

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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RUSSELL D. MARTIN,

Plaintiff-Appellant/Cross-Appellee,

v

COUNTY OF OAKLAND,

Defendant-Appellee/Cross-Appellant.

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UNPUBLISHED

June 23, 1998

No. 200487

Oakland Circuit Court

LC No. 96-515963 CL

Before: Whitbeck, P.J., and MacKenzie and Murphy, JJ.

PER CURIAM.

Plaintiff began working for defendant county in 1975, receiving appointment as deputy director of the county's department of management and budget in 1983. Subsequently he was appointed director of the department, and he remained in that position until December 31, 1992. When his employment with the county ended, plaintiff was not paid for accumulated leave time. This case involves plaintiff's claim that, as an appointed deputy director and director, he was entitled to accumulate sick leave and annual leave under the county's service rules, referred to as "the merit system." Plaintiff appeals as of right from an order granting summary disposition in favor of defendant, and defendant cross-appeals. We affirm.

Following plaintiff's appointment as deputy director in 1983, the county's supervisor of employee records informed plaintiff in writing that directors such as plaintiff, appointed under 1973 PA 139, MCL 45.551 *et seq.*; MSA 5.302(51) *et seq.* (Act 139), were excluded from the provisions of the county's merit system that governed the accumulation of sick leave and annual leave; this meant that plaintiff would no longer accumulate leave time. At that time, plaintiff, given the option of cashing out or "banking" his annual leave days, opted to cash out, and received payment for his accumulated annual leave in August 1983.

Nine years later, in August 1992, plaintiff learned that another department director had filed a claim for accumulated leave time, and that the county's personnel director considered the claim to be valid under the merit system policy. After speaking with defendant's personnel director and reviewing three opinion letters, plaintiff believed that he should have been accruing leave time since 1983. His

claim for payment for accumulated leave time was denied on January 22, 1993, and this case – originally brought in federal court – followed.

On appeal, plaintiff argues that defendant’s defenses in this case were barred by the doctrines of res judicata and collateral estoppel. However, the first action between the parties was not decided on the merits. The federal circuit court reversed the district court’s order granting defendant’s motion for summary judgment on plaintiff’s contract claim. The circuit court then remanded the claim to the district court and ordered it to dismiss plaintiff’s contract claim without prejudice in order to allow plaintiff to bring the claim in state court. The decision whether to grant dismissal with or without prejudice, by definition, determines whether a party may refile a claim or whether the claim is permanently barred. *ABB Paint Finishing, Inc v Nat’l Union Fire Ins Co of Pittsburgh, PA*, 223 Mich App 559, 562; 567 NW2d 456 (1997).

Nor were defendant’s defenses barred by collateral estoppel. 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 litigated. *Hawkins v Murphy*, 222 Mich App 664, 671-672; 565 NW2d 674 (1997). The federal court’s order was not a valid final judgment on plaintiff’s breach of contract claim. Accordingly, the doctrine of collateral estoppel does not preclude defendant from asserting in the present claim its previously-pleaded defenses.

Plaintiff also argues that the trial court erred in granting summary disposition in favor of defendant on his breach of contract claim. Again, we disagree. While the trial court did not specify under which subrule it granted summary disposition, the trial court considered deposition testimony and other documentary evidence in the course of its decision. Accordingly, we conclude that summary disposition was granted under MCR 2.116(C)910). See *Marx v Dep’t of Commerce*, 220 Mich App 66, 70; 558 NW2d 460 (1996). In considering whether to grant summary disposition under MCR 2.116(C)(10), a court must view the documentary evidence available to it and grant summary disposition if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id.* We review a grant of summary disposition de novo. *Id.* Plaintiff’s claim is based on the provisions of the merit system. As noted by the trial court, however, the merit system explicitly states that its coverage does not include the director of management and budget. Furthermore, § 15 of Act 139 specifically provides that “a department head and any deputy appointed thereunder is exempt from civil service.” Plaintiff testified at his deposition that the common understanding was that appointed directors did not accumulate leave and did not need approval to take leave because they were not limited to any particular amount of annual and sick leave time. This was consistent with the county’s practice of discontinuing the accumulation of leave time for Act 139 appointees. Plaintiff was aware of that practice; he received written notification in 1983 that, as an Act 139 appointee, he would no longer be entitled to accumulate sick or annual leave. While leave records were kept for other employees, no such records were kept for Act 139 appointees – again consistent with the policy that they were not entitled to accumulate leave time. Plaintiff himself, as the county’s chief financial officer, did not budget for the cost of leave time for Act 139 appointees when preparing salary projections because he knew that these employees did not receive leave time benefits. Clearly,

the parties did not recognize the accumulation and use of leave time as a term or condition of plaintiff's employment. Contractual undertakings are determined under the "objective theory of assent", focusing on how a reasonable person in the position of promisee would have interpreted the promisor's statements or conduct. *Rood v General Dynamics Corp*, 444 Mich 107, 119; 507 NW2d 591 (1993). Even accepting plaintiff's version of events, no reasonable person in plaintiff's position could have regarded himself as having a contractual right to accumulate leave time during the time in question. The trial court therefore properly granted summary disposition in favor of defendant on plaintiff's breach of contract claim.

In view of our holding, we need not reach the issue raised in defendant's cross-appeal.

Affirmed.

/s/ William C. Whitbeck  
/s/ Barbara B. MacKenzie  
/s/ William B. Murphy