STATE OF MICHIGAN

COURT OF APPEALS

WHITNEY PROPERTIES, L.L.C.,

Plaintiff-Appellant,

v

PHILIP F. GRECO TITLE COMPANY and JACK NELSON,

Defendants-Appellees.

UNPUBLISHED
July 23, 2009

No. 283120
Macomb Circuit Court
LC No. 2005-003636-CH

WHITNEY PROPERTIES, L.L.C.,

Plaintiff-Appellee,

v

PHILIP F. GRECO TITLE COMPANY and JACK NELSON,

Defendants-Appellants.

No. 285076
Macomb Circuit Court
LC No. 2005-003636-CH

Before: Talbot, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

In Docket No. 283120, plaintiff Whitney Properties, L.L.C., appeals as of right from a judgment of no cause of action in favor of defendants Philip F. Greco Title Company ("Greco Title") and its vice president, Jack Nelson, following a bench trial. In Docket No. 285076, defendants appeal as of right from the trial court's order denying their motion for sanctions under MCR 2.114 and MCL 600.2591. We affirm both appeals.

Greco Title acted as an escrow agent to the execution of a series of option agreements between plaintiff and four builders in connection with a residential development. A disagreement arose between plaintiff and the builders regarding the interpretation of the option agreement. Plaintiff settled its dispute with two of the builders, Finazzo Building, L.L.C. and Ambassador Building Company, but brought a separate action against the two other builders, Palazzolo Brothers Vineyards Series, Inc. ("Palazzolo"), and Woodlake Building Company, Inc. ("Woodlake"). While the Palazzolo/Woodlake action was pending before Macomb Circuit Court

Judge Edward Servitto, plaintiff brought the instant action against defendants, alleging claims for breach of contract, breach of fiduciary duty, and negligence. The instant action was stayed pending the outcome of the Palazzolo/Woodlake litigation. Judge Servitto ultimately rejected plaintiff's interpretation of the option agreement in the Palazzolo/Woodlake action and resolved that issue in favor of the builders. Plaintiff and the builders then stipulated to a judgment whereby the builders would pay plaintiff in accordance with Judge Servitto's interpretation of the option agreement, and Greco Title completed closings of the properties in accordance with that judgment.

In the present case, plaintiff alleges that defendants are liable for breach of contract, breach of fiduciary duty, and negligence, because they refused to carry out the closings in accordance with its instructions and because they supported the builders' interpretations of the option agreements. After the Palazzolo/Woodlake action was completed, defendants filed a motion for summary disposition in this case, arguing that the doctrine of res judicata precluded the action because it depended on the interpretation of the option agreement that they were charged with administering, the interpretation of that agreement was litigated in the prior action before Judge Servitto, and it acted in accordance with Judge Servitto's ruling. Judge David Viviano denied the motion and scheduled the case for trial before Judge Kenneth Sanborn.

Following a bench trial, Judge Sanborn expressed that he agreed with Judge Servitto's prior interpretation of the option agreement and, because defendants had acted in accordance with that interpretation, entered a judgment of no cause of action in favor of defendants. Defendants thereafter sought sanctions pursuant to MCR 2.114 and MCL 600.2591, on the ground that plaintiff's action was frivolous. The case had been reassigned to Judge Viviano, who denied defendants' motions.

I. Docket No. 283120

Plaintiff first argues that Judge Sanborn erroneously resolved the proper interpretation of the option agreement between it and the builders when he expressed his agreement with Judge Servitto's prior interpretation of the option agreement in the Palazzolo/Woodlake action. Plaintiff maintains that Judge Sanborn erred because neither res judicata nor collateral estoppel precluded it from relitigating the interpretation of the option agreement. Application of the doctrines of res judicata and collateral estoppel present questions of law, which this Court reviews de novo on appeal. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

Initially, contrary to what plaintiff asserts, Judge Sanborn did not determine that he was bound to apply Judge Servitto's interpretation of the option agreement under the doctrines of res judicata or collateral estoppel. Rather, the record discloses that although he expressed his agreement with Judge Servitto's prior decision, he determined on the basis of his own independent interpretation of the option agreement that Greco Title properly performed its duties as an escrow agent.

Nonetheless, we conclude on de novo review that the doctrine of res judicata barred each of plaintiff's claims against defendants that were based on the interpretation of the option agreement. "The doctrine of res judicata bars a subsequent action when (1) the first action was decided on the merits, (2) the matter contested in the second case was or could have been resolved in the first, and (3) both actions involve the same parties or their privies." *Estes, supra*

at 585. This Court applies the doctrine of res judicata broadly, 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. *ANR Pipeline Co v Dep't of Treasury*, 266 Mich App 190, 213; 699 NW2d 707 (2005). "[R]es judicata applies not only to facts previously litigated, but also to points of law necessarily adjudicated in determining the subject matter of the litigation." *Jones v State Farm Mut Automobile Ins Co*, 202 Mich App 393, 401; 509 NW2d 829 (1993).

The first and third requirements are satisfied. The prior Palazzolo/Woodlake action was decided on the merits when Judge Servitto directed a verdict for the builders and the parties subsequently stipulated to a judgment based on that verdict. See *Staple v Staple*, 241 Mich App 562, 572; 616 NW2d 219 (2000). Further, plaintiff's claims against defendants in this case could have been raised in the prior case against the builders. MCR 2.206(A)(2)(a) permits persons to be joined in one action as defendants

> if there is asserted against them jointly, severally, or in the alternative, a right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if a question of law or fact common to all of the defendants will arise in the action.

Plaintiff's asserted right to relief against the builders and defendants in this case arose out of the same series of transactions involving the execution of an option agreement. Further, the interpretation of the option agreement was common to both actions.

The only remaining question is whether defendants are in privity with the builders. Privity requires that parties be so identified in interest that the first litigant represents the same legal right that the subsequent litigant is attempting to assert. *Baraga Co v State Tax Comm*, 466 Mich 264, 269-270; 645 NW2d 13 (2002). This requires a "substantial identity of interests" and a "working functional relationship" in which "the interests of the non-party are presented and protected by the party in the litigation." *Id.* (citation omitted). Here, Greco Title and the builders had a substantial identity of interests in that they both asserted the same interpretation of the option agreement in opposition to plaintiff's contrary interpretation. Although the builders' interest in the interpretation of the option agreement in the Palazzolo/Woodlake action arose from their status as parties to the agreement, whereas defendants' interests in this case arose from their status as escrow agents under that agreement, plaintiff's claims against both sets of parties depended on it successfully asserting its interpretation of the agreement. Thus, the interests of the builders in the Palazzolo/Woodlake action and defendants in this action were substantially identical.

Furthermore, to the extent that res judicata does not apply, collateral estoppel operates to preclude plaintiff from relitigating the interpretation of the option agreement. Generally, for collateral estoppel to apply three elements must be satisfied: (1) "a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment"; (2) "the same parties must have had a full [and fair] opportunity to litigate the issue"; and (3) "there must be mutuality of estoppel." *Monat v State Farm Ins Co*, 469 Mich 679, 682-683; 677 NW2d 843 (2004). Here, the cornerstone of plaintiff's action against defendants is the proper interpretation of the option agreement with the builders. That question was actually litigated and determined in the Palazzolo/Woodlake action. Further, plaintiff had a full and fair opportunity to

litigate the issue in the prior action. Although defendants were not a party to that action, the lack of mutuality of estoppel does not preclude the use of collateral estoppel when it is asserted defensively to prevent a party from relitigating an issue that such party has already had a full and fair opportunity to litigate in a prior suit. *Id.* at 691-692. For these reasons, collateral estoppel operates to preclude plaintiff from re-litigating the interpretation of the option agreement, an issue that plaintiff had a full and fair opportunity to litigate in the Palazzolo/Woodlake action.

Although Judge Sanborn's decision was based on his independent interpretation of the option agreement, rather than res judicata or collateral estoppel, he reached the right result in concluding that defendants did not breach any duties arising from its status as an escrow agent when it acted in accordance with Judge Servitto's interpretation of the option agreement in the Palazzolo/Woodlake action. "[T]his Court will not reverse a trial court's judgment where it reached the right result for the wrong reason." *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 470; 628 NW2d 577 (2001).

Plaintiff separately argues that the trial court erred in finding that Greco Title's sole duty as an escrow agent was to carry out closings in accordance with the option agreement, as interpreted in the Palazzolo/Woodlake litigation. This Court reviews a trial court's findings of fact in a bench trial for clear error and its conclusions of law de novo. MCR 2.613(C); *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). A finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made. *Id.*

Generally, "the duties and liabilities imposed on an escrow agent are those set forth in the escrow agreement." *Hills of Lone Pine Ass'n v Texel Land Co, Inc*, 226 Mich App 120, 124; 572 NW2d 256 (1997). In this case, however, there was no separate escrow agreement. Therefore, Greco Title was required to follow the terms of the option agreement it was charged with administering. Plaintiff acknowledges that Greco Title's duty was to carry out the terms of the option agreement between it and the builders, but argues that when it and the builders gave conflicting instructions, Greco Title was obligated to interplead the dispute rather than side with the builders. Plaintiff's reliance on *Franks v North Shore Farms, Inc*, 115 Ill App 2d 57, 64; 253 NE2d 45 (1969), and *Michigan Nat'l Bank v Kroger Co*, 619 F Supp 1149, 1156 (ED Mich, 1985), is misplaced because neither case supports plaintiff's argument that an escrow agent has a duty to file an interpleader action when a dispute arises. The cases merely recognize that an interpleader action is a prudent means by which an escrow agent may protect its interests by seeking judicial resolution of a dispute between the escrowing parties.

Greco Title acted at its own peril by declining to follow plaintiff's instructions and by conducting closings contrary to plaintiff's interpretation of the option agreement. By doing so, it assumed the risk of liability if plaintiff prevailed in its interpretation of the agreement. However, plaintiff's interpretation was rejected in the Palazzolo/Woodlake action. Furthermore, Greco Title took steps to safeguard plaintiff's interest by escrowing the homebuyers' payments to the builders and refraining from disbursing the collected funds until judgment was entered in the Palazzolo/Woodlake litigation. Although plaintiff complains about the manner in which defendants proceeded, Greco Title ultimately paid plaintiff all monies to which it was entitled as determined in the Palazzolo/Woodlake action. Accordingly, there is no basis for concluding that Greco Title breached its duties to plaintiff under the escrow agreement.

Plaintiff also argues that the trial court erred in finding no cause of action with respect to its claims for breach of fiduciary duty and negligence. The elements of a negligence claim are "duty, breach of that duty, causation, and damages." *New Freedom Mortgage Corp v Globe Mortgage Corp*, 281 Mich App 63, 69; 761 NW2d 832 (2008). A breach of fiduciary duty occurs "when a position of influence has been acquired and abused, or when confidence has been reposed and betrayed." *In re Duane V Baldwin Trust*, 274 Mich App 387, 401; 733 NW2d 419 (2007) (citation omitted). Claims of negligence and breach of fiduciary duty require proof that the defendant owed the plaintiff a duty and breached that duty. *Schultz v Consumers Power Co*, 443 Mich 445, 449; 506 NW2d 175 (1993). Duty is "a question of whether the defendant is under any obligation for the benefit of a particular plaintiff." *Id.* at 449-450 (citation omitted). The existence of a legal duty is a question of law. *Oja v Kin*, 229 Mich App 184, 187; 581 NW2d 739 (1998).

In *Smith v First Nat'l Bank & Trust Co of Sturgis*, 177 Mich App 264, 270; 440 NW2d 915 (1989), this Court recognized that an escrow agent may be liable to its principal for negligence or breach of fiduciary duty. The Court stated:

> An escrow agent is the agent of both parties to the escrow agreement. *Laurentide Leasing Co v Schomisch*, 382 Mich 155, 161; 169 NW2d 322 (1969); *Frankiewicz v Konwinski*, 246 Mich 473, 477; 224 NW 368 (1929). The escrow agent ceases to be the agent of both parties and becomes agent only of the party in whom title to the property held in escrow vests when the property has been placed in escrow under an agreement that it is to go to that party upon the meeting of a condition and that condition is met. *Edward Rose Sales Co v Shafer*, 41 Mich App 105, 107; 199 NW2d 655 (1972). Thus, an escrow agent may be liable in tort for the negligent performance of its duties as escrow agent or breach of fiduciary responsibilities owed to its principal. See *Michigan National Bank v The Kroger Co*, 619 F Supp 1149, 1156 (ED Mich, 1985). [*Smith, supra* at 270.]

Here, plaintiff contends that Greco Title breached its fiduciary duty when it conducted closings contrary to plaintiff's instructions and by conveying the builders' interests in lots to homebuyers. However, Greco Title's duty as escrow agent was defined by the terms of the option agreement that it was charged with administering; it was not defined by plaintiff's instructions. The proper interpretation of the option agreement was decided in the Palazzolo/Woodlake litigation, and may not be relitigated in this case. Because Greco Title conducted the closings in accordance with the judgment in the Palazzolo/Woodlake litigation, there is no basis for concluding that it breached its fiduciary duty to plaintiff.

Plaintiff also asserts that defendants breached their duty by conveying the builders' interests to the homebuyers. The evidence at trial established that plaintiff retained a fee simple interest in the lots, and that Greco Title committed to compensating plaintiff for the purchase price of the lots as determined in accordance with the judgment in the Palazzolo/Woodlake litigation. Plaintiff ultimately received this purchase price. Any shortfall in plaintiff's expectations results from that judgment, which plaintiff did not appeal, not from defendants' actions. Further, the evidence at trial indicated that plaintiff and the builders always intended that the latter could transfer their interests to individual homebuyers before the option agreement was fully consummated. Under these circumstances, the trial court's finding that defendants did not breach any fiduciary duty or act negligently is not clearly erroneous.

Plaintiff also contends that Greco Title's actions deprived it of the opportunity to reach a settlement with Woodlake and Palazzolo that would have been more favorable to plaintiff than the trial verdict it received in the Palazzolo/Woodlake litigation. This argument is entirely speculative and we find no basis in the law for recognizing a party's alleged lost opportunity to achieve a settlement more favorable than an available legal remedy.

Plaintiff vaguely argues that defendants had other contractual or fiduciary duties in addition to its duty to carry out the option agreement, but fails to specify these duties, or explain how defendants had any duty independent of the contractual escrow relationship. We therefore reject this claim of error.

For these reasons, we affirm the trial court's judgment of no cause of action against plaintiff in favor of defendants.

II. Docket No. 285076

Defendants argue that plaintiff's claims were frivolous and, therefore, the trial court erred in denying their motion for sanctions pursuant to MCR 2.114 and MCL 600.2591. A trial court's finding that an action is frivolous is reviewed for clear error. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002). A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.* at 661-662.

Under MCR 2.114, sanctions are mandatory if a court finds that a pleading was signed without reasonable inquiry into the factual and legal viability of the pleading, or that a frivolous claim or defense was pleaded. *Attorney Gen v Harkins*, 257 Mich App 564, 576; 669 NW2d 296 (2003). A claim is frivolous under MCL 600.2591(3)(a)(ii) and (iii), if "[t]he party had no reasonable basis to believe that the facts underlying his or her legal position were in fact true," or "the party's legal position was devoid of arguable legal merit." The reasonableness of the inquiry into the factual and legal viability of a pleading is determined by an objective standard. *Harkins, supra* at 576. Whether a claim or defense is frivolous depends on the facts of each case. *Kitchen, supra* at 662.

The gravamen of plaintiff's action was that defendants breached their duties to plaintiff by acting in accordance with an interpretation of the option agreement before the proper interpretation of that agreement was judicially resolved. Although this strategy might be viewed as an attempt to avoid the res judicata effect of the Palazzolo/Woodlake litigation, it was not devoid of all arguable legal merit. Furthermore, because of the different postures of the builders in the Palazzolo/Woodlake litigation, and defendants in this action, plaintiff's attempt to evade the res judicata effect of the Palazzolo/Woodlake litigation on this action also was not devoid of arguable legal merit. The fact that plaintiff ultimately did not prevail at trial does not itself merit a finding that its claims were frivolous. See *Jerico Constr, Inc v Quadrants, Inc,* 257 Mich App 22, 36; 666 NW2d 310 (2003). We are not left with a definite and firm conviction that the trial

court made a mistake in finding that plaintiff's claims were not frivolous. Thus, we affirm the trial court's denial of defendants' motion for sanctions.

Affirmed.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra