STATE OF MICHIGAN

COURT OF APPEALS

LYNDA THOMAS and SAMUEL V. THOMAS, Plaintiffs-Appellants,	UNPUBLISHED March 15, 2018
v	No. 337013 Oakland Circuit Court
DOLLAR GENERAL CORPORATION, Defendant-Appellee, and	LC No. 2016-152703-NO
BASHIR PATTERSON MCGEE and SARA SWOPE, Defendants.	

Before: MURRAY, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

Plaintiffs appeal as of right an order granting summary disposition in favor of defendant, Dollar General Corporation, in this slip and fall action that was dismissed as barred by res judicata.[1] We affirm.

In September 2014, plaintiff Lynda Thomas slipped and fell in a Dollar General store located in Southfield. In June 2015, plaintiffs sued "Dollar General, a foreign corporation" and "Dollar General Store." Those defendants moved to dismiss on the ground that plaintiffs were suing the wrong entities. The trial court agreed, and dismissed the case with prejudice as against those defendants. In April 2016, plaintiffs filed this case against "Dollar General Corporation." Defendant moved to dismiss, arguing that plaintiffs again sued the wrong party and their claims were barred by res judicata. The trial court agreed, holding that the 2015 and 2016 cases involved the same parties or their privies and was barred by res judicata. This appeal followed.

[1] It appears that defendants Bashir Patterson McGee and Sara Swope were dismissed during the lower court proceeding; thus, we refer to Dollar General Corporation as "defendant."

Plaintiffs argue that the trial court erroneously granted summary disposition on res judicata grounds because the 2015 case was improperly dismissed with prejudice, and the party to the original action was Dollar General Company, not defendant. We disagree.

"We review de novo both a trial court's decision on a motion for summary disposition and its application of the legal doctrine of res judicata." *Garrett v Washington*, 314 Mich App 436, 440-441; 886 NW2d 762 (2016). Summary disposition is appropriate under MCR 2.116(C)(7) where a claim is barred by res judicata. *Beyer v Verizon North Inc*, 270 Mich App 424, 426; 715 NW2d 328 (2006). In considering such a motion, "a trial court should examine all documentary evidence submitted by the parties, accept all well-pleaded allegations as true, and construe all evidence and pleadings in the light most favorable to the nonmoving party." *McLain v Lansing Fire Dep't*, 309 Mich App 335, 340; 869 NW2d 645 (2015).

Res judicata precludes a claim if the following three elements are satisfied: "(1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first." *Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004). The party asserting the doctrine has the burden of proving that it is applicable. *Baraga Co v State Tax Comm*, 466 Mich 264, 269; 645 NW2d 13 (2002).

As to the first element, a dismissal with prejudice is a decision on the merits for purposes of res judicata. *Wilson v Knight-Ridder Newspapers, Inc*, 190 Mich App 277, 278-279; 475 NW2d 388 (1991). The trial court's order in the 2015 case clearly stated that the dismissal was with prejudice; therefore, the 2015 case was decided on its merits. See *id*. at 279. To the extent that plaintiffs argue the trial court erred when it dismissed the 2015 case with prejudice, the argument must fail. To challenge that decision, plaintiffs were required to file a direct appeal and they did not. See MCR 7.204. Accordingly, plaintiffs' argument in that regard constitutes an impermissible collateral attack on the order from the 2015 case.

To the extent that plaintiffs argue that the trial court's order was merely a "scribe's error," this contention must also fail. The trial court was explicit at the April 13, 2016 hearing that it intended to dismiss *with prejudice*, and furthermore, "courts speak through their judgments and decrees, not their oral statements or written opinions." *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977).

As to the second element, "To be in privity is to be so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert." *Adair*, 470 Mich at 122. In this case, defendant was a party in both the 2015 case and the 2016 case. That is, in the 2015 case, plaintiffs sued "Dollar General, a foreign corporation," and throughout their complaint referred to "Dollar General Corporation," which was a Tennessee corporation with its principal place of business in Goodlettsville, Tennessee. In the 2016 case, plaintiffs sued "Dollar General Corporation," and throughout their complaint referred to "Dollar General Corporation," which was a Tennessee corporation with its principal place of business in Goodlettsville, Tennessee. Accordingly, the trial court did not err when it determined that defendant was the same party. See *id*.

To the extent that plaintiffs argue that "Dollar General Corporation" is an assumed name for Dolgencorp, LLC, which is the alleged proper real party in interest, their contention is unsupported by evidence. According to Michigan's Department of Licensing and Regulatory Affairs (LARA), the assumed named for Dolgencorp, LLC, a Kentucky-based company, is "Dollar General," not "Dollar General Corporation."[2] And the entity number for Dolgencorp, LLC is B94619, which is not defendant's entity number. Although defendant acknowledges that it is a subsidiary of Dolgencorp, LLC, the trial court did not err when it determined that defendant was a distinct party from Dolgencorp, LLC. "It is a well-recognized principle that separate corporate entities will be respected." *Seasword v Hilti, Inc*, 449 Mich 542, 547; 537 NW2d 221 (1995). "Michigan law presumes that, absent some abuse of corporate form, parent and subsidiary corporations are separate and distinct entities." *Id*. There is nothing in the record that indicates defendant abused its corporate form.

As to the third element, Michigan uses the "same transaction" test to determine whether the matter was, or could have been, resolved in the first. *Adair*, 470 Mich at 123-124. Essentially, "[r]es judicata bars a subsequent action between the same parties when the evidence or essential facts are identical." *Id*. at 123 (citation omitted). This is true "regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff." *Id*. at 124 (citation omitted). The primary difference between the 2015 case and the 2016 case was that in the 2016 case, plaintiffs alleged an additional count of premises liability. This count was set forth as originating from the identical facts, i.e., plaintiff Lynda's slip and fall, which was the basis for the 2015 case. Therefore, the issues set forth in the 2016 complaint were, or could have been, resolved in the first case. Accordingly, the trial court properly dismissed this case under MCR 2.116(C)(7) as barred by res judicata.

Affirmed. Defendant is entitled to tax costs as the prevailing party. MCR 7.219(A).

/s/ Christopher M. Murray
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood

[2] We note that both parties submitted LARA filing information on appeal, but neither party submitted this information to the trial court. Generally, "a party may not expand the record on appeal." *Detroit Leasing Co v Detroit*, 269 Mich App 233, 237; 713 NW2d 269 (2005). However, we may take judicial notice of a public record pursuant to MRE 201. See *Johnson v Dep't of Natural Resources*, 310 Mich App 635, 649; 873 NW2d 842 (2015).