STATE OF MICHIGAN

COURT OF APPEALS

GRAND/SAKWA LINCOLN PARK, L.L.C., Plaintiff-Counter Defendant-Appellee,	UNPUBLISHED November 27, 2012
v	No. 308579 Wayne Circuit Court
SEARS, ROEBUCK AND COMPANY, Defendant-Counter Plaintiff-Appellant.	LC No. 10-013438-CH

Before: FORT HOOD, P.J., and K. F. KELLY and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right an order granting in part and denying in part plaintiff's and defendant's motions for summary disposition. We reverse.

I. BASIC FACTS AND PROCEDURAL HISTORY

This case arises from plaintiff's lawsuit regarding three contiguous parcels of property that will be referred to as (1) the Sears Parcel, (2) the Strip Mall Parcel, and (3) the Adjacent Parcel. Defendant owns the Sears Parcel and plaintiff owns the Strip Mall Parcel and the Adjacent Parcel.

In 1955, defendant owned the tract of land consisting of the Sears Parcel and the Strip Mall Parcel. By deed dated December 30, 1955, defendant sold the Strip Mall Parcel to Philip Levit. The Levit Deed contained provisions regarding two easements, which will be referred to as (1) the Service Drive/Access Easement, and (2) the Parking Easement. The Service Drive/Access Easement gave both defendant and Levit the right to use a service driveway on the other's property. The Parking Easement gave both defendant's and Levit's customers the right to park on a designated portion of the other's property.

At some point, plaintiff's predecessor in title, Pool Two Limited Partnership (Pool Two), acquired the Strip Mall Parcel and the Adjacent Parcel. In January 2008, Pool Two filed a lawsuit against defendant as it related to the Parking Easement. Pool Two hoped to develop a large shopping center that included both the Strip Mall Parcel and the Adjacent Parcel. In order to be able to develop the site as it wanted, Pool Two needed to ensure that the Parking Easement was perpetual. Count one of Pool Two's complaint alleged that defendant refused to

acknowledge that Pool Two had the right to park upon and traverse the parking area. Counts two and three of Pool Two's alleged adverse possession and prescriptive easement. Defendant successfully moved for summary disposition and sanctions. The trial court noted that Pool Two's claim was meritless, especially in light of the parties' agreement extending the Parking Easement until 2019.

Bank of America acquired both the Strip Mall Parcel and the Adjacent Parcel at a sheriff's sale after Pool Two defaulted on its loan obligation. Bank of America conveyed the property to plaintiff on October 21, 2010. On November 18, 2010, plaintiff filed a complaint against defendant. Just like Pool Two, plaintiff hoped to develop a large shopping center over both the Strip Mall Parcel and the Adjacent Parcel. In count one, plaintiff sought termination of the Service Drive/Access Easement by abandonment. In count two, plaintiff sought termination of the Service Drive/Access Easement by adverse possession. Plaintiff's theory was that defendant no longer had an interest in the Access Easement because a former owner of the Strip Mall Parcel had constructed a movie theater on a portion of the Access Easement. Plaintiff later added count three, seeking the equitable reformation of the Service Drive/Access Easement.

Defendant counterclaimed. In count one, defendant sought declaratory relief ordering plaintiff to remove the encroachment onto the Service Drive/Access Easement. In count two, defendant sought declaratory relief that plaintiff could not expand the land benefited by the Parking Easement or increase the burden on the Sears Parcel.

Defendant sought summary disposition, arguing that the compulsory joinder rule, MCR 2.203(A) and res judicata barred plaintiff's claim. Defendant argued that plaintiff's predecessor in title, Pool Two, should have raised the issue of the continued viability of the Access Easement, but failed to do so. The trial court disagreed: "[T]he Court is satisfied res judicata does not apply. I do not have the same parties. I do not have essentially the same facts, and I do not have a ruling on the merits with respect to this access easement."

Defendant again moved for summary disposition, this time arguing that plaintiff was not permitted to expand the Strip Mall Parcel by combining it with the Adjoining Parcel because such action would impermissibly increase the size benefit under the Service Drive/Access and Parking Easements. For its part, plaintiff moved for summary disposition as to defendant's counterclaim and, for the first time, asserted that the Service Drive/Access Easement had expired in 1986 under the terms of the Levit Deed.

In January 2012, the trial court entered orders granting in part and denying in part the parties' cross motions for summary disposition. The court denied plaintiff's motion for summary disposition and granted defendant's motion for summary disposition on all three counts of plaintiff's amended complaint – termination by abandonment, termination by adverse possession, and reformation. The court denied defendant's motion for summary disposition and granted plaintiff's motion for summary disposition as to both counts of defendant's counterclaim –

declaratory relief seeking removal of encroachment and declaratory relief regarding cross-parking easement. Defendant now appeals as of right.[1]

II. ANALYSIS

A. MCR 2.203(A) AND RES JUDICATA

Defendant argues that Pool Two, the prior owner of the Strip Mall Parcel and the Adjacent Parcel, could have, but did not, raise the issues concerning the Service Drive/Access Easement and the expansion of the benefitted parcel. As such, defendant argues that plaintiff's claims are barred by the compulsory joinder rule, MCR 2.203(A), and res judicata. We disagree that MCR 2.203(A) applies, but agree that res judicata applies and bars the claims.

"The interpretation and application of court rules present questions of law to be reviewed de novo using the principles of statutory interpretation." *Lamkin v Engram*, 295 Mich App 701, 707; 815 NW2d 793 (2012). This Court also reviews de novo a trial court's decision to deny summary disposition under MCR 2. 116(C)(7). *Estate of Dale v Robinson*, 279 Mich App 676, 682; 760 NW2d 557 (2008). "In reviewing a motion for summary disposition under MCR 2.116(C)(7), we accept the contents of the complaint as true unless the moving party contradicts the plaintiff's allegations and offers supporting documentation." *Kloian v Schwartz*, 272 Mich App 232, 235; 725 NW2d 671 (2006). A court should grant summary disposition under MCR 2.116(C)(7) where it finds that plaintiffs' claims are barred by the doctrine of res judicata. *Schwartz v City of Flint*, 187 Mich App 191, 194; 466 NW2d 357 (1991). "The issue whether the doctrine of res judicata bars a subsequent lawsuit constitutes a question of law that this Court likewise reviews de novo on appeal." *RDM Holdings, LTD v Continental Plastics Co.*, 281 Mich App 678, 686; 762 NW2d 529 (2008).

MCR 2.203(A) provides:

> In a pleading that states a claim against an opposing party, the pleader must join every claim that the pleader has against that opposing party at the time of serving the pleading, if it arises out of the transaction or occurrence that is the subject matter of the action and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction.

"The Court gives the language of court rules their plain and ordinary meaning. If the language poses no ambiguity, this Court need not look outside the rule or construe it, but need only enforce the rule as written." *Lamkin*, 295 Mich App at 709 (citations and internal quotation marks omitted). The plain language of MCR 2.203(A) requires the *pleader* to join every claim that it has against the opposing party. In this case, Pool Two was the original pleader. Nothing in the court rule supports defendant's position that plaintiff now "stands in the place" of Pool

[1] On May 25, 2012, we granted plaintiff's motion for immediate consideration and the motion to expedite. *Grand/Sakwa Lincoln Park, LLC v Sears Roebuck & Company*, unpublished order of the Court of Appeals, entered May 25, 2012 (Docket No. 308579).

Two for purposes of compulsory joinder. Accordingly, MCR 2.203(A) does not apply in this case.

Although the joinder rule does not apply, we concluded that res judicata does. Res judicata bars both claims and defenses that were or could have been raised in the prior lawsuit. See *Wayne Co v Detroit*, 233 Mich App 275, 277; 590 NW2d 619 (1998). Therefore, res judicata applies to the arguments plaintiff raised in response to defendant's claims.

> The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action. 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. This Court has taken a broad approach to the doctrine of res judicata, holding that it bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not. [*Adair v State*, 470 Mich 105, 121; 680 NW2d 386 (2004) (citations omitted).]

In response to defendant's counterclaim for removal of the encroachment on the Service Drive/Access Easement, plaintiff argued that the Service Drive/Access Easement had expired under the terms of the deed. Defendant maintains that continued viability of the Service Drive/Access Easement was an issue in the prior Pool Two litigation, but that Pool Two did not raise the issue. We agree that res judicata bars plaintiff, as privy to Pool Two, from now arguing that the Service Drive/Access Easement terminated under the terms of the Levit Deed.

First, in the prior action, defendant was granted summary disposition and Pool Two's action was dismissed with prejudice. This constituted an involuntary dismissal under MCR 2.504(B)(1) and an adjudication on the merits. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 419; 733 NW2d 755 (2007).

Second, both actions involve the same parties or their privies. Here, defendant was also the defendant in the first suit. While the plaintiff in the first suit was Pool Two, we conclude that plaintiff was Pool Two's privy. "A privy includes one who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through one of the parties, as by inheritance, succession, or purchase." *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 13; 672 NW2d 351 (2003). Plaintiff acquired the property in this case from Bank of America, who acquired the property at sheriff's sale. Because plaintiff acquired the property through Pool Two by purchase, there is privity. "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. Moreover, Pool Two represented the same legal right that plaintiff is trying to assert. "The outer limit of the doctrine traditionally requires both a 'substantial identity of interests' and a 'working functional relationship' in which the interests of the nonparty are presented and protected by the party in the litigation." *Id.* (citations omitted). Pool Two and plaintiff have a substantial identity of interest and plaintiff's interests were protected by Pool Two because Pool Two and plaintiff owned the same property.

Finally, the matter of the termination of the Service Drive/Access Easement by the deed "could have been" resolved in the first case. *Adair*, 470 Mich at 121. Pool Two's claims in the prior lawsuit were that it had a contractual right to the Parking Easement, that it acquired the right to park in the parking area by adverse possession, and that it had a prescriptive easement in the parking area. Pool Two alleged that it could not proceed with its development plans until the court declared that Pool Two had a right to the parking area. Pool Two's development plan, similar to plaintiff's plan, would have resulted in building over the Service Drive/Access Easement. Therefore, Pool Two would have had to have resolved the alleged termination of the Service Drive/Access Easement.

There are two approaches to determining the applicability of res judicata—the "same evidence" test and the "same transaction" test. The Michigan Supreme Court "has accepted the validity of the broader transactional test," which "provides that 'the assertion of different kinds or theories of relief still constitutes a single cause of action if a single group of operative facts give rise to the assertion of relief.'" *Adair*, 470 Mich at 124 (citation omitted). "[T]he determinative question is whether the claims in the instant case arose as part of the same transaction as did the claims in" the prior case. *Id.* at 125. "Whether a factual grouping constitutes a transaction for purposes of res judicata is to be determined pragmatically, by considering whether the facts are related in *time, space, origin or motivation,* [and] whether they form a convenient trial unit. . . ." *Id.* (citation and internal quotation marks omitted). The lawsuits in both cases arise from "a single group of operative facts." They both involved the two adjacent properties and the same deed. They are also related in space and motivation because they involve the same properties and similar proposed developments. The facts would have formed "a convenient trial unit."[2]

Res judicata also bars defendant's claim regarding the Adjacent Parcel's right to use the easements. In order for plaintiff to be able to develop the property in the manner it wished, the Levit Deed's easements would have to extend to the Adjacent Parcel. Again, this claim could have been resolved in the first case. Pool Two proposed to develop a building on both the Strip Mall Parcel and the Adjacent Parcel. The claims in the first suit and defendant's claim arise from a single group of operative facts. The facts are also related in space and motivation and would have formed a convenient trial unit.

Res judicata is applied broadly. Accordingly, the issues regarding the continued viability of the Service Drive/Access Easement and the increased burden on the Easement were barred by res judicata.

B. INTERPRETATION OF THE LEVIT DEED

[2] We acknowledge that in *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001), this Court found that res judicata did not apply where different deed language was at issue in the earlier case. However, *Ditmore* is distinguishable from the case at bar because different parcels of land were also at issue. *Id.* Although different deed language was at issue in Pool Two's case because it only involved the Parking Easement, the present case involves the same parcel of land as the Pool Two case.

Defendant argues that the trial court erred in finding that the Service Drive/Access Easement terminated on December 31, 1986. We agree.

We review de novo the proper interpretation of deeds. *Woodbury v Res-Care Premier, Inc*, 295 Mich App 232, 243; 814 NW2d 308 (2012). Plaintiff's motion for summary disposition was filed pursuant to MCR 2.116(C)(10).

> We review de novo a trial court's decision on a motion for summary disposition brought under MCR 2.116(C)(10). When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. The motion is properly granted if the evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. [*Majestic Golf, LLC v Lake Walden Country Club, Inc*, __ Mich App __; __ NW2d __ (Docket No. 300140, issued July 10, 2012) (slip op at 8) (citations omitted).]

At issue is the trial court's finding that the Service Drive/Access Easement expired in 1986 under the terms of the Levit Deed. "A deed is a contract . . . . and the proper interpretation of the language in a deed is therefore reviewed de novo on appeal." *In re Rudell Estate*, 286 Mich App 391, 402-403; 780 NW2d 884 (2009) (citation omitted). "The goal of contract interpretation is to read the document as a whole and apply the plain language used in order to honor the intent of the parties. We must enforce the clear and unambiguous language of a contract as it is written." *Greenville Lafayette, LLC v Elgin State Bank*, 296 Mich App 284, 291; 818 NW2d 460 (2012) (citations omitted).

Reading the deed as a whole, the plain language of the deed indicates that the drafters did not intend for the Service Drive/Access Easement to expire on December 31, 1986. Section 1(b) indicates that the drafters intended for the Service Drive/Access Easement to be perpetual. It provides:

> The party of the first part hereby reserves unto itself, its successors and assigns an Easement and Right of Way, together with the full and free right of ingress and egress for it and its tenants and their employees, agents, customers, visitors and invitees in common with the party of the second part, his heirs and assigns, and his and their tenants, employees, agents, customers, visitors and invitees, and all others having like right, at all times hereafter, with or without vehicles, or on foot, for said purposes of ingress and egress to and from any and all buildings or parking areas now or hereafter situate in or upon said Shopping Center property, and for all other purposes connected with the use and occupancy thereof, to pass and repass along and over the said "Service Driveway" located in Parcel "B" above described to and from Southfield Road and Dix Avenue, in accordance with the location and dimensions of which driveway as shown, marked and described upon the attached "Exhibit One" aforesaid.

The parties dispute whether the phrase "at all times hereafter" applies to the easement itself or to "all others having like right." However, even if the phrase "at all times hereafter" applies to "all others having like right," as plaintiff argues, this indicates that the drafters intended the Service Drive/Access Easement to be perpetual. As defendant argues, if individuals having like right at all times hereafter have a right of way and right of ingress and egress, then the easement must be perpetual.

The lack of a termination date in § 1(b) contrasts with the express provision of a termination date for the Parking Easement in § 2. The express mention of an expiration date in § 2 as it pertains to the Parking Easement suggests that the drafters did not intend to include such a provision in § 1(b) as it pertains to the Service Drive/Access Easement. See *Wayne County v Wayne County Retirement Comm*, 267 Mich App 230, 248; 704 NW2d 117 (2005) ("the express mention of one thing implies the exclusion of another").

The first paragraph of § 5(a) refers to the prior "restrictions and covenants" as expiring on December 31, 1986. It provides:

> The aforesaid covenants and restrictions shall be deemed as covenants and not as conditions and shall run with the land and be construed as real covenants for a period of thirty (30) years from the opening of said Shopping Center for business, but in no event later than December 31, 1986, when they shall cease and terminate, except, however, that the above covenants and restrictions, or any of them, may be altered or annulled at any time prior to December 31, 1986, by written agreement by and between the party of the first part, its successors or assigns, and the then owner or owners, and the mortgage or trust deed lien holders of record, of all of Parcel "B."

This section follows §§ 3 and 4, which are titled "Building Restrictions" and "Occupancy Restrictions." The "restrictions" must be the restrictions in §§ 3 and 4, but it is unclear to what "covenants" this paragraph is referring. Contrary to plaintiff's assertion, the term "covenants" does not refer to the easements in §§ 1 and 2. Covenants and easements are different. A covenant is "[a] formal agreement or promise, usually in a contract or deed, to do or not to do a particular act." Black's Law Dictionary (9th ed). In contrast, "[a]n easement is the right to use the land of another for a specified purpose." *Schadewald v Brule*, 225 Mich App 26, 35; 570 NW2d 788 (1997). Also, page three of the Levit Deed lists covenants, restrictions, and easements separately.

The second paragraph of § 5(a) provides:

> In the event "SEARS", or its successors, shall continue to occupy its property and conduct its business thereon for the sale of goods, wares and merchandise at retail after December 31, 1986, then the parties hereto, or their successors, grantees and assigns, may, in writing, continue the easements, rights, licenses and privileges herein created and granted by the respective parties until such time as said premises are no longer used as a Shopping Center.

Plaintiff contends that because this paragraph refers to easements, paragraph one must also include easements and the Service Drive/Access Easement must terminate. However, this paragraph refers to easements "created and granted," and the Service Drive/Access Easement in § 1(b) was reserved, not granted.

C. INCREASED BURDEN ON THE SEARS PARCEL

Finally, defendant contends that the trial court erred in denying its motion for summary disposition on the ground that plaintiff's proposed development would increase the size of the benefitted parcel. We agree.

Whether the trial court erred in permitting plaintiff to use the easements to benefit the Adjacent Parcel is a question of law that this Court reviews de novo. See *Schadewald*, 225 Mich App at 35.

This Court has stated:

> An appurtenant easement . . . attaches to the land and is incapable of existence separate and apart from the particular land to which it is annexed. The land served or benefited by an appurtenant easement is called the dominant tenement. The land burdened by an appurtenant easement is called the servient tenement. . . .
>
> Once granted, an easement cannot be modified by either party unilaterally. The owner of an easement cannot materially increase the burden of it upon the servient estate or impose thereon a new and additional burden. [*Schadewald*, 225 Mich App at 35-36 (citations omitted).]

In *Schadewald*, this Court explained that "the pertinent question is not whether the burden on plaintiffs' property has substantially increased, but rather whether lot 539 has any right to an easement over plaintiffs' property." *Id.* at 38.

The question in this case is not whether the burden on the Sears Parcel has increased, but whether the Adjacent Parcel has a right to use the Service Drive/Access Easement or Parking Easement. There is no evidence that the Adjacent Parcel is entitled to use the Service Drive/Access Easement or Parking Easement, which were created to benefit the Sears Parcel and the Strip Mall Parcel. As a matter of law, the easements do not extend to the Adjacent Parcel.

Additionally, as defendant points out, there is also a chance that plaintiff's redevelopment plan *would* materially increase the burden on the Sears Parcel. In *Schadewald*, this Court stated:

> The trial court found that travel over the easement was not materially increased by the use of the new garage. However, there is no empirical proof in the record that, despite the joinder of lots 341 and 539, an increased burden on plaintiffs' servient estate could not arise in the future. Contrary to Michigan law, the approach followed by the trial court affords the owner of the dominant estate carte blanche to unilaterally extend an easement to other property as long as he is careful not to increase the present burden on the servient estate. [*Schadewald*, 225 Mich App at 39 (citations omitted).]

Similarly, even if defendant has not shown an increased burden, it is possible that an increased burden could arise in the future. Therefore, the trial court erred in denying defendant's motion for summary disposition.

Reversed. As the prevailing party, defendant may tax costs. MCR 7.219.

/s/ Karen M. Fort Hood
/s/ Kirsten Frank Kelly
/s/ Pat M. Donofrio