STATE OF MICHIGAN

COURT OF APPEALS

WAHAB EKUNSUMI, d/b/a WAHAB JANITORIAL SERVICES,

Plaintiff-Appellant,

v

MIDWEST MANAGEMENT COMPANY, LLC, JOHN R. MORRISSEY and DANIEL D. ARMISTEAD,

Defendants-Appellees.

UNPUBLISHED
December 3, 2009

No. 287588
Livingston Circuit Court
LC No. 08-023515-CZ

Before: Borrello, P.J., and Whitbeck and K.F. Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right a trial court order granting summary disposition to defendants under MCR 2.116(C)(7). For the reasons set forth in this opinion, we affirm the trial court's granting of summary disposition under MCR 2.116(C)(7), but for a different reason than the reasons articulated by the trial court.

I. Facts and Procedural History

Plaintiff Wahab Ekunsumi is the sole proprietor of Wahab Janitorial Services. From October 2000 to May 2001, plaintiff provided janitorial services to a United States Department of Housing and Urban Development (HUD) housing complex in Ohio that was apparently owned by Huntington Meadows Limited Partnership (HMLP). PM One was the management company that managed the housing complex. After HMLP went bankrupt, plaintiff unsuccessfully sought to recover payment of monies it was due for janitorial services in HMLP's bankruptcy proceedings. Thereafter, plaintiff filed a breach of contract action against PM One in Ohio in July 2003, claiming that PM One was liable to pay the monies HMLP owed plaintiff for janitorial services provided by plaintiff's business. The trial court in Ohio ruled that PM One was not liable to plaintiff for the unpaid services because there was insufficient evidence that an enforceable contract existed between plaintiff and PM One and because if there was an agency relationship, PM One was a disclosed agent for HMLP. The Ohio Court of Appeals reversed and remanded the case for a determination whether there was a contract between plaintiff and PM One and whether HMLP was an undisclosed principal of its agent, PM One. On remand, PM One did not contest the case, and in May 2006, an Ohio trial court entered a judgment against PM One in the amount of $143,429.

On August 1, 2006, plaintiff filed an affidavit and notice of entry of foreign judgment in Oakland County Circuit Court. This filing did not result in collection of the judgment for plaintiff, however, and in October 2007, plaintiff filed in Oakland County a second motion to add defendant Midwest Management Company LLC (Midwest) as a defendant and a judgment debtor. According to plaintiff's motion, the basis for adding Midwest as a defendant and a judgment debtor was plaintiff's discovery that on March 1, 2003, Midwest had contractually assumed the liabilities of PM One. The motion alleged that both PM One and defendant Midwest were property management companies and that PM One had a large number of property management contracts with HUD and the Michigan State Housing Development Authority (MSHDA). The motion further alleged that defendant John R. Morrissey was co-owner and vice president of PM One. According to the motion, it was necessary for PM One to transfer its HUD and MSHDA property management business to a new entity for business reasons. Therefore, defendant Midwest was established as a limited liability company. Plaintiff's motion asserted that on March 1, 2003, three documents were signed affirming and memorializing Midwest's purchase of both the assets and liabilities of PM One.

In December 2007, the Oakland Circuit Court issued an order and opinion denying plaintiff's motion to add Midwest as a defendant and judgment creditor. In relevant part, the Oakland Circuit Court's opinion concluded that any claims against Midwest would be barred by the six-year statute of limitations for breach of contract claims and that Midwest would be unfairly prejudiced by being brought into the action (laches). Plaintiff appealed the Oakland Circuit Court's order, but this Court dismissed the claim of appeal for lack of jurisdiction because Midwest was not a party to the case below.[1] This Court further ordered that if plaintiff wanted "to challenge the December 2007 order, he must file a delayed application for leave to appeal." Plaintiff never filed a delayed application for leave to appeal the Oakland Circuit Court order, however. Instead, in March 2008, plaintiff filed a complaint against defendants Midwest and John R. Morrissey and Daniel Armistead in Livingston County. Defendants moved for summary disposition of plaintiff's complaint, arguing, in relevant part, that summary disposition was proper based on res judicata, collateral estoppel, laches, and the statute of limitations. The trial court granted defendants' motion based on MCR 2.116(C)(7) and expressly adopted the opinion of the Oakland Circuit Court denying plaintiff's motion to add Midwest as a defendant based on laches and the statute of limitations:

> The issues presented here I find are substantially and the same issues as were presented and argued in the Oakland County case. Judge [Steven N.] Andrews prepared a thorough and comprehensive opinion which this Court adopts. While new defendants and new dates and a new venue are presented in this case, nothing new which the parties were or could not have been aware is presented here. Based upon that, I am granting the motion for summary disposition.

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[1] *Ekunsumi v PM One Ltd*, unpublished order of the Court of Appeals, entered February 20, 2008 (Docket No. 283296).

Plaintiff moved for reconsideration, and the court denied the motion.

II. Standard of Review

Summary disposition pursuant to MCR 2.116(C)(7) is appropriate where a claim is barred by prior judgment, such as res judicata. *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008). This Court reviews de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7). *DiPonio Constr Co, Inc v Rosati Masonry Co, Inc*, 246 Mich App 43, 46; 631 NW2d 59 (2001). Whether res judicata bars a subsequent action is also reviewed de novo. *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004). In deciding a motion brought pursuant to MCR 2.116(C)(7), a court should consider all affidavits, pleadings, depositions, admissions and other documentary evidence submitted by the parties. MCR 2.116(G)(5); *Holmes v Michigan Capital Medical Ctr*, 242 Mich App 703, 706; 620 NW2d 319 (2000). If the pleadings or documentary evidence reveal no genuine issues of material fact, the court must decide as a matter of law whether the claim is statutorily barred. *Holmes*, *supra* at 706.

III. Analysis

Plaintiff argues that the trial court erred in ruling that plaintiff's Livingston County complaint against defendants was barred under the doctrine of res judicata. At the outset, we note that our resolution of this issue is made more difficult by the fact that the trial court did not clearly articulate whether it granted summary disposition based on res judicata. Although defendants moved for summary disposition, in part, based on res judicata, and the trial court granted summary disposition based on MCR 2.116(C)(7), the trial court did not specify, either on the record or in its order, whether it was granting summary disposition based on res judicata. Some of the trial court's language on the record arguably suggests that res judicata was a basis for the trial court's ruling. On the other hand, to the extent that the trial court adopted the opinion of the Oakland Circuit Court denying plaintiff's motion to add Midwest as a defendant based on laches and the statute of limitations, this would suggest that the trial court did not grant summary disposition based on res judicata. This is so because if summary disposition was proper on res judicata grounds, there would be no need to also grant summary disposition based on laches and the statute of limitations. In any event, for reasons that will be explained below, we hold that the trial court properly granted summary disposition based on MCR 2.116(C)(7). However, we conclude that summary disposition under MCR 2.116(C)(7) was proper based on res judicata rather than the statute of limitations or laches.

"The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action." *Adair*, *supra* at 121. "Res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical." *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999). "The doctrine bars a second, subsequent action when (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*, *supra* at 121. Michigan courts have applied the doctrine broadly as barring not only claims that have already been litigated, "but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Id.*

Plaintiff argues that the first element necessary to apply res judicata is not satisfied. Plaintiff equates his motion to add Midwest as a party to a motion to amend a complaint to add a party and, citing *DeCare v American Fidelity Fire Ins Co*, 139 Mich App 69, 77; 360 NW2d 872 (1984), asserts that the denial of a motion to amend a pleading is not a decision on the merits. In *DeCare*, this Court held:

> "In most instances, the denial of a motion to amend will not be a decision on the merits. For example, when amendment is denied because of undue delay, bad faith, dilatory motive or undue prejudice to the opposing party, . . . the substance of the claims sought to be added will not likely have been considered. However, when, as in the present case, the denial is made on the basis of the futility of the amendment, it is in effect a determination that the added claims are substantively without merit . . . . Such a determination is entitled to res judicata impact." [*DeCare*, *supra* at 77-78, quoting *Martin v Michigan Consolidated Gas Co*, 114 Mich App 380, 383-384; 319 NW2d 352 (1982).]

We find that *DeCare* is factually distinguishable from the instant case because *DeCare* involved a motion by the defendant to amend its pleadings to deny liability, whereas in the instant case, plaintiff sought to add a party. Moreover, in this case, the Oakland Circuit Court denied plaintiff's motion to add Midwest as a party, in relevant part, based on both the doctrine of laches and the statute of limitations.[2] The dismissal of an untimely complaint on statute of limitations grounds constitutes an adjudication on the merits. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 418-419; 733 NW2d 755 (2007); *Verbrugghe v Select Specialty Hosp-Macomb Co, Inc (On Remand)*, 279 Mich App 741, 744; 760 NW2d 583 (2008). We find that the rule that the dismissal of an untimely complaint based on statute of limitations grounds constitutes an adjudication on the merits applies equally to the court's denial of plaintiff's motion to add Midwest as a party on statute of limitations grounds. If, as plaintiff suggests, his motion to add a party is tantamount to a motion to amend a complaint, then it is at least arguable that the denial of a motion to add a party is equivalent to a dismissal of a complaint against the party. Furthermore, because laches is the equitable counterpart of a statute of limitations, *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 456; 761 NW2d 846 (2008), we also find that the denial of plaintiff's motion to amend based on laches constitutes an adjudication on the merits.[3]

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[2] We observe that "[t]he doctrine of laches will not ordinarily apply if a statute of limitations will bar a claim because laches is viewed as the equitable counterpart to the statute of limitations." *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 456; 761 NW2d 846 (2008). Plaintiff's Livingston County complaint contained numerous counts. Some of the counts were contract claims, while others were not. Although the trial court did not so specify, we interpret the trial court's reliance on the statute of limitations as applying to plaintiff's contract claims and the trial court's reliance on the doctrine of laches as applying to plaintiff's claims that were not contractual in nature.

[3] Laches applies "in cases 'in which there is an unexcused or unexplained delay in commencing an action and a corresponding change of material condition that results in prejudice to a party.'" *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 394; 761 NW2d 353 (2008), quoting *Dep't of Public Health v Rivergate Manor*, 452 Mich 495, 507; 550

(continued…)

Therefore, we reject plaintiff's contention that the Oakland County case was not decided on the merits.

The second element of res judicata is satisfied if both actions involve the same parties or their privies. *Adair*, *supra* at 121. PM One was the defendant in the Oakland County action, whereas Midwest, Morrissey, and Armistead are the defendants in the Livingston County case. Thus, the same parties were not involved in both actions. A privy of a party includes a person so identified in interest with another that he represents the same legal right, such that the interests of the nonparty are presented and protected by the party in the litigation. *Id.* at 122. According to plaintiff's Livingston County complaint, defendant Armistead was one of the founders of PM One, defendant Morrissey was president of PM One, and Morrissey and Armistead were at times both part owners of PM One. The complaint further alleged that defendants Morrissey and Armistead, along with another man who is now deceased, created Midwest to enable it to continue to do business with HUD and MSHDA; that PM One's assets were transferred to the newly created Midwest; and that Morrissey owns Midwest today.[4] Given the facts that PM One became defendant Midwest and that defendant Armistead was a founder of PM One, that defendant Morrissey was president of PM One, and that both Armistead and Morrissey were part-owners of PM One, we find that the interests of defendants were adequately protected by PM One in the Oakland County litigation. There was a sufficient identity of interest between all of the defendants and PM One to satisfy the second element of res judicata.

The third element of res judicata, that the matter could have or should have, been brought in the first action, is also satisfied in this case. *Id.* at 121. The Oakland Circuit Court specifically ruled that Midwest could not be added as a party based on laches and the statute of limitations and therefore, that plaintiff could make no claims against Midwest. By filing the complaint against Midwest in Livingston County, plaintiff was essentially attempting to avoid the Oakland Circuit Court ruling that plaintiff could not bring any claims against Midwest. Whether plaintiff could bring any claims against Midwest was already litigated in Oakland County and was decided in the negative. Thus, the final element of res judicata is satisfied.

In light of our conclusion that res judicata bars plaintiff's Livingston County complaint against Midwest, we need not address plaintiff's arguments regarding the propriety of the trial court's reliance on the doctrine of laches and the statute of limitations in granting summary

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NW2d 515 (1996). In *DeCare*, this Court stated that when an amendment is denied because of undue delay, bad faith, dilatory motive or undue prejudice to the opposing party, the substance of the claims sought to be added will not likely have been considered. *DeCare*, *supra* at 77. We acknowledge that *DeCare* could be interpreted as support for the conclusion that the denial of a motion to amend based on laches does not constitute a decision on the merits. However, *DeCare* does not specifically hold that the denial of a motion to amend based on laches does not constitute a decision on the merits, and such an interpretation of *DeCare* would be inconsistent with the rule that dismissal of an untimely complaint based on statute of limitations grounds constitutes an adjudication on the merits. Thus, *DeCare* does not govern our decision in this regard.

[4] At oral argument, counsel for defendant Midwest revealed that defendant Morrissey is deceased.

disposition in favor of defendants. As stated above, the trial court adopted the Oakland Circuit Court's rulings in this regard. Regardless of the propriety of the Oakland Circuit Court's decision regarding the applicability of laches and the applicable statute of limitations, the issue whether Midwest could be added as a party was decided by the Oakland Circuit Court and resolved against plaintiff. When this Court dismissed plaintiff's claim of appeal of the Oakland County decision because Midwest was not a party to the case below, our order informed plaintiff that if he wanted "to challenge the December 2007 order, he must file a delayed application for leave to appeal." At this point, plaintiff had two options: he could have done nothing or he could have filed a delayed application for leave to appeal the Oakland Circuit Court order. He elected not to file a delayed application to appeal and instead filed a complaint against defendants Midwest, Morrissey, and Armistead in Livingston County. By filing the complaint in Livingston County, plaintiff was attempting to circumvent the Oakland Circuit Court's denial of his motion to add Midwest as a party. For all the reasons stated above, plaintiff's Livingston County complaint was barred by res judicata.

Affirmed. Defendants, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Stephen L. Borrello
/s/ William C. Whitbeck
/s/ Kirsten Frank Kelly