SIGNED.

Dated: May 10, 2007



U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In re)	Chapter 7
DWAYNE L. SEITER and PATRICIA L. SEITER,)	CASE NO. 2: 05-bk 25971-RJH
	Debtors.)	
MISTY ANN DIWAN,)	ADVERSARY NO. 2.96-ap-00200-RJH
v.	Plaintiff,	
DWAYNE L. SEITER and PATRICIA L. SEITER,		MEMORANDUM DECISION RE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
	the friefing and	supplemental briefing on the motion for summary
//	<u> </u>	e Court concludes Defendants are entitled to
summary judgment		e court concludes Berendants are entitled to
Defendants' mo	tion asserts a def	ense of claim preclusion arising from the final
judgmententered by the Pina	l County Superio	r Court in MCS Investment Limited Partnership v.
Wheeler, Seiter and Tres Ent	erprises, CV 200	5-00285.
The claim precl	usion defense is g	governed by the law of the state of Arizona. ¹ The
Arizona law of claim preclus	on requires four	elements:
2. Common ide	ent on the merits entity of the parti entity of the subje	es;

¹ Beseder, Inc. v. Osten Art, Inc., 2006 W.L. 2730769 (D.Ariz. Sept. 25, 2006)

4. Common identity of the cause of action.²

The fact that the Pinal County Superior Court judgment was dismissal with prejudice is sufficient to conclude that it was a final judgment on the merits. Moreover, the evidence is clear that the parties, particularly the Plaintiff, actively participated in the litigation for a significant period of time.

As to the identity of the parties and cause of action, Arizona follows a transactional approach under which the test is "whether the same cause of action, or one so closely related that its proof depends on the same facts, has once been litigated." Here the undisputed facts reveal that the claim is for the same \$500,000 investment or loan that was made by MCS Investments and that was at issue in the Pinal Courty Superior Court action. It is also undisputed that the Plaintiff here, Misty Diwan, was the only party who had any controlling interest in MCS Investments, that she actively controlled that litigation or behalf of MCS Investments, and in fact verified the complaint on behalf of MCS Investments. These facts establish more than a sufficient privity and identity of the parties for the purposes of Arizona law of claim preclusion.

The undisputed facts establish that claim preclusion applies, and the final judgment entered by the Pinal County Superior Court bars this action. Defendants are therefore entitled to summary judgment.

Counsel for Defendants is requested to upload a form of final judgment.

PATED AND SIGNED ABOVE

Copy of the foregoing e-mailed this 10 day of May, 2007, to:

23 Nicolas J. Cornelius, Esq

Kendhammer Hergen bether & Cornelius

Attorneys for Plaintiff nick@klegalaz.com

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² *Id.*, citing *Hall v. Lalli*, 191 Ariz. 104, 106, 952 P.2d 748, 750 (App. 1997), *affd* 194 Ariz. 54, 977 P.2d 776 (1999).

³ Rousselle v. Jewett, 101 Ariz. 510, 513, 421 P.2d 529 (1966).

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/s/ Pat Denk Judicial Assistant

