If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

STATE OF MICHIGAN

COURT OF APPEALS

LISA MARIE ORR,

Plaintiff/Counterdefendant-Appellee,

v

PATRICK RUSEK III,

Defendant/Counterplaintiff,

and

ESTATE OF SHIRLEY OGRISKO and PATRICK RUSEK II,

Defendants/Counterplaintiffs-Appellants,

and

TIMOTHY RUSEK, JANE BUNGART, DANIEL RUSEK, SANDRA LEE, SABRINA OVIATT, CASSANDRA OVIATT, and PATRICK RUSEK I,

Defendants,

and

HENRY ORR, HELEN ORR, and PUBLIC ADJUSTER BUREAU, INC.,

Counterdefendants.

UNPUBLISHED
November 19, 2020

No. 349338
Macomb Circuit Court
LC No. 2018-002864-CZ

Before: O'BRIEN, P.J., AND BECKERING AND CAMERON, JJ.

PER CURIAM.

In this quiet title action, defendants/counterplaintiffs, the Estate of Shirley Ogrisko ("the Estate") and Patrick Rusek II ("Rusek II"), appeal the trial court's final order, which quieted title in favor of plaintiff/counterdefendant, Lisa Marie Orr ("Orr") and cancelled a notice of lis pendens. On appeal, the Estate and Rusek II challenge the court's earlier orders, which granted summary disposition in favor of Orr. We affirm.

I. BACKGROUND

This case involves a dispute over a single-family home located in Sterling Heights, Michigan. In November 2006, Rusek II and his minor son, Patrick Rusek III ("Rusek III"), moved into the house, which belonged to Rusek II's grandmother, Shirley Ogrisko, a/k/a Shirley Rusek ("Shirley"). Shirley died intestate in 2007, and a probate estate was opened. Rusek II and Rusek III continued to live in the house, and the Estate was administratively closed without distribution of the house. In 2013, the house was facing tax foreclosure, and the Estate was advised that it had until March 31, 2014, to redeem the property by paying the delinquent taxes, penalties, interest, and fees. An application to reopen the Estate was filed, along with an emergency request for appointment of a fiduciary.

On March 16, 2014, the heirs disclaimed their interests in the property and agreed to transfer the property by deed to Orr, who was in a dating relationship with Rusek II. On March 17, 2014, Orr received a fiduciary deed from the personal representative of the Estate. Orr moved into the house after obtaining the deed, and she lived in the house with Rusek II and Rusek III. Sometime in 2016, the relationship between Orr and Rusek II ended, and Orr moved out of the house in July 2016 because she was concerned for her safety. Thereafter, Orr sought to recover possession of the property by serving Rusek II with a notice to quit. When Rusek II did not leave the property within the requisite timeframe, Orr filed a complaint to recover possession of the property against Rusek II and "occupant" in the district court. Rusek II filed a counterclaim, alleging that there was "no tenancy which [could] be terminated" because Rusek II was "the beneficial owner of [the] house[.]" Rusek II acknowledged that he was "indebted" to Orr "for approximately $35,000 through July 12, 2016." However, Rusek II alleged that he and Orr "had an unwritten agreement for Rusek [II] to repay Orr" for expenses that she had expended related to the house. Rusek II alleged that the 2014 deed constituted an equitable mortgage. In March 2017, Rusek II recorded a notice of lis pendens with the register of deeds.

The district court ultimately granted summary disposition in favor of Orr, concluding that the Estate (as opposed to Rusek II) was the real party in interest and that Rusek II's claim relating to the unwritten agreement was therefore barred by the statute of frauds. Rusek II appealed. The circuit court affirmed the district court's order granting summary disposition, finding that the Estate was the real party in interest with respect to any claim regarding an equitable mortgage. The circuit court, however, ruled that the district court abused its discretion by denying Rusek II's motion for leave to file an amended counterclaim in order to add the Estate as a party. The circuit court remanded the case for further proceedings, and the district court stayed the matter.

Orr filed an action seeking to quiet title against Rusek II, Rusek III, the Estate, and the Estate's heirs.[1] Orr sought a declaration that she was "the owner in fee simple of the property." Orr also filed a claim for slander of title and requested that the notice of lis pendens be "release[d]." The Estate, Rusek II, and Rusek III answered the complaint, filed affirmative defenses, and filed counterclaims. The Estate, Rusek II, and Rusek III denied that Orr had obtained title to the property and instead alleged that the deed that was granted to Orr was actually an equitable mortgage. The trial court ultimately dismissed the counterclaims of Rusek II and Rusek III on the basis of res judicata. The trial court also granted summary disposition in favor of Orr on her quiet title claim and ruled that the deed did not constitute an equitable mortgage. Thereafter, the trial court entered a final order, ruling that Orr was the fee simple owner of the property. The final order also cancelled the notice of lis pendens and dismissed the action with prejudice. This appeal followed.

II. ANALYSIS

A. STANDING/PARTIES IN INTEREST

Preliminarily, Orr argues that the Estate lacked standing to assert that an equitable mortgage existed because the property did not belong to the Estate and because the Estate did not have a loan or agreement with Orr. Whether a party has standing is a question of law subject to review de novo. *Groves v Dept of Corr*, 295 Mich App 1, 4; 811 NW2d 563 (2011). In the prior action, the district court ruled that the Estate was the real party in interest with regard to any claim for an equitable mortgage, and the circuit court affirmed this ruling. Orr relied on these rulings below to argue that Rusek II and Rusek III did not have standing to file their counterclaims. Specifically, Orr argued below that "the Estate is the proper party in interest to claim superior title by equitable mortgage." Therefore, Orr is estopped from arguing that the Estate does not have standing to assert a claim of equitable mortgage. See *Spohn v Van Dyke Pub Sch*, 296 Mich App 470, 479; 822 NW2d 239 (2012) ("[j]udicial estoppel is an equitable doctrine, which generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.") (quotation marks and citations omitted). In addition, we conclude that the doctrine of collateral estoppel precludes relitigation of this issue. See *King v Munro*, 329 Mich App 594, 599; 944 NW2d 198 (2019) ("The doctrine of collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in that prior proceeding.") (quotation marks and citation omitted).

Relatedly, Orr argues that the Estate is not an aggrieved party and therefore lacks standing to appeal. We disagree. Under MCR 7.203(A), the party seeking appellate relief must be an "aggrieved party." *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 291; 715 NW2d 846 (2006). In *League of Women Voters of Mich v Secretary of State (League I)*, ___ Mich App

[1] Orr indicated that she named Rusek II as a defendant because he had filed the notice of lis pendens. The heirs did not answer the complaint, and defaults were entered as a result.

___, ___; ___ NW2d ___ (Docket Nos. 350938, 351073, issued January 27, 2020), slip op at 6, lv pending, this Court observed as follows:

> [T]his Court has jurisdiction over appeals by right "filed by an aggrieved party." MCR 7.203. *Black's Law Dictionary* (11th ed) defines "aggrieved party" as "a party entitled to a remedy; esp. a party whose personal, pecuniary, or property rights have been adversely affected by another person's actions or by a court's decree or judgment." "To be aggrieved, one must have some interest of a pecuniary nature in the outcome of the case, and not a mere possibility arising from some unknown and future contingency." *Federated Ins Co v Oakland Co Rd Comm'n*, 475 Mich 286, 291; 715 NW2d 846 (2006).
>
> * * *
>
> " 'Standing is the legal term used to denote the existence of a party's interest in the outcome of the litigation; an interest that will assure sincere and vigorous advocacy.' " *Allstate Ins Co v Hayes*, 442 Mich 56, 68; 499 NW2d 743 (1993) (citations omitted).

Furthermore, the appellate litigant also must show a "concrete and particularized injury." *Federated Ins Co*, 475 Mich at 291-292.

In this case, Orr argues that the Estate lacks standing to appeal because the property did not belong to the Estate and because the Estate did not have a loan or agreement with Orr. In so arguing, however, Orr overlooks the Estate's interests. As already stated, it was determined in the prior action that the Estate is the proper party to claim an equitable mortgage. The Estate alleged in the affirmative defenses and in a counterclaim that Orr was not the fee simple owner of the property because the 2014 deed constituted an equitable mortgage, thereby evidencing that the Estate had a superior interest in the property. The trial court disagreed with the Estate and granted summary disposition in favor of Orr on her quiet title claim after finding that genuine issues of material fact did not exist. Therefore, because the Estate suffered a concrete and particularized injury as a result of the trial court's ruling that the 2014 deed constituted a full conveyance to Orr and that the Estate did not have an interest in the property, we conclude that the Estate is an aggrieved party and has standing to appeal. Additionally, because the Estate is the real party in interest and has standing, this appeal is not moot as Orr alleges.

Additionally, Rusek II argues that his claim that the deed amounted to an equitable mortgage was viable because Rusek II is an interested party. As stated earlier, however, it was determined in the prior action that the Estate is the proper party to claim an equitable mortgage. To the extent that Rusek II is challenging the orders entered in the district court and circuit court, the challenge amounts to an impermissible collateral attack and will not be considered. See *Workers' Compensation Agency Dir v MacDonald's Indus Prod Inc*, 305 Mich App 460, 474; 853 NW2d 467 (2014) ("It is well established in Michigan that, assuming competent jurisdiction, a party cannot use a second proceeding to attack a tribunal's decision in a previous proceeding[.]").

B. QUIET TITLE/EQUITABLE MORTGAGE

The Estate and Rusek II argue that the trial court improperly granted summary disposition in favor of Orr on the quiet title claim because genuine issues of material fact remained as to whether the deed denoted an absolute conveyance or security for a debt, i.e., an equitable mortgage. We disagree.

"This Court reviews de novo a trial court's decision on a motion for summary disposition." *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; 809 NW2d 553 (2011). "In reviewing a motion for summary disposition under subrule (C)(10), we consider the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party."[2] *Sallie v Fifth Third Bank*, 297 Mich App 115, 117-118; 824 NW2d 238 (2012) (quotation marks and citation omitted). "Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "The construction and interpretation of an unambiguous contract is a question of law that we review de novo." See *Rossow v Brentwood Farms Dev, Inc*, 251 Mich App 652, 658; 651 NW2d 458 (2002).

An action to quiet title is equitable in nature and is "available to a party in possession of real property who [seeks] to clear the property's title as against the world." *Adams v Adams*, 276 Mich App 704, 711; 742 NW2d 399 (2007). In a quiet title action, the plaintiff "has the initial burden of establishing a prima facie case of title." *Special Prop VI v Woodruff*, 273 Mich App 586, 590; 730 NW2d 753 (2007). If the plaintiff establishes a prima facie case of title, the burden shifts to the defendant to prove superior right or title. *Qualified Personal Residence Trust v Emmet Co Rd Comm*, 236 Mich App 546, 550; 600 NW2d 698 (1999).

In this case, the plain language of the deed establishes that the Estate intended to "convey" the property to Orr.[3] Although the deed does not indicate that the Estate intended to retain an interest in the property, and even though the heirs agreed "to have the property transferred by deed" to Orr and "to exclude the property from any further estate administration," the Estate and Rusek II assert that the Estate had "superior right or title" in the property because the parties intended for Orr to have an equitable mortgage, as opposed to a full conveyance of the property.

---

[2] Several affidavits were filed in the trial court *after* the trial court granted Orr's second motion for summary disposition. Because the affidavits were not timely filed, we will not consider them when deciding whether the trial court properly granted Orr's second motion for summary disposition. See *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 474 n 6 & 475-476; 776 NW2d 398 (2009). Furthermore, although the Estate and Rusek II argue that the trial court made "palpable errors" in their brief on appeal, they do not expressly challenge the trial court's ruling on their motion for reconsideration or raise it as an issue on appeal.

[3] See *Minerva Partners, Ltd v First Passage, LLC*, 274 Mich App 207, 216; 731 NW2d 472 (2007) ("The general rule is that courts will follow the plain language in a deed in which there is no ambiguity.") (quotation marks and citation omitted).

"Michigan has long recognized equitable mortgages," *Eastbrook Homes, Inc v Dep't of Treasury*, 296 Mich App 336, 351; 820 NW2d 242 (2012), and "a court of equity can declare a deed absolute on its face to be a mortgage," *Taines v Munson*, 19 Mich App 29, 36; 172 NW2d 217 (1969). An equitable mortgage may be declared in order to circumvent the statute of frauds. *Schultz v Schultz*, 117 Mich App 454, 458; 324 NW2d 48 (1982). "Generally an equitable mortgage will be imposed if it is shown that there was an intention to place a lien on the real estate or a promise that the real estate would be used as security but for some reason the intended purpose was not accomplished[.]" *Eastbrook Homes, Inc*, 296 Mich App at 352 (quotation marks and citation omitted). The person asserting that a deed absolute on its face is actually "a mortgage bears a heavy burden of proof" and "must furnish a preponderance of evidence whereby it is made 'very clear' to the fact finder that the parties did not contemplate an absolute sale." *Grant v Van Reken*, 71 Mich App 121, 126; 246 NW2d 348 (1976).

"Although no set criterion has been established, the controlling factor in determining whether a deed absolute on its face should be deemed a mortgage is the intention of the parties." *Koenig v Van Reken*, 89 Mich App 102, 106; 279 NW2d 590 (1979). The court may glean the requisite intent from the circumstances surrounding the transaction, "including the conduct and relative economic positions of the parties" and the existence of a discrepancy between the value of the property and the price fixed in the alleged sale. *Id*. "Under Michigan law, it is well settled that the adverse financial condition of the grantor, coupled with the inadequacy of the purchase price for the property, is sufficient to establish a deed absolute on its face to be a mortgage." *Id*.

In *Schultz*, 117 Mich App at 458-459, this Court stated:

> [A] review of Michigan case law reveals two instances in which it is proper to declare an equitable mortgage in order to circumvent the requirement for a writing. One such instance occurs when the deed is between parties where one party stands in a relationship of trust or guidance to the other party, such as attorney to client, guardian to ward, or parent to child, and the relationship has been abused. In that situation, a court may declare a deed to be subject to an equitable mortgage where the deed would have been held to be unencumbered had the parties not been so related.
>
> The other instance in which equitable mortgages may properly be declared occurs when a creditor abuses the "power of coercion" which he may have, by the force of circumstances, over the debtor. Courts sitting in equity interfere between the creditor and debtor to prevent oppression. Otherwise, the statute of frauds would become "a shield for the protection of oppression and fraud". As has been observed, an oppressed debtor "will not hesitate to execute a deed or bill of sale, absolute upon the face of it, but intended to operate as a mortgage, to four times the value of the loan, without insisting upon a written deed of defeasance". Thus, an adverse financial condition of the grantor coupled with an inadequate purchase price for the property is sufficient to establish a deed absolute on its face to be an equitable mortgage. [Citations omitted.]

Neither of these two circumstances are present in this case. At the time the 2014 deed was delivered to Orr, Orr was not in a position of trust or guidance to the Estate, the personal

representative, or the heirs of the Estate. Rather, Orr was merely in a dating relationship with Rusek II, who was not an heir. Although the undisputed evidence establishes that the property was facing tax foreclosure at the time the deed was delivered, there is no indication that Orr had any connection to the Estate's alleged financial difficulties. Furthermore, while the tax sale was imminent in 2014, there was no evidence that the Estate acted under duress brought on by distressing financial circumstances or that any of the heirs lived in the home at any relevant time. Indeed, the Estate had been aware of the tax issues with the property for several years, and a payment plan was entered into in 2013. Nonetheless, the record supports that the direct heirs wanted the property to be removed from the Estate and that the Estate was reopened in 2013 to "short sell" the property. Therefore, the undisputed evidence does not establish that "the relation between the parties [was] abused" or that Orr had a "power of coercion" by virtue of her relationship with the Estate and/or the heirs. See *Alpert Indus, Inc v Oakland Metal Stamping Co*, 379 Mich 272, 278-279; 150 NW2d 765 (1967).

Additionally, the undisputed evidence establishes that the parties intended the transaction to operate as a conveyance—not as a loan. Orr averred that it was agreed that she would be sole owner of the property if she took "on all the delinquent tax bills, delinquent water bills, the mortgage, and maintenance." The undisputed record evidence supports that Orr did just that. Specifically, evidence supports that Orr paid over $16,000 in delinquent property taxes and that Orr continued to pay the property taxes each year after she acquired the deed to the property. Orr also paid a delinquent water bill, which amounted to $616.94, and she continued to pay the water bill. Orr paid a $132.50 penalty that the City of Sterling Heights had charged because the property had not been previously used as a homestead, and she obtained property insurance on the property. Orr averred that, when she obtained the property, the mortgage was "delinquent so [she] brought that up to date and assumed that as well."

Evidence establishes that Orr recorded the 2014 deed, moved into the house after obtaining the deed, and lived in the house from March 2014 through July 2016. During that time, Orr engaged in activities to make the home her own, such as painting and landscaping. Orr also made repairs and conducted maintenance because "[t]he house required work to be done due to the extensive deferred maintenance" in the years before Orr acquired the deed. Specifically, Orr treated the home for bugs, cleaned the air ducts, and replaced water shut-off valves that did not work and were not up to code. Orr averred that she was "required to replace the roof because it was so deteriorated [that] the house was uninsurable until replacement." Additionally, Orr had to repair a cracked waste pipe that was in the basement and mitigate the damage caused by the cracked pipe. This required removing floor tiles, drywall, paneling, studs, and personal effects that were in the basement. The basement also had to be disinfected. Orr and Orr's father averred that additional maintenance on the property, including replacing a furnace and windows in the home, needed to be conducted in the future at Orr's expense.

Orr averred that, as of February 2019, she had expended over $75,000, which did "not include the time and labor[.]" Orr submitted an itemized list of expenses totaling more than $75,000. Importantly, there is no indication that the Estate or Rusek II made any payments to Orr during the 2-1/2 years between the delivery of the 2014 deed and the initiation of the proceedings

in the district court.[4] Importantly, the argument that the deed constituted an equitable mortgage was not made until Orr sought to have Rusek II and Rusek III evicted from the house.

On appeal, the Estate and Rusek II argue that the "expenses that [Orr] accounts for as consideration are very inaccurate and manipulative to trick the trial court into assuming that this was a deed on its face with adequate consideration."[5] Specifically, the Estate and Rusek II challenge Orr's assertion that she spent $5,000 "gutting the basement" and that she spent close to $7,000 repairing the roof. The Estate and Rusek II also argue that Orr improperly included certain purchases in her calculations and that the trial court should have deducted "the $30,000 escrow amount from [Orr's] claimed expenses" when determining whether the consideration was adequate.[6] However, because these arguments were raised for the first time in a motion for reconsideration, they are not preserved. *Vushaj v Farm Bureau Ins Co of Mich*, 284 Mich App 513, 519; 773 NW2d 758 (2009). Furthermore, in so arguing, the Estate essentially ignores that "the controlling factor in determining whether a deed absolute on its face should be deemed a mortgage is the intention of the parties." *Koenig*, 89 Mich App at 106. Although an inadequate purchase price should be considered, case law holds that "the adverse financial condition of the grantor, *coupled with* the inadequacy of the purchase price for the property, is sufficient to establish a deed absolute on its face to be a mortgage." *Id*. (emphasis added). In this case, for the reasons already discussed, the undisputed record evidence does not support that the Estate and Orr had the type of relationship that courts of equity typically rely upon when declaring an equitable mortgage. Indeed, there is no indication that Orr had a relationship of trust with the Estate or had greater bargaining power than the Estate, which was represented by its own attorney. Consequently, to the extent that we have considered the Estate's unpreserved arguments, we find that they lack merit.

---

[4] Rusek II argued that he worked for Public Adjuster Bureau, Inc., which is a company owned by Orr's parents, but did not receive compensation because his wages went toward the amount that he owed Orr and/or Orr's parents. To support this, Rusek II mainly relied on affidavits that were executed by the heirs. However, as noted by the trial court, the affidavits do not establish any personal knowledge of the alleged agreement between Rusek II, Orr, and Orr's parents and, thus, did not create a question of fact regarding whether an equitable mortgage was created. See *SSC Assoc Ltd Partnership v Gen Retirement Sys*, 192 Mich App 360, 364; 480 NW2d 275 (1991) ("[A]ffidavits must be made on the basis of personal knowledge and must set forth with particularity such facts as would be admissible as evidence to establish or deny the grounds stated in the motion.").

[5] With respect to the purchase price of the property, the Estate argued that the value of the property in 2014 was $125,000 and Orr argued that the value of the property in 2014 was $114,800. The trial court concluded that, although the parties disputed the value of the property, the dispute was not material.

[6] The district court entered an escrow order, requiring Rusek II to pay $1,000 each month as rent; the amount was placed into an escrow account.

Next, the Estate and Rusek II argue that the trial court should not have granted summary disposition given that "motive and intent are at issue" in this case and given that, as a general rule "[s]ummary disposition is suspect where motive and intent are at issue[.]" *Foreman v Foreman*, 266 Mich App 132, 135; 701 NW2d 167 (2005). Summary disposition is also improper when a trier of fact could reasonably draw an inference in the plaintiff's favor:

> It is a basic proposition of law that determination of disputed issues of fact is peculiarly the jury's province. Even where the evidentiary facts are undisputed, it is improper to decide the matter as one of law if a jury could draw conflicting inferences from the evidentiary facts and thereby reach differing conclusions as to ultimate facts. [*Nichol v Billot*, 406 Mich 284, 301-302; 279 NW2d 761 (1979) (citations omitted).]

In this case, we fail to see how a jury could draw conflicting inferences from the evidentiary facts and reach differing conclusions as to the ultimate facts. The plain language of the deed establishes that the property was unconditionally conveyed to Orr. Furthermore, the undisputed evidence establishes that Orr was not in a position of trust with the Estate, that Orr was not a creditor of the Estate at any relevant time, and that the conduct of the parties was consistent with a conveyance, as opposed to a loan. The evidence further establishes that Orr paid outstanding debts, made repairs, and maintained the property without any contribution from the Estate or Rusek II. Although the Estate and Rusek II argue that Orr made "contradictory statements" concerning how she came to obtain the deed and whether her parents paid for certain repairs, we conclude that any inconsistencies were not material.

The Estate and Rusek II also argue that the trial court erred by failing to consider the credibility of witnesses. However, because courts may not assess credibility or make factual findings when deciding a motion for summary disposition under MCR 2.116(C)(10), the argument is without merit. *Burkhardt v Bailey*, 260 Mich App 636, 647; 680 NW2d 453 (2004).

The Estate and Rusek II also argue that summary disposition was premature because there was a pending motion to compel discovery that the trial court never decided. "A motion under MCR 2.116(C)(10) is generally premature if discovery has not been completed unless there is no fair likelihood that further discovery will yield support for the nonmoving party's position." *Liparoto Constr Co, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 33-34; 772 NW2d 801 (2009). "If a party opposes a motion for summary disposition on the ground that discovery is incomplete, the party must at least assert that a dispute does indeed exist and support that allegation by some independent evidence." *Bellows v Delaware McDonald's Corp*, 206 Mich App 555, 561; 522 NW2d 707 (1994). "The party opposing summary disposition must offer the required MCR 2.116(H) affidavits, with the probable testimony to support its contentions." *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292-293; 769 NW2d 234 (2009).

On February 21, 2019, the Estate, Rusek II, and Rusek III filed a motion to compel compliance with a subpoena that they claimed was served on Public Adjuster Bureau, Inc., on

December 26, 2018.[7] The subpoena sought evidence of claims and jobs that Rusek II had performed for Public Adjuster Bureau, Inc., which is a company that is owned by Orr's parents. The trial court took the motion to compel under advisement on March 25, 2019, but then granted Orr's second motion for summary disposition without addressing or ruling on the motion to compel. Although the Estate and Rusek II now argue that summary disposition was premature because there was outstanding discovery, they did not raise this argument in response to Orr's second motion for summary disposition. Furthermore, the Estate and Rusek II failed to provide independent evidence, including the required affidavits, to support that the records sought would have supported the contention that the deed was merely an equitable mortgage. Therefore, because the Estate and Rusek II failed to assert that summary disposition was premature and failed to support that allegation with independent evidence, we conclude that summary disposition was not premature.

In sum, even when viewing the evidence in the light most favorable to the Estate and Rusek II, we conclude that the trial court did not err by granting summary disposition in favor of Orr on her quiet title claim and on the Estate's counterclaim for an equitable mortgage.

B. RES JUDICATA

The Estate and Rusek II argue that the trial court erred by concluding that the counterclaims filed by Rusek II were barred by the doctrine of res judicata. We disagree.

MCR 2.116(C)(7) provides for summary disposition when an action is barred by a "prior judgment[.]" With respect to motions for summary disposition brought under MCR 2.116(C)(7), the Court in *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008), observed the following:

> Under MCR 2.116(C)(7) . . . , this Court must consider not only the pleadings, but also any affidavits, depositions, admissions, or other documentary evidence filed or submitted by the parties. The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. This Court must consider the documentary evidence in a light most favorable to the nonmoving party. If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide. If a factual dispute exists, however, summary disposition is not appropriate. [Citations omitted.]

"The applicability of the doctrine of res judicata is a question of law that is . . . reviewed de novo." *Duncan v State*, 300 Mich App 176, 194; 832 NW2d 761 (2013) (quotation marks and citation omitted).

"The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action." *Adair v State*, 470 Mich 105, 121; 680 NW2d 386 (2004). "Res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical."

[7] "All discovery" was required to be "initiated by" December 26, 2018.

Sewell v Clean Cut Mgt, Inc, 463 Mich 569, 575; 621 NW2d 222 (2001). The purposes of res judicata are to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and encourage reliance on adjudication[.]" *TBCI, PC v State Farm Mut Auto Ins Co*, 289 Mich App 39, 43; 795 NW2d 229 (2010) (quotation marks and citation omitted). Res judicata requires that:

> (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. [*Adair*, 470 Mich at 121.]

With respect to the third requirement, it is undisputed that Rusek II's counterclaims were not actually litigated in the district court. However, this is not dispositive because Michigan Courts have "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." *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 418; 733 NW2d 755 (2007). Therefore, we must consider whether the counterclaims could have been raised in the district court.

In the district court action, Rusek II alleged that he had an interest in the property that permitted him to retain possession of the property, which is consistent with Rusek II's claims in the trial court. Nonetheless, the Estate and Rusek II argue that the counterclaims could not have been resolved in the district court because they are equitable in nature. We disagree.

Orr began summary proceedings in the district court, seeking possession of the property. Regarding such proceedings, MCL 600.5750 provides that "[t]he remedy provided by summary proceedings is in addition to, and not exclusive of, other remedies, either legal, equitable or statutory." MCR 4.201(G)(1)(a)(*ii*) provides that "[a] party may join . . . [a] claim or counterclaim for equitable relief," and MCR 4.201(G)(2)(a) states that "[a] summary proceedings action need not be removed from the court in which it is filed because an equitable defense or counterclaim is interposed." Thus, the Estate and Rusek II's argument that Rusek II could not file his counterclaims in the district court is without legal merit.

The Estate and Rusek II also argue that "there was not a full and fair adjudication in the initial action as [Rusek II] was forced to defend a frivolous eviction in which there was never an actual trial" and because Orr and Orr's parents "have yet to testify under oath." However, as already discussed, the district court held that the Estate—not Rusek II—was the real party in interest to assert that the 2014 deed was an equitable mortgage. The circuit court affirmed this ruling. On appeal, Rusek II acknowledges that the district court and circuit court orders are now final. Consequently, because the district court's ruling that Rusek II could not pursue the equitable mortgage claim remains undisturbed, we fail to see how he would have been entitled to a trial in the district court.

Next, the Estate and Rusek II argue that res judicata does not apply because Rusek II pleaded a claim of fraud. In so arguing, however, the Estate and Rusek II disregard that case law establishes that res judicata may not be invoked to sustain *extrinsic* fraud. See *Sprague v Buhagiar*, 213 Mich App 310, 313; 539 NW2d 587 (1995). "Extrinsic fraud is fraud outside the facts of the case: fraud which actually prevents the losing party from having an adversarial trial on a significant

issue." *Id*. (quotation marks and citation omitted). An example of extrinsic fraud is "fraud with regard to filing a return of service." *Id*. at 313-314. Upon reviewing the counterclaims, it is clear that Rusek II alleged that Orr engaged in fraud by claiming that the 2014 deed was a loan, as opposed to a conveyance. Furthermore, contrary to the Estate and Rusek II's vague arguments on appeal, there is no indication that Rusek II was prevented "from having an adversarial trial on a significant issue" in the district court as a result of fraud on the part of Orr.[8] Indeed, at the time Orr initiated the action in the district court, Rusek II was aware that Orr was claiming sole ownership in the property. Thus, because any allegations of fraud were not allegations of extrinsic fraud, we conclude that the trial court did not err by granting summary disposition in favor of Orr on Rusek II's counterclaims under MCR 2.116(C)(7).[9]

Affirmed.

/s/ Colleen A. O'Brien
/s/ Jane M. Beckering
/s/ Thomas C. Cameron

[8] The Estate and Rusek II argue that, as a result of Orr's "involvement perpetuating fraud, the claim(s) against [Orr] were not known and could not have been brought without such knowledge."

[9] To the extent that the Estate and Rusek II attempt to argue that the trial court should have set aside the final judgment on the basis of intrinsic fraud, that issue is not properly before us and has not been adequately briefed.