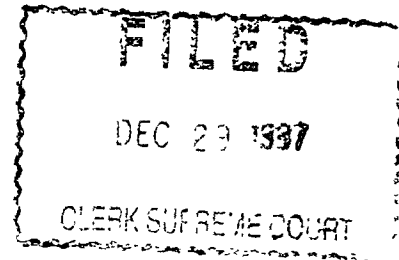


IN THE COURT OF APPEALS OF IOWA

No. 7-259 / 95-2236
Filed December 29, 1997

000069

LARRY J. COHRT, Individually and as Trustee
of the Leo Cohrt Family Trust, and **CONNIE ANN
COHRT**,
Appellants,



vs.

JOE MINARD CONSTRUCTION, INC., and **JOE
MINARD**, Individually,
Appellees.

Appeal from the Iowa District Court for Black Hawk County, William G.
Klotzbach, Judge.

Plaintiffs appeal a district court ruling dismissing their action to enforce a contractual right of rescission in a business deal between plaintiffs and defendants to construct houses on lots owned by plaintiffs. **REVERSED AND REMANDED.**

Larry Cohrt, pro se, for appellants.

David J. Dutton and Carolyn A. Rafferty of Dutton, Braun, Staack, Hellman
& Iversen, P.L.C., Waterloo, for appellees.

Heard by Cady, P.J., and Huitink and Vogel, JJ.

HUTTINK, J.

Larry Cohrt, individually, and as trustee of the Leo Cohrt family trust, and Connie Cohrt (Cohrts) appeal the district court ruling dismissing their contract action against Joe Minard Construction, Inc. and Joe Minard, individually (Minard). We reverse and remand.

I. Background Facts and Proceedings.

Minard Construction Company was a builder of multi-family units in the Waterloo and Cedar Falls area in the late 1970s and 1980s. On October 19, 1979, Minard and Cohrts entered into a contract requiring Minard to construct and Cohrts to purchase an eight-plex apartment building. Cohrts assumed a construction loan initially secured by Minard Construction and financed by Peoples Federal Savings and Loan Association (Peoples). Cohrts paid Minard approximately \$220,000 and assumed a \$150,000 real estate mortgage to Peoples at twelve percent interest.

Cohrts' apartment venture was unprofitable. On January 17, 1983, Cohrts and Minard agreed Cohrts would buy six lots from Minard in a different development and, in exchange, Minard would reassume the mortgage on the eight-plex and build one home on each of the six lots within three years. Cohrts financed their obligation under the January 17, 1983, agreement by obtaining a loan from Peoples. Minard did not build the homes as agreed. After this venture failed, Cohrts sued Minard in April 1986, seeking damages and rescission of the January 17, 1983, contract.

In a separate action Cohrts and others sued Larry Moser and Loyd Hansen, officers of Peoples; for breach of fiduciary duty, fraud (civil conspiracy), and negligence based on their failure to disclose their financial relationship with Minard; their participation in approving the contract and mortgage agreements; and their participation in other allegedly fraudulent activities in connection with the 1983 financing of Cohrts' plan to develop the six lots acquired from Minard. Cohrts sought compensatory damages and rescission of the promissory note and mortgage agreement on the six lots. The district court continued Cohrts' April 1986 action against Minard, pending resolution of their claims against Moser and Hansen. The court found in favor of Peoples, Moser, and Hansen. Cohrts' motion for a new trial was granted, and the transcript of the proceedings was submitted to another judge. On October 17, 1994, the court ruled in favor of Peoples, Moser, and Hansen. Cohrts are appealing that ruling separately.

Following resolution of Cohrts' lawsuit against Peoples, the court dismissed Cohrts' claims against Minard. The district court concluded Cohrts' claims were barred by issue and claim preclusion as a result of its earlier judgment against Cohrts. The court also held Cohrts had an adequate remedy at law precluding any equitable relief.

II. Standard of Review.

We ordinarily hear cases on appeal in the same manner as they were tried in the district court. *Davis-Eisenhart Mktg. Co. v. Baysden*, 539 N.W.2d 140, 142 (Iowa

1995). This case was tried in equity. Accordingly, we review de novo. Iowa R. App. P. 4; *Sun Valley Iowa Lake Ass'n v. Anderson*, 551 N.W.2d 621, 629 (Iowa 1996). We are not bound by the trial court's fact findings, but we give them respectful consideration because the trial court had the opportunity to view, firsthand, the demeanor of the witnesses when testifying. *In re Marriage of Brown*, 487 N.W.2d 331, 332 (Iowa 1992).

III. The Merits.

On appeal, Cohrts argue: (1) issue preclusion does not bar this action because contract rescission was not an issue in the previous action against Peoples, Moser, and Hansen; and (2) they did not split a cause of action because Minard was not a party to the previous action, and Cohrts assert a different cause of action in this case.

The district court dismissed Cohrts' claims against Minard, finding them barred by issue and claim preclusion. We disagree.

A. Issue Preclusion.

"Res judicata in the sense of issue preclusion means that further litigation on a specific issue is barred." *Iowa Coal Min. Co. v. Monroe County*, 555 N.W.2d 418, 441 (Iowa 1996). Four elements must be proven to establish issue preclusion:

1. The issue concluded must be identical;
2. The issue must have been raised and litigated in the prior action;
3. The issue must have been material and relevant to the disposition of the prior action; and
4. The determination made of the issue in the prior action must have been necessary and essential to the resulting judgment.

Selchert v. State, 420 N.W.2d 816, 818 (Iowa 1988)(citation omitted).

The issues in the separate action against Moser and Hansen were whether Moser and Hansen, as officers of Peoples, breached their fiduciary duties to the borrowers, committed fraud, and were negligent regarding their involvement with the 1983 financing of Cohrts' development plan. The issue here is whether Cohrts are entitled to the remedy of rescission, based on Minard's nonperformance under the January 17, 1983, contract. Therefore, the issues in the two actions are not identical. In addition, we note rescission of the January 17, 1983, contract was not an issue in the action against Moser and Hansen. Because all four elements necessary to establish issue preclusion do not exist, we find Cohrts' rescission claim is not barred by the doctrine of issue preclusion.

B. Claim Preclusion/Split Cause of Action.

"Res judicata in the sense of claim preclusion means that further litigation on the *claim* is barred." *Iowa Coal Min. Co.*, 555 N.W.2d at 441 (emphasis added).

Claim preclusion is based on the principle that a party may not split or try his claim piecemeal, but must put in issue and try his entire claim or put forth his entire defense in the case on trial. An adjudication in a former suit between the same parties on the same claim is final as to all matters which could have been presented to the court for determination.

Id. (citation omitted). Where two claims arise from the same transaction, claim preclusion will bar further litigation on the same claim. *Bagley v. Bagley*, 465 N.W.2d 551, 554 (Iowa App. 1990). This is true even though the plaintiff is prepared

to offer different theories of recovery in the second action than he or she presented in the first action. *Id.* For claim preclusion to apply, the two actions must be between the same parties. *Selchert*, 420 N.W.2d at 818. The parties' privies to the judgment may also assert claim preclusion. *Riley v. Maloney*, 499 N.W.2d 18, 20 (Iowa 1993).

The supreme court set forth three factors to consider in determining whether the cause of action is the same: "(1) the protected right, (2) the alleged wrong, and (3) the relevant evidence." *Iowa Coal Min. Co.*, 555 N.W.2d at 441 (citation omitted).

Regarding the relevant evidence,

[i]f the same facts or evidence would sustain both, the two actions are considered the same within the rule that the judgment in the former is a bar to the subsequent action. If, however, the two actions rest upon different states of facts, or if different proofs would be required to sustain the two actions, a judgment in one is no bar to the maintenance of the other.

Id. (quoting *Phoenix Fin. Corp. v. Iowa-Wisconsin Bridge Co.*, 237 Iowa 165, 175-76, 20 N.W.2d 457, 461-62 (Iowa 1945)).

The parties in this action are different than the parties in the action against Moser and Hansen. Minard was neither a named party in the action against Moser and Hansen, nor privy to the judgment in that action. Therefore, claim preclusion does not apply. Moreover, the alleged wrongs in the instant case and the case involving Moser and Hansen are not the same. In the case involving Moser and Hansen, the focus was on the alleged wrongs committed by Peoples' officers. Here, the focus is on the alleged wrong of Minard (nonperformance under the January 17,

1983, contract). While the evidence offered in the two actions may overlap, different proofs are required for Cohrts to sustain the actions. In the case against Moser and Hansen, Cohrts must prove breach of fiduciary duties, fraud, and negligence with respect to Peoples' officers based on their involvement in the business transaction. In this case, Cohrts must prove Minard breached his duties under the contract. Accordingly, we find claim preclusion does not bar the present action.

We reverse the district court and remand for further proceedings.

REVERSED AND REMANDED.