

**STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND  
BUSINESS COURT**

**IMPATTO CUSTOM MARKETING,  
Plaintiff,**

v.

**Case No. 13-137837-CK  
Hon. James M. Alexander**

**23235 TELEGRAPH, LLC, ET AL,  
Defendants.**

---

**OPINION AND ORDER RE: SUMMARY DISPOSITION**

This matter is before the Court on Defendants’ motion for summary disposition. This case involves a commercial landlord-tenant dispute. Since October 2009, Plaintiff has leased property at 23235 Telegraph in Southfield from Defendants. In a prior action, Defendants brought an eviction proceeding against Plaintiff based on its refusal to pay rent for a number of months’ rent or to vacate the premises. Defendants also brought a “Supplemental Complaint” for unpaid rent. In the eviction proceeding, the District Court entered a Judgment of Possession on November 25, 2013.

On December 5, 2013, Plaintiff filed its Affirmative Defenses on the unpaid-rent civil claim. These defenses generally included that the building’s roof and walls leaked – causing damages to Plaintiff’s property. As a result, (1) Defendants’ unpaid rent damages were setoff by the damages to Plaintiff’s property; (2) Defendants were the first to materially breach the contract by failing to fix the leaks; and (3) the sought damages exceeded the District Court’s jurisdictional limit.

Six days later, on December 11, 2013, Plaintiff filed the instant action (which it Amended on February 18, 2014)<sup>1</sup> – mirroring its affirmative defenses in the underlying action as breach of contract/unjust enrichment claims in the current action. In other words, Plaintiff basically converted its affirmative defenses into causes of action.

Before service on the present action, on January 17, 2014, the District Court transferred the civil rent case to the Circuit Court. On March 18, 2014 (after service of Plaintiff's First-Amended Complaint) the parties stipulated to an Order dismissing the Defendants' action for unpaid rent "with prejudice."

Defendants now request summary disposition – arguing that Plaintiff's claims (as mirror images of their underlying affirmative defenses) are barred by res judicata. To this end, Defendants move for summary disposition under MCR 2.116(C)(7), which determines whether a claim is barred, among other grounds, by a "prior judgment." The Court accepts the plaintiff's well-pleaded allegations as true and construes them in the plaintiff's favor unless the allegations are contradicted by documentary evidence. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999); *Huron Tool & Eng'g Co v Precision Consulting Services, Inc*, 209 Mich App 365, 376-77; 532 NW2d 541 (1995). In response, Plaintiff seeks summary disposition as to liability under (I)(2).

The doctrine of res judicata bars a 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 claims in the second case were, or could have been, resolved in the first case. *Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004); *Sewell v Clean Cut Mgmt*, 463 Mich 569, 575; 621 NW2d 222 (2001).

---

<sup>1</sup> Plaintiff's original Complaint included an acknowledgement that there was a pending action arising out of the same transaction or occurrence. But Plaintiff removed this acknowledgment in its First Amended Complaint.

“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) (emphasis added).

In support of their motion, Defendants cite *Ternes Steel Co v Ladney*, 364 Mich 614, 619; 111 NW2d 859 (1961), which held (internal citations omitted):

We conclude that when a litigant’s right to affirmative relief is independent of a cause of action asserted against him and it is relied upon only as a defense to that action, he is barred from seeking affirmative relief thereon in a subsequent proceeding. But if he does not rely upon his claim as a defense to the first action, or as a counterclaim thereto, he is not barred from subsequently maintaining his action for affirmative relief in an independent suit.

In other words, plaintiff can plead defendant’s breach of warranty as a defense in the first suit, he can plead it as a defense and as a counterclaim in the first suit, or he can sue thereon subsequently for affirmative relief, but he cannot combine the alternatives. Once he raises the issue, it must be fully and finally determined.

Initially, in part, Plaintiff argues that the Court “would have to rewrite MCR 2.203 to provide for **compulsory** counterclaims in order to grant Defendants’ motion.” (emphasis in original). In support, Plaintiff cites to *Salem Industries, Inc v Mooney Process Equipment Co*, 175 Mich App 213; 437 NW2d 641 (1988) for the proposition that the cited Court Rule allows a party **the option** to maintain a counterclaim in a separate action. On this issue, the entire passage from *Salem Industries* provides:

Generally, a counterclaim arising out of the same transaction or occurrence as the principal claim must be joined in one action. However, if leave to amend to state a counterclaim is denied and the ruling court does not expressly preclude a separate action, the party is not bound by the compulsory joinder rule and is free to raise the claim in another action. We also note that MCR 2.203(E) provides for the permissive joinder of counterclaims. Since the rule is permissive, as opposed to compulsory, it allows a party the option to maintain its counterclaim in a separate independent action. *Salem Industries, Inc v Mooney Process Equipment Co*, 175 Mich App at 215-216 (internal citations omitted).

Plaintiff also cites to two unpublished cases of the Court of Appeals, *Gross v Landin*, unpublished opinion per curiam of the Court of Appeals, decided Aug. 26, 2004 (Docket No. 246282) and *Chiamp & Associates, PC v Smith*, unpublished opinion per curiam of the Court of Appeals, decided July 1, 2014 (Docket No. 313495), for the proposition that *Ternes* should be ignored because it predates the current version of MCR 2.203.

But *Gross* involved a situation where he asserted a different claim in the subsequent action than he used to defend the prior.<sup>2</sup> And *Chiamp* declined to overrule *Ternes* – despite being specifically asked to do so by a party. As a result, not only are *Gross* and *Chiamp* distinguishable, they are non-binding.

Additionally, the foundation for Plaintiff’s “compulsory counterclaim” 2.203 argument, *Salem Industries*, warned that “Plaintiff may maintain its counterclaim, **to the extent allowed by the rules of collateral estoppel and res judicata, in a separate independent action.**” *Salem Industries*, 175 Mich App at 216 (emphasis added), citing *Rinaldi v Rinaldi*, 122 Mich App 391, 399-400; 333 NW2d 61 (1983). And the *Rinaldi* Court quoted the **entire** *Ternes* passage reproduced above as representing “the general rule.” *Rinaldi*, 122 Mich App at 399-400, quoting *Ternes Steel Co v Ladney*, 364 Mich at 619. As a result, the Court rejects Plaintiff’s request to ignore *Ternes*.

The Court also rejects Plaintiff’s argument that granting Defendants’ motion would rewrite MCR 2.203. Rather, read in conjunction, the Court Rules and caselaw provide that a defendant has the option to raise affirmative defenses to a lawsuit (with or without a counterclaim) **or** bring these defenses as counterclaims in a subsequent suit, but he can’t do both.

---

<sup>2</sup> The *Gross* panel reasoned: “Gross did not defend the first action on the basis of negligence, but under the no fault act. It is thus unclear that *Ternes* would preclude Gross’ automobile negligence action.”

Once a defendant raises the issue as an affirmative defense, whether or not he brings a counterclaim, he is precluded from bringing a separate action based on the same issue.

The Court also rejects Plaintiff's argument that the prior proceeding was solely a summary proceeding for eviction, which precludes application of the doctrine of res judicata. While Defendant brought a "Complaint to Recover Possession of Property" under MCL 600.5750, it also brought a "Supplemental Complaint" money damages based on unpaid rent. This "Supplemental Complaint" is the prior proceeding that forms the basis for Defendants' res judicata argument.

The Court now turns to the elements of res judicata.

*1. Prior action decided on the merits.*

The first element is whether the prior action was decided on the merits. The Court of Appeals has held "a voluntary dismissal **with prejudice** acts as an adjudication on the merits for res judicata purposes." *Limbach v Oakland County Rd Comm'n*, 226 Mich App 389, 395; 573 NW2d 336 (1997) (emphasis added), citing *Brownridge v Michigan Mut Ins Co*, 115 Mich App 745, 748; 321 NW2d 798 (1982).

On March 18, 2014, Judge Wendy Potts entered a "Stipulated Order for Dismissal with Prejudice and Without Costs" on Defendant's underlying civil rent Supplemental Complaint. As a result, the first element is met.

The Court rejects Plaintiff's argument that the timing of the previous dismissal impacts whether res judicata applies in the current case. It is undisputed that the dismissal with prejudice predated the current motion by some six months. Further, had Plaintiff wished to retain its right to litigate the issues raised as defenses in the prior suit as claims in the present suit, it could have

agreed to a conditional dismissal “without prejudice” – thereby defeating the first res judicata element.

2. *Same parties or their privies.*

The next element is whether “both actions involve the same parties or their privies.” Plaintiff and Defendant 23235 Telegraph were the parties to the underlying civil rent claim. In this case, however, Plaintiff also named 23235’s sole members and the prior owners of the property, Milton and Eunice Ring, as Defendants. In June 2013, the Ring Defendants assigned their interests in “any and all lease agreements” with Plaintiff to 23235.<sup>3</sup>

On this element, the Court of Appeals has reasoned:

The parties to the second action need be only substantially identical to the parties in the first action, in that the rule applies to both parties and their privies. As to private parties, a privy includes a person so identified in interest with another that he represents the same legal right, such as a principal to an agent, a master to a servant, or an indemnitor to an indemnitee. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 12-13; 672 NW2d 351 (2003).

The Court finds that the Ring Defendants are precisely the type of parties intended to be covered by this rule. They were the sole source of 23235’s legal right to pursue Plaintiff for the unpaid rent. And they are also the proper parties to the extent that either party’s claims predated the June 2013 assignment of rights.

3. *Claims were or could have been resolved in the first case.*

The final element is whether “the claims in the second case were, or could have been, resolved in the first case.” Again, this element should be “broadly applied” – barring “not only

---

<sup>3</sup> In a November 25, 2013 Order, the District Court found that “Rings signed a quit-claim deed in 2013 to their LLC.”

claims already litigated, **but every claim arising from the same transaction** that the parties, exercising reasonable diligence, could have raised but did not.” *Dart*, 460 Mich at 586.

In its Response to Defendants’ motion, Plaintiff does not submit any arguments on this element beyond those already rejected above.

In this case, Plaintiff’s causes of action arise from the same group of facts, the same contractual relationship, the same alleged conduct, and the same damage as Plaintiff’s affirmative defenses in the underlying lawsuit. And these things predated the prior action. See *Washington v Sinai Hosp*, 478 Mich 412, 420; 733 NW2d 755 (2007) (holding “this Court uses a transactional test to determine if the matter could have been resolved in the first case,” which provides “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.”); quoting *Adair v Michigan*, 470 Mich 105, 124; 680 NW2d 386 (2004).

**Conclusion.**

For all of the foregoing reasons, the Court finds that Plaintiff’s claims are barred by res judicata. Because Plaintiff raised the same issues as claims in the present suit previously brought as affirmative defenses in the prior suit, and the parties stipulated to dismiss the prior suit with prejudice and without condition, Plaintiff’s present suit is barred. Therefore, Defendants’ motion for summary disposition under (C)(7) is GRANTED, and Plaintiff’s Complaint is DISMISSED.

For the same reasons, Plaintiff’s motion under (I)(2) is DENIED.

This Order is a Final Order that resolves the last pending claim and closes the case.

**IT IS SO ORDERED.**

March 18, 2015 \_\_\_\_\_  
Date

\_\_\_\_\_  
/s/ James M. Alexander  
Hon. James M. Alexander, Circuit Court Judge