STATE OF MICHIGAN

COURT OF APPEALS

CARL PIONTKOWSKI, D.D.S.,

Plaintiff-Appellee,

v

MARVIN S. TAYLOR, D.D.S., P.C.,

Defendant-Appellant.

UNPUBLISHED
July 10, 2012

No. 303963
Oakland Circuit Court
LC No. 2010-115045-CK

Before: GLEICHER, P.J., and M. J. KELLY and BOONSTRA, JJ.

BOONSTRA, J (*dissenting*).

I respectfully dissent. For the reasons that follow, I would reverse and remand for entry of judgment in favor of defendant.

I. BASIC FACTS AND PROCEDURAL BACKGROUND

In October 2009, plaintiff filed a complaint in circuit court ("the 2009 case") alleging that defendant had breached an Independent Contract Agreement ("Agreement") entered into by the parties on January 10, 2009. Defendant disputed the claim, and contended that plaintiff had breached the Agreement and voluntarily terminated it. In December 2009, the parties (by their counsel) filed a stipulation and order to dismiss the 2009 case with prejudice. The stipulation reflects that it was signed by plaintiff's counsel on December 11, 2009. Plaintiff's counsel signed not only his own name, but also signed defendant's counsel's name "with permission," and checked the box for a "with prejudice" dismissal of plaintiff's claims. The record reflects that the circuit court entered the corresponding order of dismissal with prejudice on December 16, 2009.

Importantly, neither the stipulation nor the corresponding order of dismissal with prejudice reflect any precondition or rationale for the dismissal, or any settlement or other agreement between the parties that might condition the dismissal in any way. To the contrary, the "Conditions, if any" portion of the stipulated order notably is left blank.

Notwithstanding the dismissal with prejudice of the 2009 case, plaintiff apparently filed a subsequent arbitration proceeding, and again raised the precise breach of contract claim that he

previously had raised in the dismissed 2009 case. The sole evidence in the record relating to this arbitration proceeding is a two-page document captioned "Award," dated August 11, 2010.[1] The Award indicates that the arbitrator "conducted an evidentiary hearing on July 30, 2010," that plaintiff testified at that hearing, that Marvin S. Taylor and his non-lawyer wife, Laura Taylor, were "present" "via phone," and that the corporate defendant was not represented by counsel. Plaintiff claimed damages of $65,000, and the Award notes that defendant "did not present any evidence prior to the hearing or during the hearing" to dispute that amount. The Award further suggests that no evidence was presented during the arbitration hearing other than plaintiff's testimony and the Agreement itself. The Award found in favor of plaintiff and against defendant in the amount of $65,000.

Plaintiff then filed a new complaint in circuit court ("the 2010 case"), in November 2010[2], seeking confirmation of the arbitration Award. Defendant moved for dismissal, based on MCR 2.116(C)(7), (8), and (10). Plaintiff opposed the motion and filed a cross-motion for summary disposition pursuant to MCR 2.116(I)(1).[3] The trial court granted plaintiff's motion for summary disposition and denied defendant's motion to dismiss, and entered an April 18, 2011 Judgment Confirming Arbitration Award ("Judgment"). Defendant appeals.

II. STANDARD OF REVIEW

"A trial court's decision to enforce, vacate, or modify an arbitration award is reviewed de novo." *Nordlund & Assoc, Inc v Village of Hesperia*, 288 Mich App 222, 226; 792 NW2d 59 (2010) (citation omitted). Whether res judicata bars a subsequent action also is reviewed de novo, *Adair v State*, 470 Mich 105, 119; 680 NW2d 386 (2004), as is a trial court's decision to grant or deny a motion for summary disposition, *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008) (citation omitted). Summary disposition is properly granted pursuant to MCR 2.116(C)(7) when the claims are barred by res judicata. *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008).

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[1] The Judgment errantly reflects that the arbitration Award was entered on August 11, 2011, and that this case was filed on November 16, 2011, both of which would post-date the date of the Judgment itself.

[2] The record reflects that plaintiff first moved to reopen the 2009 case for confirmation of the arbitration Award, but after defendant responded to the motion by pointing out that the claim had been dismissed with prejudice, plaintiffs apparently opted not to pursue that motion and instead filed the instant action to confirm the same arbitration Award.

[3] I note parenthetically that MCR 2.116(I)(1) does not provide grounds for summary disposition, which instead are governed by MCR 2.116(C). MCR 2.116(I)(1) provides for entry of judgment where "the *pleadings* show that a party is entitled to judgment as a matter of law." *Id.* (emphasis added).

III. THE ARBITRATION WAS A NULLITY, BECAUSE IT WAS BARRED BY THE DISMISSAL WITH PREJUDICE OF THE 2009 CASE

Far from being "logical[] and pragmatic[]," the majority's res judicata analysis turns logic on its head. The proper question is not, as the majority asserts, whether the claim presented in the 2010 case (to confirm the arbitration Award) could have been resolved in the 2009 case. Of course it could not have been, since the arbitration proceeding had not then been filed (much less concluded). The majority's framing of the question in that manner serves only to erect an insurmountable obstacle to defendant's res judicata defense. It is absurd to suggest that plaintiff's relitigation (in arbitration) of a dismissed claim is challengeable on res judicata grounds only if the plaintiff – in his initial 2009 case – had pled a claim seeking confirmation of a then-nonexistent arbitration award. But, in essence, that is the majority's position.[4]

The proper question, of course, is not whether the *2010 case* presented the same claims as the 2009 case, but whether the *arbitration* itself was barred on res judicata grounds. The majority reluctantly addresses this fundamental question only in response to this dissent and, in doing so, as noted below, it premises its reasoning on non-existent evidence in order to breathe new life into plaintiff's claim.[5]

Arbitrators "do not function in a legal vacuum," and "are not free to decide the disputes submitted to them . . . without regard to the controlling principles of law which govern the rights and duties of the parties." *DAIIE v Gavin*, 416 Mich 407, 432; 331 NW2d 418 (1982). A trial court also is not required to confirm an award if it appears from the face of the award that the arbitrator acted in contravention of controlling principles of law. *Id.*, at 443. An arbitrator, like a judge, who acts in contravention of controlling principles of law, exceeds his or her powers. *Id.*

The record reflects that the stipulated dismissal of plaintiff's claims in the 2009 case was not only with prejudice, but was unconditional. There is nothing in the record from which to discern any agreement, either in writing or in open court, to condition the dismissal in any manner. More specifically, there is nothing in the record reflecting any agreement by the parties to proceed to arbitration following the stipulated dismissal of the 2009 case.[6]

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[4] As noted below, the majority's suggestion that defendant "did not raise or preserve a legal argument in the circuit court that the res judicata doctrine precluded the arbitration," and instead "raised [res judicata's bar of the arbitration] for the first time in his reply brief on appeal" is simply incorrect (as, of course, is the majority's characterization of this dissent as supposedly finding defendant's circuit court argument to lack merit; to the contrary, I find defendant's argument persuasive, and the majority's conclusions to be without merit).

[5] The majority's hesitancy to reach this fundamental issue may derive from the fact that the trial court itself did not reach the issue, and instead confined its analysis to whether the 2010 case (to confirm the arbitration award) was barred by res judicata.

[6] There is simply no way to know, based upon the record, whether it may have been plaintiff's counsel intention to so condition the dismissal with prejudice. What is clear from the record is

Res judicata "bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first." *Adair*, 470 Mich at 121 (citation omitted). The first two elements are unquestionably satisfied, as the majority acknowledges. As to the third requirement, res judicata bars a subsequent action when it presents the same evidence or the same transaction as the first action. *Adair*, 470 Mich at 124. In this case, it is undisputed that both the 2009 action and the arbitration presented the same breach of contract claims. The arbitration Award also explicitly states that the arbitrator decided the very issues that were presented in the 2009 case, *i.e.*, whether plaintiff or defendant had breached the Agreement, and whether plaintiff was entitled to 90 days notice prior to its termination.

Res judicata, therefore, barred the arbitration because the 2009 case had been dismissed with prejudice (and without condition), the same parties were involved in both proceedings, and the arbitration presented the same issues that had been raised in the 2009 case. *Id.* at 121. MCR 2.116(C)(7) provides for summary disposition when a claim is barred by res judicata. *RDM Holdings*, *Ltd*, 281 Mich App at 687. Accordingly, the arbitrator exceeded her powers. *DAIIE*, 416 Mich at 434 ("arbitrators can fairly be said to exceed their power whenever they act . . . in contravention of controlling principles of law").

Because the arbitrator exceeded her powers, and acted in contravention of controlling principles of law, the circuit court erred in confirming the Award. "The Michigan judiciary is not a procedural pass-through bureaucracy which may … be used to validate patently erroneous arbitration awards . . . ." *Id.*, 416 Mich at 433. Rather, the court's "fundamental duty" in assessing whether to confirm and enforce an arbitration award is "to assure that its equitable power is exercised in keeping with the rule of law." *Id.*, 416 Mich at 434-35. The circuit court here failed to do so, and instead enforced an arbitration Award that on its face was in clear violation of the controlling principles of law reflected in the doctrine of res judicata.

"The purposes of res judicata are to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and encourage reliance on adjudication. *Richards v Tibaldi*, 272 Mich App 522, 530; 726 NW2d 770 (2006). The majority's opinion frustrates all of these purposes. Under the rule announced by the majority, an unsuccessful litigant whose claim is dismissed with prejudice – whether by stipulation (as here) or even following a lengthy jury trial – may nonetheless file a subsequent arbitration proceeding and achieve a second bite at the apple. That is neither "logical" nor "pragmatic." More importantly, that is not the law, nor is that result supported by any of the cases cited by the majority.

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that the dismissal with prejudice was not conditioned in any manner. If this reflects an error by plaintiff's counsel (which cannot be discerned from the record), then plaintiff's remedy lies elsewhere. *Limbach v Oakland County Bd of County Road Com'rs*, 226 Mich App 389, 396; 573 NW 2d 336 (1997) ("We note however, that Limbach is not without a remedy here because she has a pending case against counsel who advised her that the voluntary dismissal would not be res judicata with respect to the second lawsuit."). It does not lie in ignoring controlling principles of law so as to allow plaintiff to re-litigate a clam that was previously dismissed with prejudice.

We should not forget that "[t]he process of dispute resolution and the procedural advantages of arbitration are the servants of the law governing the issues in dispute, not the reverse." *DAIIE*, 416 Mich at 427. Our Supreme Court has made it clear that it is not a court's role to merely mechanically approve arbitration awards without regard to their legal correctness:

> We observe parenthetically that there is a certain irony in the notion that the judiciary should stand ready to validate statutory arbitration awards, whether lawful or unlawful, but should not insist upon legal substantive correctness because to do so would overload the courts. What, one is left to wonder, is the purpose of the courts in the first place? And if correcting controlling legal errors which have substantially affected statutory arbitration awards will inundate the courts, what does that say about the quality of such awards? [*Id.* at 428.]

Plaintiff stipulated to the dismissal of his claim with prejudice and without condition. Under the circumstances, the arbitration was a nullity. It should not have taken place, because the issues it presented were conclusively resolved by the prior dismissal with prejudice (and without condition) of the 2009 case. For that reason, the circuit court, in fulfilling its duty to ensure that an arbitration is in keeping with controlling principles of law, should not have confirmed the Award, and instead should have granted summary disposition to defendant.

IV. DEFENDANT DID NOT WAIVE RES JUDICATA

Faced with these realities, the majority argues that defendant "voluntarily participat[ed]" in the arbitration "without objection," and therefore "'waived' any contention that res judicata barred the arbitration proceeding." But the majority's factual premise is without any basis in the record, and its conclusion is legally wrong.

The majority's factual position constitutes mere supposition – one that can only be reached by supplementing the record with non-existent evidence. *DAIIE*, 416 Mich at 428 ("Reviewing courts can only act upon a written record"). For example, the majority asserts, without any citation to the record, that the parties "proceeded to arbitration," and that defendant "voluntarily participated" in the arbitration hearing "without objection" and "without challenging the authority of the arbitrator to render a final, legally valid decision."

Nothing in the record supports those assertions. To the contrary, the record reflects that the 2009 case was dismissed with prejudice (and without condition), that the corporate defendant was not even represented by counsel at the subsequently-filed arbitration (as a corporation must be), and that Dr. and Mrs. Taylor were merely "present" "via phone." Defendant did not invoke arbitration, and there is no evidence in the record from which to discern that the Taylors "participated" in the arbitration in any meaningful way, or did anything more than perhaps answer the telephone. There also is nothing in the record to indicate whether plaintiff advised the arbitrator of the 2009 case, or of its dismissal with prejudice (and without condition). And there is nothing in the record to indicate any consideration, by the parties or the arbitrator, of the arbitrator's authority (or lack thereof) to arbitrate a claim that had already been dismissed with

prejudice. The majority's assertion that defendant "waived" the res judicata defense is simply without any factual support whatsoever in the record.

On the record before us, it cannot properly be said that defendant waived its right to challenge the arbitration's validity on grounds of res judicata. See *Bailey v Jones*, 243 Mich 159, 162; 219 NW 629 (1928) ("Waiver is the *intentional relinquishment* of a *known right*.") (Emphasis added).[7] There simply is nothing in the record to suggest an "intentional relinquishment" of a "known right." *Id*.

In asserting "waiver" of res judicata, the majority confuses the "related, but distinct, concepts" of "waiver" and "forfeiture." *Quality Products and Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 379; 666 NW2d 251 (2003). "While waiver requires an intentional and voluntary relinquishment of a known right, a forfeiture is the failure to assert a right in a timely fashion." *Id*. Neither concept applies here. "Mere knowing silence generally cannot constitute waiver," *id*., at 365, since it is "simply contradictory" to suggest that the "*failure*" to raise an issue "amounts to a waiver" when a "waiver" requires an "intentional and voluntary relinquishment." *Roberts v Mecosta County General Hospital*, 466 Mich 57, 69; 642 NW2d 663 (2002) (emphasis in original).

The majority nonetheless finds "waiver" arising out of defendant's supposed "failure to timely object." This is the language of "forfeiture," not "waiver." But forfeiture itself "necessarily requires that there be a specific point at which the right must be asserted or considered forfeited," *id*., and the majority identifies no such "specific point" in time by which defendant was obliged to raise the defense of res judicata without forfeiting it. The majority suggests that defendant needed to do so at some point during the arbitration, but identifies no controlling or persuasive authority to that effect.[8]

The majority thus asserts that "waiver" occurred because defendant did not complain sooner than his reply brief on appeal. But, as noted, the majority is simply incorrect in this assertion since, to the contrary, defendant raised the defense of res judicata long before, in circuit court. First, in response to plaintiff's initial effort to reopen the 2009 case to confirm the arbitration Award, defendant argued that because the 2009 case (which raised the same claim as plaintiff later also raised in arbitration) had been dismissed with prejudice, there was no proper basis for reopening the 2009 case to confirm the arbitration award. Second, after plaintiff

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[7] If anything, it was plaintiff who arguably waived his right to arbitrate, since it was plaintiff who elected to file the 2009 case in circuit court.

[8] For example, the majority's reliance on *American Motorists Ins Co v. Llanes*, 396 Mich 113; 240 NW 2d 203 (1976), is misplaced, since *Llanes* merely stands for the proposition that a party must, before arbitrating, raise issues as to whether the issues to be arbitrated fall within the parties' arbitration agreement. The majority's reliance on *Arrow Overall Supply Co v. Peloquin Enterprises*, 414 Mich 95; 323 NW 2d 1 (1982), is even more curious, since *Arrow* held that it was proper to raise, in the circuit court, for the first time in response to a motion to confirm an arbitration award, the defense that the arbitration agreement was invalid.

abandoned his effort to reopen the 2009 case and instead filed the 2010 case to confirm the arbitration award (the same result that he had sought to accomplish by reopening the 2009 case), defendant immediately (in lieu of answering the Complaint) moved to dismiss the 2010 case, noting that the "arbitration and award" that plaintiff sought to confirm "was regarding an Independent Contractor Agreement entered into and dated January 10, 2009," that plaintiff had earlier brought the 2009 case regarding the same Agreement, that plaintiff's 2009 case had been dismissed with prejudice, and that "[a]s a result of the earlier dismissal of the same claim with prejudice," the effort to confirm the arbitration Award was "barred by the doctrine of res judicata." Finally, at oral argument on defendant's motion to dismiss the 2010 case (and on plaintiff's cross-motion for summary disposition), counsel for defendant expanded as follows:

> [A]fter that dismissal [of the 2009 case], plaintiff took the case to [arbitration], went through a process there that apparently defendant did not participate in.
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> He's – he' asking for an award -- I'm sorry, a judgment based on the arbitration award, but the root of that is the same breach of contract that was dismissed with prejudice . . . .
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> [A] voluntary dismissal with prejudice is a final judgment on the merits for res judicata purposes . . . .
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> If I understand plaintiff's position, plaintiff's position is that this is a new case based upon the arbitration award, but he can't get around a fact that it -- this case, which is exhibit one in the 2009 case and is exhibit one in this case. It is the same January '09 independent contractor agreement between his client and my client. When the underlying case has been dismissed with prejudice it's over and done with. That's -- that's his bite at the apple, and it's unfortunate for plaintiff but he can't bring it anymore. If he were to go back, for example, go back to the American Arbitration Association or go to some other agency, try to get an arbitration award based upon that and -- and bring it back to court, he's going to have the same operation. Once you stipulate to dismiss a case with prejudice you're stuck with that. You can't reinstate that claim. I think that's basic black-letter law that – I -- I thought it was clear to me from, um, from -- from my law student days which are a few years ago now, but I understood it, I think all lawyers understand that, and -- and plaintiff is out of luck.

In my opinion "[s]uch a direct assertion of [this] defense[] by defendant[] can by no means be considered a waiver. . . . To the contrary, it was a clear affirmation and invocation of such defenses." *Burton v Reed City Hosp Corp*, 471 Mich 745, 755; 691 NW 2d 424 (2005) (citation omitted).

In any event, in a situation where, as here, the claims sought to be arbitrated have been previously dismissed with prejudice, the majority's rule puts the onus on the wrong party. The onus should have been on plaintiff to demonstrate why his dismissed claim was properly arbitrable. *Arrow Overall Supply Co v Peloquin Enterprises*, 414 Mich 95, 100; 323 NW 2d 1 (1982) ("If a burden must be placed on one of the parties to seek a preliminary judicial determination, it should be on the party seeking to compel arbitration"). Plaintiff failed to meet that burden. Defendant properly relied, and had a right to rely, on the finality of the 2009 dismissal with prejudice.

V. CONCLUSION

The trial court should have found the arbitration to have been barred by the doctrine of res judicata, and should not have confirmed the arbitration award. The court also should not have granted summary disposition to plaintiff, and instead should have granted summary disposition to defendant pursuant to MCR 2.116(C)(7). For these reasons, I respectfully dissent.

/s/ Mark T. Boonstra