STATE OF MICHIGAN

COURT OF APPEALS

STUART CAUFF,

Plaintiff-Appellant,

v

FIEGER, FIEGER, KENNEY & JOHNSON, P.C., and GEOFFREY N. FIEGER,

Defendants-Appellees.

UNPUBLISHED
January 27, 2009

No. 281442
Oakland Circuit Court
LC No. 07-081140-CK

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

PER CURIAM.

Plaintiff appeals by right from the trial court order granting defendants' motion for summary disposition. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

In December 2003, defendant Fieger, Fieger, Kenney & Johnson signed an agreement to purchase a 25% interest in a 1977 Learjet. The agreement required defendants make an initial payment of $90,000 and pay an additional $550,000 on or before February 28, 2004. Defendants executed a promissory note pursuant to the purchase agreement, and it was attached to the purchase agreement as exhibit A.

Defendants paid the $90,000 down payment, but were unable to secure financing for the remaining $550,000 because the Learjet was encumbered by a large mortgage that was not previously disclosed to defendants. Upon discovery of the mortgage, the seller in the purchase agreement, Pacific Jet Ventures, LLC, attempted to modify the purchase agreement so that defendants would purchase an interest in that company rather than 25% interest in the Learjet itself. Defendants were not interested in purchasing an ownership interest in the company.

Defendants filed a lawsuit in 2005 against Pacific Jet Ventures, LLC, a related business entity, and multiple individuals including plaintiff in the present case. Plaintiff had introduced defendants to Pacific Jet Ventures, LLC.

The complaint in the 2005 lawsuit included, among other allegations and requests for relief, a request for rescission of the promissory note, a declaration that the promissory note was null and void, and that the court determine the rights and interests of the parties in the promissory note.

Plaintiff filed an appearance in the 2005 lawsuit on November 27, 2006, but a default had already been entered against him on November 9, 2006. Plaintiff's motion to set aside the default was denied. On January 10, 2007, the promissory note for $550,000 was assigned to plaintiff. The 2005 lawsuit ended with the clerk of the court's entering a default judgment in the amount of $102,373.83 on January 30, 2007. Although the actual promissory note was not attached to it, the purchase agreement which described the substance of the promissory note, was attached to the default judgment.

Plaintiff's complaint against defendants in the instant lawsuit alleges breach of contract because defendant did not pay the promissory note by February 28, 2004. The trial court granted defendants' motion for summary disposition, finding that a default judgment is a judgment on the merits; consequently, the doctrine of res judicata bars the current lawsuit.

Both summary disposition decisions and applications of res judicata are reviewed de novo as questions of law. *Wayne Co v Detroit*, 233 Mich App 275, 277; 590 NW2d 619 (1998).

> Under the doctrine of res judicata, a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action. The doctrine operates where the earlier and subsequent actions involve the same parties or their privies, the matters of dispute could or should have been resolved in the earlier adjudication, and the earlier controversy was decided on the merits. [*Id.* (internal citations omitted).]

The following four factors must be met for the doctrine of res judicata to apply: "(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." *Peterson Novelties, Inc v City of Berkley,* 259 Mich App 1, 10; 672 NW2d 351 (2003). To determine whether a matter could have been resolved in the first case, courts ask whether the same evidence is essential to the maintenance of both claims. *Schwartz v City of Flint*, 187 Mich App 191, 194; 466 NW2d 357 (1991). Additionally, res judicata applies to default judgments. *Id.*

Michigan has an established principle that "a default settles the question of liability as to well-pleaded allegations and precludes the defaulting party from litigating that issue." *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 79; 618 NW2d 66 (2000). Further, "[e]ntry of a default is equivalent to an admission by the defaulting party as to all well-pleaded allegations." *Id.*

When applying the four elements of res judicata to the case at hand, elements one and two are met when the prior action was decided by a final judgment, which was a default judgment, and is considered a decision on the merits. *Schwartz, supra* at 191. The third element concerns whether the subject matter in the second case could have been decided in the first case. *Peterson, supra* at 10. The 2005 complaint alleged that opposing parties made material misrepresentations in executing the promissory note and also requested a judicial determination to ascertain the parties' rights and obligations under the promissory note. In this case, plaintiff is requesting a determination that defendants breached the promissory note contract.

The subject matter of the present case—an alleged breach of the promissory note contract—is closely related to and could readily have been decided in the 2005 lawsuit requesting rescission and a determination of the parties' rights and obligations under the promissory note. Additionally, because a default is equivalent to an admission by the defaulting party, plaintiff's assignors admitted to making material misrepresentations in executing the promissory note. *See, Kalamazoo Oil Co, supra* at 79.

The final element of res judicata addresses whether the same parties or their privies are involved in the second lawsuit. That element is also met in this case given that plaintiff was individually a party to the 2005 lawsuit and that plaintiff's assignors or privies to the promissory note, Pacific Jet Ventures, LLC and Timothy Prero, were also parties to the 2005 lawsuit.

Plaintiffs reliance on *Van Pembrook v Zero Mfg Co*, 146 Mich App 87; 380 NW2d 60 (1985) and *Martino v Cottman Transmissions Systems Inc*, 218 Mich App 54; 554 NW2d 17 (1996) is misplaced. In *Van Pembrook*, this Court held that the prior Missouri federal court action and the subsequent Michigan state court action litigated distinctly different causes of actions which required entirely different sets of proof. *Van Pembrook, supra* at 101. Neither the Missouri case nor the Michigan case addressed claims to rescind or otherwise terminate the contract that was partially in dispute in both actions. *Id.* Here, however, the prior state court action included allegations and causes of action seeking to rescind not only the purchase agreement but also the promissory note (which was incorporated into the purchase agreement), and it is that same promissory note that is involved in the instant case. Therefore, the two cases do not involve distinct subject matters.

Likewise, *Martino* is not helpful to this appeal because our Court in that case concluded that the subject matter in the two cases was different, and therefore not barred by *res judicata*. *Martino, supra* at 58. To the contrary, in this case the initial lawsuit sought to rescind the promissory note, and because of the default judgment, those allegations were deemed admitted. The continued validity of the promissory note is a vital element in this case. Thus, we are not dealing with distinct subject matters.

Because all four elements of res judicata have been met, there can be no relitigation of the parties' rights and obligations under promissory note.

We affirm. Defendant may being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Kurtis T. Wilder