

STATE OF MICHIGAN
COURT OF APPEALS

FAIRWAYS DEVELOPMENT OF NORTHERN
MICHIGAN, INC., and RESORT NORTH
DEVELOPMENT COMPANY, INC.,

UNPUBLISHED
November 12, 2009

Plaintiffs-Appellants,

v

SPL OF BLOOMFIELD, LLC, and KURT
LAFAVE,

No. 286680
Emmet Circuit Court
LC No. 08-001203-CH

Defendants-Appellees.

Before: Murphy, P.J., and Meter and Beckering, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting defendants' motion for summary disposition based on res judicata. The heart of this lawsuit at this point is whether plaintiffs' claims could have been raised or were decided by an earlier action involving these parties. We reverse and remand for further proceedings consistent with this opinion. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The earlier action arose when plaintiffs¹ defaulted on payments for a golf course they owned and were developing. After the sheriff's sale, plaintiffs had until June 15, 2007, to redeem the properties. Meanwhile, plaintiffs engaged in a number of transactions in which they "sold" the property to other would-be developers. Eventually, they had a contract with entities referred to here as "Chestnut," under which plaintiffs were to obtain clear title to the golf course and sell it and other assets to Chestnut. However, the day before the redemption period expired, defendants (also referred to herein simply as "SPL")² purchased the property before plaintiffs

¹ Although there are some differences between the two plaintiffs in this case and the actions they took below, for the sake of clarity this opinion will refer to them collectively.

² Defendant LaFave is a member of SPL.

could redeem it.³ Plaintiffs learned of the purchase on June 14, 2007, and made no attempt to also redeem the property or to seek an extension of the redemption period.

Chestnut sued both plaintiffs and SPL on a number of grounds, encompassing specific performance and a quiet-title action. Chestnut alleged that plaintiffs held title to the property and that SPL had no right to redeem the property. Litigation proceeded, with SPL responding at every step. When SPL moved for summary disposition on the quiet-title count, plaintiffs responded, arguing that SPL's "inequitable" action of a last-minute redeeming of the property at least merited an equitable extension of the right to redeem. However, they did not seek that as a remedy or separately move the court for that remedy.

Instead of going to trial, Chestnut reached an agreement with SPL to dismiss the action with prejudice. However, plaintiffs would not agree to this, so instead Chestnut moved the court to dismiss without prejudice. SPL objected to dismissing without prejudice, and after a hearing on the motion, the trial court agreed. The order expressly states that dismissal is "with prejudice." Plaintiffs did not appeal that order.

Plaintiffs sued SPL to quiet title, and SPL moved for summary disposition on the theory that the February 12, 2008, order bars the present suit under the doctrine of res judicata (claim preclusion). The trial court agreed, noting that res judicata requires "a prior decision on the merits," that "both actions involve the same parties or their privies," and that "the matter in the second case was or could have been resolved in the first." The court found that a voluntary dismissal with prejudice acts as an adjudication on the merits, so the first requirement was met. The court then found that all the parties had been parties to the earlier action. Even though plaintiffs were SPL's codefendants in the earlier suit, the court noted that plaintiffs were parties and were in privity with Chestnut, the plaintiff in the earlier suit. That satisfied the "same parties" requirement of the doctrine. Finally, the court found that under Michigan's "broad view" of res judicata, the issue of who held legal title was squarely before the court and it had found questions of fact existed on the matter. However, when the motion for dismissal was made, plaintiffs could have filed a cross-claim "in their own name rather than tagging along with the then plaintiff" – but it did not. The court concluded, "[T]he [earlier] case was dismissed and the court believes that the implications of that have been made clear today."

In this Court, plaintiffs first argue that their suit is not barred by res judicata because the earlier suit was not decided on the merits. In support of this claim, they assert that cases holding that a dismissal with prejudice is a decision on the merits are distinguishable because those cases involved the same parties taking the same, and opposing, positions in both suits. Plaintiffs contend that because plaintiffs were codefendants with SPL in the earlier suit, the dismissal with prejudice only bars claims against SPL brought by Chestnut.

³ Defendants claimed that they did not intend to redeem the property but were only purchasing it from another lienholder. However, the deed was stamped "redeemed." The merits of this claim are not before this Court at this point.

Plaintiffs also argue that the earlier suit did not involve the same parties or privies because Chestnut is not a party to this suit and plaintiffs were not in privity with Chestnut in the earlier action. Plaintiffs contend that Chestnut's reasons for dismissing the action were its own and its interests were not identical to those of plaintiffs.

Plaintiffs also argue that the subject matter of the present suit is different from the issues referenced in the earlier suit. They indicate that the trial court found questions of fact regarding who held title to the property, and that issue was never substantively litigated after that point. Plaintiffs state that the Michigan Court Rules do not require compulsory joinder of cross- or counter-claims and that, while Chestnut might be precluded from raising this issue in a new suit, plaintiffs are not.

The applicability of res judicata is a question of law that we review de novo. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007).

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 Mgt, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001). Res judicata requires proof of four elements:

(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 case; and (4) both actions involved the same parties or their privies. [*Richards v Tibaldi*, 272 Mich App 522, 531; 726 NW2d 770 (2006).]

The burden of establishing the applicability of res judicata is on the party asserting it. *Baraga County v State Tax Comm*, 466 Mich 264, 269; 645 NW2d 13 (2002).

Regarding the "same parties" issue, we first note that the complaints in the two cases are plain on their faces that plaintiffs and SPL were parties to both actions. However, the general rule is that the two parties must be "adversarial" in both actions. See *Gomber v Dutch Maid Dairy Farms, Inc*, 42 Mich App 505, 511-512; 202 NW2d 566 (1972).

Adverse parties have been defined as those who, by the pleadings, are arrayed on opposite sides. Opposite sides in this sense is not restricted to the plaintiffs against defendants, since codefendants having a controversy *inter se* may come within such classification. [*Id.* at 511]

Moreover, failure to plead an issue against a codefendant does not bar the claim in the future: "A defendant generally has the election of either pleading a counterclaim or cross-claim or preserving it for a future independent suit." *Eyde v Charter Twp of Meridian*, 118 Mich App 43, 52-53; 324 NW2d 775 (1982).

There are no pleadings in the earlier action identifying plaintiffs and SPL as being adversarial. While plaintiffs and SPL certainly had certain adversarial interests in the prior lawsuit, the fact remains that neither one filed an actual legal claim against the other. As noted

earlier, when SPL moved for summary disposition on the quiet-title count, plaintiffs argued that SPL's "inequitable" action of a last-minute redeeming of the property merited an equitable extension of the right to redeem, but *they did not seek that as a remedy or separately move the court for that remedy*. We simply cannot conclude that plaintiffs and SPL were sufficiently "adversarial" in the prior lawsuit for purposes of applying res judicata. Thus, the only way for this prong of res judicata to be met is if plaintiffs and Chestnut were in privity.

Privity requires a substantial identity of interests and a relationship in which the interests of the nonparty were presented and protected by the litigant. *ANR Pipeline Co v Dep't of Treas*, 266 Mich App 190, 214; 699 NW2d 707 (2005). Privity requires "both a substantial identity of interests and a working or functional relationship" between the parties. *Baraga Co, supra* at 269 (internal citations and quotation marks omitted).

In the earlier action, it was to both Chestnut's and plaintiffs' interests to litigate SPL's right to take title; however, Chestnut litigated its own interests: if plaintiffs did not have the right to redeem the property, Chestnut's success on its breach of contract claim would be hollow, i.e., it would have a right to develop a golf course but could not pursue the right. When it became apparent to Chestnut that pursuing the lawsuit was no longer in its best financial interests, it ceased litigation. However, the continuation of the lawsuit was indeed in plaintiffs' best interests. Under these facts, there simply was not "a substantial identity of interests and a working or functional relationship," *id.*, between plaintiffs and Chestnut.

Plaintiffs were within their rights to preserve their claims for a future suit – the present suit, in fact – because the pertinent parties were not legally adversarial in the earlier suit, nor were plaintiffs in privity with SPL's earlier adversary, Chestnut. The trial court therefore erred, and its decision must be reversed.

In light of our decision, we need not address any additional issues raised on appeal.

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

/s/ Patrick M. Meter

/s/ Jane M. Beckering