STATE OF MICHIGAN

COURT OF APPEALS

EDWARD J. HOLLAND, JR.,

Plaintiff-Appellant,

v

JOBETE MUSIC COMPANY, INC, MOTOWN RECORD CORP, BERRY GORDY, JR., JOHN DOE, RICHARD ROE and WALTER SNOW,

Defendants-Appellees.

UNPUBLISHED
April 27, 1999

No. 199539
Wayne Circuit Court
LC No. 88-15355 CK

Before: Sawyer, P.J., and Fitzgerald and Saad, JJ.

PER CURIAM.

Plaintiff appeals as of right from various orders by the trial court granting defendants' motions for partial summary disposition under MCR 2.116(C)(7) (res judicata) and (C)(10) (failure to demonstrate genuine issue of material fact). Plaintiff also appeals orders denying his motions to disqualify the trial court judge. We affirm.

I

FACTS AND PROCEEDINGS

Plaintiff filed this lawsuit in 1988. To a large extent, it reiterates claims and allegations plaintiff and his fellow songwriters raised in a 1968 lawsuit against defendants which was dismissed with prejudice in 1972 pursuant to a general mutual release. In 1996, following years of numerous contentious motions and pleadings, Wayne Circuit Judge William J. Giovan granted defendants' summary disposition motions, thereby dismissing the last remaining claims of plaintiff's ten-count lawsuit.

I

Res Judicata

Plaintiff argues that the trial court erroneously dismissed Counts I and III on the basis of res judicata. We disagree.

We review a trial court's grant or denial of a motion for summary disposition pursuant to MCR 2.116(C)(7) (includes res judicata) de novo to determine whether the moving party was entitled to judgment as a matter of law. *Limbach v Oakland County Bd of County Road Com'rs*, 226 Mich App 389, 395; 573 NW2d 336 (1997).

Judge Giovan concluded that res judicata barred any issues regarding the legitimacy of the contract, sub-statutory rates for compulsory licenses, and breach of fiduciary duty: in sum, the court dismissed all of plaintiff's claims as barred by res judicata except those predicated on defendants' conduct since 1972.[1] Res judicata bars an action when the following conditions are satisfied: (1) a former suit was decided on the merits, (2) the issues in the second action were or could have been resolved in the former action, and (3) both actions involved the same parties or their privies. *Phinisee v Rogers*, 229 Mich App 547, 551-552; 582 NW2d 852 (1998). Motions for summary disposition on res judicata raise a question of law, which we review de novo on appeal. *Id.*, 552. A dismissal with prejudice pursuant to a voluntary release constitutes a decision on the merits for res judicata purposes. *Limbach, supra*, 226 Mich App 395-396. Here, the first and third res judicata elements are clearly satisfied. This leads to the question of whether plaintiff's claims for breach of contract and breach of fiduciary duty were raised, or could have been raised, in the previous action.

Claims based on sub-statutory rates for compulsory licenses. Plaintiff argues that his claims pertaining to the sub-statutory rates for compulsory licenses were not covered by the agreement and, therefore, not barred by res judicata. Plaintiff argues that because the release was silent on the issue of sub-statutory rates, he is entitled to introduce parol evidence to show that the settlement was not intended to cover this issue. A voluntary dismissal constitutes a decision on the merits, with res judicata effect, where, as here, the dismissal was "with prejudice." *In re Koernke Estate*, 169 Mich App 397, 400; 425 NW2d 795 (1988); *Brownridge v Michigan Mutual Ins Co*, 115 Mich App 745, 748; 321 NW2d 798 (1982). Accordingly, once a claim is released with prejudice pursuant to a settlement agreement, a party may revive issues which were or could have been raised in the prior litigation by asserting that he did not intend for that release to cover those issues. (See, for example, *Limbach, supra*, where the plaintiff's stipulation to dismissal of prejudice of action with one party had res judicata effect on her lawsuit against a different party.)

Plaintiff also argues that res judicata cannot bar claims pertaining to sub-statutory rates because his claim is based on payment of sub-statutory rates after the 1972 release and dismissal. However, before plaintiff can claim damages for the sub-statutory licenses, he must first establish that such license arrangements were a violation of either the contract or defendants' fiduciary obligations. The 1965 contract does not expressly obligate defendants to utilize the statutory rate. This was an issue which could have been, and in fact was, raised in the 1968 lawsuit. Res judicata therefore bars any claims to the extent that they are predicated on defendants' negotiation of sub-statutory rates for compulsory licenses. *Koernke, supra* 169 Mich App 400; *Brownbridge, supra*, 115 Mich App 748.

Breach of fiduciary duty. Plaintiff argues also that Judge Giovan erroneously granted defendants summary disposition on Count III, breach of fiduciary duty. To establish a breach of fiduciary duty, the plaintiff must demonstrate a fiduciary relationship between himself and defendants. "A fiduciary relationship arises from the reposing of faith, confidence, and trust, and the reliance of one upon the judgment and advice of another." *Ulrich v Federal Land Bank*, 192 Mich App 194, 196; 480 NW2d 910 (1991), see also *Beaty v Hertzberg & Golden*, 456 Mich 247, 260; 571 NW2d 716 (1997) . "Relief is granted when such position of influence has been acquired and abused, or when confidence has been reposed and betrayed." *Vicencio v Ramirez*, 211 Mich App 501, 508; 536 NW2d 280 (1995).

Plaintiff claims that res judicata does not bar his breach of fiduciary duty action because defendants' fiduciary duties survived the 1972 release and dismissal. This argument is deficient for the same reason as the sub-statutory rate argument. In order for plaintiff to prevail on a breach of fiduciary duty occurring after 1972, he would have to establish either that such a duty was created by his 1960s dealings with defendants or that a fiduciary relationship was established after 1972. Res judicata bars plaintiff from asserting that a fiduciary relationship was established by events in the 1960s; he raised this claim in 1968, and it was dismissed with prejudice in 1972. Plaintiff has not attempted to show the creation of a fiduciary relationship after 1972; his argument is based on claims that defendants incurred a fiduciary duty as a result of their conduct and representations in the 1960s. Moreover, once plaintiff filed his 1968 lawsuit, he and defendants became adverse parties, thus precluding a fiduciary relationship. See *Nederlander v Nederlander*, 205 Mich App 123, 127; 517 NW2d 768 (1994) (no fiduciary relationship between husband and wife in divorce proceedings, because "there certainly was no reposing of faith, confidence, and trust and the placing of reliance by one party upon the judgment and advice of the other party.") Accordingly, res judicata bars his claim for breach of fiduciary duty.

Moreover, prior to Judge Giovan's decision, Judge White concluded that plaintiff's allegations did not actually establish a breach of fiduciary duty. She gave plaintiff permission to amend Count III in order to establish that a breach had occurred. Therefore, even if plaintiff could establish a fiduciary relationship, and even if this claim were not barred by res judicata, the striking of the First Amended Complaint would still be fatal to Count III. (See Section III below.) Indeed, plaintiff implicitly concedes this point by arguing in this appeal only that his breach of fiduciary duty claim *would* have been valid *if* Judge Giovan had not struck the First Amended Complaint.

II

Summary Disposition of Count II

Plaintiff contends that Judge Giovan improperly dismissed Count II. We disagree. When reviewing a motion for summary disposition based on MCR 2.116(C)(10), our task is to determine whether any genuine issue of material fact exists in order to prevent entering a judgment for the moving party as a matter of law. As such, we review the lower court's decision de novo. We must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the party opposing the motion, and grant the benefit of any reasonable doubt to the opposing party. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). A party opposing a motion brought

under MCR 2.116(C)(10) may not rest upon the mere allegations or denials in that party's pleadings, but must by affidavit, deposition, admission, or other documentary evidence set forth specific facts showing that there is a genuine issue for trial. *Lash v Allstate Ins Co*, 210 Mich App 98, 101; 532 NW2d 869 (1995). Where the opposing party fails to come forward with evidence, beyond allegations or denials in the pleadings, to establish the existence of a material factual dispute, the motion is properly granted. *Id.*

With regard to Count II, Judge Giovan determined that the contract's six-month limitation period barred plaintiff from raising any royalty claims unless he had made a written objection within six months of receiving the royalty statement.[2] He ordered an audit to allow plaintiff to ascertain the accuracy of the royalty statements to which plaintiff had made a timely objection. According to defendants' uncontroverted affidavit, plaintiff's representatives inspected the documents and requested photocopies, but never collected the copies and never made an evidentiary showing that the statements were inaccurate. Defendants also submitted the uncontroverted affidavit of Erlinda Barrios, Motown's royalty director, showing that plaintiff has received all royalties due to him. Accordingly, there is no material issue of fact, and defendants were entitled to summary disposition of Count II.

III

Plaintiff's First Amended Complaint

Plaintiff contends that Judge Giovan wrongfully struck his First Amended Complaint, and in consequence, wrongfully granted defendants summary disposition on Count III, breach of fiduciary duty. We have already concluded that Count III was barred by res judicata, so it is not necessary for us to consider whether the claim could have been sufficiently bolstered with the allegations in the First Amended Complaint. Nonetheless, because plaintiff has alleged that Judge Giovan's decision to strike the complaint was motivated by bias, we will consider this issue. We conclude that the First Amended Complaint was properly stricken.

When a party attempts to amend a pleading more than 14 days after being served with a responsive pleading, MCR 2.118(A)(2) provides that he may do so "only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires." Here, Judge White's order permitting the amendment of Count III can be construed as granting leave to amend the complaint. Plaintiff has not made any argument to the effect that Judge Giovan's order to strike was contrary to MCR 2.118(A)(2). Instead, the issue is framed as whether Judge Giovan properly struck the pleading after Judge White gave plaintiff leave to amend.

MCR 2.115(B) provides that the trial court "may strike from a pleading redundant, immaterial, impertinent, scandalous, or indecent matter, or may strike all or part of a pleading not drawn in conformity with these rules." Here, Judge Giovan struck the amended complaint because the pleading was contrary to MCR 2.111 and 2.118 and because it went beyond the scope of Judge White's order permitting leave.

MCR 2.111 requires that allegations "be clear, concise, and direct." MCR 2.111(A)(1). Although neither the parties nor the trial court has cited it, Plaintiff's First Amended Complaint clearly does not meet these requirements. It is a confusing array of accusations and allegations which do not fit into the breach of fiduciary allegation claim in any readily recognizable fashion. Furthermore, the pleading appears to be adding claims for relief on theories such as fraud and misrepresentation. This is contrary to MCR 2.112(B), which provides that "the circumstances constituting fraud or mistake must be stated with particularity." Additionally, although defendants and the trial court have not cited it, the pleading is contrary to MCR 2.113(E)(3), which requires that "[e]ach statement of a claim for relief founded on a single transaction or occurrence or on separate transactions or occurrences, and each defense other than a denial, must be stated in a separately numbered count or defense."

Supplemental pleadings are governed by MCR 2.118(E):

> *On motion of a party* the court may, on reasonable notice and on just terms, permit the party to serve a supplemental pleading to state transactions or events that have happened since the date of the pleading sought to be supplemented, whether or not the original pleading is defective in its statement of a claim for relief or a defense. The court may order the adverse party to plead, specifying the time allowed for pleading.

Defendants argue that plaintiff's First Amended Complaint is really a supplemental pleading, because it is largely based on events taking place after the original complaint was filed. As discussed above, several of plaintiff's allegations were indeed predicated on events since 1988. Under these circumstances, it was reasonable for Judge Giovan to conclude that the First Amended Complaint, filed pursuant to Judge White's comparatively narrow ruling, was an attempt to seek relief for post-1988 events without observing the requirements of MCR 2.118(E).

Finally, it was also reasonable for Judge Giovan to conclude that plaintiff went far beyond the scope of Judge White's ruling in order to introduce numerous extraneous matters. As stated above, plaintiff could amend his complaint only with the court's leave. MCR 2.118(A)(2). Judge White granted limited permission for the amendment: to add allegations from Counts VI and VIII that defendants breached a fiduciary duty; and to add allegations that defendants' delay in paying the IRS caused penalties and interest to accrue. Instead of staying within these confines, plaintiff added numerous other allegations. Judge Giovan's motion to strike was not an abuse of discretion.

We have already determined that plaintiff's Count III was barred by res judicata. Plaintiff's failure to file an amended complaint to support the breach of fiduciary duty claim constitutes another basis for dismissing Count III.

IV

Judicial Bias Issues

Plaintiff has made numerous spurious allegations and unfounded accusations that Judge Giovan was biased and acted improperly. These are completely void of merit.

MCR 2.003(B)(1) provides that a judge is disqualified when he cannot impartially hear a case because he is "personally biased or prejudiced for or against a party or attorney." In *Cain v Dep't of Corrections*, 451 Mich 470; 548 NW2d 210 (1996), our Supreme Court set forth the requisite level of proof to warrant disqualification for alleged bias:

> MCR 2.003(B)(1) requires a showing of *actual* bias. Absent actual bias or prejudice, a judge will not be disqualified pursuant to this section. *In re Forfeiture of $1,159,420*, 194 Mich App 134, 151; 486 NW2d 326 (1992); *Mourad v Automobile Club Ins Ass'n*, 186 Mich App 715, 731; 465 NW2d 395 (1991); *Band v Livonia Associates*, 176 Mich App 95, 118; 439 NW2d 285 (1989).
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> Coupled with the requirement of actual bias, (B)(1) also requires that the judge be "personally" biased or prejudiced in order to warrant disqualification pursuant to this section. The federal disqualification statutes similarly contain the requirement that the bias or prejudice be "personal" in nature. See 28 USC § 144 ("the judge ... has a personal bias or prejudice either against [a party] or in favor of any adverse party"), and 28 USC § 455(b)(1) ("Where [the judge] has a personal bias or prejudice concerning a party"). As a result of this statutory language, the federal courts have developed what is commonly known as the "extrajudicial source" rule.
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> Simply stated, a showing of "personal" bias must usually be met before disqualification is proper. This requirement has been interpreted to mean that disqualification is not warranted unless the bias or prejudice is both personal and extrajudicial. Thus, the challenged bias must have its origin in events or sources of information gleaned outside the judicial proceeding. [*Cain*, 495-496.]

Quoting from the United States Supreme Court decision *Liteky v United States*, 510 US 540, 550; 114 S Ct 1147; 127 L Ed 2d 474 (1994), the *Cain* Court held that the words "bias" and "prejudice"

> connote a favorable or unfavorable disposition or opinion that is somehow *wrongful* or *inappropriate*, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess . . ., or because it is excessive in degree . . . . [Emphasis in original.]
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> . . . .
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> First, judicial rulings alone almost never constitute valid basis for a bias or partiality motion. . . . In and of themselves (i.e., apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required . . . when no extrajudicial source is involved. . . . Second, opinions

> formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion *unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible*. [*Cain, supra* at 496, quoting *Liteky, supra,* 550, 555. Emphasis added; internal quotes omitted.]

The *Cain* Court emphasized that "the party who challenges a judge on the basis of bias or prejudice must overcome a heavy presumption of judicial impartiality." *Id.*, 497.

Here, plaintiff has clearly failed to overcome this presumption. Plaintiff produced no evidence of bias and his conclusory assertions of bias are based entirely on events occurring during these proceedings. These events—even when considered in their totality—do not come close to the "deep-seated favoritism or antagonism" required for disqualification based on non-extrajudicial happenings. *Id.*, 496. Plaintiff's insistence that Judge Giovan made adverse rulings on discovery and summary disposition motions does not establish bias. *Id.* In any event, plaintiff has failed to demonstrate that any of Judge Giovan's rulings were erroneous.

Moreover, a thorough review of the transcripts of proceedings reveals no evidence of impartiality, either on the basis of a personal dislike of plaintiff's counsel or racial prejudice. Nothing in the record substantiates plaintiff's allegation that Judge Giovan made "disparate" rulings to defendants' advantage and plaintiff's detriment. Plaintiff's evidence of bias is thus wholly inadequate under the *Cain-Litkey* standard. Likewise, we find nothing to support plaintiff's contention that Judge Giovan's "contact" with a non-party's wife and attorney was improper. Indeed, Judge Giovan exhibited admirable self-restraint in dealing with plaintiff's counsel's outbursts.

We affirm.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Henry William Saad

[1] Plaintiff argues that defendants' obligations under the 1965 songwriters' agreement continued after the 1968 lawsuit was dismissed, and that res judicata could not bar any claims relating to defendants' breaches occurring after 1972. In fact, Judge Giovan did not rule that res judicata barred royalty claims arising after 1972.

[2] Judge Giovan was free to make this ruling, because Judge White previously denied defendants' summary disposition motion on contractual limitations without prejudice. Furthermore, plaintiff never adduced any evidence to establish that the six-month period was not binding. Although plaintiff has not argued on appeal that Judge Giovan erred in holding him to the contractual limitations period, we briefly note that this ruling was correct. Parties to a contract are free to establish a contractual limitations

period which is shorter than the applicable statutory limitations period, *Camelot Excavating v St Paul Ins*, 410 Mich 118, 133-135; 301 NW2d 275 (1981), hence, there is nothing inherently unenforceable about this provision. Furthermore, because the provision is clear and unambiguous, we must construe it and enforce it in accordance with the language's plain and ordinary meaning. *UAW-GM V KSL Recreation Corp*, 228 Mich App 486, 492; 579 NW2d 411 (1998).