

STATE OF MICHIGAN
COURT OF APPEALS

MELISSA KNEPPER,

Plaintiff-Appellant,

v

HOLLEY DEVELOPMENT COMPANY, LLC,
DENNIS HOLLEY, JOY HOLLEY, and
THOMAS HOLLEY,

Defendants-Appellees.

UNPUBLISHED

March 3, 2009

No. 283668

Washtenaw Circuit Court

LC No. 07-001003-CZ

Before: Donofrio, P.J., and K. F. Kelly and Beckering, JJ.

PER CURIAM.

Plaintiff appeals as of right¹ from the circuit court's orders granting summary disposition to defendants, a building concern and its operators, and confirming an arbitration award. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. Facts

Plaintiff contracted with the corporate defendant for construction of a residential home. The individual defendants are the owners and operators of that corporation. The contract called for binding arbitration to resolve "all claims, disputes and other matters in question between the Contractor and the Owner." Disputes arose during the course of construction, and plaintiff and the corporate defendant entered into a binding arbitration agreement. Plaintiff claimed \$797,541.33 in damages, but the arbitrator awarded her just \$113,419.10.

Before the scheduled arbitration date, plaintiff filed this action, asking the circuit court to convert the arbitration award to a partial judgment. Plaintiff additionally named the operators of the corporate defendant as defendants, and asserted that defendants were perniciously

¹ Defendants contend that plaintiff's issues other than judgement on the arbitrator's award are not appealable by right. We disagree. Plaintiff properly claimed an appeal from a final order. See MCR 3.602(N); MCR 7.203(A); and MCR 7.204.

reorganizing the corporation and retaining certain funds of hers. In dismissing the case, the circuit court held as follows:

The Court finds no material or substantial legal error apparent on the face of the award, thus plaintiffs' [sic] allegations and arguments challenging the award are beyond the scope of proper judicial review. An arbitration award shall be vacated only where the arbitrator exceed[ed] his or her powers[,] refused to postpone the hearing on a showing of sufficient cause, refused to hear material evidence, or otherwise conducted the hearing to prejudice substantially a party's rights Plaintiff submits no evidence of any of these criteria.

The Court finds plaintiff's arguments that she can file a civil case against the individuals because the agreement to arbitrate was only with the business and not the individual business owners, and that additional issues need to be resolved by the Court without merit. A court may compel . . . a non-signatory to an arbitration agreement to arbitrate that party's claims that are a derivative of . . . and essentially identical to the relating and underlying claims of a signatory of the arbitration agreement, if the signatory is contractually bound to submit the related and underlying claims to arbitration.

Here, plaintiff agreed to arbitrat[e] claims under the construction contract. Therefore her claims against . . . any individual agents or non-signatories are a derivative of . . . and essentially are identical to her primary underlying claim. Thus the Court finds that . . . claims against the individuals and any related or additional issues should have been arbitrated.

The circuit court reduced its judgment to separate orders, signed the same day, granting defendants' motion for summary disposition and entering judgment for plaintiff in the amount of the arbitration award.

On appeal, plaintiff asserts that the circuit court misapplied the doctrine of res judicata, erred in dismissing the case before the completion of discovery, and erred in failing to take cognizance of admissions now presumed because of defendants' failure to answer the request for admissions.

II. Res Judicata

We review both applications of res judicata, and decisions on motions for summary disposition, 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.'" *Id.*, quoting Black's Law Dictionary (6th ed, 1990), p 1305. "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 its merits." *Wayne Co, supra*. The doctrine applies "to every point

which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.” *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 11; 672 NW2d 351 (2003) (internal quotation marks and citations omitted). “If the same facts or evidence would sustain both, the two actions are the same for the purpose of res judicata.” *Id.*

An arbitration award has the force of res judicata in relation to matters within the arbitrator’s authority. *Hopkins v Midland*, 158 Mich App 361, 370; 404 NW2d 744 (1987).

MCR 2.116(C)(7) authorizes motions for summary disposition premised upon “an agreement to arbitrate” When deciding a motion under that rule, “this court accepts as true plaintiff’s well-pleaded allegations and construes them in plaintiff’s favor. We must consider the pleadings, affidavits, depositions, admissions, and documentary evidence filed or submitted by the parties to determine whether a genuine issue of material fact exists.” *Watts v Polaczyk*, 242 Mich App 600, 603; 619 NW2d 714 (2000) (citations omitted).

Plaintiff emphasizes that the arbitration agreement was between herself and the corporate defendant, and argues that she should have been allowed to pursue claims against the individual defendants in court. However, for operation of res judicata, “perfect identity of the parties is not required, only a substantial identity of interests that are adequately presented and protected by the first litigant.” *Adair v Michigan*, 470 Mich 105, 122; 680 NW2d 386 (2004) (internal quotation marks omitted). Also instructive is the rule that persons with claims derivative of those of parties to an arbitration agreement may be bound by that arbitration despite their not being party to the agreement to arbitrate in the first instance. *Jozwiak v Northern Michigan Hosps, Inc*, 207 Mich App 161, 167-168; 524 NW2d 250 (1994). In this case, the substantial identity of interests between the corporate defendant and its individual owners and operators is obvious.

Plaintiff also asserts that she became aware of a statutory conversion claim only after arbitration commenced. However, plaintiff points to no evidence showing the existence of such a claim, nor does she explain why due diligence would not have brought any such claim to light in time to include it in the arbitration. Plaintiff characterizes this claim as separate and distinct from her arbitration action against the corporate defendant, even though it is beyond dispute that defendants obtained funds from her exclusively through operation of the contract that required arbitration of “all claims, disputes and other matters in question between the Contractor and the Owner.”

For these reasons, plaintiff’s attempt to avoid operation of the doctrine of res judicata must fail.

III. Discovery

Plaintiff argues that the circuit court erred in granting summary disposition to defendants when she had only begun the process of discovery. We disagree. We review a lower court’s decisions concerning discovery for an abuse of discretion. *Baker v Oakwood Hosp Corp*, 239 Mich App 461, 478; 608 NW2d 823 (2000).

Plaintiff asserts that she needed further discovery to develop her claim of conversion, arguing that the “issue of conversion arose after the arbitration, as the corporate Appellee admitted during the arbitration discovery that it was still in possession of [plaintiff’s] money from her trust fund account.” Plaintiff thus admits that the matter of her money remaining in defendants’ hands came up in the arbitration process. For that reason, and because all claims and disputes arising from the building contract were subject to arbitration, plaintiff could have developed and litigated her conversion claim in arbitration, and only in arbitration. The circuit court thus correctly dismissed the case without awaiting further discovery.

We further note that MCR 3.602(F)(2) authorizes an *arbitrator*, on a party’s request, to permit the “taking of a deposition, for use as evidence, of a witness who cannot be subpoenaed or is unable to attend the hearing,” but that neither subrule (K), governing modification or correction of an award, nor subrule (L), governing judgments giving effect to arbitration awards, make any provision for discovery for purposes of those court proceedings.

The circuit court likewise did not err in dismissing the case without regard for certain unanswered requests for admissions. Plaintiff asserts that she served a request for admissions that went unanswered in the required time, thus causing the matters in question to be deemed admitted. See MCR 2.312(B). Plaintiff further asserts that defendants have thus admitted that they have a trust fund containing funds deposited by plaintiff for the construction project, which defendants have used for improper purposes. But, again, this is a dispute arising from performance of the construction contract, which was thus a matter for arbitration, not trial in the circuit court.

For these reasons, plaintiff fails to show that the circuit court erred in any matters relating to discovery.

Affirmed.

/s/ Pat M. Donofrio
/s/ Kirsten Frank Kelly
/s/ Jane M. Beckering