

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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.”³ 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 County 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 on 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.

DATED AND SIGNED ABOVE

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

Nicolas J. Cornelius, Esq.
Kendhammer Hergenroether & Cornelius
Attorneys for Plaintiff
nick@klegalaz.com

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).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Clint W. Smith, Esq.
Clint W. Smith, P.C.
Attorneys for Defendants
clint.smith@azbar.org

/s/ Pat Denk
Judicial Assistant

SIGNED