

STATE OF MICHIGAN
COURT OF APPEALS

THELMA A. PELLICIONI,

Plaintiff/Counter Defendant-
Appellant,

v

RAYMOND A. REYNOLDS,

Defendant/Counter Plaintiff-
Appellee.

UNPUBLISHED
November 16, 2010

No. 294036
Macomb Circuit Court
LC No. 2008-000111-NZ

Before: MURPHY, C.J., and METER and SHAPIRO, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court opinion and order granting her motion for summary disposition of defendant's counter-complaint, but denying her motion for summary disposition of her own complaint and dismissing the complaint on the ground that it was barred by the doctrine of res judicata. We reverse. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff and defendant are brother and sister. Their father was Granville Floyd Reynolds ("Reynolds"), who died in November 2005. After Reynolds died, the parties were involved in a dispute in the probate court. In that case, it was determined that Reynolds's wills were invalid and therefore Reynolds died intestate. It was also determined that funds belonging to Reynolds that defendant had moved to a separate bank account in his own name (the Comerica account) were not part of Reynolds's estate, but were being held in trust for distribution upon Reynolds's death in accordance with Reynolds's wishes, which were that the funds should be divided equally among the five siblings. After Reynolds died, defendant distributed the funds but gave plaintiff a lesser share, claiming a right to setoff because plaintiff had allegedly taken other funds belonging to Reynolds before his death and converted them to her own use. Plaintiff filed this action to recover the difference, alleging claims of conversion and breach of fiduciary duty. The circuit court determined that plaintiff's claims were barred by the doctrine of res judicata and, accordingly, denied plaintiff's motion for summary disposition and dismissed plaintiff's complaint.

We review de novo both a trial court's ruling on a motion for summary disposition, *Gillie v Genesee Co Treasurer*, 277 Mich App 333, 344; 745 NW2d 137 (2007), and its application of

the doctrine of res judicata. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007).

Plaintiff first contends that the trial court erred in considering the res judicata doctrine because defendant had not raised it as an affirmative defense in his answer to the complaint. Because plaintiff did not raise this issue in the trial court, it is not preserved. *Keenan v Dawson*, 275 Mich App 671, 681; 739 NW2d 681 (2007). Therefore, review “is limited to determining whether a plain error occurred that affected substantial rights.” *In re Egbert R Smith Trust*, 274 Mich App 283, 285; 731 NW2d 810 (2007).

A party against whom a cause of action has been filed “must assert in a responsive pleading the defenses the party has against the claim” and “[a]ffirmative defenses must be stated in a party’s responsive pleading, either as originally filed or as amended” MCR 2.111(F)(2), (3). An affirmative defense includes one that “seeks to avoid the legal effect of or defeat the claim of the opposing party, in whole or in part[.]” MCR 2.111(F)(3)(b). “A defense not asserted in the responsive pleading or by motion as provided by these rules is waived However, a party who has asserted a defense by motion filed pursuant to MCR 2.116 before filing a responsive pleading need not again assert that defense in a responsive pleading later filed[.]” MCR 2.111(F)(2)(a). Because defendant filed a dispositive motion before filing an answer to the complaint, and the motion was based on the defense of res judicata, the defense was properly raised and did not have to be raised again in the answer to the complaint.

“As a general rule, res judicata will apply to bar a subsequent relitigation based upon the same transaction or events” *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 380; 596 NW2d 153 (1999). The doctrine “bars relitigation of claims actually litigated and those claims arising out of the same transaction that could have been litigated.” *Huggett v Dep’t of Natural Resources*, 232 Mich App 188, 197; 590 NW2d 747 (1998). “For the doctrine to apply (1) the former suit must have been decided on the merits, (2) the issues in the second action were or could have been resolved in the former one, and (3) both actions must involve the same parties or their privies.” *Energy Reserves, Inc v Consumers Power Co*, 221 Mich App 210, 215-216; 561 NW2d 854 (1997).

There is no dispute that the probate court case was decided on its merits. It also appears that both actions involve the same parties or their privies. “A party is one who was directly interested in the subject matter, and who had a right to defend in, or control, the proceedings, and who had a right to appeal from the judgment.” *Dearborn Hts Sch Dist No 7 v Wayne Co MEA/NEA*, 233 Mich App 120, 127; 592 NW2d 408 (1998). Plaintiff and defendant appear to have been the only litigants in the probate court case. There is no indication that plaintiff was appointed as the personal representative, or that she was acting in other than her individual capacity in the probate court, and she appealed from the judgment issued by that court in her own name. Therefore, the question remains whether the issues raised in the circuit court case were or could have been resolved in the probate court case.

“Res judicata bars relitigation of claims actually litigated and those claims arising out of the same transaction that could have been litigated.” *Huggett*, 232 Mich App at 197. “The test for determining whether two claims arise out of the same transaction and are identical for res judicata purposes is whether the same facts or evidence are essential to the maintenance of the

two actions.” *Jones v State Farm Mut Auto Ins Co*, 202 Mich App 393, 401; 509 NW2d 829 (1993).

The “transaction” giving rise to the probate court case was Reynolds’s death. The issues primarily concerned whether Reynolds died testate or intestate, which depended in part on whether he had testamentary capacity and, if so, whether his will was overborne by undue influence. An ancillary issue concerned whether the money taken by defendant and held in the Comerica account at the time of Reynolds’s death was part of Reynolds’s estate such that it would pass to Reynolds’s survivors according to the terms of his will or by the laws of intestate succession, whichever was applicable. That issue was subject to the probate court’s jurisdiction. See MCL 700.1302(a) (granting the probate court exclusive jurisdiction over matters relating to “the settlement of a deceased individual’s estate”) and MCL 700.1104(b) (defining the term “estate” as “the property of the decedent . . . as the property is originally constituted and as it exists throughout administration”).

The transaction giving rise to this case was an incident subsequent to Reynolds’s death, i.e., defendant’s disposition of Reynolds’s funds in the Comerica account. The issues are whether defendant converted plaintiff’s property to his own use and whether defendant breached a fiduciary duty owed to plaintiff when he did not give her a full one-fifth share. There is no indication that these issues were raised and decided in the probate court, and certainly the issue whether defendant properly disposed of the Comerica account could not be determined in the probate court once it was determined that the funds in that account were not part of Reynolds’s estate. See MCL 700.1302(a)(ii) (granting the probate court exclusive jurisdiction over matters relating to “the settlement of a deceased individual’s estate,” including distribution of the estate) and MCL 700.1303(a) (granting the probate court concurrent jurisdiction to determine a property right or interest in the estate of a decedent). Although the probate court does have exclusive jurisdiction over matters regarding a trust, MCL 700.1302(b), the prior probate proceeding was limited to the administration of Reynolds’s decedent’s estate, not the administration of any trust. Thus, the issue raised in this case could not have been resolved in the prior probate court case.¹ Therefore, the trial court erred in dismissing plaintiff’s complaint.

Reversed and remanded for further proceedings not inconsistent with this opinion.² We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Patrick M. Meter
/s/ Douglas B. Shapiro

¹ We note that it is not clear that the Comerica “convenience account” constitutes a trust as defined by MCL 700.1107(n). If the account is merely a constructive trust, as defendant asserted in the trial court, it is not a trust for purposes of MCL 700.1107(n) and the probate court does not have exclusive jurisdiction over the claim.

² On remand, although defendant may argue his belief that plaintiff received \$12,000 as a defense to plaintiff’s claim, he is precluded from asserting it as a counterclaim based on his failure to appeal its dismissal.