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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0836**

General Contracting and Design Services, Inc.,
d/b/a Dusty Johnson General Contracting and Design,
Appellant,

vs.

Robert T. Fryberger, et al.,
Respondents,

CF Design, Ltd., et al.,
Defendants.

**Filed January 21, 2014
Reversed and remanded
Klaphake, Judge***

St. Louis County District Court
File No. 69DU-CV-11-3008

John Carver Richards, Honkanen & Richards, S.C., Virginia, Minnesota (for appellant)

Lara R.M. Nygaard, Steven C. Overom, Maki & Overom, Ltd., Duluth, Minnesota (for respondents)

Considered and decided by Connolly, Presiding Judge; Schellhas, Judge; and
Klaphake, Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

KLAPHAKE, Judge

Appellant General Contracting and Design Services, Inc. challenges summary judgment granted in favor of respondents Robert T. Fryberger and Susan E. Fryberger for claims arising from the construction of their home. Appellant argues that because its earlier lawsuit against respondents was dismissed without prejudice, the doctrines of res judicata and collateral estoppel do not preclude it from bringing a second action alleging the same claims. Because the first lawsuit adjudicated only respondents' counterclaims and appellant's claims were not determined on the merits, we reverse and remand for trial.

DECISION

A district court shall grant summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law.” Minn. R. Civ. P. 56.03. “[W]e review a grant of summary judgment to determine (1) if there are genuine issues of material fact and (2) if the district court erred in its application of the law.” *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008) (quotation omitted).

The district court's determination that appellant's claims are barred under the doctrines of res judicata or collateral estoppel is subject to de novo review. *Hauschildt v. Beckingham*, 686 N.W.2d 829, 837, 840 (Minn. 2004). “Fundamental” to the theories of res judicata and collateral estoppel “is that a right, question or fact distinctly put in issue

and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies.” *Id.* at 837 (quotation omitted). Collateral estoppel applies if an issue to be decided (1) is identical to one in a prior adjudication; (2) the estopped party was a party or was in privity with a party to the prior adjudication; (3) there was a final judgment on the merits; and (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue. *Id.* This appeal involves the third and fourth elements: whether there was a final judgment on the merits, and whether appellant had a full and fair opportunity to be heard on its claims. We conclude that these elements have not been satisfied.

Appellant sued respondents in 2009, alleging breach of contract and unjust enrichment; respondents counterclaimed, alleging various contractual and warranty breaches. (“*Johnson I*”). When appellant failed to prosecute the case, appellant’s claims were dismissed without prejudice, and default judgment was entered on the counterclaims. The court then proceeded to an evidentiary hearing to determine respondents’ damages on the counterclaims. During this hearing, the *Johnson I* court accepted some and rejected other damages claimed by respondents, entering judgment on respondents’ claims.

For purposes of collateral estoppel analysis, the *Johnson I* court’s decision constitutes a prior adjudication, and the parties are identical. However, the issues litigated and decided in *Johnson I* pertained to claims of faulty and unfinished construction, and the court solely determined respondents’ damages, which were offset

by the contract price of the home. The issue in this case is whether appellant has a cause of action in damages for unpaid stucco work and various oral work orders.

The *Johnson I* court explicitly dismissed appellant's claims without prejudice, noting that dismissal with prejudice would be an extreme sanction and that there was "no indication" that appellant was aware of its attorney's failure to prosecute the case. The district court's order expressly states that appellant's "claims were dismissed on procedural grounds," and, as such, respondents' "claims are all that remain." In an order denying the parties' request for taxation of costs and disbursements, the district court further stated that appellant's case was "dismissed without prejudice because of [appellant's] lack of prosecution of its case. This dismissal in favor of [respondents] was not on the merits." (Emphasis added.) Finally, the *Johnson I* court found that respondents were not entitled to damages but instead still owed \$2,234.53 to appellant on the parties' construction contract. However, the court did not order entry of judgment in favor of appellant for this amount. The lack of such an order is consistent with the *Johnson I* court's view that it had not adjudicated appellant's claims.

Based on this record, we cannot conclude that appellant's claims for unpaid stucco work and various oral work orders were determined on the merits or that appellant had a full and fair opportunity to be heard on those claims. The court's grant of summary judgment was based on its view that the *Johnson I* court decided both parties' claims by deciding contested issues in a default proceeding. But this view ignores the *Johnson I* court's explicit and repeated statements that appellant's claims were not adjudicated on the merits. As such, appellants are not precluded from raising these issues again. *See*

Smith v. Armstrong, 125 Minn. 59, 65, 145 N.W. 617, 619-20 (1914) (holding a dismissal without determination of the merits has no res judicata effect).

Because we conclude that the district court erred in granting summary judgment, we need not address the other issues raised by appellant.

Reversed and remanded.