3] *Baraga Co v State Tax Comm*, 466 Mich 264, 269; 645 NW2d 13 (2002). The same-party prerequisite of res judicata requires that the parties were previously adversarial. Adverse parties are those who, by the pleadings, are arrayed on opposite sides; those who have a controversy between them. *York v Wayne Co Sheriff*, 157 Mich App 417, 426-427; 403 NW2d 152 (1987).

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[2] Defendants contend that § 7.2 rather than § 7.1 governs the assignment of a limited partner's interest. They claim that (1) plaintiff assigned its entire limited partnership interest to August; (2) because August did not comply with the requirements of § 7.2, August only obtained the rights of a holder of a beneficial interest; (3) August was only able to re-convey a beneficial interest to plaintiff; (4) therefore, plaintiff no longer has a legal interest in the partnership pursuant to § 7.2 of the partnership agreement. Because we find that plaintiff did not assign its entire interest, we do not reach defendants' argument regarding the applicability of § 7.2.

[3] We disagree with plaintiff's contention that the trial court relied on an invalid arbitration decision as the basis for its decision. Although plaintiff argues that the arbitrator's legal conclusions were erroneous, the arbitration decision was confirmed by the circuit court and constitutes a valid judgment for purposes of res judicata. *Hopkins v City of Midland*, 158 Mich App 361, 370; 404 NW2d 744 (1987).

Collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in that prior proceeding. *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001). Generally, application of collateral estoppel requires (1) that a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) that the same parties had a full and fair opportunity to litigate the issue, and (3) mutuality. *Monat v State Farm Ins Co*, 469 Mich 679, 682-684; 677 NW2d 843 (2004). For collateral estoppel to apply, the parties in the second action must be the same as or privy to the parties in the first action. A party is one who was directly interested in the subject matter, and had a right to defend or to control the proceedings and to appeal from the judgment. *Husted v Auto-Owners Ins Co*, 213 Mich App 547, 556; 540 NW2d 743 (1995). The doctrine of collateral estoppel applies to factual determinations made during an arbitration proceeding. *Porter v Royal Oak*, 214 Mich App 478, 485; 542 NW2d 905 (1995).

In determining whether the arbitration proceeding applies to bar plaintiff's present action under the doctrines of res judicata or collateral estoppel, two principal questions must be addressed. The first is whether plaintiff may be considered a party to the arbitration proceeding for purposes of applying res judicata or collateral estoppel. It is undisputed that plaintiff was not a party to the arbitration proceeding, and that its motion to intervene in that proceeding was denied. We also conclude that plaintiff did not have a "substantial identity" to a party to the arbitration proceeding. *Dearborn Heights School Dist v MEA/NEA*, 233 Mich App 120, 126-127; 592 NW2d 408 (1998). The second question is whether the same issue was presented in the arbitration proceeding. The arbitration proceeding concerned whether August and Lutz had standing as partners to pursue their claims against defendants, whereas the present case concerned whether plaintiff had an independent legal limited partnership interest. We find that plaintiff's interests were not adequately represented by August and Lutz in arbitration. Moreover, because the same issue was not actually and necessarily determined in the arbitration proceeding, collateral estoppel did not apply. The trial court erroneously granted defendants summary disposition on this basis.

Plaintiff next appears to argue that even if it only retained a beneficial interest in the partnership, it would still be entitled to maintain suit against defendants under the first sentence of MCL 449.1403(b), and the arbitrator misapplied MCL 449.1403(b) in the underlying action. Because we have determined that plaintiff retained its legal limited partnership interest, and collateral estoppel and res judicata do not apply here, we decline to address whether the arbitrator misapplied MCL 449.1403(b).

In light of our disposition, it is not necessary to consider plaintiff's remaining issues on appeal.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kurt T. Wilder
/s/ Joel P. Hoekstra
/s/ Donald S. Owens