

STATE OF MICHIGAN  
COURT OF APPEALS

---

RAYMOND COCHRAN,

Plaintiff-Appellant,

v

AMERITECH,

Defendant-Appellee.

---

UNPUBLISHED

July 20, 2001

No. 222558

Oakland Circuit Court

LC No. 97-550234-NO

Before: Smolenski, P.J., and McDonald and Jansen, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition under MCR 2.116(C)(10) in favor of defendant. We affirm.

Plaintiff brought suit against defendant for publishing his name, address, and telephone number in several telephone directories, even though he had been paying for unpublished telephone service. In the complaint, plaintiff alleged breach of contract, gross negligence, invasion of privacy, fraud, and “compromising the health, safety and welfare of the plaintiff and plaintiff’s family.” The case was dismissed after the trial court found that plaintiff’s claims were within the primary jurisdiction of the Michigan Public Service Commission (MPSC). Following a full hearing before the MPSC, it denied plaintiff’s request for economic damages in relation to the breach of contract claim, but declined to determine whether defendant’s actions constituted tortious conduct giving rise to an actionable claim based on negligence, fraud, or invasion of privacy. The trial court thereafter reinstated plaintiff’s complaint, and defendant moved for summary disposition. In granting defendant’s motion for summary disposition, the trial court found that the tort claims fell within plaintiff’s breach of contract claim, and because that claim was previously adjudicated by the MPSC, plaintiff was collaterally estopped from relitigating that claim.

Plaintiff argues that the trial court erred in granting defendant summary disposition. This Court reviews de novo both a trial court’s decision to grant or deny a motion for summary disposition and issues concerning the application of the doctrine of collateral estoppel. *Hawkins v Mercy Health Services, Inc.*, 230 Mich App 315, 324; 583 NW2d 725 (1998); *McMichael v McMichael*, 217 Mich App 723, 727; 552 NW2d 688 (1996). In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), this Court considers the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in a light most

favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999); *Rollert v Dep't of Civil Service*, 228 Mich App 534, 536; 579 NW2d 118 (1998). A motion for summary disposition under MCR 2.116(C)(10) is proper if no genuine issue of material fact exists, thereby entitling the moving party to judgment as a matter of law. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

The trial court properly found that plaintiff's breach of contract claim is barred by collateral estoppel. In order for collateral estoppel to apply, a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment in a former, different cause of action; the same parties must have had a full opportunity to litigate the issue; and, there must be mutuality of estoppel. *Nummer v Dep't of Treasury*, 448 Mich 534, 541-542; 533 NW2d 250 (1995); *Porter v Royal Oak*, 214 Mich App 478, 485; 542 NW2d 905 (1995). Collateral estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against it. *Barrow v Pritchard*, 235 Mich App 478, 481; 597 NW2d 853 (1999). Because defendant is seeking to preclude relitigation on the basis of an administrative decision, additional requirements must be satisfied: 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, supra* at 542.

Here, it is undisputed that the requirements for collateral estoppel are satisfied. Defendant's breach of contract claim, which is based on defendant's publication of plaintiff's home address and telephone number, was previously litigated in an adjudicatory proceeding before the MPSC, and involved the same parties. Following the contested hearing, the MPSC issued a final order in defendant's favor, which would have bound defendant had it been in plaintiff's favor. Finally, the MPSC's order provided a right to appeal under MCL 462.26, and the Legislature intended to make the decision final absent such an appeal. See MCL 484.2203(5). Accordingly, plaintiff is collaterally estopped from relitigating his breach of contract claim.

We further find that the trial court did not err in determining that plaintiff failed to state any tort claims apart from his breach of contract claim. We acknowledge that a duty to exercise reasonable care may arise out of a contract. *Clark v Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967). Negligent performance of a contractual duty may constitute a tort as well as a breach of contract. *Id.* However, a tort action will lie only if there is a breach of a duty separate and distinct from the duties imposed by the contract. *Nelson v Northwestern Savings & Loan Ass'n*, 146 Mich App 505; 381 NW2d 757 (1985). See also *Crews v General Motors Corp*, 400 Mich 208, 226; 253 NW2d 617 (1977) ("a tort action will not lie when based solely on nonperformance of a contractual duty"), and *Hart v Ludwig*, 347 Mich 559, 565; 79 NW2d 895 (1956). In other words, a relation must exist that would give rise to a legal duty without enforcing the contract promise itself. *Nelson, supra*.

Here, the question is whether plaintiff's alleged tort claims would arise independent of the existence of the contract. Under the parties' contract, defendant was to provide plaintiff with unpublished telephone service. It is undisputed that the sole factual allegation of misconduct supporting all of plaintiff's claims is defendant's publication of plaintiff's residential information

in several telephone directories. As such, the duty that defendant breached, i.e., the failure to provide such unpublished service, proceeds directly and exclusively from the parties' contract. The duty does not arise from any relation between the parties independent, distinct, and separate from their contract. Indeed, plaintiff has not asserted the existence of any legal duty that could not have been fulfilled by enforcement of the contract itself. As such, the contract between the parties was the source of any duty that defendant owed to plaintiff. Under such circumstances, plaintiff's tort claims will not lie. Accordingly, the trial court did not err in granting defendant summary disposition.

Plaintiff also argues that the trial court erred in denying his right to amend, modify, or expand his complaint after the case was reinstated. We decline to review this issue because plaintiff did not request that he be allowed to amend his complaint in the trial court under MCR 2.118(A), or in this Court under MCR 7.216(A)(1), and plaintiff never proffered a proposed amendment in writing as required by MCR 2.118(A)(4). *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Moreover, plaintiff requested that his original complaint be reinstated and acquiesced in the trial court's decision to reinstate the complaint in its original form. Plaintiff cannot now argue on appeal that the resultant action was error. *Smith v Musgrove*, 372 Mich 329, 337; 125 NW2d 869 (1964); *Weiss v Hodge (After Remand)*, 223 Mich App 620, 636; 567 NW2d 468 (1997).

Next, plaintiff argues that the trial court erred in denying his motion for a jury trial. We initially note that this issue is moot because the case was properly dismissed by summary disposition. *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998). We note, however, that the trial court properly denied plaintiff's motion for a jury trial where plaintiff failed to properly demand a trial by jury and failed to pay the jury fee as required by MCR 2.508(B)(1). See *People ex rel Mabley v Judge of Superior Court of Detroit*, 41 Mich 31, 34; 1 NW 985 (1879); *Thoms v Diamond*, 131 Mich App 108, 117; 346 NW2d 69 (1983).

Plaintiff's final argument is that the trial judge was biased against him. Because plaintiff failed to move for disqualification in the trial court pursuant to MCR 2.003, this issue is not preserved. *In re Jackson*, 199 Mich App 22, 29; 501 NW2d 182 (1993). In any event, we note that, absent actual personal bias or prejudice against either a party or a party's attorney, a judge will not be disqualified. MCR 2.003(B)(1); *Cain v Dep't of Corrections*, 451 Mich 470, 495; 548 NW2d 210 (1996). A judge's opinions that are formed on the basis of facts introduced or events that occur during 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. *Id.* at 496. Further, judicial rulings alone rarely establish disqualifying bias or prejudice. *Id.* A party who challenges a judge for bias must overcome a heavy presumption of judicial impartiality. *Id.* at 497. Here, the record fails to show actual bias or prejudice on the part of the trial judge.

Affirmed.

/s/ Michael R. Smolenski  
/s/ Gary R. McDonald  
/s/ Kathleen Jansen