STATE OF MICHIGAN

COURT OF APPEALS

MARK C. KLUNGLE, Plaintiff-Appellant,	UNPUBLISHED October 19, 2010
v	No. 292191 Kent Circuit Court
KATHY SUE ANDERSON, Defendant-Appellee.	LC No. 08-013557-CZ

Before: HOEKSTRA, P.J., and FITZGERALD and STEPHENS, JJ.

PER CURIAM.

In this action to obtain relief from the parties' judgment of divorce, plaintiff appeals as of right the March 30, 2009 order granting summary disposition to defendant. Because plaintiff fails to establish that the trial court erred in concluding that the present action was not timely filed, we affirm.

I. BASIC FACTS

The parties' January 2002 judgment of divorce, entered by Judge Feeney, incorporated an arbitration award. The judgment of divorce required plaintiff to pay $25,000 to defendant for attorney fees. This Court affirmed the divorce judgment, rejecting plaintiff's claim that the arbitrator was biased against him because the arbitrator had been involved in numerous arbitrated divorce cases handled by defendant's divorce attorney. *Klungle v Klungle*, unpublished opinion per curiam of the Court of Appeals, issued March 9, 2004 (Docket No. 240404).

In December 2008, plaintiff, pursuant to MCR 2.612(C)(3), filed a complaint for relief from the divorce judgment. The essence of the complaint was that defendant, along with her divorce attorney, used fraud and perjury to obtain a favorable judgment of divorce. The case was initially assigned to Judge Feeney, but after a review of the pleadings by the chief judge, which showed that the matter was civil in nature, it was reassigned to Judge Johnston.

Defendant moved for summary disposition under MCR 2.116(C)(1), (4), (6), (7), and (8). Defendant's alleged fraud was revealed in plaintiff's response to the motion. According to plaintiff, defendant's divorce attorney submitted a statement to the arbitrator that defendant had incurred substantial legal fees and that she was requesting an award of $50,000 for attorney fees. However, in his bankruptcy proceedings in 2007, plaintiff had the opportunity to depose defendant's father, who testified that he had paid $50,000 to $60,000 to defendant's divorce

attorney. Plaintiff claimed that had the arbitrator and Judge Feeney known that defendant had not paid her own attorney fees, he would not have been ordered to pay $25,000 to defendant. Plaintiff also claimed that the deposition testimony of defendant's father revealed that defendant had lied at a February 2007 support review hearing.

The trial court granted summary disposition to defendant under MCR 2.116(C)(6), (7), and (8).[1] It concluded that, by reading MCR 2.612(C)(3) and MCR 3.602(J)(3) together, plaintiff had 21 days after learning of defendant's alleged fraud to file an independent action for relief from the divorce judgment. It then determined that plaintiff knew of the alleged fraud, whether it be the relationship between the arbitrator and defendant's divorce attorney, defendant's statement that she had incurred substantial attorney fees, or defendant's apparent untruthful testimony at the February 2007 hearing, well beyond the 21 days before the complaint was filed. The trial court dismissed the case, but the dismissal was without prejudice as to any proceedings before Judge Feeney that were permissible under the court rules.

II. ANALYSIS

Plaintiff claims that the trial court erred in its determination that his fraud claims were required to be heard by Judge Feeney. This argument is not based on an accurate reading of the record.

At the hearing on the motion for summary disposition, the trial court indicated some confusion as to why the present case was assigned to it. It also expressed some reluctance to overturn a judgment entered by Judge Feeney. However, it stated that "[a] case that comes in the door with my name on it is a case I have to deal with," and it did deal with defendant's motion for summary disposition. After hearing the parties' arguments, it held that because plaintiff did not file the present case within 21 days after he learned of the alleged fraud, the case was "simply untimely" under the court rules. It therefore granted summary disposition to defendant and dismissed the case. Thus, the trial court never held that plaintiff's claims needed to be heard by Judge Feeney.

Plaintiff also claims that the trial court erred in its determination that the action was untimely under the court rules.[2] We disagree. We review de novo a trial court's decision on a motion for summary disposition. *Moser v Detroit*, 284 Mich App 536, 538; 772 NW2d 823 (2009).

---

[1] The written order granting summary disposition to defendant states that summary disposition was granted under MCR 2.116(C)(6), (7), and (9). Based on the trial court's statement at the motion hearing, we believe the written order contains a clerical error.

[2] Plaintiff asserts numerous grounds for why summary disposition was improper. However, we only address plaintiff's argument that concerns the trial court's stated basis for granting summary disposition.

Plaintiff concedes that, pursuant to MCR 2.612(C)(2), because the judgment of divorce was entered in January 2002, any motion for relief predicated on fraud filed in the divorce action before Judge Feeney would be untimely. He acknowledges that to obtain relief from the judgment of divorce he must file an independent action, pursuant to MCR 2.612(C)(3). This subrule provides:

> This subrule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding; to grant relief to a defendant not actually personally notified as provided in subrule (B); or to set aside a judgment for fraud on the court.

MCR 2.612 does not provide a limitation period for when an "independent action" must be filed.

Because the judgment of divorce was the result of arbitration and because plaintiff argued that the judgment was obtained by fraud, the trial court, in determining whether the present action was timely filed, borrowed the 21-day period from MCR 3.602(J)(3). MCR 3.602(J)(3) provides that "if the motion [to vacate an arbitration award] is predicated on corruption, fraud, or other undue means, it must be filed within 21 days after the grounds are known or should have been known."[3] Plaintiff does not claim that the trial court erred in reading the 21-day period of MCR 3.602(J)(3) into MCR 2.612(C)(3), nor does he claim that this independent action for relief from the divorce judgment was filed within 21 days of him discovering defendant's alleged fraud.

Plaintiff claims that because he filed a motion with Judge Feeney on April 11, 2008,[4] which was 12 days after he received the "hard proof" of the alleged fraud, the present action was timely, as he had made the court aware of the alleged fraud within 21 days of discovering it. We find no merit to plaintiff's argument. The present action is an "independent action," filed pursuant to MCR 2.612(C)(3), for relief from the judgment of divorce. It is an action separate and distinct from the divorce action before Judge Feeney. We are aware of no authority, and plaintiff cites none, to support the proposition that the time requirement for the filing of an action can be met by the filing of a motion in a separate, distinct legal action. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims." *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). Accordingly, we reject plaintiff's argument that actions taken by him in the divorce proceedings before Judge Feeney made the filing of this independent action timely.

---

[3] See also MCL 600.5081(4).

[4] Plaintiff also notes that in October 2005, before he had any actual proof of the alleged fraud, he informed Judge Feeney of his beliefs of the alleged fraud.

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Cynthia Diane Stephens