

STATE OF MICHIGAN  
COURT OF APPEALS

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JEFF KAGE, d/b/a JA CONTRACTING  
COMPANY,

Plaintiff-Appellant,

v

ARMADA PROPERTIES, L.L.C.,

Defendant-Appellee.

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UNPUBLISHED

October 4, 2005

No. 254049

Macomb Circuit Court

LC No. 2003-004387-CK

Before: Saad, P.J., and Jansen and Markey, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7), on the basis of collateral estoppel. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff, a subcontractor, brought a prior action against the three owners of defendant Armada Properties, L.L.C., seeking imposition of a construction lien under MCL 570.1101 *et seq.*, against property in Armada, Michigan. The trial court granted the individual defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff then brought the instant action against defendant, again seeking a construction lien against the same Armada property, alleging that he was not paid for work performed under his subcontract. The trial court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(7), concluding that collateral estoppel precluded plaintiff from relitigating a necessary issue decided in the prior case.

Plaintiff argues that the trial court erred in applying the collateral estoppel rule because the instant action did not involve the same defendant as the prior action. Collateral estoppel precludes relitigation of issues between the same parties. *VanVorous v Burmeister*, 262 Mich App 467, 479; 687 NW2d 132 (2004). "Generally, for collateral estoppel to apply three elements must be satisfied: (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*, 469 Mich 679, 682-684; 677 NW2d 843 (2004) (citations and internal quotations omitted). The mutuality of estoppel element requires that "in order for a party to estop an adversary from relitigating an issue that party must have been a party, or in privity to a party, in the previous action." *Id.* at 684. "The estoppel is mutual if the one taking advantage of

the earlier adjudication would have been bound by it, had it gone against him.” *Id.* at 684-685. However, the Supreme Court in *Monat* recognized an exception to the mutuality requirement when collateral estoppel is asserted defensively against a party who has already had a full and fair opportunity to litigate the issue. *Id.* at 685-686, 694-695.

Here, defendant is asserting collateral estoppel defensively against plaintiff, so the mutuality requirement is excused if plaintiff already had a full and fair opportunity to litigate the essential issue of fact, i.e., whether plaintiff was paid in full for the improvements he made to the property. This condition substantially overlaps the first two requirements of collateral estoppel, and plaintiff does not argue that these requirements were not satisfied.<sup>1</sup> Accordingly, collateral estoppel precludes plaintiff from relitigating this essential issue against defendant.

Plaintiff also argues that the trial court in the prior action erred by failing to assert jurisdiction over defendant, a necessary party, as required by MCR 2.205(B). Plaintiff failed to appeal the summary disposition order in the previous case and cannot collaterally attack the previous judgment in this appeal. See *Kosch v Kosch*, 233 Mich App 346, 353; 592 NW2d 434 (1999).

Affirmed.

/s/ Henry William Saad

/s/ Kathleen Jansen

/s/ Jane E. Markey

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<sup>1</sup> Both parties attached the individual defendants’ summary disposition brief from the prior action to their appellate briefs. In the prior action, the defendants argued that plaintiff failed to respond to their request for admissions pursuant to MCR 2.312 and, therefore, all matters were deemed admitted pursuant to MCR 2.312(B)(1). The defendants included a request for plaintiff to admit that he was paid in full for all improvements he made to the property.