STATE OF MICHIGAN

COURT OF APPEALS

FIA CARD SERVICES, N.A.,

Plaintiff/Counter-Defendant-Appellee,

v

ROBERT F. PONTE,

Defendant/Counter-Plaintiff/Third-Party Plaintiff-Appellant,

v

MICHAEL R. STILLMAN and LAW OFFICES OF MICHAEL R. STILLMAN, P.C., d/b/a STILLMAN LAW OFFICE,

Third-Party Defendants-Appellees.

UNPUBLISHED
January 21, 2014

No. 312980
Washtenaw Circuit Court
LC No. 12-000160-CZ

Before: WHITBECK, P.J., and FITZGERALD and O'CONNELL, JJ.

PER CURIAM.

In this breach of contract and open account action, defendant/counter-plaintiff Robert F. Ponte appeals as of right the trial court's order both denying Ponte's motion for summary disposition pursuant to MCR 2.116(C)(7) and granting plaintiff/counter-defendant FIA Card Services' motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

Ponte maintained and used a credit card account with FIA. In 2009, Ponte stopped making payments on his account, leaving a debt of over $49,000. FIA, in an attempt to collect that debt, originally filed suit in February of 2011. After FIA failed to properly serve Ponte, that suit was dismissed without prejudice. Ponte subsequently filed suit in the United States District Court for the Eastern District of Michigan, claiming that FIA and its attorney Michael Stillman, listed as a third-party defendant in the present case, violated, in attempting to collect Ponte's debt, the Fair Debt Collection Practices Act (FDCPA), 15 USC 1692, *et seq.*; the Michigan Collection Practices Act (MCPA), MCL 445.251, *et seq.*; and the Michigan Consumer Protection

Act (MICPA), MCL 445.901, *et seq.* In their first responsive pleading, both FIA and Stillman moved to dismiss the federal suit under FR Civ P 12(b)(6). That motion was granted.

Shortly thereafter, FIA refiled its breach of contract and open accounts claim in the present action. Ponte responded with an answer, affirmative defenses, including impossibility of performance and "assignment of debt," a counterclaim against FIA, and a third-party complaint against Stillman and his law firm, alleging, once again, violation of the aforementioned federal and state debt collecting statutes. Stillman and his law office were dismissed from the suit for lack of service. FIA moved the trial court for summary disposition of its claims against Ponte pursuant to MCR 2.116(C)(9) (failure to state a valid defense to the claims asserted) and (C)(10) (no genuine issue of material fact). FIA also moved for summary disposition of Ponte's claims against it pursuant to MCR 2.116(C)(6) (another action had been initiated between the parties involving the same claim), (C)(7) (claim barred as a matter of law), or (C)(8) (failure to state a claim upon which relief can be granted). Ponte also moved the trial court for summary disposition, arguing that FIA's claims against him should have been brought as a counterclaim in Ponte's federal action and were, therefore, barred under the doctrine of res judicata. MCR 2.116(C)(7). The trial court granted FIA's motion for summary disposition on its claims against Ponte under MCR 2.116(C)(10), holding that FIA's unrebutted affidavit of indebtedness pursuant to MCL 600.2145, and Ponte's entirely meritless defenses, did not create a genuine issue of material fact for trial. The trial court also disposed of Ponte's counterclaim pursuant to MCR 2.116(C)(6). Finally, the trial court denied Ponte's motion for summary disposition of FIA's claims against him pursuant to MCR 2.116(C)(7), holding that FIA's claims were not barred by res judicata.

Now, on appeal, Ponte first argues that the trial court wrongly decided his motion for summary disposition pursuant to MCR 2.116(C)(7), because res judicata bars FIA's instant action where FIA could have brought this same action in Ponte's federal court case. Because the doctrine of res judicata is inapplicable to the present case, we disagree, although on separate grounds from the trial court. A trial court's decision regarding a motion for summary disposition is reviewed de novo. *Jimkoski v Shupe*, 282 Mich App 1, 4; 763 NW2d 1 (2008) (citation omitted). Summary disposition pursuant to MCR 2.116(C)(7) is proper where a claim is barred by res judicata. See *Beyer v Verizon North, Inc*, 270 Mich App 424, 426; 715 NW2d 328 (2006). Further, "the application of a legal doctrine, such as res judicata, presents a question of law that we review de novo." *Washington v Sinai Hosp*, 478 Mich 412, 417; 733 NW2d 755 (2007). Where the judgment in the first action was entered by a federal court, "[t]his Court must apply federal law in determining whether the doctrine of res judicata requires dismissal." *Beyer*, 270 Mich App at 428-429. Accordingly,

> [u]nder federal law, res judicata precludes a subsequent lawsuit if the following elements are present: (1) a final decision on the merits by a court of competent jurisdiction; (2) a subsequent action between the same parties or their privies; (3) an issue in the subsequent action which was litigated or which should have been litigated in the prior action; and (4) an identity of the causes of action. [*Id*. at 429 (internal citations and quotations omitted).]

FIA asserts that, under the exception to the doctrine of res judicata set forth in *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 383; 596 NW2d 153 (1999), res judicata

is inapplicable to its claim in state court. We agree. In *Pierson Sand & Gravel, Inc*, our Supreme Court ruled that, where a state law claim was not brought in a federal action and the federal court dismissed all federal claims before trial, "if the federal court would clearly have dismissed the state claims when it dismissed the federal claims, then the doctrine of res judicata should not apply." The Court further ruled that, a federal court "would have clearly dismissed the [state law] action," where it had dismissed all the federal claims before trial and no "exceptional circumstances that would give the federal court grounds to retain supplemental jurisdiction over the state claim" were present. *Id*. at 387. Because it is clear and undisputed that the federal court dismissed all federal claims before trial here, res judicata does not apply unless exceptional circumstances were present. The Court has listed examples of exceptional circumstances:

> When the defendant fails to call the court's attention to the weakness of the federal claim before the court has invested a substantial amount of time in the case; when the supplemental claim significantly invokes questions of federal policy . . . where the court and the litigants had expended considerable time on the supplemental claims before the federal claim was dismissed . . . and where there have been substantial resources invested in the lawsuit towards the resolution of the dispute, and the parties are ready for trial. [*Id*. at 386 (internal citations omitted).]

We are convinced that, with regard to the Court's listed exceptional circumstances, there are none applicable to the present case. FIA wasted no time in moving to dismiss Ponte's federal claim, FIA's claim on the underlying debt has no relation to federal policy, and neither party allocated much time or money in preparing for trial regarding FIA's state law claims. Therefore, pursuant to the Court's rule in *Pierson Sand & Gravel, Inc*, 460 Mich at 386-387, res judicata is inapplicable to the present case, and the trial court properly denied Ponte's motion for summary disposition pursuant to MCR 2.116(C)(7).

Ponte also argues that genuine issues of material fact exist regarding his liability on the debt based on his two affirmative defenses. Therefore, summary disposition was improper under MCR 2.116(C)(10). We disagree. A motion for summary disposition pursuant to MCR 2.116(C)(10) "tests the factual sufficiency of the complaint." *Joseph v Auto Club Ins Assoc*, 491 Mich 200, 206; 815 NW2d 412 (2012). Summary disposition is proper where there is no "genuine issue regarding any material fact." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

Ponte first argues that his extreme financial difficulty resulting from his divorce rendered his ability to pay his debt owed to FIA impossible under the doctrine of impossibility of performance. Ponte's defense relies entirely on his financial difficulties. This, however, ignores binding case law to the contrary. "Subsequent events, which in the nature of things do not render performance impossible but only render it more difficult, burdensome, or expensive, will not operate to relieve the contractor." *Chase v Clinton Cty*, 241 Mich 478, 484; 217 NW 565 (1928). Ponte's financial hardship simply makes payment of his debt to FIA more burdensome and difficult, not impossible. Therefore, this defense did not create a genuine issue of material fact.

Ponte also argues that, under the law of the case doctrine, this Court must allocate his debt to FIA according to this Court's previous decision in *Ponte v Ponte*, unpublished opinion per curiam of the Court of Appeals, issued July 24, 2008 (Docket No. 274667), wherein a panel of this Court held that Ponte's marital debt should be distributed evenly between him and his now deceased ex-wife. The law of the case doctrine as relied upon by Ponte, however, requires that the two cases be the same. *South Macomb Disposal Auth v American Ins Co*, 243 Mich App 647, 654; 625 NW2d 40 (2000) ("[I]f an appellate court has passed on a legal question and remanded the case for further proceedings, the legal question thus determined by the appellate court will not be differently determined on a subsequent appeal *in the same case* where the facts remain materially the same." (emphasis added)); *McNees v Cedar Springs Stamping Co*, 219 Mich App 217, 221-222; 555 NW2d 481 (1996) ("[A]n appellate court's decision concerning a particular issue binds courts of equal or subordinate jurisdiction during subsequent proceedings *in the same case*."). The law of the case doctrine does not apply, and this defense did not create a genuine issue of material fact for trial.

Affirmed.

/s/ William C. Whitbeck
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell