

STATE OF MICHIGAN
COURT OF APPEALS

EDWARD HANNUM,

Plaintiff-Appellant,

v

MICHIGAN BELL TELEPHONE COMPANY,
a/k/a AMERITECH MICHIGAN, and AMERITECH
CORPORATION,

Defendants-Appellees.

UNPUBLISHED

July 31, 1998

No. 199910

Wayne Circuit Court

LC No. 96-640843 NZ

Before: Neff, P.J., and O'Connell and Young, Jr., JJ.

PER CURIAM.

Plaintiff Edward Hannum appeals as of right from the circuit court's order of summary disposition entered in favor of his former employers, defendants Michigan Bell Telephone Company and Ameritech Corporation pursuant to MCR 2.116(C)(7). The court held that plaintiff's age discrimination claim was barred by a release executed by plaintiff upon his termination because plaintiff failed to tender back the consideration received in exchange for the release before or simultaneously with the filing of this case. We affirm.

I

Plaintiff was employed by defendants from April 6, 1970, until he was terminated on September 22, 1993, as the result of internal restructuring. At the time of his termination, plaintiff was offered a severance package. As a condition of receiving the severance package, plaintiff was required to sign a "Transitional Staffing Separation Pay Plan Termination Agreement, Waiver and Release" (the "agreement"). The release provisions of the agreement provided in pertinent part:

For and in consideration of the special benefits and enhancements paid to me and described herein under the Plan, I for myself, heirs, administrators, executors, and successors, do hereby fully and forever release . . . the Company . . . of and from any and all . . . causes of actions . . . of any nature whatsoever, in law or equity, from the beginning of time up to the date of execution of this Agreement and which relate to my employment with the Company or any Affiliated Company or my separation from

employment, including but not limited to . . . the employment discrimination laws of the state of my employment. . . .

According to plaintiff, defendants represented that they were being neutral regarding age in deciding which employees to terminate. At the age of forty-nine, plaintiff was concerned about securing equivalent employment and had many financial obligations; consequently, he was reluctant to reject the offer of a severance package. Plaintiff claims that he signed the agreement under duress of impending unemployment and in reliance upon defendants' representations that their termination decisions were not related to age. Plaintiff claims that between two and three years after his termination, he learned that defendants actually terminated him because they had instituted a new policy whereby they sought to hire new employees who were under forty-five years of age.¹ Plaintiff further alleges that he was replaced by a substantially younger person. Plaintiff brought this case alleging that defendants terminated him based in part on his age in violation of the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*

II

The public policy of Michigan favors settlements. *Stefanac v Cranbrook Educational Community (After Remand)*, 435 Mich 155, 163; 458 NW2d 56 (1990). "A party entering into a settlement agreement, offering adequate consideration, is entitled to rely on the terms of the agreement." *Id.* Consequently, settlement agreements are binding until rescinded for cause. The plaintiff has the burden of showing, by a preponderance of the evidence, that the release is unfair or incorrect on its face. *Id.* at 165. Furthermore, tender of consideration received is a condition precedent to the right to repudiate the release. *Id.* In order to preserve the right to challenge or rescind a release agreement, tender-back must be made before or simultaneously with the filing of a suit alleging a cause of action arising out of the release agreement. *Id.* at 175.

Plaintiff concedes that he did not tender back to defendants the consideration he received under the agreement before or simultaneously with filing this case; however, plaintiff maintains that his claim falls within two recognized exceptions to the tender-back rule, and thus, the trial court erred by granting summary disposition in favor of defendants. This Court reviews a summary disposition determination de novo. *Horace v City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998).

A

In *Stefanac*, *supra* at 165, our Supreme Court cited two exceptions to the tender-back rule: (1) fraud in the execution and (2) waiver of the plaintiff's duty by the defendant. With regard to the fraud exception, plaintiff claims that he signed the agreement in reliance upon defendants' false representations that they were not using age as a factor in making the decision to fire him and others. According to plaintiff, he alleged sufficient facts to establish a common-law fraud claim. However, plaintiff's claim is not based upon fraud in the *execution*; rather, it is based upon fraud in the *inducement*, which has been rejected as an exception to the tender-back rule.

Fraud in the execution occurs when a party is made to believe that he is signing something other than the release, while fraud in the inducement goes to inducing a party, by fraud, to sign a release the

effect of which he understands. *Id.* at 165-166. While fraud in the execution is a recognized exception to the tender-back rule, a party claiming fraud in the inducement is still required to tender back to the defendant the consideration given in exchange for execution of the release. *Id.* at 165-167. Plaintiff does not contend that he was unaware of or did not understand the nature of the release; rather, plaintiff claims that defendant's fraudulent representations induced him to execute the release. Therefore, plaintiff's claim does not fall within the fraud in the execution exception.

B

Plaintiff also claims that defendants waived his obligation to tender the consideration that he received under the agreement. Plaintiff's waiver argument relies on litigation brought by other former employees of defendants in the United States District Court for the Eastern District of Michigan (*Raczak v Ameritech Corp.*, Civil Case 93-72697) under the Age Discrimination and Employment Act (ADEA), 29 USC 621 *et seq.*, before plaintiff filed the instant case. Specifically, the plaintiffs in that case claimed that they did not "knowingly and voluntarily" waive their rights within the meaning of § 626 of the ADEA, otherwise known as the Older Worker's Benefit Protection Act (OWBPA). The OWBPA provides a list of specific informational requirements that must be met by an employer before an employee's execution of a release is considered knowing and voluntary. The district court held that the defendant failed to comply with one of the informational requirements, 29 USC 626(f)(1)(H)(ii), which requires the employer to disclose the job titles and ages of all the individuals selected for the employment termination program, and the ages of all individuals in the same job classification or organizational unit who were ineligible or not selected for the program. As a result, the releases, which were virtually identical to the release at issue in this case, were not made knowingly and voluntarily and did not bar the plaintiffs from bringing an action under the ADEA. The district court also held that it would be inequitable and contrary to the protective nature of the OWBPA to require the plaintiffs to tender back the consideration received in exchange for executing waivers where he waivers were obtained in violation of the OWBPA.²

Plaintiff claims that the federal court ruling effectively destroyed the contract of release between defendants and plaintiff and that defendants could no longer rely on the release as a shield from liability in this case. According to plaintiff, defendants should have approached plaintiff to amend the release or to demand the consideration back from plaintiff. Plaintiff claims that by failing to take any action in response to the district court's decision, plaintiff claims that defendants waived their right to tender. However, simply because the releases at issue in *Raczak* were held invalid under the ADEA does not mean that the release executed by plaintiff is invalid for purposes of this case or prevents application of the tender-back rule under Michigan law. Moreover, plaintiff failed to cite any relevant case law in support of his claim that a defendant is required to affirmatively demand tender, or risk waiver of its rights. Rather, the burden is on the plaintiff to tender back before or simultaneously with the filing of a suit alleging a cause of action arising out of the release agreement. *Stefanac, supra* at 175.

C

Plaintiff also argues that he had already earned or was otherwise entitled to the money and benefits conferred on him at the time he executed the agreement. In other words, plaintiff claims that the benefits he received pursuant to the agreement were not "consideration" for his execution of the

agreement that must be tendered back to defendants. A similar argument was rejected by our Supreme Court in *Stefanac, supra* at 164. Here, plaintiff does not deny that he received the benefits cited in the agreement. Moreover, by the express terms of the agreement, which was signed by plaintiff, he released defendants “for and in consideration of the special benefits and enhancements paid to [him] and described herein under the Plan.”

The circuit court properly determined that plaintiff failed to establish that his claim fell within either the fraud or waiver exceptions to the tender-back rule.

III

Next, plaintiff claims that the trial court erred in dismissing plaintiff’s claim because the release only purports to affect facts or events occurring up to the signing of the release. Plaintiff argues that it was not until after he signed the agreement that he was replaced with a substantially younger person, thus establishing a prima facie case of age discrimination. We disagree.

The release portion of the agreement provides that plaintiff released defendants “from any and all demands, actions, causes of action . . . of any nature whatsoever, in law or equity, from the beginning of time up to the date of execution of this Agreement and which relate to [his] employment with the Company or any Affiliated Company or [his] separation from employment.” Contrary to plaintiff’s argument, we find that plaintiff’s age discrimination claim related to his employment and existed at the time of his termination, despite the fact that he did not discover his claim until after the release was executed. The broad language of the release includes “any and all” claims, including those that may have been unknown at the time the release was executed. See *Dresden v Detroit Macomb Hospital Corp*, 218 Mich App 292; 553 NW2d 387 (1996).

IV

In *Stefanac, supra* at 177, our Supreme Court recognized the harshness of the tender-back rule, but found it necessary to preserve the stability and integrity of release agreements. Because defendant failed to tender back the severance pay before or simultaneously with the commencement of his age discrimination claim, the trial court properly dismissed the claim.

Affirmed.

/s/ Janet T. Neff
/s/ Peter D. O’Connell
/s/ Robert P. Young, Jr.

¹ During a videotaped teleconference twelve days before plaintiff’s termination an agent of defendants stated, “We want to get back and start bringing in some folks that are under 45 years old.” The videotape was aired on a television news program on April 4, 1995.

² The decision of the district court was affirmed in part and reversed in part by the Sixth Circuit in *Raczak v Ameritech Corp*, 103 F3d 1257 (CA 6, 1997).