STATE OF MICHIGAN

COURT OF APPEALS

AMY S. LYNCH,

Plaintiff-Appellant,

v

JOHN CURCIO,

Defendant-Appellee.

UNPUBLISHED
November 27, 2012

No. 307709
Arenac Circuit Court
LC No. 10-011383-NZ

Before: BORRELLO, P.J., and FITZGERALD and OWENS, JJ.

PER CURIAM.

Plaintiff appeals as of right from a trial court order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(6) (another action involving same parties/same claim) and MCR 2.116(C)(7) (claim barred by prior judgment). We affirm.

Plaintiff was investigated for perjury and consented to take a polygraph examination in January 2006, which she failed. Plaintiff alleges that defendant disseminated the results of the polygraph examination at township meetings and to the Arenac County Board of Commissioners, which defendant flatly denies. Plaintiff alleged that she was approached by numerous individuals who knew the results of her polygraph examination, and that she lost her reelection bid for Arenac County Commissioner following disclosure of the polygraph results.

This case is the third lawsuit brought by plaintiff against defendant arising from the same facts. Plaintiff initially filed suit against defendant and various local government officials in federal district court, bringing 42 USC 1983 claims, as well as various tort claims under Michigan law. The court dismissed with prejudice plaintiff's 1983 claims, and declined to exercise pendent jurisdiction over the remaining state law claims.

Plaintiff then filed suit against defendant and various government defendants in the Arenac Circuit Court on July 30, 2009, alleging various torts as well as a violation of public policy pursuant to the Forensic Polygraph Examiner's Act (FPEA), MCL 338.1701 *et seq.* Defendants moved for and were granted summary disposition as to all claims on February 12, 2010. Plaintiff appealed as of right to this Court. With the appeal pending, the trial court heard arguments on plaintiff's motion to amend her complaint to add a claim of public disclosure of embarrassing private facts. The court initially indicated that it would allow plaintiff to amend her complaint to add the claim. However, at a later settlement conference, the court informed the parties that the amendment would not be allowed, and that plaintiff could choose to file a new

complaint against defendant as to the alleged public disclosure of private facts, because doing so would be "cleaner."

With appeal of the previous case still pending, plaintiff filed the instant action alleging a single count of public disclosure of embarrassing private facts. In lieu of filing an answer, defendant moved for summary disposition pursuant to MCR 2.116(C)(6), MCR 2.116(C)(7), and MCR 2.116(C)(8), arguing that plaintiff's claim was barred by the compulsory joinder rule and res judicata. The court heard arguments on defendant's motion and noted that if this Court reversed the grant of summary disposition in the previous case, the claim of public disclosure of embarrassing private facts could be added by amending that complaint, which would allow the instant action to be dismissed, and plaintiff acknowledged that both cases arise from the same set of facts and alleged misconduct by defendant. The court then denied defendant's motion without prejudice, staying proceedings until this Court issued an opinion in the 2009 case.

On January 6, 2011, defendant applied for leave to appeal the denial of his motion for summary disposition. While the application for leave was pending, this Court released an opinion in the previous case, affirming the trial court's grant of summary disposition in favor of defendant as to all claims. *Lynch v Arenac Co*, unpublished opinion per curiam of the Court of Appeals, issued July 12, 2011 (Docket No. 296775). Then, on July 28, 2011, this Court remanded this case for reconsideration of defendant's motion for summary disposition, citing the Court's recently-issued decision in the previous appeal. On November 9, 2011, the trial court heard arguments on reconsideration of defendant's motion for summary disposition. The trial court then granted defendant's motion for summary disposition on the basis of res judicata and compulsory joinder. This appeal follows.

Plaintiff argues that the trial court erred in granting defendant's motion for summary disposition on the basis of res judicata and compulsory joinder because she was denied the opportunity to amend her prior suit to include the claim of public disclosure of embarrassing private facts. We disagree.

"This court reviews de novo a trial court's decision on a motion for summary disposition." *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). This Court also reviews applications of res judicata de novo. *Wayne Co v Detroit*, 233 Mich App 275, 277; 590 NW2d 619 (1998).

Generally, the doctrine of res judicata operates to bar a subsequent action between the same parties involving the same facts or evidence as that essential to the prior action, and is intended to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and encourage reliance on adjudication." *Richards v Tibaldi*, 212 Mich App 522, 530; 726 NW2d 770 (2006). This Court has previously described the required elements as follows: "(1) the prior action was decided on the merits, (2) the decree in the prior action was a final decision, (3) the matter contested in the second case was or could have been resolved in the first, and (4) both actions involved the same parties or their privies." *Id*. at 531. "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." *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82,

(1999). And, "the burden of proving the applicability of the doctrine of res judicata is on the party asserting it." *Baraga Co v State Tax Comm*, 466 Mich 264, 269; 645 NW2d 13 (2002).

Res judicata applies in this case to bar plaintiff's claim, and summary disposition was properly granted. The first element is satisfied, because the previous case initially filed in 2009 was decided by the trial court's grant of summary disposition for defendant, and summary disposition is considered a determination on the merits. *Roberts v City of Troy*, 170 Mich App 567, 577; 429 NW2d 206 (1988). The order granting summary disposition was also a final decision. It resolved all claims in favor of defendant, and the plaintiffs in that case, including plaintiff Lynch, appealed as of right to this Court, which subsequently affirmed the trial court's grant of defendant's motion for summary disposition and resulting dismissal of all claims. There is no dispute that the previous case was resolved through final order on the merits.

Third, plaintiff's claim in the instant case could have been resolved in the prior action. This element represents the greatest point of contention. Plaintiff argues that the trial court's denial of her motion to amend her complaint in the previous proceeding resulted in her inability to resolve it in the prior action. The procedural history is crucial to understanding why plaintiff's argument is flawed. The trial court granted defendant's motion for summary disposition in the prior case on February 12, 2010. During oral arguments on the motion for summary disposition, the trial court first raised the possibility that plaintiff might have an actionable claim under the tort of public disclosure of embarrassing private facts. The trial court then granted summary disposition as to all claims. Before actually moving to amend her complaint, plaintiff appealed the trial court's order as of right on March 4, 2010. Then, plaintiff moved to amend her complaint and the court heard arguments on the motion on March 17, 2010.

The trial court eventually denied plaintiff's motion to amend her complaint, in an apparently erroneous belief that plaintiff would be able to raise the issue in a separate lawsuit. However, whatever the trial court's error, plaintiff's own actions were the root cause of the problem. Plaintiff could have earlier moved to amend the complaint, or even moved for reconsideration with the trial court prior to appealing, but chose not to do so. Generally, the trial court may not set aside or amend a judgment or order once a claim of appeal is filed. See MCR 7.208. This Court has held that "the filing of a claim of appeal divests the circuit court of its jurisdiction." *Vallance v Brewbaker*, 161 Mich App 642, 648; 411 NW2d 808 (1987). Thus, plaintiff chose to divest the circuit court of jurisdiction prior to moving to amend her complaint. Consequently, she had an opportunity to resolve the instant case in the prior action, but ended that opportunity through her own action in appealing the order to this Court. She also chose not to seek leave to appeal the trial court's decision not to allow her to amend the earlier complaint, but instead filed a separate action. And plaintiff puts forth no argument as to why she failed to include a claim of public disclosure of embarrassing private facts in her 2009 complaint. The underlying factual scenario was identical, and plaintiff certainly could have included the claim in the 2009 complaint.

Finally, there can be no dispute that both parties were involved in both the 2009 case and the instant case. Although there were additional defendants in the 2009 case, defendant was still among them, and plaintiff cannot and does not dispute that both she and defendant were parties to the 2009 case. Because all four elements of res judicata are satisfied, the trial court did not err in granting defendant's motion for summary disposition.

Affirmed.

/s/ Stephen L. Borrello
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens