STATE OF MICHIGAN

COURT OF APPEALS

KARL TROPF and CATHERINE TROPF,

Plaintiffs-Appellants,

V

STATE FARM INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
September 11, 2001

No. 213930
Oakland Circuit Court
LC No. 98-004354-CK

MIDWEST GUARANTY BANK,

Plaintiff/Counter-defendant-Appellee,

V

JOSEPH F. BIEREKOVEN, LYNNE WOLENSKI, TWENTIETH CENTURY FINANCIAL CORPORATION, TWENTY-FIRST CENTURY FINANCIAL CORPORATION, TRANSNATION TITLE INSURANCE COMPANY, SHARON KAY O'CONNOR, and RODERIC O'CONNOR,

Defendants,

and

KARL F. TROPF and CATHERINE TROPF,

Defendants/Counter-plaintiffs-Appellants.

No. 217134
Oakland Circuit Court
LC No. 96-530224-CZ

KARL TROPF,

Plaintiff-Appellant,

V

ANDRZEJ ZAJAC and KIMBERLY ZAJAC,

Defendants-Appellees.

Nos. 219994; 227264
Oakland Circuit Court
LC No. 98-011566-CH

Before: White, P.J., and Cavanagh and Talbot, JJ.

PER CURIAM.

In these consolidated appeals, Karl Tropf and Catherine Tropf (the Tropfs) appeal as of right, challenging several different orders. We affirm in Docket Nos. 213930, 217134 and 219994. We reverse the award of sanctions in Docket No. 227264.

Docket No. 213930

In Docket No. 213930, the Tropfs appeal the circuit court's grant of summary disposition to defendant State Farm Insurance Company. The circuit court granted the motion on the basis that the Tropfs' action to recover benefits allegedly due under an insurance policy was untimely because it was not filed within the one-year limitations period contained in the policy. We conclude that the circuit court did not err in granting summary disposition under MCR 2.116(C)(7).

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 202; 544 NW2d 727 (1996).

> A defendant who files a motion for summary disposition under MCR 2.116(C)(7) may (but is not required to) file supportive material such as affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3); *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). If such documentation is submitted, the court must consider it. MCR 2.116(G)(5). If no such documentation is submitted, the court must review the plaintiff's complaint, accepting its well-pleaded allegations as true and construing them in a light most favorable to the plaintiff. [*Turner v Mercy Hospitals & Health Services of Detroit*, 210 Mich App 345, 348; 533 NW2d 365 (1995).]

The Tropfs do not contend that their action was filed within the one-year period prescribed in their insurance policy with State Farm. Rather, they argue that State Farm is estopped from relying on the limitations period because it denied the existence of the policy. According to the facts presented, the Tropfs canceled their insurance policy in June 1996, but asked that the cancellation be made retroactive to January 24, 1996. Accordingly, State Farm canceled the policy, effective at 12:00 a.m. on that date. The Tropfs subsequently filed a claim of loss involving an alleged loss that occurred at 8:00 p.m. on January 24, 1996. State Farm denied coverage in August 1996, because the alleged loss occurred after the policy was effectively canceled. More than a year later, the Tropfs filed their action to collect benefits allegedly due under the policy.

We agree with the circuit court that the Tropfs failed to show that State Farm was estopped from relying on the policy's one-year limitations period for filing claims. The Tropfs rely on *Kassab v Michigan Basic Property Ins Ass'n*, 185 Mich App 206, 211-212; 460 NW2d 300 (1990), aff'd in part and rev'd in part on other grounds 441 Mich 433; 491 NW2d 545 (1992), wherein this Court stated:

> To avoid a statute of limitations defense under an estoppel theory, a plaintiff must allege actions by the defendant such as concealment of action, misrepresentation as to the time in which an action may be brought, or inducement to refrain from bringing an action. *Compton v Michigan Millers Mutual Ins Co*, 150 Mich App 454, 458; 389 NW2d 111 (1986), lv den 425 Mich 885 (1986). In *Lothian v Detroit*, 414 Mich 160, 177; 324 NW2d 9 (1982), our Supreme Court acknowledged its reluctance to recognize an estoppel in the absence of conduct clearly designed to induce the plaintiff to refrain from bringing an action within the statutory period.

The Tropfs also rely on *Reed v Mutual Benefit Health & Accident Ass'n*, 345 Mich 586; 76 NW2d 869 (1956), and *Baios v Clark*, 304 Mich 159; 7 NW2d 255 (1943). However, these cases are distinguishable. *Baios* and *Reed* are inapplicable to the facts of this case because there is no evidence here that the delay in filing suit was attributable to State Farm misleading the Tropfs into believing that they did not have insurance coverage. Nor is there any evidence that State Farm misled the Tropfs with regard to the time period for filing claims. The Tropfs conceded below that they had canceled their own policy, and the dispute concerned the effective time that policy coverage was extinguished. The Tropfs were fully aware of the policy at the time of their alleged loss and also when State Farm denied coverage. The circuit court correctly ruled that there was no evidence of fraud or bad faith on the part of State Farm to prevent application of the one-year filing deadline.

Moreover, under *Kassab, supra*, the Tropfs have not shown that State farm should be estopped from relying on the one-year limitations period in the policy. State Farm canceled the policy as requested by the Tropfs. If the Tropfs disagreed with State Farm's decision to deny their claim for this reason, they had a duty to promptly seek enforcement of the policy pursuant to its terms. Because they failed to do so, the circuit court did not err in granting State Farm's motion for summary disposition.

Docket No. 217134

In Docket No. 217134, the Tropfs argue that the circuit court erred by granting plaintiff Midwest Guaranty Bank's (MGB) motion for summary disposition on its complaint and by granting MGB summary disposition on the Tropfs' counterclaim. We disagree.

We review the circuit court's decisions de novo. *Baker, supra*. The circuit court considered the motions under MCR 2.116(C)(7) and (10). Summary disposition is available under MCR 2.116(C)(7) based upon the disposition of a claim before commencement of the action. *Alcona Co v Wolverine Environmental Production, Inc*, 233 Mich App 238, 246; 590 NW2d 586 (1998). For purposes of a motion under MCR 2.116(C)(7), a party may submit documentary evidence in support of the motion, but is not required to do so. If documentary

evidence is produced, the trial court must consider it. *Turner, supra*. If documentary evidence is not produced, the court must accept as true the well-pleaded allegations in the complaint and construe them in the light most favorable to the nonmoving party. *Id*.

A motion under MCR 2.116(C)(10) tests the factual support for a claim. The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties. MCR 2.116(G)(5). Summary disposition is properly granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 455-456, n 2; 597 NW2d 28 (1999).

MGB brought this action to foreclose on a mortgage that it held on property in Oakland Township formerly occupied by the Tropfs. MGB had obtained a mortgage from Lynne Wolenski, whose interest in the property was based on a quitclaim deed from the Tropfs. Wolenski conveyed the property back to the Tropfs pursuant to a land contract, but the land contract was never recorded. The Tropfs defaulted on the land contract and Wolenski successfully brought a summary land-contract forfeiture proceeding in district court, under MCL 600.5701 *et seq*. The circuit court affirmed the district court's decision, and this Court denied the Tropfs' application for leave to appeal from the circuit court's ruling (Docket No. 193284).

In the present action, after Wolenski defaulted on her loan from MGB, MGB sought to clear title to the property of any claim of interest by the Tropfs. The Tropfs filed a counterclaim, alleging that they were defrauded of their interest in the property by Wolenski and others.

The circuit court granted MGB's motion for summary disposition on the basis that the Tropfs were collaterally estopped, by virtue of the prior district court forfeiture proceeding, from defending on the basis that the deed to Wolenski was based on fraud and was a forgery because the Tropfs did not intend to convey the property to Wolenski and accept a land contract in return when they signed the documents in blank. The circuit court also granted MGB summary disposition under MCR 2.116(C)(10), relying on *Leidel v Ballbach*, 345 Mich 201, 207; 75 NW2d 860 (1956), because the Tropfs knowingly signed blank documents, including the deed by which Wolenski obtained title to the Tropfs' property.

The Tropfs first argue that the circuit court erred in granting MGB summary disposition based on collateral estoppel or res judicata. We disagree.

Collateral estoppel precludes relitigation of an issue in a subsequent, different case between the same parties or their privies if the prior action resulted in a valid final judgment and the issue was actually and necessarily determined in the prior action. *Horn v Dep't of Corrections*, 216 Mich App 58, 62; 548 NW2d 660 (1996); *APCOA, Inc v Dep't of Treasury*, 212 Mich App 114, 120; 536 NW2d 785 (1995). The ultimate issue in the second case must be the same as that in the first proceeding. *Detroit v Qualls*, 434 Mich 340, 357; 454 NW2d 374 (1990). Further, the doctrine requires that the parties must have had a full opportunity to litigate the issue in the prior proceeding, and there must be mutuality of estoppel. *Nummer v Dep't of Treasury*, 448 Mich 534, 542; 533 NW2d 250 (1995).

The doctrine of res judicata was summarized in *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999):

> Res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical. *Eaton Co Bd of Co Rd Comm'rs v Schultz*, 205 Mich App 371, 375; 521 NW2d 847 (1994). A second action is barred when (1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies. *Id*. at 375-376.
>
> Michigan courts have broadly applied the doctrine of res judicata. They have barred, not only claims already litigated, but every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not. *Gose v Monroe Auto Equipment Co*, 409 Mich 147, 160-163; 294 NW2d 165 (1980); *Sprague v Buhagiar*, 213 Mich App 310, 313; 539 NW2d 587 (1995).

The Tropfs argue that it was improper to apply either res judicata or collateral estoppel based on the district court forfeiture action because a forfeiture action is a summary proceeding. However, in *Sewell v Clean Cut Mgmt, Inc*, 463 Mich 569; 621 NW2d 222 (2001), the Supreme Court held that res judicata may apply to summary proceedings. The Court found it necessary to address this issue because an earlier decision, *JAM Corp v AARO Disposal, Inc*, 461 Mich 161; 600 NW2d 617 (1999), suggested that a judgment in a summary proceeding did not operate as a bar in a subsequent case. In *Sewell, supra* at 576, the Court noted that its decision in *JAM, supra,* said nothing about the preclusive effect of claims actually litigated in the summary proceedings.

In the instant case, MGB and Wolenski were privies because MGB acquired its mortgagee's interest in the property from Wolenski.

In order for Wolenski to have prevailed in the land contract forfeiture case, she was required to establish that she had a valid interest in the property at issue. See MCR 3.410(B)(2); MCL 600.5726; *Frye v Mielke*, 266 Mich 501, 502, 504; 254 NW 182 (1934). Further, the district court transcript showed that the validity of the deed and purchase back arrangement was raised in the earlier forfeiture proceeding. In response to Wolenski's effort to forfeit the land contract and obtain possession of the property, the Tropfs asserted that the deed and land-contract were signed in blank, before the loan was closed, that Wolenski and her agents attempted to force the Tropfs to close the transaction according to terms that they had not agreed to, that the full amount to be loaned in consideration for the transaction had not been received by the Tropfs, that the arrangement was usurious, that the land contract was not properly executed on its face, and that the deed and the land-contract were part of one single transaction, which was intended to be a loan, rather than a conveyance. Thus, the Tropfs sought to defend the summary proceedings action on the basis that Wolenski had no valid interest in the property because the deed and land-contract arrangement was invalid for several reasons. On appeal to the circuit court, the Tropfs reiterated that the documents were signed in blank and argued that the arrangement was intended to be an equitable mortgage and financing agreement, and not an outright conveyance to Wolenski. The Tropfs did not prevail on these issues before the district court, and their appeals to the circuit court and the Court of Appeals were denied. While the Tropfs have recasted the issue somewhat in the subsequent litigation, arguing that they did not intend to transfer the

property and take back a land-contract even as a financing arrangement, and that they did not sign the documents at all, even in blank,[1] the underlying issue of the enforceability of the deed and land-contract, even in the face of the Tropfs' claims that no conveyance was intended, was decided in the summary proceeding and thus could not be relitigated.[2] The only documents ever relied on by Wolenski and MGB were the deed and land contract. These were the documents involved in the district court. The Tropfs' attempts to distinguish between the documents they signed in blank and the "forged" deed and land contract are of no avail, because the litigation in the district court and in the instant case involved the same documents. Further, although there were various orders and judgments entered by the circuit court and district court during the course of these proceedings, there were other orders amending and setting aside these orders and judgments, and in the end the district court judgment remained undisturbed and the circuit court default judgment against Wolenski made no findings that would prejudice MGB's position. Accordingly, we agree with the circuit court that summary disposition of the Tropfs' counterclaim was proper based on collateral estoppel.

Because we conclude that the court did not err in determining that collateral estoppel applied, we do not address the substance of the court's decision on the merits, or the Tropfs' arguments that they still retained title to the property and that they were entitled to a trial to establish their superior title.

The Tropfs' claim that they were entitled to a trial with regard to their claims against Wolenski is insufficiently briefed in light of the fact that they obtained a default judgment against Wolenski, and, therefore, we consider it waived. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

Next, the Tropfs argue that the circuit court erred when it amended the default judgment entered on December 23, 1997, with respect to other parties. First, we disagree with the Tropfs' argument that the circuit court was required to comply with MCR 2.603(D) and (E) before it

---

[1] In the district court proceedings and appeal from those proceedings, plaintiffs took the position that they signed the deed and land-contract documents in blank. In fact, counsel admitted before the district court that a deed and purchase back arrangement was contemplated, but raised other arguments as set forth above. The counter-complaint in the instant case speaks both of the documents being "forged" and of their being submitted to the Tropfs "in blank with the representation that the documents would be used to secure the loan." At the December 17, 1997 default judgment hearing Mr. Tropf testified both that the Tropfs signed some "blank pieces of paper" and that the signatures on the purported deed were not his or his wife's. The Tropfs signed affidavits stating that they did not sign the document purporting to be a deed and that the signatures on the document are not theirs.

[2] We recognize that the district court gave summary consideration to the Tropfs' claims and observe that different considerations might have been presented had the Tropfs paid the amount owing under the district court judgment, keeping the contract in force and denying Wolenski a writ of restitution granting her possession under the deed.

could grant MGB's motion to amend the default judgment. Those rules contemplate a motion to set aside a default judgment brought by a party in default. Because the default judgment was not entered against MGB, but only Wolenski and other defendants, MCR 2.603 was not applicable to MGB's motion. Further, it appears that MGB's motion to amend was brought under MCR 2.612. Under that rule, the circuit court did not abuse its discretion in amending the default judgment because it did not conform to the court's ruling on the record and the nonconformity operated to prejudice MGB's rights. *Hadfield v Oakland Co Drain Comm'r*, 218 Mich App 351, 354-355; 554 NW2d 43 (1996).

The Tropfs also argue that the circuit court erred because it failed to follow MCR 3.403, 3.410 and 3.411 when it ordered the sale of the property in question. However, the Tropfs did not advance these rules as a basis for their objections to the sale below and, therefore, this issue is not preserved. *People v Maleski*, 220 Mich App 518, 523; 560 NW2d 71 (1996). Further, the Tropfs do not explain on appeal how the court failed to comply with these rules. Accordingly, we consider this issue waived. *Wilson, supra*.

The Tropfs next argue that the circuit court erred by disbursing the proceeds from the sale of the subject property without conducting a hearing on their objections, contrary to MCR 2.602(B)(3)(c). We disagree. MCR 2.602(B)(3)(c) requires a hearing only when the objections involve the form of an order; it is not applicable to objections to the merits of the court's ruling. *Riley v 36th District Court Judge*, 194 Mich App 649, 650-651; 487 NW2d 855 (1992). In this case, the Tropfs challenged the proposed order on the merits only; their objections did not go to the form of the proposed order.[3] Accordingly, the court did not err in entering the proposed order without a hearing on the Tropfs' objections.

Docket Nos. 219994 and 227264

These two appeals arise from Mr. Tropf's action against defendants Andrzej and Kimberly Zajac, who ultimately purchased the Tropfs' former Oakland Township property from MGB after the court approved the sale of the property in the related action involving MGB. The circuit court granted the Zajacs' motion for summary disposition and dismissed Mr. Tropf's action, concluding that it was barred by collateral estoppel based on the circuit court's ruling in the related case, which is the subject of the appeal in Docket No. 217134. In light of our disposition of the appeal in Docket No. 217134, we agree with the circuit court that summary disposition of Mr. Tropf's action against the Zajacs was proper based on collateral estoppel, MCR 2.116(C)(7), because Mr. Tropf was rearguing the same issues previously decided in the former case and the Zajacs were privies of Wolenski. Further, Tropf's claim that the district court lacked subject matter jurisdiction is unsupported.

Next, we address the circuit court's decision to award the Zajacs sanctions under MCL 600.2591; MCR 2.114(D) and (E), on the basis that Mr. Tropf's action was frivolous. Our review is for clear error. *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 91; 592 NW2d 112 (1999).

---

[3] The Tropfs should have moved for rehearing of the court's decision under MCR 2.119(F).

The court did not state the reasons for finding the action was frivolous, but it appears that the court concluded that in light of the disposition of the case involving MGB, Mr. Tropf and his attorney had no legitimate factual or legal basis for bringing this action. We disagree.

Counsel explained that he was pursuing an appeal of the court's decisions in the related case involving MGB and that the instant case was brought to obtain a complete resolution of the issues. Counsel stated:

> [*Tropf's counsel*]: Judge, this was a legal question brought by the plaintiff. It had to be brought in the context of this case in order to have complete relief. The plaintiff would have gone back to Alice Gilbert to ask that this legal question be resolved and the plaintiff in this case has appealed Judge Alice Gilbert's order. In order for him to have gotten complete relief, the question of the Zajac's [sic] title had to be tested and it's been tested as efficiently as possible. There hasn't been any discovery, any harassment of the Zajac's [sic] or anything like that, but there is no other way to determine that title but to petition this court and ask this court to rule as you did rule today.
>
> [Argument by defense counsel and colloquy with the court.]
>
> [*Tropf's counsel*]: . . . Judge, their title had to be tested. See, my client's [sic] say the deed they gave to Lynn Wolinski [sic] was forged. There's never been a hearing on it. And Lynn Wolinski [sic] then gave a warranty deed to the Zajac's [sic]. Judge, we're just trying to clear the title here, that's all. Even if we had appealed and won the question of the Zajac's [sic] titled [sic] would still be out there.
>
> Now, Judge we have an opportunity so that the whole case can now be presented to the court of appeals and we would not have been able to do that without having a hearing here. . . .
>
> * * *
>
> Judge, the only way we can tie up this whole property and get this whole thing before a hearing to determine this collateral estoppel issue, this case had to be brought and this case has been prosecuted efficiently. We filed a complaint and motion for summary judgment.

At the time this action was commenced, the Tropfs were pursuing an appeal of the related case. The issues on appeal were not frivolous. In the related case, the circuit court may well have acted prematurely in granting summary disposition on the basis of *Leidel, supra*, where the Tropfs asserted that the signatures on the documents at issue were forged, and that they did not sign these documents in blank. Further, *Sewell, supra*, was not decided until recently, and under the circumstances presented here, the collateral estoppel issue was a substantial one. The instant action was not frivolous given the explanation offered by counsel. See *Travelers Ins ex rel Pine*

Knob Wine Shop v U-Haul of Michigan, Inc, 235 Mich App 273; 597 NW2d 235 (1999).[4] We therefore reverse the order of sanctions.

We affirm in 213930, 217134, and 219994, and reverse the award of sanctions in 227264.

/s/ Helene N. White
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot

[4] This Court in *Travelers*, *supra* at 289-290, denied the defendants' request for costs on the basis that the plaintiff's action was frivolous where, although the plaintiff took an erroneous legal position, the state of the law was unsettled. See 1 Dean & Longhofer, Michigan Court Rules Practice (2000 Supp), § 2.114.13, p 18 (noting that "[a]nother factor to be considered [in awarding sanctions for frivolous actions] is whether the law was settled on the point in question," citing *Travelers*).