

STATE OF MICHIGAN
COURT OF APPEALS

GREGORY D. SMITH,

Plaintiff-Appellant,

v

EATON CORPORATION,

Defendant-Appellee.

UNPUBLISHED
November 17, 2016

No. 328601
Ingham Circuit Court
LC No. 15-000292-CK

Before: BOONSTRA, P.J., and SHAPIRO and GADOLA, JJ.

PER CURIAM.

Plaintiff filed this action seeking to enforce a settlement agreement that had resolved a previous lawsuit between the parties. The trial court dismissed plaintiff's complaint. Plaintiff appeals as of right, and we affirm.

The facts underlying this case are not in dispute. In 1979, plaintiff was injured while employed by defendant. Plaintiff brought a personal injury lawsuit, and in December 1984, the parties entered into a settlement agreement (the "agreement") resolving that case. The agreement required, in part, that defendant pay plaintiff monthly payments of \$1,119.57, increased by three percent each year, for the remainder of plaintiff's life or for 360 payments, whichever was longer. The parties do not dispute that defendant is obligated to pay plaintiff the monthly payments for as long as plaintiff is alive.

Pursuant to the agreement, defendant was permitted, but not required, to purchase an annuity from an insurance company to fund the monthly payments. The agreement provided that defendant remained liable for the remaining payments in the event that the insurance company paying the annuity failed to pay the payments. In accordance with this provision, defendant purchased an annuity to fund the payments from the Executive Life Insurance Company of New York ("ELNY").

Unfortunately, in 2012 ELNY was adjudged insolvent in New York, was liquidated, and underwent a restructuring. According to plaintiff, the last regular annuity payment he received from ELNY was in August 2013 in the amount of \$2,561.48. In September and October 2013 ELNY reduced its monthly payment to plaintiff to \$1,179.04, and since November 2013, ELNY has paid plaintiff \$1,213.62 per month.

Through a hardship fund associated with ELNY's insolvency, however, plaintiff received an additional lump sum payment of \$127,960.00. The parties agree that taking into consideration the lump sum payment and the continuing, though reduced, monthly payments plaintiff has so far been paid not only the amount owing to him under the agreement, but also advance payment through approximately August 2020.

Plaintiff filed this action before the trial court¹ seeking specific performance of the settlement agreement. Specifically, plaintiff sought an order from the trial court requiring defendant to purchase a second annuity providing plaintiff with the amount ordered under the agreement, being the difference between the amount paid by the receiver each month on behalf of ELNY and the amount owed as of the time that the lump sum amount no longer covers defendant's obligations. Defendant moved to dismiss on the basis that plaintiff had not pleaded a sufficient amount in controversy to invoke the trial court's jurisdiction. In response, plaintiff argued that it had invoked the jurisdiction of the trial court by requesting relief in equity through specific performance or an equitable accounting. The trial court granted defendant's motion finding that plaintiff had suffered no damages. Plaintiff now challenges the dismissal.

Courts are prevented from adjudicating hypothetical or contingent claims by the doctrine of ripeness. *City of Huntington Woods v City of Detroit*, 279 Mich App 603, 615-616; 761 NW2d 127 (2008). Under the ripeness doctrine, a plaintiff must have actually sustained an injury in order to invoke the court's jurisdiction. *Id.* A claim is not ripe if it is based upon a contingent future event. *King v Michigan State Police Dep't*, 303 Mich App 162, 188; 841 NW2d 914 (2013). We review de novo a trial court's ruling that a claim is not ripe. *Huntington Woods*, 279 Mich App at 614.

Because all payments due to date have been made, plaintiff has not demonstrated that defendant has breached any obligation to plaintiff nor that plaintiff has suffered any damages. Thus, a claim for breach of contract has not accrued. Pursuant to the agreement, defendant is not obligated to provide plaintiff with an annuity; rather, defendant is obligated to pay plaintiff the monthly payment for plaintiff's lifetime. Under the agreement, defendant may do so by purchasing an annuity, but is not required to use that method. Plaintiff admits that the reduced monthly payments that he has received thus far, together with the lump sum payment he has received from the receiver's hardship fund, is enough to satisfy defendant's obligations to plaintiff until approximately August 2020. Plaintiff's argument is, essentially, that plaintiff no longer has the assurance that a solvent insurance company is paying the annuity benefits and that defendant should be required to provide that assurance by purchasing an additional annuity. But defendant was never required by the agreement to provide plaintiff with an annuity, only with payment. Accordingly, defendant has not yet failed to meet its obligations to plaintiff under the

¹ Plaintiff filed essentially the same lawsuit against defendant in 2014; plaintiff averred in his complaint in this case that the prior lawsuit is no longer pending.

settlement agreement and no breach of that obligation has occurred. It therefore was proper for the trial court to dismiss plaintiff's cause of action on the ground that it is not ripe.²

Plaintiff insists that the trial court should have ordered an accounting. However, the parties do not dispute that defendant thus far has provided payment to plaintiff beyond that to which plaintiff is, thus far, entitled. If defendant should fail to pay plaintiff under the agreement, plaintiff's contentions would arguably take on merit. But at this juncture, plaintiff's contention is not that he has not been paid, but merely that he has lost the payment vehicle of the annuity and consequently fears that future payments will not be made. The fear of future non-payment, however, does not articulate a ripe claim.

Affirmed.

/s/ Mark T. Boonstra
/s/ Douglas B. Shapiro
/s/ Michael F. Gadola

² Should defendant fail to make payments allegedly due under the contract at some point in the future, a claim for breach would accrue at that time and the statute of limitations would run from that accrual date. See *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 180; 848 NW2d 95 (2014).