# STATE OF MICHIGAN

# COURT OF APPEALS

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OYO E. EKPE,

Plaintiff-Appellant,

v

DETROIT BOARD OF EDUCATION and TEAMSTERS LOCAL 214,

Defendants-Appellees.

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UNPUBLISHED
March 7, 2000

No. 209651
Wayne Circuit Court
LC No. 96-641972-CK

Before: Jansen, P.J., and Collins and J. B. Sullivan[*], JJ.

PER CURIAM.

Plaintiff appeals as of right, challenging the order granting summary disposition to defendant Detroit Board of Education (the Board) and the order dismissing defendant Teamsters Local 214 (Local 214) from the circuit court case for failure to serve process. We affirm in part, reverse in part, and remand for further proceedings.

Plaintiff argues that the circuit court erred in dismissing Local 214 for nonservice of process. This Court reviews interpretation of court rules de novo as a question of law. *In re Gosnell*, 234 Mich App 326, 333; 594 NW2d 90 (1999). The proper manner to serve a partnership association or unincorporated voluntary association, such as Local 214, is set forth in MCR 2.105(E), which provides in pertinent part:

> Service of process on a partnership association or an unincorporated voluntary association may be made by
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> (1) serving a summons and a copy of the complaint on an officer, director, trustee, agent, or person in charge of an office or business establishment of the association, and

[*] Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

(2) sending a summons and a copy of the complaint by registered mail, addressed to an office of the association.

Generally, defective service of process will not warrant dismissal of a party's pleading unless the service failed to notify the defendant of the action "within the time prescribed for service." MCR 2.105(J)(3); *In re Estate of Gordon*, 222 Mich App 148, 157; 564 NW2d 497 (1997). A complete failure of service, such as failure to serve the summons with the complaint within the time for service, warrants dismissal for improper service of process. *Id.* at 157-158. However, a party who enters a general appearance and contests a cause of action on the merits submits to the court's jurisdiction and waives any objections to service of process. *Id.* at 158; *Penny v ABA Pharmaceutical Co (On Remand)*, 203 Mich App 178, 181; 511 NW2d 896 (1993).

Plaintiff filed his complaint against defendants in the circuit court on October 1, 1996. His attorney, Ellis Boal, left a copy of the summons, complaint, and a set of his labels at the office of attorney Doyle O'Connor, who had represented defendant Local 214 in an action brought by plaintiff and involving the same facts before the Michigan Employment Relations Commission (MERC). Boal attached a letter asking O'Connor to accept service on behalf of Local 214 or return the pleadings if he could not accept service. O'Connor did not return the pleadings, nor did Local 214 answer the complaint. Subsequently, O'Connor and Boal had some conversations and exchanged a series of letters concerning the circuit court case. In his letters, which were copied to Local 214's president, O'Connor made a number of requests, including a request that Boal voluntarily dismiss the complaint or at least strike some of the claims. However, in a letter dated December 12, 1996, O'Connor told Boal that he had not accepted service on behalf of Local 214 and was not authorized to do so. In a December 18, 1996, letter, Boal acknowledged receiving this message, stated that he was "nonplussed by your waiting till December 12 to tell me that you don't yet know whether you have accepted service for the local," and further stated that he considered O'Connor to have accepted service.

The circuit court rejected plaintiff's argument that O'Connor's failure to return the pleadings and his subsequent requests for concessions and a stipulation from plaintiff constituted a waiver of any objections to service of process. The court found that Boal knew by at least December 18, 1996, that O'Connor disclaimed any authority to accept service for Local 214 and that Boal could have formally served the union before the summons expired on December 31, but did not do so. The court further found that Local 214 never received a copy of the summons and complaint and, accordingly, dismissed the union from the case.

We affirm the circuit court's dismissal of Local 214. First, because O'Connor had no actual authority to act in this matter on behalf of Local 214, service of process on him was not sufficient to serve Local 214. See *Wright v Estate of Treichel*, 36 Mich App 33, 36-37; 193 NW2d 394 (1971). Moreover, O'Connor's actions were not sufficient to constitute a general appearance. This case is distinguishable from *Penny, supra*. In *Penny*, one of the corporate defendants was not served with process, yet the defendant's attorney was appointed to the steering committee set up by the defendants to facilitate their defenses and communication among the parties, was present and participated in special motion days set by the trial court, and sent a letter to the plaintiff's counsel that enclosed an order granting an extension for answering interrogatories. *Penny, supra* at 182. This Court found that these

actions indicated that the defendant was aware of the action against it, had retained attorneys who participated in the proceedings, and that the attorney's actions were sufficient to constitute a general appearance. *Id.* Here, however, O'Connor informed Boal that he did not act with actual authority from the union, and none of O'Connor's actions or communications involved the court. Finally, although Boal was told weeks before the service deadline that O'Connor acted without authority, he did nothing to formally serve Local 214.

Next, plaintiff challenges the grant of summary disposition to defendant Detroit Board of Education. After plaintiff was terminated from his position as a mechanic for the Board, Local 214 filed a grievance on his behalf and a hearing was held before an arbitrator. Prior to the arbitrator's decision, plaintiff filed a complaint with the MERC against Local 214, alleging that the union had breached its duty of fair representation in handling plaintiff's discharge grievance. A record was made before an administrative law judge, but before she rendered an opinion, plaintiff, who was not represented by counsel, wrote a letter to the judge stating that he was "dropping the case without prejudice." MERC director Shlomo Sperka notified the parties that plaintiff's withdrawal request had been approved and the matter was closed. Counsel for Local 214, Doyle O'Connor, wrote a letter asking for clarification, and Sperka responded in another letter, stating that "both parties had a full opportunity to secure a decision from the Commission, which opportunity was waived by the withdrawal. Accordingly, although the withdrawal letter used the term 'without prejudice' the Commission would consider the matter closed." The circuit court granted summary disposition to the Board on the narrow ground that the MERC dismissal of plaintiff's case against the union was with prejudice and, therefore, plaintiff would not be able to make the requisite showing of a breach of the union's duty of fair representation in his case against the Board for breach of the collective bargaining agreement.

This Court reviews de novo both the trial court's decision to grant summary disposition and issues concerning the application of the doctrines of collateral estoppel or res judicata. *Wayne Co v City of Detroit*, 233 Mich App 275, 277; 590 NW2d 619 (1998); *McMichael v McMichael*, 217 Mich App 723, 727; 552 NW2d 688 (1996). For res judicata to apply and permanently bar a subsequent action, there must have been a prior decision on the merits, the issues must have been resolved in the first action, and both actions must be between the same parties or their privies. *ABB Paint Finishing, Inc v National Union Fire Ins Co of Pittsburgh, PA*, 223 Mich App 559, 562-563; 567 NW2d 456 (1997).

"As a general rule, an employer may rely on the finality provision of a grievance and arbitration clause in a collective bargaining agreement." *Ruzicka v General Motors Corp*, 649 F2d 1207, 1212 (CA 6, 1981). However, an exception is created if the contractual process has been seriously flawed by the union's breach of its duty to fairly represent its employees. *Id.* at 1212-1213. In order for an employee to successfully sue the employer for breach of a collective bargaining agreement, the employee must also show that the union's representation of him was unfair. *Id.* at 1213. The Sixth Circuit has ruled that the union is not a necessary party to an action against the employer, *id.* at 1213 n 4, and the employer is not a necessary party in a suit against the union, *Vencl v International Union of Operating Engineers, Local 18*, 137 F3d 420, 425 (CA 6, 1998), "but the case [the employee] must prove is the same whether he sues one, the other, or both." *Id.* at 425, quoting *DelCostello v*

*International Brotherhood of Teamsters*, 462 US 151, 165; 103 S Ct 2281, 2291; 76 L Ed 2d 476 (1983). See also *Goolsby v Detroit*, 211 Mich App 214, 223; 535 NW2d 568 (1995).

We find that the circuit court erred in granting summary disposition to the Board on the basis that plaintiff's claim against the Board was barred by the res judicata effect of the dismissal by the MERC of plaintiff's claim against Local 214. First, although plaintiff would be required to prove that Local 214's representation of him was unfair in his case against the Board, the union is not a necessary party to that case. Thus, because plaintiff's action at the MERC was not against the Board, res judicata should not apply to bar the civil court case because the parties are not the same.

Moreover, when a party seeks to prevent relitigation on the basis of an administrative decision, there are three additional requirements. "The administrative determination must have been adjudicatory in nature and provide a right to appeal, and the Legislature must have intended to make the decision final absent an appeal." *Nummer v Dep't of Treasury*, 448 Mich 534, 542; 533 NW2d 250 (1995). Although plaintiff's claim was actually litigated at the MERC, plaintiff voluntarily withdrew the claim before it could be decided. According to Rule 54(2), which is part of the MERC's general rules and located in the section entitled "Unfair Labor Practice Charges," "[t]he charge may be withdrawn by the charging party before the issuance of a final order based thereon, upon approval by the administrative law judge, subject to review by the commission." The trial court's statement that this rule did not apply because plaintiff's claim for unfair representation was not a claim for unfair labor practices was inaccurate, because a breach of the duty of fair representation is considered to be an unfair labor practice. *Demings v City of Ecorse*, 423 Mich 49, 63-64; 377 NW2d 275 (1985); *Bonneville v Michigan Corrections Organization*, 190 Mich App 473, 476; 476 NW2d 411 (1991). The letter from the MERC's director stating the dismissal was "final" and there would be no determination by the MERC of the validity of plaintiff's claim of unfair representation is not "adjudicatory in nature" because it is not an order nor is it signed by a MERC administrative law judge. Although the letter indicates that the MERC considers the matter closed, plaintiff was free to pursue his claim against the union in circuit court, which shares concurrent jurisdiction over unfair labor practice claims with the MERC. *Demings, supra* at 63-64.

In its motion for summary disposition, defendant Board of Education alternatively argued that plaintiffs' discharge was upheld by binding arbitration, which is res judicata to the present action. As we noted previously, an exception to the rule of binding arbitration in a collective bargaining environment is created if the contractual process has been seriously flawed by the union's breach of its duty to fairly represent its employees. *Ruzicka, supra* at 1212-1213. Thus, the arbitrator's decision in favor of the Board of Education would not be grounds to grant the Board summary disposition on plaintiff's claim.

We affirm the dismissal of Teamsters Local 214 from the action for failure to serve process, reverse the grant of summary disposition to Detroit Board of Education, and remand to the circuit court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Jeffrey G. Collins
/s/ Joseph B. Sullivan